

No. ____

IN THE
Supreme Court of the United States

BILL WILSON,
Superintendent, Indiana State Prison,

Petitioner,

v.

TORRAY STITTS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this habeas case involving a claim that trial counsel's investigation of an alibi defense was constitutionally deficient, the Seventh Circuit held under 28 U.S.C. § 2254(d)(1) that the Indiana courts unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984). Rather than reject the constitutional claim *de novo* on the evidence presented to the state courts, however, the Seventh Circuit remanded for the district court to take further evidence as to the extent of trial counsel's investigation of the alibi defense.

The question presented is as follows:

In a case where a habeas applicant has overcome 28 U.S.C. § 2254(d)(1)'s bar because the state court improperly applied clearly established federal law to the facts before it, but has failed to meet his burden of introducing evidence in state court sufficient to demonstrate a constitutional violation under the proper standard, does 28 U.S.C. § 2254(e)(2) preclude the habeas court from receiving new evidence supporting the claim, with the result that the writ must be denied?

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PETITION FOR WRIT OF CERTIORARI

The State of Indiana, through Bill Wilson, Superintendent of the Indiana State Prison, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit reversing the district court's denial of Stitts's petition for a writ of habeas corpus and remanding to the district court for an evidentiary hearing.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at *Stitts v. Wilson*, 713 F.3d 887 (7th Cir. 2013), and is reprinted in the Appendix at 1a. The Southern District of Indiana's Entry Directing Further Proceedings is unreported and is reprinted in the Appendix at 23a. The opinion of the United States District Court, Southern District of Indiana, is unreported, and is reprinted in the Appendix at 26a. The Indiana Supreme Court's denial of transfer on Stitts's petition for post-conviction relief is referenced at *Stitts v. State*, 929 N.E.2d 791 (Ind. 2010), and is reprinted in the Appendix at 36a. The Indiana Court of Appeals' opinion denying post-conviction relief is unreported and is reprinted in the Appendix at 37a. The Howard County Superior Court's order denying post-conviction relief is unreported and reprinted in the Appendix at 53a. The Indiana Supreme Court's denial of transfer on Stitts's direct appeal is referenced at *Stitts v. State*, 804 N.E.2d 748 (Ind. 2003), and is reprinted in the Appendix at 59a. The Abstract of Judgment is

unreported and is reprinted in the Appendix at 60a. The Howard Superior Court I's Order on Sentencing is unreported and is reprinted in the Appendix at 63a. The Seventh Circuit's order denying both parties' petitions for rehearing is unreported and is reprinted in the Appendix at 65a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 2013. A petition for rehearing was denied on June 10, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(a), (d), (e)(2)

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

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

the merits in State court proceedings unless the adjudication of the claim—

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

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

(e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing

evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT

1. On January 22, 2002, Kevin Hartson and Edward Lawton picked up Respondent Torray Stitts and his brother at a tavern in Kokomo, Indiana. Pet. App. 39a, 54a. The four men intended to rob a man named Jammeal by having one of the men pretend to purchase cocaine from Jammeal while the other three members of the group robbed him. Pet. App. 39a. While he drove the group to their destination, Hartson was talking on his cell phone to his friend Ray Charles, who was in Pennsylvania at the time. Pet. App. 39a. Charles could hear Stitts's voice over the phone as Stitts told Hartson to pull over. Pet. App. 39a. As Hartson was pulling over, Stitts said, "you all mother fuckers gonna break in my shit?" and shot Hartson in the head, killing him. Pet. App. 39a.

2. Prosecutors charged Stitts with one count of murder. Pet. App. 39a. At trial, Lawton testified that he was sitting in the front passenger seat when Stitts shot Hartson. Trial Tr. vol. 1 at 118.¹ Charles testified that he was talking to Hartson on the phone and heard Stitts's voice and gunshots shortly before

¹ The trial transcript is part of the record on appeal but is not included in the Petitioner's Appendix due to its volume.

the line was disconnected. Trial Tr. vol. 2 at 262. The State's forensic evidence indicated that someone sitting in the backseat shot Hartson. Trial Tr. vol. 1 at 220. The State also presented phone records that confirmed calls were made at a time consistent with the testimony of Hartson and Charles. Trial Tr. vol. 2 at 376. Finally, several eyewitnesses testified that they heard "pops" or gunshots and then saw men "tussling" outside of the car before fleeing the scene. Trial Tr. vol. 1 at 42, 50, 52-53, 59. The jury found Stitts guilty, and the trial court sentenced him to sixty years' imprisonment. Pet. App. 40a.

