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QUESTION PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT CORRECTLY CITED AND APPLIED FEDERAL LAW AS DETERMINED BY THIS COURT, CORRECTLY APPLIED THE "PREJUDICE" PRONG OF *STRICKLAND V WASHINGTON*, AND DID NOT STATE A NEW STANDARD OF REVIEW.

TABLE OF AUTHORITIES

CASES

COUNTERSTATEMENT OF THE CASE

The Sixth Circuit Court of Appeals applied the relevant United States Supreme Court precedent, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and found that Respondent Avery was denied his right to effective assistance of counsel at trial. *Avery v. Prelesnik*, 548 F.3d 434 (6th Cir. 2008) (rehearing and rehearing *en banc* denied with no votes, 2-9-09). (At a post conviction hearing, it was revealed that trial counsel had failed to investigate or interview two potential alibi witnesses.[1]) Petitioner does not dispute this finding, nor does Petitioner dispute the Sixth Circuit's conclusion that the Michigan Court of Appeals unreasonably applied *Strickland* in finding no ineffective assistance of counsel. Respondent takes issue only with the Sixth Circuit's finding with regard to the prejudice prong of the *Strickland* test, and claims that a trial judge's finding with regard to an alibi witness's credibility is unreviewable and binding on the federal Circuit Court.

Contrary to Petitioner's claims, the Sixth Circuit in this case did not find that a trial court is not allowed to evaluate witness credibility in determining whether the accused was prejudiced by counsel's errors. Like the Fourth and Eighth Circuits, the Sixth Circuit in the instant case recognized that a trial court's determination of the credibility of a purported alibi witness is part of the prejudice analysis.[2] However, the Sixth Circuit went on to find that the trial court failed to seriously engage in a complete *Strickland* prejudice analysis, which requires a court to consider the totality of the evidence before the judge or jury. *Strickland* at 695. Therefore, Respondent's only real complaint is with the result. Because the result is solidly grounded in well-established federal law as determined by this Court, there is no basis for granting Petitioner's writ.

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[1] Damar Crimes and Darius Boyd testified at the hearing and were consistent in their testimony that Chamar Avery was with them, at Crimes Towing and at the home of Darius Boyd, between 6:00 p.m. and 9:30 p.m.; the crime occurred between 7:30 p.m. and 8:00 p.m.

[2] "We do not denigrate the role of the factfinder in judging credibility…" *Avery* at 439.

INTRODUCTION

The Petition should be denied because the Sixth Circuit meticulously followed *Strickland v. Washington*, 466 U.S. 668 (1984), it did not create any "new rule," the decision does not present a conflict with any other federal circuit, the case is fact-specific and does not involve any important constitutional question in controversy, and the decision is not erroneous.

ARGUMENT

I. and III.

THE SIXTH CIRCUIT DID NOT CREATE ANY "NEW RULE" INCONSISTENT WITH *STRICKLAND*; THE SIXTH CIRCUIT FOLLOWED THE RULE OF *STRICKLAND* AND THEREFORE THE RULE FOLLOWED BY THE SIXTH CIRCUIT WAS DERIVED FROM CLEARLY ESTABLISHED UNITED STATES SUPREME COURT PRECEDENT AS REQUIRED BY 28 USC 2254(D).

Petitioner does not challenge the finding of the district court or the Sixth Circuit Court of Appeals that Respondent Avery was denied his constitutional right to effective assistance of counsel. Petitioner only alleges, regarding the prejudice prong, that the Sixth Circuit Court of Appeals created a "new rule" that "prejudice is presumed" every time a defendant has an alibi witness, "no matter how bizarre or unbelievable," who was not called at trial. The Sixth Circuit did no such thing. The Court cited and applied the two-part analysis established by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and found, correctly, that trial counsel was ineffective and that Respondent was prejudiced. The Sixth Circuit did not, as Petitioner argues, use the standard of *United States v. Cronic*, 466 U.S. 648 (1984) (the Court never even mentioned *Cronic*) or any manufactured standard. The Sixth Circuit reviewed and considered

the trial judge's findings and the findings of the Court of Appeals with regard to ineffective assistance and prejudice, and determined that the state courts *unreasonably*, not merely incorrectly, applied United States Supreme Court precedent. Specifically, the Court stated:

> "Under the Antiterrorism and Effective Death Penalty Act of 1996, a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that: (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d).
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> "[T]he habeas petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct.
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> "Claims of ineffective assistance of counsel have two parts: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687(1984)). The Supreme Court assesses performance using an objective standard of reasonableness and prevailing professional norms. *Strickland*, 466 U.S. at 688. Prejudice occurs when there is a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different. *Id*. at 694." *Avery v. Prelesnik*, *supra* at 436-437 (Petition, pp. 4a-5a).

