No. 19-8301

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN JOSEPH MOCCO – PETITIONER

VS.

DAVID SHINN, ET AL. - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question #1:

In *Hohn v. United States,* 524 U.S. 236, 253 (1998), this Court held that it has authority and jurisdiction to review denials of applications for Certificates of Appealability.

(a) Does the standard announced in *Slack v. McDaniel,* 529 U.S. 473 (2000), compel issuance of a certificate of appealability where prima facie evidence demonstrating a Sixth Amendment violation under the standard announced in *Brady v. Maryland,* 373 U.S. 83 (1963), "deserve[s] encouragement to proceed further" through an evidentiary hearing under the mandate of *Townsend v. Sain,* 372 U.S. 293 (1963)?;

(b) Being reasonable jurists will follow controlling law, does the standard announced in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), compel issuance of a certificate of appealability where the sentencing issue at bar has been held by the circuit court to be unconstitutional?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page.

Mark Brnovich, Attorney General, acts as respondent for the State of Arizona.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINONS BELOW

The opinion of the Ninth Circuit Court of Appeals appears at Appendix A to the petition and is **UNPUBLISHED**.

The opinion of the United States District Court appears at Appendix B to the petition and is **UNPUBLISHED**.

JURISDICTION

For cases from federal courts:

The date on which the Ninth Circuit Court of Appeals decided my case was October 1, 2019. The date on which the Ninth Circuit Court of Appeals denied en banc review was November 8, 2019.

An extension of time to file the petition for a writ of certiorari was granted to and including March 7, 2020, on January 9, 2020, in Application No. 19A770.

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

CONSTITUTIONAL AND STAUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT:

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

FOURTEENTH AMENDMENT:

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

STATEMENT OF THE CASE

On June 13, 2003, Petitioner ("Mocco") was charged by indictment with sixteen felony counts arising out of two separate incidents, one involving "M.P." and a second involving "N.E." and "M.E." It was specifically alleged that on June 4, 2003, Mocco unlawfully entered into an apartment in Sierra Vista, Arizona, and assaulted its occupant, M.P., by cutting her panties with a knife and attempting to have intercourse with her without consent. These allegations were contained in counts one through four and count fourteen of the indictment. It was further alleged in the indictment that on this same date Mocco entered into another apartment in the same complex and sexually assaulted N.E. while forcing her husband M.E. into a bedroom and otherwise engaging in an altercation with him. These allegations were contained in counts five through thirteen and counts fifteen and sixteen of the indictment. On July 1, 2004, the jury convicted Mocco of fifteen counts and found him not guilty of count four, but guilty of the lesser included offense of attempted sexual abuse. On August 19, 2004, the trial court sentenced Mocco to 165 years in custody.

Mocco timely appealed his sentence and convictions on August 30, 2004. On April 28, 2006, the Arizona Court of Appeals affirmed Mocco's convictions and sentences in *State v. Mocco,* 2 CA-CR 2004-0295.

On July 31, 2006, Mocco filed a Rule 32 Petition for Post-conviction Relief in *State v. Mocco,* Cochise County Superior Court Number CR 2005-00218, raising a claim

under the doctrine of *Brady v. Maryland,* 373 U.S. 83 (1963).

On June 27, 2007, the Arizona Supreme Court denied review in *State v. Mocco,* 2 CA-CR 2004-0295.

On April 3, 2014, the trial court denied Mocco's collateral petition on his *Brady* claim in *State v. Mocco,* Cochise County Superior Court Number CR 2005-00218, without an evidentiary hearing having been held as requested.

On July 18, 2014, Mocco timely filed a Petition for Review with the Arizona Court of Appeals.

On November 17, 2014, the Court of Appeals granted review but denied relief in *State v. Mocco, 2* CA-CR 2014-0255-PR.

On July 30, 2015, the Arizona Supreme Court denied review in *State v. Mocco,* CR 14-0407-PR.

On July 14, 2016, Mocco filed his federal habeas corpus petition in *Mocco v. Ryan, et al.,* CV 16-00474-TUC-RCC (JR).

