No.

In the

Supreme Court of the United States

ADRIAN D. RILEY,

Petitioner,

– against –

JOSEPH NOETH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, by erroneously affirming Petitioner's conviction based on a finding that the district court lacked authority to hold an evidentiary hearing as contemplated by Title 28, Section 2254(e)(2), of the United States Code, the court of appeals failed to follow this Court's federal habeas jurisprudence as set forth in *Cullen v. Pinholster,* 563 U.S. 170 (2011), and thus failed to enforce the Sixth Amendment precedent regarding ineffective assistance of counsel as expressed in *Strickland v. Washington,* 466 U.S. 668 (1984).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this petition, no others were party to the proceeding before the court whose judgment is sought to be reviewed.

CORPORATE DISCLOSURE

There are no corporate entities involved in this case.

RELATED CASES

Herkimer County [New York] Court, Indictment No. I 08-51, *People v. Riley.*

Judgment: January 28, 2009 (on conviction), May 13, 2013 (on application for post-conviction relief).

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Petitioner Adrian D. Riley respectfully petitions for a writ of certiorari to review the decision and order of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS AND ORDERS BELOW

The summary order of the United States Court of Appeals for the Second Circuit, *Riley v. Noeth*, No. 18-770, dated February 22, 2020, unofficially reported at 802 Fed. Appx. 7 (2d Cir. 2020), appears as Appendix ("App.") A to this petition. The memorandum decision and judgment of the United States District Court for the Northern

District of New York, No. 15-cv-1340, dated February 22, 2018, unofficially reported at 2018 WL 1033289, is attached as App. B. The order of the Second Circuit on petition for rehearing, dated June 4, 2020, is attached as App. C. That order is not officially or unofficially reported.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 22, 2020. The petition for rehearing was denied by that court on June 4, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides:

> **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.**

The Assistance of Counsel Clause, pertinent here, is highlighted in bold.

Title 28, Section 2254(e)(2), of the United States Code provides, in pertinent part:

> If the applicant [for a writ of habeas corpus] 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 relies on --

****

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence. . . .

STATEMENT OF THE CASE

Introduction

Adrian D. Riley petitions from the affirmance by the court of appeals of the judgment of the district court denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has been confined, pursuant to a judgment of the Herkimer County [New York] Court, to a determinate sentence of twenty-five years of imprisonment imposed on January 28, 2009, followed by twenty years of post release supervision. He had been convicted after a jury trial of one count of Sexual Conduct Against a Child, First Degree [New York Penal Law § 130.75] and is currently incarcerated pursuant to this sentence.

The conviction and sentence was the subject of a direct appeal. On May 2, 2014, the Appellate Division (4th Department) of the New York Supreme Court affirmed the judgment of the county court, and the State of New York Court of Appeals denied leave to appeal that decision on December 3, 2014. In addition, a motion had been filed in the county court to vacate the judgment pursuant to New York State Criminal Procedure Law

["CPL"] 440.10(1)(g)(h). That motion was denied on May 13, 2013, and leave to appeal that decision was denied by a justice of the appellate division on August 28, 2013.

The Second Circuit affirmed the judgment of the district court in its entirety. The petition for rehearing was denied without any additional discussion.

Background

This case arose from allegations charged in an indictment that Petitioner had engaged in sexual conduct with a female child. The key prosecution evidence at trial was the testimony of the child, then about ten years of age, and of a nurse practitioner who was qualified as an expert and who gave opinions regarding sexual abuse based on her examination of the child.[1]

The defense failed to engage a medical expert. The sole issue raised in the present case (and as to which a certificate of appealability was granted by the court of appeals) relates to the ineffectiveness of defense counsel in failing to consult a medical expert. In connection with post-conviction proceedings in state court, in response to Petitioner's letter request for an explanation of why counsel did not hire a medical expert, the record reflects that he acknowledged in writing that he inexplicably thought the issue was one of identity and not whether there had been a sexual encounter.

