

No. _____

In the
Supreme Court of the United States

MICHAEL KELLYWOOD,
Petitioner,
v.

DAVID SHINN, DIRECTOR,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the denial of Mr. Kellywood's writ of habeas corpus regarding ineffective representation of trial counsel when failing to sufficiently research and support the motion to compel production of medical and counseling records violates the Due Process Clause of the Sixth Amendment.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Michael Kellywood.

David Shinn.

LIST OF PROCEEDINGS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 22-15778

MICHAEL KELLY WOOD V. THORNELL

No. 22-15778, 2023 WL 8797889 (9th Cir. Dec. 20, 2023)

Memorandum denying ineffective assistance of counsel.

Judgment dated December 20, 2023

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV-21-00234-TUC-JCH

KELLYWOOD V. KIMBLE

No. CV-21-00234-TUC-JCH, 2022 WL 1487040 (D. Ariz. May 11, 2022)

Order refusing to grant certificate of appealability.

Judgement dated May 11, 2022

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV 21-0234-TUC-JCH (LAB)

KELLYWOOD V. KIMBLE

No. CV210234TUCJCHLAB, 2021 WL 8362938 (D. Ariz. Aug. 30, 2021)

Report and Recommendation to deny certificate of appealability.

Judgment dated August 30, 2021

THE COURT OF APPEALS OF ARIZONA,
DIVISION 2

Case no. 2 CA-CR 2017-0178

STATE V. KELLYWOOD

246 Ariz. 45 (Az. Ct. App. 2018)

Opinion affirming the conviction and sentence.

Judgment dated July 8, 2019

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kellywood respectfully requests that a Writ of Certiorari be issued to review the denial of habeas relief United States District Court of Arizona United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The May 11, 2021, memorandum order and final order in favor of the Government from the United States District Court for the District of Arizona are reproduced in the Appendix (“Appendix B and C”).

The December 20, 2023, order from the Court of Appeals for the Ninth Circuit is reproduced in the Appendix. (“Appendix A”).

BASIS FOR JURISDICTION IN THIS COURT

The United States Court of Appeals for the Ninth Circuit issued their ruling on December 20, 2023. This Court has jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS INVOLVED

“In 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.”

U.S. Const. amend. XI.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(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.”

STATEMENT OF THE CASE

Petitioner Michael Kellywood (“**Mr. Kellywood**”) brought the above-captioned Petition for Writ of Habeas Corpus and subsequent appeal following the denial of habeas relief.

Mr. Kellywood should have been granted habeas relief because Mr. Kellywood was subject to ineffective assistance of counsel.

This Petition raises questions involving a grave constitutional violation in a serious criminal conviction followed by wrongful dismissal of habeas relief. Mr. Kellywood followed all the necessary procedures and exhausted all state remedies before promptly filing for federal relief.

On May 15, 2017, Mr. Kellywood was sentenced to a total of 95 years to life following convictions of three counts of sexual conduct with a minor under the age of fifteen, and one count of molestation of a child, continuous sexual abuse of a child, and sexual abuse of a minor under the age of fifteen.

During a family vacation, Mr. Kellywood and his wife discovered A.K., their adopted daughter, watching pornography on her cell phone. As a disciplinary measure, Mr. Kellywood and his wife took A.K.'s phone. After returning home from their family vacation, A.K. began telling people, starting with her adoptive aunt, that Mr. Kellywood was having sexual relations with her that began not long after she was adopted. As time went on, her story grew, and she continued disclosing numerous alleged sexual activities between her and Mr. Kellywood.

During trial, the Mr. Kellywood sought medical and counseling records to support his defense that A.K. fabricated her complaint and accusations for an in-camera review. He argued that the requested records would possess and provide documentation regarding whether A.K. had ever disclosed the alleged sexual abuse or if she had denied being a victim when asked. Mr. Kellywood's trial counsel made the motion seeking the information requested by Mr. Kellywood in a broad,

general manner. The trial counsel did not familiarize himself with the proper method of securing documents nor did Mr. Kellywood's trial counsel articulate anything in the motion from which the trial court could determine that a reasonable possibility existed that the records contained exculpatory evidence. The trial court denied the motion.

The procedural posture is as follows:

- 5/16/2017. Timely notice of appeal filed.
- 12/12/2018. Arizona Court of Appeals affirmed the convictions and sentences.
- 8/7/2019. Arizona Supreme Court denies petition for review.
- 8/20/2019. Filed notice of post-conviction relief.
- 3/11/2020. Trial court denied post-conviction relief.
- 3/11/2020. Petition for review of the post-conviction relief denial.
- 8/10/2020. Arizona Court of Appeals denied relief.
- 2/2/2021. Arizona Supreme Court denies timely petition.
- 6/4/2021. Petition for a writ of habeas in the United States District Court for Arizona.
- 5/11/2022. District Court denied the petition for a writ of habeas corpus.

