

APR 01 2021

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No. 20-6835

**IN THE
SUPREME COURT OF THE UNITED STATES**

OTHA S. HAMILTON,
Petitioner,

v.

DENNIS REAGLE,
Respondent,

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT**

PETITION FOR REHEARING

OTHA S. HAMILTON
Petitioner / *pro se*
DOC # 217667
Pendleton Correctional Facility
4490 W. Reformatory Road
Pendleton, Indiana. 46064-9001

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PETITION FOR REHEARING AND SUGGESTIONS IN SUPPORT

COMES NOW petitioner, Otha S. Hamilton, *Pro se*, praying, and respectfully requests this court to grant rehearing pursuant to Rule 44, and thereafter, grant him a Writ of Certiorari to review the opinion of the Seventh Circuit Court of Appeals. In Support of Petition, Mr. Hamilton states the following:

STATEMENT OF FACTS

Eleven years ago, Mr. Hamilton was a service technician and small business owner, serving his community in the heating and cooling (HVAC) industry for residential and small businesses. He was a strong provider for his family, wife, children, grandchildren, lodge, and friends. His step- granddaughter's allegation of child molest greatly set back his effort as a free provider. Four days prior to trial in his initial interview, Mr. Hamilton was visited by his trial attorney, Benjamin Jaffe, who informed him that trial would be starting the following week. Mr. Hamilton informed counsel that he had read the affidavit and noticed that his step-granddaughter had made an allegation that could not have been true, or factual, and that he would be able to refute that allegation if counsel would help him obtain his medical records as evidence. This was vital, because the State's witness in chief, testified to what she had encountered, which was an erect penis. Mr. Hamilton is not capable of having an erection. Trial counsel stated that he would return the next day, but failed to do so. Four days later trial commenced without any investigations into Mr. Hamilton's medical evidence, or his inability to achieve an erection. The state's witnesses testified that Mr. Hamilton's penis was pointing straight, which is impossible

because of a surgical procedure for ischemic priapism that Mr. Hamilton had prior to knowing the witnesses.

Priapism is a condition in which a penis remains erect for hours in the absence of stimulation or after stimulation have ended. There are three types: ischemic (low to no-flow), non-ischemic (high-flow), and recurrent ischemic (intermittent). Because ischemic priapism, which is most severe and requires surgery, it causes the blood to remain in the penis for unusually long periods of time, the blood becomes deprived of oxygen, causing damage to the penile tissue in which the results ends with permanent impotence. See *Wilson v. Groze*, 800 F. Supp. 2d 949 (U.S. Dist. Lexis 84337, 2011) (Surgery for priapism leading to impotence, also see foot note 1 describing priapism).

The penis contains three columns of erectile tissue, and engorgement of this erectile tissue with blood causes the penis to enlarge and become firm, a process called erection. Two of the erectile columns form the dorsum and sides of the penis and are called the corpora cavernosa. The third columns, the corpus spongiosum, form the ventral portion of the penis and it expands to form a cap, the glans penis, over the distal end of the penis. The corpora cavernosa which is the portion of the penis that fills with blood and is responsible for erection becomes scarred after surgery leading to impotence. See *Narcisse v. U.S.A.*, No.97-0267 section: E1 (U.S. Dist 1998, Lexis 7408) (Scarring of the corpora cavernosa tissue after surgery leading to impotency).

Trial counsel refused to investigate the only plausible defense that would have refuted the State's evidence that was alleged in identifying Mr. Hamilton as the assailter of his step-granddaughter. A trial was held and Mr. Hamilton was convicted and sentenced to serve a maximum sentence of fifty years executed, for a single count of child molestation.

Mr. Hamilton's conviction was affirmed on direct appeal, but Justice Brown dissented. The Indiana Supreme Court affirmed Mr. Hamilton's conviction, but revised his sentence downward from 50 years to 35 years executed. State post-conviction proceedings were filed; relief was denied in the motion court. The Indiana Supreme Court denied transfer. 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. 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. Finally, Mr. Hamilton pleads with this Honorable Court not to turn a blind eye to justice, but to reconsider the facts in his case, and look to clearly established case law in making its final determination. There is only two questions that need to be determined. Whether Mr. Hamilton's trial counsel had an obligation to investigate the only plausible defense available, and whether the State of Indiana could have proved its case if the omitted evidence was presented to a jury. The fact that Mr. Hamilton's step-granddaughter encountered a penis that was erect, disqualified him as her assailter.

