No. _____

In The
Supreme Court of the United States

JOHN ALBERT ANDERSON,

Petitioner,

V.

JOHN F. WALRATH, WARDEN,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ROGER B. STOUGH, Esquire
Virginia State Bar # 71491
Supreme Court Bar # 308090
ROGER B. STOUGH, PC
592 Court Street, P.O. Box # 43
Appomattox, Virginia 24522
(434) 352-8787
(434) 352-8880 (Facsimile)
rbslaw1@gmail.com (email)

Counsel of Record for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Where the United States District Court for the Western District of Virginia concluded that reasonable jurists could disagree on the fundamental legal principle at issue in the underlying habeas petition, did that court's denial of a Certificate of Appealability (COA) (and the United States Court of Appeals for the Fourth Circuit's sanctioning thereof through summary affirmance on appeal), ignoring this Court's clear and precedential standard for the issuance of the COA, so far depart from the accepted and usual course of judicial proceedings with respect to the doctrine of *stare decisis* and adherence to this Court's rulings precedent as to call for an exercise of this Court's supervisory power under Supreme Court Rule 10(a)?

PARTIES

The names of the parties appear in the caption of the case on the cover page, however, Warden John Walrath is the nominal respondent for the Commonwealth of Virginia in whose custody petitioner remains pursuant to a presently presumptively valid felony conviction and sentence of imprisonment in this matter.

CORPORATE DISCLOSURE:

Pursuant to Supreme Court Rules 29.6 and 14.1(b) petitioner submits that there is no parent, private or publicly held corporation or other entity with any interest in this matter or its outcome.

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In The Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner John Anderson prays that a writ of certiorari issue to review the judgment of the United States Court for the Western District of Virginia (Roanoke Division) and the determination therein that a Certificate of Appealability (COA) pursuant to 28 U.S.C. § 2253(c) be denied and the summary affirmance thereof by a *per curiam* panel of the United States Court of Appeals for the Fourth Circuit. Petitioner respectfully requests this Court, upon finding merit herein and the issuance of certiorari, exercise its supervisory authority over inferior tribunals pursuant to Supreme Court Rule 10(a) and remand this matter to the court of appeals below with instructions to issue the COA and take the steps necessary, appropriate to, and consistent with the Federal Rules of Appellate Procedure and the Fourth Circuit Local Rules to proceed to judgment on appeal on the merits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at **Appendix A** to this petition, is unpublished, and may be found at Anderson v. Walrath, No. 18-6322, 740 Fed.Appx. 294 (Mem.), per curiam (unpublished) (4th Cir., October 22, 2018).

The opinion of the United States District Court for the Western District of Virginia (Roanoke Division) appears at **Appendix B** to this petition, is unpublished, and may be found at Anderson v. Walrath, Civil Action No. 7:17-cv-00274, 2018 WL 1158260 (unpublished) (W.D. Va., March 5, 2018).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 22, 2018. This petition for writ of certiorari is timely if it is submitted in this Court on or before January 22, 2019. The Court's jurisdiction is predicated upon 28 U.S.C. § 1251(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The instant petition involves the Due Process and Equal Protection provisions of the Fifth Amendment to the United States Constitution (found at **Appendix C**) as they pertain to the application of this Court's precedent with respect to the issuance of the Certificate of Appealability (COA) pursuant to 28 U.S.C. § 2253 (**Appendix D**).

To the extent that the Court finds it necessary to refer to the habeas matter underlying this petition the construction of Virginia Code § 18.2-308.4(C) (found at **Appendix E**) may be appropriately issue.

STATEMENT OF THE CASE

This case is a § 2254 habeas petition to the United States District Court for the Western District of Virginia which, according to that court was both timely and properly exhausted. The petition asks this Court to consider the district court's denial of a Certificate of Appealability (COA), even where the court conceded that reasonable jurists could debate the underlying issue. Petitioner submits that the district court's decision has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's supervisory power.

The underlying criminal case in Appomattox County, Virginia, originated in the early morning hours of July 25, 2014. During a search of Petitioner John Anderson's (hereinafter also 'Anderson') vehicle at that time Virginia State Police found several different types of Schedule I and Schedule II drugs and two handguns. All of the drugs and guns were found together in the interior passenger section of the car.

Anderson was charged with violations of Virginia Code §§ 18.2-248, 18.2-250, and 18.2-250.1 (the drug charges) and Virginia Code §§ 18.2-308.2 and 18.2-308.4 (the firearms charges). As charged and subsequently indicted, the charge of possession of a firearm while simultaneously in unlawful possession of Schedule I or II drugs in violation of Virginia Code § 18.2-308.4 consisted of a single count under

subsection 'A' of that statute – the subsection with no mandatory minimum sentence requirement.

