No. 21-6292

ORIGINAL

In the

Supreme Court of the United States

JASON R. BOHLINGER
Petitioner,

v

RON NEAL d/b/a Warden
Respondent(s)

On Petition for Writ of Certiorari
from the United States Court of Appeals for the Seventh Circuit

U.S.C.A.-7th Circuit cause no. 21-1705

PETITION FOR WRIT OF CERTIORARI

Jason R. Bohlinger
INDIANA STATE PRISON
1Park Row
Michigan City, IN 46360-6597

Appellant "*pro se*"

QUESTION(S) PRESENTED

Issue I: Whether the Northern District of Indiana erred by denying Bohlinger habeas relief as untimely under section 2254 habeas corpus Rule 4, and by redacting the issuance of a COA under a substantial, debatable constitutional claim.

Petitioner answers: Yes

Issue II: Whether the U.S. court of appeals for the seventh circuit erred by not meaningfully engaging in the legal analysis of the COA required by section 2253 and by its appellate review of the federal district court's decision denying habeas relief.

Petitioner answers: Yes

LIST OF PARTIES

All Parties appear in the caption of the case on the cover page

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Rules

JURISDICTION

The United States district court for the northern district of Indiana had jurisdiction over Jason R. Bohlinger's petition for a writ of habeas corpus[1] under 28 U.S.C. §§ 1331, 2241, and 2254. The court denied that petition in a final judgement on February 17, 2021. At the same time, the district court failed to grant a 'certificate of appealability'. After seeking permission, Jason R. Bohlinger filed a timely notice of appeal on April 19, 2021. The United States court of appeals for the seventh circuit[2] had jurisdiction under 28 U.S.C §§ 1291 and 2253. The judgment of the United States Court of Appeals for the Seventh Circuit denied habeas relief to Bohlinger. The jurisdiction of this Court is now invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES INVOLVED

AMENDMENT 5 - "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT 6 - "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

AMENDMENT 8 - "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT 14 -Section 1. [Citizens of the United States.] "[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[1] Cause No. 3:21-CV-100

[2] Cause No. 21-1705

STATEMENT OF THE CASE

Following a trial, on July 17, 2006, the Allen County Superior Court sentenced Bohlinger as an habitual offender to forty-seven (47) years of incarceration, relying on a prior conviction for perjury in case no. 02C01-8904-CF-11. (See habeas trans. P. 2 of 84).

On September 8, 2009, Bohlinger filed his original Post-Conviction Relief Petition in the Allen County Circuit Court in Case no. 02C01-0909-PC-4. (See habeas trans. P. 4 of 84).

On September 22, 2010, Bohlinger was ordered to submit his case by affidavit. (See habeas trans. P. 14 of 84). On December 7, 2010, Bohlinger's PCR Petition was unsuccessful and was dismissed. (See habeas trans. P. 17 of 84). On February 7, 2011, Bohlinger filed a notice of Appeal and was denied due to it was untimely filed. (See habeas trans. P. 17 of 84).

On November 27, 2017, Bohlinger filed a motion requesting transcripts of his guilty plea and sentencing proceedings in the Allen Circuit Court in case no. 02C01-8904-CF-11. Upon receiving a copy of the requested transcript, no documents were shown with the requested transcripts of the State's information for probable cause, for count two the habitual offender enhancement in case no. 02C01-8904-CF-11. (See habeas trans. P. 18 of 84).

Upon receiving this new information in the State's probable cause affidavit for count two the habitual offender enhancement (in case no. 02C01-8904-CF-11), Bohlinger became aware at the time the two prior felonies in the State's information

could not serve as foundational felonies pursuant to the Indiana habitual statue I.C. 35-50-2-8. (See habeas trans. P. 74 of 84); and (See habeas trans. P. 20 of 84).

On January 22, 2019, Bohlinger sought leave in the Indiana Court of Appeals to file a Successive Post-Conviction Petition in Case no. 20A-SP-C0188. (See habeas trans. P. 22 of 84). Petitioner raised new claims under newly discovered evidence. (1) Ineffective assistance of Trial and Post-Conviction counsel; (2) and a claim involving a invalid probable cause affidavit for Count two in the State's information for the habitual offender enhancement in Case no. 02C01-8904-CF-11. (See habeas trans. P. 35 of 84).

On February 5, 2020, the Indiana Court of Appeals denied Bohlinger's Successive Post-Conviction Petition with-out an evidentiary hearing. The Appellate Court gave no operation or function in its reasoning. Its analysis illustrated a lack of deference to the State Appellate Court's determination and was an improper intervention in the State criminal process. (See habeas trans. P. 59 of 84).

On February 27, 2020, Bohlinger filed a motion to transfer to the Indiana supreme court, and on March 16, 2020, the motion was denied. (See habeas trans. P. 59 of 84).

On February 11, 2021, Bohlinger filed Petition for a Writ of Habeas Corpus under 28 U.S.C. 2254. (See habeas trans. P. 1 of 24).

