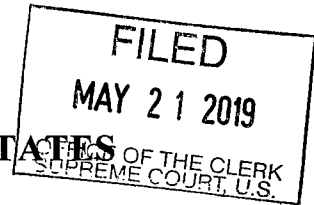


ORIGINAL

No. 18-9474



IN THE SUPREME COURT OF THE UNITED STATES

IRVING MADDEN,)
)
 Petitioner,)
)
 VS -)
)
 MICHAEL MELVIN, Warden)
 Pontiac Correctional Center,)
)
 Respondent.)

Case No.

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF
ILLINOIS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether or not the Seventh Circuit Court of Appeals decision in this case is consistent with this court's holding in *Strickland v. Washington*, 466 U.S. 688.
- II. Whether or not the trial counsel's failure to ensure that the jury received a complete jury instruction on self-defense, including in defense of another, amounted to ineffective assistance of trial counsel.

TABLE OF CONTENTS

| | |
|---|----|
| Opinions Below..... | 1 |
| Jurisdiction..... | 2 |
| Constitutional and Statutory Provisions involved..... | 4 |
| Statement of the Case..... | 5 |
| Reasons for Granting the Writ..... | 7 |
| Conclusion..... | 14 |

INDEX TO APPENDICES

APPENDIX A – ILLINOIS APPELLATE COURT

APPENDIX B – ILLINOIS SUPREME COURT

APPENDIX C – NORTHERN DISTRICT OF ILLINOIS COURT

APPENDIX D – SEVENTH CIRCUIT COURT OF APPEALS

APPENDIX E – Transcripts

TABLE OF AUTHORITIES CITED

| | |
|---|-----------|
| Cnty. Court v. Allen, 442 U.S. 140, 154 (1979)..... | 13 |
| Cone v. Bell, 556 U.S. 449, 468..... | 12 |
| Lozman v. Putman, 379 Ill.App.3 rd , 807..... | 11 |
| Harris v. Reed, 489 U.S. 233..... | 10 |
| Kubat v. Thieret, 867 F.2d 351 (Ca7 1989)..... | 7 |
| People v. Madden, 2012 Il.App (1 st) 093496-U-6 2012 WL 6936244...5 | |
| People v. Madden, 982 N.E.2d 772 (Ill.2013)..... | 2 |
| People v. Madden, 2016 Ill.App (1 st) 133872-U..... | 2 |
| People v. Madden, 60 N.E.3d 876 (Ill.2016)..... | 2 |
| Strickland v. Washington, 466 U.S. 688..... | 7, 14, ii |
| People v. Ward, 215 Ill.2d 317, 332 (2005)..... | 11 |
| Sanders v. Cotton, 398 F.2d 572, (7 th Cir. 2005)..... | 11 |

STATUTES AND RULES

| | |
|--|---|
| 28 U.S.C. – 1257(a)..... | 3 |
| Illinois Supreme Ct. Rule 341 (ch)(7)..... | 7 |

**IN THE SUPREME
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| | | |
|------------------------------|---|----------|
| IRVING MADDEN, |) | |
| |) | |
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| VS - |) | Case No. |
| |) | |
| MICHAEL MELVIN, Warden |) | |
| Pontiac Correctional Center, |) | |
| |) | |
| Respondent. |) | |

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari is issued to review the judgment below.

OPINIONS BELOW

The opinion of the highest State Court to review the merits appears at appendix (A) to the petition and is unpublished.

The opinion of the Illinois Supreme Court appears at appendix (B) to the petition and is unpublished.

The opinion of the District Court appears at appendix (C) to the petition and is unpublished.

The opinion of the Seventh Circuit Court of Appeals appears at appendix (D) to the petition and is unpublished.

JURISDICTION

The date on which the highest State Court decided my case was September 28, 2012.

The date on which the Illinois Supreme Court denied review, January, 2013, People v. Madden, 982 N.E.2d 772 (Ill.2013).

In July 2013, Petitioner filed a post-conviction petition, which summarily dismissed. A timely notice of appeal was filed and the Illinois Appellate Court affirmed, People v. Madden, 2016 Ill.App (1st) 133872-U.

The Illinois Supreme Court denied review, September 2016, People v. Madden, 60 N.E.3d 876 (Ill.2016).

No issues raised in that post conviction proceedings forms the basis for any issue raised herein this petition for Writ of Certiorari.

The District Court date of decision is October 3, 2017.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VI

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 by law, and 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.

STATEMENT OF THE CASE

Petitioner Irving Madden shot and killed Hamid Shahande and shot and wounded Antoinette Woods, People v. Madden, 2012 Il.App (1st) 093496-U-6 2012 WL 6936244. * 1 (iiiApp. Ct. Sept. 28, 2012) (12-1) at 1. Petitioner claimed self-defense, but a jury convicted him.

