21-7690

No. _____

FILED
APR 14 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Pro Se,
ANTHONY J. SPRINGER — PETITIONER
(Your Name)

vs.

BRYAN MORRISON, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Anthony J. Springer, 760969
(Your Name)
Lakeland (MSP)
Lakeland Correctional Facility 141 First St.
(Address)

Coldwater, MI. 49036
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Question #1:

TRAIL AND APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE FOR FAILING TO INVESTIGATE AND PRESENT THE PRE-TRIAL DEFENSE OF ENTRAPMENT BY ESTOPPEL.

Question #2:

APPELLATE COURT SHOULD HAVE ISSUED CERTIFICATE OF APPEALABILITY OF HABEAS ISSUE #1) INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PURSUE A DEFENSE OF ENTRAPMENT BY ESTOPPEL. REASONABLE JURIST COULD DEBATE WHETHER ISSUE #1 SHOULD HAVE BEEN RESOLVED DIFFERENTLY, BECAUSE MICHIGAN SUPREME COURT JUSTICE BERNSTEIN WOULD HAVE GRANTED LEAVE TO APPEAL.

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

OTHER

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

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix (A) to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.
Springer v. Morrison, 2022 U.S.App. LEXIS 6302

The opinion of the United States district court appears at Appendix (B) to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.
Springer v. Berghuis, 2021 U.S. Dist. LEXIS 100169

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix (C) to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.
People v. Springer, 2017 Mich. LEXIS 2119

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 10, 2022.

☒ No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment of the Federal Constitution

(Right to Effective Assistance of Counsel)

28 U.S.C. § 2253(c)(2)(Certificate of Appealability)

STATEMENT OF THE CASE

Petitioner Anthony Springer was tried with his codefendant wife, Marsha Springer. After a jury trial Anthony was convicted of torture, and first-degree child abuse, in connection with the death of their 16-year old daughter, Calista that was restrained to her bed at the time of an accidental house fire.

In Petitioner's 28 U.S.C. § 2254 habeas corpus petition, Petitioner raised Ground One) Ineffective Assistance of Trial and Appellate Counsel for Failure to Raise the Pre-Trial Defense of Entrapment by Estoppel. (ECF No. 1 filed on 08/07/2015). Petitioner alleged that he restrained his daughter with a home-made device, with complete knowledge and approval from Community Mental Health (CMH), and Child Protective Service (DHS/CPS).

On 10/29/2015 the Michigan Supreme Court vacated it's initial denial and, in lieu of granting leave, vacated the trial court's denial of Petitioner's motion with respect to habeas Ground One, Ineffective Assistance, Entrapment by Estoppel. (ECF No. 23-39 Michigan Supreme Court 150645). The trial court appointed counsel for Petitioner, conducted a hearing on Ground One, and invited post-hearing briefs regarding Ground One. (ECF No. 23-33; 05-12-2016 Evidentiary Hearing Transcript).

Facts Developed at Evidentiary Hearing:

Attorney John Bush represented Petitioner at preliminary examination and jury trial. The issues to be developed concerned ineffective assistance of trial and appellate counsel for failure to investigate and present the pre-trial defense of entrapment by estoppel.

Because Petitioner and Marsha Springer were tried jointly, the strategy developed was a "joint defense," and both defendants and their separate counsel would meet for collaboration. (ECF No. 23-33; 05-12-2016 Evidentiary Hearing Page ID. 3837). Mr. Bush admitted that the defense "team" had discussed the issue of tacit condonation by DHS/CPS. (Ev. Hr'g. Tr. Page ID. 3853-3854). Mr. Bush tried to show that the DHS/CPS' knowledge of the restraints indicated that the Springers were "acting reasonably in how he was disciplining and controlling his daughter." (Ev. Hr'g. Tr. Page ID. 3837-3838). He believed that the DHS/CPS awareness was "very relevant to the trial." (Ev. Hr'g. Tr. Page ID. 3838). Mr. Bush did not believe the DHS/CPS "condoned" the restraints even though DHS/CPS knew about them. (Ev. Hr'g Tr. Page ID. 3838).

With regard to the issue of entrapment, attorney Bush acknowledged that prior to trial, the court had commented on DHS/CPS' awareness of the restraints, and whether this awareness constituted "condonation." (Ev. Hr'g. Tr. Page ID. 3841-3842).

