

IN THE SUPREME COURT OF THE UNITED STATES

Kevin Thurlow,
Petitioner

vs.

Warden New Hampshire State Prison,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE FIRST CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Submitted By:

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03302-0014

QUESTIONS PRESENTED

Initially the Petitioner asserted two constitutional violation claims of his Sixth Amendment right: The first being that his counsel was ineffective for failing to call, interview and subpoenaing a witness whom she was made aware of prior to trial. The omitted witness would have provided testimony regarding evidence relevant to the case.

Secondly, prior to trial, the Petitioner had made three attempts to terminate appointed counsel's representation due to a complete breakdown in communication and a lack of trust. Because the Petitioner filed a motion expressing his dissatisfaction with counsel creates a conflict that was never resolved or responded to by the court during or throughout the proceedings.

The case thus presents the following questions:

- I. THE FIRST CIRCUIT'S MISAPPLICATION OF THE STRICKLAND STANDARD WARRANTS THIS COURT'S ATTENTION
- II. THE DECISION OF THE FIRST CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS
- III. THE FIRST CIRCUIT'S NEGLECTFULNESS OF THE "CONFLICT-FREE" CLAUSE OF THE SIXTH AMENDMENT WARRANTS THIS COURT'S ATTENTION
- IV. THE STATE COURT OPINION BELOW LACKS A PLAIN STATEMENT THAT IT IS BASED ON A PROCEDURAL DEFAULT AND THEREFORE THE MERITS ON THE FEDERAL CONSTITUTION QUESTION SHOULD BE REACHED

TABLE OF CONTENTS

Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1
Statutory and Constitutional Provisions Involved	2
Statement of the Case	3
 Reasons for Granting the Writ	
I. The First Circuit's misapplication of the Strickland Standard Warrants this Court's Attention	5
II. The Decision of the First Circuit is in Conflict with the Decisions of Other Circuits	7
III. The First Circuit's neglectfulness of the "Conflict-Free" Clause of the Sixth Amendment Warrants this Court's Attention	8
IV. The State Court Opinion Below Lacks a Plain Statement that is based on a Procedural Default and therefore the Merits on the Federal Constitution Question should be Reached	10
Conclusion	11
 Appendix	
Decision of the First Circuit Court of Appeals	1a
District Court Order and Report and Recommendation	2a
State v. Kevin Thurlow, 2016 N.H. Super LEXIS 25	26a
Order Denying Reconsideration	54a
Order Declining Discretionary Appeal	55a

TABLE OF AUTHORITIES

CASES

Brown v. Allen, 344 U.S. 443, 458 (1953)	9
Coleman v. Thompson, 501 U.S. 722, 735 (1991)	10
Holloway v. Arkansas, 435 U.S. 475, 487-91 (1978)	8
Kimmelman v. Morrison, 477 U.S. 365, 384 (1986)	5
McMann v. Richardson, 397 U.S. 759, 771 (1970)	8
Michigan v. Long, 463 U.S. 1032, 1041 (1983)	10
Montgomery v. Peterson, 846 F.2d 407, 411-15 (7th Cir. 1988)	7
Preston v. Maggio, 705 F.2d 113, 117 (5th Cir. 1983)	10
Rompilla v. Beard, 545 U.S. 374, 383 (2005)	5
Slack v. McDanel, 529 U.S. 473, 484 (2000)	4
State v. Thurlow, 2014 N.H. LEXIS 32 (Feb. 26, 2014)	3
State v. Thurlow, 2016 N.H. Super LEXIS 25 (July 6, 2016)	3
Stewart v. Wolfenbarger, 468 F.3d 338, 355-61 (6th Cir. 2006)	7
Strickland v. Washington, 466 U.S. 668 (1984)	5,6,7,8
Thurlow v. Zenk, 2018 U.S. Dist LEXIS 2755 (DNH Jan. 8, 2018)	3
Thurlow v. Warden NHSP, 2019 U.S. Dist LEXIS 147553 (Aug. 13, 2019)	3
Thurlow v. Warden NHSP, Case #19-1891 (Nov. 21, 2020)	4
Von Moltke v. Gillies, 332 U.S. 708, 725 (1948)	8
Wainwright v. Sykes, 433 U.S. 72 (1977)	10
Wiggins v. Smith, 539 U.S. 510, 524-29 (2003)	6
Wood v. Georgia, 450 U.S. 261, 271 (1981)	8

STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S. Const. Amend VI	<i>passim</i>
U.S. Const. Amend XIV	2
28 U.S.C. §1254	1
28 U.S.C. §2254	3

**PETITION FOR WRIT OF CERTIORARI TO THE
FIRST CIRCUIT COURT OF APPEALS**

The Petitioner, Kevin Thurlow, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the First Circuit Court of Appeals, rendered in these proceedings on November 21, 2020.