Anderson's counsel Christopher J. Collins, Esquire, filed a suppression motion. Shortly thereafter the Commonwealth offered a guilty plea agreement for a sentence recommendation of an active prison term not to exceed eight (08) years. The offer was conditioned by the threat that Anderson's refusal of the plea bargain would precipitate a new and superseding indictment replacing the single count of violation of Virginia Code § 18.2-308.4(A) (as initially charged – the statutory provision with no mandatory minimum sentence) with four separate and discrete counts of violation of § 18.2-308.4(C) (the statutory provision requiring 5-year mandatory minimum consecutive sentences), based on the combination of each of the two firearms found in the search of Anderson's vehicle with each of the Schedule I and II drugs and simultaneously discovered. **Anderson v. Dillman, Warden**, No. CL16000151-00,[1] **Verified Petition for Writ of Habeas Corpus Ad Subjiciendum** (hereinafter also '**Verified Petition**') at **Exhibit A – Declaration of John Albert Anderson** (hereinafter also '**Anderson Aff.**') at page 1, paragraph 7.

Anderson told counsel the he did not wish to plead guilty, however, his desire not to so plead was

[1] Anderson v. Dillman, Warden is the first generation of this matter as presented to the courts of the Commonwealth of Virginia. At the time Warden Dillman was Anderson's custodial warden. Subsequently, but prior to the initiation of federal habeas, Warden Walrath was appointed to replace Warden Dillman.

overborne by counsel's firm representation of the peril he would face if, after his indictment was superseded as threatened by the Commonwealth, he was found guilty at trial. In his habeas petition he stated that he "did not wish to plead guilty," **Anderson Aff**. at page 1, paragraph 9, and that his decision to do so was in order to avoid the mandatory minimum penalties attendant to the threatened new charges. **Id**. at page 2, paragraph 10. As per the guilty plea agreement to which he submitted, Anderson was sentenced to an 8-year term of active imprisonment. No appeal was taken.

On petition for writ of habeas corpus in the state Anderson alleged that his guilty plea was fraudulently induced by the threat that, had he declined the plea offer, he could and would have been charged with multiple counts of violating § 18.2-308.4(C) which, he posited, he subsequently learned would have violated double jeopardy protections. The state court held that "[t]here is no merit to Anderson's contention that because charging him with additional firearm offenses would have been a double jeopardy violation, his attorney misadvised him to plead guilty." **Anderson v. Dillman, Warden**, **supra**, **Order** at page 4, paragraph 10. "Each firearm possession constitutes a 'unit of prosecution' under Code § 18.2-308.4." **Id**. at page 5, paragraph 11 (citations omitted). The Virginia Supreme Court declined Anderson's petition for appeal without comment.

On federal habeas review the district court below agreed that "Anderson's petition is timely and properly exhausted," **Doc. No. 16**, **Memorandum Opinion** at page 2. The federal district court,

suggested that "no controlling precedent directly supports" the double jeopardy limitation proposed by Anderson, and upheld the state judge's ruling stating "the state court was not unreasonable in concluding that the Commonwealth could have brought two separate charges under Virginia Code § 18.2-308.4(C), one for each firearm." **Ibid**. at page 6. "At very least, as demonstrated by the varying interpretations of the circuit court and of Anderson's current counsel, trial counsel's performance did not fall below the Strickland standard because reasonable jurists could disagree on the issue." **Id**. at 6-7.

Notwithstanding its reasoning in the Memorandum Opinion that 'reasonable jurists could disagree on the issue,' in its Final Order, without further explanation, the federal district court below held that "Anderson has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c), a certificate of appealability is DENIED." **Appendix A**, **Doc. No. 17**, **Final Order** (March 5, 2018) (emphasis in original).

In his 'Preliminary Informal Opening Brief of Appellant' to the United States Court of Appeals for the Fourth Circuit Anderson, through counsel, challenged the decision of the district court to deny the COA. On October 22, 2018 that court summarily denied the COA in a brief, *per curiam*, opinion. **Appendix B**. This petition follows.

REASONS FOR GRANTING THE WRIT

It is petitioner's position that Where the United States District Court for the Western District of Virginia concluded that reasonable jurists could disagree on the fundamental legal principle at issue in the underlying habeas petition, that court's denial of a Certificate of Appealability (COA) (and the United States Court of Appeals for the Fourth Circuit's sanctioning thereof through summary affirmance on appeal), ignored this Court's clear and precedential standard for the issuance of the COA, and thereby so far departed from the accepted and usual course of judicial proceedings with respect to the doctrine of *stare decisis* and adherence to this Court's rulings precedent as to call for an exercise of this Court's supervisory power under Supreme Court Rule 10(a).

