21-7400

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK STRICKLIN,	:
Petitioner,	:
-vs-	:
STATE OF NEBRASKA,	:
Respondent.	:

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI

FOR PETITIONER:

Derrick U. Stricklin
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Petitioner, in pro se

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FAILURE OF DEFENSE COUNSEL TO FILE A NOTICE OF ALIBI AND PRESENT AMPLE ALIBI EVIDENCE WHEN INSTRUCTED TO DO SO BY THE DEFENDANT IN A CAPITAL CASE, TO INVESTIGATE OTHER KNOWN SUSPECTS, AND TO CONSULT WITH AN EXPERT REGARDING CELL PHONE TOWER LOCATION EVIDENCE, RENDERS COUNSEL CONSTITUTIONALLY INEFFECTIVE WITHIN THE MEANING OF THE SIXTH AND FOURTEENTH AMENDMENTS?

II. WHETHER THE EXCUSE OF "TRIAL TACTICS" MAY BE USED TO AVOID CONSTITUTIONAL SCRUTINY OF DEFENSE COUNSEL'S PERFORMANCE IN A CAPITAL CASE WHERE SUCH TRIAL TACTICS ARE FOREDOOMED TO FAILURE?

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LIST OF PARTIES

All parties to this proceeding are listed in the Caption of this case.

OPINIONS BELOW

Opinion, Nebraska Supreme Court, 04/03/2015 (290 Neb. 542) (Appendix A)

Opinion, Nebraska Supreme Court, 08/17/2018 (300 Neb. 794) (Appendix B)

Opinion, Nebraska Supreme Court, 12/03/2021 (310 Neb. 478) (Appendix C)

BASIS FOR JURISDICTION

The date upon which the Nebraska Supreme Court denied relief is December 3, 2021 (Appendix C).

This timely Petition for Writ of Certiorari is presented under the authority of 28 U.S.C. §§1254(1) and/or 1257(A) which vest Jurisdiction in this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, U.S. Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right [...] to have the Assistance of Counsel for his defence".

Fourteenth Amendment, U.S. Constitution:

> "...[n]or 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 CASE

Petitioner Derrick U. Stricklin (hereinafter "Stricklin") was charged with and convicted of 3 counts of Murder along with his co-defendant, Terrell Newman.

On December 2, 2012, Carlos Morales and Bernardo Noriega, two notorious drug traffickers, were found dead in Morales' auto body shop repair shop by Morales' fiance at approximately 2:15pm Both men had been shot.

Morales was laying on top of a shell casing, and Noriega had an entry wound in his face. One of the victims was bound at the wrist. There was blood splatter at three diffrent locations, at three different heights, and a bullet hole was in a different room from that in which they were found. There were signs of a struggle within the area marked off as the crime scene, and a large handprint in blood on a table within the scene area as though someone had tried to wipe it off. Outside of the "scene area", blood was found at the bottom of a wall, far away from where the bodies were located.

Members of Noriega's family went to the police, telling them that they believed that Jose Herrera Gutierrez, another drug dealer, had killed the men. They advised the police that he had been coming around, threatening them as well as giving different versions of what happened, saying that the "Mexicans" or "the Blacks" had done it. Because of this two days after the killings, the police eventually contacted Gutierrez, by telephone, and, telling him that they believe he was a victim, invited him to come in and give a statement. Gutierrez, who is alleged to be a member of the MS-13 gang, took this invitation to tell the police a story about what he claimed to happen.

Gutierrez told the police Morales had asked him to get him some cocaine, as he had a buyer for it; that Gutierrez and Noriega had arrived at Morales' body shop at about 11:30am with the cocaine and, when they went in, two men, that he claimed to have recognized from their prior visits to the shop, were already in the office when he a and Noriega arrived.

Gutierrez claimed that, although the men had cash in a clear plastic bag, instead of going through with the deal, they pulled guns, ordered Morales, Noriega and Gutierrez to get down on the ground, t tied Gutierrez's wrists, wrapped plastic around his face and pulled a plastic bag over his head. He told the police that the two men had tied up the other two men and pulled plastic bags over their heads as well and that he heard two or three shots, screaming, and then another shot. He told the police that the two men had shot Morales and Noriega in the back of the head "execution style", shot at him but missed, as lay faced down on the floor, then took the bag off his head, untie his wrists, and left.

Gutierrez told the police that he then left the shop in a hurry on foot, hailed down a passing car, on a 75 mile per hour highway, a and went to see Noriega's family to tell them what had happened, telling them a variety of stories.

