

19-5512
No. _____

Supreme Court, U.S.
FILED

JUL 16 2019

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Gregory Green — PETITIONER
(Your Name)

vs.

Donald Beckwith, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Gregory Green
(Your Name)

502 Beckmon Dr.
(Address)

Columbia, SC 29203
(City, State, Zip Code)

(Phone Number)

ORIGINAL

RECEIVED

JUL 23 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

Whether the Fourth Circuit erred by denying a Certificate of appealability as to the applicable Standard of review in Petitioner's 28 U.S.C. 2254 petition, where there were no adjudication on the merits by State Court of petitioner's Constitutional claim.

LIST OF PARTIES

- ☒ 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:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4-7
REASONS FOR GRANTING THE WRIT	8-16
CONCLUSION.....	16

INDEX TO APPENDICES

APPENDIX A *Decision of the Court of Appeals for the Fourth Circuit.*

APPENDIX B *Decision of the District Court of South Carolina.*

APPENDIX C *Report and Recommendation by Magistrate Judge.*

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

<u>Berger v. United States</u> , 295 U.S. 78 (1935)	8
<u>Cole v. State of Arkansas</u> , 333 U.S. 196 (1948)	12
<u>Johnson v. Williams</u> , 568 U.S. 289 (2013)	14
<u>Lopez v. Smith</u> , 135 S.Ct. 1 (2014)	16
<u>Miller-El v. Cockrell</u> , 537 U.S. 332 (2003)	10
<u>Slack v. McDaniel</u> , 529 U.S. 473 (2000)	10
<u>Schmuck v. United States</u> , 489 U.S. 705 (1989)	5
<u>Puckett v. United States</u> , 129 S.Ct. 1423 (2009)	8

STATUTES AND RULES

28 U.S.C. 2253 (e)	10
S.C. Code Ann. 44-53-370(e)(3)(9)(1-2)	4, 10-11
28 U.S.C. 2254	4
28 U.S.C. 2254(d)	13
Fed. R. Crim. P. 31(e)	10

OTHER

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

☐ For cases from **federal courts**:

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

☐ reported at _____; 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

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 21, 2019.

☒ 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, Fourteenth Amendment

"No State shall make or enforce any law which shall abridge the privilege 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."

Appeal 28 U.S.C. 2253(C)

(C) 1 Unless a Circuit Justice or Judge issues a Certificate of Appealability, an appeal may not be taken to the Court of appeals

(2) a Certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

The Case underlying this petition is a Writ of habeas Corpus pursuant to 28 U.S.C. 2254 to invalidate a guilty plea to a purported lesser-included offense.

Petitioner was indicted by the Horry County grand jury on the charge of trafficking in heroin pursuant to S.C. Code Ann. 44-53-370(e)(3)(a) 2. Petitioner retained Counsel and initiated plea negotiations. The State recommended a plea to a lesser included offense of the offense charged in the indictment with a sentence range from 9 to 12 years, and a \$50,000 dollars fine.

On May 29, 2014, the date of the Sentence proceeding, petitioner accepted the plea offer and signed the Sentence sheet indicating a plea to a lesser included offense ~~trafficking in heroin~~ trafficking in heroin, first offense pursuant to S.C. Code Ann. 44-53-370(e)(3)(a) 1. Petitioner was sentenced to 10 years of imprisonment to be served at the South Carolina Dept of Corrections.

On November 17, 2014, petitioner filed an Application for Post-Conviction Relief ("PCR") with the Horry County Court of Common Pleas. Petitioner raised (3) issues in his application; (1) Trafficking, first offense, is not a lesser included offense of trafficking, second offense; (2) Violation of notice requirement guaranteed by U.S. & S.C. Constitution and Statutes; and (3)

Breach of the plea agreement. App. B. On February 11, 2016, the date of the PCR hearing, petitioner argued that he was deprived of sufficient notice of the charge because the offense to which he pled guilty was not a lesser included offense charged in his indictment — Under the elements test enunciated in Schmuck v. United States, 489 U.S. 705 (1989).

Thereafter, petitioner's plea attorney, Stuart Axelrod, Esq., was called to the witness stand by petitioner's lead attorney, James Falk, Esq., for questioning. Petitioner was a little baffled by his plea attorney testifying as because petitioner had not raised a claim against his plea attorney as having received ineffective assistance of Counsel. App. B.