- 5/23/2022. Certificate of Appealability filed in the 9th Circuit.
- 12/1/2022. The 9th Circuit granted the Certificate of Appealability.
- 12/20/2023. The 9th Cir. denied the habeas petition.

REASONS TO GRANT THIS PETITION

This Court should reverse the lower courts and remand Mr. Kellywood's habeas petition with instructions to grant relief because of Mr. Kellywood's denial of a critical constitutional right. In 1963, this Court declared that every single defendant in the United States justice system has a right under the Constitution to assistance of counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). That right does not stop at just assistance of counsel, in order to meet the constitutional standards, counsel must also be effective, as this Court and the Constitution demands.

Habeas relief should be granted when the defendant shows that the state court decision was an unreasonable application of clearly established federal law or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). This Court should reverse the lower courts' denials of habeas relief because the dismissal of the claim was contrary to, and an unreasonable application of *Strickland*.

I. Trial Counsel was Ineffective Because the Counsel Failed to Compel Production of the Complaint’s Medical and Counseling Records for in-Camera Review.

Trial counsel was ineffective because trial counsel’s failure to compel production of the Complaint’s medical and counseling records for an in-camera review showed trial counsel’s performance deficient, and that deficient performance unconstitutionally prejudiced Mr. Kellywood. Trial counsel is ineffective when (1) the counsel’s performance was deficient and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 670 (1984).

A. Trial Counsel’s Performance was Deficient Because it Fell Below the Objective Standard of Reasonableness.

Trial counsel’s performance was deficient because trial counsel’s performance was not reasonable effective considering all of the circumstances. An attorney’s performance is deficient when the attorney’s representation falls below the range and objective standard of reasonableness, considering all the circumstances. See *Strickland*, 466 U.S. at 670.

This Court “should keep in mind that counsel’s function . . . is to make the adversarial testing process work in the particular case.” *Id.* at 689-90. Therefore, “counsel has a duty to make reasonable investigations . . .” *Id.* at 691.

The adversarial testing process is next to non-existent and ineffective performance of counsel follows

when counsel does not make reasonable investigations and introduce into evidence information that may demonstrate the client's innocence or mitigating evidence that raises sufficient doubts. *See Williams v. Taylor*, 529 U.S. 362, 393 (2000); *see also Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006). In *Reynoso*, the Ninth Circuit emphasized that counsel is ineffective when he or she fails to adequately investigate and introduce into evidence information that demonstrates a client's factual innocence or raises sufficient doubts that could undermined confidence in the verdict. *See Reynoso*, 462 F.3d at 1112. A defendant is denied his constitutionally guaranteed right to effective assistance of counsel when the attorney fails to investigate and present mitigating evidence. *See Williams*, 529 U.S. at 393. In *Williams*, the Supreme Court found counsel to be deficient, depriving the defendant of his constitutionally guaranteed right to effective assistance of counsel, because counsel failed to investigate and present mitigating evidence. *See Williams*, 529 U.S. at 362. Here, just like in *Williams*, Mr. Kellywood's counsel failed to investigate and present the evidence of A.K.'s doctors' records that contained exculpatory evidence. Therefore, trial counsel's failure to investigate is especially egregious because the trial counsel failed to consider potentially exculpatory evidence and therefore denied Mr. Kellywood the right to have that heard.

For an example, this Court can consider *Rios v. Rocha*, which found trial counsel's performance deficient because the trial counsel failed to investigate the use of drugs and alcohol to preclude a necessary finding of malice. *See Rios v. Rocha*, 299 F.3d 796, 805

(9th Cir. 2002). In *Rios*, the Ninth Circuit emphasized that assumptions are unreasonable when made in lieu of an investigation. *See Rios*, 299 F.3d at 806. Such failure, according to the Ninth Circuit, is “especially egregious when a defense attorney fails to consider potentially exculpatory evidence.” *Id.*, (quoting *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999)).

Trial counsel’s performance here, like in *Rios*, was deficient because trial counsel failed to investigate A.K.’s doctors’ records, take the time to learn the proper procedures, and draft a decent articulate motion to gain access to records that likely contained potentially exculpatory evidence. Here, like in *Rios*, trial counsel’s failure to investigate is especially egregious because trial counsel failed to consider potentially exculpatory evidence. *See id.*

When considering all the circumstances and taking into the requirement this Court has placed on defense attorneys in *Williams* and *Strickland*, Mr. Kellywood’s trial counsel’s performance was deficient because the trial counsel did not undertake even a minimally capable investigation when he failed to investigate and present potentially exculpatory evidence.

