No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHNATHAN A. DOODY

Petitioner

vs.

STATE OF ARIZONA

Respondent

On Petition for a Writ of Certiorari

to the Arizona Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED.

1. Whether Doody was denied his personal right to testify in his own behalf by his attorneys' ineffective assistance regarding their advice on the use of his involuntary confession at trial if he testified.

2. Whether Doody's lead attorney provided ineffective assistance, acted improperly, and coerced Doody into waiving his right to testify by threatening to withdraw if he testified.

LIST OF PARTIES.

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

(ii). This petition is not filed by or on behalf of a nongovernment corporation.

(iii). List of proceedings of courts directly related to this case:

1. State v. Johnathan A. Doody, CR1992-001232, Maricopa County Superior Court, Arizona. Judgment entered August 13, 2019.

2. State v. Johnathan A. Doody, No. 2 CA-CR 2021-0012-PR (mem. decision). Arizona Court of Appeals. Judgment entered March 2, 2021.

3. State v. Johnathan A. Doody, CR-21-0127-PR. Arizona Supreme Court. Judgment entered July 30, 2021.

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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 the judgment below.

OPINIONS BELOW.

The unpublished decision of the Arizona Court of Appeals, the highest state court to review the merits, was decided on March 2, 2021. A copy of that decision appears at Appendix A.

JURISDICTION.

The Arizona Supreme Court denied a timely petition for review on July 30, 2021. A copy of the order denying review appears at Appendix B. The current due date for the filing of this petition is October 28, 2021. S.Ct.R. 13.1.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

U.S. Constitution, Amendment V –

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment 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.

STATEMENT OF THE CASE.

In 1993, Doody was convicted for the murders of nine people inside a Buddhist temple in Phoenix, Arizona that occurred in 1991. Doody was seventeen at the time of the murders. He was sentenced to nine consecutive life terms. A

more complete rendition of the facts is set forth in *State v. Doody*, 187 Ariz. 363, 930 P.2d 440 (App., 1996).

In 2011, Doody's convictions were reversed by the United States Court of Appeals for the Ninth Circuit, and remanded for a new trial. The court found interrogators did not adequately inform Doody of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and that the methods of interrogation rendered his confession to the murders involuntary. *Doody v. Ryan*, 649 F.3d 986 (9th Cir., 2011).

A second trial in 2013 resulted in a mistrial. At his third trial, a jury again found Doody guilty of nine counts of first degree murder, nine counts of armed robbery and one count each of first degree burglary and conspiracy to commit armed robbery and/or first degree burglary. The trial court again sentenced Doody to nine consecutive terms of life imprisonment with the possibility of parole after twenty-five years for the murder counts and a consecutive, aggregate term of twelve years' imprisonment for the remaining counts. (State v. Doody, No. 1 CA-CR 14-0218, memo decision at 2, ¶ 1.)

On December 2, 2016, Doody filed a *pro se* petition for post-conviction relief. The trial court granted a hearing on Doody's allegation that his attorneys gave him incorrect legal information and advice that caused him to waive his right

to testify in the second retrial. (Appendix C, 8/13/19, decision order at 1-2.) Following a hearing on June 7, 2019, the trial court denied relief. (Id. at 5.)

On appeal, the court of appeals denied relief. The court found that the trial court's ruling was supported by substantial evidence. (Appendix A, at ¶ 14.) It found the trial court, "accept[ed] Ms. Schaffer's testimony that the inadmissibility of [Doody's] confession to law enforcement was clearly communicated to [Doody] on more than one occasion and she never advised anyone that [Doody] could be impeached with his confession." (Id. at ¶ 9.) It also found that it "doubt[ed] that Mr. Rothschild, whatever state he was in because of the loss of his father, misstated what was the law of the case to [Doody]." (Id.)

Regarding Doody's claim that his attorney coerced him to not testify when he wanted to, the court again accepted the trial court's determination that it believed Ms. Schaffer's testimony over that of the three members of Doody's family who testified Schaffer threatened to quit if Doody testified. (Appendix A, at ¶ 16.)

The court of appeals did not examine Doody's prejudice claims noting that since it found that the court correctly concluded Doody had not established counsel's conduct fell below prevailing professional norms, it need not address the prejudice claim. (Id., n. 8.)

On July 30, 2021, the Arizona Supreme Court denied review. (Appendix B.)

REASONS FOR GRANTING THE PETITION.

