No. 09-_____08 389 MAY 8 - 2009

In the Supreme Court of the United States

JOHN PRELESNIK, WARDEN
Petitioner,

v.

CHAMAR AVERY,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the United States Court of Appeals for the Sixth Circuit, which affirmed the grant of a habeas petition, abrogated the "prejudice" prong of *Strickland v. Washington* by holding that the issue of an alibi witness's credibility is "not" for a reviewing court, but rather is a question for the jury and, therefore, the State trial court's determination that the alibi witnesses lacked credibility was not relevant.

PARTIES TO THE PROCEEDING

Petitioner is Warden John Prelesnik of the Michigan Department of Corrections.

Respondent is Chamar Avery, a State prisoner convicted by a jury of second-degree murder.

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The opinion of the Sixth Circuit is reported at 548 F.3d 434 (6th. Cir 2008). Pet. App. 1a-11a. The opinion of the district court is reported at 524 F. Supp. 2d 908 (W.D. Mich., 2007). Pet. App. 12a-27a. The order of the Michigan Supreme Court denying an application for leave to appeal is reported at 468 Mich. 891; 661 N.W.2d 238 (2003). Pet. App. 28a. The opinion of the Michigan Court of Appeals is unreported. Pet. App. 29a-34a.

JURISDICTION

The Sixth Circuit entered judgment on November 25, 2008, and denied rehearing en banc on February 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY 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 grated with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
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> (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.

INTRODUCTION

The issue in this case is whether a State trial court can make a finding of fact as to the credibility of a purported alibi witness when evaluating whether a defendant was prejudiced by the unreasonable failure to pursue an alibi defense.

The seminal case evaluating ineffective assistance of counsel is *Strickland v. Washington*, in which this Court held that a habeas petitioner is not entitled to relief unless he can establish both that trial counsel's performance was unreasonably deficient and that but for that deficiency, there is a "reasonable probability" the outcome of the State trial would have been different.[1] This Court has recently held in a case involving the failure to pursue an insanity defense that the question of whether the defense would have been successful is a relevant and important part of the prejudice analysis.[2]

Moreover, two circuits – the Fourth and Eighth – have specifically held that a trial court's determination of the credibility of a purported alibi witness is part of the prejudice analysis. Nevertheless, in contrast to the other circuits, the Sixth Circuit held that the question of an alibi witness's credibility was "not" for the trial court to determine. Instead, it held that such evidence must

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

[2] *Knowles v. Mirzayance*, 556 U.S. __; 129 S. Ct. 1411 (2009).

be evaluated by a jury in order to give a defendant a "reasonable shot of acquittal." Thus, if the Sixth Circuit decision is allowed to stand, the question whether a trial court can consider if a purported alibi defense is credible – and, therefore, whether the failure to present such a defense would create a "reasonable probability" of a different outcome – depends on where one resides.

The fact that the Sixth Circuit reached this decision in habeas corpus is notable, because the standard under AEDPA requires that the State court's decision on the merits be an unreasonable application of clearly established Supreme Court precedent. There is no Supreme Court precedent that has established that a State trial court cannot consider the credibility of an alibi witness in determining whether trial counsel was ineffective for calling them. Moreover, this Court has never articulated a "reasonable shot of acquittal" standard for evaluating claims under *Strickland*. It is not the role of habeas for the federal courts to adopt new standards such as the one adopted here.

The State of Michigan notes that it is filing three other petitions for certiorari contemporaneously with this petition. See *Berghuis v. Thompkins*, (09-___); *Metrish v. Newman*, (09-___); and *Berghuis v. Smith*, (09-___). 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. These cases evidence a pattern by the Sixth Circuit of usurping the role of the State courts by failing to properly apply AEPDA. This failure has dramatic consequences for this case, by wrongly vacating Avery's murder conviction. This Court should grant this petition.

STATEMENT OF THE CASE

Chamar Avery was charged with and convicted by a jury of second-degree murder for shooting pizza-delivery driver Jeffrey Stanka. The conviction was largely based on the eyewitness testimony of Avery's childhood friend, Jacklyn Baker. Baker testified that on the night of Stanka's murder, she heard a sound like a gunshot, looked out of her window, and observed Avery and another male emerge from Stanka's pizza delivery vehicle. Pet. App. 2a-3a.

On direct appeal, the Michigan Court of Appeals granted Avery's motion to remand for an evidentiary hearing on the issue of whether trial counsel was ineffective for failing to produce an alibi defense at trial. Avery identified three witnesses that he believed trial counsel should have called in his defense; LaVelle Crimes, Damar Crimes, and Darius Boyd. These witnesses – including purported alibi witnesses Damar Crimes and Boyd – testified at an extensive evidentiary hearing. The State trial court held that LaVelle's testimony was not just unhelpful, but was arguably inculpatory. Pet. App. 44a. Moreover, the court concluded that the purported alibi witnesses lacked credibility. Pet. App. 46a.

Witness LaVelle Crimes could not account for Avery's whereabouts at the time of the murder. Moreover, his testimony established that Avery owed him money for car repairs and that the car repair bill was paid in cash after the time the crime occurred. Pet. App. 37a. The trial court opined that trial counsel "would have been a fool" to call LaVelle Crimes as a witness because LaVelle supported a motive for the murder, i.e., the fact that Avery owed LaVelle money.

The testimony of purported alibi witness Damar Crimes was inconsistent with Avery's testimony on a fundamental point. Pet. App. 41a. Damar 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 noted also that, according to Damar's testimony, he only tried one time to get in contact with Avery's lawyer. Pet. App. 40a. It is extraordinarily unlikely, to say the least, that Damar – a self-described close friend of Avery's – would only make one attempt to give exculpatory evidence to save his friend from a murder charge.

Finally, 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. As a result, the State trial court concluded that counsel was not ineffective for failing to pursue the alibi defense and in not calling these witnesses. Pet. App. 48a

Avery filed a federal habeas petition, which the district court granted. Pet. App. 27a. The United States Court of Appeals for the Sixth Circuit affirmed, and then denied rehearing. Pet. App. 11a. Specifically, the Sixth Circuit concluded that the issue of the purported alibi witnesses's credibility was "not" a question for the reviewing court, but rather "is a task for the jury." Pet. App. 9a. Therefore, the Sixth Circuit gave no consideration to the State court's determinations that the purported alibi witnesses lacked credibility and that the testimony appeared to be manufactured. Pet. App. 9a. In essence the Sixth Circuit applied a *Cronic* standard in cases where trial counsel failed to procure alibi witnesses, "reasoning" that that the existence of

two uncalled "alibi" witness – no matter how inherently incredible – establishes prejudice because it deprived Avery of a "reasonable shot of acquittal."

