ORIGINAL

No. 19-6030

IN THE
SUPREME COURT OF THE UNITED
STATES

♦

CRAIG ELIAS,
Petitioner,
vs.

SUPERINTENDENT FAYETTE SCI *et al*
Respondent(s)

♦

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT
OF THE UNITED STATES

♦

Craig Elias, FR-1993
SCI Fayette
50 Overlook Drive
LaBelle, PA 15450

Question(s) Presented

1. Does ***Strickland*** apply to ineffectiveness claims vis-à-vis trial counsel's broken promise to produce evidence?

List of Parties

1. Superintendent of State Correctional Facility at Fayette.
2. Attorney General of Pennsylvania.

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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

- Third Circuit Court of Appeals decision in Elias v. Superintendent Fayette SCI et al, No. 17-3648 (3d Cir. 2019) (Jordan, Krause and Roth), denying relief.

- Rehearing denied. Elias v. Superintendent Fayette SCI et al, No. 17-3648 (3d Cir. 2019).

- Opinion of Magistrate Judge Lisa Pupo Lenihan of the United States District Court in the Western District of Pennsylvania. Elias v. Coleman, issued at D.C. No. 2-14-cv- 1337 (November 9, 2017), denying habeas relief.

JURISDICTION

The date on which the United States Court of Appeals decided my case was May 30, 2019. Elias v. Superintendent Fayette SCI et al, No. 17-3648 (3d Cir. 2019) (Jordan, Krause, and Roth), denying relief.

A timely petition for rehearing was filed, but denied by the United Stats Court of Appeals on June 27, 2019, a copy of the order denying rehearing appears at **Appendix "B."**

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

Statement of the Case

Introduction:

The United States Supreme Court has never specified exactly when an attorney's broken promise to present evidence rises to the level of a Sixth Amendment violation.

In this case, three defendants, Craig Elias, Jared Lischner, and Jared Henkel were jointly tried for the murder of Andrew Jones. Attorney Duke George opened by promising that his client, Craig Elias, would testify, thereby heightening the jurors' expectations and cementing his trial plan. After the Commonwealth's case concluded, Defense Attorney Tom Ceraso called Bruce Henkel, Sr. to the stand. Henkel, Sr. labeled his son Matthew the murderer. Afterward, Mr. George renewed his initial pledge to call on Elias. Following a brief bathroom break, Mr. George told Elias that the Henkel, Sr. impeachment evidence was enough to exonerate him. Elias rested without taking the stand. All three defendants were convicted. Only Elias' conviction remains.

The lawyers for Lischner and Henkel were found ineffective for failing to have a contingency plan to counteract Elias' attorney's "strategy" of guaranteeing Elias' testimony would exonerate the trio then reneging when the time came to make good.

The disparate appellate results among three similarly situated codefendants are a microcosm of how such issues are being settled throughout the country. From one jurisdiction to another,

forecasting how IAC claims relating to defense attorneys' broken promises will be handled is unpredictable. The United States Supreme Court has never specified exactly when an attorney's broken promise to present evidence rises to the level of a Sixth Amendment violation, nor does it need to now. What is needed is an affirmation that *Strickland* is the only paradigm through which these claims must be judged.

A. Facts of the Case

On March 22, 2002, Janine Stansbury became worried when her boyfriend, Andrew Jones, failed to arrive for a prearranged meeting and failed to return her telephone calls. Trial Transcript 413, 425 (hereinafter "T.T.") Through her contact with Anthony Brownlee, she learned that earlier the two men had been together at 220 Sycamore Street. Stansbury contacted the police, who in turn interviewed Brownlee, and saw that Brownlee had fresh injuries on his face. T.T. 185. Based on the interview, police arrested Craig Elias at his apartment on Mary Street in the South Side of Pittsburgh and charged him with assaulting Brownlee.

Through information eventually provided by Matthew Henkel, police found the body of Andrew Jones in the Ohio River on April 12, 2002. T.T. 739. The rescue team found a 50 pound York barbell chained to the body and duct tape binding his hands. T.T. 745. The cause of death was determined to be

asphyxiation. T.T. 812, 816-817. Craig Elias, Jared Henkel, and Jared Lischner were eventually charged with criminal homicide in the death of Andrew Jones.

At trial, the primary Commonwealth witnesses were Anthony Brownlee and Matthew Henkel. Brownlee received immunity from prosecution for his testimony. T.T. 194-195. He admitted to talking to the police at least 10 times, T.T. 281, and lying and "withholding" information almost every time. T.T. 283. He admitted continuing to sell heroin even after he cooperated with the prosecution and testified at the preliminary hearing. T.T. 197. After testifying as an immunized witness, but before trial, Brownlee was arrested for possessing with intent to deliver ten bricks (505 bags) of heroin weighing approximately 7 grams. T.T. 198-282. Brownlee's charges were unresolved at the time of trial, so the prosecution further sweetened the pot by orally promising Brownlee that, in exchange for his testimony, the mandatory minimum sentence of imprisonment would be waived for the pending drug charges. T.T. 198, 286-287.