On direct appeal, Stitts argued that (1) the trial court erroneously failed to suppress evidence, (2) insufficient evidence supported his conviction, (3) the trial court erroneously admitted a photograph of a handgun, (4) the prosecutor committed misconduct, and (5) the trial court abused its discretion in imposing an enhanced sentence. Pet. App. 40a. The Indiana Court of Appeals affirmed the conviction and the Indiana Supreme Court denied Stitts's petition for discretionary review. Pet. App. 40a, 59a.

3. On September 1, 2004, Stitts filed a *pro se* petition for post-conviction relief. Pet. App. 40a. Nearly four years later, Stitts, now represented by counsel, amended his petition to allege that his trial counsel provided ineffective assistance in part

because he “fail[ed] to pursue an alibi defense[.]”² Pet. App. 55a. Specifically, Stitts argued that he was at the American Legion Post at the time of the shooting and that trial counsel failed to investigate and interview witnesses who could have placed him there.

At the state court post-conviction hearing, Stitts’s father testified that Stitts and his brother were at the American Legion Post at the time of the shooting. Pet. App. 4a. Stitts’s father also testified that trial counsel did not interview him until the day before trial and that he was not called to testify. Pet. App. 4a-5a. Stitts also offered testimony from Timothy Harris, who was at the Post that night and supported Stitts’s alibi but was not interviewed by trial counsel. Pet. App. 5a, 55a.

Trial counsel did not testify at the post-conviction hearing, but Stitts submitted counsel’s affidavit as evidence. Pet. App. 5a. In it, counsel stated, “I recall considering, but ultimately choosing not to pursue, an affirmative defense on behalf of the defendant. Defendant had suggested an alibi defense, but I do not recall there being any quality witnesses to testify on his behalf as to a believable

² Stitts’s ineffective assistance claim was also based on trial counsel’s alleged “failure to challenge the validity of [a] search warrant” and to preserve for appeal a challenge to the admissibility of certain evidence. Pet. App. 55a. Stitts did not raise either of these claims in federal court and they are not at issue here.

alibi.” Pet. App. 5a. The affidavit did not describe the extent of trial counsel’s investigation and did not mention whether he had interviewed Stitts’s father. Pet. App. 5a. It stated that he made a strategic decision to attack the sufficiency of the evidence rather than offer a weak alibi defense. Pet. App. 5a.

The state trial court denied relief, finding that trial counsel’s “sound strategic decision” not to pursue an alibi defense was “well considered and made” because counsel determined that Stitts’s father, the only available witness, would not have been credible and “would have diminished the chance of [counsel] being able to credibly challenge the sufficiency of the evidence supporting the state’s case.” Pet. App. 55a, 57a. With respect to the second witness, Harris, the court found that he was “unknown and undiscoverable at the time of trial.” Pet. App. 55a.

The Indiana Court of Appeals affirmed. Observing that courts “apply a great deal of deference to counsel’s judgments when deciding a claim of ineffective assistance of counsel for failure to investigate,” the court found that Stitts “failed to show that trial counsel did not investigate his claimed alibi defense.” Pet. App. 45a-46a.

Specifically, the court found that the record established that “trial counsel spoke with Stitts’s father after learning that he may have been able to provide Stitts with an alibi but ultimately

determined that he was not a credible witness.” Pet. App. 46a. Furthermore, the court observed that Harris did not come forward “until two or three weeks prior to the post-conviction hearing” and “[n]othing in the record indicates that trial counsel knew or even could have discovered that Harris could have provided Stitts with an alibi defense prior to trial.” Pet. App. 46a-47a.

The court also found that Stitts failed to demonstrate that he was prejudiced by trial counsel’s decision not to present an alibi defense. Explained the court, “[t]he State presented eyewitness testimony establishing that Stitts was the shooter. In light of this testimony, we are unable to say that there is a reasonable probability undermining Stitts’s conviction that the outcome of his trial would’ve been different had trial counsel presented an alibi defense.” Pet. App. 45a.

The Indiana Supreme Court denied Stitts’s petition for discretionary review. Pet. App. 36a.

4. Stitts then filed a petition for a writ of habeas corpus in federal court, once again alleging ineffective assistance of counsel based on trial counsel’s supposed failure “to investigate and present” Stitts’s alibi defense. Pet. App. 30a. The district court denied the petition, holding that, under the standard set forth by 28 U.S.C. § 2254(d)(1), the Indiana courts had not “unreasonably applied” clearly established federal law, namely *Strickland v.*

Washington, 466 U.S. 668 (1984). Pet. App. 34a-35a.

