No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY WHEELER

Petitioner,

v.

RON NEAL,
Superintendent, Indiana State Prison,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Cody Lee Vaughn

4310 Avenue B
Austin, TX 78751
(765) 524-6176

Michael K. Ausbrook
Counsel of Record

Indiana University
Maurer School of Law
Federal Habeas Project

211 South Indiana Avenue
Bloomington, IN 47405
(812) 322-3218
mausbrook@gmail.com

Counsel for Petitioner

QUESTIONS PRESENTED

I. Did the Seventh Circuit err under *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003) and *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017), when it determined Petitioner had not made a "substantial showing of a denial of a constitutional right" and denied a certificate of appealability after the district court—and the Indiana state courts, before it—applied to Petitioner's sentencing claim a standard higher than that constitutionally required by *Townsend v. Burke*, 334 U.S. 736 (1948) and *United States v. Tucker*, 404 U.S. 443 (1972)?

II. Similarly, did the Seventh Circuit err when it failed to issue a certificate of appealability with respect to Petitioner's Sixth Amendment claim that his lawyer had been ineffective for failing to investigate the circumstances of Petitioner's arrest for another crime—an arrest that was later expunged, because a state court necessarily found Petitioner had nothing to do with whatever lead to that arrest, but was used nonetheless as the principal aggravating factor justifying Petitioner's effective life sentence of 90 years.

III. Should a certificate of appealability issue as a matter of course when a district court relies on incorrect standards to analyze a claim, because its resolution of the claim will then always be debatable; to conclude otherwise, a circuit court of appeals would either have to apply the wrong standards, itself, or it would have to address the claim on its merits, which 28 U.S.C. § 2253(c) "forbids"? *Miller-El v. Cockrell*, 537 U.S. 322, 336–37 (2003); *accord Buck v. Davis*, 137 S. Ct. 759, 773 (2017))?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption to the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

Cases (Continued)

Cases (Continued)

Constitutional Provisions, Statutes, and Rules

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY WHEELER,

Petitioner,

v.

RON NEAL,
Superintendent, Indiana State Prison,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Wheeler respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals below.

OPINIONS BELOW

The Seventh Circuit's order denying a certificate of appealability, App., *infra*, 2a, is unreported. The district court's denial of Petitioner's motion to alter or amend the judgment, App., *infra*, 3a–6a, is unreported; the district court's decision denying Petitioner's habeas petition filed under 28 U.S.C. § 2254, App., *infra*, 9a–23a, is also unreported. The decision of the Indiana Court of Appeals affirming the denial of

state post-conviction relief, App., *infra*, 24a–29a, is unpublished, but available as *Wheeler v. State*, 2016 Ind. App. Unpub. LEXIS 890 (Ind. Ct. App. Aug. 4, 2016) (*mem.*), *reh'g denied*, *trans. denied*.

JURISDICTION

The Seventh Circuit denied Petitioner's request for a certificate of appealability on June 25, 2019. On September 20, 2019, in Application No. 19A323, Justice Kavanaugh granted an extension of time to and including November 22, 2019, in which to file this petition. This Court's jurisdiction rests on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for the defense."

Section 2253(c) of Title 28 of the United States Code provides in relevant part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—the final order in a habeas corpus proceeding in which the detention complained of arises out of a process by a State court.
>
> . . . .
>
> (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.

Section 2254(d) of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States

Indiana Code § 35–38–5–1 (Burns Supp. 2012) (repealed by P.L. 181-2014, § 3, effective March 26, 2014) provided in relevant part:

> (a) Whenever:
>
> . . . .
>
> (2) all criminal charges filed against an individual are dropped because:
>
> (A) of a mistaken identity;
> (B) no offense was in fact committed; or
> (C) there was an absence of probable cause;
>
> the individual may petition the court for expungement of the records related to the arrest.

INTRODUCTION

Petitioner Anthony Wheeler is serving a sentence for two sexual assaults committed in 1988, when he was 19 years old. When the sentencing judge found an aggravating circumstance that Petitioner had been arrested for a third sexual assault while released on bond for the first two, he increased Petitioner's sentence to 90 years—effectively a life sentence.

