

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Christopher D. Jones — PETITIONER
(Your Name)

vs.

Brian Foster, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Seventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Christopher D. Jones (#490461-A)

(Your Name)

Waupun Correctional Institution
Post Office Box 351

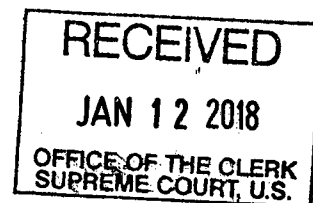
(Address)

Waupun, WI 53963-0351

(City, State, Zip Code)

N/A

(Phone Number)



QUESTION(S) PRESENTED

I. Whether the Seventh Circuit erred when it denied Jones's COA application under 28 U.S.C. § 2253(c)(1) once Jones made a substantial showing of denial of his Sixth Amendment right to the effective assistance ^{of counsel} where trial counsel failed to investigate the existence of a tattoo purporting "Killer Chars" actually introduced by defense counsel during cross-examination from a jailhouse informant testifying on behalf of the prosecutor?

II. Whether the Seventh Circuit erred when it denied Jones's COA application under 28 U.S.C. § 2253(c)(1) once Jones made a substantial showing of denial of his Sixth Amendment right to the effective assistance of counsel where trial counsel failed to investigate the reliability of toolmark evidence?

III. Whether the District Court and the Seventh Circuit erred when the two courts did not consider the question of whether Jones received constitutionally ineffective assistance of counsel as one involving a mixed question of law and fact for which the AEDPA's presumption of correctness under 28 U.S.C. § 2254(d)(1) does not apply but rather, there should have been an independent, *de novo*, review under 28 U.S.C. § 2254(e)(1), applying to the ultimate conclusions of law regarding the 'ineffective assistance' claims creating debatability among jurists of reason that satisfies granting a COA?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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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 judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B, E, D to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including November 09, 2017 (date) on JANUARY 25, 2018 (date) in Application No. 17 A 512.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRING
THE "EFFECTIVE" ASSISTANCE FROM COUNSEL DURING TRIAL COUNSEL REPRESENTATION.

171E 28 U.S.C. § 2253 (c)(1), (c)(2), 28 U.S.C. § 2253
(c)(1), (d)(1)

171E 28 U.S.C. § 2254 (d).

STATEMENT OF THE CASE

This is a CERTIORARI petition that beseech the Supreme Court to REVIEW the propriety of the Court of Appeals' decision to deny JONES's application for a CERTIFICATE OF APPEALABILITY contrary to BUCK V. DAVIS, 137 S. Ct. 759 (2017); 28 USC § 2253(c)(2).

On May 23, 2007, JONES was convicted in the State of Wisconsin, Milwaukee County Criminal Case No. : 2006 CR 4929, of ONE Count of 1st-degree RECKLESS HOMICIDE, AND ONE Count of Attempted Armed Robbery in violation of WIS. STATS. §§ 94A.02(1), 939.63, 943.32(2) AND 939.32(2).

On or about August 24, 2010, JONES appealed the conviction AND SENTENCE imposed by the trial court to Wisconsin Court of Appeals that included the following SIX contentions:

- 1). The type of testimony proffered by the technician should never have been received into evidence;
- 2). The technician's testimony should not have been received into evidence in this case;
- 3). Prosecutorial misconduct caused JONES to be deprived of a fair trial;
- 4). JONES's fair lawyer gave him ineffective assistance representation;
- 5). There is "newly discovered evidence" that requires a new trial in the interest of justice; AND
- 6). The trial court erred in not permitting

JONES TO HIRE A POSTCONVICTION EXPERT AT TAXPAYERS' EXPENSE TO GIVE COUNCIL-LLISTIC EVIDENTIARY TESTIMONY.

ON APPEAL, JONES FURTHER ASSERTED THAT THE TRIAL COURT ERRED IN DENYING JONES'S MOTION FOR POSTCONVICTION RELIEF WITHOUT A HEARING, AND THAT JONES IS ENTITLED TO A NEW TRIAL IN "THE INTEREST OF JUSTICE."

