

IN THE  
SUPREME COURT OF THE UNITED STATES

No.

19-5266

CLARENCE SCOTT

Petitioner-Petitioner,

v.

BRUCE DAVIS, et al. RESPONDENT(S)

ORIGINATED  
IN CIRCUIT

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

FILED  
JUL 05 2019

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

PETITION FOR A WRIT OF CERTIORARI

CLARENCE SCOTT  
SBI #241141C / ST #419167  
New Jersey State Prison  
P.O. Box 861  
Trenton, New Jersey 08625

QUESTIONS PRESENTED

1. Whether the district court ruling that Petitioner was not denied his right to the effective assistance of counsel, due process of the law and right to a fair trial under the state and federal constitution since trial counsel failed to provide Petitioner with effective assistance of counsel, when he failed to consult with Petitioner to provide adequate preparation of his defense was indeed contrary to clearly established federal law and united states supreme court precedence under ineffective assistance of counsel violating petitioner's rights under u. S. Const. Amend sixth and fourteenth.
2. Whether district court failure to consider if petitioner's conviction should be vacated because of trial attorney failure to request a jury charge on mistake of the facts and trial counsel's failure to provide adequate legal representation to petitioner when he failed to object to defective an erroneous jury instruction on the charge of possession of a weapon for unlawful purpose, was ineffective assistance of counsel. Counsel's actions were contrary to the United States Supreme Court ruling in *Strickland v. Washington* and clearly established federal law.
3. Whether the district court erred when it failed to consider if trial and appellate counsels failure to protect petitioner's constitutional rights to due process of law and a fair trial when they failed to challenge and/or argue that petitioner was entitled to a resentencing, this was ineffective assistance of counsels, contrary to clearly established federal law, or an unreasonable application of federal law therefore, a writ should issue.

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IN THE  
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PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

Petitioner's convictions were affirmed in an unpublished opinion issued by the District Court of the New Jersey. A copy of the opinion is attached to this petition at Appendix A.

The United States Court Of Appeals For The Third Circuit denied Certificate of Appealability on May 28<sup>th</sup> ,2019. A copy of the opinion is attached to this petition at Appendix B.

JURISDICTION

An order denying Certificate of Appealability in the United States Court Of Appeals for the Third Circuit Dated May 28<sup>th</sup>, 2019. This Court has jurisdiction to review a final judgment by the Third Circuit

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall...be deprived of...liberty, or property, without due process of law....

The Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall...have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

No state shall...deprive any person of... liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment's Assistance of Counsel Clause is applicable to the States through the Fourteenth Amendment. See *Gideon v. Wainwright*, 372 U.S. 335, 342-345 (1963).

STATEMENT OF THE CASE

In February of 1997 petitioner went to visit Lamont Folsom at his house to discuss payment of a loan he has afforded Folsom. Upon arriving and entering the abode shared by Folsom and his parents. Petitioner and Folsom entered his bedroom to have conversation about the monies owed when Folsom who according to petitioner appeared high on drugs.

After some time discussing the loan, Folsom retrieves a gun from a box under his bed and asked to trade the weapon for the debt owed and \$200 in addition. Folsom proceeded to hand petitioner the weapon and upon receiving said weapon, it accidentally discharged hitting Folsom in the arm.

Petitioner was arrested and subsequently charged with a multitude of offenses. An indictment #97-06-0581 was levied by the Passaic County prosecutions office which charged one count of aggravated assault in violation of N.J.S.A. 2C:12-1(b)(1), one count of aggravated assault in violation of N.J.S.A. 2C:12-1(b)(2), one count of aggravated assault in violation of N.J.S.A. 2C:12-1(b)(4), one count of possession of a weapon in violation of N.J.S.A. 2C:39-4(a), one count of certain person not to possess weapons one count of unlawful possession of a weapon in violation of N.J.S.A. 2C:28-5(a).

On February 1<sup>st</sup>, 2001, trial commenced before the Honorable Edward Gannon J.S.C. and a jury.

At the conclusion of the state's case, on February 13<sup>th</sup>, 2001, the jury convicted petitioner on all counts except for two counts of aggravated assault and witness tampering.

