19 March 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	USCA Dkt. No. 14-0685/AF
Staff Sergeant (E-5) WILBER J. MCINTOSH, JR., USAF *Appellant.*	)	Crim. App. No. 37977

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUE PRESENTED

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE WHEN DEFENSE COUNSEL FAILED TO INTRODUCE EVIDENCE WHICH STRONGLY CORROBORATED THE DEFENSE THEORY THAT THE ALLEGATIONS IN THIS CASE WERE FALSE.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of rape of a child who had attained the age of 12 years but had not attained the age of 16 years, on divers occasions, in violation of Article 120, UCMJ (Charge I, Specification 1); one specification of aggravated sexual abuse of a child, on divers occasions, in violation of Article 120, UCMJ (Charge I, Specification 2); one specification of assault

with the intent to commit rape, in violation of Article 134, UCMJ (Charge III, Specification 1); and one specification of communicating a threat, in violation of Article 134, UCMJ (Charge III, Specification 2). (JA at 327.) Consistent with his pleas, Appellant was acquitted of one charge and two specifications of forcible sodomy (Charge II, Specifications 1 and 2), alleged violations of Article 125, UCMJ. Appellant was sentenced to a reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 25 years, and a dishonorable discharge. (JA at 23.) On 2 August 2011, the convening authority approved the sentence as adjudged. (JA at 24.)

On appeal, AFCCA set aside and dismissed Charge III and its Specifications. (JA at 22.) Because the remaining offenses captured "the gravamen of the appellant's criminal conduct," AFCCA reassessed the sentence as adjudged. (JA at 21.) Highlighting four issues from AFCCA's opinion, Appellant moved AFCCA for reconsideration *en banc* on 18 February 2014. On 2 May 2014, AFCCA denied Appellant's request for reconsideration.

On 1 July 2014, Appellant petitioned this Court to grant review of AFCCA's decision. In his 11 August 2014 Supplement to Petition for Grant of Review, Appellant raised five issues for consideration. On 15 January 2015, this Court granted review of a single issue concerning whether Appellant received effective assistance of counsel at trial.

STATEMENT OF FACTS

Facts necessary to the disposition of this issue are set forth in the Argument section below.

SUMMARY OF THE ARGUMENT

Appellant's ineffective assistance of counsel claim fails to meet any of the required prongs under United States v. Polk, 32 M.J. 150 (C.M.A. 1994). While it is factually true that trial defense counsel declined to seek introduction of two Sexual Assault Nurse Examiner (SANE) reports into evidence at trial, there were strong tactical reasons for defense counsel's decision to forgo admission of this evidence.

Had the defense presented evidence related to the two SANE examinations, the prosecution would have rebutted the evidence by presenting its own evidence that the lack of abnormal findings in a SANE report does not rule out the occurrence of sexual assault. If the prosecution rebutted the SANE reports, this would have substantially limited the defense's trial strategy by depriving the defense of its ability to argue that the prosecution presented no corroborating medical evidence to support the testimony of BH.

Even if this Court finds ineffective assistance of counsel on the matter of the SANE reports, however, there was no reasonable probability that, but for counsel's error, the result of the proceeding would have been different given the strength of the prosecution's case.

ARGUMENT

APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT ALL STAGES OF HIS TRIAL.

Standard of Review

In reviewing claims for ineffective assistance of counsel, this Court "looks at the questions of deficient performance and prejudice de novo." United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012)(quoting United States v. Gutierrez, 66 M.J. 329, 330-31 (C.A.A.F. 2008)); *see also* United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011). Analysis of defense counsel's performance is "highly deferential." United States v. Mazza, 67 M.J. 470, 474 (C.A.A.F. 2009).

Law and Analysis

Appellant argues that his trial defense counsel were ineffective "during Appellant's court-martial by failing to introduce evidence from two (2) SANE examinations of BH that found no evidence of sexual assault/activity." (App. Br. at 8.) Additionally, Appellant asserts that his counsel's "ill-chosen decision not to offer this evidence significantly prejudiced Appellant's case given the relative weakness of the government's evidence that Appellant sexually assaulted BH." (Id.) With regard to both arguments, Appellant is mistaken. At all stages of his court-martial, Appellant received constitutionally effective representation.

The Sixth Amendment guarantees Appellant the right to effective assistance of counsel. U.S. CONST. amend. VI; United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, this Court applies the standard set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984), and begins with the presumption that counsel provided competent representation. Gooch, 69 M.J. at 361 (citing United States v. Cronic, 466 U.S. 648, 658 (1984)); *see also* United States v. Glenn, 66 M.J. 64, 66 (C.A.A.F. 2008)(In a court-martial, an accused is presumed to be sane and counsel is presumed to be competent). An appellant "who seeks to relitigate a trial by claiming ineffective assistance of counsel must surmount a very high hurdle." United States v. Saintaude, 51 M.J. 175, 179 (C.A.A.F. 2005)(quoting United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997)).

In Strickland, the Supreme Court set out a two-pronged test, which requires Appellant to demonstrate first, that his counsel's performance was so deficient that he was not functioning as counsel within the meaning of the Sixth Amendment, and second, that his counsel's deficient performance prejudiced the defense. United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010)(citing Strickland, 466 U.S. at 687); *see also* Gilley, 56 M.J. at 124 ("We have adopted the Supreme Court's test for effectiveness of counsel articulated in Strickland, as well as the presumption of

competence announced" in Cronic.). A successful ineffectiveness claim requires a finding of both deficient performance and prejudice; however, there is no requirement that an appellate court address "both components of the inquiry if the defendant makes an insufficient showing on one." Mazza, 67 M.J. at 474 (quoting Strickland, 466 U.S. at 697).

In evaluating ineffective assistance of counsel claims, "the proper standard for attorney performance is that of reasonably effective assistance." Strickland, 466 U.S. at 687. Moreover, in assessing the reasonableness of counsel's performance, an appellate court must not judge in hindsight but must, rather, place itself in the shoes of defense counsel at the point of counsel's disputed action and with the information then available to counsel. Id. To avoid second-guessing, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[1] Datavs, 71 M.J. at 424 (quoting Strickland, 466 U.S. at 689); Michael v. Louisiana, 350 U.S. 91, 101 (1955). Every effort must be made to eliminate the distorting effects of hindsight. *See* Bell v. Cone, 545 U.S. 685, 698 (2002).

[1] "Even under a de novo review, the standard for judging counsel's representation is a most deferential one." Harrington v. Richter, 131 S. Ct. 770, 788 (2011).

This Court "will not second-guess the strategic or tactical decisions made at trial by defense counsel."[2] Mazza, 67 M.J. at 475. Where an appellant "attacks the trial strategy or tactics of the defense counsel, the appellant must show specific defects in counsel's performance that were 'unreasonable under prevailing professional norms.'" Id. (quoting United States v. Perez, 64 M.J. 239, 243 (C.A.A.F. 2006)). As the Supreme Court has rightly noted, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 695 (quoting Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev. 299, 343 (1983)).

Interpreting Strickland, this Court has adopted a three-part analysis to review claims of ineffective assistance of counsel:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions" in the defense of the case?
>
> 2. If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers?" and

[2] *But see, e.g.*, Lyons v. McCotter, 770 F.2d 529, 534-35 (5th Cir. 1985)(Strickland does not require deference when there is no conceivable strategic purpose that would explain counsel's conduct); Moore v. Johnson, 194 F.3d 586, 611 (5th Cir. 1999)("Counsel's decision to exclude [exculpatory evidence], which produced no conceivable benefit to the defense and prejudiced [appellant] by precluding reliance upon a plausible alternative defense theory that was supported by other evidence in the record, was professionally unreasonable.").

> 3. If a defense counsel was ineffective, is there a "reasonable probability that, absent the errors" there would have been a different result?

Gilley, 56 M.J. at 124 (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)). It is Appellant's burden to establish all three prongs in order to obtain relief. *See, e.g.*, United States v. Rose, 71 M.J. 138, 140-41 (C.A.A.F. 2012)(requiring appellant to show deficient performance by counsel and that the deficient performance prejudiced the defense); United States v. Jameson, 65 M.J. 160, 163 (C.A.A.F. 2007) (the burden rests on the accused to demonstrate a constitutional violation).

Applying both Strickland and Polk to the case *sub judice,* it is plain that Appellant's trial defense counsel were not ineffective by deciding not to introduce the two SANE reports pertaining to the victim, BH.

1. There is a reasonable explanation for trial defense counsel's actions in this case.

Appellant's ineffective assistance of counsel claim fails to meet the first prong under Polk. Although it is indeed factually correct that trial defense counsel decided not to seek introduction of the two SANE reports into evidence at trial, nor did they elect to call the individuals who conducted the

examinations,[3] there were reasonable tactical justifications for defense counsel's decision to forgo admission of this evidence.

Appellant faults his trial defense counsel for failing to move into evidence examinations conducted of the victim, BH, in 2007 and 2010, each of which revealed an absence of physical damage to BH's hymen. (App. Br. at 5.) According to Appellant, the absence of evidence of such physical damage would have contradicted the prosecution's charges and would have supported the defense theory that Appellant was being framed by CD, Appellant's ex-wife and BH's mother. (App. Br. at 9.) With this evidence, Appellant argues, the court members would have been significantly less likely to find him guilty of the charged sexual assaults upon BH. (App. Br. at 8.)

Unfortunately for Appellant, this view is merely wishful thinking. In his first affidavit provided to AFCCA, Appellant's civilian defense counsel, GM, explained why, after thoughtfully considering whether to pursue the SANE reports, he made a tactical decision not to move them into evidence. (JA at 358-60.) First, GM notes that, in approaching this matter, he consulted with a defense expert in the field of SANE examinations. (JA at 358.) The expert, Ms. Cindy Teller, clinically confirmed GM's anecdotal experiences from over thirty years of litigating sexual assault

[3] Appellant himself also concurred with this tactical decision: Appellant "advised me that he fully understood this issue and my recommendation not to present this evidence, and he concurred fully with this tactical decision." (JA at 359.) *See* United States v. Morgan, 37 M.J. 407, 410 (C.M.A. 1993).

cases; namely, that the mere absence of evidence in a SANE report of physical injury to the victim's genitalia does not rule out sexual assault. (JA at 358-59.) In fact, the SANE reports themselves state that "[t]he lack of abnormal findings does not rule out the occurrence of sexual assault." (JA at 338.) Given this universally accepted and understood fact, both GM and Capt BC, Appellant's assigned military defense counsel, saw little benefit to pushing for the introduction of the SANE reports. (JA at 353-357.)

