NO. 20-5247

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

AVERN LEE BURNSIDE,

Petitioner,

v.

RANDEE REWERTS, WARDEN,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Avern Lee Burnside # 394665
In Propria Persona
Carson City Correctional Facility
10274 Boyer Road
Carson City, Michigan 48811

QUESTIONS PRESENTED

ARGUMENT I

DID THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENIED MR. BURNSIDE'S REQUEST FOR A CERTIFICATE OF APPEALABILITY IN THIS HABEAS CORPUS CASE WHERE JURISTS OF REASON COULD CLEARLY DEBATE WHETHER MR. BURNSIDE'S DUE PROCESS RIGHTS WERE VIOLATED AND HE IS ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE, WHERE THE PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY FROM LEAH WATSON, WHOSE TESTIMONY WAS BASED ON THREATS AND INTIMIDATION; AND THAT JUDGE FARAH'S FACTUAL FINDINGS ARE NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS?

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The United States Court of Appeals for the Sixth Circuit denied Mr. Burnside a certificate of appealability in an unpublished Order dated April 29, 2020. This Order is reproduced in the appendix to this petition as Appendix A and is cited at Burnside v. Rewerts, 2020 U.S. App. LEXIS 13803 (April 29, 2020).

United States District Court for the Eastern District of Michigan denied Mr. Burnside's petition for writ of habeas corpus in an unpublished opinion and order on August 28, 2019. The court went on to deny Mr. Burnside a certificate of appealability as to all issues in the petition in the same opinion and order. This Opinion and Order is reproduced in the appendix to this petition as Appendix B and is cited at Burnside v. Campbell, 2019 U.S. Dist LEXIS 146288 (E.D. Mich., Aug. 28, 2019).

The Michigan Supreme Court denied Mr. Burnside leave to appeal on collateral review of his state court judgment in an Order dated June 28, 2016. This Order is reproduced in the appendix to this petition as Appendix C and is cited at People v. Burnside, 2016 Mich. LEXIS 1236 (June 28, 2016).

The Michigan Court of Appeals denied Mr. Burnside leave to appeal on collateral review of his state court judgment in an unpublished Order dated September 15, 2015. This Order is reproduced in the appendix to this petition as Appendix D and is cited at People v. Burnside, 2015 Mich. App. LEXIS 2636 (Sep. 15, 2015).

The Genesee County Circuit Court denied Mr. Burnside collateral postconviction relief from his state court judgment in an unpublished Opinion and Order dated July 14, 2015. This Opinion and Order is reproduced in an appendix to this as Appendix E.

The Michigan Supreme Court denied Mr. Burnside leave to appeal on direct

appeal of his state court judgment in an Order dated October 28, 2014. This Order is reproduced in the appendix to this petition as Appendix E and is cited at People v. Burnside, 2014 Mich. LEXIS 2053 (Oct. 28, 2014).

The Michigan Court of Appeals affirmed Mr. Burnside's convictions and sentences in an appeal of right from his state court judgment in an unpublished Opinion dated April 17, 2014. This Opinion is reproduced in the appendix to this petition as Appendix G and is cited at People v. Burnside, No. 309807, 2014 Mich App. LEXIS 723 (Mich. Ct. App. Apr. 17, 2014).

STATEMENT OF JURISDICTION

The final judgment dismissing Mr. Burnside's habeas corpus petition in this case was entered by the United States District Court for the Eastern District of Michigan on August 28, 2019. The district court's judgment is reproduced in the appendix to this petition as Appendix H. On the same date, the district court denied a certificate of appealability with respect to all of the grounds raised in the habeas petition in the same opinion and order that it issued denying the writ. See Appendix B. The Petitioner filed a timely notice of appeal in the district court. The United States Court of Appeals for the Sixth Circuit subsequently issued an order denying a certificate of appealability on April 29, 2020. See Appendix A. This petition was timely filed within ninety days after that judgment.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1); United States v. Hohn, 524 U.S. 236 (1998).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by...writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 2253(c):

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from---
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255.
(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Complaintant Antwyne Ledesma was driving west on Court Street in Flint on July 30, 2009 around 2:30 in the afternoon. As she approached Ann Arbor Street, close to the White Tavern, she noticed a Black SUV swerving. She was talking to her father on the phone at the time, he told her "to get close enough to get the license plate number." (TT, 2-23-12 pg. 14-15 Appendix N). Ms. Ledesma was able to get the plate number, EXJ8088, and gave it to her dad. (TT, 2-23-12 pg. 15-16, 21 Appendix N).

