

20-8314
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUN - 8 2021
OFFICE OF THE CLERK

TIMOTHY BREWER — PETITIONER

VS.

STEWART ECKERT — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Whether the U.S. Court of Appeals for the Second Circuit erred in refusing to grant petitioner a COA to appeal from a judgment of the District Court, denying Federal Habeas relief?
2. Whether the lower court unreasonable applied Strickland's performance prong in context of this case, by simply speculating on what counsel's rationale may have been, without developing the central & contested factual issue(s) of whether counsel made reasonable investigations or made a reasonable decision that made the particular investigation unnecessary?
3. Whether the state prosecutor's misrepresentation of a T-shirt, which constituted a vital link in the evidence on which this petitioner was convicted, violate the petitioner's constitutional right to a fair trial, irrespective of state evidentiary rules that allowed it?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Brewer v. Eckert, No. 19-cv-6486, U.S. District Court for Western District of New York. Judgment entered on Sept. 10, 2020.

Brewer v. Eckert, No. 20-3517, U.S. Court of Appeals for the Second Circuit. Judgment entered on March 11, 2021.

People v. Brewer, 129 AD3d 1619 [4 Dept. 2015]; and People v. Brewer, 28 NY3d 271 [2016].

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

Petitioner respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at the Appendix A to this petition and is unpublished.

The opinion of the United States District Court appears at the Appendix B to this petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Second Circuit decided this matter was March 11, 2021.

No petition for rehearing was filed.

The jurisdiction of this court is invoked under 28 U.S.C §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2253(c)

"A COA may issue ... if the appellant has made a substantial showing of the denial of a constitutional right."

U.S. Const. Amend. VI

"In all criminal prosecutions, the accused shall enjoy the right
... to have the assistance of counsel for his defense."

U.S. Const. Amend. XIV

"... nor shall any state deprive any person of life, liberty, or
property, without due process of law, ..."

STATEMENT OF THE CASE

The Court of Appeals inappropriately denied the petitioner a Certificate of Appealability ("COA"), necessary to allow appeal of the decision of the District Court, that denied habeas relief. Whereas, jurist of reason could disagree with the District Court's resolution of whether the petitioner was denied meaningful assistance of counsel and or that the prosecutor deliberately misrepresented the truth at trial, which denied the petitioner the right to a fair trial, as would support the petitioner's application for COA.

On October 4, 2009, the petitioner was convicted, following a jury trial in the N.Y.S trial court, Monroe County on two counts of Predatory Sexual Assault Against a Child (NY PL §130.96), and two counts of Sexual Abuse in the first degree (NY PL §130.65[3]). The trial court later imposed an aggregate sentence of imprisonment of 25 years to life, which the petitioner is currently serving. The convictions were affirmed on direct appeal (People v. Brewer, 129 AD3d 1619 [4 Dept. 2015]) and leave was granted to appeal to the NYS Court of Appeals, which also affirmed (People v. Brewer, 28

NY3d 271 [2016]).

This case involves a sensitive issue involving the allegations of two minor girls (ages 7 and 9), who each alleged that the petitioner sexually abused them on two separate occasions, between the dates of June 1, 2009 and July 21, 2009. These children were the daughters of the petitioner's former live in girlfriend, who were in the midst of serious domestic issues at the time of the allegations. There was no physical evidence or eye witnesses to the alleged abuse, despite crowded living conditions. The petitioner denied the allegations and maintains that he was falsely convicted.

The underlying issues sought to be reviewed concern the actions of trial counsel, which effectively deprived the petitioner of a fair trial. This case hinged upon the credibility of the two children. Yet counsel improvidently failed to impeach one complainant with a prior statement to investigators, denying that the abuse occurred & neglected to consult with an expert on the amply documented science of child psychology regarding children who often lie about sexual abuse for one reason or another, such as the attendant circumstance present in this case. These omissions by counsel had prevented this petitioner from offering a complete defense, which had been further undermined by the state prosecutor's misrepresentation of the truth of a T-shirt containing the petitioner's semen that was found in a room that one of the complainants had alleged to have been abused, despite the fact that it was not evidence of that alleged act.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for this court to provide the lower court's with much needed guidance with the principles espoused espoused in Strickland and the impossible burdens often placed on defendants, who are faced with the court's confusing failed stratagems with true ineffectiveness.

An important constitutional question likewise exists in the context of applying Strickland standards to claims based on an attorney's failure to consult with an expert in context of cases of this nature, which is all to often disregarded as superfluous.

I. THE COURT OF APPEALS ERRED IN DENYING PETITIONER'S APPLICATION FOR A "COA", BECAUSE THE RESOLUTION OF HIS CONSTITUTIONAL CLAIMS BY THE DISTRICT COURT IS DEBATEABLE BY JURISTS OF REASON, AND WAS FURTHER DECIDED IN A WAY THAT CONFLICTS WITH RELEVANT - DECISION(s) OF THIS COURT, WHICH DEMONSTRATED THE ENTITLEMENT TO A COA.