Question by Petitioner's attorney MS. OWENS: "And, at that hearing, Mr. Bush, the judge specifically says:

> "'That's another interesting factor that's - This was brought to the State's attention back in 2004. The State investigated it and did not do anything to stop it. So they were clearly aware of the claim in 2004.
>
> One of the questions I had was whether or not there's an argument to be raised in that regard that the State's involvement condoning the use of the chain by not taking any action would raise any argument for the defense in terms of due process rights, but that's not been raised here."' (08-31-2009 Motions Transcript ECF No. 23-7 Page ID. 985-986).

Although he was aware of the doctrine of entrapment by estoppel, and acknowledged the trial court's comments about it, attorney Bush did nothing to investigate the issue, either by research (Ev. Hr'g. Tr. Page ID. 3843) or by filing a motion in limine (Ev. Hr'g. Tr. Page ID. 3844). We know he did not know whether he had all of the DHS/CPS records. The potential outcome from a motion in limine as to the issue of entrapment by estoppel would have been outright dismissal of the charges, a highly favorable outcome. (Ev. Hr'g. Tr. Page ID. 3844-3847).

When asked whether DHS/CPS had implicitly condoned the restraints by failing to take action, Mr. Bush denied the DHS/CPS had "done nothing" to prevent Calista from being restrained; "I also believe that they intervened, talked to the family, became involved, tried to tell them the dangers of fires. I think they did a lot." (Ev. Hr'g. Tr. Page ID. 3845).

At trial, DHS/CPS investigator Patricia Skelding explained to Mr. Bush, that the chain restraint had been authorized by the State.

> "And that coworker told me Calista is being chained to her bed with permission from Community Mental Health. And she already knew that before I even got the assignment. So that told me that - I believed at the time that everybody knew that; that Community Mental Health knew that; that my supervisor knew that; that the coworker knew that. That was before I even started the (hair-pulling) investigation." (Trial Tr. Vol.#IV; pg. 998 at 19).

****

Q. "If I understand your testimony, then, you believe that the restraining or chaining to the bed had been authorized; is that correct?"

A. "I believe that, yes."

Q. "All right. And, in fact, you believe it to be necessary yourself; is that correct?"

A. "According to what they told me and what I believed, yes - "

Q. "All right."

A. " - I believed it was necessary." (Trial Tr. Vol.#IV; pg. 1000 at 13).

DHS/CPS Ms. Skelding testified that she trusted the people in her office and Community Mental Health when they diagnosed Calista, and "the overall end to that was that she needed to be protected, she needed to be safe, and she needed to be restrained at night and that the parents couldn't be up 24 hours a day supervising her." (Trial Tr. Vol.#IV; pg. 997 at 14).

Specifically, with regard to the preliminary examination testimony of Patricia Skelding and her DHS/CPS supervisor Cindy Bare; attorney Bush acknowledged that they testified that they had known of "restraints" (not necessarily chains, but some sort of tethering) for 4-5 years before the fire (Ev. Hr'g. Tr. Page ID. 3847-3848) and even closed out the Springers case having noted that Calista was being "chained" (Ev. Hr'g. Tr. Page ID. 3848). Yet, he did not believe that this explicit and long-standing knowledge by DHS/CPS raised an issue of condonation. (Ev. Hr'g. Tr. Page ID. 3848). Attorney Bush was aware that DHS/CPS is "required" to take action if there is a credible allegation of child abuse or neglect, up to removal

of the child from the home and/or termination of parental rights, that DHS/CPS did nothing to file a petition with regard to Calista, and closed the case even with no resolution to the "chaining" issue. (Ev. Hr'g. Tr. Page ID. 3848).

Notwithstanding, attorney Bush did not believe that DHS/CPS knowledge and actions raised a defense for Petitioner:

> Q. "...The issue right now is did you not recognize that that could be a defense for Mr. Springer?"
>
> A. "If the facts were there, I would have raised it, yes." (Ev. Hr'g. Tr. Page ID. 3850).

But, attorney Bush was looking for "the document - the record that says we recommend that...Calista be restrained in her bed. I never saw that." (Ev. Hr'g. Tr. Page ID. 3850). He did not believe that "condonation by inaction" qualified as establishing a defense, or was sufficient to file a motion. (Ev. Hr'g. Tr. Page ID. 3851-3856). He acknowledged that Cindy Bare's "signing off" on the DHS/CPS report discussing Calista being chained to the bed could be a "plausible argument." (Ev. Hr'g. Tr. Page ID. 3853).