The Black SUV was traveling in the same direction as Ms. Ledesma. At Miller Road, the SUV moved to the left turn lane. The windows were down and Ms. Ledesma could see a black male assaulting a white female. Ms.Ledesma yelled, "Leave her alone; you're not fuckin' right." After the light turned green, Ms. Ledesma proceeded down Court Street. She testified that I, "Noticed in my rear-view mirror that the SUV had got out of the turning lane and got behind me." (TT, 2-23-12 pg. 16-17 Appendix N).

She picked up her pace, then the SUV pulled along the side of her car. (TT, 2-23-12 pg. 17-18 Appendix N). Ms Ledesma saw the man's hand going up, extended in her direction, and heard the first shot. She ducked down, "hit the accelerator, and then heard another shot."

However, she did not see a gun or a muzzle flash. (TT, 2-23-12 pg. 18, 34 Appendix N). The Black SUV then turned left onto Durand Street. (TT, 2-23-12 pg. 19 Appendix N). Ms. Ledesma did not see the man's face and could not identify him or "the white female that was sitting in the passenger's side." (TT, 2-23-12 pg. 21-22, 35-36 Appendix N). Both Ms. Ledesma and her father phoned 911 immediately to report the incident. A bullet hole was later discovered in the rear quarter panel of her car. (TT, 2-23-12 pg. 38 Appendix N).

Leah Watson testified that Avern Burnside had been her boyfriend for six years. (TT, 2-23-12 pg. 48 Appendix N). On the afternoon of July 30, 2009, the couple had gone to a restaurant on Court Street. (TT, 2-23-12 pg. 49 Appendix N). When they left, Mr. Burnside was driving his Tahoe truck that was titled to Ms. Watson. They were yelling and screaming back and forth and he was grabbing her hair, shoving her head down. (TT, 2-23-12 pg. 49-51 Appendix N).

Ms. Watson testified that a woman pulled up next to them while they were in "the turn lane to go onto Miller Road." Mr. Burnside got behind the car, then met up with it. She said "he put his arm over me...the gun was right in front of my face and Mr. Burnside shot at her." (TT, 2-23-12 pg. 52-53 Appendix N). Ms. Watson said after Mr. Burnside drove home, he left walking. (TT, 2-23-12 pg. Appendix N).

Ms. Watson later responded to a notice left by the Flint Police Department. She claimed she did not tell Sergeant Brown "the truth about what happened that day, right away" because she was scared of her "boyfriend at the time." However, she later told him the truth. (TT, 2-23-12 pg. 56 Appendix N). Ms. Watson testified for the prosecution at the preliminary examination held in this case. However, afterwards she sent Judge McDoud a lengthy, notarized letter admitting that she had lied on the witness stand. (TT, 2-23-12 pg. 66-73 Appendix N).

At a pre-trial hearing held before Judge Farah on February 15, 2012, the

parties discussed the prosecution's notice of the intent to present evidence of an alleged prior act of Mr. Burnside under MRE 404(b). The prosecutor asserted the proposed evidence, which claimed that in 2005 Mr. Burnside argued with Leah Watson and at that time fired a gunshot at her as she was driving away in her vehicle, was admissible under the evidence rule to prove Mr. Burnside's identity as the shooter in the case at bar, his system of doing an act, and his intent in the present case. (PT, 2-15-12 pg. 3-6 Appendix L). The prosecutor acknowledged that Ms. Watson had recanted her allegations in this case, and Mr. Burnside was never charged with any domestic violence charges against Ms. Watson in the present case. (PT, 2-15-12 pg. 6 Appendix L). Judge Farah concluded the evidence of the alleged act from 2005 was admissible in the case at bar. (PT, 2-15-12 pg. 18-23 Appendix L).

When Ms. Watson testified as a prosecution witness, she did relate the allegation that Mr. Burnside fired a weapon at her car as she was driving away from him following an argument between the two of them. (TT, 2-23-12 pg. 123 Appendix N).

The defense filed a motion requesting exclusion of the alleged jailhouse telephone conversations. The court ruled the tapes were admissible. (PT, 5-17-10 pg. 9 Appendix J). The prosecution was allowed to introduce transcripts of the alleged jailhouse telephone conversations purported to be Leah Watson and Avern Burnside. (PT, 2-15-12 pg. 34, 37 Appendix L). Mr. Burnside made a matter of record regarding the inaccuracies in the alleged jailhouse telephone transcripts: Your Honor, I want to inform the Court the transcripts, they are not accurate. Nor can I utilize the alleged incorrectly information related to who is actually speaking. They are saying words I did not say. (PT, 7-12-11 pg. 9 Appendix K).

