No. 07-_____

In the Supreme Court of the United States

AUSTIN RANDOLPH, PETITIONER,

v.

CHRISTOPHER RAYGOZA, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal habeas court may disregard a state trial court's factual finding that witnesses lacked credibility, made after evaluating their in-person testimony, because that finding was made implicitly rather than explicitly?

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PETITION FOR A WRIT OF CERTIORARI

Warden Austin Randolph respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 474 F.3d 958 (7th Cir. 2007). The opinion of the district court (App. 16a-47a) is reported at 361 F. Supp. 2d 779 (N.D. Ill. 2005). The order of the Supreme Court of Illinois (App. 49a) denying a petition for leave to appeal is reported at 198 Ill. 2d 604, 766 N.E.2d 243 (2002). The order of the Appellate Court of Illinois (App. 50a-81a) is unreported, but its judgment is reported at 324 Ill. App. 3d 1136, 805 N.E.2d 755 (2001).

JURISDICTION

The court of appeals entered judgment on January 25, 2007, and denied rehearing en banc over the dissent of four judges on March 21, 2007. On June 20, 2007, Justice Stevens extended until July 19, 2007, the time within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT

Respondent was charged with and convicted of murder and attempted murder following a bench trial in state court. App. 50a. He filed a motion for a new trial, arguing that his counsel was ineffective in violation of the Sixth Amendment for failing to call additional alibi witnesses. *Id.* at 17a. After an extensive hearing at which all of those witnesses testified, the state trial court denied the motion and sentenced respondent. *Id.* at 50a. The state appellate court affirmed, and the state supreme court denied respondent's petition for leave to appeal. *Id.* at 49a-81a.

Respondent filed a federal habeas petition, which the district court denied. *Id.* at 16a-47a. The court of appeals reversed, and then denied rehearing over the dissent of four judges. *Id.* at 1a-15a. In conflict with the federal habeas statute and this Court's decisions, the court of appeals failed to credit the state trial court's implicit factual finding that the additional alibi witnesses were not credible.

1. John Ribota, Hugo Munoz, Leo Dorado, and Miguel Macias were sitting inside a Chicago pizzeria when respondent and his codefendent entered and flashed gang signs at them. *Id.*

at 51a-52a. Raul Quezada, a member of respondent's street gang, was standing outside the pizzeria serving as a lookout. *Id.* at 53a-54a. Respondent pulled out a handgun and walked toward the four men. *Id.* at 52a. His codefendant yelled out "kill him, kill him, shoot him," and respondent opened fire. *Ibid.* Macias died from a shot in the back. *Ibid.* Munoz was shot in both arms and the buttocks. *Ibid.* Respondent and his codefendant then ran out of the pizzeria and fled. *Ibid.*

While the shooting took place, James Parker was walking past the pizzeria with his family. *Ibid.* He saw two Hispanic men standing in the doorway, and he heard one shout out "shoot him, shoot him, kill him[,]" followed by six or seven shots. *Ibid.* He took cover in a nearby doorway and, after the shooting stopped, saw two men run by. *Ibid.*

2. At a bench trial, Ribota, Munoz, and Dorado identified respondent as the shooter. *Id.* at 51a-52a. Two of the three men remembered respondent having a distinctive blond ponytail at the time of the shooting. *Id.* at 52a. Parker testified to the command he heard immediately before the shooting. *Ibid.*

After pleading guilty in juvenile court to first degree murder and attempted murder, Quezada testified that, immediately before the shooting, he saw respondent hand his codefendant a .38 caliber handgun and the two walked into the pizzeria. *Id.* at 53a-54a; R.15-2 at J9-J17. Quezada then heard shots and ran away. App. at 54a. He recalled respondent having a "gold" ponytail at the time. *Ibid.* Police found .38 caliber bullets and bullet casings at the crime scene. R.15-2 at J34.

In addition, the former girlfriend of respondent's codefendant testified that she saw respondent and his codefendant in the area of the shooting shortly before it occurred. App. 52a. She saw the codefendant again later that night, and he told her "the boys" shot someone at a pizza place. *Id.* at 52a-53a. In his defense, respondent called his ex-

girlfriend as an alibi witness. *Id.* at 54a-55a. She testified that, at the time of the shooting, she was with respondent at his family's residence in a northern suburb of Chicago. *Ibid.*

3. After the trial court found him guilty of murder and attempted murder, respondent hired new counsel and moved for a new trial, arguing that his counsel was ineffective for failing to call additional alibi witnesses. *Id.* at 55a. At a hearing on the motion, respondent called five witnesses who claimed they saw him at his family's suburban residence. *Id.* at 55a-62a. Two additional witnesses testified that they heard respondent's voice over a speaker phone during a call placed to his family's home that evening. *Id.* at 55a-57a, 60a-61a. All of these witnesses were either immediate family members or close family friends. *Id.* at 55a-62a.