The district court found the state court decision reasonable under *Strickland's* performance inquiry in light of evidence from the state post-conviction hearing that (1) trial counsel interviewed Stitts's father, (2) Harris was unknown and undiscoverable at the time, and (3) trial counsel made a strategic decision to focus on weaknesses in the State's evidence rather than present a potentially weak alibi defense. Pet. App. 33a. The district court found the state court's decision reasonable under *Strickland's* prejudice inquiry because of strong eyewitness testimony placing Stitts at the scene of the murder. Pet. App. 34a.

The Seventh Circuit, however, reversed on the theory that the Indiana Court of Appeals "unreasonably applied" *Strickland* by concluding that "trial counsel was not ineffective simply because he performed *some* investigation." Pet. App. 12a. The Seventh Circuit panel took particular exception with the state court's statement that "Stitts has failed to show that trial counsel did not investigate his alibi defense." Pet. App. 10a. Stating that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision," the panel explained that it "[could not] fathom a reason consistent with Supreme Court precedent that would justify a trial counsel's decision to interview only a *single* alibi witness . . ." Pet. App. 11a-12a. Furthermore, "[t]here is simply no

evidence in the record to suggest that exploring the possibility of other alibi witnesses ‘would have been fruitless.’” Pet. App. 13a (quoting *Wiggins v. Smith*, 539 U.S. 510, 525 (2003)). In conclusion, said the panel, “nothing in the record reflects . . . any . . . reason that might reasonably justify a decision not to investigate the possibility of other witnesses. Notably, the State was unable to provide any such reason, either in its brief or at oral argument.” Pet. App. 15a.

Turning to the issue of prejudice, the court found that “no ‘fairminded jurist’ would [conclude that there was no prejudice] because the prosecution’s case rested entirely on the testimony of two somewhat unreliable witnesses.” Pet. App. 15a (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011)). The court further postulated that if Stitts’s trial counsel had presented alibi witnesses, “the trial would have been transformed from a one-sided presentation of the prosecution’s case into a battle between competing eyewitness testimony, where there would have been a ‘reasonable probability’ that a jury would have reasonable doubt as to Stitts’s guilt and therefore acquit.” Pet. App. 16a (quoting *Harrington*, 131 S. Ct. at 787). The court concluded that “[b]ecause there [was] no ‘reasonable argument’ that could justify the state court’s finding of no prejudice, the state court’s application of *Strickland*’s prejudice prong was also unreasonable under § 2254(d)(1).” Pet. App. 17a (quoting *Harrington*, 131 S. Ct. at 788).

Having deemed the § 2254(d)(1) barrier overcome, however, the Seventh Circuit did not conclusively resolve Stitts's constitutional claim. The court acknowledged that Stitts's state court evidence was insufficient to establish a constitutional violation under the proper *Strickland* test. Pet. App. 17a-18a. Rather than deny the petition on the merits, however, the Seventh Circuit remanded the case for an evidentiary hearing to "determine the extent of trial counsel's alibi investigation and then determine *de novo* whether that investigation constituted ineffective assistance under *Strickland*." Pet. App. 18a.

The court clarified that it was not "remand[ing] for an evidentiary hearing to determine whether the state court unreasonably applied *Strickland* pursuant to § 2254(d)(1); we have already found that it did, without going outside the state court record." Pet. App. 19a. Instead, said the court, "we remand to reach an issue that the state court never addressed: what exactly trial counsel actually did in investigating the alibi defense and whether that was unreasonable under *Strickland*." Pet. App. 19a. Specifically, the court instructed the district court to determine, among other information, "when and what exactly Stitts told trial counsel, why trial counsel did not talk to Stitts's brother, what exactly Stitts's father told trial counsel, and any facts that may explain why trial counsel ended his alibi investigation at whatever point he chose to end it." Pet. App. 21a-22a.

