IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
2016-CA-00682=COA

JAKE BIAS APPELLANT

vs.

STATE OF MISSISSIPPI APPELLEE

****
APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY , MISSISSIPPI
****

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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ATTORNEY FOR APPELLANT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

Jake Bias
Appellant/Defendant

Cynthia A. Stewart
Appellate attorney for Mr. Bias

District Attorney and Assistant District Attorney

Jim Hood
Attorney General

The State of Mississippi
Appellee

Honorable Tommie Green
Circuit Court Judge, Hinds County, Mississippi.

SO CERTIFIED, this the 12th day of December, 2016.

s/ Cynthia A. Stewart
Cynthia A. Stewart

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STATEMENT OF ISSUES

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III. **Mr. Bias is entitled to an evidentiary hearing**

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STATEMENT OF THE CASE

On or about December 9, 2010, Jake Bias was indicted for the willful, unlawful, statutory rape of J.B. (R.E. TAB B, PG 11) On or about July 2, 2010, Jake Bias (hereinafter referred to as "Bias") pled guilty to Statutory Rape at the change of plea hearing held in the Circuit Court of Hinds County, Mississippi. At the time of the crime, Bias was twenty-seven (27) years old. Bias was sentenced to serve twenty years in prison, with five years suspended. (R.E. TAB B, PG 12)

A post-conviction was timely filed on March 31, 2014. (R.E. TAB B) The Court denied the Motion for Post Conviction on May 5, 2016 (R.E. TAB D) On or about November 2, 2010, DHS received a report from University Medical Center indicating a minor, J.B., was brought to the ER. Officers responded to University Medical Center to speak to J.B.'s mother, Chasidy Butler. **Ms. Butler indicated that J.B. had tested positive for Chlamydia and Gonorrhea.** (R.E. TAB B, PG 52) J.B. disclosed to her godmother that her father, Jake Bias, had "hurt her private area". **A physical examination did not reveal any tearing in the anal, perineum or vaginal area.** (R.E. TAB B, PGS 49,51) J.B. did not repeat the accusation against Mr. Bias.

Mr. Bias was interviewed on or about November 5, 2010. According to the police report, he was told that J.B. had Chlamydia and Gonorrhea. He denied any sexual activity with her. The report indicates that after continuous interrogation, he eventually confessed to sexual penetration. **It is notable that a review of the medical record fails to show any evidence of penetration.** (R.E. TAB C) **In addition, the one hearsay statement attributed to J.B. doesn't reference any sexual penetration.** (R.E. TAB B)

After his arrest and while at the Detention Center, Bias' blood was drawn and tested. Although no one told him about the results, he recalls the prosecutor indicating at his change of plea hearing stating that **Bias did not test positive for Chlamydia and Gonorrhea. He was**

never treated for any STDs.

During a forensic interview with the Child Advocacy Center, they were unable to conclude that sexual abuse had occurred. (R.E. TAB B, PG 58)

During an interview,

J.B. was exposed to numerous adult men including cousins, uncles and the boyfriend of her godmother. According to the discovery provided in the case, none of them were questioned, that is, the discovery does not indicate any such interviews.

The medical records indicate that the child's hymen was normal.

SUMMARY OF THE ARGUMENT

ARGUMENT

I. Defendant was not provided with constitutional effective assistance of counsel.

Jake Bias argues that he received ineffective assistance of counsel because his trial counsel: (1) failed to note and advise him of the fact that he had not tested positive nor had he been treated for any STDs. (2) failed to not or advise him that the child's hymen was intact; and (3) failed to raise the child's exposure to numerous other men.

The minor child tested positive for both Chlamydia and Gonorrhea. After his arrest and while at the Detention Center, Bias' blood was drawn and tested. Although no one told him about the results, he recalls the prosecutor indicating at his change of plea hearing stating that he did not test positive for Chlamydia and Gonorrhea. He was never treated for any STDs. Also, no other family members, occupants in the household or visitors to the household were tested.

The Sixth Amendment "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466

U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 675 (1984). Courts have long recognized that in order to render constitutionally adequate effective assistance of counsel, an attorney must provide "an intelligent and knowledgeable defense on behalf of his client. *Caraway v. Beto*, 421 F.2d 636, 637 (5th Cir. 1979).

In order to prevail, a defendant must show both that counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, a defendant must demonstrate both seriously-deficient performance on the part of his counsel and prejudice resulting therefrom, i.e., the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 690-694 (1984); *Davis v. State*, 743 So.2d 326 (1999). The *Strickland* Court elucidated this test further: "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*, 466 U.S. at 695. To prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that his attorney's performance fell below an objective standard of reasonableness and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). With respect to the first Strickland prong, there exists a strong presumption that counsel's conduct falls within the wide range of professionally reasonable assistance. *Id.* at 689. In order to

establish prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In this case, defense counsel committed several unprofessional errors and omissions that resulted in performance falling below an objective standard of reasonableness for the defense counsel at sentencing in a criminal case.

