20-5443

No. 19-

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ANTONIO D. WILLIAMS

PETITIONER,

vs.

WILLIAM J. POLLARD

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Appearing Pro Se
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QUESTIONS PRESENTED FOR REVIEW

1. Whether federal courts should or must consider the restrictive standards for granting habaes relief under the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, 28 U.S.C. §2254(d), when deciding whether the petitioner has made the "substantial showing of the denial of a constitutional right" required for issuance of the certificate of appealability prerequisite to appeal from the denial of federal habaes relief under 28 U.S.C. §2254.

2. Whether Williams was entitled to a certificate of appealability on his claim that he was denied the effective assistance of counsel due to appellate counsel's failure to appeal the following claim which was fully preserved in the record:

> Newly discoverd evidence based on the multiple admissions both before and after trial by the state's primary witness, Rosario Fuentez, that his trial testimony against Williams was false and that Williams in fact was not involved in Fuentez's commission of the charged offense.

3. Whether Williams was entitled to a certificate of appealability on his claim that he was denied the effective assistance of counsel due to appellate counsel's failure to argue the following claim in the court of appeals:

> Reversal is appropriate in the interest of justice on the grounds that the real controversy was not fully tried because the jury was denied evidence of Fuentez's admissions that Williams in fact was not involved in the charged offenses, and that Fuentez had only claimed otherwise in order to minimize the consequences of his own

criminal conduct.

PARTIES IN COURT BELOW

Other than the present petitioner and Respondent, there were no other parties in the Seventh Circuit Court of Appeals.

TABLE OF CONTENTS

ITEMS CONTAINED IN APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION, RULES AND STATUTES

Other Authorities

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PETITION FOR WRIT OF CERTIORARI

Petitioner Antonio D. Williams respectfully ask that the court issue a writ of certiorari to review the final order of the Seventh Circuit Court of Appeals, denying him a Certificate of Appealability and thereby causing dismissal of his appeal from the district court's denial of his haebes petition pursuant to 28 U.S.C. §2254.

OPINIONS BELOW

The unreported Order of the Court of Appeals dated March 13, 2020 is in appendix A (App. A:1).

The unreported Decision and Order of the District Court

for the Eastern District of Wisconsin dated April 30, 2019, denying Williams' petition for a writ of habaes corpus pursuant to 28 U.S.C. §2254 and denying him a Certificate of Appealability, is in Appendix B (App. B:1-11).

The unpublished opinion of the Wisconsin Court of Appeals dated September 6, 2017, is in Appendix C (App. C:1-5).

JURISDICTION

The Seventh Circuit Court of appeals denied Williams' Motion for Certificate of Appealability on March 13, 2020. This Court's jurisdiction is invoked under 28U.S.C. §1254(1) & 2101(c) and Supreme Court Rule 13.3.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Right to Counsel Clause of the Sixth Amendmend to the United States Constitution provides:

In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV.

28 U.S.C. §2253 provides in pertinent part:

§2253. Appeal

(a)In a habaes corbus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

* * *

(c)(1) Unless a circuit justice or judge issue a certificate of appealibality, an appeal may not be taken to the court of appeals from--

(A) the final order in

(A) the final order in a habeas corpus proceeding in which the detention complaind 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 appealabilty may issue under paragraph (1) only if the applicant has made a substantial showing of a denial of a constitutional right.

(3) The certificate of appealabilty under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. §2253.

Rule 22(b) of the Federal Rule of Appellate Procedure provides:

(b)Certificate of Appealability.

(1) In a habaes corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. §2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28U.S.C. §2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. §2254 or §2255 (if any), along with the notice of appeal and the file of the district court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit court judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

Fed. R. App. P. 22(b)

Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. §2254 provides:

> (a) Certificate of appealabilty. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to arguements on whether a certificate should be issued. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

Rule 11(a), Rules Governing Proceedings Under 28 U.S.C. §2254.

STATEMENT OF THE CASE

This is an appeal from the denial of a federal habaes petition under U.S.C. §2254 by a person in custody pursuant to a Wisconsin state court judgement of conviction. The petition claimed violation of Williams' constitutional right to effective assistance of counsel under the Sixth Amenment to the United States Constitution.

State Charges and Trial

Antonio D. Williams stands convicted of four counts of first degree intentional homicide based on allegations that, in the early morning hours of July 4, 2008 Williams', James Washington, and Rosario Fuentez fired into an after hours street party attended by members of the Murda Mobb, killing four individuals. About a week earlier, members of the Murda Mobb had assaulted and robbed Williams, allegedly providing

the motive for the shooting. The states theory was that Washington entered Questions nightclub, a Murda Mobb hangout, to determine who was there before the shooting, and then the three then fired into the crowd that subsequently left the nightclub.