On January 8, 2019, the District Court denied Mocco's federal petition on the merits and denied a certificate of appealability. (Appendix B).

On March 5, 2019, Mocco petitioned the Ninth Circuit Court of Appeals for a certificate of appealability.

On October 1, 2019, the Court of Appeals denied Mocco's request for a certificate of appealability. (Appendix A).

On November 8, 2019, the Ninth Circuit Court of Appeals denied Mocco's request for rehearing en banc. (Appendix A, *supra*).

The instant petition follows.

REASONS FOR GRANTING THE PETITION

QUESTION #1:

(a) Does the standard announced in *Slack v. McDaniel,* 529 U.S. 473, 484 (2000), compel issuance of a certificate of appealability where prima facie evidence demonstrating a Sixth Amendment violation under the standard announced in *Brady v. Maryland,* 373 U.S. 83 (1963), "deserve[s] encouragement to proceed further" through an evidentiary hearing under the mandate of *Townsend v. Sain,* 372 U.S. 293 (1963)?

In denying Mocco a certificate of appealability (COA) the Ninth Circuit Court of Appeals held that he was not entitled to issuance because he has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. at 484. (Appendix A). This is the correct standard under *Slack* for assessing the issuance of a certificate of appealability where a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claims, yet Mocco's petition was denied on the merits and under *Slack* the standard of *Barefoot v. Estelle,* 463 U.S. 880 (1983), applies instead to his request for a COA:

> "To obtain a COA under § 2253(c), a habeas petitioner must make a 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.'"

Slack, 529 U.S. at 483-84 (Quoting *Barefoot,* 463 U.S. at 893, and n. 4) (emphasis added). (*See* Appendix B). The panel decision conflicts with *Brady v. Maryland,* 373 U.S. 83 (1963), *Townsend v. Sain,* 372 U.S. 293 (1963), and the Circuit Court's opinion in *Milke v. Ryan,* 711 F.3d 998 (9th Cir, 2013).

On the evening of June 4, 2003, M.P. called her sister and legal guardian, prosecution witness Ana Martinez, and reported that she had been assaulted in her apartment in Sierra Vista, Arizona. Upon this information Mrs. Martinez contacted the police and proceeded to the apartment of M.P.

Upon arrival Mrs. Martinez assisted the police in questioning M.P. as to the perpetrator of the assault against her, given her mental health status, wherein she stated that her assailant was Hispanic, spoke to her in fluent Spanish calling her "Tia" to gain access to her apartment and identified her nephew Jose, Ana Martinez's son, as her assailant. [1]

On June 8, 2004, during an interview of prosecution witness Ana Martinez, Mrs. Martinez informed the defense that M.P. had not experienced hallucinations or fantasies of an "imaginary boyfriend" in two to three years and only had these delusions when she was not on the right medication. (Appendix C, pp. 8, 15). During the course of Mocco's post-conviction proceeding on his *Brady* claim, however, the trial court released 61 pages of M.P.'s Southeastern Arizona Behavioral Health Services (SEABUS) records

1 Mocco is of Italian-American descent and does not speak any Spanish, fluent or otherwise. M.P. did not identify Mocco as her assailant in either a photo lineup or at trial, and prosecution witness Ana Martinez supplied the sole alibi for her son Jose.

spanning June 12, 2003, eight days after M.P. reported the assault on her, to August 23, 2004, four days after Mocco was sentenced upon a guilty verdict handed down by the jury. In these records it is reported that M.P. has been diagnosed with schizoaffective disorder, moderate retardation and a Global Assessment of Functioning Score of 45. (Appendix D, pp. 1:17). M.P.'s social workers further indicate in their visit notes with her that she told them of her "imaginary boyfriend," (Appendix D, supra, pp. 1:16, 1:20), and that these delusions were so pervasive that the social workers noted under the section "**Does not work for the person**" "when staff disagrees that she has a boyfriend." (Appendix D, supra, p. 1:7). [2]

