No. _____

18-9352

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

_____

DONALD C. RIDLEY — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

FILED
MAY 02 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEAL FOR THE SEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DONALD C. RIDLEY, Reg. No. 35181-044
(Your Name)

USP McCreary - P.O. Box 3000
(Address)

Pine Knot, KY 42635
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Does a lower Court's admission that a aiding and abetting jury instruction was erroneous in light of this Court decision in Rosemond v. United States, 134 S. Ct. 1240 (2014), mean that counsel was ineffective for failing to object to the erroneous instruction, that allowed his client to be convicted under a legally insufficient theory, and is the failure to grant a defendant a new trial, under these circumstances, in direct contrast to this court's decision(s) in Yates v. United States, 77 S. Ct. 1064 (1957) and Griffin v. United States, 112 S. Ct. 466 (1991).

2. Whether an attorney is ineffective for failing to introduce favorable "shoe print" evidence, when the entire theory of defense was one of mistaken identity, and the attorney gave no reason, strategic or otherwise, for the ommission, in direct contrast to this Court's ruling in Strickland v. Washington, 104 S. Ct. 2052 (1984)

3. Dose a court deny a defendant due process and the right to confront witnesses against him, and is an attorney ineffective for failing to object to the introduction of maps, created from cell-cite data, when the agent that produced those maps was not at trial, not unavailable, and had not previously been cross-examined, in direct contradiction to this Court's decision in Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011) & Crawford v. Washington, 124 S. Ct. 1354 (2004).

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 2018 U.S. Dist. LEXIS 59981 (N.Dist.Ill) or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 6, 2019.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. VIth Amendment:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained b law, and to be informed of the nature and cause of the accusation; 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."

U.S. Const. Vth Amendment:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, ... nor be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

On May 7, 2008, two men robbed the Farmers & Merchants Bank located at 51 East St. Louis Street in Hoyleton Illinois, of $115, 098. Because the robbers wore mask, witnesses in the bank could not identify the perpetrators. Also, on that day, the video surveillance equipment at the bank was also not working, so there was no video of the robbery available.

At least two witnesses testified that they stood within one or two feet of the robbers. Witness **Cathy Michelle Lively** stated that **she was 5 feet, 7 inches tall**, and that both robbers were taller than her. Witness **Kimerly Connelly** also testified that **she is also 5 feet, 7 inches tall**, and that both robbers were taller than her. It must be noted that **petitioner is 5 feet, 4 inches tall.** A full **3 inches shorter than either woman**. The only physical evidence found in the bank were **two different foot prints. Shoe molds were made of these prints**.

The robbery left the bank in a white truck, and drove out to a sparsely populated area in Washington County, Illinois, close to the farms owned by men named Dennis Windler, and Dennis Witte. Mr. Windler had previously seen the truck - along with a car - drive down his street at approximately 3:30am on May 7, 2008, and later saw the truck parked on his street. A couple of hours later, Windler saw that the truck was gone and that a car was parked in its place.

Still later that morning, Windler saw the truck parked at the spot where it

had previously been parked early that morning. Windler also saw the car previously parked on the street drive right by him. Mr. Windler attempted to stop the car, but it kept going. Windler could not identify the occupants of the car, but he thought that there were three men in the car.

Mr. Windler went and inspected the truck. In it, he saw exploded dye packs, making him think that a bank robbery had taken place. He then went to locate Mr. Witte, and they called the police, and told them what they had found. Witte also gave the police the license plate number for the car that had been parked on the street.

The license plate number that Witte provided to investigators was registered to petitioner. The robbery was investigated by Special Agent Mann of the FBI. Mann and other agents traveled to petitioner grandmother's house to question petitioner. Petitioner had previously lived with his grandmother, but was not living there at the time. Petitioner then voluntarily traveled to his grandmother's house to speak with agents. Petitioner denied that he had participated in any robbery and stated that his car had not been in Illinois on May 7, 2008. Instead, Petitioner stated that he had taken his cousin, Terry Smith, to an interview that day. Petitioner also consented to a search of his vehicle and apartment. The agents found nothing of evidentiary value in either.

Investigators found Mr. Smith and questioned him about the bank robbery. Mr. Smith initially confirmed Petitioner's statement that he had taken Smith to a job interview on May 7th. But, after being threatened with prosecution by agents, Smith changed his story and stated that petitioner did not take him to an interview on that day. Agent Mann then attempted to use Smith to get Petitioner to confess to the Bank robbery, but this petitioner reiterated his innocence. Agent Mann released petitioner that evening.

Before petitioner's actual release, petitioner consented to a search of his cellphone. Mann's download of Petitioner's contacts found the name of a man named Joe Johnson. After subpoenaing the cell records of both Petitioner and Mr. Johnson, agent Mann found phone calls between the two on May 7, 2008. Mann questioned Mr. Johnson about the Bank robbery. Johnson admitted to drinking with petitioner on the night before the robbery, but did not admit to committing the robbery. Later, investigators pulled Johnson over for a traffic stop and seized one of the guns that Johnson had used in the bank robbery.

The investigation stretched on for over 5 years and 11 months. During that

time, investigators attempted to link the truck to petitioner to no avail. The truck had been stolen from a dealership in Belleville, IL. The sales person at the dealership had talked to the person who had stolen the truck, but when she was presented with a photo array that included petitioner's photo, she did not identify petitioner. Instead, the truck was ultimately linked to a man named "Chuck," who was a friend of Mr. Johnson, and also knew Petitioner. Defense counsel at trial argued that Chuck may have committed the bank robbery with Johnson and that Chuck's relationship with petitioner explained the presence of petitioner's DNA on the truck, as noted below.

