**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

**No. 18–1521**

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| **ARTHUR GATES,** , | ) | Appeal from |
| Petitioner-Appellant | ) | the United States District Court |
| | ) | for the Northern District Indiana, |
| v. | ) | Fort Wayne Division |
| | ) | |
| **RON NEAL**, | ) | Case No.1:16-CV-373-WCL-SLC |
| | ) | |
| Superintendent, | ) | The Honorable |
| Indiana State Prison, | ) | William C. Lee, Judge |
| | ) | |
| Respondent-Appellee. | ) | |

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**PETITIONER-APPELLANT'S**
**CORRECTED PETITION FOR REHEARING**
**AND SUGGESTION FOR REHEARING *EN BANC***

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## Disclosure Statement

**No. 18–1521**

Short Caption: **Arthur Gates v. Ron Neal**.

The undersigned, counsel of record for the Petitioner-Appellant, Arthur Gates, furnishes the following in compliance with Circuit Rule 35 and Federal Rule of Appellate Procedure 26.1:

(1) The full name of every party or amicus the attorney represents in the case:

**Arthur Gates**

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear for the party in this court:

**Not Applicable**

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Dated: November 17, 2018

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**Rule 35(b) Statement**

The panel decision denying Arthur Gates a certificate of appealability conflicts with the decisions of the United States Supreme Court in *Buck v. Davis*, 137 S. Ct. 759 (2017), and *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

That is because the decision of the district court is almost facially contrary to, among other cases, *Strickland v. Washington*, 466 U.S. 668 (1984), *Kimmelman v. Morrison*, 477 U.S. 365 (1986), *Wiggins v. Smith* 539 U.S. 510 (2003), and *Hinton v. Alabama*, 134 S. Ct. 1081 (2014).

## Introduction: the Chief Facts and Some Observations

Gates presents a single, straightforward trial ineffective-assistance claim: his lawyers completely and unreasonably dropped the investigative ball when they failed to obtain their own expert to have the State of Indiana's forensic evidence independently reviewed.

Without a certificate of appealability permitting him present his full case to this Court, Arthur Gates will likely spend the rest of his life in prison for a conviction obtained by counterfeit scientific evidence. Gates was acquitted of the anal rape of B.D.; he was convicted for the vaginal rape of B.D. and sentenced to 48 years in prison. His current earliest possible release date is in 2036, when he will be 71 years old.[1] The average life expectancy of an African-American sentenced to life in prison is about 56 years. *See Kelly v. Brown*, 851 F. 3d 686, 688 (7th Cir. 2017) (Posner, J., dissenting).

The probative evidence supporting Gates's rape conviction came chiefly from two sources. First, there was B.D.'s testimony about the alleged anal and vaginal rapes. That testimony was truly cursory. It amounted amounted to fewer than 20 lines of transcript. See Trial Tr. at 104-05.

Second, there was the testimony of Susan Walker, an "expert" from

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[1] This information is from a web page of the Indiana Department of Correction:
https://www.in.gov/apps/indcorrection/ofs/ofs?lname=gates&fname=arthur&search1.x=58&search1.y=12
(Last visited Nov. 16, 2018).

Orchid Cellmark, through whom were admitted at Gates's trial the test results coming from a "rape kit" taken from B.D. at a hospital. The test results showed *nothing* supporting an anal rape.

With respect to the alleged vaginal rape, Walker testified that the testing showed a "weak presence" of P30, which is a "prostate specific protein that's found in seminal fluid." Trial Tr. at 429. Walker said that P30 is "gender specific and that a positive result for P30 would be evidence of male sexual emission even if sperm was not found. Trial Tr. at 445.

Gates's trial lawyers, Stephen Owens and Barry Blackard, had seen Walker's report and knew her testimony was coming. They did not seek an independent review Walker's report for two reasons: 1) they believed P30 was, in fact, a male-specific protein; and 2) they believed the report helped more than it hurt. Post-Conviction Ex. 5 (Affidavit of Stephen Owens).

Dr. Karl Reich of Independent Forensics testified in Gates's post-conviction proceedings that P30 is *not* male specific and that his retesting completely contradicted Walker's testimony about the presence of P30 and its implications. Post-Conviction Tr. at 44.

