No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

HAZHAR A. SAYED — PETITIONER
(Your Name)

vs.

THE STATE OF COLORADO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Tenth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Hazhar A. Sayed, #133608
(Your Name)
Colorado State Penitentiary
P.O. Box #777
Canon City, CO. 81215-0777
(Address)

(City, State, Zip Code)

None (incarcerated)
(Phone Number)

QUESTION(S) PRESENTED

1) If a defendant is convicted of a lesser included offense of a higher level charge, does the Fifth Amendment's Double Jeopardy Clause prohibit retrying the defendant on the higher level charge?

2) Is a pro-se prisoner litigant entitled to liberal construction, which includes reading into his claim the strongest argument suggested, in this case which is that the doctrine of collateral estoppel prevented the retrying of Mr. Sayed?

3) Did Mr. Sayed receive ineffective assistance of counsel when counsel failed to raise the double jeopardy/collateral estoppel issue?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 2018 U.S. App. LEXIS 11279 (May 1, 2018); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 2017 U.S. Dist. LEXIS 23868 (Fev. 21, 2017); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 1, 2018.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Five

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment Six

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

United States Constitution, Amendment Fourteen

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Statutes

28 U.S.C. § 2254

Colorado Revised Statutes

18-3-402 C.R.S.

18-3-404 C.R.S.

STATEMENT OF THE CASE

In 2005, Mr. Sayed was arrested and charged with sexual assault under Colorado Revised Statute (C.R.S.) § 18-3-402. These charges stemmed from several women going over to an apartment Mr. Sayed shared with others, in order to party. At some point during the party, Mr. Sayed ended up in a bedroom with one of the women (the victim). The woman and he left the bedroom and returned to the party which went on for some time thereafter, which was when all the women left. It was several hours after leaving the party that the "victim" alleged Mr. Sayed had sexually assaulted here while they were in the bedroom together.

A trial was held in Broomfield County, Colorado. See People v. Sayed, Broomfield County Case No. 05CR70. At trial, Mr. Sayed was convicted of the lesser included offense of unlawful sexual contact (as defined by § 18-3-404 C.R.S.) The jury failed to return a verdict on the greater charge of sexual assault. Accordingly, the trial court, over objection, declared a mistrial on the sexual assault charge and allowed a second trial on that charge only (while retaining the guilty verdict on the lesser included conviction of unlawful sexual contact). At the second trial, Mr. Sayed was convicted of sexual assault.

Mr. Sayed appealed and a division of the Colorado Court of Appeals affirmed his convictions. See People v. Sayed, 2007 Colo. App. Lexis 730 (April 26, 2007). Certiorari to the Colorado Supreme Court was sought and denied.

See Sayed v. People, 2007 Colo. LEXIS 756 (August 20, 2007).

Mr. Sayed then filed a pro-se motion for postconviction relief, in which he raised both claims of ineffective assistance of counsel on the double jeopardy arguments presented herein, but also a claim of newly discovered evidence, i.e., that one of the other women who had initially supported the victim's version of events now recants her testimony and avered that the victim had a history of making false allegations of sexual misconduct against the men she had been with. Counsel was appointed, amended the pro-se application, following which the trial court summarily denied said without conducting an evidentiary inquiry. Mr. Sayed appealed and a division of the Colorado Court of Appeals affirmed the trial court's summary dismissal. See People v. Sayed, 2015 Colo. App. LEXIS 1544 (Oct. 8, 2015); cert. denied, Sayed v. People, 2016 Colo. LEXIS 368 (April 18, 2016).

In a timely fashion, Mr. Sayed sought federal habeas relief. Mr. Sayed's 28 U.S.C. § 2255 habeas application was dismissed by the Honorable R. Brooke Jackson of the U.S. District Court of Colorado on Feb. 21, 2017). See Sayed v. Trani, 2017 U.S. Dist. LEXIS 23868 (Feb. 21, 2017); U.S. District Court of Colorado Case No. 16-cv-00926-RBJ. A certificate of appealability was also denied by Judge Jackson.

