

20-6835

NO.: _____

Supreme Court, U.S.

FILED

DEC 16 2020

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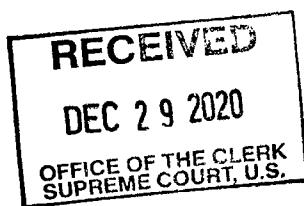
IN THE
SUPREME COURT OF THE UNITED STATES

OTHA S. HAMILTON- Petitioner;

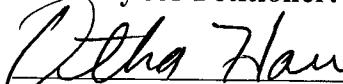
v.

DENNIS REAGLE- Respondent;

PETITION FOR WRIT OF CERTIORARI



Attorney for Petitioner:



Otha S. Hamilton, Petitioner / *pro se*
DOC# 217667
Pendleton Correctional Facility
4490 West Reformatory Road
Pendleton, IN 46064-9001

ORIGINAL

QUESTIONS PRESENTED

Mr. Hamilton alleged that his trial counsel was ineffective for failing to investigate his medical procedure for priapism. Mr. Hamilton was convicted upon uncorroborated testimony that he molested his step granddaughter. The omitted medical evidence, along with a professional expert witness would have refuted the State's witness's testimony, as incredible, because a physical impossibility exists. In finding no substantial showing of the denial of a constitutional right, the Seventh Circuit relied upon the District court's order of the State's court statement of the facts on appeal, but significantly misstated even that slanted version of the fact. The case thus presents the following questions.

1. Whether the Seventh Circuit erred in finding no substantial showing of the denial of a constitutional right, when trial counsel failed to investigate the only evidence that could have changed the outcome of the trial, which is the ramification of post ischemic priapism surgery.
2. Whether the Seventh Circuit erred in finding no substantial showing of the denial of a constitutional right, when there was insufficient evidence to convict, because at least one element could not have been proved based upon incredible testimony, which is an erect penis that could point straight, the State's witness's could not have seen, felt, or experienced what they testified to, which is an essential element necessary for conviction.

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: N/A

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

The Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The Order of the United States court of appeals appears at Appendix B to the petition and is-

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

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

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

For cases from **state courts**:

The Order of the highest state court to review the merits appears at Appendix D to the petition and is-

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

The opinion of the Indiana Court of Appeals appears at Appendix F to the petition and is-

reported at *Hamilton v. State*, 95 N.E.2d. 206 (Ind. Ct. App 2017); or,
 has been designated for publication but is not yet reporter; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States court of appeals decided my case was August 19, 2020. A copy of that decision appears at Appendix B.

- 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, 2020, 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 _____, 20_____, on _____, 20_____, in Application No. ___, and a copy of the order granting said extension appears at Appendix ____.

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 April 12, 2018. A copy of that decision appears at Appendix D.

- No petition for rehearing was timely filed in my case.
- A timely petition for rehearing was denied on the following date: February 2, 2018, and a copy of the order denying rehearing appears at Appendix E.
- An extension of time to file the petition for a writ of certiorari was granted to and including _____, 20_____, on _____, 20_____, in Application No. ___, and a copy of the order granting said extension appears at Appendix ____.

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

CONSTITUTIONAL PROVISIONS AND STATUTES

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

U.S CONST., AMEND. VI

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.

U.S. CONST., AMEND. XIV

Section One. 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 in 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 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 court 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) circumstances 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 the 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 proceedings.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to a 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 relies 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 offense.

(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 that 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 reason is unable to produce such part of the record, 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 record 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 Substance 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 306A 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

Mr. Hamilton was convicted of a single count of class A Child Molest. According to T.M., Mr. Hamilton's step granddaughter, she spent the night with the Hamilton's (Otha and Juanita), on a school night, when she had a dental appointment scheduled for the following day. She played pool with Mr. Hamilton; she said he gave her beer to drink and a cigarette to smoke. Mr. Hamilton then asked her to go outside with him to his garage, where he asked her to perform oral sex on him, and that if she did not do it, he would hurt her grandmother, which is Mr. Hamilton's wife. T.M stated that Mr. Hamilton forced her to her knees and with both hands on her head; he pushed her head down onto his penis. T.M. said that Mr. Hamilton's penis was pointing straight, describing an erection. Thus Mr. Hamilton was convicted, in large part, on T.M.'s uncorroborated testimony.