In rebuttal, the State called respondent's former counsel, who testified that he interviewed four of the additional alibi witnesses but chose not to call them for strategic reasons. *Id.* at 65a-71a. Counsel stated that he opted not to interview three other potential alibi witnesses because they were children. *Id.* at 67a. The State also introduced evidence of an "alibi script" produced by two of the uncalled witnesses. *Id.* at 56a, 64a.

The trial court, which had been the finder of fact at respondent's bench trial, denied the motion for a new trial. *Id.* at 71a. Applying the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), the court held that respondent's former counsel made "a rational decision as a competent lawyer" not to call the additional witneses, that certain witnesses "would [not] have detracted" from the State's case, and that the court remained convinced that respondent was the shooter and was not at his family's house at the time of the shooting. R.15-6 at U14-U15, U24, U31, U40-U41.

4. The state appellate court affirmed, holding that respondent's counsel made strategic decisions not to call the

additional alibi witnesses, and that respondent was not prejudiced by their absence from the trial in any event. App. 72a-79a. The state supreme court denied review, and the federal district court denied respondent's petition for a writ of habeas corpus. *Id.* at 49a, 16a-47a.

5. A divided panel of the court of appeals reversed and granted habeas relief, holding that the state appellate court unreasonably applied *Strickland*. *Id.* at 1a-15a. The majority first discounted counsel's strategic rationale, reasoning that trial counsel and the state courts failed to consider the cumulative effect of calling complementary alibi witnesses. *Id.* at 9a-13a. The majority next determined that the trial court's holding of no prejudice was objectively unreasonable. *Id.* at 13a-14a. It explained that the combined testimony of the alibi witnesses was so strong that the state courts' holding of no prejudice was "outside the boundaries of permissible differences of opinion." *Id.* at 9a, 14a. In so holding, the court of appeals did not acknowledge, let alone accord deference to, the trial court's implicit factual finding that the additional alibi testimony was incredible.

In dissent, Judge Bauer concluded that the state court's holding was not an objectively unreasonable application of *Strickland* to the facts of the case. *Id.* at 15a. The court of appeals then denied the State's petition for rehearing or rehearing en banc over dissents by Judges Bauer, Evans, Kanne, and Manion. *Id.* at 1a.

REASONS FOR GRANTING THE PETITION

In *Marshall v. Lonberger*, 459 U.S. 422 (1983), this Court held that implicit factual findings made by state courts are entitled to deference in federal habeas corpus proceedings. Federal courts of appeals have been unanimous that this principle survives the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and that 28 U.S.C. § 2254(e) requires deference to such findings. Nevertheless, the Seventh Circuit failed to accord any deference to the state courts' implicit finding that testimony by the seven additional alibi witnesses petitioner presented at his post-trial hearing was incredible. The very judge who was the finder of fact at respondent's bench trial evaluated the live, in-person testimony of these witnesses and remained convinced that respondent was the murderer. R. 15-6 at U41-U42. This determination was based on the necessary (albeit implicit) factual finding that the additional alibi testimony was not credible, for it was not possible for the state court to believe this testimony and still conclude that respondent committed the murder. The court of appeals did not acknowledge these findings, let alone accord them the deference that 28 U.S.C. § 2254(e) and *Lonberger* require. Accordingly, petitioner respectfully requests that this Court issue a writ of certiorari and summarily reverse the Seventh Circuit's judgment or, in the alternative, set the case for full briefing and argument, in order to reaffirm *Lonberger*'s holding that obvious, implicit state court factual findings are entitled to deference by federal habeas courts. Sup. Ct. R. 10(c) (certiorari warranted when court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

I. Under *Marshall v. Lonberger*, Implicit Factual Findings Made By State Trial Courts Are Entitled to Deference In Federal Habeas Proceedings.

In *Marshall v. Lonberger*, this Court reversed the Sixth Circuit's judgment granting a writ of habeas corpus. 459 U.S. 422 (1983). The Sixth Circuit had credited the testimony of Lonberger, the habeas petitioner, after the state trial court failed "to make express findings" regarding his credibility.