At some point during the years of investigation, agents obtained warrants to collect DNA evidence from both Mr. Johnson and this petitioner. While not a direct match, Johnson's DNA was the predominant profile on a ski mask found in the vicinity of the abandoned truck near Mr. Windler's farm. Investigators determined that this petitioner's DNA was a match to saliva found on the outside window of the truck.

On April 18, 2013, a Grand Jury indicted Petitioner and Mr. Johnson, and both were arrested that same day.

Trial Testimony

1. Johnson Testified that Petitioner "Had No Weapon" - Before trial, Johnson entered into a plea agreement with the government that resulted in Johnson getting a 121 month sentence for bank robbery, and the other charges against him were dropped. Johnson also agreed to be the government star witness against petitioner at trial if the government would seek a further reduction in his sentence. The government agreed, and in fact did seek a further reductio in Mr. Johnson's sentence after trial.

Johnson testified that he had robbed the bank with petitioner, and that he (Johnson) controlled the crowd while petitioner retrieved the money from the bank's vault. Johnson also stated that he received between $40,000 and $50,000 from the robbery. Johnson also stated that there was very little planning of the robbery before it took place. According to Johnson, there was "little" discussion between him and petitioner, and there were not a lot of details. Johnson also testified that he brought two guns, a change of clothing and a ski mask to the robbery, but significantly, johnson stated that petitioner "had no weapon" at the Bank robbery. While two of the three tellers at the bank believed that both of the robbers had guns, Johnson's testimony unequivocally contradicted that testimony.

Most importantly, for the purposes of this motion, is the fact that there was no testimony describing any plan that called for the use of guns during this bank robbery.

Cell Phone Evidence:

A key component of the Government's case was the admission of technical cell site data obtained from the cell phones of both Petitioner and Mr. Johnson. From that "cell tower" data, the Government attempted to establish where Petitioner's and Johnson's phones had been located - and by implication where petitioner and Mr. Johnson had been located - during the early morning hours of May 7, 2008.

The government did not introduce the cell tower data by having an expert witness testify as to the technical information under F.R.E. 702. The government did not even have the "tech agent" at the FBI who generated the reports and data testify as to his analysis of the information. Instead, the Government used Special Agent Mann who referred to himself as "not real tech savvy to tell where the phone was on May 6th and 7th," to introduce the cell tower evidence. Petitioner's attorney did not object to the admission of Mann's testimony.

Mann testified that he could tell where petitioner's phone was located in the early morning hours of May 7, 2008. He testified that the phone was at various locations in Missouri - and then in Illinois - after midnight on May 7, 2008 when petitioner had said that he was in bed. The locations in Illinois included that "[a]t 2:51 on May 7th he is in Nashville, Illinois, which is southeast of Hoyleton (i.e. where the robbery occured). In fact, on the corner you can see the "HO", which is Hoyleton."

Although the government attempted to couch the testimony as Manns opinion on the location of the phone, Manns said that he was "not naive," and that Petitioner was "probably in possession of that phone," meaning that he was near the location of the robbery when he said he was not. (See Manns testimony, Ex. ___). Agent Manns went on to testify about the location of Johnson's phone at various times during the early morning hours of May 7, 2008 based on the cell tower technical records that he did not prepare. He testified that "according to this" referring to the cell tower records, the phones of petitioner and Mr. Johnson were in the same areas of Illinois at the same time.

The government characterized the cell tower data as "incredibly significant information." Even during closing arguments, the government focused on Manns' testimony about the cell tower data, arguing that it was "personalized GPS" establishing that petitioner had committed the crimes.

DNA Evidence

The Government introduced the testimony of Stacie Speith ("Speith") from the Illinois State Police regarding DNA evidence obtained by the government. Speith testified that the saliva on the truck was a match for petitioner's DNA, and also that DNA evidence on the ski mask found near the Truck could be linked to Johnson (although not a direct match.

Witness Testimony Regarding The Height of the Robbers

At trial, two women testified concerning the height of the robbers. The first was Ms. Cathy Michelle Livesay. Her testimony was as follows:

Q. The height, the approximate height, do you recall that?

A. I dont recall. I know one was a little shorter than the other one but that's all I recall.

Q. How tall are you?

A. I'm about 5-7.

Q. Were they taller than you or shorter than you?

A. They were taller than me.

Q. A lot taller?

A. The one was probably 4 or 5 inches taller than me, and the other was probably a couple inches taller than me.

Q. You said you're 5-7?

A. Yes.

The next witness was Ms. Kimberly Connelly, a customer that day. Her testimony was as follows:

Q. And you were standing there when they actually walked through the door?

A. I had backed up against the Christmas tree.

Q. How far would you say you were from the robbers?

A. About a foot

Q. How Tall are you?

A. 5-7

Q. Do you recall whether you were able to give an estimate of their Height?

A. I recall that they weren't much taller than I was.

Q. Were they as tall as you were?

A. At least.

Q. And did you tell that to the police officers.

A. I believe so.

Both witnesses were consistent in their testimony that both robbers were taller then them, they were both 5 feet 7 inches tall, and they both were between one to two feet from the robbers. Petitioner is 5 feet 4 inches tall. That's three (3) inches **shorter** than either woman.

Initially Deadlocked Jury And Petitioner's Request for a Mistrial

After the close of trial, the jury began their deliberations. After a few hours, the jury sent a note to the judge. The Note stated:

> "Judge Henderson, the jury is stuck on a verdict and cannot come to a unanimous agreement. What should the jury do? Do we wait until a unanimous agreement is reached or is there another option for the jury?"

Petitioner requested a mistrial. The Court denied the request and instead sent the jury a note that stated:

> "The Court request that the jury continue in their deliberations in an effort to reach a unanimous verdict."

