In The

Supreme Court Of The United States

BRIAN K. MURPHY,
Petitioner,

v.

BERNALE BRYANT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

CONNECTICUT COMMISSIONER OF CORRECTION'S PETITION FOR WRIT OF CERTIORARI WITH ATTACHED APPENDIX

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QUESTION PRESENTED

Whether the Connecticut Supreme Court misapplied United States Supreme Court precedent and improperly overturned a conviction for a brutal homicide by ignoring *Strickland v. Washington*'s strong admonition to assess counsel's performance with appropriate deference and, instead found that counsel's performance was deficient based entirely on speculation and conjecture?

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Brian K. Murphy, acting Commissioner of Correction for the State of Connecticut, respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, entered in this proceeding on March 10, 2009.[1]

[1] When this case was litigated in state court, the Commissioner of Correction for the State of Connecticut was Theresa Lantz. Commissioner Lantz retired on June 30, 2009 and the petitioner herein, Brian K. Murphy, was appointed to serve as acting Commissioner of Correction effective July 1, 2009.

OPINION BELOW

The opinion of the Connecticut Supreme Court reported as *Bryant v. Commissioner of Correction*, 290 Conn. 502 (2009) reh'g denied (April 21, 2009), which reversed the decision of the Connecticut Appellate Court and upheld the state habeas court's ruling granting the respondent habeas corpus relief, is the subject of this petition. The opinion and the state supreme court's order denying reconsideration and reargument are reprinted in the appendix.

JURISDICTION

The decision below was released on March 10, 2009. The petitioner's motion for reconsideration and and reargument en banc was denied on April 21, 2009. This Court has jurisdiction over the case pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rule 10(c).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[N]o State shall ... deprive any person of life, liberty or property without due process of law...."

RELEVANT STATUTORY PROVISIONS

Connecticut General Statutes § 53a-55(a)(1) provides, in pertinent part, as follows:

> A person is guilty of manslaughter in the first degree when ... with intent to cause serious physical injury to a person, he causes the death of such person....

RELEVANT RULES OF THE UNITED STATES SUPREME COURT

Rule 10 provides, in pertinent part, as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. Any petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
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> (c) a state court ... has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

STATEMENT OF THE CASE

In *Bryant v. Commissioner of Correction*, supra, the respondent was convicted of manslaughter in the first degree, in violation of Connecticut General Statutes § 53a-55(a)(1), for stomping his victim to death in a "drug deal gone bad." The evidence in the case showed that the victims drove off without paying for their drugs, but collided with another vehicle as they fled. The respondent dragged both victims from the wreck and stomped them, killing one and injuring the other. When questioned by the police, the respondent admitted being at the scene of the accident, but denied assaulting the victims. His statement suggested that the injuries suffered by the deceased victim were the result of the collision. The respondent was convicted at trial because the massive blunt trauma suffered by the deceased victim was not consistent with an injury sustained in an automobile accident and was obviously the result of a beating. In addition, the surviving victim and a bystander testified that they saw the respondent stomping the deceased victim. Finally, forensic evidence, including DNA analysis of blood from the victim that was sprayed on the front grill of the car, corroborated the eyewitness testimony.

In his habeas corpus petition, the respondent claimed that his defense counsel was ineffective in failing to present a defense that the victim was killed by being shot in the head by an unknown gunman. There were numerous problems with this defense, including the fact that: (1) the autopsy did not show a bullet wound to the victim's head or anywhere else on his body; (2) the theory of defense was inconsistent with the

respondent's statements to the police and his testimony at trial; (3) no one at the scene, including the respondent, reported seeing anyone with a gun; and (4) the theory provided no explanation for the massive blunt trauma injuries suffered by the victim. Nevertheless, the habeas court found defense counsel ineffective and granted a new trial.

The Commissioner of Correction appealed and the Connecticut Appellate Court reversed the judgment of the habeas court. *Bryant v. Commissioner of Correction*, 99 Conn. App. 434, 444 (2007). After granting the respondent's petition for certification to appeal, however, the Connecticut Supreme Court reversed the decision of the Appellate Court and restored the habeas court's order granting a new trial. *Bryant v. Commissioner of Correction*, 290 Conn. at 527.

A. The Respondent's Criminal Trial

The respondent was charged with murder, in violation of Connecticut General Statutes § 53a-54a, in connection with the death of Edward Jones. At the respondent's trial, Gary Fournier testified that during the early morning hours of April 14, 1996, he and Jones decided to steal cocaine from drug dealers working in the vicinity of Irving Street and Albany Avenue in Hartford. Fournier and Jones planned to obtain the drugs and drive off without paying for them. T. at 608-11.[2] Fournier and Jones drove to Irving Street and were approached by a drug dealer named Terry Davis. Davis

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[2] T. refers to the transcript of the petitioner's trial in *State v. Bernale Bryant*, CR00-0540873, Judicial District of Hartford.

then backed away from the car and they were approached by the respondent. At that point, Fournier, who was driving the car, engaged in a drug transaction with the respondent. T. at 611-12.

