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I. Facts

Larry Donnell Fowlkes ("Fowlkes") filed an initial federal petition seeking a writ of habeas corpus in the United States District Court for the Eastern District of Virginia under 28 U.S.C. § 2254 in which he made three claims: (1) that he received ineffective assistance of counsel; (2) that the prosecution violated *Brady v. Maryland*;[1] and (3) that he was actually innocent.[2] The district court denied Fowlkes relief and dismissed his petition under 28 U.S.C. § 2244(d)(1)(A) for failing to meet the filing deadline of one year.[3] On appeal to the United States Court of Appeals for the Fourth Circuit, Fowlkes added an impartial jury claim to his original claims in a supplemental brief.[4] The Fourth Circuit denied Fowlkes a certificate of appealability ("COA") and held Fowlkes's claims "meritless."[5] Fowlkes subsequently sought from the Fourth Circuit pre-filing authorization ("PFA") for a successive § 2254 habeas petition forwarding the same claims as his initial petition as well as the impartial jury claim.[6]

Billy Williams ("Williams") included the following two claims in his initial federal habeas corpus petition to the United States District Court for the Eastern

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1. 373 U.S. 83 (1963).

2. *In re* Fowlkes, 326 F.3d 542, 543–44 (4th Cir. 2003); Fowlkes v. Angelone, No. 00-6230, 2001 WL 1545484, at *1 (4th Cir. Dec. 5, 2001) (per curiam) (opinion not selected for publication); *see* 28 U.S.C. § 2254 (2000) (defining process for seeking federal writ of habeas corpus; part of AEDPA); Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that due process requires the prosecution to produce evidence favorable to the accused upon request if the evidence is material either to guilt or to punishment). Fowlkes was serving a forty-five-year prison sentence for his convictions of accessory before the fact to first-degree murder, attempted capital murder, and robbery. *Foulkes*, 326 F.3d at 543.

3. *Foulkes*, 326 F.3d at 544; *see* 28 U.S.C. § 2244(d)(1)(A) (2000) (establishing a one-year statute of limitations for filing an application for a writ of habeas corpus from the date state proceedings conclude; part of AEDPA). The district court also rejected his actual innocence claim. *Foulkes*, 326 F.3d at 544. For a complete discussion and analysis of the application of § 2244(d)(1)(A) in the capital context, see generally Jessie A. Seiden and Priya Nath, 16 CAP. DEF. J. 179 (2003) (analyzing Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003)).

4. *Foulkes*, 326 F.3d at 544.

5. *Id.* at 544; *Foulkes*, 2001 WL 1545484, at *1.

6. *Foulkes*, 326 F.3d at 544; *see* 28 U.S.C. § 2244(a)(3)(A) (requiring the permission of a court of appeals to file a successive habeas petition; part of AEDPA).

District of Virginia: (1) ineffective assistance of counsel; and (2) denial of the right to appeal.[7] The district court denied his petition, and the Fourth Circuit dismissed his appeal.[8] While Williams's § 2254 proceeding was pending, he found evidence that perjured testimony was used to convict him.[9] With this information in hand, Williams filed a state habeas petition, which was denied.[10] Williams sought from the Fourth Circuit a PFA for a successive § 2254 habeas petition based on his two previous claims and a new claim based on the use of perjured testimony to convict him.[11]

II. Holding

The Fourth Circuit held that all of Fowlkes's claims had been previously dismissed on the merits in his initial § 2254 habeas proceedings and were thus barred by § 2244(b)(1) and, even if the claims had not been in his initial petition, Fowlkes's claims would not have satisfied the requirements of § 2244(b)(2).[12] The court in *In re Williams*[13] held, first, that the thirty-day response deadline for the Court to respond to a request for a PFA in § 2244(b)(3)(D) was not mandatory and a violation of the deadline did not require that Williams's request be granted.[14] Second, the court held that Williams's claims failed to meet the requirements of § 2244(b)(2).[15] Because Fowlkes and Williams each failed to make a prima facie showing of merit as required by § 2244(b)(3)(C), the court in each case denied the request for a PFA.[16]

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7. *In re* Williams, 330 F.3d 277, 279 (4th Cir. 2003).

