NO. 21-7456

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT EARL ROWLES

PETITIONER-APPELANT,

V.

JULIE JONES

RESPONDENTS-APPELLEES,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Pro se

QUESTION PRESENTED

Whether a Petitioner who is serving a life sentence without the possibility of parole is denied his constitutional rights to counsel where counsel's representation fell outside that range of reasonably professional assistance for failure to call two witnesses (Doris Jones and Leshwand McSwain) to testify; Where their testimonial evidence supports the Petitioner's defense and Petitioner has shown that a reasonable probability exists that the outcome of the proceeding would have been different.

Whether it's proper to deny a claim as strategic without holding an evidentiary hearing to determine why trial counsel did not call a particular witness, when the record clearly does not refute the claim?

LIST OF PARTIES

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

RELATED CASES

There are no related cases.

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ROBERT EARL ROWLES
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STATE OF FLORIDA
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE FLORIDA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Robert Earl Rowles, *pro se*, respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the denial of his motion for post-conviction relief filed in the state trial court in the Twentieth Judicial Circuit, in and for Lee County Florida. The judgment of the United States Court of Appeals for the Eleventh Circuit, denying Petitioner's application for Certificate of Appealability.

OPINIONS BELOW

The following opinions and orders below are pertinent here, all of which are attached as appendixes:

[1] The opinion and orders of the United States Court of Appeals for the Eleventh Circuit Denying Request for Certificate of Appealability (12-3-21). **(App. A).** The opinions is designated for publication but is not yet reported. [2] Order enying petitioner motion to alter and amend judgment fiuled May 10, 2021. **(App. B).** [3] Decision of State Court of Appeal; Second District denying Petitioner's 3.850 motion for post conviction relief. **(App. C).** [4]. **(App. D).**

STATEMENT OF JURISDICTION

The District Court and the Court of Appeal for the Eleventh Circuit denied Petitioner's request for Certificate of Appealability. In *Hohn v. United States*, 524 U.S. 236 (1998), This court held that, pursuant of 28 USC 1254 (1), The United States Supreme Court has jurisdiction, on certiorari, to review a denial of a request for Certificate of Appealability by a circuit judge or panel of a Federal Court of Appeals.

The date on which the United States Court of Appeals decided my case was December 3, 2021, and a copy of the order denying reconsideration appears at Appendix **(A).**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right of a State prisoner to seek Federal Habeas Corpus Relief is guaranteed in 28 USC 2254. The standard for relief under "ADEPA" is set forth in 28 USC 2254 (d) (1).

Petitioner's questions involves the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner's questions involves the Sixth and Fourteenth Amendments to the United States Constitution.

The Sixth Amendment provides, in part, that:

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

The Fourteenth Amendment provides, in part, that:

> [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.

Strickland v. Washington, 466 U.S. 668 (1984).

STATEMENT OF THE CASE

Petitioner was arrested on January 8, 2011, for sexual battery on a Child under the age of 12. The State filed an Information charging Petitioner with Capital Sexual battery. Pre-trial motions were filed and the State's Motion to allow hearsay statements of the child victim was granted.

On August 16, 2012, Petitioner proceeded to trial on the information. The State presented testimony from seven witnesses. On August 16, 2012, the jury returned a verdict of guilty of capital sexual battery on a child under the age of 12 (T.T. 423). On December 3, 2012, the Honorable Bruce Kyle sentenced Petitioner to a term of Life in the Florida State prison.

Petitioner appealed the conviction. On June 25, 2014, The Florida Second District Court of Appeal affirmed Petitioner's conviction. (**App. D**).

Subsequently, the Petitioner filed a motion for postconviction relief (3.859), motion for postconviction relief (3.850). The trial court denied said motion. Petitioner appealed. The Second District Court of Appeal pre curriam affirmed without an evidentiary hearing March 24, 2017, _____ So.3d _____ (Fla. ___ DCA 20__).

On June 29, 2017, Petitioner, pursuant to 28 USC 2254 filed a petition for writ of habeas corpus in the U.S. District Court for the Middle District of Florida. On January 16, 2018, Respondent filed a response arguing the Petitioner failed to exhaust claims 1, 2, 4, 5, 6 and 7; and addressing Petitioner's other claims on the merits.

On January 16, 2018, the State responded to the Petitioner's petition. On March 27, 2018, Petitioner filed a traverse to the State's Response.

On March 9, 2021, a final judgment was entered by Magistrate Judge Mac R. McCoy denying Petitioner's petition.

On March 30, 2021, The Respondent filed a motion for Reconsideration pursuant to Federal Rule of Civil Procedure 59 (e), for reconsideration of the petition. On May 10, 2021, the court denied the Petition.

On June 17, 2021, Petitioner filed a timely notice of appeal. Subsequently, On June 29, 2021, Petitioner filed a Certificate of Appealability.