When the respondent handed Fournier the drugs, he drove off without paying for them. The respondent grabbed onto the car and ran down the street with it until he dropped off as Fournier drove through the stop sign at Albany Avenue. When Fournier's car entered the intersection, it collided with a sport utility vehicle (SUV), spun around and struck a telephone pole. T. at 614-15. After the accident, the respondent dragged Fournier out of the car, pushed him to the ground and kicked him. Fournier testified that after kicking him for about fifteen seconds, the respondent went back to the car and dragged Jones out. Fournier then went to a nearby building and sat on the steps. From that location, Fournier watched the respondent beat and kick Jones at the front of the car. T. at 616-18.

Fournier's testimony was corroborated by Ewan Sharp, a witness to the incident. At the hearing in probable cause, Sharp testified that at the time of the incident, he was on the corner of Magnolia Street and Albany Avenue, one block from Irving Street.[3] Sharp testified that he heard the sound of squealing tires and looked in the direction of Irving Street. When he did so, he saw a car proceeding from Irving Street onto Albany

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[3] Article First, § 8, of the Connecticut Constitution provides that "[n]o person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law...."

Avenue. Sharp saw a man fall off the car and roll into the street. The car was struck by another vehicle that was traveling on Albany Avenue. The collision caused the car to spin around and strike a telephone pole. Sharp recognized the man who fell off the car as the respondent. T. at 925-30, 943-49.

Sharp testified that he ran to Irving Street after the collision. When he arrived at the scene, Sharp saw the respondent pulling a man out of the car. The respondent then kicked and beat the man for five to ten seconds. Sharp testified that the respondent searched the man's pockets before he ran off toward Garden Street. T. at 930-35, 949-51, 957-61. Sharp testified that blood was "gushing" from the man's neck after the respondent left him lying in the street. T. at 978.[4]

Terry Davis, the drug dealer who had initially approached Fournier and Jones, testified that he saw the respondent engaging in a transaction with the two men, and then saw them drive off with the respondent holding onto the window frame and running beside the car. T. at 310-14. He also saw the car run a stop sign and collide with a truck. Davis testified that the respondent "barely got off the car" before the "moment of contact" with the truck. Davis then saw the respondent get up and run across Albany Avenue. T. at 316, 322. After witnessing the collision, Davis went the other direction on Irving Street toward Homestead Avenue. After a few minutes, Davis went back down

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[4] Sharp refused to testify at the petitioner's trial; T. at 912; but his testimony at the hearing in probable cause was read into the record. T. at 925-89.

Irving Street to the intersection of Albany Avenue. T. at 316-17, 322-23. When he arrived at the scene, Davis saw the passenger from the car lying face down in front of the car bleeding from his head. T. at 316-19.

Dr. Arkady Katsnelson, the medical examiner who performed the autopsy on the victim, testified that Jones suffered extensive and multiple contusions and lacerations to the head and face and contusions and abrasions to the chest and upper abdomen. The victim also suffered extensive fractures in the maxilla, or upper jaw, and suffered three broken ribs. T. at 522-28, 539. The victim suffered "multiple and extensive fractures of the skull" as a result of six separate blows to the head. T. at 534-36. When Katsnelson opened the victim's head, he did not need to use a saw because the skull was so extensively fractured. Fragments of broken bone had lacerated the membrane which covers the brain, as well as the brain itself. There was a transection of the victim's brain, which means a complete laceration and separation of one part of the brain from another due to an extremely forceful blow. T. at 535-38. Katsnelson testified that he observed no other injuries to the victim and that the cause of death was blunt trauma to the head. T. at 540-41. Finally, Katsnelson testified that the victim's injuries were inconsistent with injuries caused in a motor vehicle accident. T. at 547-48.[5]

Steven Grabowski, a detective from the Hartford Police Department, testified that when he interviewed

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[5] At the hearing in probable cause, Dr. Katsnelson specifically testified that there were no gunshots wounds or stab wounds on the victim's body. T. at 174-75.

Fournier at the hospital, he was uncooperative, intoxicated and unable to express himself clearly. T. at 703-705. Grabowski also testified that in November, 1997, the respondent gave him a written statement regarding his participation in the incident. T. at 742, 758. Finally, Grabowski testified that while he was at the scene of the accident, he observed blood spatter on the front license plate of Fournier's car. T. at 700.

Dr. Heather Coyle, a criminalist from the state crime lab, testified that the DNA profile of the blood on the license plate was an exact match for the DNA profile from a sample of the victim's blood. T. at 899-905.

