No. 22-7491

IN THE

SUPREME COURT OF THE UNITED STATES

ORLANDO OCASIO, ---- PETITIONER

vs.

JOSEPH NOETH, ---- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ORLANDO OCASIO Pro-Se.

Attica Correctional Facility Box 149
Attica, New York 14011-0149

QUESTIONS PRESENTED

As in Mr.Ocasio's case where there was no introduction of any defense whatsoever and the Monroe County Court, Western District Court, and the Second Circuit Court of Appeals denied grounds for relief to Mr.Ocasio stating that there is no grounds for ineffective assistance of counsel, rather, disagreement with tactics, trial strategy, defaulted claims, and AEDPA.

(QUESTION 1). WAS MR.OCASIO DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO: 1). INTRODUCE ANY DEFENSE; 2). INTRODUCE EXPERT OPINION EVIDENCE TO EXPLAIN BOTH WHAT WAS AND WHAT WAS NOT FOUND DURING THE MEDICAL EXAMINATION OF THE COMPLAINANT'S; 3). CROSS-EXAMINE THE PEOPLE'S EXPERT REGARDING THE SIGNIFICANCE OF THE ABSENCE OF EVIDENCE OF INFLICTED TRAUMA; 4). ADEQUATELY CROSS-EXAMINE THE PEOPLE'S EXPERT ON CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME REGARDING LITERATURE RAISING DOUBTS AS TO THE SYNDROME; 5). CONSULT OR CALL MEDICAL EXPERT; 6). OBTAIN COPIES OF THE COLPOSCOPE SLIDES AND HAVE THEM REVIEWED BY AN INDEPENDENT MEDICAL EXPERT; 7). RETAINED MEDICAL EXPERT; 8). CALL FACTS WITNESSES WHEN THEY WERE AVAILABLE TO COOPERATE AND TESTIFY FOR THE DEFENSE ?

(QUESTION 2). CAN TRIAL STRATEGY AND TACTICS EXCUSE ALL THESE FAILURES HIGHLIGHTED IN QUESTION (1) WHEN ALL (8) ARE SUBJECT TO ONE CASE ?

(QUESTION 3). WAS THE SECOND CIRCUIT COURT OF APPEALS IN CONFLICT WITH ESTABLISHED FEDERAL LAWS IN DENYING MR.OCASIO'S CERTIFICATE OF APPEALABILITY WHEN MR.OCASIO'S CLAIMS OF CONSTITUTIONAL VIOLATION WERE PRESENTED TO THE DISTRICT COURT UNDER MCQUIGGINS v. PERKINS, 469 U.S 383; KRUELSKI v. Connecticut Supreme Ct. for Jud. Dist. of Danbury, 316 F 3d 103, 106 (2d Cir. 2003) TO OVERCOME HIS PROCEDURAL BAR, DEFAULTED CLAIMS, AND AEDPA TO ALLOWED PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, ACTUAL INNOCENT, MISCARRIAGE OF JUSTICE, CAUSE AND PREJUDICE, CONTRARY TO OR INVOLVED AN UNREASONABLE APPLICATION OF CLEAR ESTABLISHED FEDERAL LAW OR UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING 28 U.S.C.A. § 2254 [d](1)(2) ?

QUESTION 4). WAS MR.OCASIO'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF THE LAW, RIGHT TO EFFECTIVE COUNSEL, AND A FAIR TRIAL VIOLATED WHEN MR.OCASIO DO NOT HAVE THE ECONOMICAL SUPPORT TO RETAINED A MEDICAL EXPERT TO INTRODUCE MEDICAL OPINION EVIDENCE AND WHEN REQUESTED IN POST CONVICTIONS REMEDIES ... THE INTRODUCTION OF PEDIATRIC MEDICAL EXPERT THE COURT DENIED MR.OCASIO'S REQUEST STATING THAT ANOTHER EXPERT IS NOT GOING TO SAY ANYTHING EXCULPATORY IN NATURE, THEREFORE, ASSUMING THE POSITION OF A MEDICAL EXPERT TO DENIED MR.OCASIO'S MOTION ?

