20-7981

No.

IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN NIVENS-- PETITIONER

vs.

J. PHILLIP MORGAN, WARDEN -- RESPONDENT(S)

(No. 19-7790 UNITED STATES COURT OF APPEALS FOURTH CIRCUIT)
(8:16-cv-02648-TDC UNITED STATES DISTRICT COURT FOR MARYLAND)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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MCTC
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QUESTION PRESENTED FOR REVIEW

Whether the Petitioner has a right to be free from Double Jeopardy, after the jury was sworn in and with the jury ruling upon Count 5 and Count 6 pursuant to the sameness analysis and charging document, which were both duplicitous and multiplicitous, pursuant to the Fifth Amendment?

LIST OF PARTIES

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

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Nivens v. Morgan, Warden, No. 16-cv-02648, U.S. District Court for the District of Maryland. Judgment Nov. 15, 2019.

Nivens v. Morgan, Warden, No. 19-7790, U.S. Court of Appeals for the Fourth Circuit. Judgments Aug. 24, 2020, December 14, 2020, and January 5, 2021.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

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

[√] For cases **from federal courts:**

The opinions of the United States Court of Appeals appears at **Appendix A** to the petition and is

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[√] is unpublished.

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

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[√] is unpublished.

[ ] For cases **from state courts:**

The opinion of the highest state Court of Appeals appears at _____ to the petition and is

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the at _____Court appears at _____ to the petition and is

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[√] For cases **from federal courts:**

The dates on which the United States Court of Appeals decided my case was **August 24, 2020**, **December 14, 2020** and **January 5, 2021**.

[ ] No petition was filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____A____.

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

[ ] For cases **from state courts:**

The date on which the highest Court of Appeals decided my case was_____.

A Copy of that decision appears at_____.

[ ] A timely petition for rehearing was thereafter denied on the on the following date:_____, and a copy of the order denying rehearing appears at_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____A____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 17 of the Md. Declaration of Rights provides: That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required. Md. Declaration of Rts., Article 17.

Double Jeopardy Clause. —The Fifth Amendment—"nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb." Ratified in 1791 **(Black's Law Dictionary, Ninth Edition 2009)**

Federal Criminal Law § 22, 29, 31 – guaranty against double jeopardy:

The Fifth Amendment guaranty against double jeopardy consists of three separate constitutional protections: **(1)** protection against a second prosecution for the same offense after acquittal; **(2)** protection against a second prosecution for the same offense after conviction; and **(3)** protection against multiple punishments for the same offense.

Federal Appeal and Error § 1675 – habeas corpus – affirmance:

Upon review of the judgment in federal habeas corpus proceedings ordering the release of state prisoners on the ground that more severe sentences imposed by the state trial courts after reconviction upon retrial were unconstitutional, the first convictions having been set aside on constitutional grounds, the United States Supreme Court will affirm such judgments where there is nothing in the record to show that the states in question offered any reason or justification for the increased sentences either at the time such sentences were imposed or at any stage in the habeas corpus proceedings.

Former Article 27, § 464 First degree sex offense.

A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(i) With another person by force or threat of force against the will and without the consent of the other person, and:

(i) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably concludes is a dangerous weapon; or

(ii) Inflicts suffocation, strangulation, disfigurement, or serious physical injury upon the other person or upon anyone else in the course of committing the offense; or

(iii) Threatens or places the victim in fear that the victim or any person known to the victim will be subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or

(iv) The person commits the offense aided and abetted by one or more other persons. **(1992 Repl. Volume 2, Replaces 1987 Repl. Volume 3A)**

Former Article 27, § 29 Burglary generally; restitution.—Every person convicted of the crime burglary or accessory thereto before the facts shall restore the thing taken to the owner thereof, or shall pay him the full value thereof, and be sentenced to imprisonment in jail or in the Maryland House of Correction or in the Maryland Penitentiary for not more than 20 years.

(1992 Repl. Volume 2, Replaces 1987 Repl. Volume 3A)

Former Article 27, § 464A. Second degree sex offense.

(a) *What constitutes.*—A person is guilty of a sex offense in the second degree if the person engages in a sex act with another person:

(1) By force or threat of force against the will and without the consent of the other person; or

(2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless; or

(3) Under 14 years of age and the person performing the sex act is four or more years older than the victim.

(b) *Penalty.*—Any person violating the provisions of this section is guilty of a felony and upon conviction is subject to imprisonment for a period of not more than 20 years. **(1992 Repl. Volume, Replaces 1987 Volume 3A)**

Md. Rule 4-601 Search warrants. (2012)

(a) *Issuance – Authority.*- A search warrant may issue only as authorized by law. Title 5 of these rules does not apply to the issuance of a search warrant.

Md. Rule 4-212 Issuance, service, and execution of summons or warrant. (2012)

(a) *General.*-When a charging document is filed or a stetted case is rescheduled pursuant to Rule 4-248, a summons or warrant shall be issued in accordance with this Rule. Title 5 of these rules does not apply to the issuance of a summons or warrant.

STATEMENT OF THAT CASE

Nivens was tried and convicted for a crime **[allegedly]** committed on October 25, 1987, over 20 years later, in 2008 and then again in 2011 after the fact, **as the State contended**, where laws were substantially changed altering the consequences.

Nivens is challenging his right to be free from ex post facto laws, prohibition, restriction and clause, and the violation of the Double Jeopardy Clause which are his justiciable issues and controversy pursuant to the U.S. Constitution, Md. Constitution and Md. Declaration of Rights Article 17. *Nivens* was convicted of Count 1 **(Former Article 27 § 464A)** and Count 5 **(Former Article 27 § 29)(Court Docket Entry Sheet at p. 5)** by a jury on June 12, 2008. *Nivens* was then sentenced to 70 years **(Circuit Court Docket Entry at p. 11)**, *Nivens* filed a direct appeal and then on February 23, 2010 the Court of Special Appeals reversed *Nivens'* Conviction. On September 15, 2011 *Nivens* entered an ill-advised Alford Plea on the advice and ineffective assistance of his counsel Jessica R. Bancroft and was reconvicted of Count 2 **(Former Article 27 § 464A)** and Count 5 **(Former Article 27 § 29)(T. 9/15/2011 2, 15)** and then on October 31, 2011 **(T. 10/31/2011 at 33)** was resentenced to 40 years he was sentenced to 20 years incarceration for Count 2 **(Former Article 27 § 464A)** and 20 years incarceration consecutive for Count 5 **(Former Article 27 § 29)**

REASONS FOR GRANTING THE WRIT

Petitioner has a right to be free from Double Jeopardy, after the jury was sworn in and with the jury ruling upon Count 5 and Count 6 pursuant to the sameness analysis and charging document, which were both duplicitous and multiplicitous, pursuant to the Fifth Amendment.[1]

DOUBLE JEOPARDY AND MULTIPLE PROSECUTIONS FOR SINGLE OR RELATED ACTS AND MULTIPLE CHARGES AND PUNISHMENTS IN SINGLE PROSECUTIONS[2]

Former Article 27, § 29 clearly states:

