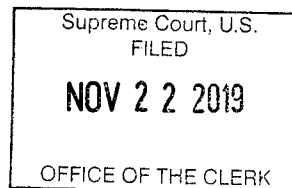


19-7025
No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL FELICIANO

(Your Name) — PETITIONER

vs.

KEVIN RANSOM, et al.

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court for the Eastern District of Pennsylvania,
July 31, 2018

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL FELICIANO

(Your Name)

SCI Waymart, P.O. Box 256, Route 6

(Address)

Waymart, PA 18472-0256

(City, State, Zip Code)

N/A

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

1. Is the State court of last resort and U.S. Court of Appeals decision which denied petitioner's claim that he was deprived of his Sixth Amendment right to effective assistance of counsel conflict with this Court's decision in *Strickland* that counsel has a duty to investigate the substance of a key eyewitness' testimony?
2. Is the U.S. Court of Appeals and Eastern District Court's decision that denied petitioner's claim on the improper jury instructions on reasonable doubt was time-barred conflict with this Court's decision in *In re Winship*, *Carrier*, and *Strickland* because the failure to raise this issue was due to PCRA counsel's ineffectiveness?

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:

United States Court of Appeals for the Third Circuit Judge Stephanos Bibas.

United States District Court for the Eastern District of Pennsylvania, District Judge Gerald Austin McHugh.

United States District Court for the Eastern District of Pennsylvania, U.S. Magistrate Judge Timothy R. Rice.

Pennsylvania Superior Court Judge Judith F. Olson.

Buck's County Court of Common Pleas for Pennsylvania, Trial Judge Diane E. Gibbons.

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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

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A-13 to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix C-0 to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

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

☐ reported at 2017 Pa. Super. Unpub. LEXIS 2535; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Common Pleas court appears at Appendix F to the petition and is

☐ reported at (id.); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

[] For cases from **federal courts**:

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

[] 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: September 16, 2019, and a copy of the order denying rehearing appears at Appendix A.

[] 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).

[] For cases from **state courts**:

The date on which the highest state court decided my case was Dec. 6, 2017.
A copy of that decision appears at Appendix N/A. *cit'd @: 644 Pa. 322, 176 A.3d 233, 2017 Pa. LEXIS 3513*

[] 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

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

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

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

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

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

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

In August 11, 2011, petitioner was acquitted of conspiracy to commit aggravated assault, conspiracy to commit simple assault, and stalking. But found guilty of the attempted murder of Edwin Bayron, two counts of aggravated assault, simple assault, and possessing an instrument of crime. Seven months later, in March 23, 2012, he was sentenced to 10-20 years for attempted murder, plus a consecutive 5 years probation for possessing an instrument of crime.

A post sentence motion was filed in April 2, 2012 and was denied June 7, 2012. The sentence was affirmed by the Superior Court in April 18, 2013 and the Supreme Court denied his petition for allowance of appeal in October 22, 2013.

Petitioner then filed a timely pro se PCRA in March 13, 2014 and the trial court appointed counsel to represent him. In May 15, 2014 appointed counsel filed an amended PCRA petition and a hearing was held in February 19, 2016. The PCRA court denied his petition in June 30, 2016. Petitioner timely appealed the denial of his PCRA to the Superior Court which affirmed in July 3, 2017. In May 22, 2018, petitioner timely filed a habeas petition in the Third Circuit which was then recommended to the United States Magistrate Judge a week later. The Honorable Timothy R. Rice issued an R&R that the writ of habeas corpus be denied with prejudice and on November 5, 2018 the Honorable Gerald McHugh adopted the R&R to dismiss. Petitioner filed a timely certificate of appealability to the U.S. Court of Appeals for the Third Circuit

and on July 22, 2019 the COA was denied without opinion. In August 3, 2019, a timely petition for rehearing en banc was filed and denied in September 16, 2019.