At trial, the prosecutor claimed that, when provided with a photo array, Gutierrez eventually picked out Derrick Stricklin and Terrell Newman as the men he claimed to have previously seen in the body shop three or four times. The investigation then turned to Stricklin and Newman. The evidence against Stricklin and Newman consisted solely of the reported identification by Gutierrez, and cell phone records. The

purported to show that calls to and from a cell phone had "pinged" off a tower located near the crime scene. The cell phone was owned by a former girlfriend of Newman, and purportedly showed calls between Newman and Morales, and Newman and Stricklin, on the morning of December 2, 2012.

The prosecutor theorized that Stricklin and Newman had been at the crime scene from between 11:42am and 12:36pm. STricklin had a prior drug offense, so the police and prosecutor ran with the theory and charged them. However, the evidence caused problems with this story.

Therstory told by Gutierrez does not fit the physical evidence from the crime scene.

The blood splatter does not match his description of the shootings, with blood splatter in three diffrent locations, and three different heights, completely inconsistent with two men being shot in the back of the head, while laying face down on the floor.

Moreover, if Noriega were face down on the floor and shot in the back of his head, there could not have been a shell casing found under his body.

No plastic bags or tape were found at the crime (besides the ones the police planted) were found at the crime scene to corroborate Gutierrez's claim of having been tied up and his head wrapped and bagged. Moreover, there were no marks on his wrists from having been tied up and struggling as he described. Only one of the victims had his wrists tied, the other had only one tied, and when the cords were subjected to DNA testing, a single source male donor was determined to have touched the cords. Stricklin and Newman were both excluded as donors by DNA testing. The testers were told by lead Detective Dave

Schneider " if the DNA was not Stricklin's or Newman's" then he didnt care whose it was. The same went for all other DNA as well. Noteworthy: Schneider also told crime scene not to collect any blood evidence, just take pictures. Including the bloody hand smear on the table, and the blood in the other room. In addition to that he also claimed that Jose's prints on file were so bad that he couldn't compare them to anything, but never moved to reprint him, nor did counsel.

The evidence at the crime scene clearly established that only three men had gone into the shop, and only one had left. The only person known with certainty to have left the shop was Gutierrez. No evidence exists to even suggest that anyone other than Morales, Noriega and Gutierrez were present in the shop.

The cell phone was purchased by Newman's ex-girlfriend, who was investigated and charged with unrelated drug weapons and charges. The only reason the girlfriend's home was raided was solely because Newman called her from jail. Thereby she coerced into testifying that she had purchased the phone for Newman; despite the fact that he had used the cell phone on only one or two occasions a month prior to the shootings, and it had remained in her possession ever since. She was told bt police she would get a " get out of jail free" card if she say she bought the phone for Newman. The call supposedly linking Stricklin to having been in phone contact with Newman had actually been a call to the ex-girlfriend, with whom the evidence proved he was friends with independently of Newman.

It was also established at trial that the prosecutor's assertions that Gutierrez had picked the two defendants from a photo array was falsified. No line-up ever occurred. It was admitted at the suppress

sion hearing that there had been police misconduct involved with the creation of the line-ups, and the video purporting to show the non-existent line-up, was completely fabricated. During the trial, the state suborn perjury when they allowed Jose, to lie, not recant, and say that he gave an accurate description of Stricklin. The state simultaneously committed misconduct when they elicited a false description from Jose, when they asked him to describe Stricklin how he was looking in court that day.

Stricklin's cellphone records established that he was 5 miles away from Newman and the crime scene at 12:34pm, making a call while traveling in his car, two minutes before the prosecutor asserted he left the crime scene with Newman at 12:36pm, a physical impossibility.

Newman's cell phone, which was actually his and which was in his possession when he was arrested, proved he was making and recieving calls during the time period in which he was purported to be committing the murders, the state told the jury it was not Newman making these calls, if it is not him, then who?

The sole evidence adduced at trial was the falsified identification by Jose and the girl's cell phone information. There's is no way the state can believe their own theory that Stricklin and Newman were together at Morales committing murder from 12:30pm until at least 12:36pm. Because Stricklin's records is in their files. They know or should have known it is impossible for the defendants to be together at this time because at 12:34pm and 12:36pm STricklin and Newman is at least 5 miles apart.

Notably, trial counsel failed to challenge the girl's testimony stating that the cell phone had been purchased " for Newman". Counsel also failed to consult with, present evidence from an expert witness,

or ask any questions during trial relating to cell phone locations. Moreover, counsel completely failed to present existing alibi evidense for either Stricklin or NEwman.

