No. 20-7400

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DRASHAWN BARTLETT, Petitioner

v.

ANNA VALENTINE, Warden, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Drashawn Bartlett
Petitioner, KSR #209870
3001 W. Hwy 146
LaGrange, Kentucky 40032

QUESTIONS PRESENTED

In a case involving the substantive offenses of murder and robbery, can the offense of robbery be included as an element in a felony murder instruction resulting in a guilty verdict, then presented separately in a jury instruction for robbery with a firearm, also resulting in a guilty verdict - without violating the Double Jeopardy Clause of the Fifth Amendment?

Did the Sixth Circuit abrogate the intent of 28 U.S.C. § 2253(c) when it failed to apply this Court's precedent of Harris v. Oklahoma that "a subsequent prosecution for robbery with a firearm was barred by the Double Jeopardy Clause because the Defendant had already been tried for felony murder based on the same underlying felony" to the same facts present here?

Does U.S. CONST. art. III, § 2, cl.1, mandate this Court address the important public interest of Double Jeopardy proscriptions against the States, when the lower Federal courts have impermissibily given the State court decision deference when that decision is the very antithesis of Harris v. Oklahoma?

LIST OF PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner Drashawn Bartlett respectfully prays that a Writ of Certiorari issue to review the United States Court of Appeals for the Sixth Circuit order denying certificate of appealability under an impermissible deference to the Kentucky Court of Appeals decision that is "on its face" the very antithesis to this Court's Double Jeopardy precedent of Harris v. Oklahoma, 433 U.S. 682 (1977).

OPINIONS BELOW

The Order of the U.S. Court of Appeals denying certificate of appealability (COA) appears at Appendix A to this petition and is unpublished.

The Order of the U.S. Court of Appeals denying Petition for Rehearing appears as Appendix D to this petition.

The Memorandum and Order of the U.S. District Court appears at Appendix B to this petition and is unpublished.

The Opinion of the Kentucky Court of Appeals appears as Appendix C to this petition and is unpublished.

JURISDICTION

The date on which the U.S. Court of Appeals for the Sixth Circuit denied COA was November 2, 2020, and appears at Appendix B.

A timely petition for rehearing was denied by the U.S. Court of Appeals for the Sixth Circuit on January 8, 2021, and appears at Appendix A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Constitutional Provisions

Article III of the United States Constitution in Section 2, Clause I, provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States []. U.S. CONST. art III, §2, cl.1

The Fifth Amendment to the United States Constitution, the Double Jeopardy Clause, provides in relevant part:

> No person shall ... be subject to the same offense to be twiced placed in jeopardy of life []. U.S. CONST. amend. V

II. Statutory Provisions

Title 28 United States Code, Section 2253(c)(2) provides in relevant part:

> A certificate of appealability may issue ... only if the applicant has made substantial showing of the denial of a constitutional right.

Title 28 United States Code, Section 2254(d) provides:

> An application for 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 adjudication of the claim -
>
> (1) resulted is 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;

STATEMENT OF THE CASE

Bartlett's Fifth Amendment right not to be twiced placed in jeopardy for the same offense was violated when a Kentucky state trial court instructed the jury under the felony murder rule that "they could find him guilty of second-degree manslaughter only if they found him guilty of the robbery;" App. C, p.21. Then the trial court instructed the jury separately regarding the robbery with "the use of a weapon and the infliction of physical injury upon the victim." Id. Bartlett was found guilty under both instructions.*

The felony murder jury instruction requiring a finding of guilt of robbery for second-manslaughter and the separate jury instruction for the same substantive offense of robbery allowed Bartlett to be found guilty twice for the same robbery in violation of the Double Jeopardy Clause of the Fifth Amendment. In Harris v. Oklahoma, 433 U.S. 682 (1977) (per curium), this Court established a species of Double Jeopardy violations outside

