23-7718

IN THE UNITED STATES SUPRME COURT

CaseNo.20-CV-1835JPS
Appeal No.23-1729

JUSTIN T. WINSTON,

Petitioner-Appellant

v.

JOHN NOBLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX OF PETITIONER-APPELLANT JUSTIN T. WINSTON

Justin T. Winston
DOC #: 396600
Kettle Moraine Correctional Institution
P.O. Box 282
Plymouth, WI 53073

QUESTIONS PRESENTED

Did Mr. Winston procedurally default all of his federal claims?

If Mr. Winston defaulted his claims, did he show cause and prejudice?

Did the Wisconsin Court of Appeals adopt federal law and then poorly disguise the law as a question of state law, for a postconviction motion, alleging federal constitutional violations?

Did Mr. Winston make a substantial showing of the denial of his constitutional rights to receive a COA?

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below because Mr. Winston maintains that he did not commit this horrible crime that was caused by gun violence and killed the innocent victim, Marquise Harris; and now Mr. Winston is serving a life sentence without the possibility of extended supervision and the federal courts below, with their erroneous rulings, won't even review the merits of his claims.

OPINIONS BELOW

The order of the Seventh Circuit Court of Appeals, (Ex.A.p.1), is unreported. The opinion of the District Court's decision on the reconsideration motion, (Ex.B.p.2), is reported at 2023 WL 5432326. The District Court's original decision, (Ex.C.p.12), is reported at 2023 WL 2652175. The State of Wisconsin Court of Appeals decision on collateral appeal, (Ex.D.p.43) is reported at 2020 WL 13349017, summary disposition. The trial court's decision on the collateral appeal motion. (Ex.E.p.44) The State of Wisconsin Court of Appeals decision on direct appeal, (Ex.F.p.48), is reported at 378 Wis.2d 739, per curiam opinion. The trial court's decision on the direct appeal motion. (Ex.G.p.58) The Batson hearing. (Ex.H.p.65)

JURISDICTION

The date on which the U.S. Court of Appeals for the Seventh Circuit decided Winston's case was dated April 2, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state crime defendant's constitutional rights under the Fourteenth, Fifth, and Sixth Amendments. The Fourteenth Amendment provides in relevant part:

Nor shall any State deny to any person within its jurisdiction the equal protection of the law.

The Fifth Amendment provides in relevant part:

Nor shall any person be deny due process.

The Sixth Amendment provides in relevant part:

In all criminal prosecutions and appellate procedures, the accused shall enjoy the right to have the assistance of counsel.

This case also involves the application of 28 U.S.C. §2253(c) which states:

(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 copmplained of arises out of process issued by a state court.

(2) A certificate of appealability may issue under sub (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

[1]STATEMENT OF THE CASE

The State charged Winston with first-degree intentional homicide as a party to a crime and felony possession of a firearm. The complaint alleged that on July 2, 2010, detective Kent Corbett spoke to the codefendant, Raphfeal Myrick, with counsel. Myrick stated that on July 26, 2009, he and Winston allegedly drove to Deruntae Mason's residence at N. 37th St. Winston allegedly got out of the truck and brought the victim, Harris, back at gunpoint. Myrick and Winston allegedly then drove Harris to an alley at N.15th St. Myrick allegedly drove his Tahoe. At N. 15th St, Harris was allegedly removed from the Tahoe and standing near a garage. Myrick allegedly held the pistol and fired one shot at Harris. Winston allegedly pointed the AK out the window and began to fire multiple shots into Harris. Myrick and Winston then allegedly drove away until the police stopped them. (Ex.I.pp.77-79)

When jury selection began, the State struck one African-American juror and Winston struck three African-American jurors. The State indicated that it wanted to make a record that it only struck one black juror and Winston struck three. The court stated, "Let's have each party give their race-neutral reasons for striking the people that they struck." (Ex.H.pp.65.70) The prosecutor, Mark S. Williams, struck the juror because:

> **He was a young African-American male he had a lot of chains around his neck**. He said he was a physical trainer. There were times when he was sighing when he was on the jury and the State felt that he would not be a fair juror for the State based on his youth, based on the fact that he was wearing extensive jewelry in this case, including a number of large chains and a number of wrist watches and bracelets, and the fact that he was – he indicated that he was some type of trainer without explaining how he was a trainer or what he was doing. **So that was our reason for striking him**. Id at 71.

Counsel stated, "Is the court asking the State for an explanation?" The court stated. "I am waiting to hear your explanation, I will rule on 'everything' after I have heard all of your

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[1]Winston requests this Court to give a generous interpretation to all his pro se filings. *Haines v. Kerner*, 404 U.S. 519, 502, (1972)

explanations." Counsel stated, "I am challenging the State's strike and that their reasons were insufficient," Id at 72, and the trial court stated:

> Here's the problem. If one juror is struck, you don't have a Batson (sic) challenge unless there is only one African-American on the panel, if one juror is struck, you technically do not have a Batson (sic) challenge unless somehow you can show before the State makes its proffer for the reason why they struck that juror beforehand, you don't have a Batson (sic) challenge because it is – Batson (sic) says that you cannot make a group of challenges, peremptory challenges, you can't make a group of them on race. Id.

After counsel gave his explanation for the jurors he struck and the State agreed to the reasons being adequate. The trial court reaffirmed its reason and stated:

> He had an adequate explanation as the State did also, but the State is in less of a precarious position because the State only struck one of the four thinking that the other three would be on the panel. And if it were race-specific, then the State would have taken their opportunity with their strikes to strike the rest of the African-Americans and chose not to do so. Id at 75.

During trial, the State argued matters not in evidence and vouched for Ricky Grinston's recorded statement that he gave to Detective, Rodolfo Gomez. In the closing and rebuttal arguments, Williams stated:

> (1) The fingerprint guy told you how that works. It's moisture and rubs off very easily, especially if it's outside; it dissipates very quickly if it's outside; and it doesn't last very long if it's outside; which certainly indicates that those fingerprints were put there right away, right as Mr. Winston was running away; (2) You also heard that on the gun that Mr. Myrick threw away, Mr. Winston's DNA was on that gun; (3) Grinston says I'm gonna be killed by these guys; and (4) there was no more profound and truthful testimony in this trial other than by Mr. Grinston on that videotape. And you heard how truthful he was when he was talking to Gomez and how difficult it was for him to admit truth. (Ex.J.pp.80-86)

Winston was found guilty and the circuit court imposed a life sentence without the possibility of extended supervision. (Ex.K.pp.87-88). Winston filed a Wis. Stat. §809.30 motion claiming a Batson violation and trial counsel ineffectiveness on the claim. (dkt:26-Ex.3.40.) The post-conviction court denied Winston's claims, (Ex.G.p.58), and the court of appeals affirmed. (Ex.F.p.48) Winston was represented by Attorney Patrick T. Earle at trial and represented by Attorney Paul G. Bonneson on post-conviction appeal.

Winston, pro se, filed a Wis.§ 974.06(1)(2) motion asking for a new trial or a Machner hearing[2] on the following grounds and arguments:

> (1) Batson claim; (2) prosecutorial misconduct claim; (3) trial counsel was ineffective for not objecting to gender and in the alternative, counsel was ineffective for inadequately raising the Batson claim on race and for not objecting to the misconduct; and (4) ineffectiveness of post-conviction counsel for inadequately arguing the Batson claim and trial counsel's ineffectiveness on the claim when dealing with race, not arguing that trial counsel was ineffective for not objecting to gender, and for not arguing the prosecutorial misconduct claim that's related to trial counsel's ineffectiveness. (Ex.L.pp.89)

The circuit court denied Winston's 974.06 motion, (Ex.E.44), and the court of appeals affirmed. (Ex.D.p.34) Winston filed a habeas corpus on the above claims in his 974.06 motion. (dkt:1) Winston also filed an amended petition. (dkt:18) The respondent filed a motion to dismiss Winston's amended petition with a supporting brief. (dkt:25-26) Winston filed an opposition brief to deny the respondent's motion to dismiss. (dkt:28) The respondent field a reply brief. (dkt:33), and the District Court granted the respondent's motion. (Ex.C.p.12). Winston filed a reconsideration motion requesting the District Court to reverse its decision. (dkt:43,44) The Court denied the motion. (Ex.B.p.2) Winston filed a COA and an amended COA to the Seventh Circuit and the court denied both motions.[3] (Exs.M-N.pp.110-42. A.p.1)

REASON FOR GRANTING WRIT OF CERTIORARI

Winston asserts this Court should grant this writ under Supreme Court Rule 10(c) because the courts below have decided an important federal question in a way that conflicts with relevant decisions of this Court. As explained below, the District Court's decisions are in conflict with this Court's precedents in *Lee v. Kemma*, 534 U.S. 362,378,383,(2002), *Ake v. Oklahoma*, 470 U.S. 68,75, (1985), *Osborne v. Ohio*, 495 U.S. 103,124, (1990), and *Harris v. Reed*, 489

[2] Evidentiary hearing.

[3] But granted Winston to amend the COA.