ISSUE ONE

DOES A LOWER COURT'S ADMISSION THAT A AIDING AND ABETTING JURY INSTRUCTION WAS ERRONEOUS IN LIGHT OF THIS COURT'S DECISION ON ROSEMOND v. UNITED STATES, 134 S. Ct. 1240 (2014), MEAN THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ERRONEOUS INSTRUCTION, THAT ALLOWED HIS CLIENT TO BE CONVICTED UNDER A LEGALLY INSUFFICIENT THEORY, AND IS THE FAILURE TO GRANT A DEFENDANT A NEW TRIAL UNDER THESE CIRCUMSTANCES, IN DIRECT CONTRAST TO THIS COURT'S DECISION(S) IN YATES v. UNITED STATES, 77 S. Ct. 1064 (1957) and GRIFFIN v. UNITED STATES, 112 S. Ct. 466 (1991).

In this petitioner's § 2255 petition, he complained that his attorney was ineffective for failing to object to the fact that the court had given a Jury Instruction that was erroneous in light of this Court's decision in Rosemond. There, this Court has clearly stated that in order for a defendant to be guilty of aiding and abetting a § 924(c) violation, petitioner's knowledge of his cohorts use of a firearm had to be "foreknowledge," and a jury instruction that does not require a jury to find that the defendant had advanced knowledge is flawed because:

> "In telling the jury to consider merely whether a defendant knew his cohorts used a firearm," the court did not direct the jury to determine when the defendant obtained the requisite knowledge, i.e., to decide whether the defendant knew about the gun in sufficient time to withdraw from the crime."

The instruction given in this petitioner's case did exactly what this court's decision forbids. In this case the judge told the jury:

"A defendant aids, counsels, commands, induces, or procures the commission of the offense only if he knowingly and intentionally assist another's use or carry of a firearm during and in relation to a crime of violence. This requires the government to prove the following beyond a reasonable doubt:

(1) The **defendant knew** either **before** or **during the crime** of another persons use or carrying of a firearm; and

(2) The defendant intentionally facilitated the use or carry of the firearm once so informed.

Now the reason that the government wanted the court to give an aiding and abetting jury instruction, was because petitioner co-defendant, who testified for the government, had said that petitioner had no firearm during the robbery, and petitioner's defense was that he was not there, at the robbery at all. Also, when pressed for specifics concerning the planing of the robbery, petitioner co-defendant testified that there was not much discussion/planing.

Obviously this instruction did not require the jury to decide/find that petitioner had foreknowledge. But, since this is an ineffective assistance of counsel claim, the relevant question is whether counsel was ineffective for failing to object to the flawed jury instruction that allowed his client to be convicted on an impermissable legal theory.

The district court resolution of this issues fails on several purely legal fronts. But before we get to those, the District Court stated in its denial of petitioner's § 2255 petition that:

> Taken in a vacuum, the Court would agree that the instruction given was in error in light of Rosemond. However, the instruction must bee looked at in context of the big picture and all evidence presented. Here, at worst, the instruction was harmless error as the Rosemond-standard was sufficiently attained when the government submitted evidence that petitioner not only organized the entire bank robbery and directed his co-defendant to bring firearms, but also brandished a firearm himself during the robbery. See e.g. petitioner's appellate case, Ridley, 826 F.3d at 442 (Court found jury had sufficient grounds to credit testimony of two eye witnesses to find that Ridley possessed and brandished a firearm during a robbery); crim. case 13-cr-30084, doc 93. pgs. 1-3 (Special Verdict form specifically finding petitioner guilty of possessing a weapon during the crime); see also Tr. Vol. III, p. 146-49 (co-defendant testimony that petitioner planned for the two men to meet the morning of the robbery with firearms). The evidence presented at trial demonstrates that even had the jury instruction been edited, it would not have resulted in a reasonable probability that the proceeding would have been different." The same is true for appellate counsel had raised an objection - the great weight of the evidence falls against petitioner."

The above quote is right in one respect, and totally flawed in the other. First, the court is correct that the istruction must be looked at in teh context of the big picture. But, what the court is missing from its assessment of the "big picture" is that since the jury instruction itself allowed the jury to find petitioner guilty on a legally insufficient leagal theory, and there was no special verdict form that ask the jury whether they had found that petitioner had "actually" brandished, or "aided and abetted" another's brandishing of a firearm, and since the jury actually heard conflicting evidence about whether petitioner carried and displayed a firearm during the robbery (his co-defendant, who testified 'for' the government stating that petitioner had no firearm), then there is no way to tell from the general verdict of Guilty, if the jury actually found petitioner guilty of actual possession, or aiding and abetting. Again, the jury instruction, as given, would have led the jury to mark the so-called special verdict form the exact same way that it did, if they found that petitioner had aided and abetted.

Also, ever present in the "big picture" is the fact that the jury sent the note stating that they were stuck, and could not reach a unanomous decision." This means that there was some disagreement among juors. There is simply no way for anyone to tell if the jury convicted petitioner of brandishing a firarm during the bank robbery on the imprioper basis, that being the admittedly flawed aiding and abetting jury instruction. This requires a new trial. It should be clear to all that if the evience was overwhelming as to guilt, the jury would not have been stuck on a verdict.

The second problem drafts off the first, but is purely legal. The Supreme Court has clearly stated in Yates v. United States, 354 U.S. 298, 312 L. Ed. 2d 1356, 77 S. Ct. 1064 (1957), that:

> "A general verdict of guilty in a criminal case must be set aside where it is supportable on one ground but not another and it is impossible to tell which ground the jury selected."