The *Lonberger* Court recognized that state court factual findings carry a "presumption of correctness" in federal habeas proceedings, and that the Sixth Circuit had "failed in at least one major respect to accord those [factual] determinations the 'high measure of deference' * * * they are entitled." *Id.* at 432 (quoting *Sumner v. Mata*, 455 U.S. 591, 596-598 (1982)). Specifically, this Court held that the state trial court's legal ruling "was tantamount to a refusal to believe the testimony of [Lonberger]." *Lonberger*, 459 U.S. at 434. The Sixth Circuit therefore erred in crediting Lonberger when it was clear from the record that the state trial court implicitly rejected his testimony. *Ibid.*; *see also Parke v. Raley*, 506 U.S. 20, 35 (1992) (factual inferences drawn by state trial courts are entitled to presumption of correctness on federal habeas review) (citing *Lonberger*, 459 U.S. at 431-32).

Since *Lonberger* and *Parke* were decided, Congress has codified the requirement that federal habeas courts accord deference to state courts' fact-finding generally. *See* 28 U.S.C. § 2254(e). And consistent with *Lonberger*, this Court has made clear that implicit findings of fact are entitled to the same deference under § 2254(e) that express findings enjoy. In *Uttecht v. Brown*, 127 S.Ct. 2218 (2007), this Court reversed the Ninth Circuit's judgment granting habeas relief based on a claim that the state trial court erroneously excused a potential juror. *Uttecht* explained that "[d]eference to the trial court is appropriate because [that court] is in a position to assess the

demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing" potential jurors. *Id.* at 2224. *Uttecht* also noted that such deference "is owed regardless of whether the trial court engages in explicit analysis regarding impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias." *Id.* at 2223. This Court thus reaffirmed the principle from *Lonberger* that federal habeas courts owe special deference to the findings, express or implied, of state trial courts that have evaluated the "demeanor" of witnesses in person. *See Lonberger*, 459 U.S. at 434 (federal law "gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them").

Recent lower court decisions are to the same effect. For example, in *Campbell v. Vaughn*, 209 F.3d 280 (3d Cir. 2000), the Third Circuit held that a state trial court's implicit factual finding was entitled to deference under § 2254(e). In that case, a habeas petitioner alleged that his trial counsel had been ineffective for failing to inform him that he had a right to testify. *Id.* at 288. After a hearing where the petitioner testified that he had not been told of this right but his former counsel testified that the petitioner had been so informed, the state trial court rejected the claim. *Id.* at 283-85. The court did not "explicitly" credit the testimony of counsel over that of petitioner, but the court stated that the petitioner's argument was "unsupported" and that he had "failed to carry his burden" to establish ineffectiveness. *Id.* at 284-85.

The Third Circuit determined that the state trial court had "implicitly discredited" the petitioner's testimony based on "the [state] court's legal conclusions and the rational deductions that we can draw therefrom." *Id.* at 288-89. The court noted that it needed to analyze the "legal conclusion" of the trial court and then "reason backward to the factual premises that, as a matter of reason and logic, must have undergirded it." *Id.* at 289. That

is, the state trial court must have determined that the petitioner had been warned about his right to testify, because otherwise its rejection of his claim "would be irrational." *Ibid.* Citing *Lonberger* and *LaValle v. Delle Rose*, 410 U.S. 690 (1973), the Third Circuit concluded that it was "bound by [the state trial court's] implicit resolution of the credibility dispute between [the petitioner] and his trial counsel." *Campbell*, 209 F.3d at 290. It therefore deferred to this factual finding, as required by § 2254(e).

Like the Third Circuit in *Campbell*, the courts of appeals have followed *Lonberger*'s holding that clear but implicit factual findings made by the state trial courts must be presumed correct by federal habeas courts. *See Caldwell v. Maloney*, 159 F.3d 639, 650 n.13 (1st Cir. 1998) (factual findings that may be "inferred from a judge's ultimate ruling" are entitled to "a presumption of correctness"); *Whitaker v. Meachum*, 123 F.3d 714, 715 n.1 (2d Cir. 1997) ("deference is owed to implied as well as express findings of fact" made by state courts) (internal quotations omitted); *Hartman v. Blankenship*, 825 F.2d 26, 28 n.2, 31 (4th Cir. 1987) (deferring to implicit finding of fact derived from state trial court's legal conclusion); *Guidry v. Dretke*, 429 F.3d 154, 165 (5th Cir. 2005) ("[g]ranting deference to state court's implicit and explicit historical factfindings predates AEDPA, moreover, and is in fact a bedrock principle of federal habeas jurisprudence"); *Powell v. Collins,* 332 F.3d 376, 388-89 (6th Cir. 2000) (§ 2254(e) deference also applies to "implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility"); *Conner v. McBride*, 375 F.3d 643, 654 (7th Cir. 2004) ("[t]he court's implicit decision to credit the evidence [against the habeas petitioner] is entitled to our deference, absent clear and convincing evidence to the contrary"); *Perry v. Kemna*, 356 F.3d 880, 884 (8th Cir. 2004) ("the underlying factual findings are entitled to deference"); *Weaver v. Palmateer*, 455 F.3d 958, 964 (9th Cir. 2006)