Defendant testified that on April 26, 2004, defendant asked Monique to notify Shahande that defendant was prepared to pay back the loan and repurchase his gold chain. Defendant asked Monique to meet Shahande outside, repay the loan and retrieve the gold chain. After several minutes, defendant heard screaming and yelling from outside his apartment. He heard Monique say, “get your hands off me.” Shahande demanded to speak with defendant. Defendant testified that he feared Shahande and what he was doing to Monique. Defendant testified that he then armed himself with a gun. Defendant testified that he had previously observed Shahande with multiple guns and observed Shahande on multiple times perpetrating violence on others. Shahande’s history of violence, the knowledge

and awareness of the harm Shahande can afflict on Monique and the Defendant permeated the defendants' mind every moment they were together.

The Defendant exited his apartment and immediately observed Shahande wrestling Monique. The Defendant attempted to break up the fight when immediately Shahande pulled a gun and demanded both Monique and the Defendant to leave the house and get into their car whereupon Shahande began driving away. Fearing their lives were in danger the Defendant and Monique pleaded for Shahande not to drive them away from the house and used the Defendant's electronic ankle monitor as a reason for them to stop driving away. the Defendant and Monique feared they would be killed if Shahande took them away from the neighborhood.

As the vehicle was driving down the alley behind the Defendant's home both Shahande and Antoinette suddenly turned and raised their hands towards the Defendant and Monique. Antoinette reached for Monique and began fighting with Monique. Petitioner/defendant immediately and instinctively shot Shahande fearing, if he did not Shahande would shot him and Monique first. Antoinette was slashing a knife at Monique's face and neck. Petitioner/defendant immediately and shot Antoinette before she could kill Monique.

Antoinette was not killed by the Petitioners gunshot and continued to fight with Monique. Petitioner grabbed Antoinette in an effort to pull her away from

Monique. The Petitioner and Monique immediately left the area. Monique, who was pregnant expressed she was experiencing pain, thus the Petitioner/defendant took Monique to the hospital emergency room to be examined.

The Trial Judge gave the jury an instruction on self-defense that did not cover the defense of third parties; this instruction was incomplete and inaccurate and trial counsel did not object at trial. This incomplete instruction denied the jury and the defendant the procedure and process to consider self-defense of another.

The District Court concluded the claim of incomplete jury instructions was procedurally defaulted, but then proceeded to address the merits of the claim. The Seventh Circuit Court of Appeals stated they found no constitutional violation had occurred. However, Petitioner believes The Seventh Circuit Court of Appeals has not been consistent in applying the Strickland standard in ineffective assistance of counsel cases. Therefore, Petitioner request this Honorable Court grant certiorari review.

REASON FOR GRANTING THE PETITION

The District Court said Petitioner's ineffective assistance of trial counsel claim, related to the incomplete self-defense jury instruction, was procedurally defaulted because the Illinois State Appellate Court imposed forfeiture of that claim. However, if the Illinois State Appellate Court meant to impose waiver, it

erred because they went on to reach the merits of petitioner's ineffective assistance of trial counsel claim related to the incomplete jury instruction on self-defense.

The Illinois State Appellate Court stated: "neither defendant nor the state cited any authority in their briefs before this Court that analyzed whether an attorney is ineffective when he or she fails to ensure a correct jury instruction. Both parties merely cited to the Strickland two prong test.

Petitioner believes The Seventh Circuit Court of Appeals has not been consistent in this matter and does not reflect the holding of this Court's determination in Strickland v. Washington, 466 S.Ct. 688.

In Kubat v. Thieret, 867 F.2d 351 (Ca7 1989) the Seventh Circuit concluded because the erroneous jury instructions were submitted without objection from counsel, counsel was ineffective. At Kubat's sentencing hearing the following instruction and verdict forms were submitted to the jury without objection from defense counsel: "if ...you unanimously determine that there is no sufficiently mitigating factor or factors o preclude the imposition of the death sentence on the defendant, you should sign the verdict form which so indicates".

The State does not dispute that both the second paragraph of instruction no 6 and the third paragraph of instruction No. 7 clearly misstate the law by calling for unanimous agreement of a decision not to impose the death penalty. The District

court found that defense counsel's failure to object to these instructions constituted deficient performance.

In this cause of action, the State Court chose not to impose waiver and decided to review the ineffective assistance of counsel claim on the merits and because the Appellate Court elected to review on the merits, petitioner was not barred from federal review of this claim.