QUESTION 5). IT'S FAIR TO SAY THAT THESE CASES; GERSTEN V. SENKOWSKI, 426 F. 3d 588; HOLSOMBACK V. WHITE, 133 F. 3d 1382 at 1386,1387; PAVEL V. HOLLINS, 261 F. 3d 210; EZE V. SENKOWSKI, 321 F. 3d 110; BURCH V. MILLAS, 663 F. Supp. 2d 151; LINDSTADT V. KEANE, 239 F. 3d 191 FUNDAMENTALLY STRESSED MR.OCASIO'S CONSTITUTIONAL VIOLATIONS HIGHLIGHTED IN QUESTION (1), SO, IT WOULDN'T BE FAIR TO SAY THAT ONE ACCUSED OF A SERIOUS CRIME AS IN THIS CASE, MR.OCASIO, AND BASED IN THE ABOVE CASES WE CAN AGREE THAT MR.OCASIO WAS NOT CONSTITUTIONALLY DEPRIVED OF HIS RIGHT TO A FAIR TRIAL, AND DUE PROCESS OF THE LAW, THAT WOULD BE UNREASONABLE APPLICATION OF ESTABLISHED FEDERAL LAWS ?

(QUESTION 6). DID THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK ERROR IN ASSESSING THE PREJUDICIAL IMPACT OF CONSTITUTIONAL ERRORS IN A STATE COURT CRIMINAL TRIAL UNDER BOTH "SUBSTANTIAL AND INJURIOUS EFFECT" STANDARD SET BY BRECHT v. ABRAHAMSON, 507 U.S. 619, 631, 113 S. Ct. 1710, 123 L. Ed.2d 353. "HARMLESS BEYOND A REASONABLE DOUBT" STANDARD SET FORTH IN CHAPMAN v. CALIFORNIA, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed 2d 705 Pp.2324-2328. ?

LIST OF PARTIES

[X] 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

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

The opinion of the United States court of appeals appears at Appendix NAA to the petition and is

[ ] reported at Ocasio v. Noeth 2023 WL 2769064; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.
Not Reported in Fed. Rptr. (2023

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

[XX] reported at 2022 WL 4007633, W.D.N.Y., Sep. 02, 2022; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[XX] 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

[XX] reported at 16 N.Y. 3d 898, N.Y. May 09, 2011; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Supreme Court, Appellate Division, 4 Dep't court appears at Appendix D to the petition and is

[XX] reported at 81 A.D. 3d 1469; 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 February 15, 2023.

[ ] 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),(2).

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

The date on which the highest state court decided my case was May 9, 2011. A copy of that decision appears at Appendix C.

[ ] 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

United States Constitution Article 1, Section 9, clause[2] states, in relevant part: "The privilege of the Writ of Habeas Corpus shall not be suspended."

The Fourteenth Amendment to the United States Constitution states, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of the law..."

28 U.S.C. § 2254. State custody; remedies in Federal courts

(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 Law 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 the State Court shall not be granted unless it appear that ---

(a) the applicant has exhausted the remedies available in the Court of the State; or

(b)(i) there is an absesnce of available State corrective process; or

(c) circumstances exist that render such process ineffective to protect the right of the applicant.

STATEMENT OF THE CASE

In September 2008 the Petitioner Mr.Ocasio was accused of committing multiple acts of Child Sexual Abuse. He was indicted in a 13 count indictment. in December 2008, that indictment was dismiss. A second 10 count indictment was issue. Mr.Ocasio pleaded Not Guilty. In a bench trial Mr.Ocasio was acquitted of (2) counts of first degree rape, and (1) count of Predatory Sexual Assault to a Child was dismiss. Petitioner then wife retained Brian Shiffrin to perfect Petitioner Mr.Ocasio's direct appeal. In 2011 the Appellate Division 4th Dep't denied Mr.Ocasio's direct appeal. 81 A.D. 3d 1469, N.Y.A.D. 4 Dep't Feb. 18 2011. Leave to appeal denied 16 N.Y. 3d 898, N.Y. May. 09, 2011, and Certiorari was denied 565 U.S. 910, U.S.N.Y., Oct. 03, 2011. The Appellate Division 4th Dep't denied Mr.Ocasio's direct appeal in a Order and Decision stating that there was no ineffective assistance of counsel, rather, a disagreement with trial strategy and tactics. The Petitioner (Mr.Ocasio) in 2011 filed to this court a Writ of Certiorari, that was also denied. Mr.Ocasio agree that his first Writ of Certiorari was not presented to this Court with the legal importance require to the granting of his first Writ of Certiorari. The reasons for that failure and any other failure are as follow:

