

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Richard Eric Ross,
Petitioner-Appellant

v.

Jeff Macomber, Secretary of the
California Department of Corrections
and Rehabilitation,
Respondent-Appellee

Ninth Circuit
No. 23-2110

United States for the Southern
District Court of California
No. 17-cv-00953

**REQUEST FOR CERTIFICATE
OF APPEALABILITY**

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OF APPEALABILITY

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Issues Presented

1. Whether trial counsel rendered ineffective assistance of counsel under the Sixth Amendment by failing to investigate a medical defense that would have shown the accusations of sexual abuse against children to be false.

2. Whether the state court's factfinding process was flawed for purposes of 28 U.S.C 2254(d), where the state court refused to accept a timely submitted informal reply by petitioner, which was submitted by mail

and therefore did not meet the court's new electronic filing requirement.

Standard for granting a certificate of appealability

To obtain a COA, a petitioner “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” (*Slack v McDaniel*, 529 U.S. 473 (2000).) The showing required for a COA is “relatively low.” (*Williams v. Woodford*, 384 F.3d 567, 583 (9th Cir. 2004).) The applicant need not prove that jurists would grant the habeas petition. (*Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).) Because a COA does not require a showing that the appeal will succeed, the Court of Appeals should not require a showing that the appeal will succeed, and should not decline an application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. (*Id.* at 337.) The court resolves any doubts about issuing a COA in favor of the petitioner. (*Rhoades v. Henry*, 598 F. 3d 511, 518 (9th Cir. 2010).)

Argument

The state court unreasonably rejected appellant's claim that trial counsel rendered ineffective assistance by failing to investigate a medical defense.

Appellant was convicted of molesting two young girls, including one who claimed multiple acts of forcible penetration. The state did not have the accuser examined medically to confirm the sexual abuse took place because the complaint was made more than 72 hours after the last alleged act. Defense counsel at trial contacted a physician to obtain a medical opinion as to whether evidence of forced penetration would be found after 72 hours but the doctor said she was not available to meet, and defense counsel thereafter pivoted to a defense that the accusers made false allegations. Following the convictions, appellant contacted a physician, and expert in the field of child sexual abuse, who concluded the claims made by the accuser, if true, would be verifiable in a medical exam.

Appellant argued in state court that trial counsel rendered ineffective assistance under the Sixth Amendment by failing to properly investigate and present a medical defense that would have shown whether the accusations were true. (See *Strickland v. Washington*, 466 U.S. 668

(1984).)

In *Weeden v. Johnson*, 854 F.3d 1063 (9th Cir. 2017), this court reversed the district court's denial of a habeas corpus petition, accepting the defense argument that trial counsel rendered ineffective assistance by failing to properly investigate a defense. (*Id.* at p. 1071.) The court wrote that, under *Strickland*, counsel's investigation must determine trial strategy, not the other way around, and defense counsel could not have reasonably concluded that obtaining a psychological examination would conflict with his trial strategy without first knowing what such an examination would reveal. (*Ibid.*)

The case rested entirely on the credibility of the accusers, and the accusations were far fetched in light of the circumstances. Appellant was a productive adult with no history of improper behavior; there was no physical evidence to support the claims; one accuser's parents disliked appellant and the other was known to lie; the social worker acknowledged that certain allegations were the product of suggestibility, and immediately after learning of the accusations appellant asked that the accuser be physically examined.

Trial counsel's defense that the girls were liars was no substitute for a proper defense using medical evidence to prove the girls lied. Counsel thought to investigate this stronger defense but aborted the effort after being told the doctor she consulted was no longer available to consult on such a case.

Appellant further argues the state court's ruling is not entitled to deference under 28 U.S.C § 2254(d) because the factfinding process was flawed. (See *Taylor v. Maddox*, 366 F.3d 992, 1000-1001 (9th Cir. 2004).) Specifically, the state court issued its denial of the habeas corpus petition without considering appellant's informal reply, which had been timely mailed to the court, but returned under the court's then-new electronic filing requirement. The reply was then electronically filed but rejected because it was submitted one day late.

Defense counsel also requested oral argument on the issue in the informal reply, but the court acknowledged in its ruling that it did not consider the reply, and so there was no argument on the important and complicated issue of counsel's failure to properly investigate a medical defense.

The informal reply has an important function in the state's habeas corpus process. (See Cal. Rules of Court, rule 4.551(b) which provides that the court may not deny the petition until after it considers the petitioner's informal response.) Resolving the case after only reading respondent's argument was a flawed process and not entitled to deference by the federal courts.

Appellant respectfully requests that this court issue a certificate of appealability and review the constitutional claim raised in his case which supports appellant's claim of factual innocence that was not established due to the lack of a proper investigation by defense counsel.

Dated: September 22, 2023

Respectfully submitted,
s/Patrick Morgan Ford
PATRICK MORGAN FORD,
Attorney for Petitioner-Appellant
Richard Eric Ross

Certificate of Service

CASE NAME:

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I hereby certify that on September 22, 2023, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

Request for Certificate Of Appealability

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 22, 2023, at San Diego, California.

/s/Patrick Morgan Ford
PATRICK MORGAN FORD,
Attorney for Petitioner
Richard Eric Ross