No. 07-102

IN THE
SUPREME COURT OF THE UNITED STATES

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AUSTIN RANDOLPH,
Petitioner,

v.

CHRISTOPHER RAYGOZA,
Respondent.

_____

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

_____

Brief in Opposition to Petition for Certiorari

_____

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QUESTIONS PRESENTED

1. Whether this Court should consider the State's claim that the state trial judge made an "implicit" credibility finding which the federal habeas court had no license to review where the State failed to make this argument in the courts below.

2. Whether a state trial judge's decision to deny the defendant's motion for new trial, brought under *Strickland v. Washington,* on the basis that trial counsel "made a rational decision as a competent lawyer would make" to call only one of eight available alibi witnesses was, as the State now alleges, an "implicit" finding that the alibi witnesses lacked credibility.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT

In 1999, Christopher Raygoza was tried in the Circuit Court of Cook County, Illinois, for first degree murder and attempted murder in connection with a 1997 shooting at a Chicago pizza parlor. At trial, three young who were at the restaurant that night, none of whom knew Raygoza, identified him as the shooter. Tr. 58, 110, 144-45. Raygoza's lawyer asserted an alibi defense. In support thereof, he called a single witness, Raygoza's girlfriend Desiree Moyet, who testified that she was with Raygoza on the night of the shooting at his family home, thirty-five miles away from the scene of the crime, along with other members of the Raygoza family and their friends. Tr. 78-88. The trial judge, sitting without a jury, convicted Raygoza on all charges and sentenced him to 45 years incarceration.

Represented by new counsel, Raygoza moved for a new trial. At a hearing on the motion, the defense called five alibi witnesses, who were available to testify at trial but never called. These witnesses corroborated the trial testimony of Moyet that Raygoza was 35 miles away from the crime scene at the Raygoza family home celebrating his mother's 40th birthday with family and friends. N-Tr. C35-41, R98-105, R189-98, R200-208, R233-44, R246-56. An additional witness, a family law attorney and the former employer of Mrs. Raygoza, testified that she called the Raygoza home shortly before the time of the shooting and spoke to the defendant whom she knew well. N-Tr. R101-06. Attorney Morgan's husband also testified that he overheard the call which was made on a speaker phone. N-Tr. C6-12. Phone records were introduced establishing that this call occurred at a time which made it impossible for Raygoza to have been both on the phone and at the scene of the crime.

N-Tr. R104-05; SCR. C149. Other witnesses at the hearing implicated a gang member named Eduardo Lerma in the pizza parlor shooting. N-Tr. C104-17, R164-85, S3-13. As the lower court found: "Lerma and Raygoza bore a strong physical resemblance to one another." *Raygoza v. Hulick*, 474 F.3d 958, 961 (7th Cir. 2007).

Raygoza's trial attorney testified for the State at the post-trial hearing and offered varied explanations for his decision to call only one of eight available alibi witnesses. Some potential witnesses were rejected because they were children. Others because they were related to the defendant. Two witnesses were rejected because Brandstrader mistakenly believed that the prosecutor had some impeachment materials. N-Tr. S59-155. The trial judge denied the motion for new trial finding trial counsel's failure to corroborate the alibi or present available exculpatory evidence to be "strategic." N-Tr. U33.

After exhausting his state court remedies, Raygoza filed a petition for habeas corpus relief in federal court. The district court denied the petition but the Seventh Circuit reversed, finding that Raygoza's trial counsel was constitutionally deficient for failing to investigate and call available alibi witnesses, and that Raygoza was prejudiced by his attorney's failings. *Raygoza v. Hulick*, 474 F.3d 958 (7th Cir. 2007). The lower court ordered: "The writ of habeas corpus is Granted unless the State of Illinois elects to retry Raygoza within 120 days of issuance of this Court's final mandate, or of the Supreme Court's final mandate." *Id*., 474 F.3d at 966. The lower court denied the State's Petition for Rehearing and Rehearing *En Banc*. On April 11, 2007, the Seventh Circuit granted the State's motion to recall and stay its mandate pending its filing of a petition for a writ of certiorari in the United States

Supreme Court. The State filed its petition on July 19, 2007.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

I. THE STATE'S PETITION FOR WRIT OF CERTIORARI IS BASED ENTIRELY ON AN ARGUMENT WHICH WAS NEVER RAISED NOR CONSIDERED BY ANY LOWER COURT.

