No. 21-6481

In The
Supreme Court of the United States
February 2022

GENERAL GRANT WILSON,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Wisconsin's test for introducing evidence that a third party committed the crime—which requires a defendant to show the third party's motive, opportunity, and direct connection to the crime—falls within the States' "broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citation omitted).

2. Whether the Wisconsin Court of Appeals applied the wrong legal standard to Wilson's ineffective assistance claim when it stated that *Strickland* prejudice exists only when there is "a substantial likelihood" of a different result absent counsel's error—the same phrasing of the standard used in *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011), and others.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

The Petitioner raises two issues; neither is worthy of this Court's review. The decisions of the state courts were sound and consistent with this Court's rulings.

In *Holmes*, this Court noted that states have broad latitude to set their rules for third-party perpetrator evidence; the reason South Carolina's was struck down in that case was that the state had "radically changed and extended" its rule and had shifted "the critical inquiry" to "the strength of the prosecution's case" *prior to trial*. *Holmes v. South Carolina*, 547 U.S. 319, 320, 329, 330 (2006). Wisconsin has done neither of those things; it is simply not true that this is "*Holmes*, redux." (Pet. 23.)

Petitioner frames his constitutional challenge to Wisconsin's rule as a narrow one (Pet. 1), recognizing this Court's role with regard to state evidentiary rules. But the point of the law review article he quotes (for the proposition that Wisconsin's version is an "extreme form," and such "doctrines are unconstitutional") (Pet. 1) is not that Wisconsin is an outlier; it's that *Holmes* was wrongly decided and that this type of rule is per se unconstitutional and should be "abolish[ed] . . . entirely."[1]

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[1] David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 Wis. L. Rev. 337, 391, 402 (2016) ("*Holmes* implicitly misstates the problem . . . . First, it understates probative value as though it consisted only of the strength of the logical connection to the issue of perpetrator identity. . . . Second, *Holmes* implicitly overstates the danger side of the balance.").

His argument that the state court misapplied the *Strickland* standard is similarly flawed. It characterizes the court's statement of the prejudice standard as "nudg[ing] the standard . . . in an erroneously more onerous direction" (Pet. 32) when it used the phrase "substantial likelihood of a different outcome" despite acknowledging (Pet. 32–33) that this Court has stated the standard using the same phrase.[2] Though he also argues that the state court reached the wrong result on these facts, this Court "[is] not, and for well over a century ha[s] not been, a court of error correction," and it declines "[ ]nakedly uncertworthy questions" even when they "have undoubtedly been decided wrongly." *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 620–21 (2015) (Scalia, J. concurring in part and dissenting in part).

Both state court decisions applied constitutional rules in a way consistent with this Court's case law. They were rightly decided on these facts, but even if they weren't, Wilson's petition does not merit review.

STATEMENT OF THE CASE

Petitioner shot the victim to death early in the morning on April 21, 1993. (App. 49.) At the time of the shooting, the victim was sitting in a car with Willie Friend, who escaped uninjured. (App. 49.) A neighbor heard the initial shots and then

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[2] *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020); *Buck v. Davis*, 137 S. Ct. 759, 782 (2017); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011); *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

watched as Friend fled, and the shooter fired five to seven additional shots into the car. (App. 49.)

Both the neighbor and Friend testified at trial, but Friend was the State's primary witness and identified Petitioner as the shooter. (App. 51, 53–57.) Petitioner's theory in defense was that Friend had orchestrated the murder and framed him. (App. 49, 62, 78, 79.) Given the neighbor's uncontroverted testimony that she watched Friend flee before the final shots were fired, Petitioner theorized that Friend had hired an accomplice to kill the victim. (App. 49, 62, 78.) In support of this theory, Petitioner sought to introduce testimony from two acquaintances that Friend had slapped and threatened the victim two weeks before her murder. (App. 50, 62.) The trial court, however, excluded the testimony. (App. 50.)

