

No. _____

In the
Supreme Court of the United States

Lemar Gant,

Petitioner,

v.

Brian Williams, Sr., et al.

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether the Ninth Circuit erroneously concluded Gant could not establish ineffective assistance of counsel where counsel failed to conduct an independent investigation of a defense witness, which would have shown the witness was not being truthful, and that witness's untruthful testimony caused severe prejudice to Gant?

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

LIST OF RELATED PROCEEDINGS

State v. Gant, C-11-278233-1 (8JDC Nev.) (Judgment of Conviction, entered October 12, 2012)

State v. Gant, No. 62102 (Nev. Sup. Ct.) (Order of Affirmance, issued September, 19, 2013)

State v. Gant, No. 67855 (Nev. Ct. App.) (Order of Affirmance, issued November 19, 2015).

Gant v. Williams, No. 2:16-cv-00528-JAD-NJK (Dist. Nev.) (order denying 28 U.S.C. § 2254 petition)

Gant v. Williams, No. 19-15265 (9th Cir. May 11, 2020) (affirming denial of petition)

TABLE OF CONTENTS

Question Presented.....	i
List of Parties.....	ii
List of Related Proceedings	ii
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved.....	1
Statement of the Case	2
Reasons for Granting the Petition	5
1. Under § 2254(d)(1), the Ninth Circuit was only allowed to assess the reasonableness of the decision based on the reasons the state court actually used	7
2. There is a Core Constitutional Duty to Investigate that is Independent of the Defendant's Representations, Omissions, and Even Wishes.	8
Conclusion.....	12

TABLE OF AUTHORITIES

Federal Cases

<i>Brown v. Myers</i> , 137 F.3d 1154 (9th Cir. 1998)	6, 7
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	8
<i>Hinton v. Alabama</i> , 571 U.S. 263 (2014)	5, 8
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986)	5, 8
<i>Silva v. Woodford</i> , 279 F.3d 825 (9th Cir. 2002)	9
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	5, 8
<i>Summerlin v. Stewart</i> , 267 F.3d 926 (9th Cir. 2001)	9
<i>United States v. Howell</i> , 231 F.3d 615 (9th Cir. 2000)	9, 10
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	5, 8

Federal Statutes

28 U.S.C. § 2254	1
28 U.S.C. § 1257	1

PETITION FOR WRIT OF CERTIORARI

Petitioner Lemar Gant requests this Court grant his petition for a writ of certiorari issue to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit. *See Appendix (“App.”) 2.*

OPINIONS BELOW

The Ninth Circuit memorandum, affirming the denial of Gant’s 28 U.S.C. § 2254 petition is unreported and appears at App. 2.

JURISDICTION

The United States District Court for the District of Nevada had original jurisdiction over this case pursuant to 28 U.S.C. § 2254. The district court denied the petition but granted a certificate of appealability. App 20-21. The Ninth Circuit’s memorandum affirming the denial of the petition was issued on May 11, 2020. *See App. 2.* This Court has statutory jurisdiction under 28 U.S.C. § 1257(a) because, by order issued March 19, 2020, this Court extended the deadline for filing petitions to 150 days from the lower court decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Under 28 U.S.C. 2254(d)(1), a petitioner cannot obtain relief on a claim in a 28 U.S.C. § 2254 petition unless the petitioner shows, for any claim adjudicated on the merits in state court, that the state court’s adjudication “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.”

The Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend VI.

STATEMENT OF THE CASE

This case involves a firearm found by law enforcement in the engine-block area of a car lawfully borrowed and driven by Lemar Gant. Gant denied ownership of the firearm during arrest. There were two other passengers in the car one of which, Jamar Jones, had a felony record. DNA evidence tied Gant to the firearm but could be explained by the fact the firearm and holster were wrapped in a bandana that could have caused a profile mixture to transfer to the firearm.