The respondent testified on his own behalf at trial. In his testimony, the respondent denied selling drugs and claimed that he approached Fournier's car because "[he] was just being nosy." He testified that when Fournier sped off, he just "didn't let go of the car" and rode it to the intersection. T. at 1038. The respondent testified that after the crash, he went to the car and saw Jones on the ground and Fournier walking away from the wreck. He claimed that he stayed on the scene only briefly before departing. T. at 1040-43, 1065.

The respondent's testimony was consistent with the statement that he had given to Detective Grabowski and an oral statement that he gave to Detective Keith Knight in April, 1996. T. at 761-62, 383-86, 1036-43.[6]

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[6] The respondent concluded the sworn statement that he gave to Detective Grabowski by stating that "I can honestly say that *no one* touched [the victims]. T. at 762; State's Exhibit 49A.

On October 27, 2000, the jury returned a verdict of not guilty on the charge of murder but guilty of the lesser included offense of manslaughter in the first degree, in violation of Connecticut General Statutes § 53a-55(a)(1). T. at 1307-1308. Thereafter, the trial court sentenced the respondent to imprisonment for nineteen years. T. at 1336. The respondent appealed and the Appellate Court affirmed his conviction. *State v. Bryant*, 71 Conn. App. 488, cert. denied, 261 Conn. 939 (2002).

B. The Hearing on the Respondent's Habeas Corpus Petition

In his state petition for a writ of habeas corpus, the respondent claimed that his conviction was obtained in violation of his Sixth Amendment right to the effective assistance of counsel. "Amended Petition" at 5, *Bryant v. Warden*, Case No. CV03-0003933-S, Judicial District of Tolland.[7] In his petition, the respondent alleged that his trial counsel, Assistant Public Defender David Smith, was ineffective for numerous reasons. At the hearing on his petition, however, the respondent's counsel focused on a claim that Smith was ineffective in failing to present a defense that the victim was fatally shot by an unknown gunman rather than being kicked and beaten to death by the respondent.

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[7] The respondent also claimed that his conviction violated his right to the effective assistance of counsel under Article First, § 8, of the Connecticut Constitution. "Amended Petition" at 5, *Bryant v. Warden*, supra. The Connecticut Supreme Court has held, however, that "the state and federal constitutional standards for review of ineffective assistance of counsel claims are identical." *State v. Drakeford*, 261 Conn. 420, 431 (2002), quoting *Millon v. Meachum*, 211 Conn. 352, 355-56 n.3 (1989).

The respondent called Thomas Davis, the driver of the vehicle that struck the victims' car, as a witness at the habeas hearing. Davis testified that on April 14, 1996, he was working as an armed security guard for Metro Loss Prevention Services. Davis testified that during the early morning hours of that day, he was driving an SUV owned by his employer on Albany Avenue in Hartford. As he approached the intersection of Irving Street, Davis testified that he heard several gunshots that he thought had come from the gas station at the corner. T. 1/19/05 at 16.[8] Davis then saw a small, blue car coming out of Irving Street. When the car drove through the intersection, Davis' vehicle collided with it and caused it to spin around and strike a telephone pole. Davis' vehicle came to rest with its rear window facing the blue car. T. 1/19/05 at 17-18.

Davis testified that three or four seconds after the collision, a white "late seventies model Lincoln or Cadillac" came out of Irving Street. The white car was occupied by a driver and a passenger. The car stopped and the passenger got out and approached Davis. Davis described the passenger as a "light-skinned Spanish male." T. 1/19/05 at 18-19. Davis testified that the passenger had an "item" in his hand that he "couldn't identify." Davis stated, however, that "[a]t that time of night, and in that area" he assumed that the item was a gun. T. 1/19/05 at 19-20, 46. Davis took out his sidearm and displayed it to the man. Upon seeing the weapon, the man looked startled, "turned and went up

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[8] Citations to the transcript of the hearing on the respondent's habeas petition are signified by T. followed by the date on which the testimony to which reference is made was given.

to the corner where the car accident was." Davis testified that the white car then left the scene. T. 1/19/05 at 19-21.

Davis testified that after the vehicles came to rest, there "was lots of chaos" at the scene and that there were "several people out there jumping up and down." Davis stated, however, that he "wasn't too sure what was going on." T. 1/19/05 at 22. Davis testified that he saw one man exit the car and stumble toward the "front stoop" of a package store where he sat down. He stated that neither occupant was dragged from the car and that he did not see anyone kick or beat the men. T. 1/19/05 at 21, 23-24. Davis testified that he assumed that the gunshots that he heard, the large white car and the blue car with which he had collided were all connected. T. 1/19/05 at 21, 47. He acknowledged, however, that "[g]unshots in the north end of Hartford every night are ... a common thing." T. 1/19/05 at 21.