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* The trial court intially instructed the jury that it could find Bartlett guilty of murder only if they found him guilty of the robbery. The jury did not return a guilty verdict for murder electing instead to find him guilty under the second-degree manslaughter robbery instruction. In the proceedings below Bartlett had also argued that the implied acquittal on the felony murder robbery instruction barred him from being found guilty of the robbery in the second-degree manslaughter robbery instruction. Both the State and Federal courts misconstrued Bartlett's claim as one where he was arguing that the implied acquittal under the murder robbery instruction precluded the jury from finding him guilty of the lesser offense of second-degree manslaughter. Being frustrated with the lower courts myopic obstinancy, Bartlett proceeded only with his Harris Double Jeopardy claim, which was far more blatantly clear.

the Blockburer v. U.S., 284 U.S. 299 (1932) analytical standard involving felony murder instructions and held "that a subsequent prosecution for robbery with a firearm was barred by the Double Jeopardy Clause, because the defendant had already been tried for felony murder based on the same underlying felony;" reaffirmed in U.S. v. Dixon, 509 U.S. 688, 698 (1993), to prove felony murder, "it was necessary for all the ingredients of the underlying felony" (to be proved), Id. 706; Harris, 433 U.S. at 682-683.

Here, it is indisputable that Bartlett's conviction for the substantive offense of robbery was barred by the Fifth Amendment as held in Harris after it had been included as an elemental incident in the second-degree manslaughter instruction pursuant to the felony murder rule.

In the face of this blatant violation of Harris and the Fifth Amendment, the Sixth Circuit unreasonably upheld the District Court's impermissible extension of deference to the State court decision and denied COA.

Bartlett met his burden of making "a substantial showing of the denial of his Fifth Amendment right" not to have been placed twice in jeopardy for the substantiave offense of robbery that he was found guilty of under the felony murder second-degree manslaughter instruction, then being found guilty of the same substantive offense of robbery in a separate instruction by itself.

This Court's review is necessary to promote the public interest of having confidence in the judiciary where a COA was required to be granted upon a substantial showing of the

violation of the Fifth Amendment Double Jeopardy Clause as held by this Court in Harris.

The State court's decision is both, contrary to Harris and, involved an unreasonable application of Blockburger, the District Court's refusal to grant relief pursuant to 28 U.S.C. § 2254(d)(1) despite a clear violation of Harris by impermissibly extending deference which could not have been applied, and the Sixth Circuit's refusal to grant COA for the same reason amounts to a travesty of justice and has left a man incarcerated twice convicted for a single robbery.

Factual Background

On November 9, 2005, Bartlett and co-defendant Girton were driving together to meet Bartlett's grandmother. Unable to locate Bartlett's grandmother, the pair drove near the Acadia Apartments, where Girton asked Bartlett to stop the car. Bartlett waited in the car while Girton entered the building. Girton ran out of the building after a loud boom and Bartlett drove off with Girton. The victim, Adolfo Jimenez was shot and killed during Girton's robbery.

During a two week period between January and February 2007 a trial was held. At the close of the evidence the trial court instructed the jury as to the evidence law of the case, stated in relevant part below:

Instruction No. - Murder

A. ... the Defendant knowingly and intentionally

participated in a robbery;

B. That during the coruse of that robbery ... Adolfo Jimenez was shot and killed;

AND

C. That by so participating in that robbery ... he caused Adolfo Jimenez's death ...

Thus, under the felony murder rule, the jury was instructed that it must find Bartlett guilty of murder if it found that he knowingly and intentionally participated in a robbery.

The court further instructed the jury under the felony murder rule on the lesser included offense of Second Degree Manslaughter in relevant part:

Instruction No. 2(A)

A. ... the Defendant knowingly and intentionally participated in a robbery;

B. That during the coruse of that robbery ... Adolfo Jimenez was shot and killed;

AND

C. That by so participating in that robbery ...

The jury returned a guilty verdict under Instruction No. 2(A). However, the trial court had also instructed the jury that they could find Bartlett guilty of the underlying substantive robbery offense as well under Instruction No. 3. The jury returned a guilty verdict for robbery thereunder as well.

The jury sentenced Bartlett on second degree manslaugher to eight (8) years, as to the robbery, it sentenced him to twenty (20) years. The sentences were to be run consecutively for a total twenty-eight (28) year sentence.

On March 26, 2007, the trial court sentenced Bartlett to

twenty-eight (28) years accordingly.

