No. 08-94

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

RICKY MALLORY, BRAHEEM LEWIS, and HAKIM LEWIS,
Respondents

On Petition for Writ of Certiorari to the Pennsylvania Supreme Court

---

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

RONALD EISENBERG
Deputy District Attorney
(*counsel of record*)
HUGH J. BURNS, Jr.
Chief, Appeals Unit
ARNOLD GORDON
1st Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107
(215) 686-5700

Table of Contents

Table of Citations

Reply Argument

I. The brief in opposition serves only to emphasize the importance of the *Strickland* prejudice question before the Court.

The question presented is whether a criminal defendant can establish ineffective assistance of counsel merely by asserting "prejudice" as to a specific stage of the trial, without showing that the alleged ineffectiveness had any effect on the verdict or sentence. Respondents' answer – a resounding but unreasoned "yes" – demonstrates the need for this Court's review.

Respondents maintain that their ineffectiveness claim – that counsel failed to shepherd them properly through the jury waiver process – is just like a claim that counsel was ineffective in relation to a guilty plea, or in failing to file a notice of appeal. Therefore, say respondents, this case is easily controlled by *Hill v. Lockhart*, 474 U.S. 52 (1985), and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), and there is no cert-worthy issue. Brief in Opp. at 4-6.

Apparently, however, the application of these precedents to the question presented here is somewhat less obvious than respondents now

insist, because this is the first time they have cited either *Hill* or *Roe* since the prosecution began. In fact, federal and state courts are in disarray about the nature of the prejudice assessment in the context of both jury waiver ineffectiveness claims, Certiorari Pet. at 12-15, and guilty plea ineffectiveness claims, Certiorari Pet. at 20-22. Respondents do not even attempt to address these lower court conflicts.

Rather, respondents simply declare that their lawyers' conduct caused them to "forfeit[ ] an entire judicial proceeding," Brief in Opp. at 8, and thus that they should not have to show real prejudice, in the form of an effect on the outcome of the trial they received.

But this is circular reasoning. The whole question here is whether respondents' decision to take a bench trial rather than a jury trial can be treated as "the result of the proceeding" for purposes of assessing prejudice under *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *See* Certiorari Pet. at 7-11. Respondents did, after all, have a trial: a three-day trial, with multiple witnesses, lengthy cross-examination, and extensive closing arguments. That is hardly the same as a defendant who has no appeal at all because his lawyer neglects to file the necessary notice. If what respondents want is a new trial, they must show that the one they already had did

not "produce[ ] a just result." *Strickland*, 466 U.S. at 686.

Respondents nonetheless contend that they should not have to prove full prejudice because their ineffectiveness claim is not merely one of "'trial error', or an error which occurred during the presentation of a case." Instead, counsel allegedly deprived them of their independent constitutional right to a jury trial. Brief in Opp. at 7.

This is an empty distinction. There are many constitutional rights, independent of the right to effective counsel, that involve the conduct of a trial. These include the right to testify or not to testify, the right to confront witnesses, the right to compel process, and the right to present defense evidence. All of these can be lost through an attorney's actions. Yet, when counsel's conduct allegedly prevents the defendant from testifying, or calling a witness, or presenting a defense, there can be no serious argument that he is entitled to a presumption of prejudice. *See* Certiorari Pet. at 22-24. Instead he must show that the missed opportunity affected the outcome of the trial in light of all the evidence.

Respondents insist, however, that the nominal showing required by the court below really was "actual prejudice," not just presumed prejudice. Brief in Opp. at 8-9. But calling it so does not make

it so. If this is not presumption of prejudice, what would be?

Paradoxically, respondents place great reliance on *Florida v. Nixon*, 543 U.S. 175 (2004), a case in which the Court refused to presume prejudice. Respondents contend that their situation is distinguishable. Brief in Opp. at 6-7. That argument, however, in effect concedes that the presumption of prejudice is exactly what respondents are seeking.

The *Florida v. Nixon* decision, moreover, presented a far stronger basis for presuming prejudice than does respondents'. The Court made clear that a presumption of prejudice is "reserved for cases in which counsel fails meaningfully to oppose the prosecution's case." 543 U.S. at 179. But there the trial lawyer explicitly *conceded guilt*, contesting only the penalty phase, and still did not merit a presumption of prejudice. Here, by contrast, all three lawyers fought vigorously at the trial, which consisted largely of their objections, cross-examination, and argument. The fact that they advised their clients to accept the judge as fact finder does not conceivably constitute a failure to meaningfully oppose the prosecution's case.