8. *Williams*, 330 F.3d at 278–79; *see* Williams v. Angelone, No. 01-8038, 2002 WL 220343, at *1 (4th Cir. Feb. 13, 2002) (per curiam) (opinion not selected for publication) (dismissing Williams's initial federal habeas petition), *cert. denied*, 537 U.S. 844 (2002).

9. *Williams*, 330 F.3d at 279.

10. *Id.*

11. *Id.*

12. *Fowlkes*, 326 F.3d at 543; *see* 28 U.S.C. § 2244(b)(1)–(2) (2000) (providing limits on the ability of federal courts to review federal habeas petitions; part of AEDPA).

13. 330 F.3d 277 (4th Cir. 2003).

14. *Williams*, 330 F.3d at 280–81; *see* 28 U.S.C. § 2244(b)(3)(D) (requiring a federal court of appeals to grant or deny permission to file a successive petition not later than thirty days after the filing of the motion; part of AEDPA).

15. *Williams*, 330 F.3d at 282–84; *see* 28 U.S.C. § 2244(b)(2) (providing requirements for filing a claim that was not presented in a prior habeas petition; part of AEDPA).

16. *Fowlkes*, 326 F.3d at 543; *Williams*, 330 F.3d at 281, 284; *see* 28 U.S.C. § 2244(b)(3)(C) (requiring a second or successive application to make a "prima facie showing" that the application satisfies § 2244; part of AEDPA); 28 U.S.C. § 2254 (2000) (providing the requirements for the issuance of a writ of habeas corpus; part of AEDPA).

III. Analysis

A. Fowlkes

In Fowlkes's first petition to the Fourth Circuit, the court ruled that all of Fowlkes's claims were meritless and denied relief.[17] The court ignored the strictures of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") that require the courts of appeals to consider an application for a COA only on the basis of a substantial showing of the denial of a constitutional right and not "on the merits."[18] In denying Fowlkes's application for a successive petition, the court acknowledged its past practice of deciding "the substantive merits of claims presented on habeas without regard to the requirement of a certificate of appealability."[19] Despite the court's recognition of its improper application of § 2253(c)(2) in Fowlkes's original appeal, the Fourth Circuit ruled that because it had denied all three of Fowlkes's claims on the merits, § 2244(b)(1) barred Fowlkes from "resurrect[ing] those claims."[20]

Concurring in the judgment, but not in the application of § 2244, Judge Gregory found the majority's reliance on its original merits decision to be contrary to the requirements of AEDPA and referred to the court's "gratuitous finding" that Fowlkes's claims were "meritless" as dicta.[21] Instead of ascribing finality to the court's original judgment, Judge Gregory would have applied the principles of res judicata to the claims presented by Fowlkes.[22] Adopting the analysis used by Judge Cudahy in *Brannigan v United States*,[23] Judge Gregory considered Fowlkes's ineffective assistance of counsel claim and *Brady* claim to

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17. *Fowlkes*, 326 F.3d at 544; *see Fowlkes*, 2001 WL 1545484, at *1 (finding Fowlkes's claims "meritless" and denying a COA).

18. *Fowlkes*, 326 F.3d at 546; *see* 28 U.S.C. § 2253(c)(2) (2000) (stating that a certificate of appealability can only issue "if the applicant has made a substantial showing of the denial of a constitutional right"; part of AEDPA).

19. *Fowlkes*, 326 F.3d at 546; *see* Miller-El v. Cockrell, 537 U.S. 322, 348–49 (2003) (Scalia, J., concurring) (disapproving of analyzing the merits of a case without considering whether the applicant has made a substantial showing of the denial of a constitutional right); Swisher v. True, 325 F.3d 225, 230 (4th Cir. 2003) (acknowledging improper application of AEDPA). For a complete discussion and analysis of *Swisher*, see generally Maxwell C. Smith, 16 CAP. DEF. J. 195 (2003) (analyzing Swisher v. True, 325 F.3d 225 (4th Cir. 2003) and Rowsey v. Lee, 327 F.3d 335 (4th Cir. 2003)).