The respondent also called Melissa Young-Duncan as a witness. Young-Duncan testified that on April 14, 1996, she was employed as an Emergency Medical Technician (EMT) by L & M Ambulance Service. She testified that at 1:30 a.m., she was dispatched to the scene of a motor vehicle accident at the intersection of Irving Street and Albany Avenue. Upon her arrival, Young-Duncan observed a car that had come to rest next to a telephone pole and a man lying next to it. Young-Duncan testified that when she examined the man, she observed "[w]hat appeared to be a gunshot ... [t]o his left temple." T. 1/7/05 at 5-9. She testified that the wound she observed was "perfectly round and was the same size as a bullet." She testified

that based on her training, she concluded that the wound she observed was a gunshot wound. T. 1/7/05 at 9-11.

Young-Duncan testified that at the time of the incident, she had trained to the level of "EMT Intermediate." She testified, however, that she had received no training on gunshot wound identification prior to the incident. T. 1/7/05 at 10. On cross-examination, Young-Duncan testified that she spent a total of about twenty minutes with the victim on the night of the incident. T. 1/7/05 at 19-20.

The respondent also called John Gartley as a witness during the presentation of his case. Gartley testified that on April 14, 1996, he was employed as a paramedic by L & M Ambulance Service. He testified that his partner that night was Melissa Young-Duncan. Gartley testified that at 1:33 a.m. on that date, they were dispatched to the intersection of Irving Street and Albany Avenue. T. 1/7/05 at 23-25. When Gartley arrived at the scene, he observed a car that had come to rest near a telephone pole and a man lying on the ground nearby. T. 1/7/05 at 25-27.

When Gartley began to attend to the man, he observed what he believed to be a gunshot wound in the man's left temple. T1. at 28. Gartley testified that he believed the wound that he observed was a gunshot wound for the following reasons:

> First, it was a small circular-type hole, maybe the roundness of a of a pencil.... There was some tissue protruding back out of the hole, which is normal for a gunshot wound of that type, and there was some black residue around the hole, possibly, you know, like a powder burn ... from a close-range shot.

T. 1/7/05 at 28. Gartley testified that he received training in gunshot wound identification during his one year of paramedic training at Capital Community Technical College. T. 1/7/05 at 29.

On cross-examination, Gartley testified that the victim had suffered numerous other injuries. He testified that "[t]here were multiple contusions ... bruises, some swelling and what appeared to be a boot print on him." T. 1/7/05 at 30. On redirect examination, the respondent's counsel asked Gartley if he were certain that he had observed a boot print on the victim. Gartley replied "Well, I can't be exactly sure. It looked more like a boot than a shoe print." T. 1/7/05 at 34.

The petitioner also called Rene Fleury at the hearing. Fleury testified that in April 1996, she was engaged to Gary Fournier and shared an apartment with him. T. 1/19/05 at 4-5. On Saturday, April 13, 1996, Fleury allowed Fournier to drive her 1995 Ford Escort to work. Fournier did not come home that night and when Fleury arose the next day, Fournier had still not returned to their apartment. Fleury testified that she went to work at 7:00 or 8:00 a.m. that day. T. 1/19/05 at 6-7.

Sometime after Fleury arrived at work, Fournier came to the restaurant where she was employed. Fournier told her that he had been involved in an automobile accident. Fleury decided to leave work and return with Fournier to their apartment. T. 1/19/05 at 7-8. Fleury testified that Fournier was badly bruised and cut up. He was not very mobile and it took Fleury and a friend to "get him up to the apartment and into bed." As they were getting Fournier into bed, Fleury again asked him about the incident. Fournier said something about three Spanish guys with a gun. T. 1/19/05 at 8-9. She testified that she asked Fournier for more information, as follows:

> I asked him, again, what had happened that night, he told me that he got in a car accident, and that Eddy, the other gentleman in the car, got beat up, and he got beat up, and that was pretty much all I ever got out of him.

T. 1/19/05 at 9.

Fleury later gave a statement to the police regarding Fournier's behavior on that morning. In her statement, Fleury indicated that as she was putting Fournier to bed, he said "something about three Spanish guys with a gun, but nothing he said made any sense." Petitioner's Exhibit 2, *Bryant v. Warden*, CV03-0003933-S, Judicial District of Tolland.

Based on the testimony of these four witnesses, the habeas court granted the petition and ordered a new trial. "Memorandum of Decision," *Bryant v. Warden*,

supra, at 17. In its decision, the habeas court ruled that the petitioner's trial defense counsel provided "inadequate representation" because he had failed to introduce "available and credible evidence of a clearly exculpatory nature" at the petitioner's trial. Id., at 13.