Stricklin took his stepson to the barbershop, in downtown Omaha, miles away from the crime scene, at approximately 10:00am. After their haircuts, which took about an hour each, they left the barbershop at approximately noon and drove to Stricklin's grandmother's house, near 36th Street using the North Freeway, with Stricklin making a phone call along the way, the 12;34pm call, which clearly established he had been miles away from the crime scene at the exact time the prosecutor's timeline purported to place him there. Instead of putting Stricklin in the location of his alibi as the evidence proved, the state only by theory NOT evidence, put him at the crime scene with Newman, literally 2 places at one time.

Newman also had a solid alibi with multiple credible witnesses. Two witnesses, Kevin Riley and Janet Mariscal place Newman at Clayton's BBQ Shop and following that, the service counter emploee and cashier at Chubb's food store establish that he was there right in the middle of the time the prosecutor asserted he was at the crime scene. None of the alibi evidence or witnesses for either man was interviewed, contacted, deposed, subpoenaed, or called as witness at trial by counsel.

The police and prosecutors further ignored and withheld the fact that there were other suspects in the case, beyond Jose himself, including the fact that Morales was being targeted by a local gang who wanted a "drug tax" that Morales refused to pay resulting in threats from the gang; and evidence from an informant that the person threatening Morales went by the nickname of "Sip", which neither

Stricklin nor Newman had ever done. In addition, the police had information, withheld from the jury, that a MArcus Jefferson named James Moore as "Sip" and the killer. It was also established that Moore and Jefferson had motive to comitt the killings.

There was also issues with the jury. There were only two black jurors. Not only did one of them know both of the defendant's and na haveea bad history with them, but another juror was visually imtimidated by a woman in the gallery, who knew the defendants and blamed STricklin for the death of a family member. Stricklin was not involved in that death and had been completely cleared of any involvement, ibutnthe woman still blamed him and glared at the woman on the jury and had conversations about this with the jurors in the courthouse hallway. A hearing was held on one of these issues misconduct and the court found no error, after filing its own motion for appointment of counsel. The counsel that the court appointed was allowed to testify for the jury, prior to the hearing, and after talking to the court on what he (lawyer) was going to testify to again prior to the hearing .Despite the fact that the jurors staement was different from that of his attorney, the court found the lawyer credible and struck the jurors statement "solely" on the representations of his lawyer. Creating a structural error swaying the evidence totally in favor of the state. Notably, after trial, jurors affidavit confirmed all of these fatcs. The juror affidavits further stated that the only reason that the jury voted to convict is because neither defendant testified.

After a post-trial motion hearing regarding the jury isues was denied, a timely direct appeal was taken to the Nebraska Supreme Court which overruled all assignments of error and affirmed on April 3, 2015 (290 Neb. 542 - Appendix A).

A subsequent Post-Conviction proceeding was held in which the issues dehors the record, including ineffective counsel for failing to investigate and present substantive alibi evidence and to consult with an expert on cell phone tracking data, were presented. After denial of relief in the trial Court, the Nebraska Supreme Court, on appeal, reversed and remanded for an evidentiary hearing on the ineffective counsel issues (300 Neb. 794, August 17, 2018, Appendix B). Following the hearing and denial of relief, the Nebraska Supreme Court affirmed the denial of relief on appeal therefrom, holding that "trial tactics" insulated counsel's performance from Constitutional scrutiny (310 Neb. 478, December 3, 2021, Appendix C). This timely Petition for Writ of Certiorari follows.

FIRST QUESTION PRESENTED FOR REVIEW

WHETHER THE FAILURE OF DEFENSE COUNSEL TO FILE A NOTICE OF ALIBI AND PRESENT AMPLE ALIBI EVIDENCE WHEN INSTRUCTED TO DO SO BY THE DEFENDANT IN A CAPITAL CASE, TO INVESTIGATE OTHER KNOWN SUSPECTS, AND TO CONSULT WITH AN EXPERT REGARDING CELL PHONE TOWER LOCATING EVIDENCE, RENDERS COUNSEL CONSTITUTIONALLY INEFFECTIVE WITHIN THE MEANING OF THE SIXTH AND FOURTEENTH AMENDMENTS?

LAW AND ARGUMENT

This Court has long interpreted the Sixth Amendment right to counsel for the defense of an accused as applicable to State prosecutions through the Fourteenth Amendment, **Powell v Alabama** (1932) 287 U.S. 45, to apply to all criminal prosecutions in

which the accused is facing a serious penalty, **Gideon v Wainwright** (1963) 372 U.S. 335; **Baldasar v Illinois** (1980) 446 U.S. 222; **Scott v Illinois** (1979) 440 U.S. 367; **Argersinger v Hamlin** (1972) 407 U.S. 25 and **Glover v U.S.** (2001) 531 U.S. 198, and regardless of the ability of the accused to pay (id). See also **Douglas v California** (1963) 372 U.S. 353.