> Burglary generally; restitution.—Every person convicted of the crime burglary or accessory thereto before the facts shall restore the thing taken to the owner thereof, or shall pay him the full value thereof, and be sentenced to imprisonment in jail or in the Maryland House of Correction or in the Maryland Penitentiary for not more than 20 years. **(1992 Repl. Volume 2, Replaces 1987 Repl. Volume 3A)(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #1, 3)**

The Respondents Counsel has **conceded** and **admitted** the **1994 version** of the statutory offense of first degree burglary was applied to Nivens, but this again would make the 1994 version ex post facto to Nivens, which under the U.S. and Maryland Constitutions is prohibited. Nivens had to be tried under the **1987 version**, not the **1994** or the **2008 version**, which in its language does not state, whatsoever with the intent to commit theft or a crime of violence. Being tried and convicted under the **1994 and 2008** versions is and was prejudicial. **(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #3)(9/8/20 Respondents Informal Brief at 21, 22)**

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[1] Indictments, Dismissal of Indictments, Duplicity and Multiplicity, citations are from 38 **Geo. L.J. Ann. Rev. Crim. Proc.** 268, 269, 287-291, 293, 294 (2009). **The Georgetown Law Journal 38th Annual Review of Criminal Procedure (2009)**

[2] Double Jeopardy, Multiple Prosecutions for Single or Related Acts, Multiple Charges in Single Prosecutions, citations are from 38 **Geo. L.J. Ann. Rev. Crim. Proc.** 447, 450, 459-464, 466-468, 481 (2009). **The Georgetown Law Journal 38th Annual Review of Criminal Procedure (2009)**

Under the deferential standard and review the State Court **unreasonably applied** the Supreme Court precedent, which was objectively unreasonable and lacked justification that there were errors well understood and comprehended in existing law beyond any possibility for fair minded disagreement. ***Id.* at 419-20** (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). **(9/8/20 Respondents Informal Brief at 11, 13-15)**

The unreasonable determination of the facts in Nivens' case that were unreasonable were what the State presented on the Verdict Sheet and the State's Request for Jury Instructions by not affording the jury the opportunity to see, deliberate and rule upon a breaking and entering and that it lacked justification **that was error**, along with the 2 counts for **former Article 27 § 29**. **(9/8/20 Respondents Informal Brief at 11, 13-15, 25)**

The prosecutor **(Glennon)** who drafted the indictment **was** aware **(9/8/20 Respondents Informal Brief at 9)** that Nivens was charged, tried and convicted under the 2008 statutes and not the 1987 statute. **(9/8/20 Respondents Informal Brief Exhibit C, p. 220)**

On September 15, 2010, after the reversal of Nivens' 2008 convictions on Count 1 and Count 5, Nivens initially filed a Petition for Writ of Habeas Corpus, with a double jeopardy claim that was **DISMISSED WITHOUT PREJUDICE. (9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #5)(Civil Action No. RDB-10-2563)**

This is the first time that the State and the Respondents Counsel has **conceded** and **admitted** that **"by the time of trial, neither the prosecutor, nor defense counsel(s), nor the trial judge was not alert to this issue"** and Nivens was, as a result was **prejudiced** by being charged, tried, and convicted by the 2008 statute and not the 1987 statute, by **not recognizing** and **"complicated the record,"** and as a result, he was exposed to the Double Jeopardy Clause and an Ex Post Facto Clause violation, in regards to applying a 1994 statute, instead of a 1987 statute, and that errors were made in Nivens' case, but to say he was not **prejudiced** is **farfetched**. This was not only prejudicial, but also as the Respondents Counsel stated, **"the lapse was regrettable."** **(9/8/20 Respondents Informal Brief at 19, 21-27)**

Again, The Respondents Counsel **conceded** and **admitted** that the "court and all parties apparently were not alert to the fact that, the requests for jury instructions that both parties submitted were taken from the then current Maryland Pattern Jury Instructions, which of course were based on the law in effect in 2008." **(9/8/20 Respondents Informal Brief Exhibit C, pp. 217-222) (9/8/20 Respondents Informal Brief at 24-25)**

In *Dutton v. State of Maryland*, 160 Md. App. 180 (2004): There are three sources of information examined regarding a sentence in order to resolve a dispute regarding the term of the sentence: **(1)** The Transcript of the sentencing proceeding; **(2)** the Docket Entry; **(3)** the Commitment Records.

When there is a **conflict** between the **transcript** and the commitment record, unless it is shown that the transcript is in error, **the transcript prevails**, Nivens states the transcript control the reading of the verdict on the record. The record supersedes everything and not under a theory. ***SEE*** *Shade v. State*, 18 Md. App. 407 (1973); *Gatewood v. State*, 158 Md. App. 458 (2004).

The jury **was not given** and **afforded the opportunity** to see **(9/8/20 Respondents Informal Brief Exhibit A, pp. 7, 8)**, deliberate, and rule upon a breaking and entering. The jury instead was given 2 first degree burglary counts, based on the theory of Count 5 violates the Double Jeopardy Clause, as the Verdict Sheet, and the State's Request for Jury Instructions clearly shows, along with the Court Docket Entry on **pp. 6, 7** clearly showing and listing **former Article 27 § 29. (9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #2)(9/8/20 Respondents Informal Brief Exhibits C, E) (9/8/20 Respondents Informal Brief at 24-25)**

Nivens did not ask the State, trial court, trial judge(s), and both his trial Attorney's to violate the Double Jeopardy Clause by first charging, indicting, trying and then convicting Nivens of 2 duplicitous and multiplicitous charges. They all **erred by submitting 3 counts to the jury**, 2 of which were not only **duplicitous** and **multiplicitous**, but also **prejudicial. (9/8/20 Respondents Informal Brief at 19, 21, 22, 24-27)**

Respondents Counsel is correct in stating that the State abandoned Count 6, which was breaking and entering, but it **does not excuse** or change the fact that they **(State) submitted** 2 of the **same counts** to the jury, **the same in fact, in law**, and both counts **arose out of the same course of conduct**, on **one occasion** and **one incident** as the State contended, not Nivens. What they fail to show and also state is that the jury deliberated on 2 counts of first degree burglary, not breaking and entering, which is **former Article 27 § 29** does not state in its language. **(9/8/20 Respondents Informal Brief at 19, 21, 22, 24-27)(9/8/20 Respondents Informal Brief Exhibit E)**

The Court Docket Entry on **pp. 6, 7** lists Counts 1-7 **(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #2)**, the Verdict Sheet **(9/8/20 Respondents Informal Brief Exhibit E)**, and the State's Request for Jury Instructions **(9/8/20 Respondents Informal Brief Exhibit C)** all correspond with listing Count 5 and Count 6 as **former Article 27 § 29**. Nowhere, on **neither** the Verdict Sheet, the Court Docket Entry, and State's Request for Jury Instructions, does it show or separately list as the Respondents Counsel contends, breaking and entering. The Verdict Sheet does not state with the intent to commit theft or breaking and entering. **(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #2)(9/8/20 Respondents Informal Brief Exhibits C, E)**

