Case No. 19-6877

In the Supreme Court of the United States

CHRISTOPHER R. BROWN, *Petitioner*

v.

FLORIDA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether Petitioner was deprived of due process when the state courts failed to apply collateral estoppel to bar the government from introducing evidence in his criminal trial after a forfeiture court held there was no probable cause for seizure of the evidence.

(2) Whether the state courts applied the wrong standard in denying Petitioner's claims of ineffective assistance of counsel.

(3) Whether Petitioner has been subject to disparate treatment because his co-defendant obtained relief on a claim that Petitioner's appellate counsel did not raise on appeal because Petitioner's trial counsel did not preserve the issue for appeal.

ADDITIONAL RELATED PROCEEDINGS

Regarding Petitioner's Conviction in Case 10-462A:

Nineteenth Judicial Circuit Court, State of Florida:

In re: Forfeiture of $15,980 in U.S. Currency, 2010-CA-10618 (Mar. 29, 2010)

Christopher Rudolph Brown v. State, 2010-CF-462A (Nov. 20, 2012)

District Court of Appeal of Florida, Fourth District (Dist. Ct. App.):

Christopher Rudolph Brown v. State, 146 So. 3d 1193 (Aug. 14, 2014)

Christopher Rudolph Brown v. State, 4D16-2042 (Jul. 27, 2016)

Christopher Rudolph Brown v. State, 205 So. 3d 604 (Nov. 3, 2016)

Christopher Rudolph Brown v. State, 267 So. 3d 392 (Mar. 21, 2019)

Christopher Rudolph Brown v. State, 4D19-945 (Jun. 25, 2019)

Florida Supreme Court (Fla.):

Christopher R. Brown v. State, SC19-1585 (Sept. 19, 2019)

United States District Court (S.D. Fla.):

Christopher R. Brown v. Julie L. Jones, Sec'y, Fla. Dept. of Corr., 16-cv-14555 (Aug. 8, 2017)

United States Court of Appeals (11th Cir.):

Christopher Brown v. Sec'y, Fla. Dept. of Corr., 750 Fed. Appx. 912 (Oct. 11, 2018)

Regarding Petitioner's Conviction in Case 10-427:

Nineteenth Judicial Circuit Court, State of Florida:

Christopher Rudolph Brown v. State, 2010-CF-427 (Nov. 13, 2013)

District Court of Appeal of Florida, Fourth District (Dist. Ct. App.):

Christopher Rudolph Brown v. State, 162 So. 3d 1076 (Apr. 15, 2015)

Christopher R. Brown v. State, 229 So. 3d 1241 (Feb. 9, 2017)

Christopher R. Brown v. State, 230 So. 3d 870 (Aug. 3, 2017)

Christopher Rudolph Brown v. State, 267 So. 3d 392 (Mar. 21, 2019)

Christopher Rudolph Brown v. State, 4D19-1021 (Jun. 25, 2019)

Florida Supreme Court (Fla.):

Christopher R. Brown v. State, SC19-1582 (Sept. 19, 2019)

United States District Court (S.D. Fla.):

Christopher R. Brown v. Mark S. Inch, Sec'y, Fla. Dept. of Corr., 17-cv-14351 (Dec. 20, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Statutes, rules: Page

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The district court of appeal's order denying Petitioner's petitions for writ of habeas corpus is unpublished and appears in Appendix A of Petitioner's Appendix (hereafter Pet. App.). The orders below dismissing review for lack of jurisdiction of the district court of appeal's order are unpublished and appear in Pet. App. C.

JURISDICTION

The Court does not have jurisdiction to review this habeas case, because Petitioner failed to file his petition for writ of certiorari within 90 days of the final state court judgment. *See* 28 U.S.C. § 2101(c); *Bowles v. Russell*, 551 U.S. 205, 212 (2007) ("[T]he 90–day . . . filing period for civil cases is jurisdictional."). Final judgment was entered on June 25, 2019, but Petitioner did not file his petition until 155 days later, on November 27, 2019.

On June 25, 2019, a Florida district court of appeal entered judgment against Petitioner without issuing an opinion. Pet. App. A. The district court of appeal was the "highest court of [Florida] in which a decision could be had," and its judgment was final. *See* 28 U.S.C. § 1257(a); *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967). Under Florida law, the Florida Supreme Court lacked jurisdiction to review the judgment. Pet. App. C; *Palmore v. Sidoti*, 466 U.S. 429, 431 (1984) ("The Second District Court of Appeal affirmed without opinion, thus denying the Florida Supreme Court jurisdiction to review the case."). Petitioner nevertheless requested review by the Florida Supreme Court, which dismissed the request for lack of jurisdiction. Pet. App. C.