In reaching this decision, the court contrasted the testimony of the four witnesses called by the petitioner at the habeas hearing (Thomas Davis, Young-Duncan, Gartley and Fleury) with that of Ewan Sharp, whose testimony from the probable cause hearing was read into evidence at the petitioner's trial. "Memorandum of Decision," *Bryant v. Warden*, supra, at 13-14. The court found the credibility of the four witnesses to be "considerable and compelling." Id., at 13. The court found, therefore, that the testimony offered by the four witnesses "could easily have led a jury to harbor a reasonable doubt as to the guilt of the petitioner." Id., at 14. Accordingly, the court concluded that "it was deficient performance on the part of trial defense counsel not to present this testimony at the petitioner's original trial." Id. The court also concluded that the petitioner was prejudiced by the failure to call these witnesses "[g]iven the significance of [their] potential exculpatory testimony and its propensity to induce reasonable doubt in the minds of the jury." Id., at 14-15.

Nonetheless, the habeas court conceded that "there are some contradictions in the record." Memorandum of Decision," *Bryant v. Warden*, supra, at 16. The habeas court noted that the medical examiner's report "found no evidence of a gunshot wound to the head." In order to explain this anomaly in its theory, the habeas court speculated that "*it is not impossible*

that the force of the impact of the collision, coupled with a gunshot wound to the head and emergency medical treatment at the trauma center that a severe fracturing of the skull *might* have masked the existence of the gunshot wound by the time of the post-mortem examination." (Emphasis added.) Id. The habeas court also noted that the petitioner's testimony at trial refuted the existence of a white Cadillac and a shooting before the collision. The court dismisses this significant flaw in its logic simply by stating that the petitioner did not claim "actual innocence." Id. The court concluded, therefore, that "[t]he jury were entitled to hear this testimony before they made the finding of guilty." Id.

C. Appellate Review of the Habeas Court's Decision

The Commissioner of Correction appealed from the judgment of the habeas court and the Connecticut Appellate Court reversed. *Bryant v. Commissioner of Correction*, 99 Conn. App. at 444. After granting the respondent's petition for certification to appeal, however, the Connecticut Supreme Court reversed the decision of the Appellate Court and restored the habeas court's order granting a new trial. *Bryant v. Commissioner of Correction*, 290 Conn. at 527.

1. Decision of the Connecticut Appellate Court

In reversing the habeas court's ruling, the Appellate Court held that the respondent had failed to show that the performance of his trial counsel was deficient under *Strickland v. Washington*, 466 U.S. 668,

687-91, reh. denied, 467 U.S. 1267 (1984). *Bryant v. Commissioner of Correction*, 99 Conn. App. at 443-44. The court noted that the respondent "did not indicate in either of his statements to the police, or in his testimony at his criminal trial, that there was an unknown gunman involved in the April 14, 1996 incident." Id., at 443. The court concluded, therefore, that "the presentation of a defense regarding an unknown gunman would have been rendered implausible by the petitioner himself." Id. The court further observed that:

> [I]n developing the [respondent's] defense, [Assistant Public Defender] Smith weighed the testimony of Young-Duncan and Gartley and determined that they were entirely unsupported by any other evidence. No other witness indicated the presence of a gun at the scene, including the [respondent]. Additionally, the medical examiner's report and the records from Saint Francis Hospital and Medical Center belied such contention because there was no [stippling] or gunshot residue on the head of the victim, there was no indication of an entrance wound or exit wound and there were no lead fragments found inside the victim's head.

Bryant, 99 Conn. App. at 443.

Accordingly, the court concluded that "Smith's decision not to call the four witnesses was a matter of trial strategy." *Bryant v. Commissioner of Correction*, 99 Conn. App. at 444. The court further stated that:

> Contrary to our settled law, the [habeas] court *did not accord any deference* to Smith's tactical decision or make *any attempt to evaluate his conduct from his perspective* at the time of the [respondent's] criminal trial. Rather, the court employed hindsight to retry the case as if the omitted testimony had been offered and admitted, and the court *engaged in speculation* that the testimony would have been credited even though it was inconsistent with the [respondent's] version of events and all the forensic evidence.

(Emphasis added.) *Bryant*, 99 Conn. App. at 444. Consequently, the Appellate Court concluded that the habeas court "improperly determined that the performance of counsel was deficient." Id.

2. Decision of the Connecticut Supreme Court

On appeal to the Connecticut Supreme Court, the respondent claimed that the Appellate Court had erred in ruling that his trial counsel's failure to present a defense that the victim was shot in the head by an unknown gunman did not constitute ineffective assistance of counsel. *Bryant v. Commissioner of Correction*, 290 Conn. at 503. The court began its analysis of the respondent's claim by noting that in order to prevail, the respondent had to show that the performance of his counsel was deficient and that he was prejudiced by that deficient performance. Id. at 510.

The court further noted that "[j]udicial scrutiny of counsel's performance must be highly deferential...." *Bryant v. Commissioner of Correction*, 290 Conn. at 512, quoting *Strickland v. Washington*, 466 U.S. at 689. The court observed, therefore, that "[a] fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Bryant*, 290 Conn. at 512, quoting *Strickland*, supra, 689.