On February 17, 2021, the Northern District of Indiana, denied Bohlinger's habeas petition as untimely, and denied COA pursuant to section 2254 habeas corpus

rule 11. (See attached opinion and order). (Also see other order denying COA dated April 26, 2021).

Bohlinger filed a motion to reconsider the order denying habeas relief under Fed. R. Civ. P. 60(b); that motion was denied on April 29, 2021. (See document 21 filed 4-29-2021, attached).

Bohlinger filed a motion to extend the deadline to file a notice of appeal. (See order dated March 15, 2021, attached).

Bohlinger filed his request for a certificate of appealability with a notice of appeal, motion to appeal in forma pauperis with affidavit and trust fund statement, and docketing statement, filed April 19, 2021, attached. (See attached documents).

On August 26, 2021, the U.S. Court of Appeals for the Seventh Circuit of Chicago, Illinois denied Bohlinger's COA application, and denied the motion to proceed in forma pauperis. (See attached order).

REASONS FOR GRANTING THE PETITION

Bohlinger's petition is governed by the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481(1997). AEDPA allows a district court to issue a writ of habeas corpus on behalf of a person in custody pursuant to State court judgment "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. "28 U.S.C. § 2254 (A). The court may grant an application for habeas relief only if it meets the stringent requirements of 28 U.S.C. 2254(b), set forth as follows:

An application for writ of habeas corpus on behalf of a person in State custody, pursuant to the judgment of a court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim-

(1) Resulted in a decision that was contrary to, or involving an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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

Under this deferential standard, a federal habeas court must "attend closely" to the decision of the State court and "give them full effect when their findings and judgments are consistent with federal law." *Williams v. Taylor*, 529 U.S. 362, 383, 120 S. ct. 1495, 146 L. Ed. 2d 389 (2000).

A State court's decision is "contrary to" Federal law if the State court arrives at a conclusion opposite to that reached by the Supreme Court or reaches an opposite result in a case involving facts materially indistinguishable from relevant Supreme Court precedent. *Bell v. Cone*, 535 U.S. 685, 694, 122 S. ct. 1843, 152 L. Ed. 2d 914 (2002). A Federal Court may grant habeas relief under the "unreasonable application" clause if the State court identifies the correct legal principle from the Supreme Court precedent but unreasonably applies that principle to the facts of the petitioner's case. *Wiggins v. Smith*, 539 U.S. 510, 520, 123, ct. 2527, 156 L. Ed. 2d 471 (2003). To warrant relief, a State court's decision must be more than incorrect or erroneous; it

must be "objectively" unreasonable. *Id.* In other words, "A State court's determination that a claim lacks merit precludes habeas relief so long as fair-minded jurists could disagree on the correctness of the State court's decision." *Herrington v. Richter*, __U.S.__, 131 S. Ct. 770, 786, 178 L. Ed 2d 624 (2011).

ARGUMENT I

A. Conflicts with decisions of other counts:

The holding of the U.S. District Court for the Northern District of Indiana in Bohlinger's case is directly contrary to the holding of the U.S. Court of Appeals for the Ninth Circuit in *Branham v. Montana*, 996 F. 3d 959 (9th Cir, 2021). In addition, its own court's holding in *Bonds v. Indiana*, (U.S. Dist. LEXIS 128090, case no. 3:11-cv-420 WL). The U.S. Supreme Court has held that "collateral review" means a form of review that is not part of the direct appeal process. For example, Supreme Court has explained that "habeas corpus" is a form of collateral review under 28 U.S.C. § 2254-2255 cases. (See *Wall v. Kbeli*, 562 U.S. 545 (2011).

In the Northern District Court's opinion and order they dismissed Bohlinger's habeas petition as untimely under Habeas Corpus Rule 4. The court held that the limitations period expired one year later on June 23, 2012, on Bohlinger's original Post-Conviction Petition, and that statement would be true, for that petition. But Bohlinger filed his Successive Petition for Post-Conviction Relief in the Indiana Court of Appeals on January 22, 2020. (See habeas trans. P. 59 of 84). The court further stated that Bohlinger made additional efforts to obtain Post-Conviction Relief in 2018 and 2019. But this statement from the court is not true because Bohlinger never made

any attempt until January, 2020. (See habeas trans. P. 59 of 84). Furthermore, the court stated the efforts of filing a Successive Post-Conviction petition for collateral review didn't restart the federal limitations period or "open a new window for federal collateral review," and cited *De Jesus v. Acevedo*, 567 F. 3d 941, 943 (7th Cir. 2009). This case does not hold U.S. Supreme Court authority and should not apply.

The Ninth Circuit observed that the Supreme Court has held that "collateral review" means a form of review that is not a part of the direct appeal process. Under 28 U.S.C. § 2244 (d), the one year clock to file Bohlinger's habeas petition in federal court began when Bolinger's direct appeal and State post-conviction challenges were complete.