Both parties filed petitions for rehearing, and the State asked for rehearing en banc. Pet. App. 66a. Stitts did not try to justify a new hearing under § 2254, but instead argued that he had “demonstrated an entitlement to a writ and not just a remand.” Petitioner-Appellant’s Rule 40 Petition for Panel Rehearing at 1, *Stitts v. Wilson*, 713 F.3d 887 (7th Cir. Apr. 29, 2013) (No. 12-2255). The State argued that the panel’s decision “disregard[ed] the presumption of effectiveness of trial counsel, shift[ed] the burden in ineffective assistance of counsel cases to the state . . . , and fail[ed] to apply the requisite deference set forth in *Harrington [v. Richter]*.” Respondent-Appellee’s Petition for Rehearing and Rehearing En Banc at 1-2, *Stitts v. Wilson*, 713 F.3d 887 (7th Cir. Apr. 29, 2013) (No. 12-2255). The State also contended that the panel’s decision to remand the case for an evidentiary hearing was inconsistent with *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). *Id.* at 11-12. The Seventh Circuit denied both petitions. Pet. App. 66a.

Following remand, on September 10, 2013, the district court issued an Entry Directing Further Proceedings in which it asked Stitts to report to the court “what additional information he could produce at an evidentiary hearing,” including the following:

1. What evidence was available to be discovered that may be credible alibi witness testimony which was not offered by trial counsel;

2. Whether trial counsel's investigation was limited to an interview with petitioner's father;
3. When and what exactly petitioner told trial counsel;
4. Why trial counsel did not talk to petitioner's brother;
5. What specifically petitioner's father told trial counsel;
6. When and why trial counsel ended his alibi investigation; and
7. Any other facts petitioner now contends show counsel's performance to be deficient and prejudicial.

Pet. App. 23a-24a.

REASONS FOR GRANTING THE PETITION

As even the Seventh Circuit acknowledged, Torray Stitts failed to create a state court record proving that Stitts's trial counsel was constitutionally deficient. Pet. App. 17a-18a. Both the text of 28 U.S.C. § 2254 and this Court's precedents—specifically, *Cullen v. Pinholster*, 131 S. Ct. 1388 (2013) and *Burt v. Titlow*, No. 12-414, 571 U.S. ___ (2013)—foreclose an evidentiary hearing and require rejection of the writ where the habeas

petitioner had an opportunity to present evidence on the merits in state court but failed to carry the burden. By instead remanding for the district court to take new evidence for a “fresh determination of constitutionality,” Pet. App. 19a, the Seventh Circuit diminished the remaining force of 28 U.S.C. § 2254(e)(2) and read it as apparently no other circuit in the country has. Certiorari is warranted to ensure that the AEDPA applies as Congress intended.

I. Review Is Warranted Because the Seventh Circuit’s Decision Contradicts This Court’s Decision in *Cullen v. Pinholster*

If a federal habeas petitioner “has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim” 28 U.S.C. § 2254(e)(2). Where there has been such a failure, an evidentiary hearing will be permitted only if “the claim relies on . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or [] a factual predicate that could not have been previously discovered through the exercise of due diligence[.]” 28 U.S.C. § 2254(e)(2)(A)(i), (ii).

Notwithstanding the plain text of § 2254(e)(2), the Seventh Circuit remanded this case for an evidentiary hearing without finding any of the necessary qualifications for such a hearing. It did so

based expressly on its erroneous understanding that, once 28 U.S.C. § 2254(d)(1)'s barrier to habeas relief has been overcome and a federal court is free to consider the applicant's constitutional claim anew, § 2254(e)(2) no longer applies. Pet. App. 19a-20a. In *Cullen v. Pinholster*, however, the Court announced that the opposite is true. Certiorari is warranted both because the decision below is in conflict with *Pinholster* and because this case would afford the Court another concrete instance to demonstrate where § 2254(e)(2) applies outside of § 2254(d)(1) review.

1. In *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), the Court declared that § 2254(e)(2) applies to habeas claims even where § 2254(d)(1) provides no barrier to relief. There, a district court erroneously took new evidence on a claim that penalty-phase counsel "fail[ed] to adequately investigate . . . mitigating evidence," considered the § 2254(d)(1) issue in light of the new evidence, and ultimately granted the writ. *Id.* at 1396-97. This Court principally held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 1398. In explaining that its holding did not render § 2254(e)(2) a nullity, however, the Court expressly declared that "Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar habeas relief." *Id.* at 1401.

To be sure, the sole example the Court gave where § 2254(e)(2) would apply apart from § 2254(d)(1) is where the state court did not adjudicate the habeas applicant's claim on the merits *at all*. *Id.* (“At a minimum, § 2254(e)(2) still restricts [federal habeas courts'] discretion in claims that were not adjudicated on the merits in state court.”). But there is no principled rationale for limiting § 2254(e)(2) to that circumstance. A case such as this, where the federal court determined that the state court unreasonably applied *Strickland*, is equally susceptible to application of § 2254(e)(2) when the habeas court undertakes a “fresh” consideration of the underlying claim. Whether the state court did not address the claim at all or addressed it unreasonably, the sanctity of the state court record under § 2254(e)(2) is the same.