The reasoning behind this ruling in clear as the Supreme Court explained in Griffin v. United States, 502 U.S. 46, 59, 112 S. Ct. 466, 116 L. Ed 2d 371 (1991). where the Court stated:

> "In such a situation, we cannot trust the jury to have chosen the legally sufficient theory and to have ignored the insifficient one, because jurors are not equipped to determine whether a particular theory of conviction submitted to them is contrary to law."

So unless the government can somehow show that under the aiding and abetting instruction that was given, a jury who determined that petitioner had aided and abetted his co-defendant's firearm use because he found out "during" the crime that his co-defendant used a firearm, would have marked those special verdict forms any different then they did, then petitioner's substantial rights have been affected, the conviction for violating § 924(c) should be overturned, and petitioner should be resentenced.

Petitioner prays that this court will grant COA of this critical issue, because jurist of reason could certainly disagree with the District Court resolution of this issue, and this issue certainly deserves encouragement to proceed further.

Petitioner pointed all of the above out to the Seventh Circuit Court of Appeals when he was requesting to be granted a Certificate of Appealbility, but that court decline to grant COA. But, since the District Court's resolution is in direct contrast to this Court's secision(s), petitioner ask this Court to find that counsel's performance was deficient, and remand this case back with instructions to grant this petitioner a new trial.

I S S U E T W O

WHETHER AN ATTORNEY IS INEFFECTIVE FOR FAILING TO INTRODUCE FAVORABLE "SHOE PRINT" EVIDENCE, WHEN THE ENTIRE THEORY OF DEFENSE WAS ONE OF MISTAKEN IDENTITY, AND THE ATTORNEY GAVE NO REASON, (STRATEGIC OR OTHERWISE), FOR THE OMISSION, IN DIRECT CONTRAST TO THIS COURT'S RULING IN STRICKLAND v. WASHINGTON, 104 S. Ct. 466 (1991)

In Strickland, this Court made several points perfectly clear, that are relevant here, thos points are:

(1) The right to counsel is the right to effective assistance of counsel;

(2) The Sixth Amendment right to counsel exist, and is needed, in order to protect the fundamental right to a fair trial, **since access to counsel's skill and knowledge is necessary** to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.

And, because of the above, this court concluded that:

(3) Counsel can deprive a defendant of the right to effective assistance of counsel simply by failing to render adequate legal assistance.

In petitioners original § 2255 petition, he complained that during trial, testimony was given by Mr. Gary Henson. Mr. Henson was responsible for collecting evidence from the scene of the bank robebry. Mr. Hensen testified about finding foot prints on the counter of the bank, and testified as follows:

Q. But nevertheless, you did lift some latent prints from the bank, didn't you?

A. Footware prints, latent footwear.

Q. You looked at footwear prints?

A. Yes, sir.

Q. And where did you lift the footware prints from?

A. They were lifted from the top of the teller's counter. The Counter has three openings for three different tellers, and the footware impressions were lifted from the opening -- the south opening and the center opening.

Q. And were both -- were the prints both -- were they in the same direction? You know what I'm trying to ask you here?

A. Yes. I couldn't tell you.

Later, Mr. Henson was asked:

Q. And could you tell what size the prints were?

A. No, sir.

Petitioner also complained that what his attorney knew, was that there was actually prints from two different shoes on the counter in front of two different openings. Additionally, molds (or gels) were made, and pictures of these molds were turned over to the defense in discovery.

Now for the purposes of petitioner's ineffective assistance of counsel claim, petitioner pointed out that in the pictures of the molds, a ruler was placed next to each mold. Now one of the molds clearly shows that it is from a Nike shoe. Mr. Joe Johnson testified that he in fact wore NIKE shoes during the robbery. In fact, Mr. Johnson was asked two questions that he answered directly:

Q. What kind of shoes were you wearing?

A. NIKE'S.

Q. What's your shoe size?

A. Nine.

The other shoe was clearly not a NIKE shoe and was distinctly different from the first. But the key to this case, is the fact that the other shoe was smaller than the NIKE shoe. This fact is vitally important because petitioner wears size 10 shoes. This means that if Joe Johnson wears a size nine, than any shoe that was smaller could not have possibly have been petitioner's shoe because it would be at least a size eight, or at least two sizes smaller than petitioner's foot.

The failure by petitioner's attorney to introduce this favorable shoe print evidence was especially prejudicial becuase petitioner's defense was that dispite Joe Johnson's testimony that he had in fact robbed the bank with petitioner, this petitioner was not the second man in the robbery. So anything pointing to identity was vital to the defense. It must be remembered that the jury had already heard that both robbers were taller than 5 feet 7 inches tall, and petitioner is in fact 5 feet 4 inches tall. Petitioner feels that this is what gave at least some pause, and may have lead to the original note sent to the judge stating that the jury was unable to come to a unanimous decision.

District Court's Resolution of This Issue

In the District Court's denial, the court assigned the attorney's failure to intorduct favorable shoe print evidence as a "trial tactic.", and cited the case Yu Tian Li v. United States, 648 F.3d 524, 528 (7th Cir. 2011) for the proposition that "The decision not to introduce this evidence generally cannot support claims of IAC, if a strategic reason for a sound decision is apparent." (See Dist. Ct.

opinion page 10). But, that is not what this court said in Yu Tian Li at all. What this Court actually said is:

> "So long as an attorney articulates a strategic reason for a decision that was sound at the time it was made, the decision generally cannot support a claim of ineffective assistance of counsel." Id.