REASONS MERTING REHEARING

The Seventh Circuit's order finding no substantial showing of the denial of a constitutional right, and denying Mr. Hamilton relief is in conflict with *Strickland v. Washington*, 466 U.S. 668 (1984); and *Williams (Terry) Taylor*, 529 U.S. 362 (2000) emphasizing that in determining *Strickland* Prejudice, the court must examine both the trial testimony and the post-conviction evidence to determine whether, had the omitted evidence been

presented, there is a reasonable probability of a different outcome, in that the court merely examined the opinion of the Indiana Court of Appeals which stated the facts in the light most favorable to the jury's verdict and all contrary evidence ignored. For example, the state court's opinion states, "T.M.'s testimony alone is sufficient to sustain Mr. Hamilton's conviction." The court completely ignored the fact that a physical impossibility of the state's witnesses' testimony can provide an exception to that rule as an alibi. When a jury is prohibited from hearing such factual information it cannot be said that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The court further ignored the fact that while the evidence most favorable to the State of Indiana in convicting Mr. Hamilton is T.M.'s testimony, the court also held in *United States v. Hayes*, 236 F.3d 891, 896 (7th Cir 2001), that if it would have been physically impossible for the witness to observe what she described, or it was impossible under the laws of nature for those events to have occurred at all, the jury's verdict could be overturned because the testimony would be incredible as a matter of law.

After Mr. Hamilton's surgery for ischemic priapism, it is physically impossible for T.M. to have seen what she testified to. Mr. Hamilton did not have the ability, nor was he capable of such an erection. See *Wilson v. Groze*, 800 F. Supp 2d 949 (U.S. Dist. Lexis 84337, 2011) (Surgery for priapism leading to impotence).

The court's order is in conflict with *Kimmelman v. Morrison*, 477 U.S.365 (1986) (quoting *Strickland* 466 U.S. at 690). The duty to investigate is a basic function for trial counsel "to make the adversarial testing process work in the particular case, *Id* at 384. When an attorney receives information from his client that will bolster his defense, he has a duty to make reasonable

investigations or to make a reasonable decision that makes particular investigations unnecessary.

Id. Also see *Brown v. Sternes*, 304 F.3d 677, 691 (7th Cir. 2002) (same)

In the solitary interview between Mr. Hamilton and his attorney, just four days prior to the trial, counsel was made aware of Mr. Hamilton's surgical procedure that would have brought the State's witnesses' testimony into question. At that point, Mr. Hamilton believed that it was reasonable to have counsel help him in this particular defense as it was the only actual evidence to the allegations against him, but trial counsel opted to stipulate for the State's witness testimony, in lieu of an independent investigation. There was no obligation to share such information until such information became physical evidence. See Fed. Evid. Rule 16(b)(2)(B) (Information not subject to disclosure; Rule 16 does not allow the prosecutor to discover statements made to an attorney by his client). Relying only on the State's one-sided investigation as a defense can hardly be considered sufficient and adequate representation. See *U.S. v. Garner*, 507 F.3d 399, 407 (6th Cir. 2007), rev (ineffective assistance of counsel for relying only on state's investigation.)

SUGGESTIONS IN SUPPORT OF REHEARING

The Seventh Circuit Court of Appeals order, finding no substantial showing of the denial of a constitutional right, and affirming that Mr. Hamilton did not prove that the evidence at trial was insufficient for a conviction, and that he could not have overcome the presumption that the decision by trial counsel not to investigate, or provide professional testimony was trial strategy, resulted in both an unreasonable determination of the facts in light of the evidence presented, and an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). Mr. Hamilton asserts that trial counsel's failure to investigate his medical condition *was* unreasonable, and not

part of a calculated strategy. The evidence in the record shows that Mr. Hamilton informed counsel of his medical condition and the ramifications of such, at his first initial interview prior to trial, which meets the first prong of *Strickland*.

As in *Anderson v. Johnson*, 338 F.3d 382, 393 (5th Cir. 2003); “[T]here is no evidence that the decision by counsel to forego an investigation was reasoned at all, and it is, in our opinion, far from reasonable. Counsel’s failure to investigate was not part of a calculated trial strategy, but was likely the result of either indolence or incompetence.