On December 3, 2021, the Eleventh Circuit Court of Appeals, (by a single judge) entered an order denying Petitioner's Certificate of Appealability. Concluding "[p]etitoner failed to make a substantial showing of a denial of a constitutional right."

REASONS FOR GRANTING THE WRIT

I. In order to prevail for a claim of ineffective assistance of counsel, based on the failure to call a witness, to be facially sufficient, the allegations must include(1) the identity of the prospective witness; (2) that the prospective witness would have been available to testify at trial; (3) the substance of the testimony; and (4) an explanation as to how the omission of the testimony prejudiced the outcome of the trial

A. Petitioner Was Denied His Constitutional Right To Effective Assistance Of Counsel:

The Eleventh Circuit and the United State Supreme Court has held that under Florida law, for a claim of ineffective assistance of counsel, based on the failure to call a witness, to be facially sufficient, the allegations must include: (1) the identity of the prospective witness; (2) that the prospective witness would have been available to testify at trial; (3) the substance of the testimony; and (4) an explanation as to how the omission of the testimony prejudiced the outcome of the trial. See *Nelson v. State*, 875 So. 2d 579, 2004 WL 1207517 (Fla. 2004); *Ford v. Inch*, 2021 U.S. Dist. LEXIS 139759 (N.D. Fla., July 1, 2021); *Gilreath v. Head*, 234 F.3d 547, 551 n.12 (11th Cir. 2000) (citing *Horsley v. State of Ala.*, 45 F.3d 1486, 1494-95 (11th Cir. 1995)).

The Petitioner claims that counsel was ineffective for failing to call two witnesses to testify. Witness Doris Jones and witness Leshwand McSwain were two witnesses that were willing and available to testify.

Petitioner alleged the identity of both witnesses: *Doris Jones and witness Leshwand McSwain*

Petitioner alleged the both witnesses were available to testify: *Leshwand McSwain stated in her affidavit that she was willing to testify and waited on counsel to pick her up. Doris Jones also stated in her affidavit that she was willing to testify and waited on counsel to pick her up.* (See **App. E** Sworn Affidavit(s))

Petitioner alleged the substance of the testimony: *Leshwand McSwain stated in her affidavit that she would have testified about specific encounters that she had with the alleged victim. She would have testified that she asked the alleged victim about the incident and she denied it happened. She also would have testified that on numerous occasions the alleged victim lied on her because she did not get her way.*

Doris Jones stated in her affidavit that she would have testified about specific encounters that she had with the alleged victim. She would have also testified that on numerous occasions the alleged victim lied on her because she did not get her way.[1]

Petitioner gave an explanation as to how the omission of the testimony prejudiced the outcome of the trial: *The omission of the two witnesses' testimony did in fact prejudice the Petitioner's trial defense and case.* Petitioner's defense was that he did not do what the victim is alleging he did. The alleged victim is lying on

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[1] *Cliburn v. State*, 710 So. 2d 669 (Fla. 2nd DCA 1998) relying on *Jaggers v. State*, 536 So. 2d 321, 327 (Fla. 2d DCA1988) have held: where the witness previously had made a false allegation of sexual abuse, we noted that evidence relevant to a prosecuting witness's possible bias or corruptness is admissible. When assessing a key witness's credibility, the jury must know about any improper motives. Id. Also the Florida Supreme Court has held in *Kennard v. State*, 42 Fla. 581, 28 So. 858 (Fla. 1900), "Where, however, a witness has knowledge of the facts, and speaks from a recollection of the facts as they actually appeared to him, though his impression may not amount to positive assurance, it is competent to be considered by the jury." Id. at 859.
Also See *Louis v. United States*, 2014 U.S. Dist. LEXIS 145773, at *12, 2014 WL 5093850, at *5 (M.D. Fla. Oct. 10, 2014). "[E]vidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or on affidavit.

him because she did not get her way. The interest in making up the story was crucial to the finding of guilt in Petitioner's case.[2]

B. Argument of the post conviction court:

The Respondent argued that state court reasonable concluded that the victim had no interest in making up her testimony were proper, as the prosecutor was asking the jury to draw logical inferences from the trial testimony. Further, this Court must defer to the state court's conclusion that the purported testimony from the witnesses identified by Mr. Rowles would have been inadmissible and cumulative. (See Order of Appeal from the United States District Court for the Middle District of Florida pg. 3)

C. No Competent Counsel Would Have Made The Same Decisions:

The Eleventh Circuit held that a defendant can rebut this presumption only by establishing that no competent counsel would have made the same decisions. *Prince v. Sec'y, Fla. Dep't of Corr.*, 2021 U.S. Dist. LEXIS 16705 (11th Cir. Fla., January 29, 2021)

In the instant case, the testimonial evidence of Ms. Doris Jones and Ms. Leshwand McSwain was vital considering that the State's case was based solely on the victim's testimony. The alleged victim has a history of lying on people when she cannot get her way. Counsel had both witnesses on the list who was waiting to be called to trial (see **App. E** Sworn Affidavit(s)).

