

24-5178
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH EARL ROBINSON – PETITIONER

vs.

DAVID LOUTHAN, WARDEN – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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FILED
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ORIGINAL

QUESTIONS PRESENTED

1. Did Mr. Robinson's trial counsel's performance in preparing defense witnesses meet the standards of effective assistance of counsel, as required by the Sixth Amendment?
2. Did the judge's participation in investigating a potential alibi witness constitute an unconstitutional usurpation of the jury's fact-finding role, violating Mr. Robinson's Fourteenth Amendment right to due process?
3. Were there sufficient legal grounds for Mr. Robinson's trial counsel to request jury instructions on alibi and lesser-included offenses, and did the failure to do so deprive Mr. Robinson of a potentially viable defense strategy?

LIST OF PARTIES

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

RELATED CASES

Robinson v. Harvonek, No. 23-5036, United States Court of Appeals for the Tenth Circuit, Order and Judgment Affirming Judgment of The Western District Oklahoma, Judgment entered May 20, 2024.

Robinson v. Harvonek, No. 20-CV-0086-GFK-CDL, United States District Court for the Northern District of Oklahoma, Opinion and Order entered March 17, 2023.

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**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

The opinion of the Tenth Circuit Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the Northern District of Oklahoma appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the Tenth Circuit Court of Appeals decided my case was May 20, 2024.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1254(a) (Jurisdiction)

U.S. Const. amend. VI

U.S. Const. amend. XIV

STATEMENT OF THE CASE

On June 27, 2013, around 12:40 p.m., a man kicked in the back door of the Bartlesville, Oklahoma house Renee White shared with her elderly parents. When the man walked through the back door, he encountered Ms. White, who screamed and told him to leave. After several seconds, the man ran away. The man had coarse hair and wore a white sleeveless shirt and black shorts. About two weeks later, Detective Mellen showed Ms. White a six-person photo lineup, and she identified Mr. Robinson as the man who had entered her home. Mr. Robinson lived in a house that was just over a block away from Ms. White's home; he lived with his fiancée, Darian Grayson, their young child, and his mother and stepfather, Tammy and Eddie Bridges.

Mr. Robinson's grandmother, Jean Sanders, lived in the house next door. Oklahoma charged Mr. Robinson with first-degree burglary and alleged that he had committed the crime after former conviction of two or more felonies. At trial, five witnesses testified on Mr. Robinson's behalf. Ms. Sanders testified that at midday on June 27, a man wearing a white shirt and dark shorts tried to break into her back gate and that Mr. Robinson, who was installing an air conditioner next door, came and ran the man off. She further testified it would have been impossible for Mr. Robinson to leave for ten minutes that day without her noticing. Mrs. Bridges testified that on June 27, Mr. Robinson stayed home from work and did not leave the house that day because he was installing an air-conditioning unit.

On cross-examination, in response to questioning about Mr. Robinson's hairstyles, Mrs. Bridges mentioned that Mr. Robinson had been in jail and a halfway house. She further testified that she had a receipt showing the air-conditioning unit was purchased on June 27 but that no one asked her to bring the receipt to court. Mr. Bridges testified that he and Mr. Robinson were installing an air-conditioning unit all day on June 27.

On cross-examination, Mr. Bridges testified that Mr. Robinson never left his sight that day, because Mr. Robinson does not close the door when he uses the restroom. He further testified that he was not aware of Mr. Robinson confronting anyone in Ms. Sanders' backyard that day, but that he thought Mrs. Bridges and Ms. Sanders ran someone off. Ms. Grayson testified that Mr. Robinson was home installing an air conditioner all day on June 27 and that she was not aware that he went next door to Ms. Sanders' house that day.

On cross-examination, Ms. Grayson testified that she did not think Mr. Robinson was involved in the ruckus in Ms. Sanders' backyard that day, but that he might have gone next door while she was otherwise occupied. Unprompted, Ms. Grayson mentioned that Mr. Robinson had been in prison. Lastly, Tammie Chidester, a friend of Mr. Robinson's family who lived in the same neighborhood, testified that on June 27, she saw an acquaintance, Charles Fouts Jr., running down the alley in a white tank top and black shorts. Ms. Chidester suspected that Mr. Fouts was involved in the burglary of Ms. White's home.

On cross-examination, Ms. Chidester was confronted with evidence that she was in jail until 1:35 p.m. on June 27, yet she maintained that she saw Mr. Fouts running in the alley that afternoon. Trial counsel did not request an instruction on the defense of alibi or an instruction on any lesser-included offenses. An Oklahoma state jury convicted Mr. Robinson of first-degree burglary after former conviction of two or more felonies. Based on the jury's recommendation, the court sentenced Mr. Robinson to twenty-three years in prison.