[1] The specific testimony giving rise to the present petition is that of the nurse practitioner. She stated her opinion that in her examination of the child she observed an abnormality she believed was consistent with penetration from sexual abuse. On cross-examination she acknowledged that she could not rule out penetration from a different cause, that her opinion could be called speculation, and that she didn't "know what happened."

Notwithstanding, as will be detailed *infra*, the state court hearing the application for post-conviction relief found that Petitioner had not carried his burden of proof on the ineffectiveness claim, even though it denied an express request for an evidentiary hearing, *inter alia,* on the question on counsel's failure to consult an expert. In his federal habeas proceeding, Petitioner again sought a hearing to prove that his counsel had not consulted an expert. The issue before this Court is focused on the error of the district court (affirmed by the court of appeals) in concluding that it was without authority to conduct such a hearing.

State Court Post-Conviction Proceedings

During the pendency of the direct appeal in state court, Petitioner submitted a post-conviction motion pursuant to state law in which he sought relief based on, *inter alia,* his trial counsel's ineffectiveness by virtue of, as pertinent here, the failure to consult a medical expert. The motion included not only the express request for an evidentiary hearing, but also for other assistance such as the appointment of counsel and authorization of an investigator.

The portion of the state court's decision denying the post-conviction motion that is relevant here found that Petitioner's factual statements were not sworn [even though they were] and (as such) "do not support an argument that he did not receive the effective assistance of counsel in the criminal proceedings as that concept is applied in New York." The court concluded:

> Similarly, as the People have argued, in claims that counsel failed to provide effective assistance at trial, based on a failure to call an expert witness "it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's failure to [call such witness]" *People v. Rivera*, 71 NY2d 705, 709.
>
> Defendant's motion on these issue [sic] contains only conclusory, self-serving interpretation and arguments concerning the deficiencies he alleges, which at best, are properly considered on the appeal. Further, as previously noted, the defendant's application is not supported by any sworn allegations of fact, and are insufficient to raise a question of fact outside of the existing record.

(App. D, pages 5-6) As noted, the court made this flawed ruling without granting Petitioner the requested evidentiary hearing or any other means to demonstrate his counsel's ineffectiveness.

Petitioner filed his motion to vacate the judgment of conviction pursuant to New York Criminal Procedure Law section 440.10(1)(g)(h). In support of his claim, he submitted an (in fact, sworn) affidavit that included his exchange of correspondence with counsel. Petitioner asked counsel, in pertinent part:

> What tactical advantage did you provide for the defense[] case, by not hiring a medical expert witness to testify for the defens[e] on the physical evidence (or lack there of), especially after having the fore knowledge that the prosecutor intended on putting a medical expert witness on the stand for the case of the prosecution?

Counsel responded:

> The medical evidence was such that the issue was not whether the victim had had sex but the identity of the perpetrator. In other word [sic], not what had been done but who did it.

Petitioner described his unsuccessful efforts to obtain an affidavit from trial counsel responding to the allegations in the motion papers, and asked the court to issue an order compelling counsel to submit an affidavit (which it did not do).[2]

The county court denied the motion without ordering a hearing, or even compelling trial counsel to submit an affidavit. The court never specifically addressed the ineffective assistance argument based on counsel's failure to consult a medical expert. Instead, the court found his arguments were "unsupported by sworn facts" (again, despite being made in a sworn affidavit). The trial court stated that counsel's failure to effectively cross-examine the prosecution's expert was "more properly addressed on the appeal" (which was still pending) as it was "inherently contained in the record of the trial proceedings." This statement was in the nature of a *non-sequitur*: Petitioner's argument was that the cross-examination was compromised by counsel's failure to consult with an expert, which was a fact outside of the record, and which he had properly raised in his post-conviction motion, not on direct appeal.