Only two purported eye-witnesses claimed to have actually seen Williams involved in the shooting. First, seeking to reduce his own exposure, Fuentez minimized his involvement(claiming that he only shot a .45 handgun above the heads of the crowd) andclaimed that Williams and Washington were involved and were shooting "SKS assault rifle[s]". Second, although Xavier Turner admitted to police shortly after the shooting that he did not see who was involved, and others testified to the poor lighting conditions making identification difficult, he changed his story after being charged with an unrelated crime and claimed that he could identify Williams as firing the rifle after all.

In it's attempts to connect Williams to the shooting, the state also presented a number of other "cooperating witnesses" who provided various accounts in similar efforts to mitigate their own sentencing exposure for other offenses. Some claim that Williams either "admitted" his involvement in the shootings or made statements before the shootings that he sought revenge against the Murda Mobb for the beating and robbery, while others claimed that others attempted to bribe them to "lie" about his non-involvement.

For instance, Demetrius Murrell, one of the state's "cooperating witnesses", first admitted to police that he never saw Williams with a rifle, but then claimed that Williams had stored two SKS assault rifles in his home for a short time and that the banana clips for a SKS rifle found in his home by police belonged to Williams. He testified at the preliminary examination that Williams never told him he shot four people, but claimed at trial that Williams did say that.

The state also presented cell phone records of Fuentez, Williams, and Washington, which it claim supported Fuentez's story. Those records showed calls between Williams and Washington at 11:47 p.m. on July 3, 2008 and 3:25a.m. on July 4, from which the state speculated that they might have been together and involved in the shooting in the meantime. The records also showed a series of calls between Williams and Fuentez between 11:41p.m. on July 3 and 2:27a.m. on July 4. The next call made from Williams phone was at 2:42.

The state's expert also testified that the cell tower information for Fuentez calls was consistent with him being in the general, multi-block area including the crime scene prior to the shootings. That expert also testified that Williams' phone was in that general area shortly before the shootings, but was already some distance away as of 2:42a.m..

The 911 call came in at about 2:40a.m., and the first officer on the scene heard shots from about 12 blocks away

at about 2:43a.m., and continued hearing shots as she drew closer to the scene.

As relevent here, the state's ballistics expert identified cartridges at the scene as having come from three different guns: a .45 handgun and two different AK-type assault rifles. None could have come from an SKS rifle.

The jury convicted Williams on all four counts and the circuit court sentenced him to life without parole.

STATE POST-CONVICTION AND HABEAS PROCEEDINGS.

Attorney Timothy Provis was appointed to represent Williams on post-conviction proceedings. Provis moved for new trial based on evidence that Fuentez had admitted before trial that he falsely accused Williams to mitigate the consequences of his own involvement and because he was upset that Williams was unwilling to retaliate against the Murda Mobb, as well as Fuentz's post-conviction admissions(both sworn and unsworn) to the same effect, and that he had provided information about the shootings to two of the state's "cooperating witnesses". Provis also sought reversal based on the recantation of another witness, the state's failure to disclose certain evidence, and reversal in the interest of justice becasuse the jury was denied evidence of Fuentez's admissions that Williams was not involved in the shootings. The circuit court denied the brady claim without a hearing. following a joint evidentiary hearing on Williams' newly

discovered evidence claims and those of his separately tried co-defendant, James Washington, the circuit court denied those claims as well in oral decision.

At the hearing, Fuentez initially asserted his Fifth Amendment rights, explaining that he is "not participatin' in none of this," because "[t]hey can charge me with whatever." Fuentez subsequently admitted under oath that the affidavit swearing to Williams' lack of involvement in the homicides were his, that the affidavit was truthful, and that he was not threatened in any way to admit that his trial testimony was false. He was scared, but from the Murda Mobb not the defendants. However, given the risk of perjury charges and reopened federal charges, he asserted his Fifth Amendment privilege regarding questions about the substance of his recantation.

Three other witnesses attested to the accuracy of their affidavits stating that Fuentez had admitted to them, either before the trials or afterwards, that neither Williams nor Washington was involved in the homicides: Tremayne Edwards before trial; Dakeya Johnson before trial; and Leycester Zissler before trial.

Detective James Hensley testified for the state, claiming that, after being read his Miranda rights, Fuentez told him in an unrecorded interview that he never admitted to lying about the involvement of Williams and Washington prior to trial, that his sworn recantations were false, that he signed the affidavits because he feared for his life, and that his trial

testimony was true.

Following extensive briefing, the circuit court issued it's oral decision denying Williams' motion on April 3, 2013.

