No. 03-11040

IN THE
SUPREME COURT OF THE UNITED STATES

BILLY WILLIAMS,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR OF THE
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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October 4, 2004

QUESTIONS PRESENTED

1. Whether a prisoner who files a motion pursuant to 28 USC § 2244(b)(3)(A), seeking authorization for the district court to consider a successive 28 U.S.C. § 2254 petition, is entitled to review by the circuit court of a claim previously presented in a prior 28 U.S.C. § 2244(b)(3)(A) motion, but rejected on the merits, where the prisoner does not rely on any fact or legal rule that he could not have relied on in his prior Pre Filing Authorization motion?

2. Whether in considering a prisoner's claim of actual innocence in the context of adjudicating petitioner's motion pursuant to 28 USC § 2244(b)(3)(A), which seeks authorization for the district court to consider a successive 28 U.S.C. § 2254 petition, a court of appeals may require the prisoner to make a threshold *prima facie* showing that his new evidence, viewed together with other evidence in the record, establishes by clear and convincing evidence that, no reasonable fact finder would have found the prisoner guilty of the charges against him, so as to warrant a fuller exploration by the district court?

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The Respondent, Gene M. Johnson, the Director of the Virginia Department of Corrections ("Director"), through his counsel, Virginia Attorney General Jerry W. Kilgore, and pursuant to this Court's Orders of August 4, 2004, directing that a response be filed, and August 31, 2004, extending the time for such filing, hereby responds to the Petition for Writ of Certiorari. For the reasons set forth below, the petition should be denied.

JURISDICTIONAL STATEMENT

It is not at all clear that this Court has jurisdiction to rule on the Petition for Certiorari. The Petition asks this Court to review the Circuit Court's decision to deny a Pre Filing Authorization motion which sought permission to file a second habeas corpus petition. Under the terms of 28 U.S.C. § 2244(b)(3)(E) ("§2244(b)(3)(E)"), this Court may not review "[t]he grant or denial of an authorization by a court of appeals to file a second or successive petition" for habeas corpus. *See Felker v. Turpin*, 518 U.S. 651, 661 (1996)("The Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition."). While this Court has held that § 2244(b)(3)(E) is to be given a narrow construction, *Castro v. United States*, 124 S. Ct. 786, 791 (2003), it has never held that it has jurisdiction to review a decision, such as the decision below, which explicitly denies authorization to file a successive habeas petition.

STATEMENT OF THE CASE

This Petition involves the technical aspects of the process by which a prisoner, who has been unsuccessful in his appeals and in his first petition for habeas corpus, may ask a court of appeals for permission to file a *second* petition for habeas corpus. Under the terms of the statute,

a prisoner who wishes to file a second petition for habeas corpus must file a Pre-Filing Authorization motion ("PFA motion") in the court of appeals and must meet certain criteria before the court of appeals may grant the PFA motion. *See* 28 U.S.C. § 2244(b)(2) ("2244(b)(2)").[1] In this instance, the prisoner filed a PFA motion and the court of appeals denied that motion. *See Pet. App.* 9a. The prisoner then filed *another* PFA motion raising the *same claim* as the previous PFA motion, albeit supported by additional information. The court of appeals again denied the PFA motion. *See Pet. App.* 2a. In doing so, the court of appeals expressly held that it must deny a successive PFA motion which relies "entirely on evidence and constitutional decisions that were available to the applicant during previous PFA proceedings," *Pet. App.* 4a, and, alternatively, that Williams' PFA motion did not meet the requirements of § 2244(b)(2). *Pet. App.* 8a. The Petition seeks review of the court of appeals' denial of the PFA motion.

The underlying substance of this procedural case is straightforward. The Petitioner, Billy Williams, was convicted of second-degree murder, malicious wounding, two counts of using a firearm in the commission of those felonies, and shooting into an occupied vehicle.[2] The Court

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[1] A federal court of appeals considering a PFA motion filed by a state prisoner does not rule on the merits of the petition itself, but simply determines whether a successive petition even has sufficient arguable merit to justify authorizing another round of federal review of a presumptively valid state court judgment, which, in most cases, already has been upheld against challenge by a state appellate court, a state habeas court, a federal district court and a federal court of appeals.