Background

In the Habeas Act of 1867 (Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385) Congress initially empowered federal courts to issue writs of habeas corpus for persons in state custody which presumed the right to appeal the habeas decision of a lower federal court. **See Barefoot v. Estelle**, 463 U.S. 880, 892 n.3 (1983). Subsequently, "Congress inserted the requirement that a prisoner first obtain a certificate of probable cause to appeal before being entitled to do so. Act of Mar. 10, 1908, ch. 76, 35

Stat. 40. See H.R.Rep. No. 23, 60th Cong., 1st Sess., 1–2 (1908); 42 Cong.Rec. 608–609 (1908)." **Id**.[2]

This Court has pointed out that "[T]he primary means of separating meritorious from frivolous appeals should be the decision to grant or withhold a certificate of probable cause." **Barefoot** at 892-893. Further, "'probable cause' requires something more than the absence of frivolity." **Id**. at 893 (citation omitted). The certificate of probable cause requires petitioner to make a "substantial showing of the denial of [a] federal right." **Id**. (citation omitted). In order to make such a showing the petitioner need not demonstrate any likelihood of success on the merits of his habeas appeal. "Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" **Id**. at n.4 (citation omitted; alterations in the original).

28 U.S.C. § 2253 was amended in 1996 by the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) (Pub. L. 104-132, Title I, § 102, April 24, 1996, 110 Stat. 1217). Therein, although the formal name for the 'certificate of probable cause' was changed to the 'certificate of appealability,' the concept remains the same – as does the standard for its issuance. "Our conclusion follows from AEDPA's present provisions, which incorporate earlier habeas corpus principles. Under AEDPA, a COA may not issue unless "the applicant has made a substantial

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[2] The habeas appeal statute was eventually codified at 28 U.S.C. § 2253: June 25, 1948, c. 646, 62 Stat. 1949, c. 139, § 113, 63 Stat. 105, Oct. 31, 1651, c. 655, § 52, 65 Stat. 727.

showing of the denial of a constitutional right." **28 U.S.C. § 2253(c)** (1994 ed., Supp. III)." **Slack v. McDaniel**, 529 U.S. 473, 483 (2000). "Except for substituting the word "constitutional" for the word "federal," § 2253 is a codification of the CPC standard announced in **Barefoot v. Estelle,** 463 U.S., at 894." **Id**.

This Court has, on two occasions, reaffirmed the standard for issuance of the Certificate of Appealability (COA):

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under **Barefoot**, ***includes showing 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.' " **Barefoot**, **supra**, at 893, and n. 4, ("sum[ming] up" the " 'substantial showing' " standard).

Slack, **supra**, at 483-484 (emphasis added). Again, in 2003, the Court reaffirmed its 'reasonable jurists' standard in the issuance of the COA:

> Under the controlling standard, a petitioner must "sho[w] 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.' " **529**

> **U.S.**, at 484, (quoting **Barefoot**, **supra**, at 893, n. 4).

Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (emphasis added). Accordingly, the standard is, by now, black-letter law.

Executive Summary

Under this Court's standard controlling the issuance of the COA petitioner must make a showing of the denial of a constitutional right that is substantial enough that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." **Slack**, **supra** at 484. Here, the district court held, with respect to petitioner's habeas issue: "At the very least, as demonstrated by the varying interpretations of the circuit court and of Anderson's current counsel, trial counsel's performance did not fall below the *Strickland* standard because reasonable jurists could disagree on the issue." **Memorandum Opinion** (**Doc. No. 16**) at page 4. Nevertheless, in defiance of that controlling standard as articulated by this Court, the district court denied petitioner the COA. Accordingly, petitioner submits that the district court did so far depart from the accepted and usual course of judicial proceedings with respect to the doctrine of *stare decisis* and adherence to this Court's precedential rulings as to call for the exercise of this Court's supervisory power under Supreme Court Rule 10(a).

Discussion

The reasons for granting the writ of certiorari are straightforward. The district court erroneously agreed that the state court's "interpretation of Virginia Code § 18.2-308.4(C) does not violate the Double Jeopardy Clause." **Memorandum Opinion** (**Doc**. **No**. **16**) at page 4. It is, however, that interpretation which is the *res gestae* of Anderson's intended appeal. The court went on to suggest that it was not in spite of but, rather, *because* "reasonable jurists could disagree on the issue," **id**., that counsel's performance was immune to review. Under these circumstances, however, the denial of the Certificate of Appealability (COA) here is in direct conflict with the standard for issuance of the COA set by this Court. "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that ***reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong***." **Slack v. McDaniel**, 529 U.S. 473 at 484 (2000) (emphasis added). The district court here, using the precise **Slack** 'reasonable jurists' language, has conceded the COA standard while, at once, refusing to honor it by granting the COA.