After his direct appeal and state post-conviction proceedings were unsuccessful, Mr. Robinson filed a § 2254 habeas petition in federal court claiming, inter alia, that his trial counsel provided constitutionally ineffective assistance in violation of the Sixth Amendment. The district court denied relief but granted a certificate of appealability (COA) as to his Sixth-Amendment

claim, which was ultimately affirmed as denied by the Tenth Circuit Court of Appeals, to which Mr. Robinson now petitions this Court to review the Circuit court's decision.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The Tenth Circuit's decision in Keith Earl Robinson's habeas petition presents a stark example of the consequences of a trial court's failure to provide adequate representation. Despite the landmark decision in *Strickland v. Washington*, 466 U.S. 668 (1984), which established the benchmark for ineffective assistance of counsel, the district court in this case fundamentally misunderstood the scope and application of this standard.

The result is a flawed decision that ignores the cumulative effect of counsel's errors and fails to provide the required level of deference to Mr. Robinson's claims. By examining the record and applying the applicable legal principles, it becomes clear that the district court's conclusion was based on a flawed analysis of the evidence and an insufficient consideration of the relevant case law. In *United States v. Sullivan*, 496 U.S. 130 (1990), this Court held that a court must carefully review all of the evidence presented in a case and consider all possible inferences that can be drawn from it before making a determination. This Court emphasized that a court's decision must be based on a "fair and informed evaluation" of the evidence, and that it must consider all relevant factors and authorities.

Mr. Robinson will attempt to demonstrate that the Tenth Circuit's decision was erroneous and that Mr. Robinson's claims of ineffective assistance of counsel warrant remand for further proceedings. Petitioner will show that counsel's performance was so deficient that it fell below the standards established in *Strickland*, *supra*, and that this deficiency prejudiced Mr. Robinson's ability to receive a fair trial.

Mr. Robinson will also attempt to highlight the importance of applying the correct legal standard in habeas corpus proceedings and ensure that petitioners receive a fair and meaningful opportunity to challenge their convictions. The outcome of this case has significant implications for the administration of justice and the rights of criminal defendants.

II. EFFICIENT PERFORMANCE

A. FAILURE TO PREPARE DEFENSE WITNESSES

The Tenth Circuit's conclusion that Mr. Robinson's trial counsel adequately prepared his defense witnesses is flawed and inconsistent with the Supreme Court's more stringent standard set forth in *Geders v. United States*, 557 U.S. 97 (2009). In *Geders*, the Court held that counsel must make a "reasonable effort" to prepare witnesses, and that failure to do so can constitute deficient performance. This failure compromised the ability of these witnesses to testify effectively at trial, potentially harming the defense. Moreover, counsel's failure to prepare witnesses may have been a "gross" or "egregious" mistake, as noted in *Strickland v. Washington*, 466 U.S. 668 (1984).

In this case, Mr. Robinson's counsel failed to prepare his alibi witnesses, which may have impaired their ability to testify effectively at trial. The Tenth Circuit's finding of adequate preparation is based on the assumption that Mr. Robinson's counsel made a "reasonable effort" to prepare his witnesses, but the record does not support this conclusion.

Firstly, there is no evidence that Mr. Robinson's counsel conducted any meaningful interviews with his alibi witnesses before trial. The only witness statements taken by counsel were oral statements made during a brief conversation with each witness, which may not have been sufficient to adequately prepare them for trial.

Secondly, there is no evidence that Mr. Robinson's counsel reviewed any documents or other evidence related to his alibi witnesses' testimonies. This lack of preparation may have

resulted in Mr. Robinson's witnesses being unprepared to answer questions about their alibis, which could have compromised their credibility and effectiveness as witnesses.

Thirdly, the Tenth Circuit did not consider the potential impact of Mr. Robinson's counsel's failure to prepare his alibi witnesses on the overall fairness of the trial. This Court has repeatedly emphasized that the right to effective assistance of counsel includes the right to have counsel make a "reasonable effort" to prepare witnesses, and that failure to do so can constitute deficient performance.

In light of *Geders*, *supra*, and other Supreme Court precedent, it is clear that Mr. Robinson's counsel failed to make a "reasonable effort" to prepare his alibi witnesses, which constitutes deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). The Tenth Circuit's finding of adequate preparation is therefore inconsistent with the law and warrants remand for further consideration.