Defense counsel obligation includes a duty to investigate.

ABA Criminal Justice Standard 4 – 4.1 states:

> (a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

Furthermore, BA Criminal Justice Standard 4 – 3.8(b) requires defense counsel to "explain development in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Mr. Bias' constitutional right to effective assistance of counsel extends to the decision to negotiate and enter a plea of guilty. The right to effective assistance of counsel is well established and has been reiterated by the United States Supreme Court. *Hill v Lockhart*, 474 S. Ct. 52 (1995); *Roe v. Flores-Ortega*, 328 U.S. 470,480 (2000); *Padilla v Kentucky*, 130 S. Ct. 1473 (2010); *LaFler v Cooper* 132 S. Ct. 1376 (2012); *Missouri v Frye*, 132 S. Ct. 1399 (2012).

In *McCann v Richardson*, 397 U.S. 759, 768-71 (1970), the Court observed that whether defense counsel provided adequate representation, in advising a guilty plea, depended not on

whether a court would respectively consider his advise right or wrong "but on whether that advise was within the range of competence demanded of criminal attorneys in criminal cases." See also *Tollett v Henderson*, 411 U.S. 258, 266-69 (1973); *United States v Agurs*, 427 U.S. 97, 102 n.5 (1976).

There are two components to the test: deficient attorney performance and resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question. Although, the gage of effective attorney performance is an objective standard of reasonableness, the Court concluded that "[j]udicial scrutiny of counsel's performance must be highly deferential." Strategic choice made after thorough investigation of relevant law and facts are "virtually unchallengeable," as are "reasonable" decisions making investigation necessary, *Strickland*, 466 U.S. @ 690, and decisions selecting which issues to raise on appeal. Providing effective assistance is not limited to a single path. No detailed rules or guidelines for adequate representation are appropriate: "Any such set of rules could interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making factual decisions." *Strickland*, 466 U.S. @ 690.

The defendant "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," in order to establish prejudice resulting from attorney error. This standard does not require that "a defendant show that counsel's deficient conduct more likely that not altered the outcome of the case." Also, presentation of a plausible mitigation theory supported by evidence, does not foreclose prejudice base on counsel's earlier failure to have conducted and adequate mitigation investigation. *Sears v Upton* 130 S.Ct. 3259 (2010)

Although the Supreme Court in *Strickland* discussed the performance prong of an

ineffectiveness claim before the prejudice prong, the Court made clear that "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. As the Court noted: "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

The issue is "whether the investigation supporting counsels decision not to introduce mitigating evidence ... was itself reasonable." *Clark v. Thaler*, 673 F.3d 410, 418 (5th Cir), cert. denied, 133 S. Ct. 179 (2012) (emphasis in original). The Fifth Circuit also noted in *Brawner v. Epps* that the Sixth Amendment's objective standard of reasonableness" in light of prevailing professional norms" laid out in Strickland, 466 U.S. at 686, are to be understood as the ABA Guidelines. 439 Fed. Appx. 396, 402 (5th Cir. 2011). In fact quoting the Supreme Court in *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009), the *Brawner* court noted that "[c]counsel's duty to investigate is not negated by the expressed desires of a client. ABA Guidelines Sec. 11.4.1 cmt." Id. The Fifth Circuit went on to explain that the "current" ABA Guidelines 'discusses the duty to investigate mitigating evidence in exhausting detail.'" *Brawner*, 439 Fed. Appx. At 402 n.1 (quoting *Bobby v. Van Hook*, 130 S. Ct. at 17). The Fifth Circuit also expressed, "we...consider the ABA's Guidelines and embracing the prevailing norms of the time even before the Supreme Court explicitly referenced them.' *Adams v. Quarteman*, 324 Fed. Appx. 340, 345 n.17 (5th Cir. 2009).

II. Defendant's "confession" did not match the physical evidence.

Mr. Bias denied on more than one occasion the allegations against him. After continuous interrogation Mr. Bias admitted to having sexual intercourse with the child. The medical records of the minor child indicate that there were no tears anally, vaginally or in the perineum. They also indicate that the minor child had a "normal hymen". After his arrest and while at the Detention Center, Bias' blood was drawn and tested. Although no one told him about the results, he recalls the prosecutor indicating at his change of plea hearing stating that he did not test positive for Chlamydia and Gonorrhea. He was never treated for any STDs.