In this case the government sought two extensions and both time stated that they were waiting on an affidavit from petitioner's attorney. No such affidavit from the attorney was ever produced explaining why he would not introduce "favorable" shoe print evidence. Especially when it does not take an expert to read a ruler. Anyone could see that the second shoe print was "smaller" than Joe Johnsons shoe print. Any juror could tell that the shoe was obvoiusly not a size 10, and again the entire defense was "identity." Therefore, there is no sound reason that could be given to excuse this mistake. But the District Court did try.

In it's denial, on page 11, the Court stated:

> "In this case -- as the government notes -- the sensible decision not to introduce shoe-print evidence was made due to the expert crime scene investigator's testimony that he could not determine shoe size from the impressions that were lifted at the crime scene.
>
> As such, and in this case, "favorable" shoe print evidence would have not been dispositive, ..."

But the District Court's decision ignors the fact that petitioner further claimed in his § 2255 petition, that his attorney was equally ineffective for failing to call his own shoe-print expert to determine the size of the shoe from the molds. In fact, petitioner pointed out on page 26 of his § 2255 motion, that Expert testimony on footware comparisons has been admitted in courts for years. See United States v. Rodgers, 85 Fed. Appx. 483, 486-87 (6th Cir. 2004); United States v. Mahone, 328 F. Supp. 2d 77, 89 (D. Me. 2004), aff'd, 453 F.3d 68 (1st Cir. 2008), and United States v. Allen, 207 F. Supp. 2d 856 (N. Dist. Ind. June 10, 2002). Also, in this Circuit, experts on footware impressions have been used by the government to help convict defendants in bank robbery cases. See United States v. Smith, 697 F.3d 625 (7th Cir. 2012). But petitioner's attorney did not even attempt to consult, or call, an expert. But again, in this case all the jury needed was their own eyes to recognize the obvious, that is, that the shoe molds was much smaller than petitioner's feet.

Next, the district court's assignment of "strategy" to this failure by counsel

is also debatable. It has been said that "the mere incantation of the term "strategy" does not insulate an attorney's actions from review. Hardwick v. Crosby, 320 F.3d 1127, 1185-86 (11th Cir. 2003); Hooper v. Mullin, 314 F.3d 1167, 1169-70 (10th Cir. 2002). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 145 L. Ed 2d 985, 120 S. Ct. 1029 (2000). If counsel's straegy was at best "bone headed," it was not a reasonable strategic choice.

Lastly, the District Court's conclusion that "favorable" shoe print evidence would not have been dispositive, over looks the clear standard set forth in Strickland. As this Court has pointed out in Miller v. Zateck, 820 F.3d 275 (7th Cir. 2016):

> "A court considering an ineffective assistance claim need not definitively resolve in the defendant's favor the merits of the arguments counsel omitted, "for under Strickland [the defendant] need show only a reasonable probatility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." United States v. Weathers, 493 F.3d 229, 238, 377 U.S. App. D.C. 256 (D.C. 2007)."

No evidence is looked at in isolation. But coupled with the evidence that the height was wrong, the shoe size also being wrong, at least would have created a "reasonable probability" that the result would have been different. Especially when one considers the jury's note that clearly showed at least some doubt on the part of jurors.

In conclusion on this issue, petitioner stated that since counsel gave no reason (strategic or otherwise) for not introducing this very favorable evidence, the Court of Appeal should have granted COA, and the District Court should have held an evidentiary hearing where counsel could have been examined and asked if this omission was simply an unprofessional error that deprived his client of a complete defense, or, if it was strategic, what was the strategy, and then decide whether that strategy was reasonable under prevailing professional norms.

Petitioner ask this court to return this case to the lower courts for an evidentiary hearing, or, in the alternative, grant COA on his ineffective assitance claim.

I S S U E T H R E E

DOES A COURT DENY A DEFENDANT DUE PROCESS AND THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, AND IS AN ATTORNEY INEFFECTIVE FOR FAILING TO OBJECT TO THE INTRODUCTION OF MAPS, CREATED FROM CELL-CITE DATA, WHEN THE AGENT THAT PRODUCED THOSE MAPS WAS NOT AT TRIAL, NOT UNAVAILABLE, AND HAD NOT PREVIOUSLY BEEN CROSS-EXAMINED, IN DIRECT CONTRADICTION TO THIS COURT'S DECISION IN BULLCOMING v. NWE MEXICO, 131 S. Ct. 2705 (2011) & CRAWFORD v. WASHINGTON, !@$ S. Ct. 1345 (2004)

This claim actually raises several distinct issues concerning the ineffective assistance of counsel, and an issue of the court denying this petitioner due process by intorducing maps prepared by a witness that was not unavailable, to wit:

(1) Trial Counsel was ineffective for failing to investigate the government's cell tower evidence;

(2) Petitioner's trial counsel was ineffective for failing to object to the introduction of maps that were produced from cell tower date because the agent that prepared those maps, specifically to be used against petitioner at a trial, was not at trial, was not unavailable, and had not been previously cross-examined.

(3) Trial counsel was ineffective for failing to call an expert witness; and

(4) Appellate counsel was also ineffective for failing to raise on appeal that Agent Manns' testimony of how another agent located petitioner's cell phone was technically impossible.

In this case, petitioner's attorney failed to even investigate how cell phones connect to cell towers. He also failed to consult an expert, or call an expert. And, the government failed to get an affidavit from petitioner's attorney that explained this failure to investigate.

In regards to this claim, petitioner pointed out to the District Court, the standard of review for such a claim, as explained by this court. Specifically, petitioner pointed out that in United States v. Lathrope, 634 F.3d 931 (7th Cir. 2010), this Court stated that:

> "It is well recognized that counsel must engage in a reasonable investigation, or come to a defensible decision that a particular investigation is unnecessary." (Citing Strickland).