Matt Henkel is the older brother of defendant Jared Henkel. T.T. 580. When questioned by police on March 26th, 2002, about Jones' disappearance, Matt lied. T.T. 586. Later, on March 29th, 2002, Matt entered into a non-prosecution agreement with the district attorney's office in exchange for his truthful statement as to the location of Jones' body and the events of March 22nd, 2002. T.T. 479. There was no question that Matt had played at least a supporting role in the disappearance of Jones. T.T. 621. Matt

also knew that "truthful" cooperation would be determined by the district attorney's office. T.T. 593. After gaining the extraordinary agreement, he gave a completely different statement from the first. T.T. 594. Up until the trial began, Matt contacted the district attorney's office numerous times with new and different information. T.T. 627-28. A year and a half after the murder, on September 25th, 2003, Matt met with the prosecutor again with new information he said he remembered after counseling and therapy. T.T. 635. In a rare addition to his non-prosecution agreement, the prosecution secured a grant of immunity for Matt regarding his trial testimony. T.T. 479. As a result of their immunity and non-prosecution agreements, Matt and Brownlee cooperated and testified. The following scenario emerged at trial based largely on their testimony:

On March 22nd, 2002, Matt awoke to hear his brother, Jared Henkel, yelling on the cell phone about safes being stolen. T.T. 496. Jared told Matt he was going to meet Brownlee and Jones at the Mt. Washington house at 220 Sycamore Street (hereinafter referred to as "Sycamore Street"). T.T. 497. Jared left in Elias' green Audi. T.T. 498. In Matt's view, his brother accidentally left behind duct tape on the kitchen table. Wanting to be a part of the action, Matt grabbed the tape, jumped into his Camero and, eventually, headed toward Sycamore Street. T.T. 500. According to Matt, while he was driving, his brother phoned and, coincidentally, asked that Matt meet him at the CoGo's with the duct tape. T.T. 504. After meeting all three defendants in the Audi at the nearby

CoGo's and handing over the duct tape, Matt drove to Sycamore Street and parked down the block to surreptitiously "watch" what may happen. To Matt's dismay, the defendants never arrived so he left. T.T. 506.

After receiving the call from Henkel, Jones and Brownlee voluntarily went to Sycamore Street. T.T. 218-220, 260. Ten to fifteen minutes later, Elias, Jared Henkel, and Lischner arrived at the home. T.T. 141. The five men stood downstairs in the kitchen discussing missing safes. T.T. 143. Henkel, Elias, and Lischner decided that the kitchen window had been broken from the inside out; leading them to believe it was an inside job. T.T. 144. Elias and Henkel decided to go upstairs to investigate and Brownlee voluntarily followed. T.T. 144. Henkel then disappeared from the upstairs and Elias began to question Brownlee about who he thought could have been responsible for the theft. T.T. 145. According to Brownlee, Elias then hit him. T.T. 146. After a few minutes, Elias took Brownlee back downstairs into the kitchen where Brownlee had his hands and legs duct taped together. T.T. 147-149. Brownlee observed Jones lying face down on the floor with Lischner holding Jones' hands behind his back and Henkel standing in front of him with duct tape and a knife he had removed from Jones' pocket. T.T. 148. Henkel and Lischner then proceeded to duct tape Jones' legs and hands. T.T. 148.

After both Jones and Brownlee were duct taped, Brownlee testified that Elias carried each up the stairs, putting Jones in the front bedroom and

Brownlee in the other bedroom where the safes had been located. T.T. 150. Brownlee claimed that Elias repeatedly interrogated, threatened, and beat him. T.T. 152-53. When Elias left the room, either Henkel or Lischner would come and sit in the room with Brownlee. T.T. 154. During this time, Brownlee could slightly hear Jones in the other bedroom. T.T. 156. Brownlee never saw Mr. Elias hit Jones, T.T. 268, and never heard him threaten Jones. T.T. 271.

Meanwhile, according to Matt Henkel, he received another phone call from his brother, asking him to get a four-wheel drive truck. T.T. 506. Later that day, Matt borrowed a pickup truck from Chris Gabig and drove to Sycamore Street. T.T. 514.

Eventually, Brownlee convinced the defendants to allow him to call Scott Carlin to bring money to the house in exchange for the release of himself and Jones. T.T. 159-161, 164. Brownlee told Carlin to get a pair of shorts from his room with an envelope in it and bring it to Mt. Washington. T.T. 162, 459. The envelope contained between $3,000 - $4,000. T.T. 162. Later, Carlin placed the shorts in the black Blazer but Jones and Brownlee were not freed. T.T. 163. Brownlee then offered the defendants some more money that was buried in the basement of his parents' home. T.T. 166.

According to Matt, at some point, he, Jared Henkel, Lischner, and Elias met downstairs to discuss what to do about Jones and Brownlee. T.T. 519. Jared Henkel said that Jones was too dangerous to let go because he was likely to seek revenge. T.T. 518. Matt agreed, and added that they could not kill them

both, and since Brownlee was not as much of a threat, they should let him go. T.T. 519. Matt testified that the group agreed with him and Lischner went upstairs. T.T. 519-520. Matt admitted that the recollection of this conversation was the result of a flashback. T.T. 636.

While upstairs, Lischner told Brownlee that he would be leaving with Henkel. T.T. 170. Then, still downstairs, Jared Henkel pretended to call Matt, so it would sound like he was asking Matt to come pick up him and Brownlee. T.T. 520. About five to ten minutes later, Matt opened and closed the front door loudly so it would sound like he had just arrived. T.T. 521. Jared Henkel went upstairs and untied Brownlee. T.T. 521. Brownlee saw Jones before leaving and asked him if he was okay, to which Jones responded that he was. T.T. 178. After Brownlee was freed, he went downstairs to retrieve his cell phone and jacket and walked outside to where Matt was waiting in a white pick-up. T.T. 171-72. Jared Henkel, Brownlee, and Matt left in the pickup, and shortly afterwards Lischner also left Mt. Washington, ending up at Elias' Mary Street apartment in the South Side area of Pittsburgh. T.T. 522, 922.

When the three arrived at the Henkel residence, Jared Henkel and Brownlee went upstairs. Henkel spoke with Elias and Lischner telling them to let Jones go because Brownlee had given him more money. T.T. 174-75. Brownlee then called his friend Dorian to come pick him up from the Henkel residence. T.T. 179, 183. Meanwhile, Matt went down to the basement, got a 50-pound weight that he

claimed Elias had requested, and drove back to Sycamore Street. T.T. 528. After Brownlee left, he tried unsuccessfully to reach Jones on his cell phone. Finally, Brownlee telephoned Jared Henkel to inquire about Jones' whereabouts. Henkel reported that, "[t]hey said they let [Jones] go"; "Craig [Elias] and Lischner said they let him go,"; "[T]hey said they left a knife up there with [Jones] so that he could cut himself loose." T.T. 179, 180-181.

