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SUPREME COURT OF THE UNITED STATES

IN THE

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

MARK A. MARCHETTI — PETITIONER
(Your Name)

vs.

SEC'y, FLA. DEPT OF CORRECTIONS RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE ELEVENTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MARK A. MARCHETTI (#B15527)
(Your Name)

382 SW MCI Way
(Address)

Madison, FL 32340-4430
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I. WHETHER MARCHETTI'S CONSTITUTIONAL
RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND
EFFECTIVE ASSISTANCE OF COUNSEL WERE
VIOLATED BY TRIAL COUNSEL'S FAILURE TO
INTRODUCE AVAILABLE RELEVANT EXONERATORY
EVIDENCE WHICH CONCLUSIVELY REFUTED
THE VICTIM'S UNEQUIVOCAL DESCRIPTION OF
OF HIS PENIS AS UNCIRCUMCISED WHEN HE
COMMITTED THE ALLEGED ABUSE.

LIST OF PARTIES

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:

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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 (AMENDED)

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 is unpublished.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 _____ 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 is unpublished.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 is unpublished.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 is unpublished.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 (AMENDED)

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 3, 2024

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).

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

The Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, as they pertain to the Due Process right to Fair Trial, and Effective Assistance of Counsel.

28 U.S.C. §§ 1254(1), 1257(a), as they pertain to Invoking this Court's Jurisdiction

28 U.S.C. §§ 2244 (AEDPA), 2254, as the laws governing Federal Habeas Corpus Proceedings brought by State prisoners.

STATEMENT OF THE CASE

Marchetti is currently serving six consecutive Life sentences in the State of Florida pursuant to convictions for sexual abuse involving his daughter C.M. These convictions were obtained based on circumstantial evidence, and the testimony of C.M. and other State witnesses subject to impeachment for bias and inconsistent statements.

The allegations against Marchetti in this case were the culmination of well documented campaign by Elaine Marchetti (C.M.'s mother), and Esther Dees (C.M.'s grandmother), with the sole objective of permanently separating Marchetti from his daughter.

C.M.'s mother and grandmother repeatedly exposed C.M. to sexually explicit discussions of sexual abuse in Talk shows, and to explicit pornography and the use of sex toys since an early age. Marchetti believes the exposure to this graphic sexual content facilitated the manipulation of C.M. into making false allegations against her father in exchange for material and travel rewards from her mother and grandmother.

Elaine Marchetti had repeatedly accused Marchetti of domestic and sexual abuse, both in Florida and in California. All her allegations were found to be baseless, by both law enforcement and the Courts.

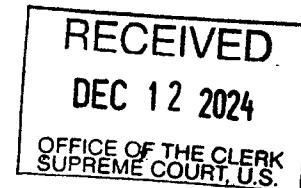
Significantly, the trial court in Miami-Dade County had initially decided to dismiss the charges against Marchetti due to the lack of direct physical evidence, combined with the history of false allegations previously made by Elaine Marchetti. Regretfully, when the Judge found out that Marchetti's counsel had not sought his release on bond, and had no explanation for her actions, he appears to have changed his mind based on suspicions that something sinister was afoot in this case, and allowed the case to proceed.

Trial counsel was a young and inexperienced lawyer who candidly admitted to Marchetti that she was "out of her depth," and was completely unprepared to handle such a complex sexual abuse case. It became evident to Marchetti that trial counsel, in addition to being ill-prepared to handle his case, was also overwhelmed by peer pressure, and felt fear of being despised for defending her client who, as most defendants accused of child sexual abuse, was presumed guilty until proven innocent. It is with this background that counsel embarked on a long trajectory of failures to defend her client's constitutional rights.

In the end, the record of trial reveals that even in the face of counsel's failures, the Jury was unconvinced of Marchetti's guilt. They asked questions that were not clearly answered, and after long deliberations all but confessed to being deadlocked and unable to reach a unanimous decision. At that point, the trial Judge tipped the scales against Marchetti when he flatly refused to declare a mistrial or give an Allen charge to the Jury. Instead, he proudly declared that he had never given an Allen charge, and he was not going to do it in Marchetti's case. The Jury was essentially bullied by the trial Judge back into deliberations and to reach a verdict if they wanted to go home. Under such circumstances, the Jury returned a guilty verdict.

Marchetti appealed his Judgment and Sentence to Florida's Third District Court of Appeal under Case number 3D17-869. The Third DCA per curiam affirmed the Judgment and Sentence without an opinion on the merits by Order entered on October 31, 2018. See Marchetti v. State, 258 So.3d 437 (Fla. 3d DCA 2018).

On September 16, 2019, Marchetti timely filed a Fla. R. Crim. P. 3850 motion for post conviction relief raising several claims of ineffective assistance of counsel.