In this case the complete failure to conduct any investigation clearly violates

Strickland). This court has also has made it clear that in order for a petitioner to demonstrate prejudice on a claim of failure to investigate or failure to call a witness, a petitioner must make a "comprehensive showing as to what invewstigation would have produced." United States ex rel. Cross v. DeRoberts, 811 F.2d 1008, 1016 (7th Cir. 1987); see also United States v. Olsen, 846 F.2d 1103, 1109-1o (7th Cir. 1988).

In this case, petitioner pointed out that the only testimony concerning the government's cell tower evidence was given by Agent Manns. This agent, who described himself as "not real tech savy" told the jury that he could pinpoint where this petitioner's phone had been by looking at maps that had been prepared by another agent named "Dolan," who he alledged has "specialized training," to analize such cell tower data. Petitioner also pointed out to the district court that on page 47 of agent Manns testimony, at lines 13 & 14 he states:

"so were able to tell from these towers where the phone was."

This was a definate statement. Agent Manns followed this with his testimony on page 49, at lines 9-17:

A. "By looking at this map. I could tell where Ridley's phone had been during the early morning hours of May 7th."

Q. "So to an agent, is that rather significant?"

A. "Oh, Yes."

Q. "Doesn't necessarily mean that the defendant was the user of that phone, does it?"

A. "No. Just means the phone was there."

Q. " But it was definitely the defendant's cell phone."

A. "Yes."

The government followed up this testimomy by telling the jury that cell tower data was like "personalized GPS." The normal person understands "GPS" to mean that the Global Positioning System had pinpointed petitioner phone to within feet using satellites. Agent Manns further testified that:

> "It's -- our tech agent, Special Agent Dolan in this case, when he gets the records, the records provide what we call cell tower data, which would be the -- the phone -- when we use the phone it touches towers and the towers transfer, ect., **so we're able to tell from those towers where the phone was.**"

Because of this petitioner's complaint in his Section 2255 petition was that his counsel was ineffective for failing to investigate the use of cell tower data. This petitioner also provided the court, in great detail, what that investigate would

have found. Namely, that because of the attorney failure to investigate the cell tower evidence, and the failure to call an expert, the jury never heard that it is actually **impossible** to say with certainty where a particular cell phone is or was located by looking at the particular cell tower that relayed a particular call, or even a series of calls. What **any expert** would have informed the jury of is cell tower date is not "GPS," or anywhere near that percise. Petitioner further offered the testimony of several experts. For instance, petitioner pointed to the case of mermer v. McDowell, 2016 U.S. Dist. LEXIS 129112 (C.D. Cal. 2016). There, expert witness Ricardo Leal, who for eight years had been sprints "subpoena analyst" and interpreted telephone records for law enforcement.

Mr. Leal explained that the originating and terminating tower are usually, but not necessarily, those that are the closest to the originating and receiving phones and some of the factors (such as distance, terrain, and density of cellphone usage) that affect whether a call is routed to the closest tower. He further explained that calls are sometimes handed off from one tower to another, usually due to the phones location during the call. Id.

Petitioner also pointed to the case of United States v. Banks, 93 F. Supp. 3d 1237 (D. Kan. 2015), where an expert named Russell Pope, who had worked for T-Moble for 18 years. Mr. Pope candidly explained the strenghts and weaknesses, or rather limitations of relying on cell-site date to infer location of a cell phone. He further explained that because the phone normally selects a tower base on signal strenght, any factor that effect signal strenght can influence whether a phone receives a signal from the nearest tower. Mr. Pope testified that those factors include:

(1) A service outage at the nearest tower;

(2) Imperfect signal handoff,, which might occur when a call is placed in transit and the phone drags as initial tower's connection into another tower's service area;

(3) Call congestion, where too many phones are already connected to the nearest tower;

(4) Physical barriers, both geographic and man made;

(5) Differences in elevation (i.e. height of the tower);

(6) Weather; or

(7) Any other barrier that obstruct a tower signal, causing a phone to connect to a different tower.

From the above it is clear what an expert would have added to the defense. That is, endowing the jury with the knowledge as to the reliability and limitaitons connnected to the use of cell tower data alone to locate where any particular phone had been. Again, this is an ineffective assistance of counsel claim. Counsel's failure to investigate cell tower data's reliability kept him from being able to effectively cross examined Agent Manns about the strenth and/or weakness of using cell tower data, and also prevented him from telling the jury himself.

Now in the District Court's response to this issue, the court notes that:

"Petitioner cited to United States v. Hill, 818 F.3d 289 (7th Cir. 2015) for the proposition that analysis of cite data is not admissible to prove the location of a cell phone user. Id. at 6.

These assertions are simply untrue, The Seventh Circuit has spoken to the holding and implications of Hill more recently in United States v. Adame, 827 F.3d 637 (7th Cir. 2016). cert denied, 137 S. Ct. 407 (2016) and explaineds:

> In Hill, we noted that historical cell-site analysis can show with sufficient reliability that a phone was in a general area, especially in a well populated one. It show the cell sites with which a persons cell phone connect, and the science is well understood." Id at 645. See Dist. Ct.'s opinion at 5.