REASONS FOR GRANTING THE PETITION

I. The Petition should be granted to resolve the conflict over whether counsel's failure to investigate and call an available key eyewitness to an attempted murder was reasonable and strategic when counsel had not yet obtained facts on which such a decision could be made as determined by this Court in Strickland v. Washington, 466 U.S. 668, 690-91 (1984) and the Third Circuit in U.S. v. Gray, 878 F.2d 702, 711 (3d Cir. 1989).

Here, counsel's decision not to investigate was not reasonable or strategic judgment. Petitioner has proved that counsel was aware Lawrence Cooper, a key eyewitness, existed months before trial began. Had he chosen to investigate, he would have found out that Cooper was the only person to see another man grab a knife from a table and then stand by the victim just moments before he was stabbed. Appendix E, at 8-9. However, counsel never investigated the substance of Cooper's testimony because according to him "I really had no interest in speaking to him [the witness, Mr. Cooper]." Id. at 14. This mistake was improper and highly prejudicial because the victim himself testified that petitioner never possessed a knife. Id at 8-9. The victim testified that he in fact had petitioner's hands pinned to the ground in a "U.F.C." position when he was stabbed. Id. Had counsel chosen to investigate further, he would have found that Cooper was willing to cooperate and would have testified for the defense at trial if called upon. Id. at 8-9, 14-19. And there is

a reasonable probability that but for counsel's unprofessional errors, and had the jury heard this evidence, petitioner would have been found not guilty. Strickland, 466 U.S. at 691-92 ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.") Plus, petitioner has always maintained that he is actually innocent and Cooper's testimony would have established that it was the unidentified man who actually stabbed the victim. Schlup v. Delo, 513 U.S. 298, 327-28, 115 S.Ct. 851, 867 (1995) ("[T]he emphasis on actual innocence allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.")

The above facts show that counsel's failure to investigate and call Cooper was highly prejudicial and unconstitutionally deprived him of a fair trial and right to have the effective assistance of counsel. U.S.C.A. Const. Amend. 6. Accordingly, the State Court's decision which denied petitioner's PCRA on this claim is contrary to and a misapplication of the Strickland standard. See Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, at 788, 178 L.Ed.2d 624 (2011)(In the Strickland analysis, the Court must decide only if "an attorney's representation amounted to incompetence under the prevailing professional norms, not whether it deviated from best practices or most common custom.")

And the Third Circuit's decision which denied Habeas Corpus relief on this issue is a misapplication of Strickland's deferential standard. See

Harrington, 131 S.Ct. at 788 (When evaluating an ineffectiveness claim that has already been rejected by a state court, “the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland’s* deferential standard.”)

II. On this issue, this Court should also grant petitioner’s writ of certiorari because the Third Circuit’s decision was contrary to the Fourteenth Amendment due process clause which requires that each element of a crime be proved beyond a reasonable doubt as held by this Court in In re Winship, 397 U.S. 358, 364 (1974). And the Third Circuit’s determination that petitioner’s failure to raise the issue caused it to be waived, conflicts with this Court’s holding in Carrier that where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default if it is due to collateral appeal counsel’s failure. Murray v. Carrier, 477 U.S. 478, at 496 (1986).

Here, petitioner’s failure to raise this claim earlier was due to PCRA counsel’s ineffectiveness. Carrier, 477 U.S. at 492 (“[W]e hold that counsel’s failure to raise a particular claim on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by

the state courts.”) PCRA counsel’s ineffectiveness has usually been held not to satisfy the cause prong to excuse procedural default. However, the United States Supreme Court has recognized a narrow exception to this when collateral appeal counsel is the cause of the default in the underlying claim of trial counsel’s ineffective assistance. Martinez v. Ryan, 566 U.S. 1, ___, 132 S.Ct. 1309, 1315-17, 182 L.Ed.2d 272 (2012); Carrier, 477 U.S. at 491-92 (“[T]he cause and prejudice test applies to defaults on appeal as to those at trial. . . . we see little reason why counsel’s failure to detect a colorable constitutional claim should be treated differently from a deliberate but equally prejudicial failure by counsel to raise such a claim.”)