With both charges of **former Article 27 § 29** being duplicitous counts **(Counts 5 and 6) both are fatal** because **it was** and is **prejudicial now** in Nivens' **subsequent double jeopardy defense**, where the State's Request for Jury Instructions only lists "burglary-first degree" and **not** breaking and entering, and the jury instructions **do not** and **did not clarify the charges**, but combined the elements of **former Article 27 § 29** and breaking and entering. The court as the Respondents Counsel **conceded** and **admitted** the **court had difficulty determining admissibility of evidence** and **did not recognize** and **"was not alert"** and using the **"then current jury instructions" (2008 not 1987)**, and **"complicated the record." (9/8/20 Respondents Informal Brief at 19, 21, 22, 24-27)** ***SEE*** *U.S. v. Schlei*, 122 F.3d 944, 977 (11th Cir. 1997)**(duplicitous indictment** runs **risk "defendant may be prejudiced in a subsequent double jeopardy defense")**; Nivens **did not waive** his **challenge to duplicitous indictment** because **duplicity not apparent before trial** and **multiplicitous indictment impermissibly resulted** in **2 sentences for single act.** ***SEE*** *U.S. v. Sturdivant*, 244 F.3d 71, 76 (2d Cir. 2001)(defendant **did not waive challenge to duplicitous indictment by not objecting before trial** because **duplicity not apparent before trial)**; *U.S. v. Dunford*, 148 F.3d 385, 390 (4th Cir. 1998)**(multiplicitous indictment including separate weapon possession counts for each firearm** found on defendant **impermissibly resulted in 14 sentences for single act)**

INDICTMENTS

The Fifth Amendment **requires** the federal government to initiate prosecutions of capital or **"otherwise infamous"** crimes by indictment unless the defendant waives this right. The Supreme Court has defined the **"infamous crimes"** as those crimes "punishable by imprisonment in the penitentiary." ***SEE*** *Mackin v. U.S.*, 117 U.S. 348, 354 (1886).

Dismissal of Indictments. Rule 12 of the Federal Rules of Criminal Procedure requires the defendant to bring all motions to dismiss defective indictments before trial begins. ***SEE*** **Federal Rule Criminal Procedure 12(b)(3)(B)(11/25/19 Appellant's Certificate of Appealability and Notice of Appeal Appendix #5, 6)**

Duplicity. Indictments charging **two or more distinct offenses in a single count** are **"duplicitous."** Duplicitous indictments **obscure the specific charges,** thereby **preventing the jury from separately deciding the issue** of guilt or innocence **with respect to each particular offense** and **creating uncertainty** as to whether the defendant's conviction was based on a unanimous jury decision. **Duplicitous indictments** may also **violate the defendant's constitutional right of the charges** or **hinder the defendant's ability to argue double jeopardy in subsequent prosecution.** ***SEE*** *U.S. v. Schlei*, 122 F.3d 944, 977 (11th Cir. 1997)**(duplicitous indictment** runs **risk "defendant may be prejudiced in a subsequent double jeopardy defense")** Furthermore, duplicitous indictments **raise risk of prejudicial evidentiary rulings** and may **prevent appropriate sentencing** because the **basis of the defendant's conviction is uncertain.** A duplicitous indictment could lead to prejudicial evidentiary rulings because **evidence admissible on one defense could be inadmissible on another.** ***SEE*** *U.S. v. Schlei*, 122 F.3d 944, 977 (11th Cir. 1997)**(when count of indictment duplicitous, court may have difficulty determining admissibility of evidence)**

The court may, however, dismiss a duplicitous indictment if it **finds the defendant is prejudiced.** ***SEE*** *U.S. v. Savoires*, 430 F.3d 376, 380 (6th Cir. 2005)(duplicitous count fatal because **prejudicial where jury instruction did not clarify charges** but **"combined elements of the separate** use or carriage and possession offenses") A defendant risks waiver by failing to challenge a duplicitous indictment before trial. ***SEE*** *U.S. v. Sturdivant*, 244 F.3d 71, 76 (2d Cir. 2001)(defendant **did not waive challenge to duplicitous indictment by not objecting before trial** because **duplicity not apparent before trial)**

Multiplicity. Indictments charging a single offense in different counts are **"multiplicitous." Such indictments are generally improper** because they may **prejudice the defendant** or **result in multiple sentences for a single offense in violation of the Double Jeopardy Clause.** ***SEE U.S. v. Brandon***, 17 F.3d 409, 422 (1st Cir. 1994) **(multiplicitous indictment violates Double Jeopardy Clause** because **it raises danger that defendant will receive more than 1 sentence for single crime**); ***SEE also U.S. v. Dunford***, 148 F.3d 385, 390 (4th Cir. 1998) **(multiplicitous indictment including separate weapon possession counts for each firearm** found on defendant **impermissibly resulted in 14 sentences for single act).**

When multiplicity becomes apparent before trial, the court may order the government to choose the count on which it will continue and dismiss the remaining counts. ***SEE U.S. v. Roy***, 408 F.3d 484, 491-92 (8th Cir. 2005) **(election to pursue only 1 count could have cured multiplicitous indictment charging 2 counts for violation of the same statute,** but **failure of government to do so and lack of curative instructions required 1 count be vacated). When the violation becomes apparent after trial has begun,** the court may **require the government to dismiss** or **consolidate multiplicitous counts.**

The defendant risks waiver by failing to challenge a multiplicitous indictment before trial but may **still object after trial to the imposition of multiple sentences based on a multiplicitous indictment.** ***SEE U.S. v. Chacko***, 169 F.3d 140, 145-46 (2d Cir. 1999) **(multiplicity claim can be part of pretrial motion or at later time);** ***SEE also U.S. v. Hubbell***, 177 F.3d 11, 14 (D.C. Cir. 1999) **(multiplicity claims better resolved post-trial** because **factual issues as to what acts of concealment were committed need development at trial).**

The attachment of jeopardy pursuant to the Double Jeopardy Clause bars a second prosecution for the same offense when jeopardy attached in Nivens' original proceeding. In the criminal proceeding of Nivens, jeopardy attached because he faced the potential determination of guilt in his jury trial on June10-12, 2008, **which attached once the jury was impaneled and sworn.** ***SEE*** 38 **Geo. LJ. Ann. Rev. Crim. Proc.** 447, 450, 459-464, 466-468, 481 (2009). **The Georgetown Law Journal 38th Annual Review of Criminal Procedure (2009);** *Ingram v. State*, 179 Md. App. 485, 947 A.2d 74 (2008)**(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #4)**

At the conclusion of trial on June 12, 2008[3] the trial court **(9/8/20 Respondents Informal Brief Exhibit E)(T3. 2, 140, 173, 174)(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #1, 2)(Court Docket Entry at 6, 7)**[4] submitted three **(3) counts that went to the jury,** to wit: Count 1 first degree sex offense, Count 5 first degree burglary, and Count 6 first degree burglary. The jury acquitted Nivens of Count 6 **(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #4)** first degree burglary, and convicted Nivens of Count 1 first degree sex offense and Count 5 **(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #4)** first degree burglary. The attachment of jeopardy pursuant to the Double Jeopardy Clause bars a second prosecution for the same offense when jeopardy attached in Nivens' original proceeding.