PETITIONER JONES RECEIVED A REVIEW OF HIS APPELLATE CLAIMS THROUGH WHAT APPEARED TO BE THE LENSE OF THE 2-PRONG STANDARD DEVELOPED IN THE SUPREME COURT PURSUANT TO STARKLAND v. WASHINGTON, 466 U.S. 668, 687 (1984). HIS APPEAL WAS DENIED AND JONES, BY COUNSEL, FILED A PETITION FOR REVIEW IN WISCONSIN SUPREME COURT PURSUANT TO WIS. APP. RULES § 808.10 AND § 809.62, WHICH ESSENTIALLY RECAPITULATED THE SAME APPELLATE ISSUES ASSERTED IN JONES'S APPELLATE BRIEF AND AFTER THE SUPREME COURT DECLINED REVIEW, JONES FILED A PETITION FOR WRIT OF HABEAS CORPUS PURSUANT 28 U.S.C. § 2253 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

ON OCTOBER 31, 2012, JONES PROSECUTED HIS WRIT OF HABEAS CORPUS, AND ON NOVEMBER 8TH AND 19TH, 2012, BOTH PARTIES CONSENTED TO HAVE JURISDICTION BEFORE A MAGISTRATE JUDGE. PETITIONER JONES'S MOTION FOR COUNSEL WAS GRANTED AND COUNSEL WAS APPOINTED TO REPRESENT THE PETITIONER.

ON OR ABOUT DECEMBER 11, 2012, JONES WAS GRANTED LEAVE TO STAY THE WRIT AND RETURNED TO THE STATE COURT TO FURTHER EXHAUST STATE COURT REMEDIES, AND ON JULY 17, 2014, JONES RETURNED TO THE DISTRICT COURT WHERE MAGISTRATE JUDGE DUFFIN ABSOLVED THE PREVIOUS ORDER TO STAY THE WRIT AND THE MATTER PROCEEDED ON ITS MERITS.

ON AUGUST 27, 2014, THE DISTRICT COURT SCREENED THE WRIT PURSUANT TO RULE 4 AND ORDERED AN ANSWER TO BE FILED BY THE RESPONDENT.

On or about February 10, 2016, Jones received the district court's decision and order that:

- 1). denied habeas corpus relief;
- 2). entered an order and judgment that dismissed the habeas corpus; and
- 3). declined to issue a certificate of appealability ("COA").

On or about March 02, 2016, by and through counsel, Jones filed a Notice of Appeal in the district court.

On or about March 29, 2016, by and through counsel, Jones filed in the United States Court of Appeals for the Seventh Circuit, a COA petition that was denied on January 23, 2017; however, the decision was only sent to the attorney and not Jones.

On March 20, 2017, Jones received a correspondence from Attorney Jahl, the appointed attorney, who admitted that he dropped the ball failing to send or share with Jones the January 23, 2017, decision.

On or about April 16, 2017, Jones, proceeding pro se, filed a motion pleading for the recall of mandate pursuant to Fed. R. App. P. 27 and 41; Cir. R. 41, that included the error of Attorney Brian Jahl and further asserted that neither Attorney Jahl nor Magistrate Judge Duffin considered that the ultimate question on habeas corpus review was "imperative assistance of trial counsel" which is a mixed question of law and fact to which the district court erroneously applied the AEDPA's presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). Consequently, a federal court reviewing a state court conclusion on a mixed issue involving question both of law and fact must first separate the legal conclusion from the factual determination that

underlie it." Citing Paige v. Schaefer, 648 F. Supp. 2d 1151 (D. Ariz. 2009); Hamblett v. Blodgett, 393 F.3d 943, 978 (9th Cir. 2004).

On June 15, 2017, the Seventh Circuit granted the motion to recall the mandate and on or about July 15, 2017, Jones filed a motion for reconsideration of the Seventh Circuit's decision to deny Jones's application for a COA.

On or about September 01, 2017, the Seventh Circuit denied Jones's motion for reconsider but did not mail Jones its decision until after Jones wrote the Clerk of Court for the United States Court of Appeals and, of course, it delayed the 90-day period under S.Ct. Rule 13.1, and on or about November 09, 2017, Jones sought and received an extension under S.Ct. Rule 13.5 to file the foregoing certiorari pursuant to Application No. 17A 512.

This Petition for writ of certiorari now follows:

REASONS FOR GRANTING THE PETITION

CONSISTENT WITH S. Ct. Rule 10(c), THE SEVENTH CIRCUIT HAS ACCEPTED THE DISTRICT COURT'S DECISION TO DENY THE PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPELLABILITY (COA) DECIDING AN IMPORTANT QUESTION OF FEDERAL LAW OF INEFFECTIVE ASSISTANCE OF COUNSEL OR A MIXED QUESTION OF LAW AND FACT, FOR WHICH THE CLEAR AND CONVINCING EVIDENCE STANDARD FOR REHEARAL UNDER 28 U.S.C. § 2254(e)(1) DOES NOT APPLY. RATHER, INEFFECTIVE ASSISTANCE OF COUNSEL UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668, 698 (1984), CREATES A CLAIM CONCERNING:

- ISSUES OF COUNSEL'S PERFORMANCE; AND
- WHETHER JONES WAS PREJUDICED BY THE DEFICIENT PERFORMANCE.