Mr. Sayed filed a timely notice of appeal and combined Opening Brief

and request for the issuance of a certificate of appealability to the United States Court of Appeals for the Tenth Circuit. A panel determined Mr. Sayed was not entitled to issuance of said (and/or habeas relief), on May 1, 2018. See Sayed v. Trani, 2018 U.S. App. LEXIS 11279 (May 1, 2018), United States Court of Appeals for the Tenth Circuit Case No. 17-1096. No petition for rehearing was sought and this action is timely filed. (All federal decisions in this case are attached as an appendix to this Petition as required. See Appendix A & B).

REASONS FOR GRANTING THE PETITION

1) If a defendant is convicted of a lesser included offense of a higher level charge, does the Fifth Amendment's Double Jeopardy Clause prohibit retrying the defendant on the higher level charge?

The Fifth Amendment of the U.S. Constitution states in pertinent part that no person: "shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause embodies two vitally important interests: 1) a deeply ingrained principle that a state, with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty; and 2) preserving the finality of judgment. See Yeager v. U.S., 557 U.S. 110, 119 (2009)(citing Green v. U.S., 355 U.S. 184, 187-88 (1957)). In other words, the principles of Double Jeopardy Clause protect a criminal defendant from being: 1) prosecuted a second time for the same offense after acquittal; 2) prosecuted a second time for the same offense after a conviction; and 3) prosecuted multiple times for the same offense. See Brown v. Ohio, 432 U.S. 161, 165 (1977).

An offense and its lesser included offenses are the same offense for double

jeopardy purposes. See Illinois v. Vitale, 447 U.S. 410, 421 (1980); Brown v. Ohio supra, 432 U.S. at 168-69. Thus, if a defendant is convicted of a greater offense, subsequent prosecution for a lesser offense is barred. See Vitale, Brown supras. Consequently the opposite then is also true, i.e., if a defendant is convicted of a lesser included offense and the jury is silent as to guilt on the greater offense, then double jeopardy bars prosecution a second time on the greater offense as conviction on the lesser included offense is an implied acquittal on the greater one. See Green supra, 355 U.S. at 188-90; Yeager, 557 U.S. at 112 (finding that an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return verdicts on others does not preclude protection under the Double Jeopardy Clause).

In the instant case, Mr. Sayed was charged with sexual assault and the lesser included offense of unlawful sexual contact as defined respectively by §§ 18-3-402 C.R.S., 18-3-404 C.R.S. Under Colorado law, unlawful sexual contact is a lesser included offense of sexual assault. See People v. Loyas, 259 P.3d 505, 510 (Colo. App. 2010); see also, People v. Garcia, 940 P.2d 357, 358-59 (Colo. 1997)(holding that the charging of a defendant with sexual assault is sufficient notice that the defendant must also defend against the charge of unlawful sexual contact). He was initially tried on both charges, convicted by the jury at his first trial of unlawful sexual contact, with the jury not returning a verdict as to the sexual assault charge (Mr. Sayed submits that the jury's failure to return a verdict on the greater of the two charges was an implied acquittal on the sexual assault charge).

Nonetheless, the trial court retained the conviction on the unlawful sexual contact conviction and allowed, over objection, retrial on the sexual assault charge. (Mr. Sayed was prejudiced as he could not now seek an instruction on the lesser included offense of unlawful sexual contact, as retrial on this charge would surely violate double jeopardy principles). At the second trial (all or nothing on the charge of sexual assault), Mr. Sayed was convicted of the higher level felony. It is this retrial he submits violated the protections he is afforded under the Double Jeopardy Clause of the Fifth Amendment.

Respectfully, the decisions rendered by the lower courts in this case are flawed.

