No. 08-1389

In the Supreme Court of the United States

John Prelesnik,
Petitioner,

v.

Chamar Avery,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

Michael A. Cox
Attorney General

B. Eric Restuccia
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Mark G. Sands
Assistant Attorney General
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY BRIEF 1

I. The State court's finding of fact that the proposed alibi witnesses were not credible is presumed to be correct under AEDPA. Respondent failed to overcome that presumption 2

II. The Sixth Circuit did not overcome the presumption of correctness by clear and convincing evidence. Instead, it ignored that factual finding. 4

TABLE OF AUTHORITIES

Page

Cases

Amadeo v. Zant,
486 U.S. 214 (1988) 1

Avery v. Prelesnik,
548 F.3d 434 (6th Cir. 2008) 6

Blackledge v. Allison,
431 U.S. 63 (1977) 2

Shabazz v. Artuz,
336 F.3d 154 (2d Cir. 2003) 1

Smith v. McCormick,
914 F.2d 1153 (9th Cir. 1990) 2, 4

Smith v. Spisak,
case no 08-724, cert granted Feb. 23, 2009 ..... 1, 7

Strickland v. Washington,
466 U.S. 668 (1984) 1, 6, 7

United States v Cronic,
466 U.S. 648 (1984) 7

Woodford v. Visciotti,
537 U.S. 19, 123 S. Ct. 357, 154 L. Ed. 2d 279
(2002) (per curiam) 2

Statutes

28 U.S.C. § 2254(e)(1) 1, 3

28 U.S.C. § 2254(e)(2) 4

Other Authorities

Antiterrorism and Effective Death Penalty Act of 1996 ..... passim

PETITIONER'S REPLY BRIEF

This case is jurisprudentially significant because it represents part of a continuing pattern by the Sixth Circuit of deciding important federal questions in a way that conflicts with relevant decisions of this Court. The same error is present here as is present in *Smith v. Spisak*, where this Court granted certiorari on the issue of whether the Sixth Circuit failed to properly apply the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[1] This Court should grant certiorari ensure that the Sixth Circuit properly applies the AEDPA standard.

It is axiomatic that a federal appellate court must give "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses."[2] This "due regard" is strengthened on habeas review because of the "double layer" of deference given to State court determinations of credibility. First, under the general *Strickland* layer, a State prisoner must establish a *prejudicial* error – i.e., an error so serious that it calls into question the reliability of the entire trial.[3] Second, under AEDPA, a federal appellate court must presume that factual determinations are correct, especially those regarding witness credibility.[4]

The presumption of factual correctness can only be overcome if they are proven to be incorrect by clear and convincing evidence.[5] This Court has held that where, as

---

[1] See, e.g., *Smith v. Spisak*, case no 08-724, cert granted Feb. 23, 2009.

[2] *Amadeo v. Zant*, 486 U.S. 214, 223 (1988).

[3] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[4] See, e.g., *Shabazz v. Artuz*, 336 F.3d 154, 161 (2d Cir. 2003).

[5] 28 U.S.C. § 2254(e)(1).

here, the central issue is one of credibility, an evidentiary hearing will often be necessary to resolve material factual conflicts.[6] In other words, an evidentiary hearing is generally necessary to provide the "clear and convincing evidence" required for a federal habeas court to reject the factual finding of a State trial court.

But in this case, the Sixth Circuit did not order an evidentiary hearing to determine whether the "alibi" witnesses cited by Respondent were as incredible as the State trial court who observed their testimony found them to be. Nor did the Sixth Circuit find that this was one of the "rare instances" where credibility might be determined without an evidentiary hearing, "based on documentary testimony and evidence on the record."[7] Instead, the Sixth Circuit *ignored* the finding of fact by the State trial court and it held that as a matter of law, the failure to pursue any alibi defense is per se unreasonable because it deprives Respondent of a "reasonable shot of acquittal."

I. The State court's finding of fact that the proposed alibi witnesses were not credible is presumed to be correct under AEDPA. Respondent failed to overcome that presumption.