U.S. 255,263,(1989). Winston also asserts he has demonstrated cause and prejudice on the alleged defaults on grounds one through three, but the District Court failed to review the facts Winston filed in his pro se filings, in the State Court, that established cause and prejudice because of its ruling that Winston's postconviction/appellate counsel claim is barred, but as explained below, this ruling is in conflict with *Harris supra.*

In addition, the State Court pleading standard for postconviction motions on due process claims are placing undue restraints upon Wisconsin state prisoners' litigation because the State Court's pleading standard is a poorly disguise question of federal law which was adopted from this Court's precedent in *Blackledge v. Allison*, 431 U.S. 63, 73-74,(1977). Further, since Wis stat. §974.06(3)(c), is identical to 28 U.S.C.A. §2255(b), also makes the state court's pleading standard a question of federal law. Winston asserts if this Court does not intervene, then these undue restraints would probably never be lifted, therefore, other federal courts below might adopt this approach and discriminate against the federal rights asserted for state prisoners.

Furthermore, the Seventh Circuit's order is in conflict with this Court's precedents in *Slack v. McDaniel*, 529 U.S. 473,484-85,(2000), and *Barefoot v. Eatelle*, 463 U.S. 800,893n.4-894,(1983), because the Seventh Circuit never resolve the District Court's procedural holding and the State Courts' decision are debatable or wrong and the issues raised are adequate to deserve encouragement to proceed further because they are in the factual basis, but the court's one sentence approach without any additional analysis makes it impossible for any petitioners to get granted a COA even when the facts presented demonstrate otherwise, thereby, resolving the case an unfair and prompt manner, therefore, making its order in conflict with *Slack, supra*, at 485.

Winston asserts his conviction is tainted by discrimination and prosecutorial misconduct that violated his federal constitutional rights, but the courts below are letting these violations stand in place, therefore, undermining the public confidence in the justice system and the risk of injustice in other cases.

General standard for granting a Certificate of Appealability

This Court in *Barefoot,* 463 U.S. at 893n.4, recognized to be allowed to appeal in a habeas case; obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. *Id.* Instead, a certificate should issue if the appeal presents at least one question of substance: (1) which is debatable among jurists of reason; or (2) that a court could resolve in a different manner; or (3) that is adequate to deserve encouragement to proceed further; *Id* or (4) that is not squarely foreclosed by statute, rule or authoritative court decision, or that is lacking factual basis in the record. *Id* at 894.

Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. *Slack*, 529 U.S. at 484-85. Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. *Id* at 484-85.

(I) MR. WINSTON IS ENTITLED TO COA BECAUSE JURISTS OF REASON WOULD FIND THE DISTRICT COURT'S RULING THAT HIS FOUR GROUNDS ARE PROCEDURAL DEFAULTED AND THAT HE DID NOT SHOW CAUSE AND PREJUDICE ON THE "ALLEGED" DEFAULTS ARE DEBATABLE OR WRONG

A federal court entertaining a petition for a writ of habeas corpus will not review a question of federal law if it determines the state decision rests on a state procedural ground that is independent of the federal question and adequate to support the judgment. *Moore v. Bryant*, 295 F.3d 771, 774 (7th Cir.2002). Simply stated, the independent and adequate state ground

doctrine bars federal habeas when a state court has declined to address a prisoner's federal claims because the prisoner has failed to meet a state procedural requirement. *Moore*, 295 F.3d at 774 (quoting *Coleman v. Thompson*, 501 U.S. 722, 729–30,(1991). In determining whether a claim has been procedurally defaulted, the Seventh Circuit looks to Wisconsin law. See *Thomas v. McCaughtry*, 201 F.3d 995, 1000 (7th Cir.2000). The adequacy of state procedural bars to the assertion of a federal question is not within the state court's prerogative finally to decide; rather adequacy is itself a federal question. *Cone v. Bell*, 556 U.S. 499,466, (2009). To excuse any default a petitioner can establish cause and prejudice. *Love v. Vanihel*, 73 F.4th 439,446.(7th Cir.2023).

This Court has held that ineffective assistance is adequate to establish cause for the default of some constitutional claims, like some to be raised first in the state court. *Edwards v. Carpenter*, 529 U.S. 466,451-52,(2000).

(a) Winston's pro se Batson claim is not defaulted

The court in *Winston, II*, adopted the decision from *Winston, I*, which held that Winston's trial counsel did not properly raise or pursue a Batson claim and Winston cannot re-litigate that conclusion. (Ex.D.pp.34.37) This decision is incorrect. Winston agrees that trial counsel did not properly raise the challenge by "omitting" key arguments on race, not knowing the law on Batson, and not objecting to gender, but he did *pursue* a Batson claim because he made a challenge on race before the jury was sworn in and followed the state's rule on preserving the challenge, see *State v. Jones*, 218 Wis.2d 599,602,(1998) citing *Batson v. Kentucky*, 476 U. S. 79,99-100,(1986), "a Batson challenge must be made before the jury is sworn in," also see *Lee*, 534 U.S. at 378,383, (when a state prisoner properly follows state law).

Winston also asserts since *Jones*, 218 Wis.2d at 602, relies on Batson to determine if the challenge was timely; therefore, its application cannot be independent of federal law. See *Ake*, 470 U.S. at 75, (dkt:28.2), The District Court ignored this argument. (Ex.C.pp.12.22-24)

In addition, Winston argued there is no state case law that states a Batson challenge is not properly raise or preserve during trial because a defendant did not raise it before the State, as the court's decision suggested in *Winston,I.* Therefore, this part of the court's decision in *Winston, II*, was not firmly established and regularly followed, See *Lee*, 534 U.S. at 378,382n.13, by adopting the decision from *Winston, I.*

The District Court held that Winston's pro se Batson claim is procedurally defaulted because the Wisconsin Court of Appeals denied it as forfeited, (Ex.C.pp.12.24) and Winston *somewhat* misstated the court's decision because the court only held that the Batson claim was forfeited because counsel failed to ask the trial court to make a factual finding under step three. Id at 14, but Winston asserts when reading the court's decision on the Batson claim, this is part of the decision as well, on why the claim was not properly raised or preserved because postconviction counsel argued, "if trial counsel waived the Batson claim for not objecting *first*, then counsel was ineffective." (dkt:26-Ex.3. pp.40.50) Winston asserts when connecting this fact to the State Court's decision, it's part of the decision as well.

(i) Even if Winston somewhat misstated the record, the State Court's decision was still unexpected and inadequate to hold that his pro se Batson claim is barred

Further, the District Court does not dispute that counsel made an objection before the jury was sworn in. In addition, even if the District Court was right about Winston somewhat misstating the record, this would not overcome the fact that the State Court applied it forfeiture rule in an unexpected way, since counsel made an objection before the jury was sworn in; and any attempt to press the trial court to make a factual finding would have been doomed to fail in

the wake of the trial court's determination that there is no Batson violation because the State only struck one African-American juror. (Ex.H.pp.65.72).

See *Osborne*, 495 U.S. at 124, this Court held that there was no need for Osborne's trial counsel to press the issue since his counsel filed a pretrial motion and the trial court ruled against the motion, therefore, the due process claim was preserved for appellate review. *Id.* Winston asserts the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore, sufficient to preserve the claim for review. *Lee*, 534 U.S. at 378. Winston asserts this above law applies to his case because trial counsel made the challenge and the trial court denied the challenge. (Ex.H.pp.65.72.75)

Winston asserts there was no need for his trial counsel to ask the trial court to make a factual finding, under step three, and the trial court denied his challenge from the start and the State Court cite no state law to hold this position. *Lee*, 534 U.S. at 378,382n.13, therefore, making the decision unexpected. *Id.* Further, as asserted above, determining whether a claim has been procedurally defaulted, the Seventh Circuit looks to Wisconsin law. *Thomas,* 201 F.3d at, 1000. Winston asserts the District Court never determine whether there is such a procedural rule that is applicable to this Batson claim and whether Winston did, in fact, fail to follow it, for example, see *Lancaster v. Adams*, 324 F.3d 423,436,(6th Cir.2003). In addition, it's the trial court's *duty* to make a factual finding under step three. See *State v. Lamon*, 2003 WI 78, ¶32. Therefore, Winston also asserts this is another way showing how this forfeiture rule was unexpected. *Lee*, *supra*, at 378,382n.13

The District Court also held that Winston is arguing the correctness of the State Court's ruling as to forfeiture, but this court cannot review the correctness of state law. (Ex.C.pp12.23)

Winston asserts, nowhere, in his opposition brief he contested the rule. (dkt:28.1-2) When Winston made the argument that the State Court did not cite case law to hold its position. Id. The District Court, again, held that Winston is contesting the correctness of state law. (Ex.C.pp.12.24) These parts of the District Court's rulings are errors. See *Lee*, 534 U.S. at 362,378,382n.13, this Court held, "the state court of Missouri, cited no published Missouri's decision to bar Lee's due process claim in the way it held" *Id.* Therefore, Winston asserts it was proper for him to make this argument, due from this Court's precedent.

