NO. 22-7393

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ALLEN W. THOMPSON # 1202947

PETITIONER,

VS.

HAROLD CLARKE, DIRECTOR, DEPT' OF CORRECTIONS

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Allen W. Thompson
479 Camp Nine Rd.
Rustburg, Va. 24588
pro-se,

QUESTION(S) PRESENTED

1. Pro se litigants filing claims of ineffective assistance of counsel and claims are routinely dismissed as "insufficient" "where it is merely conclusory and unsupported by any evidence". Under what circumstances should a habeas petition be held sufficient in the absence of affidavit's?

2. Where a case hinges on the testimony of the arresting officer. Did the Supreme Court of Virginia err in finding "no err" in the lower court's decision?

LIST OF PARTIES

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

   (a) Allen W. Thompson, Petitioner.

   (b) Harold Clarke, Director, Department of Corrections, Respondent.

RELATED CASES

- Allen W. Thompson v. Commonwealth of Virginia, (Va. App. No. 1452-183) in the Court of Appeals of Virginia. Judgment entered on July 24, 2019.
- Allen W. Thompson v. Commonwealth of Virginia (Va. App. No. 1911106) in the Supreme Court of Virginia. Judgment entered on February 13, 2020.
- Allen W. Thompson v. Harold Clarke, Director, Dep't of Corrections (No. CIO 1-95) in the Circuit Court for Nelson County. Judgment entered on August 2, 2021.
- Allen W. Thompson v. Harold Clarke, Director, Dep't of Corrections (No. 210990) (Circuit Court No. CIO 1-95) in the Supreme Court of Virginia. Judgment entered on October 19, 2022.

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OPINIONS BELOW

Thompson, does not have knowledge of any published opinion from the lower courts mentioned in this petition.

JURISDICTION

The Supreme Court of Virginia entered judgment on October 19, 2022. See Appendix A. This petition is timely filed pursuant to Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLED

United States Constitution, Amendment VI

STATEMENT OF THE CASE

On January 30, 2018, Thompson was convicted by a jury in the Nelson County Circuit Court of possession of oxycodone, in violation of Va. Code § 18.2-250, and possession of cocaine in violation of Va. Code § 18.2-250. For both counts of simple possession, the jury recommended a total sentence of 11 years in prison. By sentencing order dated August 21, 2018, the circuit court imposed the sentence as recommended by the jury with without suspending any portion. (Cir. Ct. Case Nos. CR17000321-00, CR170003222-00).

Thompson filed a timely Petition for Appeal with the Virginia Court of Appeals arguing insufficiency of evidence to convict as matter of, which the court denied on July 24, 2019. (Va. App. Record No. 145-18-3). He appealed that decision to the Supreme Court of Virginia, which refused the petition by order entered on February 13, 2020. (Va. Record No. 1911106).

On February 13, 2021, Thompson filed a timely petition for writ of habeas corpus in the circuit court. He challenged the legality of his confinement claiming, among other things, that his trial counsel was ineffective in violation of his Sixth Amendment rights.[1] On May 24, 2021, Respondent Clarke filed a motion to dismiss

[1] Thompson also raised claims of double jeopardy, prosecutorial misconduct, insufficiency of evidence, denial of an impartial jury, improper jury instructions, and violation of his Eighth Amendment rights. The circuit court dismissed these claims without addressing the merits pursuant to the Rule in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974).

the habeas corpus petition. On August 2, 2021, entered the dismissing the habeas petition, (Cir. Ct. No. C121-95).

Thompson timely noted an appeal, pro se. Thompson then by counsel filed a petition for appeal to the Supreme Court of Virginia on October 19, 2021. On October 19, 2022 the Supreme Court of Virginia entered an order denying the petition for appeal.

In denying Thompson's Petition for Appeal, the Virginia Court of Appeal's summarized the facts adduced at trial as followed:

> On January 3, 2017, Deputy Sheriff Jones encountered a car parked in the yard next to appellant's house. Appellant's was sitting in the front passenger seat, and a man named Truslow was in the driver's seat. Jones, dressed in his uniform and badge, pulled into appellant's driveway and spoke to Truslow from his patrol car. As he spoke with Truslow, he noticed appellant moving around in the car.
>
> Jones exited his patrol car, instructed Truslow to keep his hands on the steering wheel, and walked around the back of Truslow's hatchback. AS he did, Jones saw appellant "make a motion of leaning forward and then sitting back up". Jones directed appellant to show him his hands and exit the car. When Jones frisked appellant for weapons, he felt a "bulged" in his jacket, and upon removing it, discovered a pouch containing nearly $2400 in predominantly twenty-dollar denominations.
>
> Jones searched the passenger seat and found two pill bottles, a scale, and a bag of cocaine beneath it. One of the pill bottles bore appellant's name, and appellant admitted that it was his. Appellant told Jones that the bottle contained his diabetes medication, but in fact, the pills were a mixture of oxycodone and acetaminophen. The bag of cocaine was found the pill bottles and the scale.
>
> When the police search the appellant's house, they found a razor blade bearing white power in the kitchen with a box of sandwich bags next to it. A box cutter was on top of the sandwich bags, and an open box of baking soda was next to a razor blade a box of baggies. In the master bedroom a tied-off bag containing white powder and a "green leafy material" was in the drawer next to men's clothing. Also, on the top the