Particularly relevant to the instant petition was one claim alleging constitutionally ineffective assistance of counsel for failing to introduce relevant exculpatory photographic evidence proving that he is circumcised, and has been so since childhood. This evidence was exculpatory because it directly refuted the victim's unequivocal description of Marchetti's penis as being uncircumcised during her abuse episodes at the hands of Marchetti. Specifically she referred to Marchetti's penis as his "pee pee" and described it as having "like an outer layer at the tip." (DC Doc. 16-1, at 291; TT 288). There is no question this described an "uncircumcised" penis, and it certainly was not describing Marchetti's penis. Counsel, however, failed to introduce evidence that would have conclusively refuted C.M.'s allegations against her father; and would have cast reasonable doubt upon the case as a whole.

On October 29, 2019, the State postconviction court summarily denied Marchetti's motion. (Appendix D, at 77-84). Marchetti appealed under case number 3D19-2353, and submitted an Initial Brief (Appendix E).

On March 4, 2020, the state appellate court entered an unelaborated opinion without reaching the merits of the issues presented by Marchetti, and per curiam affirmed the postconviction court's summary denial of relief. See Marchetti v. State, 302 So.3d 847 (Fla. 3d DCA 2020). The Mandate issued on April 27, 2020. (Appendix C).

On September 21, 2020, Marchetti timely filed his initial federal habeas petition under 28 U.S.C. § 2254, and on November 4, 2020, he filed an Amended Petition raising all claims properly exhausted in State direct appeal, and on collateral postconviction appeal involving trial court errors, and ineffective assistance of counsel. (DC Doc. 10). He also filed a Memorandum of Law (DC. Doc. 11).

The State of Florida filed a Response to Marchetti's Amended Petition (DC Doc. 14, 15, 16), as directed by the U.S. District Court (DC Doc. 12).

On November 8, 2022, the U.S. District Court entered an Order (DC Doc. 20) denying all claims raised by Marchetti in his Amended Petition. Marchetti timely filed Notice of Appeal, and filed a Motion for Permission to Appeal in Forma Pauperis along with an Affidavit of Insolvency in the Eleventh Circuit Court of Appeals.

On September 14, 2023, the U.S. Circuit Court for the Eleventh Circuit (CA 11), entered an Order (CA Doc. 10-2) granting a Certificate of Appealability (COA) as to Ground Four of the Amended Petition, and granted the request to proceed in Forma Pauperis.

After briefing by Marchetti and the State, the U.S. Circuit Court entered an Order (CA Doc. 15-2), affirming the decision of the U.S. District Court below with an opinion dated September 3, 2024.

The instant Petition for Writ of Certiorari is timely filed under the mailbox rule, and represents Marchetti's last chance to obtain an impartial review of his Constitutional Claims.

REASONS FOR GRANTING THE PETITION

MARCHETTI'S CONSTITUTIONAL DUE PROCESS RIGHTS TO A FAIR TRIAL, AND TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY TRIAL COUNSEL'S FAILURE TO INTRODUCE AVAILABLE RELEVANT EXONERATORY PHOTOGRAPHIC EVIDENCE WHICH CONCLUSIVELY REFUTED THE VICTIM'S UNEQUIVOCAL DESCRIPTION OF HIS PENIS AS UNCIRCUMCISED WHEN HE COMMITTED THE ALLEGED ABUSE.

Marchetti seeks certiorari review of the decision reached by the Eleventh Circuit Court of Appeals in case number 22-14146.

In its opinion dated September 3, 2024 (CA Doc. 15-2), the Eleventh Circuit Panel affirmed the denial of habeas relief in the U.S. District Court in what appears an adoption of that court's factual recitations, which in turn, had adopted the state courts' refusal to address meritorious claims.

The scope of review in the Eleventh Circuit was limited to a single claim involving counsel's failure to introduce exculpatory evidence that conclusively refuted the victim's unequivocal description of Marchetti's penis as "uncircumcised." Such evidence, if introduced, would have allowed counsel to impeach the victim as to this discrepancy and other inconsistencies in her story.

Had counsel adequately introduced an exculpatory photograph of Marchetti's "circumcised" penis, along with evidence and testimony showing that he was circumcised as a child, there is a reasonable probability that the jury would have seen through the charade mounted by Elaine Marchetti and her mother Esther Dees to frame Marchetti on allegations of heinous child sexual abuse by manipulating a psychologically damaged C.M. into lying in exchange for material and travel rewards.

Of Course, Marchetti's proclamations of innocence fell on deaf ears, especially those of counsel. A significant reason why state courts, and then federal courts failed to grant relief is the fact of Marchetti's initial reaction when informed of C.M.'s allegations. When confronted with what he felt was a frivolous allegation so outrageous it defied belief, he flippantly let out an outburst saying well, "if she says I did it, I did it!" At that point, it never crossed Marchetti's mind that anyone who knew him; how much he cared for his daughter; and how disturbed and manipulating his wife was, would believe a word of this latest attack on him by his ex-wife Elaine, in a long list of frivolous, malicious, and false claims. The chain of events following that outburst have shown Marchetti how wrong he was to underestimate far-fetched allegations that can be twisted in court to put an innocent father in prison for the rest of his life.