Finally, respondents argue that they should not be required to show prejudice to the outcome of trial because it is too hard to do. They protest that any such effort would require "speculation." Brief

in Opp. at 8, 11. But that is always true of *Strickland* prejudice analysis. The defendant contends that his lawyer should have done something differently, and the court attempts to determine what the effect would have been. The inquiry is inherently inferential.

What respondents really seem to mean, however, is that actual prejudice is too hard to show because it infrequently exists in the jury waiver ineffectiveness context. But that is no cause to dispense with the prejudice prong. The Court did not create the presumption of prejudice in order to relieve defendants of a burden they would otherwise have difficulty meeting; on the contrary, the presumption was intended for "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Untied States v. Cronic*, 466 U.S. 648, 658 (1984).

The decision to be tried by a judge rather than a jury will seldom affect the verdict to the defendant's detriment, as long as the fact finder is fair; and if not, then the defendant is properly required to provide some evidence of bias in order to establish ineffective assistance of counsel. That is as it should be. Review is warranted to settle the question.

II. The ruling below was plainly final under this Court's controlling precedent, and was not based on state law.

Respondents assert that the state supreme court "merely remanded" the matter for further proceedings, that its ruling is not final, and that the case therefore is not properly before this Court. *See* Brief in Opp. at 3 (second sentence), 9 (argument heading).

Respondents cite no law for their argument, but directly applicable authority, in another case arising from the Pennsylvania Supreme Court, negates the claim. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the Court granted review of a state supreme court Sixth Amendment ruling. The state court holding was that the defendant had a constitutional right to review the confidential file compiled by a child protective services agency investigating a child abuse claim.

The defendant argued in this Court that jurisdiction was lacking. The ruling below was not final, contended the defendant, because the state court mandate merely remanded the case to the trial judge to allow review of the file, to determine whether any of its contents might have aided the defense, and if so to grant a new trial.

This Court rejected the finality challenge. The Court concluded that, if the remand went forward, there would be no practical way for the Commonwealth to achieve review of the Sixth Amendment ruling in question. Under any permutation of possible results, the Commonwealth would at best be forced to re-argue constitutional questions that the state courts had already resolved, and that would be subject to law-of-the-case bars there, unless and until this Court re-granted certiorari on the exact issue that was already before it. "The goals of finality would be frustrated, rather than furthered, by these wasteful and time-consuming procedures." 480 U.S. at 48.

This case is in precisely the same posture. As in *Ritchie*, the state supreme court has announced its views on the federal constitutional standard to be applied to respondents' ineffective assistance claim, and has remanded only for application of the standard by the trial judge. App. 42-44. Win or lose on the facts, the Commonwealth can receive no further review in the state courts on the constitutional question now before this Court. This Court need not defer its consideration merely because of the theoretical possibility that the case could reach it again after years of additional proceedings. *Ritchie* disposes of respondents' finality challenge.

Respondents also charge that this Court lacks jurisdiction because the ruling below rests on

an independent state ground. According to respondents, the state supreme court decision was really just an application of the state procedural rule calling for jury waiver colloquies. Brief in Opp. at 10-11.

The claim is untenable. In reality, the state supreme court discussed its procedural rule only to hold that the trial judge had erred in relying on it to determine what were really constitutional issues. App. 22-24.[1] That is why the court spent the next 20 pages of its opinion discussing federal questions, without further reference to state procedural rules. Respondents have gotten it exactly backwards.

The case is properly before this Court.

---

[1]"A waiver colloquy is a procedural device; it is not a constitutional end or a constitutional 'right." . . . The right to a jury trial in criminal cases, unlike the Rule-based requirement of a waiver colloquy, does implicate constitutional concerns." App. 23-24.

Conclusion

For the reasons set forth above and in the certiorari petition, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

RONALD EISENBERG
Deputy District Attorney
(*counsel of record*)
HUGH J. BURNS, Jr.
Chief, Appeals Unit
ARNOLD GORDON
1st Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107
(215) 686-5700