No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

BRANCH WILLIAM NIEHOUSE,

Petitioner,

v.

MS. BRIGITTE AMSBERRY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Would reasonable jurists debate whether the evidence of robbery was legally sufficient when the only evidence that Mr. Niehouse's threatened use of force while trying to exit the business where he was trespassing was to retain stolen property was speculation sunglasses he appeared to carry might have been taken from the business's lost and found?

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The petitioner, Branch Niehouse, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 13, 2020.

Opinions Below

A United States Magistrate Judge for the District of Oregon issued his Findings and Recommendation, recommending denial of the habeas corpus petition and the denial of a Certificate of Appealability (Appendix A). Over timely objections (Appendix B), the United States District Court for the District of Oregon adopted those Findings and Recommendation, and issued an Order and Judgment denying the petition and further denying a Certificate of Appealability (Appendix C and Appendix D). The United States Court of Appeals for the Ninth Circuit Court denied a Certificate of Appealability on February 13, 2020 (Appendix E).

Jurisdictional Statement

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

28 U.S.C. § 2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in 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 . . . of the United States."

28 U.S.C. § 2254(d) provides: "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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Due Process Clause of the Fourteenth Amendment provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

Introduction

The Due Process Clause of the Fourteenth Amendment of the federal constitution "protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). This reasonable-doubt standard is a foundation of American criminal trials. In *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), this Court announced the standard for determining if a conviction is based on sufficient evidence under the Due Process Clause: "[W]hether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." A writ of habeas corpus must issue to any habeas petitioner whose conviction falls short of this essential proof requirement. *Weaver v. Foltz*, 888 F.2d

1097, 1099 (6th Cir. 1989) (citing *Jackson*, 443 U.S. at 317-19). Lower federal courts struggle to apply this law. Mr. Niehouse's case, and the denial of a certificate of appealability by the District Court and Ninth Circuit Court of Appeals, illustrates as much.

Branch William Niehouse was convicted of first degree robbery, after a court trial. That trial also included numerous second degree burglary and theft charges from separate incidents, which are not directly relevant to this Petition. The primary constitutional violation briefed in the District Court concerned whether the evidence of robbery was legally sufficient.

In Oregon, robbery requires a use of force to facilitate the taking or retaining of another's property. It does not prohibit the use of force following an aborted attempt. *See* Or. Rev. Stat. § 164.395. The trial judge did not understand this.[1] The district court and the Ninth Circuit each declined to grant a Certificate of Appealability (COA). Mr. Niehouse meets the low burden of establishing that reasonable jurists would debate the procedural default rulings in this case.

Under *Slack v. McDaniel*, 529 U.S. 473, 478 (2000), Mr. Niehouse must establish that the merits are subject to reasonable debate. In this case, that the

[1] In his District Court briefing, Mr. Niehouse described how trial counsel failed to correct the judge's misapprehension of the controlling law, in part by failing to discuss Oregon's Jury Instruction on robbery and the attending commentary.

underlying constitutional claim distills to whether the trial evidence was sufficient to establish that the pair of sunglasses seen in Mr. Niehouse's hand were taken from the business's lost and found. If not, there was no threat of force[2] used to retain stolen property, and, under state law, no robbery.

This Court should summarily grant the petition, vacate the judgment, and remand to the Ninth Circuit with instruction to issue the Certificate of Appealability and consider the merits.

Statement of Facts

An Oregon judge convicted Branch Niehouse of first degree robbery. The only possible evidence that Mr. Niehouse might have stolen a pair of sunglasses was the business owner's testimony that, when he confronted Mr. Niehouse in the establishment's back room, and Mr. Niehouse turned toward him, "I think he had sunglasses in his hand[,] which w[ere] probably from in the ... lost and found." Trial Transcript (Tr.) 233-34 (not submitted as an Appendix in this Court). There was no evidence that any sunglasses had either been left in, or found at, the establishment prior to these events. In response to trial counsel's motion for judgment of acquittal on the robbery charge, the prosecutor argued:

[2] Evidence that Mr. Niehouse displayed a chain in a threatening manner in order to leave the establishment is not disputed.

> It's clear that the person is – the defendant is going through what's in the safe. I disagree that there was no evidence of anything being taken. Mr. Gilbert testified that on top of that – inside that open safe, they regularly keep lost and found items, such things as cameras, keys, wallets, sunglasses, those types of things. And *he wouldn't have an inventory of what was necessarily there*, but that's where they kept those items. And that he observed in the defendant's hand, when he came around the corner – when Mr. Gilbert came around the corner, that defendant had a pair of sunglasses in his hand, and *he wasn't sure if those had been taken out of the safe.*

Tr. 588 (emphasis added).

