

DAVID PAUL STOCKS, #137310
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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

DAVID PAUL STOCKS,)	
)	NO. CIV 03-1510-PHX-ROS(LOA)
Petitioner,)	
)	
vs.)	REQUEST FOR CERTIFICATE
)	OF APPEALABILITY
DORA B. SCHRIRO, et al.,)	
)	
Respondents.)	

PETITIONER, David Paul Stocks, *in pro se*, and pursuant to 28 U.S.C. § 2253(c), Rule 22(b), FRAP, and Ninth Circuit Rule 22-1, hereby respectfully moves this Court for a Certificate of Appealability from the Order and Judgment dismissing the Petition for Writ of Habeas Corpus in the above-entitled and numbered cause for the reasons set forth in the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 22ND day of September, 2006.



David Paul Stocks, #137310
Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

I. Requested Certificate of Appealability Issues

Petitioner request that a certificate of appealability ("COA") issue on the Court's dismissal of his habeas petition with respect to the following issues:

1. Ineffective Assistance Claims: Whether the Court erred in failing to apply the standard for claims of ineffective assistance of counsel, as clarified by *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), rather than the more deferential standard employed by the Court under *Strickland v. Washington*, 466 U.S. 668 (1984).

Whether the state court's findings of fact were entitled to deference where Petitioner was denied an evidentiary hearing in the state courts.

Whether the record establishes that the search warrant below was properly obtained and the search properly conducted, and if not, whether a warrant was necessary given Petitioner's probationary status.

2. *Brady* Claim: Whether Petitioner sufficiently stated a claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), in light of the fact that he was denied an evidentiary hearing.

3. Insufficient Evidence Claims: Whether the evidence at trial was sufficient to establish the "benefit" element of the Arizona fraudulent schemes statute; whether Petitioner's prior convictions were properly proven under Arizona law; and whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000), may be retroactively applied to Petitioner's prior convictions under Arizona's unique

statutory scheme.

II. Substantial Constitutional Issues

Pursuant to 28 U.S.C. § 2253(C)(3), Petitioner submits that his habeas petition raised the following substantial issues:

Ineffective Assistance of Counsel

Ground I

Failure to challenge illegal search and seizure in violation of the Fourth and Sixth Amendments.

Ground II

Failure to interview state's expert or obtain expert witness for defense in violation of Sixth Amendment.

Ground III

Failure to interview and call a crucial defense witness at trial in violation of the Sixth and Fourteenth Amendment.

Ground IV

Denial of Sixth Amendment right to effective assistance due to conflict of interest by trial counsel.

Ground V

Violation of Fifth and Fourteenth Amendment right to due process through state's withholding of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Ground VI

Violation of Fifth and Fourteenth Amendment right to due process where evidence was insufficient to satisfy "benefit" element of fraudulent schemes and artifices statute.

Ground VII

Violation of Fifth and Fourteenth Amendment right to due

process where evidence was insufficient to satisfy prior conviction allegation.

III. Law and Argument

A. Applicable Standard

In order to be entitled to a COA, a petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c). This "substantial showing" standard is a "relatively low" one, *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003), as the petitioner is not required at this stage to prove that some jurists would grant his habeas petition. *Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S.Ct. 1029, 1040 (2003); accord, *Lambright Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000)("[T]he issuance of a COA is not precluded where the petitioner cannot meet the standard to obtain a writ of habeas corpus."). Rather, all the petitioner is required to establish is "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604 (2000). The Court must resolve in petitioner's favor any doubt whether he has met his burden. *Lambright, supra*.

Here, the Court dismissed Petitioner's constitutional claims on the merits, therefore in order to obtain a COA he need only show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Miller-El* at 336, 123

S.Ct. at 1039.

B. Reasons For Issuing a COA

Ineffective Assistance Claims (Grounds I-IV)

Petitioner contends that a COA should issue on his claims of ineffective assistance to determine whether the Court erred in failing to apply the standard for claims of ineffective assistance of counsel set forth in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), rather than the more deferential standard employed by the Court under *Strickland v. Washington*, 466 U.S. 668 (1984). Previously, counsel enjoyed almost unfettered discretion in matters of tactical and strategic decisions, however, *Wiggins* now provides that limited investigations or decisions not to call pertinent witnesses may no longer be summarily dismissed as mere "tactical decisions." Rather, review focuses on whether the investigation supporting the "tactical decision" was itself reasonable. *Id.* 2536 (2003).

In *Wiggins*, trial counsel made a so-called "tactical decision" not to offer mitigating evidence of Wiggins' traumatic childhood at sentencing, and instead opted to contest his involvement in the crime. Thereafter Wiggins was sentenced to death. Rejecting the prior deference given to "tactical decisions," The *Wiggins* Court held:

We base our conclusion on the much more limited principle that strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on the investigation. A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances.

Id. at 2536 (internal quotations and citations omitted).

