QUESTION PRESENTED FOR REVIEW

Does the deficient performance/resulting prejudice standard of *Strickland v. Washington* 466 U.S. 668 (1984), still control claims of ineffective assistance of post-conviction or appellate counsel, or is the Wisconsin Supreme Court correct that *Smith v. Robbins*, 528 U.S. 259 (2000), imposed a more restrictive standard limiting such ineffectiveness solely to cases in which prior counsel failed to raise one or more issues that were "clearly stronger" than the issues prior counsel chose to raise.

PARTIES IN COURT BELOW

Other than the present Petitioner and Respondent, there were no other parties in the Wisconsin Supreme Court.

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No. 14-_____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2014

TRAMELL E. STARKS,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

Petitioner Tramell E. Starks, respectfully asks that the Court issue a writ of certiorari to review the judgment of the Wisconsin Supreme Court affirming denial of his post-conviction motion challenging the judgment of conviction and sentence against him

OPINIONS BELOW

The published opinion of the Wisconsin Supreme Court, *State v. Tramell E. Starks*, 2013 WI 69, 349 Wis.2d 274, 833 N.W.2d 146 (7/12/13),

is in Appendix A (A:1-A:53).

The published order of the Wisconsin Supreme Court denying rehearing, *State v. Tramell E. Starks*, 2014 WI 91, 849 N.W.2d 724 (7/24/14), is in Appendix B (B:1-B:33).

The unpublished decision of the Wisconsin Court of Appeals, *State v. Tramell E. Starks*, 2011 WI App 114, 336 Wis.2d 474, 801 N.W.2d 348 (6/14/11) is in Appendix C (C:1-C:4).

The unpublished order of the Wisconsin Circuit Court (2/1/10) is in Appendix D (D:1-D:6).

JURISDICTION

The Wisconsin Supreme Court entered judgment on July 12, 2013. On July 24, 2014, that Court denied the timely rehearing petitions filed by the State of Wisconsin and by Starks. This Court's jurisdiction is invoked under 28 U.S.C. §§1257(a) & 2101(d) and Supreme Court Rules 13.1 & 13.3. As he did below, Mr. Starks asserts the deprivation of his rights to due process secured by the United States Constitution

CONSTITUTIONAL PROVISIONS INVOLVED

This petition concerns the construction and application of the Right to Counsel Clause of the Sixth Amendment to the United States Constitution which provides:

In all criminal prosecutions, the accused shall enjoy the right

> . . . to have the Assistance of Counsel for his defense

U.S. Const. amend. VI.

This petition also concerns the construction and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

> No state shall ... deprive any person of life, liberty, or property, without due process of law....

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Tramell E. Starks seeks review of the decision of the Wisconsin Supreme Court, affirming the denial of his post-conviction motion challenging the effectiveness of the attorney who represented him during his post-conviction motions as part of his direct appeal.

Following a jury trial in the Wisconsin circuit court on charges of first-degree intentional homicide as a party to a crime and possession of a firearm by a felon, Tramell E. Starks was convicted of the lesser-included offense of first degree reckless homicide and the firearm charge.

On direct appeal, Starks' counsel argued that the trial court erred when it denied his request for an additional lesser-included offense instruction, denied his mistrial motion, and refused to dismiss based on

an alleged discovery violation. Starks' counsel also argued that the evidence was inconsistent and therefore insufficient to support the verdict. The Wisconsin Court of appeals rejected those arguments as baseless.

Starks subsequently filed a *pro se* post-conviction motion in the circuit court pursuant to Wis. Stat. §974.06.[1] The motion alleged that the attorney who handled his appeal was ineffective for failing to raise certain ineffective assistance of trial counsel claims.[2] The circuit court denied the motion on the merits without a hearing (D:1-D:6) and the Wisconsin Court of Appeals affirmed on state procedural grounds (C:1-C:4).