REASONS FOR GRANTING THE PETITION

In *Strickland v. Washington*, this Court held that a habeas court may not grant relief based on a claim of ineffective assistance of counsel unless the State prisoner can establish *both* that trial counsel's performance was deficient and that the deficient performance prejudiced the defense.[3] This Court has defined "prejudice" as an error so serious that it calls into question the reliability of the entire trial.[4] *Strickland* makes it clear that "unless [a petitioner] makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable."[5]

But the Sixth Circuit's decision below abrogates the "prejudice" prong of *Strickland* because it forbids a State trial court from considering whether a proposed alibi witness is sufficiently credible to create a "reasonable probability" that the outcome of the trial would have been different. According to the Sixth Circuit, it does not matter how outlandish a purported alibi defense may be because it is always up to the jury to determine whether that defense is credible. Thus, under the new rule invented by the Sixth Circuit, the failure to pursue *any* alibi defense is *per se* unreasonable because it deprives the defendant of a "reasonable shot of acquittal." The result is that the Sixth Circuit has

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[3] *Strickland*, 466 U.S. at 687.

[4] *Strickland*, 466 U.S. at 687.

[5] *Strickland*, 466 U.S. at 687.

effectively abrogated *Strickland* in regard to alibi witnesses and has replaced it with a *Cronic* analysis.

Moreover, the Sixth Circuit's decision conflicts with decisions of the United States Courts of Appeals for the Fourth and Eighth Circuits holding that a proposed alibi whiteness's credibility should be considered in determining whether trial counsel was ineffective for failing to call that witness and whether the defendant was prejudiced by that failure. Also, the United States Court of Appeals for the Eleventh Circuit has held that a State court's determination of a witnesses's credibility plays an essential role in the prejudice analysis. The Sixth Circuit's newly minted rule conflicts with these other circuit courts and this Court should resolve that split.

Furthermore, the rule invented by the Sixth Circuit is not one that is "clearly established" by this Court. Therefore, the Sixth Circuit's erred in determining that the Michigan courts "unreasonably" applied *Strickland* under the AEDPA.

ARGUMENT

I. The new rule created by the Sixth Circuit is inconsistent with *Strickland*.

In *Strickland v. Washington*, this Court set forth the standard to be applied to claims of ineffective assistance of counsel. A convicted defendant claiming constitutionally ineffective assistance must establish both deficient "performance" and "prejudice" to the defense. In assessing the "performance" component, this Court held that a habeas petitioner "must show that counsel's representation fell below an objective standard

of reasonableness."[6] Turning to the "prejudice" component, "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."[7] "The defendant must show 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."[8]

In this case, the State trial court held that trial counsel was not ineffective for failing to call the alibi witnesses because their testimony was either not helpful to defendant's case or it was incredible. The trial judge who held the evidentiary hearing in State court evaluated the live, in-person testimony of the three "alibi" witnesses called by Avery and found them to be completely incredible. And on that basis, the trial judge rejected defendant's claim of ineffective assistance adding, "I can't say that this would have resulted in a different result at all . . . ." It follows, then, 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 conceivably have changed the outcome. Yet that is what the Sixth Circuit's decision not only permits, but mandates.

According to the Sixth Circuit, the credibility of proposed witnesses should "not" be determined by a

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

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

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

reviewing court. Rather, the Sixth Circuit stated that evaluating the credibility of the witnesses "is a task for the jury." In so doing, it created a new rule such that prejudice is established when trial counsel fails to call an alibi witness *no matter how lacking in credibility that witness may be* because the failure to present an alibi witness deprives a defendant of a "reasonable shot of acquittal."

The Sixth Circuit did not explain how a trial court is to assess the impact of a witness on a reasonable jury without evaluating the credibility of that witness. And that is because such an evaluation is not possible under the new rule set forth by the Sixth Circuit. Instead, under this new rule, prejudice is *presumed* in circumstances where trial counsel failed to call a witness whose credibility must be determined by a jury. The only relevant question under the Sixth Circuit's new test is whether trial counsel's actions have deprived the petitioner of a "reasonable shot of acquittal." Pet. App. 10a.

In short, the Sixth Circuit has effectively abrogated the prejudice prong of *Strickland* and has mandated relief for any habeas petitioner who makes any minimal showing that there was evidence, whether credible or not, that counsel could have pursued and presented at trial. Thus, a habeas petitioner in the Sixth Circuit need not show a reasonable probability that an alibi defense – or presumably any other defense that relies on a jury's determination of credibility – would have altered the outcome of the State trial. This rule runs afoul of this Court's statement in *Strickland* that the prejudice prong "discourages insubstantial claims by requiring more than a showing of prejudice, which could

virtually always be made, of some conceivable adverse effect on the defense."[9]

Under *Strickland*, to the contrary, the question is not whether a habeas petitioner was denied a "reasonable shot of acquittal," but rather whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

The Sixth Circuit has done exactly what this Court sought to discourage in *Strickland*. It affords defendants habeas relief based on counsel's error even if that error involves evidence of an insubstantial nature. Moreover, it usurps the trial court's role in making an assessment of the quality of that evidence. Rather, it holds that the failure to present any alibi defense, no matter how bizarre or unbelievable, is *presumed* prejudicial.[10] Thus, the Sixth Circuit has imposed the standard from *Cronic* in cases where trial counsel unreasonable fails to call an alibi witness.[11] This is in direct conflict with *Strickland*.

This new rule by the Sixth Circuit also contradicts this Court's application of *Strickland* in other circumstances where the credibility of the challenged evidence is ordinarily a matter of fact for the jury. For instance, this Court recently addressed the applicability

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[9] *Strickland v. Washington*, 466 U.S. at 690.

[10] This new rule dilutes the first prong of *Strickland* as well. A trial counsel who decides not to call purported alibi witnesses identified by his client because, in his reasonable professional judgment, they lacked credibility is arguably ineffective under the court of appeals's new rule because such a credibility determination is "always" a matter to be decided by the jury.

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

of the "prejudice" prong to the failure to pursue an insanity defense in *Knowles v. Mirzayance*.[12]

In *Mirzayance*, the defendant was charged with murder and claimed during the guilt phase of his trial that due to temporary insanity he was incapable of the premeditation or deliberation necessary to prove first-degree murder. The jury rejected the claim and convicted the defendant of first-degree murder. As a result of this rejection, trial counsel recommended to defendant that he abandon his plea of not guilty by reason of insanity before the insanity phase of the trial. The court of appeals affirmed the district court's grant of habeas relief, on the basis that there was "nothing to lose" by pursing the insanity defense and that there was a "reasonable probability" that the jury would have found defendant insane. This Court reversed the grant of habeas relief, holding that the court of appeals's "nothing to lose" standard has no basis in established United States Supreme Court precedent.

Additionally, this Court noted that the defendant failed to establish prejudice because it was "highly improbable" that a jury which rejected the defendant's temporary insanity claim during the guilt phase of his trial would accept his insanity claim during the insanity phase:

> Mirzayance has not demonstrated that he suffered prejudice from his counsel's performance. See *Strickland*, 466 U.S., at 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding

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[12] *Mirzayance*, 129 S.Ct. at 1422.