[2] In his affidavit, Petitioner specifically requested "an order pursuant to CPL §§ 440.30(5), granting an evidentiary hearing on the ground that one is crucial to create the evidentiary record necessary for the Court to adequately, effectively and meaningfully determine my motion to vacate judgment." He also requested that he be assigned an attorney and/or investigator, pursuant to New York C.P.L. §§ 1101 and 1102, "on the ground that [he] can not afford such professional services and the witnesses needed to be located are extremely material to a proper determination of my motion to vacate judgment …" Additionally, he provided legal authority for his various arguments regarding his attorney's deficient performance, including argument that he suffered prejudice from his attorney's failure to consult an expert.

In his *pro se* brief submitted in support of the appeal, Petitioner again argued that trial counsel had rendered ineffective assistance by failing to "consult or call an expert witness to testify on behalf of the defense." The state court hearing his appeal, noting that Petitioner contended that he was denied the effective assistance of counsel, pointed him in the diametrically opposite direction to that of the court hearing his post-conviction motion: "Defendant's contentions regarding defense counsel's failure to conduct a proper investigation are based on information outside the record on appeal and must be raised by way of a motion pursuant to CPL 440.10 (*see People v. Russell*, 83 AD3d 1463, 1464, *lv denied* 17 NY3d 800)." Thus, the state appeals court found the issue to be outside the record (as it was) and therefore instructed that it had to be raised in a post conviction motion, contrary to the county court's sidestepping of the issue by saying it had to be addressed on the direct appeal. Petitioner was left in no-man's land.

District Court Habeas Proceeding

Petitioner filed a timely application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Therein, in Ground One, he raised the issue as to which the certificate of appealability was granted by the court of appeals, among others. The issue was also addressed at length in a memorandum of law supporting the application, in which an evidentiary hearing was again requested.

The district court filed a memorandum decision (App. B) denying the petition (without a hearing) on February 22, 2018. As pertinent to this appeal, the court ruled:

> Riley's ineffective assistance claims must fail, however, even under the more favorable New York standard. He first contends that trial counsel was ineffective for failing to call a medical expert to rebut the testimony of the medical personnel who examined the victim and were called by the prosecution at trial. However, the ultimate decision of whether to call witnesses to testify is well within counsel's full authority to manage the conduct of the [proceeding]. The decision of whether to call any witnesses on behalf of a defendant, and which witnesses to call or omit to call, is a tactical decision which ordinarily does not constitute incompetence as a basis for a claim of ineffective assistance of counsel. Claims that counsel was ineffective for failing to call certain witnesses are disfavored on habeas review because allegations of what a witness would have testified [to] are largely speculative. Indeed, Riley does not demonstrate here that a medical expert would have provided beneficial testimony or that the omission of such testimony deprived him of a fair trial. Notably, the record reflects that counsel skillfully cross-examined the nurse practitioner and forensic nurse examiner who had examined the victim, getting them to admit that were unable to conclusively link the victim's irregular hymen to sexual abuse and that their opinions were based on speculation. Riley fails to demonstrate that their testimony would have been further weakened if a medical expert had been called.

(App. B, pages 8-9) As can be seen, the district court failed to address the question that was the subject of the certificate of appealability granted by the court of appeals: whether counsel was ineffective for failing to *consult* a medical expert.

The district court also denied the request for an evidentiary hearing. In doing so, it ruled that Petitioner had not met the standard of 18 U.S.C. § 2254(e)(2). It also observed that Petitioner had not been precluded by the state courts "from developing a factual basis for his claim." (App. B, pages 15-16)

The Second Circuit's Summary Order

The court of appeals affirmed based on, as pertinent here, three rulings:

1. To the claim that counsel was ineffective because he failed to consult a medical expert, the court (referencing the correspondence between Petitioner and his counsel quoted *supra*, page 6) stated "[t]he record thus does not indicate whether trial counsel consulted with an expert before trial." (App. A, page 5)
2. The court stated that in any event "the medical studies that Riley relied on in his state court § 440.10 motion fail to substantiate his claim that this alleged failure caused him prejudice . . . [because they were] consistent with the conclusion offered by the [state's] medical expert at trial". (*Id.*)
3. The court, relying on *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011), affirmed the denial of an evidentiary hearing by saying that it was "to evaluate the reasonability of a state court's merits determinations under § 2254(d)(1) only on the record which was before the state court at the time of the merits determination and without regard to any information which is or could be gathered at a federal court evidentiary hearing." (App. A, page 6)