The flashpoint of the trial, and the issue presented herein, involved defense witness Matthew Scott Merry. Merry testified he surreptitiously grabbed Gant’s bandana out of the backseat of a car, wrapped up his recently purchased gun, and hid it in the engine block. EOR 156-58, 163-64.¹

Unfortunately, Merry was in custody on the date in question. The prosecutor easily rebutted Merry’s testimony with a witness from the jail establishing that Merry’s testimony could not be true. EOR 178-79.

This was not a surprise rebuttal witness. Just two days after Gant filed his notice of witnesses, the prosecutor served notice the custodian of the jail records could

¹ “EOR” citations are to the Excerpts of Records filed in the Ninth Circuit. *See Gant v. Williams*, No. 19-15265, Entry No. 17.

be called to testify. *Compare* EOR 405 (Gant's witness notice, dated June 26, 2012), *with* EOR 409-11 (Supplemental Notice, dated June 28, 2012).

Carl Arnold, retained defense counsel for Gant, testified at an evidentiary hearing on Gant's ineffective assistance of counsel claims. *See* EOR 415-64 (counsel's testimony). Arnold claimed he did not receive the supplemental witness notice. *See* EOR 427-28. If he had, it would have "went off in my mind, ding, ding, ding, ding, what's going on with this witness." EOR 429.

Arnold admitted he had the ability to run a criminal record check on witnesses and that he had learned his lesson from the Gant trial and now did it as a routine matter. *See* EOR 424-25 ("I always think of Mr. Gant that we should've done that").

Arnold, and in fact the trial court, agreed that submitting Merry's perjured testimony was brutally damaging to Gant's defense. *See* EOR 434-37; *accord* EOR 478 (trial court agreeing "absolutely" that Gant's presentation of this witness was prejudicial, adding that it was "awful").

Given the patent prejudicial impact the only question was whether counsel was deficient in failing to conduct a records check which would have revealed Merry's custodial status thereby establishing his proposed testimony as false. Arnold stated that he told Gant about Merry's proposed testimony to which Gant replied, "I don't know anything about that, so you got to do what you think is best." *See* EOR 422. Gant never told Arnold the testimony was untrue. Gant, however, did not recall being apprised of the substance of Merry's testimony. *See* EOR 467-68.

The Nevada Court of Appeals affirmed the denial of the petition, upholding the lower court's conclusion the performance was not deficient, despite the investigative trigger of the supplemental witness notice, based on the conclusion that Gant had an onus to tell his attorney Merry was not with him the day before or of his arrest. App. 82. The court concluded, "Gant knew his testimony was false but did not disclose this fact to counsel." *Id.*

In an unpublished memorandum, the Ninth Circuit concluded the state court's decision finding counsel 's performance was not deficient was not unreasonable. App. 02-03. The Ninth Circuit concluded that it was "conceivable, if not entirely reasonable, [] for the state court to conclude that Gant's nonchalant response to the expected testimony gave counsel no reason to doubt its veracity." App. 03. And while the testimony's "detrimental" effect on the defense resulted in counsel changing his vetting process, the court said that "the harsh light of hindsight" cannot alter its analysis. *Id.* (internal quotation omitted). The court also concluded, as a separate ineffective claim, that it was not ineffective for counsel to take steps to ensure he was receiving the State's filings in this case. App. 04.

One judge wrote separately, concurring in the result. This judge concluded that counsel's performance was deficient, but that there was no prejudice. App. 5.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit erroneously concluded Gant’s could not establish ineffective assistance of counsel where counsel failed to conduct an independent investigation of a defense witness, which would have shown the witness was not being truthful, and that witness’s untruthful testimony caused severe prejudice to Gant

A lawyer has a “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *accord Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003) (holding counsel’s failure to conduct an adequate investigation, and the prejudice resulting therefrom, violated the standard set forth in *Strickland*).

The Supreme Court has repeatedly made plain that counsel has the “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691; *accord Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *see also Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (“strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation”).

It is the legal propriety of that ruling that is central to this appeal—to what extent is a defense attorney’s duty to investigate reduced by a defendant’s failure to communicate concerns with the truth of that witness’ testimony?