However,the court ruled that the transcripts of the alleged jailhouse

telephone conversations would be read after voice identification. (PT, 2-15-12 pg. 34, 37 Appendix L). During direct examination of Leah Watson, the prosecutor introduced a snippet of the phone recording from the Genesee County Jail. Ms. Watson claimed that she recognized the voices on the recording as hers and Mr. Burnside's. (TT, 2-23-12 pg. 77-79 Appendix N). Then the prosecutor read the alleged jailhouse telephone conversations purported to be Leah Watson and Avern Burnside from the transcripts. (TT, 2-23-12 pg. 77-121 Appendix N).

The jury trial in this case began on February 22, 2012, before the Honorable Mark Latchana, District Court Judge who was sitting in for Joseph J. Farah, Circuit Court Judge.

Mr. Burnside was convicted of assault with intent to murder; carrying a concealed weapon; felon in possession of a firearm; discharging a weapon from a vehicle; and possession of a firearm during the commission of a felony following the jury trial. (TT, 2-24-12 pg. 130 Appendix O). Mr. Burnside was sentence to serve 240 months to 480 months with a consecutive 24 months. (ST, 3-28-12 pg. 18-20 Appendix P).

Mr. Burnside appealed the convictions and sentences as a matter of right. The Michigan Court of Appeals affirmed Mr. Burnside's convictions on April 17, 2014 in Docket No. 309807. See Appendix G; Court of Appeals' Opinion, 04-17-14. The Michigan Supreme Court subsequently denied leave to appeal on October 28, 2014 in Docket No. 149464. See Appendix F; Michigan Supreme Court Order, 10-28-14.

Mr. Burnside subsequently filed a motion for relief from judgment pursuant to Mich. Ct. R. 6.500 et seq in the Genesee County Circuit Court.

In Mr. Burnside's Motion for Relief From Judgment (ground one), he submitted the sworn affidavit of Leah Watson (5-13-14 Appendix S), who was a primary government witness in Mr. Burnside's trial. In the affidavit, Watson recants her

trial testimony, stating that she testified falsely when she implicated Burnside as being involved in the crime. She explains that she made these false statements because the police officers threatened to send her to prison for this crime, and that she was scared of the police officers. She also explains that Burnside did not shoot at her in 2005. And she states that upon reading the telephone transcripts, she saw a lot of errors. And that she was not given the opportunity to confirm if the conversations presented to her were indeed Burnside and herself. Nonetheless, Judge Farah denied Mr. Burnside's perjured testimony claim implying that Watson's affidavit wan not credible and "there was nothing about which the People were aware that suggests they presented perjured testimony..." See (Judge Farah's decision pg. 1-2 Appendix E).

Mr. Burnside subsequently filed an application for leave to appeal with the Michigan Court of Appeals, which was denied on September 15, 2015 in Docket No. 328495. See Appendix D; Michigan Court of Appeals Order, 06-28-16. Mr. Burnside subsequently filed an application for leave to appeal with the Michigan Supreme Court, which was denied on June 28, 2016 in Docket No. 152410 (17). See Appendix C; Michigan Supreme Court Order, 06-28-16.

On September 14, 2016, Mr. Burnside filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Michigan, which is the subject of the instant petition for certiorari. The district court had jurisdiction over this habeas proceeding under 28 U.S.C. § 2254. Mr. Burnside's petition raised the following five grounds for relief: (1) the prosecutor knowingly used perjured testimony from Leah Watson; (2) the alleged phone conversations purported to be between Leah Watson and Avern Burnside were not sufficiently authenticated and were not trustworthy; (3) the verdict is against the great weight of the evidence; (4) ineffective assistance of trial counsel, where he failed to compel the prosecution to hand over the exculpatory

phone calls from the Genesee County Jail, and failed to let Burnside hear the phone recordings;(5) and ineffective assistance of appellate counsel.

After filing his initial petition, Mr. Burnside filed an amended petition for writ of habeas corpus on May 25, 2017, adding five additional grounds, and on July 3, 2018, added one more ground: (6) the trial court erred in allowing police sergeant to testify about the behavior of domestic violence victims; (7) the prosecutor committed misconduct because her opening statement was argumentative, she vouched for the credibility of prosecution witness, and elicited improper opinion testimony; (8) prior bad acts evidence was improperly admitted; (9) right to a speedy trial was violated; (10) trial counsel was ineffective; (11) and cumulative effect of trial errors denied Burnside a fair trial. Following supplemental briefing, the district court denied Mr. Burnside's habeas corpus petition and declined to issue a certificate of appealability. See (District Court's Opinion pg. 24 Appendix B).