Yet, according to Matt, Jones was dead when he arrived back at Sycamore Street. T.T. 529 -30. Matt helped Elias put the body in the back of the truck. T.T. 532. Matt tried to close the broken tailgate. T.T. 536. The noise from the slamming tailgate attracted the next-door neighbor, Rochelle Riemersma, who came out onto the fire escape. T.T. 536. Riemersma testified that she saw a young man wearing a light colored shirt and dark pants swinging the tailgate of a white pickup truck. T.T. 831, 835. After a brief conversation with Matt, Riemersma went inside to answer the phone. T.T. 536, 832. According to phone records, this call was made at 8:48 pm. T.T. 834. A couple minutes after Riemersma spoke with Matt outside, Bruce Henkel, Sr., received a call from Elias asking for Matt's phone number. T.T. 1113.

Matt testified that, once in the truck, Elias told Matt to drive toward West Virginia. T.T. 539. While en route, they stopped at Lowe's in Robinson Towne Center to get a chain to wrap the body. T.T. 539-40, 680. They agreed to go into the store separately and to different registers. T.T. 541. Lowe's security

system produced surveillance photographs of Matt and Mr. Elias buying the items. T.T. 844. Lowe's security system revealed, Matt and Elias to be in the store from approximately 9:26 pm to 9:40 pm. T.T. 851.

According to Matt, he asked Elias if Jones had said anything while he was killing him. T.T. 547. Matt testified that Elias told him Jones said, "Craig, you are killing me" and Elias replied "I know". Elias demonstrated to Matt how he had put a chokehold on Andy, which Matt re-enacted for the jury. T.T. 547. It appears that not only the circumstances of this conversation – how the killing occurred – but possibly memory of the conversation itself were the product of a flashback. T.T. 644-645. Matt further admitted that he demonstrated the alleged chokehold for the very first time on the witness stand during direct examination. T.T. 645.

After crossing the state line, Elias and Matt agreed to dump the body off a bridge into the Ohio River. T.T. 548-49, 738. They parked in an isolated area to wrap the body in chains and connect the weight. T.T. 549. Matt testified that Elias pulled Jones' body out of the truck, pushed him over the railing and into the river. T.T. 553. Matt and Elias then drove to Montour Heights Country Club in Moon Township to meet Matt's friend, Josh Falvo. T.T. 555. They met Josh inside the country club and Elias went downstairs to the locker-room to take a shower. T.T. 556-57. Elias returned wearing a different set of clothes and carrying a bag of clothes and shoes. T.T. 557. Matt and Elias returned to the

Henkel home and Matt gave Gabig his truck. T.T. 559.

Matt drove Elias and Lischner to the South Side apartment in his Camero. T.T. 561. When they arrived at the Mary Street apartment, Lischner gave Matt $1,000 in cash saying, "Your brother wanted you to have this." T.T. 563. After smoking some marijuana, Matt left the apartment and went home. T.T. 564. According to Matt, when he returned home, he told his brother and father that he and Elias had tied Jones' body with a weight and dumped it into the river. T.T. 564. However, Bruce Henkel, Sr., testified that he only saw Matt for about two minutes around 12 or 1am, and that Matt did not say anything about Jones. T.T. 1096-97.

The next day, March 23rd, Matt called Gabig and told him to clean out his pickup truck and change the tires. T.T. 566, 661. Gabig washed the truck that day and changed the tires on Monday. T.T. 770-71. Later, Gabig noticed that Matt had put over 200 miles on his truck. T.T. 772.

The police also returned to the Sycamore Street apartment that next day between 4:00 pm and 6:00 pm. T.T. 369-370. They found white powder in the microwave, a knife on the kitchen counter, pepper spray, balled up tape in the bathroom, and a brown stain on the carpeting and padding in the rear bedroom. T.T. 371-374, 376. However, police found no stains or any other evidence in the front bedroom. T.T. 376.

B. Procedural History

Pre-trial motions were filed on or about September 29, 2003. Matthew Henkel had disclosed the "kitchen conversation" only days before. Defense counsel was highly suspicious and vigorously objected. According to ADA Thomas Merrick, Matthew's counsel provided information to the District Attorney's office that a psychiatrist had treated Matthew during the time before trial and his memory was enhanced through therapy and medication.

Through the Motion to Compel Psychiatric Examination of Commonwealth Witness Matthew Henkel, the defendants challenged Matt's competency based upon his counsel's representations that Matthew's memory was enhanced as a result of mental health treatment and psychotropic drugs. As part of their competency challenge, defendants requested that Matt undergo a court-ordered psychiatric examination as well as the disclosure of medical records, treatment, and drugs administered. Motion Hearing Transcripts at 57-62.

Without ever observing Matthew testify, the trial court refused to order a competency hearing or a psychiatric examination and ordered only that the prosecution supply the defense with the names of the medications Matthew was taking. The trial court also agreed to permit limited cross-examination on the issue.

During cross-examination, however, Matt denied that therapy and medication enhanced his memory and instead relied on "flashbacks" triggered by the sound made while riding across a bridge similar to the bridge in Ohio from which he and Elias threw Jones' body. After Matthew's testimony, defense counsel renewed the pre-trial motion in an effort to further challenge Matthew's competency based upon the brand new revelation of revived repressed memory due to flashbacks. The trial court reserved its decision pending argument by Matthew's lawyer, Anthony Mariani, regarding his statutory privilege pursuant to Title 42 Pa.C.S.A. § 5944, the psychotherapist-patient privilege. The trial court ultimately denied the motion the next morning.