Over Williams' objections, Provis chose to omit the newly discovered evidence and related interest of justice claims on the appeal, and the court of appeals affirmed on June 3, 2014. State v. Antonio Williams, case No. 2013Ap814-cr. The Wisconsin Supreme Court denied review on October 6, 2014.

Williams subsequently filed a state habeas petition in th Wisconsin Court of appeals on December 28, 2015, alleging ineffectiveness of Attorney Provis due to his failure to raise the newly discovered evidence and related "interest of justice" claims on appeal. After briefing, that court denied the petition on September 6, 2017, without ordering a hearing. The Wisconsin Supreme court denied Williams' timely-file petition for review on January 8, 2018.

Federal Habeas Proceedings

Williams timely filed a federal petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 on January 18 2018. Williams challenged the Wisconsin court of appeals rejection of the arguement raised in his state habeas petition (Knight Petition). Williams argued that his appellete counsel was ineffective for failingto raise the issue of Fuentez's recantation on his direct appeal and in failing to raise the issue that his judgement should be reversed in the

interest of justice.because the real controversy was not fully tried.

By Decision and Order datedApril 30, 2019, the U.S. District Court for the Eastern District of Wisconsin rejected both of Williams' claims finding that"Williams has not shown a reasonal probability that the recantation issue would have altered the outcome of his direct appeal had it been raised" and that Williams position "falls short of demonstrating that the court of appeals decision rests upon factual findings that ignore the clear and convincing weight of the evidence". Further, the district court denied Williams a certificate of appealability finding that "jurists of reason would not find it debatable that Williams is not Entitled to habeas relief."

Williams subsequently filed a motion with the United States Court of Appeals for the Seventh Circuit pursuant to Fed. R. App. P.22(b) and 28 U.S.C. §2253(c) requesting a cirtificate of appealability. The motion was denied based on the finding of no substantial showing of the denial of a constitutional right.

REASON FOR ALLOWANCE OF THE WRIT

I

SUPREME COURT REVIEW IS APPROPRIATE TO CLARIFY WHETHER FEDERAL COURTS SHOULD OR MUST CONSIDER THE RESTRICTIVE STANDARDS FOR GRANTING HABEAS RELIEF UNDER AEDPA WHEN DECIDING WHETHER TO GRANT A CERTIFICATE OF APPEALABILITY

Certiorari review is appropriate to resolve confusion and a circuit split regarding what impact, if any, perceptions regarding application of substantive statutory restrictions on federal habeas relief should have in short-circuiting a habeas petitioner's right to an appeal and full briefing on a substantial claim that his or her conviction or sentence resulted from the denial of a constitutional right.

Resolution of this conflict is of no small consequence to habeas petioners and the courts. In the twelve months ending June 30, 2015, the circuit courts denied certificates appealabilty ("COA") and thus terminated appeals without full briefing regarding 2,118 motions challenging federal sentences under 28 U.S.C. §2255, and 3,597 petitions challeging state covictions or sentences under 28 U.S.C. §2254. http:/www.uscourts.gov/statistics/table/b-5/statistical-table-federal-judiciary/2015/06/30

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a habeas application "shall not be granted" with respect to a claim the state courts adjudicated on the merits unless the adjudicattion of the claim-

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

> established Federal law, as determined by the Supreme Court; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C §2254(d).

Under AEDPA, a petitioner likewise may not appeal the denial of a petition filed under 28 U.S.C. §2254 or 2255 to the Court of Appeals unless he or she first is granted a certificate of appealability ("COA") regarding each claim to be appealed. 28 U.S.C. §2253(c)(1) & (3). The COA is a jurisdictional prerequisite to an appeal. Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003). "A prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." Id. at 338. Rather, to obtain a COA, the petitioner must make " a substantial showing of the denial of a constitutional right". 28 U.S.C. §2253(c)(2). "The [certificate of appealability] process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." Gonzalez v. Thaler, 132 S. Ct. 641, 650 (2012).

This Court has resolved a number of issues regarding application of the COA requirement. See, e.g., Hohn v. United States, 524 U.S. 236 (1998) (Supreme Court has jurisdiction to review denial of COA); Slack v. McDaniel, 529 U.S. 473 (2000) (COA requirement applies to appeals filed after its

effective date regardless of when the underlying habeas petition was filed; setting standards for issuance of COA when district court denied petition on procedural grounds); Miller-El v. Cockrell , 537 U.S. 322 (2003) (COA is jurisdictional prerequisite to habeas appeal and to be resolved separately from decision on merits; clarifying standards for granting COA); HArbison v. Bell, 556 U.S. 180 (2009) (COA not required to appeal final order that does not resolve merits of a habeas proceeding); Jennings v. Stephens, 135 S.Ct. 793(2015) (COA not necessary for habeas petitioner to defend a favorable judgement on appeal); Gonzalez v. Thaler, 132 S.Ct. 641 (2012) (COA that identifies procedural issues but not substantive constitutional claim is not jurisdictionally defective).

