

19-6351

No.: \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

**ORIGINAL**

GEOFFREY ELKINGTON,  
*Petitioner,*

v..

Supreme Court, U.S.  
FILED  
**OCT 07 2019**  
OFFICE OF THE CLERK

MICHAEL CLARK; SUPERINTENDENT SCI-ALBION, et al.  
*Respondent,*

ON PETITION FOR WRIT OF CERTIORARI TO  
THE THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by:  
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*Petitioner pro se*

QUESTIONS PRESENTED

1. Did the Third Circuit err in deferring to the State Court finding that Petitioner was not prejudiced by Petitioner's trial attorney failing to enter into court exculpatory evidence in the form of a photograph of Petitioner's feet that would have proven that Petitioner could not possibly be the person on the photograph with alleged victim?
2. Did the Third Circuit err in deferring to the State Court finding that Petitioner was not prejudiced by Petitioner's trial attorney failing to enter into court exculpatory evidence in the form of Petitioner's time-sheets that would have proven that Petitioner could not possibly have been at his co-defendant's home on the date she specified?
3. Did the Third Circuit err in deferring to the State Court finding that Petitioner was not prejudiced by Petitioner's trial attorney failing to enter into court exculpatory evidence in the form of medical reports of alleged victim that would have proven that purported abuse of alleged victim could not have taken place?
4. Did the Third Circuit err in deferring to the State Court finding that Petitioner was not prejudiced by Petitioner's trial attorney failure to comply with even the most basic professional duties of loyalty to Petitioner or conduct the most rudimentary of pre-trial investigations?

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**PETITION FOR WRIT OF CERTIORARI TO**  
**THE THIRD CIRCUIT COURT OF APPEALS**

Petitioner, Geoffrey Elkington, respectfully prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the Third Circuit Court of Appeals, rendered in the proceedings of May 22, 2019.

**OPINION BELOW**

The Third Circuit Court of Appeals affirmed Petitioner's conviction in its Case No. 18-3591 without an opinion. A copy of the Order of the Third Circuit Court of Appeals is included in the Appendix to this Petition. A copy of the Order of the Third Circuit Court of Appeals denying rehearing is included in the Appendix to this Petition.

The Report and Recommendation on Petitioner's Habeas Corpus is published at Geoffrey Elkington v. Michael Clark et. al., 2018 U.S. Dist. LEXIS 184308 (E.D. Pa. Oct. 26, 2018). The Memorandum by Judge Gerald J. Pappert is also published at Geoffrey Elkington v. Michael Clark et. al., 2018 U.S. Dist. LEXIS 184308 (Civil Action No. 16-2949).

**JURISDICTION**

The original Order of the Third Circuit Court of Appeals was entered May 22, 2019. A timely motion to that court for Rehearing was overruled on July 11, 2019. The jurisdiction of this court is invoked under 28 U.S.C. §1254.

## **STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED**

The following statutory and constitutional provisions are involved in this case.

### **SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION**

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 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.

### **FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

### **28 U.S.C. §2254**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to

the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State shall not be granted unless it appears that:-

- (A) the applicant has exhausted the remedies available in the courts of the State; or
- (B)(i) there is an absence of available State corrective process; or
  - (ii) circumstance exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted his remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

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

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that:-

(A) the claim relied on:-

- (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offence.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce the part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reasons is unable to produce such part of the report, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is, or becomes, financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to

statutory authority. Appointment of counsel under this section shall be governed by section 3006A of Title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

## STATEMENT OF THE CASE

Petitioner was convicted of "IDSI with child", "Criminal attempt – rape of child", "Aggravated indecent assault – complainant less than 13 years old", "Indecent assault, person less than 13 years old", "Corruption of minors", and "Sexual abuse of children – possession of child pornography".

The convictions were based on the statements of the alleged victim's mother who, in an attempt to shift blame for her own sexual abuse of her daughter, fabricated stories implicating petitioner.

Petitioner was found guilty after a trial by jury during which, amongst other things, Petitioner's trial attorney failed to introduce available exculpatory evidence, failed to cross-examine witnesses in any meaningful way, failed to call available character witnesses and threatened petitioner not to take the stand.

There were numerous examples of ineffectiveness on the part of Petitioner's trial attorney and questionable behavior by the investigating detective, Roy Calarese. In this light Petitioner puts forward the following arguments:

- 1) Did the Third Circuit err in deferring to the State Court finding that Petitioner was not prejudiced by Petitioner's trial attorney failing to enter into court exculpatory evidence in the form of a photograph of Petitioner's feet that would have proven that Petitioner could not possibly be the person in a photograph with alleged victim?

The Third Circuit overlooked, or underestimated, the importance of the deliberate misidentification of Petitioner that could easily have been proven to be false had Petitioner's court appointed trial attorney, Ms. Elizabeth Plasser Kelly, Esquire, introduced into evidence a photograph of Petitioner's feet as Petitioner had repeatedly requested.

Petitioner was convicted, in large part, by his co-defendant and ex-wife falsely identifying him as the man in a photograph of a naked man with the alleged victim.

The undisputed facts of the photograph are as follows:

- a) The photograph was entered into evidence by the prosecution.
- b) The man in the photograph is naked and can only be seen from the waist down. Emily Alexanis, the alleged victim is sitting on the man's stomach. The man in the photograph has a very distinctive deformation of his second toe, which is clearly visible.
- c) The photograph was taken on November 27, 2006, using a Kodak CX 6330 digital camera. This information was attested to by Commonwealth expert Detective Roy Calarese who had obtained it from meta-data embedded in the photograph.

Because of the clear deformation of the man in the photograph's second toe, the prosecution sought, and was granted, a Court Order to photograph Petitioner's feet in order to demonstrate that the man in the photograph was Petitioner.