In denying the motion, the trial judge explained:

> I think there is – I'm going to deny the motion. I think there is evidence from which the jury could conclude – or the finder of fact, not the jury, me, could conclude by proof beyond a reasonable doubt that this use of force or threatened use of force was in an effort to attempt or – the commission of a theft. Certainly lots of evidence of – from which one could conclude an attempt. There may even be some evidence, from my recollection of the tape, and – but I'll look at it again, that an actual commission occurred. But that's – a finder of fact kind of decision.

Tr. 589 (emphasis added). Because Oregon's appellate courts affirmed without opinion, the state court's reasoning is as articulated by the trial judge. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

At the time of the trial, the commentary to Oregon pattern jury instruction on robbery directed the reader to the controlling state law. *See* Or. Unif. Crim. Jury Inst. No. 2101, Comment. In the cited opinion, *State v. Jackson*, 40 Or. App, 759, 763 (1979), the Oregon Court of Appeals could have been describing Mr. Niehouse's case:

> This case does not involve force used in the course of attempting to commit theft. Rather, it involves force used in flight following an abandoned attempt to commit theft. There is no "retention" and hence no extension of the course of the attempt into the flight stage. Because the defendant had abandoned his attempt to commit theft prior to the use of force, his acts do not come within the requirement of the statute that force be used "in the course of committing or attempting to commit theft." In other words, for there to be robbery, there must be a relationship, not merely a concurrence, of force and theft. . . . Hence robbery was not proved and defendant's conviction must be reversed.

Id.[3]

Reasons for Granting the Writ of Certiorari

The standard for issuing a certificate of appealability (COA) requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel*, this Court held that a COA should issue when "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." 529 U.S. 473, 478 (2000). A petitioner meets that threshold

[3]Oregon's pattern jury instruction's citation to *Jackson* includes the parenthetical explanation that the crime was not robbery because "defendant's use of force against victim did not occur during and attempt to commit theft; rather, defendant used force following an abandoned attempt to commit theft."

As set out in Or. Rev. Stat. § 164.415, the crime of robbery in the first degree requires that a defendant commit the crime of robbery in the third degree as well as an attendant aggravating element. *See State v. Hamilton*, 348 Or 371, 377 (2010). Analysis of the sufficiency of the evidence in Mr. Niehouse's case focused upon his culpability under the robbery in the third degree statute, Or. Rev. Stat. § 164.395, because it is not the potential gravity of the threatened force that was not adequately established question, but rather if the threat was made in conjunction with an ongoing theft.

upon demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *accord Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

To meet this "threshold inquiry," *Slack*, 529 U.S. at 482, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (alteration in original) (internal quotation marks omitted). The petitioner need not establish that relief must ultimately be granted. *Miller-El*, 537 U.S. at 337 (reaffirming the holding in *Slack* "that a COA does not require a showing that the appeal will succeed").

The questions raised in this petition meet the Certificate of Appealability threshold: reasonable jurists would debate whether the evidence of robbery was legally sufficient when the only evidence that Mr. Niehouse's threatened use of force while trying to exit the business where he was trespassing was to retain stolen property was speculation sunglasses he appeared to carry might have been taken from the business's lost and found?

In adopting the Magistrate Judge's findings and recommendation, the district court remarked, "[t]he state also presented surveillance footage that showed

Petitioner enter through the back door of the business and walk directly to the safe." Appendix C at 3. The district court's reference is not germane to the theft element, as it only provided evidence of a threat of force as Mr. Niehouse sought to leave. Mr. Neihouse highlighted this distinction in his district court briefing:

> After his arrest, Mr. Niehouse was interrogated on multiple occasions. During questioning by Detective Julie Smith, Niehouse repeatedly asked why he had been charged with robbery. Tr. 523. Smith responded that Niehouse had been recorded on Putters' video surveillance system and identified in a photo lineup. Tr. 523.
>
> Detective Smith showed Mr. Niehouse a still image from the video recording and Niehouse remarked: "It doesn't show me threatening him, I was just trying to leave." Tr. 523. After Smith told Niehouse that the weapon had been found in his motel room, he expressed consternation and concern that the weapon would lead to his extended incarceration. Tr. 524.