The court stated in *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994), “An attorney must engage in a reasonable amount of pretrial investigation and at a minimum... Interview potential witnesses and ... make independent investigations of the facts and circumstances in the case.” (Quoting *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985). Because counsel failed to provide any investigation, Mr. Hamilton has met the “performance prong” of the *Strickland v. Washington*, 466 U.S. 668 (1984) test. Under the circumstances here, trial counsel had an *obligation* to show a strategy supporting Mr. Hamilton’s inability to have the type of erection alleged by the state’s witnesses. The severe post-surgical complications for ischemic priapism as outlined in Mr. Hamilton’s brief could have easily been obtained by internet at the least, so that the jury would have had refutable evidence, contrary to the state, leading to reasonable doubt.

The court also held that Mr. Hamilton had not demonstrated prejudice from counsel’s failure to investigation, in that he did not show what the investigation would have proved. This conclusion is likewise an unreasonable interpretation of *Strickland* and its progeny. *Williams (Terry) Taylor*, 529 U.S. 362 (2000), emphasizes that in determining *Strickland* prejudice, the court must examine both the trial testimony and the PCR evidence to determine whether, had the omitted evidence been presented, there is a reasonable probability of a different outcome.

When the specifics of a fact are known it sheds light on the reality of what is happening , because surgery for ischemic priapism damages the two main muscles for creating an erection, the possibility of a penis standing straight or pointed upward, or outward, which was the State's witnesses' testimony, is a physical impossibility . If a jury does not have the specific facts then any contrary testimony will suffice. Here, trial counsel knew in advance that an important issue concerned his client deeply; the very least that he could have done was research the surgical procedure so that he could have made a cogent argument when the issue was made at trial. Because trial counsel failed to investigate the minimum, and stipulated for the state's witness, for corroborating testimony to the fact that Mr. Hamilton had such a surgery, did nothing to support the factual evidence that would have refuted all the state's witnesses testimony in regards to Mr. Hamilton's physical impossibility . Counsel's lack of any possible investigation prejudiced Mr. Hamilton in that there was factual evidence that was contrary to trial testimony and he clearly is responsible for that evidence not being presented to the jury at trial.

Mr. Hamilton has also meets the prejudice prong of *Strickland* test.

Mr. Hamilton never made any admissions to the police. The closest thing to any evidence connecting him to the crime was the uncorroborated testimony of the state's witnesses, in which the omitted factual evidence of Mr. Hamilton's surgical procedure would have refuted. Had the jury heard the omitted evidence, along with professional testimony, there is a reasonable probability that there would have been a different outcome. The Court's order denying Mr. Hamilton a Writ of Certiorari urgently needs to be reconsidered.

CONCLUSION

For the foregoing reasons, Mr. Otha S. Hamilton CRAVE this Court to grant rehearing of its judgment entered on March 8, 2021, and issue a Writ of Certiorari to hold the Seventh Circuit Court of Appeals accountable for failing to properly apply the laws of this Court and grant Mr. Hamilton relief. Mr. Hamilton further prays for any other and further relief which this Court may deem just and proper under the circumstances.

Respectfully submitted,



Otha Hamilton #217667

Petitioner/ *Pro se*

Pendleton Correctional Facility
4490 W. Reformatory Road
Pendleton, Indiana. 46064-9001

CERTIFICATE OF SERVICE

I, the undersigned, Otha S. Hamilton, hereby certify that on March 30th, 2021, I served a true and correct copy of the foregoing *Petition For Rehearing With Suggestions In Support* upon Office of Indiana Attorney General, 302 W. Washington St., I.G.C.S., 5th Fl., Indianapolis, Indiana, 46204-2770, with sufficient first-class postage affixed, by submitting same to correctional staff for placement in the U.S. Mail, which constitutes filing under the prison "mailbox rule". *Houston v. Lack*, 487 U.S. 266, 270-72 (1988).



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CERTIFICATE OF GOOD FAITH

COMES NOW Petitioner, Otha S. Hamilton, and makes certification that his petition for rehearing is presented to this Court in good faith pursuant to Rule 44. Mr. Hamilton further states the following:

This Court entered its judgment denying Mr. Hamilton a Writ of Certiorari on March 8, 2021. Mr. Hamilton believes that he presents this Court with adequate grounds to justify the granting of a rehearing in this case and said petition is brought in good faith and not for delay. Furthermore, Mr. Hamilton believes that based upon the law of this Court and the facts of this case, he is entitled to relief which has been unjustly denied to him. He further believes that a great number of people will be denied their constitutional right to due process if the Seventh Circuit Court of Appeals is allowed to continue to ignore evidence and apply the *Strickland* standard ineffectively.

I personally declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 30th day of March, 2021.

