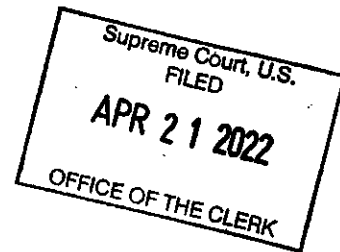


21-7766 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Jacory Brown — PETITIONER
(Your Name)

Christian Pfeiffer ^{vs.}
United States Court of Appeals — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court for the Eastern District of California
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jacory Brown
(Your Name)

PO Box 5101
(Address)

Delano, CA, 93216
(City, State, Zip Code)

NONE
(Phone Number)

QUESTION(S) PRESENTED

1. When making a claim of ineffective assistance of counsel under the Sixth Amendment, Does making a showing under deficient performance and prejudice establish a prima facie case?
2. Does a District Court's failure to comply with Supreme Court authority violate the fourteenth Amendment?
3. Did petitioner receive ineffective assistance of counsel under the Sixth Amendment for counsel's failure to investigate and object to identification evidence.

LIST OF PARTIES

- ☒ 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 AUTHORITIES CITED

CASES	PAGE NUMBER
Strickland v. Washington & passim 3104 S.Ct. 2052, 2066 (1984)	5., 10.
Miller-EL v. Cockrell 537 U.S. 322 (2003)	9.
Ex parte Royal, 117 U.S. 241 251 (1886)	9.
Hohn v. U.S. 524 U.S. 239 (1998)	9.
Williams v. Taylor, 529 U.S. 362 407	10.
Kimmelman v. Morrison 477 U.S. 365, 375 (1986)	11.
Lafler v. Cooper, 132 S.Ct. 1376 (2012)	12.

STATUTES AND RULES

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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

☒ 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,
☒ is unpublished.

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,
☒ is unpublished.

☐ For cases from **state courts**:

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

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☐ is unpublished.

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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 21, 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

Six Amendment pg. 10

fourteenth Amendment pg. 9

28 U.S.C 2254 pg 4, 12

Statement of the case

Petitioner Jacory Brown, a prose prisoner proceeding in forma pauperis, hereby seeks a certificate of appealability, where the 9th circuit court of appeals on January 21, 2022 denied his petition for writ of habeas corpus, claiming he had not made a substantial showing of the denial of a constitutional right. (Exhibit A)

The district court and 9th circuit, abused their discretion in denying petitioner's certificate of appealability pursuant to 28 U.S.C. 2254(d). The lower courts ignored the primary issues, disregarded supporting documents and made unreasonable factual determinations, attempting to counter Supreme Court precedent in regards to issues critical to establishing petitioner's claims.

1. Procedural Background

Petitioner filed his initial petition in the California Superior Court April 21, 2016 raising six claims of ineffective assistance of counsel, and a claim of prosecutory misconduct. The Superior Court denied the petition in an unpublished opinion issued on June 29, 2016.

The State court denied petitioner's first claim of ineffective assistance of counsel for failing to object to identification evidence. Citing petitioner failed to set forth a prima facie case for relief. (Exhibit C, pg. 7) The state court provided no tactical reasoning supported by evidence in the record that contravened petitioner's claim. Nor did the state court conduct a performance analysis to evaluate the reasonableness

of counsel's decision not to object to Nehemiah's pretrial identification of petitioner, based on exculpatory evidence in her possession prior to trial, in the form of a defense investigator report. (Exhibit C pg 6) This performance analysis is required by the Supreme Court in *Strickland v. Washington* & *passim*, 104 S. Ct. 2052, 2066 (1984). A court judging an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.

The state court did not acknowledge petitioner's second claim of ineffective assistance of counsel for failure to investigate. The state court ignored the merits on the primary issue of petitioner's claim. That counsel was ineffective in failing to investigate Nehemiah's claim to the defense investigator, petitioner did not shoot him. (Exhibit C pg 6) In doing so, avoided the performance analysis required by the Supreme Court in *Strickland v. Washington* & *passim*, 104 S. Ct. 2052, 2066 (1984).

The district court denied petitioner's federal petition on 9-14-20. In denying petitioner's claim counsel was ineffective for failing to object to identification evidence. The district court accepted the state court's decision without an objective review of the evidence petitioner presented in support of a *prima facie* case. When the district court reviewed the "last reasoned decision by the state court." (Exhibit B pg 8) The district court failed to review if the state court followed Supreme Court precedent by conducting a performance analysis as required by the Supreme Court in *Strickland v. Washington* & *passim*, 104 S. Ct. 2052, 2066 (1984).

