

No. _____

In the
Supreme Court of the United States

Donte Johnson,

Petitioner,

v.

The State of Nevada,

Respondent.

*On Petition for Writ of Certiorari
to the Supreme Court of Nevada*

Petition for Writ of Certiorari

CAPITAL CASE

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QUESTION PRESENTED

Did the Nevada Supreme Court deprive petitioner of his Sixth Amendment right to effective counsel by analyzing counsel's ineffective performance as mere discretionary strategy?

LIST OF PARTIES

Petitioner Donte Johnson is an inmate at Ely State Prison. Respondent Aaron Ford is the Attorney General of the State of Nevada. Respondent William Gittere is the warden of Ely State Prison.

LIST OF RELATED PROCEEDINGS

State v. Johnson, 8th Jud. Dist. Ct. Nev., No. 98C153154 (Oct. 9, 2000, amended judgment of conviction); (June 6, 2005, judgement of conviction following penalty phase re-trial) (Mar. 17, 2014, denying state postconviction relief).

Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002) (*Johnson I*) (Dec. 18, 2002, reversing penalty phase and remanding).

Johnson v. State, 122 Nev. 1344, 148 P.3d 767 (2006) (*Johnson II*) (Dec. 28, 2006, affirming sentence of death on penalty phase re-trial).

Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (*Johnson III*) (Oct. 5, 2017, affirming denial of state postconviction relief).

Johnson v. Gittere, No. 2:18-cv-00740-JAD, (D. Nev.) (Dec. 20, 2018, petition for writ of habeas corpus filed).

Johnson v. Gittere, 8th Jud. Dist. Ct. Nev. No. A-19789336-W (Oct. 8, 2021, denying state postconviction relief).

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Nevada Supreme Court affirming the state district court's denial of habeas corpus relief.

OPINIONS BELOW

Johnson v. Nevada, No. 83796, (Nev. Jun. 28, 2023).

JURISDICTION

The Nevada Supreme Court's opinion of June 29, 2023, and subsequent denial of petition for rehearing constitute a final judgement of the highest state court. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

STATEMENT OF THE CASE

Donte Johnson was convicted of burglary, conspiracy, four counts of robbery, four counts of kidnapping, and four counts of murder. 33AA8175–8181.¹ The State's theory was that Johnson and his co-defendants, Terrell Young and Sikia Smith, were itinerant residents at the home of Tod Armstrong on Everman Drive in Las Vegas. The Everman house was a flop house frequented by drug users. When a drug buyer arrived at the house, Johnson and his co-defendants overheard his conversation that the residents of a house on nearby Terra Linda Avenue, also frequented by partiers and drug users, had made “a lot of money” selling drugs at rock concerts that summer. 4AA854; 4AA980–81. Days later, a friend of the Terra Linda residents visited the house and found the four victims. 4AA899.

Johnson's conviction rests in part on the testimony of Brian Johnson², Charla Severs, Tod Armstrong, and Ace Rayburn Hart. Each witness gave a voluntary statement to the police between August 17, 1998, and September 22, 1998. 29AA7122; 29AA7206; 30AA7285; 29AA7092, 30AA7339. Trial counsel attempted to impeach the witnesses using inconsistent statements from the voluntary statements and trial testimony. *See, e.g.*, 5AA1277 (impeachment of Brian using inconsistent statements). However, the State successfully rehabilitated the witnesses using the same voluntary statements.

¹ AA cites refer to the appendix before the Nevada Supreme Court record below.

² To avoid confusion between the witness Brian Johnson and the petitioner here, the witness will be referred to by his first name, Brian.

Following the imposition of the death penalty by a three-judge panel, the Nevada Supreme Court reversed, finding the three-judge panel unconstitutional and granting Johnson a new penalty phase trial. *Johnson v. State*, 118 Nev. 787, 802–03, 59 P.3d 450, 460–61 (2002).

At Johnson’s second penalty phase, Johnson was again sentenced to death, and the Nevada Supreme Court affirmed on direct appeal. *Johnson v. State*, 122 Nev. 1344, 148 P.3d 767 (2006). The Nevada Supreme Court denied relief on appeal from Johnson’s first state postconviction petition. *Johnson v. State*, 133 Nev. 571, 402 P.3d 1266 (2017). Remittitur issued on February 13, 2018. Johnson timely filed a Petition for a Writ of Habeas Corpus in the United States District Court for the District of Nevada on December 20, 2018. *Johnson v. Gittere*, No. 2:18-cv-00740-JAD, Dkt. #14 (D. Nev. Dec. 20, 2018). The district court stayed Johnson’s petition to allow him to return to State court to exhaust all claims. *Johnson v. Gittere*, 2:18-cv-00740-JAD, Dkt. #28 (D. Nev. Mar. 25, 2019).

Of importance here, Johnson raised a claim that trial counsel were ineffective during the guilt phase for failing to retain a coerced confession expert who could have explained the coercive interrogation tactics used against Brian, Armstrong, Hart, and Severs.