In denying Mocco's *Brady* claim the district court relied upon the unpublished opinion in *United States v. Rodriguez,* 360 F. App'x 743 (9th Cir. 2009), and the state court of appeals' memorandum decision upholding nothing more than a bald assertion by the trial court that SEABUS was not involved in the investigation or evaluation of this case in order to support its position that under *Brady* the prosecution is not required to "learn of or search for information in the possession of agencies that are not at all involved in the government's investigation or prosecution." *Rodriguez,* 360 F. App'x at 747. This proposition, however, without any plenary hearings having ever been held at the state or federal levels as requested by Mocco, cannot withstand constitutional muster

2 It is worthy of note that M.P.'s SEABUS case manager documented in her reports of June 18 and July 23, 2003, that Ana Martinez declined SEABUS counseling on behalf of her sister M.P. just fourteen days after the reported assault upon her and ten days after she intentionally misled the defense as to the status of M.P.'s mental health. (Appendix E, pp. 1:23; 1:53).

when there are still disputed material facts at issue: 1) did the government have knowledge that M.P. had been having hallucinations of an "imaginary boyfriend" both before and during the prosecution of Mocco and, if so, when did the government become aware of this; 2) if the government was aware of M.P.'s delusions and hallucinations of this imaginary boyfriend did it investigate the matter; and 3) did SEABUS case workers and prosecution witness Ana Martinez participate in assisting the government with its case-in-chief and, if so, to what extent was this assistance. While the government baldly alleged during the post-conviction proceedings on Mocco's *Brady* claim that it had no knowledge of M.P.'s hallucinations and delusions of an imaginary boyfriend, it cannot answer how this can be so when it was present during the defense interview of Ana Martinez on June 8, 2004, where this was a primary point of focus. What motivation would prosecution witness Ana Martinez have had in misleading the defense as to M.P.'s true mental health status but at the suggestion of the government. It is incredulous that the government never had any contact with SEABUS case workers during preparation of its case against Mocco; never discussed M.P.'s mental health issues or hallucinations of an imaginary boyfriend with either SEABUS or Ana Martinez, and haphazardly placed M.P. on the witness stand at the competency hearing and trial without *any* knowledge of her mental health status.

Contrary to the state court of appeals' memorandum decision relied upon by the district court in denying Mocco's *Brady* claim, just 24 days after Division Two issued its

decision in the case at bar Division One held that "a prosecutor's office cannot get around *Brady* by keeping itself in ignorance or compartmentalizing information about different aspects of a case." *Milke v. Mroz,* 236 Ariz. 276, 339 P.3d 659, 666 (App. 2014) (quoting *Kyles v. Whitley,* 514 U.S. 419, 437 (1995)). The district court's holding that a purported lack of knowledge dispels the government's responsibility under *Brady* is not only contrary to the decision in *Milke v. Mroz,* 339 P.3d at 666, but also *Brady* and the Circuit Court's opinion in *Milke v. Ryan,* 711 F.3d 998 (9th Cir, 2013):

> "Where a defendant doesn't have enough information to find the *Brady* material with reasonable diligence, the state's failure to produce the evidence is considered suppression."

Id. at 1018. The crux of the issue at bar is not just that Mocco was denied his Sixth Amendment right to cross-examine M.P. concerning her delusions and hallucinations, but also goes to Mocco's ability to adequately cross-examine and impeach Ana Martinez and SEABUS case workers concerning their knowledge and intentional misleading of the defense as to M.P.'s delusions and hallucinations of an imaginary boyfriend before and during trial:

> "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

Kyles, 514 U.S. at 434-35. Accord *State v. Roberts,* 139 Ariz. 117, 121 (App. 1983), *review denied* (reversing a sexual assault conviction because the defense was not allowed to present evidence regarding the victim's developmental disabilities and her

"preoccupation" about men and women hurting each other).