Yet, Petitioner had nothing to do with the incident used to increase his sentence. Twenty-three years after the fact, *pro se*, from prison, Petitioner successfully litigated the expungement of that arrest. That expungement is a judicial determination that Petitioner had been mistakenly identified or no crime had, in fact, occurred. *See* Ind. Code § 35–38–5–1(a) (Burns Supp. 2012) (repealed by P.L. 181-2014, § 3, effective March 26, 2014) (providing the sole grounds for expungement of an arrest).

Petitioner's 90-year sentence therefore violated Petitioner's federal right to due process, because it rested "at least in part upon misinformation of constitutional magnitude." *United States v. Tucker*, 404 U.S. 443, 447 (1972).

This Court held in *Townsend v. Burke* that sentencing someone "on the basis of assumptions concerning his criminal record which were materially untrue. . . . whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand," 334 U.S. 736, 741 (1948). Then, in *Tucker*, the Court reaffirmed its holding in *Townsend*, applying *Townsend* to a mistake discovered decades later. *Tucker,* 404 U.S. at 447. These precedents require that Petitioner's sentence, founded on materially inaccurate information, must be

revised. At a minimum, because Petitioner's sentence "might been different be different" without consideration of the now-expunged arrest, *id.* at 448, Petitioner is entitled to a new sentencing hearing at which the now-expunged arrest will play no part.

To the extent it applied federal law at all, the Indiana Court of Appeals applied a "likely would have been the same" standard to Petitioner's *Tucker-Townsend* claim, which is *much* higher than the straightforward, correct, *lower* "might have been different" standard established by this Court. An application of an incorrect, higher standard by a state court is contrary to this Court's clearly established precedents and releases a district court from AEDPA deference under § 2254(d)(1). *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). Nevertheless, the district court gave the state-court decision AEDPA deference. App., *infra,* 12a. Compounding this error, the district court then incorrectly applied the harmless-error standard from *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). App., *infra,* 6a, 13a. The *Brecht* standard is higher than *Tucker*'s and *Townsend*'s materiality standard.

Petitioner's ineffective-assistance claim simply approaches the obvious *Tucker-Townsend* error in Petitioner's sentence from the other side. Petitioner, on his own, from prison, years after the fact, successfully litigated the expungement of the arrest that was the principal aggravating circumstance used to justify increasing Petitioner's sentence to 90 years.

Had Petitioner's trial lawyer bothered to investigate the circumstances of Petitioner's now-expunged arrest, he would have achieved the same result as

Petitioner, himself, achieved years later from prison. The failure to investigate the circumstances of Petitioner's now-expunged arrest was deficient performance. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 39–41 (2009); *Wiggins v. Smith*, 539 U.S. 510, 527–29 (2003). Once Petitioner's trial lawyer had discovered that Petitioner's now-expunged arrest lacked any foundation in fact, there is a reasonable probability that Petitioner would have received a sentence considerably less than the 90-year, effective life sentence meted out. *See Wiggins*, 529 U.S. at 535.

To Petitioner's ineffective assistance claim, both the state court and the district court applied an incorrect preponderance standard to analyze *Strickland* prejudice, instead of the lower standard of a reasonable probability of a different result from *Strickland*, itself. App., *infra*, 29a, 21a.

Despite the demonstrable application of incorrect standards to Petitioner's claims by both the state court and the district court, the two-judge panel of the Seventh Circuit concluded Petitioner had not made a "substantial showing of the denial of a constitutional right" and denied Petitioner a COA. App., *infra*, 2a. When both a state court and, after it, a district court apply incorrect standards, it should follow that "reasonable jurists would find that the district court's assessment of the[se] constitutional claims debatable or wrong," s*ee Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner is entitled to a COA and the opportunity, at least, to challenge on appeal the constitutional basis of his effective life sentence.