Johnson’s exhaustion petition was denied without an evidentiary hearing and the Nevada Supreme Court affirmed the denial of relief. *Johnson v. Nevada*, No. 83796, (Nev. Jun. 28, 2023).

REASONS FOR GRANTING THE PETITION

I. The Nevada Supreme Court failed to vindicate Johnson's constitutional right to effective assistance of counsel when it applied a discretionary standard in place of *Strickland*.

The Nevada Supreme Court failed to analyze the reasonableness of trial counsel's decision not to call an expert witness. Instead, the Nevada Supreme Court relied on a conclusory statement that the decision to call or not call an expert witness was wholly within trial counsel's discretion. In its order affirming the denial of Johnson's petition, the Nevada Supreme Court relied on *Rhyne v. State*, 38 P.3d 163, 167–68 (Nev. 2002). *Rhyne* underscores the distinction between a client's decisions to exercise his right to plead or testify, and an attorney's decision-making in forming a strategy in executing a defense. *Id.* Indeed, in *Rhyne*, the attorney made a well-informed decision not to call an unreliable witness and discussed the strategic decision with his client. Upon the client's vociferous objection, the trial court ordered the attorney to call the witness with disastrous results for the defendant. The Nevada Supreme Court held that neither the trial court judge nor the defendant had a dispositive say in defense counsel's strategy. *Id.* at 168. While reaffirming a long-standing rule governing the attorney-client relationship, the Nevada Supreme Court overextended that rule in Johnson's case, denying him the opportunity to present claims of ineffective assistance of counsel in state court.

The Nevada Supreme Court's characterization of *all* attorney decisions as "discretionary" undercuts the constitutional rule of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). *Johnson v. Nevada*, No. 83796, (Nev. Jun. 28, 2023) at 7–8. *Strickland* and its progeny devote

much discussion to prevailing standards of representation and diligent, informed decision making by defense attorneys. The Nevada Supreme Court now substitutes an entirely different line of reasoning—the distinction between client autonomy and attorney strategy—for *Strickland*'s objective test. To reframe trial counsel's decisions as merely discretionary guts the constitutional rule. Had the Nevada Supreme Court applied the two-part test of *Strickland*, it would have found that Johnson's trial counsel were ineffective for failing to call experts, and that he was prejudiced because his death sentence rests on circumstantial evidence from unreliable witness testimony.

A. Trial counsel were ineffective for failing to make informed decisions to retain experts to challenge witness testimony because police interrogation techniques are known to produce erroneous or false statements.

In his exhaustion petition, Johnson raised a claim of ineffective assistance of counsel alleging trial counsel was ineffective for failing to call an expert witness to testify about police interrogation techniques. This expert testimony would have challenged the credibility of Brian, Severs, Armstrong, and Hart whose statements provided important evidence against Johnson.

At issue is the manner in which the voluntary statements were taken by Las Vegas police. On August 17, 1998, Brian, Armstrong, and Hart were simultaneously taken to the police station and interviewed separately.³ 6AA1288. Law enforcement

³ Trial testimony indicates that the three men all gave statements on August 17, 1998. 6AA1288. However, the transcript of Armstrong's statement is dated September 17, 1998. 30AA7286. It is assumed that the transcript date is a typographical error and that the trial testimony is correct.

likely used the “Reid method,” which was widely used at the time of Johnson’s arrest. 42AA10388–90. The Reid method is “very effective at inducing a person to comply with the demands of the interrogator, but if the person is innocent this compliance can result in false statements or confessions.” 42AA10389–90.

The record of these interviews reveals several techniques common with the Reid method. The police lied during interrogations, telling Severs that Johnson had blamed her for the killings, and Armstrong that Hart had implicated him in the murders. 44AA10908–99; 29AA7192–94, 7203–03; 43AA10857; 30AA7308–09. Las Vegas police pressured suspects to confess under the auspices of minimizing the consequences. 42AA10393–97. For example, when police asked Severs what she thought “should happen to somebody that would kill four people,” the police were using a tactic designed to convince Severs to confess—whether or not she was guilty. 43AA10851–53; 44AA10897–901; 42AA10393–97. Similarly, when police asked Severs to “explain” the offenses, it was done in a way suggesting that “the ‘explanations’ can affect consequences in a positive way that will be unavailable once the interrogation is over.” 42AA10394–97; 43AA10852, 10854, 10856; 44AA10903; 29AA7152. And when police told Armstrong that others were exposed to the death penalty for the underlying crimes, that “might lead Armstrong to think he might be vulnerable as well.” 42AA10422; 30AA7308. Other tactics included statements of desire to help, statements lessening the severity of the crime or the interview subject’s involvement in the crime, and statements maximizing the consequences of failing to confess. 42AA10369–71; *see* 30AA7308; 29AA7150–205; 44AA10896–97, 10899, 10908. Suggestive questions appeared throughout the

interrogations, including direct suggestions, closed-ended questions, leading questions, repeated questions, recounting what others said, disclosure of other evidence, selective reinforcement, invited speculation, and stereotype induction. 42AA10413–14; *see generally* 29AA7092–7138, 29AA7150–269, 30AA7285–7358, 32AA7959–80, 43AA10786–44AA10911.