At the evidentiary hearing on remand from the Superior Court to address whether Matthew Henkel was hypnotized by his mother, Diane Henkel, both Matthew and his mother testified that Matthew was committed to Western Psychiatric Hospital in July 2003, three months prior to the commencement of trial.

Mrs. Henkel testified that during the time leading up to trial, Matthew was suicidal and experiencing severe mental health problems. At the evidentiary hearing, Matthew testified that he was taking psychiatric medication upon hospital discharge and had only a vague recollection of leaving the hospital. He also testified that during the time leading up to trial, he was seeking counseling and medical treatment.

On September 29th, 2003, the Court also entertained oral argument concerning the Commonwealth's Notice Pursuant to Pa.R.E. 404(b). Defense objections to admission were overruled. M.H.T. 55. The Commonwealth filed a second 404(b) Notice on October 14th, 2003, immediately before commencement of trial. Counsel Pat Thomassey objected to admission of the drug relationship among the defendants and their prior acts of violence. The objection was overruled. T.T. 12-13. On direct appeal, the Superior Court held that these objections had not adequately preserved the issue for appellate review.

Jury selection began in Erie County, Pennsylvania on or about September 30th, 2003. The trial began on October 14th, 2003. Verdicts were returned on October 21st, 2003. Mr. Elias was found guilty of one count of first-degree murder, two counts of kidnapping (as to Anthony Brownlee and Andrew Jones), one count of robbery, one count of aggravated assault, and one count of abuse of a corpse. Sentence was imposed on January 22nd, 2004. Post sentence motions were filed and denied May 19th, 2004. A timely Notice of Appeal was filed.

The trial court filed its Opinion on December 29th, 2005. On June 13th, 2006, while the case was pending on appeal, all three defendants filed in the Superior Court a "Petition for Remand Pursuant to Rule 720 (c) of the Pennsylvania Rules of Criminal Procedure". The petitions requested that the Superior Court remand the case for an evidentiary hearing before the trial court in order to further

develop matters relating to an alleged hypnosis before trial of the prosecution's chief witness, Matthew Henkel.

The Superior Court granted remand and an evidentiary hearing was conducted by the trial court, which found no hypnosis of the witness occurred. Subsequently, all parties filed supplemental briefs in the Superior Court. On November 14th, 2007, the Superior Court denied relief on all claims asserted and affirmed the judgment of sentence. Opinion of Superior Court, November 14th, 2007. Mr. Elias filed for reargument, which was denied by the Superior Court on January 23rd, 2008. Next, a Petition for Allowance of Appeal was filed to the Pennsylvania Supreme Court on February 22nd, 2008 and denied on August 25th, 2008.

Elias filed, *pro se*, a timely application for Post-Conviction Collateral Relief on February 24, 2009. On January 11, 2010, attorney Caroline Roberto, Esq. filed an Amended Petition on Elias' behalf. A Commonwealth Answer timely followed on January 25, 2010. On January 4, 2011, the Honorable Jeffrey A. Manning, Administrative Judge of the Criminal Division of the Court of Common Pleas of Allegheny County, Pennsylvania issued a notice of intent to dismiss all but one of Elias' issues raised on PCRA while granting an evidentiary hearing to take testimony regarding the issue of whether Elias' trial counsel was ineffective where he offered unreasonable advice to Elias not to testify, thereby depriving him of his right to testify on his own behalf and the right to a planned and coherent trial strategy.

Within twenty (20) days, Elias filed a response to the Notice of Intent to Dismiss. On January 31, 2011, the evidentiary hearing was held. All three co-defendants were present and represented by counsel. On April 7, 2011, Elias filed a Memorandum in Support of Petition for Post Conviction Relief. On February 17, 2012, Judge Manning issued an Order dismissing Elias' Petition for Post Conviction Relief. The Superior Court upheld that ruling on appeal, adopting Judge Manning's decision as its own. Elias moved for Reargument, which was denied, and the Supreme Court of Pennsylvania denied review.

On June 19, 2014, at No. CC 2013-14480 on an unrelated case in the Court of Common Pleas of Allegheny County, Matthew Henkel was found guilty of attempted murder and aggravated assault involving a firearm. At sentencing, the prosecutor stated, "This demonstrates [Matthew's] violent and dangerous nature, that he so grossly and disproportionately responded to what was essentially a verbal argument in the street about a basketball hitting a car." Matthew Henkel was sentenced to a term of 10 to 20 years incarceration.

On October 2, 2014, Elias filed a timely habeas petition in the United States District Court for the Western District of Pennsylvania. He asserted the issue presently before the Court in that initial filing. November 9, 2017, the District Court denied Elias' habeas petition on the merits. Elias sought a Certificate of Appealability from the Third Circuit Court of Appeals. COA was granted concerning Elias' ineffective assistance of counsel claim. On May

30, 2019, the Third Circuit issued an opinion agreeing with the District Court's decision to deny Elias habeas relief. Elias filed a timely petition for Reargument that was denied two weeks later. This petition for Writ of Certiorari follows.

C. Post-Conviction Proceedings and a Summary of Evidence Presented at the PCRA Evidentiary Hearing

At the outset of trial, Mr. Duke George, Esquire, told the jury:

"[Elias] is basically going to testify and tell you that Matt Henkel's story bears no resemblance to actually what happened on the day in question. He never told Matt Henkel to bring back a 50 pound weight. In fact when they were leaving, what he told Matt was, I'm going to get some pot. So when you get the call, we are going to release Jones. And he comes back on the scene.

But prior to the time that he comes back on the scene, he is driving over to Mr. Henkel's house. He calls Jared and says, Jared, I'm in the area. Is everything done? Jared said, No. Brownlee is still here. Go back.

He goes back. When he arrives at Sycamore, Matt Henkel is there.