But what the District Court seems to have ignored is that in both Hill and Adame an expert 'did' testify, and in both, that expert told the jury the limitations of the cell tower date. For instance in Hill, this court clearly stated immediately prior to the portion of that decision that the district court quoted above, that:

> "In his testimony, Agent Raschke emphasized that Hill's cell phone's use of a cell site did not mean that Hill was right at the tower or at any particular spot near that tower. **This disclamer saves his testimony.**"

The reason that the disclamer saved the testimony was that the jury was given at least some knowledge that the cell tower date was not always correct and not **absolutely conclusive.** The same thing happened in Adame , the same agent Joseph Raschke, "He testified that cell phones generally send information to whichever cell tower is closest but not always because different factors can affect the signal." 827 F.3d at 642. also "He cautioned that the records were not precise to state whether a phone "was absolutely at a specific address," but that he could determine whether "it was in [a general] area." Id. at 642. This Court went on to note:

"But we noted that the expert witness should include a "disclamer" regarding the accuracy of the analysis, and that the witness **should not "overpromise[] on the technique's precision - or fail [] to account adequately for its potential**

flaws." Hill, at 298-99. But, in petitioner's case, no such "disclamer" was given. If fact, it was quite the opposite. On page 47, of Agent Mann's testimony, at lies 13 & 14 he states:

"so were able to tell from these towers where the phone was."

Then again on page 48, at lines 9 thru 17 it states the following:

A. "By looking at this map. I could tell where Ridley's phone had been during the early morning hours of May 7th."

Q. "So to an agent, is that rather significant? "

A. "Oh, yes."

Q. Doesn't necessarily mean that the defendant was the user of the phone does it?"

A. "No. It just means his phone was there."

Q. "But it was definitely the defendant's cell phone?"

A. "Yes."

Lastly, in closing arguments, on page 36, the government told the jury that cell tower data was like "personal GPS." This is plainly false, and "overpromises on the technique's percision," and "fails to account adequately for its potential flaws." See Hill and Adame.

Again, the court misstated petitioner ineffective assistance of counsel claim by stating that petitioner was saying that "analysis of cell ,cite data is not admissable to prove the location of cell phone users." See Dist. Court's Response at page 5. But petitioner actually said no such thing. At page 9 of petitioner's reply to the government he perfectly stated his real claim and his position on cell cite data. There it states:

"Getting back to petitioner's claim of ineffective assitance of counsel, **petitioner is not saying that cell tower data can not, or should not be used in a case, either by, or against a defendant**. it should be presented because it is evidence. **But, with expert testimony about its limitations, its easly rebutted/defended against**. So any attorney, whether government attorney or defense counsel should call an expert to explain to the jury the limitations of such data, when it is introduced by the opposing party. Therefore, petitioner's attorney was ineffective for both failing to research the cell tower evidence so that he could effectively cross examine Agent Manns, and he was ineffective for failing to call an expert to rebut and defend against this easily rebuttable evidence. This failure left the

jury believing that cell tower data was the equivalent of "GPS." it is not. And it left the jury believing that Agent Manns could say where the defendant's phone was. Which he actually could not. And, considering that the jury initially hung, there is at least a reasonable probability that if an expert were called, the result of the trial would have been different.

So petitioner's claim was clear. But the District Court was quick to assign the attorney's investigation of the government's cell tower evidence, and the failure to call an expert, to a "stratigic choice." But the failure to even conduct any investigation into the cell tower data ment that the attorney could not have made a "strategic choice," when he had no information upon which to make such a choice, This is clear from the fact that the government sought two extensions of time to file their response to petitioner's § 2255 petition. These extensions were sought because the government said they were waiting for an affidavit from both trial and defense counsel. These affidavits were sought in an effort to give both counsels a chance to explain whether their decisions were the result of some strategic choice, or just errors cause by a lack of investigation. Neither attorney supplied an affidavit. The reason for this failure is clear. As the Supreme Court said in Johnson, 544 F.3d at 603:

"Johnson's attorney's were not in a position to make ... reasonable strategic choice[s] ... because the investigation supporting their choice[s] was [itself] unreasonable." (quoting Wiggins, 539 U.S. at 536))."

In other words, the attorney(s) could not explain there failure to investigate the government's cell tower data, therefore, there was also no explination for the failure to call an expert. This court should find that the attorney was ineffective, and the District Court cannot supply the attorney with an excuse for their failure.

Lastly on this issue, the District Court seems to think that the evidence against this petitioner was especially strong. The Court stated:

"During petitioner's trial, a plethora of evidence was entered against him including his DNA found on the get-away vehicle, his co-conspirator's identifying testimony, and registration of a second get-away vehicle, among others. Clearly, the weight of the evidence was against him."

But again, what the court clearly overlooks, is that even with the evidence as it was presented by the government, the jury still told the court "The jury is stuck on a verdict and cannot come to a unanimus agreement. What should the jury do?" The Court also clearly ignored the fact that under Strickland, the standard for

prejudice is "reasonable probability" of a different result. "reasonable probability" the Supreeme Court has made clear, means "less than a probability." See United States v. Dominguez-Benitez, 542 U.S. 74, 83 n9, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004). So the lack of the Jury knowledge of the limitations of cell tower data, and the failure to rebut the government's asertion that is was just like "GPS," has far more probability of being prejudicial in light of the Jury note.

Failure to Object to Introduction of Maps of Confrontation Clause Grounds

Petitioner conplained that his attorney was ineffective for failing to object to the introduction of maps that were produced from cell cite data because the agent that had prepared those maps, specifically to be used against petitioner in a Trial, was not at trial and was not unavailable or previously cross-examined. Those maps were specifically used by the government to attempt to put petitioner close to the town that the bank was in that was robbed. The exclusion of those maps from the trial, as well as the testimony of Agent Manns concerning the meaning of said maps, would have prevented the government's attorney from being to tell the jury that thos maps, and the data that was used to create them, was "personlized GPS."

Petitioner pointed out to the District Court that the case law is clear on this issue. In Bullcoming v. New Mexico, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed 2d 610 (2011), the Supreme Court held that "Six Amendment Confrontation Clause held not to permit prosecution to introduce forensic labratory report containing testimonial certification through in-court testimony of scientist who had not signed certification or performed or observed test reported certification."