(b) Winston's pro se alternative argument that trial counsel was ineffective on the Batson claim is not defaulted

Winston asserts this pro se claim is not barred relying on *Warren v. Baenen,* 712 F.3d 1090,1098,(7th Cir.2013); and Winston properly persevered this pro se claim at each levels of state's court review. (dkt:28.4.n3-4) Further, since the court in *Winston, II,* addressed the merits of Winston's pro se trial counsel's ineffectiveness claim, any default rule on this claim is lifted. *Malone v. Walls,* 538 F.3d 744,756, (7th Cir.2008).

The District Court held that in *Warren,* 712 F.3d at 1100, the case Winston cited, is distinct. (Ex.C.pp.12.29) Winston argued, in his reconsideration motion, that the District Court erroneously applied the wrong section of the Warren case to his argument because Winston was relying on the part of the Court's decision dealing with how the failure to investigate the alibi witness was not barred, not how Warren's mental competence claim was not barred. (dkt:44.4-6)

The District Court in denying the reconsideration motion held:

> Indeed, it appears that in Petitioner's original briefing, he cited to page 1098 of *Warren*—a point at which the Seventh Circuit addressed the petitioner's argument that his counsel was "ineffective because she failed to investigate a [witness] statement," *Warren*, 712 F.3d at 1097-98. (Ex.B.pp.2.7-8). *This portion of Warren does not aid Petitioner because the issue this Court encountered in addressing Ground Three was whether it was procedurally defaulted, not one of which standard to review to apply in addressing the ground's merits.* Id.

Winston asserts, again, the District Court erroneously applied the Warren case by not acknowledging that the Court held that it was not barred from reviewing the claim because the claim was not *denied on a question of state law*, like the related, but distinct issue on direct appeal. *Warren*, 712 F.3d at 1098.

After, the Court, determined that it was not excluded from reviewing the claim because it was different and not denied on a question of state law, then in the following paragraph, it also held that the proper standard of review is de novo. *Warren*, 712 F.3d at 1098. The Court's decision, in this section, was not solely discussing what proper standard of review to apply, due from its above history.

(c) Winston's claim that postconviction counsel was ineffective on the Batson claim and the trial counsel's ineffectiveness on the claim is not defaulted

(i) Winston's argument that postconviction counsel was ineffective for not arguing that step one was moot is not defaulted

First, Winston asserted facts, under the Allen pleading standard, that postconviction counsel was ineffective for not arguing that step is moot.

The State Court held:

> Winston challenges this court conclusion that he had to demonstrate a prima facie case of discrimination *in order to prove that his trial counsel provided ineffective assistance.* Winston cited case law suggesting that courts need not consider whether a prima facie case was established if the trial court moved to the second and third steps of the Batson analysis. We decline to address that principle would apply here where it has been determined that the defendant did not properly raise or pursue a Batson claim because Winston cannot relitigate the legal analysis this court employed in his direct appeal. (Ex.D.pp.34.38)

Winston asserted he never challenged the court's conclusion that he need not make a prima facie case to demonstrate trial counsel's ineffectiveness because step one is moot. Winston argued postconviction counsel was ineffective for not arguing that step one is moot. This argument is not saying in any shape or form that Winston need not show trial counsel's ineffectiveness and the court did not point to any were in Winston's pro se filings that such

argument was made. Moreover, the court cited no state case law that state, "step one is only moot if the Batson claim was properly preserved, and if not, the moot issue is barred."

In fact, in the State Court, Winston need not show that the Batson claim was properly preserved to demonstrate that step one is moot. See *State v. Taylor,* 2004 WI App 81. When Talory's counsel failed to make a challenge, but the State Appellate Court still found step one to be moot because the prosecutor gave a reason at the postconviction hearing and the trial court ruled on the explanation. *Id* at ¶¶5-10, 23n.5-24. Therefore, Winston properly followed the state law rule. *Lee*, 534 U.S. at 383 Winston asserts the court's decision on his moot argument being barred that's related to postconviction counsel's ineffectiveness was unexpected. *Id.*

Winston asserts even though the State Court made a ruling on this argument, Winston asserted in his amended petition that step one is moot, (dkt:18.2.5), Winston asserted in his opposition brief that step one is moot, (dkt:28.6), the respondent made an untimely argument in its reply brief about the moot argument being barred, (dkt:33.13-14), and Winston asserted in his cover letter and reconsideration motion that the District Court ignored this argument, in its first decision, (dkts:43.44), but nevertheless, the District Court still ignored these facts and arguments in its decision on reconsideration. (Exs.B.pp.2.8-9. C.pp.12.31)

(ii)The State Court did not rely on the Allen pleading standard, but instead, relied on the law from Batson and denied the claims on the merits, but the District Court's decision improperly conflated the law from Batson with Allen because both laws use the word, "facts"

The District Court held that the ineffective assistance of postconviction counsel claim, that's related to the Batson claim, is defaulted because the State Court expressly relied *State v. Allen*, 274 Wis.2d 568,682,(2004), and *State v. Escalona-Naranjo*, 185 Wis.2d 168,185,(1994) to bar the claim. (Ex.C.pp.12.31) The District Court relied on *Whyte v. Winklesk*, 34 F.4th 617,624,(7th Cir.2022), to hold its position.

Winston asserts the State Court's decision in his case is nothing like Whyte, the court, in Whyte, held that he failed to established prejudice because his pleading was conclusory and legally insufficient under Allen, even if the court also rejected Whyte's claims as meritless. *Id* at 624. A state court need not fear addressing the merits in an alternative holding. *Id.*

In the present case, the State Court never began or ended with Winston's 974.06 motion as being conclusory and legally insufficient under *Allen*, 274 Wis.2d at 682, and addressed the merits in an alternative holding, unlike in Whyte. Winston asserts the State Court must expressly state in plain language that its decision was based on the procedural default. See *Jenkins v. Nelson*, 157 F.3d 485,491, (7th Cir.1998). The State Court only cited the general standard from Allen, (Ex.D.pp.34.36), this is not good enough. *Jenkins*, *supra*, at 491. The court never used the Allen language again when assessing the facts.

In addition, the District Court improperly conflated the state law from *Allen,* 274 Wis.2d at 682, with the law from *Batson*, 476 U.S. at 97, because both of the laws use the word, "*facts*." Under Allen, the defendant must assert with the motion, material sufficie*nt facts*, if true, for the court could meaningfully asses the IAC claim under the pleading standard; and in Batson under step one, an opponent could use all relevant *facts* to raise an inference. Winston asserts he would demonstrate below how the State Court's decision was a ruling on the merits, the court held:

> First, no jurors raised their hands when the trial court asked whether any juror was "aware of any bias or prejudice they may have in this matter[s]." Thus, Winston concluded, Juror 27 did not show bias toward either party. Second, Juror 27 stated that he was not married, had two adult children, was a personal trainer, had not previously served on a jury, and liked roller skating. Winston argued: "These are not reasons for Juror [27] to be struck." Finally, Winston noted that the State did not ask Juror 27 any follow-up questions about his job before striking him. (Ex.D.pp.34.39)

This part of the ruling demonstrates the court assessed the facts in Winston's pro se motion. Further, the State Court held:

> On appeal, the State argues, "None of those *facts*, had postconviction counsel advanced them, would have established a prima facie case of discriminatory intent or purpose under Batson." Id.

This part of the ruling demonstrates the State/respondent conceded to Winston presenting facts with his motion under the Allen pleading standard, but those facts did not raise an inference under the law from Batson. Finally, the State Court held:

> We agree with the State that the prosecutor's questions and statements did not support an inference of discriminatory intent. The fact that the State brought the lack of African-American jurors to the trial court's attention-thereby inviting scrutiny of the State's use of its peremptory challenge-further suggests there was no discriminatory intent. We conclude, as we did in Winston's direct appeal, that he has *not presented facts supporting a prima facie case of discriminatory intent.* Therefore, Winston cannot demonstrate that he was prejudice by trial counsel's failure to raise or preserve a Batson challenge *or* by postconviction counsel's alleged failure to adequately *present those facts as part* of Winston's direct appeal. Id at 40.

When reading this part of the court's decision, it's clear that it was discussing the law from Batson in denying Winston relief when it held, "he has not presented facts supporting a prima facie case of discriminatory intent," this is Batson's language, not the Allen pleading standard, as the court held, "postconviction counsel's alleged failure to present those facts." This part of the court's decision is clearly stating that Winston presented facts with his motion, under the Allen pleading standard, but in the court's view, those facts did not raise an inference of discriminatory intent under the law from Batson. Winston asserts the State Court never held, "Winston failed to support objective facts, so, that the court could meaningfully asses, the ineffective claims, under the Allen pleading standard," unlike the Court's decision in *Triplett v. McDermo*tt, 996 F.3d 825,829-30,(7th Cir.2021).

Winston asserts the District Court should not be allowed to interpret the law from Batson, when the State Court held that his pro se motion failed to present facts, supporting a prima facie case of discriminatory intent, to a wrongful reading between the lines by stating that this is really the Allen pleading standard, without such language from the State Court; and the ruling demonstrates the State Court assessed the facts in his 974.06 motion. Winston asserts if the District Court's decision stands, by improperly conflating these two laws, then this Court's

precedent in *Harris*, 489 U.S. at 263, which held that state courts must expressly state in plain language the claim is defaulted, would be irreverent.