I. The Arizona Court of Appeals Decision That Doody's Attorneys Were Not Ineffective in Their Advice Regarding the Use of Doody's Involuntary Confession at Trial Should He Testify was Clearly Erroneous.

The effective assistance of counsel is guaranteed under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984). To prove ineffective assistance of counsel, the defendant must show that 1) his counsel's performance fell below an objective standard of reasonableness, as defined by the prevailing professional norms, and 2) that deficient performance resulted in prejudice to his defense. *Id*. at 687-688. The deficient performance prong of *Strickland* requires a showing that counsel's performance fell below an objective standard or reasonableness or was outside the wide range of professionally competent assistance. *Id*. at 688-690. The test is highly deferential. It evaluates the challenged conduct from counsel's perspective at the time in issue. *Id*. at 689.

To prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome. *Id*. at 694. In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. *Ibid.*

Generally, a conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill-chosen that it permeates the entire trial with obvious unfairness. *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983). The accused must overcome a "strong" presumption that the challenged action was sound trial strategy under the circumstances. *Strickland*, at 681-82. Nevertheless, courts are "not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999).

A. The Court of Appeals Erred in Finding That Counsel Did Not Advise Doody That His Confession Could Be Introduced Against Him if He Testified.

The voluntariness of the waiver of a fifth amendment right must be decided when viewed in relation to the totality of the circumstances. *Frazier v. Cupp*, 394

U.S. 731 (1969); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973. The right to testify in one's own behalf is a personal right of "fundamental" dimensions. E.g., *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) ("Even more fundamental to a personal defense than the right to self-representation ... is an accused's right to present his own version of events in his own words.") The defendant, not trial counsel, has the authority to decide whether or not to testify. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751 n. 6, (1983). In order to be effective, the waiver of a fundamental constitutional right must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458 (1938).

An involuntary confession may not be used for any purpose. *Mincey v. Arizona*, 437 U.S. 385 (1978). As the court in *Doody v. Ryan* found Doody's confession to be involuntary, it could not be used to impeach him should he elect to testify.

Here, the trial court found that Doody's family all testified that his lead attorney told them outside the courtroom during the trial that Doody wanted to testify, but that he should not. (Appendix C, at 2.) Further, the court found they all testified that counsel implored Doody's father to convince Doody not to testify. (Id.)

But counsel did not "implore." At hearing, Doody's sister-in-law said that at the meeting, counsel looked "pretty flustered, irritated, kind of angry." (Appendix D, Transcript, 6/7/19 at 72, hereinafter, Tr.) Asked if counsel's request for Doody's father go to the jail to convince him not to testify was "polite," Doody's sister-in-law responded:

A. No, no, it was pretty angry, sounded like. She sounded demanding.

(Id. at 74.)

Asked what counsel's demeanor was, Doody's father responded, "I interpreted her demeanor as being extremely agitated and upset because Johnathan wanted to testify." (Id. at 44.) "[S]he was angry and she said if he testifies, I'm getting off of the case." (Id. at 47.) "She told me to go talk to Johnathan, try and talk him out of testifying." (Id. at 46.)

Doody's sister testified counsel was, "A little aggressive. So, I mean, it was like she -- she came to make a statement and make a point and kind of, like, this is what is -- this is what needs to happen kind of, you know, demeanor, so --." (Id. at 67-68.) She added, "Johnathan wanted to testify and that she did not want him to testify. She didn't think it was right for him to testify. He wasn't ready. And she was actually pretty shaken up…." (Id. at 68.)

Even lead counsel acknowledged that at the meeting she was "adamant" about Doody not testifying. (Id. at 98.) Oddly, while first describing counsel as imploring, later, the trial court acknowledged that counsel "was clearly forceful and perhaps angry in her communication to Defendant and his family regarding her opposition to his plan to testify." (Appendix C, at 4.)

Therefore, the facts show counsel was angry, aggressive, and demanding. This understanding of how counsel spoke to the family is significant. Counsel's direction to Doody's father to convince Doody not to testify is a critical pivot point as to what Doody father told him about testifying. It shows counsel's improper language and demeanor at the meeting.

Moreover, while lead counsel said she advised Doody his confession could not be used to impeach him should he testify, she did not record this crucial conversation in her otherwise extensive notes, nor document it in any fashion. (Appendix D, Tr., 6/7/19 at 108-109, 110.) Trial counsel asserted she did not make a log entry regarding any conversation she had with Doody about the use of his confession because it was an elementary issue in the case. (Id. at 111.) However, she also acknowledged that she found Doody to be "low functioning." (Id.)