When they talk about the neighbor, the independent witness has nothing to do with the outcome of this case, that is probably one of the most important witnesses in this case because when she

comes and she looks and sees who is there, the only person she sees is Matt Henkel.

Why, you are going to ask yourself, why would Matt commit such an act? Well, you are going to have the reason why. Mr. Ceraso has alluded to that reason. He was a homosexual. And Jones, among other people, would belittle this boy. They would harass him. They would make this boy feel like a ninth class citizen. And on the day in question that Mr. Ceraso alluded to, he threatened to kill Mr. Jones.

Now, when my client goes back to the house and sees Matt's truck is there. He calls him. Matt says, You got to come in here. Something happened. He goes in, and that's when he discovered that Matt had taken the life of Mr. Jones.

Understand something. Mr. Jones was bound, he was tied. This was his opportunity to get the revenge that he wanted because he knew when he left, that my client wasn't there. My client told him, when he took Mr. Brownlee, his brother, and went back to the Henkel house, that he was leaving, that he was going to get some pot because his buddy, Mr. Latusek, told him that he wanted some pot and he wanted to do some.

These are not Boy Scouts. This is not the type of testimony, this is not the type of facts that I'm proud to tell you about with reference to my client.

But one thing, at the conclusion of this case, when you hear all the evidence, when he goes through all the chapters, through the testimony that he is going to present, that the cover on that book bears not

resemblance to what happened." Trial Transcript 84-86.

When the time came to fulfill this promise, Mr. George balked. He told his client that his testimony was unnecessary because Bruce Henkel, Sr. had given him everything needed to secure an acquittal. Elias rested.

Mr. George began his closing with the same narrative he presented in his opening: "Ladies and gentlemen, [Elias] wasn't there when Matthew Henkel was there. Matt knew when he went into that house that Mr. Jones was duct taped. He knew somebody was there. He figures now he is going to commit the perfect crime. He is going to put the bag over [Jones'] head... He puts the bag over his head, calls my client, or my client calls him..." The prosecutor objected: "Your Honor, I object. There has been no evidence of this whatsoever." George immediately withdrew his statement to the jury and the jury was instructed to ignore counsel's misstatements. T.T. 1205.

In continuation of his closing argument, Attorney George barely mentioned Bruce Henkel, Sr.'s testimony, which purportedly was so important to the defense case:

"And then the father comes in, the father comes into this courtroom, takes that witness stand and tells you that Matt Henkel told him that he was the one that was responsible for the death of Andrew Jones." T.T. 1207.

...

"God forbid, God forbid, based on the testimony that you have heard today, that any of these

three individuals, any of them should be found guilty of homicide when you heard the testimony of Matt Henkel, you heard the motive, heard from his brother, heard from his father.

All we ask you is that you use your common sense when you go over all these things and acquit these three individuals of any homicide whatsoever.

Thank you very much, ladies and gentlemen." T.T. 1209.

Nowhere did counsel articulate to the jury how Mr. Henkel's impeachment testimony damaged the integrity of Matthew's entire trial testimony. Nowhere did counsel argue how the impeachment evidence was relevant to show that Mr. Elias did not commit the killing. Contrary to his own advice, this change in plans significantly damaged Elias' chances of winning at trial.

It was due to defense counsel's ineffective representation that the prosecutor seized the opportunity in his closing: "Members of the jury, with no evidence whatsoever, which doesn't seem to stop anyone, with no evidence whatsoever, Mr. George has told you, defending his client, that his client left 220 Sycamore, and that makes, we submit to you, no sense at all. For him to leave 220 Sycamore, Andy Jones tied up as he was upstairs would defeat the purpose of Andy Jones going in the first place. What is the point? If you are going to leave 220 Sycamore, Andy Jones could squirm out of that. Who knows what could have happened. You either stay there and watch him or you cut him loose. We know, we know Elias didn't cut him loose.

It makes no sense whatsoever, there is no reason and there is no evidence to say that Elias ever left 220 Sycamore. All the evidence and all inferences from your common sense are totally to the contrary. Why watch over somebody that is tied up and then just leave them there? That makes no sense whatsoever.

Elias never left Sycamore before he killed Jones. As long as Elias has reason to keep him bound, he has no reason to leave and every reason to stay.

...

Members of the jury, the defense accused Matt Henkel of no evidence whatsoever and no logic either, we submit, of doing this crime when everything in this case points to Elias.." T.T. 1261-1262, 1267.

Elias filed a PCRA challenging Mr. George's stewardship in this regard.

At the PCRA hearing, Mr. George testified that it was his intention, from prior to trial and at the beginning of the trial, to have Elias testify on his own behalf. PCRA Hearing Transcripts 7. (Hereinafter, numerals preceded by the letters "PHT" refer to the PCRA Evidentiary Hearing Transcripts dated January 31, 2011.) He said that during the recess, after he had told the jury that Elias would testify but that he needed to go to the bathroom, that he engaged the Elias family in a discussion as to whether or not Elias should testify. PHT 19. They went over the testimony in detail and decided that "when Mr. Henkel, Sr. testified and basically told the jury that

[Matthew Henkel] was the one that committed the homicide, that that was pretty strong evidence." PHT 18, 19. Mr. George believed that Mr. Henkel, Sr.'s testimony was enough to exonerate Elias. PHT 30.

Mr. George met with his client and advised him that "it would be in his best interest for him not to testify." PHT 17-19. On cross-examination, Mr. George reiterated that he had prepared Elias to testify and that he wanted to testify. PHT 20-21.

Mr. George informed attorneys Tom Ceraso (for Jared Henkel) and Patrick Thomassey (for Jared Lischner) that Elias would not be taking the stand. PHT 52. The attorneys discussed the matter. Ceraso and Thomassey tried to convince Mr. George that he was making a mistake. PHT 61-62, 74, 107. Under cross-examination by the prosecutor, Mr. George agreed that it was the sole decision of Elias not to testify after Mr. George gave him advice not to testify. PHT 31.