Notably, by not admitting these reports, GM was able to cross-examine the prosecution's DNA expert concerning the condition of BH's underwear.[4] Mr. Fisher, the prosecution's DNA expert, testified on direct examination that he examined "items [from] a sexual assault evidence collection kit from" BH. (JA at 239.) Because Mr. Fisher was not involved with the collection of BH's underwear during the SANE examination, on cross-examination GM was able to exploit Mr. Fisher's inability to rule out contamination of the underwear:

> Q: Now, can you tell whether the pair of underwear in question had been washed before they were examined?

[4] "It was my opinion the S.A.N.E. report did not help out defense or further our overall strategy; specifically since underwear collected from the victim during one of the S.A.N.E. exams contained [Appellant's] semen." (JA at 354.) Mr. Fisher's direct examination: "The only weak positive I got [for semen], or the only positive I got was with the immunological test. So, because of that, I couldn't say that semen was identified. But it does give me an indicator that there might be semen there, so that's why I went forward with the next step, which is DNA testing." (R. at 762.)

A: Not all the time. But if there is like something crusty on the outside, it generally determines that it's not been washed.

...

Q: But you don't have any knowledge that this pair of underwear was worn at all, do you?

A: No. That's why we compare the victim and the subject's DNA to that um, sample.

Q: So, in actuality, since you have no knowledge as to what the source of this evidence is, you cannot testify that the particular pair of underwear in question were actually even worn by [BH] at all; correct?

A: Well, it was submitted to me as being [BH's] underwear.

...

Q: All right. But you can't testify that it was worn at the time of the alleged incident; correct?

A: Correct.

Q: Okay. You cannot testify that somebody did not manipulate this pair of underwear and co-mingled it with other items of known source of DNA from the accused; correct?

A: Correct.

(JA at 245.) Had the SANE reports been admitted, the prosecution could easily rehabilitate Mr. Fisher in rebuttal by pointing out the 2007 SANE report, which specifically stated that BH's "[u]nderpants [were] collected, sealed, [and] placed in PERK kit." (JA at 336; *see also* Photo of BH's Underwear, Pros. Ex. 10.)

In addition to the initial tactical decision not to admit the reports, a great boon befell the defense team when the prosecution decided not to introduce the reports. With no medical evidence from BH brought by the government bearing on the charged assaults, trial defense counsel had an affirmative tactical reason not to pursue introduction of the evidence, as its absence allowed him to argue to the members that there was no medical evidence because there had been no assault. (JA at 359.) GM followed this precise strategy, arguing vehemently during closing argument that the government had failed to present any medical evidence during its case-in-chief:

> Where's the medical evidence in this case? This child was violently raped, sodomized by this man. He put his penis into her butt, he put his penis into her vagina on multiple occasions. We have one incident that happened apparently hours before she was examined. Government, where is your medical evidence?
>
> ...
>
> There is not one single piece of medical evidence in this case. There's nothing to support this contention. There is nothing to support that this man put his penis into her vagina or her butt, nothing.

(JA at 279.)

Far from being constitutionally defective representation, the well-contemplated strategy reflected a wise use of the "cards" dealt to Appellant's defense team by the prosecution. Ironically,

had the SANE reports been admitted, as Appellant in hindsight wishes they had been, the prosecution would surely have taken the opportunity to clarify, on cross-examination of the SANE nurses (who would have to be called, at least, to provide foundation for the exhibits),[5] that the absence of physical injury did not negate the possibility of a sexual assault. As GM pointed out, this would have significantly hampered the defense's options during closing argument. (JA at 359.) And had the prosecution called its own expert to rebut the SANE reports, this would have limited the defense's options even more.

2. The level of advocacy did not fall measurably below the performance ordinarily expected of fallible lawyers.

Trial defense counsel's advocacy did not "fall measurably below the performance of ordinarily expected of fallible lawyers." Polk, 32 M.J. at 153 (quoting United States v. DiCupe, 21 M.J. 440, 442 (C.M.A. 1986), *cert. denied*, 479 U.S. 828 (1986)). To the contrary, GM and Capt BC made a reasonable, and indeed, wise, assessment that the best course of action under the circumstances was to leave the SANE reports out of evidence and then to argue their absence to the members.

Appellant's allegations clearly fail to meet the first prong of the Strickland test, which require Appellant to demonstrate that his counsel's performance was "so deficient that

[5] The reports are arguably admissible under Mil. R. Evid. 803(4).

[they were] not functioning as counsel within the meaning of the Sixth Amendment." Strickland, 466 U.S. at 689. All that is needed to defeat Appellant's claim is evidence that counsel's performance was not constitutionally deficient. Appellant's allegations also fail Polk's second prong. Far from being constitutionally deficient, or "measurably below the performance ordinarily expected of fallible lawyers," counsel's performance regarding the SANE reports was well-reasoned and based on counsel's diligent pretrial inquiry into the medical realities. It was also based on his understanding of trial practice and the tactics needed to deliver the most powerful possible defense against the charges.

This is not a case where defense counsel failed to secure evidence or neglected to talk to a witness. *See, e.g.*, United States v. Edmond, 63 M.J. 343, 351 (C.A.A.F. 2006)(counsel ineffective when he failed to take "simple steps to secure the testimony of a witness that he had previously deemed relevant and necessary."); United States v. Gibson, 51 M.J. 198 (C.A.A.F. 1999)(defense counsel's failure to investigate information strongly suggesting that victim was not credible was deficient within the meaning of the first prong of Strickland). While Strickland calls for a *de novo* standard of review, this Court should be mindful that the failure of the defense to move the SANE reports into evidence reflected a deliberate tactic rather than a

negligent oversight.[6] Before its implementation, Appellant was apprised of this tactic and fully concurred in it. (JA at 359.) Having deliberately chosen not to seek introduction of the SANE reports at trial, Appellant should not now be allowed to circumvent his own trial tactic in the guise of an IAC claim. Rather, this Court should "apply the Strickland standard with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve." Harrington, 131 S. Ct. at 788.

Appellant argues that both reports were "undeniably exculpatory as [they] contained medical evidence that the alleged sexual assaults did not occur." (App. Br. at 8.) While these reports may have been technically helpful in theory, they are certainly not unambiguous evidence of innocence, especially given, as stated *infra*, the reports themselves state that the "lack of abnormal findings does not rule out the occurrence of sexual assault." (JA at 338.) As the United States Court of Appeals for the Second Circuit recently noted in Jackson v. Conway, 763 F.3d 115, 154 (2d Cir. 2014), not admitting supposedly exculpatory scientific reports in the defense case-

[6] Appellant cites to the pre-Strickland, pre-Polk decision in United States v. Rivas, 3 M.J. 282 (C.M.A. 1977) to support the proposition that "unreasonable 'tactical' decisions will not defeat a claim of ineffective assistance of counsel." Although not expressly overruled, the Court in Rivas stated that no "hard and fast rule can be promulgated to test the sufficiency of the discharge of counsel's responsibilities." 3 M.J. at 287. Because both Strickland and Polk subsequently provided "hard and fast" rules concerning ineffective assistance of counsel, the United States asserts that Rivas is in no way helpful to this Court or Appellant.

in-chief can "allow[] defense counsel to 'take advantage of the negative reports even though [they] did not introduce the reports themselves.'"

In Davis v. United States, 865 F.2d 164 (8th Cir. 1988), the United States Court of Appeals for the Eighth Circuit contemplated an ineffective assistance of counsel claim where defense counsel failed to present evidence that the sexual assault victim in that case had gonorrhea, but did not pass the disease to the appellant. Finding no ineffective assistance of counsel, the Court concluded that there was "no guarantee that the jury would have accepted [the expert's] figures [on transmission], and it is quite possible that his testimony could have been successfully impeached." Id. at 167; *see also* Zannino v. United States, 871 F. Supp. 79, 82 (D. Mass. 1994)("Numerous factors may have contributed to the decision not to introduce the" exculpatory evidence); Bracknell v. Price, 223 Fed. Appx. 929, 933 (11th Cir. 2007)(attached)("[E]ven if the medical report was available, and assuming its contents are [exculpatory], the report does not necessarily contradict the victim's testimony."). Here, there would be no guarantee the members would have taken the report at face value given the fact that the prosecution certainly would have impeached the conclusion that the reports negated BH's testimony regarding the sexual assaults. In addition, the reports do not necessarily

contradict BH's testimony, since it is certainly likely the sexual assaults did not cause any injuries to BH.

Typically, in federal courts of appeal, the failure to obtain or admit exculpatory evidence by defense counsel is held to be ineffective assistance only when counsel confesses that the failure to introduce the evidence was the result of an oversight or misapprehension, not a strategic decision. *See, e.g.*, Harris v. Cotton, 365 F.3d 552, 555 (7th Cir. 2004)(failure to introduce toxicology report showing victim was under the influence of cocaine and alcohol at the time of the incident was held ineffective assistance of counsel where defense strategy was self-defense); Dorsey v. Kelly, 1997 U.S. Dist. LEXIS 10205 (S.D.N.Y. July 16, 1997)(attached), *aff'd sub nom.*, Dorsey v. People, 164 F.3d 617 (2d Cir. 1998)(failure to introduce medical report confirming that semen stain was consistent with bodily fluids of complainant but not those of petitioner constituted ineffective assistance of counsel in a sodomy prosecution). A lawyer's decision to call or not to call a witness is a strategic opinion that is generally not subject to review. Valenzula v. United States, 261 F.3d 694, 699-700 (7th Cir. 2001); United States v. Balzano, 916 F.2d 1273, 1294 (7th Cir. 1990); McKibbins v. United States, 2013 U.S. Dist. LEXIS 145702 (N.D. Ill. Oct 3, 2013)(attached); *but see* Sullivan v. Fairman, 819 F.2d 1382, 1390 (7th Cir. 1987)(an attorney who

fails to interview a readily available witness whose testimony may potentially aid the defense should not be allowed to defend his omission simply by raising the shield of trial strategy).