Furthermore, the last sentence in the above State Court's decision when it held, "Winston cannot demonstrate that he was prejudice by trial counsel's failure to raise or preserve a Batson challenge *or* by postconviction counsel's alleged failure to adequately *present those facts as part* of Winston's direct appeal," demonstrates that this was a ruling on the merits for both counsels because this part of the decision is identical to *Malone*, 538 F.3d at 756-57. When the court held that his ineffective claims are not barred. *Id.*

(iii) Even if the State Court's decision relied on the Allen pleading standard, then the decision was unexpected and inadequate

Furthermore, when closely reading the State Court's decision when it agreed with the State's argument, "Winston cannot demonstrate an inference of discrimination because he did not identify the prosecutor's statements during voir dire." (Ex.D.pp.34.39) Winston asserts this is why the State Court held that he failed to support facts to raise an inference because the statements Winston used were the prosecutor's statements from the Batson hearing and the prosecutor's response motion, not voir dire. (dkt:26-Ex.3. pp.61.85.97) Winston asserts by the State Court limiting Winston to only using the prosecutor's statements during voir dire to raise inference, but the court cite no state case law to hold this position, makes its decision unexpected. *Lee*, 534 U.S. at 382n.13-83.

Moreover, Winston also asserts, even if the court was relying on the Allen pleading standard to deny him, then the court used a dual approach. First, in Winston's 974.06 motion and in his brief-in-chief to the court of appeals, he argued, using evidence from voir dire, the Batson hearing, and the prosecutor's response motion citing *Lamon,* 262 Wis. 2d at ¶28. (Ex.L.pp.89.92-93) This paragraph in *Lamon* states all relevant circumstances can be used in determining

whether a defendant made the requisite showing. *Id* citing *Batson*, *supra*, at 97. Winston also argued in his reply brief that he can use the statements inside of the prosecutor's explanation to meet step one citing *State v. King*, 215 Wis. 2d 300, 303-04 (1997). (Ex.O.pp.143,151) Therefore, Winston properly followed the state law rules. *Lee*, 534 U.S. at 383.

The court without referring to any of Winston's arguments in his reply brief held, "it would not discuss statements the prosecutor made during the second and third steps to determine whether Winston had satisfied his prima facie burden because he has not explained why it would be appropriate." (Ex.D.pp.34.39n.6)

Winston asserts the application of the state-pleading rule as applied here does not rest on an independent and adequate state ground. Winston asserts his pro se filings alleged everything the court needed to apply the proper standard of review and thereby, meaningfully assess, using all facts asserted to determine whether he was entitled to an evidentiary hearing on his claims that trial counsel and counsel on his direct appeal was ineffective in failing to adequately litigate his Batson claim. *Walker v. Pollard,* 2019 U.S. Dist. Lexis, 150379, *38-*40, and by the court not identifying, *specifically*, in any of Winston's pro se filings that he did not cite case law from preventing the court to meaningfully assess his argument that the prosecutor's explanation raised an inference, he is not barred from using it. *Id.*

The District Court dismissed this argument in a footnote by rejecting the law in *Walker,* 2019 U.S. Dist. Lexis 150379, at *30, when the court held, "I do not think that when a court determines that a motion does not contain sufficient facts to enable the court to "meaningfully assess a federal claim, the court has made a decision that is independent of federal law." *Id.* (Ex.C.pp.12.30n.11) This is incorrect. Winston relied on Walker when it held, as asserted above, "*if the State Court's decision was relying on the Allen pleading standard to deny him, then the*

decision would have been unexpected and discriminating against the federal right asserted." *Walker*, *supra*, at *30-34. (dkt:28.7-10). The District Court transformed the authority that Winston was using to the authority that he was not relying on.

(iv)The State Court's decision is intertwined in federal law

Finally, when the State Court held it would not discuss statements the prosecutor made during the second and third steps to meet step one. Winston asserts the court's decision is stating that his is conflating steps two and three to meet step one and since the federal court looks to see if any of the Batson steps have been conflated, see *Purkett v. Elem*, 514 U.S. 765,768, (1995), depends on a question of federal law, therefore, the State Court's decision is intertwined in federal law. *Page v. Frank,* 343 F.3d 901,907, (7th Cir.2003). The District Court ignored this argument. (Ex.12.22-31)

(d) Winston's prosecutorial misconduct claim and both counsels' ineffectiveness on the claim is not defaulted

(i)The State Court did not rely on Escalona or Romero-Georgana pleading standards to bar the prosecutorial misconduct claim that's connected to both counsels' ineffectiveness, but instead, relied on federal law and denied the claims on the merits

The court *Winston,II*, cited the general standards for a 974.06 motion and what a defendant needs to do, it held:

> Where, as here, a defendant seeks relief under § 974.06 following a prior postconviction motion and appeal, the motion must establish a "sufficient reason" for failing to previously raise any issues that could have been raised in the earlier proceedings. See *State v. Escalona-Naranjo*. A claim of ineffective assistance of postconviction counsel may present a "sufficient reason" to overcome the procedural bar. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, (1996). To establish that postconviction counsel was ineffective, the motion must show that the claims now asserted are clearly stronger than the issues that postconviction counsel chose to pursue. *State v. Romero-Georgana*, 2014 WI 83, ¶¶45-46, 360. (Ex.D.pp.34.40)

After citing these general standards, the court *immediately* went into the merits of the claims without adding a conclusion such as Winston's claims are barred, for example see *Jenkins*, 157 F.3d at 491, the State Court in Winston's case held, "For reasons explained below, we conclude, the new issue that Winston raised in his latest postconviction motion *does not have*

merit. Therefore, it was not clearly stronger than the issues postconviction counsel raised." (Ex.C.pp.34.40) Winston asserts the court set out the legal standard on the prosecutorial misconduct claim and then addressed the merits. Id at 40-43.

Further, the court with into a Strickland analysis on both counsels by holding, "We concluded that the prosecutor's statements were not improper. Therefore, Winston cannot demonstrate that trial counsel was ineffective for not objecting to the prosecutor's closing argument. We concluded that this issue was not clearly stronger than the issue that postconviction counsel pursued on direct appeal and that Winston was not entitled to an evidentiary hearing *or* relief based on his new claim." Id at 43.

The District Court held that Winston's prosecutorial misconduct claim that's related to both counsels' ineffectiveness is barred because the State Court relied "expressly" on Escalona-Naranjo and Romero-Georagan. (Ex.C.pp.12.25-26)

Winston asserts, nowhere, in the court decision, it held that Winston's pro se claims is barred by *Escalona*, *supra* at 185 or *Romero-Georgana*, *supra* at ¶¶37,58-62,68-75. The District Court also rejected Winston's argument about the State Court's decision to be a ruling on the merits by relying on *Garcia v. Cromwell*, 28 F.4th,764,774 (7th Cir.2022). (Ex.C.pp.12.26-27)

Winston asserts his decision is nothing like *Garcia*, 28 F.4th at 774, were as in that case, the state court focused entirely on Garcia's claims by failing to meet the pleading standard of *Romero-Georgana/Allen* because Garcia failed to demonstrate (*how* and *why)* the new claims were clearly stronger than the issues postconviction counsel raised. *Id.* The Court held that when a motion fails to allege sufficient facts, the definition of facts means: who, what, where, when, why, and how. *Id* at 773.

The State Court, in Winston's case, never held which five w's or one h that was missing from his 974.06 motion. Again, the State Court must actually state in plain language that it is basing its decision on the state procedural default. *Jenkins,* 157 F.3d at 491. This Court in *Garcia* never held when the state court holds that a claim does not have merit, therefore, the claim is not clearly stronger, that the procedural defaults is automatically triggered from *Escalona* and *Romero-Georgana,* as the District Court's decision suggested.

(ii)The District Court modified the State Court's decision

Furthermore, the District Court modified the State Court decision because the State Court held: "For reasons explained below, we conclude, the new issue that Winston raised in his latest postconviction *motion does not have merit.* Therefore, it was not clearly stronger than the issues postconviction counsel raised." (Ex.D.pp.34.40) The District Court interpreted the decision to state: "The court then conclude that Petitioner's alleged prosecutorial misconduct claim was not clearly stronger than the issues postconviction counsel raised, and that it therefore *did not constitute a sufficient reason under Escalona-Naranjo.*" (Ex.C.pp.12.25-26). Winston asserted the District Court's decision omitted out from the State Court's decision that, "*his claim does not have merit,*" showing that it was a ruling on the merits, and the District Court modified the State Court's decision to stating that Winston did *not constitute a sufficient reason under Escalona-Naranjo.* Id. As this Court just read, the State Court never used the language from Escalona-Naranjo in this way; therefore, the District Court's decision is in conflict with in *Harris*, 489 U.S. at 263.

(e) Cause and prejudice

Winston asserts because his postconviction counsel claim is not defaulted, he has shown cause and on grounds (1), (2), and (3). *Edwards*, 529 U.S. at 451-52.