> master bedroom dresser the police discovered a Q-tip and a razor blade with white powder. In addition, they found a "ripped off piece of a corner baggie" under the bed in the master bedroom.
>
> In a shed located approximately fifteen to twenty feet from the house the police discovered another razor blade bearing white residue and a "vial container" containing white residue and a green leafy substance in plain view on top of a toolbox. Further, they found a torn, knotted, corner baggie that had been cut open at one end. The contents of the vial tested positive for cocaine residue and marijuana.
>
> Special Agent Burkhead, an expert in drug distribution, testified that the street value of the cocaine found beneath appellant in the was approximately $1,500. Burkhead also noted that razor blades were used to separate cocaine into smaller amounts for consumption. He stated that baking soda was "often used as a cut for cocaine". Further, Burkhead explained that cocaine is a stimulant that accelerated "body processes," while oxycodone is a central nervous system depressant that "slowed you down ..." Finally, he stated that twenty-dollar bills were the currency "most commonly-used" to purchase drugs. (Court of Appeals Order, Record No. 1452-18-3, July 24, 2019, at 2-3).

REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary in providing guidance to lower court's regarding the circumstances under which pro se litigation takes place. This guidance would provide a "full and fair opportunity" to a habeas petitioner to develop the factual basis of a collateral attack.

Claims of ineffective assistance of counsel are resolved under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, this Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the Sixth Amendment. Under Strickland, a defendant must demonstrate that counsel performance was deficient and that such deficient performance substantially prejudiced the defendant.

Strickland, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's fell below an objective standard of reasonableness. Id. In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

In Claim 1(a), Thompson asserted that his counsel failed "to conduct an independent investigation to determine if matters of a defense [could] be developed and to allow time for preparation of trial." (Pet. Mem. at. 1, IAC). Thompson proffered that a witness, Gray Crawford, "witnessed the event and would testify to the location of both [Thompson] and the officer which was contradictory to the testimony given at the preliminary [hearing] then at trial." (Date of hearing July 26, 2017) (Pet. Mem. 1, IAC). Thompson explained that he advised counsel of the falsehoods in the police report and the testimony given at the preliminary hearing with regard to his location and that of the officer. Id.

However, trial counsel failed to call Gary Crawford as a witness or investigate Gray Crawford. (Pet. Mem. at 1, IAC).

In denying this claim, the circuit court found that "Thompson's claim is insufficient to demonstrate a cause for habeas relief where it is merely conclusory and unsupported by any evidence." (Cir. Ct. Order, at 14). The circuit court furthered reasoned that, "[i]n any event, during, during arraignment, Thompson expressed that 'all the witnesses' he need[end] for trial' were present, that he was ready for trial, and

that his lawyers have 'done everything [he] asked them to do.' "(Tr. 1/30/18 at 23-24). Id. At 15. Thompson argues this decision by the Circuit Court is plainly wrong and without evidence to support it. Cardinal Dev. Co. v. Stanly Constr. Co., 255 Va. 300, 302, 497 S.E.2d 847, 849 (1998).

Thompson made a specific proffer, under the penalty of perjury, that Gary Crawford, "had witnessed the event and would testify to the location of both [Thompson] and the officer which was contradictory to the testimony given at the preliminary [hearing] then at trial." (Pet. Mem. at 1 IAC). The testimony of Crawford, an eyewitness to the event, which would have contradicted the testimony given at trial, where "well pleaded allegations of the petition [are not denied] they must be accepted as true". Cash v. Culver, 358, U.S. 633, 634, 358 U.S. 633, 79 S. Ct. 432, 3 L. Ed. 2d 557.

Accepted as true, as the circuit court was required to do in the absence of any denial, the court should have then asked whether the Thompson's claim can be "fully determined on the basis of the recorded matters". (quoting Code 8.01-654(B)(4)). This is because the "decision whether to hold an evidentiary hearing in a habeas corpus proceeding depends chiefly on the adequacy of the trial record." Friedline v. Commonwealth, 265 Va. 273, 277, 576 S.E.2d 491, 493 (2003). "Because each trial record is different," however, "such determinations are not subject to fix rules but must proceed on a case-by-case basis." Id. At 277, 576 S.E.2d at 494.

In this case, Thompson identified Gary Crawford to counsel as a crucial witness and proffered that his testimony would have contradicted the testimony given at trial

with regard to a vital aspect of the alleged offense. This specific proffer is a valid reason why the circuit court should not have summarily dismissed his claim. Because the case could not be decided solely upon the recorded matters, an evidentiary hearing in which Gary Crawford could be called as a witness was necessary to determine whether is trial counsel's representation "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688.