The Wisconsin Supreme Court granted Starks' *pro se* petition for review and appointed counsel to represent him. Following briefing and argument, that Court affirmed 4-3 on July 12, 2013 (A:1-A:53). As relevant here, that Court rejected the lower court's procedural holding (A:4, A:20-A:29) and instead held that satisfying the deficient performance/resulting prejudice standard of *Strickland v. Washington*, 466 U.S. 668 (1984), is no longer sufficient for assessing claims of ineffective post-conviction or appellate counsel. Rather, in that Court's

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[1] Wis. Stat. §974.06 sets forth a procedure similar to 28 U.S.C. §2255 for a Wisconsin defendant to collaterally attack his conviction after completion of the direct appeal.

[2] Under Wisconsin law, a criminal defendant is entitled to raise trial ineffectiveness and similar claims in a post-conviction motion in the trial court as part of the direct appeal process. *See* Wis. Stat (Rule) 809.30.

view, *Smith v. Robbins*, 528 U.S. 259 (2000), imposed a more restrictive standard, limiting such ineffectiveness solely to cases in which prior counsel failed to raise one or more issues that were "clearly stronger" than the issues counsel chose to raise. (A:29-A:36).

The Court below summarized the issue and its holding as follows:

> Turning to the specific issue here, the parties dispute the appropriate standard a court should use in determining whether a defendant received ineffective assistance of appellate counsel because of counsel's failure to raise certain arguments. Starks contends that all he must do to demonstrate ineffectiveness is to show that appellate counsel's performance was deficient and that it prejudiced him. The State, on the other hand, argues that Starks must also establish why the unraised claims of ineffective assistance of trial counsel were "clearly stronger" than the claims that appellate counsel raised on appeal. We hold that the State has articulated the proper standard.

(A:30-A:31).

The state court then analyzed Starks' ineffectiveness claim under its "clearly stronger" standard rather than under the traditional *Strickland* standard (A:37-A:41), holding that,

> For Starks to succeed on Strickland's deficiency prong with his claim that Kagen [(Starks' appellate counsel)] rendered ineffective assistance of appellate counsel, he must first show that the claims of ineffective assistance of trial counsel that were not argued were "clearly stronger" than the arguments Kagen did pursue.

(A:37).

Three of the seven justices dissented on the grounds that the

majority's new "clearly stronger" standard, although perhaps a helpful consideration in some circumstances, conflicts with *Strickland* and has been rejected by other state supreme courts. (A:44-A:53).

Both parties timely petitioned the state court for reconsideration based on the court's oversight regarding a matter of state procedure concerning the appropriate forum for a challenge to the ineffectiveness of post-conviction counsel (*see* B:4-B:18). Starks also challenged the court's application of the new "clearly stronger" standard to his particular allegations of ineffectiveness (*see* B:16-B:17). The court nonetheless summarily denied reconsideration on July 24, 2014 (B:1), although three of the seven justices wrote separately in an attempt to clarify the majority's state law procedural error (B:2-B:33).

REASONS FOR ALLOWANCE OF THE WRIT

CERTIORARI REVIEW IS APPROPRIATE TO DETERMINE WHETHER THE WISCONSIN SUPREME COURT IS CORRECT THAT INEFFECTIVE ASSISTANCE OF POST-CONVICTION OR APPELLATE COUNSEL CLAIMS NOW ARE LIMITED TO CASES IN WHICH THE CLAIM THAT PRIOR COUNSEL FAILED TO RAISE WAS "CLEARLY STRONGER" THAN THE CLAIMS THAT ATTORNEY CHOSE TO RAISE

The Wisconsin Supreme Court's decision that post-conviction or appellate ineffectiveness must be limited to circumstances in which prior counsel failed to raise a claim that was "clearly stronger" than those that he or she chose to raise is contrary not only to this Court's decisions in

Strickland v. Washington 466 U.S. 668 (1984), and *Smith v. Robbins*, 528 U.S. 259 (2000), but to those of other state supreme courts as well. That Court's application of the wrong standard, moreover, was not harmless.

Because the decision below both confuses an issue previously settled by this Court and conflicts with the decisions of other state courts, review and clarification by this Court is appropriate. *See* Sup. Ct. R. 10(b) & (c).