> if the error had no effect on the judgment"). To establish prejudice, "[t]he defendant must show 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." Id., at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. To prevail on his ineffective-assistance claim, Mirzayance must show, therefore, that there is a "reasonable probability" that he would have prevailed on his insanity defense had he pursued it. This Mirzayance cannot do. It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the NGI phase. See *supra*, at 12-13. [13]

In order to obtain habeas relief, a petitioner must demonstrate both that trial counsel's performance was deficient and that petitioner was prejudiced by that deficient performance. This Court has held that a petitioner suffers prejudice when "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [14] But under the Sixth Circuit's new "reasonable shot of acquittal" standard, a State trial court cannot make a factual finding whether a proposed alibi witness is

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[13] *Mirzayance*, 129 S.Ct. at 1422.

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

credible, i.e., whether their testimony would have created a reasonable possibility of a different result. This new rule is fundamentally inconsistent with *Strickland* and should not be allowed to stand. This Court should grant certiorari, reverse the Sixth Circuit, and reiterate the proper two-prong approach to ineffective assistance of counsel claims set forth under *Strickland*.

II. The Sixth Circuit's decision conflicts with other federal circuit's application of *Strickland*.

The prejudice prong of *Strickland* comports with the principle that a habeas petitioner is only entitled to relief if he is being incarcerated because of a constitutional error.[15] But the Sixth Circuit has concluded that the unreasonable failure to call an alibi witness is *per se* prejudicial, because it deprives the defendant of a "reasonable shot of acquittal." The Sixth Circuit's new rule is at odds with the holdings of the United States Courts of Appeals for the Fourth, Eighth, and Eleventh Circuits. The Fourth and Eighth Circuits have held directly that a habeas petitioner must establish that he actually suffered prejudice from his counsel's failure to pursue an alibi defense. Similarly, in the context of the failure to present an expert witness, the Eleventh Circuit has noted that the determination of a proposed witness's credibility is an important part of the prejudice analysis under *Strickland*.

The Fourth Circuit has held that the credibility of the purported alibi witnesses may be considered in determining whether there is a reasonable probability that their testimony would have altered the result of the

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[15] See *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

trial.[16] In *United States v. Olson*, the defendant claimed that his trial counsel was ineffective for failing to call an alibi witness. The purported witness testified at an evidentiary hearing following the defendant's conviction. The district court judge determined that the witness's testimony was "incredible, inconsistent, and unlikely to persuade the jury."[17] The Fourth Circuit – giving proper deference to the trial judge who had the opportunity to observe the live testimony – agreed with the district court's conclusion and held that "defendant and his appellate counsel have failed to establish that had counsel presented an alibi defense, there is a 'reasonable probability that . . . the result of the proceeding would have been different.'"[18]

Likewise, the Eighth Circuit has held that "in cases involving alleged ineffective assistance of counsel for failure to investigate an alibi defense, we have consistently required a defendant to prove actual prejudice under *Strickland*."[19] In *Freeman v. Graves*, the defendant filed a petition for a writ of habeas corpus on the basis that his State trial counsel was ineffective for failing to investigate and call alibi witnesses. The district court granted habeas relief, holding that trial counsel unreasonably failed to investigate the alibi witnesses and that prejudice should be presumed under the *Cronic* standard, just as the Sixth Circuit has here.[20] The Eighth Circuit reversed, holding that *Strickland*, not *Cronic*, governed the petitioner's ineffective assistance

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[16] *United States v. Olson*, 846 F.2d 1103, 1109 (4th Cir. 1988).

[17] *Olson*, 846 F.2d at 1109.

[18] *Olson*, 846 F.2d at 1109 (quoting *Strickland*, 466 U.S. at 694).

[19] *Freeman v. Graves*, 317 F.3d 898, 901 (8th Cir. 2003).

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

claim and, therefore, he was required by established United States Supreme Court precedent to establish that he suffered prejudice as a result of trial counsel's failure to investigate the alibi witnesses.[21] Because the petitioner did not establish what the purported alibi witnesses would have testified to, the Eighth Circuit held that he failed to demonstrate that he suffered prejudice from any error. Moreover, the court noted that "the testimony of alibi witnesses, especially friends and relatives of the defendant, does not assure an acquittal and is sometimes counterproductive."[22] This is in direct conflict with the decision of the Sixth Circuit here.

The Eleventh Circuit has recognized that the prejudice prong applies to the unreasonable failure to call an expert witness. In *Bottoson v. Moore*, the petitioner claimed that his trial counsel was ineffective for failing to present mental health evidence at the penalty phase of his trial following his conviction for murder.[23] The State courts had held on direct review that petitioner was not prejudiced by the failure to present expert testimony at the penalty phase of the trial because the evidence of his mental health problems would not outweigh or overcome the aggravating circumstances of the murder. Moreover, the State court noted that the testimony of petitioner's expert witness was contradicted by the State's expert and that the trial court had found the State's expert to be more credible.

The Eleventh Circuit held that the State courts were entitled to make such a credibility determination and that their determination was entitled to deference

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[21] *Freeman*, 317 F.3d at 900.

[22] *Freeman*, 317 F.3d at 900.

[23] *Bottoson v. Moore*, 234 F.3d 526 (11th Cir. 2000).

under 28 U.S.C. § 2254(e)(1).[24] Specifically, "[w]hen there is conflicting testimony by expert witnesses, as here, discounting the testimony of one expert constitutes a credibility determination, a finding of fact. A finding of fact made by a state court is presumed to be correct, and a habeas petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1)."[25] Thus, the determination of the credibility of an expert witness is not just permitted, but plays an essential role in the prejudice analysis. The Eleventh Circuit also made clear that the State court's determination of credibility is entitled to deference, and that the petitioner has the burden to demonstrate that such a determination was unreasonable.

But the Sixth Circuit's new rule does not allow State trial courts to determine whether evidence offered by a habeas petitioner would have actually made a difference at his trial. Even if a trial error would not have made a difference – and on that basis a petitioner cannot be said to be incarcerated because of a constitutional error – the Sixth Circuit's rule would nevertheless grant that petitioner habeas relief because he was entitled to a "reasonable shot of acquittal." This standard is wholly at odds with the application of *Strickland* by the Fourth, Eighth, and Eleventh Circuits. According to the Fourth and Eighth Circuits, even if trial counsel unreasonably failed to call an alibi witness, the habeas petitioner nevertheless must show that the alibi witnesses's testimony creates a reasonable possibility of a different outcome. Moreover, the Eleventh Circuit notes that in the context of an unreasonable failure to

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[24] *Moore*, 234 F.3d at 534.

[25] *Moore*, 234 F.3d at 534.

call an expert witness, the State trial court's determination of credibility plays an essential role in the prejudice analysis. This Court should grant certiorari to resolve this split among the circuits.

III. The new rule created by the Sixth Circuit is not derived from clearly established United States Supreme Court precedent as required by 28 U.S.C. § 2254(d).

Under AEDPA, federal courts have limited authority to grant habeas relief to a State prisoner. Where a State court has adjudicated the petitioner's claim on the merits, a federal court can only grant a writ of habeas corpus where the State's adjudication "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."[26] This Court has explained that "[a] federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule differently from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts."[27] Here, the Sixth Circuit's conclusion that the question of whether a purported alibi witness is credible is "not" a question for the State court is not based on any decision of this Court. Moreover, there is no Supreme Court precedent – established or otherwise – supporting the Sixth Circuit's creation of a "reasonable shot of acquittal" standard. As such, the plain language of AEDPA bars habeas relief under these circumstances.