[2] The failure to call witnesses can constitute ineffective assistance of counsel if the witnesses may have been able to cast doubt on the defendant's guilt. *Bulley v. State*, 900 So. 2d 596, 597 (Fla. 2d DCA2004).

Under the circumstances of this case, trial counsel's performance was not that of a reasonably effective attorney. Counsel's failed to call two witnesses that who would have produced evidence that corroborated Petitioner's sole defense.

Additionally, counsel was ineffective for failing to present the testimony from Ms. Doris Jones and Ms. Leshwand McSwain that was otherwise available.

Had this testimony been presented to the jury, a reasonable probability exists that the outcome at trial would likely have been different such that confidence in the outcome is undermined. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Devaney v. State*, 864 So. 2d 85, 88 (Fla. 1st DCA2003) (failure to call exculpatory witnesses constituted ineffective assistance that cast doubt on defendant's guilt).

II The post conviction cannot deny a motion for post-conviction relief by finding that defense counsel's decision was tactical or trial strategy without first holding an evidentiary hearing.

A. Evidentiary Hearing Standard:

A district court shall hold an evidentiary hearing on a habeas petition "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. . . ." 28 U.S.C. 2255(b). "[I]f the petitioner alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim." *Aron v. United States*, 291 F.3d 708, 714-15 (11th Cir. 2002) (citation omitted). However, a "district court is not required to hold an evidentiary hearing where the petitioner's allegations are affirmatively contradicted by the record, or the claims are patently frivolous." Id. at 715. See also

Gordon v. United States, 518 F.3d 1291, 1301 (11th Cir. 2008) (a hearing is not necessarily required whenever ineffective assistance of counsel is asserted). To establish entitlement to an evidentiary hearing, petitioner must "allege facts that would prove both that his counsel performed deficiently and that he was prejudiced by his counsel's deficient performance." Hernandez v. United States, 778 F.3d 1230, 1232-33 (11th Cir. 2015). Viewing the facts alleged in the light most favorable to petitioner, the Court finds that the record establishes that petitioner is not entitled to relief, and therefore an evidentiary hearing is not required.

Counsel failed to present the testimony from Ms. Doris Jones and Ms. Leshwand McSwain that was otherwise available and corroborated Petitioner's sole defense.

Under the circumstances of this case, trial counsel's performance was not that of a reasonably effective attorney. The facially sufficient claim was not refuted by the records attached to the postconviction court's order, summary denial of this claim was improper.

B. Florida law requires an evidentiary hearing when determining whether counsel's decision was tactical or strategic:

The law is clear that in Florida the trail court cannot deny a motion for post-conviction relief by finding that defense counsel's decision was tactical or trial strategy without first holding an evidentiary hearing. See *Button v. State*, 941 So. 2d 531, 533 (Fla. 4th DCA2006)

> "A trial court cannot deny a motion for post-conviction relief by finding that defense counsel's decision was tactical or trial strategy without first holding an evidentiary hearing.

Romero v. State, 48 So. 3d 971 (Fla. DCA2010)

> holding that a trial court cannot deny a motion for post-conviction relief by finding that defense counsel's decision was tactical or trial strategy without first holding an evidentiary hearing.

O'Neal v. State, 54 So. 3d 1071 (Fla. 4th DCA2011)

> disagreeing with the state's argument that defense counsel trial strategy was evident from the face of the record without necessitating an evidentiary hearing to resolve the question of whether the omission alleged to be deficient was reasonable trial strategy);

Gordon v. State, 608 So. 2d 925 (Fla. 3d DCA1992)

> finding that when the trial court is confronted with a claim of ineffective assistance of counsel, a finding that some action or inaction by defense counsel was tactical is generally inappropriate without an evidentiary hearing; counsel should be heard from, and, if necessary, cross-examined as to whether a decision truly was tactical)

Johnson v. State, 840 So. 2d 369 (Fla. 1st DCA2003)

> finding that the attachments to the order denying relief did not conclusively negate the defendant's allegation, and the possibility that counsel's omission might have been a matter of trial strategy could not be determined without an evidentiary hearing.

Dauer v. State, 570 So. 2d 314 (Fla. 2d DCA1990)

> holding that the determination of whether or not defense counsel's actions were tactical is a conclusion best made by the trial judge following an evidentiary hearing.

Accordingly, counsel's actions violated Petitioner's Constitutional Rights to effective assistance of counsel. An evidentiary hearing is required to determine counsel's actions were tactical or a matter of trial strategy.

CONCLUSION

Based on the foregoing, this court should grant the petition for writ of certiorari and order full briefing.

Respectful submitted,

Robert E. Rowles

Robert Earl Rowles, Pro se

Date: March 1, 2022