A. The Decision Below Conflicts with the Decisions of This Court and Those of Other State Supreme Courts

This Court long ago established that all claims of ineffective assistance of counsel must be judged based on the two-prong standard of *Strickland v. Washington*, 466 U.S. 668 (1984). The first, deficiency prong is met where counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. The second, prejudice prong is satisfied when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The same *Strickland* standard for ineffectiveness applies to assess the constitutional effectiveness of post-conviction or appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285-86, 287-88 (2000). The defendant raising such a claim must show both that post-conviction or appellate counsel acted unreasonably and that there exists a reasonable probability that he or she would have prevailed on appeal but for counsel's

unreasonable behavior. *Id.*

The state court majority here nonetheless chose to add an additional requirement to the standard for appellate ineffectiveness, requiring that the defendant show not just deficient performance and resulting prejudice as required by *Strickland*, but also that the issues the defendant claims that appellate counsel should have raised are "clearly stronger" than those actually raised on the direct appeal. The majority deemed the requirement mandated by *Smith*. (A:31-A:36).

This Court in *Smith* held that when a defendant (such as Robbins) alleges that his appellate attorney was deficient for failing to file a merits brief, all that a defendant must do to show deficiency is to demonstrate "that a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief . . . ." 528 U.S. at 288. According to the majority below, however,

> when a defendant (such as Starks) alleges that his appellate attorney was deficient for not raising a particular claim, "it [will be] difficult to demonstrate that counsel was incompetent" because the defendant must show that "a particular nonfrivolous issue was *clearly stronger* than issues that counsel did present." [528 U.S. at 288] (emphasis added).

(A:34-A:35).

This comment is puzzling because this Court in *Smith* said no such thing. Rather, the state court majority here omitted critical language from

the *Smith* decision, substantially changing this Court's meaning. Compare the *Starks* majority's assertion that *Smith* held "that the defendant must show that 'a particular nonfrivolous issue was clearly stronger than issues that counsel did present,'" with this Court's actual language in *Smith*:

> [I]t is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. *See, e.g.*, *Gray v. Greer*, 800 F.2d 644, 646 (C.A.7 1986) ("*Generally*, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome"). With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the *Strickland* test, for it is only necessary for him to show that a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief, rather than showing that a particular nonfrivolous issue was clearly stronger than issues that counsel did present.

Smith, 528 U.S. at 288 (emphasis added).

Somehow, despite the dissent's pointing out this error (A:45-A:52), the *Starks* majority overlooked both this Court's clear holding in *Smith* that *Strickland* standards apply to assessment of appellate ineffectiveness and the qualifying "[g]enerally" in the *Smith* decision's "clearly stronger" parenthetical reference from *Gray*. As such, the state court majority transmogrified a common but by no means exclusive method of establishing that appellate counsel's actions were unreasonable into a

mandatory additional requirement.

The state court majority's decision to adopt the bright-line "clearly stronger" standard as the exclusive means of testing post-conviction or appellate ineffectiveness based on prior counsel's omission of claims on the direct appeal also simply ignores the many other ways in which counsel may act unreasonably in such circumstances. The Seventh Circuit, for instance, has recognized one way to show deficient performance of appellate counsel:

> [W]hen appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient.

Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996) (citations omitted). *See also Smith*, 528 U.S. at 288. This means of proving deficiency under *Strickland*, from the same court that produced the related but different "clearly related" standard, makes sense in some circumstances. Reasonable post-conviction/appellate counsel normally would raise the strongest issues available, *see Jones v. Barnes*, 463 U.S. 745, 751-54 (1983), not forego them for weaker issues. *See Gray*, 800 F.2d at 646. When the issue is obvious, moreover, the court can rest assured that a reasonable attorney would not overlook it.

As this Court noted in *Smith*, 528 U.S. at 285, however, the question remains whether counsel acted unreasonably. As other courts have noted,

failing to raise an obvious and stronger issue is not the only way that post-conviction/appellate counsel can act unreasonably. *Id.* at 288 ("'*Generally*, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome'" (emphasis added)), *quoting Gray*, 800 F.2d at 646.

