

No. 19-6367

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
OCT 18 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

JAMES E. KEISER

— PETITIONER

(Your Name)

vs.

STATE OF MARYLAND

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE 4th CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JAMES E. KEISER, #366940

(Your Name)

ECI-30420 REVELLS NECK ROAD

(Address)

WESTOVER, MD 21890

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether the 4th Circuit exceeded the limited scope of the COA analysis which was an error, albeit Petitioner met the requirement showing of denial of a constitutional right and under 28 U.S.C. §2253(c)(2)?
2. Whether Petitioner was denied his Sixth Amendment right to effective assistance of counsel when his attorney permitted him to be tried in prison clothes, in spite of the state trial court warnings?
3. Whether Petitioner was denied his Sixth Amendment right to effective assistance of counsel when his attorney impeached him with inadmissible prior convictions which prejudiced the defense?

LIST OF PARTIES

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

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

Walter West, Warden, ECI

Brian Frosh, Attorney General of Maryland

RELATED CASES

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
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Washington County, Maryland

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Circuit Court for Washington County, Maryland

APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from federal courts:

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

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[X] is unpublished.

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

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[X] is unpublished.

[X] For cases from state courts:

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

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

The opinion of the Circuit Court for Washington County, MD court appears at Appendix D to the petition and is

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

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was July 22, 2019.

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

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

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

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

[X] For cases from state courts:

The date on which the highest state court decided my case was 12/8/2016. A copy of that decision appears at Appendix C.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Sixth Amendment

28 U.S.C. §2253

STATEMENT OF THE CASE

On October 4, 2010, in the Circuit Court for Washington County, Maryland, the Honorable Kenneth Long, Jr., presiding, a jury found Petitioner guilty of both solicitation to commit murder in the first degree, and solicitation to commit assault in the first degree. On October 12, 2010, the Petitioner filed, pro-se, a Motion for a New Trial, which was denied on October 19, 2010. On November 11, 2011, the Petitioner was sentenced to life, suspend all but thirty years, for solicitation to commit murder in the first degree, and was sentenced to twenty-five years for solicitation to commit assault in the first degree.

The Petitioner appealed the conviction to the Court of Special Appeals of Maryland in Keiser v. State, No. 2797, September Term, 2010. (Unreported, agreed with the Petitioner in part, and merged his sentence for solicitation to commit assault in the first degree with his sentence for solicitation to commit murder in the first degree. The Court otherwise affirmed the convictions. On March 17, 2011, the Petitioner filed a Motion for Modification or Reduction of Sentence and Request to be held Sub Curia, which was denied on April 6, 2011. On October 5, 2012, the Petitioner filed a Petition for a Writ of Certiorari with the Court of Appeals of Maryland, which was denied on December 17, 2012. The Petitioner filed a Petition for Post Conviction Relief with the Circuit Court for Washington County, Maryland on May 6, 2013. After several postponements, a hearing was held on June 3, 2015. The The Court held the matter sub curia pending its opinion. Therefore, the post conviction court issued a Memorandum and Opinion dated July 30, 2015 denying post conviction relief. (App. D). The Petitioner filed a timely Application for Leave to Appeal to the Court of Special Appeals of Maryland in which he raised three issues of ineffective assistance of counsel. The Court of Special Appeals of Maryland denied Petitioner's Application for Leave to Appeal the denial of his state post conviction relief on December 8, 2016. (App. C).

Having exhausted his state-court remedies, Petitioner

petitioned for relief pursuant to 28 U.S.C. §2254 on May 5, 2017. On December 18, 2018, the District Court for the District of Maryland denied his petition and declined to issue a certificate of appealability. (App. B).

On January 28, 2019, the Petitioner filed a Motion for Certificate of Appealability and Informal Opening Brief in the Court of Appeals for the Fourth Circuit, raising the issue of the state court misapplied Strickland standard.

The U.S. Court of Appeals for the Fourth Circuit issued an unpublished Per Curiam Opinion dated July 22, 2019 denying a Certificate of Appealability (App. A).