Appellant argues that "it is nonsensical for GM to claim that it is more persuasive to argue that the government did not produce evidence of trauma than it is to definitively produce independent evidence that no trauma actually existed. Actual evidence trumps mere argument, absent compelling tactical considerations that were not present in Appellant's case." (App. Br. at 10.)(emphasis in original.) While, superficially, this argument appears to have merit, upon closer scrutiny, it does not hold true. For one, as stated *infra*, had the defense admitted the reports (as opposed merely arguing their absence), the prosecution would have been allowed to affirmatively rebut the reports either with the language in the reports themselves, by cross-examination of the individuals who conducted the reports during the defense case-in-chief, or by calling its own expert witness to refute the findings in rebuttal. Additionally, while it is true that mere argument can be rebutted by argument, evidence can be more effectively rebutted by contrary evidence. That is, while the prosecution can and did argue the lack of medical evidence does not negate a sexual assault, this argument would have been an order of magnitude

more powerful had the government been able to impeach the reports during cross-examination or during its rebuttal case.

GM's trial strategy was to point out the lack of any corroborating evidence, not just the lack of medical evidence.[7] (JA at 359.) The prosecution's failure to admit the reports, therefore, allowed the defense to argue that the government's proof (other than the DNA evidence), consisted only of witness testimony. Admitting the reports during the defense case-in-chief could have drawn attention away from that theory, and could have led to a "battle of the experts" over whether the lack of trauma rules out a sexual assault. Given that it is the prosecution's burden to prove the allegations beyond a reasonable doubt, the defense was wise to argue the lack of any medical evidence (which could not be rebutted with evidence), rather than admitting the reports and exposing them to impeachment. Although defense counsel on appeal certainly disagrees with GM and Capt BC's strategy at trial, and even if this Court disagrees with that strategy, that disagreement does not in any way mandate reversal: "[A]n appellate court must not judge in hindsight but must, rather, place itself in the shoes of

[7] Because the members knew that BH had undergone two SANE examinations (*see, e.g.*, JA at 239), the only conclusion that could be drawn from the prosecution's failure to admit those reports was that the reports both indicated no evidence of a sexual assault. Arguing the absence of forensic or medical evidence can be highly persuasive. *See* Julie A. Singer, Monica K. Miller, and Meera Adya, The Impact of DNA and Other Technology on the Criminal Justice System: Improvements and Complications, 17 Alb. L.J. Sci. & Tech. 87 (2007)(discussing the so-called "CSI effect").

defense counsel at the point of counsel's disputed action and with the information then available to counsel." Strickland, 466 U.S. at 687. This Court's analysis in Mazza is equally true in this case:

> It has been said that hard cases make bad law. It may be said with equal truth that hard cases may make otherwise questionable trial tactics reasonable. The CDC in this case had a difficult assignment: to defend an accused whose [step] daughter testified to repeated instances of abuse performed upon her, and whose wife [corroborated that] abuse. Attacking the credibility of this testimony and suggesting its fabrication was one of the few options the CDC had. While a different defense counsel might have chosen different tactical steps, the tactics used were part of a trial strategy that Appellant failed to show was unreasonable under the circumstances and prevailing professional norms.

Mazza, 67 M.J. at 476. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Datavs, 71 M.J. at 424 (quoting Strickland, 466 U.S. at 689). Appellant cannot meet that "very high hurdle" merely because, in hindsight, he disagrees with his counsel's strategy--a strategy, which, by the way, resulted in his acquittal of two forcible sodomy specifications. *See* Saintaude, 51 M.J. at 179.

GM and Capt BC's strategy at trial did not fall measurably fellow the performance ordinarily expected of fallible lawyers. Although Appellant disagrees with his trial team's partially-successful strategy,[8] mere disagreement does not constitute ineffective assistance of counsel. Appellant's trial defense counsel were absolutely not constitutionally deficient and, therefore, Appellant is entitled to no relief.

3. Appellant has failed to demonstrate prejudice.

There is clearly no reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Additionally, "there is no reasonable probability that, absent the [alleged] errors, the fact-finder would have had a reasonable doubt respecting [Appellant's] guilt." Polk, 32 M.J. at 153.

On the law and facts presented, there is simply no reason to believe that, had his defense team moved the two SANE reports into evidence, the outcome of the trial would have been any more favorable to Appellant. Indeed, quite the opposite is likely. As noted *infra*, and as observed by GM and Capt BC, introduction of the SANE reports would have necessitated the testimony of the SANE nurses as defense witnesses. Had these nurses been called to testify for the defense, it is overwhelmingly likely that

[8] *See, e.g.*, United States v. Green, 68 M.J. 360, 362 (C.A.A.F. 2010)(finding no prejudice where appellant's attorney was "successful in obtaining his acquittal of seven of the thirteen specifications of which he was charged.").

trial counsel would have seen the direction in which the case was going and would have elicited testimony on cross-examination to the effect that the absence of physical damage to BH's hymen did not negate a sexual assault (it certainly does not negate the mere touching of BH's genitalia, Charge I, Specification 2).[9] Such testimony would have thoroughly deflated what turned out to be one of the defense's most powerful points in closing argument: That the government had failed to introduce any medical evidence because it lacked a solid case.

Ultimately, Appellant was convicted of all charged offenses (except the charged sodomy under Article 125, UCMJ) because the evidence of his guilt was overwhelming. Appellant's suggestion that his counsel's trial tactics with respect to the SANE reports somehow invited his convictions is nothing more than wishful thinking and an overstatement of the record. There is simply no legal or factual basis to believe his counsel's performance did anything but toughen the government's road toward the convictions it earned in this case.

The prosecution's case against Appellant was strong. In addition to the eye witnesses to Appellant's sexual abuse, including BH, the prosecution admitted DNA evidence located on the inside crotch of BH's underwear, which strongly corroborated

[9] Whether the 2007 SANE report should have been admitted has little prejudicial impact on the verdict whatsoever considering the remaining Charge and Specifications allege that the sexual acts occurred between on or about 1 January 2009 and on or about 20 April 2010. (JA at 23.)

BH's version of the events. (JA at 83.) Despite GM's best efforts to attack the DNA evidence, he was ultimately unable to do so. Even if the defense had admitted the reports in its case-in-chief, the defense's closing argument would not have been any stronger since the defense already argued that there existed no medical evidence indicating abuse:

> Government, where's the medical evidence? Where do we have trauma to her vagina? Where do we have trauma to her anus from an examination that took place a couple hours after the fact? Where is it, government?

(JA at 286-87.)

Appellant argues that the sexual assaults were supposedly accomplished using "significant force," which, he argues, should have left substantial injuries. (App. Br. at 12.) BH testified, however, that the rapes that occurred between 1 January 2009 and 20 April 2010 were accomplished with force, but not necessarily with violence:

> TC: Now, do you remember a time when you're [sic] Aunt [TD] stayed with you?
>
> BH: Yes.
>
> TC: Okay. Do you remember where you were living at the time?
>
> BH: I was living in Alexandria.
>
> TC: Okay. Now what did you experience when you're [sic] Aunt [TD] was living with you with respect to Sergeant McIntosh?

> BH: Um, I experienced the touching and the um, him putting his penis into my private part.[10]

(JA at 80.) In addition to this testimony, trial counsel discussed the method of Appellant's abuse, as well as the frequency of the abuse BH sustained, starting in 2006, when BH lived in Alabama with Appellant:

> TC: Okay. What would he touch you with? When you say he touched you in your private places, what did he touch you with?
>
> BH: Hands and his private part.
>
> TC: Okay. When you say his private part can you be more specific by chance?
>
> . . .
>
> BH: His front.
>
> TC: His front?
>
> BH: Yes.
>
> TC: Okay. Now you're 14 years old, do you know the terms penis and vagina?
>
> BH: Yes.
>
> TC: When you say his front are you referring to his penis?
>
> BH: Yes.
>
> TC: Okay. When he would take his penis and he would touch you in your private parts where exactly on your body would that be?
>
> BH: My vagina and my butt.

[10] BH refers to her vagina as her "privates" in previous testimony: "Um, he would touch me in pri – in my private places and my butt and he would have sex with me." (JA at 68-69.)

TC: Okay, now when he touched you did his penis actually go into your vagina and your butt?

BH: Yes.

TC: Okay. And when he touched you with his hands did his hands ever go inside of your vagina and your butt?

BH: No.

TC: Okay, what did he do with his hands?

BH: Just touched my vagina and butt.

. . .

TC: Now was there ever a time in – when you are in Alabama did this happen more than one time?

BH: Yes.

. . .

TC: Okay. Did he ever say or do anything that made you not want to tell?

BH: Yes.

TC: What did he do?

BH: He threatened me.

TC: What was that threat?

BH: He said if I ever told anybody he would kill me and my family.

(JA at 69-71.)

Appellant also argues prejudice because "no injury was discovered during an examination that occurred less than 12 hours after an alleged assault." (App. Br. at 14.) Yet, the

only charged offense relating to the 2007 SANE report[11] was the sodomy charge and specifications, of which Appellant was acquitted. (JA at 327.)

As a final resort, Appellant argues that trial counsel's "rebuttal argument to the members regarding medical evidence was prejudicial" and that "trial counsel not only argued facts not in evidence, she knowingly argued facts not in existence." (App. Br. at 18-19.) Unfortunately for Appellant, he cannot bootstrap a prosecutorial misconduct/improper argument issue onto the granted issue in this case. Appellant's argument falls well outside of the granted issue and should, thus, be discarded by this Court.[12]

Throughout his representation, Appellant was kept informed of all proposed defense tactics and agreed with his defense counsel on all proposed decisions, including the plan not to seek introduction of the two SANE reports. (JA at 359.) This Honorable Court should thus not permit Appellant to second-guess the strategic or tactical decisions of Appellant's trial defense

[11] Although the DNA evidence was collected from BH's underwear in 2007, it could nonetheless be used by the prosecution to prove Charge I, Specifications 1 and 2. (JA at 83.) Also, although the presence of semen could not be confirmed, it was indicated during a test conducted by Mr. Fisher, and its presence was certainly not ruled out: "There was an immunological indication of semen found on the thigh/external genitalia swabs, as well as the inside crotch of the underwear of" BH. (JA at 240-41.)

