

No. _____

In The
Supreme Court of the United States

ROBERT JOHN DODD,
Petitioner,
v.

HAROLD CLARKE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

APPENDIX

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 4th day of February, 2021.

Robert John Dodd, Appellant,

against Record No. 200091
Circuit Court No. CL18HC-930

Harold Clarke, Director, Appellee.
Virginia Department of Corrections,

Upon appeal from a judgment rendered by the Circuit Court of Chesterfield County.

Robert John Dodd (“Dodd”) appeals from a judgment of the Circuit Court of Chesterfield County (“circuit court”) denying his petition for a writ of habeas corpus. Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no reversible error in the judgment of the circuit court.

I.

On November 9, 2014, Dodd was convicted of three counts of forcible sodomy of a child under the age of thirteen, three counts of taking indecent liberties with a minor while in a custodial relationship, and three counts of aggravated sexual battery of a child under the age of thirteen. The indictments were facially identical for each count of the specific offenses. The jury instructions, like the indictments, failed to differentiate between Dodd’s three charges for each offense by date or underlying conduct. During deliberations, the jurors asked whether there were one or three counts for each of the three different offenses. The trial court referred them to their instructions. The jury sentenced Dodd to five years for each of the indecent liberties charges; eight years for each of the aggravated sexual battery charges; and twenty years for each of the sodomy charges. The trial court suspended twenty years of the sentence, leaving a total active sentence of seventy-nine years. The Court of Appeals affirmed Dodd’s sentence by unpublished order on July 5, 2016. *Dodd v. Commonwealth*, 2016 WL 3659125 (Va. Ct. App.

July 5, 2016). This Court refused his petition for appeal on January 30, 2017 and refused his petition for rehearing on March 24, 2017.

On March 23, 2018, Dodd filed a petition for a writ of habeas corpus in the circuit court, raising seven claims. The only claim relevant to this appeal is Dodd's allegation that the identical indictments for each of the three offenses violated his due process and double jeopardy rights and that his trial counsel was ineffective for failing to object to the alleged due process and double jeopardy violations. Harold Clarke, Director of the Virginia Department of Corrections (the "Director"), filed a motion to dismiss. On October 21, 2019, the trial court granted the motion to dismiss as to all seven claims. The incorporated September 12, 2019 letter opinion specifically held that no binding federal case law existed holding that identical indictments violated a defendant's constitutional rights, and any motion to the contrary "very likely would have failed as unsupported by law."

II.

On appeal, Dodd contends that his double jeopardy and due process rights were violated when he was tried and convicted on identical indictments and that trial counsel was ineffective for failing to object to the alleged constitutional violations.*

"A prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction." *Morrisette v. Warden of the Sussex I State Prison*, 270 Va. 188, 188 (2005) (quoting *Slayton v. Parrigan*, 215 Va. 27, 29 (1974), *cert. denied*, 419 U.S. 1108 (1975)). When a petitioner had the opportunity at trial and on direct appeal to raise constitutional issues but failed to do so, the petitioner "lacks standing to raise the claim in a petition for writ of habeas corpus." *Id.* While we recognize that Dodd's double jeopardy and due process arguments could have been raised at trial or on direct appeal, the significant portion of Dodd's appeal consists of his allegation that his trial counsel failed to object to the constitutional violations.

Dodd must prove his ineffective assistance of counsel claim by a preponderance of the evidence by satisfying both parts of the two-part test established in *Strickland v. Washington*,

* When a circuit court dismisses a petition for a writ of habeas corpus with no evidentiary hearing, we apply a de novo standard of review. *Zemene v. Clarke*, 289 Va. 303, 307 (2015). "[E]ntitlement to habeas relief is a mixed question of law and fact" and the circuit court's legal conclusions are not binding on this Court; this Court is tasked with determining whether the circuit court correctly applied the law to the facts. *Id.*

466 U.S. 668 (1984). *See Jerman v. Director*, 267 Va. 432, 438 (2004). The test requires Dodd to prove that his trial counsel’s performance was so deficient that “counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” *id.*, and that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” *Strickland*, 466 U.S. at 694.

A reviewing court is not required to determine “whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Strickland*, 466 U.S. at 697. To the contrary, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,” the reviewing court may address the prejudice prong first. *Id.* In this case, we conclude that Dodd did not suffer prejudice sufficient to undermine confidence in the outcome of the proceedings as a result of trial counsel’s failure to object to the alleged due process and double jeopardy violations.

Dodd relies on *Valentine v. Kontech*, 395 F.3d 626 (6th Cir. 2005), in which the Sixth Circuit held that the defendant’s twenty identical indictments for rape and twenty identical indictments for sexual penetration of a child failed to give the defendant adequate notice of the charges against him or permit him to effectively assert potential double jeopardy violations. *Id.* at 631. The Sixth Circuit upheld only one count of rape and one count of sexual penetration of a child. *Id.* at 634.

Decisions of the Sixth Circuit, while informational, are not binding on this Court. *See Toghill v. Commonwealth*, 289 Va. 220, 227 (2015) (decisions of federal courts other than the Supreme Court of the United States not conclusive in state court). A petition for a writ of habeas corpus cannot be granted without “clearly established federal law.” *See* 28 U.S.C. § 2254(d)(1).

There is no clearly established Supreme Court precedent addressing the constitutionality of multiple identical indictments. Further, Dodd fails to cite to any decisions from this Court, nor are we aware of any, addressing this issue. We hold that trial counsel was not required to make claims based on double jeopardy and due process because they would have likely failed, as no controlling caselaw existed holding that multiple identical indictments violate a defendant’s constitutional rights. Therefore, Dodd has failed to prove that he was prejudiced by the inaction of his trial counsel.

III.

For the reasons stated, we find no error in the circuit court's denial of Dodd's habeas petition and affirm the judgment.

This order shall be certified to the Circuit Court of the City of Chesterfield.

A Copy,

Teste:

A handwritten signature in blue ink, appearing to read "John B. Ruhl".

Clerk