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[26] 28 U.S.C. § 2254(d)(1).

[27] *Bell v. Cone*, 535 U.S. 685, 694 (2002).

As to the "unreasonable application" clause, this Court has explained that a federal habeas court may only grant relief when "the state court correctly identifies the governing legal principal from [Supreme Court] decisions but unreasonably applies it to the facts of the particular case."[28] But it is not enough for the federal court to determine that the state court got it wrong.[29] Rather, "the state court's application of clearly established federal law [must have been] objectively unreasonable."[30]

This Court has made clear on several occasions that it takes a narrow view of what constitutes clearly established law. For example, in *Wright v. Van Patten*, this Court held that "clearly established" means that the precedent cited by the habeas court must have been clearly stated by this Court.[31] In *Van Patten*, the petitioner pleaded guilty to reckless homicide. His attorney was not physically present at the plea hearing, but, rather, participated by speakerphone. The State court rejected petitioner's subsequent claim that counsel's physical absence violated the Sixth Amendment.

On habeas review, the United States Court of Appeals for the Seventh Circuit concluded that the claim should have been resolved, not under *Strickland*, but under *Cronic*. This Court ultimately reversed, explaining that its precedents had not "clearly held" that *Cronic* should apply under those circumstances:

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[28] *Bell*, 535 U.S. at 694.

[29] *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002).

[30] *Bell*, 535 U.S. at 694.

[31] *Wright v. Van Patten*, __ U.S. __; 128 S. Ct. 743, 746 (2008).

No decision of this Court, however, squarely addresses the issue in this case, see [*Van Patten v. Deppisch*, 434 F.3d 1038, 1040 (7th Cir. 2006)] (noting that this case "presents [a] novel . . . question"), or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context. Our precedents do not clearly hold that counsel's participation by speaker phone should be treated as a "complete denial of counsel," on par with total absence. Even if we agree with Van Patten that a lawyer physically present will tend to perform better than one on the phone, it does not necessarily follow that mere telephone contact amounted to total absence or "prevented [counsel] from assisting the accused," so as to entail application of *Cronic*. The question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time. Cf. *United States v. Gonzalez-Lopez*, 548 U.S. 140,___ , 126 S. Ct. 2557, 2563, 165 L. Ed. 2d 409, 418 (2006)) (Sixth Amendment ensures "*effective* (not mistake-free) representation" (emphasis in original)). Our cases provide no categorical answer to this question, and for that matter the several proceedings in this case hardly point toward one. The Wisconsin Court of Appeals held counsel's performance by speaker phone to be constitutionally effective; neither the Magistrate Judge, the District Court, nor

> the Seventh Circuit disputed this conclusion; and the Seventh Circuit itself stated that "[u]nder *Strickland*, it seems clear Van Patten would have no viable claim." *Deppisch*, 434 F.3d at 1042.
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> Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" [*Carey v. Musladin*, 549 U.S. 70; 127 S. Ct. 649, 651; (2006)] (quoting 28 U.S.C. § 2254(d)(1)). Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized.[32]

Likewise, in *Mirzayance*, this Court rejected the creation of a "nothing to lose" standard for the unreasonable failure to pursue an insanity defense.[33] In *Mirzayance*, the defendant had claimed during the guilt phase of his State trial that he was temporarily insane at the time he killed the victim and, therefore, was incapable of the premeditation or deliberation necessary to prove first-degree murder. The jury rejected the claim and convicted the defendant of first-degree murder. After the jury's verdict, trial counsel advised defendant not to pursue his not guilty by reason of insanity (NGI) defense during that phase of the trial and defendant accepted the advice. The defendant filed a petition for a writ of habeas corpus, claiming that trial counsel was ineffective for failing to pursue the insanity defense during the NGI phase of the trial. The court of appeals affirmed the district court's grant of habeas relief,

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[32] *Van Patten*, 128 S. Ct. at 746.

[33] *Mirzayance*, 129 S. Ct. at 1419.

holding that counsel was ineffective because there was "nothing to lose" by pursing the NGI claim. This Court rejected the "nothing to lose" standard, noting that it had no basis in established Supreme Court precedent:

> But this Court has held on numerous occasions that it is not "'an unreasonable application of clearly established Federal law'" for a state court to decline to apply a specific legal rule that has not been squarely established by this Court. This Court has never established anything akin to the Court of Appeals' "nothing to lose" standard for evaluating *Strickland* claims. Indeed, Mirzayance himself acknowledges that a "nothing to lose" rule is "unrecognized by this Court." And the Court of Appeals did not cite any Supreme Court decision establishing a "nothing to lose" standard in any of its three opinions in this case.[34]

With these decisions this Court has explicitly stated that "clearly established" means *clearly* established. Here, the Sixth Circuit has failed to demonstrate *any* Supreme Court precedent that stands for the proposition that a State trial court cannot consider the credibility of an alibi witness in determining whether trial counsel was ineffective for calling them. But this Court has *never* articulated a "reasonable shot of acquittal" standard for evaluating claims under *Strickland*. The Sixth Circuit did not city any Supreme Court decision establishing a "reasonable shot of acquittal" standard. This is because no such decision exists. Inasmuch as this Court has never articulated the

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[34] *Mirzayance*, 129 S. Ct. at 1419.

rule invented by the Sixth Circuit in this case, "it cannot be said that the State court 'unreasonabl[y] appli[ed] clearly established Federal law.'"[35] The action here by the Sixth Circuit also is not an isolated failure to accord a State court decision the proper deference under AEDPA. Indeed the Sixth Circuit has exhibited a clearly identifiable pattern in its failure to follow AEDPA. In this regard the State would note that it is contemporaneously seeking certiorari in three other murder cases, all published, in which it contends that the Sixth Circuit, in granting habeas relief, failed to properly apply the AEDPA standard.[36] Therefore, under the plain language of § 2254(d)(1), Avery cannot obtain habeas relief.

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[35] *Van Patten,* 128 S. Ct. 743.

[36] See *Thompkins v. Berghuis*, 547 F.3d 572 (6th Cir. 2008)(the Sixth Circuit determined that there was a violation of *Miranda* where the police continued to interview the defendant where the defendant acknowledged his rights but did not expressly waive them); *Newman v. Metrish*, 543 F.3d 793 (6th Cir. 2008)(the Sixth Circuit determined that there was insufficient evidence even though there was compelling circumstantial evidence of defendant's guilt including evidence linking him to the murder weapons); and *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008)(the Sixth Circuit adopted a new rule – the comparative disparity test – for evaluating whether there was a fair cross section of the community under the Sixth Amendment).

CONCLUSION

The Sixth Circuit's opinion is incompatible with the principles this Court set forth in *Strickland v. Washington*. The Sixth Circuit's creation of a new rule presuming prejudice in cases involving the failure to call alibi witnesses conflicts with the well-reasoned decisions of the Fourth, Eighth, and Eleventh Circuits. Moreover, the new rule created by the Sixth Circuit has no basis in Supreme Court precedent – clearly established or otherwise.