Under the highly deferential AEDPA standard, a federal habeas court must give the State-court decision "the benefit of the doubt."[8] That "benefit of the doubt"

---

[6] *Blackledge v. Allison*, 431 U.S. 63, 82 n 25 (1977).

[7] *Smith v. McCormick*, 914 F.2d 1153, 1170 (9th Cir. 1990).

[8] *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam).

lasts until the habeas petitioner demonstrates that such findings are incorrect by clear and convincing evidence.[9]

Respondent argues that the finding by the State trial court that the alibi witnesses lacked credibility was completely unsupported. But Respondent, like the Sixth Circuit, failed to give the State trial court the deference that is required under AEPDA.

Here, the trial court found as a matter of fact that neither of the alibi witnesses proposed by Respondent was credible. Since their testimony could not be believed, trial counsel was not ineffective for failing to call them. Specifically, the trial court noted that purported alibi witness Damar Crimes's statement was inconsistent with Avery's testimony on a fundamental point. Pet. App. 41a. Damar Crimes testified that Avery dropped off his automobile at the repair shop on the day of the murder, while Avery claimed to have dropped the automobile off on the day before the murder. Pet. App. 40a - 41a. The trial court concluded that witness Darius Boyd – who was allegedly with Avery and Damar Crimes – was completely incredible. Specifically, the court noted that his testimony "suggests to me a manufacturing of testimony." Pet. App. 46 a.

Implicit in the State trial court's conclusion is that Avery could not have suffered prejudice from trial counsel's failure to call the "alibi" witnesses, because no reasonable juror could believe their manufactured story. In other words, the failure to call wholly non-credible witnesses cannot deprive a defendant of a fair trial because their false testimony could not with any reasonable probability have changed the outcome.

---

[9] 28 U.S.C. § 2254(e)(1).

Under AEDPA, then, the federal habeas court was bound to presume that these credibility determinations were correct.

II. The Sixth Circuit did not overcome the presumption of correctness by clear and convincing evidence. Instead, it ignored that factual finding.

Respondent argues that the Petitioner is asking this Court to create a new rule making a trial court's subjective finding on witness credibility unreviewable. While that is not correct, it nevertheless highlights the idea that Congress intended habeas review of State court convictions to be a *limited* remedy. Under 28 U.S.C. § 2254(e)(2), Congress set forth very limited conditions under which a federal habeas court can proceed with an evidentiary hearing in order to make its own findings of fact. Unless those conditions are met, a habeas petitioner is *not* entitled to hearing and the findings of fact made at the State court level *must* be given deference.

Where no evidentiary hearing is authorized, the federal habeas court in rare circumstances might still review a State court determination of credibility where it is possible to conclusively decide the credibility question "based on documentary testimony and evidence on the record."[10] But the federal habeas court must have *some* basis upon which it decides there is "clear and convincing evidence" to overcome the presumption that the State trial court was correct. In the absence of either a circumstance justifying an evidentiary hearing or of "evidence on the record" disputing the State trial court's finding of fact, then a claim regarding those facts is

---

[10] *McCormick*, 914 F.2d at 1170.

essentially unreviewable. That is what Congress intended when it limited the scope of habeas review under AEDPA.

Yet, the Sixth Circuit did not order an evidentiary hearing to challenge the State trial court's finding that the alibi witnesses were incredible. Nor did the Sixth Circuit undertake an analysis of the "evidence on the record" to demonstrate why the State trial court's determination of credibility was incorrect. Rather, the Sixth Circuit simply rejected the trial court's factual determination and substituted its own determination of the facts:

> We do not denigrate the role of the factfinder in judging credibility when we review a record in hindsight, but evaluation of the credibility of alibi witnesses is "exactly the task to be performed by a rational jury[,]" not by a reviewing court. Here, although the factors the state judge highlighted in her credibility assessment -- including Boyd's ability to remember exact times while failing to recall the date or day of the week that Avery visited his home -- may have ultimately affected the credibility of his testimony in the eyes of the jury, but they do not dispose of the issue of prejudice. Notably, the evidentiary hearing occurred approximately a year and three months after Avery's trial, and the record before us does not demonstrate that the presiding judge found fault with Crimes's testimony. Ultimately, as the district court properly recognized, "[O]ur Constitution leaves it to the jury, not the judge, to evaluate the