Mr. Hamilton's conviction was affirmed on direct appeal, but Justice Brown dissented. (Memorandum Decision 2011) App. J. The Indiana Supreme Court affirmed Mr. Hamilton's conviction, but revised his sentence downward from 50 years to 35 years executed. *Hamilton v. State*, 955 N.E. 2d. 723 (Ind. 2011). App. I. State post-conviction proceedings were filed; relief was denied in the motion court, App. G, and on appeal, App. F. The Indiana Supreme Court denied transfer. App. D. Mr. Hamilton filed a habeas corpus action under 28 U.S.C. § 2254. The District Court denied both Mr. Hamilton's Petition under 28 U.S.C. § 2254, and application for a certificate of appealability. App. C. The Seventh Circuit affirmed the district court's opinion, finding no substantial showing of the denial of a constitutional right. Accordingly, Mr. Hamilton's request for a certificate of appealability, and motion to proceed in forma paupers was also denied. App. B.

In T.M.'s initial interview with I.M.P.D. detective Julie A. Dutrieux, T.M. stated that Mr. Hamilton's [penis] was pointed straight as he pushed her head down on his [penis]. App. K, (Affidavit for Probable Cause). Prior to trial at Mr. Hamilton's sole interview with his trial counsel, Mr. Hamilton informed counsel that he had surgery for ischemic priapism and that his penis could not point straight as T.M. stated in her initial interview. Trial counsel did not investigate Mr. Hamilton's medical condition, but stipulated with the prosecutor to use the State's witness (Juanita Hamilton), to confirm that Mr. Hamilton had surgery for priapism.

Juanita Hamilton testified that Mr. Hamilton did in fact have surgery, but her testimony also included acts that were physically impossible, in that they are inconsistent with post ischemic priapism surgery. T.M. testified at trial that, while she could not see Mr. Hamilton's penis, that it felt like it was sticking straight out. T.M.'s testimony is also inconsistent with the specific characteristics of post ischemic priapism surgery. The State lacked any forensic evidence from the scene where T.M. alleged the incident occurred. T.M. testified that Mr. Hamilton's semen was on a table and over the floor, but a blue light used to see any trace of fluids did not show anything.

At Mr. Hamilton's post-conviction hearing, trial counsel testified that, while he did not do any pre trial investigation, he did have an obligation to inform the State of Mr. Hamilton's defense concerning his surgery. App. H. However, Fed. Rule 16 do not allow the prosecutor to discover statements made to an attorney by his client. Further, trial counsel stated that Juanita Hamilton, the State's witness, could testify to what Mr. Hamilton's medical evidence would have shown, as if she was an expert witness, but that was impossible, and never happened at trial. Id.

Mr. Hamilton contends that not only was he denied effective assistance of counsel for counsel's failure to investigate, but also that the evidence produced by the state was insufficient

for his conviction. The testimony of the State's witnesses is incredible in regards to surgery that Mr. Hamilton had prior to knowing Juanita. The physical impossibilities that were testified to could not have proved each and every element of the offense charged, because one of the elements that needed to be proven is that Hamilton actually put his penis in T.M's mouth. The fact that she stated that he did is one thing, however, her testimony of what she actually encountered excludes Mr. Hamilton, because it was physically impossible do to surgery for ischemic priapism, that is, Mr. Hamilton's penis is not capable of an erection that could make his penis elevate in any direction. See Petitioner's exhibit A. App. N. (Diagram of the male sex organ showing the two main muscles that need to function for an erection, which no longer operates after surgery for ischemic priapism).

The post-conviction court denied relief claiming that trial counsel's, performance was not deficient for using his reasonable professional judgment in deciding that obtaining medical evidence was unnecessary when Mr. Hamilton's wife, the State's witness, was going to testify to the same information which the medical evidence would have provided. Juanita Hamilton was not a professional expert witness, in fact, at trial she testified that she did not know what priapism was, but she knew that Mr. Hamilton had surgery on his penis. Thus the court stated that there is no showing of a reasonable probability of a more favorable outcome had trial counsel conducted a more extensive investigation or obtain medical evidence- no showing of prejudice. This ruling was unreasonable based on the evidence presented to the court. The Indiana Court of Appeals affirmed. Holding that Mr. Hamilton failed to submit medical evidence to support what an investigation might have uncovered, and that there is no evidence that such evidence exist. It largely ignored Mr. Hamilton's evidence that the omitted investigation and professional expert testimony would have changed the outcome of his trial.