After being granted the order, but before any photographs were taken, Detective Calarese conducted an interview with Petitioner's ex-wife, Carolee Gifford. During this interview, Ms. Gifford informed Detective Calarese that Petitioner did not have any deformation of his toes. Since taking the court ordered photograph of Petitioner's feet would prove that the man in the photograph could not possibly be Petitioner, and thus destroy the Commonwealth's case against Petitioner, the prosecution wilfully, and in bad faith defied the Court Order and did not obtain said photograph.

When Petitioner discovered that the prosecution were not going to comply with the Court Order and photograph his feet, he requested that Ms. Kelly arrange for one to be taken so that it could be entered into court as exculpatory evidence. Ms. Kelly refused to act upon Petitioner's request but would give no reason for failing to do so.

Ms. Kelly's noncompliance with Petitioner's expressed wishes that she have photographs of his feet taken and entered into court as exculpatory evidence clearly fulfils the reasonable application of Strickland v. Washington, 466 U.S. 668 (1984).

Ms. Kelly stated during Petitioner's PCRA Evidentiary Hearing that she had advised Petitioner against having a photograph of his feet taken saying that she "didn't think it would move the ball forward", but offered no reason for that conclusion. Petitioner

avers that Ms. Kelly at no time gave such advice to Petitioner, but merely ignored all of his requests.

In his Opinion denying Petitioner's PCRA, Judge Gavin stated "... it appears that counsel was ineffective for not looking at [Petitioner's] feet, especially in the Commonwealth's intent on the same. There simply was no reason, good or otherwise, for not having done so." Despite having made such a comment Judge Gavin still denied Petitioner's PCRA stating that "Petitioner's claim lacked merit because Petitioner never offered his feet for inspection." Petitioner had made it clear to his court appointed PCRA attorney, Mr. Robert Brendza, Esquire, before the hearing that he would be more than happy to demonstrate that his toes were not deformed but was told by Mr. Brendza that it was not the purpose of the Evidentiary hearing to actually determine if Petitioner's toe was deformed or not, but only if Ms. Kelly was ineffective in not having a photograph of Petitioner's feet taken and introduced into evidence. Judge Gavin did not ask to see Petitioner's feet during the Evidentiary Hearing so Petitioner assumed that Mr. Brendza was correct in his assertion.

Neither Ms. Kelly nor Mr. Brendza ever asked to see Petitioner's feet, presumably because they believed that Petitioner did indeed not have a deformed toe. Even in response to Petitioner's appeal of his PCRA denial to the Superior Court of Pennsylvania, the Court acknowledged that all pertinent evidence supported the fact that Petitioner's second toe is not deformed.

The photograph of the unknown man was entered into evidence by the prosecution and Petitioner's co-defendant, Geraldine Alexanis, and Petitioner's ex-wife, Carolee

Gifford stated that they could identify the man in the photograph as Petitioner. Alexanis stated that she could identify Petitioner by his "roll of fat" while Gifford claimed she could identify his genitals. Notable, neither mentioned the very distinctive deformation of the man's toe despite it being clearly visible. Ms. Kelly failed to raise the issue of the man's deformed toe or question either Commonwealth witness about it.

In various interviews that Detective Calarese had conducted with Alexanis she had described Petitioner as being about 5 feet 7 inches tall and weighing between 200 and 220 pounds with "a bit of a stomach". She also stated that Petitioner wore a gold wedding band, was circumcised, and shaved his pubic area. Although Alexanis' description quite accurately describes the man in the photograph it does not describe Petitioner who is approximately 6 feet tall and in November of 2006 (the time that the photograph of the unknown man was taken) was morbidly obese at approximately 335 pound and had what could best be described as a "mound of blubber" rather than a bit of a stomach (Petitioner was over 100 pounds lighter by the time of his trial). Petitioner also wore a silver wedding band (not a gold one), which was attested to by Gifford in an interview with Detective Calarese, is not circumcised, and was never in the practice of shaving his pubic area. A fact that could have been verified by Gifford had she been asked by Detective Calarese during her interview without being pre-warned that Alexanis had already stated that he did. None of these exculpatory facts were addressed by Ms. Kelly.

Alexanis had every reason to falsely identify the man in the photograph as Petitioner. Alexanis had already made a deal with the Commonwealth and pled guilty to

charges stemming from her own alleged misconduct with her two daughters. As part of the plea deal, sixty three serious charges against her were dropped and she received a very much reduced sentence. This deal, however, was totally reliant on Alexanis testifying against Petitioner. The Commonwealth had threatened Alexanis that if she failed to testify against Petitioner that the deal would be withdrawn and that she would be resentenced to a much longer term of imprisonment.

Although Gifford had nothing material to gain from falsely identifying Petitioner as the man in the Photograph, she does have a history of taking vindictive action against her ex-husbands and at the time of Petitioner's arrest Gifford was in the middle of an "ugly" divorcee from Petitioner. In 1989 Gifford accused her first husband, Mark Shively, of sexually abusing their two young sons in a malicious attempt to deprive him of his visitation rights. When the accusations were proven to be totally false, Gifford absconded with her two sons from their home in Fountain Hill, Pennsylvania in July of 1989. After travelling to Ireland, New York and California the police finally caught up with them in November of 1990. Gifford was arrested for interfering with the custody of the children (a felony) in November of 1990.

The Commonwealth's computer forensic expert, Detective Roy Calarese, analyzed the photograph of the naked man with the alleged victim and concluded from the embedded meta-data that the photograph was taken on November 27, 2006 using a Kodak CX6330 digital camera. Using the Commonwealth's own investigative documents the date when the photograph was taken is several months before Petitioner first met the alleged victim and well over a year before Petitioner owned such a camera, as

unequivocally confirmed to in an interview with Gifford conducted by Detective Calarese on February 7, 209:

RC: Just one more time to clarify if I'm wrong. This is a Kodak camera?