On cross-examination, attorney Bush testified that he never found any report, document or statement from DHS/CPS indicating that "it was okay to restrain Calista in any way." (Ev. Hr'g. Tr. Page ID. 3859). "I was looking for that, but I never found that." (Ev. Hr'g. Tr. Page ID. 3859). He further testified on cross-examination that he did not believe the Springers could meet the elements of estoppel, specifically the element that the government worker "told the defendant that certain criminal conduct was legal" (Ev. Hr'g. Tr. Page ID. 3862), even though Mr.

Bush argued that the Springers acted reasonably and in good faith (Ev. Hr'g. Tr. Page ID. 3863-3864). He believed a motion in limine predicated on an estoppel theory would have been frivolous. (Ev. Hr'g. Tr. Page ID. 3865-3866). He did agree that the issue of "condonation" was "percolating" through the entire trial, including via jury questions, but he thought it was frivolous. (Ev. Hr'g. Tr. Page ID. 3869).

Facts Developed at Evidentiary Hearing:

Appellate counsel John Roach testified next. He was appointed to represent Mr. Springer on appeal, but did not represent him in the Michigan Supreme Court. (Ev. Hr'g. Tr. Page ID. 3878). After receiving the appointment, attorney Roach obtained the circuit court file, probative report and transcripts. He then visited Petitioner in prison. (Ev. Hr'g. Tr. Page ID. 3878-3879).

At his introductory (and only) meeting with Petitioner, attorney Roach explained the appellate process and discussed potential issues. (Ev. Hr'g. Tr. Page ID. 3881-3882). He raised the following issues: 1) an autopsy photo issue 2) an issue regarding severance of the trials between Mr. and Mrs. Springer 3) an unavailable witness whose preliminary examination testimony was read into the record 4) a sentencing issue and a fifth issue that Mr. Roach could not recall. (Ev. Hr'g. Tr. Page ID. 3883-3884). He did not recall whether he and Petitioner discussed the issue of entrapment at the prison visit. (Ev. Hr'g. Tr. Page ID. 3884). He did recall that DHS/CPS witnesses had been aware of Calista being restrained to her bed at night, and was aware of entrapment, although he had "not actually delved into it until this case." (Ev. Hr'g. Tr. Page ID. 3884-3885).

Mr. Roach conceded that as an appellate attorney, he had an obligation to be aware of issues that arise regularly in the practice of appellate law, including entrapment, and that such an issue would be one that a reasonable practitioner of appellate law would be expected to know about. (Ev. Hr'g. Tr. Page ID. 3885). He agreed that Petitioner was claiming DHS/CPS knew about Calista's restraints "all along...[T]hat was his claim, yes." (Ev. Hr'g. Tr. Page ID. 3886). When the trial court expressed concern about a "due process issue," attorney Roach was "reminded...of that fact that there were individuals who had knowledge of their daughter being chained up, yes." (Ev. Hr'g. Tr. Page ID. 3886). He did not raise this issue on appeal, or in post-conviction proceedings, because "many of the people that knew about it also tried to do something about it." (Ev. Hr'g. Tr. Page ID. 3886). He did not believe there was an issue of tacit condonation in this case or that Petitioner's trial attorney should have "focused" on that issue. (Ev. Hr'g. Tr. Page ID. 3887-3888). He agreed that the issue of condonation "percolated" throughout the trial, but he took no action to raise the issue of ineffective assistance of trial counsel (via motion for a new trial or motion to remand) because "based on the facts that were presented...the different departments...had actually...tried to do something about it." (Ev. Hr'g. Tr. Page ID. 3889-3892). He did not believe the issue of entrapment by estoppel was there. (Ev. Hr'g. Tr. Page ID. 3892).

Facts Developed at Evidentiary Hearing:

Petitioner Anthony Springer was the final witness for the defense. (Ev. Hr'g. Tr. Page ID. 3894). At the very first meeting with attorney Bush, the Springers had brought up the DHS/CPS' knowledge of Calista being restrained, and that the DHS/CPS had approved restraints. (Ev. Hr'g. Tr. Page ID. 3897-3899):

> Q. "When did you first discuss that with him?"
>
> A. "On the first meeting."
>
> Q. "What was the nature of that discussion?"
>
> A. "The discussion was that all along everybody in DHS knew that Calista was being restrained, they knew why, they knew how, and they okayed it."
>
> Q. "And what did Mr. Bush say to that?"
>
> A. "He said that there--apparently there's a law against it [against "restraining my child"] and that ignorance of the law did not make any kind of defense." (Ev. Hr'g. Tr. Page ID. 3899-3900).