20. *Fowlkes*, 326 F.3d at 545; *see* 28 U.S.C. § 2244(b)(1) (stating that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed"; part of AEDPA).

21. *Fowlkes*, 326 F.3d at 547–48 (Gregory, J., concurring); *see* 28 U.S.C. § 2253(c)(2) (requiring an applicant for COA to make a substantial showing of the denial of a constitutional right; part of AEDPA).

22. *Fowlkes*, 326 F.3d at 548 (Gregory, J., concurring).

23. 249 F.3d 584 (7th Cir. 2001).

be barred by claim preclusion and thus barred by § 2244(b)(1).[24] Judge Gregory would have analyzed Fowlkes's third claim as a new claim.[25] Nevertheless, Judge Gregory would have barred that claim under § 2244(b)(2)(B).[26]

Apparently in response to Judge Gregory's concurrence, the majority also briefly analyzed Fowlkes's claims under § 2244(b)(2)(B).[27] Proceeding under § 2244(b)(2)(B)(i), the court found that the evidence supporting his ineffective assistance claim was not supplemented in his new petition and that the evidence supporting the claim had been available since the trial.[28] The court noted that the exercise of due diligence could have revealed any evidence to support this claim.[29] The court then analyzed Fowlkes's *Brady* claim and impartial jury claim under § 2244(b)(2)(B)(ii).[30] The court found that the evidence presented by Fowlkes to support these claims did not prove that, but for the *Brady* violation and the foreman's bias, no reasonable juror would have voted to convict.[31]

B. Williams

1. Thirty-day Period Under § 2244(b)(3)(D)

The court in *Williams* first answered Williams's claim that § 2244(b)(3)(D) required that the court grant his PFA request as a remedy for violating the thirty-day grant or deny period imposed on a federal court of appeals.[32] The court held that the thirty-day rule is " 'precatory, and not mandatory.' "[33] The court found

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24. *Fowlkes*, 326 F.3d at 549–50 (Gregory, J., concurring); *see* Brannigan v. United States, 249 F.3d 584, 590 (7th Cir. 2001) (Cudahy, J., concurring) (finding that claims are distinguished by their facts, not just by the legal principle invoked); 28 U.S.C. § 2244(b)(1) (barring claims filed in a prior habeas petition; part of AEDPA).

25. *Fowlkes*, 326 F.3d at 550 (Gregory, J., concurring).

26. *Id.* at 547, 550 (Gregory, J., concurring); *see* 28 U.S.C. § 2244(b)(2)(B) (providing for the denial of a claim not previously asserted in a prior habeas petition unless "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 factfinder would have found the applicant guilty of the underlying offense"; part of AEDPA).

27. *Fowlkes*, 326 F.3d at 546–47.

28. *Id.* at 547.

29. *Id.*

30. *Id.*

31. *Id.*; *see* 28 U.S.C. § 2244(b)(2)(B)(ii) (requiring that facts be proven by "clear and convincing" evidence; part of AEDPA). Fowlkes submitted into evidence two new affidavits implying perjured testimony and pointing out that the jury foreman was a relative of someone possibly connected to the crime. *Fowlkes*, 326 F.3d at 544–45.

32. *Williams*, 330 F.3d at 280; 28 U.S.C. § 2244(b)(3)(D) (providing thirty days for a federal court of appeals to grant or deny authorization to file a second or successive habeas petition; part of AEDPA).

