No. _____

In The
Supreme Court of the United States

TERRY DIBBLE,

Petitioner,

v.

DEANNA BROOKHART, Warden,
Lawrence Correctional Center,

Respondent.

On Petition For A Writ Of Certiorari To the Supreme Court of Missouri

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Mr. Dibble filed a petition for habeas corpus relief from his state conviction for first degree murder. Mr. Dibble was sentenced to forty-five years' imprisonment. The district court denied all of Mr. Dibble's claims either on the merits or as being procedurally barred. Among those claims, Mr. Dibble argued that his right to due process was violated when the trial court instructed the jury on alternative theories of murder when the state's theory of the case was that Mr. Dibble committed murder based on the burglary of dwelling. Burglary and residential burglary are mutually exclusive under Illinois law. Mr. Dibble appealed. The district court denied Mr. Dibble a certificate of appealability as to this ground. The Seventh Circuit also denied Mr. Dibble a certificate of appealability as to this ground. Accordingly, the case presents the following question:

The question presented is:

Did Mr. Dibble present a ground for relief as to which reasonable jurists could differ concerning the correctness of the district court's conclusion, thus requiring a COA?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

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

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Terry Dibble respectfully prays that a Writ of Certiorari issue to review the judgment of the Missouri Supreme Court entered in this case.

OPINIONS BELOW

The order of the Seventh Circuit denying Mr. Dibble a certificate of appealability is printed at Appendix (hereinafter "App.") p. 1a. The memorandum and order of the district court is printed beginning at App. 2a

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on April 8, 2021, denying Mr. Dibble a certificate of appealability. That court denied leave to file a petition for rehearing or, in the alternative, for rehearing *en banc* out of time, on April 28, 2021. This Court has jurisdiction under 28 U.S.C. § 1257 to review this petition. Under this Court's March 19, 2020, Order, Mr. Dibble's petition for certiorari is due on September 7, 2021.[1]

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[1]September 5, 2021, is the 150th day after the denial of Mr. Dibble's petition for writ of certiorari, however, that day is a Sunday and Monday, September 6, 2021, is a federal holiday.

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI

The Sixth Amendment to the United States Constitution provides: "No person shall ... be deprived of life, liberty, or property, without due process of law."

U.S. Const. Amend. XIV

The Fourteenth Amendment to the United States Constitution provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the

United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Mr. Dibble is a Illinois state prisoner due to the sentence and judgment of the St. Clair County, Illinois Circuit Court. A jury found Mr. Dibble guilty of first-degree murder. The trial court sentenced Mr. Dibble to a forty-five year sentence of imprisonment. Mr. Dibble timely appealed his conviction and sentence without success. Subsequently, he sought post-conviction relief under Illinois law which was also denied.

After the exhaustion of his state remedies, Mr. Dibble filed a timely habeas petition. After briefing, the U.S. District Court, Southern District of Illinois, denied relief as to all grounds. Also, the district court denied a certificate of appealability (COA). Mr. Dibble timely appealed. The Seventh Circuit denied Mr. Dibble a COA.

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO DIRECT THE COURT OF APPEALS TO ISSUE A CERTIORARI AND REVIEW MR. DIBBLE'S FIRST GROUND FOR RELIEF.

As noted above, the court of appeals denied Mr. Dibble a COA as to all grounds rejected by the district court. Mr. Dibble had specifically requested a COA as Ground One of his petition as well as to other claims. Each of them warranted a COA.

In *Buck v. Davis*, 137 S.Ct. 759, 773-774 (2017), this Court rejected the reasoning of the Fifth Circuit in denying a COA, holding that the court had improperly reviewed the merits of the claim:

> The court below phrased its determination in proper terms-that jurists of reason would not debate that Buck should be denied relief, 623 Fed. Appx., at 674-but it reached that conclusion only after essentially deciding the case on the merits. . . . We reiterate what we have said before: A "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." *Miller-El*, 537 U.S., at 327, 348, 123 S.Ct. 1029.

Of course, in Mr. Dibble's case, this Court cannot determine the reasoning employed by the Seventh Circuit. However, the standard of 28 U.S.C. § 2253, as interpreted in *Buck* and this Court's other cases, notably *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003), requires a COA in Mr. Dibble's case. Because Mr. Dibble

has been denied review of significant grounds for relief, this Court should intervene and provide him with the opportunity for appellate review. The individual ground as to which review is required is discussed below.

GROUND ONE: DENIAL OF DUE PROCESS

In his habesamended petition, Mr. Dibble argued that, in effect, the state charged him with felony murder based on simple burglary of a dwelling place. The district court found that Mr. Dibble had waived this claim and, to the extent the court of appeals addressed it, the court of appeals' decision was a reasonable application of clearly established law at the time of its decision. Because reasonable jurists could differ as to whether Mr. Dibble had been denied due process and a fundamentally fair trial, a COA should have been issue as to this ground.

First, it is debatable among reasonable jurists whether a jury, being instructed on a theory of murder - felony murder based on burglary - that had no factual basis violated Mr. Dibble's right to due process. *Cf. Czech v. Melvin*, 904 F.3d 570 (7th Cir. 2018) (finding that including a felony murder theory in a general verdict violated clearly established law but the defendant was not prejudiced). Clearly, the state's case was built around the felony murder theory. In the state's opening statement, the prosecutor told the jury that it would find Mr.

Dibble caused the death of the victim, Bill Barker, "while committing or attempting to commit the offense of burglary." Again, in closing the prosecutor discussed that the Mr. Dibble and his co-defendants were at Barker's house to commit burglary.

Second, Mr. Dibble's argument that both *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) and *Skilling v. United States*, 561 U.S. 358 (2010), although decided after Mr. Dibble's appeal, may be relied upon to determine the constitutional origins of *Yates v. United States*, 354 U.S. 298 (1957) at the time of the state appellate court's decision, is worthy of further review

Furthermore, "clearly established" law is not limited to decisions from this Court that are identical to or "on all fours" with the case at hand. *White v. Coplan*, 399 F.3d 18, 25 (1st Cir. 2005); *Lewis v. Johnson*, 359 F.3d 646, 655 (3d Cir. 2004). In other words, the "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring); *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014). In addition, multiple cases of this Court, in tandem, can create the "clearly established" law. The Supreme Court explained in *Wright v. Van Patten*, 552 U.S. 120, 126 (2008), that federal law is "clearly established" when

this Court's case law already provides a "clear answer" to the question presented. Reviewing courts may rely on a matrix of cases from this Court to identify the controlling principle in the case before it. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 257-258 (2007) (finding a state court's "formulation of the issue" unreasonable due to inattention to "the fundamental principles established by [this Court's] most relevant precedents."); *See also Tyler v. Cain*, 533 U.S. 656, 666 (2001).

Accordingly, it is arguable among reasonable jurist whether both *Hedgpeth* and *Skilling* , although decided after Mr. Dibble's appeal, may be relied upon to determine *Yates's* constitutional origins at the time of the state appellate court's decision. Given these subsequent cases, it is arguable that *Yates* was clearly established law.

Because reasonable jurists could disagree with this Court's conclusion that the state appellate court reasonably applied this Court's precedent, this Court should grant certiorari and require the Seventh Circuit to review this ground for relief.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 7, 2021

APPENDIX