The PCR Judge made its ruling from the bench and ruled on an ineffective assistance of Counsel claim, stating plea Counsel did not render ineffective assistance of Counsel and denied the PCR application. On March 31, 2016, petitioner submitted a Rule 59(c) motion to the Kerry County Court of Common Pleas, requesting the PCR Court to offer or amend the judgment. App. C.

Subsequently, petitioner filed an appeal with the South Carolina Supreme Court. Petitioner petitioned the Court for a writ of certiorari, raising only one issue. App. B.

On January 9, 2018, the South Carolina Court of Appeals denied the petition for writ of *certiorari*. Petitioner filed his petition for writ of *habeas corpus* pursuant to 28 U.S.C. 2254 on October 13, 2017. App. C.

On August 8, 2018, the Magistrate Judge issued the Report and Recommendation ("RJR"). The Magistrate Judge recommended denying petitioner's Federal Relief because:

"Schmuck addresses the standard for determining when a Federal crime is a lesser included offense under the Federal Rule of Criminal Procedure. Because petitioner is challenging a State conviction, *Schmuck* is not applicable." App. C.

Petitioner filed objections to the RJR under the Supremacy Clause pursuant to U.S. Const. art. VI, cl. 2.

On December 28, 2018, the district court denied petitioner's *habeas* petition with prejudice. The district court denied a certificate of appealability, App. B. Petitioner filed an appeal with the district court requesting a certificate of appealability ("C.O.A.") to the Court of Appeals for the Fourth Circuit on January 9, 2019. On May 31, 2019, the Fourth Circuit denied petitioner's motion for a C.O.A. App. A.

Petitioner now seek review of the Fourth Circuit's denial of his motion for a C.O.A. The Fourth Circuit refusal to issue a C.O.A. has denied petitioner a ruling on Ground One of his habeas petition, and absent the grant of this petition for Writ of Certiorari by this Court, petitioner will be denied a ruling on the merits of Ground One by State and Federal Courts, depriving petitioner of property and liberty interest without due process of law.

REASONS FOR GRANTING THE PETITION

1.

The Underlying Issue of Plea Bargaining Is One Of Extraordinary National Importance

Plea bargaining, or negotiating a plea, is a process through which the prosecutor and defense attorney negotiate an agreeable handling of some aspect of a criminal trial such as acceptance of a guilty plea to a minor offense instead of a trial or a more serious charge or a plea to a lesser charge with a promise by the prosecutor to recommend to the Judge that a light punishment be imposed. No matter how the negotiation occurs, the pawn in the process is the defendant.

This Court has recognized that "plea agreements are essentially contracts." Puckett v. United States, 129 S. Ct. 1423, 1430 (2009). A "prosecutor's duty is not only to use every legitimate means to bring about conviction, but to refrain from improper methods calculated to produce a wrongful conviction" Berger v. United States, 295 U.S. 78 (1935).

Due to "truth and Sentencing" legislation that were implemented in the early 1990's, they have been an astronomical rise in the prison population in regard to drug offenses committed due to addiction to opiates and other forms of highly addictive substances.

Because of the draconian sentencing laws that were implemented in regards to drug offenses, the underlying case is one of extraordinary National importance because it addresses the plea bargaining phase, in which so many of the accused in the jails across the country, as well as those currently serving "extremely long" drug sentences, will be directly affected by a ruling on the merit of the underlying issue.

Now more than ever this Court should take this opportunity to address the "extreme malfunctions in the State Criminal Justice Systems" in regard to plea bargaining, coupled with the State's prosecutors' inability to adhere to the applicable principle of law, when in the process of depriving the accused of physical liberty as it relates to reducing drug offenses to lesser charges.

II.

The Fourth Circuit Erred By Denying A Certificate of Appealability on Ground One of Petitioner's Habeas Petition.

Petitioner asserts the Fourth Circuit assessment of his Constitutional claim in Ground One is wrong. A certificate of appealability will not

The Schmuck Court held "under the elements test, one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the charged offense." *Id.* at 716.

The Court held constitutionally "a defendant cannot be held to answer a charge not contained in the indictment brought against him" based in part on his right to "notice of the charge brought against him." *Id.* at 717. The Court ultimately ruled "the elements of the offense of odometer tampering are not a subset of the elements of the crime of mail fraud." *Id.* at 721.

In the instant case, petitioner asserts in Ground One, under the "Clearly established" elements test enunciated in Schmuck, trafficking, first offense pursuant to S.C. Code Ann. 44-53-370(e)(3)(a) 1, is not "necessarily included" in the offense of trafficking, second offense pursuant to S.C. Code Ann. 44-53-370(e)(3)(a) 2, because the offenses have identical elements.