As for the claim addressed by the Eleventh Circuit, the Panel relied substantially upon the analysis provided by the District Court. The Circuit Court references C.M.'s testimony regarding certain photographs she had observed in Marchetti's cell-phone, but that according to her had been deleted, except one photograph of Marchetti's penis. When asked "what did your eyes see?" C.M. answered that "I saw his pee pee... it had like an outer layer at the tip..." (DC Doc. 16-1, at 291, T.T. 288).

In its Order, The Eleventh Circuit indicated that during her testimony C.M. described a single photo "depicting the abuse. Seemingly describing Marchetti's penis in the picture, C.M. recalled that it had like an outer layer at the tip." (CA Doc.15-1, at 3). The fact is that C.M. was describing what she testified to be her father's penis as uncircumcised, Not "seemingly."

The gravamen of Marchetti's claim of IATC was that had counsel introduced an actual photograph of his "circumcised" penis – however unsavory that may have been, the jury would have concluded that the alleged abuse could not have been perpetrated by him. That is so, especially, because Marchetti provided sworn affidavits to the postconviction court from known, available witnesses who, if called, would have further supported Marchetti's position that he was targeted by his manipulative ex-wife and mother-in-law with the objective of permanently severing his relationship with his daughter.

In denying relief, the State postconviction court NEVER provided any record evidence demonstrating that C.M. had, at any time, described Marchetti's penis as "circumcised." Yet, the Eleventh Circuit references "the state habeas court found she [C.M.] seemingly described Marchetti as circumcised, so introducing a picture of his penis would have incriminated him further." (CA Doc. 15-1, at 4).

The Eleventh Circuit's finding that his argument was unfounded – based on the above recitation – is plain error. The decision of the Eleventh Circuit simply continues to ignore plain facts to perpetuate a miscarriage of justice.

Marchetti has been presumed guilty from the outset of his criminal case. This is evident at all critical stages of the proceeding where, decisions were made based upon a pyramid of speculative inferences not supported by facts or evidence.

Even under the highly deferential AEDPA standard, the failures of trial counsel to present exculpatory evidence and adequately impeach C.M. with her inaccurate description of Marchetti's penis, warrant relief because they were plainly prejudicial to Marchetti.

The manner in which the State Appellate Court, and then the federal courts "seemingly" ignored the facts in this case has resulted in a violation of Marchetti's procedural due process under the Fourteenth Amendment, and his due process right to a fair trial, and effective assistance of counsel under the Fifth and Sixth Amendments to the U.S. Constitution.

The Eleventh Circuit's determination that the State habeas court "did not unreasonably determine that C.M.'s testimony that the penis had 'an outer layer at the tip' was not necessarily a statement that Marchetti was circumcised." is, in itself, unreasonable. Marchetti never claimed that C.M. stated he was circumcised, it was exactly the opposite. (CA Doc. 15-1, at 6).

Next, the Court concludes, without basis, that "C.M. was describing a picture she saw on Marchetti's phone — not what she observed during any instance of sexual abuse — and did not elaborate on what she meant by 'an outer layer at the tip?'" The fact is C.M. was testifying that Marchetti would take pictures of the abuse with his phone, and in that line of questioning she described what she termed Marchetti's "pee pee."

Finally, the Court concludes that Marchetti was not prejudiced by speculating that "If C.M. did not mean that Marchetti was uncircumcised [which she did], a picture of his penis wouldn't have been exculpatory and he wasn't prejudiced by any failure to present it." Then the Court chides Marchetti for "his speculative interpretation" of what C.M. meant, and thus did not show a substantial probability that he would have been acquitted.

The Strickland standard does not require "a substantial probability of acquittal," it merely requires "a reasonable probability of different outcome."

To recap, Counsel's failures in general, and more particularly, her failure to introduce relevant exculpatory evidence refuting the victim's testimony that her assailant - Marchetti - had an uncircumcised penis, prejudiced Marchetti. Had counsel introduced a photograph showing that Marchetti was circumcised, and if needed, introduced evidence that he was circumcised when he was a child, There is a reasonable probability the outcome of his criminal proceeding would have been different. The prejudice stemming from Counsel's numerous failures was incrementally amplified with each squandered opportunity to present a viable defense, or have Marchetti testify, or bring an expert witness, or call available witnesses who would have testified as to the type of person Elaine was, and her capability to manipulate her daughter to make the allegations she made.

The Jury was not completely blind to what was going on but between counsel's failure to present a defense, and then a trial Judge who put his own judicial arrogance above a man's life by refusing to give an Allen charge, and failing to properly answer the Jury's reasonable questions, all combined into the perfect storm to convict an innocent man.

"I AM INNOCENT!" Please review the facts of my case and the evidence of Constitutional violations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Mark A. Marchetti (#B15527)

Date: 11/30/2024