At the hearing, Elias explained that he did not testify because Mr. George had advised him not to because Bruce Henkel, Sr.'s testimony was such that Elias would be acquitted of the homicide charge. PHT 34-35. When Mr. George made his promises the jury, Elias was still under the impression that he was going to testify. PHT 35. Elias stressed that he continued to believe that he would testify even after Henkel, Sr. testified. PHT 36. Elias did not know the difference between impeachment testimony and substantive testimony at the time he was advised by Mr. George, and explained that had he been properly advised by Mr. George as to the differences between

impeachment and substantive evidence, he would have testified. PHT 36, 37.

Attorney Thomassey testified that he has represented well over one hundred homicide defendants. PHT 47-48. Attorney Thomassey testified, "Mr. Elias had told me on a number of occasions that he was going to testify." PHT 50. He said that he was aware that Elias had been planning to testify before trial and was still planning to testify when the trial opened. PHT 50. Attorney Thomassey testified that, until the bathroom break at trial, he was under the impression that Elias was going to testify.

Attorney Thomassey testified that, prior to the break, he had told Attorney Ceraso not to put Bruce Henkel, Senior on the stand. PHT 62-63. Following Henkel, Sr.'s testimony, Mr. George informed attorneys Ceraso and Thomassey that his client would not be taking the stand. PHT 52.

D. State and Federal Court Rulings

The PCRA Court believed that Attorney George's broken promises were merely tangential to the "only question" it was called upon to answer, whether counsel was ineffective for advising Petitioner against testifying at trial. PCRA Court Opinion p. 3. Construing Petitioner's ineffective assistance claim only to be one involving counsel's advice, the PCRA Court said: "It is well settled that a defendant who makes a knowing, voluntary, and intelligent waiver of testimony, may not later claim

ineffective assistance of counsel caused him not to testify. *Commonwealth v. Fletcher*, 750 A2d 261, 275-75 (Pa. 2000). The defendant did not establish, at the hearing on his PCRA Petition, that counsel provided advice so unreasonable as to render his decision involuntary. Counsel's advice that the testimony of Bruce Henkel, Sr., which, if believed by the jury would have impeached the testimony of the only Commonwealth witness with direct knowledge that the defendant killed the victim, was not unreasonable, based on the evidence presented at the PCRA hearing." PCRA Court Opinion pp. 16, 17.

The PCRA Court's appraisal narrowed Petitioner's claim to a determination about the validity of Elias' waiver of his right to testify and disregarded Petitioner's argument that Counsel George's actions, as a whole, deviated from the planned trial strategy. Petitioner's right to a coherent defense under the due process clause of the 14th Amendment had been infringed upon. Petitioner's IAC claim was much broader than the PCRA Court ascertained and to the extent that the PCRA Court understood Petitioner's argument as one that only involved counsel's advice, the Court misconstrued the nature of the petitioner's claim.

On appeal, the Pennsylvania Superior Court agreed with and adopted the PCRA Court's opinion. It offered no new analysis and no new discussion of the issue. Petitioner's argument that the PCRA Court applied an incorrect test was discharged without comment. The Pennsylvania Supreme Court refused

to allow an appeal and Petitioner took the matter to the Federal District Court.

At the Federal level, the District Court decided (1) Petitioner's claim failed because the decisions of lower Federal Courts do not constitute clearly established Supreme Court law (District Court Opinion p. 33); and (2) Petitioner's claim failed under the "unreasonable application" clause because Circuit Court precedent can not be used to refine or sharpen general principles announced by the Supreme Court. In making its ruling, the District Court misapprehended Petitioner's rationale behind citing case law from the Circuit Courts. Petitioner was not asking the District Court to violate the AEDPA by breaking new ground, rather he was citing *Ouber* and its progeny to demonstrate that the proper application of *Strickland* to cases like the one at bar have resulted in the granting of habeas relief.

The Third Circuit Court of Appeals found that Petitioner's IAC arguments fell short given the deference afforded state court conclusions on AEPDA review of habeas petitions. The panel noted that no Federal Court has found it unreasonable for a state court to conclude that a change in circumstances warranted a change in trial strategy. Third Circuit Opinion p. 10 FN 8. This ruling, along with its predecessors, failed to address Petitioner's point that his attorney's promise-breaking should be examined using *Strickland's* totality of circumstances approach to answering the performance and prejudice questions.

The PCRA Court misapplied *Strickland* and each Court since has deferred to its judgment.

REASONS FOR GRANTING APPEAL

At the heart of this appeal lies a broken promise that the jurors would hear what happened from Petitioner himself. Thus, the error attributed to counsel consists of two events: Attorney Duke George's initial decision to present his client's testimony as the centerpiece of the defense and his decision to advise Elias against testifying. Taken alone, these decisions may fall within the range of acceptable professional judgment. Taken together, they are indefensible. Yet because of the narrow view the PCRA Court took when considering Petitioner's claim, Duke George's performance has not been subjected to the kind of rigorous scrutiny that cases in jurisdictions where *Strickland* is properly applied receive.

The Federal Judges reviewing this case concluded that overturning Petitioner's conviction was not possible under the AEDPA. The District Magistrate found, "[T]he Supreme Court has never specifically addressed the circumstances under which counsel's failure to fulfill a promise made in an opening statement to call a witness violates the *Strickland* standard, and federal courts that have addressed this issue have reached different results." (District Court Opinion p. 35). The Third Circuit disposed of Petitioner's claims, in part, because "No federal court has found it unreasonable for a state court to conclude that a change in circumstances warranted a change in trial strategy." (Third Circuit Court Opinion p. 10, FN 8). This Court should allow

this appeal to determine if *Strickland* applies to cases where an attorney fails to produce promised evidence in order that the split among circuits might be resolved.