In the criminal proceeding of Nivens, jeopardy attached because he faced the potential determination of guilt in his jury trial on June10-12, 2008, **which attached once the jury was impaneled and sworn.** ***SEE*** 38 **Geo. LJ. Ann. Rev. Crim. Proc.** 447, 450, 459-464, 466-468, 481 (2009). **The Georgetown Law Journal 38th Annual Review of Criminal Procedure (2009);** *Ingram v. State*, 179 Md. App. 485, 947 A.2d 74 (2008)

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[3] **SEE** Transcript references are as follows: June 10, 2008 (Trial), "T1"; June 11, 2008 (Trial), "T2"; June 12, 2008 (Trial), "T3".

[4] **SEE p. 140 lines 21, 22, 23, 24; p. 173 lines 16, 17, 18; p. 174 lines 16-23.**

The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the **constitutional guarantee** against double jeopardy. Nivens' first trial was a jury trial. Therefore, the jeopardy that would have a **preclusive effect** in this case attached as of the moment the jury was sworn on the morning of June 10, 2008. The scope of that jeopardy was **properly measured** by the **words of the indictment** or **criminal information**. *Anderson v. State*, 385 Md. 123, 140 (2005). The primary purpose of a charging document is to inform the defendant of the accusation against him or her by describing the crime as to inform the accused of the specific conduct with which he is charged, in order, among other things, to protect the accused from a future prosecution for the same offense. ***Id.* at 141.**

At Common Law,[5] it means that where there has been a final verdict of either **acquittal** or **conviction** or an adequate indictment, the defendant **(Nivens) could not be** for a second time, be placed in jeopardy for the particular offense. The Appellant has met all 3 standards, he was both **acquitted** of **Count 6** and **convicted** of **Count 5 (9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #1-3)**, which are the same crime, in fact and in law and both were on the same and on an adequate indictment. **(9/8/20 Respondents Informal Brief Exhibit E)**

In *Ingram v. State*, 179 Md. App. 485, 947 A.2d 74 (2008), the Court stated:

> "Absent special circumstances, the charging documents, not actual trial evidence control the analysis of sameness in fact." Both the Supreme Court and the State of Maryland, for Constitutional purposes, have rejected an "actual evidence" test to determine sameness in law. ***Id.* at 141.** Instead, in most cases, the only sensible and workable criterion for determining the nature and scope of the prior offense is the effective charging document, which states the offense for which the defendant was tried. ***Id.* at 141. (9/8/20 Respondents Informal Brief Exhibit E)**

[5] **SEE** *Hubbard v. State*, 395 Md. 73 (2006) and *Hoffman v. State* (1863)

The actual trial evidence has no bearing here it's the Appellant's charging document that control the analysis of sameness in fact.[6] The Appellant was charged twice with the same crime with **Count 5** and **Count 6. (9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #1-4)(9/8/20 Respondents Informal Brief Exhibit E)**

In the present case, the first information filed was the seven-count criminal information that the State took to trial on June10, 2008. Both Count 5, **former Article, 27 § 29 (convicted)** and Count 6, **former Article, 27 § 29 (acquitted)**, of the criminal information, expressly charged burglary in contravention **(conflict, opposition, contradiction, violation, infringement)** of **former Law Article, 27 § 29** or **burglary** statutes **(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #4)(9/8/20 Respondents Informal Brief Exhibit E)**.

The fifth count charged a violation of **former Law Article, 27 § 29** or **burglary** statutes, a continuing course of conduct involving one or more violations of **former Law Article, 27 § 29** or **burglary** statutes. Each of these counts, Count 5, **former Article, 27 § 29 (convicted)** and Count 6, **former Article, 27 § 29 (acquitted)** was verbatim clone of the other, charging exactly the same conduct and covering exactly the same 20 year time period. Both counts generated a pervasive cloud of jeopardy, even if both counts were aimlessly **(and improperly)** redundant. **(9/8/20 Respondents Informal Brief Exhibit E)(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #2)**

Furthermore, the fact that both Count 5, **former Article, 27 § 29 (convicted)** and Count 6, **former Article, 27 § 29 (acquitted)**, is not irrelevant, because the plea in bar of *autorefois acquit* was just as foreclosing of future jeopardy for the same offense as was the plea in bar of *autorefois convict*. **(9/8/20 Respondents Informal Brief Exhibit E)(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #2)**

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[6] **SEE** *Ingram v. State*, 179 Md. App. 485, 947 A.2d 74 (2008)

Under both the Fifth Amendment to the United States Constitution and Maryland Common Law, an acquittal on the merits is ordinarily final and precludes further trial proceedings upon the same charge. This is true even if the acquittal is **based on error of law** or an **incorrect resolution of the facts.**

Once a verdict of not guilty has been rendered at the conclusion of a criminal trial, that verdict is final and cannot be set aside. It makes no difference whether the acquittal is based on a mistake of law or a mistake of fact. The verdict was inconsistent with Count 5 and Count 6.

In Maryland case law, the principle embodied in the plea of *autorefois acquit* is broadly interpreted. A verdict of not guilty, even though not followed by a judgment on the docket, is sufficient to invoke the protection. The plea of *autorefois acquit* **(already acquitted)** protects a defendant who has been acquitted of an offense from being retried for the same offense. *Copsey v. State*, 67 Md. App. 223, 225-26, 507 A.2d 186 (1986)(stating that the plea of former acquittal is designed to prevent a defendant "who has once survived his initial jeopardy from being **'twice vexed'** by a fresh exposure to the hazard of conviction for that same offense").

More than a century ago, the Court of Appeals explained in *Scott v.* State, 230 Md. App. 411; 148, A.3d 72 (2016):

> **{148 A.3d 85}** It has always been a settled rule of common law that after an acquittal of a party upon a regular trial on an indictment for either a felony or a misdemeanor, the verdict of acquittal can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside. *State v. Shields*, 49 Md. 301, 303 (1878). **(9/8/20 Respondents Informal Brief Exhibit E)**

The **multiple prosecutions for the single related act** under *Blockburger v. United States,* if the same transaction violates two distinct statutory provisions, the test to determine whether there are multiple offenses is, whether each provision requires proof of a fact that the other does not, as in Nivens' case with **Count 5** and **Count 6 (9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #1-3)(9/8/20 Respondents Informal Brief Exhibit E)(SEE Appendix #2)**. This is shown with the **charging document** and the test can be satisfied even when there is substantial overlap in the evidentiary showings for the two offenses. As a consequence, of *Blockburger*, double jeopardy also bars successive prosecutions for greater and lesser-included offenses of **Count 5** and **Count 6 (9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #1-3)**. A lesser-included offense is one that does not require proof of elements beyond those required by the greater offense. ***SEE*** 38 **Geo. L.J. Ann. Rev. Crim. Proc.** 447, 450, 459-464, 466-468, 481 (2009). **The Georgetown Law Journal 38th Annual Review of Criminal Procedure (2009)**

Due process, moreover, is a guarantee that a man should be tried and convicted only in accordance with valid laws of Maryland. If a conviction is not valid under current laws at the time of the committed offense, statutory and constitutional, a man has been **denied due process** and has a **constitutional right to have his conviction set aside, without being deprived of life, liberty, or property as a result. ECF No. 30 at 8, p. 10 of 30.**