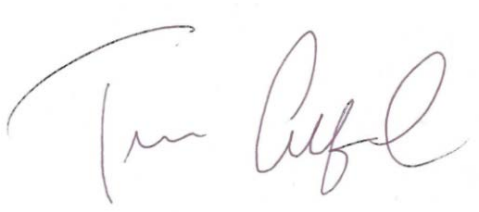
[12] Even if this Court considers Appellant's argument, however, trial counsel argued that "medical evidence" existed because trial counsel asserted that the DNA evidence constituted "medical evidence." (JA at 320-21.)

team, especially when Appellant himself explicitly concurred in them.

Appellant has not demonstrated that the admission of the SANE reports would have substantially undermined the DNA evidence, or the testimony of the eye witnesses. Appellant's conviction hinged on whether the members found BH's testimony credible in light of the other corroborating testimony, in addition to the evidence of Appellant's semen and DNA on BH's underwear. There is, thus, no "reasonable probability" that the panel would have arrived at a different outcome. Therefore, this Court should hold that defense counsel's decision to forgo using that evidence is not "sufficient to undermine confidence in the outcome" of Appellant's court-martial.

CONCLUSION

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 19 March 2015.

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Appendix

Analysis
As of: Mar 19, 2015

JOHN STEPHEN BRACKNELL, Petitioner-Appellant, versus CHERYL PRICE, Warden, TROY KING, Attorney General of the State of Alabama, Respondents-Appellees.

No. 06-15307 Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

223 Fed. Appx. 929*; *2007 U.S. App. LEXIS 10135

May 2, 2007, Decided
May 2, 2007, Filed

NOTICE: [**1] NOT FOR PUBLICATION

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Alabama. D. C. Docket No. 04-00136-CV-3-AR-NW.
Bracknell v. Price, 135 Fed. Appx. 284, 2005 U.S. App. LEXIS 11279 (11th Cir. Ala., 2005)

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner prisoner appealed from the United States District Court for the Northern District of Alabama, challenging the denial of his *28 U.S.C.S. § 2254* petition for habeas relief, which challenged his convictions for multiple counts of sexual abuse and sodomy of his step-daughter.

OVERVIEW: The prisoner alleged ineffective assistance of trial counsel for, inter alia, failing to present (1) a medical report stating that the victim's hymenal ring was normal, and (2) school records indicating that the victim was in school on October 25, 1995, one of the days when she alleged he molested her. The prisoner could not satisfy the second prong of the Strickland test because he could not demonstrate prejudice. First, the medical report was never submitted to the state court or the district court. Second, even if the medical report was available, and assuming its contents were as the prisoner alleged, the report did not necessarily contradict the victim's testimony. Furthermore, once the prisoner admitted his guilt to trial counsel, counsel was bound by ethical rules not to mislead the court or provide perjured testimony. The prisoner also failed to show any prejudice with respect to the school records. Counsel submitted testimony from numerous witnesses to establish that the prisoner had an alibi for many of the days on which the victim alleged to have been abused, including October 25, 1995. The school records, therefore, would have been cumulative.

OUTCOME: The district court's decision was affirmed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review > Clear Error Review
Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review > De Novo Review
[HN1] In reviewing a district court's denial of habeas relief, a court of appeals review factual findings for clear error and questions of law de novo.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review > De Novo Review
Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > Ineffective Assistance
[HN2] An ineffective assistance of counsel claim is a mixed question of law and fact that a court of appeals reviews de novo.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > Ineffective Assistance
[HN3] The United States Supreme Court's Strickland decision is the "controlling legal authority" to be applied to ineffective assistance of counsel claims. Under this standard, a petitioner must show both (1) deficient performance of counsel and (2) prejudicial impact stemming from counsel's deficient performance. Under the first prong, the petitioner must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the *Sixth Amendment*. To establish prejudice under the second prong, the petitioner must show that the outcome would have been different. The petitioner must meet both prongs, and, where the petitioner cannot show prejudice, this court need not address whether counsel's performance was reasonable.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Factual Issues
[HN4] When a record reflects facts that support conflicting inferences, there is a presumption that a jury resolved those conflicts in favor of the prosecution and against a defendant.

COUNSEL: For John Stephen Bracknell, Appellant: Thomas Martele Goggans, Attorney at Law, MONTGOMERY, AL.

For Cheryl Price, BRENT, AL: Stephanie Jean Norris Morman, Office of the AL Attorney General, MONTGOMERY, AL.

For Troy King, Appellee: Stephanie Jean Norris Morman, Office of the AL Attorney General, MONTGOMERY, AL.

JUDGES: Before TJOFLAT, HULL and KRAVITCH, Circuit Judges.

OPINION

[*930] PER CURIAM:

I.

John Stephen Bracknell, an Alabama prisoner, appeals the district court's denial of his *28 U.S.C. § 2254* petition for habeas relief, which challenged his convictions for multiple counts of sexual abuse and sodomy of his step-daughter. [1] In his petition, Bracknell alleged ineffective assistance of trial counsel for, *inter alia*, failing to present (1) a medical report stating that the victim's hymenal ring was normal, and (2) school records indicating that the victim was in school on October 25, 1995, one of the days when she alleged he molested her. [2]

1 Bracknell filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-32, 110 Stat. 1214 (1996), and, therefore, the provisions of that act govern this appeal.

[**2]

2 Bracknell also alleged one other count of ineffective assistance of trial counsel and one count of ineffective assistance of appellate counsel. These claims are outside the scope of the certificate of appealability, and, therefore, are not discussed further.

II.

According to the record, Bracknell was charged with twenty-four counts of sexual abuse and sodomy of his step-daughter between 1995 and 1999. At the time the alleged molestation began, Bracknell's step-daughter was under the age of 12. At trial, the victim testified that Bracknell would come into the bathroom when she was bathing, look at her naked, touch her breasts and private parts, and wash her. He would make her lay on the bed while he touched her, and he would take her with him on errands and touch her while they were out. She also testified that Bracknell would touch her inappropriately with his hands, mouth, and private parts, would digitally penetrate her "a lot," perform oral sex on her, and make her perform [*931] oral sex on him. The victim stated that she was afraid of Bracknell and that, on at least one occasion, he struck [**3] her. In describing one particular incident of molestation, the victim testified that on October 25, 1995 she was home from school with a broken arm and Bracknell bathed her and molested her. She was positive about the date. She further testified that the molestation continued in June, July, September, and November 1998, and March and June 1999 until she told her step-sister.

Bracknell denied the allegations and testified that he had not been home on October 25, 1995, or on the dates of the alleged incidents in 1998 and 1999. Bracknell presented evidence from various employers and co-workers confirming that he had been at work on October 25, 1995. He also presented testimony and evidence that he had been out of town in June, July, September, and November 1998, and in June 1999, including telephone bills and shopping receipts.

The jury convicted Bracknell of six counts of sexual abuse and two counts of sodomy. He was sentenced to 10 years imprisonment on six of the counts and 25 years imprisonment on the remaining two counts, to run concurrently. His convictions were affirmed on direct appeal. *Bracknell v. State, 821 So. 2d 1032 (Ala. Crim. App. 2001)*. The state supreme [**4] court denied review.

Bracknell then filed a state post-conviction motion for relief under *Ala. R. Crim. P. ("Rule") 32*. This petition is identical to the instant *§ 2254* petition in the relevant aspects. Bracknell argued that counsel's performance was deficient because he failed to use all available evidence to contradict the victim's testimony, including a medical report that stated, "The hymenal ring appears normal and is not irregular," and school records to confirm that she was in school on October 25, 1995.

The state responded that the claims were defaulted because they were not raised on direct appeal. The state also noted that the medical examination from which Bracknell quoted was not part of the record and had not been submitted to the court. With regard to the school records, the state argued that Bracknell's counsel made a strategic choice not to submit the school records, which would have been cumulative evidence. The state also argued that even if counsel erred by failing to present the medical examination or school records, there was no prejudice, as the outcome would have been the same given the overwhelming weight of the evidence. Finally, attached to the response [**5] was an affidavit from Bracknell's trial counsel in which counsel indicated that Bracknell had admitted his guilt.

The state court summarily denied relief, finding that the claims should have been raised on direct appeal. The state appeals court then affirmed, although on other procedural grounds, concluding that Bracknell failed to include in his petition any facts tending to indicate how his counsel's acts or omissions prejudiced his defense. *Bracknell v. State, 883 So. 2d 724, 726-27 (Ala. Crim. App. 2003)*. The state supreme court denied review. *Ex parte Bracknell, 883 So. 2d 728 (Ala. 2003)*. Bracknell then filed the instant *§ 2254* petition.

The federal magistrate judge reviewing Bracknell's *§ 2254* petition recommended dismissing the petition, finding that the claims were not exhausted because they could have been raised on direct appeal but were not. The magistrate judge further found that on the merits there was no showing of prejudice given the overwhelming evidence of guilt. The district court adopted the recommendation and dismissed the petition. On appeal, this court [*932] vacated and remanded, concluding that the district court could not invoke [**6] the state's procedural default rule because the last state court rendering judgment had declined to follow that rule. This court then instructed the district court to address the merits of the ineffective-assistance-of-trial-counsel claims. *Bracknell v. Price, 135 Fed. Appx. 284 (11th Cir. 2005)*.

On remand, the magistrate judge issued a second recommendation denying relief. First, the magistrate judge noted that the medical records were not submitted to the court, there was no evidence the report existed, and

it was reasonable for counsel to believe that the report would not be helpful. According to the magistrate judge, the report was consistent with the victim's testimony and would not have undermined her credibility or changed the outcome of the case. Second, with regard to the school records, the magistrate judge found that there was no prejudice because the evidence was cumulative. Finally, the magistrate judge noted that Bracknell had confessed his guilt to counsel, and counsel could not proffer evidence he knew to be false.

The district court adopted the magistrate judge's recommendation and denied the petition. The court then granted a certificate of appealability [**7] on the following issues:

> (1) Whether petitioner was deprived of effective assistance of counsel because trial counsel failed to present medical evidence from a physician who examined the victim and reported that "The hymenal ring appears normal and is not irregular," even though this evidence tended to contradict the victim's description of the sexual abuse she suffered.
>
> (2) Whether petitioner was deprived of effective assistance of counsel because trial counsel failed to present school records to contradict the victim's testimony that the petitioner made her stay home from school on or about October 25, 1995, and that he sexually abused her on that date.