The gravamen of the district court's holding with respect to this COA analysis is the following statement from the court's opinion:

> First, the state court's interpretation of Virginia Code § 18.2-308.4(C) does not violate the Double Jeopardy Clause. The statute does not explicitly limit the

> Commonwealth to one charge for multiple firearms during a single temporal event, and, as Anderson concedes, no controlling precedent directly supports that limitation; therefore, the state court was not unreasonable in concluding that the Commonwealth could have brought two separate charges under Virginia Code § 18.2-308.4(C), one for each firearm. At the very least, as demonstrated by the varying interpretations of the circuit court and of Anderson's current counsel, trial counsel's performance did not fall below the *Strickland* standard because ***reasonable jurists could disagree on the issue***.

Memorandum Opinion, **supra**, at page 4 (emphasis added). The district court's opinion, however, turns the principles of the statutory construction of criminal statutes on their head. The question is not whether the statutory language "explicitly ***limit[s]*** the Commonwealth to one charge for multiple firearms during a single temporal event," **id**. (emphasis and alteration added). The question before both the state court and the district court below is whether the statutory language 'explicitly ***permits***' the Commonwealth to charge each of multiple firearms found simultaneously in a single temporal event separately and individually. This Court has held that absent the clear and affirmative statement of the legislature in the statutory language itself defining the unit of prosecution under the statute, or otherwise articulating its intent for such construction, doubts with respect to the enforcement of criminal statutes

must be resolved against the imposition of the harsher penalty.

Anderson never 'concede[d]' the absence of controlling precedent directly supporting the limitation on the Commonwealth's ability to fragment a single charge under § 18.2-308.4 by redefining the unit of prosecution thereunder. He simply pointed out that there was no precedent in Virginia law construing the statute, defining the unit of prosecution, or in any way permitting such fragmentation – a fact the district court accepted and embraced in its opinion. This Court, however, has clearly held that, absent some demonstrated legislative intent to the contrary, such fragmentation of a single event into multiple sources of cumulative criminal liability is unlawful:

> When [the Legislature] has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When [the Legislature] leaves to the Judiciary the task of imputing to [the Legislature] an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of [the Legislature] in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes

> should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if [the Legislature] does not fix the punishment for [an] [ ] offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes.

Bell v. United States, 349 U.S. 81, 83-84 (1955) (alterations added). **Bell** is the 'controlling precedent [which] directly supports that limitation' and it is settled law. Therefore, the district court's reliance on the Eleventh Circuit's decision in **Black v. United States**, 373 F.3d 1140 (11th Cir. 2004) holding that "counsel's performance was not deficient for failing to predict what was not yet a certain holding" (**id**. at 1146) in its ruling below and that, therefore, Anderson's "counsel's performance could not have been constitutionally deficient," **Memorandum Opinion**, **supra**, at page 4, and finally qualifying that "reasonable jurists could disagree on the issue," **id**., was clear error. The standard articulated in the **Bell** holding is clear, certain, and enduring – it requires no 'prediction' on counsel's part. Counsel is expected to know the law.

At the end of the day the Court "look[s] to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." **Miller-El v. Cockrell**, 537 U.S. 322, 336 (2003).

"This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." **Id**. at 337. Where, as here, the district court specifically determines that 'reasonable jurists could disagree on the issue' that issue itself becomes amenable to determination on appeal. "To that end, our opinion in **Slack** held that a COA does not require a showing that the appeal will succeed." **Id**. "The holding in **Slack** would mean very little if appellate review were denied because the prisoner did not convince a judge . . . that he or she would prevail." **Miller-El**, **supra**, 537 U.S. at 337. "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner '"has already failed in that endeavor."' **Barefoot, supra**, at 893, n. 4." **Id**.

The now firmly established standard that the COA should issue where reasonable jurists could disagree on the resolution of the habeas issue (or agree that a different resolution should have been reached) is not in question before this Court. Here, although the district court has denied petitioner the COA, it has specifically stated that such is the case – reasonable jurists could disagree on the underlying issue. Where, as here, the court of appeals has abdicated its oversight responsibility this Court is urged to act. Accordingly, this Court should now require the issuance of the COA and the resolution of the underlying habeas issues on appeal to the Fourth Circuit.

CONCLUSION

WHEREFORE, the foregoing premises considered, Petitioner John A. Anderson prays that this Court will grant certiorari and remand this case to the Fourth Circuit Court of Appeals with instructions to grant the Certificate of Appealability and to require such briefing and argument as may be necessary and appropriate under the rules of the Court and the circumstances of this case to proceed to judgment on appeal on the merits.

Date: January 18, 2019

Respectfully submitted,

For: John Albert Anderson

ROGER B. STOUGH, Esquire
Virginia State Bar # 71491
Supreme Court Bar # 308090
ROGER B. STOUGH, PC
592 Court Street
P.O. Box # 43
Appomattox, Virginia 24522
(434) 352-8787
(434) 352-8880 (Facsimile)
rbslaw1@gmail.com (email)