The District Court held, "Petitioner mentions at one point in his brief that he has "shown cause and prejudice on grounds (1), (2), and (3), but this is only a passing reference to those concepts in his briefing. The argument is unsupported and undeveloped." (Ex.C.pp.12.24n.7)

Winston filed a reconsideration motion arguing that the District Court edited out one key part of his argument showing for the alleged default and (2) his ineffective assistance of postconviction counsel is claim is not defaulted because the State Court never held in plain language that he failed to explain *why* and *how* his new claim was clearly stronger. (dkt:44.9)

The District Court in denying the reconsideration motion held:

> Such is the case here. Petitioner argues, albeit baldly, that the ineffective assistance of his postconviction counsel constitutes cause and prejudice with respect to his remaining grounds for relief such that their procedural default can be set aside. This argument fails because the Court has already concluded that Petitioner's claim of ineffective assistance of postconviction counsel Ground Four is *itself* procedurally defaulted. This Ground Four is similarly procedurally defaulted, in part for the reasons already provided above. The Wisconsin Court of Appeals expressly relied on *State v. Allen* and *Escalona-Naranjo.* (Ex.B.pp.2.10-11)

Winston asserts the District Court ironed the facts and argument, in his reconsideration motion, on how his claim is not defaulted by ignoring the Seventh Circuit's precedents in *Jenkins*, 157 F.3d at 497 and *Garcia*, 28 4th, at 770,773-75. (dkt:44.3-4) As asserted above, the District Court never determined whether Winston did, in fact, fail to follow the rule, *Adams*, 324 F.3d at 436, by not looking at his pro se filing in the State Court that he asserted with his opposition brief (dkt:28-Ex.C.pp.21-59), and on pp.11-14.16-18, demonstrate he has met the State Court pleading standards. Therefore, the claim is not defaulted and Winston has shown cause on grounds (1), (2), and (3).

Winston also asserts by the prosecutor using discrimination to benefit a conviction tainted the entry trial. Winston asserts because he was a young African-American male at the time of his trial and the prosecutor thought that he was striking a young African-American male from the trial, demonstrates the prosecutor's bias toward him and the juror, therefore, put Winston at

substantial disadvantage because of his race and gender. Furthermore, harmless error does not apply because a Batson violation is structural error, even when it's connected to a prejudice prong. For example see W*inston v. Boatwright*, 649 F. 3d 618,632, (7th Cir.2011). Winston asserts he has shown from the facts of his case that his entry trial was affected by constitution dimension, therefore, meeting the prejudice prong under *U.S. v. Frady*, 456 U.S. 152,170,(1982).

Winston also asserts he was prejudice by the prosecutorial misconduct because the evidence was not overwhelming, (Ex.L.pp.89.99-101n.4), and because of this fact, also demonstrates his entry trial was affected by constitution dimension. *Frady*, 456 U.S. at 170.

(II) MR. WINSTON IS ENTITLED TO A COA BECAUSE JURISTS OF REASON WOULD FIND THE STATE APPELLATE COURT'S PLEADING STANDARD IS A POORLY DISGUISE QUESTION OF FEDERAL LAW.

Legal standard

This Court has held that it will examine state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision that was reached. *Michigan v. Long*, 463 U.S. 1032,1039, (1983).

When a state prisoner's motion alleges material sufficient facts, if true, on a due process claim, to determine if the prisoner is entitled to an evidentiary hearing on the merits, is within of itself a question of federal law, even if the facts are insufficient or conclusory. See *Blackledge v. Allison*, 431 U.S. 63, 73-74,(1977), (superseded by statute on other grounds), citing *Machibroda v. U.S.*, 368 U.S. 487, 493-98,(1962).

[4](i)The Nelson/Bentley/Allen pleading standard is built from federal law

Winston asserts the Seventh Circuit's precedents in *Lee v. Foster*, 750 F.3d 687,693-94,(7th Cir.2014),; *Triplett,* 996 F.3d at 829-30, *Garcia,* 28 F.4th at 775; *Whyte,* 34 F.4th at 624,

[4] The *State v. Escalona-Naranjo*, bar does not apply to ineffectiveness of post-conviction counsel. See *Lee v. Baenen*, 2013 U. S. Dist. Lexis 12482, 12-13.

and *Wilson v. Cromwell*, 69 F.4th 410,419,(7th Cir.2023), all held that the pleading standard from *State v. Bentley*, 201 Wis.2d 303,309-15,(1996), and *Allen*, 274 Wis.2d at 585.n7, is an independent and adequate state ground when the motion fails to allege sufficient facts or present conclusory allegations because this type of ruling is not a decision on the merits of the underline federal claim, but Winston asserts he will demonstrate below that the Bentley/Allen pleading standard is built from *Nelson v. State*, 54 Wis.2d 489,497-98,(1972), and that all these cases are built from federal law to determine the prisoner's allegations inside of his motion, if true, entitle the prisoner to a hearing on the merits of his due process claim. Therefore, revealing that the *Allen* court disguised a question of federal law into a question of state law.

[5]The Wisconsin Supreme Court in *Nelson*, *supra*, at 497-98, held:

> We here determine that if a motion to withdraw a guilty plea after the judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the trial court may in exercise of its legal discretion deny the motion without a hearing. *Id.*

This language is identical to the U.S. Supreme Court precedent in *Machibroda*, 368 U.S. at 493, the court held:

> There can be no doubt that, if the allegations contained in the petitioner's motion and affidavit are true, he is entitled to have his sentence vacated. *Id.* The statue requires a district Court to grant a prompt hearing when such a motion is filed, and to determine the issues and making finding of fact and conclusion of law with respect thereto, unless the motion and files and records of the case conclusively show that the petitioner is entitled to no relief. *Id* at 494.

Twenty-four years after the Wisconsin Supreme Court decision in *Nelson*, the court reaffirmed its decision in *Bentley*, 201 Wis.2d at 309-11. Therefore, naming the standard, the *Nelson/Bentley* test. The court further held that a prisoner's motion that is connected to ineffective assistance of trial counsel, must allege sufficient facts, if true, under both Strickland's prongs to entitle a hearing on the merits relying on the U.S. Supreme Court precedent in *Hill v. Lockhart*, 474 U.S. 53,(1986). *Id* at 311-18.

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[5] Winston asserts that most of these cases cited in this subsection deal with plea withdrawals, but this pleading standard apply to all motions that deal with due process claims. See *Blackledge,*431 U.S. at 75.n7, (Notice' pleading is not sufficient, for the petition is expected to state facts that point to a '*real possibility of constitutional error.*') *Id.*

Nine years after the *Nelson/Bentley* test the Wisconsin Supreme Court decided *Allen*, 294 Wis.2d 568. The *Allen* court also adopted the *Nelson/Bentley* test to determine if the prisoner is entitled to a hearing on the merits of the federal claim. *Id* at 579-80. The court further held that for a motion to meet the *Bentley* standard the motion must allege the five w's and one h test that is, who, what, where, when, why, and how for the court to meaningfully assess the defendant's claim. *Id* at 585. The court gave a hypothetical example, like if trial counsel failed to call a witness. The court held that this motion contains sufficient material facts the name of the witness, (who), the reason the witness is important, (why, how), and the facts that can be proven, (what, where, when)- that clearly satisfy the *Bentley* standard, and would entitle the defendant to a hearing. *Id* at 585-87.

Winston asserts this language is identical to this Court precedent in *Blackledge*, 431 U.S. at 76, when dealing with a state prisoner's motion allegations, this Court held:

> Allegations of state prisoner were not themselves so "vague (or) *conclusory*," *Id* citing *Machibroda*, 368 U.S. at 493.The petitioner indicated exactly (what) the trams of the promise were; (when), (where), and by (whom) the promise had been made; and the identity of one witness to it communication. *Id*. The critical question is whether/(why, how) these allegations viewed against the plea hearing, were so palpably incredible. *Id*.

Winston also asserts this language from *Blackledge* was adopted in *Bentley*, 201 Wis.2d at 314-15. The court held:

> A defendant in a situation might allege, in addition to alleging the Hill requirements (what) the trams of the allege promise were; (when), (where), and by (whom) the promise had been made. *Id*.

The court in *Bentley*, at 314, adopted this language from the Seventh Circuit precedent in *Key v. U.S.*, 806 F.2d 133,139,(7th Cir.1986), and this court adopted this language from the Fifth Circuit precedent in *Bonvillan v. Blackburn*, 780 F.2d 1248, 1251,(5th Cir.1986), and nevertheless, this court adopted this language from *Blackledge*. *Id*.

Winston asserts the State Court should not be allowed to take this question of federal law for postconviction motion on due process claims, and then nine years later, turn it into state law

to bar state prisoners in the federal court because the merits of the underline federal claim was not addressed. Winston asserts this Court in *Blackledge*, *supra*, at 74-76, was reviewing the allegations inside the state prisoner's motion, if true, for a hearing, "*not the merits.*" *Id* at 78,80. Most importantly, this Court in *Blackledge* never used any procedural default language because the merits of the underline federal claim were not address. This Court described how the state prisoner's motion was proper for a hearing on the merits, *Id* at 76, and this part of *Blackledge* was never overturned. See *Patel v. Matteson*, 20022 WL 4540959 *33, citing *Blackledge*, at 75n.7, therefore, still making this a question of federal law.