Petitioner[1] (Mr.Ocasio) did not purposely defaulted any of his appeal claims. Mr.Ocasio is unlearned in the law, born and race in Puerto Rico, language barrier, Spanish speaking who may not understand or comply with State's procedural rules or may misapprehend the substantive details of procedural or Federal Laws and the evidence of that has reflected in Mr.Ocasio's defaulted appeal claims. Furthermore, Mr.Ocasio's concerns for his own safety and life, a major contribution to Mr.Ocasio's failure to learn and have an understanding where he can exercise specific Court rules

to avoid defaulting his claims, or AEDPA.

Unfortunately for Petitione (Mr.Ocasio) he may have to be incarcerated for the remaining time he have left, because even if he was or is Constitutionally Violated the Court has refused to review Mr.Ocasio's claims of Constitutional Violation when they appear to be will established and supported by Federal case law highlighted in question (1) and (5).

Despite all the adds against Mr.Ocasio, he did what he thought was the right thing to preserve his Constitutional Right to be Free.

On appeal to the Western District Court Mr.Ocasio brought his Constitutional Violations based in ineffective assistance of counsel, Actual innocence, Miscarriage of Justice, Cause and Prejudice, Contrary to or Involved an unreasonable application of clear established federal law[2] claims to overcome procedural bar, default and AEDPA.

Although, the Western District has review Mr.Ocasio's 28 U.S.C. § 2254 unfortunately the decision and order was not what Mr.Ocasio expected.

The Petitioner (Mr.Ocasio) made it very clear the importance of introduction of medical expert and facts witnesses in his case. Mr.Ocasio respectfully requested a hearing in the Western District Court and requested federal funding in a motion for expert services to retain Dr.Jocelyn Brown and locate Angela Ocasio who possess personal knowledge and could provide exculpatory evidence when she was at the house in September 1st through the 30th. 2005.

As stated in question (4) the Petitioner (Mr.Ocasio) was stripped of any economical support upon his arrest for a crime that he did not commit, and yet, the presentation of any defense including the failure to introduce both, medical expert, expert psychologist in CSAAS, and facts

witnesses, or atnleast cross-examine the medical expert all was denied.

This is a very concerning matter that need to be review by this court. The fact that the lower Court arguments, order, and decisions are erroneous First, the weakness of the prosecution's case against Mr.Ocasio should have caused defense counsel to do more, not less, in Mr.Ocasio's defense because "a verdict or conclusion only weakly supported by the record is more likely to have been affective by errors than one with overwhelming record support" Strickland v. Washington, 466 U.S. 668,698 (1984). Second, the fact that defense counsel did some things right in his failed defense of Mr.Ocasio does not mean that his assistance was Constitutionally effective, for even "a single, serious error may support a claim of ineffective assistance of counsel." Dorsey v. Kelly, 1997 WL 400211, No. 92 Civ. 8943 (LLS)(SDNY July 16, 1997), affd, 164 F. 3d 617 (2d Cir. 1998). Third, the lower Court claim that none of the witnesses who by trial counsel's failure to investigate and introduce at trial in defense of Mr.Ocasio in support of a defense who possessed personal knowledge and exculpatory evidence was a trial strategy and tactics. If the lower Court were correct, then a defendant accused of sexually abusing young children behind close doors, with no eyewitnesses to exonerate him, would be able to defend himself only by taking the stand and denying the allegations-even after the prosecution has presented expert medical and psychological testimony that supports the charges against the defendant. Fortunately, this is not the law. Petitioner (Mr.Ocasio) was indeed denied his Constitutional Right to effective assistance of counsel. The fact that this case, assessed in light of Supreme Court precedent and recent case law of the Second Circuit, entitle Mr.Ocasio either to a Writ of Habeas Corpus or a hearing before the District Court so that Mr.Ocasio can