REASONS FOR GRANTING THE PETITION

The facts of this case are relatively simple. The prosecution alleged, while Petitioner was incarcerated, he solicited inmate Tyrone Smith to kill his wife. The prosecution attempted to bolster the shaky testimony of Smith by showing he possessed information about the prospective victim that could only have been learned from a plot with Petitioner.

The defense argued that, even though Petitioner had strained relations with his wife, he never had the intent of killing her. The allegations, rather, were the product of a jailhouse cooperator who gleaned just enough information from Petitioner to con law enforcement -- all for his own benefit in the form of early release from jail.

While there were some ancillary facts presented to the jury, the case boiled down to Petitioner's word versus Smith's word and whose word the jury would believe. In essence, this case was entirely a credibility battle and Petitioner's credibility was seriously undermined when his trial counsel permitted him to (1) be tried in prison clothing against the court's concerns, (2) defense counsel impeached Petitioner with otherwise inadmissible prior convictions.

These errors from counsel caused severe prejudice to Petitioner, which lies squarely within the heartland of ineffective assistance of counsel under the Sixth Amendment right to effective assistance of counsel.

1. The 4th Circuit exceeded the limited scope of the COA analysis which was an error, albeit Petitioner met the requirement showing of denial of a constitutional right and under 28 U.S.C. §2253(c)(2).

Petitioner was denied his constitutional right to effective assistance of counsel when trial counsel committed two egregious errors; first, counsel allowed Petitioner to wear jail clothes for the duration of the jury trial, and second, counsel affirmatively introduced non-admissible prior convictions when Petitioner testified in his own defense, thereby impeaching his own client.

As a result of counsel's ineffectiveness, Petitioner was convicted based almost entirely on the testimony of a jailhouse informant - arguably the most unreliable of all types of evidence - and sentenced to life with all but thirty years suspended, for a crime he did not commit.

In its opinion denying relief, the state court acknowledged that trial counsel made two separate errors. (App. D). But the court ultimately upheld the conviction, concluding that these errors did not prejudice Petitioner. In addition, trial counsel effectively threw Petitioner under the bus, stripping him of his credibility as he testified in his own defense before the jury. When a criminal defendant testifies in jail clothes, and is impeached by his own attorney with otherwise inadmissible prior convictions, it cannot possibly be said that counsel's errors did not affect the outcome of the trial proceeding. The state court's ruling was therefore, both contrary to and involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984).

The determination whether a Certificate of Appealability should issue does not require full consideration of the factual or legal bases adduced in support of the claims. Swisher v. True, 325 F.3d 225, 229-30 (4th Cir. 2003)(citing Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). A prisoner seeking a COA need only demonstrate a substantial showing of the denial of a constitutional right. Miller-El, 537 U.S. at 336 (citing 28 U.S.C. §2253 (c)(2)).

In this case, the 4th Circuit sidestepped the COA process which was an error by first deciding the merits of an appeal and then justifying its denial of a COA based on its adjudication of the actual merits, which in essence it decided the appeal in this case without jurisdiction.

In this case, the 4th Circuit held that: We have independently reviewed the record and conclude that Keiser has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and

dismiss the appeal. (App. A, slip #2).

This was an error because Petitioner made a strong showing of ineffective assistance of counsel and when the state court misapplied the Strickland standard, the lower federal court disregarded Petitioner's claim without even conducting an analysis as required under Strickland, albeit counsel admitted at bench that he was prejudicial and at Post Conviction that this was an error. See Buck v. Davis, 137 S.Ct. 759 (2017).

As in this Court's opinion in Buck v. Davis, supra, the 4th Circuit placed a heavy burden on the Petitioner at the COA stage; thus, judicial precedent flatly prohibits such a departure from that as prescribed under 28 U.S.C. §2253.

2. Petitioner was denied his Sixth Amendment right to effective assistance of counsel when his attorney permitted him to be tried in prison clothes, in spite of the state trial court warnings.