Mr. Burnside timely filed a Notice of Appeal in the district court. On April 29, 2020, the Sixth Circuit denied Mr. Burnside's request for a certificate of appealability. See (Sixth Circuit Court's Order pg. 3 Appendix A).

Mr. Burnside asserts that he is entitled to proceed on appeal to the United States Court of Appeals for the Sixth Circuit with respect to ground one and the supplemental pleading to his habeas petition, and he petitions this Court for permission to do so.

REASONS FOR GRANTING THE WRIT

ARGUMENT I

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENIED MR. BURNSIDE'S REQUEST FOR A CERTIFICATE OF APPEALABILITY IN THIS HABEAS CORPUS CASE WHERE JURISTS OF REASON COULD CLEARLY DEBATE WHETHER MR. BURNSIDE'S DUE PROCESS RIGHTS WERE VIOLATED AND HE IS ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE, WHERE THE PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY FROM LEAH WATSON, WHOSE TESTIMONY WAS BASED ON THREATS AND INTIMIDATION; AND THAT JUDGE FARAH'S FACTUAL FINDINGS ARE NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS.

Mr. Burnside raised eleven grounds for relief in his petition for writ of habeas corpus in the district court. Mr. Burnside has made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253 (c)(2), with respect to ground one and the supplemental pleading to the habeas petition, which alleges that Mr. Burnside's due process rights were violated and he is entitled to a new trial based on newly discovered evidence, where the prosecutor knowingly used perjured testimony from Leah Watson, whose testimony was based on threats and intimidation; and that Judge Farah's factual findings are not entitled to a presumption of correctness.

Prior to the effective date of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat 1214, a certificate of probable cause was required before an appeal from a federal district court order could be taken in habeas cases. In order to obtain a certificate of probable cause a petitioner was required to make a "substantial showing of the denial of (a) federal right." Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed. 2d 1090 (1983). Under Barefoot, all doubts are to be resolved in favor of the petitioner in making this determination. Barefoot, supra, 463 U.S. at 893, n. 4. The probable cause standard in this context was intended to be a low hurdle to surmount, and has been noted to require only "something more than the

absence of frivolity." Barefoot, supra, 463 U.S. at 893.

Obviously, Mr. Burnside is not required to show that he should prevail on the merits as in every case where a certificate of appealability is required the district court has made a determination against the petitioner on the merits.

Under Barefoot, this Court has instructed that the certificate should be issued when a petitioner shows that "the issues are debatable among jurists of reason," or "a court could resolve the issues in a different manner," or "the issues are adequate to deserve encouragement to proceed further," or the issues are not "squarely foreclosed by statute, rule or authoritative court decision or [not] lacking any factual basis in the record." Barefoot, supra, 463 U.S. at 894.

While Barefoot, supra, was obviously issued when the required certificate was one of probable cause, this Court, along with several circuits, has held that there is no real change from the showing required for a certificate of probable cause now that the required certificate is one of appealability under the AEDPA. Slack v. McDaniel, 529 U.S. 473, 483-484, 120 S.Ct. 1595, 146 L.Ed. 2d 542 (2000). See also Reyes v. Keane, 90 F.3d 676 (2nd Cir. 1996). In fact, the intent of Congress in this respect when passing the AEDPA was to codify the Barefoot standard. Slack v. McDaniel, supra, 120 S.Ct. at 1603; Lennox v. Evans, 87 F.3d 431 (10th Cir. 1996); Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063 (6th Cir. 1997)(noting that "the AEDPA merely codifies the Barefoot standard" and that the only difference in the statutory language is an applicant seeking a certificate of appealability must make "a substantial showing of the denial of a constitutional right.")(emphasis added).

In Miller-El v. Cockrell, 537 U.S. 322, 336, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003),this Court reaffirmed its prior holding in Slack when it stressed that the AEDPA's section 2253(c) "codified our standard, announced in

Barefoot v. Estelle [ ], for determining what constitutes the requisite showing [for obtaining leave to appeal a district court's denial of habeas corpus relief]. Under the controlling standard, a petitioner must 'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner' or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Miller-El, supra. This Court further stressed in Miller-El that the standard for a certificate of appealability is "much less stringent" than the standard for success on the merits, and that petitioners need not show that they are likely to succeed on appeal or that any reasonable jurists would, after hearing the appeal, rule in their favor. Id. Rather, the petitioner need only show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Id.