CG: Yes

RC: A Kodak 63..

CG: CX63.. or something like that

RC: And you got this when?

CG: It was during ... It was before one of our trips to England... um...

RC: 2005, 2006?

CG: No, No, it was later. It was...

RC: Later 2006?

CG: No, No, No. I think it was 2008. I'm trying to think when we went to the Isle of Wight last. It might have been 2007. I apologize.... I...

RC: Could it have been 2006:

CG: No.

The dating of Petitioner's first meeting with Emily Alexanis, the alleged victim, is mentioned in several Commonwealth produced documents: In the "Chester County Detectives Supplemental report, interview with Geraldine Alexanis" dated December 15, 2008, Alexanis states "After January [2007] Geoff wanted to meet the girls" and the "Affidavit of Probable Cause" date January 10, 2009, as well as confirming Alexanis' statement adds, "mid 2007 'Geoff' began to have sexual contact with the children" (a statement Petitioner categorically denies). These dates are never contested; even after

Petitioner's trial the "Sexual Offenders Assessment Board evaluation" dated June 29, 2010 states "During the early part of 2007, she [Geraldine Alexanis] introduced Mr. Elkington to her daughters.

This information, the dating of the photograph as it relates to pre-dating Petitioner's first meeting with the alleged victim, and the fact that Petitioner did not own such a camera at that time, were not brought to the attention of the jury by Ms. Kelly.

In summary, this means that the photograph of Emily Alexanis with a naked man taken on November 27, 2006, shows a man with a deformed toe, a physical trait that Petitioner does not have, and that the photograph was taken several months before Petitioner first met the alleged victim with a type of camera that Petitioner did not possess until a year later.

Ms. Kelly was made fully aware of these incongruities on numerous occasions before the beginning of Petitioner's trial yet failed to raise these issues at any juncture. This photograph was the major item of evidence and if it had been demonstrated to the jury that the man in the photograph was someone other than Petitioner, then the outcome of the trial would almost certainly have been different.

In dismissing Petitioner's habeas corpus, the District Court stated that the man in the photograph had been identified by "other photographic and forensic evidence." This is simply not true. This was the only photograph of the alleged perpetrator entered into evidence since, as far as Petitioner is aware, it was the only one that existed. So there is no other photographic evidence available and no forensic evidence such as DNA or

fingerprints exists. This makes the statement that the man in the photograph had been identified by "other photographic and forensic evidence" completely inconsistent with all of the available facts.

It is worth noting that in the Report and Recommendation on Petitioner's Habeas Corpus, it was stated that "the photograph itself is not part of the State Court record provided to this court." as it should have been. One has to question why such a central and important item of evidence was excluded from the State Court's record.

2) Did the Third Circuit err in deferring to the State Court finding that Petitioner was not prejudiced by Petitioner's trial attorney failing to enter into court exculpatory evident in the form of Petitioner's time-sheets that would have proven that petitioner could not possibly have been at his co-defendant's home on the date she specified.

The Third Circuit overlooked, or underestimated, the importance of the fact that Petitioner could not possibly have been at his co-defendant's home on the date she stated, and that this could easily have been proven had his court appointed trial attorney, Ms. Elizabeth Plasser Kelly, Esquire, introduced into evidence copies of Petitioner's time-sheets that were in her possession at the time of Petitioner's trial. Even though she blatantly lied to Petitioner about having them.

Petitioner's co-defendant, Geraldine Alexanis, repeatedly claimed that Petitioner had gone to her home on the morning of either Wednesday 9<sup>th</sup> January, 2008 or Thursday 10<sup>th</sup> January, 2008 and became violent with her. Alexanis was adamant about these gates being accurate since she based these dates on a specific e-mail dated Sunday 6<sup>th</sup> January, 2008.

Petitioner's employment time-sheets would have proven that he could not possibly have been at Alexanis' home on the dates she claimed since he was at work at Sanofi-Pasteur in Swiftwater, Pennsylvania, some two and a hour drive away. In fact, the last time Petitioner saw Alexanis was in either May or June of 2007, so six months earlier.

Petitioner repeatedly asked Ms. Kelly to obtain copies of his employment time-sheets for the period of January 2008 to substantiate his assertion that he was at work at these times. Sanofi-Pasteur is a high-technology biopharmaceutical company and because of the sensitive nature of their business security at the facility is very high with entry and exit to and from the campus, and even specific buildings, being controlled, monitored, and recorded via personal security passes. These recordings could easily have been used to verify the accuracy of Petitioner's time-sheets.

Proving beyond doubt that the alleged meeting between Petitioner and Alexanis could not possibly have taken place as Alexanis swore under oath that it did was important on two fronts. Firstly, it proves that Alexanis is a self-serving liar who has no scruples when it comes to self-preservation no matter who else she harms, and secondly it would have countered the jury's impression, given by Alexanis, that Petitioner was prone to fits of rage and violence.

On the morning that Petitioner's trial started, Ms. Kelly informed Petitioner that she had "not bothered" to obtain his employment time-sheets claiming that she had contacted Petitioner's employer's secretary, Ms. Colflesh, and had been told that time-sheets were often generic and just gave an average of time worked over a specific period. This was not true; Petitioner's time-sheets were not generic but very specific, as were the time-sheets of all employees working at client facilities. Petitioner's employer charged well in excess of \$100 per hour for his services as a validation consultant and clients would not agree to be billed on "generic time-sheets". In fact, because of the structure of the contract,

Petitioner had to file three time-sheets that had to agree with each other. One of these had to be detailed as to exact times and what activity Petitioner was working on.