Petitioner testified that Patricia Skelding "didn't like" restraining Calista but did nothing to stop him. (Ev. Hr'g. Tr. Page ID. 3900). Later on, the Springers were told by DHS/CPS workers "to lock her door, through the first DHS worker, during the evenings. And later on, it became to take whatever means necessary to protect her from herself and to protect others from herself." (Ev. Hr'g. Tr. Page ID. 3900).

His testimony clearly raised a fact question of whether the Springers were affirmatively told to restrain Calista, and according to Mr. Springer, they were so told. The Springers were told to "take any means necessary." (Ev. Hr'g. Tr. Page ID. 3901-3902). Petitioner believed he had specific approval from the

DHS/CPS to restrain Calista, although there was no specific document giving approval. (Ev. Hr'g. Tr. Page ID. 3902). In fact, Petitioner Anthony Springer offered to show Patricia Skelding the home-made restraint, but Ms. Skelding declined, saying she didn't need to see it since it had already been approved:

> Q. "Ms. Skelding said she didn't need to since it had previously been okayed - "
>
> A. "Yes."
>
> Q. " - nor was she there for that."
>
> A. "Correct."
>
> Q. "Was that Ms. Skelding's exact words to you - "
>
> A. "Yes."
>
> Q. " - that it had been okayed?"
>
> A. "Uhm-hmm." (Ev. Hr'g. Tr. Page ID. 3908).

Additionally, he was told by Sharon Gerger (apparently the first DHS/CPS worker with the Springers) to use "any means necessary" to restrain Calista. (Ev. Hr'g. Tr. Page ID. 3912-3914).

Facts Developed at Evidentiary Hearing:

During codefendant Marsha Springer's portion of the hearing her counsel, Victor Bland, testified that he never filed any sort of motion regarding estoppel because "I never felt we had the goods. I never felt we had one person who said, I told them to do this." (Ev. Hr'g. Page ID. 3926). Randy Davidson, Mrs. Springer's appellate counsel, felt that the Springers could not meet two of the elements of entrapment by estoppel, i.e. a specific representation, or objectively reasonable reliance. (Ev. Hr'g. Tr. Page ID. 3942).

Marsha Springer testified that Patricia Skelding was aware of the home-made chain restraint and declined to see it herself. (Ev. Hr'g. Tr. Page ID. 3955). Mrs. Springer did add one additional, and highly probative, item of testimony--she testified that she asked DHS/CPS to pay for restraints that were common in psychiatric hospitals. (Ev. Hr'g. Tr. Page ID. 3954). Mrs. Springer showed a picture of one such restraint to Sharon Gerger, but because it cost $1,500 DHS/CPS declined to pay for it, and Sharon Gerger said that the Springers were doing a fine job, "keep up the good work." (Ev. Hr'g. Tr. Page ID. 3953-3954, 3972-3973). She testified that it was told to her that it was okay to restrain Calista with the home-made chain restraint. (Ev. Hr'g. Tr. Page ID. 3953, 3972-3973). After Mrs. Springer testified, the evidentiary hearing closed.

REASONS FOR GRANTING THE PETITION

Reason For Granting Question #1:

TRIAL AND APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE FOR FAILING TO INVESTIGATE AND PRESENT THE PRE-TRIAL DEFENSE OF ENTRAPMENT BY ESTOPPEL.

Mr. Springer has a constitutional Sixth Amendment right to the effective assistance of counsel. The above claim calls for the two-pronged deficiency and prejudice analysis of ineffective assistance of counsel precedents announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Deficiency:

Without any investigation of DHS/CPS employees or the doctrine of entrapment by estoppel, attorney Bush was ill equipped to assess the plausibility of filing a pretrial motion.