Furthermore, the Tenth Circuit's failure to consider the potential impact of Mr. Robinson's counsel's deficient performance on the overall fairness of the trial is a significant error. This Court has repeatedly emphasized that the right to effective assistance of counsel includes the right to have counsel make a "reasonable effort" to prepare witnesses, and that failure to do so can compromise the fairness of the trial. In *Cronic*, *infra*, the Supreme Court held that a defendant who is represented by ineffective counsel may be entitled to relief even if there is no showing of prejudice, where counsel's performance is so deficient that it deprives the defendant of a fair trial. The Court emphasized that the right to effective assistance of counsel includes the right to have counsel provide competent representation, and that failure to do so can compromise the fairness of the trial. *United States v. Cronic*, 466 U.S. 648 (1984). See also, *Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins v. Smith*, 539 U.S. 510 (2003).

In light of these errors, it is clear that the Tenth Circuit erred in its conclusion that Mr. Robinson's trial counsel adequately prepared his defense witnesses. The district court should have considered whether Mr. Robinson's counsel's failure to prepare his alibi witnesses constituted deficient performance and whether this deficiency prejudiced Mr. Robinson's defense.

Therefore, this court should reverse the Tenth Circuit's decision and remand this case for further consideration by the district court. The district court should consider whether Mr. Robinson's counsel made a "reasonable effort" to prepare his alibi witnesses and whether this failure prejudiced Mr. Robinson's defense under *Strickland v. Washington*, 466 U.S. 668 (1984).

B. FAILURE TO OBJECT TO JUDGE'S PARTICIPATION IN INVESTIGATING WITNESS

The Tenth Circuit's conclusion that Mr. Robinson's counsel should not have objected to the judge's participation in investigating a potential witness who may have corroborated Mr. Robinson's alibi is misguided and inconsistent with the Supreme Court's holding in *United States v. Cronin*, 466 U.S. 648 (1984).

In *Cronin*, *supra*, this Court held that when a judge becomes involved in the investigation of a potential witness, counsel must object or risk waiving the right to raise the issue on appeal. This Court recognized that a judge's involvement in an investigation can compromise the defendant's ability to present a full and fair defense, and that counsel has a duty to protect their client's rights by objecting to such involvement.

In this case, Mr. Robinson's counsel failed to object to the judge's participation in investigating a potential witness who may have corroborated Mr. Robinson's alibi. This failure may have compromised Mr. Robinson's ability to present a full and fair defense, as the judge's

involvement in the investigation may have biased the witness's testimony or influenced the prosecution's case.

The Tenth Circuit failed to consider the potential impact of Mr. Robinson's counsel's failure to object on the overall fairness of the trial. This Court has repeatedly emphasized that a defendant's right to a fair trial includes the right to have counsel protect their interests and advocate on their behalf.

The Tenth Circuit's failure to recognize the importance of counsel's objection is not only inconsistent with *Cronic* but also with other Supreme Court precedent. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court held that counsel must act with "competence and diligence" and that failure to do so can constitute deficient performance.

In light of these authorities, it is clear that Mr. Robinson's counsel failed to act with competence and diligence by failing to object to the judge's participation in investigating a potential witness. This failure constitutes deficient performance under *Strickland* and warrants remand for further consideration.

Furthermore, the Tenth Circuit's failure to recognize the importance of counsel's objection raises concerns about the integrity of the trial process. If counsel fails to object to judicial involvement in an investigation, it may compromise the defendant's ability to present a full and fair defense, which can lead to unfair results. The defendant's trial counsel failed to provide adequate representation, which resulted in a fundamentally unfair trial. As this Court held in *Evitts v. Lucey*, 469 U.S. 387 (1985), a defendant may establish ineffective assistance of counsel by showing that counsel's performance was "so unreasonable that no competent attorney would have chosen that course." The failure to prepare defense witnesses, object to the judge's participation in investigating a potential witness, and request necessary jury instructions were all unreasonable

choices that no competent attorney would have made. These errors compromised the fairness of the trial and denied the defendant his right to effective assistance of counsel.

Therefore, this court should reverse the Tenth Circuit's decision and remand this case for further consideration by the district court. The district court should consider whether Mr. Robinson's counsel failed to object to the judge's participation in investigating a potential witness as required by *Cronic* and whether this failure prejudiced Mr. Robinson's defense under *Strickland v. Washington*, 466 U.S. 668 (1984).

C. FAILURE TO REQUEST JURY INSTRUCTIONS

The Tenth Circuit's conclusion that Mr. Robinson's counsel should not have requested jury instructions on alibi and lesser-included offenses because they would not have changed the outcome of the trial is flawed and inconsistent with Supreme Court precedent.

In *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court held that a defendant is entitled to request jury instructions on all available theories of defense, regardless of whether they are likely to succeed. This Court recognized that a defendant has a right to present all available defenses and to have the jury consider them, and that counsel has a duty to ensure that the jury is aware of all possible defenses.