The relevant statute reads:

- (e) Any person who knowingly sells, manufacture, cultivates, deliver, purchase or bring into this State. . . . or is knowingly in actual or constructive possession of:
- (3) Four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin. . . . is guilty of a felony which is known as trafficking in illegal drugs and. . . must be punished as follows if the quantity involved is:

(a) Four grams or more, but less than Fourteen grams:

1. for a first offense, a term of imprisonment of not less than seven years nor more than twenty-five years, nor part of which may be suspended nor probation granted, and a fine of fifty thousand dollars;

2. for a second offense or subsequent offense, a mandatory minimum term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of one hundred thousand dollars.

S.C. Code Ann. 44-53-370 (e)(3)(9)(1-2).

Petitioner contends under the elements test, Ground One establishes that petitioner's Constitutional right to sufficient notice of the charge was violated, because Code 44-53-370(e)(3)(9) 1, the purported lesser offense elements, are not a subset of Code 44-53-370(e)(3)(9) 2, the offense charged in his indictment.

In Cole v. State of Arkansas, 333 U.S. 196, 201 (1948), this Court held:

"it is as much a violation of due process to send an accused to prison following conviction of a charge in which he was never tried as it would be to convict him upon a charge that was never made." *id.*

Based on the above discussion, petitioner contends that he has established "a substantial showing of the denial of a Constitutional right" pursuant to 28 U.S.C. 2253(C)(2)(2012); and reasonable jurists could find that the district Court's assessment of his Constitutional claim is wrong. Miller-El v. Cockrell, *Supra*.

Therefore, petitioner respectfully request this Court to grant a writ of Certiorari to address his constitutional claim.

III

Under The Appropriate And Applicable Standard of Review, Petitioner Has Sufficient Merit To Be Granted Federal Relief.

Petitioner asserts the district Court applied the wrong standard of review to Ground One of his habeas petition. The district Court applied 28 USC. 2254 (d) deferential standard of review to an ineffective assistance of Counsel claim. There is no indication from the state appellate Courts that Ground One was adjudicated on the merits, where the South Carolina Court of Appeals denied petitioner's petition for writ of Certiorari on January 9, 2018. App.B.

"The language of 28 U.S.C. 2254(d) makes clear that this provision applies only when a Federal claim was adjudicated on the merits in state court." Johnson v. Williams, 568 U.S. 289, 302 (2013).

In the instant case, the district court clearly applied the wrong standard of review to Ground One of Green's habeas petition where the court ruled:

"Therefore, in considering petitioner's ineffective assistance of counsel claim, the Court's review is limited by the deferential standard of review set forth in 2254(d)." App. B.

Petitioner contends that Ground One of his habeas petition warranted a de-novo standard of review because there was no "state decision" on the Federal constitutional claim presented to the state court, therefore, "2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a Federal Judge." Johnson v. Williams, *supra*, 568 U.S. at 303.

Under a de-novo standard of review, petitioner asserts Ground One implicates a Federal right to "notice of the charge" under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

This Court have indicated the elements test is not only compelled by statute, but also by the due process "right of the defendant to have notice of the charge brought against him." Schmuck, *supra*, 489 U.S. at 718,

In the R¹R the Magistrate Judge recommended, and the district Judge adopted, denying petitioner Federal relief because:

"Schmuck addresses the standard for determining when a Federal crime is a lesser included offense under the Federal Rule of Criminal Procedure. Because petitioner is challenging a state conviction, Schmuck is not applicable." App. C.

Petitioner asserts U.S. Supreme Court precedent is binding on all state and Federal Courts. See U.S. Const. art. VI, Cl. 2.

A district Court may entertain an application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. 2254(a).

Petitioner argues he is being held in custody in South Carolina Dept. of Corrections in violation of Federal law.

Accordingly, under the appropriate and applicable standard of review — de-novo standard of review — Schmuck v. United States, *supra.*, is applicable to a state conviction. See Lopez v. Smith, 135 S.Ct. 1204 (under AEDPA only U.S. Supreme Court precedent is sufficient to grant Federal relief).

Petitioner respectfully request for this Court to grant a writ of Certiorari to the Court of Appeals for the Fourth Circuit and address the merits of the Constitutional claim in Ground One.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gregory Green

Date: July 16, 2019