This Court has further held that defense counsel in a criminal case owes a duty of diligence to the accused, to advocate zealously, within the bounds of the law. See, e.g. **McMann v Richardson** (1970) 397 U.S. 759; **Yarborough v Gentry** (2003) 540 U.S. 1; **Padilla v Kentucky** (2010) 559 U.S. 356. That is, the right to counsel means the right to "effective counsel" (id). This reqeuirement for counsel to be "effective" attaches regardless of whether counsel is appointed or retained. **Cuyler v Sullivan** (1980) 446 U.S. 335.

This Court has established a "two-pronged test" to determine whether claimed instances of ineffective assistance of counsel at trial in a criminal case rerquire relief under the Sixth and Fourteenth Amendments. In **Strickland v Washington** (1984) 466 U.S. 668, this Court held that, in order to warrant relief, the defendant must show that counsel's assistance was ineffective, and then, separately, that the defense was prejudiced by such ineffectiveness. In determining whether counsel was ineffective, the reviewing court must determine whether counsel violeted essential duties owed to his client, and whether counsel's performance fell below an "objective standard of reasonableness". (id), see also **McMann v Richardson**, supra.

In determining the "prejudice prong" of the two-pronged

Strickland analysis, the relevant inquiry is whether counsel's errors undermine confidence in the outcome of the proceedings (id), that is, whether the errors rendered the results of the proceedings unfair or unreliable. **Lockhart v Fretwell** (1993) 506 U.S. 364; **Glover**, supra; **Williams v Taylor** (2000) 529 U.S. 362, et. al.

In **Strickland**, this Court cautioned that, under the performance prong, there is a presumption that counsel's strategy and tactics fall "within a wide range of reasonable professional assistance" (id, 466 U.S. at 689), thereby generating a cascade of following decisions that employ substantial deference to counsel's performance, including "trial tactics", which requires a reviewing court to exercize hindsight in order to uncover scenarios under which every conceivable claimed error of counsel can be delegated to "trial tactics" no matter how egregiously deficient.

In reviewing claims relating to failure to call witnesses, various courts have held that the failure to present alibi evidence and call important witnesses, or to consult with experts constitutes a departure from even the wide range of reasonable, professional assistance. See, e.g. **Grant v Lockett** (CA 3, 2013) 709 F3d 224 (counsel's failure to impeach prosecution's witness in light of weakness of government's case was ineffective); **Elmore v Ozmint** (CA 4, 2011) 771 F3d 783 (Counsel's failure to investigate prosecution's forensic evidence ineffective); **Peoples v Lafler** (CA 6, 2013) 734 F3d 503 (Counsel's failure to impeach key prosecution witness ineffective); **Toliver v Pollard** (CA 7, 2012) 688 F3d 853

(counsel's failure to call crucial witnesses because of their familial relationship ineffective); and multiple cases have held that the faulure to properly research, prepare and investigate for trial, to interview witnesses and to present alibi evidence constitutes ineffectiveness on the part of defense counsel. See, e.g. **Groseclose v Bell** (CA 6, 1997) 130 F3d 1161; **Vasquez v Bradshaw** (CA 6, 200) 345 Fed. App'x. 104; **Bigelow v Williams** (CA 6, 2004) 367 F3d 562; (holding that the failure to call a known alibi witness would generally constitute ineffectiveness); cf: **Lopez v Miller** (E.D. NY, 2013) 915 F. Supp. 2d 373; **Fargo v Phillips** (E.D. MI, 2001) 129 F. Supp. 2d 1075; **Grooms v Solem** (CA 8, 1991) 923 F2d 88; **Lawrence v Armentrout** (CA 8, 1990) 900 F2d 127; **Hadley v Groose** 1995 U.S. DIst. LEXIS 6860; **Tosh v Lockhart** (CA 8, 1989) 879 F2d 412, et.al.

Where a failure to investigate, interview or call witness, including alibi witnesses, is established, the question becomes not whether counsel's decision is "strategic", but whether it was reasonable. See, e.g. **Roe v FLores-Ortega** (2000) 528 U.S. 478.

In multiple applications of **Strickland** and its progeny, the lower courts have vacillated on the question as to whether the deference due to the performance of counsel in a criminal case is absolute when couched in terms of "trial tactics", or whether it must be reviewed in light of whether such a performance deemed "tactical" was, in itself, reasonable.