Later, on November 27, 2019, Petitioner filed his petition for writ of certiorari in this Court. The petition is untimely. Petitioner's "improperly filed" appeal with the Florida Supreme Court did not extend his 90-day deadline for challenging the final judgment. *See Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007); Sup. Ct. R. 13.3 ("The time to file a petition for writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed . . . .").

STATEMENT OF THE CASE

The district court of appeal's final judgment disposed of two petitions for writ of habeas corpus: one that Petitioner filed after he was convicted of conspiracy to traffic cocaine, and one that he filed after he was convicted of racketeering. The district court of appeal consolidated the petitions and disposed of them in the same order. Pet. App. A.

First Petition

A. Petitioner, along with co-defendant Risto Wyatt, was charged by information in the Nineteenth Judicial Circuit Court, Indian River County, State of Florida, case 2010-CF-462 with conspiracy to traffic in cocaine – 28 grams or more and perjury in an official proceeding.

1. The Indian River County Sheriff's Office began conducting surveillance on Petitioner and Wyatt and monitoring their calls on suspicion they were trafficking cocaine in the county. Mark Leakes assisted Petitioner in purchasing cocaine after he asked Leakes to do so. Leakes testified each time a sale occurred, Petitioner and Wyatt (sometimes accompanied by a third individual) would drive to Leakes's brother's house near Orlando. Petitioner would pay for the cocaine in cash that was rubber-banded in $1,000 bundles.

2. On February 27, 2010, Petitioner called Leakes and ordered nine ounces of cocaine. During additional phone calls, the amount was increased to twenty-seven ounces. Leakes testified that Petitioner and Wyatt arrived to buy the cocaine, but the deal didn't go through because Leakes couldn't find enough cocaine and didn't trust Wyatt. Law enforcement were following Petitioner and Wyatt on February 27th after intercepting the calls. A traffic stop was conducted during Petitioner's return trip to Indian River County, and a state trooper observed a grocery bag in the back seat with a large sum of cash inside, eventually determined to be $15,980. The car was searched, but no narcotics were found. The cash was seized, but Petitioner and Wyatt were not arrested.

3. Taped phone conversations made by Petitioner after the car was stopped were introduced into evidence. In one call, Petitioner called his wife and told her that they "pulled us on 95. Wasn't none, though. But they got took, took like 18 stacks, though." In another, Petitioner told a third party that they had just been "pulled," but "I had nothing but change in my pocket," and that he told the cops he didn't know anything about the money.

4. A forfeiture proceeding was instituted regarding the seized cash. The wiretap was still confidential at this time and Petitioner and Wyatt had not been arrested. Wyatt's girlfriend, Rashonda James, testified at the forfeiture hearing that the car belonged to her and Wyatt had borrowed the car that morning without permission. She had put a bag full of cash in the backseat behind the driver's seat that morning. James explained that she withdraws cash periodically to stash away, and the money in the car represented withdrawals she had made over the course of a year. James packaged the money personally in rubber-banded $1,000 increments, placing it in the car to use later that day to purchase an apartment with cash as an investment. Petitioner and Wyatt also testified, denying knowledge of the cash in the car and claiming that Wyatt had picked up Petitioner at a location in Brevard County to give Petitioner a ride home. The forfeiture court ruled there was no probable cause for the seizure and ordered the money returned to James.

5. Petitioner and Wyatt were tried at a joint trial. Evidence that cash was seized from the car was introduced by the State into evidence, as well as Leakes's testimony, recorded phone calls between Petitioner and Leakes, and Petitioner and Wyatt's

statements at the forfeiture proceeding. After the State rested, the trial court asked Petitioner's counsel if he was going to introduce evidence. Petitioner's counsel stated he was just moving in a copy of the vehicle registration for James's car and was not calling any witnesses. Wyatt's counsel moved to introduce James's testimony at the forfeiture hearing, as James had invoked the Fifth Amendment and was thus unavailable as a witness. The prosecutor objected on grounds the prior testimony was inadmissible hearsay and the trial court sustained the State's objection. Petitioner's counsel did not join in Wyatt's counsel's motion or object to the court's ruling.