III.

[HN1] In reviewing a district court's denial of habeas relief, we review factual findings for clear error and questions of law *de novo*. *Nyland v. Moore, 216 F.3d 1264, 1266 (11th Cir. 2000)*. [HN2] An ineffective assistance of counsel claim is a mixed question of law and fact that we review *de novo*. *Dobbs v. Turpin, 142 F.3d 1383, 1386 (11th Cir. 1998)*.

IV.

It is well established that [HN3] the Supreme Court's decision in *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)* [**8] is the "'controlling legal authority' to be applied to ineffective assistance of counsel claims." *Marquard v. Sec'y for the Dep't of Corr., 429 F.3d 1278, 1304 (11th Cir. 2005)*, *cert. denied, 126 S. Ct. 2356, 165 L. Ed. 2d 283 (2006)*. Under this standard, the petitioner must show both (1) deficient performance of counsel and (2) prejudicial impact stemming from counsel's deficient performance. *Strickland, 466 U.S. at 687*. Under the first prong, the petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." *Id.* To establish prejudice under the second prong, the petitioner must show that the outcome would have been different. *Strickland, 466 U.S. at 694*. The petitioner must meet both prongs, and, where the petitioner cannot show prejudice, this court need not address whether counsel's performance was reasonable. *Id. at 697*.

[*933] Here, Bracknell cannot satisfy the second prong of the *Strickland* test because he cannot demonstrate prejudice. First, the medical report was never submitted to the state court or the district [**9] court. Second, even if the medical report was available, and assuming its contents are as Bracknell alleges, the report does not necessarily contradict the victim's testimony. Furthermore, once Bracknell admitted his guilt to trial counsel, counsel was bound by ethical rules not to mislead the court or provide perjured testimony. *Schwab v. Crosby, 451 F.3d 1308, 1321 (11th Cir. 2006)*. Finally, [HN4] "[w]hen the record reflects facts that support conflicting inferences, there is a presumption that the jury resolved those conflicts in favor of the prosecution and against the defendant." *Johnson v. Alabama, 256 F.3d 1156, 1172 (11th Cir. 2001)*. Thus, Bracknell has not shown that he suffered prejudice because of the failure of his trial counsel to present the medical report.

Bracknell also fails to show any prejudice with respect to the school records. Counsel submitted testimony from numerous witnesses to establish that Bracknell had an alibi for many of the days on which the victim alleged to have been abused, including October 25, 1995. The school records, therefore, would have been cumulative. *See Hunter v. Sec'y for Dep't of Corr., 395 F.3d 1196, 1204 (11th Cir. 2005)* [**10] (concluding that there was no showing of prejudice from the failure to put forth additional cumulative evidence).

Accordingly, we **AFFIRM.**

Caution
As of: Mar 19, 2015

RONALD DORSEY, Petitioner, - against - WALTER KELLY, Superintendent, Attica Correctional Facility, Respondent.

92 Civ. 8943 (LLS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1997 U.S. Dist. LEXIS 10205

July 15, 1997, Decided
July 16, 1997, FILED

DISPOSITION: [*1] Petition granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner inmate filed a writ of habeas corpus claiming that at the trial where he was convicted by a jury of sodomizing a young boy, his counsel gave him ineffective assistance by not introducing into evidence reports of test results that strongly suggested that semen found on the boy's underwear came from the boy and not the inmate.

OVERVIEW: The inmate was convicted of four counts of sodomy and thereafter filed a habeas corpus petition, claiming that at trial, his counsel gave him ineffective assistance by not introducing into evidence reports of test results that strongly suggested that semen found on the victim's underwear came from the victim and not the inmate. The court granted the inmate's petition, holding that it was unreasonable for counsel not to introduce the reports because they would have provided a simple inference for the jury to draw that, because of the presence of an antigen in the semen stain that was in the bodily fluids of the victim but not in those of the inmate, the semen came from the victim and not the inmate. The court found that such evidence could have countered the prosecution's insinuations as to the location of the semen on the underwear and that the inmate ejaculated on the underwear without the victim's knowledge. The court concluded that counsel did not act reasonably or in furtherance of a sound strategy in not introducing the reports, and that the error undermined confidence in the jury's verdict that the charges against the inmate were proved beyond a reasonable doubt.

OUTCOME: The court granted the inmate's petition claiming his counsel gave him ineffective assistance and directed the superintendent to release the inmate from custody within a certain period unless the state declared its intention within that period to retry the inmate on the sodomy charges against him.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Sodomy > Elements
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
[HN1] Sodomy in the first degree requires proof that the defendant forced the victim to engage in "deviate sexual intercourse" (which includes contact between the defendant's penis and the victim's anus). *N.Y. Penal Law §§ 130.00, 130.50* (1997).

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Sodomy > Elements
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
[HN2] Sodomy in the second degree requires proof that a person 18 years or older engaged in deviate sexual intercourse with a person less than 14 years old. *N.Y. Penal Law § 130.45* (1997).

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Evidence > Inferences & Presumptions > General Overview
[HN3] In evaluating a petitioner's claim that his trial counsel gave him ineffective assistance, the issue is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. To meet that standard, the petitioner must show that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Evidence > Inferences & Presumptions > General Overview
Legal Ethics > Client Relations > Effective Representation
[HN4] Defense counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. The performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances, evaluated from counsel's perspective at the time. The court must indulge a strong presumption that the challenged action was reasonable and sound trial strategy, and a petitioner must overcome that presumption to prevail.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Evidence > Inferences & Presumptions > General Overview
Legal Ethics > Client Relations > Effective Representation
[HN5] A single, serious error may support a claim of ineffective assistance of counsel. In determining whether an error was sufficiently serious to constitute ineffective assistance, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Evidence > Inferences & Presumptions > General Overview
[HN6] To show that he was prejudiced by his counsel's error, a petitioner must show that there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

COUNSEL: RONALD DORSEY, Pro se, Brooklyn, NY.

JUDGES: LOUIS L. STANTON, U.S.D.J.

OPINION BY: LOUIS L. STANTON

OPINION

OPINION AND ORDER

Ronald Dorsey has filed a *habeas corpus* petition, claiming that at the 1988 trial in New York State Supreme Court where he was convicted by a jury of sodomizing a young boy, his counsel gave him ineffective assistance by not introducing into evidence reports of test results that strongly suggested that the semen found on the boy's underwear came from the boy and not from him. Because that claim is supported by the

trial record and the evidence submitted in support of the petition, the petition is granted.

BACKGROUND

The following background summary omits this case's procedural history in the state and federal courts. That history is set forth in *Dorsey v. Kelly, 112 F.3d 50, 51-52 (2d Cir. 1997)*, which reversed this court's order determining that petitioner had not exhausted his ineffective assistance claim, and remanded the case to this court for a determination of the merits of that claim. *112 F.3d at 54*; *see also Dorsey v. Irvin, 56 F.3d 425 (2d Cir. 1995)*.

Petitioner was convicted of two counts of [HN1] sodomy in the first [*2] degree, which requires proof that the defendant forced the victim to engage in "deviate sexual intercourse" (which includes contact between the defendant's penis and the victim's anus), *see N.Y. Penal Law §§ 130.00, 130.50* (1997), and of two counts of [HN2] sodomy in the second degree, which requires proof that a person eighteen years or older engaged in deviate sexual intercourse with a person less than fourteen years old. *See N.Y. Penal Law § 130.45* (1997).

A. Trial testimony

At trial, the victim ("complainant"), a thirteen-year-old learning-disabled boy, testified that petitioner forced him to submit to deviate sexual intercourse on two consecutive days in the summer of 1987. He testified that on the morning of July 31, 1987, he was chasing one of his friends, an eight-year-old boy, across a street in upper Manhattan when a car drove by with four people in it, including petitioner, who asked complainant if he wanted a job. When complainant said yes, petitioner gave him a card with the address "246 West 123rd Street" printed on it. Complainant went to the building at that address and met petitioner, who let him into the building and led him to an office occupied by [*3] several people, whom petitioner told to leave. Petitioner asked complainant a few questions, then told him to go to the corner of the office and pull down his shorts because he needed a "physical." (Tr. 145-46.) Petitioner came up behind complainant, put his hand on complainant's anus, and looked inside. Complainant then pulled up his shorts and, at petitioner's instruction, went to an upstairs room to sweep the floor. Later, petitioner came up to that room, shut the door, pulled complainant's shorts down and, grabbing complainant's waist on both sides, stuck his penis in complainant's anus, saying that if complainant would "keep this up" he would "pass all the tests." (Tr. 148.) Petitioner kept his penis inside complainant for about five minutes, then left when someone called for him. Complainant went out of the room and met the friend he had been chasing earlier. Petitioner took the two boys to breakfast at a restaurant, and then took them back to 246 West 123rd Street, where petitioner paid four dollars to complainant, who then left. That night, complainant did not tell his parents what had happened. (Tr. 135-67, 245.)

The next day, according to complainant, petitioner sodomized [*4] him again. That morning, complainant went back to the building at 123rd Street and met petitioner, who told him to mop the floor he had swept the day before. Complainant's young friend arrived, and petitioner took them to Brooklyn, where they raked leaves and moved a bed, and then brought them back to the building at 123rd Street. Petitioner told them to go downstairs to a basement room where there were tapes that they could have. Later, petitioner came down to that room and told complainant's friend to leave, which he did. Petitioner then told complainant to go into an adjoining room that had large yellow foam pads in it, and told him to lie down on a pad, saying, "Time for another test." (Tr. 184.) After complainant lay face down, petitioner pulled complainant's shorts down and put his penis in complainant's anus for about five minutes. Complainant testified that he did not feel petitioner ejaculate, nor had he felt any ejaculation the day before. (Tr. 172-89, 245.)

That night, according to complainant, he told his father and uncle about petitioner's conduct after they questioned him about it. The next morning, two police officers took him to the hospital, where two doctors examined [*5] him. The police officers took his underwear, which he had worn nonstop for the last three days. (Tr. 200-06.)

