No. _____

October Term, 2019

In the Supreme Court of the United States

Jamaar Jerome Williams,

Petitioner,

v.

Jo Gentry, Warden, et al.

Respondents.

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

Petition for a writ of certiorari

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it concluded Williams had failed to establish prejudice under *Martinez v. Ryan* because the record clearly shows Williams' underlying claim that his trial counsel was ineffective for failing to investigate alibi witnesses had "some merit"?

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

LIST OF RELATED PROCEEDINGS

State v. Williams, No. C174590 (8JDC Nev.) (judgment of conviction entered April 20, 2002)

State v. Williams, No. 39651 (Nev. Sup. Ct.) (order of affirmance issued Oct. 16, 2003)

Williams v. State, No. C174590 (8JDC Nev.) (post-conviction petition; order denying petition entered March 6, 2005)

Williams v. State, No. 44779 (Nev. Sup. Ct.) (order of affirmance issued June 1, 2005)

Williams v. State, No. C174590 (8JDC Nev.) (second post-conviction petition; order denying petition entered June 16, 2010)

Williams v. State, No. 56273 (Nev. Sup. Ct.) (order of affirmance issued May 9, 2011)

Williams v. Gentry, et al., No. 2:05-cv00879-APG-CWH (Dist. of Nev.) (first judgment entered August 11, 2014; second judgment entered November 20, 2017)

Williams v. Crawford, No. 14-16723 (9th Cir.) (memorandum issued Oct. 19, 2016)

Williams v. Gentry, No. 17-17442 (9th Cir.) (memorandum issued Oct. 22, 2019)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jamaar Jerome Williams respectfully prays that a writ of certiorari issue to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit. *See* Appendix ("App.") A at 1.

OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Ninth Circuit affirming the denial of Williams's petition for a writ of habeas corpus, issued on October 22, 2019, is unpublished. *See* App. A at 1.

JURISDICTION

The United States District Court for the District of Nevada had original jurisdiction over this case, pursuant to 28 U.S.C. § 2254. The Ninth Circuit granted a Certificate of Appealability. The Ninth Circuit affirmed the district court's decision on October 22, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. *See also* Sup. Ct. R. 13(1).

STATEMENT OF THE CASE

1. The jury trial

The instant litigation arises out of two separate shootings occurring on November 7, 2000 and November 8, 2000. In his opening statement,

defense counsel stated that Williams may have been present when the November 7 shooting occurred, but he was not the shooter. Ninth Circuit Excerpts of Record ("EOR") 114-15.[1] Counsel claimed that Williams has said "over and over again" he was not present when the November 8 shooting occurred. EOR 116.

Darin Archie ("Archie") testified that on November 7, 2000, he and Williams had a verbal altercation at a trailer park. EOR 125-26. The altercation arose when Archie intervened in a dispute between Williams and Jimmy Polito. EOR 124-26. Later that night, Williams returned to the trailer park and fired a gun in Archie's direction as Archie ran into his trailer. EOR 135-37. After additional gunfire, Reggie Ezell ("Ezell") was found dead outside the trailer. EOR 138.

On the following evening, November 8, 2000, a man by the name of "Jules" visited Jimmy Polito ("Polito") and Ricky Policastro's ("Policastro") trailer asking who the witnesses were to the shooting. EOR 366-67. After about fifteen minutes, Polito walked Jules to the door and

[1] The EOR is available electronically in the Ninth Circuit record as document 10. *See Williams v. Gentry*, No. 17-17442, ECF No. 10.

an individual appeared and that individual fired a handgun at Polito striking him in the neck. EOR 371-72. Policastro was on the sofa and was shot as well. EOR 406. Both Polito and Policatstro survived.

Appointed counsel Joseph Sciscento represented Williams at trial. At trial, the State presented no conclusive evidence linking Williams to the November 7 shooting of Ezell. Williams testified he was not the shooter during the November 7 incident and he did not fire a gun. EOR 654-56. Williams further testified that his prior taped statement given to police, in which he admitted being present and shooting during the November 7 incident, did not accurately present the facts of the shooting. EOR 655, 658. At no time—either in his statement to the police or in his testimony—did Williams indicate that he shot Ezell or Polito and Policastro.

Darin Archie only saw a single shot fired at him and did not see any more shots. EOR 135, 137, 176-77. Olivia McBride witnessed shots fired at Archie—not the victim—and only heard Ezell fall. EOR 284-6. McBride had not previously met Williams. *Id.* In identifying Williams as the shooter, she relied solely on Archie's earlier identification of the

person who stuck his head inside the trailer door as Williams. EOR 280 (Archie testified the person who opened the door as a person named Dominique).