On May 1<sup>st</sup>, 2001, the petitioner appeared before judge Gannon for motion for new trial. The judge however denied the motion. Petitioner was sentenced to an extended term of 20 years with 10 years of parole ineligibility and the court also sentenced petitioner to an additional 20 years with 10 years of parole ineligibility *sua sponte* on a certain person not to possess a firearm running consecutive to the first sentence.

On February 11<sup>th</sup>, 2002, the petitioner filed a notice of appeal *Nunc Pro Tunc*. The Appellate Division On April 30<sup>th</sup>, 2003 in a seven page *per curiam* opinion affirmed the conviction and sentence imposed below in part and reversed in part. Petitioner was resentenced to an aggregate sentence of 30 year with a fifteen years parole ineligibility, and the Supreme Court thereafter denied certification on September 24<sup>th</sup>, 2003.

Petitioner filed a Petition for Post Conviction Relief with the trial Court that was heard by Judge Ralph L. Deluccia, J.S.C. on January 13<sup>th</sup>, 2006 and June 2<sup>nd</sup>, 2006 where the Prosecution conceded to petitioner meeting the *prima facie*

requirement and an evidentiary hearing was granted by the PCR court.

On September 30<sup>th</sup>, 2011 some five years later and a number of different judges being assigned petitioner's case the Hon. Marilyn C. Clark, J.S.C., assumed the reigns of petitioner's petition for post-conviction relief subsequently eroding the prior rulings by judge Ralph L. Deluccia, J.S.C. electing to start anew because the prosecutor in the case retracted it's earlier concession to an evidentiary hearing being granted. Judge Clark then denied the motion for post-Conviction relief without an evidentiary hearing in its entirety. An appeal was filed to Appellate Division and on March 4<sup>th</sup>, 2014, they affirmed the denial of petitioner's PCR petition.

On September 25<sup>th</sup>, 2014, the New Jersey Supreme Court denied the Petition for Certification.

Petitioner went on to seeks habeas corpus relief from the District Court of New Jersey and was denied on January 3<sup>rd</sup>, 2019.

A Certificate of Appealability was filed for and subsequently denied April 18<sup>th</sup>, 2019 in the Third Circuit. A Rehearing Enbanc was filed and denied on May 28<sup>th</sup>, 2019.

### REASONS FOR GRANTING THE PETITION

Petitioner argues that his counsel was ineffective under the requirements of the Sixth Amendment. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The *Strickland* standard requires a two-part inquiry. "First, the Petitioner must show that counsel's performance was deficient" by showing that it fell "below an objective standard of reasonableness," including "[p]revailing norms of practice." *Id.* at 687-88. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."

In the case at hand, counsel stating in open court on the record, that he was not prepared to argue this case due to other pressing cases that was unrelated to petitioner's current case. A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." *Id.* However, "a criminal defendant alleging prejudice must show 'that counsel's errors

were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" **Lockhart v. Fretwell**, 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (quoting **Strickland**, 466 U.S. at 687) ). An "analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Id. Counsel stated that he did no investigation spoke to no witnesses nor did he take the time to get familiar with the facts of this case. Using the testimonies garnered at the Wade hearing does not constitute an investigation. It is well settled that trial counsel's in court performance is no substitute for investigating a case, including interviewing witnesses. See **United States v. Baynes**, 622 F.2d 66 (3d Cir. 1980), who claimed he had not received the effective assistance of counsel at his trial. On remand, after conducting such a hearing, the district court determined that Trice's constitutional right to effective assistance had been infringed, but held that no prejudice resulted to the petitioner therefrom. {1982 U.S. App. LEXIS 2} We agree that Trice's sixth amendment rights were violated by his trial counsel's admitted failure to investigate potentially exculpatory information. Unlike the district court, however, we cannot conclude that Trice was not prejudiced by his counsel's shortcomings.