This case is similar to *Button v. State*, 42 So. 2d 773 (Miss. 1949).

III. Mr. Bias is entitled to an evidentiary hearing

Specifically, quoting the Supreme Court, in the context of a claim of failure to investigate, *Strickland* instructs that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 104 s. Ct. at 2066. The Fifth Circuit has explained that an evidentiary hearing should be granted because of trial counsel's failure to present mitigating evidence. See *Loyd v. Smith*, 899 F.2d 1416, 1425 (5th Cir. 1990) (the case was vacated and remanded when the appellate court found that the district court mostly ignored "explicit and implicit finds of fact [] supported by the record." The parallels strongly militating for an evidentiary hearing abound.

In another case, the Fifth Circuit Court of Appeals concluded that the evidentiary hearing was necessary when trial counsel misrepresented material facts, withheld information and exerted pressure on defendant to induce a guilty plea. See *Friedman v. U.S.*, 588 F.2d 1010 (5th Cir. 1979) (contested fact issues cannot be resolved on the basis so

conflicting affidavits). The Fifth Circuit holds that when material facts are in dispute, an evidentiary hearing is necessary.

The Friedman court advanced a tow-step inquire detailing when a petitioner would be entitled to an evidentiary hearing; (1) does that record in the case, as supplemented by the Trial Judge's "personal knowledge or recollection," conclusively negate the factual predicates asserted in support of the motion for post-conviction relief? (2) Would the petitioner be entitled to post-conviction relief as a legal matter if those factual allegations which are not conclusively refuted by the record and mattes within the Trial Judge's personal knowledge or recollection are in fact true? If the answer to the first inquiry is an negative one and the answer to the second inquiry an affirmative one, the court requires evidentiary hearing on those factual allegations which, if found to be true, would entitle petitioner to post-conviction relief. *Friedman*, 588 F.2d at 1015 (footnote omitted). The Fifth Circuit went on to explain that "a district court abuses its discretion by denying an evidentiary hearing if the motion sets forth specific, controverted issues of facts that are not conclusively negated by the record and that, if proven at the hearing, would entitle petitioner to relief." *U.S. v. Kayode*, 2014 U.S. ap. LEXIS 24338 (5th Cir. Dec. 23, 2014) (citing *Mack v. Smith*, 659 F.2d 23, 25 (5th Cir. 1981)) " [W]here [the petitioner] would be entitle to post-conviction relief if his factual allegations were proven true, Sec 2255 requires an evidentiary hearing on those allegations.") (citing *Friedman*, 588 F.2d 1010). *Kayode* also quotes its sister circuit. "[A] petitioner need only allege-not prove – reasonably specific, non-conclusory facts that, if true, would entitle him to relief." *Winthrop-Redin v. U.S.*, 767 f.3d 1201, 1216 (11th Cir. 2014).

The Fifth Circuit reaffirms its long held tenant which categorically states that

"[c]ontested fact issues in Sec. 2255 case must be decided on the basis of evidentiary hearing." Reagor v. U.S., 488 f.2d 515, 517 (5th cir. 1973) (emphasis added). "As the Supreme Court has explained, even if the Government contends that the petitioner's allegations are 'improbably and unbelievable,' if the petitioner makes specific and detailed assertions in his motion and affidavit that create contested issue of fact that, if true, entitle him to relief, an evidentiary hearing is warranted." Kayode, LEXIS 24338 (quoting *Machibroda v. U.S.*, 368 U.S. 487, 494 (1962); see also *Blackledge v. Allison*, 431 U.S. 63, 75 (1977) (explaining that "[i]n administering the writ of habeas corpus and it Sec. 2255 counterpart, the federal courts cannot fairly adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty pleas was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment," and remanding because the "record of the plea hearing did not, in view of the allegations made, conclusively shoe that the prisoner (was) entitled to no relief") "footnote and internal citations omitted). Petitioner Bias has properly presented specific facts that, if true would entitle him to relief under 28 U.S. C Sec. 2255. He therefore respectfully requests an evidentiary hearing to resolve these matters of fact.

CONCLUSION

For the above and foregoing reasons, this Court should issue an Order that the conviction and sentence must be vacated or reversed and remanded for a new trial or in the alternative and evidentiary hearing.

This the 12th day of December, 2016.

JAKE BIAS

By: s/ Cynthia A. Stewart
CYNTHIA A. STEWART

SUBMITTED BY:

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CERTIFICATE OF SERVICE

I, the undersigned, CYNTHIA A. STEWART, attorney for Defendant, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing to:

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Honorable Tomie Green
Circuit Court Judge
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DATED, this the 12th day of December, 2016.

: s/ Cynthia A. Stewart
CYNTHIA A. STEWART