33. *Williams*, 330 F.3d at 280 (quoting United States v. Barrett, 178 F.3d 34, 42 n.2 (1st Cir. 1999)).

that when the issues are as important as they were in Williams's case, extended consideration is warranted.[34] Williams relied on *Tyler v. Cain*[35] for the proposition that PFA motions must be granted or denied by a federal court of appeals within the thirty-day limitation.[36] In *Tyler*, the Supreme Court recognized the difficulty in meeting the thirty-day deadline when reviewing PFA motions and suggested that courts of appeals rely on Supreme Court retroactivity holdings in order to meet the deadline.[37] The Fourth Circuit stated that Williams's reliance on this holding was misplaced and that nothing in the *Tyler* decision contradicted the court's finding that the thirty-day limitation is not mandatory.[38] The court found that the Supreme Court's general rule does not apply to "exceptional cases that cannot be resolved more quickly."[39]

2. *Application of § 2244(b)*

Next, the court analyzed Williams's three claims under § 2244(b).[40] As an initial matter, the court determined the meaning of the statutory term "prima facie showing" as used in § 2244(b)(3)(C).[41] The court recognized a difference of opinion across the federal courts of appeals: the circuits differ on whether the term represents an "exacting requirement or a relatively lenient one."[42] Nonetheless, every court of appeals to decide the issue has adopted the "prima facie showing" definition from the Seventh Circuit in *Bennett v. United States*,[43] which states:

> By "prima facie showing" we understand . . . simply a sufficient showing of possible merit to warrant a fuller exploration by the district court . . . . If in light of the documents submitted with the [PFA

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34. *Id.*; *see In re* Vial, 115 F.3d 1192, 1194 n.3 (4th Cir. 1997) (en banc) (ruling that extended consideration of important issues justified the delay beyond the thirty days required by § 2244(b)(3)(D)).

35. 533 U.S. 656 (2001).

36. *Williams*, 330 F.3d at 280; Tyler v. Cain, 533 U.S. 656, 662 (2001) (creating general rule for courts of appeals to utilize when considering PFA motions).

37. *Tyler*, 533 U.S. at 663.

38. *Williams*, 330 F.3d at 280–81.

39. *Id.* at 281.

40. *Id.*

41. *Id.*; *see* 28 U.S.C. § 2244(b)(3)(C) (2000) (stating that a "court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection"; part of AEDPA).

42. *Williams*, 330 F.3d at 281. *Compare* Rodriguez v. Superintendent, 139 F.3d 270, 273 (1st Cir. 1998) (finding that § 2244(b)(3)(C) creates "a high hurdle"), *with* Bell v. United States, 296 F.3d 127, 128 (2nd Cir. 2002) (per curiam) (finding that § 2244(b)(3)(C) does not create a "particularly high standard").

43. 119 F.3d 468 (7th Cir. 1997).

> motion] it appears reasonably likely that the [motion] satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the [motion].[44]

The Fourth Circuit adopted this definition of a "prima facie showing."[45] The court, in particular, pointed out that the standard does not require an inquiry into the merits of an applicant's claims but only requires "the possibility that the claims in a successive application will satisfy" the requirements of § 2244.[46]

Applying this standard, the court considered whether Williams made the "requisite showing as to any of his claims."[47] The court addressed Williams's first two claims, ineffective assistance of counsel and denial of the right to appeal, and found that these claims were filed with Williams's first habeas petition, which meant they were precluded under § 2244(b)(1).[48] The court then turned to Williams's third claim—perjured testimony—and analyzed it under § 2244(b)(2)(B).[49] Section 2244(b)(2)(B) is comprised of the following three components, all of which the defendant must prove: (1) the facts on which the claim depends were not discoverable through the exercise of due diligence; (2) the claim must describe constitutional error; and (3) the facts must provide " 'clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.' "[50] The court refused to resolve the controversy over whether the perjured testimony was discoverable before the filing of the initial habeas petition because its decision to deny the motion was based on other grounds.[51]

The court found that Williams made a prima facie showing that the prosecutor suborned perjury in violation of Williams's due process rights and thus satisfied the second component.[52] The third component of the analysis, how