In essence what the district court and Ninth Circuit proposes concerning *Brady* is that as long as the prosecution can shield itself behind non-governmental witnesses and entities, regardless of the role they play in the government's case-in-chief, no *Brady* violation can occur. However, instead of examining Mocco's claim in light of *Brady* and *Giglio v. United States,* 405 U.S. 150 (1972), – asking whether the evidence was favorable, whether it should have been disclosed and whether Mocco suffered prejudice – the district court made conclusions of facts unsupported by the record that SEABUS and Ana Martinez were not acting on the government's behalf in this case and that disclosure of SEABUS records which were unknown to the prosecutor was not required, therein allowing the prosecution to "keep [] itself in ignorance" and "compartmentaliz[e] information about different aspects of [the] case." *Milke v. Mroz,* 339 P.3d at 666. *Id.*

The district court's and Ninth Circuit's reliance upon the unpublished opinion in *Nino v. Flannagin,* 2007 WL 1412493 (D.Ariz. May 14, 2007), to deny Mocco's *Brady* claim and a COA is misplaced in this matter, for its proposition is wholly inapposite to the spirit and intent of *Brady,* 373 U.S. at 87; *Kyles,* 514 U.S. at 437; *Milke v. Ryan,* 711 F.3d at 1018; *Milke v. Mroz,* 339 P.3d at 666; and *United States v. Bagley,* 473 U.S. 667, 682 (1985), given the record before the Court. Accord *Hamdi v. Rumsfeld,* 542 U.S. 507, 533 (2004) (just as a habeas court may accept evidence from the government, it must *as a matter of law* allow a petitioner an opportunity to present his own factual case in order

to rebut the government's return to a habeas corpus petition). A COA should have issued under the mandate of *Townsend v. Sain,* 372 U.S. at 312-13, and the case remanded for an evidentiary hearing on Mocco's *Brady* claim given the material questions of fact that remain unanswered concerning the extent of the government's knowledge as to M.P.'s mental health status as well as the extent of SEABUS case workers and Ana Martinez' role in assisting the government in its prosecution of Mocco so as to make a reasoned determination as to whether a *Brady* violation has occurred, for, given the record before the court, Mocco's unrefuted allegations are "'adequate to deserve encouragement to proceed further.'" *Slack,* 529 U.S. at 484 (quoting *Barefoot,* 463 U.S. at 893, and n. 4).

> "An evidentiary hearing on a habeas corpus petition is required whenever petitioner's allegation, if proved, would entitle him to relief."

Turner v. Marshall, 63 F.3d 807, 815 (9th Cir. 1995). *Brady* is not static, and jurists of reason could find the district court's denial of Mocco's *Brady* claim and Circuit Court's denial of a COA debatable given the record in this matter. *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). See *Miller-El v. Cockrell,* 537 U.S. 322, 337, 338 (2003).

The district court's and Ninth Circuit's findings "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" and "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d)(1) and (2).

(b) Being reasonable jurists will follow controlling law, does the standard announced in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), compel issuance of a certificate of appealability where the sentencing issue at bar has been held by the circuit court to be unconstitutional?

In denying Mocco a COA on his *Apprendi* sentencing claim the Ninth Circuit Court of Appeals held that he was not entitled to issuance because he has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." (Appendix A, *id.). Slack v. McDaniel,* 529 U.S. at 484. What the Circuit Court overlooked, however, is that the very sentencing issue at bar was previously held to be unconstitutional by the Court. The Circuit Court's decision conflicts with *Apprendi v. New Jersey,* 530 U.S. 466 (2000), *Blakely v. Washington,* 542 U.S. 296 (2004), and the Ninth Circuit's opinion in *Stokes v. Schriro,* 465 F.3d 397 (9th Cir. 2006).