In *Warren v. State*, No. 2571, September Term, 2014 **(filed January 29, 2016)** concerning the Federal Constitutional Law of Double Jeopardy and the Maryland law of Double Jeopardy are one in the same. *See* Gilbert and Moylan, Maryland *Criminal Law*, § 37.1, the Court of Special Appeals stated:

> Where the State sought to prosecute a defendant, who had previously been convicted of two counts of sexual abuse of a minor, for four additional counts of sexual abuse of a minor using evidence that **the circuit court had disallowed** at the defendant's first trial, the second prosecution was barred by the constitutional prohibition against double jeopardy because the first three counts of the new indictment charged sexual abuse of a minor during the **same time period** alleged in the first information and thus were based on the **same conduct** as that alleged in the first criminal information. **(9/8/20 Respondents Informal Brief Exhibit E); ECF No. 30 at 8, p. 10 of 30.**
>
> "State Double Jeopardy of Federal Double Jeopardy," **pg. 432 (*Criminal Law*, § 37.1)**. In order to determine whether the principle of double jeopardy barred the second prosecution against *Warren*, it was first **necessary to determine precisely when jeopardy attached. (9/8/20 Respondents Informal Brief Exhibit E); ECF No. 30 at 8, p. 10 of 30.**

Double Jeopardy bars subsequent prosecutions for a single act after jeopardy attached in a previous prosecution. Under *Blockburger v. United States*, if the same transaction violates two distinct statutory provisions, the test to determine whether there are multiple offenses is whether each provision requires proof of fact that the other does not and by **examining** the **charging document**. The multiple prosecutions for the single related act under *Blockburger v. United States,* violates two distinct statutory provisions, the test determines that there are multiple offenses, each provision requires proof of a fact that the other does not, as in Nivens' case with **Count 5** and **Count 6. (9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #1-3)**

This is shown with the **charging document** and the test can be satisfied because there was a substantial overlap in the evidentiary showings for the two offenses. As a consequence, pursuant to *Blockburger*, double jeopardy also bars successive prosecutions for greater and lesser-included offenses of **Count 5** and **Count 6. (9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #1-3)(9/8/20 Respondents Informal Brief Exhibit E)**

A lesser-included offense is one that does not require proof of elements beyond those required by the greater offense. To determine what may be a lesser-included offense, this Honorable Court must focus on the statutory elements of the offenses. *Payne v. Virginia*, 468 U.S. 1062, 1062 (1984)(per curiam)**(double jeopardy bars subsequent prosecution for lesser offense following convictions** of greater offense because **court cannot convict of greater without also convicting of lesser) ECF No. 31 at pp. 29-34**

It serves the additional purpose of **precluding** the State, following **acquittal (Count 6 former Article, 27 § 29),** from successively retrying the defendant in the hope of securing a conviction. "The vice of this procedure lies in the re-litigating the same issue on the same evidence before the two different juries or judges with a man's innocence or guilt at stake" "in the hope of that they would come to a different conclusion." **"Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches."** *Hoag v. New Jersey*, 356 U.S. 464, 474, 475, 2 L. Ed. 2d 913, 922, 78 S. Ct. 829; *Downum v. United States*, 372 U.S. 734, 736, 10 L. Ed. 2d 100, 102, 103, 83 S. Ct. 1033. **ECF No. 30 at 8, p. 10 of 30**. And finally, it **prevents** and **bars** the State, following **conviction (Count 5 former Article, 27 § 29)**, from retrying the defendant again in the hope of securing a greater penalty. Nivens' case presents an instance of prosecution being allowed to harass Nivens with the repeated trials and convictions on the same evidence that the State achieved in its desired result of a guilty verdict. It is the latter purpose which is relevant in Nivens' case here, for in his case the Court allowed the State the second chance to retry Nivens and secured a more favorable penalty for former Article, 27

§ 29 the same in fact, law and both arose out of the same incident of time and place. The only evidence needed to prove and control the analysis of sameness is the **charging document** and "not the actual trial evidence." *See U.S. v. Buchanan*, 485 F.3d 274, 282 (5th Cir. 2007)(**double jeopardy bars 4 convictions for receipt of child pornography** because **defendant took only 1 action** to download **4 images**); *U.S. v. Roy*, 408 F.3d 484, 491-91 (8th Cir. 2005)(**double jeopardy bars indictment charging 2 counts** of **assaulting federal officer** because **both counts arose out of single factual occurrence of stabbing officer**).

According to the "balancing process", under the guidelines of *Barker v. Wingo* , this test can be satisfied despite substantial overlap in evidentiary showings for the two offenses and hearing that Nivens **was not afforded**, it is essential to a determination of whether Nivens' constitutional right to dismiss due to *double jeopardy* was violated. When a trial court is confronted with a decision on hearing a motion prior to trial, 3 factors must be considered **(a)** the length of the delay, **(b)** reasons for the delay, and **(c)** prejudice to the defendant. All 3 factors occurred in Nivens' case, **(a)** his motion was filed 13 months prior, on August 17, 2010 **(b)** no reason was given by Judge Norman who **deferred** Nivens' motion to his trial attorney Jessica Bancroft who did not address the Court on Nivens' behalf, **(c)** his motion filed was deferred and a hearing was never held as required by *Barker v. Wingo,* 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).[7]

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[7] **SEE ECF No. 31 Exhibit #5 of Petitioner's Writ of Habeas Corpus,** Motion to Dismiss Indictment due to Double Jeopardy and the Correspondence Letter from Judge Mickey J. Norman addressed to Petitioner's Attorney Jessica R. Bancroft, dated September 1, 2010. Petitioner filed a Motion to Dismiss Indictment due to Double Jeopardy on August 31, 2010. Judge Norman's response to Petitioner's Motion made the Court aware of Petitioner's intentions and should have been addressed, and **not deferred**;
"By the mere **deferring of a ruling** on a motion to dismiss grounded on former jeopardy, the constitutional barrier, erected by our founding fathers, would be no barrier at all. Rather, it would be relegated to the status of a high sounding **{36 Md. App. 711}** phrase, devoid of substance and 'signifying nothing.'" as stated by the Court of Special Appeals in, *Gray v. State*, 36 Md. App. 708, 375 A.2d 31 *cert. denied*, 281 Md. 738, 744 (1977).

The *Barker v. Wingo* court stated that:

"the factual record requisite to the 'balance process' shall be developed by a hearing.