At the heart of this case is the courts failure to adhere to the model jury charge that pointing a firearm was the use of force within the meaning of that defense. Under N.J.S.A. 2C:12-1(b) (4), the trial court committed reversible error when it did not inform the jury it could convict Petitioner of aggravated assault only if it found the Petitioner was aware it was practically certain that when he pointed the gun, he was pointing it at or in the direction of persons other than his victim. Petitioner argued before this Court that if the trial court's "molding the jury instructions to the fact" would not have diverted the jury's attention from the central question of whether the act of pointing without intent "substantially different" in terms of nature or degree. As such, the prosecution burden of proving every element beyond a reasonable doubt had been impermissibly lessened. Counsel's non-action with respect to the charge to the jury and the mistake of facts as it pertained to the case, left petitioner with even lesser chance of not being prejudiced by the jury charge.

Given petitioner was acquitted of second and third degree assault; the trial court erred in not granting petitioner judgment of acquittal. The jury finding Petitioner guilty of assault in violation of N.J.S.A. 2C:12-1(b) (4) after having acquitted Petitioner of assault in violation of N.J. Stat. Ann. 2C:12-1(b) (1) based on the express finding that Petitioner had

not acted under circumstances manifesting extreme indifference to the value of human life. **State v. Graham**, 223 N.J. Super. 571, 539 A.2d 322, 1988 N.J. Super. LEXIS 93 (App.Div.), certif. denied, 113 N.J. 323, 550 A.2d 442, 1988 N.J. LEXIS 865 (N.J. 1988), was as a result of trial attorney's failure to object to the erroneous jury charge.

Petitioner contends that his trial and appellate attorney along with his PCR attorney was all grossly ineffective for not objecting to judge Clark's decision to start over his PCR proceedings. When a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. There are exceptions. The United States Court of Appeals for the Third Circuit has discretion to revisit the law of the case when (1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest injustice.

Post-Conviction Relief attorney was ineffective for failing to raise that claim [.] "We also directed the parties "to address whether an exception to the law of the case doctrine, see **Schneyder v. Smith**, 653 F.3d 313, 331-32 (3d Cir. 2011). While Judge Deluccia didn't offer a written order, he orally ordered that an evidentiary hearing was warranted. making the ruling after he was led to believe by the concession of the Assistant

prosecutor that the state conceded to Point I of the petitioner's brief of ineffective assistance of trial attorney. Given that judge Deluccia never presided over the case again, Judge Clarks' decision to start anew is Contrary to the fact that the court presumed that the chronology of events is such that things have changed substantially. In order to maintain the integrity of the judicial process by prohibiting parties from deliberately changing position according to the exigencies of the moment. Assistant prosecutor changed his position of concession once a new judge was assigned to the case.

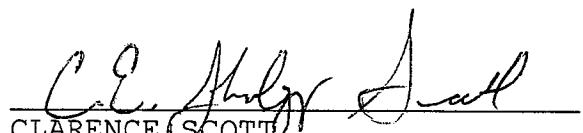
Here the prosecutor's later position is "clearly inconsistent" and induce error with it's earlier position, the prosecutor's change in position has succeeded in persuading judge Clark to accept that his earlier position was not in the interest of the state. The judicial acceptance of an inconsistent position in a later proceeding definitely create the perception that either the first court was misled, and petitioner seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the state's case, resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'' the prosecution's last-minute change of theory unfairly prejudiced the defense. § 2254(d). This ``difficult to meet," **Harrington v. Richter**, 562

U.S. --, --, 131 S. Ct. 770, 178 L. Ed. 2d 624, and `` 'highly deferential standard'. To satisfy § 2254(d) (1)'s ``unreasonable application'' prong, he must show that ``there was no reasonable basis'' for the State Court's decision to start all over after Judge's decision to grant an evidentiary hearing. Petitioner believes that the actions of Judge Clark violates his right to due process and a fair trial under the six and fourteenth amendments.

CONCLUSION

For all of the foregoing reasons, this Honorable Court should grant the petition for a writ of certiorari to determine whether the petitioner's due process rights and his right to effective assistance of counsel were impermissibly infringed in the lower courts.

Respectfully submitted,

  
CLARENCE (SCOTT) KELLEY