It is well established that this Court does not ordinarily consider "claims neither raised nor decided below." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168-169 (2004). Accord *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (refusing to consider arguments by petitioner not pressed below). *Pennsylvania Department of Corrections v. Yeskey,* 524 U.S. 206, 212-13 (1998); *Delta Airlines v. August,* 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"); *United States vs. Mendenhall,* 446 U.S. 544, 551-52 n.5 (1980); *Youakim v. Miller,* 425 U.S. 231, 234 (1976); *Adickes v. Kress & Co.,* 398 U.S. 144, 147 n. 2 (1970).

The State's petition for writ of certiorari makes a single claim – that by denying Raygoza's motion for new trial, the State trial judge *implicitly* found that the alibi witnesses were not credible, a finding that the federal habeas court had no license to review under *Marshall v. Lonberger*, 459 U.S. 422 (1983). This claim was neither raised in nor passed on in any court below. (A copy of the State's brief in the Seventh Circuit and its petition for *en banc* rehearing are attached hereto as Exhibits A and B.)

In the court below, the State merely argued that the Illinois Courts "reasonably determined that [Raygoza]'s trial counsel was not ineffective for failing to call additional alibi witnesses." Ex. A, p. 27. In support, the State argued that trial counsel conducted an

adequate investigation of his client's alibi and made a reasonable strategic decision to call only one witness, Raygoza's former girlfriend Desiree Moyet, and to offer no corroborating documentary evidence such as phone records. Ex. A, pp. 27-40. The State also argued that Raygoza was not prejudiced, under *Strickland,* by his attorney's failure to call the additional alibi witnesses because their testimony "contained 'a number of inconsistencies' and all 'were either biased and/or could have been impeached to varying degrees.'" Ex. A, p. 41 (citing the Illinois Appellate Court opinion). Lastly, the State defended the Illinois Courts' finding that trial counsel adequately cross-examined a prosecution witness who had changed her story less than a month before trial to contradict Raygoza's alibi. Ex. A, pp. 44-46.

Absent from the State's Seventh Circuit brief is any assertion that the State trial judge made a negative credibility finding, not subject to habeas review under *Lonberger*, as to the uncalled alibi witnesses.[1] Rather, the State merely argued that the trial judge "was able to personally assess their credibility and weigh it against the evidence presented at trial, and he conclusively rejected [Raygoza]'s ineffectiveness claims." Ex. A, pp. 43-44.

This Court will occasionally consider an issue not raised below if the lower court actually passed on the issue *sua sponte.* See *Lebron v. National Railroad Passenger Corp.,* 513 U.S. 374, 379 (1995) ("even if this were a claim not raised by petitioner below, we

[1] The State's Seventh Circuit brief cites *Lonberger* once, in support of an argument that the trial judge's *explicit* finding that a defense witness named Torrent had "nil" credibility could not be redetermined on habeas review. Ex. A, p. 46. Mr. Torrent was called by Raygoza's co-defendant at the post-trial hearing to give testimony about another suspect in the shooting named Eduardo Lerma. Torrent did not testify in support of Raygoza's alibi. Torrent was impeached by several prior felony convictions and the trial judge explicitly found that he lacked credibility. Raygoza has never sought a redetermination of this finding on federal habeas review.

would ordinarily feel free to address it since it was addressed by the court below"); *Virginia Bankshares, Inc. v. Sandberg,* 501 U.S. 1083, 1099 n. 8 (1991).