In the context of a Certificate of Appealability, where applicants must make a substantial showing of the denial of a constitutional right (§2253[c][2]), this court has long cautioned that a threshold inquiry is not coextensive with the merits analysis and does not require the showing that the appeal would succeed. Instead, the only question is whether the applicant can show that jurists of reason could disagree with the district court's resolution of his constitutional claims and or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further. Buck v. Davis, 137 S.Ct 759, 773 - 74 [2017] (quoting Miller - El v. Cockrell, 537 U.S. 322, 336 - 37 [2003]).

Here, petitioner advanced two constitutional claims that included *inter alia*, (a) ineffective assistance of counsel based upon trial counsel's failure to consult an expert witness on child psychology or to impeach of the child complaintants with her prior statement that denied any sexual abuse occurred; and (b) misrepresentation by the state prosecutor of the truth regarding a T-shirt containing the petitioner's semen, which constituted a vital link in evidence on which he was convicted.

In denying the petition, the District Court concluded in relevant part that: (a) the petitioner's ineffective assistance claims failed to demonstrate prejudice from counsel's failure to consult an expert, and likewise failed to show that counsel's failure to impeach the complainant with her prior statement (denying that the petitioner sexual abused her) was objectively unreasonable; and (b) that the state's use of the T-shirt with his semen on it was relevant, and that it went only to the weight of evidence, and inferences to be drawn from it and therefore, did not violate due process.

Resolution of these claims by the District Court, are debateable by jurists of reason and were further decided in a way that conflicts with relevant decisions of this court, which demonstrated the petitioner's entitlement to a COA.

A. JURISTS OF REASON COULD DEBATE WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S FAILURE TO CONSULT AN EXPERT ON CHILD PSYCHOLOGY OR TO IMPEACH ONE OF THE CHILD COMPLAINTANTS' WITH A PRIOR STATEMENT DENYING THAT THE ABUSE FOR WHICH THE PETITIONER WAS CONVICTED OCCURED.

Under Strickland's test, a defendant must first show that counsel's performance was deficient and two, that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 [1984]. To establish deficiency in counsel's performance this court held defendants must show that counsel's representation fell below an objective standard of reasonableness (466 U.S. at 687). And to establish prejudice a defendant must show that there is a

reasonable probability that, but for defense counsel's errors, the results of the proceedings would have been different. A reasonable probability being a probability sufficient to undermine confidence in the outcome (466 U.S. at 694).

Here, the correctness of the Strickland standard as applied by the District Court to deny petitioner's ineffective claims was not only debateable by jurists of reason, but is incomplete / contrary to relevant precedent set by this court.

In this case, there was no physical evidence of abuse, nor any eye witnesses and the state's case hinged upon the credibility of the two child complaintants. The petitioner denied their allegations. His defense strategy hinged on showing that there were serious domestic problems between the petitioner and the childrens mother and that they were upset because of that situation, crowded living conditions and the petitioner's strict discipline of them. These issues provided a motive for the complaintants to lie and falsely accuse this petitioner, which had been further supported by time frames that the allegations occurred (while the mother was in the hospital and then reported after petitioner wanted her to move) and that the words they used to describe the alleged acts were more likely those used by an adult, which suggests that they may have been coached. In fact, investigators who interviewed the children, reported that one child initially denied that any abuse even occurred.

This court has clearly established that the reasonableness of a

purported strategic decision on the part of trial counsel is based upon the adequacy of the investigations supporting it (466 U.S. at 690 - 91). The rationale being that an attorney's strategy is shaped by the results of the investigations supporting it (466 U.S. at 690 - 91) Whereas, the District Court's decision was based on a material incomplete analysis to deny the petitioner's claims, without first developing the central and contested factual issue of whether counsel even made reasonable investigations (to consult an expert witness or to adequately prepare for cross examination) or made the reasonable decision(s) that made these investigations unnecessary in this case. Instead, the court relied on unfounded speculations as to what counsel's rationale may have been.

The failure to impeach the complainant with her prior statement to investigators (denying the abuse occurred) could not reasonable be attributed to being a strategic choice. The lack of strategy in this regard is readily demonstrated by counsel's belated, improper and unsuccessful attempts to put the prior statement before the jury (T. 576 - 83). First, as correctly noted by the state, he failed to prepare a proper foundation or to confront the child herself, during cross examination. Then he later improperly attempted to introduce the statement through cross examination of the investigator who interviewed her. This was met with objections from the prosecutor and was sustained by the trial court (T. 576 - 583). Counsel was therefore, either unfamiliar with the court's procedure or ill prepared for the trial. As a result, a crucial point for the defense was lost and the jury never learned that one

complainant denied being abused by the petitioner.