Before the trial began, the trial judge called a bench conference and admonished trial counsel twice for Petitioner being tried in prison clothes because he was concerned that this could be an issue. See App. E at pages 8-9.

Trial counsel acknowledged that this was prejudicial, however, believed it was "not as prejudicial as it would be in some cases." Trial counsel never asked Petitioner if he understood what was discussed or how he wished to proceed.

All the lower courts completely disregarded the actual prejudice caused by counsel and on record, when he admitted that what he was doing was prejudicial to the Petitioner. On this particular point, the state court ruled that the error was not prejudicial because the jury learned why Petitioner was incarcerated, without first applying the Strickland analysis.

While it is true that the jury would have probably figured out that Petitioner had been in jail - at some point in time - that is not a justification for trying him in prison clothes. See United States v. Harris, 703 F.2d 508, 512 (11th Cir.1983)(That the jury will learn of his arrest during the course of the trial does not mitigate the harm occasioned by parading the defendant

clothed in a shroud of guilt).

In Estelle v. Williams, 425 U.S. 501 (1976), this Court explained the fundamental injustice that stems from defendants wearing prison clothing at trial: An accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption of innocence so basic to the adversary system The constant reminders of the accused condition implicit in such distinctive, identifiable attire may affect a jurors judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial an unacceptable risk is presented of impermissible factors coming into play.

In this case of credibility testifying in prison clothes tended to portray Petitioner as untrustworthy, and reduced the weight given to the evidence introduced on his behalf. It was a constant reminder" that threatened to reduce the presumption of innocence and a continuing influence that the jury should convict Petitioner, because he was a bad person already in jail. See Estelle v. Williams, *supra*.

On this matter, the state court claimed Petitioner was not prejudiced because he was not compelled to wear prison clothes. Again, the state court missed the issue. Compulsion is not relevant to a Strickland analysis for it is trial counsel's decision to allow Petitioner to be tried in prison clothes that caused the prejudice.

It is further noted that the lower courts were in agreement that Petitioner was not prejudiced as to the strength of the states case. This is simply not true.

The lower courts erroneously assumed that having information about a person is strong evidence that the information was obtained during a solicitation to murder that person. Corroborating the fact that Mr. Smith knew information about Petitioner's wife did not advance the states case because the state still had to prove that it obtained that information as part of a solicitation to kill the intended victim. The state could not

corroborate whether Petitioner solicited Mr. Smith, and Smith's information about Petitioner's wife was addressed by Petitioner and another defense witness. Thus, the only way the state could get a conviction was to have the jury believe Mr. Smith. In comparison the only chance Petitioner had of winning an acquittal depended upon his credible testimony.

Because this was a trial depending upon credibility, it can not be said that the prison clothes were an abstract, harmless error. The prison clothes were there for the jury to see throughout the entire trial proceeding, and it did handicap Petitioner's testimony, causing severe prejudice to his defense.

3. Petitioner was denied his Sixth Amendment right to effective assistance of counsel when his attorney impeached him with inadmissible prior convictions which prejudiced the defense.

When Petitioner took the stand to testify on his behalf, the first thing his counsel did was impeach him with three inadmissible prior convictions, one of which was for a recent second degree assault on Petitioner's wife. This conviction was under appeal at the time and in any event, did not qualify as an impeachable offense.

This error opened the door for the prosecution to forcibly argue that the reason Petitioner wished to have his wife killed was because she was the only witness to her second degree assault.

To exacerbate this error, trial counsel never requested a limited instruction informing the jury that the convictions were admissible only to help the jury determine whether Petitioner testified truthfully, and were not admissible as evidence of guilt.

On this matter, the lower courts all agreed that this was a serious attorney error, however, again, they concluded that Petitioner was ^{not} prejudiced due to the strength of the state's case.