Reviewing the denial of habeas corpus relief by the District Court, the Seventh Circuit Court of Appeals found no substantial showing of the denial of a constitutional right, citing 28 U.S. C. § 2253(c)(2). In so holding, the Court said, “We have reviewed the final order of the district court and the record on appeal...” To determine the facts of the case for the purpose of making its determination, the Seventh Circuit undermined clearly established case law, in its review of the evidence presented. Such cases include, *Strickland v. Washington*, 466 U.S. 668 (1984) (Constitutional right to a reasonable investigation); *United States. v. Dennis*, 115 F. 3d 524, 535 (7th Cir. 1997) (Incredible testimony); *United States v. Hayes*, 236 F. 3d 891, 896 (7th Cir. 2001) (The exclusion to uncorroborated testimony for conviction); *Narcisse v. United States of America*, No. 97-0267 section: E1 (U.S. Dist. 1998, Lexis 7408) (ramification of post ischemic priapism surgery), which all supports the facts in this case. This and other evidence presented by Mr. Hamilton demonstrates the breakdown of the adversarial process described in *Strickland*, and the unreasonableness of the holding of the Seventh Circuit Court of Appeals.

REASON FOR GRANTING THE WRIT

I. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS WAS CONTRARY TO, AND INVOLVES AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THIS COURT IN *STRICKLAND*, THUS NEEDING THIS COURT'S ATTENTION.

The Seventh Circuit Court of Appeals decision, after review of the district court's opinion, and record on appeal is unreasonable for the following reasons. The Seventh Circuit ruled that it found no substantial showing of the denial of a constitutional right, affirming the District Court's opinion that Mr., Hamilton failed to present any exculpatory evidence that trial counsel would have uncovered with further investigation, or medical information different from his wife's first-hand descriptions. The District Court of Southern Indiana and the Seventh Circuit Court of Appeals disregarded this evidence. This Court requires, in making an analysis under *Strickland*, that the reviewing court considers all of the evidence in the record, both that which was admitted at the trial and that which is developed at the post-conviction stage. *Strickland v. Washington*, 466 U.S. 668,687, 688 (1984). *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). Under this analysis, it is inappropriate to consider the evidence in light of the verdict. It is clear that the Seventh Circuit Court of Appeals disregarded this principle, in that it only considered the District Court's final order and the record on appeal. With the limited review of evidence, the Seventh Circuit Court of Appeals could not have considered the evidence presented to the District Court in light of Mr. Hamilton's post ischemic priapism surgery issue, which is the thrust of his argument.

The District Court's determination that the evidence at trial was sufficient is not reasonable, and should not have been affirmed by the Seventh Circuit. In reasoning that the testimony of Mr. Hamilton's wife was consistent with T.M.'s testimony that Mr. Hamilton's penis was "pointing straight" shows this evidence was never considered in light of all available evidence, nor was this evidence ever addressed by either court. The omitted evidence that refutes both Juanita Hamilton and T.M.'s testimony was never investigated by trial counsel, that being what condition surgery for ischemic priapism leaves a person in. Mr. Hamilton has made the courts aware of the evidence in his brief. If the Seventh Circuit disregarded this evidence, it was unreasonable, but if it was considered, its ruling that it found no substantial showing of a denial of a constitutional right, is clearly at odds with the evidence presented in light of all available evidence, and clearly established Federal law established by this Court. It is established that courts and juries rely on medical evidence as triers of fact. Trial counsel failure to investigate and present Mr. Hamilton's medical evidence invites arbitrariness and error by prevented him from offering contrary medical evidence, and from explaining the inadequacies of the State's examinations. See *Panetti v. Quaterman*, 551 U.S. 930, 949 (2007) (Lack of medical evidence). Without this omitted medical evidence being presented to a jury for consideration Mr. Hamilton will never be afforded the effective assistance of counsel this Court deems necessary for adversarial testing. *Strickland v. Washington*, at 685. (Citing *Adams v. United States ex rel; McCann*, 317 U.S. 269, 275, 276 (1942); see *Powell v. Alabama*, at 68-69).