finally present the evidence that the lower Court has repeatedly refuse to consider because the Western District Judge Elizabeth A. Wolford and the State are wrong, because the (Strickland) test does not require a defendant to prove that the evidence that his trial counsel failed to investigate and introduce at trial would have "exonerated" him. Rather, [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. Strickland, 466 U.S. 668,693 (1984). Since the existence of a reasonable doubt as to the defendant's guilt is sufficient to (acquitte), the defendant need not be "exonerated" by the missing evidence. He need only show that it would likely have created a reasonable doubt in the mind of the trier of facts. See also Sims v. Livesay, 970 F. 2d 1575, 1581 (6th Cir. 1992) (in a Habeas Corpus proceeding, the Petitioner is not required to "establish his innocence or even demonstrate that counsel's deficient conduct more likely than not altered the outcome of the case"). Moreover, the lower Court argued that it was reasonable for defense counsel not to investigate or introduce any exculpatory evidence including medical expert, because, such an expert would not testified to something different to what Dr.Thomas-Taylor would have testified that would be considerably beneficial to Mr.Ocasio's behalf and lothaty statement made by the Court is legally incorrect.

THEREFORE, I, Orlando Ocasio, respectfully requests for this Supreme Court to Grant a Writ of Certiorari to review and correct and establish that a person under same circumstances as Mr.Ocasio should not be deprive of his Constitutional Right based on the specific failures presented to this Court by the Petitioner (Mr.Ocasio).

REASON FOR GRANTING THE PETITION

The national importance of having the Supreme Court decide the question whether the Second Circuit Court of Appeals is in direct conflic with already established federal laws when applying deferential treatment AEDPA as a gateway to denied Mr.Ocasio's Certificate of Appealability when Mr.Ocasio's claims of constitutional violations were presented to the District Court under McQuiggin v. Perkins, 469 U.S. 383, Actual innocence, Miscarriage of Justice, Cause and Prejudicial, Contrary to or Involved an Unreasonable application of clear established, Federal law claims for which the Western District Court reviewed Mr.Ocasio's 28 U.S.C. § 2254, copy of the decision attached. Appendix B.

Petitioner Mr.Ocasio timely filed his notice of appeal to the Second Circuit Court of Appeals. The Second Circuit Court of Appeals denied Mr.Ocasio's Motion for a oversize brief and motion for a COA stating that the appellant has not made a substantial showing of the denial of a constitutional right and cited 28 U.S.C. § 2253(c); Miller -El v. Cockrell, 537 U.S. 322,327(2003).Mr.Ocasio's Constitutional claims were based in Ineffective Assistance of Counsel.

However, what is quite alarming is the fact that the majority of cases like Petitioner Mr.Ocasio, accused of committing a serious crime for which based in the testimony given by (CF. and JF.) physical corroboration should be found but, there was no physical corroborating evidence to corroborate any of the sexual abuse claim made by (CF. and JF.) and the conviction was made in believing that the petitioner is guilty, rather than the introduction of any exculpatory evidence or any defense when defense counsel was advised by the Petitioner that such exculpatory

evidence need be introduction[3] Marchesano v. Garmin, 2022 WL 3913545. The PCRA Court applied Pennsylvania's test for determining whether petitioner's counsel was ineffective for failing to call potential witness, which requires a showing that: 1) the witness existed; 2) the witness was available; 3) counsel was informed of the existence of the witness or counsel should otherwise have known of the witness; 4) the witness was prepared to cooperate and testify for Petitioner at trial; 5) the absence of the testimony prejudiced Petitioner so as to deny him a fair trial.[4] Defense attorney never even bother to investigate creating a conundrum in which violate the Petitioner right to a fair trial and the best excuse used against cases like Mr.Ocasio is procedural bar, defaulted, or AEDPA to avoid reviewing Petitioner's claim of Constitutional violation which do appear will established. Cases supporting ineffective assistance of counsel. The fact that these cases Gersten v. Senkowski, 426 F.3d 588; Holsomback v. White, 133 F.3d 1382 at 1386,1387; Pavel v. Hollins, 261 F. 3d 210; Eze v. Senkowski, 321 F. 3d 110; Burch v. Millas, 663 F. Supp. 2d 151; Lindstadt v. Keane, 239 F. 3d 191 fundamentally stressed the importance of the introduction of facts witnesses, medical expert witness, cross-examine, consult or call, conducted pretrial investigation in child sex abuse crime for which Petitioner Mr.Ocasio was deprived of these requirement, depriving him of his constitutional rights under the Sixth and Fourteenth Amendment to a fair trial due to defense counsel ineffectiveness for which at the above cited cases the decision of the lower Court, Western District Court, and the Second Circuit Court of Appeals are erroneous in continuous denial of Mr.Ocasio's claims and others similarly situated.