When a state court declines to find that a claim has been waived by a petitioner's alleged failure to comply with state procedural rules...respect for the state court judgment counsel (federal courts) to do the same. *Cone v. Bell* 556 U.S. 449, 468. Federal Courts thus have no duty to apply state procedural bars where state courts have themselves declined to do so.

If state courts are willing to ignore a procedural default, a federal court implies no disrespect in doing the same, quoting *Cuty court v. Allen*, 442 U.S. 140, 154 (1979). The Illinois Appellate Court stated: "placing forfeiture aside (Appendix A p.41) and then went on to resolve the claim on the merits. Even, if the Illinois Appellate Court decision could be construed as applying waiver, The Illinois Appellate Court (Appendix A p.41) and then went on to review and decide the merits the claim.

In *Sanders v. Cotton*, 398 F.3d 572 (7th Cir. 2005), the State Court had likewise recited that “if an issue was available on direct appeal but not litigated, it is waived. But instead of following that observation with a conclusion such as and petitioner claims are waived under that standard, the Court immediately proceeded to address and decide the merits. Because the State Court never applied the procedural doctrine to the claims petitioner raised, its decision did not clearly and expressly rest on an independent procedural ground that would bar federal review.

Petitioner’s ineffective assistance of trial counsel claim related to the incomplete self-defense jury instruction was not barred from federal review.

Petitioner pointed out to the District Court, that the State Court’s finding of facts was inaccurate regarding his ineffective assistance of trial counsel claim stated: “no weapon was found on or near Shahande, and he was shot in the back of his head. In fact, no weapon was found on or near the vehicle.” (appendix A p.41 attached hereto). However, the lack of finding a weapon does not mean no weapon existed at the time of the shooting. It only means no weapon was found.

The jury instructions left the jurors in a position to have to disregard the petitioner’s version of events, because the form instructed them to only find him not guilty under the theory of self-defense, if they believed he was in defense of himself. But, in so doing this, petitioner’s testimony that he believed he was

defending his girlfriend, was not a defense presented as an option for consideration by the jury.

However, in *Kubat* the Seventh Circuit found counsel was ineffective for not objecting to the erroneous jury instructions. Clearly indicating the counsel's duty to review the jury instruction before they are tendered to the jury.

In this present case, the District Court erred in finding that petitioner's ineffective assistance of trial counsel claim was procedurally defaulted. the District Court like the State Court went on to reach the merits of Petitioner's claim, *Harris v. Reed*, 489 U.S. 233.

Petitioner pointed out to the District Court that the State Court's finding of facts was inaccurate regarding his ineffective assistance of trial counsel claim. The State Appellate Court in assessing Petitioner's ineffective assistance of trial counsel claim stated, "No weapon was found on or near Shahande, and he was shot in the back of his head. If fact, no weapon was found on or near vehicle." See Appellate Court Order p.41. The State Appellate Court findings here were incorrect.

Antoinette Woods testified that a steak knife was in the vehicle. Arthur Oswald, a retired member of the Chicago Police Department's forensic services division and a member of the mobile crime lab unit, testified that a steak knife was recovered from the vehicle on the night of the shooting, see Appellate Court Order

p.11. Also, at the pre-trial hearing it was determined that Shahande had a knife in his pocket at the time of the incident, see attached Ex.A, P.4-5. Hence, it cannot and should not be said that “no weapon was found...”

Petitioner believed Shahande going to shot him and Antoinette Woods was trying to stab and cut Monique. Petitioner reacted to save his life and the life of Monique.

At the pre-trial hearing it was determined that Shahande had a knife rather than a gun - this does not undermine Petitioner’s claim of self-defense of himself and another because ultimately Shahande could have killed the Petitioner with whatever weapon he had and Antoinette Woods could have killed Monique with her knife without the petitioner taking action to prevent his and Monique’s death.

Hence, the trial counsel’s statement, without a proper jury instruction, was meaningless. The Petitioner testified he believed his girlfriend’s life was in danger, but the jury forms did not reflect that as a proper defense to vote “not guilty” for defending another. The jury was not empowered to even consider this option.

To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test of Strickland. The defendant must prove that: 1)

counsel's representation fell below an objective standard of reasonableness and 2) counsel's substandard representation so prejudiced the defendant as to deny him a fair trial. To prove actual prejudice, a defendant must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

A reasonable probability exists because there were weapons found in the vehicle and on the deceased. Had the jury been properly instructed they could have considered a finding of not guilty for defending one's self and the defense of another. But due to the trial counsel's error that possibility was forever precluded from the jury as a consideration. Therefore, Petitioner was unduly prejudiced. Based on all the reasons stated herein Petitioner has satisfied the two-prong standard set forth in Strickland.

CONCLUSION

WHEREFORE, the above stated reasons, Petitioner request this Honorable Court grant a review


Irving Madden