In almost all cases, it is well-settled that the refusal to investigate or call alibi witnesses, the refusal to investigate other suspects and the refusal to even consider investigating or explore expert witnesses regarding forensic cell phone tower

location evidence, individually, constitute ineffectiveness as objectively unreasonable, as shown above. This Court has never issued any decision discussing specifically alibi evidence overlooked, ignored or neglected by defense counsel in a criminal case and this case is ripe for such review and discussion.

This case is especially ripe for such review in that it is a case in which the defendant has shown a plethora of evidence of actual innocence and is serving a life sentence despite his innocence, which could have been easily established at trial had counsel peformed effectively and reasonably, and more especially where, as here, the evidence inculpating the defendant was extremely weak and contradictory.

This Court should accept jurisdiction to correct the errors in this case and to clarify the requirements of counsel in a capital case in terms of investigating the claimed alibi of the defendant.

SECOND QUESTION PRESENTED FOR REVIEW

WHETHER THE EXCUSE OF "TRIAL TACTICS" MAY BE USED TO AVOID CONSTITUTIONAL SCRUTINY OF DEFENSE COUNSEL'S PERFORMANCE IN A CAPITAL CASE WHERE SUCH "TRIAL TACTICS" ARE FOREDOOMED TO FAILURE?

LAW AND ARGUMENT

As noted above, there is a limit to the presumption that the performance of counsel is "within a wide range of reasonable professional assistance" contemplated in **Strickland**, supra."While strategic choices made after thorough investigation of law and facts ... are virtually unchallengeable [...] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable, professional judgment

supports the limitation on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that investigation was not warranted" (id at 690-691).

In practice, as in the instant case, when presented with evidence that counsel refused to investigate or interview alibi witnesses or present them at trial, while failing to file a mandatory notice of alibi despite being clearly informed of the alibi and instructed to do so by the defendant, the failure to investigate other known suspects, and failing and refusing to consult with necessary forensic evidence, especially in a case without little substantive evidence against the defendant, trial courts routinely rule out any relief, or even hearings, under the guise of attributing virtually every decision or deficiency of trial counsel as "trial tactics". In doing so, the trial courts foreclose relief and slam the courthouse doors on often actually innocent prisoners.

In the rare case where, as here, the defendant is fortunate enough to obtain the grant of a hearing to present the evidence that counsel ignored, refused to investigate, obtain or present, the practice is for the prosecutor to put trial counsel on the stand as a prosecution witness and to elicit 'trial tactics' from counsel to shut down the inquiry process.

In this case, at the hearing, the prosecutor presented a deposition he obtained from trial counsel in which counsel admitted not having reviewing the case file "for years", and then stated that he had "vague memories of potentially not going forward with an alibi as trial strategy" (Appendix C, p. 13).

The trial court, having already refused a hearing on these issues and only conducting the hearing after being forced to do so by the higher court on remand, immediately seized upon this talismanic incantation of "trial tactics" to avoid further consideration, applying deference and denying relief.

The rulings of this Court in **Strickland** and its progeny have been so distorted by the lower courts in application, that they have created a legal climate where, no matter how severe the deficiency of counsel, it is almost always rejected under the talismanic incantation of "trial tactics", brooking no further inquiry.

It must be noted that, according to the National Registry of Exonerations, the incidence of ineffective counsel for refusing to investigate and present evidence and witnesses is a leading cause of wrongful conviction of actually innocent American Citizen in their findings based upon analysis of over 1,200 exonerations spanning the past 40 years (the average time in which it took to obtain release by an innocent prisoner being almost 13 years).

The practice of interpreting the prior decisions of this Court in such a way as to insulate glaring errors and deficiencies of trial counsel, especially in a capital case, under the guise of "trial tactics" undermines confidence in the judiciary as well as in the reliability of the outcome of criminal cases in our society.

The trending of courts in refusing to grant relief, no matter how egregious counsel's errors, so long as counsel parrots "trial tactics" must be addressed and corrected by this Court.

CONCLUSION

The increasing prevalence of the practice of lower courts to excuse valid claims of ineffective assistance of counsel under the guise of trial tactics is a tortured rendering of prior decisions of this Court, being used to insulate deficient performances of lawyers that result increasingly in innocent people being incarcerated for extended periods of time. This Court should accept jurisdiction, review these matters, and clarify the standards of review for criminal defense lawyers with an eye towards enforcing and upholding the Constitutional Rights crafted by the Framers and embedded in our philosophical judicial system, rather than being used as a way to undermine, deteriorate and avoid providing and protecting such rights.

Respectfully submitted,

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