However, one issue that remains open, and which has divided the lower courts, is what impact, if any, the restrictive standards for granting habeas relief under AEDPA should have when deciding whether the petitioner has made the "substantial showing of the denial of a constitutional right" required by §2253(c)(2) for issuance of the certificate of appealabilty. See Supreme Court, 2002 Term-Leading Cases: Federal Jurisdiction and Procedure, 117 HArv. L. Rev. 380, 386-88(2003)("Term-Leading Cases")

> Under one of two possible interpretations, a habeas petitioner may obtain a COA if reasonable jurists could debate whether the petitioner's constitutional rights had been violated. Under the other approach, COA may be granted only if reasonable jurists could debate whether the petitioner might be eligible for habeas

relief-i.e., in a case governed by §2254(d), whether the statecourt's decision on the merits of the petitiner's constitutional claim was unreasonable or ran contrary to clearly established federal law.

Dockins v. Hines, 374 F.3d 935, 937 (10th Cir. 2004); see Tomlin v. Britton, 448 Fed. App'x 224, 227 n.3 (3rd Cir. 2011).

The text of 28 U.S.C. §2253(c)(2), does not mention AEDPA deference. That language omly requires a "substantial showing of the denial of a constitutional right." Justice Scalia thus aptly noted, concurring in Miller-El, that "[how] the district court applied AEDPA has nothing to do with whether a COA applicant has made 'a substantial showing of the denial of a constitutional right'...so the AEDPA standard should seemingly have no role in the COA inquiry." 537 U.S. at 349.

However, the majority opinion in Miller-El is vague and internally inconsistent on this point. Term Leading Cases,117 Harv. L. Rev. at 386. on the one hand, that opinion held that, "Consistent with our prior precedent and the text of the [] habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right.'28 U.S.C. §2253(C)(2)." Miller-El, 537 U.S. at 327 (emphasis added). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district courts' resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."Id., citing Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The majority opinion further stated that "[s]ubsection [2254(d)(2)] contains the unreasonable requirement and applies to the granting of habeas relief rather than the granting of COA." Id. at 342. "The question is the debatability of the underlying constitutional claim, not the resolution of the debate." Id. at 342. "[Our] opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly a court of appeals should not decline the application for COA merely because it believes the applicant will not demonstrate an entitlement to relief." Id. at 337.

At the same time, language in the opinion suggests a very different inquiry, stating that the question should be "whether the District Court's application of AEDPA deference, as stated in §2254(d)(2) and (e)(1), to petioner's...claim was debatable amongst jurists of reason." 537 U.S. at 341; see id at 336 (We look to the District Courts application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason"). Justice Scalia advocated for this approach. Id. at 348-50 (Scalia, J., concurring).

The only other decision touching on the issue does not resolve the confusion. In Tennard v. Dretke, 542 U.S. 247 (2004), the court on the one hand focused on the constitutional claim, holding that "[a] COA should issue if has made a substantial showing of the denial of a constitutional right."

Id. at 282, and quoting Slack for the applicable standard of whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id., quoting Slack, 529 U.S. at 484. It also noted that "[t]he petitioner's arguments ultimately must be assessed under the deferential standars required by 28 U.S.C. §2254(d)(1)," id., but use of the term "ultimately" could reference when the claims are reviewed on the merits after the COA is granted. The Court nonetheless considered and discussed both the substance of the underlying constitutional claim and the AEDPA limitations on habeas relief in holding that the court of appeals had erred in denying a certificate of appealability. It did so, however, without discussion of the contrary language in Miller-El, and without stating whether the AEDPA discussion was necessary to its holding or or merely supportive of its finding that the constitutional claim was substantial. See id. at 288-89.

Not surprisingly, the unclear and apparently conflicting language of Miller-El and Tennard have led to conflicting interpretaions in the courts below. The third Circuit has rejected the suggestion that the statutory standards for granting habeas relief should mandate a more restrictive standard for granting a COA than the statutory requirement of "a substantial showing of the denial of a constitutional right" under §2253(C)(2). Pabon v. Mahanoy , 654 F. 3d 385,

392-93 & n.9 (3rd Cir. 2011) (relying on Miller-El's recognition that the reasonableness requirements of §2254(d) "appl[y] to the granting of habeas relief rather than to the granting of a COA." Miller-El, 537 U.S. at 342).