McBride stated that the person holding the gun and the person looking in the door was the same person. EOR 284. McBride could not conclusively identify Williams in the photographic line-up. EOR 290. Archie's testimony affirmed Ezell talked with Williams and a third person before the shooting. EOR 134, 161.

Ballistics expert James Krylo testified that the bullets recovered from the scene on November 7 did not conclusively come from one gun. EOR 520. The State's experts also could not discount that at least one of the bullet fragments was the product of a ricochet bullet. EOR 543.

The critical issue for the jury regarding the November 8 incident was the eyewitness testimony of several witnesses. No other evidence linked Williams to the crime. Polito testified he only recognized Williams from a "quick flash" just before he was shot. EOR 395; *see also* EOR 432 (Policastro affirmed Polito was shot "immediately" after walking to the door). Polito identified Williams in the photographic line-up because

"[Williams] was the only one [Polito] recognized" and he learned from others of Williams's involvement in the November 7, 2000 incident. EOR 393, 395.

Likewise, Policastro had been informed by others that Williams had been in a shooting the previous night, and looked specifically for Williams in the photographic line-up. EOR 427-28. Additionally, Policastro observed a second person outside the trailer who had about the same build as Williams. EOR 409-10. However, he only named Williams.

Witness Cerra, located at the time about four or five trailers away from the shooting on November 8 (EOR 453), testified she did not actually see Williams's face; she only saw his back. EOR 474. She observed the person for a very short time, about 10-20 seconds. *Id.* The witnesses expected the shooter to be Williams and assumed it was Williams.

The state presented no conclusive physical evidence linking Williams to the November 8 incident. The State called multiple expert and police witnesses. Homicide Sergeant Ken Hefner linked alternate suspect Jules Lindsey's phone calls immediately prior to the November 8 incident to a person named Alexis Sims – not Williams. EOR 479; EOR

577 (Homicide Detective James LaRochelle agreed that an investigation as to Jules was still ongoing at the time of trial).

Criminalistic technologist David Welch could not conclusively link the black stocking hood worn by the shooter on November 8, 2000, to Williams as the hood yielded no DNA. EOR 500-01.

Joe Geller, an expert in fingerprint analysis, acknowledged he did not recover any latent prints from the submitted cartridge cases. EOR 516. Geller further testified that footprint evidence recovered at the scene did not match Williams, nor did the latent print recovered from a motion detector sensor. EOR 521-23. The testimony of Detective James LaRochelle further reenforced the lack of physical evidence connecting Williams to the crime. LaRochelle testified that fingerprints taken off the motion sensor did not match Williams, the footprint analysis did not match Williams, and no DNA was recovered sufficient to determine any generic markers on the mask. EOR 597-98.

Most significantly, ballistics expert James Krylo testified that the bullets from the November 8, 2000 incident were neither the same type, nor fired from the same gun, as those found in connection with the

November 7, 2000 incident. EOR 534.

Williams testified on his own behalf. He testified that he was present on November 7, 2000, but did not do the shooting. EOR 644-55. He was at home with relatives on November 8, 2000, and was not present at the scene. EOR 658.

In closing argument, defense counsel argued, as he had in opening statements, that Williams was not present on November 8. EOR 711.

Williams was ultimately convicted of one count of first-degree murder with use of a deadly weapon (Ct. 1), three counts of attempt murder with use of a deadly weapon (Cts. 2, 4, 5), and one count of conspiracy to commit murder (Ct. 3). App. H at 85. Two of the attempted murders concern the November 8 incident. On each of those two counts, Williams received a sentence of 106 to 480 months. App. H. at 86. The court ran all of the counts consecutively, except for the conspiracy count. The aggregate sentence was 66.5 years to life. *Id.*

2. Post-conviction litigation

After his direct appeal was complete, Williams filed a *pro se* state habeas petition raising a due process issue based on his appointed

counsel's failure to notify him of the completion of his direct appeal or to provide him with his file. EOR 752. The state court denied the petition because he failed to state a claim or provide supporting facts. EOR 879, 880-3. The Nevada Supreme Court affirmed the lower court's decision. EOR 18.

Williams mailed a timely *pro se* 28 U.S.C. § 2254 petition to federal court. EOR 755. Counsel was appointed (ECF No. 26), and a second amended petition was filed raising several new grounds for relief, including an argument that counsel was ineffective for failing to call two alibi witnesses, Blanche Williams and Donell Porte, who would have testified that Williams was with them at the time of the November 8 shooting. EOR 776.

Williams filed a motion to stay and abey the proceedings, which the court granted. ECF No. 66. The state court found this ineffective claim to be procedurally barred. EOR 27-30.

Williams returned to the federal district court. The Respondents moved, in part, to dismiss this ground as procedurally defaulted. EOR 1460. Williams opposed the motion to dismiss, arguing he had cause and

prejudice to overcome the defaults. ECF No. 74-75.