Congress limited the availability of a successive habeas corpus petition to prisoners who could make a *prima facie* showing of actual innocence, and assigned to the courts of appeals a gate-keeping role with respect to such claims.

[2] As explained by the Virginia Court of Appeals in its decision denying Williams' petition for appeal, the facts surrounding his crimes are terrifying. On May 5, 1997, Torrey Wright rode in his sister's car with his four-year-old daughter, Katori Chavis. Wright picked up Richard Teach, and Teach suggested that they ride to a specified location to say hello to the petitioner, "B.J." (Williams), who was Teach's friend. The men later saw Williams, and Teach yelled, "Hey, B.J." Williams

of Appeals of Virginia denied his petition for appeal, *Williams v. Commonwealth*, Record No. 3004-97-2 (Va. App. March 30, 1999)(unpublished), and he chose not to seek review by the Supreme Court of Virginia. Instead, Williams filed a habeas corpus petition in federal court, which dismissed the petition as untimely. *Williams v. Angelone*, No. 2:01cv69 (E.D. Va. Nov. 13, 2001)(unpublished). His subsequent appeal to the Fourth Circuit was dismissed, *Williams v. Angelone*, 26 Fed. Appx. 373 (4th Cir. 2002)(per curiam)(unpublished), and this Court denied his petition for certiorari.[3] *See* 537 U.S. 844 (2002).

Williams then filed a PFA motion, accompanied by a petition for habeas corpus, in the Fourth Circuit.[4] Specifically, Williams sought leave to file a successive petition advancing the following "newly discovered" claim:

> On June 27, 2001 Petitioner learned through Prosecutor witness in this Case (Richard Teach) that his testimony was perjury in that he testified he wasn't charged with any crimes, at Petitioner trial, however on June 27, 2001 he admitted to Petitioner that Prior to his trial he was charged with crimes in order to testify . . . .

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replied, "Don't be calling my damn name," and he started shooting a gun at the car. Wright saw flashes from the gun, and positively identified Williams in court as "B.J." Wright was wounded and the child, Chavis, was killed by the gunfire.

The evidence presented at trial included the testimony of Wakeel Sabur, who was incarcerated with petitioner while he was awaiting trial. Sabur testified that Williams both confessed to him that he had shot at Wright's car and expressed remorse about the child's death.

[3] While Williams' federal habeas appeal was pending, he filed a state habeas corpus petition. The state trial court ruled his petition was "time barred by § 8.01-654(A)(2) of the Code of Virginia," (Virginia's habeas statute of limitations), and dismissed the petition. *Williams v. Young*, No. LP29 (02-138) (Va. Richmond Circuit Court Jan. 28, 2002)(unpublished).Williams' subsequent appeal to the Supreme Court of Virginia was dismissed on procedural grounds *Williams v. Young*, No. 020610 (Va. 2002)(unpublished).

[4] Williams' initial attempt to file a PFA motion was dismissed without prejudice on June 18, 2002, because of Williams' failure to comply with the Fourth Circuit's local rules requiring background materials. Pet. App. 17a.

Pet. App. 11a. The court of appeals appointed counsel for Williams and, following briefing and oral argument, denied Williams' motion, holding that he had failed to make a *prima facie* showing that Teach's alleged recantation of his trial testimony established "by clear and convincing evidence that, but for the alleged subornation of perjury, no reasonable fact finder would have found Williams guilty of the charges against him." *Pet. App*. 15a. In doing so, the court of appeals observed, "[w]e need not decide here whether we would be willing to consider a new PFA motion reiterating the current claim and providing additional information favorable to Williams. *Pet. App.* 14a n.2 (citations omitted).

Williams accepted the Fourth Circuit's implicit invitation to file another PFA motion reiterating his previous claim but also providing additional information. Specifically, the additional information included allegations:

> that Williams was tried twice on charges relating to the May 5 shooting; the first trial ended with a hung jury, but the second trial—the only one in which Teach testified—resulted in Williams being convicted on all counts. The new motion also avers that Wright, the only eyewitness other than Teach, testified that he had never seen Williams before the shooting; in contrast, Teach and Williams were acquainted before the shooting occurred.