In rejecting the trial judge's "finding" with regard to prejudice,[3] the Sixth Circuit determined that, primarily because the trial court found (before hearing the alibi witnesses testify) that counsel was not ineffective, it did not make any serious, reasoned analysis

[3] Contrary to Petitioner's allegation, the trial judge did not find *both* witnesses "totally incredible." (See fn. 6). The judge pointed out the inconsistency between Crimes' and Avery's recollection of the precise time that Avery brought his car in for repairs, but never said Crimes was incredible. And this inconsistency did not involve the alibi (the whereabouts of Avery at the time of the shooting).

concerning prejudice[4] - which, again, the Sixth Circuit recognized as the second prong of *Strickland*:

> "To satisfy *Strickland's* prejudice prong, Avery must demonstrate that with effective assistance of counsel, the result of his trial would have been different with a probability sufficient to undermine the confidence in the outcome. 466 U.S. at 694. He must show a reasonable probability that absent his trial attorney's errors, the factfinder would have had a reasonable doubt respecting guilt. *Id*. at 695. [5]
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> "Though the judge presiding over the hearing observed, 'I can't say that this would have resulted in a different result at all,' **we do not find in the record evidence that the trial court seriously engaged in a complete *Strickland* prejudice analysis, which requires a court to consider the totality of the evidence before the judge or jury**. (Emphasis added).
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> "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.** (Emphasis added).
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> Moreover, *Strickland* instructs that a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. *Id.* Thus, the availability of willing alibi witnesses must also be considered in light

[4] The Sixth Circuit opinion also reveals that the trial judge's subjective "finding" was not based on a reasonable assessment of the facts (the testimony of the alibi witnesses was not inconsistent in any *significant* way).

[5] In rejecting the outcome-determinative standard and adopting the current standard, the *Strickland* Court stated, "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id*. at 694.

> of the otherwise flimsy evidence supporting Avery's conviction. *See Strickland*, 466 U.S. at 696." *Avery v. Prelesnik, supra* at 438- 439 (Petition, pp. 8a-9a).

Although the Court correctly stated that witness credibility *on the issue of guilt or innocence* is a matter for the jury,[6] the Sixth Circuit did *not* hold that the state trial court "cannot consider the credibility of an alibi witness in determining whether trial counsel was ineffective." (Petition, p. 21). The Sixth Circuit merely found that the trial court failed to properly analyze the essential issue of prejudice by failing to consider the totality of the evidence (therefore its decision was unreasonable)[7], that the Michigan Court of Appeals did not address the issue at all, and that Respondent was prejudiced by trial counsel's ineffectiveness.

In making the latter finding, the Sixth Circuit again applied the correct United States Supreme Court precedent. The Court found:

> To satisfy *Strickland's* prejudice prong, Avery must demonstrate that with effective assistance of counsel, the result of his trial would have been different with a probability sufficient to undermine the confidence in the outcome. 466 U.S. at 694. He must show a reasonable probability that absent his trial attorneys' errors, the factfinder would have had a reasonable doubt respecting guilt. *Id* at 695.
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> In sum, we agree with the district court's conclusion that potential alibi witnesses coupled with an otherwise weak case renders the failure to investigate the testimony sufficient to undermine confidence in the outcome of the jury verdict. We do not ask whether Avery was ultimately innocent, but, rather, whether he was deprived a reasonable shot of acquittal. Here, the jury was deprived of the

[6] A proper consideration when determining the reasonable likelihood of a different result: a "reasonable probability" does not mean a certainty, or even a preponderant likelihood, of a different outcome, nor that no rational juror could constitutionally find the defendant guilty. *Strickland v. Washington at 694.*

[7] *The Sixth Circuit correctly recognized that the credibility of one out of three alibi witnesses (Damar Crimes*, Darius Boyd, and Chamar Avery) was not the *sole* factor in determining prejudice. And the trial court's determination of credibility, while relevant, is not *binding* on the reviewing court.