Split Decisions

In 1984, *Strickland v. Washington*, 466 US 668 (1984) set forth the two-pronged performance and prejudice test governing criminal defendants' challenges to their attorneys' stewardship. Four years later, the First Circuit reversed a murder conviction where the defendant's attorney had promised to present medical experts during his opening and failed to follow through. *Anderson v. Butler*, 858 F2d 16 (1st Cir. 1998) was the first time a Federal Court held that in light of counsel's introductory remarks, his failure to present evidence was manifestly unreasonable and prejudiced his client as a matter of law. The *Anderson v. Butler* decision hinged on a detailed analysis of the promise made and the consequences of counsel's failure to comply with his own opening.

Two years later the Seventh Circuit took up a similar claim. In *Harris v. Reed*, 894 F2d 871 (7th Cir. 1990), the Court reversed a homicide conviction based on a defense attorney's decision to rest on the perceived weakness of the prosecution's case. Building on the *Anderson* Court's foundation, the *Harris* panel found that counsel's actions of preparing the jury for evidence in the opening and subsequently failing to supply the testimony were objectively unreasonable. The *Harris* Court's opinion was not as

detailed analytically as the *Anderson* Court's, but it did make clear that counsel's promise-breaking performance fell outside the range of professionally competent lawyering.

The Third Circuit weighed in on the issue in 1993. In *McAleese v. Mazurkiewicz*, 1 F3d 159 (3d Cir. 1993) the defendant challenged his attorney's stewardship because the lawyer had not lived up to promises made during the opening argument. The *McAleese* Court referred to both *Anderson* and *Harris* when stating that, "The rationale for holding such a failure to produce promised evidence ineffective is that when counsel primes the jury to hear a different version of the events from what he ultimately presents, one may infer that reasonable jurors would think the witnesses to which counsel referred in his opening statement were unwilling or unable to deliver the testimony he promised." The *McAleese* Court did not reverse its habeas petitioner's conviction, but it did make clear that the Third Circuit agreed with the First and the Seventh that the failure to fulfill a vow made in an opening statement to the jury could, under the right circumstances, constitute ineffective assistance of counsel.

In 1997 Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), restricting the power of Federal Courts to grant writs of habeas corpus to state prisoners unless the adjudication of the claim in state court 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. 28 USC § 2254(d)(1). Given the uncertainty surrounding the new legislation, Courts were reluctant to grant habeas relief on issues that had not been explicitly fleshed out by the High Court.

Through its opinion in *Williams v. Taylor*, 529 US 362 (2000) the Supreme Court guided jurists towards a new understanding of how to apply the "contrary to" and "unreasonable application of" clauses of § 2254(d)(1) within the context of an ineffective assistance of counsel claim. Not long after *Williams* was issued, the First Circuit evaluated a "broken promise" ineffectiveness claim under the new parameters. The panel in *Phoenix v. Matesanz*, 233 F3d 77 (1st Cir. 2000) concluded that habeas corpus relief was rightly denied because the petitioner could not establish that prejudice was incurred from defense counsel's strategic decision not to call defense experts.

The *Phoenix* decision represented the first post-AEDPA case in which *Strickland* was applied to a "broken promise" IAC claim. The First Circuit highlighted two factors in rendering its decision: the specificity of the promise made and the temporal gap between the promise and juror deliberations. "...[C]ases that premise a habeas writ on an unfulfilled promise during an opening argument generally require greater specificity in the promise and greater contemporaneousness between the promise and jury deliberations. ...The promise here was neither 'dramatic' nor was the indicated testimony 'strikingly significant.'" According to *Phoenix*, habeas relief was

impossible absent a direct pledge by counsel to produce significant and vital evidence.

The second major post-AEDPA "broken promise" case was *Ouber v. Guarino*, 293 F3d 19 (1st Cir. 2002). There, counsel promised four times in his opening statement that the defendant would testify, and he underscored the importance of the anticipated testimony by stating that it was the centerpiece of the trial. On the evening of the first day of trial, counsel persuaded the defendant not to testify. In concluding that counsel's broken promise was prejudicial, the court reasoned that "counsel's belated decision not to present the petitioner's testimony sabotaged the bulk of his efforts prior to that time (and, in the process, undermined his own standing with the jury, thereby further diminishing the petitioner's chances of success)."

The *Ouber* Court addressed the two promise-related prongs laid out in *Phoenix* and additionally asked whether unforeseen events had mandated a shift in the trial strategy and if, by withholding the promised testimony, the defendant had gained any advantage. Together, the *Ouber* and *Phonix* decisions formed a four-factor appraisal process that would channel future Federal inquiries. Unfortunately, some Courts strayed from the path.

In April of 2003, a pair of Federal Appellate Courts took up the issue of "broken promise" ineffective assistance of counsel claims. That August, the Eighth Circuit in *Williams v. Bowersox*, 340 F3d 667 (8th Cir. 2003) ruled that the AEDPA precluded them from granting habeas relief because no Eighth Circuit

or Supreme Court precedent existed that said they could. Two months later, the Seventh Circuit reached the opposite conclusion, finding that the Illinois Courts had unreasonably applied *Strickland* for denying relief to an appellant whose attorney had promised the jury he would testify. *US ex rel. Hampton v. Leibach*, 347 F3d 219 (7th Cir. 2003). There has been a recognized split in the Circuit Courts ever since. See *Batuoh v. Smith*, 855 F3d 868 (8th Cir. 2017) and *Musladin v. Lamarque*, 227 F3d 647 (9th Cir. 2005).