In September of 2013, Petitioner gained temporary access to his "legal file" while preparing his pro se PCRA (which was later altered by his court appointed PCRA attorney, Mr. Robert Brendza, Esquire, against Petitioner's expressed wishes) and discovered that Ms. Kelly had in fact obtained all of Petitioner's employment time-sheets well before Petitioner's trial and that Ms. Kelly had also subpoenaed Ms. Colflesh to appear at trial on April 13, 2010 to testify that the time-sheets were genuine and accurate. However Ms. Kelly did not introduce the time-sheets as evidence or call Ms. Colflesh as a witness.

The time-sheets would have definitively proven that Petitioner could not possibly have been at Alexanis' home on the date's and that Alexanis was a pathological liar prone to making up stories to "save her own neck". Alexanis had previously been offered a very lenient plea deal in exchange for providing incriminating evidence against Petitioner. If Alexanis had claimed to have been mistaken as to the exact dates and that it was closer to two weeks after the e-mail of January 6<sup>th</sup>, 2008, Petitioner's time-sheets would still have proven that Petitioner could not possibly have been at Alexanis' home since they clearly show that Petitioner worked every day from January 7<sup>th</sup>, 2008 until the end of the month with the exception of Sundays, and Alexanis could not claim that Petitioner visited her on a Sunday since she stated in her interview with Detective Calarese that "Emily was at school" at the time of the alleged visit. Since Ms. Kelly had all of Petitioner's time-sheets dating back to mid-2007 they could have also been used to demonstrate that Petitioner could not have visited Alexanis' home since May or June of 2007.

The Report and Recommendation on Petitioner's pro se Petition for Writ of Habeas Corpus attempts to minimize the importance of Alexanis' perjured statements and Ms. Kelly's ineffectiveness (and lies) by stating that the fact that Petitioner did "not necessarily visit Alexanis in person" was of "no real significance". By making such a statement the District Court is implying that lying under oath is perfectly acceptable so long as it leads to a conviction, and that the Sixth Amendment to the Constitution of the United States of America which states that the defendant in a criminal case has the right to assistance of counsel, and that counsel should be effective, is optional.

Not only was Ms. Kelly clearly ineffective in not entering the time-sheets into evidence, but this also demonstrates that Ms. Kelly was prepared to lie to her client for some unknown reason. This clearly fulfils the reasonable application of Strickland v. Washington, 466 U.S. 668 (1984).

3) Did the Third Circuit err in deferring to the State Court finding that Petitioner was not prejudiced by Petitioner's trial attorney failing to enter into court exculpatory evidence in the form of medical reports of alleged victim that would have proven that purported abuse of alleged victim could not possibly have taken place?

The Third Circuit overlooked, or underestimated, the importance of the fact that medical reports were available at the time of Petitioner's trial that would have proven that the purported abuse of alleged victim, Emily Alexanis, could not have occurred. Said medical reports specifically concluded that "there were no specific physical diagnostic for sexual abuse seen [today]" and were in the possession of Petitioner's trial attorney, Ms. Elizabeth Plasser Kelly, Esquire, but she failed to introduce them as exculpatory evidence.

The Commonwealth claimed that Petitioner repeatedly sexually assaulted the alleged victim in a very violent manner. According to the Commonwealth, these alleged assaults included Petitioner "placing his penis against [Emily Alexanis'] vagina, and forcing penetration until [Emily Alexanis] would scream, this occurred on approximately 10 occasions" {Police criminal complaint, Affidavit of probable cause dated January 12, 2009, p8} and Petitioner "using a 'dildo' on Emily ... prior to penetrating Emily with his penis." {Chester County detectives supplemental report dated May 5, 2009}.

These allegations were repeated during testimony by Petitioner's co-defendant, Geraldine Alexanis, at Petitioner's trial:

Q: "You testified that [Petitioner] put his penis in your daughter's vagina?"

A: "Yes"

Q: "And you said that he did that five... we heard five to ten times... you said today that he was moving his penis in and out of her vagina?"

A: "Yes"

{T.T. 4/13/2010 p.135}

Such brutal and repetitive assaults, had they actually occurred, would have left permanent damage to a girl who was only six years old at the time of the alleged assaults

Nemours Children's Clinic performed a medical examination of Emily Alexanis in January of 2009 and generated a report that states: "[Emily's] labia majora, labia minora, clitoris, mons pubis, and posterior commissure had no lesions, sores, lacerations, abrasions, or scars present... The margin of the hymen was uniform without any distinctive scars, lesions, clefts, or projections." The report concludes with "there were no specific physical diagnostic for sexual abuse seen today"

The medical report does state that "oral genital contact or fondling or superficial contact of the genital or anal areas or penetration by a finger or penis between the labia but not through the hymen itself are particularly unlikely to produce any specific signs of abuse." But this was not the type of violent abuse that was alleged and it is clear, even to a layperson, that the sort of abuse alleged would not leave "the margin of the hymen uniform."

Ms. Kelly was in possession of these medical reports well before Petitioner's trial and would have been fully aware of their contents had she bothered to read them.

However, she failed to enter them into evidence even though they clearly contradicted the Commonwealth's case against Petitioner.

The Report and Recommendation on Petitioner's habeas corpus states that: "In light of the significant photographic and forensic evidence, the medical records would not have changed the outcome of the trial and the jury was aware that there was no medical evidence of harm to the victims." This statement is totally false in every aspect. Firstly, there is no "significant photographic and forensic evidence". As previously established, the man in the only photograph of Emily Alexanis with her alleged abuser cannot possibly be Petitioner, and in any case shows no genital contact, and a photograph of Emily Alexanis holding a "sex toy" against herself was taken by her mother and shows no penetration. Even though the expression "forensic evidence" is bandied about, it is totally without foundation since no forensic evidence exists whatsoever.