The Fifth Circuit, on the other hand, it appears to follow its pre-Miller-El requirement that the petitioner's COA request must be viewed "through the lens of the deferential scheme laid out in 28 U.S.C. §2254(d)." Chanthakoummane v. Stephens, 816 F.3d 62, 69 (5th Cir. 2016), citing Barrientes v. Johnson, 221 F.3d 741, 772 (5th Cir. 2000). But see Cotton v. Cockrell, 343 f. 3d 746, 750-52 (5th Cir. 2003) (granting COA on basis that "[r]easonable jurists could debate whether a constitutional violation occurred").

The Seventh and Tenth Circuits likewise merge the deferential standards of §2254(d) into the COA determination. Cage v. McCaughtry, 305 F.3d 625, 626 (7th Cir. 2002) (vacating COA as improperly granted given absence of controlling Supreme Court authority necessary to staisfy AEDPA standards); Dockins, 374 F.3d at 938 ("we now reach this issue and hold that AEDPA's deferential treatment of state court decisions must be incorporated into our consideration of a habeas petitioner's request for COA')

Fourth Circuit cases conflict on this point. Compare Daniels v. Lee, 316 F.3d 477, 493 (4th Cir. 2003) (denying COA because state court decision was neither contrary to

to nor unreasonable application of controlling Supreme Court precedent), with Rowsey v. Lee, 327 F.3d 335, 340-41 (4th Cir. 2003) (granting COA based on substantial nature of constitutional claims while reserving application of AEDPA deference for the evaluation of the claims on the merits).

Consistent with its practice, Internal Operating Procedures 1(a)(1) (7th Cir.), two judges of the Seventh Circuit heard and summarily denied Williams COA motion, stating only that they "find no substantial showing of denial of a constituional right." (A:1). Accordingly, it is impossible to know what deficiencies they perceived in Williams' request. However, because Williams made more than a showing of the denial of a constitutional right,"

II

SUPREME COURT REVIEW IS APPROPRIATE BECAUSE WILLIAMS MADE THE SHOWING REQUIRED FOR A CERTIFICATE OF APPEALABILITY

Certiorari review is also appropriate because, contrary to the lower courts' holdings, Williams has made the "substantial showingof the denial of a constitutional right" which is both necessary and sufficient for issuance of the COA. See Miller-El, 537 U.S. at 327("prisoner seeking a COA need only demonstrate a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). A petitioner need only show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. (citation omitted).

1. Ineffective assistance of counsel in failing to raise the Newly Discovered Evidence claim respecting the recantation made by the state's primary witness.

The lower courts also erred in denying Williams COA on his ineffective assistance of counsel claim based on counsel's oversight in failing to raise the newly discovered evidence claim on Williams appeal. Attorney Timothy Provis represented Williams in postconviction proceedings. Provis moved for a new trial based on evidence that the state's primary witness (Fuentez) had admitted before trial that he falsely accused Williams in order to mitigate the consequences of his own involvement in the crime, and because he was upset that Williams was unwilling to retaliate against the Murda Mobb. Williams' motion was further based on postconviction admissions (both sworn and unsworn) by Fuentez that he had falsely accused Williams and that Williams was not in any way involved in the crimes at issue. Provis sought reversal based on other grounds as well (none of which went into Williams' actual innocence).

Following an evidentiary hearing, The circuit court ordered briefings. Provis submitted a brief which identified the correct legal standard and correctly argued that because Funtez's recantation and admissions were not "incredible" as a matter of law. (i.e. in conflict with nature,etc.), it was for the jury and not the court to weigh the evidence (including Fuentez's recantation) in determining whether Williams was guilty of the charged crimes.

There was no dispute in the lower courts that Williams had satisfied all of the requirements necessary to prevail on a newly discovered evidence claim, with the sole exception being the fifth requirement which requires a showing that "a reasonable probability exists that a different result would be reached at trial." State v. Avery, 213 wis. 2d 228, 234-37, 570 N.W. 2d 573 (Ct. App. 1997). a reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt. State v. Love, 284 Wis. 2d 111, 700 n.W.W 62 (2005). The parties and the lower courts agreed that this represented well settled law in the state of Wisconsin.

Although Williams had presented solid evidence of six occasions on which Fuentez admitted that Williams infact was not involved in the shootings.The circuit court relied on its personal belief that Fuentez's trial testimony was "more credible" than his pretrial admissions and post-trial recantations and therefore concluded that there existed no reasonable probability of a different result. The court also confused a finding that Fuentez's recantation testimony was "very suspect" with a finding that the testimony was "incredible" as a matter of law. The court compared credibility noting that, although Fuentez had motive from the beginning to falsely accuse Williams, "the evidence is significant to support the accusation piece of this in contrast to

the recantation."