6. After a jury trial, Petitioner and Wyatt were found guilty as charged in the information. Petitioner was sentenced to life in prison as a habitual felony offender for the conspiracy charge and five years in prison on the perjury charge; Wyatt was also sentenced to prison. *See Brown v. Sec'y, Fla. Dep't of Corr.*, 750 F. App'x 912, 913 (11th Cir. 2018).

7. Petitioner and Wyatt filed separate appeals. Wyatt argued on appeal error in the trial court excluding James's prior testimony. *Wyatt v. State*, 183 So. 3d 1081, 1082 (Fla. Dist. Ct. App. 2015). The District Court of Appeal of Florida, Fourth District (hereafter Fourth District Court of Appeal) reversed Wyatt's conviction, holding it was error to exclude the prior testimony and that the error was not harmless. *Id.* at 1085. Petitioner argued on appeal that the trial court erred in denying a motion to suppress and that his habitual offender designation was illegal. The Fourth District Court of Appeal affirmed without opinion. *Brown v. State*, 146

So. 3d 1193 (Fla. Dist. Ct. App. 2014) (table).

8. Petitioner then filed a petition for writ of habeas corpus before the Fourth District Court of Appeal, alleging appellate counsel rendered ineffective assistance by failing to raise on direct appeal the trial court's exclusion of James's prior testimony. (This petition is not at issue here.)

9. Petitioner then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Florida, alleging trial counsel was ineffective for failing to join Wyatt's objection to the exclusion of James's prior testimony and appellate counsel was ineffective for failing to raise the exclusion of the testimony on direct appeal. A report and recommendation was issued recommending the petition be denied on the basis that (1) the trial counsel claim was procedurally defaulted, and such default was not excused by *Martinez v. Ryan*, 566 U.S. 1 (2012) because the claim was not substantial, or alternatively the claim lacked merit, and (2) the appellate counsel claim lacked merit. The district court adopted the report and recommendation and denied the petition. *Brown*, 750 F. App'x at 913. The Eleventh Circuit Court of Appeal granted a certificate of appealability and ultimately affirmed, holding Petitioner did not show "a reasonable probability that, but for the inclusion of James's testimony, the result of the proceeding would have been different." *Id.* at 915 (internal quotations omitted).

10. Petitioner then filed another petition for writ of habeas corpus before the Fourth District Court of Appeal alleging entitlement to relief under cases recognizing that disparate treatment of co-defendants can result in a manifest injustice,

warranting relief to correct the disparity notwithstanding any procedural bar. *See generally Johnson v. State*, 226 So. 3d 908 (Fla. Dist. Ct. App. 2017). Petitioner asserted that because Wyatt received a new trial due to the exclusion of James's prior testimony, Petitioner was entitled to a new trial as well. Pet. App. D.

Second Petition

A. Petitioner was separately charged in Indian River County case 2010-CF-427 with racketeering, sale of cocaine, and sale/delivery of cocaine within 1000 feet of a church. The basis of the racketeering charge was a retail cocaine and Xanax enterprise managed principally by Petitioner. In addition to testimony from a co-defendant involved in the enterprise, testimony was presented from seven of Petitioner's customers, and over 300 intercepted phone calls were introduced of Petitioner discussing drug deals. One of the predicate offenses presented was the attempted purchase of cocaine on February 27, 2010 at issue in case 2010-CF-462, and the fact that $15,980 was seized at that time was introduced into evidence.

1. After a jury trial, Petitioner was found guilty of racketeering and sentenced to life in prison as a habitual felony offender. Petitioner appealed, arguing on appeal only that his designation as a habitual felony offender was illegal. The Fourth District Court of Appeal affirmed Petitioner's sentence. *Brown v. State*, 162 So. 3d 1076 (Fla. Dist. Ct. App. 2015).

2. Petitioner then filed a motion for postconviction relief before the trial court, claiming trial counsel was ineffective for (1) failing to introduce James's prior testimony and (2) failing move to arrest judgment on grounds his racketeering

conviction was based on uncharged predicate acts. The trial court summarily denied the motion. Petitioner appealed, but only raised the denial of the second claim as error. The Fourth District Court of Appeal affirmed without opinion. *Brown v. State*, 229 So. 3d 1241 (Fla. Dist. Ct. App. 2017).