WHICH IS A MIXED QUESTION OF LAW AND FACT AND HENCE, WHILE THE PRESUMPTION OF CORRECTNESS APPLIES TO STATE COURT FINDINGS OF FACT UNDERLYING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, IT DOES NOT APPLY TO ULTIMATE CONCLUSIONS OF LAW REGARDING THE INEFFECTIVE ASSISTANCE. SEE MARSHALL V. LONGERGER, 459 U.S. 422, 431-37 (1983), 28 U.S.C. § 2254(d)

IN ADDITION, THE LOWER COURTS HAVE DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RECENT DECISION IN BUCK V. DAVIS, ___ U.S. ___, 137 S.Ct. 759 (2017), WHERE, IT IS NOT DISPUTED THAT DEFENSE COUNSEL, ON CROSS-EXAMINATION, ELICIT TESTIMONY FROM MORGAN, A JAILHOUSE INFORMANT, ABOUT JONES RECEIVING A TATTOO WHILE IN JAIL WITH MORGAN THAT WAS PATENTLY MENACIOUS, HOWEVER, AS OPPOSE TO INVESTIGATING THE MERE EXISTENCE OF THE TATTOO THAT ALLEGEDLY STATED THE WORDS "KILLER CHRIS," DEFENSE COUNSEL RAN WITH IT, NEVER LOOKING AT THE ARMS OF HIS CLIENT, AND IN COUNSEL'S CLOSING ARGUMENTS BUDAHOUSLY TOLD THE JURY THAT WERE COUNSEL ON COUNSEL'S WAY TO PRISON, A VERY DANGEROUS PLACE, COUNSEL, TOO, WOULD RECEIVE SOME SORT OF MENACING TATTOO TO KEEP THE BAD, BAD MEN IN THE PENITENTIARY AT BAY.

Not only was defense counsel not operating within the "wide range of professionally competent assistance," SEE STRICKLAND, at 690, the Sentencing Judge found this approach "incredulous and during sentencing, ordered Jones to display Jones's name and inquired about the tattoo only to discover name existed displaying "Killer Chris."

The state court sustained that on this issue regarding the tattoo was deficient but not prejudicial. In the district court, regarding claims of ineffective assistance of counsel, Magistrate Judge Durkin, in part, wrote:

"However, when the question of effective assistance of counsel is presented in a habeas petition under § 2254, the court does not directly apply the Strickland standard. Harrington v. Richter, 562 U.S. 86, 101 (2011). Rather than focusing on the actions of counsel, the Federal court focuses on the actions of the state court in applying Strickland. . . ."

(App. A: 1-21, at p. 10).

It appears that the determinative factor here is whether the district court afforded the state court's conclusion of law, that Jones was not prejudiced by counsel's deficiency, the presumption of correctness where § 2254(e)(1) would apply. This is incorrect. Rule 28 U.S.C. § 2254(d), permits habeas relief based on claims adjudicated on the merits in state court only when the state decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or (2) "based on an unreasonable determination of the facts."

Therefore, on certiorari, the Supreme Court must ascertain, for the purpose of COA, whether a de novo review of the state court's ultimate conclusion of law that Jones's trial court defense counsel's error to elicit on cross-examination from the state's witness, Morgan,

Testimony of a jailhouse tattoo of "Killer Chris," that, as the district court so eloquently noted, in closing argument, amidst a later discussion of Morgan's testimony and while reiterating why Morgan chose to testify, the prosecutor stated:

"I came in here because this guy is a killer.
Tattoo on his arm. Killer. Killer."

Defense counsel, in his closing arguments, stated that if he were going to jail he would get

"a couple of those little tattoos that go under the left eye and when people asked me what that meant, it says, I killed women and children, whatever I would have to say to let them off."

While this is LINGARRE AND FLIES INTO THE FACE OF THE Sixth Amendment's guarantee to EFFECTIVE REPRESENTATION; ON THE REBUTTAL by the prosecutor, the prosecutor stated:

"Apparently what [Jones] did is he put the tattoo KILL on his wrist. That's something to be proud of? That's something that is gonna keep people away from you? He did that because he is a KILLA and he's proud of it and that's why he did it in the jail."