Furthermore, researching the West Law website, it appears that the Bentley case was not cited in the Seventh Circuit in the years of 1996 through 2004, holding that the pleading standard for postconviction motion, for state prisoners, is a question of state law. It was only after the State Court's decision in Allen, dated 2004, that the Seventh Circuit started to cite the Bentley pleading standard as a question of state law because it was a not ruling on the merits of the underline federal claim, due from Allen. But, when going back to basic of everything, the focus is not on the merits of the underline federal claim when the State Court rules that state prisoners failed to assert sufficient facts in their motions for an evidentiary hearing. The focus for the federal court is whether or not the state prisoners properly asserted facts for an evidentiary hearing. See *Evans v. Dretke*, 2005 WL 2387572, *9, citing *Blackledge*, *supra*, at 74. The Allen court omitted out all of the federal law from Bentley and Nelson when focusing on the pleading standard and poorly disguised a question of federal law into state law. For example see *Hansen v. Group Health Cooperative*, 902 F.3d 1051,106,(9th Cir.2018).

Winston asserts the other way the State Court disguised this question of federal law by changing the word "whether" into the words "why and how," when this Court in *Blackledge*,

supra, at 74, held: "The critical question is *whether* these allegations viewed against the plea hearing, were so palpably incredible." Winston asserts this disguise was poorly as well because the Court in *Patel*, 20022 WL 4540959, at *33, held:

> Petitioner's claim of cumulative error fails because it lacks a statement of specific facts. Petitioner merely has listed a series of errors, without setting out the specific facts underlying each error. For example, Petitioner fails to state *how* the Pitchess process was not followed, *how* a juror was allowed to commit misconduct, or *how* the jury never heard third-party culpability evidence. Thus, the claim does not warrant habeas relief because it is vague and conclusory. *Id* citing *Blackledge*, *supra* at 75 and n.7.

Winston asserts it appears the petitioners in the above Seventh Circuit precedents, in *Lee*, *Triplett*, *Garcia*, *Whyte*, and *Wilson* never presented this argument to the Seventh Circuit, that the *Allen* pleading standard is a poorly disguise question of federal law and since this Court precedent in *Blackledege* could determine if the allegations inside the motion, if true, on a due process claim, entitle a state prisoner to a hearing to review the merits, even if the facts are insufficient or conclusory; *without any default language*, then the Seventh Circuit and the Wisconsin Federal District Court could also do the same. See *Lesko v. Lehman*, 925 F.2d 1527,1537,(3d Cri.1991), the court held, "we shall determine if the allegations inside of Lesko's motion, if true, describe a due process violation for a hearing." *Id* citing *Townsend v. Sain*, 372 U.S. 293,312,(1963) *Santobello v. New York*, 404 U.S. 257,261-62,(1972), & *Blackledge*, *supra*, at 74.

(ii) Wis §974.06(3)(c) is counterpart to 28 U.S.C.A.§2255(b)

The Court in *Nelson*, *supra*, at 497, also held that 28 U.S.C.A.§2255, is counterpart to Wis. §974.06. In §2255(b) is states:

> Unless the motion and the files and records of the case conclusively show that the petitioner is entitled no relief, the court shall grant a prompt hearing. *Id.*

In Wis§974.06(3)(c) it states:

> Unless the motion and the files and records of the case conclusively show that the person is entitled to no relief, the court shall grant a prompt hearing. *Id.*

Winston asserts the Seventh Circuit in *Garcia*, 28 F.4th at 772, acknowledged that Wis §974.06(1)(2)(d) is counterpart to 28 U.S.C.A.§2255(a), but this Court, (or any of the above Seventh Circuit precedents) when dealing with the *Bentley/Allen* pleading standard, never acknowledged that §974.06(3)(c) is also counterpart to §2255(b), when dealing with motion allegations), unlike *Nelson, supra*, at 498. Further, when researching the West Law website, it appears the Nelson case is not cited in the Seventh Circuit. Somehow, only this part of the language from *Nelson* came up missing in the mix of everything, and thirty-two years later, the *Allen* court disguised this question of federal law by turning it into a question of state law with the five w's and one h test, but it is clear, as asserted above, this test came from *Blackledge*, that was poorly disguised by *Allen*. Winston asserts since §974.06(3)(c) is counterpart to §2255(b), makes it a question of federal law. For example see *Griffith v. Rednour*, 614 F.3d 328,330,(7th Cir.2010).

(III) MR. WINSTON IS ENTITLED TO COA BECAUSE JURISTS OF REASON WOULD FIND THE STATE COURTS' RULING ARE DEBATABLE OR WRONG

(1) BATSON VIOLATION

In *Batson, supra*, at 97, first, the opponent of a peremptory challenge must make out a prima facie showing of race discrimination in selection of the venire. If this showing is made, the burden of production shifts to the proponent of the strike to offer a racial-neutral explanation. Then the court must determine whether the opponent of the strike has proved purposeful discrimination. *Harris v. Hardy*, 680 F.3d 942,947, (7th Cir.2012). At the second step, the explanation need not be persuasive or even plausible; the issue is whether the explanation is non-discriminatory. *Id.* The justification becomes relevant at the third step, in which the court weighs the evidence and determines whether the racial-neutral reason is credible or pretext for purposeful discrimination, "it requires the trial court to make a factual finding of fact regarding

the State's credibility after the State has offered a race-neutral reason for the strike." *Id.* The three-step test that applies for race also applies for gender. *J. E. B. v. Alabama*, 511 U. S. 127, 144-45, (1994).

(a) The prima facie is moot

Winston asserts that the prima facie is moot. In *Hernandez v. New York*, 500 U. S. 352, 359, (1991). This Court held: (when the State offers a racial-neutral reason and the trial court ruled on the ultimate question of discrimination, the prima facie is moot.) *Id.*

Here, Winston asserts that because the trial court asked Williams to give a reason, Williams complied with no objection, Earle made a challenge to Williams' reason, and the trial court ruled on the ultimate question of discrimination by stating: "he had an adequate explanation as the State did also but the State is in less of a precarious position because the State only struck one; and if it were race-specific, then the State would have struck the rest of the African-Americans."(Ex.H.pp.65.71.73.75) Step one is moot on whether Winston made a prima facie showing.

(b) Even though step one is moot, in the alternative, Winston has established a prima facie showing

Requirement one: Applying the first Batson step here, the record is undisputed that the State used a strike and Winston and the juror, Eric Lee, are African-Americans showing that they are part of cognizable group on race, *Batson*, *supra*, at 97 and it's undisputed that they are both males showing that they are part of cognizable group on gender, *J.E.B.*, *supra*, at 144-45.

Requirement two: Winston asserts:

> (1) The State struck Lee because he was a young African-American male with many chains around his neck and this makes him unfair is a racial-stereotype. A prosecutor's explanation is considered as relevant circumstance. *Johnson v. California*, 545 U.S. 162,170, (2005); (2) When Williams stated that Lee did not explain how he was a trainer; Williams could have asked him, but struck him without asking any questions about this issue. This too, also raises an inference of discrimination. *SmithKline Beecham Corp v. Abbott*, 740 F. 3d 471, 476 n1, (9th Cir.2014); (3) Lee shown no bias towards either parties, (Ex.P.pp.158.163-64), the burden under step one is low. *Johnson*, *supra*, at 173 and; (4) Williams' new reason that he asserted in his response motion

struck." (Ex.H.pp.65.72). Winston asserts that it only takes one strike to show a violation, see *Snyder*, 552 U.S. at 478.

(b) Under step two the State used a racial and gender stereotype

Regarding the second Batson prong, when Williams struck Lee because "*he was a young African-American male with a lot of chains around his neck,*" is a racial and gender stereotype. The record demonstrates that Williams did not give any other reason why wearing jewelry shows a bias against the State beside the fact that he stated that Lee was a young African-American male wearing jewelry. He could have stated that he would have said the same thing if Lee was white, but he did not. This is exactly what Justice Breyer concurred about in *Miller-El, II, supra*, at 268, (noting that the unconscious internalization of racial stereotypes may lead litigants more easily to conclude "that a prospective black juror is 'sullen,' or 'distant,'" even though that characterization would not have sprung to mind had the prospective juror been white.) Therefore, since this explanation is inherently discriminatory it's not sufficed under this step. *Rice v. Collins*, 546 U.S. 333,338, (2006).

(c) The State's explanation was pretextual for racial discrimination under step 3, and the trial court cannot accept ADA Williams' post hoc reasons

Regarding Batson third prong, going to the credibility of Williams' explanation when he stated that Lee was a young African-American male, and his youth makes him unfair is incredible because Lee had children in their twenties. A pretextual reason bears on the plausibility of other explanations given. *Harris*, 680 F. 3d at 961, citing *Snyder*, 552 U. S. at 478.