3. Petitioner then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Florida, alleging trial counsel was ineffective for failing to introduce James's prior testimony and three other unrelated claims. A report and recommendation was issued, holding Petitioner's claim regarding Jones's testimony was unexhausted and procedurally barred because it was not assigned as error on appeal, and lacked merit because Petitioner had not demonstrated that introduction of this testimony would have altered the jury's verdict given the overwhelming evidence presented at trial. The district court adopted the report and recommendation and denied the petition. Petitioner has not appealed this judgment.

4. While the § 2254 petition was pending, Petitioner filed a petition for writ of habeas corpus before the Fourth District Court of Appeal, alleging appellate counsel rendered ineffective assistance by failing to raise on appeal the exclusion of James's prior testimony, claiming such evidence would have been exculpatory and was admissible based on the ruling in *Wyatt*. Pet. App. E.

The District Court of Appeal's Judgment

A. On June 25, 2019, the Fourth District Court of Appeal consolidated Petitioner's two petitions for writ of habeas corpus and denied them. Pet. App. A. The Florida

Supreme Court then dismissed review for lack of jurisdiction. Pet. App. C.

1. On November 27, 2019, Petitioner filed his petition for writ of certiorari in this Court.

ARGUMENT

This Court lacks jurisdiction to review Petitioner's claims, but even putting aside that defect, the claims are not appropriate for review. This case not only "comes to [the Court] on review of a decision by a state intermediate appellate court" but also presents no circuit split or important federal questions. *See Huber v. New Jersey Dep't of Envtl. Prot.*, 562 U.S. 1302 (2011) (statement of Alito, J., joined by Roberts, C.J., and Scalia and Thomas, J.J., respecting denial of certiorari).

Petitioner asserts that it constituted plain error for the state to admit evidence of the money in the back seat of the car against him after a forfeiture court ordered that the money be returned to James. He argues the forfeiture court's judgment barred the use of the money against him under the doctrine of res judicata and thus it was a violation of due process for the state to use the money against him, or ineffective assistance of counsel for trial counsel to fail to object to the evidence. Petitioner's claim is more accurately described as collateral estoppel or issue preclusion. *See Ashe v. Swenson*, 397 U.S. 436, 443 (1970). But as Petitioner never raised a res judicata or collateral estoppel claim at any stage of any proceeding, the claim is not properly before the Court. *See Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("We cannot decide issues raised for the first time here.").

Petitioner also contends the state courts erred in denying his claims of ineffective assistance of trial counsel for failing to join in Wyatt's counsel objecting to the excluding James's prior testimony and of appellate counsel for failing to raise the issue on direct appeal. Petitioner argues he has suffered disparate treatment from co-defendant Wyatt due to counsels' failures. But the state courts correctly applied *Strickland v. Washington*, 466 U.S. 668 (1984) in denying Petitioner's ineffective assistance of counsel claims. Further, Petitioner has not suffered disparate treatment when he was not identically (or even similarly) situated with Wyatt due to the difference in culpability and evidence against Petitioner and Wyatt.

A. As Petitioner has never raised a collateral estoppel claim below, the claim is not properly before the Court.

A writ of certiorari is not warranted to review Petitioner's first question presented because he has never presented the argument to a lower court. This Court has long held that it does not have jurisdiction to review a state court of last resort's judgment "unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such State court." *Whitney v. California*, 274 U.S. 357, 360 (1927); *cf. Heath v. Alabama*, 474 U.S. 82, 87 (1985) ("Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court, as has sometimes been stated, the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." (citations omitted)).

Petitioner did not raise res judicata or collateral estoppel as a ground for relief in either of his petitions for writ of habeas corpus, Pet. App. D, E, or in any prior proceeding, whether before the trial court, appellate courts, or federal courts in § 2254 proceedings. While Petitioner claims review can be had due to plain error, prior adjudication of this issue is necessary because whether there is identity of the issues is dependent on a sufficient record of the underlying proceedings. A civil forfeiture proceeding conducted prior to a criminal trial may or may not involve the same issues as a subsequent criminal case. *Compare People v. Buonavolanto*, 606 N.E.2d 509 (Ill. App. Ct. 1992) (holding that where State failed to show in civil forfeiture hearing that car was used to facilitate crime and defendant's guilt or innocence in subsequent criminal proceeding was premised solely on use of the vehicle, collateral estoppel applied), *with State v. Barnes*, 932 P.2d 669 (Wash. Ct. App. 1997) (civil forfeiture proceeding where state failed to show proof defendant was successful in obtaining financial gain did not preclude criminal charges where success in financial gain was not an element). As there is no record of the forfeiture hearing in the underlying state habeas proceedings, it cannot be determined on the record whether there exists identity of issues between the forfeiture case and Petitioner's criminal case.