OPINION BELOW

The First Circuit Court of Appeals affirmed the District Court's denial of habeas relief and a certificate of appealability in its Cause no. 19-1891. The opinion is unpublished, and is reprinted in the appendix to this petition at page 1a, *infra*.

JURISDICTION

The original opinion of the First Circuit Court of Appeals was entered November 12, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

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 1. 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.

STATEMENT OF THE CASE

The Petitioner, Kevin Thurlow was charged with multiple counts of aggravated felonious sexual assault and manufacturing of child sexual abuse images. Following a jury trial he was convicted as charged. His conviction was affirmed on direct appeal. State v. Thurlow, 2014 N.H. LEXIS 32 (Feb. 26, 2014).

Shortly thereafter he filed a post-conviction motion asserting that his conviction was unconstitutional due to violations of his Sixth Amendment right. Among those violations, he asserted that his counsel was ineffective for failing to call, interview and subpoenaing a witness that she was made aware of prior to trial. The witness would have provided testimony exculpatory in nature. Secondly, he asserted that the trial court abused its discretion when it failed to inquire into his request to terminate counsel's representation due to a complete breakdown in communications and a lack of trust. The court made No attempt to inquire into the nature of the dissatisfaction or resolve the matter, instead, the Petitioner was forced to proceed to trial despite the conflict between him and counsel.

Following a hearing on the Petitioner's constitutional claims, the court denied the claims in a decision that was both legally and procedurally. State v. Thurlow, 2016 N.H. Super LEXIS 25 (July 6, 2016). Following which, he filed a timely discretionary appeal and the State Supreme Court declined to hear the appeal. The Petitioner then filed a habeas petition pursuant to 28 U.S.C. §2254. Initially, the petition was denied without prejudice by the district court. Thurlow v. Zenk, 2018 U.S. Dist. LEXIS 2755 (DNH Jan. 8, 2018). Parties were permitted to refile motions for summary judgment in the case. Following the refiling, the magistrate judge issued a report and recommendation denying the Petitioner's motion for summary judgment and a certificate of appealability. Thurlow v. Warden N.H. State Prison, 2019 U.S. Dist. LEXIS 147553 (Aug. 13, 2019).

Following the district court's denial, the Petitioner filed for an Issuance of a certificate of appealability to the First Circuit Court of Appeals. Despite setting forth examples that reasonable jurists would find the district court's assessment of the Petitioner's constitutional claims debatable or wrong. As indicated by the Court in Slack v. McDaniel, 529 U.S. 473, 484 (2000), "if the district court denied the habeas petition based on a procedural ground, without reaching the merits of the claims, a COA should be issued upon a showing that jurists would find it debatable that the Petitioner presented a valid claim and whether the district court was correct in its decision".

Contrary to the Court in Slack, the First Circuit Court of Appeals agreed with the district court's ruling and denied a certificate of appealability. Thurlow v. Warden NH State Prison, Case #19-1891.

This petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT'S MISAPPLICATION OF THE STRICKLAND STANDARD WARRANTS THIS COURT'S ATTENTION

In siding with the district court's denial of the Petitioner's ineffective claim, the First Circuit essentially affirmed the misapplication of Strickland v. Washington, 466 U.S. 668 (1984), test in two important ways. Foremost, 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 disregarded the evidence of Mr. Carroll and ignored his willingness to testify.

It is well established that counsel has a duty to conduct a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. *Id. Strickland*, 466 U.S. at 691. The duty to investigate derives from counsel's basic function, which is to make the adversarial testing process work in the particular case. Kimmelman v. Morrison, 477 U.S. 365, 384 (1986)(quoting Strickland, at 691).

Although the duty to investigate does not mandate counsel to search the world on the off-chance that something may turn-up, Rompilla v. Beard, 545 U.S. 374, 383 (2005) however, the duty does include counsel's obligation to investigate all witnesses who may have information concerning the Client's guilt or innocence.