While the motion to dismiss was pending, this Court issued *Martinez v. Ryan*, 566 U.S. 1 (2012). Williams filed a notice of supplemental authority requesting supplemental briefing and an evidentiary hearing. ECF No. 83-87.

Without requesting supplemental briefing or holding a hearing, the district court issued an order dismissing the ineffectiveness ground. It rejected Williams' arguments as to prejudice to overcome the default. EOR 12; ECF No. 88. The court did not address *Martinez*. In a later order, the court denied the remaining grounds in the petition. EOR 20-26.

The Ninth Circuit vacated the district court's dismissal of the ineffectiveness ground, concluded the district court erred in failing to consider the applicability of *Martinez*. App. F at 70-71. The court held "the last three prongs of *Martinez* are clearly satisfied in this case." App. F at 71. The court remanded the case to the district court for that court to "evaluate whether further factual development is needed and [to] determine whether Williams's claims are substantial under the

appropriate standard." App. F at 72.

On remand, the district issued an order directing Williams to "submit points and authorities and to proffer any evidence in support [of] his claims under *Martinez*." EOR 9-10.

Williams filed a points and authorities, including declarations from two potential alibi witnesses, Dorrell Porter and Blanche Williams ("Blanche"). App. . In tbe declarations, Porter and Blanche stated that Williams is their cousin. EOR 828. They both confirmed that they were with Williams at Porter's house all day on November 8, 2000. EOR 828-29.

The district court dismissed the ineffectiveness ground, concluding that Williams had not shown prejudice under *Martinez*, and denied a COA. App. B at 4-11. After issuing a COA, the Ninth Circuit affirmed. App. A at 1-2. The court stated that it was appropriate for the district court to find a lack of prejudice without holding a hearing because Williams submitted "no evidence that prior to Williams' testimony at trial his counsel had reason to suspect or believe that Williams had an alibi or alibi witnesses. On the contrary, the record indicates the opposite." App.

A at 2.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT ERRED WHEN IT CONCLUDED WILLIAMS HAD FAILED TO ESTABLISH PREJUDICE UNDER *MARTINEZ V. RYAN* BECAUSE THE RECORD SHOWS WILLIAMS' UNDERLYING CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE ALIBI WITNESSES HAD "SOME MERIT"

This Court should grant Williams's petition because the Ninth Circuit's decision is clearly erroneous. *Cf. Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (granting review when lower court misapplied settled law); *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (same, citing cases). Here, Williams easily met the standard for establishing prejudice under *Martinez*. The Ninth Circuit's decision to the contrary is wrong. This Court should grant review and vacate that court's decision with instructions for that court to order a hearing in the district court.

A. The Martinez standard

In *Martinez v. Ryan*, 566 U.S. 1 (2012), this Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17.

To establish cause and prejudice under *Martinez*, a petitioner must show: (1) the underlying ineffective assistance of trial counsel claim is "substantial" or has "some merit"; (2) the petitioner was not represented or had ineffective counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) during the post-conviction review proceeding; (3) the state post-conviction review proceeding was the initial review proceeding; and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding. *Trevino v. Thaler*, 569 U.S. 413, 427-29 (2013).

To establish prejudice under *Martinez*, a petitioner must demonstrate that his ineffective assistance of trial claim is "a substantial one, which is to say the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14. A petitioner should easily meet this standard because it is the same as that of an application for a certificate of appealability ("COA"). *Id.* (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). The COA standard is satisfied if the petitioner can "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the

questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (quotations omitted).

It is important to recognize that the COA standard is not the same as a merits analysis. Rather, "at the COA stage, the only question is whether the applicant has shown jurists of reason could disagree with the district court's resolution" of the issue. *Buck v. Davis*, 137 S.Ct. 759, 773 (2017). A court must make a COA inquiry without "full consideration of the factual or legal bases adduced in support of the claim." *Miller-El*, 537 U.S. at 336.

B. Williams demonstrated cause under Martinez.

Williams meets the standard to demonstrate cause under *Martinez*. Williams did not have counsel in his first state habeas proceedings. EOR 746. The first state petition was the relevant initial review proceeding. And the initial review proceeding was the appropriate proceeding under state law for Williams to have raised a challenge to the effectiveness of his trial counsel. *See, e.g., Rippo v. State*, 146 P.3d 279, 285 (Nev. 2006) ("Claims of ineffective assistance of trial or appellate counsel are properly raised for the first time in a timely first post-conviction petition.").

Therefore, Williams established good cause to overcome the procedural default.

C. Williams also demonstrated prejudice under Martinez.

Williams can demonstrate his ineffective assistance of trial counsel claim is "substantial" or has "some merit." *Martinez*, 566 U.S. at 14. Williams's claim that trial counsel was ineffective for failing to present alibi witnesses at trial meets that standard. EOR 776. Williams presented evidence in his federal petition that two people would have testified that Williams was not at the trailer park on November 8, 2000. *Id.* Porter and Blanche, Williams's cousins, confirmed that they were with Williams at Porter's house all day on November 8, 2000.