In denying Mocco's Sixth Amendment claim the district court relied not upon the mandates of *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Blakley v. Washington,* 542 U.S. 296 (2004), but rather the district court's opinion in *Van Norman v. Schriro,* 616 F.Supp.2d 939 (D.Ariz. 2007), and the state court's decision in *State v. Martinez,* 210 Ariz. 578, 115 P.3d 618 (2005), which are wholly inapposite to the factual basis of Mocco's claim. In the case at bar the district court disregarded the rule of *Apprendi* announced in *Blakely,* upheld the trial court's pre-*Blakely* application of A.R.S. § 13-702

to make a finding of aggravating factors and upheld the trial court's finding of aggravating factors unrelated to his prior felony conviction: 1) the instant offenses were predatory; 2) M.P. has the mental age of a child; 3) N.E. was pregnant; 4) the victimization of N.E. and M.E. was brutal; and 5) Mocco intended to use N.E. and M.E. as hostages. (Appendix F, R.T. 58:8-14; 59:17-25; 60:1-12, 8/19/04). In *Stokes v. Schriro,* 465 F.3d 397, 403, 404 (9th Cir. 2006), however, the Circuit Court held that *Apprendi's* prior conviction exception does not inoculate an enhancement predicated upon judicial factfinding:

> "The judge's finding of aggravating circumstances are not covered by *Apprendi's* prior conviction exception. Even if the prior conviction exception covers the finding that "the defendant was previously convicted of felonies within 10 years immediately preceding the date of this offense," neither of the other two findings is covered by the exception because each was directed by Stoke's *present* offenses, not the fact of his *prior* offenses.
>
> ....
>
> Because the prior conviction exception does not inoculate an enhancement predicated upon judicial factfinding, Stoke's sentence violated *Apprendi.*"

(Emphasis original). So it is in the case at bar.

From the day that *Blakely* issued on June 24, 2004, the trial court was adamant in denying Mocco a jury trial on aggravating factors under the mandate of *Apprendi,* for its position was that the court's authority in the finding and application of aggravating factors is derived from the Arizona Legislature, not the United States Supreme Court

interpreting the Federal Constitution. (Appendix G, R.T. 7:12-25; 8:1-23, 7/1/04).

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered ... If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."

Ring v. Arizona, 536 U.S. 584, 609 (2002) (quoting *Duncan v. Louisiana,* 391 U.S. 145, 155-56 (1968)). [3]

The trial court's utilization of aggravating factors relating to his *present offenses* found by the adult probation department in a presentence report circumvented the bright-line rule of *Apprendi;* shifted the burden of persuasion on Mocco; invaded the fact-finding province of the jury and, being the jury made no finding of aggravating factors, exposed Mocco to a greater punishment than that authorized by the jury's guilty verdict, the presumptive sentence. *Blakely,* 542 U.S. at 303-04. While the trial judge could have imposed maximum aggravated terms relying solely upon Mocco's single prior felony conviction, we cannot say he would have because he did not arrive at his sentences until after refusing to apply *Apprendi* and *Blakely* to the case at bar and applied aggravating factors relating to the present offenses, not his prior conviction. Jurists of reason could

3 The trial court further violated Mocco's due process rights through its rationalization it was authorized to find that the *present* offenses were "predatory, violent" and "the victimization of [N.E. and M.E.] was brutal" because the "jury found dangerousness on particular counts." (Appendix H, R.T. 2:1-14, 7/1/04). This, however, violated the *pre*-2005 revisions to A.R.S. § 13-702(c)(1), (2) and (5) being the government made a § 13-604 dangerous nature allegation pretrial, thereby establishing these aggravators to constitute elements of the offenses for which Mocco was convicted. See *State v. Munninger,* 209 Ariz. 473, 104 P.3d 204, 215-17 (App. 2005), *rev'd on other grounds.*

find the district court's denial of Mocco's *Apprendi* claim debatable being it is supported by binding circuit precedence and the Ninth Circuit should have issued a COA on the issue "because reasonable jurists will follow controlling law." Cf. *Hamilton v. Sec'y Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015).

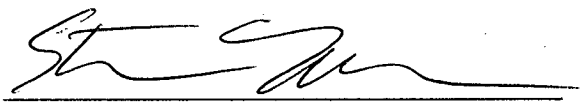
The district court's and Ninth Circuit's findings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" and "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d)(1) and (2).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Executed on February 14, 2020.



Stephen Joseph Mocco