2. In the decision below, the Seventh Circuit ignored this rule from *Pinholster*, expressly declaring that an evidentiary hearing was appropriate notwithstanding § 2254(e)(2) because “[w]e do not remand for an evidentiary hearing to determine whether the state court unreasonably applied *Strickland* pursuant to § 2254(d)(1); we have already found that it did, without going outside the state court record.” Pet. App. 19a. Instead, said the court, “we remand to reach an issue that the state court never addressed: what exactly trial counsel did in investigating the alibi defense and whether that was unreasonable under *Strickland*. This inquiry is

basically a fresh determination of constitutionality pursuant to § 2254(a).” Pet. App. 19a-20a.

“Fresh” though it may be, *de novo* review of Stitts’s constitutional claim does not justify an evidentiary hearing. Given the text of § 2254(e)(2), federal courts have limited federal habeas evidentiary hearings to circumstances where, for example, the state court denied the petitioner’s request for an evidentiary hearing (*Thomas v. Horn*, 570 F.3d 105, 125-26 (3d Cir. 2009), *cert. denied*, 559 U.S. 1009 (2010)), the evidence was undiscoverable at the time of the state post-conviction hearing (*Williams v. Taylor*, 529 U.S. 420, 442-43 (2000)), the state court denied the petitioner’s request for funds to investigate his claim (*id.* at 442), the state court prevented the petitioner from contacting potential witnesses (*Harrison v. Quarterman*, 496 F.3d 419, 428-29 (5th Cir. 2007)), or the state court denied the petitioner’s motion for access to the evidence so that his expert could examine it (*Lee v. Glunt*, 667 F.3d 397, 406 (3d Cir. 2012)).

Yet in the Seventh Circuit’s view, where a state court’s reasons for rejecting a federal constitutional claim are unreasonable, a new evidentiary hearing is justified if the state court record does not permit a firm conclusion about the merits. *See* Pet. App. 17a (“Though the state court decision was an unreasonable application of *Strickland*, what remains unresolved is whether trial counsel *in fact*

limited his alibi investigation to an interview of Stitts's father.”).

This result disregards the limitations of § 2254(e)(2), which apply not only to § 2254(d)(1) inquiries, but to *all* phases of habeas review. Observing that AEDPA's statutory scheme is designed to “strongly discourage” habeas petitioners from submitting new evidence in federal court, the Court in *Pinholster* stated that “[p]rovisions like §§ 2254(d)(1) and (e)(2) ensure that federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.” *Pinholster*, 131 S. Ct. at 1401 (internal quotation marks omitted). *See also, e.g., Stokley v. Ryan*, 659 F.3d 802, 806, 809 (9th Cir. 2011) (holding that, even if § 2254(d)(1) is not a barrier to relief, a habeas petitioner seeking a new evidentiary hearing must still overcome § 2254(e)(2)).

Lest there be any doubt, the evidentiary hearing the Seventh Circuit has ordered will pertain *only* to evidence that Stitts could have presented at the state post-conviction relief hearing. In an entry directing further proceedings, the district court has already ordered Stitts to report what additional information he could produce at an evidentiary hearing including, among other things, “[w]hether trial counsel's investigation was limited to an interview with petitioner's father . . . [w]hen and what exactly petitioner told trial counsel . . . [and

w]hen and why trial counsel ended his alibi investigation[.]” Pet. App. 23a-24a. This is certainly information that could have been “previously discovered through the exercise of due diligence[.]” 28 U.S.C. § 2254(e)(2). At the very least, Stitts has made no effort to demonstrate the contrary proposition.

Furthermore, as the Court has observed, § 2254(e)(2) “carries out AEDPA’s goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance.” *Pinholster*, 131 S. Ct. at 1401 (internal quotation marks omitted). It limits the power of federal courts to afford a truly *de novo*—“fresh,” in the Seventh Circuit’s terminology—review of constitutional claims that have already been adjudicated in a proceeding where the petitioner had a chance to present evidence. In that circumstance, if the evidence adduced at the state proceeding does not prove a constitutional violation, the writ may not issue. *Cf. Burt v. Titlow*, No. 12-414, 571 U.S. ___, slip op. at 9 (2013).