No other witnesses claimed to have seen the alleged acts of sodomy. Complainant's young friend testified that he and complainant had spent time with petitioner, but he did not testify that he saw any sodomy. (Tr. 75-120.) Complainant's mother testified that complainant was "cranky" on the night he told his father and uncle about the sodomy. (Tr. 258.) Several other witnesses testified about the chain of custody of the "vitullo kit" -- blood and saliva samples and throat and rectal swabs taken

from complainant at the hospital -- and of the blood and saliva samples taken from petitioner. The officer who arrested petitioner testified that petitioner said that he had just offered complainant a job and that the sodomy allegations were untrue. (Tr. 50.)

The rest of the prosecution's case focused on medical and scientific evidence. The two doctors who had examined complainant at the hospital both testified that they had examined complainant's anal opening and had found a slight, recent bruise there that could have been caused by sodomy by an adult male, or by numerous other causes. [*6] (Tr. 285-89, 294-95, 303-08.) One of the doctors observed that complainant had no lacerations or fissures in his rectum and that most patients who had been annually penetrated by an adult male would probably have had lacerations and fissures. (Tr. 307-08.)

The prosecution's final witness was Detective Robert Lewis from the police "serology" (*i.e.*, blood analysis) laboratory. Lewis had tested the vitullo kit, the samples taken from petitioner, and the complainant's underpants. (Tr. 316-25.) He testified that he had found no semen on the throat and rectal swabs taken from complainant. On the underpants, he found sperm on a stain in an area "near the penile section where the anus is" (Tr. 320-21), though he observed that semen, when it hits underwear, spreads out in the fabric like water through a paper towel. (Tr. 324-25.)

Petitioner's case consisted of his own testimony. He testified that he was a minister for the Community Christian Mission and managed some of that church's properties, including the building at 246 West 123rd Street, and had hired complainant to work for him. (Tr. 348-52.) He denied having sodomized complainant. (Tr. 360.)

B. Summations

In summation, [*7] petitioner's counsel argued that "the most important thing you're going to have to decide perhaps the only think [sic] you're going to have decide [sic] is whether [complainant] was telling the truth." (Tr. 488.) He indirectly suggested that the semen found on the underwear might be the complainant's, observing that Detective Lewis had not testified about whose semen it was and that the doctors had not testified about whether a boy of complainant's age could ejaculate. (Tr. 488-91.) While acknowledging that Lewis had found the semen on the rear portion of the underpants, he pointed out that Lewis also testified that semen can spread through underwear fabric. However, he shied away from explicitly urging the jury to conclude that the semen was not petitioner's but complainant's, and instead told the jury, "There's no evidence on that, and you can't speculate on that because there's no evidence." (Tr. 491.)

The prosecutor also focused on complainant's credibility and argued that complainant had no motive to lie. (Tr. 506-10.) He attacked petitioner's counsel's summation, claiming that petitioner's counsel had suggested that complainant had "lied by putting semen on his underwear" [*8] and that such a suggestion was "outrageous." (Tr. 515.) He speculated that since no semen was found in complainant's rectum but some was found on his underpants, it "probably came out of [petitioner's] penis at a point after he withdrew from the boy." (Tr. 518.) He argued that there had been contact between petitioner's penis and complainant's anus, and claimed, "The semen on the rear portion of his underwear, which at some point he had to pull up to get dressed again, corroborates that contact." (Tr. 519.)

C. The other serology reports

Petitioner submits reports of test results that his trial counsel had but did not introduce into evidence. Those reports were prepared by a police department chemist, Mary Veit, based on her tests on the blood and saliva samples taken from petitioner and complainant, on the part of the complainant's underpants that was stained with semen, and on a control area elsewhere on the underpants. Neither party called Veit to testify; she was on maternity leave at the time, and Lewis testified in her stead. Her reports showed that complainant had type A blood and secreted A and H antigenic substances ("antigens") in his bodily fluids (such as semen, [*9] blood, and sweat), and that petitioner had type O blood and secreted H antigens, but not A antigens, in his bodily fluids. Veit found no antigens in the control area of the underpants, but her test of the semen stain showed the presence of A and H antigens. (Petitioner's Br., Ex. A.) In other words, there was an antigen in the semen stain, the A antigen, that was in the bodily fluids of complainant but not in those of petitioner.

Lawrence Kobilinsky, a biology professor and forensic science consultant, states in a declaration submitted by petitioner that he has reviewed Veit's reports and that they show that the A antigen found on complainant's underpants

> could not have originated from Mr. Dorsey, but must have come from some other person whose physiological fluids contain the A antigenic character. The A and H substances on the underwear could have come from [complainant] exclusively. Furthermore, it is possible that the antigens found on the underwear are the result of a mixture of antigens originating from [complainant] and Mr. Dorsey (or some third person), but the testing done neither supports nor excludes this possibility.

(Petitioner's Br., Ex. B, P 5.)

[*10] Mary Veit (now Mary Quigg) states in an affidavit that she agrees with Kobilinsky's conclusions and, if called at trial, would have testified accordingly. (Respondent's Br., Ex. M, P 9.)

There is no evidence that petitioner's trial counsel was aware that those conclusions could be drawn from the reports. He swears that he has "no current recollection why I did not introduce the laboratory reports in that case into evidence in Mr. Dorsey's trial." (Petitioner's Br., Ex. C.) What he thought about the reports is suggested in notes taken by petitioner's appellate counsel when he spoke to petitioner's trial counsel. Those notes state that petitioner's trial counsel "said the People did do tests to see if they could establish that [petitioner] did or did not sodomize the boy. Tests were inconclusive. Might have been better if they were done earlier." (Petitioner's Br., Ex. D.) Petitioner's trial counsel also told appellate counsel that the reports showed "Blood type not evident on underwear." (*Id.*)

DISCUSSION

[HN3] In evaluating petitioner's claim that his trial counsel gave him ineffective assistance by not introducing Veit's reports into evidence, the issue is "whether counsel's [*11] conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984)*. To meet that standard, petitioner must show that his counsel's performance "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 688, 694, 104 S. Ct. at 2064, 2068*.

A. Counsel's performance

[HN4] Defense counsel "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id. at 688, 104 S. Ct. at 2065*. "The performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances," evaluated "from counsel's perspective at the time." *Id. at 688, 689, 104 S. Ct. at 2065*. The court must "indulge a strong presumption" that the challenged action was reasonable and sound trial strategy, and petitioner must overcome that presumption to prevail. *Id.*

Viewing the circumstances from petitioner's [*12] counsel's perspective at the time, it was unreasonable for him not to introduce the reports. They would have substantially helped petitioner's case. From the test results shown in those reports, it would have been an simple inference for the jury to draw (and an easy argument for petitioner's counsel to make) that the semen on the underpants came not from petitioner, who did not secrete one of the types of antigens found in the stain, but instead from complainant, who secreted both types of antigens found in the stain and had worn the underwear to bed for the three nights preceding his trip to the hospital.

Without the reports, it was difficult for petitioner's counsel to counter the prosecutor's insinuations that the semen on the underpants came from petitioner. By the time petitioner's counsel had to decide whether to introduce the reports, the prosecutor had already suggested to the jury that the semen was petitioner's by repeatedly emphasizing the location of the sperm on the underpants. In his opening statement, he observed that the semen stain had been found "on the rear portion of [complainant's] underwear." (Tr. 23.) His final witness, Detective Lewis, testified that the [*13] stain was located on the "bottom portion of the underpants, near the penile section where the anus is right in the crotch area." (Tr. 321.) That testimony clearly laid the foundation for the prosecutor to argue in summation that the semen came from petitioner, and not from complainant, whose semen presumably would have appeared on the front of the underpants. Even the trial judge expressly recognized that the prosecutor might argue that the semen was petitioner's. In denying petitioner's counsel's application

to exclude the underpants as irrelevant in light of complainant's testimony that petitioner had not ejaculated, the judge observed that the prosecutor could argue that petitioner had ejaculated onto the underpants without complainant's knowledge. (Tr. 275-76.) The reports would have provided petitioner's counsel with a solid evidentiary foundation for countering that argument.

Respondent contends that it was reasonable for petitioner's counsel not to introduce the reports because they were consistent with the prosecution's case. He points out that Kobilinsky and Veit agree that the semen found on the underpants could have been a mixture of semen from petitioner and some bodily [*14] fluid from complainant. Respondent suggests that the prosecutor could have explained that such a mixture might have resulted if the petitioner's semen made the stain and then mixed with complainant's sweat, which could have borne the A antigen that petitioner lacked.

That the prosecutor could have offered that explanation of the reports does not show that petitioner's counsel was reasonable in not introducing them. Without the report, the prosecutor was able to make the simple argument that the semen came from petitioner. With the reports in evidence, it would have been petitioner's counsel who had a simple argument to make: that the presence in the stain of an antigen that could not have come from petitioner but could have come from complainant showed that the semen in the stain was not petitioner's but complainant's. The prosecutor would then have been left with the argument that petitioner's semen had mixed with complainant's sweat, and would also have had to explain why antigens from complainant's sweat were found in the semen stain but not in the control area on the underpants, where Veit found no antigens at all. Because the reports thus would have given petitioner a straightforward [*15] and powerful argument and would have left the prosecutor with a more strained one, it would not have been reasonable for petitioner's counsel not to introduce the reports for the reason respondent asserts, that they were arguably consistent with the prosecution's argument that the semen came from petitioner.

Respondent next argues that introducing the reports into evidence would have deprived petitioner's counsel of an argument he made in summation -- that there was no evidence linking the semen to petitioner -- because the reports did not exclude the possibility that the semen was petitioner's. But the argument was still open, because even with the reports there *was* no evidence linking petitioner's semen to the stain. Nothing in the reports affirmatively showed that petitioner's semen was present on the underwear. Although the reports did not conclusively establish that petitioner's semen was not present on the underwear, they were not evidence that his semen was present.

Respondent argues that it was sound strategy for petitioner's counsel not to introduce the reports because doing so would have distracted the jury from the main issue in the case. According to respondent, even [*16] if the reports suggested that the semen on the underpants did not come from petitioner, that suggestion mainly called into question the identity of the semen's depositor. Respondent claims that petitioner's counsel could reasonably have concluded that because the main issue in the case was not the identity of the semen-depositor but the credibility of complainant and petitioner, the reports would have distracted the jury's attention from the credibility issue.