STATEMENT

This case arises from the confluence of two separate cases. One, successfully prosecuted by the State, resulted in Petitioner's April 1989 convictions and sentences totaling 90-years. For clarity, it will be called "the April Case." The other, in which Petitioner's arrest was later expunged, was dismissed on the State's motion in March 1989 and will be called "the Dismissed March Case."

At Petitioner's sentencing hearing for the April Case, on May 12, 1989, the prosecutor detailed the events of an attempted rape that was the basis of the Dismissed March Case and ascribed that attempted rape to Petitioner. App., *infra,* 25a. The prosecutor held up what he represented to be a motion to dismiss the Dismissed March Case. That motion was file-stamped May 2, 1989. But court records clearly show that the State dismissed the Dismissed March Case on March 15, 1989, six weeks before the date on the State's motion. App., *infra,* 15a.

In sentencing Petitioner to an aggregate 90 years, the trial judge focused on the arrest in the Dismissed March Case, "I don't think I can ignore the fact that again, while the defendant was out on this particular matter, the 9/11/88 offense was committed." App., *infra,* 25a. The trial judge arrived at the total 90-year sentence by giving Petitioner: 1) 35 years for each Class A felony, which was 5 years above the presumptive sentence for a Class A felony at the time; and 2) 10 years for each Class B felony, which was the presumptive sentence for Class B felonies at the time. *Id.* The trial judge ordered Petitioner to serve two of the four Class A and two of the Class B felonies consecutively, with Petitioner to serve the remaining sentences concurrently. *Id.*

At the sentencing hearing, there was no discussion or argument by anyone with respect to of Indiana's most significant mitigating circumstances: Petitioner's youth—he was 19 when he committed the acts for which he was sentenced; or Petitioner's complete lack of a criminal history.[1] Nor did anyone mention that Petitioner was employed.

Following his sentencing, Petitioner pursued an unsuccessful direct appeal and similarly unsuccessful first round of state post-conviction litigation. App., *infra*, 25a–26a. Then, in 2012 and 2013, Petitioner, *pro se*, successfully litigated the expungement of his arrest for the Dismissed March Case that was used to enhance his sentence to 90 years in the April Case. App., *infra,* 27a. Significantly, Petitioner defeated the State's argument that the Dismissed March Case had been dismissed because he had been found guilty in another case—namely, in the April Case.[2] *Id.* Accordingly, in February 2013, the court ordered Petitioner's arrest in the Dismissed March Case expunged. App., *infra*, 30a.

With the expungement of his arrest in the Dismissed March Case in hand, Petitioner sought permission to pursue a second round of state post-conviction relief. App., *infra*, 27a. The Indiana Court of Appeals granted that permission in May 2013. *Id.* Petitioner filed his second post-conviction petition in July 2013, and

---

[1] *See Merlington v. State*, 814 N.E.2d 269, 273 (Ind. 2004) ("Our jurisprudence indicates that the two mitigating circumstances here—young age and lack of criminal history—are weighty.").

[2] That argument by the State was, on its face, absurd, because Petitioner could not have been found guilty in April 1989 in the April Case, *before* the Dismissed March Case had been dismissed on March 15, 1989.

it was denied in August 2015. *Id.* In August 2016, the Indiana Court of Appeals affirmed that denial, App., *infra*, 29a, denied rehearing, and the Indiana Supreme Court denied transfer.

Having failed with his specifically authorized claims in the state courts, Petitioner filed an amended petition for a writ for habeas corpus in April 2017, amending a petition the district court had earlier stayed specifically so that Petitioner could exhaust his claims in the state court. App., *infra,* 11a. The district court denied the petition on July 11, 2018. App., *infra*, 23a. The court then denied Petitioner's Rule 59(e) Motion on September 10, 2018. App., *infra*, 6a. The Seventh Circuit Court of Appeals summarily denied a certificate of appealability on June 25, 2019. App., *infra*, 2a.