Winston also asserts Williams' one new reason and two modified reasons are pretext for racial discrimination. This challenge must be decided on what Williams believed when he struck Lee. *U.S. v. Taylor*, 636 F. 3d 902, (7th Cir.2011) citing *Miller-El, II, supra*, at 246. Therefore, the fact that Williams struck Lee because he had "children in their mid-twenties, lack of youth,

and he looked bored or disgusted" reeks with afterthought. *Miller-El, II, supra,* at 246. Once Bonneson pointed out the miss description of Lee not being young, (dkt:26-3.40.48-49), Williams changed his reason to Lee being old and struck him because of his children.[6] This is a clear textbook case of a Batson violation, *Miller-El, II, supra,* at 245-46.

Winston asserts even if Williams' reason about Lee's children being in their mid-twenties could be accepted. Why did Williams accept the two white jurors, Cindy Hones, whose child was 26 and Gerry Bickel, whose children were 25 and 23? Winston asserts Williams' reason for striking a black panelist applies just as well to otherwise-similar non-blacks who are permitted to serve that is evidence tending to prove-purposeful discrimination. *Foster v Chatman*, 136 S. ct. 1737, 1752,1754, (2016).

(d) Judge Conen did not make a factual finding on Lee's demeanor or ADA Williams' explanation

Winston asserts Lee's sighing is very ambiguous, and as stated previously, the post-conviction court cannot agree with Williams' post hoc reason by stating that Lee looked "bored or disgusted." In fact, the trial court did not indicate whether that Lee was sighing or Lee's sighing was common with other jurors. *U.S. v. McMath,* 559 F. 3d 657,666,(7th Cri.2009). This Court also made clear that deference is "heightened" when the reason for striking a juror involves the juror's demeanor. The trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. *U.S. v. Rutledge*, 648 F. 3d 555, 558-59, (7th Cir.2011), citing *Snyder*, 552 U.S. at 477. Here, in the Winston case, the trial court's legal error of Batson left the record silent on Lee's demeanor, which is unacceptable by *Snyder*. The post-conviction court stated that the trial court founded

[6] There is no evidence that Williams misspoke on the juror's youth like the State in *Rice*, 546 U.S. at 340. The record demonstrates that Williams stated, "***So, that was our reason for striking him.***" (Ex.H.pp.65.71)

Williams' explanation credible because Williams raised the hearing and only struck one African-American. (Ex.G.pp.58.63-64). This is not correct. The trial court accepted an incredible reason and it only takes one strike to show a violation. *Snyder*, *supra*, at 478.

Winston also asserts the trial court committed another serious Batson error when it did not let Earle rebut Williams' explanation for striking Lee because the persuasion regarding racial motivation rests with the opponent of the strike. *Benson v. Foster*, 2020 WL 2770267 at *5. So, the fact that Lee was not young and the trial court accepted this reason as being adequate conflated step two with step three, which is an error. *Purkett*, 514 U. S.at 768.

Winston also asserts the trial court need not make detailed findings addressing all of the evidence before it "so long as the arguments were adequately considered." *Lamon v. Boatwright*, 467 F.3d 1097,1101, (7th Cir.2006). The trial court did not consider Winston's Batson challenge adequately and the post-conviction court's decision on how the trial court weighed Williams' credibility was clearly erroneous and the court's decision under this step is owed no deference. *Snyder*, 552 U. S. at 477.

Therefore, Williams' explanations about Lee being young and his two modified reasons with his one new reason are pretext for discrimination, *Taylor*, 636 F. 3d at 905; and a hearing is warranted because the trial court conflated steps two and three, *Rutledge*, 648 F. 3d at 560 ; to see why Williams did not strike the two white jurors who had children in their twenties, *Taylor, supra,* at 903-04; and for the trial court can make a factual finding on Williams' explanation and Lee's demeanor, but a hearing would be deemed fruitless since Winston's voir dire is over ten years old. Therefore, it would be impossible for the trial court to make a factual finding and the fact that it already accepted an incredible reason. *Snyder*, 552 U.S.at 486.

(2) PROSECUTORIAL MISCONDUCT CLAIM

In evaluating the prosecutorial misconduct under Governing Supreme Court law, "the relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Baer v. Neal*, 879 F.3d 769,781, (7th Cir.2018), citing *Darden v. Wainwright*, 477 U.S. 168,181,(1986).

(a) The print was not fresh on the outside driver's window

When Williams stated that Winston's fingerprints were put there right away because "it would have wiped off very quickly from being outside," is a misstatement. Identification technician, David Wagoner, testified to saying, "it depends on the conditions." (Ex.S.pp.188-91). Williams never put forth any evidence of the condition. When Williams asked Wagoner, "when a print is outside it's pretty fresh?" And when Wagoner answer, "ideally." Id. The word ideally means "imagination." See Merriam Webster's Dictionary 11th Edition page 616. Again, Williams never put forth any evidence and this is why Wagoner gave the above answer. Further, when Williams asked the forensic investigator, Sylvia Castor, "do you remember the date of July 27, the day after the homicide, when you lifted prints off the truck?" She answered, "yes." (Ex.T.pp.192-93.195). This demonstrates the print was not fresh because from Williams' theory, the print would have wiped off very quickly. So, why was the print still there the following day? This was facts not in evidence. *Jordan v. Hepp*, 831 F.3d 837, 847, (7th Cir.2016), citing *U.S. v. Young*, 470 U.S.1, 18-19, (1985).

Winston asserts the Respondent conceded to the above argument by not responding. (Ex.U.pp.204.223-25)[7] Winston made this argument in his reply brief. (Ex.O.pp.143.155) Nevertheless, the Court held: "testimony of I.D. tech, which the prosecutor 'explicitly' referenced, provided a basis to argue that Winston's fingerprints were fresh." (Ex.D.pp.34.42)

[7] In the state court, when a party do not respond to an opponent's argument the opposing party concede. *Charolais Breeding Ranches, Ltd v. FPC Secrities Corp.*, 90 Wis.2d 97, 108-09, (1979).

This is incorrect because the facts demonstrate otherwise. For example see *Wiggins v. Smith*, 539 U.S. 510,528, (2003).

(b)Winston's DNA was not identified on the gun

When Williams stated that you just heard evidence that Winston's DNA is on the gun, is also a misstatement. The DNA analyst, Susan Noll, testified and stated, "*I did not identify anyone in the sample. I included Mr. Winston's profile, or DNA, as being a possible contribute.*" (Ex.V.pp.227-28.231-32) Winston argues that the jury may not decide the case on evidence that never made it into the record. The right to a trial by jury includes the right to the jury's own decision, not a decision dictated or unduly influenced by Williams. *Jordan*, 831 F.3d at 847.[8]

The Respondent conceded to the above argument by not responding, (Ex. U.pp.204.223-25), but nevertheless, the court held: "when the prosecutor asserted that Winston's DNA was on the gun, *he also acknowledged that the defense could argue that the DNA tests were not conclusive based on the analyst's testimony about one in 3,000.* When viewed in their entirety, the comment was not outside the record." (Ex.D.pp.34.43)

This is incorrect. Winston asserts there is no U.S. Supreme Court precedent that states a prosecutor can argue *opposite* from what the evidence actually states because the defense could argue what the evidence actually *present*. See *Jordan*, 831 F.3d at 847, citing *Young*, U.S., 470 at 18-19.

(c) The State presented facts not inside the recorded statement and then improperly bolstered the statement

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[8] In addition, after the court gave the instruction, the jury asked, "does being the driver of a vehicle containing a firearm and knowing that the firearm is present constitutes physical control?" The Court stated, "because the evidence in this case, I thought, pointed to direct possession. There was DNA evidence, right?" Mr. Williams: "Right." Mr. Earle: "I don't know which case they might be referring to." The Court: "I have no ideas what they are thinking." (Ex.W.pp.233-35)

There was only DNA evidence on the hand gun in the Harris case not the Pulley case. Therefore, since the trial court thought that Winston's DNA was on the gun, "a jury would have too." *Kyles v. Whitley*, 514 U.S. 419,488, (1995). Winston was charged with the Maurice Pulley murder, case No.2011CF134, and these cases was joind for trial, but Winston was found not guilty in the Pulley case.

Winston asserts in the recorded statement Grinston stated, "I got to worry about someone." (Ex.X.pp.236.248) Gomez asked Grinston, "why do you have to worry about Justin?" Grinston stated, "That's my blood, he got my same blood." Id. This statement does not mean that Grinston was worry about Winston. In fact, Gomez mention Winston's name not Grinston. Id. At trial, Williams asked Grinston, "do you remember telling the detective that you were afraid of Justin Winston because he's gonna kill your family if you snitch on him and you were scared of him to tell the police this information?" Grinston stated, "*no, I didn't tell him, the detective that, whatsoever.*" (Ex.T.pp.191-92.196-98)

In the recorded statement, Grinston never stated Winston was going to kill him and his family. (Ex.pp.236.248.2520 Williams also brought Gomez in to testify and asked him: "he was scared of what Mr. Winston might do to him." Gomez answered: "Yes, sir." (Ex.T.pp.191-92.196-98) This was a misstatement under oath. Nevertheless, Williams stated in the closing arguments that Grinston stated, "I'm gonna be killed by these guys."