A jury convicted Petitioner of first-degree intentional homicide of the victim and attempted homicide of Friend. (App. 135.) The trial court denied his post-conviction motion for relief, (App. 132), but Petitioner's lawyer failed to appeal, so the Wisconsin Court of Appeals reinstated his appellate rights 15 years later, (App. 130–31). Petitioner filed a renewed post-conviction motion arguing three grounds for reversal: (1) that the trial court improperly excluded evidence that a third party committed the crime (or that his lawyer ineffectively introduced the evidence); (2) prosecutorial misconduct; and (3) ineffective assistance of counsel (for reasons unrelated to the third-party-perpetrator evidence). (App. 127–28.) A new circuit court judge denied Petitioner's renewed post-conviction motion. (App. 126.) The Wisconsin

Court of Appeals, however, held that the third-party-perpetrator evidence should have been admitted and granted Petitioner a new trial. (App. 124–25.) The Court of Appeals did not address Petitioner's remaining two grounds for challenging his conviction. (App. 121.)

The Supreme Court of Wisconsin reversed on the issue of the third-party-perpetrator evidence, holding that the evidence was properly excluded. (App. 47–50.) The court first reaffirmed Wisconsin's longstanding test for introducing evidence that a third party committed the crime—under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984)—which requires defendants to show that "the third party had motive, opportunity, and a direct connection to the crime." (App. 49.) The court noted that this Court cited *Denny* "with approval" in *Holmes*, 547 U.S. at 327 n.*. (App. 70.) The court then upheld the exclusion of the disputed testimony—that Friend had threatened the victim—because Petitioner could not show that Friend had an opportunity to commit the crime. (App. 51.) Because of Petitioner's unique theory of the case—that Friend had an accomplice kill the victim—the court held that, to show opportunity, Petitioner needed "some evidence that [Friend] had the realistic ability to engineer such a scenario." (App. 51.) After exhaustively reviewing the evidence, the court concluded that Petitioner "in 1993 and now" had "failed to proffer any

evidence" that Friend had "the opportunity to arrange a hit on" the victim. (App. 81, 82.)[3]

The case was remanded to the court of appeals for a decision on the two remaining issues and ultimately to the circuit court for further proceedings. (App. 42, 45.)

After an evidentiary hearing held over three days, at which Wilson's trial counsel testified, the circuit court denied Wilson's motion. (App. 40.) It concluded that Wilson had failed to show prejudice as to each of the claims. (App. 38, 39.)

Wilson appealed, and the court of appeals affirmed, assuming deficient performance (App. 1, 7) but concluding that Wilson had "still failed to provide evidence of opportunity by Friend—or any other third party—at the level of clarity dictated by" Wisconsin law. (App. 9.) It pointed to the "highly probative, consistent testimony of a neutral observer," which "had a powerful tendency to exclude Friend as the shooter" and "matched the substance of Friend's testimony about the shooting." (App. 12.) It thus concluded that counsel's errors had not prejudiced Wilson, and that considering their "cumulative effect" did not "add anything to the arguments . . . already rejected." (App. 13.) One judge dissented, opining that Wilson had presented "significant additional facts" (App. 22) at the postconviction evidentiary hearing and that trial counsel's "numerous errors and omissions," considered together, prejudiced

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[3] Two Justices dissented. (*See* App. 108–14.)

Wilson. (App. 32.) The Wisconsin Supreme Court denied Wilson's petition for review. (App. 136.)

REASONS TO DENY THE PETITION

I. THERE IS NO SPLIT OF AUTHORITY THAT WARRANTS THIS COURT'S REVIEW OF WISCONSIN'S EVIDENTIARY RULE FOR THIRD-PARTY PERPETRATOR DEFENSES.

A. "State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes*, 547 U.S. at 324 (citation omitted). That latitude includes "rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged." *Id.* at 327. "Such rules are widely accepted." *Id.* at 327 & n.* (citing Wisconsin's rule, *Denny*, 357 N.W.2d 12). The Constitution prohibits only the extremely rare state evidentiary rules "that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." *Holmes*, 547 U.S. at 326. This Court has "[o]nly rarely . . . held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." *Nevada v. Jackson*, 569 U.S. 505, 1992 (2013) (per curiam).

B. Petitioner compares Wisconsin's specific three-part test with the "more flexible" approaches of states that simply balance relevance against unfair prejudice, arguing that this demonstrates the unconstitutionality of Wisconsin's test. (Pet. 26.) But the different approaches Petitioner notes simply show that States have exercised their constitutional authority to adopt different, but entirely permissible, tests for

deciding whether to admit evidence that a third party committed the crime. *See Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) ("[F]ederalism . . . allows individual States to define . . . rules of evidence . . . in a variety of different ways . . . . Nonuniformity is, in fact, an unavoidable reality in a federalist system of government."); 22 Charles Alan Wright & Kenneth W. Graham, *Federal Practice & Procedure Evidence* § 5180.2 (2d ed. 2012) ("[T]here [are] so many different 'tests' applied to the admissibility of evidence of third party guilt that the number seems to approach infinity.").

