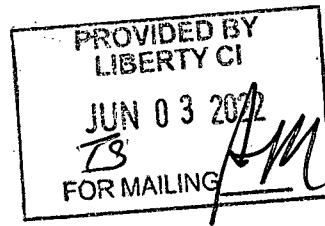


22-5210

No.



IN THE

SUPREME COURT OF THE UNITED STATES

TRAVIS LOUIS SHAW - PETITIONER

vs.

RICKY DIXON, SECRETARY,

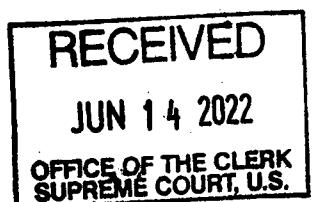
FLORIDA DEPARTMENT OF CORRECTIONS,

RESPONDENT(S).

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Travis Shaw, pro se
DC# L65867
Quincy Annex
5 Pat Thomas Pkwy.
Quincy, Fl. 32351



QUESTION(S) PRESENTED

I. Whether Petitioner should be granted a Certificate of Appealability pursuant to 28 U.S.C. 2253 on the issue of whether

(A) Petitioner was denied his U.S. Constitutional right to Due Process under *Jackson v. Virginia*, 443 U.S. 307 (1979) and *In re Winship*, 397 US 358, 25 L Ed 2d 368, 90 S Ct 1068 (1970), when the state's evidence against the Petitioner was insufficient to prove the crime charged beyond a reasonable doubt; and

(B) Petitioner was denied his constitutional right to a full and fair jury trial due to ineffective assistance of trial counsel caused by a conflict between his attorneys and Petitioner in the presentation of a viable defense in violation of the 5th, 6th, and 14th, Amendments of the U.S. Constitution, and clearly established federal law in *Strickland v. Washington*.

LIST OF PARTIES

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

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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 is unpublished.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 is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was
March 08, 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: _____, 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). *See also, Hohn v. United States*, 524 U.S. 236, 141 L. Ed. 2d 242, 118 S. Ct. 1969 (1998)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment

The 5th Amendment of the U.S. Constitution provides in part that “[n]o person shall... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]”

Sixth Amendment

The 6th Amendment of the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

Fourteenth Amendment

The 14th Amendment of the U.S. Constitution provides in part that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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.

§28 U.S.C. 2254 provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

§28 U.S.C. 2253 provides in relevant part:

....

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

The jurisdiction of the U.S. District Court, Middle District of Florida, Orlando Division, was timely invoked pursuant to §28 U.S.C. 2254 by the Petitioner's filing of a Petition for Writ of Habeas Corpus by a person in state custody. The district court denied the petition. The Petitioner timely appealed and subsequently sought a Certificate of Appealability from the U.S. Eleventh Circuit Court of Appeals. The circuit court denied the request for a certificate on March 8, 2022. This Court's jurisdiction is timely invoked.

State proceedings:

Petitioner was charged in the State of Florida, Ninth Judicial Circuit Court, Orange County, Florida, with Aggravated Child Abuse in violation of s.827.03(2), Fla. Stat. (Count One); and Shooting at, within or into a building in violation of s. 790.19, Fla. Stat. (Count Two).

Petitioner proceeded to a jury trial and was found guilty of the offenses as charged.

Petitioner was sentenced on April 7, 2011, to 25-years in prison minimum mandatory day-for-

day as to Count One; and 15-years in prison for Count Two, concurrent to the sentence in Count One.

Petitioner's state direct appeal was affirmed per curiam without written opinion on September 11, 2012, mandate issued October 5, 2012. *See Shaw v. State*, 97 So. 3d 240 (Fla. 5th DCA 2012) Petitioner argued on direct appeal that the evidence was insufficient to convict of Aggravated Child Abuse.