In conducting its analysis, the Connecticut Supreme Court first determined whether evidence of the unknown gunman would have been admissible under Connecticut law as third party culpability evidence. *Bryant v. Commissioner of Correction*, 290 Conn. at 514-15. The court concluded that because the evidence in question established a direct connection between a third party and the charged offense, it was relevant to the issue of the respondent's guilt or evidence. Id., at 515.

Nevertheless, the court observed that "[i]t is not ineffective assistance of counsel ... to decline to pursue a third party defense when there is insufficient evidence to support that defense. *Bryant v. Commissioner of Correction*, 290 Conn. at 515, citing *Dunkley v. Commissioner of Correction*, 73 Conn. App. 819, 827 (2002), cert. denied, 262 Conn. 953 (2003). In this case, however, the court found that "the testimony of Davis, Young-Duncan, Gartley and Fleury would have worked in to create a credible scenario in which the cause of [the victim's] death was a gunshot wound to the head perpetrated by a small group of unidentified Hispanic

males driving a white Cadillac or Lincoln, not the actions of the [respondent]." *Bryant*., 290 Conn. at 516.

Accordingly, the court stated that under Connecticut's "third party culpability rules, the testimony tending to show that the unidentified Hispanic males with a gun were responsible for [the victim's] death would have been relevant to the jury's determination of whether there existed a reasonable doubt as to the [respondent's] guilt." *Bryant v. Commissioner of Correction*, 290 Conn. at 517. The court concluded, therefore, that "the failure to present this relevant, plausible third party culpability defense constituted deficient performance on the part of defense counsel under *Strickland*." Id., at 517-18.

The Connecticut Appellate Court concluded that the decision of the respondent's trial counsel, Attorney Smith, not to rely on the "unknown-gunman" defense was reasonable because of two significant weaknesses in the theory. First, the Appellate Court noted that respondent himself did not mention that a gunman was involved in the incident in either of his statements to the police or in his testimony at trial. *Bryant v. Commissioner of Correction*, 99 Conn. App. at 434. Second, the court noted that neither the autopsy of the victim nor the medical records of his treatment revealed the existence of a gunshot wound. Id.

The Connecticut Supreme Court dismissed these concerns. First, the court stated that it was "possible that the [respondent] simply did not hear the gunshots or see the white vehicle and the unidentified Hispanic males" when they drove up to the scene of the accident

and shot the victim in the head. *Bryant v. Commissioner of Correction*, 290 Conn. at 520 n.14. Second, the court stated that the testimony of Dr. Katsnelson, the medical examiner who conducted the autopsy, "was not irrefutable." Id., at 525. The court suggested that Dr. Katsnelson's credibility could have been successfully challenged on cross-examination by confronting him with the opinions of the Young-Duncan and Gartley, the emergency medical personnel who treated the victim on the night of the incident. Id., at 526 n.22. Accordingly, the court was not "persuaded by the state's argument that deference to trial strategy saves Smith's actions." Id., at 521.[9]

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[9] The two concurring justices agreed that Attorney Smith provided ineffective assistance, but they did not agree that he ineffective for failing to present a defense that was predicated on the theory that the victim was shot to death by a small group of unidentified Hispanic males. *Bryant v. Commissioner of Correction*, 290 Conn. at 527-28 (*Palmer, J.*, concurring). The concurrence concluded that Smith was ineffective in failing to present the testimony of Thomas Davis, the driver of the SUV, to refute the state's theory that the respondent beat the victim to death. Id., at 528. The concurrence stated that Davis would have testified that he was at the scene in the aftermath of the collision and that he did not see the victim being beaten. Id., at 536. The concurrence concluded, therefore, that "Davis's testimony is unassailable and casts grave doubt on the only evidence that the state adduced implicating the petitioner in Jones's [killing]." Id.

REASONS FOR GRANTING THE WRIT

In *Strickland v. Washington*, this Court struck a delicate balance between the right of defendants to a fair trial and the interest of the states in the finality of their criminal judgments. *Strickland* did this by permitting defendants to obtain relief on claims of ineffective assistance of counsel but by also imposing stringent standards for obtaining such relief. The Court held that a claim of ineffective assistance of counsel has two components. The Court stated that:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so egregious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires that showing that counsel's unprofessional errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

The *Strickland* court was well aware that when assessing the performance of defense counsel, it would be "all too tempting to second-guess counsel's assistance after conviction...." *Strickland v. Washington.*, 466 U.S. at 689. The court concluded, therefore, that "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. The court stated that "[a] fair

assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight ... and to evaluate the conduct from counsel's perspective at the time." Id.