B. The state courts properly applied the ineffective assistance of counsel standard to Petitioner's claim that appellate counsel failed to raise the exclusion of James's prior testimony on appeal.

1. A writ of certiorari is not warranted to review Petitioner's second question. Petitioner essentially disagrees with the state's court's determination that appellate counsel did not render ineffective assistance. But "[a] petition for a writ of certiorari

is rarely granted when the asserted error consists . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

2. To prevail on a claim of ineffective assistance, a petitioner must demonstrate both that (1) counsel's performance was deficient, meaning that it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 688 (1984). In his petition for writ of habeas corpus directed at the judgment in case 10-CF-427, Petitioner alleged appellate counsel rendered ineffective assistance by failing to argue the trial court abused its discretion in excluding James's prior testimony, and that testimony would have been exculpatory against the racketeering charge. Pet. App. E at 3. But trial counsel never sought to admit James's prior testimony in the racketeering case, which is perhaps why Petitioner alleged in his § 2254 petition against the judgment in case 10-CF-427 that trial counsel was ineffective for failing to seek admission of James's prior testimony. Appellate counsel could not be ineffective for failing to raise an issue that was never raised or ruled on by the trial court. *See Jackson v. Dugger*, 931 F.2d 712, 715 (11th Cir. 1991). And appellate counsel could not be ineffective for failing to raise trial counsel's ineffectiveness on direct appeal, as Florida appellate courts will not address a claim that trial counsel was ineffective for failing to present evidence on direct appeal except in exceptional circumstances. *See Nairn v. State*, 978 So. 2d 268, 269 (Fla. Dist. Ct. App. 2008). Regardless, Petitioner's attempt to purchase cocaine in Orlando on February 27, 2010 was not the sole evidence in support of the racketeering charge, but was one of dozens of predicate sales,

purchases, or attempted sales or purchases introduced into evidence. Thus, Petitioner could not be prejudiced by any deficient performance of counsel in case 10-CF-427.

Further review by this Court is not warranted.

C. Petitioner did not suffer disparate treatment from his co-defendant when the evidence against the two defendants was not identical and their theories of defense were not identical.

A writ of certiorari is not warranted to review Petitioner's third question. Petitioner was not subject to disparate treatment from his co-defendant because Petitioner and Wyatt were not identically (or even similarly) situated. *Cf. Walter v. United States*, 969 F.2d 814, 817 (9th Cir. 1992). "[T]he state's case against Brown was much stronger than its case against Wyatt." *Brown*, 750 F. App'x at 914. The State's evidence against Petitioner included recorded phone calls between Petitioner and Leakes, not Wyatt and Leakes. Leakes testified and confirmed that a failed cocaine purchase occurred on February 27, 2010 and directly identified Petitioner, not Wyatt, as the person who arranged the transactions. *Id.* The State introduced phone calls that Petitioner made immediately following the traffic stop in which he stated that officers took the "stacks" and expressing relief that he only had "change in [his] pocket." Petitioner's counsel argued in closing that the evidence was insufficient to conclude that the Petitioner had purchased *cocaine* and that his recorded statements could have instead referred to marijuana. In contrast, the State did not introduce any phone calls by Wyatt following the traffic stop. Wyatt's counsel argued in closing that Wyatt did not know about the money and referred to the

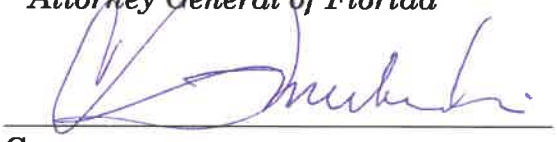
forfeiture judge's ruling returning the money to James because James testified the money was hers. Thus, unlike for Petitioner, the presence of the cash was the principal evidence demonstrating Wyatt's knowledge he was participating in a drug transaction. The difference in the evidence caused counsel for both defendants to pursue different strategies. Any benefit of James's former testimony would have been substantial for Wyatt's defense and minimal to Petitioner. As there was no disparate treatment, further review by this Court is not warranted.

CONCLUSION

The Petitioner's request for certiorari review should be dismissed as untimely or alternatively denied.

Respectfully submitted,

ASHLEY MOODY
Attorney General of Florida



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