Contrary to the statement made in the Report and Recommendation, the jury was not aware that there was no medical evidence of harm to the alleged victim. Since no mention was made at trial of any medical reports it is natural to assume that the jury would have believed that medical examinations were performed on the alleged victim as a matter of course and that the results of such an examination supported the Commonwealth's assertion. It is also natural to presuppose that the Jury would have expected any reports to the contrary to have been entered into evidence by the defense and forcefully brought to their attention.

Had the jury been presented with overwhelming and convincing evidence that the alleged assaults could not possibly have taken place then they would most likely have returned a different verdict.

Ms. Kelly was obviously ineffective in not entering the medial reports into evidence and clearly fulfils the reasonable application of Strickland.

4) Did the Third Circuit err in deferring to the State Court finding that Petitioner was not prejudice by Petitioner's trial counsel's failure to comply with even the most basic professional duties of loyalty to Petitioner and rudimentary pre-trial investigations.

The Third Circuit overlooked, or underestimated, the importance of the total ineffectiveness of Petitioner's trial attorney, Ms. Elizabeth Plasser Kelly, Esquire, during both the pre-trial period and the trial itself. Ms. Kelly's performance was so deficient, not only in those areas highlighted as specific grounds in the appeals process but also in general, that it left Petitioner severely prejudiced and such prejudice can only be properly evaluated by assessing the cumulative effect of those deficiencies.

Although claims of ineffective assistance of counsel must normally be considered individually, it is fair to consider the cumulative effect where trial counsel's failings demonstrate an unacceptable lack of preparation for trial and a failure to comply with even the most basic professional duties of loyalty that trial counsel owes to the defendant.

While the Commonwealth Court of Pennsylvania has repeatedly held that "no number of failed [ineffective] claims may collectively warrant relief if they fail to do so individually." Commonwealth v. Washington, 592 Pa. 698, 972 A.2d 586, 617 (Pa. 2007) (citing Commonwealth v. (James T.) Williams, 586 Pa. 553, 896 A.2d 523, 548 (Pa. 2006); Commonwealth v. Rollins, 558 Pa. 532, 738 A.2d 435, 452 (Pa. 1999); Commonwealth v. (Craig) Williams, 532 Pa. 265, 615 A.2d 716, 772 (Pa. 1992)) the Court has also stated:

"Claims may fairly be considered together, given appellant's overarching argument that Trial Counsel's multiple failings demonstrate his

unacceptable lack of preparedness for trial. Furthermore, we must recognize that if multiple instances of deficient performance are found, the assessment of prejudice properly may be premised upon cumulation.” Commonwealth v. Perry, 537 Pa. 385, 644 A.2d, 705, 709 (Pa. 1995) (finding that multiple instances of ineffectiveness “in combination” prejudices defendant.)

In Commonwealth v. Johnson, 600 Pa. 329, 966 A.2d 523, 532 (Pa. 2009) (citing Commonwealth v. Perry, 537 Pa. 385, 644 A.2d 705, 709 (Pa. 1994)) the Court stated “Cumulative effect of Trial Counsel’s deficient performance so undermined the fairness of the trial and sentencing proceedings...”

Petitioner asserts that the quantity and gravity of individual instances of ineffectiveness by Ms. Kelly must be examined in a comprehensive manner to establish the cumulative impact of prejudice at Petitioner’s trial.

Under widely accepted professional standards, effective representation entails various duties, including the following:

- A. “The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his or her client and free from any compromising influences of loyalties.” (*Standards for Criminal Justice, Note 18, supra, Commentary to Standard 403.5 at 162*).
- B. “A defense lawyer should interview his client early on in their relationship, keep his client well informed of important developments in the case, and consult with his client on important decisions.” (*Standards for Criminal Justice, Note 18, supra. Commentary to Standard 4-325, 4-3.8 and 4-5.2*).

C. Counsel has a duty to "conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of a conviction." (*Standards for Criminal Justice*, Note 18, *supra*, *Commentary to Standard 4.4-1*), after which he must bring to bear "the legal knowledge, skill, thoroughness and preparation necessary for the representation." (*American Bar Association, Model Rules of professional Conduct, Rule 1.1 (2004)*).

Petitioner asserts that Ms. Kelly was also ineffective for failing to adequately review any of the discovery material available. In Commonwealth v. Grant, 572 Pa. 813, A.2d 726, 738 (Pa. 2002) (at 656) "The Court determined that this failure of preparedness was 'crucial' and in and of itself...justifies a finding of ineffective assistance of counsel."

It is obvious from Ms. Kelly's behavior that she did not have Petitioner's best interests at heart and that her general level of disinterest in the case, punctuated by bouts of outright hostility towards Petitioner, clearly demonstrates personal animosity. This animosity caused Ms. Kelly to breach her duty of loyalty to Petitioner and render ineffective assistance of counsel depriving Petitioner of a fair trial. In Frazer v. United States, 18 F.3d 288 (9<sup>th</sup> Cir. 1994), appellant successfully argued that when trial counsel acts with animosity towards his client, his performance must be scrutinized by a more critical eye, and since the effect of this type of corrupting influence on counsel's performance is difficult to measure, prejudice must be presumed.

At no point did Ms. Kelly make any attempt to interview Petitioner, but repeatedly badgered him to "take a deal". On the first meeting between Ms. Kelly and petitioner, Ms. Kelly did not even bother to introduce herself but merely stated "I can get you a deal of 25 to 50 years; take it." When Petitioner informed Ms. Kelly that he had no intention of pleading guilty to crimes he had not committed, Ms. Kelly became very belligerent and stated "You'll get found guilty" in a manner that was obviously meant as a threat. At this point Ms. Kelly had not seen any of the discovery evidence.