Even seperate from applying that "relative credibility standard, the court repeatedly asserted its personal view that the evidence from Fuentz was not particularly Credible ("I didn't find his recantation credible..."; " I did not find it to be credible based on body language, the guarded way in which Mr. Fuentez answered questions, the guarded way he was acting. And he made statements to Detective Hensley, according to Hensley, that were directly contrary to what he said [at the postconviction hearing]" ; "I think Detective Hensley [sic] is credible... I believe Detective Hensley [ic] that Mr. Fuentez had mad those statements to him, and I don't believe he made it up"; "We have Detective Hensley testimony which I do find credible...").

It is undisputed that Williams insisted to Provis that he raise the "newly discovered evidence" and "interest of justice" issues on appeal since they were firmly supported by the record and by established law that bars the court from relying on its own credibility findings when assessing whether there exists a reasonable probability of a different result (a principle of law correctly argued by Provis in his postconviction brief). Provis nonetheless refused to raise the claims, citing his belief that the circuit court's credibility findings would be deemed controlling by the court of appeals (even though such a determination would be incongruent with the law). Instead, Provis raised far weaker

claims that had no chance of success.

The Wisconsin court of appeals decided that Williams was not prejudiced by Provis' failure to appeal the newly discovered evidence claim, concluding that the circuit court findings were not clearly erroneous in discrediting Fuentez's numerous statements and accusation. However, the court of appeals' conclusion is irrational in light of the controlling legal standard which focuses, not on whether the circuit court believed Fuentez's statements and recantation, but on whether a jury reasonbly could credit them sufficiently to raise a reasonable doubt.

The Wisconsin Court of Appeals adopted its holding from the appeal of Williams' co-defendeant, James Washington. According to that court (Washington)appellete court), "the circuit court determined that Fuentez's recantation was not credible," this factual finding was not clearly erroneous, and Williams accordingly failed to show a reasonable probability of a different result based on Fuentez's recantation.

However, that is not what the circuit court actually found. As noted above, the circuit court found that the evidence supporting Williams' motion "was not as credible" as Fuentez's trial testimony. There is a major difference between evidence that is "not as credible" as trial evidence and evidence that is "incredible as a matter of law".

Even established Wisconsin law holds that when assessing whether there exists a reasonable probability of a different result, "a circuit court may not substitute its judgement for that of the jury in assessing which testimony would be more or less credible. "State v. Jenkins, 335 Wis. 2d 180, 848 N.W. 2d 786 (2014).

The requirement to focus on the potential impact of evidence on a reasonable juror rather than the impact on a particular judge is exactly what the United States Supreme Court has established. E.g. Neder v. United States, 527 U.S. 1, 19(1999) (where the defendant contested the issue affected by the error, and the evidence viewed most favorably to the defendant supports his theory, it is for the jury to determine whether to believe it); Strickland v. Washington, 466 U.S. 688, 695 (1984) (assessment of prejudice "should not depend on the idiosyncracies of the particular decision-maker").. Just as with appellate review of challenges to evidentiary sufficiency, an objective standard is necessary for harmless error or resulting prejudice so that reviewing judges do not succomb to the temptation to substitute their subjective views on the evidence for the views of the jury.

Assuming that the Wisconsin Court of Appeals intended to comply with controlling Wisconsin and United States Supreme Court authority requiring focus on the potential impact on a reasonable juror rather than on the idiosyncracies of a particular judge, then the court's assertion that the

circuit court's credibility findings were not "clearly erroneous" is patently unreasonable. Whatever any individual juror may decide, nothing about Fuentez's statements or recantation is incredible as a matter of law, i.e., "in conflict with...nature or with fully established or conceded facts," ROhl v. State, 65 Wis2d 683, 695, 223, N.W.2d 567 (1974); see United States v. Griffin, 194 F.3d 808, 817 (7th Cir. 1999) (court will substitute its credibilty findings for that of the jury only where evidence is incredible as a matter of law, i.e., that "it would have been physically impossible for the witness to observe what he described, or it was impossible under the law of nature for those events to have occurred at all.").

Despite the personal views of the particular circuit court in this case, there is nothing inherently inherently preventing a reasonable juror from crediting Fuentez's many admissions to Williams lack of involvement. Any conclussion that a reasonable jury could not credit Fuentez's admissions sufficient to create a reasonable doubt necessarily would be irrational. While the circuit court attributed Fuentez's demeanor and the assertion of his Fifth Amendment rights at the hearing to his being threatened to falsely recant, a reasonable jury easily could credit his testimony, that he was not threatened in any way by the defendants. That jury also reasonably could determine that Fuentez's demeanor and resistancy was attributed to his expressed concern that, by

telling the in the affidavits and at the hearing, he subjected himself to potential perjury charges and reopened federal charges.