REASONS FOR GRANTING THE PETITION

The Court Should Grant Certiorari to Clarify the Threshold Inquiry for Issuing a Certificate of Appealability, to Correct the Multiple Applications of Incorrect Standards in this Case, and to Disambiguate the *Tucker-Townsend* and *Brecht* standards.

The standard for a court to authorize a certificate of appealability (COA) is low. For a COA to issue, a habeas petitioner need only make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and need not "prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El v. Cockrell,* 537 U.S. 322, 328 (2003); *accord Buck v. Davis*, 137 S. Ct. 759, 773 (2017). In fact, it is a jurisdictional mistake for a court to engage in "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 357 U.S at 337. "The COA inquiry asks only if the District Court's

decision was debatable." *Id.* at 348. The focus of the COA inquiry is the district court's decision.

In Petitioner's case, the district court made four erroneous choices of standards in evaluating Petitioner's *Tucker-Townsend* and ineffective-assistance claims. First, it accorded the last state court's decision AEDPA deference, to which that decision was not entitled under 28 U.S.C. § 2254(d)(1). Second, by way of *Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008), the district court erroneously applied the harmless-error standard from *Brecht*, 507 U.S. at 638, to Petitioner's *Tucker-Townsend* claim. (As will appear below, *Tucker-Townsend* claims are not subject to *Brecht*.) Third, with respect to Petitioner's ineffective-assistance claim, the district court again gave the state court's decision undue AEDPA deference after the state court had applied a prejudice standard higher than *Strickland*'s "reasonable probability of a different result." *Strickland*, 466 U.S. at 694. Fourth, the district court, *itself*, then applied to Petitioner's ineffective-assistance claim *the same* incorrect, higher standard for *Strickland* prejudice.

A. Petitioner's Case Presents a Clear Misapplication of the COA Standard, Because the District Court's Misapplication of the *Tucker–Townsend* Standard Makes Its Decision at Least Debatable.

The Seventh Circuit did not recognize that the district court made two critical errors. First, the district court gave the state court's decision unwarranted AEDPA deference under § 2254(d)(1). If the Indiana Court of Appeals applied federal law at all—arguably it did not—it applied a standard higher than that set by *Tucker* and *Townsend*. That was an unreasonable application of federal law as established by

this Court and entitled Petitioner to *de novo* review by the district court. Second, the district court made the same mistake as the state court in applying an erroneous standard to Petitioner's *Tucker-Townsend* claim.

1. *Tucker* and *Townsend* Directly Control This Case—without Reference to *Brecht*.

In *Townsend v. Burke*, this Court held that sentencing someone "on the basis of assumptions concerning his criminal record which were materially untrue. . . . whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand," 334 U.S. 736, 741 (1948). This court reaffirmed *Townsend*'s holding in *United States v. Tucker*, even when the infirmity was only later discovered. 404 U.S. at 447 ("Yet it is now clear that two of those convictions were wholly unconstitutional . . . .").

A meritorious *Tucker-Townsend* claims only requires that: 1) a defendant was "sentenced on the basis of assumptions concerning his criminal record which were materially untrue," *Townsend*, 334 U.S. at 741; and 2) the sentencing judge gave "specific consideration" to the materially untrue parts of the criminal record, *Tucker*, 404 U.S. at 447.[3] That a sentencing court did not know at the time the information is false is no matter. In *Tucker*, it was "[s]everal years later" before a state court discovered the infirmity via collateral attack. *Id.* at 444–45. Further,

[3] Circuit courts agree with this construction. *See,* e.g., *McGee v. United States*, 462 F.2d 243, 245 (2d Cir. 1972); *United States v. Tabares*, 86 F.3d 326, 329 (3d Cir. 1996); *Lester v. Flournoy*, 909 F.3d 708, 713 (4th Cir. 2018); *Bourgeois v. Whitley*, 784 F.2d 718, 721 (5th Cir. 1986); *Bryan v. Brandon*, 228 Fed. App'x 578, 584 (6th Cir. 2007); *United States ex rel. Welch v. Lane*, 738 F.2d 863, 865 (7th Cir. 1984); *Taylor v. United States*, 472 F.2d 1178, 1180 (8th Cir. 1973); *Brown v. United States*, 610 F.2d 672, 675 (9th Cir. 1980).