Despite this crucial evidence to corroborate Williams's alibi, defense counsel failed to call either witness to testify at trial. Based on his opening statement, trial counsel was well aware that the defense at trial would be that Williams was not present at the shooting on November 8. It is reasonable to infer that counsel would know that alibi witnesses were available to support that defense. Williams testified this was his alibi at trial. EOR 658; *see also* ECF No. 40-2 (petition for writ of habeas corpus, filed two months before sentencing, alleging the

ineffective assistance of counsel for failing to call alibi witnesses, including Blanche Williams). Trial counsel failed to present evidence that would corroborate Williams's theory of defense for November 8.

A "lawyer who fails adequately to investigate, and to introduce evidence, evidence that demonstrates his client's factual innocence, or that raises doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002). Where the testimony of alibi witnesses at trial would "create a reasonable probability that the fact-finder would have entertained a reasonable doubt concerning guilt," trial counsel is ineffective for failing to call them. *Brown v. Meyers*, 137 F.3d 1154, 1158 (9th Cir. 1998) (quotation omitted); c*f. Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994) (trial counsel's failure to interview defendant's brother, who confessed he was the murderer, was deficient performance because counsel has a duty to investigate); *see also Stitts v. Wilson*, 713 F.3d 887, 892 (7th Cir. 2013) (rejecting the state court's determination that counsel's performance was not deficient because he performed some investigation, because the standard is whether the investigation was adequate following reasonable investigation); *Blackmon v. Williams*, 823

F.3d 1088, 1104 (7th Cir. 2016) ("An outright failure to investigate witnesses … is more likely to be a sign of deficient performance.") (citations omitted); *Bryant v. Scott*, 28 F.3d 1411, 1417-8 (5th Cir. 1994) (where trial counsel knew of alibi witnesses before trial, his failure to contact them was deficient performance).

It is also reasonable to presume that in a shooting case where his client has told him that he was not present at the scene an attorney would want to know if there were any potential alibi witnesses available. Indeed, trial counsel attorney would—and indeed has a duty to—attempt to speak to those witnesses before trial and to present their testimony if it corroborates the theory of defense. It is doubtful any "reasonable professional judgment" could have supported trial counsel's failure to interview the witnesses. It strains credulity that counsel would mount an alibi defense using only his client's statements, without asking whether other evidence was readily available.

At a minimum, the district court should have held an evidentiary hearing to permit questioning of trial counsel regarding his investigation and how that investigation informed his strategy to put Williams on the stand to testify to an alibi defense. A hearing would also permit the

district court to observe the demeanor and testimony of Williams's other proffered alibi witnesses. *See Siripongs v. Calderon*, 35 F.3d 1308, 1314-5 (9th Cir. 1994) ("Without the benefit of an evidentiary hearing … we cannot determine if counsel's decision was a strategic one, and if so, whether the decision was a sufficiently informed one." (quoting Hendricks v. Vasquez, 974 F.2d 1099, 1109-10 (9th Cir. 1994))).

It is debatable among reasonable jurists whether there is a reasonable probability that had trial counsel called the alibi witnesses the outcome of the trial would have been different. Williams clearly showed the claim had some merit.

D. The Ninth Circuit's analysis is wrong

The Ninth Circuit rejected this claim, stating Williams presented "no evidence that prior to Williams' testimony at trial his counsel had reason to suspect or believe that Williams had an alibi or alibi witnesses. On the contrary, the record indicates the opposite." App. A at 2.

This is simply wrong. Defense counsel going into trial that the defense would be that Williams was not at the scene of the crime on November 8. **Defense counsel said this in his opening statement**. That obviously occurred before Williams' testimony. This comment in

opening was clearly based on the discovery material, namely Williams's prior statements to the police indicating he was not present on November 8. And counsel would have known that this was the defense because he would have spoken with Williams about it before trial. It makes little sense to conclude that defense counsel and Williams would not have spoken about potential alibi witnesses. Counsel would have wanted to know that information before pursuing that defense. Based on counsel's pursuit of this defense from the very beginning of trial, it is incorrect to say that the record proves that counsel did not know about these witnesses. Williams would have obviously shared this information with counsel before trial. There is no reason why Williams would have waited until his testimony to mention this for the first time. Indeed, Williams was complaining about the failure to call these witnesses immediately after the trial.

Contrary to the Ninth Circuit's analysis, Williams's allegations as well as the record as a whole established that this claim had some merit. Alternatively, there was more than enough evidence to justify a hearing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated January 15, 2019.

Respectfully submitted,

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