Sirhan Case: Petition / Dismiss Oct 2010 Court filing

admission of a key piece of evidence despite possessing the knowledge that the prosecution could not authenticate it.

In addition to rendering constitutionally unreasonable assistance by stipulating to the authenticity of the state's ballistics evidence, counsel also was ineffective in failing to investigate alternative defenses. Defense counsel in this case conducted zero investigation into the facts surrounding it, taking at face value everything that the state asserted. For example, after reviewing the ballistics evidence prior to Petitioner's trial, criminalist William Harper concluded that there was no ballistics match between Petitioner's weapon and the bullets recovered from Senator Kennedy and victims Weisel and Goldstein Robert J. Joling and Philip Van Praag, An Open & Shut Case: How a "rush to judgment" led to failed justice in the Robert F. Kennedy Assassination viii (2008). When confronted with this evidence, lead defense counsel Grant Cooper did nothing except to continue with his trial strategy of conceding Petitioner's guilt so as to argue diminished capacity. Cooper was again confronted with evidence that the ballistics match the Wolfer and the state claimed matched Petitioner's weapon to bullets recovered from Senator Kennedy and other victims when the prosecution conceded that they could not establish the authenticity of that evidence. Not only did counsel decline to investigate this claim, but he actually made it easier on the state by stipulating to the bullets' authenticity. Yet a third example of counsel's failure to consider the alternative defense strategy that Petitioner did not fire the fatal shot is that upon belatedly receiving the autopsy report indicating that Senator Kennedy was shot from behind and that the gun that shot Senator Kennedy was no more than two

inches away, defense counsel declined to move for a continuance to investigate and possibly alter his trial strategy.

In 1972, Cooper explained his decision not to investigate as follows:

> I did not retain an independent ballistics expert to analyze the slugs... Had I any feeling that in a case of this importance, Mr. Wolfer either willfully falsified his ballistics analysis or negligently, improperly, or otherwise arrived at his conclusions, I would have hired an independent ballistics expert....Because of my firm belief that Sirhan alone fired the shots and that Mr. Wolfer was testifying correctly under oath I did not have the bullets independently analyzed. Id. at 64.

Putting aside for the moment the implausibility that this is probably the first time in the history of jurisprudence that a defense lawyer that a police officer would not negligently misrepresent evidence, the statement is entirely implausible on its face. Cooper had up to and during the trial at least three objective indicia that Wolfer had either negligently or willfully misstated his conclusions: First, there is Harper's conclusion that no match could be identified between Petitioner's weapon and bullets recovered from the victims; second, there is the state's representation that they would be unable to authenticate the bullets offered and accepted into evidence at trial; and third, there is the autopsy report, which, had Cooper read it and followed through, would have shown him not only that the bullet the state admitted as having been recovered from Senator Kennedy was not in fact so, but also that it was literally impossible for Petitioner to have shot Senator Kennedy. See § III(C), *infra*. Defense counsel's failure to adequately investigate the possibility

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Putting aside for the moment the implausibility that this is probably the first time in the history of jurisprudence that a defense lawyer argued that a police officer would not negligently misrepresent evidence, the statement is entirely implausible on its face. Cooper had up to and during the trial at least three objective indicia that Wolfer had either negligently or willfully misstated his conclusions: First, there is Harper's conclusion that no match could be identified between

Petitioner's weapon and bullets recovered from the victims; second, there is the state's representation that they would be unable to authenticate the bullets offered and accepted into evidence at trial; and third, there is the autopsy report, which, had Cooper read it and followed through, would have shown him not only that the bullet the State admitted as having been recovered from Senator Kennedy was not in fact so, but also that it was literally impossible for Petitioner to have shot Senator Kennedy. See § III(E), *infra*.

Defense counsel's failure to adequately investigate the possibility of a second shooter goes well beyond his failure to hire an independent ballistics expert. Counsel did not fail to request even the most rudimentary pre- or in-trial examination of the bullet identification evidence, nor did he proffer any cross-examination of the state's presentation of the ballistics evidence. When determining if counsel's acts or omissions are constitutionally unreasonable, the Supreme Court has stated that the inquiry should be guided by reference to "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690. In failing to make even the most basic investigation of the state's allegations against Petitioner, defense counsel failed to "make the adversarial process work in the particular case."

Harper re bullet storage (source JWS)

re Sirhan's Appellate attorney George Shibley's letter to the County Clerk authorizing Harper to examine Sirhan trial evidence

[illegible] numbers listed; some [illegible] ... The files contain no indication that Harper had a court's permission to view restricted evidence. It is understood, however, that he was authorized to [illegible] the evidence by Sirhan's attorneys of record, George Shibling and Luke McKissack. Judge Walker's original order made no provision for attorneys of record to authorize anyone else to view the evidence. Another who viewed the evidence under the authority of attorney Shibling and McKissack was William Harper, a criminalist who has exchanged information with Charack. Harper made nine visits. He examined the gun and bullets on a table in the Clerk's Office. Harper told KNXT News he handled the evidence in the course of his examination, but he also said the gun and bullets had not been sealed in plastic containers as Judge Walker had instructed. They were in plain paper envelopes. Harper says he does not know if the evidence has been contaminated, but as a crime expert, he has strong reservations about the way it was handled. To preserve the integrity of such evidence, Harper said it should be wrapped and stored in such a way that it cannot come into an abrasive contact with other objects. Then he says the Sirhan bullets were thrown together in envelopes usually without protective wrappings. A bullet fragment from Kennedy's head had been wrapped in gauze, but another taken from his neck was loose in the same envelope. Three bullets and two empty shell casings were mixed loosely in another envelope. And another bullet was loose in a glass vial with nothing to separate it from the hard sides of the container. The Clerk's records show that a total of [illegible] person examined Sirhan trial evidence but those records are so vague it is impossible to say for sure what evidence was examined and by whom.

re Geo Shibley letter to Clerk Sours