Indeed, Justice O'Connor, writing for the court in *Strickland*, warned that:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial. this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Strickland v. Washington, 466 U.S. at 690. The Connecticut Supreme Court's decision in this case, as well as decisions by the courts of other states, make it all too clear that precisely what Justice O'Connor feared has come to pass.

In the twenty-five years since *Strickland* was decided, there has been an erosion of the stringent standards established in that case to a point where absurd decisions, such as the one by the Connecticut Supreme Court in *Bryant v. Commissioner of Correction*, are possible. Indeed, the courts of other states have decided cases with equally egregious results. See, e.g., *Anfinson v. State*, 758 N.W. 2d 496 (Iowa 2008) (in case involving drowning of infant, counsel ineffective for failing to raise a post-partum depression defense even though such defense would have been inconsistent with defense claim of accident); *Commonwealth v. Hill*, 432 Mass. 704, 717-20 (2000) (counsel ineffective for failing to call witness whom he deemed to be hostile, lacking in credibility because of drug use and whose description of the perpetrator fit the defendant to some degree); *In re Maxfield*, 133 Wash.2d 332, 344 (1997) (counsel ineffective for failing to raise previously unrecognized state constitutional right to privacy in public utility records).

The decision of the Connecticut Supreme Court in *Bryant v. Commissioner of Correction* is not an aberration, but is, rather, an extreme example of a common problem throughout the country. Accordingly, this Court should grant certiorari in this case to better define the scope of "reasonableness under prevailing professional norms," *Strickland*, supra, 688, to provide guidance to lower courts regarding the application of "highly deferential" review, id., at 689, and to correct the egregious misapplication of *Strickland* in this case.

A. The Connecticut Supreme Court Failed to Afford Appropriate Deference to Decisions Made by Respondent's Counsel

In *Strickland v. Washington*, this Court held that in order to prevail on a claim of ineffective assistance of counsel, the petitioner must show that show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment...." Id., 466 U.S. at 687. Moreover, the Court stated that "[j]udicial scrutiny of counsel's performance must be highly deferential." Id., at 689.

While the Connecticut Supreme Court acknowledged this standard, it failed to heed the this Court's strong admonition against second-guessing the decisions of trial counsel. Instead, the court substituted its own judgment for that of the trial counsel, and concluded that there was a better defense available to the petitioner. In doing so, the court overlooked the fact that "the relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable." *Siripongs v. Calderon*, 133 F.3d 732, 736 (9th Cir.), cert. denied, 525 U.S. 839 (1998); see *Bloom v. Vasquez*, 840 F. Supp. 1362, 1369 (C.D. Cal. 1993) (ability to fashion different, or even better, defense is irrelevant if defense presented was a reasonable tactical decision).

In this case, the trial counsel's decision not to base the petitioner's defense on the theory that the victim was shot to death by an unknown gunman was

entirely reasonable. As the Connecticut Appellate Court noted, the respondent "did not indicate in either of his statements to the police, or in his testimony at his criminal trial, that there was an unknown gunman involved in the ... incident." *Bryant v. Commissioner of Correction*, 99 Conn. App. at 443. A defense based on the existence of such a gunman, therefore, would have been completely implausible. Moreover, none of the witnesses, including the respondent, were able to say that they saw a gun at the scene. Finally, the autopsy report included no indication that the victim had been shot. As the Appellate Court noted, "the medical examiner, who had more than twenty years of experience and performed thousands of autopsies, testified that the victim had sustained several injuries to various parts of his body as the result of blunt trauma and that the cause of the victim's death was blunt trauma to the head." Id. The defense proposed by the respondent in his habeas corpus petition offered no explanation for these injuries.

In addition, the state supreme court failed to consider that the petitioner was originally charged with murder. When faced with such a serious charge, a prudent defense counsel would certainly be reluctant to base his client's defense on a tenuous theory with such obvious disadvantages. Indeed, in *United States v. Cronic*, 466 U.S. 648 (1984), this Court observed that "[i]f there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." Id., at 657 n.19.

Finally, the Connecticut Supreme Court compounded its error by resorting to speculation and conjecture to support its conclusion that counsel's decision not to rely on a defense that the victim was shot by an unknown gunman constituted deficient performance. The most daunting obstacle to a defense that the victim was shot to death is the absence of any indication in the autopsy report that he suffered a gunshot wound. The court suggests, with absolutely no basis for doing so, that the medical examiner's "testimony was not irrefutable." *Bryant v. Commissioner of Correction*, 290 Conn. at 525. Indeed, the court even suggests that the medical examiner's testimony could have been impeached by confronting him with the observations of the paramedic and the EMT who treated the victim at the scene. Id., at 526 n.22. It is, of course, highly unlikely that an experienced medical examiner would admit an egregious professional error when confronted with the fact that the emergency personnel who treated the victim disagreed with his conclusion. The court also dismissed the troubling fact that the petitioner never mentioned a gunman in any of his statements to the police with the implausible suggestion that the petitioner simply failed to notice when the victim was shot to death in his presence. Id., at 521 n.14. It is difficult to imagine, however, that the petitioner could have failed to notice three men pursuing the victim in a white Cadillac and then shooting him in the head at close range.