Although counsel concedes to having a brief conversation with Mr. Carroll, but he was unable to speak at that time and requested her to call him back at a later date. *Id. Depo.* at 10-24. Despite having an investigator assigned to the case, counsel never directed her to locate and speak with the witness. *Id.* Counsel was aware of the fact that the witness was cooperative and had exculpate information.

Nevertheless, counsel failed to call and or subpoena Mr. Carroll despite the importance of his information. This Court has found ineffective assistance in violation of the Sixth Amendment when counsel fails to conduct a reasonable investigation into one or more aspects of a case and when that failure prejudice the defendant. For example, in the case of Wiggins v. Smith, this Court held that the petitioner was entitled to a writ of habeas corpus because his counsel had failed to conduct a reasonable investigation into potentially mitigating evidence with respect to sentencing. Id. 539 U.S. 510, 524-29 (2003). The Court found that "counsel chose to abandon their investigation at an unreasonable juncture". Id. at 527-28.

Here, counsel's failure to call or subpoena Mr. Carroll as a witness violated the Petitioner's Sixth Amendment right to effective assistance of counsel, her decision was objectively unreasonable because it was a decision made without undertaking a full investigation into the extent of his information pertaining to the case. Even if Mr. Carroll was a difficult witness to contact as asserted by counsel, she had other ways to communicating with Mr. Carroll but chose not to utilize her resources or simply subpoena the witness.

Counsel chose to abandon her efforts to contact the witness despite knowing full well that the information that he posed was critical in establishing the Petitioner's innocence. As in Wiggins, hereto, counsel abandon her investigation at an unreasonable juncture, making a full informed decision in respects to calling or subpoenaing Mr. Carroll as a witness impossible. Id. at 527-28.

Because the First Circuit Court of Appeals has truncated the scope of Strickland v. Washington, 466 U.S. 668 (1984), this Court must grant certiorari.

II. THE DECISION OF THE FIRST CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

A majority of the Circuits has been confronted with counsel's failure to interview, call and or subpoena witnesses who would provide important exculpatory information, and in doing so, overwhelmingly they have deemed counsel to be ineffective under the Strickland standard.

Numerous arguments have been advanced to justify counsel's deficiencies. *Id.* Stewart v. Wolfenbarger, 468 F.3d 338, 355-61 (6th. Cir. 2006). Similar reasons was used in the Petitioner's case to justify counsel's failure to interview, call and or subpoena Mr. Carroll as a witness. Contrary to the justifications given, Mr. Carroll was more then willing to testify as to what he knew in regards to photographs being taken of the allege victim in swim ware. Counsel's failure to pursue this important witness can only be viewed as inadequate preparation and not some fault of the witness himself.

Nevertheless, under the Strickland standard, the federal appeals court in Stewart, found that the failure of trial counsel to interview and call witnesses was prejudicial, and that the state court's contrary conclusion was not reasonable. The conviction was reversed. See also, Montgomery v. Peterson, 846 F.2d 407, 411-15 (7th. Cir. 1988), when the court found ineffective assistance of counsel for failing to investigate the only available disinterested alibi witness fell below the standard of reasonably effective assistance as required by Strickland.

These cases illustrate the fact that the First Circuit Court of Appeals is out of step with this Court and with other circuits in its consideration of the Strickland v. Washington, 466 U.S. 668, 687-91 (1984), performance and prejudice prong.

Certiorari should be granted to correct this error.

REASONS FOR GRANTING THE WRIT

III. THE FIRST CIRCUIT'S NEGLECTFULNESS OF THE "CONFLICT-FREE" CLAUSE OF THE SIXTH AMENDMENT WARRANTS THIS COURT'S ATTENTION

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense". U.S. Const.

In giving content to this safeguard, this Court has repeatedly emphasized that the right to counsel is the right to effective assistance of counsel.

McMann v. Richardson, 397 U.S. 759, 771 (1970). The first essential element of effective assistance of counsel is counsel's ability and willingness to advocate fearlessly and effectively on behalf of his/her Client. For this reason, the importance of ensuring that counsel is not subject to any conflict of interest which could dilute loyalty to the accused: "the right to counsel guaranteed by the Constitution contemplates the services of counsel devoted solely to the interests of his/her Client". Von Moltke v. Gillies, 332 U.S. 708, 725 (1948); Strickland v. Washington, 466 U.S. 668 (1984) (counsel owes the Client a duty of loyalty, a duty to avoid conflicts of interest) (citation omitted); Wood v. Georgia, 450 U.S. 261, 271 (1981) (the Sixth Amendment gives rise to a correlative right to representation that is free from conflicts of interest).