The decisions Petitioner has cited from Hawaii, Kentucky, and New York appellate courts (Pet. 27–29) merely reflect those courts' decisions as to state evidentiary rules; they thus add nothing to the constitutional analysis. *State v. Yoko Kato*, 465 P.3d 925, 940 (2020) ("[Wisconsin's *Denny*] test is not fully consistent with the Hawai'i Rules of Evidence"); *Gray v. Commonwealth*, 480 S.W.3d 253, 267–68 (2016) (holding that "evidence of some logical, qualifying information . . . beyond speculative, farfetched theories" is "all KRE 403 requires"); *People v. Primo*, 753 N.E.2d 164, 168 (2001) (reviewing the history of New York's third-party perpetrator evidence rule and concluding that "[t]he better approach . . . is to review the admissibility of third-party culpability evidence under the general balancing analysis that governs the admissibility of all evidence"). Wisconsin's test, as articulated in *Denny*, 357 N.W.2d 12, requires a showing of motive, opportunity, and a direct connection to the crime to introduce third-party-perpetrator evidence. (App. 49.) At

least one other state has adopted this approach. *State v. Griswold*, 782 A.2d 1144, 1146 (Vt. 2001). Many states hold that motive *and* opportunity are insufficient to introduce evidence that a third party committed the crime. *See* Wright & Graham, *supra*, at n.40. Many more hold that neither motive *nor* opportunity alone is sufficient. *Id.* at nn.41, 42. Other states hold that a direct connection to the crime is required. *Id.* at n.5 and accompanying text. All of these tests merely adopt their own approach to balance the defendant's right to present the defense of his choice with the necessary interest in avoiding juror confusion. *See Denny*, 357 N.W.2d at 16 ("The rule is designed to place reasonable limits on the trial of collateral issues . . . and to avoid undue prejudice to the People from unsupported jury speculation as to the guilt of other suspects.") (citation omitted); *see also Griswold*, 782 A.2d at 1146.

C. Wisconsin's test is well within the range of tests permissible under this Court's caselaw. In fact, this Court in *Holmes* tacitly approved of Wisconsin's rule by citing it—among many other examples—to show that rules limiting the admissibility of third-party-perpetrator evidence "are widely accepted." 547 U.S. at 327 n.* (citing *Denny*, 357 N.W.2d 12).

Wisconsin's rule is derived from *Alexander v. United States*, 138 U.S. 353 (1891), and requires defendants to show "a 'legitimate tendency' that the third person could have committed the crime." *Denny*, 357 N.W.2d at 17 (quoting *Alexander*, 138 U.S. at 356). Defendants do not have to "establish the guilt of third persons with that degree of certainty requisite to sustain a conviction," but "evidence that simply

affords a possible ground of suspicion against another person should not be admissible." *Id.* Therefore, to be sufficiently relevant, defendants must show "motive and opportunity" and have "some evidence to directly connect a third person to the crime charged." *Id.* Wisconsin's rule is designed to prevent the proceedings from "degenerating . . . into a trial of collateral issues," *id.*, and this Court has noted that this is a "good reason[ ]" for excluding evidence. *Jackson*, 569 U.S. at 1993.

Petitioner's argument that Wisconsin's test is one of those "rare[ ] . . . rule[s] of evidence," *Jackson*, 569 U.S. at 1992, that is ""arbitrary' or 'disproportionate to the purposes [it is] designed to serve,"' *Holmes*, 547 U.S. at 324, is wrong. In *Holmes*, this Court struck down a South Carolina rule that excluded evidence of a third party's guilt whenever "the prosecution's case is strong enough." 547 U.S. at 329. According to this Court, the problem with such a rule is that it does not "focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt." *Id.* "[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.* at 331. Therefore, this Court concluded, the rule was not rationally related to the legitimate goal of excluding evidence with a weak logical connection to the case. *Id.* at 330–31.