Brief in Support at 5. It was the state trial judge's observation that there was evidence "from which one could conclude [Mr. Niehouse was present in] an attempt [at theft]." That judge made his misunderstanding of Oregon robbery law plain by adding "[t]here may even be some evidence … that an actual commission [i.e., theft] occurred." Tr. 589.

The magistrate judge cited only one case addressing sufficiency. Appendix A at 10. In his objections, Mr. Niehouse addressed how that case, dealing with proof of intent in a sex offense, was inapposite. Appendix B at 7-8. In its opinion, the district court also cited a single case addressing sufficiency, *Johnson v. Montgomery*,

899 F.3d 1052 (9th Cir. 2018). Appendix C at 4. Specifically, the district court cited to footnote one of that opinion. *Id.* But that note explained: "When we 'look to [state] law ... to establish the elements of [the crime],' that includes prior state cases because, were a state court to misapply the elements or reinterpret the elements in a wildly inconsistent manner, recasting sufficiency of the evidence questions as matters of state law interpretation, it would doubtless transgress *Jackson* and due process." *Johnson*, 899 F.3d 1066 n.1 (internal citation omitted). What occurred in Mr. Niehouse's case was exactly such a recasting of state law (elevating a threat of force after an aborted attempt at theft into robbery). Moreover, the *Johnson* opinion manifested the disagreement of reasonable jurists as to the sufficiency issue there because one member of the three judge panel dissented on that issue. *Id.* at 1060 (Berzon, J. dissenting) ("there was simply no evidence that Johnson committed robbery either 'in association with' or 'for the benefit of' his co-defendant's gang…. I would thus grant Johnson's habeas claim under *Jackson v. Virginia*").

The issue warrants fuller exploration and resolution because the lower federal courts have struggled to correctly apply *Jackson v. Virginia*. *See, e.g.,* Appendix B at 5-8 (addressing sufficiency cases on habeas review from the First, Second, Sixth, Seventh, and Ninth Circuits). In *Kelly v. Roberts*, 998 F.2d 802, 808-09 (10th Cir. 1993), habeas relief was granted after the Tenth Circuit found a *Jackson* violation.

There, the conclusion that *Kelly* aided and abetted the armed robbery and murder "required piling speculation on inference." As the *Kelly* Court highlighted, the prosecutor merely assumed that a car linked to Kelly had been used in the crime. *Id.*

In Mr. Niehouse's case, an even higher piling of inference upon inference was required. Specifically, without any evidence that these events occurred — much less proof of them beyond a reasonable doubt — Oregon law required that Niehouse's fact-finder conclude:

- A customer had left a pair of sunglasses at Putters;
- An employee had found the glasses and placed them in Putters' lost and found;
- Mr. Niehouse found those sunglasses in the lost and found and stole them; and,
- When Niehouse responded to Mr. Gilbert's question, "What's in your pocket?", he produced the homemade weapon with the specific intent to retain possession of the stolen sunglasses.

Although the *Jackson* standard may be difficult to apply, the degree of conjecture here exceeds that in numerous reported cases granting habeas petitions based on *Jackson* insufficiency. *See Owens v. Duncan*, 781 F.3d 360, 362-65 (7th Cir. 2015) (opinion by Posner, J.) *Langston v. Smith*, 630 F.3d 310, 315-19 (2d Cir. 2011); *O'Laughlin v. O'Brien*, 568 F.3d 287, 302-04 (1st Cir. 2009); *Newman v.*

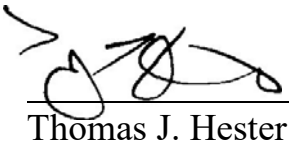
Metrish, 543 F.3d 793, 796-97 (6th Cir. 2008); *McBath v. Gomez*, 1997 U.S. App. LEXIS 20922 (9th Cir. 1997); *Kelly*, 998 F.2d at 808-09

A conviction upon legally insufficient evidence is precisely the type of injustice that the writ of habeas corpus, in both its constitutional and statutory forms, was designed to remedy. *See Blackledge v. Allison*, 431 U.S. 63, 72 (1977) ("[A]rrayed against the interest in finality is the very purpose of the writ of habeas corpus to safeguard a person's freedom from detention in violation of constitutional guarantees.") (citing *Harris v. Nelson*, 394 U.S. 286, 290-291 (1969)).

Conclusion

Reasonable jurists would debate whether the evidence adduced at Mr. Niehouse's trial was legally sufficient to establish a robbery under Oregon law. For these reasons, the Ninth Circuit erred in denying Mr. Niehouse a Certificate of Appealability.

DATED this 8th day of May 2020.



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