Petitioner subsequently properly filed a Motion to Correct Illegal Sentence pursuant to Florida Rules of Criminal Procedure 3.800(a), arguing a violation of *Apprendi* and his Sixth Amendment U.S. Constitutional Rights, which was summarily denied and affirmed without written opinion on appeal. *See Shaw v. State*, 183 So. 3d 371 (Fla. 5th DCA 2015)

Thereafter, Petitioner filed a timely Motion for Postconviction Relief pursuant to Florida Rules of Criminal Procedure 3.850 alleging two claims of ineffective assistance of counsel. After an evidentiary hearing on claim one Petitioner's post-conviction motion was denied. A timely appeal followed in which the Fifth District Court of Appeal summarily affirmed the postconviction court's denial. *See Shaw v. State*, 301 So. 3d 230 (Fla. 5th DCA 2020) In his post-conviction motion, Petitioner alleged 1) that his trial counsel was ineffective for failing to move for a mistrial when the state elicited on direct examination of a state witness the fact that Shaw was on probation at the time of the offense, and 2) that Shaw received ineffective assistance of counsel arising out of the conflict between counsel during trial on the theory of defense.

Federal Proceedings

Petitioner through counsel timely filed his first Petition for Writ of Habeas Corpus. Petitioner raised four claims for relief: 1) Shaw was denied due process of law when he was convicted based on legally insufficient evidence of proof beyond a reasonable doubt on the charge in Count One; 2) Shaw received ineffective assistance of counsel when his counsel failed to move for mistrial when the State elicited on direct examination of a state witness the fact that Shaw was on probation at the time of the offense; 3) Shaw received ineffective assistance of counsel arising out of the conflict between counsel during trial on the theory of defense; 4) The State court and State prosecutor committed Apprendi error in violation of the Sixth Amendment when it scored Shaw's guideline scoresheet based on a factor not submitted to the jury for a verdict based on proof beyond a reasonable doubt then relied upon this guideline scoresheet determination to exercise its discretion to sentence Shaw under the 10/20/Life statute to a minimum mandatory term of 25 years imprisonment.

After the Respondent's Answer and the Petitioner's Reply, the District Judge Honorable Roy B. Dalton, Jr., entered an Order on November 12, 2021, denying habeas corpus relief on all grounds. The District Court also denied a certificate of appealability.

Petitioner filed a timely Notice of Appeal invoking the jurisdiction of the U.S. 11th Circuit Court of Appeals, and subsequently filed a Petition for Application for a Certificate of Appealability in the court of appeals. The 11th Circuit denied application on March 8, 2022. This petition timely follows.

REASONS FOR GRANTING THE PETITION

I. The decision of the Court of Appeals is Erroneous.

A. Reasonable jurists would debate the district court's denial of ground one

Concerning a request for certificate of appealability, the 11th Circuit Court of Appeals finds: "First, given the victim's testimony at trial, any rational trier of fact could have found beyond a reasonable doubt that Shaw knowingly committed aggravated child abuse." However, Petitioner contends the victim's testimony would establish facts for debate as to the intent required to prove the crime of aggravated child abuse.

Aggravated child abuse by definition requires an act which is knowingly or willfully done. "Knowingly" means an act done voluntarily and intentionally and not because of mistake or accident. Fla. Std. Jury Inst. 16.1. Aggravated child abuse is a specific intent crime which requires the State to prove that the defendant specifically intended the harm resulted. Child abuse means the "intentional infliction of physical injury upon a child."

In this case, the victim's testimony will show that on the morning of the shooting, Shaw was simply playing with the gun. On direct examination by the State, the victim repeatedly described Shaw's actions as "playing." Nothing had occurred between Laura and Shaw to cause Shaw to intend to hurt her. They had spent the night together, enjoyed themselves smoking marijuana, and in the morning when she woke and showered she asked Shaw how to use his smart phone so she could listen to music and he showed her how to do so. They were

apparently very comfortable together. She saw the same gun earlier laying on the floor to which she picked up and was holding it then put it back down. She also asked Shaw for a gun for her protection because she had been raped by another person the night before.

She was waiting for a ride from her other friend, Darrell. While they waited for Darrell to come over, they were both on the bed, Shaw sitting with his back up against the wall. Shaw leaned over and picked up the revolver off the floor and started "playing with it" (Laura's words). On direct examination the victim repeatedly and unequivocally testified that she was not afraid "at all" when Shaw was playing with the gun because she had no doubt in her mind that Shaw did not intend to shoot her. She was even to the point of "laughing" with Shaw.