To protect this right of "conflict-free" counsel, the court has an affirmative "duty to inquire" into the factual basis of any potential conflicts or dissatisfaction. Wood, 450 U.S. at 272. Indeed, a failure to appoint new counsel under these circumstances will lead to a reversal of any conviction obtained at trial. See Holloway v. Arkansas, 435 U.S. 475, 487-91 (1978).

In this case, the Petitioner submitted a handwritten motion/complaint to the court expressing his dissatisfaction with appointed counsel.

The complaint was predicated on a complete breakdown in communications and a lack of trust. Contrary to the notion that the Petitioner should have done more to get the court's attention, two additional attempts were made by the Petitioner to No avail. Despite his attempts, the trial court not only failed to make an inquiry into his dissatisfaction with counsel, but also failed to issue a ruling on the merits of the complaint. Sup. Ct. 7/6/2016 Order at 21.

Because the court seem to ignored the complaint, the Petitioner waited until after trial and submitted his constitutional claim in a motion for new trial. Here, although the post-conviction court acknowledged the factual aspects of the claim an the trial court's failure to make an inquiry, the post-conviction court denied the claim in a decision that was both legally and procedurally interwoven. *Id.*

When ambiguity exists as to whether a state court opinion rests on adequate and independent grounds, it should be resolved in favor of preserving federal review of the federal constitutional claim. This presumption in favor of federal review follows from the right of a habeas petitioner to have his federal constitutional rights adjudicated by a federal court even if passed upon by a state court. See Brown v. Allen, 344 U.S. 443, 458 (1953) (state adjudication of federal right not res judicata in federal habeas review). This presumption also makes sense in light of the strong policy that federal rights should not be lost to unclear state decisions. Michigan v. Long, 463 U.S. 1032, 1041 (1983).

IV. THE STATE COURT OPINION BELOW LACKS A PLAIN STATEMENT THAT IT IS BASED ON
A PROCEDURAL DEFAULT AND THEREFORE THE MERITS ON THE FEDERAL
CONSTITUTION QUESTION SHOULD BE REACHED

The state court order in this case discusses both the merits and the procedural default of the Petitioner's constitutional claim. (Sup. Ct. 7/6/2016 Order at 20-27. Interpreting ambiguity is risky when a petitioner's last chance to assert a constitutional right is at stake. The Petitioner's case provides a palpable example of the problems inherent in allowing federal courts free rein to search inscrutable state court decisions for adequate and independent state grounds. The plain rule of Long avoids these problems. The rule should be applied here to reverse the decision of the Court of Appeals below.

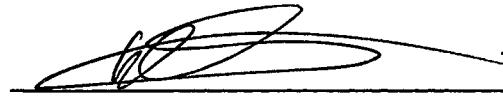
In Michigan v. Long, 463 U.S. 1032 (1983), this Court laid down a rule to avoid difficulties associated with such ambiguity. The rule was further reiterated in Coleman v. Thompson, 501 U.S. 722, 735 (1991), when a decision "fairly appears to rest primarily on federal law, or interwoven with federal law, and the adequacy and independence of any state law ground is not clear from the face of the opinion", habeas court's will presume that there is no adequate and independent state law ground supporting the judgment.

The decision below in the instant case is clearly interwoven with a legal analysis followed by an alternative procedural analysis. The District Court found that a procedural default had been excused by the state court, and thus no hearing was conducted on the merits of the Petitioner's Sixth Amendment claim. The Court of Appeals, however, did not remand for a hearing on whether the Petitioner could show "cause and prejudice" under Wainwright v. Sykes, 433 U.S. 72 (1977). See Preston v. Maggio, 705 F.2d 113, 117 (5th Cir. 1983) (after finding state procedural default, court remands for hearing on cause and prejudice).

CONCLUSION

For these reasons, this Court should grant a Writ of Certiorari to hold the First Circuit Court of Appeals accountable for failing to properly apply the law of this Court and grant the Petitioner relief.

Respectfully submitted,



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