The Roots of Conflict

Phoenix and *Ouber* combined to describe a four-part diagnostic for "broken promise" ineffectiveness claims. (1) Did counsel make an express pledge to produce certain evidence? (2) Was it a promise that the jury would remember? (3) Was there an unforeseeable event that occurred during trial that prevented counsel from fulfilling his vow? (4) Did the failure to present the promised evidence work out to the defendant's advantage? All reviewing courts agree that making and then breaking a promise to jurors is not a sound trial strategy. Where the Circuits have split concerns the issue of when a Federal Court can hold a state defendant's attorney accountable for these actions.

For instance, the Sixth Circuit has evolved from a jurisdiction which initially refused to rule on whether the failure to fulfill promises made during opening statements is a "clearly established" basis for

an IAC claim (*Harrison v. Motley*, 478 F3d 750, 758 n. 4 (6th Cir. 2007) into one that has since decided that it is objectively unreasonable for a lawyer to make and then break a promise to the jury without having previously interviewed his prospective witness. *English v. Romanowski*, 602 F3d 714, 728 (6th Cir. 2010). The Sixth Circuit has become quite efficient at applying *Strickland* and aptly censuring lawyers for failing to follow through on promises made in their openings. See *Caldwell v. Lewis*, 414 Fed. Appx. 809 (6th Cir. 2011) and *Plummer v. Jackson*, 491 Fed. Appx. 671 (6th Cir. 2012).

The Ninth Circuit stands in line with the Sixth. In *Musladin v. Lamarque*, 227 F3d 647 (9th Cir. 2005), the panel acknowledged the circuit split but rejected the *Williams v. Bowersox* logic that the "diversity of opinion" among the federal courts on the issue suggested that the state court did not unreasonably apply *Strickland.* Courts in the 9th Circuit regularly granted relief on "broken promise" claims from 2005 to 2013. In *Saesee v. McDonald*, 725 F3d 1045 (9th Cir. 2013) the Circuit wrote specifically to concur with District Judge Alex Kozinski's approach of evaluating "broken promise" claims in accordance with the way the Court in *Ouber* applied *Strickland.* In the years since *Saesee*, habeas petitioners have not prevailed in the Ninth Circuit on this kind of claim. The Court has construed what constitutes a promise to the jury very narrowly and has been forgiving of defense attorneys when determining the effect their broken vows had on cases. See *Pray v. Farwell*, 620 Fed. Appx. 561 (9th Cir. 2015) and *Mann v. Ryan*, 828 F3d 1143

(9th Cir. 2016). Still, the Court has remained consistent in its holding that *Strickland* contains the clearly established principles that must shape every inquiry.

The primary reason that there is so little inter- and intra-Circuit cohesion regarding this issue is that the appellate courts making these evaluations are coming down differently on the subject of whether the application of *Strickland* to broken-promise IAC claims has been clearly established or not. The Courts that believe *Strickland* is clearly established focus the bulk of their analysis on the specificity of the promise made by the attorney, the temporal gap between the promise and juror deliberations, and whether unforeseeable events necessitated a tactical switch. Additionally, these jurists examine the attorney's performance using a bottom line-oriented approach to determine whether there was a net gain or loss to the client's chances caused by the attorney's strategy shift.

Other jurisdictions have decided that *Strickland* offers no help when reviewing state court determinations about counsel's ineffectiveness where broken promises are concerned. Their theory is that until this Court announces a more explicitly defined test, there is no evaluation that a reviewing state court can make that would run afoul of clearly established Federal law under the AEDPA. The *Williams v. Bowersox* opinion has convinced some Circuits, including the Third, that *Strickland* is too skeletal to be used to overturn state court pronouncements.

It is because of *Williams v. Bowersox* that the Federal Courts in this case decided that the PCRA Court's evaluation process was acceptable despite the fact that the PCRA Court funneled its entire ineffective assistance of counsel inquiry into a singular question about waiver. The PCRA Court's appraisal of the issue was flawed because (1) it construed Petitioner's ineffectiveness claim too narrowly; (2) it failed to properly weigh the context in which the advice was given; (3) it failed to identify any potential benefit that Elias could have derived from Duke George's mid-trial strategy shift; and (4) it failed to take into account the credible testimony of defense attorney Pat Thomassey when making its evaluation.

A proper totality of the circumstances assessment under *Strickland* would have addressed questions that the PCRA Court avoided answering:

How did Mr. George's opening statement affect the jury?

What were the risks and rewards associated with putting his client on the stand?

Was counsel compelled to change his trial strategy? Did counsel believe that he would be able to argue Bruce Henkel, Sr.'s testimony as substantive evidence?

Did counsel overestimate the value of Bruce Henkel, Sr.'s evidence?

What did the other expert legal professionals trying this case say about Attorney George's course of conduct?

Did it deviate from acceptable norms?

The PCRA Court's resolution failed to extend *Strickland* to a situation in which it was warranted.

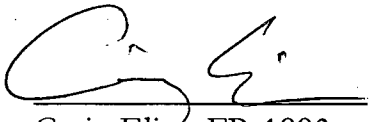
The positions adopted by the Circuits on this "broken promise" issue are conflicting. On one side,

the *Ouber* adopters believe that the *Strickland* standard – correctly applied – carries the day. On the other, the *Williams v. Bowersox* group believe that unless and until the High Court precisely details when a broken promise from an attorney rises to the level of 6th Amendment violation, relief for habeas petitioners is impossible under the AEDPA. Either some Courts are granting habeas relief frivolously and overturning convictions that should stand or the other side is precluding habeas relief to petitioners who have not received the effective assistance of counsel. Either way, inconsistent results and incongruent opinions are infecting what should be a more systematic, uniform appellate evaluation process.

Conclusion

The case at bar offers the factual scenario necessary to produce a comprehensive opinion governing this topic. Therefore, this Court should grant this petition for a Writ of Certiorari to settle the debate about whether *Strickland* should be considered clearly established for purposes of evaluating "broken promise" IAC claims on federal habeas review.

Respectfully submitted,



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