It very soon became apparent that Ms. Kelly had absolutely no interest in the case and no intention of expending any time or effort on it other than the absolute minimum she could get away with. Ms. Kelly failed to make any attempt to obtain exculpatory evidence requested by Petitioner, she also repeatedly lied to, and deliberately mislead Petitioner. When Petitioner's trial was continually delayed for over a year she blamed the prosecution and it was not until Petitioner gained access to his "legal file" in 2013 that he discovered that the delays had been requested by Ms. Kelly on the pretext that she required more time to "prepare for trial" when in reality she failed to prepare for trial in any way whatsoever, but continued to pressurize Petitioner to accept a plea deal so that she would not have to deal with a trial.

Had Ms. Kelly performed even a merely perfunctory pre-trial investigation she would have discovered, amongst other things, that e-mails that the prosecution claimed Petitioner had sent from his work place, Sanofi-Pasteur, could not possibly have been sent from there since the corporate network was very secure and it did not allow access to personal e-mail and social media websites. This could have easily been confirmed by Sanofi-Pasteur's IT department. Ms. Kelly also failed to investigate why the prosecution

obtained a search warrant to ascertain the internet provider of the IP Address that the prosecution claimed Petitioner's e-mails were sent from so they could locate who it was licensed to. The warrant was issued on the pretext that at the time of issuance the prosecution had no idea who the person sending the e-mails was (other than he was known to Alexinas as "Geoff") or where he worked, yet in an earlier interview with Alexinas Detective Calarese had mentioned Swiftwater where Sanofi-Pasteur was located. He could not have obtained that information from Alexinas since she did not know where Petitioner worked so it is obvious that Detective Calarese had obtained that information in some other way that was not divulged. Since Petitioner's work place could not have been determined from any e-mails, since none could be sent from there, Calarese must have already have known who Petitioner was and where he worked and that such information must have come from other, undisclosed sources. Since Detective Calarese was dishonest about the originating locale of alleged e-mails, and was disingenuous on the application for the search warrant to obtain the licensee of an IP address that he already knew to be Petitioner's work place, it is quite feasible that Detective Calarese obtained this information by means not allowed by law. Petitioner requested that Ms. Kelly investigate these serious irregularities, but she ignored those requests.

Ms. Kelly would also have discovered that Petitioner's ex-wife, Carolee Gifford, had a history of making vindictive false statements, specifically claiming that her first husband had sexually abused their children after their divorce in an attempt to interfere with his visitation rights. This information could have been used cross-examination of Ms. Gifford during petitioner's trial to rightfully discredit her testimony.

During petitioner's trial, Ms. Kelly failed to question detective Calarese about clear errors in his analysis of photographs of the alleged victim and his contradictory statements on whether or not Alexinas' computer had been "cleaned up". In pre-trial statements Detective Calarese stated that because of pornographic images on Alexinas' computer, her husband had it "cleaned up", yet during Petitioner's trial Detective Calarese stated "I can say with a reasonable degree of forensic certainty that there was no attempt to do any data clean up, no attempt to do any data wipe or extensive data-maintenance on [Alexinas'] system." These contradictory statements were most likely an attempt to account for conflicting accounts of what was actually found on Alexinas' computer, initially stating that no incriminating photographs were found, then suddenly finding the photograph of Emily Alexinas with the naked man with the deformed toe. Since Detective Calarese had already demonstrated that he had a propensity to be dishonest, Ms. Kelly should have pressed him on these issues but instead completely ignored them.

There were serious deficiencies in Ms. Kelly's performance as defense counsel in failing to obtain exculpatory evidence and not undertaking any pre-trial investigation for which there was no possible logical or tactical reason. However, Ms. Kelly's abysmal behavior was not limited to pre-trial functions. On Thursday, April 8, 2010, Petitioner attended a pre-trial hearing at Chester County Courthouse. At the conclusion of the proceedings Ms. Kelly stated that she would visit Petitioner at Chester County Prison over the following weekend to "go over trial strategy and prepare Petitioner for trial" which was due to commence on the following Monday, April 12, 2010. Ms. Kelly failed to visit Petitioner in prison and only had a very brief meeting with him on the Courthouse holding

cells on the morning of the trial. During that meeting, Ms. Kelly informed Petitioner that the day would be taken up with jury selection and very briefly outlined the procedure. During the actual jury selection Ms. Kelly took virtually no notice of the proceedings and instead spent the time working on a different case. Ms. Kelly did not meet with Petitioner to discuss any aspect of the upcoming trial.

The following day, which was the first day of the trial proper, Ms. Kelly did not meet with Petitioner until Petitioner was called into the courtroom. At that point, Ms. Kelly informed Petitioner that she had decided not to put Petitioner on the stand. Up until that point Ms. Kelly had made no suggestion that Petitioner would not testify and gave no reason for suddenly deciding not to do so. Ms. Kelly went on to tell Petitioner that she could not prevent Petitioner from taking the stand, but that if he chose to do so she would allow the prosecution to "rip him to pieces" without raising any objections, and would not cross-examine Petitioner in an effort to reduce any damage done. This was clearly a threat.

Petitioner, being in a very stressful and frightening position of being on trial for very serious offenses that he had not committed, and knowing nothing of the law of court procedures having never been in any trouble with the law before, did exactly as Ms. Kelly instructed him to do assuming, wrongly, that she had Petitioner's best interests at heart.