Here, petitioner has shown that (1) the trial court’s instruction violated the due process clause because it created a mandatory presumption which relieved the State of its burden on persuasion; (2) trial counsel was ineffective for failing to raise the issue on direct appeal; (3) PCRA counsel was ineffective for failing to raise the issue; (4) the trial court’s incorrect instructions were not withdrawn; and (5) the Third Circuit failed to consider the erroneous instructions in the context of the overall charge. See Appx. E, at 10-13; N.T. 8/10/11 at 229, 232-33, 237-39, 249-50; Francis v. Franklin, 105 S.Ct 1965, at 1975, 471 U.S. 307, at 322 (1985) (“Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.”)

Petitioner explained that the error was reversible and not harmless because it created a mandatory presumption that the jury “may convict if you find **without the agreement necessarily**, that there was any discussion between this unnamed individual and the Defendant” (emphasis added). N.T. 8/10/11 at 239; Appx. E, at 12. This misapplication of the law is not isolated and petitioner respectfully urges this Honorable Court to analyze the trial court’s charge in its entirety. Francis, 471 U.S. at 315 (“If a specific portion of the jury charge, considered in isolation, could be understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the whole.”) The instructions are full of mistakes. One of the most flagrant violations is the following:

There was evidence that the Commonwealth introduced . . . which tended to establish, if you believe this testimony to be true, and if you find this to be a fact, that **the Defendant left and fled the scene of an assault that occurred in the park, and then also on October 30th he left the scene and fled the scene** after hearing – or after 911 was called and prior to the police arrival on October 30th. N.T. 8/10/11 at 224-25.

This is incorrect and prejudicial for two reasons: (1) petitioner was never charged with any crime related to the alleged incident which occurred on Oct. 13th; (2) the judge was explaining specific intent and implies that if jurors believed petitioner was involved in the alleged fight on Oct. 13th, then he’s automatically presumed to be guilty of the stabbing which occurred on Oct. 30th; (3) and it impermissibly shifts the burden from the Commonwealth to the petitioner. Francis, 471 U.S. at 313 (citing Winship) (The due process

clause of the Fourteenth Amendment “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); Com. v. Kelly, 724 A.2d 909, 914 (Pa. 1999) (“[H]armless error analysis was inappropriate in reviewing a jury instruction that had mandatorily shifted the burden to the accused to disprove a material element of the crime.”) Other examples arise when the court instructs jurors on the elements of attempted murder. See N.T. 8/10/11 at 228-29, 231-33.

Since the instructions on intent, when read in the context of the jury charge as a whole, violated the Fifth and Fourteenth Amendment’s requirement that the State prove every element of a criminal offense beyond a reasonable doubt, petitioner was deprived of his right to due process, and right to a fair trial. U.S.C.A. Const.Amend. 5, 14. And PCRA counsel’s failure to raise trial counsel’s ineffectiveness on the issue deprived him of the right to have the effective assistance of counsel. U.S.C.A. Const.Amend. 6.

Accordingly, the Third Circuit Court’s decision is contrary to and a misapplication of the Strickland, Carrier, Francis, and Winship standard. Murray v. Carrier, 477 U.S. 478, at 488 (1986) (“Ineffective assistance of counsel, then, is cause for a procedural default.”); Francis v. Franklin, 471 U.S. 307, at 326 (1985) (“Due Process Clause of the Fourteenth Amendment prohibits the State from making the use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in Winship on

the critical question of intent in a criminal prosecution.”); In re Winship, 397 U.S. 358, 364 (1974) (same); Strickland v. Washington, 466 U.S. 668, at 691-92 (1984) (“The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.”)

CONCLUSION

Respectfully, for all of the foregoing reasons,

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: November 21, 2019