> right to hear testimony that could have supplied such reasonable doubt.
>
> Because the Michigan Court of Appeals's application of *Strickland* standard was unreasonable, we AFFIRM the district court's grant of Avery's petition for a writ of habeas corpus." *Avery v. Prelesnik*, *supra* at 438-439 (Petition, pp. 8a-10a).

The observation that Respondent never got a "reasonable shot of acquittal" was not the statement of a "new rule." It was an observation. The Sixth Circuit Court of Appeals followed *Strickland* to the letter in finding that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different sufficient to undermine confidence in the outcome.

The decision by the Sixth Circuit does not contradict this Court's application of *Strickland* in *Knowles v. Mirzayance*, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009), in any way. In applying *Strickland* and reversing the Ninth Circuit Court of Appeals' holding that trial counsel was ineffective, this Court in *Mirzayance* found that abandoning the insanity plea was reasonable trial strategy. Petitioner in the instant case does not dispute the finding that trial counsel was ineffective. The *Strickland* prejudice test was applied in *Mirzayance*, just as it was in this case by the Sixth Circuit. However, the Court in *Mirzayance* concluded that it was highly improbable that the jury would accept a defense *it had just rejected*. In the instant case, the Sixth Circuit followed the *Strickland* test in finding that Respondent demonstrated a reasonable probability that the result would have been different. The Sixth Circuit did not apply a different test than this Court applied in *Mirzayance*. Again, there was no "new rule." The different *results* do not demonstrate a conflict in the *law* that was applied.

In fact, it is the Petitioner who is advocating a new rule: that a trial court's subjective finding on witness credibility is *unreviewable*. Petitioner argues that it follows from the trial

judge's subjective opinion (that one of Respondent's alibi witnesses was "completely incredible"[8]) 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." (Petition, p. 8, emphasis added). Petitioner is seeking a "new rule" that the trial judge's opinion on witness credibility, however unsupported, is, without more, a finding of "no prejudice" that is infallible and cannot be reviewed by the state appellate courts, the federal appellate courts, or this Court. This position, of course, is wholly inconsistent with clearly established federal law. (Neither the performance nor the prejudice components of the ineffectiveness inquiry in a state court are findings of fact binding on the federal court. *Strickland*, *supra*, at 698.)

It should be noted that the trial judge who heard the post-conviction hearing was not the judge who heard the trial, and that she tried to circumvent the Michigan Court of Appeals' order to conduct an evidentiary hearing. She informed counsel that she had no obligation to conduct a hearing, she found that trial counsel provided effective assistance without hearing the alibi witnesses' testimony, and indicated that this determination would not be affected by the witnesses who she reluctantly allowed to make a record. The judge said:

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[8] The trial judge never actually said that Mr. Boyd was "completely incredible," only that it was "totally incredible" that he could remember the events of the day but not the exact date, and the trial judge had no support or theory for why his testimony might be "manufactured." The judge said:

> "I understand that argument [that the date would be inferred from the fact that Mr. Avery only went to Darius Boyd's house one time with Damar Crimes], but again as the fact finder, I have to wonder just how much he remembers, if he can remember the times, the exact times of the occurrences on two different time frames when he can't even remember the day and initially didn't even remember the season until he was basically prompted, until I stepped in. So I find that to be totally incredible and what it suggests to me is a manufacturing of testimony." (Hearing of 11-2-09, p. 60).

Actually, contrary to the judge's finding, the witness *did* remember the season: he testified (with no help from the judge) that the event occurred in the winter of 2000, about two weeks after the New Year. *Id.*, 7, 10.

> And let me just make my position clear. My position is that there hasn't been the foundational requirement established to even have this hearing. That's my position and I'll make that very clear in my ruling because my position further is that the Court of Appeals did not order me, as I indicated to you this morning, to have an Evidentiary Hearing**. I'm going to have one just for the sake of judicial economy. That's the only reason.** I don't think this is legally supportable at all, frankly, because of the threshold requirement [ineffective assistance of counsel] that must be met which hasn't been met in my opinion . . .I have told you that I'm going to allow you to present witnesses on a motion that I think is frivolous. I mean, frankly, I think it's a waist [sic] of my time, my staff's and everyone's time…" (Hearing, 6-7-2001, pp. 58, 63).