The petition for a writ of certiorari should be granted.

Respectfully submitted

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Dated: May, 2009

No. 09-_____ 0 8 1 3 8 9

In the Supreme Court of the United States

JOHN PRELESNIK, WARDEN
Petitioner,

v.

CHAMAR AVERY,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the United States Court of Appeals for the Sixth Circuit, which affirmed the grant of a habeas petition, abrogated the "prejudice" prong of *Strickland v. Washington* by holding that the issue of an alibi witness's credibility is "not" for a reviewing court, but rather is a question for the jury and, therefore, the State trial court's determination that the alibi witnesses lacked credibility was not relevant.

PARTIES TO THE PROCEEDING

Petitioner is Warden John Prelesnik of the Michigan Department of Corrections.

Respondent is Chamar Avery, a State prisoner convicted by a jury of second-degree murder.

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JURISDICTION

The Sixth Circuit entered judgment on November 25, 2008, and denied rehearing en banc on February 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY 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 grated 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.

INTRODUCTION

The issue in this case is whether a State trial court can make a finding of fact as to the credibility of a purported alibi witness when evaluating whether a defendant was prejudiced by the unreasonable failure to pursue an alibi defense.

The seminal case evaluating ineffective assistance of counsel is *Strickland v. Washington*, in which this Court held that a habeas petitioner is not entitled to relief unless he can establish both that trial counsel's performance was unreasonably deficient and that but for that deficiency, there is a "reasonable probability" the outcome of the State trial would have been different.[1] This Court has recently held in a case involving the failure to pursue an insanity defense that the question of whether the defense would have been successful is a relevant and important part of the prejudice analysis.[2]

Moreover, two circuits – the Fourth and Eighth – have specifically held that a trial court's determination of the credibility of a purported alibi witness is part of the prejudice analysis. Nevertheless, in contrast to the other circuits, the Sixth Circuit held that the question of an alibi witness's credibility was "not" for the trial court to determine. Instead, it held that such evidence must

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

[2] *Knowles v. Mirzayance*, 556 U.S. __; 129 S. Ct. 1411 (2009).

be evaluated by a jury in order to give a defendant a "reasonable shot of acquittal." Thus, if the Sixth Circuit decision is allowed to stand, the question whether a trial court can consider if a purported alibi defense is credible – and, therefore, whether the failure to present such a defense would create a "reasonable probability" of a different outcome – depends on where one resides.

The fact that the Sixth Circuit reached this decision in habeas corpus is notable, because the standard under AEDPA requires that the State court's decision on the merits be an unreasonable application of clearly established Supreme Court precedent. There is no Supreme Court precedent that has established that a State trial court cannot consider the credibility of an alibi witness in determining whether trial counsel was ineffective for calling them. Moreover, this Court has never articulated a "reasonable shot of acquittal" standard for evaluating claims under *Strickland*. It is not the role of habeas for the federal courts to adopt new standards such as the one adopted here.

The State of Michigan notes that it is filing three other petitions for certiorari contemporaneously with this petition. See *Berghuis v. Thompkins*, (09-___); *Metrish v. Newman*, (09-___); and *Berghuis v. Smith*, (09-___). 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. These cases evidence a pattern by the Sixth Circuit of usurping the role of the State courts by failing to properly apply AEPDA. This failure has dramatic consequences for this case, by wrongly vacating Avery's murder conviction. This Court should grant this petition.

STATEMENT OF THE CASE

Chamar Avery was charged with and convicted by a jury of second-degree murder for shooting pizza-delivery driver Jeffrey Stanka. The conviction was largely based on the eyewitness testimony of Avery's childhood friend, Jacklyn Baker. Baker testified that on the night of Stanka's murder, she heard a sound like a gunshot, looked out of her window, and observed Avery and another male emerge from Stanka's pizza delivery vehicle. Pet. App. 2a-3a.

On direct appeal, the Michigan Court of Appeals granted Avery's motion to remand for an evidentiary hearing on the issue of whether trial counsel was ineffective for failing to produce an alibi defense at trial. Avery identified three witnesses that he believed trial counsel should have called in his defense; LaVelle Crimes, Damar Crimes, and Darius Boyd. These witnesses – including purported alibi witnesses Damar Crimes and Boyd – testified at an extensive evidentiary hearing. The State trial court held that LaVelle's testimony was not just unhelpful, but was arguably inculpatory. Pet. App. 44a. Moreover, the court concluded that the purported alibi witnesses lacked credibility. Pet. App. 46a.

Witness LaVelle Crimes could not account for Avery's whereabouts at the time of the murder. Moreover, his testimony established that Avery owed him money for car repairs and that the car repair bill was paid in cash after the time the crime occurred. Pet. App. 37a. The trial court opined that trial counsel "would have been a fool" to call LaVelle Crimes as a witness because LaVelle supported a motive for the murder, i.e., the fact that Avery owed LaVelle money.

The testimony of purported alibi witness Damar Crimes was inconsistent with Avery's testimony on a fundamental point. Pet. App. 41a. Damar 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 noted also that, according to Damar's testimony, he only tried one time to get in contact with Avery's lawyer. Pet. App. 40a. It is extraordinarily unlikely, to say the least, that Damar – a self-described close friend of Avery's – would only make one attempt to give exculpatory evidence to save his friend from a murder charge.

Finally, 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. As a result, the State trial court concluded that counsel was not ineffective for failing to pursue the alibi defense and in not calling these witnesses. Pet. App. 48a

Avery filed a federal habeas petition, which the district court granted. Pet. App. 27a. The United States Court of Appeals for the Sixth Circuit affirmed, and then denied rehearing. Pet. App. 11a. Specifically, the Sixth Circuit concluded that the issue of the purported alibi witnesses's credibility was "not" a question for the reviewing court, but rather "is a task for the jury." Pet. App. 9a. Therefore, the Sixth Circuit gave no consideration to the State court's determinations that the purported alibi witnesses lacked credibility and that the testimony appeared to be manufactured. Pet. App. 9a. In essence the Sixth Circuit applied a *Cronic* standard in cases where trial counsel failed to procure alibi witnesses, "reasoning" that that the existence of

two uncalled "alibi" witness – no matter how inherently incredible – establishes prejudice because it deprived Avery of a "reasonable shot of acquittal."

REASONS FOR GRANTING THE PETITION

In *Strickland v. Washington*, this Court held that a habeas court may not grant relief based on a claim of ineffective assistance of counsel unless the State prisoner can establish *both* that trial counsel's performance was deficient and that the deficient performance prejudiced the defense.[3] This Court has defined "prejudice" as an error so serious that it calls into question the reliability of the entire trial.[4] *Strickland* makes it clear that "unless [a petitioner] makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable."[5]

But the Sixth Circuit's decision below abrogates the "prejudice" prong of *Strickland* because it forbids a State trial court from considering whether a proposed alibi witness is sufficiently credible to create a "reasonable probability" that the outcome of the trial would have been different. According to the Sixth Circuit, it does not matter how outlandish a purported alibi defense may be because it is always up to the jury to determine whether that defense is credible. Thus, under the new rule invented by the Sixth Circuit, the failure to pursue *any* alibi defense is *per se* unreasonable because it deprives the defendant of a "reasonable shot of acquittal." The result is that the Sixth Circuit has

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[3] *Strickland*, 466 U.S. at 687.