At Gates's trial, the "weak presence" of P30 was the *only* material difference between the rape-kit test results as they related to the alleged vaginal rape, for which Gates was convicted, and those results as they related to the alleged anal rape, of which Gates was acquitted.

Both the Indiana Court of Appeals and the district court made much of B.D's injuries. *See Gates v. State*, Indiana Court of Appeals No.

82A01-1504-PC-149 (Ind. Ct. App. Nov. 15, 2015) (*mem.*), *trans. denied*, ("*Gates II*") slip op. at 7, (evidence of B.D.'s injuries part of "substantial evidence" that Gates "sexually assaulted B.D.); D.E. 17 at 8 (Opinion and Order) ("The court has also considered the other evidence presented by the prosecution, including testimony from the victim and police officers as well as the medical evidence regarding the victim's injuries . . . .). But B.D.'s injuries said no more about the vaginal rape, for which Gates was convicted, than for the anal rape, for which Gates was acquitted.

To be clear, Gates almost certainly battered B.D. But the State did not charge Gates with battery; as Gates's lawyer said in closing argument, denying there had been an anal or vaginal rape: "Had they chosen to bring a battery case . . . we might be talking about a different story at this point," Trial Tr. at 660.

The Indiana Court of Appeals and the district court also both made much of the finding of a vaginal tear found at the hospital. *See Gates II*, slip op. at 7 (Gates's jury "heard evidence that B.D. sustained a hymenal tear consistent with sexual assault"); D.E.17 at 5 (Order and Opinion) ("Medical testimony also indicated a tear in the victim's hymen . . . .).

That evidence was equivocal at best. The hospital nurse who observed the tear testified that the tear could have come from sources unrelated to sexual activity or from consensual sexual activity; she also said the age of the tear was unknown. Trial Tr. at 282, 307, 313.

In light of Walker's acquittal for anal rape, it can only have been

Walker's mistaken testimony about the "weak presence" of P30 and its implications that was decisive in the jury's decision to convict Gates for vaginal rape.

## Argument

### A. The showing required to obtain a certificate of appealability is *very* low.

The Court is certainly aware of the standard required for a certificate of appealibility to issue. But because this is a petition for rehearing from the denial of certificate of appealability, Gates first spends some pixels and print on it before moving on to the mistakes by the district court that absolutely justify a certificate of appealability in this case.

To obtain a certificate of appealability, Gates must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That is not much.

Gates can satisfy this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (internal quotation marks omitted); *accord Buck v. Davis*, 137 S. Ct. 759, 773 (2017). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 773).

To obtain a certificate of appealability, Gates need not even "prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El*, 537 U.S. at 338. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id*.

And it is particularly important that the Court not deny a certificate of appealability by actually deciding the merits of Gates's trial ineffective-assistance claim at this stage: "When a court of appeals sidesteps th[e COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id*. at 336–37.

### B. The district court's decision is so clearly mistaken with respect to both *Strickland* performance and prejudice, that the Court should issue a certificate of appealability.

Analysis of whether a certificate of appealability issue focuses on the decision of the district court. *See Miller-El*, 537 U.S. at 327 (to obtain a certificate of appealability, it is necessary to "demonstrat[e] that jurists of reason could disagree with the district court's resolution of [the] constitutional claims."). First, with respect to *Strickland* performance, the district court's invented a purely fictional theory of Gates's defense never mentioned anywhere by anyone before. It also made the same *Strickland* / *Wiggins* mistake that the Indiana Court of Appeals had made before it in *Gates II*. Ignorant of the true meaning of the rape-kit test

results—specifically that P30 is *not* a male-specific protein—Gates's lawyers could not have made *any* tactical or strategic decision *not* to seek independent review of the State's test results, much less a reasonable one.

Second, the district court concluded that the *Gates II* court had not unreasonably determined there had been no *Strickland* prejudice. That can't be right, because the *Gates II* court said nothing about *Strickland* prejudice.