this Court directly rejected a prejudice analysis when the government argued "it [wa]s highly unlikely that a different sentence would have been imposed." *Tucker*, 404 U.S. at 446–47. Instead, the only question the court asked with respect to "prejudice" was "whether the sentence in [the most recent case] *might have been different* if the sentencing judge would have known" the previous convictions were infirm. *Id.* at 447–48 (emphasis added). The Court reasoned that "the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding." *Id.* at 448.

Petitioner's case is no different. Petitioner "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." *See, Townsend*, 334 U.S. at 741. Petitioner, *pro se*, successfully litigated the expungement of his September 11th arrest, in connection with which he was charged in the Dismissed March Case. App, *infra*, 27a. To do so, Petitioner necessarily convinced an Indiana state court that either he had been mistakenly identified or that not crime had been committed. Ind. Code § 35–38–5–1(a). Those were the only possible grounds justifying expungement of Petitioner's arrest. *See State ex rel. Ind. State Police v. Arnold*, 906 N.E.2d 167, 169 (Ind. 2009).

Yet, the sentencing judge directly and specifically considered the materially untrue "fact" that "while [Petitioner] was out on this particular matter, the 9/11/88 offense was committed." App., *infra*, 25a. This is unsurprising. The State's only sentencing argument was that Petitioner committed another assault while released

on bond. *Id.* Accordingly, the written sentencing order noted that: "Def[endant] committed offense while out on bond on similar charge." App., *infra*, 31a.

The sentencing judge's explicit emphasis on this materially untrue "fact" is the "specific consideration" that *Tucker* identifies as a due process violation. 404 U.S. at 447. In *Tucker*, an FBI agent present at the sentencing proceeding testified to offenses committed by Tucker. *Id.* at 444 n.1. And the sentencing judge "gave explicit attention" to that testimony. *Id.* at 444. The circuit courts of appeals analyze *Tucker-Townsend* claims no differently.[4]

In Petitioner's case, the State similarly presented to the sentencing judge the erroneous information about Petitioner's criminal record—using the later-expunged arrest as a (false) proxy for the proposition that Petitioner had, in fact, committed the additional crime for which he had been arrested. And the sentencing judge then gave that erroneous information "explicit attention." Despite this, Petitioner has not prevailed, because the state courts and the district court have applied the wrong standards to Petitioner's sentencing claim.

[4] S*ee, e.g.*, *United States v. Miller*, 900 F.3d 509, 513–14 (7th Cir. 2018) ("Thus, showing "reliance"—that the judge explicitly considered inaccurate information—does not require demonstrating prejudice—that the judge would have chosen a different sentence if properly informed. . . . A single misinformed comment warrants resentencing if it reveals that the judge misapprehended the record with respect to an aggravating factor that the judge considered important."); *Martinez v. United States*, 464 F.3d 1289, 1291 (10th Cir. 1972) ("We cannot presume that the trial court ignored the 1956 conviction although the record is silent on this. On the contrary, the probabilities are that he took it into account, since a second offense charge had been filed.").

2. The Last State-Court Decision Applied the Wrong Standard to Petitioner's *Tucker-Townsend* Claim; the District Court Therefore Erred in Giving That Decision Deference under § 2254(d)(1).

The Indiana Court of Appeals failed to make any mention of *Tucker* or *Townsend*, nor did it advert to anything federal, save that "Wheeler argues that his federal due process rights were violated because he was not sentenced on materially accurate information." App., *infra*, 28a. But the state court appears to have only analyzed Petitioner's claim under state law.[5] The court mainly posited that "Wheeler's conduct on September 11, 1988, could be a valid aggravating factor with or without expungement of that arrest record." App., *infra*, 29a.[6] Regardless, here, it is the federal *Tucker-Townsend* claim that matters.

