

No. _____

23-5046

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

JUN 22 2023

OFFICE OF THE CLERK

Kashard Omar Brown — PETITIONER
(Your Name)

vs.

Brian Williams, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Ninth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kashard Omar Brown
(Your Name)

P.O. Box 1989
(Address)

Ely, Nevada 89301
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

How can a reviewing Court address the merits of a complex case when it refuses to apply the historical record and U.S. Supreme Court case law to the facts of that case?

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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

☐ 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☒ is unpublished.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☒ is unpublished.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☐ is unpublished.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☐ is unpublished.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 16 December 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: 27 March 2023, and a copy of the order denying rehearing appears at Appendix A.

☐ 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

6th Amendment to the United States Constitution
14th Amendment to the United States Constitution

28 USC § 2254

STATEMENT OF THE CASE

In September of 2001, the petitioner, Keshard Omar Brown, accidentally shot and killed Rebekah Hanson, his girlfriend of nearly a decade.

After a plea of not guilty, by way of jury verdict, petitioner was found guilty of possession of a short-barreled shotgun and Murder with the Use of a Deadly Weapon in September of 2002. District Court case number C-178925, Clark County, Nevada.

In November of 2002, petitioner was sentenced to: 12 to 36 months for the possession of a short-barreled shotgun and life without the possibility of parole on the murder charge with an equal and consecutive term of life without the possibility of parole for the use of a deadly weapon enhancement.

Timely notice of appeal was filed with the Nevada Supreme Court, case number 40718, wherein a three Judge panel of that Court Reversed the conviction on 3 September 2004 and issued its Remittitur on 29 September 2004. The State filed an untimely motion requesting a rehearing which was ultimately granted and a different three Judge panel issued an Order vacating the prior Order of reversal and Affirming the Judgment of conviction on 25 October 2005.

Petitioner was represented by Scott Coffee from the arraignment through the direct appeal to the Nevada Supreme Court.

On 21 November 2006, petitioner filed his State post-conviction

writ of habeas corpus. An evidentiary hearing was held on 18 November 2008, and the State District Court orally denied the petition at that time. David Phillips represented petitioner during those proceedings.

Timely Notice of Appeal was filed. On 3 March 2009, the Nevada Supreme Court appointed Lisa Rasmussen to represent the petitioner on appeal. Nevada Supreme Court Case Number 50829.

After briefing the appeal, Ms. Rasmussen, in an exercise of due diligence, discovered that trial counsel Scott Coffee had concealed critical evidence from defense expert Robert Irwin. With jurisdiction of the State writ resting with the Nevada Supreme Court, Ms. Rasmussen filed two ~~separate~~ motions addressing the matter.

On 30 December 2010, filed a motion to admit newly-discovered evidence and to Supplement or Amend petition with the Nevada Supreme Court.

On 19 January 2011, filed a Request for Limited Remand based upon the newly-discovered evidence so as to establish the record with the Nevada Supreme Court. Neither motion was unreasonable and completely appropriate given the circumstance.

Both were denied in the Order of Affirmance issued on 28 April 2011.

Petitioner for Rehearing denied on 29 July 2011.

Ms. Rasmussen filed the 28 USC §2254 federal writ on 27 June 2011, Case number 2:11-cv-01058-JCM-CWH.

On 6 February 2014, the Federal District Court issued an Order granting a stay and abeyance in part as to the issue of ineffective assistance of trial counsel for Scott Coffee's failure to provide the defense expert he hired with critical material evidence central to petitioner's defense at trial, and his failure to call that witness to testify.

On 14 March 2014, the Federal Public Defender's Office through Ryan Narwood, filed a State writ of habeas corpus so as to address the merits of the stay.

On 14 October 2014, the State District Court issued its Findings of Fact, Conclusions of Law and Order denying the State writ.

Timely Appeal was taken, and on 17 March 2016 the Nevada Supreme Court issued its Order of Affirmance. Nevada Supreme Court case number 66919.

The stay was lifted in case number 2:11-cv-01058-JCM-DJA, and on 7 September 2021, the Federal District Court denied the 28 USC § 2254 writ of habeas corpus granting a certificate of appealability as to the issue of Trial Counsel Scott Coffee's ineffectiveness for concealing evidence from the defense expert and failing to call same as a witness.