Mr. Springer told attorney Bush right from the beginning that DHS/CPS knew of the chain restraint. (ECF No. 23-33; 05-12-2016; Ev. Hr'g. Tr. Page ID. 3899-3900). Mr. Bush testified that he thought that; "I've always felt that DHS understood what the Springer familiy was doing." (Ev. Hr'g. Tr. Page ID. 3832). Mr. Bush never investigated any of the DHS/CPS workers that were involved with the Springer family. Specifically Mr. Bush never made any attempt to contact "Pat Skelding and Cindy Bare" before trial. "I don't recall speaking with them." (Ev. Hr'g. Tr. Page ID. 3833). Neither did he ever see or investigate the reports

that DHS/CPS discussed restraining Calista with a chain. (Ev. Hr'g. Tr. Page ID. 3833). Mr. Bush admitted that Patricia Skelding testified at trial and the preliminary examination that she noted in the file that Calista was being chained, however she did not recommend the case into the court system, but instead recommended the case be closed. "That's correct." (Ev. Hr'g. Tr. Page ID. 3848); see also DHS/CPS supervisor Cynthia Bare admitting she signed off on Skelding's recommendation to close the case. (Trial Tr. Vol.#IV; pg. 1025-2028). Mr. Bush stated that he received records from civil attorneys that represented the Springers in a different matter. But, admitted that he did not know if he had all of the records. (Ev. Hr'g. Tr. Page ID. 3831). Mr. Bush agreed that the issue of whether DHS/CPS "condoned restraining" Calista was a big issue. "It was something I think was very relevant to the trial, yes." (Ev. Hr'g. Tr. Page ID. 3838).

Patricia Skelding submitted a report that stated the Springers were using a chain restraint, and recommended closing the case. DHS/CPS supervisor Cynthia Bare signed off on the report and closed the case. Attorney Bush agreed that with these facts the State was agreeing with the method of restraint. "You could make that argument...I guess that's a plausible argument." (Ev. Hr'g. Tr. Page ID. 3853).

Competent counsel can be expected to undertake a "thorough investigation of law and facts relevant to plausible options" for the defense. Strickland, 466 U.S. at 690. After this Court's holding in Wiggins v. Smith, 539 U.S. 522, 156 L.Ed.2d 471, 123 S.Ct. 2527 (2003), the Sixth Circuit in a long line of cases has

held to the principle that; "To make a reasoned judgment about whether evidence is worth presenting, one must know what it says." Couch v. Booker, 632 F.3d 241, 246 (6th Cir. 2011); Poindexter v. Booker, 301 Fed.Appx. 522 (6th Cir. 2008)("Consistent with Wiggins and Williams, we have also granted habeas relief when counsel failed to investigate, particularly when counsel declined to interview key defense witnesses"). These cases demonstrate that Mr. Bush's failure to interview key defense witnesses [Patricia Skelding and Cynthia Bare] is objectively unreasonable in light of Strickland.

Given the record fact, that both Ms. Skelding and Ms. Bare would have offered beneficial entrapment by estoppel testimony at a pretrial hearing, Mr. Bush's failure to investigate said witnesses before trial is neither "strategic" nor reasonable. Bigelow v. Williams, 367 F.3d 562, 574 (6th Cir. 2004)("Wiggins demonstrates that it does not invariably suffice that a lawyer make some efforts to investigate a case; the proper inquiry is "'whether the known evidence would lead a reasonable attorney to investigate further."" 123 S.Ct. at 2538").

According to attorney Bush's testimony the known evidence prior to trial was; Mr. Springer told him right from the beginning that DHS/CPS knew of the chain restraint, and he always felt that DHS understood what the Springer's were doing. (Ev. Hr'g. Tr. Page ID. 3832); He thought that the issue of DHS/CPS condoning the restraint was "very relevant to the trial." (Ev. Hr'g. Tr. Page ID. 3838); Even after the Court stated that one of the questions it had "was whether or not there's an argument to be raised in that regard that the State's involvement condoning

the use of the chain by not taking any action would raise any argument for the defense in terms of due process rights...." (Ev. Hr'g. Tr. Page ID. 3841). Bush still did not research the law or investigate DHS/CPS witnesses. "I didn't think there was anything to investigate at that time." (Ev. Hr'g. Tr. Page ID. 3843).

This Honorable Court should find attorney Bush's failure to investigate known witnesses and applicable law inexcusable, and thus constitutionally deficient under Strickland. Strickland, 446 U.S. at 688.

