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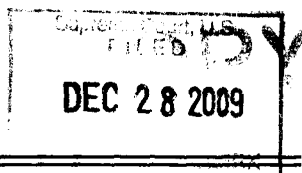

In the Supreme Court of the United States

KELLY HARRINGTON, WARDEN, *Petitioner,*

v.

JOSHUA RICHTER, *Respondent.*

ON PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION

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QUESTIONS PRESENTED

In granting *habeas corpus* relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U.S.C. section 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt?

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ARGUMENT

THE NINTH CIRCUIT VIOLATED 28 U.S.C. § 2254(D) IN REJECTING THE CALIFORNIA SUPREME COURT'S DECISION

A. Introduction

Respondent Richter's trial counsel had to steer between daunting evidence of his client's guilt—incontrovertible physical evidence that Patrick Klein was shot at close range by two different-caliber semi-automatic firearms and the eyewitness testimony of another gunshot victim who identified respondent as one of two burglars responsible for the murder of Klein—and respondent's insistence that he was not involved in committing the crime. So counsel crafted the best defense available at the time: an attack on the credibility of the survivor and exploitation of deficiencies in the police investigation of the crimes. Counsel's strategy also took into account that the prosecution, as of the start of trial, had neither performed any scientific testing of various samples of blood collected by the police investigator at the crime scene nor expressed any intention to introduce expert testimony in regard to that evidence.

After the presentation of evidence had begun, however, the prosecution had the blood stains collected at the crime scene analyzed by a serologist. Over defense counsel's objection and pleas for a continuance, the prosecutor then presented the testimony of the serologist, plus the testimony of a police detective as a blood-spatter expert. Respondent's counsel met this evidence by cross-examining the serology expert who admitted that she had not tested the stains for cross-contamination and that she had only been able to run one test. He also cross-examined the detective to good effect.

The Ninth Circuit granted respondent habeas corpus relief, holding that the California Supreme Court "unreasonably applied" this Court's "clearly

established" *Strickland v. Washington* ineffective-counsel standard in denying respondent's claim. But the Ninth Circuit erred in two fundamental ways. Rather than apply *Strickland's* clearly-established general and deferential rule, the court of appeals instead invoked its own novel and idiosyncratic rule requiring counsel to meet expert-opinion evidence offered by the State with expert-opinion evidence from the defense. And it purported to find that the state court unreasonably had failed to detect the requisite "probable prejudice" of a *Strickland* claim, even though respondent never produced, in either the state or federal court, any expert who had re-examined the allegedly crucial blood pool or proved able to refute the State's serologist's findings.

B. The Ninth Circuit Improperly Imposed, in the Guise of "Clearly Established Law," a Novel Expert-Testimony Requirement on Defense Counsel

In *Knowles v. Mirzayance*, 556 U.S. ___, 173 L.Ed.2d 251 (2009), this Court confirmed that, under 28 U.S.C. § 2254(d)(1), federal habeas relief may be granted on an ineffective-counsel claim only if the state-court decision unreasonably applied the general and deferential standard established by *Strickland v. Washington*, 466 U.S. 468 (1984). As this Court explained in Knowles, a "doubly deferential judicial review" standard applies to a *Strickland* claim evaluated under § 2254(d). *Mirzayance*, 129 S.Ct. at 1410; see *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam). It cannot be "'an unreasonable application of clearly established Federal law'" for a state court to decline to apply a specific ineffective-counsel rule that has not been squarely established by this Court. *Mirzayance*, 129 S.Ct. at 1419; *Wright v. Van Patten*, 552 U.S. 120, ___, 128 S.Ct. 743, 169 L.Ed.2d 583, 586-587 (2008) (*per curiam*); *Schriro v. Landrigan*, 550 U.S. 465, 478 (2007); *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006).

Yet the Ninth Circuit in this case granted habeas corpus relief to respondent on the basis of such a novel rule. Richter, of course, can cite no case in which this Court has ever held that defense counsel must consult with and/or present experts in every case in which expert opinion testimony might prove useful. Moreover, Richter, like the en banc court, can cite no case that stands for the proposition that defense counsel must invariably respond in kind to expert evidence presented by the prosecution rather than rely on other, equally effective methods such as cross-examination.

Richter instead asserts that "this Court, and every circuit court to address the issue, have held that where a criminal defense lawyer affirmatively selects a defense theory of the case, stands by that theory throughout the presentation of evidence, and relies on that theory in closing argument, the lawyer's failure to investigate readily available evidence supporting that theory is unreasonable." (Opp. at 21.) But, while this Court has found counsel ineffective for failing to follow up on investigative leads evident from information counsel had already obtained (see *Wiggins v. Smith*, 539 U.S. 510, 527 (2003); Opp. at 21-22), it cannot reasonably be said in this case that Richter's counsel unreasonably failed to investigate any information he had obtained prior to trial about the blood spatter evidence. Instead, Richter's counsel reasonably based his defense strategy on the prosecution's failure to examine the available blood evidence and to express any intention of presenting forensic evidence in support of its theory of the case.

Richter similarly argues that the en banc court's decision is consistent with decisions of this and other federal courts that have addressed the failure of defense counsel to investigate and present impartial evidence that could corroborate the defendant's testimony in a "credibility contest." (Opp. at 22-23.) Richter asserts (see Opp. at 25) that "the en banc opinion did not require defense counsel to search for a needle in a haystack; it required him to simply look at the haystack itself." Richter's assertion reveals

the same flawed reasoning that permeates the en banc court's decision. Here, trial counsel had no reason to suspect that there was a "haystack" he should look into, because the prosecution had given no notice of its intention to present evidence that it derived from a previously ignored source.