Pet. App. 3a-4a. Despite the inclusion of the additional information, the Fourth Circuit denied Williams' PFA motion. *Pet. App.* 8a.

The Fourth Circuit gave two separate and distinct justifications for its denial of Williams' subsequent PFA Motion. First, the Fourth Circuit determined that it was obligated to deny a subsequent "PFA motion that relies exclusively on evidence and constitutional rules that the applicant could have relied on in his last federal collateral challenge." *Pet. App*. 8a. As the lower court explained:

> Williams' current PFA motion presents the same claim as his second PFA motion, augmented by two new allegations relating to events at Williams' trial. But Williams was surely aware of these events when they occurred, long before he filed his second PFA motion. Thus, Williams' current motion does not rely on any fact or legal rule that he could not have relied on in his second PFA motion.

Pet. App. 7a. In other words, the Fourth Circuit determined that it could not even consider the merits of Williams' subsequent PFA motion.

Second and alternatively, the Fourth Circuit held that, even if it could consider the subsequent PFA motion, the subsequent PFA motion should be denied because it failed to meet the standard required by 28 U.S.C. § 2244(b)(2)(B). As the lower court explained:

> We note that we would deny Williams' motion even if he could satisfy the previousness requirement. Although the new facts alleged in the current PFA motion highlight the significance of Teach's testimony at Williams' trial, they do not undermine the value of Torrey Wright's testimony to the extent necessary to "establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found [Williams] guilty of the underlying offense,"

Pet. App. 8a (quoting § 2244(b)(2)(B)). In other words, the Fourth Circuit determined that, if it could reach the merits, Williams' subsequent PFA motion would be denied.

REASONS FOR DENYING THE WRIT

Certiorari should be denied for three reasons. First, although the Circuits differ in their approaches to the problem of successive PFA motions, these differences are not outcome determinative. In the absence of an outcome determinative conflict, review by this Court is not warranted. Second, there is no conflict among the Circuits concerning the standard to be utilized in resolving PFA motions. When the PFA motion does not assert that there is a new rule of constitutional law, the Circuits universally apply the actual innocence standard of proof articulated by *Sawyer v. Whitley*, 505 U.S. 333 (1992), and then codified with modification by

Congress in § 2244(b)(2)(B)(ii). Third, review by this Court will not alter the judgment. Even if this Court concludes that the lower court should have considered Williams successive PFA motion and even if this Court concludes that the lower court misinterpreted the language of § 2244(b)(2)(B)(ii), Williams cannot prevail. Quite simply, regardless of how one interprets the language of § 2244(b)(2)(B)(ii), Williams cannot meet the standard it imposes.

I. ALTHOUGH THE CIRCUITS DIFFER IN THEIR APPROACHES TO THE PROBLEM OF SUCCESSIVE PFA MOTIONS, THESE DIFFERENCES ARE NOT OUTCOME DETERMINATIVE.

As the lower court expressly observed, the Circuits differ in their approaches to the problem of successive PFA motions. *Pet. App*. 5a-6a. However, these different approaches do not result in different outcomes. In the absence of an outcome determinative split among the Circuits, this Court should decline review.

As explained above, in the Fourth Circuit, "a successive PFA motion must present claims that rely, at least in part, on evidence or Supreme Court decisions that the applicant could not have relied on in his last PFA motion." *Pet. App*. 5a. Consequently, the key inquiry is what constitutional rules and/or facts were available at the time of the last challenge to the same criminal judgment. In other words,

> constitutional rules that were established at the time of the applicant's last PFA motion were not "previously unavailable," and facts known or reasonably discoverable at the time of the applicant's last PFA motion cannot satisfy the "could not have been discovered previously" requirement.

*Pet. App.*4a.