Such a conclusion would not have been reasonable. It was obvious that the semen stain evidence bore directly on complainant's credibility. Since it was a facile inference (without the reports in evidence) that the semen was petitioner's, the semen stain corroborated complainant's testimony that the sodomy occurred. Petitioner's counsel could have used the reports to discredit that inference, and doing so would have made the stain a weaker corroboration (if one at all) of complainant's credibility.

Respondent next contends that there is no reason to believe that the decision not to introduce the reports was a product of anything other than reasonable strategic considerations. However, the record does not reveal a strategy guiding [*17] that decision. Rather, what petitioner's trial counsel told petitioner's appellate counsel about those reports strongly suggests that trial counsel did not recognize the exculpatory inference that the reports supported. His statement that the reports were "inconclusive" is accurate to the extent that, as explained above, the reports do not conclusively establish that petitioner's semen was not present, but the vagueness of that statement suggests that he did not recognize the ways that the reports strongly supported the argument that the semen was not petitioner's. That he did not fully

comprehend the reports is further suggested by his statement that "blood type" was "not evident" on the underwear, which is odd in light of the reports' clear findings that A and H antigens were found in the semen and that petitioner, unlike complainant, did not secrete the A antigen.

Moreover, the record suggests that petitioner's counsel's actual strategy regarding the semen stain was one in which the reports would have been of substantial use. It appears from his summation that his strategy was to suggest, obliquely, that the semen came from complainant, not petitioner. He observed that the doctors [*18] did not address whether a boy of complainant's age could ejaculate, and that the semen stain could have spread through the underwear -- the latter comment implying that even if complainant ejaculated onto the front of his underpants, the stain could have spread to the bottom portion where the semen was found. However, petitioner's counsel refrained from directly claiming that the semen came from complainant because, as he told the jury, he believed that there was no evidence to support that claim. His strategy was thus to make a claim for which he thought he had no support, but which the reports' findings directly supported.

Respondent points out that counsel's conduct was competent throughout the rest of the trial. However, [HN5] "a single, serious error may support a claim of ineffective assistance of counsel." *Kimmelman v. Morrison, 477 U.S. 365, 383, 106 S. Ct. 2574, 2587, 91 L. Ed. 2d 305 (1986)*. In determining whether an error was sufficiently serious to constitute ineffective assistance, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, [*19] *466 U.S. at 690, 104 S. Ct. at 2066*.

Petitioner's counsel's error was serious enough to support his ineffective assistance claim, because the prosecutor's argument that the semen on the underpants came from petitioner was not subjected to the adversarial testing that it would have been if petitioner's counsel had countered it with the reports' findings. Not introducing the reports was unreasonable under professional norms, resulting as it apparently did from petitioner's counsel's failure to apprehend the exculpatory inference that could be drawn from the reports. *Cf. Kimmelman, 477 U.S. at 385-87, 106 S. Ct. at 2588-89* (where defense counsel filed a suppression motion late due to a mistaken understanding of the law, his error was unreasonable under professional norms). As the Court of Appeals observed in its opinion remanding this case, "it was clearly his counsel's role to introduce such evidence." *Dorsey v. Kelly, 112 F.3d 50, 53 (2d Cir. 1997)*. It was also his counsel's role to learn enough about the reports to ascertain whether they would be of use at trial. *See generally* ABA Standards for Criminal Justice: Prosecution Function and Defense Function ("The Defense [*20] Function") 183 (3d ed. 1992) ("Without careful preparation, the lawyer cannot fulfill the advocate's role."); *Strickland, 466 U.S. at 688, 104 S. Ct. at 2065* (citing The Defense Function as a "guide" for evaluating the reasonableness of defense counsel's conduct). Petitioner's counsel did not fulfill his role as advocate under the circumstances.

Petitioner has overcome the presumption that his counsel acted reasonably and in furtherance of a sound strategy in not introducing the reports. A similar conclusion was reached by the Eighth Circuit Court of Appeals when it confronted a situation like this one. In *Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995), cert. denied, 136 L. Ed. 2d 196, 117 S. Ct. 273 (1996)*, the defendant was accused of stabbing two prison guards. A serologist, testifying for the prosecution, stated that she had not found the first victim's blood on the knife. The prosecution's theory, which it argued to the jury, was that the first victim's blood had been either "masked" by the second victim's blood, or wiped off. However, one test the serologist had done would have detected the first victim's blood regardless of any masking. Neither the prosecutor nor defense counsel asked [*21] the serologist about that test. At a post-conviction hearing, defense counsel testified that he had not taken any steps to inform himself about the serology tests or the conclusions that could be drawn from them. The Eighth Circuit determined that because he did not take such steps, the prosecutor's argument about masking was never subjected to adversarial testing, and defense counsel was therefore ineffective. *71 F.3d at 706-09*. Here, similarly, the prosecutor repeatedly made insinuations about the semen stain that were unsupported and even contradicted by Veit's reports, but petitioner's counsel erred by not marshalling those reports to counter the prosecutor's presentation.

B. Prejudice

[HN6] To show that he was prejudiced by his counsel's error, petition must show that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland, 466 U.S. at 696, 104 S. Ct. at 2068-69*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id. at 694, 104 S. Ct. at 2068*.

Petitioner's counsel's error undermines confidence in the jury's conclusion that the charged offenses [*22] had been proved beyond a reasonable doubt. Due to that error, the jury was not aware of the reports and the exculpatory inference they supported. The reports would have substantially weakened the probative significance of the semen stain on the underpants. Without the reports in evidence, the existence of the stain supported the prosecutor's circumstantial argument that the petitioner had ejaculated onto complainant's underwear after sodomizing him. That argument would have lost much force if the reports, which strongly suggested that the semen on the underpants was not petitioner's but complainant's, had been in evidence.

The semen stain's probative value, which the reports so directly affected, was a central and crucial issue in the case as a whole. The prosecutor claimed in summation that the semen stain corroborated the testimony of the complainant, whose credibility was the focus of both sides' summations. The importance of the scientific evidence to the prosecution was clear from the substantial number of witnesses that the prosecutor called to testify about the vitullo kit and other blood and saliva samples: eight of the prosecution's thirteen witnesses testified about taking, [*23] transporting, or analyzing those samples.

Nor was the evidence inculpating petitioner so overwhelming that his counsel's error does not undermine confidence in the verdict. The jury could have drawn exculpatory inferences not only from the reports but also from other gaps in the evidence. No semen was found in complainant's rectum, nor any lacerations or fissures, even though, according to one of the doctors, there probably would have been lacerations and fissures if complainant had been sodomized by an adult male. The slight bruise on complainant's anus, according to the doctors, could have been the result of several causes other than sodomy. None of the witnesses saw the alleged acts of sodomy other than the complainant, whom the jury might have considered a less reliable witness due to his youth and learning disability. While his testimony betrayed no motive to lie, some reasonable jurors might not have found his testimony enough to establish petitioner's guilt beyond a reasonable doubt if they had also known of the scientific reports strongly suggesting that the semen found on the underpants came not from petitioner but from complainant.

Accordingly, petitioner has shown that [*24] there is at least a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different.

CONCLUSION

The petition is granted. Respondent is directed to release petitioner from custody within 45 days of the date of this order unless the state declares its intention, before those 45 days expire, to retry petitioner on the charges against him; such retrial shall occur not later than 90 days from the date of this order.

So ordered.

Dated: New York, New York

July 15, 1997

LOUIS L. STANTON

U.S.D.J.

Analysis
As of: Mar 19, 2015

PATRICK MCKIBBINS, Petitioner, v. UNITED STATES OF AMERICA, Respondent.

No. 12 C 9841

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2013 U.S. Dist. LEXIS 145702

October 3, 2013, Decided
October 3, 2013, Filed

PRIOR HISTORY: *United States v. McKibbins, 656 F.3d 707, 2011 U.S. App. LEXIS 18475 (7th Cir. Ill., 2011)*

COUNSEL: [*1] For United States of America, Plaintiff: Bethany Kaye Biesenthal, LEAD ATTORNEY, Paul H. Tzur, United States Attorney's Office (NDIL), Chicago, IL.

For Patrick M. McKibbins, Defendant: David Jay Bernstein, PRO HAC VICE, David Jay Bernstein, P.A./Federal Legal Center-A Law Firm, Lauderhill, FL.

JUDGES: Robert W. Gettleman, United States District Judge.

OPINION BY: Robert W. Gettleman

OPINION

MEMORANDUM OPINION AND ORDER

Petitioner Patrick McKibbins has filed a Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to *28 U.S.C. § 2255*, claiming ineffective assistance of trial counsel. The government opposes petitioner's motion. For the reasons described below, the motion is denied.

BACKGROUND

In 2008, petitioner was arrested in the Northern District of Illinois for traveling in interstate commerce from Wisconsin to Illinois for the purpose of engaging in illicit sexual conduct with a minor, in violation of *18 U.S.C. 2423(b)*. Petitioner was charged in a three-count superseding indictment with using interstate wire communications to attempt to entice an individual whom the petitioner believed to be a female minor, in violation of *18 U.S.C. 2442(b)* (Count One); traveling in interstate commerce [*2] in order to engage in a sexual act with an individual whom the petitioner believed to be a female minor, in violation of *18 U.S.C. 2423(b)* (Count Two); and attempted obstruction of justice, in violation of *18 U.S.C. 1512(c)(1)* and *(2)* (Count Three). On January 16,

2009, following a four day jury trial, petitioner was found guilty on all three counts. Petitioner was subsequently sentenced to 140 months' imprisonment.

Petitioner has filed a *§ 2255* petition alleging that his trial counsel was ineffective for four reasons: he failed to introduce at trial the results of a psychosexual evaluation that ruled out a diagnosis of pedophilia; he failed to call character witnesses at trial to testify on petitioner's behalf; he refused to permit plaintiff to testify at trial on his own behalf; and he failed to prevent an entrapment defense at trial.

Legal Standard

A. *§ 2255* Petitions

Section 2255 allows a person convicted of a federal crime to seek to vacate, set aside, or correct his sentence. This relief is available only in limited circumstances, such as where an error is jurisdictional, constitutional, or there has been a "complete miscarriage of justice." See *Harris v. United States, 366 F.3d 593, 594 (7th Cir. 2004)*; [*3] *Bischel v. United States, 32 F.3d 259, 263 (7th Cir. 1994)* (internal quotations and citations omitted). The record is reviewed and all reasonable inferences are drawn in favor of the government. See *United States v. Galati, 230 F.3d 254, 258 (7th Cir. 2000)*; *Messinger v. United States, 872 F.2d 217, 219 (7th Cir. 1989)*.