Other courts have noted, contrary to the Wisconsin decision in this case, that the *Gray* balancing test

> does not effectively operate in all cases in which appellate counsel's performance is claimed to be deficient because of a failure to assert an error on appeal. Situations may arise when every error enumerated by appellate counsel on appeal presented a strong, nonfrivolous issue but counsel's performance was nonetheless deficient because counsel's tactical decision not to enumerate one rejected error "was an unreasonable one which only an incompetent attorney would adopt."

Shorter v. Waters, 571 S.E.2d 373, 376 (Ga. 2002) (citation omitted); *Carpenter v. State*, 126 S.W.3d 879, 888 (Tenn. 2004) (same); *see e.g., Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999). For instance, counsel may raise two strong issues but, by unreasonably failing to raise a third, leave critical state evidence unchallenged, resulting in a finding of harmless error.

Under *Strickland*, moreover, defense counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. If

counsel chooses issues based on less than a full investigation, without obtaining and reviewing all of the court record, trial counsel's file, or discovery, the deficiency determination turns on whether the failure to investigate was itself unreasonable, not on whether that attorney would have chosen to raise the issues discovered by such an investigation. *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). The failure to complete a reasonable investigation makes a fully informed strategic decision impossible. *Id.* at 527-28.

Likewise, the failure to raise an issue is unreasonable if it was due to oversight rather than an intentional, reasoned strategy, *id.* at 534, or if counsel intended to raise it but simply forgot to do so. Counsel also acts unreasonably, regardless of the relative strength of the issues, if the claims raised on the appeal are contrary to the defendant's stated goals, as when the defendant only wants to attack the sentence but counsel forgoes such issues for others challenging only the conviction. Post-conviction/appellate counsel also acts unreasonably if he or she in fact identified an issue (regardless of whether it was "clearly stronger") but failed to raise it because he or she unreasonably believed other issues were stronger.

Even if post-conviction/appellate counsel properly identifies an issue, he or she may act unreasonably and provide deficient performance

by inadequately raising it. For instance, counsel may fail to conduct the investigation or research reasonably necessary to support the claim or fail to present necessary evidence or an adequate argument to support it. *Cf.* Wis. Stat. §974.06(4) (defendant may raise previously adjudicated claim upon showing of sufficient reason why it was "inadequately raised" in the prior proceedings).

Yet, the state court majority apparently assumes that the *Smith* Court intended its "clearly stronger" *dicta* to overrule the very *Strickland* reasonableness standard it simultaneously said courts must apply to ineffective appellate counsel claims. That assumption conflicts not only with *Smith* itself, but with more recent authority from this Court as well. *See Cullen v. Pinholster*, 131 S.Ct. 1388, 1406 (2011) ("[b]eyond the general requirement of reasonableness, 'specific guidelines are not appropriate,'" citing *Strickland*, 466 U.S. at 688).

Accordingly, although post-conviction/appellate counsel's failure to raise a "clearly stronger" issue may constitute deficient performance in a given case, neither controlling authority nor common sense suggests that it is the *only* way to establish deficient performance. The question, as with any assessment of counsel's performance, remains one of reasonableness under the circumstances. *Smith*, 528 U.S. at 285-86, 287-88; *Strickland*, 466 U.S. at 688.

B. The State Court's Application of the Wrong Standard Was Not Harmless

The state court's refusal to apply the applicable deficient performance/resulting prejudice standard under *Strickland* was not harmless. Instead, that court used the "clearly stronger" test as a means to avoid application of generally applicable legal standards for the assessment and evaluation of post-conviction motions, standards that Starks satisfied sufficiently to entitle him to an evidentiary hearing on his claims. (A:37-A:41).