If there is any analysis of the federal, it is when the state court required Petitioner to show that his sentence would not "have likely been the same with or without the mention of his conduct on September 11th, 1988". App., *infra*, 29a. That

[5] The Court has said, of course, that a state court need not even give reasons for its decision to entitle the decision to AEDPA deference. *Harrington v. Richter*, 562 U.S. 86, 100 (2011). The absence of *any* reference to *Tucker* or *Townsend*, the cases on which Petitioner's sentencing claim explicitly rested, is at least suggestive. More than suggestive, though, was the state court's use of society's interest in finality to defeat Petitioner's *Townsend-Tucker* claim. See App., *infra*, 29a ("[s]ociety ha[ving] a large interest in ensuring the finality of convictions").

[6] Just as a matter of fact, it is impossible to imagine how this is could be. The expungement of Petitioner's arrest in the Dismissed March case *means* either Petitioner was mistakenly identified or that no crime had been committed. *See* Ind. Code § 35–38–5–1(a)(2).

As a matter of state law, the cases the state court cites for this proposition make that court's conclusion only more questionable. *Compare Lockard v. State*, 600 N.E.2d 985, 987–88 (Ind. Ct. App. 1992) ("A sentencing judge does not err in considering prior criminal conduct which has not been reduced to conviction and evidence of prior uncharged crimes.") *with Owens v. State*, 544 N.E.2d 1375, 1379 (Ind. 1989) (finding error in considering conduct from expunged juvenile records as an aggravating factor in sentencing decision because "[t]here are no procedures for partial or conditional expungement.").

standard is *much* higher than the "might have been different" standard from *Tucker*.

So either the state court did not decide Petitioner's *Tucker-Townsend* sentencing claim or, if it did, it applied the wrong standard. Application to a claim of an incorrect, higher standard than this Court has announced allows "a federal court [to] be unconstrained by § 2254(d)(1), because the state-court decision falls within that provision's 'contrary to' clause." *Williams v. Taylor*, 529 U.S. 362, 406 (2000). As the Court explained: "A state-court decision [is] certainly[] contrary to [] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [this Court's] cases." *Id.* at 405–06. One of the two examples the Court chose to illustrate this rule was the application of an incorrect, higher, preponderance standard instead of the correct, lower reasonable-probability *Strickland* prejudice standard. *Williams*, 529 U.S. at 405–06.

Williams notwithstanding, the district court applied AEDPA deference under § 2254(d)(1) to the state-court decision. Specifically, the district court deferred to the state court's determination that "Wheeler's sentence would have likely been the same with or without mention of his conduct on September 11, 1988." App., *infra,* 17a. As discussed above, this is *not* the standard this Court has established; nor is it a standard any circuit court of appeals has articulated. The district did not notice this incorrect standard because it independently made the same mistake.

3. The District Court Also Incorrectly Applied *Brecht* to Petitioner's *Tucker-Townsend* Claim; Even So, It is Still at Least Debatable that Petitioner is Entitled to Relief under *Brecht*.

The district court required that "the trial court's reliance on the misinformation had a substantial injurious effect on his sentence," App., *infra*, 20a, 6a (citing *Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008)). *Burr*'s reference to the "substantial and injurious effect" comes from *Brecht*, 507 U.S. at 638. *Burr*, 546 F.3d at 831 ("under AEDPA a federal habeas court is to apply the more forgiving 'substantial and injurious effect' standard from *Brecht").* But that standard is not applicable here, because harmless error has never been part of the *Tucker-Townsend* analysis. *See United States v. Miller*, 900 F.3d 509, 515 (7th Cir. 2018) (distinguishing between harmless error analysis and errors of due process from *Tucker*, 404 U.S. at 446, in a case under 28 U.S.C. § 2255).

This is for good reason. In *Tucker*, a habeas case, both the district court and the Ninth Circuit had found the sentencing error there harmless. *Tucker*, 404 U.S. at 445. Still, the Ninth Circuit reversed and remanded for a resentencing untainted by consideration of any invalid prior convictions. *Id.* In affirming the Ninth Circuit, this Court directly rejected the government's contention that "it is highly unlikely that a different sentence would have been imposed." *Tucker*, 404 U.S. at 446–47.