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44. *Williams*, 330 F.3d at 281 (alteration in original) (quoting Bennett v. United States, 119 F.3d 468, 469–70 (7th Cir. 1997)); *see* Bennett v. Unites States, 119 F.3d 468, 469–70 (7th Cir. 1997) (providing definition of "prima facie showing"); *see, e.g.*, Bell v. United States, 296 F.3d 127, 128 (2nd Cir. 2002) (adopting the Seventh Circuit *Bennett* standard); Reyes-Requena v. United States, 243 F.3d 893, 899 (5th Cir. 2001) (same); Thompson v. Calderon, 151 F.3d 918, 925 (9th Cir. 1998) (en banc) (same); *Rodriguez*, 139 F.3d at 273 (same).

45. *Williams*, 330 F.3d at 282.

46. *Id.*

47. *Id.*

48. *Id.*; *see* 28 U.S.C. § 2244(b)(1) (2000) (requiring the dismissal of claims repeated in subsequent habeas petitions; part of AEDPA).

49. *Williams*, 330 F.3d at 282; *see* 28 U.S.C. § 2244(b)(2)(B) (providing for the dismissal of claims not included in an initial habeas petition unless due diligence would not have uncovered the new evidence at the time of trial, there was constitutional error, and there is clear and convincing evidence that absent the error the outcome would have been different; part of AEDPA).

50. *Williams*, 330 F.3d at 282 (quoting 28 U.S.C. § 2244(b)(2)(B)(i)–(ii)).

51. *Id.* at 283.

52. *Id.* The court reached this conclusion based on the fact that *pro se* proposed applications

ever, required the court to determine if the record established "by clear and convincing evidence that but for the alleged subornation of perjury, no reasonable factfinder would have found Williams guilty of the charges against him."[53] The Fourth Circuit relied on the Supreme Court's holding in *Sawyer v. Whitley*[54] to guide its analysis.[55] In *Sawyer*, the Supreme Court established a standard on which the language of § 2244(b)(2)(B)(ii) was based.[56] Comparing the similar evidence proffered in the two cases, the Fourth Circuit found that Williams's evidence did not meet the *Sawyer* standard and, consequently, the standard in § 2244(b)(2)(B)(ii).[57] The court held that the impeachment value of the evidence proffered by Williams did not clearly and convincingly outweigh other eyewitness testimony.[58] The court concluded that because Williams's evidence failed *Sawyer*, it also failed § 2244(b)(2)(B).[59]

IV. Application

A. Fowlkes

Any decision by the Fourth Circuit dismissing a petitioner's claims "on the merits" made prior to the Supreme Court's decision in *Miller-El* can be used to preclude, as second or successive, any subsequent habeas petition under § 2244.[60] As the concurrence pointed out, the court relied on a very short one-line conclusion about the lack of merit in Fowlkes's claims from the initial habeas proceedings to deny Fowlkes's PFA request.[61] The *Miller-El* court noted that the federal courts of appeals are limited to determining whether an applicant can make a substantial showing of the denial of a constitutional right when deciding whether to grant a COA and cannot make a determination of the applicant's claims on the merits at that point in time.[62] The court should not have relied on its prior decision, but instead considered the alternative presented in Judge Gregory's

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should be construed liberally. *Id.* (citing Haines v. Kerner, 404 U.S. 519, 520–21 (1972) (per curiam)).

53. *Id.*

54. 505 U.S. 333 (1992).

55. *Williams*, 330 F.3d at 283; *see* Sawyer v. Whitley, 505 U.S. 333, 335–37 (1992) (establishing the standard eventually codified as 28 U.S.C. § 2244(b)(2)(B)(ii)).

56. *Williams*, 330 F.3d at 283.

57. *Id.* at 284.

58. *Id.*

59. *Id.*

60. *Fowlkes*, 326 F.3d at 546.

61. *Id.* at 547–48 (Gregory, J., concurring).