Proceedings Below

After his conviction, Bartlett unsuccessfully appealed his conviction to the Kentucky Supreme Court, which affirmed the conviction on February 19, 2009. Bartlett petitioned for rehearing, which was denied.

On April 23, 2010, Bartlett filed a state post-conviction motion raising several issues of ineffective assistance of counsel, including counsel's failure to object to the violation of his right under Double Jeopardy Clause of the Fifth Amendment. On June 3, 2010, counsel from the Department of Public Advocacy was appointed. An evidentiary hearing was held on May 31, 2013, and the trial court denied relief on June 12, 2013.

Bartlett filed an appeal to the Kentucky Court of Appeals which affirmed the denial of post-conviction on December 24, 2014. Bartlett's petition for rehearing was denied on February 13, 2015.

On May 14, 2015, Bartlett filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254(d)(1) asserting several arguments, including counsel's ineffectiveness for failing to raise objection to Bartlett being thrice convicted for robbery under the theory of the implied aquittal of the robbery when the jury rejected a finding of guilt under the felony murder - murder robbery Instruction No. 2, finding him guilty of the same robbery under the felony murder rule and second degree

manslaughter under Instruction No. 2(A), then finding him guilty of that same robbery as a separate substantive offense under Instruction No. 3. The second part of Bartlett's Double Jeopardy violation stemmed from the fact that once he was convicted for robbery under the felony murder instruction for second degree manslaughter, this finding precluded a subsequent finding of guilt for the same robbery under Instruction No. 3.

On May 4, 2020, the District Court adopted the Magistrate's Findings of Fact, Conclusions of Law and Recommendations and denied relief under an impermissible deference given to the state court decision to deny relief, despite the unreasonable application of Blockburger's "same elements" test for disposition of the claim. The District Court denied relief regarding Bartlett's implied acquittal argument that the jury's rejection of finding him guilty of murder robbery under Instruction No. 2 barred conviction of that same robbery in the felony murder second degree manslaughter Instruction No. 2(A). The District Court erroneously concluded that the conviction of the lesser included offense of second degree manslaughter was not precluded by the jury's rejection of a finding of guilt under the murder robbery instruction. Regarding the subsequent conviction for robbery as a separate offense, the District Court erroneously concluded, giving deference to the state court decision and its unreasonable application of Blockburger "same elements" test, that since the robbery instruction required a finding that a firearm was used, which was not an element necessary for finding of guilty under the felony murder instruction(s), it was not

barred under the Double Jeopardy Clause. The District Court denied COA.

Bartlett moved the Sixth Circuit for COA only on his two-part Double Jeopardy Clause violations, one regarding the implied acquittal, the other regarding the conviction for robbery under the felony murder instruction for second degree manslaughter barred the subsequent conviction for the same robbery as an separate offense.

On November 3, 2020, the Sixth Circuit denied COA essentially for the same reasons asserted by the District Court.

On November 11, 2020, Bartlett petitioned for rehearing asserting that the Sixth Circuit had overlooked substantive facts regarding the second part of his Double Jeopardy claim concerning being convicted for the robbery under the felony murder rule, and then convicted for the same robbery as a separate offense, thus misapprehended the law, which clearly states that Bartlett's rights under the Fifth Amendment Double Jeopardy Clause were violated when analized under the principle held by this Court in Harris.

On January 8, 2021, the Sixth Circuit denied Bartlett's petition for rehearing obstinately asserting that it did not overlook anything or misapprehend any point of law or fact in denying COA.

REASONS FOR GRANTING CERTIORARI

This case presents questions of important public interest regarding the integrity of the judicial system in the State and Federal courts and the appropriate, if not mandated, standards that have been imposed upon them by Congress and this Court's precedents for obtaining habeas relief when a State trial process has unquestionably violated a Defendant's U.S. Constitutional rights, including issuance of a COA.

In its decision below, the errant Sixth circuit created a new habeas standard regarding the issuance of COAs that is untethered from this Court's precedents and effectively closes the door on habeas corpus relief in the face of an egregious violation of a defendant's right under the Fifth Amendment not to "be subject to the same offense to be twiced placed in jeopardy of life."

I. The Sixth Circuit decision in denying COA relief has created a question of important public interest in the integrity of the judicial system regarding a Defendant's Fifth Amendment Right not to be Twice Placed in Jeopardy for the Same Offense.