The decision of the Second Circuit Court of Appeals is erroneous in

applying the AEDPA to denied Mr.Ocasio's motion's for oversize brief and COA.

The Federal Law provide that an actual innocence claim together with newly discovered facts claims is enough to overcome defaulted claims, procedural bar, or AEDPA. Reeve v. Fayette, 897 F. 3d 154, 157 states that exculpatory evidence that counsel should have presented can be new evidence for purposes of actual innocence relief from Habeas as Petitioner arguably introduce counsel's ineffectiveness in support of his cause and prejudice to overcome procedural bar. In addition, Kruelski v. Connecticut Superior Ct. for.Jud. Dist. of Danbury, 316 F. 3d 103, 106 (2d Cir. 2003) in support of contrary to or involved an unreasonable application of clear established federal laws to overcome procedural bar, default, and AEDPA. Moreover, Mr.Ocasio's claims were enough to time tolled his procedural bar issues and the AEDPA statute of limitation.

Mr.Ocasio now is pleading to this Court for a Writ of Certiorari and in support explained that Supreme Court case Martinez v. Ryan, 566 U.S. 1 [5][6][7] support his contention for which this controversial dilemma concerning the Second Circuit Court of Appeals decision in denying Mr.Ocasio's motion for a COA based in procedural bar, and AEDPA statute need to be review by this Court. This is a very concerning issue, the same would not be true if the State appointed an attorney to assist Mr.Ocasio in his collateral proceedings, which the State upon Mr.Ocasio's requests for appointment of counsel for his collateral proceeding was denied, and therefore, Mr.Ocasio unlearned in law, born and race in Puerto Rico, language barrier, Spanish speaking may not understand or comply with the State's procedural rules or may misapprehend the substantive details of Federal Constitutional Law Cf., e.g, I'd., at 620-

621, 125 S. Ct. 2582 and describing the educational background of the prison population while confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance of counsel which often turns on evidence outside the trial record and for that reasons in Petitioner's 2254 motion Petitioner requested a hearing under clear error review. The District Court's factual findings in denying Petitioner Habeas petition may be "clear erroneous" where the Court failed to synthesize the evidence in a manner that accounts for conflicting evidence or the gaps in a party's evidentiary presentation, incorrectly assessed the probative value of various pieces of evidence, or failed to weigh all of the relevant evidence before making its factual findings. The Petitioner Mr.Ocasio also emphasize the cumulative effect failures presented to the lower Court in support of his claims of ineffective assistance of counsel which based in Lindstadt v. Keane, 239 F.3d 191, the cumulative effect of counsel's error adding from Lindstadt, that nothing could have been more relevant, for "[i]n a credibility contest, the testimony of neutral, disinterested witnesses is exceedingly important." Williams, 59 F. 3d at 681-82 (holding that counsel's failure to investigate and call witnesses who could bolster client's defense of innocence in a case alleging sexual abuse constituted ineffective counsel. The Second Circuit in Rodriguez v. Hoke, 928 F. 2d 534 would have constituted cumulative effect unfortunately Mr.Rodriguez did not exhausted his claim in the lower court in any capacity.

THEREFORE, for all the stated reasons hereto, Petitioner Mr.Ocasio respectfully requests that his Writ of Certiorari be Granted.

CONCLUSION

THE PETITION FOR A
WRIT OF CRTIORARI SHOULD BE GRANTED.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

Executed on, April 24, 2023

Orlando Ocasio

Orlando Ocasio, 09-A-3964
Pro-se.
Attica Correctional Facility
Box 149
Attica, New York 14011-0149