Thus, a tactical decision is only as valid as the investigation supporting it, and competent counsel must pursue all leads, absent evidence that further investigation would be counter-productive, fruitless or harmful. *Id.* at 2537 (citing *Burger v. Kemp*, 483 U.S. 776, 794)(concluding counsel's limited investigation was reasonable because he interviewed all witnesses brought to his attention and discovered little that was helpful much that was harmful). *Wiggins* concluded:

In assessing the reasonableness of an attorney's investigation, however, a court must consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. ... *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to ... strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Id. at 2583.

For the sake of brevity Petitioner incorporates herein, by reference, the numerous instances of counsel's failure to prepare for trial set forth in Petitioner's motion to alter amend judgment (Dkt.# 32) in support of his claim that reasonable jurists could easily debate whether the Court erred in applying the more deferential standard set forth in *Strickland*, rather than the standard now required by *Wiggins*, therefore a COA should issue thereon. *See, Rompilla v. Beard*, 125 U.S. 2456 (2005).

Petitioner also contends that reasonable jurists could debate the Court's adoption of the state court's findings of fact to deny his claims of ineffective assistance, the *Brady* violation, and insufficient evidence claims as to both the elements of the fraudulent schemes charge, as well as the prior

convictions used to enhance his sentence, where Petitioner was not afforded an evidentiary hearing in the state courts. Although a state court's finding of fact is entitled to a presumption of correctness under the AEDPA, when a state court makes evidentiary findings without holding a hearing and giving a petitioner an opportunity to present evidence, such findings clearly result in an "unreasonable determination" of the facts. *Taylor v. Maddox*, 366 F.3d 992, _____ (9th Cir. 2004). Similarly, where the state courts plainly misapprehend or misstate the record in making their finding, and the misapprehension goes to a material factual issue that is central to a petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable. *Id.* at _____.

For instance, during sentencing the trial court declared the search warrant below valid notwithstanding the fact that it was signed and dated *after* the search of Petitioner's home. Moreover, Petitioner was under no obligation to allow a search of his home as a condition of his probation, therefore there was no basis for the warrantless search that led to the discovery of the evidence that subsequently formed the basis for the warrant. *United States v. Knights*, 534 U.S. 112 (2001). Accordingly, jurists of reason could find it debatable whether the petition states a valid claim of the denial of a constitutional right," *Slack* at 484, 120 S.Ct. at 1604 (2000).

For the sake of brevity, Petitioner incorporates herein, by reference, the arguments set forth in his motion to alter amend

judgment in support of a COA (Dkt.# 32) reference his *Brady* and insufficient evidence claims. Petitioner contends that he was not required to prove that the evidence suppressed by the state would have exonerated him before he could state a constitutional violation under *Brady*. *Strickler v. Green*, 527 U.S. 263, 282-83 (1999). Moreover, the withheld photograph went directly to whether Petitioner was guilty of the fraudulent schemes charge and whether he benefited from it.

Similarly, the fact that the state alleged Petitioner's prior convictions was not enough to prove that he had *committed* them within the previous five years as required by A.R.S. § 13-604(U). To the extent the Court relied on Rule 17.6, Arizona Rules of Criminal Procedure to uphold Petitioner's sentences, that rule has no application to admissions made during trial. *See, State v. Gastelum*, No. 1 CA-CR 04-0661, filed 3/23/06, Slip Op. at 6, ¶12. Moreover, the trial court cannot rely on matters not in evidence to support a prior conviction allegation. *Ibid.* at n.5. Accordingly, the trial court had absolutely no evidence before it as to when the prior convictions had been committed.

Finally, the Court's finding that *Apprendi, supra* cannot be collaterally applied to Petitioner is clearly debatable. *Apprendi* was decided in 2000, and Petitioner's appeal from his re-sentencing did not become final until 2002. *See, State v. Stocks*, No. 1 CA-CR 00-0404, filed 6/13/02. New rules of criminal procedure must be applied to all cases that have not yet become final on the date the decision announcing the new rule is decided. *Griffith v. Kentucky*, 479 U.S. 314 (1987). It is of no

moment that Petitioner seeks to have the new rule applied on collateral review in this Court where he timely presented the claim to the state courts in the first instance. Accordingly, and given all the above, reasonable jurists could debate whether Petitioner's sentencing claim should be allowed to proceed. *Slack, supra*.

IV. Conclusion

Given all the above, Petitioner contends that "reasonable jurists could debate whether (or, for that matter, agree that) his petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Miller-El* at 336, 123 S.Ct. at 1039, *Slack* at 484, 120 S.Ct. at 1604 (2000).

WHEREFORE, and based on all the above, Petitioner respectfully request this Court issue a COA on the above-identified issues.

RESPECTFULLY SUBMITTED this 22nd day of September, 2006.

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Copy of the foregoing mailed
this 22nd day of September, 2006, to:

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By David Paul Stocks
David Paul Stocks