The Fifth Amendment to the U.S. Constitution states in relevant part: "No person shall .... be subject to the same offense to be twice placed in jeopardy of life []. U.S. CONST., amend. V. This right at its core is supposed to protect against second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same offense. See, North Carolina v. Pearce, 395 U.S. 711 (1969). The prohibition of double jeopardy applies not only to "life or

limb," but also to imprisonment and monetary penalties, Ex Parte Lange, 85 U.S. (18 Wall.) 163, 170 (1873). This Court in Benton v. Maryland, 395 U.S. 784, 794 (1969) extended the Double Jeopardy Clause's protections to state prosecutions.

This Court recognizing that the "same elements" test set forth in Blockburger could not be utilized as the sole analytical framework for cases involving felony murder instructions where the underlying substantive offense like robbery, as here, is a necessary element that must be found in relation to the murder. In Harris, this Court held "that a subsequent prosecution for robbery with a firearm was barred by the Double Jeopardy Clause, because the defendant had already been tried for felony murder based on the same underyling felony. Here, to prove murder or second degree manslaugher, "it was necessary for all the ingredients of the underyling felony" of robbery to be proved. See, Harris, 433 U.S. at 682-683.

Bartlett was convicted under the felony murder rule for second degree manslaughter robbery under Instruction No. 2(A). That robbery conviction barred Bartlett from being subject to the same robbery and conviction under Instruction No. 3.

The answer to the first question is: Yes, the Double Jeopardy Clause of the Fifth Amendment was violated. Thus, the State court decision that Bartlett's Double Jeopardy Claim must be rejected under Blockburger's "same elements" test because the robbery instruction required a finding that "a handgun was used," which was not an element necessary for guilt for the second

manslaughter conviction,* was contrary to Harris and involved an unreasonable application of Blockburger. In such a case on the face of the record, habeas relief pursuant to 28 U.S.C. § 2254(d)(1) was mandated.

However, the District Court impermissibly gave this State court decision a deference which was not authorized pursuant to the unrefutable facts in the record. While the deference standard is "demanding," it is not "insatiable," and this Court has held "deference does not by definition preclude relief," Miller-El v. Dretke, 545 U.S. 231, 240 (2005).

It is without question, pursuant to the unrefutable facts in the record that Bartlett's Fifth Amendment right not to be twice placed in jeopardy was violated when he was convicted for robbery under the felony murder rule and convicted for the same robbery as a separate substantive offense - a "substantial showing of the denial of a constitutional right."

II. The Sixth Circuit's Decision in this Case directly conflicts with the clearly established law of Harris and demonstrates abrogation of the Conressional Intent of 28 U.S.C. § 2253(c) and has created a split between Circuit Court's of Appeal Regarding Issuing COA(s).

Title 28 United States Code, Section 2253(c)(2) provides in relevant part: "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right."

This Court in Miller-El v. Cockrell, 537 U.S. 322 (2003)

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* It must be noted here that there is no legal distinction between a "firearm" and a "handgun," under Harris.

clarified the standard for issuance of a COA:

> A prisoner seeking COA need only demonstrate a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). A petitioner satisfies this standard by demonstrating jurists of reason could disagree with the district court's resolution of his constitutional claims or jurists of reason could conclude that the issues presented are adequate to deserve encouragement to proceed further. Id. 327, citing Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Reduced to its essentials, the test is met where the petitioner makes a showing that "the petition should have been resolved in a different manner or that the issues presented 'were adequate to deserve encouragement to proceed further.'" See, Miller-El, 537 U.S. at 336, citing Barefoot v. Estelle, 463 U.S. 880, 893 (1983).

This Court further stated: "We do not require a petitioner to prove, before issuance of COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatble even though every jurist of reason might agree, after COA has been granted and the case received full consideration, that the petitioner will not prevail. As stated in Slack, where a district court has rejected a constitutional claim on the merits, the showing required to satisfy § 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. Miller-El, 537 U.S. at 338.