The jury could also reasonably reject the circuit court's theory that the details of Fuentez's trial testimony made his original accusation against Williams more credible than the recantation. Such a jury could reasonably determine that Fuentez's details in discribing the shooting merely resulted from his own involvement and did nothing to discredit his admission that Williams was not with him.

Fuentez made the admission to many different people, both before and after trial, and under many different circumstances. Indeed, those admissions are corroborated by the physical evidence that Williams cellphone was several blocks away from the scene and that, while the state allegedly connected Williams to an SKS rifle, the shells found at the scene could not have come from that rifle. Moreover, Detective Hensley had a motive to falsify his questioning of Fuentez and nonetheless chose not to record it. This too could lead a reasonable juror to accept Fuentez statements over Detective Hensley, including his testimony that he did not fear harm from Williams, but feared harm from the Murda Mobb, as well as possible perjury charges. Add to this the fact that every witness who claimed that williams was at the scene or made some incriminating statement was seeking to mitigate the

consequences of his own wrong doings, and thus was inherently unreliable. See Goodman v. Bertrend, 467 F.3d 1022, 1030 (7thCir., 2006) ("Where the state's case consists chiefly or solely upon the word of an accomplice... court's have recognized the great importance to the defendant of evidence of direct connection or material corroboration from other sources").

Because there is no basis on which the state circuit court could reasonably conclude that the jury would necessarily discredit Fuentez's many admissions, the State Court of appeals decision **rests on an unreasonable finding** of fact.

Like the state court's, the federal district court's decision makes no sense. The question is not whether the state circuit court's personal credibility findings were reasonable, but whether those personal credibility findings reasonably support the factual conclusion required to support the state court's holding, i.e., that the new evidence is so incredible that no reasonable jury could accept it. (If the jury accepted it, it would obviously lead to a finding of reasonable doubt). Moreover, it has been well established that the jury would not necessarily have to believe the recantation to find reasonable doubt:

> "The issue is not even whether the recantation is true or false"
>
> "The issue is not whether the jury could accept the recantation as true, or even whether the jury could believe it. A jury does not have to

> accept the recantation as true in order to have reasonable doubt."
>
> "The issue is whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt." State v. McCallum, 208 Wis.2d 464, 561 N.W.2d 707 (1997).

Nothing in this case supports the suggestion that the new evidence is "incredible as a matter of law." Although the district court denigrated as irrelevant Williams' showing of "why each finding the court of appeals made as to the [resulting prejudice] factor could have been viewed differently by the jury", that is exactly the factual analysis that a rational court must apply in assessing whether evidence creates a resonable probability of a different result. And again, we must presume that the state courts intended to follow the law. Strickland, 466 U.S. at 694.

However, it is irrational as a matter of fact to equate the circuit court's personal credibility findings with a conclusion that no reasonable jury could deem Fuentez's pretrial admissions and sworn recantations sufficiently credible to create a reasonable doubt. By doing so, the state court (and the federal district court) necessarily relied upon unreasonable findings of fact.

The district court overlooked the central reason why the state court of appeals' decision denying Williams ineffectiveness claims rested on unreasonable findings of fact and thus is not entitled to deference under the AEDPA.

The evidence it relied upon-the circuit court's personal credibility findings- did not rationally support its conclusion that no reasonable jury could credit the new evidence sufficiently to create a reasonable doubt, and nothing else in the record did either.

That error impacts the merits of Williams claims in addition to overcoming defernce to the state court's under AEDPA. Williams' appellate counsel epitomized deficient performances (prong one of IAC test under Strickland) by unreasonably forgoing winner issues going directly to Williams' innocence in favor of frivolous or nearly frivolous issues merely picking around the periphery of the states' case against him. Counsel's failures prejudiced Williams (prong two of IAC test under Strickland) because a reasonable jury easily could credit the newly discovered evidence of Williams' innocence and find a reason to doubt the state's evidence. In other words, a jury hearing both the old evidence and the new evidence would have a reasonable doubt respecting guilt.

Contrary to the district court's conclusion, therefore, Williams has made "a substantial showing of the denial of a constitutional right." Reasonable jurists could, and no doubt would , find debatable the lower courts' irrational focus on the personal credibility findings of the circuit court rather than on a proper application of the facts to the

to the appropriate legal standard.

2. Ineffective Assistance of Counsel in failing to raise the interest of justice claim on grounds that the real controversy was not fully tried.

The lower courts also erred in denying Williams a COA on his ineffective assistance of counsel claim based on counsel's oversight in failing to raise the interest of justice ground on appeal. Provis failure to raise the interest of justice ground cannot be reasonably explained or justified. A competent appellate attorney, acting reasonably, would recognize that Williams' case closely tracks the 2011 case where the Wisconsin court determined that the real controversy was not fully tried because the jury did not hear the testimony that the accusations of the state's primary witness were false. State v. Davis, 337 Wis.2d 688, 808 N.W.2d 130 (Ct. App 2011). Therefore, Provis failure to raise the issue constitutes deficient performance.