This decision is at odds with other state and federal courts that routinely have held that: The defendant is prejudiced when he or she (1) testifies and denies the state's allegations, but (2) is improperly impeached by trial counsel with inadmissible prior convictions. United States v. Russell, 221 F.2d 515,619 (4th Cir.2000).

is a case most on point with Petitioner's case. In this case, the defendant took the stand to defend the evidence himself and was impeached by his trial attorney with inadmissible convictions. As in Petitioner's case here, if believed, the defendant's testimony would have negated nearly all the evidence against him.

The 4th Circuit held that the defendant was prejudiced by counsel's serious attorney error because it was "critical ... to accurately portray the defendant's criminal record." Id. at 621. The Court explained the evidence against the defendant could have been rebutted by his own testimony. Id. at 621-22. Thus, "if the jury had found Russell's explanation plausible and had credited his testimony, the Government's case would have undoubtedly failed." Id. at 619. See also Napue v. Illinois, 360 U.S. 264, 269 (1959)(the jury estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence).

The 4th Circuit went on to explain that the defendant's credibility was 'paramount.' Id. at 622. Impeaching the defendant with overturned convictions created the "inherent danger that a jury may convict a defendant because he is a 'bad person' instead of because the evidence of the crime with which he was charged proves him guilty.. (quoting United States v. Holloway, 1 F.3d 307, 311 (5th Cir.1993)); accord Miller v. Anderson, 255 F.3d 455, 459 (7th Cir. 2001), holding that trial counsel introducing evidence that opened the door to the defendant's otherwise inadmissible prior conviction was a prejudicial serious attorney error.

The 4th Circuit holding on this question has been echoed by other federal courts. In Lyons v. McColter, 770 F.2d 529 (5th Cir. 1985) the court found ineffective assistance of counsel and explained that it could "hardly imagine anything more prejudicial" than allowing the jury to improperly hear about the defendant's prior convictions. Id. at 533. Similarly, in Byrd v. Trombley, 352 Fed.Appx. 6 (6th Cir. 2009), the court found prejudice because the trial amounted to a credibility contest between victim and defendant, and stated: "Because the outcome turned on the jury's determination of whose testimony was more credible, there is a

reasonable probability that defendant's prior conviction affected the jury's opinion of his credibility and, accordingly, the verdict. *Id.* at 12-13.

This case was entirely a credibility battle, not merely a "corroboration case" as the state argued. In ruling that there was no potential for prejudice the lower courts relied entirely on the fact that Smith knew information about Petitioner's wife. But the fact that Smith knew information about Petitioner's wife was not dispositive. Petitioner testified to how he acquired this information. If the jury believed Petitioner's explanation, then he would have been found not guilty.

The errors described above are individually enough to violate the Sixth Amendment. When combined, however, their effect is compounded. Because this trial pitted the word of Petitioner against the word of the state's cooperating informant, the loss of Petitioner's credibility was particularly prejudicial.

The lower court's prejudice analysis incorrectly failed to consider the constitutional and strategic importance of a defendant's own testimony at trial.

Strickland seeks to ensure the "fundamental fairness" of the proceeding. *Id.* at 697-98. It asks whether the errors "undermined confidence in the outcome" of the trial. *Id.* at 695. Strickland's proper prejudice analysis requires a balanced approach, yet the lower court's erred by only considering one side of the story.

The problem with the lower court's ruling is that they viewed the trial through the myopic perspective of the state. Because they believed the state's version of events, they did not independently consider the value of Petitioner's credibility. They did not consider the Petitioner's presumption of innocence, and they discounted the effects of presenting Petitioner to the jury without this presumption.

When the full dynamic of trial is considered and weighed fairly, the proper conclusion is that Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment.

CONCLUSION

Petitioner has made a substantial showing that his constitutional rights were violated in this case. Reasonable jurists could debate whether Petitioner's motion should have been resolved differently. And the 4th Circuit should have issued a COA.

For this reason, the petition for a writ of certiorari should be granted and relief in the form of a certificate of appealability.

Respectfully Submitted,

James E. Keiser
James E. Keiser

Date: October 15, 2019.