Strickland makes clear that one critical element of constitutionally reasonable performance is an adequate investigation of relevant facts and law. 466 U.S. at 690-91(discussing counsel's duty to make "reasonable investigations"). "[P]revailing professional norms ... include the duty to support informed legal judgments." United States v. Carthorme, 878 F.3d 458, 466 (4th Cir. 2017); see, e.g., William v. Taylor, 526 U.S. 362, 395 (2002) (find counsel's performance deficient for unreasonable failure to investigate mitigating evidence).

"[N]o 'reasonable professional judgments can justify counsel's lack of investigation" Wright v. Clarke, No. 19- 7447 at * 14 (4th Cir. 2021); See also Vinson v. True, 436 F.3d 412, 419 (4th Cir. 2006) (noting that we do not regard a decision as "tactical ... if it made no sense or was unreasonable").

In Elmore v. Ozmint, 661 F.3d 783 (4th Cir. 2011), where the Fourth Circuit granted an ineffective assistance of counsel claim based on a failure to investigate. Although the state's case hinged on the forensic evidence collected at the scene, the petitioner's trial attorney "conducted no independent analysis of the State's forensic

evidence" and "did not otherwise mistrust the State's case against [the petitioner]." Id. At 853-54, 861. Regarding an attorney's duty to investigate under Strickland, the Fourth Circuit commented:

> A healthy skepticism of authority, while generally advisable, is an absolute necessity for a lawyer representing a client charged with capital murder. After all, the custodians of authority in our democracy are ordinary people with imperfect skills and human motivations. The duty of the defense lawyer "is to make the adversarial testing work in the particular case," Strickland, 466 U.S. at 690 []- an obligation that cannot be shirked because of the lawyer's unquestioning confidence in the prosecution.
>
> Id. at 859.

Here, it was unreasonable for trial counsel to ignore evidence of an eyewitness, Gary Crawford, with regard to the location of both Thompson's and that of the Officer. Trial counsel had established that officer's vehicle's "dash cam" was not operable, and that the officer did have an "operable body cam" during his interaction with Thompson. (Resp. Mot. to Dismiss, pg. 17, no. 28). This made Crawford's testimony even more crucial to Thompson's defense. See Andrus v. Texas, 140 S. Ct. 1875 (2020):

> HOLDINGS:
>
> [1] Habeas petitioner in a capital case demonstrated that trail counsel's performance was deficient where counsel performed almost no mitigation investigation; due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case; and counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation; [2] A remand was necessary to address the Strickland prejudice prong given the uncertainty as to whether the state court adequately conducted that weighty and record-intensive analysis in the first instance.

In failing to investigate or even try to present Crawford as a witness, trial counsel's performance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. The jury could have easily disbelieved the testimony of the officer given a trial over that of Crawford who would have contradicted the officer. Crawford's testimony would have been "consistent with [Thompson's defense] and would have created more equilibrium in the evidence presented to the jury" Luna v. Cambra, 306 F.3d 954 961 (2002), amended, 311 F.3d 928 (quoting Brown v. Myers, 137 F.3d 1154, 1157 (1998)). Here, as in Brown, "without any corroborating witnesses, [Thompson's] bare [defense] left him without any effective defense. Brown, 137 F.3d at 1158. See also Anderson v. Johnson, 338 F.3d 382, 394 (2003) (Counsel's failure to call a witness who was one of only two adults to observe the alleged crime prejudiced the petitioner because the witness's testimony "would have been a powerful rebuttal to that of the victim and her minor daughter"). Moreover, "In the context of a credibility competition, how new alters the evidentiary picture makes all the difference. Where evidence would directly contradict uncorroborated eyewitness testimony, the failure to offer it is held to be prejudicial" Valentino v. Clarke, 972 F.3d 560, 566, 2020 U.S. App. LEXIS 227232, *1, 2020 WL 5034418 (4th Cir. Va. August 26, 2020).

Furthermore, that Thompson expressed satisfaction with trial counsel and he was ready for trial does not contravene his claim that trial counsel was ineffective for not investigating and calling Crawford. It is indeed plausible that Thompson made

those representations under the belief that, counsel had performed the necessary investigation and would call him to the stand. Indeed, trial counsel provided no affidavit denying Thompson's claims.

CONCLUSION

This Court's intervention is necessary in providing guidance to lower court's regarding the circumstances under which pro se litigation takes place. This guidance would provide a "full and fair opportunity" to a habeas petitioner to develop the factual basis of a collateral attack. This Honorable Court should grant certiorari to review and consider the uncontrollable circumstances that pro se litigants may face. Hold this case as the example, that justice requires. For the foregoing reasons Mr. Thompson respectfully request, and prays that this Honorable Court issue a writ of certiorari to review the judgment of the Supreme Court of Virginia.

Dated this 16th day of January 2023.

Respectfully submitted,

Allen W. Thompson
479 Camp Nine RD.
Rustburg Va. 24588
Pro Se, Litigant