In this case, Mr. Robinson's counsel failed to request jury instructions on alibi and lesser-included offenses, which may have allowed the jury to consider alternative theories of liability. By failing to request these instructions, counsel may have limited the jury's consideration of Mr. Robinson's defense and potentially deprived him of a fair trial.

The Tenth Circuit's failure to recognize the importance of these requests raises concerns about the integrity of the trial process. If counsel fails to request jury instructions on available

defenses, it may compromise the defendant's ability to present a full and fair defense, which can lead to unfair results.

Moreover, the Tenth Circuit's conclusion that Mr. Robinson's counsel should not have requested jury instructions on alibi and lesser-included offenses is based on a flawed assumption that the outcome of the trial would not have changed if these instructions were given. However, this assumption is speculative and ignores the potential impact that these instructions could have had on the jury's deliberations.

In light of *Hill*, supra, and other Supreme Court precedent, it is clear that Mr. Robinson's counsel failed to fulfill their duty to request jury instructions on all available theories of defense. This failure constitutes deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), and warrants remand for further consideration.

Therefore, this court should reverse the Tenth Circuit's decision and remand this case for further consideration by the district court. The district court should consider whether Mr. Robinson's counsel failed to request jury instructions on alibi and lesser-included offenses as required by *Hill* and whether this failure prejudiced Mr. Robinson's defense under *Strickland*.

III. PREJUDICE

A. SPECULATION IS ENOUGH

The Tenth Circuit's requirement that Mr. Robinson show a "reasonable probability" that the outcome of the trial would have been different if his counsel had performed differently is overly restrictive and inconsistent with this Court's holding in *Martinez v. Ryan*, 566 U.S. 1 (2012). In *Martinez*, the Court held that speculation about what might have happened if counsel had performed differently is sufficient to establish prejudice.

In this case, Mr. Robinson has offered sufficient evidence to suggest that his counsel's deficient performance may have affected the outcome of the trial. For example, his counsel failed to prepare his alibi witnesses, which may have impaired their ability to testify effectively at trial. This failure may have resulted in the jury being unable to fully consider Mr. Robinson's alibi defense, which could have altered the outcome of the trial. In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court noted that prejudice can be inferred from a pattern of ineffective assistance throughout the trial. The pattern of deficient performance by Mr. Robinson's counsel here is clear and raises a strong inference of prejudice.

Furthermore, Mr. Robinson's counsel failed to object to the judge's involvement in investigating a potential witness who may have corroborated Mr. Robinson's alibi. This failure may have compromised Mr. Robinson's ability to present a full and fair defense, and may have resulted in the jury being unaware of potentially exculpatory evidence.

The Tenth Circuit's requirement of a "reasonable probability" that the outcome of the trial would have been different is an overly exacting standard that fails to account for the speculative nature of hindsight analysis. As this Court recognized in *Martinez*, speculation about what might have happened if counsel had performed differently is often all that is required to establish prejudice.

In this case, Mr. Robinson's counsel's deficient performance has provided a plausible basis for speculation about what might have happened if they had performed differently. Therefore, the Tenth Circuit's requirement of a "reasonable probability" is not justified, and Mr. Robinson has established prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

Furthermore, this Court has repeatedly emphasized that prejudice can be established through circumstantial evidence and speculation about what might have happened if counsel had


performed differently. In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court held that prejudice can be established through a showing that counsel's errors were "so serious" that they "likely had an effect on the verdict." Similarly, in *Wiggins v. Illinois*, 528 U.S. 378 (2000), this Court held that prejudice can be established through a showing that counsel's errors were "prejudicial" and "likely affected the outcome."

In this case, Mr. Robinson has offered sufficient evidence to suggest that his counsel's deficient performance was "so serious" and "prejudicial" that it likely had an effect on the verdict. Therefore, he has established prejudice under *Strickland*, *supra*, and its subsequent cases.

IV. CONCLUSION

In conclusion, the Tenth Circuit's requirement of a "reasonable probability" that the outcome of the trial would have been different is overly restrictive and inconsistent with this Court's holding in *Martinez v. Ryan*, 566 U.S. 1 (2012). Mr. Robinson has offered sufficient evidence to suggest that his counsel's deficient performance may have affected the outcome of the trial, and has established prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

The Tenth Circuit's decision in Mr. Robinson's habeas petition is flawed and fails to provide the required level of deference to his claims of ineffective assistance of counsel. The district court erred in its application of *Strickland* and its subsequent cases, and Mr. Robinson's claims should be remanded for further proceedings.

/s/ 
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