Doody testified that co-counsel told him he could not testify. (Id. at 12-13.) Co-counsel could not recall advising Doody that his confession could be

introduced if he testified. (Id. at 58, 62.) Co-counsel had no recollection of his conversations with lead counsel on the issue. (Id. at 59.) Notwithstanding co-counsel's inability to recall, in the face of Doody's testimony, the trial judge still doubted co-counsel misstated the law of the case to Doody. (Appendix C, at 3.) This finding is clearly erroneous, unsupported by the facts elicited at the hearing.

The right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right. See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 164 (1986); *Jones v. Barnes*, 463 U.S. at 751 (defendant has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf"); *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right").

Here, the evidence adduced showed that, more probably than not, Doody was mis-advised by trial counsel as to the use of his illegal confession should he testify. Counsel did not want Doody to testify, and was adamant that his family help her convince him not to testify. The trial court's findings otherwise are not supported by the record. The court of appeals denial is clearly erroneous.

The trial court also found that there was a "disconnect" between what lead counsel told Doody and his family members, and what the family members heard.

(Appendix C, at 3.) The judge determined that trial counsel likely was communicating that should Doody testify, the state could introduce Doody's father's previous statements to law enforcement that Doody told him in 1991 he was at the Temple at the time of the murders. (Id.)

However, this finding is also not supported by the evidence. Doody's father testified that both matters were discussed with counsel. He said that counsel told him if Doody testified, the state would introduce *both* Doody's confession to use against him, and Doody's father's statements to police. (Appendix D, Tr., 6/7/19 at 47.) Importantly, Doody's father disputed telling police Doody told him he was at the Temple on the night of the murders. He said he asked his son only what Doody told police, not what he did. (Id. at 52.) Thus, the father's statements to police merely repeated what Doody told police, and were not Doody's confession to his father. (Id. at 20.)

Consequently, while the judge's view of how Doody and his family's account of what occurred could be so diametrically opposed to counsel's version is appealing, it is not borne out by the record. The finding that Doody's family was confused as to what counsel told them about what would happen if Doody testified, is objectively unreasonable, unsupported by the testimony.

As a result, the trial court's determination on this issue is clearly erroneous. It is uncontradicted that co-counsel told Doody if he testified his involuntary confession could be introduced, yet the trial judge "doubts" co-counsel misstated the law. Lead counsel's assertion that she properly advised Doody concerning the non-use of his illegal confession, and that she did not tell his family it could be used against him should he testify, is unsupported by any evidence other than counsel's word. Even though the confession was central to the case, it was too "elementary" for counsel to record in her log that she discussed the matter with Doody. Given the testimony of Doody's family, it is more probable that trial counsel, obviously upset at the prospect of Doody testifying, told his family the confession would be introduced if he testified, and enlisted Doody's frightened father to go to the jail and communicate incorrect information to Doody.

Even if the trial court's finding that there was a disconnect between what counsel told Doody's family, and what Doody's family understood, Doody's father communicated the information he believed trial counsel told him to Doody which caused Doody to waive his right to testify. In this circumstance, it was incumbent on trial counsel, herself, to explain to her client the correct law, not delegate the matter to Doody's father. That counsel left this task to Doody's father is the height of irresponsibility, especially after Doody told her he wanted to testify. As a result,

if any disconnect occurred to Doody's detriment, the responsibility for the misinformation is counsel's, not Doody's. This is especially true here where both attorneys identified Doody as low functioning. The failure to ensure Doody was properly advised constitutes deficient performance below the prevailing profession norms.

B. The Court of Appeals Erred in Finding That Counsel Did Not Threaten to Withdraw If Doody Elected to Testify.

If an attorney threatens to withdraw in the event his client testifies on his own behalf, and the defendant's will is over-borne to the extent that he does not take the stand, the performance prong of a claim for ineffective assistance of counsel is established. *Tyler v. State*, 793 So. 2d 137, 142 (Fla. App., 2001); *Commonwealth v. Velasquez*, 437 Pa. 262, 263 A.2d 351 (1970) (guilty pleas rendered involuntary because they were entered as a result of counsel's threat to withdraw).