A reading of the witnesses' testimony will reveal that they were consistent on all significant facts, and the judge's conclusion that one of the witnesses was "completely incredible" (because he could not remember an exact date) was completely unsupported. Her personal finding that counsel would have been ineffective if he presented the alibi was 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. (Hearing of 9-7-2001, p. 53; Hearing of 11-2-2001, p.49, 50, 57, 58). As the Court said in *Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355 (4th Cir.1992), "Tolerance of tactical miscalculations is one thing; fabrication of tactical excuses is quite another. *Kimmelman v. Morrison*, 477 U.S. 365, 386-387, 106 S.Ct. 2574, 2588-2589, 91 L.Ed.2d 305 (1986)."

II. THE SIXTH CIRCUIT'S DECISION, BASED ON A PROPER APPLICATION OF *STRICKLAND*, DOES NOT CONFLICT WITH OTHER FEDERAL CIRCUIT COURTS.

The premise upon which Petitioner bases his "conflict" argument is false. The Sixth Circuit in this case did *not* create a new rule (as demonstrated in Respondent's Issue I and III.) The decisions of the Fourth and Eighth Circuits cited by Petitioner are not inconsistent because

those circuits, like the Sixth Circuit, followed the two-prong prejudice test of *Strickland v Washington, supra*. In *United States v. Olson*, 846 F2d 1103 (4th Cir. 1988), the Fourth Circuit, like the Sixth Circuit here, reviewed the record, but determined that the defendant had failed to establish that had the alibi defense been presented there was a reasonable probability that the result of the proceeding would have been different. That the Sixth Circuit here came to the opposite conclusion, using the same *Strickland* standard, does not create a conflict.

Similarly, the Eleventh Circuit applied *Strickland* in *Bottoson v. Moore*, 234 F.3d (11th Cir. 2000). The Eleventh Circuit acknowledged that a finding of fact made by a trial judge is presumed to be correct. The Sixth Circuit acknowledged this also in the instant case:

> "Finally, the habeas petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct. 28 U.S.C. § 2254(e)(1); *McAdoo v. Elo*, 365 F.3d 487, 493-94 (6th Cir. 2004)." *Avery v. Prelesnik*, *supra* at 437 (Petition, p. 5a).

The trial judge's statement in the instant case, that witness Boyd's inability to remember the date while remembering other details was "completely incredible," is merely an unsupported, subjective opinion by a judge who did not preside at trial and who had pre-determined that counsel was not ineffective. Even so, the Sixth Circuit took this finding into consideration. However, as the Court of Appeals concluded, the trial court failed to seriously engage in a complete *Strickland* prejudice analysis, which requires a court to consider the totality of the evidence. The Sixth Circuit followed *Strickland* and, although it concluded that Respondent was prejudiced and the Michigan courts unreasonably applied *Strickland*, that conclusion does not create a conflict.

The third case cited by Petitioner, *Freeman v. Graves*, 317 F.3d 898 (8th Cir. 2003), is inapposite. The district court in that case used the *Cronic* standard in reviewing an ineffective

assistance of counsel claim, and the Eighth Circuit reversed, holding that the proper standard was set forth in *Strickland*. It is unclear why Petitioner cites *Freeman* because the Sixth Circuit in the instant case properly applied the *Strickland* two-pronged analysis (see Issue I and III) and did not even mention *Cronic*.

The analysis and findings of the Sixth Circuit in the instant case are completely consistent with other Circuit Courts. For example, the Seventh Circuit Court of Appeals granted a petition for writ of habeas corpus in a case very similar to the one at bar. In *Raygoza v. Hulick*, 474 F.3d 958 (7th Cir. 2007), cert denied, 128 S.Ct. 613, 169 L.Ed.2d 413 (2007), the petitioner had argued in state court that trial counsel was ineffective in failing to investigate alibi witnesses before trial, and the witnesses testified at a post-conviction hearing. The prosecutor presented evidence that the alibi testimony may have been "scripted." The state court[9] denied the motion for new trial and the state appellate courts affirmed. The federal district court denied the petition for writ of habeas corpus. The Seventh Circuit found that trial counsel was ineffective for failing to present the alibi, and further found prejudice, despite the state trial court's finding that the result of the proceeding would not have been different:

> "Raygoza is not entitled to relief, however, unless he also can establish that he was prejudiced by his attorney's deficient performance. . . . We find this test [*Strickland's* prejudice test] met as well, *even taking into account both the AEDPA standard of review and the fact that the trial judge subjectively believed that the array of additional alibi witnesses would not have swayed his judgment.*" *Id.* at 965.