Ms. Kelly also failed to call available character witnesses wrongly stating that character witnesses were useless as they carried little weight and could only testify as to

a person's basic honesty, and the fact that Petitioner had had an extra-marital affair showed that he obviously was not honest. This is not true:

"Evidence of good character offered by the defendant in a criminal procedure must be limited to his general reputation for the particular traits or traits of character that are involved in the commission of the crime charged; cross-examination of character witnesses by Commonwealth is limited to sex traits ... While Commonwealth may discredit evidence of good character, it may do so only by evidence of good reputation and not by particular acts of misconduct, and cross-examination of character witnesses by Commonwealth is limited to the knowledge of defendant's reputation with respect to traits vouched for on direct examination." Commonwealth v. Luther, 463 A.2d 1073, 317 (Pa. Super. 41)

"Evidence of good character is substantial and positive evidence and not mere makeweight to be considered in a doubtful case, and such evidence of itself may create a reasonable doubt so as to produce an acquittal."

Commonwealth v. Goodman, 126 A.2d 763, 182 Pa. Super. 205

And most pointedly:

"Evidence of good character may, in spite of all evidence to the contrary, raise a reasonable doubt in the minds of the jury" Commonwealth v. Shapiro, 223 Pa. Super, 19-20 297 A.2d 161, 163 (1972)

The available character witnesses would have testified that Petitioner had a reputation of being non-violent, peaceable and law abiding, and had never shown any indication of having a sexual interest in children.

Ms. Kelly also failed to raise questions over a note handed to the Assistant District Attorney, Elizabeth Pitts, Esquire, by Alexinas during Petitioner's trial relating to a person known simply as "Titus" and was entered into evidence. The content of the note read as follows:

"Dear Ms. Pitts,

I don't know if you will get this in time I hope it does but if not I will bring a copy of what I thought of. You were asking me about if I ever said he could have her virginity [sic] this is what I remember:

I do remember when Geoff found out I was talking to Titus he ask me if I was going to give Emily her virginity to him I said no. No one can have Emily just you.

I am trying to remember if I said that line above or if I said he (Geoff) can have her virginity.

This conversation would be in an email. And I can say it was said. After it started with Emily, Lori, Geoff & I.

So I am hoping you will get this if not I will write down and bring it and if I remember anything else I will write it down.

Sincerely

Geraldine Alexinas

Alexinas was having a sexual relationship with "Titus" at the time that the November 27, 2006 photograph of Emily Alexinas with the unidentified naked man was taken. Alexinas had previously told the prosecution that "Titus" was African-American, when in fact he was white. This became apparent during Petitioner's trial when the following exchange took place between Ms. Pitts and Alexinas:

Q: Now, I want to ask you, you described a person by the name of Titus?

A: Yes.

Q: What race is Titus?

A: White.

Q: Did you tell the police that he was African-American?

A: No.

Q: If you did, why would you have told them that?

A: I don't understand.

Q: Did you meet Titus?

A: Yes, I have. That is how I know he is white.

[T.T. 4/13/2010 p.146]

This exchange is totally nonsensical if Alexinas had not previously told the police that "Titus" was African-American.

Petitioner immediately informed Ms. Kelly that he wanted to discuss this with her because he felt that it was important and raised a lot of questions of doubt. Relatively early in Petitioner's relationship with Alexinas, Alexinas had told Petitioner that "Titus" was African-American and "not to worry if when you meet the girls they mention something about oral sex. They walked in on us and caught me giving Titus a blow job." Petitioner thought this comment somewhat odd at the time, but after discovering during trial that "Titus" was actually white and that Alexinas had deliberately lied to and misled both Petitioner and the prosecution about this fact, Petitioner realized that there was a high possibility that "Titus" was the naked man in the photograph with Emily Alexinas

since Alexinas was having a sexual relationship with "Titus" at the time that the photograph was taken. Ms. Kelly should certainly have requested the court to recess so that she could discuss this issue with Petitioner and should have questioned Alexinas about these inconsistencies during cross-examination since it was an obvious ploy by Alexinas to divert attention away from "Titus", but Ms. Kelly completely ignored Petitioner's concerns stating that they were "irrelevant."

The Report and Recommendation on Petitioner's pro se Petition for Writ of Habeas Corpus is surprisingly mute on these assertions by Petitioner.

Besides Ms. Kelly's ineffectiveness in these issues, which more than fulfills the reasonable application of Strickland v. Washington, 466 U.S. 667 (1984), serious questions are also raised about the blatant and serious shortcomings of Detective Calarese's handling of the case in so far as it seriously prejudiced Petitioner by its fundamentally dishonest nature. There can be no doubt that Petitioner did not receive the fair trial and due process of law that is his right under the Fourteenth Amendment to the Constitution of the United States of America.

## CONCLUSION

It is patently evident that Petitioner did not receive a fair trial due to the appalling ineffectiveness of his court appointed attorney, Ms. Elizabeth Plasser Kelly, Esquire, both before and during Petitioner's trial. She repeatedly ignored Petitioner's requests for her to obtain exculpatory evidence, and failed to discuss trial strategy with Petitioner (since she plainly had no strategy).

Ms. Kelly's sole objective was to do as little work as she could "get way with" and to get the trial over with in as short a time as possible. Because of the serious charges involved, Petitioner's trial was initially scheduled to last eight days, but s. Kelly told Petitioner that she hoped to "get it over with in a week." when the trial eventually took place it lasted just two days which was achieved by Ms. Kelly's failure to call available character witnesses, failure to put Petitioner on the stand, and failure to cross-examine witnesses in any meaningful way.

