Ken Richey's Conviction and Death Sentence Overturned A Second Time

Ken Richey was sentenced to death in Ohio in 1986 after being convicted of aggravated felony murder in the death of a two-year-old girl during a fire. In April 2005 the federal Sixth Circuit Court of Appeals overturned Richey's conviction and sentence. In November 2005 the U.S. Supreme Court reinstated Richey's conviction and sentence, but it also sent his case back to the Sixth Circuit for review of Richey's claim that his trial attorney was ineffective. On August 10, 2007, the Sixth Circuit overturned Richey's conviction and death sentence for the second time. The court ruled the failure of Richey's trial attorney to investigate and present scientific evidence undermining the State's arson theory was ineffective assistance of counsel. Ohio's Attorney General decided not to appeal the decision, but did announce that Richey would be retried. As of early October 2007 a trial date had not been announced. Excerpts from the Sixth Circuit's decision follow:

Kenneth T. Richey v. Margaret Bradshaw, No. 01-3477 (6th Cir. 08/10/2007)

A. The Trial

In 1986, when he was twenty-one, Kenneth Richey was convicted and sentenced to death by an Ohio state court for aggravated felony murder in connection with the death of two-year-old Cynthia Collins. (¶23)

The State argued at trial that in the early morning hours of Monday, June 30, 1986, Richey intentionally set fire to the apartment of Hope Collins, Cynthia's mother, due to a jealous rage directed at Candy Barchet, Richey's ex-lover. Barchet occupied the apartment immediately beneath Collins's and that night she was with another man ... The State conceded at trial that it had no evidence suggesting that Richey intended to kill two-year-old Cynthia. (¶24)

The fire started in Collins's apartment around 4:15 a.m. No one saw Richey set the fire or flee the burning apartment. (¶29)

The State argued at trial that Richey set the fire by using accelerants. ... To substantiate its theory, the State put on two expert witnesses from the state fire marshal's office and the state arson lab. (¶31)

Richey's trial counsel, William Kluge, retained Gregory DuBois to investigate the cause of the fire and test the conclusions of the State's experts. DuBois did not have any special expertise in arson investigations and little arson-related training. … The work DuBois performed was limited to meeting with Bob Gelfius, the State's expert ... DuBois then informed Kluge that he agreed with the State's conclusion that the fire was caused by arson. (¶32)

Prior to knowing what DuBois's testimony would entail, Kluge disclosed him as a trial witness. When the State figured out that Kluge was not going to call DuBois, Richey's only scientific expert, the State subpoenaed DuBois, who then conceded on the stand that he agreed with the State's analysis of the evidence, and agreed that the fire was caused by arson. Kluge did not object to DuBois's testimony and did not cross-examine him. (¶33)

B. State and Federal Post-Conviction Proceedings

Richey challenged his conviction and sentence on direct appeal but both the state intermediate appellate court and the Ohio Supreme Court affirmed. … Richey then filed a post-conviction petition in the state court. There, he adduced new forensic evidence that cast doubt on the State's arson conclusions. In particular, Richey retained fire experts Richard Custer and Andrew Armstrong who opined that the State used flawed scientific methods not accepted in the fire-investigation community to determine that arson caused the fire and that the samples of carpeting and wood from Collins's apartment did not contain evidence of accelerants. In particular, Custer testified that the State's experts "ignored facts that make it just, if not more, likely that the June 30, 1986 fire was caused by the careless discard of smoking materials than that the fire was caused by arson." (¶35)

Despite Richey's new evidence, the state post-conviction court denied his request for an evidentiary hearing and dismissed his petition. The intermediate appellate court affirmed and the Ohio Supreme Court declined to review the case. (¶36)

Richey then filed a petition for habeas corpus relief in the [U.S.] district court. The district court found that Richey's new experts "certainly undermine the state's arson evidence," but the court nevertheless denied his petition in full. (¶37)

We reversed the judgment of the district court ... (¶38)

On November 28, 2005, the Supreme Court vacated our judgment and remanded for further proceedings. *Bradshaw v. Richey*, 546 U.S. 74 (2005). (¶39)

A. Instructions on Remand

… the Supreme Court has remanded the case for us to further consider Richey's ineffective-assistance-of-counsel claim. (¶43)

We agree with the parties that the Supreme Court's remand instructions are not entirely clear. (¶46)

… Under either interpretation-Richey's or the State's—we conclude once again that the state courts unreasonably applied *Strickland* in determining that Richey was not deprived of his constitutional right to the effective assistance of counsel. (¶49)

B. Analysis According to Richey's Interpretation of the Supreme Court's Remand Language

1. Our Reliance on Evidence not Presented to the State Courts

In the state post-conviction court, Richey sought an evidentiary hearing. The state court denied this request and dismissed his petition. After Richey filed his habeas petition in the federal district court, that court granted both parties leave to take discovery. (¶55)

On appeal, the State did not challenge the district court's ruling that Richey had been diligent in attempting to develop his claim in the state court. Accordingly, we have no trouble concluding that we properly relied on the evidence newly developed in the district court. (¶56)

2. The Uniformity of Richey's Claim

… A review of the record shows that at all relevant times, Richey's ineffective-assistance claim has been predicated on the single theory that his counsel was ineffective in handling the scientific evidence. (¶59)

Where the legal basis for Richey's claim has remained constant, and where the facts developed in the district court merely substantiate it, we cannot say that the claim has been so "fundamentally alter[ed]" from that presented to the state court as to preclude our review. (¶70)

We therefore once again hold … that the state courts unreasonably applied *Strickland* in determining that Richey had not been denied his constitutional right to effective representation. (¶76)

C. Analysis According to the State's Interpretation of the Supreme Court's Remand Language

To establish ineffective assistance of counsel, a habeas petitioner must show both deficient performance and prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). (¶115)

First, at trial, the State put forth a specific theory of how Richey set the fire. The State did not rest on the circumstantial witness testimony tying Richey to the fire. The State instead maintained that Richey stole paint thinner and gasoline from the greenhouse across the street, brought them back to Collins's apartment where he poured them on her living room carpet and deck, and ignited them. The State supported its theory with detailed scientific testimony from Cryer and Gelfius. (¶117)

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edge the conviction had occurred. This *Brady* violation was discovered by Arey after his trial when a record of it was obtained under the Maryland Public Information Act.