> credibility of witnesses in deciding a criminal defendant's guilt or innocence."[11]

This was the new rule created by the Sixth Circuit in this case – a rule that would deprive a State trial court from determining whether a proposed alibi witness was so incredible that his or her testimony could not have altered the outcome of the trial.[12]

According to this novel rule, any determination of a witnesses's credibility is *always* within the providence of the jury. Therefore, the failure to call a witness is *always* prejudicial, because it deprives a defendant of a "reasonable shot of acquittal."

However, this is the exact opposite of what *Strickland* requires. Under *Strickland*, a habeas petitioner carries the burden of proof to demonstrate that there is a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [13] But that was not the holding of the Sixth Circuit in this case. Rather, the Sixth Circuit identified the "error" as failing to investigate two incredible witnesses; and it defined the "harm" caused by that error as depriving Respondent of a "reasonable shot of acquittal."[14]

---

[11] *Avery v. Prelesnik*, 548 F.3d 434, 439 (6th Cir. 2008).

[12] Respondent's contention that the African-American State court judge in this case made her determination "based on a blatant, racist and ageist stereotype that a young black man would not have the money to pay for his car repairs without robbing someone" is hyperbole and unsupported by *any* evidence whatsoever.

[13] *Strickland*, 466 U.S. at 698.

[14] *Avery*, 548 F.3d at 439.

But this case is not an isolated instance of the Sixth Circuit deciding an important question of federal law in a way that conflicts with decisions of this Court.[15] Indeed, this case is not even the only instance where the Sixth Circuit has imposed a *Cronic* standard on habeas review without citing to *United States v. Cronic.*[16]

This Court recently granted certiorari to the Sixth Circuit in *Smith v. Spisak*, and identified one of the issues for briefing as whether "the Sixth Circuit exceeded its authority under AEDPA when it applied *United States v. Cronic* [], to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements"). In *Smith*, the Sixth Circuit undertook its analysis by noting that trial counsel was ineffective based on his arguments at closing. But the Sixth Circuit determined that the comments were the functional equivalent of counsel not being present at all and, on the basis, found that the defendant was *per se* prejudiced by those arguments. Just as in the instant case, the Sixth Circuit cited *Strickland* and purported to apply that case. Moreover, like the instant case, the Sixth Circuit did not even cite *Cronic* in its analysis. But the Sixth Circuit's decision not to cite *Cronic* is not dispositive – in both cases the Sixth Circuit held that trial counsel's failures were *per se* prejudicial and granted habeas relief on that basis.

---

[15] The State of Michigan notes that it has filed three other petitions for certiorari contemporaneously with this petition. See *Berghuis v. Thompkins*, (08-1470); *Metrish v. Newman*, (08-1401); and *Berghuis v. Smith*, (08-1402). All four are murder cases, all published, all reaching disposition in February 2009, in which the State of Michigan contends the Sixth Circuit failed to accord the State court decisions with the proper level of deference required by AEDPA.

[16] *United States v Cronic*, 466 U.S. 648, 659 (1984).

Here, the Sixth Circuit did not demonstrate that, but for trial counsel's deficient performance, there was a "reasonable probability" that the outcome of the trial would have been different. Rather, the Sixth Circuit merely opined that the alibi witnesses "could have" supplied reasonable doubt and the failure to call them deprived Respondent of a "reasonable shot at acquittal." In other words, the Sixth Circuit articulated a *Cronic* standard for the failure to call an alibi witness; even though the Sixth Circuit did not cite *Cronic*.

Respectfully submitted

Michael A. Cox
Attorney General

B. Eric Restuccia
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
Telephone: (517) 373-1124

Mark G. Sands
Assistant Attorney General
Attorneys for Petitioner

Dated: August, 2009