On 6 October 2021, Notice of appeal was submitted to the Ninth

Circuit Court of Appeals.

On 16 December 2022, a Ninth Circuit Court of Appeals three Judge panel issued a memorandum affirming the District Courts denial of the 28 USC § 2254 writ.

Rehearing was requested, as well as rehearing en banc. Both were denied and an Amended memorandum issued on 27 March 2023. Mandate filed on 4 April 2023. Ninth Circuit Court of Appeals case number 21-16668.

REASONS FOR GRANTING THE PETITION

This petition should be granted. The Nevada Courts are creating procedural defaults by electing to not correctly apply U.S. Supreme Court case law to the historical record, and reviewing courts in Nevada apply that default as the means of not addressing the merits of claims legitimately placed before them.

An evaluation of the historical record requires an application of law to fact. Determining whether there was a reasonable probability that the result of the post-conviction proceedings would be different is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective.

See Ramirez v. Ryan, 937 F.3d 1230, 1242

Ms. Rasmussen's exercise of due diligence brought to light the failure of the Clark County Public Defender's Office in that she exposed Scott Coffee's actions and inactions which had a substantial and injurious effect upon the petitioner and the finding of guilt against him.

As determined by the Federal District Court, trial counsel failed to "investigate whether the improperly mounted stock played a role in Brown's alleged inadvertent discharge of the shotgun". Because he lacked Irwin's informed conclusion, trial counsel did not make an

informed choice not to call the expert. See Correll v. Ryan, 539 F.3d 938, 951 "Counsel's ineffective assistance cannot be excused as strategic. He failed to conduct an investigation sufficient to make an informed judgment. To the extent that his decisions reflected any tactical considerations, his approach cannot be considered an objectively reasonable strategy, even when viewed under the highly deferential Strickland standard." Jennings v. Woodford, 290 F.3d 1006, 1014 "Although defense counsel is empowered to make such strategic decisions, Strickland demands that such decisions be reasonable and informed."

It can be more than reasonably presumed that every reasonable lawyer would have provided their expert an accurate and full description of the Shotgun's condition at the time of the shooting and presented that expert's opinion that "there would be a high likelihood for that shotgun to be fired accidentally" and that said "likelihood would increase even more in close quarters and/or in a stressful or life threatening situation." See Dunn v. Reeves, 141 S.Ct. 2405, 2411 (citing Harrington v. Richter, 562 U.S. 86, 101.

This places trial counsel's actions "below an objective standard of reasonableness" and that, absent his errors, "there is a reasonable probability... the factfinder would have had a reasonable doubt respecting guilt." Strickland v. Washington, 466 U.S. 668, at 695.

Rasmussen did all that the process of law in Nevada would allow her to do once she learnt of Coffee's failure as counsel, file a motion for newly-discovered evidence in the Court with jurisdiction and a request for limited remand so as to further develop the claim under Nevada law.

Clearly the issue is manifest in other jurisdictions as well. "A petitioner's attempt to obtain an evidentiary hearing by filing a pro se motion to remand in the Court of Appeals is evidence that he acted with due diligence in attempting to develop his claim in the State Court." See Kane v. Nagy, 2021 U.S. Dist. LEXIS 70746 (E.D. Mich. 2021).

Additionally, there is a distinction between the failure to develop a factual basis of a claim in the State Court and the failure to adjudicate a claim on the merits. See Ohino v. Ramirez, 142 S.Ct. 1718, and Picard v. Connor, 92 S.Ct. 509.

In Ramirez, the petitioners altogether failed to present their claims and accompanying evidence in State Court. 142 S.Ct. at 1728-29. This is not the case here.

The Nevada Supreme Court refused to grant the limited remand based upon the newly-discovered evidence and thereby created the procedural default later applied by the State District Court.

These acts are routinely committed, and the Nevada Defense Bar will not address these instances. Clearly, petitioner's circumstances are unique.

Regardless, the overall actions of Nevada would appear to be practice and procedure in other jurisdictions as well. A full briefing of the question presented will allow for Amicus briefs of other jurisdictions to more fully address the merits of the issue.