As shown above, the facts in the record undisputably demonstrate that Bartlett's conviction for robbery under the felony murder Instruction No. 2(A) for second degree manslaughter barred a subsequent conviction for the same robbery under Instruction No. 3 - is the very eptiome of a "substantial showing

of the denial of Bartlett's Fifth Amendment Constitutional right "not to be placed twice in jeopardy for the same offense." This meets the first part of the Miller-El test.

Bartlett meets the second part by showing that jurists of reason in this Court have debated this issue and found that in such a case, Harris, not Blockburger, bars the subsequent conviction for the same robbery, regardless if it contains an additional element that was not included in the felony murder instruction, as the robbery and all its ingredients were subsumed into a finding of guilt for second degree manslaugther. This demonstrates that both the District Court's assessment of the Double Jeopardy Claim under Blockburger was wrong and the Sixth Circuit's blind acceptance of its ruling has created a spilt among the Circuit Courts of Appeal regarding the Miller-El standard which the Ninth Circuit has held to be "relatively low," Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002).

The Sixth Circuit's decision denying COA canot be reconciled with the above precedents of this Court or the intent of 28 U.S.C. § 2253(c)(2) grant of COA when a substantial showing that Bartlett's Fifth Amendment right "not to be placed twice in jeopardy for the same offense" was denied.

The Sixth Circuit had a duty not to rubber stampt the District Court's denial of Bartlett's claim as the Anti-Terrorism and Effective Death Penalty Act still requires that federal courts must exercise independent judgment regarding legal and mixed questions of law and fact to its Article III obligations consistent with the Separation of Powers doctrine.

III. The Sixth Circuit's Decision Directly Conflicts with this Court's Precedent and Effectively Closes the Courthouse Door to Habeas Relief.

This Sixth Circuit's decision is not only troubling for its failure to follow this Court's long-standing precedent of Harris and its Double Jeopardy jurisprudence, but also for its abrogation of the Congressional intent of 28 U.S.C. § 2253(c)(2) and ignoring the standard set by this Court in Miller-El regarding issuance of COA.

By denying relief without regard to the "substantial showing" of a fundamental violation of Bartlett's rights under the Jeopardy Clause as held in Harris, the Sixth Circuit's act of rubber stamping the District Court's impermissible giving of deference to the **unreasonable** State court resolution of Bartlett's Double Jeopardy claim under Blockburger, when Harris is the controlling principle, demonstrates a course of action that directly affects the integrity of this Nation's State and Federal judicial systems.

The People must have confidence in the judiciary. But, when they see that the judiciary is not upholding the United States Constitution, its Laws, nor protecting their guaranteed rights thereunder, then what are they left to believe to be their avenue for protection of their rights and liberties? Our Democratic society demands more.

Article III of the U.S. Constitution in Section 2, Clause I, clearly states in relevant part: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States []. U.S. CONST. art III, §2, cl. 1.

This Court has deemed it prudent to limit the number of cases it accepts from all lower State and Federal courts to prevent it from becoming overwhelmed, yet, at the same time, it needs to ensure cases of National Public Interest are heard. This Court must not close its eyes to manifest injustices as presented, which is of a National Public Interest.

This Court not only has an Article III obligation, but an inherent duty thereunder to ensure that all lower State and Federal courts adhere to its decisions defining clearly established Federal law, and must exercise that Article III jurisdiction whenever a case sub judice presents itself, to maintain the harmony of the Law withint the Spirit of the United State Constitution.

CONCLUSION

For the foregoing reasons, Drashawn Bartlett respectfully requests that the Court grant him petition for writ of certiorari.

Dated: February 25, 2021

Respectfully submitted,

Drashawn Bartlett
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NOTICE

Notice is hereby given that the the original plus (9) copies of the petition, appendix and motion to proceed in forma pauperis were mailed postage prepaid this 25 day of February 2021; to the U.S. Supreme Court Clerk, 1st St. NE, Washington, D.C. 20543-0002.

Drashawn Bartlett

CERTIFICATE OF SERVICE

Pursuant to Rule 29 of the Supreme Court Rules, I certify that a true copies of the same were mailed postage prepaid this 25 day of February 2021; to Hon. Bryan D. Morrow, 1024 Capital Center Dr., Frankfort, Kentucky 40601-8204.

Drashawn Bartlett