Gant’s lawyer failed to investigate Merry to determine whether his story was true. Had he done so, it would have revealed that it was not.

This is not a case where counsel's investigation was incomplete. Counsel's investigation regarding Mr. Merry was nonexistent. It cannot be a sound strategic or tactical decision to proceed to trial with a witness that you know so little about that his testimony may blow up in your client's face.

And this is exactly what happened.

Here, it is doubtful that any "reasonable professional judgment" could have supported trial counsel Arnold's failure to investigate his witness. *See, e.g., Brown v. Myers*, 137 F.3d 1154, 1157 (9th Cir. 1998).

There are two nuances to this case. The first is that trial counsel had notice there was a problem with this witness because of the DA's supplemental witness notice. *See* EOR 407-11. This would appear to assist Gant but this aspect of the case was largely ignored by the Nevada Court of Appeals.

As stated by post-conviction counsel, Arnold's excuse of non-receipt holds little water. Defense attorneys are trained, at least in Clark County, Nevada, to closely examine prosecutor witness lists in order to determine the importance of each witness and how to counter that testimony. *See* EOR 481-82. "And the very last thing you do before going to trial is you go on Odyssey [the Eight Judicial District's electronic filing and record system] and make sure you have seen every witness list." EOR 482.

It was below prevailing professional standards for Arnold to not ensure he was receiving timely filings of crucial case developments right before trial. The Ninth Circuit's conclusion to the contrary was patently absurd. No reasonable attorney, practicing in any court in this country, does not take all reasonable steps to ensure

he is receiving the other party's filings. It is both ineffective and unethical to fail to take those basic steps. It is incomprehensible a court would condone conduct like this from an attorney.

The Nevada Court of Appeals never dealt with this question. *See* App. 82. This is a curious omission as the entire basis for that court's decision is the idea that counsel had no onus to investigate Merry because his client never alerted him to the questionable nature of his proposed testimony. *See Id.* This reasoning was fundamentally flawed. Trial counsel did have that onus because he was directly alerted to the witness' problem by the prosecutor. Failing to ensure receipt of court filings right before trial is constitutionally deficient performance; as this case amply demonstrates.

But putting that aside, the central issue in this case involves whether Arnold was excused from investigating Merry because Gant failed to tell him his story must be false. The Ninth Circuit's reasoning here was not justified procedurally and was also wrong on the merits.

- 1. Under § 2254(d)(1), the Ninth Circuit was only allowed to assess the reasonableness of the decision based on the reasons the state court actually used**

The Ninth Circuit concluded that the state court decision was "conceivabl[y]" reasonable because Gant gave a nonchalant answer when confronted with Merry's potential testimony, so the attorney was not put on notice of an issue. App. 03.

This was improper. Under § 2254(d)(1), the reasonableness of a state court decision, which contains an analysis on the merits of a claim, is assessed based on the

reasons the state court actually gave. *See, e.g., Harrington v. Richter*, 562 U.S. 86, 102 (2011). A federal court is not entitled to “conceive” of a reason to support the state court’s decision.

Here, the state court was explicit. It held that the burden was on Gant to specifically inform his attorney the testimony was false. The Ninth Circuit did not assess the reasonableness of the actual reason given. That was improper. This was a critical error here because, as shown below, there is no way to justify this as reasonable.

2. There is a Core Constitutional Duty to Investigate that is Independent of the Defendant’s Representations, Omissions, and Even Wishes.

As stated before, this Court has repeatedly made plain that counsel has the “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691; *accord Kimmelman*, 477 U.S. at 384; *Wiggins*, 539 U.S. at 521; *see also Hinton*, 571 U.S. at 274 (“strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation”).

This duty to investigate is completely independent of whether the client tells the attorney to conduct the investigation. Strategic decisions are for the attorney to make. And a strategic decision on an investigation must be an independent assessment made by the attorney based on what is reasonable.

The question of whether defense counsel has a duty to investigate despite a client's lack of assistance comes up in capital sentencing mitigation. Indeed, the Ninth Circuit in other cases repeatedly discussed how it is the attorney's responsibility alone to make these investigative decisions. For instance, *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002), concerned a mitigation case that was truncated because Mr. Silva did not desire a mitigation investigation. *See Silva*, 279 F.3d at 838.