The long and short of it is that Moon had a very long and violent criminal history, and the jury didn't know when assessing his credibility that he had already been convicted of threatening to kill a person at the very site of Shapiro's murder.

Judge denies warrant to search Moon's home for murder weapon

The police had not recovered the murder weapon, so Arey made a motion for the police to search Moon's home for the murder weapon. The judge held that granting a defense motion for a search would be a Maryland precedent, and that it would be harassment of Moon. So what the judge did was order the police to go to Moon's home accompanied by Arey's defense counsel, and request that Moon permit a search for weapons in his home. Moon was on parole so he of course refused. The judge's refusal to issue a search warrant for the murder weapon ensured that it would likely never be found.

Records support Moon's rental of car for disposal of Shapiro's body

Moon testified that he had been with Arey at Baltimore's Belvedere Hotel at 6 p.m. on May 9, 1973, moving Shapiro's body. At that time he had in fact been across town renting a green Duster at National Car Rental. The trial was stopped in the middle of the day on April 4, 1974, so a Baltimore City policeman and a state trooper could go with sirens screaming to Friendship Airport in Glen Burnie to seize the original car rental records. The time and date stamped records showed Moon rented the car at 6:06 p.m. on May 9, 1973. Arey's lawyer used the records to prove Moon lied that Arey was with him at the Belvedere Hotel at 6 p.m. on the day of Shapiro's disappearance. The car rental records also established that Moon personally rented and returned the vehicle.

When shown the rental documents Moon admitted they were authentic, but he claimed the date and time stamps were in error on the documents he signed, both when he rented and returned the car. Moon also denied he rented the Duster to transport Shapiro's body. Unknown to Arey, however, was Moon had admitted this in his police statement, a copy of which the judge refused to order turned over to the defense as discovery material. Arey obtained a copy of Moon's Police Statement after his trial, another *Brady* violation.

Moon's immunity deal from prosecution for Shapiro's murder was conditioned upon his truthful testimony. Yet, repeated proof of his perjury about his criminal history, his location at the time of Shapiro's disappearance, and the rental car, was not considered a deal breaker to bar Moon's testimony or invalidate his immunity from prosecution for his admission to Shapiro's murder.

Prosecution falsely claimed Shapiro's blood was on Arey's shirt

When Arey was questioned on May 11, 1973, it was his first ever police interrogation. During the long periods of time that he was left in the Interview Room with nothing to read or do, he indulged in a bad habit while awaiting each round of questioning.

Arey felt pimples on his forehead, picked and scratched them and then saw a little blood on his finger. With no tissue or running water available Arey licked his finger and applied saliva to the pimples in order to slow or staunch the minimal bleeding, and dried his finger on

Arey cont. on p. 19

Richey cont. from p. 17

The scientific evidence of arson was thus fundamental to the State's case. Yet Richey's counsel did next to nothing to determine if the State's arson conclusion was impervious to attack. … At bottom, the record shows that Richey's counsel did not conduct the investigation that a reasonably competent lawyer would have conducted into an available defense-that the fire was not caused by arson-before deciding not to mount that defense. (¶118)

[W]e can discern no strategic reason why counsel would have so readily ceded this terrain to the prosecution. (¶121)

The testimony of experts such as Armstrong and Custer, both of whom have stated they would have testified on Richey's behalf had they been contacted, would have severely undermined the State's case against him. Armstrong and Custer would have attacked the State's gas chromatography analysis as unsound and out of step with prevailing scientific standards; they would have disputed the State's conclusion that any of the samples contained traces of gasoline or paint thinner; they would have testified that the burn patterns, about which Cryer made so much, were just as consistent with a naturally occurring fire; and they would have rejected Cryer's contention that the fire's speed was indicative of arson, explaining that modern furnishings cause fires to burn more rapidly. Finally, they would have testified that the most likely cause of the fire was a cigarette smoldering in the cushions of Collins's couch. (¶122)

There can be little doubt that Richey was prejudiced by his counsel's deficient performance. There is a reasonable probability that had his counsel mounted the available defense that the fire was caused by an accident, and was not the result of arson at all, the outcome of either the guilt or the penalty phase would have been different. … Confronted with evidence debunking the State's scientific conclusions, the trial court might have had a reasonable doubt about Richey's guilt... (¶123)

III. CONCLUSION

… because the deficient performance of Richey's counsel undermines our confidence in the outcome of his trial, and because we believe that the Ohio state courts unreasonably applied *Strickland* in determining otherwise, we reverse the judgment of the district court and remand with instructions to enter a conditional writ of habeas corpus, giving the State of Ohio ninety days to retry Richey or release him. (¶125)

The 11-page *Richey v. Bradshaw*, No. 01-3477 (6th Cir. 08/10/2007) decision is on *JD's* website at, www.justicedenied.org/cases/richey_081007.htm, or order the "Richey Opinion 0807" for $3 (stamps OK) from: Justice Denied; PO Box 68911; Seattle, WA 98168.

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