A review of the issue that Mr. Burnside raised in ground one and the supplemental pleading of the habeas petition confirms the conclusion that this particular issue is substantial. Petitioner argued in ground one and the supplemental pleading to the petition for writ of habeas corpus that Mr. Burnside's due process rights were violated and he is entitled to a new trial based on newly discovered evidence, where the prosecutor knowingly used perjured testimony from Leah Watson, whose testimony was based on threats and intimidation; and that Judge Farah's factual findings are not entitled to a presumption of correctness.

A state denies a criminal defendant's due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. Giglio v. United States, 405 U.S. 150, 153-54 (1972);Napue v. Illinois, 360 U.S. 264, 269-70 (1959). And when a witness perjures himself because of threats from police officers, the defendant suffers "a deprivation of rights guaranteed by

the Federal Constitution." Plye v. Kansas, 317 U.S. 213, 214-16 (1942). To succeed in showing a due process violation from the use of alleged perjured testimony, a defendant has the burden of establishing that (1) the witness in question actually gave false testimony, (2) the falsity was material in that there was a reasonable likelihood that it affected the judgment of the jury, and (3) the prosecution used the testimony in question knowing that it was false. Giglio v. United States, 405 U.S. at 153-54.

In the instant case, Mr. Burnside submitted the sworn affidavit of Leah Watson (5-13-14 Appendix S), who was a primary government witness in Mr. Burnside's trial. In the affidavit, Watson recants her trial testimony, stating that she testified falsely when she implicated Burnside as being involved in the crime. She explains that she made these false statements because the police officers threatened to send her to prison for this crime, and that she was scared of the police officers. She also explains that Burnside did not shoot at her in 2005. And she states that upon reading the telephone transcripts, she saw a lot of errors. And that she was not given the opportunity to confirm if the conversations presented to her were indeed Burnside and herself. Nonetheless, Judge Farah denied Mr. Burnside's perjured testimony claim implying that Watson's affidavit was not credible and "there was nothing about which the People were aware that suggests they presented perjured testimony..." See (Judge Farah's decision pg. 1-2 Appendix E). Judge Farah's decision was unreasonable (as shown below) both legally and factually. 28 U.S.C. § 2254 (d)(1)(2).

A. THE PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY

This Court in Mooney v. Holohan applied the prohibition against using false testimony to"prosecuting officers" and the "State" generally; Mooney applies

to the actions of law enforcement. See Mooney, 294 U.S. at 112-13 (1935). Leah Watson's affidavit shows that police officers knew that she "originally stated to them that the man that committed this crime was a man" she "was engaged in a sexual relationship with, despite being involved in a relationship with Avern Burnside at that time..." The name she know him by is Ty, and the police officers still used her perjured testimony in violation of Mr. Burnside's due process rights. See (Leah Watson's affidavit 5-13-14 Appendix S). Prohibitions against providing false testimony apply to law enforcement officers; Mr. Burnside needed not prove that the particular prosecuting attorney at trial knew that Leah Watson's testimony was perjured. The Third Circuit has made clear that when law enforcement officers procure false testimony and present it at trial, the state is liable for the resulting Mooney violation even if the prosecuting officers do not know the testimony is perjured. Curran v. Delaware, 259 F.2d 707, 712-13 (3rd Cir. 1959); Limone v. Condon, 372 F.3d 39, 47 (1st Cir. 1997)(holding that "[i]t strains credulity to suggest that FBI agents and police officers, duly sworn to uphold the law, do not fall within the compass of [Mooney/Napue] proscrptions"). Therefore, reasonable jurists could debate whether police officers knew that Leah Watson's trial testimony was false.

B. THE TESTIMONY WAS PERJURED

Mr. Burnside's perjured testimony and witness intimidation claim are premised on Leah Watson's sworn affidavit, in which Watson states that she was taken in front of Judge Farah on a $50.000 bond hearing, see also (Petiton to hold Watson to bail 1-20-11 Appendix R), and she knew then there was nothing she

could do but to get on the stand and just say what they wanted her to, and she had no choice but to say that it was Burnside who committed the crime, as a result of being intimidated by the prosecutor and police officers. Watson also states that she testified falsely when she implicated Burnside as being involved in the crime. And she explains that she made these false statements because the police threatened to send her to prison for this crime, and that she was scared of the police. See also (Leah Watson's Affidavit of case witness Appendix Q). However, for a conviction based on false testimony to offend due process, (as proven here), there must be "the presence of impermissible state involvement in the untruthful testimony." Burks v. Egeler, 512 F.2d 221, 225 (6th Cir. 1975); Pyle v. Kansas, 317 U.S. 213, 215-16 (1942). Watson's statements, indicate that the prosecutor and the police threatened her into implicating Mr. Burnside. "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice." Giglio v. United States, 405 U.S. 150, 153 (1972)(quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). Therefore, reasonable jurists could debate whether Leah Watson's trial testimony was false because it was based on threats and intimidation.