Additionally, petitioner pointed out that this Court has explained it's understanding of the confrontation clause, and of what kinds of statements, reports, ect., are covered under said clause in United States v. Brown, 882 F.3d 966 (7th Cir. 2015). There, this Court noted that:

> "The confrontation Clause applies only to testimonial evidence. U.S. Con. Amend. VI, Crawford v. Washington, 541 U.S. 36, 68, 128 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)(Where testimonial evidence is at issue however, the Six Amendment demands what the common-law required; unavailability and a prior opportunity for cross-examination." Testimonial statements are formal statements to government officers or formalized testimonial materials such as affidavits, depositions, and the like, that are destined to be used in judicial proceedings. See Crawford, 541 U.S. 1t 51-52; See also Bullcoming v. New Mexico, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed 2d 610 (2011)(Blood

Alcohol report testimonial); Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed 2d 93 (2011)(Statements to Police during ongoing emergency not testimonial); Melendez-Diaz v. Massachusetts,557 U.S. 305, 309-10, 129 S. Ct. 2527, 174 L. Ed 2d 314 (2009)(certificates fron labortory analysis identifying narcotic substance testimonial); David v. Washington, 547 U.S. 813, 826-30, 126 S. Ct/ 2266, 165 L. Ed 2d 224 (2006)(statements made to 911 operator not testimonial).

In light of the clear case law from the Supreme Court and from this Circuit, petitioner pointed out trial counsel was ineffective for failing to object to the introdiuction of the maps and cell cite records through the testimony of Agent Manns, when another Agent (Agent Dolan), who had specialized training, and actually produced the maps, specifically to be used in a prosecution, was not there to question as to what the data showed, the limitations of cell-cite information, and how/what procedures he used to formulate the maps. Lastly, petitioner pointed out that if the attorney had of objected, the maps, and a large part of Agents Manns testimony would not have been allowed. Or, would have been stricken because it violated petitioner right to confront witnesses against him.

The District Court and the government disagreed that petitioner's counsel was ineffective, and they both pointed to this court statements in petitioner's appeal (See United States v. Ridley, 826 F.3d 437 (2015)), where this Court stated:

> "If it had been sustained, the government could have fixed the problem easily by calling Agent Dolan, who prepared the map and had more technical expertise. The defense then would have had to try to challenge a better qualified witness."

The District Court concluded, on page 8 of the attached denial of petitioner § 2255 petition that:

> "It is within sound strategy to allow the maps in via the former and question agent Manns on his credibility and expertise. See Strickland, 466 U.S. at 600 ("strategic choices made after **thorough investigation** of the law and facts relevant to plausible options are virtually unchallengable."). Thus, petitioner's claim fails the performance prong of the IAC test created in Strickland."

Petitioner want this court to please consider what the District Court obviously missed. That is that petitioner's first claim that that his attorney did not invesigate cell-cite data/eveidence by either consulting or calling an expert. In other words if he did not conduct **any** investigation into how cell tower data worked, then there was no basis upon which to make a "strategic choice." That is the whole point of both Issue(s) One & Two. Additionally, since whatever an expert (such as Agent Dolan) would have said, as long as it included a 'disclamer' as to the

reliability and limitations of cell tower evidence, it is very difficult to see how petitioner could have possible have been in a worst situation. But again, only a counsel who had himself investigated the cell tower evidence/data would have known that. Again, the government failed to produce an affidavit from counsel that stated that he had in fact made some/any investigation, upon which he could have made some/any strategic decision not to introduce evidence that was favorable to his client. The District Court should have conducted an evidentiary hearing, called counsel to testify, and then determine whether counsel's decisions were reasonable. Lastly, the Court of Appeals should have granted COA since this issue is certainly debatable.

Petitioner prays that this Court will reverse and remand this case for an evidentiary hearing, or find that counsel's performance was deficient.

REASONS FOR GRANTING THE PETITION

This court should grant this writ because the Rosemond issue herein is an issue of National importance. When a court gives a flawed aiding and abetting jury instruction, and stated that the jury can convict if it finds that a defendant knew either **before or during** the crime of his cohorts use of a firearm, they have given the jury one legally sufficient theory of conviction, and one theory that is legally insufficient. This court needs to use it's supervisory power to reiterate that this court's decision(s) in both Yates v. United States, 77 S. Ct. 1064 (1957), and Griffin v. United States, 112 S. Ct. 466 (1991), dictate that a defendant be given a new trial because it can not be assumed that a jury chose the legally sufficient theory, and rejected the insufficient one.

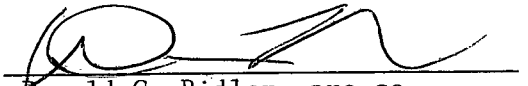
In regards to petitioner's ineffective assistance of counsel claim for failing to introduce favorable shoe print evidence, when the entire theory of defense was mistaken identity, this court should grant cert to make clear to the lower court that they cannot simply invoke the word "strategy" to excuse bone headed decisions by counsel. And

This Court should grant Cert on petitioner's third claim because the confrontation Clause of the U.S. Constitution "requires" that when scientific evidence is introduced, defendant's have a Constitutionally protested right to cross-examine the actual person who conducted the test, if that person is not unavailable and has not previously been cross-examined. Anything less is a violation of the VIth Amendment.

CONCLUSION AND RELIEF SOUGHT

Therefore, in light of all of the above, the petition for a writ of ceriorari should be granted.

Respectfully Submitted:



Donald C. Ridley, pro-se
Reg. No. 35181-044
U.S. Penitentiary McCreary
Pine Knot, KY 42635