[4] *Strickland*, 466 U.S. at 687.

[5] *Strickland*, 466 U.S. at 687.

effectively abrogated *Strickland* in regard to alibi witnesses and has replaced it with a *Cronic* analysis.

Moreover, the Sixth Circuit's decision conflicts with decisions of the United States Courts of Appeals for the Fourth and Eighth Circuits holding that a proposed alibi whiteness's credibility should be considered in determining whether trial counsel was ineffective for failing to call that witness and whether the defendant was prejudiced by that failure. Also, the United States Court of Appeals for the Eleventh Circuit has held that a State court's determination of a witnesses's credibility plays an essential role in the prejudice analysis. The Sixth Circuit's newly minted rule conflicts with these other circuit courts and this Court should resolve that split.

Furthermore, the rule invented by the Sixth Circuit is not one that is "clearly established" by this Court. Therefore, the Sixth Circuit's erred in determining that the Michigan courts "unreasonably" applied *Strickland* under the AEDPA.

ARGUMENT

I. The new rule created by the Sixth Circuit is inconsistent with *Strickland*.

In *Strickland v. Washington*, this Court set forth the standard to be applied to claims of ineffective assistance of counsel. A convicted defendant claiming constitutionally ineffective assistance must establish both deficient "performance" and "prejudice" to the defense. In assessing the "performance" component, this Court held that a habeas petitioner "must show that counsel's representation fell below an objective standard

of reasonableness."[6] Turning to the "prejudice" component, "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."[7] "The defendant must show 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."[8]

In this case, the State trial court held that trial counsel was not ineffective for failing to call the alibi witnesses because their testimony was either not helpful to defendant's case or it was incredible. The trial judge who held the evidentiary hearing in State court evaluated the live, in-person testimony of the three "alibi" witnesses called by Avery and found them to be completely incredible. And on that basis, the trial judge rejected defendant's claim of ineffective assistance adding, "I can't say that this would have resulted in a different result at all . . . ." It follows, then, 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 conceivably have changed the outcome. Yet that is what the Sixth Circuit's decision not only permits, but mandates.

According to the Sixth Circuit, the credibility of proposed witnesses should "not" be determined by a

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

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

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

reviewing court. Rather, the Sixth Circuit stated that evaluating the credibility of the witnesses "is a task for the jury." In so doing, it created a new rule such that prejudice is established when trial counsel fails to call an alibi witness *no matter how lacking in credibility that witness may be* because the failure to present an alibi witness deprives a defendant of a "reasonable shot of acquittal."

The Sixth Circuit did not explain how a trial court is to assess the impact of a witness on a reasonable jury without evaluating the credibility of that witness. And that is because such an evaluation is not possible under the new rule set forth by the Sixth Circuit. Instead, under this new rule, prejudice is *presumed* in circumstances where trial counsel failed to call a witness whose credibility must be determined by a jury. The only relevant question under the Sixth Circuit's new test is whether trial counsel's actions have deprived the petitioner of a "reasonable shot of acquittal." Pet. App. 10a.

In short, the Sixth Circuit has effectively abrogated the prejudice prong of *Strickland* and has mandated relief for any habeas petitioner who makes any minimal showing that there was evidence, whether credible or not, that counsel could have pursued and presented at trial. Thus, a habeas petitioner in the Sixth Circuit need not show a reasonable probability that an alibi defense – or presumably any other defense that relies on a jury's determination of credibility – would have altered the outcome of the State trial. This rule runs afoul of this Court's statement in *Strickland* that the prejudice prong "discourages insubstantial claims by requiring more than a showing of prejudice, which could

virtually always be made, of some conceivable adverse effect on the defense."[9]

Under *Strickland*, to the contrary, the question is not whether a habeas petitioner was denied a "reasonable shot of acquittal," but rather whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

The Sixth Circuit has done exactly what this Court sought to discourage in *Strickland*. It affords defendants habeas relief based on counsel's error even if that error involves evidence of an insubstantial nature. Moreover, it usurps the trial court's role in making an assessment of the quality of that evidence. Rather, it holds that the failure to present any alibi defense, no matter how bizarre or unbelievable, is *presumed* prejudicial.[10] Thus, the Sixth Circuit has imposed the standard from *Cronic* in cases where trial counsel unreasonable fails to call an alibi witness.[11] This is in direct conflict with *Strickland*.

This new rule by the Sixth Circuit also contradicts this Court's application of *Strickland* in other circumstances where the credibility of the challenged evidence is ordinarily a matter of fact for the jury. For instance, this Court recently addressed the applicability

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[9] *Strickland v. Washington*, 466 U.S. at 690.

[10] This new rule dilutes the first prong of *Strickland* as well. A trial counsel who decides not to call purported alibi witnesses identified by his client because, in his reasonable professional judgment, they lacked credibility is arguably ineffective under the court of appeals's new rule because such a credibility determination is "always" a matter to be decided by the jury.

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

of the "prejudice" prong to the failure to pursue an insanity defense in *Knowles v. Mirzayance*.[12]

In *Mirzayance*, the defendant was charged with murder and claimed during the guilt phase of his trial that due to temporary insanity he was incapable of the premeditation or deliberation necessary to prove first-degree murder. The jury rejected the claim and convicted the defendant of first-degree murder. As a result of this rejection, trial counsel recommended to defendant that he abandon his plea of not guilty by reason of insanity before the insanity phase of the trial. The court of appeals affirmed the district court's grant of habeas relief, on the basis that there was "nothing to lose" by pursing the insanity defense and that there was a "reasonable probability" that the jury would have found defendant insane. This Court reversed the grant of habeas relief, holding that the court of appeals's "nothing to lose" standard has no basis in established United States Supreme Court precedent.

Additionally, this Court noted that the defendant failed to establish prejudice because it was "highly improbable" that a jury which rejected the defendant's temporary insanity claim during the guilt phase of his trial would accept his insanity claim during the insanity phase:

> Mirzayance has not demonstrated that he suffered prejudice from his counsel's performance. See *Strickland*, 466 U.S., at 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding

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[12] *Mirzayance*, 129 S.Ct. at 1422.

> if the error had no effect on the judgment"). To establish prejudice, "[t]he defendant must show 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." Id., at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. To prevail on his ineffective-assistance claim, Mirzayance must show, therefore, that there is a "reasonable probability" that he would have prevailed on his insanity defense had he pursued it. This Mirzayance cannot do. It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the NGI phase. See *supra*, at 12-13. [13]

In order to obtain habeas relief, a petitioner must demonstrate both that trial counsel's performance was deficient and that petitioner was prejudiced by that deficient performance. This Court has held that a petitioner suffers prejudice when "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [14] But under the Sixth Circuit's new "reasonable shot of acquittal" standard, a State trial court cannot make a factual finding whether a proposed alibi witness is

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[13] *Mirzayance*, 129 S.Ct. at 1422.