If the standards established in *Strickland* and this Court's guidance with regard to claims of ineffective assistance are to have any meaning, they must be upheld and enforced by the Court. Accordingly, this

Court should grant certiorari to correct the egregious misapplication of *Strickland* by the Connecticut Supreme Court in this case.

B. Failure to Afford Appropriate Deference to Trial Counsel in Other States

While the Connecticut Supreme Court's ruling in *Bryant v. Commissioner of Correction*, supra, represents an extreme example inappropriate second-guessing of defense counsel by a court reviewing an ineffective assistance of counsel claim, Connecticut is by no means the only state where the highest court has failed to apply appropriate deference when evaluating the performance of counsel under *Strickland*.

For example, in *Anfinson v. State*, 758 N.W.2d 496 (Iowa 2008), the Iowa Supreme Court held that the performance of the trial defense counsel was deficient because he had failed to raise a postpartum depression defense in a prosecution for the drowning death of an infant. Id., at 505. The petitioner in *Afinson* was charged with murder as a result of the drowning death of her infant son. After reporting the child missing, the petitioner told the police that the child had drown accidentally and that she had panicked and had disposed of the body in a nearby lake. Id., at 498. At trial, the petitioner's defense counsel relied exclusively on a defense of accident. The petitioner was, nevertheless, convicted of second degree murder. Thereafter, she filed an application for post conviction relief alleging that her trial counsel was ineffective for failing to raise a defense based on postpartum

depression. Id., at 499. In the post conviction proceeding, her trial defense counsel testified that he did not want to introduce postpartum depression into the case because he was concerned that it could lead the jury to believe the petitioner had intentionally killed the child. Id. at 500 n.3. The Iowa Supreme Court, however, concluded that evidence of postpartum depression could have supported the petitioner's defense of accident, Accordingly, the court found that the defense counsel was ineffective and ordered a new trial. Id., at 505.

In *Commonwealth v. Hill*, 423 Mass. 704 (2000), the Supreme Judicial Court of Massachusetts held that the defendant was denied his right to the effective assistance of counsel because the his trial counsel had failed to call a witness who could have provided third party culpability evidence. Id. at 680. The defendant and Robert Shular were charged with the murder of an elderly man in an apartment belonging to Israel Lewis, a known drug dealer. Id., at 705-706. The Commonwealth's theory was that the defendant and Schular broke into Lewis's apartment to steal money. While they were in the apartment, they were confronted by Lewis's grandfather. A struggle ensued and the defendant shot and killed the elderly Lewis. Id., at 705.

Shular and the defendant were tried separately and Shular was tried first. Shular's attorney called Jose Ramos as a witness at the trial. Ramos, who had lived across the street from Lewis's apartment, testified that on the day of the murder, he saw a car pull up in front of the house, and a man get out. Ramos testified that the man went into the Lewis's house. A few minutes later, Ramos heard a shot. He then looked out his

window and he saw the same man running back to the car and getting in. *Commonwealth v. Hill*, supra, 717. After hearing Ramos' testimony, the jury acquitted Shular. Shular's attorney told the defendant's attorney about Ramos, but the defendant's attorney did not call Ramos as a witness at the defendant's trial. The defendant was convicted of the murder. The defendant moved for a new trial claiming that his trial counsel had been ineffective in failing to call Ramos as a witness. The defendant's attorney testified that he did not call Ramos as a witness because Ramos was extremely hostile, he was a drug user and the description of the man Ramos saw leaving the house where the victim was murdered resembled the defendant. Id. Nevertheless, the Supreme Judicial Court found that the defendant's trial counsel ineffective in failing to call Ramos as a witness at the defendant's trial. Id., at 717-18.

In the *Matter of Maxfield*, 133 Wash.2d 332 (1997), the Washington Supreme Court found that the petitioner's trial defense counsel was ineffective in failing to raise a defense based on a state constitutional right that had not been recognized at the time of the petitioner's trial. The petitioner had been convicted of cultivating marijuana in his home. The petitioner's marijuana growing operation came to the attention of the police when an official of the power company advised them of the petitioner's high level of power consumption. Id., at 335. At trial, the petitioner's defense counsel made no claim that the power company official's action violated the petitioner's constitutional rights. In the petitioner's action for post conviction relief, the Washington Supreme Court recognized for the first time a state constitutional right to privacy in public utility

records and found the petitioner's trial lawyer ineffective for not raising a claim based on that right at the petitioner's trial. Id. at 339-45.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted to correct the error of the Connecticut Supreme Court and to clarify this area of the law.

Respectfully submitted,

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July 20, 2009