Wisconsin's test for admitting evidence that a third party committed the crime is wholly unlike South Carolina's. The Supreme Court of Wisconsin reiterated *Holmes*'s holding when it held that "[o]verwhelming evidence against the defendant

may not serve as the basis for excluding evidence of a third party's opportunity." (App. 75) (citing *Holmes*, 547 U.S. at 331). However, "overwhelming evidence . . . that the proposed third party *could not* have committed the crime" can be enough to exclude evidence of a third party's guilt. (App. 75.) This is designed to prevent the proceedings from "degenerating . . . into a trial of collateral issues," *Denny*, 357 N.W.2d at 17, whereas South Carolina's rule was unconstitutional because it did *not* "rationally serve the end . . . [of] focus[ing] the trial on the central issues," *Holmes*, 547 U.S. at 330.

Petitioner believes the Supreme Court of Wisconsin required him to show Friend's opportunity to commit the crime with too much "specificity." (Pet. 22.) He focuses on the court's language that he must show the "scenario" of Friend's involvement. (Pet. 22.) But Petitioner takes this language out of context. The court used that language because Petitioner's unique theory of the case involved a complex scenario: "[T]o show that a third party had the 'opportunity' to commit a crime *by employing a gunman or gunmen to kill the victim*, the defendant must provide *some evidence* that the third party had the realistic ability to engineer such a scenario." (App. 51 (emphasis added).) The court listed some examples of evidence that would suffice, (Pet. 22 (citing App. 82)), but ultimately concluded that Petitioner "failed to proffer *any evidence* that would elevate the theory of Friend's involvement in an assassination conspiracy from a mere possibility to a legitimate tendency." (App. 81

(emphasis added).) "Some evidence" is hardly a "degree of specificity . . . beyond what should be required of a defendant." (*See* Pet. 22.)

Petitioner also attacks Wisconsin's rule for requiring him to show Friend's motive to kill the victim (Pet. 19, 20), but that issue is not properly presented in this case because the State conceded that Petitioner *did* show Friend's motive. (App. 77.) Regardless, many states use motive as a legitimate proxy for relevance. *See* Wright & Graham, *supra*, at n.40.

II. THE WISCONSIN STATE COURT CORRECTLY STATED AND APPLIED THE *STRICKLAND* PREJUDICE STANDARD TO WILSON'S CLAIMS.

Petitioner argues that the Wisconsin Court of Appeals "misapprehended and misstated" the *Strickland* prejudice standard when it stated, "The ultimate question is whether there was a substantial likelihood of a different outcome but for trial counsel's presumed deficient performance." (Pet. 30, 32 (quoting App. 13).) But it cannot have *misstated* the standard when it used the same words this Court has used to state the standard. *Harrington v. Richter*, 562 U.S. 86, 112 (2011) ("The likelihood of a different result must be substantial, not just conceivable."); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (a "probability sufficient to undermine confidence in the outcome" exists when there is 'a "substantial," not just "conceivable," likelihood of a different result'"); *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) ("A reasonable probability means a 'substantial,' not just 'conceivable,' likelihood of a different result.") (quoting *Cullen*, 563 U.S. at 189, and *Richter*, 562 U.S. at 112); *Buck v. Davis*,

137 S. Ct. 759, 782 (2017) ("Prejudice exists only when correcting the alleged error would have produced a 'substantial' likelihood of a different result.").

He argues that the court of appeals "did not look at the cumulative effect of the multiple errors on the proceeding, as it was required to do." (Pet. 31.) The court of appeals did consider the cumulative effect of the errors Wilson alleged—failure to investigate and present the third-party perpetrator defense, failure to impeach Friend's credibility, and failure to object to hearsay. (App. 7, 13.) It assumed deficient performance as to each allegation. (App. 7.) In concluding that even in the aggregate, the errors did not prejudice Wilson (App. 13), it relied on the "highly probative, consistent testimony of a neutral observer," which "had a powerful tendency to exclude Friend as the shooter" and "matched the substance of Friend's testimony about the shooting." (App 12.)

The fact that there was a vigorous dissent in the court of appeals (Pet. 33–34) does not make make this petition certworthy. The majority and dissent reached different conclusions about how settled law applies to the facts of this case. Applying the same law to the circuit court's findings of fact, the dissent concluded that Wilson was entitled to a new trial, and the majority concluded that he was not. A difference of judicial opinion about whether the cumulative effect of counsel's errors requires granting a new trial in a highly fact-driven analysis is not a basis for this Court's review.

CONCLUSION

This Court should deny the petition.

Dated this 9th day of February 2022.

Respectfully submitted,

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