As a consequence of *Blockburger*, double jeopardy also bars successive prosecutions for greater and lesser-included offenses. *U.S. v. Miller*, 527 F.3d 54, 70-72 (3rd Cir. 2008) **(offenses charged same transaction** because **receiving child pornography includes all elements of possession of child pornography)**; *U.S. v. Gamboa*, 439 F.3d 796, 808 (8th Cir. 2006) **(offenses charged the same transaction** because **being felon in possession of firearm and drug user in possession of firearm are single offense when they arise from same act** of possessing firearm. **(9/8/20 Respondents Informal Brief at 25, 26); ECF No. 31 at pp. 29-34; ECF No. 30 at 8, p. 10 of 30**

Concerning the *"timing of challenge"* to a *double jeopardy* claim, if Nivens makes a timely motion and shows a non-frivolous *double jeopardy* claim, **the government [State] must prove** by a preponderance of the evidence that the offense charged is not the same one for which Nivens was formerly placed in jeopardy, **Counts 5** and **Count 6 (9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #1-3)** are both former Article, 27 § 29, the same in fact, law and both arose out of the same incident of time and place. The only evidence needed to prove and control the analysis of sameness is the **charging document** and "not the actual trial evidence." **ECF No. 30 at 8, p. 10 of 30; ECF No. 30 at 20, p. 24 of 30**

The Rule of Lenity violates the Double Jeopardy Clause because it **forbids, prohibits** and **precludes** the State and the second trial court judge on September 15, 2011 **(Judge Kathleen G. Cox)** from prosecution of Count 5 **(convicted)** and Count 6 **(acquitted)** of both former Articles, 27 § 29 after the first trial, after **jeopardy attached** with the **paneling, swearing in,** and **ruling** of the jury of Count(s) 5, and 6 on June 12, 2008 **(Judge Norman)** because both counts arose out of a single factual occurrence and cumulative punishments are forbidden for the multiple charges of former Article, 27 § 29.

For multiple charges and punishments in single prosecutions, if legislative intent is ambiguous, the *Blockburger* test determines whether multiple charges constitute the same offense and are therefore barred by double jeopardy. When the government seeks to prove that a single act or occurrence results in **multiple violations** of the **same statute**, the **rule of lenity** requires only one punishment unless legislative intent to impose multiple punishments is shown.

Because **Congress has the ability to express its will** regarding the allowable unit of prosecution, **if it's will is not declared**, court's will follow the **"rule of lenity"** and assume that only a single punishment is authorized. *Bell v. U.S.*, 349 U.S. 81, 83 (1955)(**rule of lenity forbids prosecuting for 2 violations** of Mann Act, which prohibits interstate transportation of prostitutes, because **2 prostitutes transported in same trip**); *U.S. v. Wallace*, 447 F.3d 184, 188 (2nd Cir. 2006)(**rule of lenity forbids charging 2 firearms offenses** because **defendant charged with firearm possession in furtherance of 2 drug trafficking crimes**); *U.S. v. Hebeka*, 25 F.3d 387, 290 (6th Cir. 1994)(**rule of lenity forbids prosecution for fraudulent act of obtaining false license** and **prosecution for fraudulent act of selling food stamps** because **only single pattern of food stamp fraud.**

The Rule of Lenity **forbids prosecuting for 2 violations** of Count 5 **(9/8/20 Respondents Informal Brief Exhibit E), former Article, 27 § 29 (convicted)** and Count 6, **former Article, 27 § 29 (acquitted)**, and **forbids charging 2 burglary offenses** because **defendant charged with burglary in furtherance of 2 burglary crimes** arising out the same crime, incidence, time, and place, as the State contends and lastly, **forbids prosecution for burglary** and because **prosecution of burglary** is **only a single pattern of burglary.**

Nivens' Alford Plea **does not foreclose** a subsequent claim because his constitutional rights were violated by the State and Court, who did not have jurisdiction and he **cannot confer jurisdiction** on both trial court's **(2008** and **2011)** or with a plea agreement, which are protected rights that were **justified,** and **fortified,** and was not prescribed by all 8 statutes, which violated the ex post facto clauses and the double jeopardy clauses of the U.S. and Maryland Constitutions.

The 1987 version and **not the** 1994 version **(9/8/20 Respondents Informal Brief at 21, 22)** of **Former Article 27, § 29 (1992 Repl. Volume, Replaces 1987 Volume 3A)** was the same in fact, the same in law, and arose out of the same incident on October 25, 1987 as the State contended. Nivens was convicted of **Former Article 27, § 29 (1992 Repl. Volume, Replaces 1987 Volume 3A)** and **not** Criminal Law Article § 6-202 (2012), which were both **not effective** in 1987, these are Ex Post Facto Law to Nivens. **ECF No. 41 at 16-19; (9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #1-3)**

Former Article 27, § 29 (1992 Repl. Volume, Replaces 1987 Volume 3A)(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #1, 3) is clear and plain in its language in regards to burglary, the statute **does not** state **"with the intent to commit a crime of violence"** and the statute does not state **"with the intent to commit theft." ECF No. 41 at 16-19; (9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #3)(9/8/20 Respondents Informal Brief at 21, 22)**

The charging document charged and separately lists **Former Article 27, § 342 (1992 Repl. Volume 2, Replaces 1987 Repl. Volume 3A)** and he was acquitted of **Former Article 27, § 342** on June 12, 2008 by a jury. The charging document also charged and separately lists **Former Article 27, § 29 (1992 Repl. Volume 2, Replaces 1987 Repl. Volume 3A)(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #2, 3)(Court Docket Entry at 6, 7)**

INASMUCH THE PETITIONER WAS TRIED AND CONVICTED ON THE LAW FOR FIRST DEGREE SEX OFFENSE AS IT EXISTED IN 2008 INSTEAD OF THE LAW AS IT EXISTED IN 1987 DUE TO EX POST FACTO APPLICATION AND DUE TO MARSHALL T. HENSLEE'S FAILURE TO PRESERVE THE SPECIFIC SUFFICIENCY ISSUE FOR APPELATE REVIEW.

The Petitioner was convicted of first degree sex offense. The crime took place on October 25, 1987. The Petitioner was not tried until June of 2008. During that 20 plus year period, the law regarding first degree sex offense changed dramatically. In October of 1987, the law was clear that a first degree sex offense could only be committed as follows **(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #6 at 8-17, Nivens' Appeals Brief)**:

(ii) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
(iii) With another person by force or threat of force against the will and without the consent of the other person, and:
(v) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably concludes is a dangerous weapon; or
(vi) Inflicts suffocation, strangulation, disfigurement, or serious physical injury upon the other person or upon anyone else in the course of committing the offense; or
(vii) Threatens or places the victim in fear that the victim or any person known to the victim will be subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or
(viii) The person commits the offense aided and abetted by one or more other persons.

Md. Ann. Code 1957, Art. 27 § 464(a) (1987 Repl. Vol.). In 1991, the Legislature amended the statute to include an additional means by which a sex offense could be characterized as a first degree sex offense; specifically, where "[t]he person commits the offense in connection with the breaking and entering of a dwelling house." Md. Ann. Code 1957, Art. 27 § 464(a) **(1991Cumm. Suppl.).**

The Petitioner was improperly tried and convicted based on the law as it existed in 2008, not on the law as it existed in 1987, when the crime was committed. *See Spielman v. State*, 298 Md. 602, 471 A.2d 730 (1984)(stating the general presumption that statutory enactment is to have prospective, not retrospective effect). This *ex post facto* application of the law error and this error manifested at Petitioner's trial.