Additionally, Leah Watson's affidavit was central to the prosecution case. The information that Watson claimed in her affidavit that she was pressured by police officers to testify or risk going to prison would go directly to her believability. Mr. Burnside's trial counsel attempted to undermine Watson's credibility by showing that, in the trial, Watson claimed and denied that Ty shot at Ledesma's case. See (TT, 2-23-12 pg. 66-73; 52-53 Appendix N). Leah Watson's affidavit would have provided the jury with an alternate explanation for her inconsistent testimony--namely that it was perjured and police officers intimidated her into making the statements. See, e.g., U.S. v. Perdomo, 929 F.2d 967, 971-72 (3d Cir. 1991)(undisclosed evidence

could do but to get on the stand and just say what they wanted her to, and she had no choice but to say that it was Burnside who committed the crime, as a result of being intimidated by the prosecutor and police officers. Watson also states that she testified falsely when she implicated Burnside as being involved in the crime. And she explains that she made these false statements because the police threatened to send her to prison for this crime, and that she was scared of the police. See also (Leah Watson's Affidavit of case witness Appendix Q). However, for a conviction based on false testimony to offend due process, (as proven here), there must be "the presence of impermissible state involvement in the untruthful testimony." Burke v. Egelar, 512 F.2d 221, 225 (6th Cir. 1975); Pyle v. Kansas, 317 U.S. 213, 215-16 (1942). Watson's statements, indicate that the prosecutor and the police threatened her into implicating Mr. Burnside. "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice." Giglio v. United States, 405 U.S. 150, 153 (1972)(quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). Therefore, reasonable jurists could debate whether Leah Watson's trial testimony was false because it was based on threats and intimidation.

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would have presented a new and different ground for impeachment and was material). Therefore, reasonable jurists could debate whether Leah Watson's affidavit is believable.

C. THE TESTIMONY WAS MATERIAL

This Court has applied the materiality standard articulated in Brady v. Maryland, to claims that false testimony was knowingly presented at trial. The terms "reasonable likelihood" and "reasonable possibility" are treated as synonyms. See United States v. Bagley, 473 U.S. 667, 679-80 (1985). To determine its materiality, perjured testimony "must be evaluated in the context of the entire record" to determine whether it creates a reasonable doubt about defendant's guilt. United States v. Agurs, 427 U.S. 97, 112 (1976). From the testimony and evidence provided in Mr. Burnside's trial Watson was the only witness to implicate and identify Burnside. See (TT, 2-23-12 pg. 52-53; 77-79; 123 Appendix N). But she recanted that testimony as well. See (Watson's affidavit explaining that the man that committed this crime name is Ty, and that Burnside did not shoot at her in 2005. She also states upon reading the telephone transcripts, she saw a lot of errors. And that she was not given the opportunity to confirm if the conversations presented to her were indeed Burnside and herslef... pg. 1-2 Appendix S). The other witness Ledesma couldn't identify Mr. Burnside as the perpetrator. See (TT, 2-23-12 pg. 21-22 Appendix N). And there was no other physical evidence that tied Mr. Burnside to the crime. So Leah Watson's perjured testimony is material and not harmless.

Furthermore, perjured testimony reasonably likely to have affected the verdict at trial when it bears on the credibility of the witness. In Giglio this Court found that the perjured testimony was material because "the Government's case depended almost entirely on [the witness's] testimoy," and without it

"there could have been no indictment and no evidence to carry the case to the jury." 405 U.S. at 154. The government's key witness's credibility was "an important issue in the case." Id. at 155. Here, like in Giglio, Watson's testimony was crucial at trial. If the jury had known Leah Watson lied, there would have been nothing left of the case against Mr. Burnside. Watson's trial testimony was critical to demonstrating that Mr. Burnside had shot at Ledesma's car. See (TT, 2-23-12 pg. 52-53 Appendix N). Finally, if, Leah Watson's trial testimony is not considered, then the only legitimate verdict would be an acquittal. So there is more than a reasonable likelihood that Leah Watson's perjued testimony affected the verdict at Mr. Burnside's trial. Therefore, reasonable jurists could debate whether Leah Watson's perjured testimony is material.