62. 28 U.S.C. § 2253(c)(2) (2000) (requiring applicant for COA to make a substantial showing of the denial of a constitutional right); *see Miller-El*, 537 U.S. at 348–49 (Scalia, J., concurring) (pointing out flawed use of decisions on the merits when determining whether or not to grant a COA); *Swisher*, 325 F.3d at 230 (acknowledging improper determinations on the merits).

concurrence.[63] Judge Gregory would have attempted to conform the court's analysis to the language of AEDPA and at the same time achieve a degree of uniformity among the circuits by adopting Judge Cudahy's test for determining whether to grant permission to file a second or successive habeas petition.[64] Judge Gregory would have held that two of Fowlkes's claims were barred by § 2244(b)(1) because they were included in the first habeas petition.[65] However, the impartial jury claim had not been adjudicated on the merits, but Judge Gregory agreed with the majority's analysis that this claim would have been barred under § 2244(b)(2).[66]

B. Williams

If a defendant brings a new federal claim in postconviction proceedings, his only recourse is a PFA request. In dismissing Williams's claims, the Fourth Circuit adopted the *Bennett* definition of a "prima facie showing" under § 2244(b)(3)(C); therefore, appellate counsel must now conform any claims for relief with an eye to the Seventh Circuit's standard.[67] Unlike an application for a COA, in which a petitioner must make a substantial showing of the denial of a constitutional right, the *Bennett* standard only requires that a petitioner make " 'a sufficient showing of possible merit to warrant a fuller exploration by the district court.' "[68] For a PFA request to succeed under *Bennett* it need only appear " 'reasonably likely that the [motion] satisfies the stringent requirements' " of § 2244(b).[69] If, for example, a defendant offered new evidence of perjured testimony used at trial, the court would consider whether in light of this evidence " 'a sufficient showing of possible merit' " was made to warrant proceedings in district court.[70] It is likely that the prima facie showing standard in *Bennett* creates a lower threshold than the substantial showing standard in § 2253 for the issu-

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63. *Foulkes*, 326 F.3d at 547–50 (Gregory, J., concurring).

64. *Foulkes*, 326 F.3d at 549 (Gregory, J., concurring); *see* 28 U.S.C. § 2244 (2000) (setting forth requirements for filing second or successive habeas petition); *Brannigan*, 249 F.3d at 590 (Cudahy, J., concurring) ("A claim, specifically in the context of the federal habeas statute, is a set of facts giving rise to a right to a legal remedy. A claim is therefore distinguished by its facts (specifically by its nucleus of operative facts), not just by the legal principle that it invokes or the body of law from which it derives.").

65. *Foulkes*, 326 F.3d at 550 (Gregory, J., concurring).

66. *Id.*

67. *Williams*, 330 F.3d at 281; *see* 28 U.S.C. § 2244(b)(3)(C) (requiring prima facie showing that claims satisfy § 2244(b) requirements); *Bennett*, 119 F.3d at 469–70 (providing the "prima facie showing" standard to evaluate successive petitions under § 2255).

68. *Williams*, 330 F.3d at 281 (quoting *Bennett*, 119 F.3d at 469–70).

69. *Id.* (quoting *Bennett*, 119 F.3d at 469–70).

70. *Id.* (quoting *Bennett*, 119 F.3d at 469).

ance of a COA.[71] With identical evidence, it is likely that a PFA request would be granted where an application for a COA would be denied.

V. Conclusion

In *Fowlkes*, the Fourth Circuit has proven itself unwilling to take seriously the strictures of AEDPA by continuing to follow its own admittedly incorrect precedent. The court has widened the available precedent for precluding claims in second or successive habeas petitions under AEDPA by reviewing claims on the merits when deciding whether to authorize a PFA request. Although the court has admitted to this error in application, practitioners must be cognizant of the fact that even an allusion to a possible decision on the merits in a per curiam opinion could deny a client relief under § 2244. Practitioners must be careful to include all claims reasonably foreseeable in the initial habeas petition to avoid the claim preclusive effect of § 2244.

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71. *See* 28 U.S.C. § 2253(c) (2000) (providing requirements for issuance of a certificate of appealability; part of AEDPA).