Conduct that would constitute a second degree sex offense may also constitute a first degree sex offense if one or more additional circumstances are present. ***SEE* 1957 Md. Ann. Code, Art. §§ 464 and 464 A (1987 Repl. Vol.)**. Although the Petitioner was originally charged with second degree sex offense, this charge was **"abandoned"** by the State at trial. **(R. 6; T3. 124)**. In Petitioner's case, there was no evidence of any of the additional circumstances enumerated in § 464(a) that would sustain a conviction under that section. Notwithstanding the argument in the **third argument** of this petition, assuming, *arguendo*, that there was some evidence presented at trial that a sex offense was committed in the course of a burglary, this was **not** one of the additional circumstances enumerated in the October 1987 version of § 464(a). As such, because there was a complete absence of any evidence that would elevate the sex offense from a second degree sex offense to a first degree sex offense, the Petitioner's conviction for first degree sex offense was reversed.

In viewing the sufficiency of the evidence to support a criminal conviction, this Court must "determine whether the record evidence would reasonably support a finding of guilt beyond a reasonable doubt." *See Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1972). This standard does not require this Court to **"ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt."** *Id.*, 443 U.S. at 318-19. Instead the standard to apply is **"whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt."** *Id.*, at 319; *Tichnell v. State*, 287 Md. 695, 415 A.2d

830 (1980); *Barnes v. State*, 31 Md. App. 25, 28-29, 354 A.2d 499 (1976). Where the evidence presented at trial was insufficient to sustain the Petitioner's conviction, the conviction must be reversed. *Tichnell*, 287 Md. at 717. Upon reversal of the Petitioner's conviction for insufficiency of the evidence, no retrial is permitted. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Mackall v. State*, 283 Md. 100, 387 A.2d 762 (1978).

As set forth above, as of 1987 when this offense was committed, in order for a sex offense to be characterized as a first degree sex offense, the State must prove that the Petitioner engaged on one of the following behaviors:

(i) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably concludes is a dangerous weapon; or
(ii) Inflicts suffocation, strangulation, disfigurement, or serious physical injury upon the other person or upon anyone else in the course of committing the offense; or
(iii) Threatens or places the victim in fear that the victim or any person known to the victim will be subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or
(iv) The person commits the offense aided and abetted by one or more other persons.

Md. Ann. Code 1957, Art. 27 § 464(a)(1)(i-iv)(1987 Repl. Vol.). In the present case, there was absolutely no evidence to suggest that the Petitioner used any type of weapon or was aided and abetted by anyone else in the commission of the offense. At trial, the State proceeded on the **theory** that the Petitioner broke into Patricia Regan's home and sodomized her. The State never proved that the Petitioner caused Patricia Regan's serious physical injury, separate and apart from the sodomy, or that he threatened or placed her in fear of such injury. For those reasons the evidence was insufficient to prove that the Petitioner committed first degree sex offense, as the crime was defined in 1987.

The Petitioner concedes that the defendant Marshall Trowbridge Henslee as his counsel did not make this argument to the trial court at the appropriate time as the record will also prove that fact. Md. Rule 4-324(a) (2005) provides in relevant part that "[a] defendant may move for judgment of acquittal... at the close of the evidence offered by the State and, in a jury trial, at the close of all evidence. The defendant shall state with particularity all reasons why the motion should be granted." In *Testerman v. State*, 170 Md. App. 324, 342-43, 907 A.2d 294 (2006), *cert. dismissed as improvidently granted*, 399 Md. 340, 924 A.2d 308 (2007), the Court of Special Appeals; held that where evidence was insufficient to sustain a conviction for fleeing and eluding a police officer, defense counsel's **(Marshall T. Henslee) failure to preserve the sufficiency issue for appellate review denied** the defendant **(Nivens)** his right to the effective assistance of counsel and reversed that conviction. 170 Md. App. at 335-44.

At issue was whether the driver of a vehicle switching seats with the passenger after being pulled over, constituted fleeing and eluding. *Id.* At 337-38. The Court of Special Appeals applied the statutory construction to fleeing and eluding statute and concluded *Testerman's* act of switching seats did not constitute eluding. *Id.* At 336-40. Next, the Court of Special appeals conducted a review of out of state cases addressing the same issue and concluded "[o]ur view of eluding" is apparently shared by other states." *Id.* At 340-41.

Regarding whether failing to raise this issue constituted ineffective assistance of counsel, this Court must conclude **that there was no trial strategy** that could explain Henslee's **failure to preserve the sufficiency issue for appellate review** and that there was a **"reasonable probability"** that, but Henslee's **unprofessional errors**, the result of the proceeding would have been different." *Id.* At 343-44 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

At the close of the State's case and at the close of all the evidence, Petitioner's counsel Henslee made a motion for judgment of acquittal; however, Henslee's argument focused on the DNA evidence that was presented at trial. **(T3. 58-59; 199-121)**. As such, Henslee failed to preserve this specific sufficiency issue for appellate review. *See, e.g. Testerman v. State*, 170 Md. at 342-43. Here, as in *Testerman*, **there was no conceivable trial strategy** that could explain Henslee's **failure to preserve the sufficiency issue for appellate review.** The Court of Special Appeals in Nivens'[8] direct appeal of his conviction held that **"We elected to review *Testerman's* claim of ineffective assistance of counsel because we were unable to make a determination on the issue of the sufficiency of the evidence based on the record,... "since this issue was fully aired at trial."** *Id.* at 336. *Cf. Mosley v. State*, 378 Md. 548, 569 (2003) (holding that appellant's claim of ineffective assistance of counsel for failure to raise a particular argument on a motion for judgment of acquittal could not be reviewed on direct appeal because the Court of Appeals could not "determine whether the evidence was sufficient and so, applying the test [the Court] elucidated in *In re Paris W.*, we cannot evaluate on direct appeal whether or not his counsel provided ineffective assistance of counsel because critical facts are in dispute.").

As in *Testerman* the Court of Special Appeals in Nivens'[9] direct appeal of his conviction held that, **"there is no dispute in the case *sub judice*, that Henslee failed to preserve this issue for appellate review.** Unlike *Testerman*, however, we are unable to conclude in Nivens' case that, but for **Henslee's failure to argue that the** Petitioner **was entitled to be tried under the 1987 version of the first degree sex offense statute, "the result of the proceeding would have been different"** *Strickland, 466 U.S. at 694.*

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[8] **SEE pp. 11-12** of the Court of Special Appeals Unreported Opinion of Nivens v. State, No. 1389, September Term, 2008.

[9] **SEE p. 12** of the Court of Special Appeals Unreported Opinion of Nivens v. State, No. 1389, September Term, 2008.

The Court of Special Appeals in *Nivens*'[10] direct appeal of his conviction held that, Accordingly, we are unable to hold as in *Testerman*, **that if** Petitioner's **claim was properly preserved, we would have reviewed and reversed** Petitioner's **conviction for first degree sex offense.** 170 Md. App. at 344. This Court should follow *Testerman* and grant and award Petitioner relief.

MARSHALL T. HENSLEE FAILED TO CHALLENGE AND PRESERVE THE SPECIFIC SUFFICIENCY ISSUE OF EVIDENCE OF BURGLARY FOR APPELATE REVIEW.