D. JUDGE FARAH'S FACTUAL FINDINGS ARE NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS.

The jury trial in this case began on February 22, 2012, before the Honorable Mark Latchana, District Court Judge who was sitting in for Joseph J. Farah, Circuit Court Judge. Therefore, Judge Farah's factual findings, in particular its credibility finding of Leah Watson's affidavit, are not entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1).

The fact that Judge Farah who reviewed Leah Watson's affidavit relating to the perjured testimony and witness intimidation claim was not the same state judge who presided over Mr. Burnside's trial or sentencing. See (TT, 2-22-12; TT, 2-23-12; TT, 2-24-12; and ST, 3-28-12). Therefore, Judge Farah was not in an optimal position to assess the credibility of Leah Watson's affidavit. Because Judge Farah did not have the benefit of observing Leah Watson's testimony at trial. See (TT, 2-22-12; TT, 2-23-12; TT, 2-24-12). So Judge Farah cannot make credibility determination of Leah Watson's affidavit based on erroneous

assumptions and speculation. see (Judge Farah's Order 7-14-15 pg. 1-2 Appendix E), and having not considered the demeanor of Leah Watson being heard at trial, and without holding an evidentiary hearing to take live testimony from Leah Watson.

This Court explained: "A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). This Court also explained that a state court's credibility and demeanor determination based solely on the paper record are not accorded a presumption of correctness, i.e., AEDPA deference. See Cabana v. Bullock, 474 U.S. 376, 388 n.5 (1986); McGhee v. Yukins, 229 F.3d 506, 513 (6th Cir. 2000)("the state court of appeals made its determination based on a review of the record, rather than live testimony, so there is no reason to suppose the state court was especially well situated to observe the demeanor of witnesses and to make credibility determinations"). Judges simply cannot decide whether a witness was lying or telling the truth "on the basis of a paper record." Cabana at 388 n. 5. "[O]ur Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence." Ramonez v. Berghuis, 490 F.3d 482, 490 (6th Cir. 2007).

Here, Judge Farah's credibility determination, implied that Watson's recantation was incredible as a matter of law. See (Judge Farah's Order pg. 1-2 Appendix E). That determination, was inappropriate and legal error because Judge Farah's credibility determination was based on a "paper record" of Watson's prior testimony. See Mendiola v. Schoming, 224 F.3d 589, 597-98 & n. 4 (7th Cir. 2000)(Rover, J., Dissenting)(trial judge's determination that a material witness "recantation" was incredible as a matter of law, could not be based on a "paper

record"). See also, Fernandez v. Capra, 916 F.3d 215, 229-30 (2d Cir. 2019)(state court unreasonably determined facts in rejecting claim that prosecution presented false testimony by eyewitness, who later "recanted his identification" and testified to police officer's coercion to lie about identification: state court rejected witness's recantation, but "state court's decision contains sound reasons to credit [witness's] recantation, and no plausible reason to discredit it."); Norton v. Spencer, 351 F.3d 1, 7 (1st Cir. 2003), cert. denied, 542 U.S. 933 (2004)("state court's finding that 'the affidavits were necessarily incredible or merely cumulative' is an unreasonable determination of the facts in light of the evidence presented."). Therefore, reasonable jurists could debate whether Judge Farah's credibility finding of Leah Watson's affidavit, are not entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1).

When confronted with this issue on habeas review, the district court judge found that Judge Farah's decision denying Mr. Burnside's claim was not contrary to or an unreasonable application of Darden. And afforded Judge Farah's factual findings a presumption of correctness. See (District Court's Opinion pg. 5, 8 Appendix I). In coming to this conclusion, the district court essentially adopted Judge Farah's decision. See (Judge Farah's decision pg.1-2 Appendix E). Consequently, the district court denied habeas relief on this claim.

The district court also declined to issue a certificate of appealability on the basis that reasonable jurists would not debate the disposition of Petitioner's claim, see (District Court's Opinion pg. 24 Appendix B), and the Sixth Circuit Court of Appeals subsequently declined to issue a certificate of appealability in relation to this claim for the same reason. See (Sixth Circuit Court's Order pg. 3 Appendix A).