But it is *at least debatable* that Petitioner cleared the even higher *Brecht* threshold. A judge must find *Brecht*'s "substantial and injurious effect or influence," when "the matter is so evenly balanced that [judge] feels himself in virtual equipoise as to the harmlessness of the error," *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

As described above, the *Tucker-Townsend* violation not merely affected Petitioner's 90-year sentence, it permeated it. The aggravating factor on the written sentencing order was: "Def[endant] committed offense while out on bond on similar case." App., *infra*, 31a. The state's *only* sentencing argument was that Petitioner had committed another assault while released on bond. App., *infra,* 25a. And the sentencing judge responded directly to that argument: "I don't think I can ignore the fact that again, while the defendant was out on this particular matter, the 9/11/88 offense was committed." *Id.* But, again, as a matter of Indiana law, the expungement of Petitioner's arrest means either: 1) Petitioner was mistakenly identified; or 2) no crime had been committed. *See* Ind. Code § 35–38–5–1(a). Petitioner had on his side at sentencing the two weightiest mitigating circumstances—youth and a complete lack of a criminal history[7]—about which no one said anything. He was also employed. In light of these mitigating circumstances, the use of Petitioner's factually unfounded, now-expunged arrest to increase his sentence to 90 years makes it debatable that a reasonable reviewing judge would *at least* "feel[] himself in virtual equipoise as to the harmlessness of the error," *McAninch*, 513 U.S. at 435.

[7] *See Merlington*, 814 N.E.2d at 273 ("Our jurisprudence indicates that the two mitigating circumstances here—young age and lack of criminal history—are weighty.").

B. The Seventh Circuit Erred Again by Failing to Issue a COA, Because the District Court Repeated the State Court's Error in Applying a Prejudice Standard Higher than *Strickland* Requires.

The Seventh Circuit again missed that the district court chose two additional erroneous standards in its analysis of Petitioner's ineffective-assistance claim. First, the district court wrongly gave the state court's decision AEDPA deference under § 2254(d)(1). Second, the district court applied, itself, the same wrong prejudice standard for *Strickland* prejudice that the state court had applied before it.

1. The District Court Erred When it Gave the State Court's Decision AEDPA Deference after the State Court Applied to Petitioner's Trial-Ineffective-Assistance Claim a Prejudice Standard Higher Than *Strickland*'s.

To establish ineffective assistance of counsel, a petitioner must show deficient performance and prejudice from that deficient performance. *Strickland*, 466 U.S. at 687. A lawyer's performance is deficient if it falls below "an objective standard of reasonableness," *id.* at 688; and his performance is to be judged at "the time of the counsel's conduct," *id.* at 690. To show prejudice, a "defendant must show that there is a reasonable probability, that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Instead, with respect to *Strickland* prejudice, the district court merely adopted the state court's conclusion that the "sentencing determination would have likely been the same." App., *infra*, 21a. This was the same wrong standard the state courts and the district court applied to Petitioner's *Tucker-Townsend* claim. It is a preponderance standard and higher than *Strickland*'s reasonable probability of a different result.

Applying a preponderance standard to an analysis of *Strickland* prejudice is one of the two examples this Court has used to illustrate when a state-court decision is contrary to clearly this Court's clearly established precedents. *Williams*, 529 U.S. 405–06. Because the state court did just that, it is error for a district court to grant that state court's decision AEDPA deference under § 2254(d)(1).

If a state-court's decision is contrary to this Court's clearly established precedents when it applies an incorrect standard, a district court's resolution of a claim should be at least debatable when it commits the same error. "Likely would have been the same" is as incorrect a standard for a district court to deploy in the analysis of *Strickland* prejudice as it is for a state appellate court.

2. Under the Correct Standards, Petitioner's Claim Survives Both *Strickland* Prongs in Fact; the Question is certainly *at Least* Debatable.