While adjudicating petitioner's claim for failure to investigate. The district court unlike the state court acknowledged petitioner's primary claim. (Exhibit B pg 14) But the district court like the state court did not consider the merits of petitioner's claim. Neither the state or district court adjudicated the primary issue of petitioner's claim. That counsel was ineffective in failing to investigate Nehemiah's claim to a defense investigator petitioner did not shoot him. (Exhibit B pg 11) Both courts ignored the merits of petitioner's primary issue and only considered what petitioner explained should of been part of the investigation. Such as personally interviewing Nehemiah regarding his exculpatory statement. (Exhibit B pg 11)

The 9th Circuit arbitrarily denied petitioner's request for a certificate of appealability on 1-21-22 asserting petitioner had not made a substantial showing of the denial of a constitutional right. (Exhibit A) Petitioner now request a certificate of appealability from this court.

2. Factual Background

On November 13, 2011 two brothers Nehemiah and Garvin Johansen were shot while riding as passengers on the freeway at night. On February 23, 2012 petitioner was arrested and subsequently charged with two counts of attempted murder, two counts of assault with a firearm and shooting at an occupied vehicle. On May 15, 2013 petitioner was convicted on all charges. Petitioner was sentenced to 96 years and 5 life sentences. The dispute at trial was over the identification

of petitioner as the shooter.

3. Summary of evidence supporting claims.

Petitioner submitted multiple documents to the record in support of his claims. (Exhibit B pg 10-11) These documents contain multiple inconsistent statements in regards to whether he knew who shot him. In Nehemiah's first statement he informed deputy Beezley "I don't know who shot me. I don't know who did this. Maybe later on after I get out of here I can figure it out." (Exhibit C pg 10) One hour later Nehemiah was interviewed by detective Biggers. In this second statement Nehemiah identified the name "Cory or Jacory" as the person he seen shoot him and his brother. (Exhibit C pg 10)

On November 16, 2012 petitioner's initial attorney Lisette Lancaster sent out a defense investigator to interview Nehemiah regarding his two inconsistent statements. During this interview Nehemiah told the investigator the petitioner did not shoot him. Not that he's aware of. Nehemiah claimed the police brought a picture of petitioner to his house and told him petitioner shot him. Nehemiah explained the officer said he knew this because "the streets are talking" and petitioner was shooting at people before. Nehemiah concluded the interview stating he was not afraid of petitioner. "of course not." (Exhibit C pg 11)

Counsel possessed this report prior to trial and conducted no pretrial investigation into Nehemiah's claims. Nor did counsel object to the admission of Nehemiah's pretrial identification of petitioner on the grounds she

possessed evidence indicating its unreliability.

Petitioner cited multiple statements in the trial record demonstrating counsel's challenged performance was unreasonable.

- During motions in limine counsel informed the court "Identity is obviously what the issue is going to be in this case."
- During opening statements counsel informed the jury "You're going to hear from Nehemiah Johashen, who I expect is going to tell you Mr. Brown was not the shooter." (1 RT 83)
- During trial Nehemiah testified he wrote he was almost 100 percent petitioner is the person who shot him because "prior to this, somebody came to my house with a picture of him (indicating) and told me 'this is who shot you.'" (1 RT 135-136)

The lower courts disregarded the evidence petitioner submitted during the adjudication of petitioner's claims. They also failed to apply Supreme Court precedent for analyzing performance and unreasonably determined the facts while ignoring the primary issues petitioner presented in his claims.

4. Standard of review certificate of appealability

A prisoner seeking a certificate of appealability need only demonstrate a substantial showing of the denial of a constitutional right. A petitioner satisfies this standard by demonstrating that jurist of reason could disagree with the district court's resolution of his constitutional claims, or that jurist could conclude the issues presented are adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell* 537 U.S. 322 (2003). The Supreme court has instructed "a court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." *Miller-El v. Cockrell* 537 at 327, 123. Petitioner may apply for Certiorari following a denial of a certificate of appealability application. See *Hohn v. U.S.*, 524 U.S. 239 (1998). A petitioner who has been denied a Certificate of Appealability in both the district and court of appeals can apply for certificate of appealability on Certiorari.