These factual issues do not require the attention of this Court. What does merit review is the emerging practice of the District Court of Southern Indiana and Seventh Circuit court of Appeals of ignoring evidence in light of all available evidence while performing its analysis of the issues

presented. This was precisely the type of review that this Court condemned in *Williams v. Taylor*, 529 U.S. 362, 397, 398 (2000).

[T]he State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation. [Citation omitted]. This error is apparent in its consideration of the additional mitigation evidence developed in the post-conviction proceedings...

[T]he state court failed even to mention the sole argument in mitigation that trial counsel did advance-Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability...

Because the Seventh Circuit Court of Appeals has truncated the scope of *Strickland v. Washington*, 466 U.S. 668, 687, 688 (1984) analysis review, this Court must grant certiorari.

II. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH OTHER CIRCUITS

In the closely analogous case of *United States v. Garner*, 507 F. 3d 399, 407 (6th Cir. 2001), the court confronted a situation where counsel pursued a continuance to investigate cell phone records, unlike in Mr. Hamilton's case where counsel failed to pursue his medical records. In a sensitive case where a child is involved, the jury will not accept any evidence short of factual evidence. In *United States v. Garner*, defense counsel did not have timely access to the cell phone records that may well have impeached the testimony and credibility of the victim's girlfriend and cast doubt on her identification of defendant as a co-hijacker... The cell phone records provided strong evidence to support Mr. Garner's theory that he had been framed. The government failed to produce this evidence in a timely manner. In contrast, trial counsel for Mr. Hamilton did not pursue the necessary right to investigate and present factual evidence that would have provided strong support of his claim that T.M.'s testimony that his penis was "pointed straight" and Juanita Hamilton's testimony that if Mr. Hamilton was sitting in a chair that he could have an erection that "pointed straight" was a physical impossibility. This omitted evidence with expert testimony would have had a major impact on the State's case. Trial counsel was aware that Mr. Hamilton had surgery for ischemic priapism, and that Juanita Hamilton would testify to that fact. He did not question her prior to trial to know what her testimony would be, did not do any investigation or research to find out what the ramifications of ischemic priapism surgery are, so that he could have effectively cross examined the State's witness's. Thus, trial counsel relied only on the State's one-sided investigation and its witness's, all of which were contrary to Mr. Hamilton. The Seventh Circuit affirmed this to be a strategic decision.

In showing the reasonableness of an investigation when records are involved, the Sixth Circuit Court of Appeals reasoned that a continuance would not have been burdensome on the government or the trial court while it would have provided the defendant with an opportunity to prepare an adequate defense against the government entire case against him-the arguable suspect testimony of Smith and Melton. The cell phone records could have been reviewed and an important defense theory possibly bolstered had a short continuance been granted. *Id.* at 409.

Similar in Mr. Hamilton's case, where he had only been incarcerated under four months before his trial commenced, it would not have been unreasonable for trial counsel to seek an continuance to investigate his client's medical evidence to bolster the trial defense. The medical evidence was the only plausible defense available for Mr. Hamilton, and it would have refuted the State's witness's testimony, as it was incredible. There was no reasonable reason for trial counsel not to investigate Mr. Hamilton's surgical procedure. Further, it was unreasonable for the Seventh Circuit Court of Appeals to find no substantial showing of a denial of a constitutional right.

In final, the *Strickland* court reasoned that in every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to provide just results. *Id.* at 696. The reasons stated above illustrate the fact that the Seventh Circuit Court of Appeals is out of sync with this Honorable Court, and other circuits in its analysis of *Strickland v. Washington*, 668, 687, 688 (1984). Certiorari should be GRANTED to correct this error.

CONCLUSION

The petition for a writ of certiorari should be granted to review the judgment and order of the Seventh Circuit Court of Appeals.

Executed on: December 14, 2020,

Respectfully submitted,



Otha S. Hamilton
Petitioner / *pro se*