Prejudice:

Both, Mr. and Mrs. Springer testified adamantly that they were assured that Calista's restraints were acceptable to DHS/CPS. In portions of their testimony, the Springers each testified that they were affirmatively told by DHS/CPS workers it was acceptable to restrain Calista. (Anthony Springer): "Ms. Skelding said...it had previously been okayed - Yes" (Ev. Hr'g. Tr. Page ID. 3908); DHS/CPS Sharon Gerger told the Springers to restrain Calista to her bed: "By any means necessary." (Ev. Hr'g. Tr. Page ID. 3913);

(Marsha Springer) Patricia Skelding "knew about chaining...She was offered to go upstairs and take a look at the improvised restraint." (Ev. Hr'g. Tr. Page ID. 3955); The Prosecutor asked, "Did they tell you to use a choker chain to restrain her?" MSR. SPRINGER: "...I'm going to say yes." (Ev. Hr'g. Tr. Page ID. 3958). Mrs. Springer explained why Anthony Springer's testimony about the type of restraint used and the specific time of use seemed conflicting:

THE COURT: "...On the date that Ms. Skelding in 2004, are you saying that you were using the chain and the other items on that date?"

MRS. SPRINGER: "We could have been at that time...And I know we may have improvised a chaining restraint then." (Ev. Hr'g. Tr. Page ID. 3960).

Mrs. Springer testified further that the description Calista gave to Ms. Skelding in 2004 of the improvised chain restraint was correct. "I would say yes." (Ev. Hr'g. Tr. Page ID. 3975).

The Springer's testimony on this point is corroborated by the testimony of Pat Skelding and Cindy Bare, who both acknowledged that they knew Calista was not simply being "restrained" but actually was being chained. In her preliminary exam testimony, Pat Skelding at one point says that she discussed "chaining" with the Springers (PE. Tr. 183) but then one page later, says the concept of "chaining" was not mentioned "in so many words." (PE. Tr. 184). But, Skelding had been told by Calista herself that she was being chained to her bed. (PE. Tr. 174-175). She closed her case file because "everybody knew...that Calista was being chained to the bed." (PE. Tr. 181). She nonetheless recommended that the case be closed. Ms. Skelding also testified at trial that "Calista is being chained to her bed with permission from Community Mental Health...I believed at the time that everybody knew that." (Trial Tr. Vol.#IV; pg. 998 at 19).

The United States Supreme Court spoke on the due process defense later known as entrapment by estoppel in Raley v. Ohio, 360 U.S. 423 (1959) and Cox v. Louisiana, 379 U.S. 559 (1965). In each case the Court held that when a party reasonably relies on advice or opinion from a government official regarding the legality of conduct, the fundamental fairness of due process relieves that party of responsibility for the legal consequences of those actions.

In the State of Michigan the pre-trial defense of entrapment by estoppel applies when defendant establishes by a preponderance of the evidence that 1) a government official 2) told the defendant that certain criminal conduct was legal; 3) the defendant actually relied on the government official's statement; 4) the defendant's reliance was in good faith and reasonable in light of the identity of the government official's point of law represented, and the substance of the official's statement and; 5) given the defendant's reliance, the prosecution would be unfair.

Under the above Federal and State analysis, government worker Patricia Skelding testified: "And that coworker told me Calista is being chained to her bed with permission from Community Mental Health." (Trial Tr. Vol.#IV; pg. 998 at 19); "...you believe that the restraining or chaining to the bed had been authorized...I believe that, yes...I believed it was necessary." (Trial Tr. Vol.#IV; pg. 1000 at 13); Even the trial Court believed DHS/CPS condoned the use of chain restraint, thus questionable under the Due Process Clause to seek prosecution.

"...the State's involvement condoning the use of the chain by not taking any action would raise any argument for the defense in terms of due process rights...." (08-31-2009 Motions Transcript ECF No. 23-7 Page ID. 985-986). Petitioner testified that DHS/CPS worker told him "to take whatever means necessary" (Ev. Hr'g. Tr. Page ID. 3900); Marsha Springer testified that it was told to her that it was okay to restrain Calista with the home-made chain restraint. (Ev. Hr'g. Tr. Page ID. 3953, 3972-3973); Pat Skelding testified at the prelim that she discussed "chaining" with the Springers (PE. Tr. 183) and she closed her case file because "everybody knew...that Calista...was being chained to the bed." (PE. Tr. 181).

Under Michigan law, when a government agent has "improperly instigated or encouraged the conduct," then the conduct is excused. People v. Woods, 241 Mich.App. 545, 555 (2000)("The first prong of ordinary entrapment is substantially similar to entrapment by estoppel. Both defenses excuse criminal conduct where a government agent has improperly instigated or encouraged the conduct."); see also People v. Bennett, 2013 Mich.App. LEXIS 2005 at [*8] (quoting Woods)("The defense of entrapment by estoppel 'excuse[s] criminal conduct where a government agent has improperly instigated or encouraged the conduct'").