To purposefully sacrifice the only opportunity to discredit the complainant and to apprise the jury of her prior denial of abuse, as the District Court opinions in favor of seeming sympathetic and belatedly pursuing a course that is prohibited by the court rules can not be deemed strategic. On the contrary, it demonstrated counsel's deficiency, which undermined the defense. It is therefore debateable under a proper application of Strickland to this case that the District Court erred in this aspect of it's decision.

Second, the lower court's seem to ignore that there is well known and amply documented science on the psychology of children, who often lie about sexual abuse for the same reasons attendant in this case (see generally Gersten v. Senkowski, 426 F.3d 588, 597 [2 cir. 2005]). Although there is no per se rule requiring counsel to seek out an expert in all child abuse cases, some courts have observed that such cases will generally require some consultation with an expert. (see generally Eze v. Senkowski, 321 F.3d 110, 128 [2 cir. 2003] and People v. Richard R., 31 Misc.3d 1212[a] [co. court 2011] at *7).

Considering the circumstances of this case counsel could not have provided the petitioner with a complete defense, without the aid of an expert on child psychology. It was a critical element of the defense that the children fabricated the alleged abuse. The state's case rested entirely on the credibility of the two child

complaintants. There was no physical evidence in this case and the state's expert was permitted to testify that less than 5% of child abuse victims exhibit physical signs and that the absence of physical indicia of abuse is not unusual. Consulting with an expert was therefore, at minimum, reasonable expected of counsel consistent with the trial strategy to demonstrate that the petitioner was falsely accused and possibly why.

It was unreasonable for the District Court to conclude as it did, that the petitioner failed to show that counsel's failure to call a psychology expert was objectively unreasonable. The basis of the lower court's rationale was that the petitioner's claims were based entirely on speculations that a medical expert exists, who would have testified that child complaintants are not credible witnesses. This interpretation by the lower court was grossly disproportionate to what was claimed and further suggest that the petitioner had to meet a much higher standard then what's required by Strickland. In essence, the lower court effectively side stepped even considering the primary issue of whether counsel made reasonable investigations or a reasonable decision that such an investigation was unnecessary (466 U.S. at 690 - 91).

The trial amounted to a credibility contest and thus, the testimony from an expert witness on the science of psychology of children who often lie about sexual abuse (based on the attendant circumstances of this case), along with revelation that one of the complaintants previously denied that she was abused by petitioner

would have made all the difference. It would have called into question whether any sexual abuse occurred and was tantamount to reasonable doubt. It may have thus, led one or more of the jurors to have doubt and readily satisfies the prejudice prong set by Strickland (466 U.S. at 694 -95).

B. JURISTS OF REASON COULD DEBATE WHETHER THE STATE PROSECUTOR'S MISREPRESENTATION OF A T-SHIRT WHICH CONSTITUTED A VITAL LINK IN EVIDENCE ON WHICH THIS PETITIONER WAS CONVICTED, DENIED HIM A FAIR TRIAL.

This court has long established that the constitutional right exists not to be deprived of liberty on the basis of false evidence (Napue v. Illinois, 360 U.S. 264, 269. It has further held that due process is also violated where the prosecutor uses evidence, which is known to create a false impression of material facts (Miller v. Pate, 386 U.S. 1 [1967]).

Here, a major issue at trial concerned evidence by the prosecutor of a T-shirt that had the petitioner's semen on it and was found in a back bedroom, where he was alleged to have forced oral sex on one of the complainants. It should have been suppressed, because it was never established that it was the product of any sexual abuse. In fact, the child's DNA was not found on the T-shirt as would have been consistent with her allegations of what happened. Although, the trial court precluded the childrens' mother from speculating about the semen, the prosecutor was nonetheless, permitted to elicit responses from her that effectively produced the same result. It created the impression that it was physical

proof of the alleged sexual abuse, despite the fact that it was not.

The prejudice sustained by this false impression is clearly evident by the fact that there was no physical evidence of any sexual abuse. Yet, the state was permitted to effectively eliminate that weakness by falsely representing that there was physical evidence. As in pate, the prosecutor's theory with respect to this T-shirt depended upon that misrepresentation (Pate, 386 U.S. at 6). It therefore, had a substantial and injurious effect on the jury's verdict, because it created a false impression about evidence in this case. Jurists of reason could thus, disagree with the District court's resolution of this constitutional claim.

The cumulative effect of the false impression relied upon by the state by use of the T-shirt, along with the omissions of counsel (as previously discussed in part A.) effectively deprived this petitioner of a fair trial, from which he was falsely convicted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: June 2, 2021.

RESPECTFULLY SUBMITTED,



TIMOTHY BREWER, PRO SE
(Petitioner)