In *Nix*, the Court determined that effective assistance of counsel does not include a requirement that counsel present testimony he reasonably believes to be false, and that the constitutional right of an accused to testify in his own defense does not extend to a right to testify falsely. 475 U.S. at 173. Here, however, there is no indication that Doody intended to testify falsely. Moreover, the trial court

acknowledged that Doody's father and sister testified that counsel said she would quit or "walk off" the case if Doody testified. (Appendix C, at 4.) However, the court found that Doody's sister-in-law did not corroborate that lead counsel made these statements. (Id.) This finding was erroneous.

The court of appeals noted the error. (Appendix A, n. 10.) In fact, all three family members, not just Doody's father and sister testified that counsel said she would leave the case if Doody testified. Doody's sister-in-law said:

A. She also stated that she would not be his lawyer if he still continued and pursued to take the stand.

Q. She would leave the case?

A. Yes.

(Appendix D, Tr., 6/7/19 at 74.)

Consequently, the court of appeals finding that this error did not constitute an abuse of discretion is clearly erroneous. (Appendix A, n. 10.) And while lead counsel denied threatening to withdraw if Doody testified (Appendix D, Tr., 6/7/19 at 98.), her testimony was squarely contradicted by all three of Doody's family members present at the meeting.

Based, on the evidence, it is more probable that an upset, aggressive counsel, who was adamant that Doody not testify, did exactly what the family testified she did—threatened to withdraw if Doody testified. Trial counsel then insisted Doody's father go talk to him and convince him not to testify. Counsel's threat and her demeanor were communicated to Doody and coerced him to waive his right to testify. Thus, the court of appeal's support for the trial court's findings are clearly erroneous. Doody demonstrated his counsel's performance was deficient.

C. Doody Was Prejudiced by His Attorneys' Deficient Performance.

The second prong of the *Strickland* test for ineffective assistance of counsel requires a defendant to show his defense was prejudiced by this attorney's deficient performance. 466 U.S. at 694. The Arizona court of appeals did not address the prejudice prong of ineffective assistance finding that it need not since it found counsel's performance was not defective. (Appendix A, n. 8.)

However, as trial counsel argued, without the co-defendant's testimony, there was no case against Doody. (Appendix E, Tr., 1/13/14 at 45.) (Partial transcript.) The missing ingredient from the entire trial was exactly what jurors wanted to know—where was Doody on the night of the murders:

THE COURT: **What was Jonathan doing the night of August 9th, the night of the murders?**

(Appendix F, Tr., 1/9/14 at 103.) (Juror question.) (Partial transcript.) (Emphasis supplied.) The parties agreed they could not answer the question. (Id.)

But Doody wanted to answer. He wanted to testify he was not at the Temple at the time of the murders. Because his attorneys misadvised him as to the use of his involuntary confession should he testify, and threatened to withdraw if he testified, Doody was coerced into waiving his right to testify and suffered conviction as a consequence.

Accordingly, the trial court's findings were contrary to or involved an unreasonable application of clearly established federal law as determined by the United States Supreme Court and were based on an unreasonable determination of facts in light of the evidence presented in court. *Johnson v. Williams*, 133 S. Ct. 1088 (2013).

II. Conclusion.

Doody demonstrated both prongs of ineffective assistance sufficient to show a Sixth Amendment violation. His attorneys' performance fell below an objective standard of reasonableness by telling him his confession could be re-introduced

against him if he testified. That information was incorrect. Doody relied on his attorneys advice in waiving his right to testify. The attorneys' deficient performance prejudiced Doody's defense by preventing him from answering the very question jurors wanted to know—where was Doody on the night of the murders. The attorneys' ineffective assistance constitutes a Sixth Amendment violation.

Doody's attorney told his family that she would withdraw from the case if he testified, and insisted Doody's father convince him not to testify. Threatening to withdraw is highly improper. Counsel's conduct coerced Doody into waiving his right to testify.

Doody said he was not at the Buddhist temple at the time of the murders. That testimony directly undermined the co-defendant's testimony, and provided information that was important to the jury in making its decision.

Under the totality of the circumstances, Doody has shown, more probably than not, in the crucial moment when he wanted to testify, both attorneys made a critical error giving the automatic answer that he could not testify or his and his father's prior statements could be introduced in evidence against him. That error caused Doody to waive his right to testify in violation of the Fifth Amendment, and prejudiced him.

It is reasonably probable that the error affected the result sufficient to undermine confidence in the outcome. The trial court's decision denying Doody relief as well as the court of appeal's affirmance are clearly erroneous, unsupported by the facts or prevailing case law.

Doody prays this Court grant his petition and grant him relief.

Respectfully submitted,

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