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

credible, i.e., whether their testimony would have created a reasonable possibility of a different result. This new rule is fundamentally inconsistent with *Strickland* and should not be allowed to stand. This Court should grant certiorari, reverse the Sixth Circuit, and reiterate the proper two-prong approach to ineffective assistance of counsel claims set forth under *Strickland*.

II. The Sixth Circuit's decision conflicts with other federal circuit's application of *Strickland*.

The prejudice prong of *Strickland* comports with the principle that a habeas petitioner is only entitled to relief if he is being incarcerated because of a constitutional error.[15] But the Sixth Circuit has concluded that the unreasonable failure to call an alibi witness is *per se* prejudicial, because it deprives the defendant of a "reasonable shot of acquittal." The Sixth Circuit's new rule is at odds with the holdings of the United States Courts of Appeals for the Fourth, Eighth, and Eleventh Circuits. The Fourth and Eighth Circuits have held directly that a habeas petitioner must establish that he actually suffered prejudice from his counsel's failure to pursue an alibi defense. Similarly, in the context of the failure to present an expert witness, the Eleventh Circuit has noted that the determination of a proposed witness's credibility is an important part of the prejudice analysis under *Strickland*.

The Fourth Circuit has held that the credibility of the purported alibi witnesses may be considered in determining whether there is a reasonable probability that their testimony would have altered the result of the

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[15] See *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

trial.[16] In *United States v. Olson*, the defendant claimed that his trial counsel was ineffective for failing to call an alibi witness. The purported witness testified at an evidentiary hearing following the defendant's conviction. The district court judge determined that the witness's testimony was "incredible, inconsistent, and unlikely to persuade the jury."[17] The Fourth Circuit – giving proper deference to the trial judge who had the opportunity to observe the live testimony – agreed with the district court's conclusion and held that "defendant and his appellate counsel have failed to establish that had counsel presented an alibi defense, there is a 'reasonable probability that . . . the result of the proceeding would have been different.'"[18]

Likewise, the Eighth Circuit has held that "in cases involving alleged ineffective assistance of counsel for failure to investigate an alibi defense, we have consistently required a defendant to prove actual prejudice under *Strickland*."[19] In *Freeman v. Graves*, the defendant filed a petition for a writ of habeas corpus on the basis that his State trial counsel was ineffective for failing to investigate and call alibi witnesses. The district court granted habeas relief, holding that trial counsel unreasonably failed to investigate the alibi witnesses and that prejudice should be presumed under the *Cronic* standard, just as the Sixth Circuit has here.[20] The Eighth Circuit reversed, holding that *Strickland*, not *Cronic*, governed the petitioner's ineffective assistance

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[16] *United States v. Olson*, 846 F.2d 1103, 1109 (4th Cir. 1988).

[17] *Olson*, 846 F.2d at 1109.

[18] *Olson*, 846 F.2d at 1109 (quoting *Strickland*, 466 U.S. at 694).

[19] *Freeman v. Graves*, 317 F.3d 898, 901 (8th Cir. 2003).

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

claim and, therefore, he was required by established United States Supreme Court precedent to establish that he suffered prejudice as a result of trial counsel's failure to investigate the alibi witnesses.[21] Because the petitioner did not establish what the purported alibi witnesses would have testified to, the Eighth Circuit held that he failed to demonstrate that he suffered prejudice from any error. Moreover, the court noted that "the testimony of alibi witnesses, especially friends and relatives of the defendant, does not assure an acquittal and is sometimes counterproductive."[22] This is in direct conflict with the decision of the Sixth Circuit here.

The Eleventh Circuit has recognized that the prejudice prong applies to the unreasonable failure to call an expert witness. In *Bottoson v. Moore*, the petitioner claimed that his trial counsel was ineffective for failing to present mental health evidence at the penalty phase of his trial following his conviction for murder.[23] The State courts had held on direct review that petitioner was not prejudiced by the failure to present expert testimony at the penalty phase of the trial because the evidence of his mental health problems would not outweigh or overcome the aggravating circumstances of the murder. Moreover, the State court noted that the testimony of petitioner's expert witness was contradicted by the State's expert and that the trial court had found the State's expert to be more credible.

The Eleventh Circuit held that the State courts were entitled to make such a credibility determination and that their determination was entitled to deference

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[21] *Freeman*, 317 F.3d at 900.

[22] *Freeman*, 317 F.3d at 900.

[23] *Bottoson v. Moore*, 234 F.3d 526 (11th Cir. 2000).

under 28 U.S.C. § 2254(e)(1).[24] Specifically, "[w]hen there is conflicting testimony by expert witnesses, as here, discounting the testimony of one expert constitutes a credibility determination, a finding of fact. A finding of fact made by a state court is presumed to be correct, and a habeas petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1)."[25] Thus, the determination of the credibility of an expert witness is not just permitted, but plays an essential role in the prejudice analysis. The Eleventh Circuit also made clear that the State court's determination of credibility is entitled to deference, and that the petitioner has the burden to demonstrate that such a determination was unreasonable.

But the Sixth Circuit's new rule does not allow State trial courts to determine whether evidence offered by a habeas petitioner would have actually made a difference at his trial. Even if a trial error would not have made a difference – and on that basis a petitioner cannot be said to be incarcerated because of a constitutional error – the Sixth Circuit's rule would nevertheless grant that petitioner habeas relief because he was entitled to a "reasonable shot of acquittal." This standard is wholly at odds with the application of *Strickland* by the Fourth, Eighth, and Eleventh Circuits. According to the Fourth and Eighth Circuits, even if trial counsel unreasonably failed to call an alibi witness, the habeas petitioner nevertheless must show that the alibi witnesses's testimony creates a reasonable possibility of a different outcome. Moreover, the Eleventh Circuit notes that in the context of an unreasonable failure to

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[24] *Moore*, 234 F.3d at 534.

[25] *Moore,* 234 F.3d at 534.

call an expert witness, the State trial court's determination of credibility plays an essential role in the prejudice analysis. This Court should grant certiorari to resolve this split among the circuits.

III. The new rule created by the Sixth Circuit is not derived from clearly established United States Supreme Court precedent as required by 28 U.S.C. § 2254(d).

Under AEDPA, federal courts have limited authority to grant habeas relief to a State prisoner. Where a State court has adjudicated the petitioner's claim on the merits, a federal court can only grant a writ of habeas corpus where the State's adjudication "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."[26] This Court has explained that "[a] federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule differently from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts."[27] Here, the Sixth Circuit's conclusion that the question of whether a purported alibi witness is credible is "not" a question for the State court is not based on any decision of this Court. Moreover, there is no Supreme Court precedent – established or otherwise – supporting the Sixth Circuit's creation of a "reasonable shot of acquittal" standard. As such, the plain language of AEDPA bars habeas relief under these circumstances.