It is true that “the competence of a lawyer's tactical and strategic decision . . . is entitled to an additional measure of deference if he acts in conformity with the client's wishes.” *Summerlin v. Stewart*, 267 F.3d 926, 948 (9th Cir. 2001). Counsel's “duty to investigate mitigating evidence” however “is neither entirely removed nor substantially alleviated by his client's direction not to call particular witnesses to the stand.” *Silva*, 279 F.3d at 838.

United States v. Howell, 231 F.3d 615 (9th Cir. 2000), provides further support for the notion that a minimal duty to investigate exists regardless of the defendant's actions.

In *Howell*, the defendant made an opening statement based on police reports which stated the illegal drug proceeds were taken from the codefendant. In reality, the proceeds were found on Mr. Howell. *See* 231 F.3d at 623-24. The prosecuting Assistant United States Attorney discovered the reports' mistakes but did not disclose it before trial. *See id.* at 623. When the true evidence came out at trial Mr. Howell unsuccessfully moved for mistrial. *See id.* at 624.

On appeal, Howell claimed the prosecutor's failure to reveal the errors in the reports violated his due process rights. The government countered in various ways but of most interest to this appeal is the argument that, because Howell knew that the money was actually recovered from him, the government was under no obligation to disclose the information. *See id.* at 624-25.

"The government's contention that it had no duty to disclose the mistake to the defense because Howell knew the truth and could have informed his counsel is wrong." *Id.* at 625. The availability of particular statements through the defendant himself does not negate the government's duty to disclose. *Id.* (citing *United States v. McElroy*, 697 F.2d 459, 465 (2d Cir. 1982)).² This is so because defendants often mistrust their counsel. Even defendants who cooperate with counsel cannot always remember all of the relevant facts or realize the legal importance of certain occurrences. *See id.* Consequently, counsel is entitled to plan his trial strategy on the basis of full disclosure by the government regardless of the defendant's knowledge or memory of the disclosed statements. *Id.*

Cases like *Summerlin* and *Howell* are consistent with this Court's prior precedent and demonstrate that there is level of constitutional obligation that is independent of the actor or defendant. In the situation here, an attorney clearly has an obligation to investigate a defense witness to determine whether the witness's

² In *McElroy*, the court held that the government could not excuse its failure to turn over materials by relying on the fact a defendant could provide the information to avoid discovery obligations under Rule 16.

testimony is true. It would be one thing if it was the defendant who was insisting on the testimony. But here it was the attorney's decision to do it without guidance from the defendant. That was the attorney's strategic decision to make. It is not excused simply because the defendant didn't specifically tell him to question the truthfulness of the witness's testimony.

And contrary to the Ninth's reasoning, Gant's statement was, at best, ambivalent. Rather than agree with the proposed testimony, Gant essentially stated he didn't know anything about it. It can be interpreted as potentially a failure of his own memory or at least a request for the attorney to decide whether it was in Gant's interest to present the testimony. At the very least, trial counsel could have easily clarified what Gant meant by that statement. He did not. But even beyond that, when a client does not provide sufficient guidance to an attorney, it does not alleviate the attorney's obligation to determine whether presenting certain evidence is beneficial or harmful to the client.

It is not a large onus to put on defense counsel. As Gant's counsel testified in this case, he had the ability to run Merry's criminal record. That was all he needed to do here. He just didn't do it. *See* EOR 425. He emphasized he will never make that mistake again. Of course he won't—because he learned that he should not have made that outcome-determinative mistake here. He acted unreasonably when he failed to do that for Gant. And that mistake led to incontrovertibly "devastating" evidence being admitted at trial. Gant met both prongs of the *Strickland* analysis. The state

court's reason for rejecting the claim were unreasonable. The Ninth Circuit clearly erred in holding to the contrary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated October 5, 2020

Respectfully submitted,

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