When the gun accidentally went off Shaw had a surprised look on his face, like "Oh my gosh, I just shot you." Which is exactly what he said. Even after the gun accidentally fired and hit Laura, Shaw immediately rushed to her aid and carried her to the hospital for treatment. She was in good enough condition that she was able to get herself into the car and ride along in the back seat.

Based on the aforementioned facts Petitioner contends reasonable jurists would debate the district court's denial of ground one. There is no specific intent proven that Shaw intended to shoot or cause great bodily harm to Laura. The victim's testimony, which was the sole evidence against the Petitioner, establishes merely an accidental shooting which is not enough to prove the offense of aggravated child abuse. Thus, no rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979); *see also In re Winship*, 397 US 358, 25 L Ed 2d 368, 90 S Ct 1068 (1970)

Petitioner contends that while ultimately, the merits of an appeal may not be resolved in his favor, the correct standard at this juncture is not to make a merits determination but “whether the applicant has shown ‘that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.’” See, *Buck v. Davis*, 197 L.Ed. 2D 1 (2017) Any doubts as to whether a COA should issue must be resolved in the applicant’s favor. *Thompson v. Davis*, 916 F.3d 444 (5th Cir. 2019).

In Buck, this Court granted certiorari because the federal appeals court “sidestepped” the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits. This Court concluded, “it is in essence deciding an appeal without jurisdiction.” Id. (Citing *Miller-El v. Cockrell*, 537 U.S. 322, 336-337, 123 S.Ct 1029, 154 L.Ed 2d 931 (2003)).

In this case, it appears that the 11th Circuit Court of Appeals sidestepped the correct COA process and therefore certiorari should be granted. Petitioner contends that under the correct standard of review, the Petitioner has met his burden for an Certificate of Appealability to be issued.

B. Reasonable jurists would debate the district court's denial of ground three

Concerning a request for certificate of appealability, the 11th Circuit Court of Appeals finds that “reasonable jurists would not debate the district court's determination that the state court's resolution of Ground Three was not contrary to, or an unreasonable application of clearly established federal law, as determined by the Supreme Court, or based on an unreasonable determination of the facts. After a lengthy discussion about the conflict between his attorneys about their theory of defense, Shaw stated that he desired to proceed with both attorneys. Thus the state court reasonably could have concluded that Shaw waived the conflict between his attorneys. See *United States v. Rodriguez*, 982 F.2d 474, 477 (11th Cir. 1993). Further, given the victim and expert testimony at trial, Shaw cannot demonstrate that prejudice resulted from counsel's conflict.”

Petitioner contend that a certificate of appealability should issue. An actual conflict of interest that adversely affects counsel's performance violates the Sixth Amendment of the United States Constitution. See *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350, 100 S. Ct. 1708, 1718, 1719, 64 L. Ed. 2D 333 (1980); *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) The issue in this case is trial counsel Leslie Sweet's ineffective assistance due to causing the actual conflict and the consequent prejudice to the defense.

The record shows that an actual conflict existed in this case where Shaw's two trial attorneys had competing interests in the midst of trial to which pushed his primary attorney Morrell to want to withdraw. Shaw, who is not a legal expert

was forced to choose sides in the middle of trial while facing a potential life sentence if convicted. The facts will show that Shaw was given no other option but to have both remain as his attorneys:

Petitioner initially hired Mr. Joseph Morrell as his trial attorney. Later, Petitioner hired Ms. Sweet to conduct cross-examination of the purported victim. When Morrell attempted to discuss trial strategy with Sweet prior to trial, Sweet snubbed Morrell's invitation. A conflict arose when Sweet unexpectedly took a different stance to the trial court's pretrial rulings and aired her grievances for the first time (stating this came to her "overnight") concerning the defense strategy already agreed upon by Morrell and the Petitioner. Morrell informed the judge of his invitation to Sweet pre-trial, and Sweet responded stating "I don't do that." Morrell moved to withdraw as Shaw's attorney citing irreconcilable differences between what Sweet was wanting to present as a defense and what he and Shaw had already agreed would be the defense presented. Both Morrel and Sweet agreed that the two defense were like "East and West."