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[26] 28 U.S.C. § 2254(d)(1).

[27] *Bell v. Cone*, 535 U.S. 685, 694 (2002).

As to the "unreasonable application" clause, this Court has explained that a federal habeas court may only grant relief when "the state court correctly identifies the governing legal principal from [Supreme Court] decisions but unreasonably applies it to the facts of the particular case."[28] But it is not enough for the federal court to determine that the state court got it wrong.[29] Rather, "the state court's application of clearly established federal law [must have been] objectively unreasonable."[30]

This Court has made clear on several occasions that it takes a narrow view of what constitutes clearly established law. For example, in *Wright v. Van Patten*, this Court held that "clearly established" means that the precedent cited by the habeas court must have been clearly stated by this Court.[31] In *Van Patten*, the petitioner pleaded guilty to reckless homicide. His attorney was not physically present at the plea hearing, but, rather, participated by speakerphone. The State court rejected petitioner's subsequent claim that counsel's physical absence violated the Sixth Amendment.

On habeas review, the United States Court of Appeals for the Seventh Circuit concluded that the claim should have been resolved, not under *Strickland*, but under *Cronic*. This Court ultimately reversed, explaining that its precedents had not "clearly held" that *Cronic* should apply under those circumstances:

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[28] *Bell*, 535 U.S. at 694.

[29] *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002).

[30] *Bell*, 535 U.S. at 694.

[31] *Wright v. Van Patten*, __ U.S. __; 128 S. Ct. 743, 746 (2008).

No decision of this Court, however, squarely addresses the issue in this case, see [*Van Patten v. Deppisch*, 434 F.3d 1038, 1040 (7th Cir. 2006)] (noting that this case "presents [a] novel . . . question"), or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context. Our precedents do not clearly hold that counsel's participation by speaker phone should be treated as a "complete denial of counsel," on par with total absence. Even if we agree with Van Patten that a lawyer physically present will tend to perform better than one on the phone, it does not necessarily follow that mere telephone contact amounted to total absence or "prevented [counsel] from assisting the accused," so as to entail application of *Cronic*. The question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time. Cf. *United States v. Gonzalez-Lopez*, 548 U.S. 140,___ , 126 S. Ct. 2557, 2563, 165 L. Ed. 2d 409, 418 (2006)) (Sixth Amendment ensures "*effective* (not mistake-free) representation" (emphasis in original)). Our cases provide no categorical answer to this question, and for that matter the several proceedings in this case hardly point toward one. The Wisconsin Court of Appeals held counsel's performance by speaker phone to be constitutionally effective; neither the Magistrate Judge, the District Court, nor

> the Seventh Circuit disputed this conclusion; and the Seventh Circuit itself stated that "[u]nder *Strickland*, it seems clear Van Patten would have no viable claim." *Deppisch*, 434 F.3d at 1042.
>
> Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" [*Carey v. Musladin*, 549 U.S. 70; 127 S. Ct. 649, 651; (2006)] (quoting 28 U.S.C. § 2254(d)(1)). Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized.[32]

Likewise, in *Mirzayance*, this Court rejected the creation of a "nothing to lose" standard for the unreasonable failure to pursue an insanity defense.[33] In *Mirzayance*, the defendant had claimed during the guilt phase of his State trial that he was temporarily insane at the time he killed the victim and, therefore, was incapable of the premeditation or deliberation necessary to prove first-degree murder. The jury rejected the claim and convicted the defendant of first-degree murder. After the jury's verdict, trial counsel advised defendant not to pursue his not guilty by reason of insanity (NGI) defense during that phase of the trial and defendant accepted the advice. The defendant filed a petition for a writ of habeas corpus, claiming that trial counsel was ineffective for failing to pursue the insanity defense during the NGI phase of the trial. The court of appeals affirmed the district court's grant of habeas relief,

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[32] *Van Patten*, 128 S. Ct. at 746.

[33] *Mirzayance*, 129 S. Ct. at 1419.

holding that counsel was ineffective because there was "nothing to lose" by pursing the NGI claim. This Court rejected the "nothing to lose" standard, noting that it had no basis in established Supreme Court precedent:

> But this Court has held on numerous occasions that it is not "'an unreasonable application of clearly established Federal law'" for a state court to decline to apply a specific legal rule that has not been squarely established by this Court. This Court has never established anything akin to the Court of Appeals' "nothing to lose" standard for evaluating *Strickland* claims. Indeed, Mirzayance himself acknowledges that a "nothing to lose" rule is "unrecognized by this Court." And the Court of Appeals did not cite any Supreme Court decision establishing a "nothing to lose" standard in any of its three opinions in this case.[34]

With these decisions this Court has explicitly stated that "clearly established" means *clearly* established. Here, the Sixth Circuit has failed to demonstrate *any* Supreme Court precedent that stands for the proposition that a State trial court cannot consider the credibility of an alibi witness in determining whether trial counsel was ineffective for calling them. But this Court has *never* articulated a "reasonable shot of acquittal" standard for evaluating claims under *Strickland*. The Sixth Circuit did not city any Supreme Court decision establishing a "reasonable shot of acquittal" standard. This is because no such decision exists. Inasmuch as this Court has never articulated the

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[34] *Mirzayance*, 129 S. Ct. at 1419.

rule invented by the Sixth Circuit in this case, "it cannot be said that the State court 'unreasonabl[y] appli[ed] clearly established Federal law.'"[35] The action here by the Sixth Circuit also is not an isolated failure to accord a State court decision the proper deference under AEDPA. Indeed the Sixth Circuit has exhibited a clearly identifiable pattern in its failure to follow AEDPA. In this regard the State would note that it is contemporaneously seeking certiorari in three other murder cases, all published, in which it contends that the Sixth Circuit, in granting habeas relief, failed to properly apply the AEDPA standard.[36] Therefore, under the plain language of § 2254(d)(1), Avery cannot obtain habeas relief.

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[35] *Van Patten,* 128 S. Ct. 743.

[36] See *Thompkins v. Berghuis*, 547 F.3d 572 (6th Cir. 2008)(the Sixth Circuit determined that there was a violation of *Miranda* where the police continued to interview the defendant where the defendant acknowledged his rights but did not expressly waive them); *Newman v. Metrish*, 543 F.3d 793 (6th Cir. 2008)(the Sixth Circuit determined that there was insufficient evidence even though there was compelling circumstantial evidence of defendant's guilt including evidence linking him to the murder weapons); and *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008)(the Sixth Circuit adopted a new rule – the comparative disparity test – for evaluating whether there was a fair cross section of the community under the Sixth Amendment).

CONCLUSION

The Sixth Circuit's opinion is incompatible with the principles this Court set forth in *Strickland v. Washington*. The Sixth Circuit's creation of a new rule presuming prejudice in cases involving the failure to call alibi witnesses conflicts with the well-reasoned decisions of the Fourth, Eighth, and Eleventh Circuits. Moreover, the new rule created by the Sixth Circuit has no basis in Supreme Court precedent – clearly established or otherwise.

The petition for a writ of certiorari should be granted.

Respectfully submitted

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