Mr. Burnside would strongly urge that the decision of the district court and

the Sixth Circuit Court of appeals in declining to issue a certificate of appealability in relation to this particular habeas claim under the facts of this case was such a departure from the accepted and usual course of judicial proceedings as to call for this Court's supervisory power to intervene in the matter because this issue is clearly and unequivocally debatable among reasonable jurists, a court could resolve this issue in a different manner, the issue is not lacking any factual basis in the record, and ultimately, the issue deserve encouragement to proceed further.

However, in determining that the state courts decision pertaining to the perjured testimony claim were reasonably rejected, the district court noted that, "Watson's testimony was inconsistent and she was a reluctant witness. But "merely inconsistencies" in testimony do not establish a prosecutor's knowingly use of perjured testimony. Coe v. Bell, 161 F.3d 320, 343 (6th Cir. 1998). At trial, Watson identified her fear of Petitioner as the reason for her inconsistent testimony. Defense counsel adequately probed Watson's credibility on cross-examination. The jury was properly left to evaluate Watson's credibility. Petitioner fails to show that Watson's trial testimony was false or that the prosecutor was aware it was false..." See (District Court's Opinion pg. 8 Appendix B). Furthermore, a portion of the district court's opinion rejecting Mr. Burnside's claim because "the last court to address the merits of this claim, found Watson's affidavit unpersuasive. See 7/14/2015 Ord. at 2, ECF No. 11-30 at Pg. ID 1118. The state court noted Watson's testimony vacillated from the outset and that her inconsistencies were well-known. Defense counsel cross-examined Watson about these inconsistencies and asked which of her multiple "versions" of the truth she would testify to at trial. The state court held that the prosecutor simply asked Watson to tell the truth and denied this claim." See (District Court's Opinion pg. 7, Appendix B).

Mr. Burnside posits that reasonable jurists could debate whether the state courts, the district court and the Sixth Circuit Court of Appeals (based on a paper record alone), unreasonably stood in the place of the jury by determining that Leah Watson's affidavit was not credible because they did not find Leah Watson's affidavit in support of Mr. Burnside's perjured testimony claim persuasive and their determination that Leah Watson's trial testimony was more believable than Leah Watson's affidavit. Even if Judge Farah did not find Leah Watson's affidavit persuasive, "[i]t is neither the proper role for a [state court judge] to stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others." See e.g., Barker v. Yukins, 199 F.3d 967, 874-75 (6th Cir. 1999); Williams v. Ryan, 623 F.3d 1258, 1266 (9th Cir. 2010)(district court erred in "conclud[ing] on the basis of written statements alone that Barnett and McKaney were inherently unbelievable witnesses" because of "inconsistencies in their declarations"; assessment of "veracity of the witnesses" required "in-court evidentiary hearings."); Smith v. Mississippi Dep't of Corr., 153 Fed. Appx. 328, 328-29, 2005 U.S. App. LEXIS 24483, at 2-3 (5th Cir. Nov. 10, 2005 (per curiam)("district court improperly relied on conflicting affidavit testimony [on jury selection claims] alone to resolve the constitutional issues."); Lewis v. Jeffers, 497 U.S. 764, 801 (1990)(Blackman J., dissenting)(finding of state supreme court not due deference because state court "did not see the witnesses and was forced to rely upon a paper record.").

For all of the above reasons, reasonable jurists could find that the district court's decision to deny habeas relief with respect to ground one and the supplemental pleading to the habeas petition was debatable or wrong, and that Leah Watson's trial testimony was false and police officers knew it was false. Therefore, the district court or the Sixth Circuit Court of Appeals

should have issued a certificate of appealability.

The denial of a certificate of appealability would effectively preclude appellate review of the perjured testimony claim; and that Judge Farah's factual findings are not entitled to a presumption of correctness in this case, despite the fact that this particular claim plainly deserves encouragement to proceed further on appeal. The requirement of a certificate of appealability is designed to bar frivolous appeals, not to preclude appellate review of cases involving substantial issues. See Moore's Federal Practice (2d Ed), § 220.03. Nonetheless, that is just what has happened here: a substantial issue is being passed upon without the benefit of full appellate review. A fair review of the record in this case clearly demonstrates that a certificate of appealability should issue with respect to this particular claim and that the decisions of the district court and the Sixth Circuit Court of Appeals declining to issue the same were an extraordinary departure from the accepted and usual course of judicial proceedings in these types of cases.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner respectfully asks this Honorable Court to grant certiorari in this case and remand this matter to the United States Court of Appeals for the Sixth Circuit for full appellate review of the issue that was raised as ground one and the supplemental pleading in Burnside's petition for writ of habeas corpus.

Respectfully Submitted,

Dated 7-16-20

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