The Fourth Circuit's approach is remarkably similar to that of the Seventh Circuit. *In Bennett v. United States*, 119 F.3d 470 (7th Cir. 1997), the Seventh Circuit denied a successive PFA motion because it relied on a constitutional rule which was established at the time of the previous PFA motion. *Id*. at 472. In this respect, the Seventh Circuit's approach is identical to the Fourth Circuit's approach—if the constitutional rule or new evidence presented was available at the time of the initial PFA motion, it may not be raised in the successive PFA motion. Although the Seventh Circuit went on to articulate an alternative rationale for its result and although the lower court expressed its disagreement with this aspect of the Seventh Circuit's analysis, *Pet. App.*7a, this aspect of the Seventh Circuit's analysis is irrelevant to the issue presented by the Petition. The fact is that in both the Fourth Circuit and the Seventh Circuit, a successive PFA motion that relies on a rule or on evidence that was previously available will be denied. Had Williams been litigating in the Seventh Circuit, *Bennett* would have dictated the same outcome that occurred in the Fourth Circuit.

Of course, in *Bell v. United States*, 296 F.3d 127 (2nd Cir. 2002) (per curiam), the Second Circuit denied an initial PFA motion because the prisoner had made an inadequate showing on a key issue, *id*. at 127-29, but stated that the denial was "without prejudice to Bell's filing a subsequent [PFA motion] that fully addresses the *prima facie* showing required by § 2255." *Id.* at 129. Williams interprets this result as meaning that the Second Circuit imposes no limitations on successive PFA motions. If Williams' interpretation of *Bell* is correct, then there is an outcome determinative conflict among the Circuits.

However, as the lower court expressly noted, it is not clear that Williams' interpretation of *Bell* is correct. As the Fourth Circuit explained:

> We are not persuaded, however, that *Bell* announces a general policy allowing successive PFA motions to be filed and considered without limitation. *Bell* may reflect nothing more than a determination that one particular prisoner should be permitted to file a successive PFA motion. If that is so, then we perceive no conflict between *Bell* and the rule we announce today. We agree with the Second Circuit that in some circumstances a court should deny a PFA motion without prejudice; indeed, we did so ourselves with respect to Williams' first PFA motion, which was filed without the attachments required by our local rule. On this understanding of *Bell* that decision neither conflicts with our holding nor supports Williams' argument for open-ended review of successive PFA motions.

Pet. App. 6a. Moreover, Williams' interpretation of *Bell* is undermined by the fact that *Bell* involved an initial rather than successive PFA motion. Where a prisoner's first pleading, suit or complaint is dismissed without prejudice, the lower federal courts routinely decline to deem the action as "successive" when it is re-filed. Indeed, that result was indicated by this Court in *Slack v. McDaniel*, 529 U.S. 473 (2000) (first petition dismissed without prejudice as non-exhausted "mixed petition;" second petition did not require PFA motion). In the absence of a clear and unambiguous statement from the Second Circuit that it interprets *Bell* in the same manner as Williams interprets it, this Court should not presume that there is a split.

Moreover, contrary to the Williams' assertions, the Ninth Circuit's decision in *Cooper v. Woodford*, 358 F.3d 1117 (2004) (*en banc*), *cert. denied sub. nom Goughnour v. Cooper*, 124 S. Ct. 2176 (2004), does not conflict with the court below. The Ninth Circuit majority's opinion makes no mention of the fact that Cooper had filed two prior PFA motions. No portion of the analysis attributes significance to that fact and the opinion does not discuss whether the claim in that motion was merely a "rehash" of the claim rejected in the earlier PFA motions, or discuss the possibility that the claim might be barred. Indeed, the opinion contains nothing to indicate that the Court even considered the question. Moreover, the suggestion in a dissent that petitioner had not shown due diligence implies that this was a new claim the petitioner had not previously

presented to the Court. *Cooper*, 358 F.3d at 1125-26 (Tallman, J., joined by Bybee, J., dissenting),

In sum, while the Circuits differ in their analytical approaches, these differences do not result in different outcomes. In the absence of an outcome determinative split, review is not warranted. Certiorari should be denied.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE STANDARD TO BE UTILIZED IN RESOLVING PFA MOTIONS.

Williams also asserts that there is a conflict among the Circuits concerning the proper standard for resolving PFA motions. Williams is mistaken.