C. The State Court's Decision Was Not an Unreasonable Application of this Court's General and Deferential *Strickland* Rule.

In the instant case, Richter's counsel prepared the defense with the reasonable understanding that the prosecution (1) intended to rely heavily on the testimony of the surviving victim, Joshua Johnson, a marijuana dealer, and (2) had not expressed any intention of presenting expert testimony in regard to blood spatter at the crime scene. The anticipated lack of forensic proof regarding the blood spatter was important to defense counsel because it meant the trial was destined to turn into a "credibility contest."

As this Court has held, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689 (emphasis added). Inasmuch as Richter's counsel had no reason to expect the prosecution would present expert testimony in regard to blood spatter, he had no reason to conduct a thorough investigation of the blood evidence at the crime scene.

In finding that Richter's counsel rendered ineffective assistance because he did not investigate and present expert opinion evidence in regard to blood spatter, the en banc court not only erected a novel standard for attorney competence that in essence requires the presentation of expert testimony in every case in which it might prove beneficial, it ignored the "circumstances of counsel's challenged conduct." Further, the en banc court found counsel's

failure to present the supposedly vital expert opinion evidence prejudicial.

The Ninth Circuit's decision in this case suffers from the same kind of error that this Court was constrained to correct in *Wong v. Belmontes*, 130 S.Ct. 383 (2009) (*per curiam*). There, the Ninth Circuit determined that a reasonably competent defense lawyer would have introduced more mitigation evidence on top of what counsel had already presented, and that the evidence defense counsel presented and the additional evidence it proposed would have carried greater weight if counsel had submitted expert testimony. In reversing the Ninth Circuit, this Court explained that "the notion that the result could have been different if only [defense counsel] had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful." 130 S.Ct. at 391. As it was in *Belmontes*, the Ninth Circuit's infatuation with expert testimony is manifest in its opinion in this case. And, as in *Belmontes*, the proffered expert evidence here would not have made a difference in the outcome. As Judge Bybee aptly observed, it would only have contradicted Johnson's recollection of the events whereas "the State's blood spatter testimony contradicts the defense's entire case because it establishes that Johnson could not have physically shot Klein." (App. at 189a.)

Richter's opposition brief argues that the Ninth Circuit's decision was "unremarkable" in light of trial counsel's "unreasonable" failure to investigate the theory of defense counsel had chosen to rely on. Like the en banc court, Richter contends that proof regarding the source of the so-called "blood pool" was vital to his defense and that counsel inexplicably failed to seek relevant expert assistance and present evidence that would have corroborated his testimony. Not so. Even if expert testimony could have established the source of the blood pool—and no expert has ever examined it in this case—it would not have undermined the prosecution's case against Richter.

Richter's claim of constitutionally-deficient representation is a chimera. The source of the blood pool can never be known as it was never collected by the police at the crime scene and has never been analyzed by any forensic scientist. The "evidence" that Richter and the Ninth Circuit say would have been uncovered by competent counsel consists of nothing more than untested opinions rendered by Richter's habeas corpus experts to the effect that victim Johnson could not have caused the blood pool if he was standing in the doorway waiting for the police to arrive. [1] With such expert testimony, so Richter's argument goes, the jury then would have believed Richter's testimony that he had seen Klein lying on the floor rather than on the couch where he lay when the police later arrived. This, the argument continues, somehow would have proved that Klein was killed in a crossfire between Johnson and Christian Branscombe—and not, as the prosecutor asserted, while he lay sleeping on the couch.

But, even if such opinion evidence had been presented at trial, it would not have addressed the compelling physical evidence that tied Richter directly to the crimes: the expended .22-caliber CCI Stinger shell casing, found near the couch where Klein lay mortally wounded, that matched live bullets found in Richter's garage by police investigators; and the discovery of Johnson's stolen gun safe and backpack in the same location. Further, neither Richter nor the Ninth Circuit can offer any credible explanation for how or why the gravely

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[1] Richter's repeated descriptions of his habeas experts' opinions as "undisputed" or "unrebutted" apparently derives from nothing more than the State's unexceptional stipulation that, if Richter's federal habeas experts were called to testify in the district court *at an evidentiary hearing*, their testimony would be consistent with the content of their declarations—nothing more. The State has *never conceded* that such testimony, if presented *at trial*, would have conclusively disproved the People's case regarding the circumstances surrounding the murder of Patrick Klein.

injured Klein could have been moved from the floor onto the couch with nary a drop of blood being spilled. Nor can Richter explain why, if Klein had actually deposited the pool of blood while laying face down in the doorway, there was no evidence that blood had drained and accumulated around his face. Instead, the relevant blood spatter evidence that commanded Richter's trial counsel's attention—and that Richter's experts have never even addressed, much less refuted, in the federal habeas proceedings—was the testimony of Detective Bell whose opinions were directed to the blood patterns and spatter on Klein's body and in other areas of the crime scene.

Thus, despite the Ninth Circuit's portrayal of it, the proffered expert evidence about the source of the blood pool could hardly have undermined the prosecution's case let alone establish Richter's innocence. For the reasons discussed herein and in the petition for writ of certiorari, petitioner submits that the en banc court's decision should be reviewed.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: December 21, 2009

Respectfully submitted

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