Performance

No court has yet addressed performance. But it is at least debatable that Petitioner's trial lawyer performed deficiently by failing to investigate the circumstances of Petitioner's arrest, fully aware that that arrest would be the center piece of the State's sentencing argument. In *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), this Court found Wiggins's counsel ineffective for failing to *expand* their investigation past what was given to them. There, Wiggins's counsel had presentence investigation and department of social services reports, but "abandoned their investigation of the petitioner's background after having acquired only a rudimentary knowledge of his history from a narrow set of sources." *Id.*

Petitioner's lawyer was similarly on notice that something might be awry with Petitioner's arrest for the Dismissed March Case. First, after that (wrongful) arrest, a judge denied the State's motion to revoke Petitioner's bond. App., *infra*, 14a. To deny a motion to revoke bond when a defendant is alleged to have committed a similar offense while released on bond is a tip-off that something is strange.

Second, in the Dismissed March Case, there was no record of a May motion to dismiss because Petitioner *had been* convicted in the April Case. App, *infra*, 15a. Nor should there have been: The case had been dismissed in March—six weeks before the April conviction and two months before Petitioner's May sentencing. This would have been apparent had Petitioner's lawyer checked.

Third, *pro se*, from prison, twenty-three years after the fact, Petitioner successfully litigated the expungement of his arrest on September 11, 1988. And he did so entirely on facts available while his trial was pending in 1988 and 1989.

Prejudice

Setting aside Petitioner's now-expunged arrest in the Dismissed March Case, there is at least a reasonable probability that Petitioner would have received a sentence less than 90-years. The State's *only* sentencing argument was that Petitioner had committed another sexual assault while released on bond. The principal aggravating factor noted in the written sentencing order was that Petitioner committed the September 11th, 1988, offense, the subject of the Dismissed March Case. App, *infra*, 31a. And the sentencing judge could not "ignore th[at] fact." App., *infra*, at 25a. There is no aggravating circumstance left—certainly

none that anyone argued or mentioned—that would justify Petitioner's 90-year sentence.

More importantly, for the purposes of obtaining a COA, it is *at least debatable* whether Petitioner was prejudiced in the *Strickland* sense by his lawyer's failure to discover that Petitioner's arrest in the Dismissed March Case had no factual basis.

C. Because Both the State Court and the District Court Applied Incorrect Standards to Petitioner's Claims, the Seventh Circuit Can Only Have Denied Petitioner a COA Either by Applying Incorrect Standards, Itself, or by Adjudicating Petitioner's Claims on Their Merits—"Decid[ing] an Appeal without Jurisdiction."

Petitioner's *Tucker-Townsend* and ineffective-assistance claims are meritorious on their face. But regardless of those claims' merits, the Court has said that the focus of the COA inquiry should be the decision of the district court, because a COA should issue if "jurists of reason could disagree with *the district court's* resolution of [the] constitutional claims." *Miller-El*, 537 U.S. at 327 (emphasis added); *accord Buck*, 137 S. Ct. at 773. The Court has also said that a circuit court of appeals commits a jurisdictional mistake when it denies a COA based on its view of the merits: "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." *Miller-El*, 537 U.S. at 336–37.

The district court—and the Indiana state courts before it—applied incorrect standards to Petitioner's *Townsend-Tucker* and ineffective-assistance claims. The Seventh Circuit necessarily either: 1) denied a COA by applying the same incorrect

standards; or 2) made the jurisdictional mistake of looking at the fact, applying the correct standards, and deciding Petitioner's claims on the merits. In either case, the district court's resolution of both Petitioner's claims was *per se* debatable, and the Seventh Circuit should have issued a COA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Cody Lee Vaughn
4310 Avenue B
Austin, TX 78751
(765) 524-6176

Michael K. Ausbrook
Counsel of Record
Indiana University
Maurer School of Law
Federal Habeas Project
211 South Indiana Avenue
Bloomington, IN 47405
(812) 322-3218
mausbrook@gmail.com

Counsel for Petitioner

November 22, 2019