Michigan's legal principle of "improperly instigated or encouraged the conduct" is consistent with the Supreme Court's condition in Raley v. Ohio, 360 U.S. 438 (1959)("There was active misleading"); and Cox v. Louisiana, 379 U.S. 559, 571-572 (1965)("...they relied upon assurances of the commission, either expressed or implied....").

Federal Circuit Courts have also adopted the Supreme Court's principle of "active misleading"..."either expressed or implied," and Michigan's "improperly instigated or encouraged." Please see United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004)("...an official who mistakenly misleads a person into a violation of the law."); United States v. Nichols, 21 F.3d 1016, 1018 n.2 (10th Cir. 1994)("...where an agent of the government affirmatively misleads a party as to the state of the law....").

The trial Court's pre-trial assessment that the State condoned "the use of the chain by not taking any action" (EFC No. 23-7 Page ID. 985-986) compounded with the above record evidence that "everybody knew...that Calista...was being chained to the bed" (PE. Tr. 181) and "...Calista is being chained to her bed with permission from Community Mental Health" (Trial Tr. Vol.#IV; pg. 998 at 19); is overwhelming evidence that the government at the very least, "improperly instigated or encouraged the conduct" People v. Woods, 241 Mich.App. 545, 555 (2000).

Trial attorney Bush's failure to investigate and raise the issue of entrapment is even more deficient and prejudicial in light of the lessened burden of proof that he faced. As the Woods Court noted, a defense of entrapment by estoppel is a question of law for the Court to rule on, not a jury issue of fact. As such,

a finding of entrapment by estoppel need only be shown "by preponderance of the evidence." 241 Mich.App. 545, supra. Attorney Bush did not have to show entrapment "by clear and convincing evidence" much less "beyond a reasonable doubt." All he had to show was a 51 -to- 49% that the State workers "improperly instigated or encouraged the conduct" Woods, supra.

The above record facts demonstrate that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. Strickland, 466 U.S. 668, at 687.

Appellate counsel John Roach's performance was equally deficient and prejudicial. The issue was open and apparent from the transcripts - the trial Court invited the parties to investigate the Due Process issue of entrapment, whether it was formulated as "acquiescence," "condonation," "tacit approval," or entrapment by estoppel," whatever. The issue was there to be seen, and the trial Court had in fact seen it. Only appellate counsel failed to pursue it. For these reasons appellate counsel Roach was ineffective.

REASONS FOR GRANTING THE PETITION

Reason For Granting Question #2:

APPELLATE COURT SHOULD HAVE ISSUED CERTIFICATE OF APPEALABILITY OF HABEAS ISSUE #1) INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PURSUE A DEFENSE OF ENTRAPMENT BY ESTOPPEL. REASONABLE JURIST COULD DEBATE WHETHER ISSUE #1 SHOULD HAVE BEEN RESOLVED DIFFERENTLY, BECAUSE MICHIGAN SUPREME COURT JUSTICE BERNSTEIN WOULD HAVE GRANTED LEAVE TO APPEAL.

Specifically, with regard to Habeas Issue #1, on October 24, 2017 Justice Bernstein of the Michigan Supreme Court dissented from the decision to deny leave to appeal and would have granted leave. (Mich. Order, ECF No. 23-40, Page ID. 4674). In light of this fact, "Petitioner has shown that jurists of reason could decide this issue differently or that the issue deserves encouragement to proceed further." McGuire v. Ludwick, 2009 U.S. Dist. LEXIS 69983 at 29 (E.D. Mich. 2009); see also Buckner v. Tribley, 2013 U.S. Dist. LEXIS 50128 at 41 (E.D. Mich. 2013); Robinson v. Stegall, 157 F.Supp.2d 802, 820 n.7 & 824 (E.D. Mich. 2001).

Respectfully, the Sixth Circuit Court of Appeals has simply applied a higher bar than necessary for issuing a COA. Instead, the certificate of appealability analysis is limited "to a threshold inquiry into the underlying merit of the claims" and whether "the District Court's decision was debatable." Buck v. Davis, 137 S.Ct. 759, 774 (2017)(quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)).

For the above reasons this Honorable Court should grant the petition, remanding to the Circuit Court for a full merits review with a COA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Anthony Springer

Date: April 15, 2022