Ineffective assistance of counsel is governed, in general, by Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to find Strickland prejudice the court need not find that it is more likely than not that Petitioner would have been acquitted absent the ineffective assistance of counsel. As the U.S. Supreme Court in Williams (Terry) v. Taylor, 529 U.S. 362, 405-406 (2000) opined:

"If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner has not established by a

preponderance of the evidence that the result of his criminal proceeding would have been different, the decision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposite' to our clearly established precedent because we held in Strickland that the prisoner need only demonstrate 'reasonable probability that...the result of the proceeding would have been different.'" [citations omitted]

The decision of the Third Circuit is in clear conflict with the decision of other circuits since Petitioner has clearly demonstrated that the ineffectiveness of his trial attorney severely prejudiced Petitioner to the extent that, except for the ineffectiveness, there was a "reasonable probability that the result of the proceeding would have been different".

The prejudice determination must be based on ALL of the evidence available to the court, not simply the evidence supporting the verdict. Again, Williams (Terry) is instructive in this point:

"[T]he State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available evidence adduced in the habeas proceeding - in reweighing it against the evidence in aggravation."

Petitioner has adequately demonstrated that he was severely prejudiced by Ms. Kelly's ineffectiveness, but this is not the only factor that the court should consider in evaluating the fairness of Petitioner's trial and whether or not he received due process of law.

Alexinas was clearly coerced into making untrue statements whenever she spoke to the police or was interviewed by Detective Calarese, and constantly changed her story in a belief that she was getting herself out of trouble for taking naked photographs of her daughter. Emily Alexinas, the subject of the photographs, repeatedly stated that it was her mother, Geraldine Alexinas, who took the photographs and that there was nobody else with Alexinas when the photographs were taken. [Interview of Emily Alexinas by Detective Donna J. Carroll dated December 10, 2008]

Before being interviewed by Detective Calarese and Detective Carroll, Alexinas was told that she was not under arrest and was led to believe that as long as she told Detectives Calarese and Carroll what they wanted to hear she would not get into trouble. During the interview dated December 15, 2008, Alexinas gave vague answers to Detective Calarese's questions. When Alexinas stated that she was "trying to remember," Detective Calarese retorted "You better start remembering quick. A lot more... I'm not playing games with you... because I tell you what, Geoff starts throwing you under the bus okay... We're trying to work with you here." [Interview of Geraldine Alexinas, December 15, 2008 p.12]

Alexinas then starts to give a series of confused and contradictory answers to Detective Calarese's questions to which he repeatedly informs her that he thinks she is lying. Once Alexinas gives an answer that Detective Calarese wants, Alexinas then concocts further stories to expand her answer, regularly changing the details as she goes along until Detective Calarese is happy with what she has said.

Alexinas was obviously intimidated and coerced into making false statements under the belief that if she told Detective Calarese what he wanted to hear, whether or not it was actually true, she would not get into trouble. In doing so, her "stories" became more and more extreme and further from any semblance of truth. In making up the "stories" she thought Detective Calarese wanted to hear she also incriminated herself and was arrested on serious charges of sexually abusing her daughters. In order to get a much reduced sentence Alexinas accepted a plea deal that included testifying against Petitioner. In Alexinas Plea Bargain the Court stated:

"And you [Alexinas] understand that if called upon to give that testimony and you decline to do so, that the Commonwealth will come back in here and seek to have this plea agreement set aside?" [Proceedings – Plea Bargain, September 28, 2009 p.16 l.21 – p.17 l.1].

Alexinas was put in a position where she believed that she had to repeat her false allegations against Petitioner at Petitioner's trial or she would get an extended prison sentence. This she was quite prepared to do to save her own neck and after much coaching from Assistant District Attorney Elizabeth Pitts and Detective Calarese [T.T. April 13, 2010 p.99 ll.5-22] she did exactly that.

Alexinas obviously regretted accepting the plea deal when in a letter Alexinas wrote to the court on October 2, 2009 she stated:

"When I talk to the detectives back in Dec. 2008 about my case I ask the detective woman Det. Donna Carroll of the Coatesville Police department, I

think I should have a lawyer before she talk to me and she said if I got one that would mean I was guilty. I should have had a lawyer and said it, but was denied."

Later in the letter she adds:

"I said I didn't think I did anything wrong and ***I did everything you told me to do.***" [emphasis added]

It is quite apparent that not only were Petitioner's rights repeatedly violated, but so were Alexinas'

The case against Petitioner was based solely on the incomprehensible and confused allegations of a woman of limited intelligence and education who had already been coerced into admitting that she had sexually abused her daughters and was now attempting to shift the blame for her actions onto an innocent man. The prosecution attempted to support these false accusations with disjointed fragments of e-mails taken entirely out of context and with no attempt made to obtain a complete set of e-mails from the e-mail providers.

Petitioner's arguments undoubtedly have merit and the evidence is clearly not constitutionally sufficient to sustain the conviction against him since there was no attempt made to get to the truth of the matter during the investigative stages or during Petitioner's trial. It is patently obvious that Detective Calarese was determined to obtain a conviction against Petitioner as soon as Alexinas mentioned the name "Geoff" and was not going to

let such things as investigating alternate possibilities get in his way even when it became evident that Petitioner was innocent of the alleged crimes.

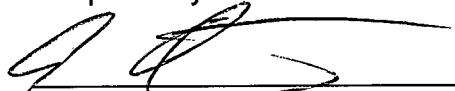
This refusal to pursue justice has been perpetuated by various courts throughout the appeals process who have hidden behind procedure and wording, displaying contempt for justice and deliberate indifference to the truth and as such petitioner requests that this Court undertake a de novo review of the record.

The United States Supreme Court is the bastion for upholding the Constitution of the United States of America, and it is clear that Petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution, as they relate to effective assistance of counsel for his defense and due process of law, were seriously violated.

For these reasons, a writ of Certiorari should be issued to review the judgment and opinion of the Third Circuit Court of Appeals.

Date: OCTOBER 3, 2019

Respectfully submitted



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