Here, however, the lower court did not *sua sponte* address the issue of *implicit* credibility findings which the State now raises. Rather, the lower court unambiguously declared that the State judge did not say "anything about the credibility of the witnesses at the post-trial proceeding." *Raygoza v. Hulick*, 474 F.3d 958, 962 (7th Cir. 2007). Despite this clear statement by the Seventh Circuit which is in direct conflict with the State's current position, the State did not even make its argument about implicit credibility findings in its petition for *en banc* rehearing. Ex. B. Rather, the State's rehearing petition merely argues that the lower court "Overlooked Significant Facts in Finding *Strickland* Prejudice" and should have deferred to the Illinois "Appellate Court's Determination that (A) Petitioner Was Not Prejudiced by Counsel's Failure to Call/Investigate Additional Alibi Witnesses, and (B) Counsel's Performance Was Within the Bounds of Permissible Representation." Ex. B, pp. 5-8.

The State offers no explanation for its failure to make its argument about implicit credibility findings in the court below. Injecting new issues into the case at this stage deprives the Justices of the of the benefit of the lower court's refinement and resolution of such issues. For these reasons, the State's petition for writ of certiorari should be denied.

II. THE STATE'S ARGUMENT THAT THE STATE TRIAL JUDGE MADE IMPLICIT CREDIBILITY FINDINGS AS TO RAYGOZA'S UNCALLED ALIBI WITNESSES IS BELIED BY THE RECORD.

The reason that the State never raised the issue of implicit credibility findings in the courts below is that the record does not support it. As the lower court found, the State judge did not say "anything about the credibility of the witnesses at the post-trial proceeding." *Raygoza v. Hulick*, 474 F.3d 958, 962 (7th Cir. 2007). The state trial judge was quite clear about his reasons for denying Raygoza's motion for new trial and it had nothing to do with the credibility of the uncalled alibi witnesses. The trial judge found that "all or most" of the uncalled alibi witnesses "were impeached or could have been impeached in various ways and he [Raygoza's trial attorney] made a rational decision as a competent lawyer would make, I'm not going to call all those people, take my best shot with Desiree Moyet and that best shot with Desiree Moyet did not work out for him." N-Tr. U31.[2]

At no time did the state judge find, explicitly or implicitly, that the uncalled alibi witnesses were not credible. The record reveals that when the trial judge found that "all or most" of the uncalled alibi witnesses "were impeached or could have been impeached", he

[2] During a colloquy with defense counsel, the Judge further explained his reasoning as follows: "You may get a situation where your client says I was with seven different people at the time something occurred, correct? * * * I didn't commit the crime. I was somewhere else which is commonly referred to as an alibi. And you talk to those various seven people, and for various reasons you think about it and say, I don't want to call number two; this could happen with him. I don't want to call number four. I don't want to call number six. I will just call one or two of the witnesses, lot of problems with the others. That could certainly happen with a competent lawyer like you, that you'd make a rational choice not to call certain witnesses?" N-Tr. S124-25.

was using the term "impeach" in the broadest sense. Raygoza's family members and friends could have been "impeached" only by the fact that have a familial bias. The State's impeachment of family law attorney Wendy Morgan was that she once told a family law court that Maria Raygoza's former landlord, Chloe Gavin, was an attorney but later stated that Ms. Gavin was not a "practicing attorney" but had attended law school; this purported impeachment was so collateral as to be impermissible under Illinois law. See e.g. *People v. Sandoval*, 135 Ill. 2d 159, 181, 552 N.E.2d 726 (1990). Therefore, the trial judge's finding that all or most of the uncalled witnesses could have been impeached is not in any sense equivalent to a finding that the witnesses lacked credibility.

Moreover, the state trial judge was not shy about making credibility findings when he disbelieved a witness. At trial, the defense called a single witness, Desiree Moyet. In explaining his verdict, the judge stated:

> The defense presents one witness, the girlfriend at the time of Christopher Raygoza who says that Raygoza was with her at the mother's house in Highland Park, the suburbs. And that [if] believed that would mean that he obviously could not have been on 63rd Street at the time committing this murder. Her testimony is certainly one of a biased witness.... [S]he was his girlfriend back then and she maintains he was with her at the time. I don't have any trouble saying I don't believe that testimony at all.