First, Starks alleged that his trial counsel was ineffective for not interviewing and calling to testify a separately charged witness who swore to the effect that Starks did not commit the offense. Generally, issues of credibility are solely for the jury unless the evidence is incredible as a matter of law, *see First Nat. Bank of Appleton v. Nennig*, 92 Wis.2d 518, 285 N.W.2d 614, 620 (1979), and there is no indication here that the testimony would inherently be "so confused, inconsistent, or contradictory" as to be considered incredible as a matter of law. *State ex rel. Brajdic v. Seber*, 53 Wis.2d 446, 193 N.W.2d 43, 46 (1972). Also, under normal circumstances, the allegations of the motion must be accepted as true for purposes of obtaining a hearing unless they are contrary to the record. Wis. Stat. §974.06(3). Moreover, the state regularly relies on evidence

from those charged with crimes to meet its burden of proof beyond a reasonable doubt at trial. The state court nonetheless deemed such assertions to be "unreliable," such that Starks' claim was not "clearly stronger" than the issues raised on the direct appeal. (A:37-A:38).

Second, Starks alleged ineffectiveness due to trial counsel's failure to interview and call as a witness another prisoner who was in a police van with two of the state's main witnesses and observed them composing a story together to convict Starks. The state court held that the circuit court at trial already had decided, based on the testimony of one of those state witnesses, that the two had not discussed their testimony. The court deemed that finding controlling, at least to the extent of rendering Starks' allegation not "clearly stronger" than the issues raised on his direct appeal. (A:38-A:39). It did so even though judicial determinations are *not* controlling when they result from ineffective assistance of counsel or when the defendant satisfies the due process requirements for newly discovered evidence under the Wisconsin Constitution. Moreover, the state court made no attempt to decide whether, if the witness's allegations were true, it would create a reasonable probability of a different result under *Strickland*.

Third, Starks alleged that his trial attorney was ineffective for failing to obtain the phone records regarding a particular phone that a

state's witness claimed he used to call Starks the day of the homicide. Starks alleged that the records would demonstrate that no such call was made. The state court nonetheless deemed the claim "conclusory" and not "clearly stronger" than the issues raised on the direct appeal because Starks did not attach the actual phone records to his post-conviction motion (A:39). Wisconsin procedure, however, does not require presentation in the motion of the defendant's evidence supporting his specific factual allegations. *E.g.*, *State v. Love*, 2005 WI 116, ¶36, 284 Wis.2d 111, 700 N.W.2d 62. A specific factual allegation – such as that specific phone records would show that the state's witnesses did not speak with Starks – is not rationally rendered "conclusory" merely because Starks did not attach the phone records corroborating that claim.

Finally, Starks alleged that his trial counsel was ineffective for failing to call two witnesses who could testify to the fact that one of the state's primary witnesses in fact was not present at a funeral where, according to the state's witness (Gray), Starks told him he wanted to kill another witness because that witness had told police about Starks' involvement in the charged homicide. Although admitting that a jury may have deemed the state's witnesses less believable had trial counsel called those two additional witnesses, the majority below speculated that the jury might not have believed them and "imagin[ed]," albeit without

evidence, that trial counsel intentionally chose not to call them for strategic reasons. (A:39-A:40). While counsel may be assumed to have acted for tactical reasons, at least where the defendant relies solely on the trial record without calling the attorney to testify, *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam), the state court's apparent approval of denying a hearing absent proof that trial counsel's failure was due to something other than reasoned tactics effectively creates an "attorney's veto" of most any ineffectiveness claim, allowing allegedly ineffective counsel to avoid a finding of ineffectiveness merely by refusing to speak with the defendant or his post-conviction counsel.

Accordingly, although the state court concluded that Starks' allegations of deficient performance were "either unsubstantiated, unpersuasive, or previously adjudicated" and thus not "clearly stronger" than the issues raised on his direct appeal (A:40-A:41), application of the controlling *Strickland* standard of deficient performance and resulting prejudice easily could have produced a different result.

* * *

Review thus is appropriate to resolve the important question of whether the Wisconsin Supreme Court is correct that this Court in *Smith* overruled the controlling *Strickland* standard for assessing ineffectiveness of post-conviction or appellate counsel. Until this Court acts, the conflict

created by the majority decision below regarding the applicable analysis will cause unnecessary confusion and litigation in the lower courts. *See* Sup. Ct. R. 10(b) & (c).

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the Wisconsin Supreme Court.

Dated at Milwaukee, Wisconsin, October 21, 2014.

Respectfully submitted,

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