Williams was prejudiced by Provis' deficient performance because, had Provis raised the issue and had the court of appeals applied the same legal reasoning as was applied by the court in Davis, the outcome of Williams appeal would have been different. Here, as in Davis, the primary evidence against Williams consisted of the testimony of an alleged co-participant in the crime. Here, as in Davis, the new evidence consisted of admissions by the co-participant to others that Williams

in fact was not involved.

The case for reversal in the interest of justice is even stronger here than in Davis. Unlike Davis, the co-participant here admitted to Williams' non-participation both before trial and under oath after trial, while Davis accuser did not recant by affidavit or in court. Also, while Davis allegedly confessed his involvement to police, the state presented no evidence that Williams did so. The court of appeals in Davis nonthelessheld that "the evidence which the jury should have heard, but did not, made it impossible for the jury to weigh all appropriate factors in considering the importance of Davis' properly admitted confession." Id., para. 34.

The court of appeals in Wisconsin has the statutory authority to reverse in the interest of justice when the real controversy has not been fully tried. Sec. 752.35, Wis. stat. Reversal in the interest of justice is justified when, as here, "the jury was erroneously not given the opportunity to hear important testimony that bore on an important isssue of the case." State v. Hicks, 202 Wis.2d 150, 160, 549 N.W.2d 435 (1996).

In the postconviction motion filed on behalf of Williams, Provis correctly and prudently demonstrated that Fuentez's various admissions to Williams' lack of involvement in the homicides justified reversal in the interest of justice under sec. 752.35

under sec. 752.35, Wis. Stat. because the absence of those admissions before the jury prevented the real controversy from being fully tried. While the case for reversal in the interest of justice was strong, Provis inexplicably failed to renew that request on appeal, focusing instead on far weaker issues that had no realistic chance for success. It appears that he did so based on the same view that the circuit court's credibility findings would be agreed with by the appellate court, a view that is demonstrably unreasonable for the reasons stated in Section II 1, supra.

It may also be that Provis believed that he could only raise the interest of justice claim by asserting that the circuit court erroneously exercised it's discretion by denying his postconviction motion raising that claim. Such a perception likewise would have been unreasonable because the appellate court may exercise its discretion to grant a new tial in the interest of justice under sec. 752.35, Wis. Stat. regardless of whether the circuit court erroneously exercised its discretion in denying a similar motion. Stivarius v. Divall, 121 Wis.2d 145, 358 N.W.2d 530 (1984). Ignorance of well-established legal principles is unreasonable and deficient performance. Kimmelman v. morrison, 477 U.S. 365, 385 (1986)

The only issue in dispute here is concerned and concerns whether a reasonable jury could credit Fuentez' sta

statements and recantation sufficiently to create a reasonable doubt, and therefore, a reasonable probability of a different result. The circuit court expressed its own personal beliefs about Fuentez's demeanor on the stand, and the credibility of a police officer who offered testimony countering that of Fuentez, in expressing question on the part of the court respecting the credibilty of Fuentez's recantion.In essence, the circuit court enunciated its reasons to disbelieve Fuentez's recatation over his trial testimony. But as demonstrated, the standard for the court was whether a reasonable jury(which may have reached a different credibility findings about Fuentez's demeanor, the police officer, etc.) could have reasonable doubt about Williams' guilt. And, of course, if a reasonable jury reached different credibility findings, the nature of the recantation was such that it would be reasonable for that jury to find reasonable doubt about Williams' guilt(because Fuentez stated that his previous testimony implicating Williams was untruthful and that Williams was not even present at the time of the shooting- as corroborated by the cellphone tower and the absence of any connection to the shells found at the scene).

Mr. Williams was not required to convince the federal district court or the Seventh Circuit Court of Appeals to reverse the conviction in order to obtain a Certificate of Appealability. While Williams steadfastly maintains that

his claims are fully supported by both controlling authority and the facts, they are, at a minimum, open to dispute anong reasonable jurists. Because a reasonable jurists could reach a contrary conclusion, Williams is entitled to the requested Certification of Appealability.

Moreover, until this Court resolves the conflict regarding the deferential requirements of §2254(d) in respect to the "substantial showing" requirement, a petitioner's right to obtain federal habeas relief will turn, not on the claim, but on the luck of which appellate court hears the request. Review accordingly is appropriate. S.Ct. Rule 10(A).

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals.

Dated this 4 day of August, 2020.

Antonio D. Williams