The Petitioner was charged with burglary in violation of section 29 of Article 27 of the Maryland Code. **(R. 6).** At common law, burglary was defined as breaking and entering the dwelling house of another in the nighttime with the intent to commit a felony. *Regan v. State*, 4 Md. App. 590, 244 A.2d 623 (1968); *Jennings v. State*, 8 Md. App. 312, 259 A.2d 543 (1969). Here, the evidence was insufficient to support Petitioner's conviction of first degree burglary because the State **did not produce any evidence of a breaking,** either actual or constructive. As set forth above, the standard of review applied to a challenge to the sufficiency of the evidence to support a criminal conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the Petitioner guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443, U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560(1979). **(9/10/2020 U.S. Court Appeals Informal Reply Brief Appendix #6 at 8-17, Nivens' Appeals Brief)**

Even when viewed in this light, the evidence is and was insufficient to sustain Petitioner's conviction for first degree burglary.

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[10] **SEE p. 14** of the Court of Special Appeals Unreported Opinion of Nivens v. State, No. 1389, September Term, 2008.

It is well established that proof of "a breaking is an essential element to be proved in the crime of burglary, both at common law and under the Maryland statute." *Jones v. State*, 2 Md. App. 356, 359, 234 A.2d 625, 627 (1967). As the Court of Special Appeals explained in *Reagan v. State*, Md. App. 262, 267-68, 234 A.2d 278, 281 (1967)(citation omitted).

> Actual breaking means the unloosening, removing or displacing of any covering or fastening of the premises. It may consist of the lifting of a latch or drawing of a bolt; the raising of an unfastened window, the turning of a key; the turning of a knob, or the pushing open of a closed door, so kept merely by its own weight.

The Court of Special Appeals and the Court of Appeals have consistently required that the breaking element be proven in its technical and strictest sense in burglary cases. *See Jones*, 2 Md. App. at 360, 304 A.2d at 628 (The word **'breaking'** in the definition of burglary is used in a technical rather than popular sense[.]"); *Wagner v. State*, 160 Md. App.531 n.24, 564, 864 A.2d 1037 n.24, 1056 (2005)(holding that "[t]here was no evidence of actual breaking in this case. There were no signs of forced entry and no evidence that Petitioner or any other suspects used any type of physical force to enter the home[.]" but holding burglary conviction because there was no evidence of a constructive breaking); *Arnold v. State*, 7 Md. App. 1, 4, 252 A.2d 878, 879-80 (1969)("Not only must there be a breaking, but it must be of some part of the house itself.'")(Quoting CLARK & MARSHALL, LAW OF CRIMES).

In the present case, there was no evidence regarding the way the Petitioner entered Patricia Regan's home. Patricia Regan never testified that her doors were locked and shut or that the windows were closed. When Patricia Regan's son went to view the home after the attack, he did not see any evidence of an actual breaking. Under *Reagan*, without evidence of an actual or constructive breaking, the jury could not infer that Petitioner committed a breaking, an essential element of first degree breaking.

The breaking element of burglary may also be satisfied **"constructively,"** through an entry gained by artifice, by fraud, conspiracy, or by threats." *Oken v. State*, 327 Md. 628, 662, 612 A.2d 258, 274 (1992)(quoting *Brooks v. State*, 277 Md. 155, 159-60, 353 A.2d 217, 220 (1976)). Here, there was no evidence or argument by the State that there was anything other than an actual breaking. The State **presented no evidence from which a juror could infer that the burglar gained entry by fraud, trickery,** or **threats**. Therefore, the State **had to prove** that the breaking was in this case **was an actual breaking but failed to produce any evidence of an actual breaking** in Patricia Regan's home.

The Court of Special Appeals in Nivens'[11] direct appeal of his conviction held that Petitioner argued that the State **failed to present sufficient evidence to support his conviction for first degree burglary** because there was **insufficient evidence of a "breaking"**, either actual or constructive." As this claim is being raised for the first time on appeal, it shall not detain us long. We have said that:

> In a criminal action, when a jury is the trier of fact, appellate review of sufficiency of evidence is available only when the defendant moves for judgment of acquittal at the close of all evidence and argues precisely the ways in which the evidence is lacking. *Brummell v. State*, 112 Md. App. 426, 428 (1996); *Garrison v.* State, 88 Md. App. 475, 478, *cert. denied*, 325 Md. 249 (1991); Md. Rule 4-324(a). The issue of sufficiency of the evidence is not preserved when appellant's motion for judgment of acquittal is on a ground different than that set forth on appeal. *Graham v. State*, 325 Md. 398, 416, 601 A.2d 131 (1992); *Pugh v. State*, 103 Md. App. 624, 650-51 *cert. denied*, 339 Md. 355 (1995); Maryland Rule 4-324(a).
> *Anthony v. State*, 117 Md. App. 119, 126 (1997). ***SEE** also Graham v. State*, 325 Md. 398, 417 (1992)("A claim of insufficiency of the evidence is ordinarily not preserved if the claim is not made as part of the motion for judgment of acquittal."); *Muir v. State*, 308 Md. 208, 218-19 (1986); *State v. Lyles*, 308 Md. 129, 135-36 (1986).

[11] **SEE p. 21-22** of the Court of Special Appeals Unreported Opinion of Nivens v. State, No. 1389, September Term, 2008.

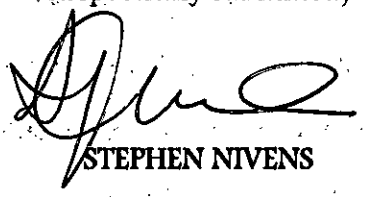
Disabilities who was then sanctioned, suspended, and then was removed from the bench and relieved of his judicial duties for his conduct, which has also tainted the Petitioner's case. **Jurisdictional issues**, therefore, **are rights** that **are justified** as **protecting** something other than the truth-seeking process. *Menna v. N.Y.*, 423 U.S. 61, 63 (1975)(guilty plea cannot waive double jeopardy claim because **government may not prosecute** defendant **regardless of factual guilt**); *U.S. v. Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003)(guilty plea did not waive right to argue that **conduct to which defendant admitted was not prescribed by the statute charged**); *U.S. v. Bustos-Useche*, 273 F.3d 622, 626 (5TH Cir. 2001)(guilty plea did not waive defendant's argument on appeal that district court did not have jurisdiction to accept plea **because cocaine was seized on foreign vessel**); *U.S. v. Vega*, 241 F.3d 910, 912 (7th Cir. 2001)(guilty plea **did not waive** appeal to district court's reconsideration of defendant's sentence because district court **did not have jurisdiction** to reconsider sentence and defendant **cannot waive right to appeal jurisdictional issue** because **defendant cannot confer jurisdiction** on court with plea agreement); *U.S. v. Ventre*, 338 F.3d 1047, 1051 (9th Cir. 2003)(**guilty plea did not waive defendant's challenge to district court's jurisdiction under statute**); *U.S. v. Delgado-Garcia*, 374 F.3d 1337, 1341 (D.C. Cir. 2004)(**claim of lack of subject matter jurisdiction can never be waived** or **fortified** because **it involves court's power to hear case**). ***See* ECF No. 30 at 20, p. 24 of 30; ECF No. 31.**

Thus, the failure of the parties and the trial court to ensure that the jury was instructed under the 1987 law did prejudice Nivens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



STEPHEN NIVENS

Footlight MT Light 12pt.