In his exhaustion petition, Johnson proffered expert testimony explaining the problems with the Reid technique in inducing false or misleading statements. 42AA10385. The use of the technique was common knowledge at the time of Johnson’s guilt-phase trial. Effective counsel would have investigated the possibility of erroneous statements made during interrogation given the importance of Brian, Armstrong, Hart, and Severs’s testimony held in a case built on circumstantial evidence.

B. Trial counsel were ineffective for failing to investigate the vulnerabilities of witnesses to police interrogation.

The interrogation subjects all had specific vulnerabilities that increased the likelihood of false statements—particularly when interrogated using the Reid method. 42AA10400–09. Armstrong was 20 years old, had a prior criminal record, and was using crack cocaine regularly. 42AA10420; 30AA7339. Hart and Bryan were 19 years old. 42AA10423, 10425, 10432. Bryan was vulnerable to coercion because of his perceived involvement, his drug addiction, and his association with the defendants. 42AA10423–25, 10432–33. “Thus, as with other witnesses he would likely feel that he would be suspected and not likely to be believed.” 42AA10432. And, like the other witnesses, the transcript reflects he had started speaking with

the police before the tape began recording. 42AA10432 (noting that the tape begins by referencing earlier unrecorded discussions). Finally, Severs, like the rest of the witnesses involved with the defendants, was young—20 years old—with a criminal history. 42AA10427–28. “These facts suggest that Severs would not expect to be believed (i.e., that her credibility would be very low), and that she would expect that she was vulnerable to criminal charges herself.” 42AA10428–29.

Even the interview subjects who were not suspected of involvement in the homicides likely were interrogated using those same techniques, especially if “they appear[ed] reluctant or dishonest.” 42AA10386,10417. And the interviews with these subjects involved an additional factor that could have led to false statements: “A wealth of research has demonstrated that people are more easily led to change their opinions, to conform to or comply with others, and to have their memories altered by suggestion when they are less certain or knowledgeable about the facts.” 42AA10403.

Trial counsel’s strategic decisions must themselves be based on reasonable investigation. *Wiggins v. Smith*, 539 U.S. 510, 522–23 (2003). The pressures of custodial interrogation are well known to the defense bar. *Miranda v. Arizona*, 384 U.S. 436, 465 (1966) (“[T]he compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.”). While the witnesses in this case may not raise a *Miranda* claim, *Miranda* stands for the proposition that custodial interrogation is inherently coercive and likely not only to elicit confessions, but also has the ability to bend the details of those confessions. Trial counsel recognized the value of the voluntary statements for

impeachment purposes but failed to act to fully investigate the effect of the custodial interrogation on the witnesses. Counsel therefore failed to act reasonably or strategically when they did not investigate the effects of the interrogation or retain an expert to consult. The prejudice to Johnson is clear: his co-defendants were sentenced to life, while Johnson was sentenced to death.

II. This Court should grant the petition because the Nevada Supreme Court decided an important federal question in a manner which conflicts with this Court’s precedent.

This Court should grant the petition because the Nevada Supreme Court substituted an incorrect standard in assessing an ineffective-assistance-of-counsel claim. This issue reaches beyond the instant litigants and is of public concern. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73 (1955) (review of state supreme court decisions appropriate when decision reaches beyond the “academic or episodic” and is of “constitutional dimension”).

This Court has consistently allowed for broad factual interpretation of *Strickland* and its progeny. *Strickland*, 466 U.S. at 690–91; *see Wiggins*, 539 U.S. at 521. Failure to use facts or tools that are readily available has consistently been held to constitute deficient performance. *See, e.g., Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (failure to request available expert funding); *Williams v. Taylor*, 529 U.S. 362, 296 (2000) (failure to use available mitigation evidence). In the instant case, trial counsel likely knew of the Reid method, and clearly—as demonstrated by his attempts to impeach various witnesses—understood the importance of the

voluntary statements. The logical step would be to attack the veracity of the statements, which counsel failed to do.

Johnson has raised a colorable claim of ineffective assistance of counsel. However, the Nevada Supreme Court denied Johnson the opportunity to fully litigate that claim by tacitly approving of all of trial counsel's missteps as mere discretionary choices. Failure to correct the Nevada Supreme Court's oversight signals that the constitutional rule in *Strickland* is optional and denies future Nevada defendant's a critical constitutional right.

CONCLUSION

Based on the foregoing, Johnson requests that this Court grant his request for a writ of certiorari.

Dated this 23rd day of February, 2024.

Respectfully submitted,

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