Tr. J161-62. At the post-trial hearing, Raygoza's co-defendant called a gang member named David Torrent to testify about another suspect in the shooting. The trial judge found Torrent's credibility "to be nil." N-Tr. U29. Accordingly, had the judge found the uncalled alibi witnesses to lack credibility, he would have said so directly.

The State's citation to *Marshall v. Lonberger* is misplaced. There, this Court found

that the state trial court's ruling that the respondent "intelligently and voluntarily" pled guilty at a prior proceeding in another state was "tantamount to a refusal to believe the testimony of respondent" in opposition to that finding. *Lonberger*, 459 U.S. at 434. This Court further held that the federal habeas courts could not reject that finding because the federal courts had "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court but not by them." *Id.*

In the case at bar, the state trial judge found that trial counsel "made a rational decision as a competent lawyer would make" to call only one of eight available alibi witnesses. This finding was not in any way tantamount to a finding that the uncalled alibi witnesses were not credible.

The State's argument to the contrary is not even plausible. Raygoza's trial attorney called a single witness, Desiree Moyet, who testified that she was with Raygoza at the time of the crime, at his home, along with members of his family and several friends (the uncalled alibi witnesses). At the post-trial hearing, the uncalled alibi witnesses confirmed and corroborated the testimony of Ms. Moyet. Thus, if the uncalled witnesses are proven liars, as the State now contends, then Ms. Moyet is also a liar and trial counsel put on a false alibi defense.

But the state trial judge did not find that trial counsel put on a false alibi. Quite to the contrary, the judge found that trial counsel "made a rational decision as a competent lawyer would make" to call only Ms. Moyet and not the other witnesses, whose testimony was identical to hers. The trial judge's finding that trial counsel made a rational competent

decision to call one of eight available alibi witnesses is in fact an implicit concession by the judge that the alibi was truthful.[3]

Moreover, one of the uncalled alibi witnesses, Wendy Morgan, is a practicing family law attorney with an office in Arlington Heights, Illinois. It was nearly eight years ago, in October, 1999, that Ms. Morgan testified under oath that she telephoned the Raygoza home on the evening of the shooting and had a conversation with the defendant whom she had spoken to on the telephone "hundreds of times." N-Tr. R103. Morgan further identified her phone records which reflect a 23 minute call from her home to the Raygoza home in Highland Park, Illinois beginning at 9:15 p.m. on June 4, 1997. N-Tr. R104-05; SCR. C149. If, as the State now alleges, the state trial judge implicitly found Ms. Morgan to have given false alibi evidence in a murder case, then she should have been disbarred years ago. The fact that the State has never made any attempt to take away Morgan's law license but has instead fought to keep Raygoza locked away in jail and his case out of court is itself proof that the position which the State of Illinois takes in this Court is false and disingenuous.

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[3] The State's argument might be plausible had trial counsel rejected the alibi altogether. In such a case, the trial judge might hear from the uncalled alibi witnesses post-trial and decide that they are incredible and that trial counsel was wise not to call them. But that is not the case here. For a year and a half leading up to trial, Raygoza's family pressured trial counsel to prepare the alibi defense and talk to the witnesses but trial counsel refused, telling Mrs. Raygoza on the eve of trial that "alibi's never work." Then at trial, counsel changed his mind and decided to call a single alibi witness whom he had never spoken to and who was arguably the most biased and least persuasive of the available witnesses. As the lower court properly found, there was no strategic advantage to self-limiting the investigation of the alibi and then presenting at trial a partial, uncorroborated alibi defense.

CONCLUSION

For the reasons stated, Respondent respectfully requests that the Petition for Certiorari be Denied.

Respectfully submitted,

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August 21, 2007

In The
Supreme Court of the United States

AUSTIN RANDOLPH,
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v.

CHRISTOPHER RAYGOZA,
Respondent.

CERTIFICATE OF SERVICE

I, LEONARD C. GOODMAN, do swear or declare that on this date, August 21, 2007, I have served the attached BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Lisa Madigan, Attorney General of Illinois
Michael Glick, Assistant Attorney General
Michael A. Scodro, Solicitor General of Illinois
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_____
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