(finding that state trial court made implicit credibility determination in denying habeas petitioner's claim); *Smith v. Gibson*, 197 F.3d 454, 459 (10th Cir. 1999) (noting that state court's implicit credibility finding should be accorded deference under § 2254(e)); *Freund v. Butterworth*, 165 F.3d 839, 858 n.30 (11th Cir. 1999) (implicit factual finding accorded deference); *but see Goldyn v. Hayes*, 444 F.3d 1062, 1065 n.5 (9th Cir. 2006) ("[w]e are not convinced that we are bound by a state court's implicit findings under AEDPA"). As shown below, the Seventh Circuit's decision in this case cannot be reconciled with the settled rule in *Lonberger*.

II. The Seventh Circuit's Decision Disregards *Lonberger* And Its Progeny.

The court below failed to defer to the clear, implicit factual findings made by the state trial court. The opinion simply ignores this Court's rule in *Lonberger*, reaffirmed in *Parke* and *Uttecht*.

The state trial court's implicit finding could not have been clearer. The court rejected respondent's post-trial claim that his trial counsel was ineffective for failing to call additional alibi witnesses. App. 17a, 50a. In support of this claim, respondent presented seven additional alibi witnesses at a post-trial hearing, none of whom testified at trial. *Id.* at 55a-62a. After the State cross-examined these witnesses and presented its case in rebuttal, the trial court denied the claim. *Id.* at 71a. In fact, the same judge who was the finder of fact at trial presided over the post-trial proceedings and found that respondent's trial counsel had not been deficient, and also conclusively rejected respondent's alibi that he was at his family's house at the time of the murder and reaffirmed that respondent was the shooter. R. 15-6 at U14, U24, U31, U40-U42.

This holding rested on the clear, implicit finding that the additional alibi witnesses were incredible. For, in this case, it

was simply impossible for the state trial court — after evaluating all of the alibi witnesses in person — to have found that petitioner committed the murder without rejecting their testimony. That is because respondent's alibi witnesses directly contradicted the State's evidence at trial, where three eyewitnesses identified respondent as the man who shot at them in a Chicago pizzeria. App. 51a-52a. The state trial court had to choose one account over the other, and by reiterating that it believed respondent was the shooter (U40-U42), that court made a clear, implicit factual finding that it did not believe the additional alibi witnesses. The district court recognized this implicit finding, noting that "to assume that the [alibi] witnesses's testimony was all true contradicts" the state trial court's findings. App. 39a. As in *Lonberger* and *Campbell*, the state trial court's "failure to grant relief was tantamount to an express finding against the credibility" of the habeas petitioner's witnesses. *Lonberger*, 459 U.S. at 434.

The state appellate court affirmed, holding that respondent's counsel was not deficient and that even if counsel had "put on all of the witnesses * * * as [respondent] now believes he should have" there was not "a reasonable probability" that the result of the trial would have been different. App. 78a-79a. The district court denied respondent's habeas petition. *Id.* at 16a-47a. On appeal, petitioner argued, *inter alia*, that the state courts' factual determinations were entitled to deference under § 2254(e) (Pet. Br. 25-26), and that the state trial court "was able to personally assess [the witnesses'] credibility" *(id.* at 43) and conclusively rejected petitioner's claims. *Id.* at 40-44. The Seventh Circuit rejected this argument without even acknowledging the state courts' implicit findings, let alone according them the deference that *Lonberger* and § 2254(e) require.

Like the Ninth Circuit in *Goldyn*, the Seventh Circuit in this case apparently was "not convinced that [it is] bound by a state

court's implicit findings under AEDPA." *Goldyn*, 444 F.3d at 1065 n.5. This error is so plain in light of *Lonberger* and its progeny that summary reversal is appropriate. *See Gonzalez v. Thomas*, 547 U.S. 183, 126 S.Ct. 1613, 1614 (2006) (granting summary reversal of "legally erroneous" decision, where error was "obvious in light of" controlling precedent). At a minimum, given its clear departure from the Court's decisions and its incompatibility with the law of other circuits, certiorari is warranted, and the case should be set for full briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the Seventh Circuit's opinion is fundamentally incompatible with the principles set forth in *Marshall v. Lonberger* and *Uttecht v. Brown*, the judgment below should be summarily reversed. In the alternative, the case should be set for full briefing and argument.

Respectfully submitted.

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