5. Argument

Under our federal system both the federal and state courts are entrusted with the protection of constitutional rights. See *ex parte Royal*, 117 U.S. 241, 251 (1886). In this case the lower courts disregarded Supreme Court precedent for evaluating attorney performance. In doing so the lower courts violated petitioners fourteenth Amendment right to equal protection of the laws.

The Supreme Court held a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on

the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel alleged not to have been the result of reasonable professional judgment. The court must then determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. See *Strickland v. Washington*, 476 U.S. 661, 104 S.Ct. 2052 (1986).

The lower courts in their assessment of petitioner's six government ineffective assistance of counsel claims, did not comply with this Supreme Court authority. Specifically the lower courts were required to but did not assess the reasonableness of counsel's failure to investigate Nehemiah's statement to the defense investigator and failure to object to Nehemiah's pretrial identification, in light of counsel's possession of Nehemiah's statement to the investigator that petitioner did not shoot him. (Exhibit B pg 11) The Supreme Court determined a state court unreasonably applies federal law when it identifies the correct legal principle but unreasonably applies it to the facts of the case, or if it unreasonably refuses to extend a principle to a context in which it should apply. See *Williams v. Taylor*, 529 U.S. 362, 407. Such is the case here. The district court identified the correct legal principle *Strickland v. Washington*. (Exhibit B pg 8) But it failed to extend the measure of performance, in the context in which it should apply. Reasonable jurist could conclude petitioner's claim are adequate to deserve encouragement to proceed further in order to rectify the district court's unreasonable error.

The district court's denial of petitioner's claim that counsel was ineffective for failing to object to identification evidence was an unreasonable application of federal law.

The district court denied petitioner's claim after concluding petitioner failed to demonstrate that the photo lineup identification was impermissibly suggestive or unreliable. (Exhibit B 13-14) This conclusion is an unreasonable determination of facts. Petitioner's claim is counsel was ineffective in failing to object to Nehemiah's identification of petitioner, based on Nehemiah's statement to petitioner did not shoot him. (Exhibit B pg 11) The district court cited *To prevail on an ineffective assistance* ^{claim} of counsel predicated on counsel's failure to file a motion to suppress evidence, a petitioner must establish that the motion would of been meritorious and a reasonable probability that the jury would of reached a different verdict, absent the introduction of the evidence. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (Exhibit B pg 13) *Kimmelman* only requires petitioner demonstrate the motion would of been meritorious. Petitioner demonstrated that via the defense investigator report in the record. (Exhibit B pg 11) It was an unreasonable application of Supreme Court authority under *Kimmelman* for the district court to expect petitioner to demonstrate the lineup identification was impermissibly suggestive or unreliable. Reasonable jurist could agree given the district court's errors, petitioner's claim deserves encouragement to proceed further.

The state court unreasonably applied Supreme Court authority when it concluded petitioner failed "to set forth a prima facie case for relief."

(Exhibit C. pg 7)

The Supreme Court established in deciding whether a state court unreasonably applied SCOTUS law, the federal court accepting as true the allegations of the petition that are backed up by trial record, cannot summarily (i.e. without a hearing) deny the petition where the petitioner has established a "prima facie case" for relief. *Lafley v. Cooper*, 132 S.Ct. 1376 (2012) Petitioner backed up his claims of ineffective assistance of counsel with documentary evidence of a defense investigator report. (Exhibit B pg 11) The lower courts disregarded petitioner's evidence in an unreasonable application of SCOTUS law under *Lafley*.

The deference to state court finding of fact required under AEDPA does not equate to the abdication of judicial responsibilities; Where a federal court determines that the state court's fact finding was unreasonable, it has an obligation to set those findings aside and if necessary make new findings. The Ninth circuit has held that a state court's factual findings are not entitled to deference *un 2254 (d)* when the fact finding procedure was fundamentally flawed, e.g., when the state made factual findings without holding an evidentiary hearing. Here the state court record is silent on defense counsel's tactical reasoning. This court should grant petitioner's request for certificate of appealability. Petitioner has made a factual showing of the denial of constitutional rights supported by evidence in the record. Petitioner never had an opportunity to receive a hearing

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Juliet Brea

Date: April 21, 2022