REASON FOR GRANTING THE WRIT

CERTIORARI IS REQUIRED TO CORRECT A SERIOUS AND UNSUPPORTABLY RESTRICTIVE MISINTERPRETATION OF SECTION 2254(E)(2) AND THIS COURT'S DECISION IN *CULLEN V. PINHOLSTER* AND WILL ALLOW THE COURT TO CLARIFY THE CIRCUMSTANCES UNDER WHICH A DISTRICT COURT MAY GRANT AN EVIDENTIARY HEARING IN A STATE HABEAS PROCEEDING

A. Legal Principles of Ineffectiveness of Counsel

This petition arises in the context of a Section 2254 claim based on ineffective assistance of counsel. A defendant's Sixth Amendment right to effective assistance of counsel is violated when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on an ineffectiveness claim, defendants must show that their attorney's performance fell "below an objective standard of reasonableness," and there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Thus, when a defendant challenges a conviction, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id*. at 695.

A defense attorney must conduct an adequate pretrial inquiry because the failure to do so "puts at risk both the defendant's right to an ample opportunity to meet the case of

the prosecution and the reliability of the adversarial testing process." *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (citations omitted). Where counsel are confronted with evidence beyond their area of expertise, and even more so when the government relies on witnesses treated as experts, reasonable trial preparation demands that counsel obtain expert advice. Indeed, failure to do so is demonstrative of ineffectiveness.

While this Court directs that courts considering ineffective assistance of counsel claims not second-guess defense counsel's trial tactics, and should indulge in the presumption that counsel's conduct falls within the wide range of reasonable professional assistance, *Strickland*, 466 U.S. at 689, the deference courts owe an attorney's trial strategy is not unlimited, but bears a direct relationship to the adequacy of the investigations underlying counsel's decisions:

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91; *accord Wiggins v. Smith*, 539 U.S. 510, 525-29 (2003) (counsel's limiting of the scope of investigation at an unreasonable stage not entitled to deference); *Williams v. Taylor*, 529 U.S. 362, 390 (2000) (counsels' failure to uncover and present evidence not justified by decision to focus on other issues).

To determine whether counsel exercised reasonable professional judgment, a court must assess whether the investigation supporting counsel's tactical decision was itself reasonable. *Wiggins*, 539 U.S. at 523. Thus, "in assessing counsel's investigation, [the court] must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Id*. (internal citations omitted). In addition, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id*. at 527.

B. Section 2254(e)(2) Jurisprudence

As pertinent, subsection (e)(2) of section 2254 limits the evidence a federal court may consider in a habeas review of a state court's adjudication where "the applicant has failed to develop the factual basis of a claim in State court proceedings" *unless* the claim is based on "a factual predicate that could not have been previously discovered through the exercise of due diligence." *A fortiori*, where an applicant either developed the claim in state court or could not have done so by the exercise of due diligence (or both), the subsection is inapposite.

This Court considered the application of the subsection in *Cullen v. Pinholster,* 563 U.S. 170 (2011). Although the holding of that case is that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the

claim on the merits," *id.* at 181, as pertinent here, the Court makes clear that "§ 2254(e)(2) bars a federal court from holding an evidentiary hearing, *unless* the applicant meets certain statutory requirements." *Cullen*, 563 U.S. at 184 n.4 (emphasis added).

This rule has been made abundantly clear by the Court:

> Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law. "Comity ... dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). . . . If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings. Yet comity is not served by saying a prisoner "has failed to develop the factual basis of a claim" where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2).