Under the plain language of the statue, a court of appeals must deny a PFA unless the PFA "makes a prima facie showing that the application satisfies the requirements of this subsection" 28 U.S.C. § 2244(b)(3)(C). If the PFA does not assert that there is new rule of constitutional law, then the "requirements of this subsection" are:

> the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B). In effect, the prisoner must make a preliminary showing of merit under the same actual innocence standard of proof articulated in *Sawyer* and then codified with modification by Congress in 28 U.S.C. § 2244(b)(2)(B). *See Pet. App*. 15a (holding that § 2244(b)(2)(B) substantially incorporates the *Sawyer* test).

Although the Circuits have sometimes described this standard in different ways, it is clear that every Circuit applies *Sawyer's* actual innocence standard. To illustrate, in denying his first PFA motion, the Fourth Circuit required Williams to make a *prima facie* showing that his new evidence, viewed together with other evidence in the record, "establishes by clear and convincing evidence that, but for the alleged subornation of perjury, no reasonable fact finder would have found Williams guilty of the charges against him." *Pet. App*. 15a. Similarly, the Ninth Circuit declared that a prisoner must demonstrate that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish *by clear and convincing evidence* that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." *Cooper*, 358 F.3d at 1119 (quoting § 2244(b)(2)(B)(ii) (emphasis added). Finally, the Sixth Circuit demands that a prisoner make a "'*prima facie* showing' that the facts underlying the claim 'if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.'" *In re: Lott*, 366 F.3d 431, 432 (6th Cir. 2004). In sum, regardless whether they describe the standard as "low" or "high," all Circuits apply the same standard—the *Sawyer* actual innocence standard codified by Congress.

Because there is no conflict among the Circuits concerning the proper standard to be utilized in resolving PFA motions, certiorari should be denied.

III. REVIEW BY THIS COURT WILL NOT ALTER THE JUDGEMENT

"This Court reviews judgments, not statements in opinions." *California v. Rooney,* 483 U.S. 307, 311 (1987) *(per curiam)* (internal quotation marks omitted). Where the lower court

reached the correct result, but utilized faulty reasoning, there is no reason for this Court to intervene. Thus, unless there is a possibility that the judgment of the court below will be altered by this Court's decision, this Court should deny review. In other words, Williams must show that if this Court accepts his legal position, he will prevail. This Williams cannot do. Even if this Court concludes that the lower court should have considered his successive PFA motion and even if this Court concludes that the lower court misinterpreted the language of 28 U.S.C. § 2244(b)(2)(B), Williams cannot prevail. Quite simply, regardless of how one interprets the language of § 2244(b)(2)(B)(ii), Williams cannot meet the actual innocence standard.

To explain, Williams' proffered claim of actual innocence is based solely upon an allegation that he has new evidence with which to impeach one of the witnesses who testified at his trial. The alleged new evidence is that Richard Teach lied about having charges pending against him. Other testimony in Williams' trial established that prosecutors told Teach he would be charged with a crime if Teach did not testify in Williams' trial. Whether Teach had been promised favorable treatment in exchange for testimony or warned of adverse treatment if he did not testify is a distinction without any difference, in terms of its impeachment value. *Cf. Bordenkircher v. Hayes*, 434 U.S. 357, 360-361 (1978) (recognizing the functional equivalence of a prosecutor threatening to bring additional charges if a defendant does not plead guilty and a prosecutor offering to drop some charges if a defendant does plead guilty). In addition to the necessary uncertainty surrounding petitioner's assertion that this "new evidence" might have affected the weight the jury gave to Teach's testimony, petitioner's evidence never could satisfy any articulation of the actual innocence standard. The jury heard the unimpeached eyewitness testimony of Torrey Wright, who identified Williams as the man he saw shoot at his car and kill his daughter, as well as Williams' own confession that he shot at the car. Further impeachment

of Teach would not affect this evidence, which is a more than sufficient basis upon which reasonable judge or juror could conclude that Williams was guilty of this heinous murder.

Because review by this Court would not alter the judgment of the court below, certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be **DENIED.**

Respectfully submitted:

GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS

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PROOF OF SERVICE

On October 1, 2004, I served one copy of the RESPONDENT'S BRIEF IN OPPOSITION upon all parties required to be served, by United States Postal Service in accordance with Rule 29(3), as follows:

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