AEDPA was designed to prevent federal courts from affording state prisoners seriatim cracks at proving constitutional violations. Congress realized that permitting federal courts to receive new evidence supporting state prisoners’ constitutional claims not only undermines the finality of state court convictions but also implies profound (and

unnecessary) disrespect for state criminal justice systems. The Court should review the decision below because it evades Congress's express restrictions on habeas evidentiary hearings and implicit protection of state evidentiary records as recognized by this Court in *Cullen v. Pinholster* and provides the Court with a concrete opportunity to address squarely how § 2254(e)(2) applies notwithstanding a finding of "unreasonable application" under § 2254(d)(1).

II. Alternatively, the Court Should Grant Certiorari and, in Light of *Burt v. Titlow*, Either Summarily Reverse or Vacate the Decision Below and Remand

By refusing to deny the writ in the face of an insufficient record, the decision below absolved Stitts of his burden to prove his trial counsel's ineffectiveness in the state court proceedings. Both the text of § 2254 and this Court's recent decision in *Burt v. Titlow*, No. 12-414, 571 U.S. ___ (2013), mandate that a federal court deny a petitioner's writ if he fails to present sufficient evidence to allow a federal court to determine that trial counsel was ineffective. Because, as the Seventh Circuit acknowledged, the state court record does not support a finding that Stitts's trial counsel was constitutionally ineffective, Pet. App. 19a, the proper result should be denial of the writ.

In *Burt v. Titlow*, the Court reviewed a decision of the Sixth Circuit, which had assumed that Titlow’s attorney failed to inform her of the risks and benefits of withdrawing her guilty plea because, as the Sixth Circuit explained, “[t]he record in this case contains no evidence that [counsel] explain[ed] the elements necessary for the government to secure a conviction, discuss[ed] the evidence as it bears on those elements, [or] explain[ed] the sentencing exposure the defendant [would] face as a consequence of exercising each of the options available.” *Titlow v. Burt*, 680 F.3d 577, 590 (6th Cir. 2012) (internal quotation marks omitted). On this basis, the court “conclude[d] that [trial counsel] failed to fulfill his ‘clear obligation’ to provide sufficient advice to Titlow during the plea-negotiation stage.” *Id.*

This Court reversed, holding that “the Sixth Circuit failed to apply [AEDPA’s] doubly deferential standard . . . by assuming that counsel was ineffective where the record was silent. Because [AEDPA and *Strickland*] do not permit federal judges to so casually second-guess the decisions of their state-court colleagues or defense attorneys, the Sixth Circuit’s decision must be reversed.” *Titlow*, slip op. at 1.

Specifically, the Court found “troubling . . . the Sixth Circuit’s conclusion that [trial counsel] was ineffective because the record . . . contain[ed] no evidence that he gave constitutionally adequate

advice on whether to withdraw the guilty plea.” *Id.* at 9 (internal quotation marks omitted). The Court reiterated the now-familiar strong presumption of adequate assistance of defense counsel and that the burden of proof to show a counsel’s deficiency “rests squarely on the defendant.” *Id.* As the Court observed, “[t]he Sixth Circuit turned that presumption of effectiveness on its head. It should go without saying that the absence of evidence cannot overcome the ‘strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance.’” *Id.* (quoting *Strickland*, 466 U.S. at 689).

Stitts’s state court record, like Titlow’s, was insufficient to establish a constitutional violation under the proper legal standard. Although Stitts requested a hearing and submitted his trial counsel’s affidavit, the affidavit avers only that his counsel considered raising an alibi defense but chose not to after being unable to find any “quality witnesses.” Pet. App. 5a. The record is silent as to how many witnesses trial counsel interviewed, whether he visited the Legion Post, whether he interviewed potential alibi witnesses other than Stitts’s father, and what else he did to investigate the asserted alibi.

The Seventh Circuit did not go as far as the Sixth Circuit and order that the writ be issued, but neither did it follow the path laid out by this Court’s decision in *Titlow*, which is to deny the writ for failure to

establish an adequate record in state court. That result is consonant with the declaration in *Pinholster* that § 2254(e)(2) applies even outside § 2254(d)(1)—a holding that severely limits the circumstances in which further evidence rather than outright denial in federal court is appropriate.

In short, if an evidentiary hearing is generally available to shore up a deficient state court record, the Court would have left that door open in *Titlow*. That it ordered denial of the writ instead compels the same result here. And while summary reversal on this point is justified, at the very least the Court should vacate the decision below and remand for the Seventh Circuit to consider the significance of *Titlow* in the first instance.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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