In the Tenth Circuit's opinion (see id, at * 7), respectfully, the Court relying on the U.S. District Court of Colorado's decision denying Mr. Sayed habeas relief, that there was a "hung jury" at Mr. Sayed's initial State trial and hence nothing precludes: "retrial on a greater charge after the jury expressly states that it can't agree on that charge but returns a verdict on a lesser charge." Problematic with this determination is the fact that the U.S. District Court relied on the State Court of Appeals decision which found that Mr. Sayed had been convicted of a lesser "non-included" offense, i.e., the panel reaching the decision in Mr. Sayed's appeal incorrectly found that unlawful sexual contact (as defined by § 18-3-404 C.R.S.), was not a lesser included offense of sexual assault.

See Appendix B, at * 12-15 (citing Docket No. 1, at 21-26). This decision is clearly contrary to that determined in Loyas supra, and also clearly contrary to this Court's decision in Vitale and Brown supras.

Mr. Sayed thus respectfully moves this Court to grant certiorari on this issue. This as well as any and all other available relief is respectfully requested.

2) Is a pro-se prisoner litigant entitled to liberal construction, which includes reading into his claim the strongest argument suggested, in this case which is that the doctrine of collateral estoppel prevented the retrying of Mr. Sayed?

It is well-established by this Court that the doctrine of collateral estoppel in criminal law stems from the Fifth Amendment's protection against double jeopardy. See Ashe v. Swenson, 397 U.S. 436, 442-46 (1970); Green v. Ohio, 455 U.S. 976, 977-80 (1982). Moreover, this Court has long held that pro-se prisoner litigants are entitled to liberal construction when having thier pleadings reviewed. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); see also, e.g., Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007).

In this case, Mr. Sayed argued on appeal that the U.S. District Court of Colorado had an obligation to grant him liberal construction when reviewing his double jeopardy argument, which included reading into said the strongest

argument(s) suggested. (This Court has never exactly stated that there is such a requirement under liberal construction, however, the U.S. Court of Appeals for the Tenth Circuit, relying on this Court's decision in Haines supra, held that it is so. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991)).

This issue/argument presented on appeal by Mr. Sayed was that the U.S. District Court failed to read into his initial arguments that the doctrine of collateral estoppel precluded him being retried on the greater offense of sexual assault once he was convicted on the lesser included offense of unlawful sexual contact. See § 18-3-402 C.R.S., § 18-3-404 C.R.S., Loyas supra.

Clearly collateral estoppel applies if retrial on an offense necessarily involves relitigation of an issue which has already been determined. See Yeager supra, 557 U.S. at 119. In deciding whether an issue was "necessarily decided" by a previous jury, the reviewing court must examine the record of the prior proceeding, taking into account the pleadings, evidence, charge and relevant matters. See Ashe supra, 397 U.S. ta 444. The reviewing court must then conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. Id.

In this case, Mr. Sayed submitted that the definitions set forth in § 18-

3-401 C.R.S., concerning sexual assault and unlawful sexual contact necessarily are synonymous with one another, hence the conviction of Mr. Sayed on the unlawful sexual contact charge precluded his being retried on the greater offense of sexual assault. See §§ 18-3-401, 18-3-402, 18-3-404 C.R.S. Specifically, § 18-4-401(5) C.R.S., defines "sexual intrusion" as being: "[a]ny intrusion, however slight, by any object or any part of a person' body, except the mouth, tongue or penis..." § 18-4-402(1) C.R.S., defines sexual assault as: "Any actor who knowing inflicts sexual intrusion... on a victim commits sexual assault if: (a) The actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will..." § 18-3-404 C.R.S. defines unlawful sexual contact as: "(1) Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if: (a) The actor knows that the victim does not consent..."

Mr Sayed respectfully submits that the jury, given the evidence in his case, could have believed he committed "sexual intrusion" against the victim, based upon her testimony, which he respectfully submits may also define unlawful sexual contact as well as sexual assault, given the above statutory definitions. Consequently, a determination of his guilt on the unlawful sexual contact charge should have collaterally estopped any retrial on the sexual assault, i.e., the sole charge at his second trial.

Given this, the only question is whether the U.S. District Court should

have read into his double jeopardy argument the strongest argument suggested, i.e., the second trial was collaterally estopped by a conviction on the unlawful sexual contact charge.