The district court's obvious errors entitle Gates to a certificate of appealability. That is because this Court cannot conclude that the district court's errors were harmless—that the case would come out the same way even without the errors—without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 773). That is, the Court cannot bypass the district court's obvious errors without deciding the case on the merits, which is precisely what *Miller-El* forbids. *Miller-El*, 537 U.S. at 336-37.

1. *Strickland* Performance: the district court must have been thinking of another case.

With respect to *Strickland* performance, the district court's decision was mistaken on both the facts and the law. On the facts, Gates's lawyers made a reasonable decision, said the district court, not to further test the

biological evidence. That is because an attack on State's test results would have been inconsistent with Gates's defense that any sexual contact was consensual.

> **Significantly, trial counsel's strategy was to invite the jury to find that the sexual conduct was consensual** and to concede the fact that Gates and the victim engaged in sexual conduct. This strategy was reasonable in light of the medical evidence regarding her injuries and the police officers' testimony that they found Gates in the victim's bed. Considering this strategy, trial counsel's decision to not retain an expert witness was also reasonable—a stronger challenge to the forensic evidence would have been inconsistent with the defense strategy and would have likely damaged the credibility of the defense. Thus the court cannot find that the appellate court's determination regarding trial counsel's performance was unreasonable.

D.E. 17 at 7. (Opinion and Order) (emphasis added). The closing argument for Gates appears at pages 651-60 of the trial transcript. At no point of the argument is there the slightest suggestion that either the alleged anal or vaginal intercourse was consensual. The only thing Stephen Owens said regarding consent to anything was:

> "We know, again, from Sarah Walker, that [Gates's] DNA was on her breast and I told you in opening statement that they had engaged in some sort of sexual conduct. **Assuming, if you want to, that licking her breast is consensual or non-consensual, it really doesn't matter because it's not an element of any of the crimes with which he's charged.** It certainly isn't an

> element of rape or deviate conduct. . . . We're not trying to get around that. **That isn't the issue. But it tells you nothing as to whether any of the other activities occurred.**"

Trial Tr. at 656 (emphases added).

That mistake by the district court alone should be enough to justify half a certificate of appealability—the *Strickland* performance half.

But there is a bigger problem. Gates's lawyers could not reasonably plan Gates's defense while under the mistaken belief that P30 is a male-specific protein, the presence of which supported an inference in this case that there had been a rape. As *Strickland* says, "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. That is, "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id*. Decisions based on ignorance of the facts or the law are almost *per se* unreasonable. *Hinton*, 134 S. Ct. at 1088-89; *Kimmelman*, 477 U.S. at 385.

2. *Strickland* Prejudice: Contrary to *Wiggins*, the district court applied AEDPA deference to a decision the Indiana Court of Appeals never made.

The *Gates II* court did not opine about *Strickland prejudice*. Gates was therefore entitled to *de novo* review on the subject. *Wiggins*, 539 U.S. at 531.

Instead, the district court read into its prejudice analysis the *Gates II* decision about Gates's state-law, newly-discovered-evidence claim. That standard is higher—"would probably produce a different result"— than the standard required to show *Strickland* prejudice.

These errors by the district court entitle Gates to the second half of a *Strickland* certificate of appealability.

### C. If this were a *Brady* case, the Court would probably not have a hard time concluding that Gates is entitled to relief.

Once a lawyer's unprofessional errors have been established, the standard to establish *Strickland* prejudice flowing from those errors is a reasonable probability that the result would be different. *Strickland*, 466 U.S. at 694. That standard is the same as the standard for materiality under *Brady v. Maryland*, 373 US 83 (1963). *See Strickland*, 466 U.S. at 694

Suppose the State had first hired Dr. Reich and then buried his test results and report, because they would have been less than helpful. Suppose then the State had hired Walker, and she produced the report she did. If Dr. Reich's hypothetical report for the State surfaced, this Court would probably not hesitate to find that Dr. Reich's report was both exclupatory and material. The result should be no different just because Gates's claim is that his trial lawyers were ineffective.

## Conclusion

For the foregoing reasons, the Petitioner respectfully requests that the Court grant rehearing and issue a certificate of appealability with respect to the single issue presented by this case: Whether Gates's lawyers were ineffective for failing to have the State of Indiana's forensic evidence reviewed by an expert before Gates's trial.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that on November 17, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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