Shaw then would be forced to proceed in trial with Sweet who admittedly was not prepared to conduct a full trial, and who desired to present an extremely different defense. The waiver of conflict of interest relied upon by the state court was a waiver made after Shaw moved for a mistrial based on the conflict and the trial judge denied the motion. Thus this was not a free and voluntary waiver of the conflict of interest. Instead it was merely his attempt to resolve as best he could the conflict between his lawyers after the Court improperly refused to grant

Shaw's own motion for mistrial based on the conflict. Under these circumstances reasonable jurist would debate whether the Petitioner freely and voluntarily "waived" the conflict.

Moreover, the issue here is not whether the Petitioner waived the conflict, but whether Sweet's representation of the Petitioner was ineffective due to her lack of participation, preparedness, and communication with Petitioner and attorney Morrell prior to trial. Also, Sweet's causing of a conflict in the midst of trial by desiring to put forth a defense extremely different than what was, at all times, agreed upon by the Petitioner and Morrell, which she thought of "overnight" and which was subsequently rejected by the jury. Due to this conflict Morrell refused to go forward with her defense and Shaw was forced to proceed with Sweet who was admittedly unprepared to conduct a full trial. This is reflected by her ineffectiveness during closing arguments which was an incoherent mess! This is the claim that was presented to the state postconviction court.

In a similar case, a Florida court has held that trial counsel labored under a conflict of interest in his representation, depriving the defendant of effective assistance of counsel. *See Morales v. State*, 513 So. 2d 695 (Fla. 3rd DCA 1985) Similar as what happened here, the court found "the record indicates that Morales' counsel was subject to personal concerns regarding the effect of his trial conduct. Those concerns constituted the active representation of "conflicting interests" which "adversely affected his . . . performance," *Strickland v. Washington*, 466

U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 696 (1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 348, 100 S. Ct. 1708, 1719, 1718, 64 L. Ed. 2d 333, 346-47, 347 (1980)), and inhibited the zealous representation required of attorneys.” *Morales, supra*.

The record in this case established an actual conflict caused by attorney Sweet which adversely affected Shaw's attorney's performance and prejudiced the presentation of a viable defense in which Petitioner and attorney Morrell strategically agreed to present at trial. The Petitioner immediately brought this claim to the attention of the trial court. However, the trial court failed to grant the Petitioner a new trial. This case should be reversed for a new trial as the Petitioner met his burden under AEDPA standards that the state court decision was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court, or was based on an unreasonable determination of the facts.

Under these circumstances presented herein, reasonable jurists would debate the district court's denial of ground three of Petitioner's habeas corpus petition. Thus, Petitioner requests for a certificate of appealability to be issued in this case.

II. The questions presented are important.

The long established right to the effective assistance of counsel in criminal proceedings is rooted and grounded in the 6th Amendment of the U.S. Constitution made applicable to the states by the 14th Amendment. *Strickland v. Washington*, 466 U.S. 668 (1984) The United State Constitution guarantees a full and fair trial with the effective assistance of counsel that is without conflict. This case is one that highlights the importance of the effective assistance of counsel during the course of trial proceedings as it hampered a meritorious defense being presented to a jury in which would establish the defendant's innocence. The actual conflict of interest and denial effective assistance of counsel here deprived Petitioner of his constitutional right to a full and fair jury trial. Petitioner met his burden under *Strickland* to prove both deficient performance by counsel and prejudice. Moreover, the evidence presented at trial was insufficient to prove beyond a reasonable doubt that Shaw committed the offense of aggravated child abuse as specific intent was never proven. Under this Court's decision in *Jackson*, and *Winship, supra*, the Petitioner's rights under the Due Process clause of the U.S. Constitution was violated.

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully Submitted,

/s Travis Shaw
Travis Louis Shaw, pro-se