Williams v. Taylor, 529 U.S. 420, 437 (2000). Moreover, *Cullen* confirms this interpretation of the statute. *See Cullen*, 563 U.S. at 184 n. 5 (*Williams* "explains that § 2254(e)(2) should be interpreted in a way that does not preclude a state prisoner, who was diligent in state habeas court and who can satisfy § 2254(d), from receiving an evidentiary hearing"). *See also Cullen*, 563 U.S. at 213 n.5 (Sotomayor, J., dissenting) ("I assume that the majority does not intend to suggest that review is limited to the state-court record when a petitioner's inability to develop the facts supporting his claim was

the fault of the state court itself. *See generally* Tr. of Oral Arg. in *Bell v. Kelly*, O.T.2008, No. 07–1223)."

C. As a Result of Multiple Errors by the District Court and the Court of Appeals, This Court's Section 2254(e)(2) Jurisprudence Has Been Ignored, Misapplied and Misinterpreted, and a Grant of Certiorari Is Therefore Warranted to Correct These Errors and Align This Case with this Court's Precedent

Petitioner was prevented from developing the factual basis for his claim by the state court's failure to hold a requested evidentiary hearing as to whether counsel consulted a medical expert, the issue highlighted in the certificate of appealability granted by the court of appeals. Moreover, the state court did not even compel his trial attorney to submit an affidavit addressing the substance of his claims. No state court found that counsel had (or had not) consulted an expert, notwithstanding Petitioner's repeated efforts to have the record developed for a proper adjudication of this essential fact.

Despite the fact that Petitioner was diligent in the state courts in seeking to prove that his counsel had not consulted an expert, his efforts were thwarted by the inconsistent and erroneous rulings in the state courts and by a failure to provide him the due process to which he was entitled. That does not alter the fact, for Section 2255(e)(2) purposes, that he was diligent. As Justice Sotomayor noted, this Court's jurisprudence has not sanctioned a restriction on a federal evidentiary hearing "when a petitioner's inability to develop the facts supporting his claim was the fault of the state court itself."

The district court erred by ruling that it was without authority to hold an evidentiary hearing and was limited to the record before the state court in reaching its decision. Its conclusion followed from an analysis that was devoid of any recognition of the "duty to investigate" component of this Court's precedent under *Strickland, Kimmelman, Wiggins,* and *Williams,* as discussed in Section A, *supra.* As such, it was fundamentally in error in concluding that Petitioner was precluded from developing a record in federal court.

As identified at page 10, *supra,* the court of appeals committed two serious threshold errors. These led it to its third and ultimate error in deciding that Petitioner was not entitled to an evidentiary hearing at the federal level.

First, the court apparently interpreted the attorney's letter response to Petitioner as suggesting that he *may* have consulted with an expert even though he did not call one at trial. Such an interpretation is unreasonable in light of the plain language of the response which does not state that he consulted an expert at all. It is also unreasonable in context because, had counsel consulted an expert, it is inconceivable he would not have mentioned it as the source of his conclusion regarding the medical evidence. Further, at best, the court's interpretation suggests an unresolved question of fact that would require a hearing in federal court once Petitioner's diligence was established.

Second, the court creates a false equivalency between Petitioner's amateur medical research and the knowledge of an expert that begs the question of whether

counsel was ineffective in not engaging an expert. This circular reasoning is inherently flawed.

These errors were preliminary, however, to the error the court committed in reaching its holding on the issue now before this Court: the court of appeals completely ignored the impact of § 2254(e)(2) and the holdings of *Cullen* and *Williams*. Thus, the court of appeals interpreted the question of when a federal hearing was precluded by ignoring the statutory language commencing with the word "unless," thereby eviscerating the intent of subsection (e)(2)(A)(ii). This alone justifies a grant of certiorari in this case.

In sum, Petitioner was (a) precluded in state court from establishing that his counsel failed to consult an expert, (b) diligent in seeking to establish that fact, and (c) erroneously precluded from proving this critical fact in federal court. Consequently, multiple errors that are in material conflict with this Court's precedent were committed at every level of the state and federal courts considering this matter and as a consequence Petitioner was deprived of his constitutional right to effective assistance of counsel under the Sixth Amendment.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Second Circuit.

Respectfully submitted,

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