Winston asserts the questing by Williams to Grinston and Gomez demonstrates the above comment in the closing means that Winston was "one of these guys," therefore, arguing facts not in evidence. *Jordan*, 831 F.3d at 847. Winston also asserts when Williams stated, "There was no more profound and truthful testimony in this trial other than by Mr. Grinston on that videotape. And you heard how truthful he was when he was talking to Gomez and how difficult it was for him to admit what the truth was." Winston asserts these remarks were also improper. *Jordan*, *supra,* at 847.

Further, Winston asserts that Williams' improper vouching had a clear effect on the jury since the jury sent a question to the trial court asking. "Did Ricky Grinston testify on his own volition?" Grinston did not testify against Winston. Therefore, the jury took his recorded

statement to be credible because of the improper vouching. The credibility was uncertain, and the slightest wisp of influence could have directed the jury's determination. Having set forth the circumstances, Williams' closing arguments tipped the balance and resulted in injustice because due process forbid a prosecutor to urge a jury to rely on evidence not in the record. *Jordan, supra,* at 848.

Winston asserts the court held: "the comment was based on the evidence because the statement supported the prosecutor argument because Grinston was concerned that he would be harmed by people who were angry that he spoke to the detective." (Ex.D.pp.34.41-42) Winston asserts Grinston was worry about other people, [9]but not Winston. As Grinston affirmed this fact by stating, "*no I did not tell him, the detective that, whatsoever,*" and the recorded statement corroborates this part of his testimony. See *Evans v. Jones*, 996 F.3d 766, 776, (7th Cir.2021).

When it comes to the improper vouching for the statement, the court held: "the comments were not improper because a prosecutor is permitted to argue that the witness's testimony was compelling." (Ex.D.pp.34.42). This is incorrect. Winston asserts Williams may comment on the credibility of Grinston's statement as long as the comments reflect reasonable inferences from the evidence adduced at trial rather than personal opinion. *U.S. v. Nunez*, 532 F.3d 645,654, (7th Cir.2008), but the above comments were not based on the evidence. Winston asserts because Williams presented the statement, as evidence, does not mean he can vouch for the statement without other evidence "outside the statement to support it." See *Townsend v. Jess*, 2006 WL 3327064 at *9.

(d) There were no instructions given immediately after the improper comments and the evidence was not overwhelming

[9] Other people could mean anybody else.

Winston asserts even though the trial court instructed the jury that closing arguments from the attorney are not evidence. The trial court's instructions did not identify Williams' remarks as improper statements that should be disregarded or any other instruction given immediately after the improper comments, *Jordan*, *supra*, at 849, the improper comments were too prejudicial for the curative instruction to mitigate their effect. *Id.* Moreover, the trial court thought that Winston's DNA was on the gun, *"after it gave the instructions."* (Ex.W.pp.233-35) Finally, the evidence was not overwhelming to justify harmless error, *U.S. v. Whitaker*, 127 F.3d 595, 606, (7th Cir.1997), as Winston argued in great detail in his motion,(Ex.L.pp.89.99-101); and the Respondent conceded by responding, (Ex. U.pp.204.223-25) and the State Court never held that the evidence was overwhelming. (Ex.D.pp.34.39-43)

(3) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND INEFFECTIVE ASSISTANCE OF POST-CONVICTION/APPELLATE COUNSEL CLAIMS

To prove ineffective assistance of counsel, Winston must show (1) that his trial counsel's performance was deficient and (2) that this deficiency prejudiced the defense. *Strickland v. Washington*, 466, U. S. 688, 687-94, (1984). Regarding the second prong, Winston must show that there is a "reasonable probability" that, but for counsel unprofessional errors, the result of the proceeding would have been different.

This Court also held that the Strickland analysis applies to show ineffectiveness of post-conviction/appellate counsel. *Smith v. Robbins*, 528 U. S. 259,259-286, (2000). Although post-conviction/appellate counsel is not constitutionally ineffective for failing to raise every meritorious issue. *Id* at 288, his or her decisions in choosing among issues cannot be isolated from review. *Gray v. Greer*, 800 F. 2d 644, 646, (7th Cir.1986).

Winston wrote Atty. Earle a letter and asked him why he omitted arguments on race, was he objecting to gender, and why he did not object to the prosecutorial misconduct. He wrote back

with his answers. (Ex.Y.pp.260-65) Winston argued in his motion, with this Court precedent, that Atty. Earle was ineffective. (Ex.L.pp.89.101-04)

When it comes to Atty. Bonnseon, Winston wrote him letters and asked why he did not argue that Atty. Earle was ineffective for not objecting to the prosecutorial misconduct; why did he omit arguments on race, why he did not use some very important case laws that Winston pointed him to on the Batson/ineffective claims; and why he did not argue that counsel was ineffective for not objecting to gender. He wrote back with his answers. (Ex.Y.pp.260.266-92) Winston argued in his motion, with this Court precedent, that Atty. Bonnseon was ineffective. (Ex.L.pp.89.104-11)

As asserted above, for both counsels' ineffectiveness on the Batson claim the court held: "Winston cannot demonstrate that he was prejudice by trial counsel's failure to raise or preserve a Batson challenge or by postconviction counsel's alleged failure to adequately present those facts as part of Winston's direct appeal." (Ex.D.pp.34.39)

And for both counsels' ineffectiveness on the prosecutorial misconduct claim the court held: "We concluded that the prosecutor's statements were not improper. Therefore, Winston cannot demonstrate that trial counsel was ineffective for not objecting to the prosecutor's closing arguments. We concluded that this issue was not clearly stronger than the issue that postconviction counsel pursued on direct appeal and that Winston was not entitled to an evidentiary hearing or relief based on his new claim." Id at 43.

Winston asserts the court's decision on both counsels' ineffectiveness rests entirely on the holding with regard to the Batson claim and prosecutorial misconduct claim. Winston asserts the facts above on pp.25-35, demonstrates that the court's decision is incorrect.

(IV) THE SEVENTH CIRCUIT'S ORDER IN DENYING MR. WINSTON A COA WAS AN ERROR.

The Seventh Circuit never disputed that jurists of reason would find the District Court's decision on its procedural holding debatable or wrong and the Seventh Circuit never disputed that it's debatable the State Court's pleading standard is a poorly disguise question of federal law. Winston asserts by the court not addressing this component of 2253 makes its order in conflict with this Court's precedent in *Slack*, 529 U.S. at 485, because it is present that this case could have been dispose of on other grounds; and this Court encourage the federal appeals court below to first resolve procedural issues, *Id*, which did not happen here. (Ex.A.p.1)

Winston asserts the Seventh Circuit declared in one sentence, "Having reviewed the final order of the District Court and the record on appeal, we find no substantial showing of the denial of a constitution right." Id. This order does no further analysis explaining how and why Winston failed to make this showing. Winston asserts the standard for a COA requires the petitioner to demonstrate that the State Court's ruling on the underlying constitutional claim was incorrect.

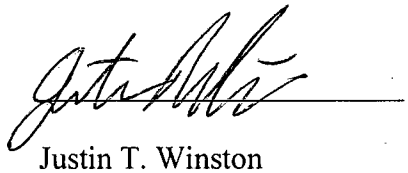
The arguments and facts above on pp.25-36., demonstrated that the State Courts' decisions are in conflict with this Court's precedents. Winston asserts these are the same arguments inside of his COA motion and facts attached thereto that were submitted to the Seventh Circuit. (Ex.M.pp.110.118n.4-128) Further, the Respondent, while down in the State Court conceded to Winston raising and arguing multiple claims in their "*factual basis*." (Ex.U.pp.204.211) This is more evidence that Winston met the threshold for a COA.

The Seventh Circuit should have granted Winston a COA because jurists of reason would find the State Courts' decisions debatable or wrong or that the issues presented above are adequate to deserve encouragement to proceed further because they are in their factual basis, therefore, the court's order is in conflict with *Barefoot*, 463 U.S. at 893n.4-894. Winston asserts that a court may find that it can dispose of the application in a fair and prompt manner if it

proceeds first to resolve the issues whose answer is more apparent from the record and arguments. *Slack*, 529 U.S. at 485. The Seventh Circuit's one sentence approach without any additional analysis explaining how and why Winston failed to make this showing cannot be reconciled with the text or purpose of the statue, *Miller-El v. Cockrell*, 537 U.S. 322,336, (2003), therefore, the Seventh Circuit's order is in conflict with *Slack*, *supra*, at 485, because the order was *unfair*, but prompt. For example, see The Tenth Circuit's decision in *Reid v. Powell*, 2024, WL 18277248, *2-4, explaining with additional analysis and case law how Reid failed to meet the COA standard.

CONCLUSION

Winston respectfully requests that this Court grant this writ.



date 6-3-24

Justin T. Winston
K.M.C.I.
P.O. Box. 282,
Plymouth, WI 5307