The Seventh Circuit recognized that the trial judge's subjective opinion concerning the credibility and/or persuasiveness of the witnesses' testimony was not the *sole* factor in making the requisite prejudice finding:

[9] Like the judge in the instant case, in *Raygoza* "The trial judge held a hearing on the motion, but even before the hearing began he expressed skepticism about the value of the proceeding."

> "The State's case against Raygoza was not particularly strong. The only evidence apart from the suppressed confession linking him to the crime was eyewitness identification from rival gang members . . ., and a passerby . . . On the other side, Raygoza's alibi witnesses included both family members and unrelated people; their stories were corroborated by telephone records and train tickets. Obviously, a trier of fact approaching the case with fresh eyes might choose to believe the eyewitnesses and to reject the alibi evidence, but this trier of fact never had the chance to do so. *This undermines our confidence in the outcome of the proceedings so seriously that we conclude that there is a reasonable probability that the result would have been different* had Raygoza's attorney presented the testimony of all or most of his alibi witnesses." *Id*.

The Sixth Circuit's application of *Strickland* in the case at bar does not conflict with that of the Seventh Circuit, or any other circuit. Moreover, *Raygoza* demonstrates that the government's position in the instant case - that a state trial judge's determination of witness credibility is unreviewable - is contrary to the prejudice standard required by *Strickland*. The trial court's subjective opinion of witness credibility is only one factor in the prejudice analysis, which is fully reviewable. *See also Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000), where the Seventh Circuit Court of Appeals rejected the state court's finding that the petitioner was not prejudiced by his attorney's alleged ineffectiveness because, if the missing defense witness had testified, the State would have put another witness on the stand to contradict the defense witness's testimony and because the other defense witnesses would have been cumulative. Under the Petitioner's Prelesnik's "new rule" in the instant case, the state court findings in *Smith* would have been unreviewable.

The analysis in the instant case is also very similar to that of the Fourth Circuit in *Griffin v. Warden, Maryland Correctional Adjustment Center, supra*. There, the state court found that trial counsel's failure to present alibi witnesses at trial, where the petitioner was identified by an eyewitness, was not ineffective and that the petitioner failed to demonstrate prejudice. As in the

instant case, the Fourth Circuit faulted the state court for its failure to adequately assess prejudice, and granted the petition for writ of habeas corpus. The Court found that the petitioner had shown prejudice, stating, "Eyewitness identification evidence, uncorroborated by a fingerprint, gun, confession, or coconspirator testimony, is a thin thread to shackle a man for forty years. Moreover, it is precisely the sort of evidence that an alibi defense refutes best." *Id*. at 1359.

Suffice it to say that there is *no conflict* between the decision in the instant case and those of other federal circuits regarding the standard to apply when reviewing a claim of ineffective assistance of counsel and prejudice to the defendant. That the results of the various cases are different is only a function of the specific facts of each case. It appears that Petitioner is merely dissatisfied with the result in this case.

Finally, there is absolutely no connection between the decision in the present case and the other Sixth Circuit opinions referred to by Petitioner. *Thompkins v. Berghuis*, 547 F.3d 572 (6th Cir. 2008) involves a violation of *Miranda*; *Newman v. Metrish*, 543 F.3d 793 (6th Cir. 2008), involves an insufficiency of evidence issue; *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008), involves a jury selection (fair cross section) issue for an automated selection process that is no longer employed by the trial court in that county.

The Sixth Circuit correctly applied Supreme Court precedent and there are no grounds for granting the Petition.

CONCLUSION

The Sixth Circuit's opinion is completely compatible with the principles set forth in *Strickland v. Washington, supra*; the Sixth Circuit did not create a new rule but followed the rule of *Strickland*; the Sixth Circuit's opinion is not in conflict with decisions of the Fourth, Eighth, or Eleventh Circuits; the Sixth Circuit followed the clearly established Supreme Court precedent of *Strickland v. Washington.*

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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