THIS IS AN OSTENSIBLE BREAKDOWN IN THE MEANINGFUL ADVERSARIAL TESTING PROCESS THAT THIS Supreme Court has spoke on in UNITED STATES V. CAONIC, 466 U.S. 648, 659 (1984), where, on this issue, prejudice should have been presumed but conversely, Wisconsin Court of Appeals, in the face of the trial court judge's decision to contact Wisconsin Department of Corrections (DOC) for information on Jones's noted tattoos and colloquy with Jones, sustained [the] following conclusion of law:

"...[I]f Jones did not have the tattoo on that day, he could have easily told his trial lawyer. Thus, Jones's contention that his lawyer was ineffective for not investigating something that Jones could have revealed to him at the time is wholly without merit."

State v. Jones, 2010 WL App 133 at P. 33, 791 N.W. 2d 390.

CERTIORARI REVIEW IS WARRANTED BECAUSE THIS CREATES THE TYPE OF ISSUE UNDER 28 U.S.C. § 2253(C)(1) AND MILLER-EL V. COCKRELL, 537 U.S. 322, 336 (2003), SHOWS A SUBSTANTIAL DENIAL OF A CONSTITUTIONAL RIGHT, THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. SEE BUCK, *supra*, 137 S.Ct. at 773-774.

NEXT, THE STATE'S FINAL WITNESS WAS MILWAUKEE COUNTY CRIME LAB FIREARM AND TOOLMARK ANALYST, MARK SIMONSON, AND ACCORDING TO HIS TESTIMONY, THERE WAS NO OTHER GUN IN THE WORLD THAT THE RECOVERED CARTRIDGE CASE AND BULLET COULD HAVE COME FROM. SIMONSON ALSO TESTIFIED SEVERAL TIMES THAT "[T]HERE [WAS] NO ERROR RATE" FOR HIS ANALYSIS.

PERSONNEL JONES'S TRIAL COURT DEFENSE ATTORNEY DECIDED NOT TO INVESTIGATE THE RELIABILITY OF THE FIREARM AND TOOLMARK IDENTIFICATION EVIDENCE, AND THE STATE COURT OPT NOT TO DECIDE WHETHER THIS BLUNDER WOULD CONSTITUTE DEFICIENT REPRESENTATION. RATHER, AND AS THE DISTRICT COURT POINTS OUT, THE COURT OF APPEALS ADDRESSED ONLY THE PREJUDICE PRONG OF THE STUCKLAND ANALYSIS, CONCLUDING THAT THE EVIDENCE AGAINST JONES WAS OVERWHELMING AND THAT THE OUTCOME WOULD HAVE BEEN NO DIFFERENT HAD THE GUN NEVER BEEN FOUND. SEE JONES, 2010 WL App 133 at P. 26.

FIRST, IN THIS INSTANCE, STUCKLAND IS RECOGNIZED BUT DETERMINATIVE, ALSO, THEN, IS WHETHER STUCKLAND IS ERRONEOUSLY APPLIED UNDER 28 U.S.C. § 2254(C)(1), AND APPEARS TO BE "CONTRARY TO" STUCKLAND WHICH WOULD SEEM TO REQUIRE "SOME FORM" OF INVESTIGATION AND REBUTTAL INTO

AND OF THE RELIABILITY OF FIREARM AND TOOLMARK IDENTIFICATION EVIDENCE PROFFERED BY SIMONSON.

Second, this deficiency was compounded by defense counsel when defense counsel elicited damaging evidence regarding the reliability of the state's expert analysis. Without any knowledge of the answer, Jones's trial attorney asked the state's expert about the error rate for his analysis. Simonson responded:

"There is no error rate."

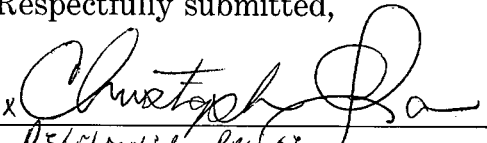
Defense counsel then asked a second time and a third expressing surprise with the answer but never ever challenging it to any degree whatsoever illustrating no apparent rational trial strategy which would challenge the adversarial testing process as required by Crowe, supra.

Finally, the Seventh Circuit and the district court neither appears to have limited its examination to a threshold inquiry into the underlying merit of Jones's claims as required by Miller-Ed v. Cockren, 537 U.S. 322 (2003); see also 28 U.S.C. § 2253(c)(2) and Underbuck, supra. This Court should grant certiorari review to definitively address the appropriate standard to address a mixed question of law and fact relating to the conclusion of law reached by the state court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

x 
PETITIONER, PRO SE

Date: January 24, 2018

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