B. Trial Counsel’s Deficient Performance Prejudiced Mr. Kellywood by Depriving Him of a Fair Trial.

Mr. Kellywood’s trial counsel’s deficient performance prejudiced Mr. Kellywood because there was a reasonable probability that, but for the counsel’s error, the result of the proceeding would have been different. Counsel’s deficient performance prejudices a

defendant when the decision reached has reasonable probability to have been different absent the counsel's error. *See Strickland*, 466 U.S. at 694. To show a reasonable probability it is not necessary to show that counsel deficient conduct more likely than not altered the outcome in the case, but rather a reasonable probability is any probability sufficient to undermine confidence in the outcome. *Id.* at 699; *Duncan v. Ornoski*, 528 F.3d 1222, 1239 (9th Cir. 2008) (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1461 (9th Cir. 1994)). Here, Counsel's deficient performance in failing to investigate and introduce potentially exculpatory evidence drastically undermines confidence in Mr. Kellywood's conviction because neither judge nor jury even had the chance to consider the potentially exculpatory evidence. This wrong cannot go unaddressed.

In *Crime Victims R.S. v. Thompson*, 251 Ariz. 111, 118 (2021), the defendant's knowledge of the alleged victim's medical and counseling appointments plus the fact that the alleged victim attended those appointments was sufficiently material to constitute potentially exculpatory evidence because those documents could show propensity for lying and lack of abuse. *See Crime Victims R.S. v. Thompson*, 251 Ariz. 111, 118 (2021). Additionally, the Arizona Supreme Court in *Thompson* held that when a defendant demonstrates a reasonable possibility that the medical and counseling records include exculpatory evidence, refusal to allow an in-camera review violates due process. *See id.* at 119. Here, Mr. Kellywood had the exact same knowledge about potentially exculpatory evidence as the defendant in *Thompson* that could have

shown A.K.'s propensity for lying and lack of abuse. Therefore here, like in *Thompson*, the evidence had potentially exculpatory characteristics. Respondent's claim that evidence is based upon "mere speculation" (R. at 182) is in total contradiction of the Arizona Supreme Court's statement in *Thompson*. *See id.* at 118.

In *Duncan*, the Ninth Circuit found that counsel's failure to investigate and present potentially exculpatory evidence prejudiced the defendant because the potentially exculpatory evidence raised doubts about the defendant's guilt. *See Duncan*, 528 F.3d at 1226. Here, like in *Duncan*, counsel's failure to investigate and present potentially exculpatory evidence prejudiced Mr. Kellywood because the evidence could have raised doubts about Mr. Kellywood's guilt. Now, Mr. Kellywood has been sentenced to the sobering sentence of life without anyone seeing, hearing, reading, or even having knowledge of what was in potentially exculpatory documents.

Additionally, A.K.'s privacy interests are not strong enough to outweigh the need for such evidence and even if trial counsel thought it would, the legitimate needs of fairness outweigh even an absolute privilege. *See, e.g., United States v. Nixon*, 418 U.S. 683, 709–13, (1974) (finding that the absolute executive privilege did not trump a demonstrated, specific need for evidence in a pending criminal trial).

The gross incompetence of failing to investigate resulted in the denial of exculpatory information and access to exculpatory information is critical to the

reliability and fairness of a criminal trial. *See California v. Trombetta*, 467 U.S. 479, 485 (1984) (stating that “Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness.”). This standard of fairness demands and “require[s] that criminal defendants be afforded a meaningful opportunity to present a *complete* defense.” *Id.* (emphasis added); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.”).

This Court has long held that the “right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (citations omitted). At the end of the day, Mr. Kellywood, like every defendant, must have had effective counsel in trial—which includes appropriate investigation—to make the justice system work and be fair and to meet the constitutional standards this Court demands. Effective assistance of counsel is not a low bar because it is someone’s life at stake.

In summary, court’s “ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, 466 U.S. at 670. The very purpose of the right to effective assistance of counsel is to increase the fairness and likelihood of justice ultimately being reached. The fact that Mr. Kellywood’s counsel failed to investigate and present

potentially exculpatory evidence is leading to a potentially innocent foster father being convicted and sentenced with no regard to the evidence that could prove his innocence. That is not fair. Because Mr. Kellywood's trial counsel's performance was deficient and the deficient performance prejudiced Mr. Kellywood, Mr. Kellywood had ineffective counsel which constitutes a Sixth Amendment violation.

CONCLUSION

The harm suffered by Mr. Kellywood without the issuance of habeas relief goes against the essence of the Constitution and forces irreparable harm upon Mr. Kellywood absent the relief requested here.

For the foregoing reasons this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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