It is clear that Mr. Sayed raised a double jeopardy argument and that the doctrine of collateral estoppel stems from the Fifth Amendment's protection against said. Accordingly Mr. Sayed submits that it is not unreasonable to believe that a U.S. District Court could read into a double jeopardy argument one which conveys that a defendant's retrial was also precluded under the collateral estoppel doctrine.

The Tenth Circuit found that the U.S. District Court did in fact grant Mr. Sayed liberal construction. See Appendix A. However, the Court then goes on to find that a collateral estoppel argument cannot be reasonably read into a double jeopardy argument and that the U.S. District Court was not required to create one for him. Id.

Mr. Sayed respectfully submits that this was clear error on the part of the Tenth Circuit panel rendering the decision in Mr. Sayed's case and thus moves this Court to grant certiorari on this claim. This as well as all other available relief is respectfully requested.

3) Did Mr. Sayed receive ineffective assistance of counsel when counsel failed to raise the double jeopardy/collateral estoppel issue?

All criminal defendants have a Sixth Amendment right to receive the effective assistance of counsel during all critical stages of a criminal proceeding. See Jay Lee v. U.S., 137 S.Ct. 1958, 1964 (2017). In order to demonstrate a violation of this Sixth Amendment right, a defendant must show that counsel's representation "'fell below an objective standard of reasonableness' and that he was prejudiced as a result." Id, 137 S.Ct. at 1364 (quoting Strickland v. Washington, 466 U.S. 668, 688, 692 (1984)). A criminal defendant may satisfy the prejudice component if he shows that there is a "'reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.'" Id, 137 S.Ct. at 1964 ((quoting Roe v. Flores-Ortega, 528 U.S. 470, 482 (2000)); see also, Strickland supra, 466 U.S. at 694.

The right to effective assistance of counsel is equally applicable to any defendant on any first appeal as a matter of right allowed by a state. See Evitts v. Lucey, 469 U.S. 387, 396 (1985)(finding that the Fourteenth Amendment's Due Process Clause guaranties a defendant the effective assistance of counsel on any first appeal as a matter of right). The standard for evaluation of a claim of ineffective assistance of appellate counsel on a first appeal as a matter of right is that set by this Court in Strickland supra.

In the instant case, Mr. Sayed was required to argue that direct appeal counsel was ineffective when he failed to post a challenge to the Double Jeopardy violation argued herein on Mr. Sayed's direct appeal. Mr. Sayed respectfully submits that there is a reasonable probability that had counsel raised such an issue, his conviction would have been reversed, for the reasons outlined in this Petition for Writ of Certiorari. In other words, both the deficient performance and prejudice requirements of a claim of ineffective assistance of counsel will be satisfied if this Court determines that the State decision was clearly contrary to, or an unreasonable application of controlling federal law as decided by this Court, which was in effect at the time Mr. Sayed's conviction became final. See 28 U.S.C. 2254 (d)(1); see also e.g., Bell v. Cone, 535 U.S. 685, 694 (2002).

Mr. Sayed submits that as assessed under Strickland's requirements, his direct appeal counsel's performance was both deficient and prejudicial. See e.g., Wilson v. Czerniak, 355 F.3d 1151, 1154 (9th Cir. 2003)(finding when assessing under Strickland's standards that failure of counsel to argue a double jeopardy violation when a defendant is convicted on a lesser included offense and not on a greater offense is ineffective assistance).

Respectfully Mr. Sayed submits that the U.S. District Court should have granted his request for habeas relief and the U.S. Court of Appeals should have issued a certificate of appealiability, as reasonable jurists would

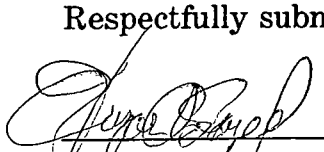
have debated that his habeas application was incorrect decided. See Buck v. Davis, 137 S.Ct. 759 (2017).

Mr. Sayed respectfully moves this Court to grant certiorari on this issue. This as well as all other available relief is respectfully requested.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Hazhar A. Sayed, #133608 (Pro-Se)

Date: June 18, 2018

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