Section 2255 petitions are subject to various bars, including procedural default. The Seventh Circuit has noted that *§ 2255* petitions are "'neither a recapitulation of nor a substitute for a direct appeal.'" *McCleese v. United States, 75 F.3d 1174, 1177 (7th Cir. 1996)* (citations omitted). Therefore, a *§ 2255* motion cannot raise: (1) issues that were raised on direct appeal, unless there is a showing of changed circumstances; (2) non-constitutional issues that could have been raised on direct appeal, but were not; and (3) constitutional issues that were not raised on direct appeal. See *Belford v. United States, 975 F.2d 310, 313 (7th Cir. 1992)* (overruled on other grounds by *Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994))*. An ineffective assistance of counsel claim may be brought in a *§ 2255* motion regardless of whether the claim was raised on appeal. *Massaro v. United States, 538 U.S. 500, 504, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003)*.

B. [*4] **Ineffective Assistance of Counsel**

To prevail on his claim of ineffective assistance of counsel, petitioner must show that his counsel's conduct "fell below an objective standard of reasonableness" and "outside the wide range of professionally competent assistance." *Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)*. To succeed on a *§ 2255* petition, petitioner's counsel's errors must be so serious "as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." *Lockhart v. Fretwell, 506 U.S. 364, 369-70, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)* (quoting *Strickland, 466 U.S. at 687*). In other words, 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." *Benefiel v. Davis, 357 F.3d 655, 662 (7th Cir. 2004)* (quoting *Strickland, 466 U.S. at 694*).

Because the court begins with a strong presumption that counsel's conduct falls within the wide range of acceptable professional assistance, petitioner faces a heavy burden in making out a winning ineffective assistance of counsel claim. See *Strickland, 466 U.S. at 690*; *United States v. Ruzzano, 247 F.3d 688, 696 (7th Cir. 2001)*.

DISCUSSION

Petitioner [*5] first argues that counsel failed to introduce evidence of a psychosexual evaluation performed on petitioner in which the psychiatrist concluded that petitioner was not a pedophile. [1] Petitioner's brief characterizes the report as "exculpative," and claims that this evidence, coupled with testimony from his nieces that he had never acted improperly with them, would have resulted in his acquittal at trial. Petitioner claims these arguments would have bolstered an entrapment defense (which was never argued) by demonstrating that the government's intent was to induce or entrap petitioner to commit a crime for which he had never previously been convicted. He further argues that the psychiatrist's findings would have demonstrated to the jury that petitioner was a naive individual susceptible to manipulation by undercover agents.

> 1 The government states that no such report has been tendered, and petitioner has not submitted an affidavit attesting to the facts allegedly contained in the report. The court notes that at the sentencing hearing, trial counsel did mention the existence of such a report and its conclusion. Petitioner states in his briefs that he has attempted

to obtain the report [*6] from former counsel, but counsel has been uncooperative, which petitioner claims is further evidence of ineffective assistance of counsel.

First, it is not clear that the psychiatrist's report would have been admissible at trial. Such a report would likely be considered hearsay; the psychiatrist who wrote the report would have to have been called to testify at trial. [2] A lawyer's decision to call or not to call a witness is a strategic opinion that is generally not subject to review. *Valenzuela v. United States, 261 F.3d 694, 699-700 (7th Cir. 2001)*; *United States v. Balzano, 916 F.2d 1273, 1294 (7th Cir. 1990)*. In rare cases, an attorney's failure to investigate or call certain witnesses can constitute ineffective assistance of counsel. See *Sullivan v. Fairman, 819 F.2d 1382, 1390 (7th Cir.1987)*; *Berry v. Gramley, 74 F.Supp.2d 808 (N.D.I11.1999)*. "Where a petitioner claims his trial counsel failed to call a witness, he must make a specific, affirmative showing as to what the missing evidence would have been, and prove that this witness's testimony would have produced a different result." *Patel v. United States, 19 F.3d 1231, 1237 (7th Cir.1994)* (citations omitted).

2 Petitioner cites [*7] various cases where the failure to obtain an exculpatory report was held to be ineffective assistance. The relevance of the reports in those cases far outweighs the questionable relevance of the report petitioner seeks to introduce, and counsel those cases confessed the failure to introduce was the result of an oversight or misapprehension and not a strategic decision. See *Harris v. Cotton, 365 F.3d 552, 555 (7th Cir. 2004)* (failure to introduce toxicology report showing victim was under the influence of cocaine and alcohol at the time of the incident was held ineffective assistance of counsel where defense strategy was self-defense); *Dorsey v. Kelly, 92 CIV. 8943 (LLS), 1997 U.S. Dist. LEXIS 10205, 1997 WL 400211 (S.D.N.Y. July 16, 1997)* (failure to introduce medical report confirming that semen stain was consistent with the bodily fluids of complainant but not those of petitioner constituted ineffective assistance of counsel in a sodomy prosecution) aff'd sub nom. *Dorsey v. People, 164 F.3d 617 (2d Cir. 1998)*.

Petitioner claims that the psychiatrist's report concluded that petitioner is not a pedophile, and that this evidence could have convinced a jury that he was entrapped into committing the crime with which [*8] he was charged. Petitioner's argument that the psychiatrist's testimony would have led the jury to reach a different result, however, is wholly unconvincing.

To begin, petitioner's argument regarding the psychiatrist's testimony hinges on the presentment of an entrapment defense. To raise an entrapment defense, a defendant must introduce evidence of: (1) government inducement; and (2) his lack of predisposition. *United States v. Blassingame, 197 F.3d 271, 279 (7th Cir. 1999)*. Petitioner argues that his lack of criminal convictions for sex offenses shows his lack of predisposition, and that the undercover agent induced him to engage in sexually explicit conversations as part of an extraordinary scheme. He claims the agent was "hammering away at [petitioner's] remaining self-control" for two hours, and overcame petitioner's desire not to prey on the alleged minor's innocence by enticing him with talk of "her" sexual experience. Petitioner posits that, had the agent claimed "she" was a virgin or accepted petitioner's initial equivocations about meeting a minor, petitioner would not have gone forward.

Petitioner repeatedly argues that he was naive and susceptible to manipulation, but as [*9] the government points out, there is no evidence in the record of government inducement. Petitioner initiated the online conversation with the individual he believed to be a minor and petitioner was the one who suggested that the two meet. Chat transcripts demonstrate that petitioner almost immediately brought up the topic of meeting with his chat partner. Although petitioner does initially state that he does not want to have sex with "her," he changes his mind within a few lines of the chat conversation. Further, there was ample evidence at trial of petitioner's predisposition. The government presented recordings of petitioner's calls from prison to family members encouraging them to destroy evidence on his computer. The record reflects that petitioner had hundreds of pictures of what appeared to be underage females stored on his computer, and admitted to conversations with other minors.

Petitioner has not demonstrated that the introduction of a report or testimony concluding that he is not a pedophile would have resulted in a different outcome at trial. His reliance on an entrapment defense that would have been insufficient and inadmissible renders his

argument unconvincing. Consequently, [*10] the court finds counsel was not ineffective in failing to introduce such a report or testimony.

Further, the introduction of a report finding that petitioner is not a pedophile does not necessarily bear on petitioner's guilt or innocence as to the charged conduct. The report cannot be said to be directly exculpatory because petitioner is not charged with being a pedophile, but rather with attempting to entice a minor to engage in sexual activity and crossing state lines to engage in sexual activity with a minor. Evidence of a diagnosis of pedophilia is not necessary to his conviction on either count. At trial, the government introduced sufficient evidence, through chat conversations and recordings, that petitioner engaged in interstate travel with the purpose of enticing a minor. A psychological evaluation does not negate that evidence.

Petitioner's second argument is that counsel should have called a number of character witnesses to the stand. As noted above, a lawyer's decision to call or not to call a witness is a strategic opinion that is generally not subject to review. *Valenzuela, 261 F.3d at 699-700 (7th Cir. 2001)*. Petitioner argues that counsel should have called his nieces, [*11] who were minors at the time, to testify that petitioner never made or attempted to make any advances towards them that would be considered inappropriate. This testimony, however, is not proper character testimony, but rather inadmissible prior good act testimony. *FRE 404(b)*. Petitioner therefore fails to show that any of his attorney's decisions regarding the presentation of witnesses at trial were unreasonable at the time they were made. Counsel's performance regarding this strategic decisions were therefore not ineffective. See *Harris v. Reed, 894 F.2d 871, 877 (7th Cir. 1990)* ("objectively reasonable strategic decisions ... are virtually unchallengeable.").

Petitioner's third argument is that he wanted to testify on his own behalf at trial, but that counsel persuaded him not to do so. He now argues that had he known that his defense attorney would not subject the prosecution's case to meaningful adversarial testing, he would not have forfeited his right to testify. Petitioner claims that his testimony "would have allowed him to tell his side of the story and would have subjected the government's case against him to a more meaningful adversarial testing process."

First, petitioner [*12] does not allege that the outcome of the trial would have been different if he had testified; he simply states that the government's case would have been subject to a "more meaningful adversarial process." Petitioner has therefore failed to demonstrate that any prejudice resulted from his failure to testify. Petitioner has also failed to demonstrate that he was deprived of any right. Petitioner was present when the court inquired whether he would testify at trial, and petitioner did not object when counsel announced petitioner's intention not to testify. His *§ 2255* petition concedes that counsel convinced him not to testify, not that he was prevented from testifying. The record therefore demonstrates that plaintiff affirmatively made the choice not to testify. He may have regretted that choice after the trial concluded, but he has not demonstrated that he did not realize he was waiving his right to testify or that his attorney made that choice for him.

Petitioner's final argument, that counsel was ineffective for failing to present an entrapment defense at trial, has been discussed and rejected above.

The court therefore denies petitioner's *Section 2255* motion to vacate his sentence.

ENTER: [*13] **October 3, 2013**

/s/ Robert W. Gettleman

Robert W. Gettleman

United States District Judge