The Northern District has previously assumed that the application of a Successive Post-Conviction in Indiana, is a collateral proceeding and not a direct appeal, but in the case of *Bonds v. Indiana*, U.S. Dist. LEXIS 128090 (2011), the Northern District confirmed what had been assumed-A challenge in the Indiana Court of Appeals with an application in the form of a successive post-conviction petition is a collateral review proceeding that may toll the one year time limit (i.e. clock) but does not start until Bohlinger exhausted the State appeal process.

The Ninth Circuit has held that a proceeding that substitutes form appeal can be a form of direct review, and Bohlinger is respectfully requesting that the Supreme Court apply this reasoning in his case and to a review in the form of a successive post-conviction petition, since it is the only way for an Indiana prisoner to challenge the legality of a newly discovered Constitutional issue. Accordingly, the court dismissal

confirmed the dismissal of Branham's habeas petition as untimely filed because he had only about three weeks to file his habeas petition in federal court but he waited six month(s). The Supreme Court held in *Sanders v. U.S.*, 373 U.S. 1, 15, 835 (1963), turning initially to successive applications presenting grounds that were not asserted in earlier proceedings, but grounds that were not asserted in earlier proceeding the court stated will deny relief (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prion application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merit of the subsequent application.

Thus, the court reiterated its long standing insistence that conventional notion of finality of litigation have no place where life or liberty is at stake and infringement of constitution rights are alleged. If the court in the earlier proceeding denied relief after finding that the files and records conclusively showed that the prisoner was not entitled to relief, or if relief was denied after a evidentiary hearing; the prior judgment was on the merits and a new application presenting the same ground need not to be entertained. Finally, the court gave a qualified indicative of what it meant to accomplish by including the third guideline, permitted district court's discretion to re-examine any issue if the "end of justice would be served" with the caveat that no attempt would be made to exhaust the possibilities the court mentioned two instance in which a successive application must be entertained-implying that a district court's failure to consider such a case from a pro se prisoner with newly discovered evidence would constitute an abuse of discretion. If a constitutional question or legal questions

are involved, a new petition must be entertained if the prisoner sustains the burden of showing an intervening change in the law, or some other justification for having failed to raise a crucial point or argument in the prior application.

B. Importance of the Question Presented

This case presents a fundamental question of the interpretation of this court's decision in *Wall v. Kboli,* 562 U.S. 545 (2011); and the Ninth Circuit was directed by this case in their decision in *Branham v. Montana,* May 6, 2021. The question Bohlinger has presented is of great public importance because it effects the operations of the court system of Indiana. In view of the large amount of prisoners from Indiana filing successive petitions in the Indiana Court of Appeals to litigate their criminal convictions when like Bohlinger that years later under great form of due diligence finds newly discovered evidence in the face of the record that shows he is innocent of a crime of one of his prior felony convictions that supported the habitual offender findings years after his trial.

This guidance from the U.S. Supreme Court on the question is also of great importance to the judiciary from Indiana. In addition, the question is of great importance in a proceeding that may result of months or even years of added incarceration. This issues importance is enhanced by the fact the U.S. Northern District Court's decision should not be applied to Bohlinger's case because it would result to be fundamentally unfair. The law in Bohlinger's case should be a certain way as a matter of federal law and "public policy" i.e., and ruling in Bohlinger's favor

would have a good result for society and ruling against Bohlinger would be a bad result.

ARGUMENT II

The Northern District conflicts with decisions of the courts

The Northern District denial of a COA application pursuant to Rule 11 conflicts with *Barefoot*[3] standards and other decisions from other courts. The holding by this District court stated that there was no basis for the finding that reasonable jurists would debate the correctness of his procedural ruling, and further stated there was no need to encourage Bohlinger to proceed further. This is contrary to the U.S. Supreme Court holding in *Barefoot v. Estelle*, 463 U.S. at 893 n. 4. In addition to *Slack v. McDaniel,* 529 U.S. 473, 480 (2000) quoting the act of June 25, 1948, 62 stat. 967. *Jimenez v. Quarterman*, 555 U.S. 133; *Buck v. Davis*, 137 s. ct. 759, no, 15-8049 (2017).

COA applications filed with a district court

The COA standard set forth in the amended version of section 2253 requires a prisoner to make "a substantial showing of the denial of a constitutional right" before an appeal will be authorized. In *Slack v. McDaniel*, the Supreme Court held that this statutory language essentially codified the judicial gloss that the court had given the former CPC statue in *Barefoot v. Estelle.* The *Barefoot* standard only requires that the legal issue sought to be raised on appeal "be debatable among jurists of reason,

[3] *Barefoot v. Estelle*, 463 U.S. 880 (1983)

that a court could resolve the issue in a different manner, or that the questions are adequate to deserve encouragement to proceed further. See 28 U.S.C. § 2253 (c)(1)(B)., 529 U.S. 473, 483 (2000) (noting that the amended version of 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle*, 463 U.S. 880 (1983). (Citations and internal quotations omitted; bracketed language in original). In *Slack*, the court held that a modified version of the *Barefoot* standard applies when a district court denies habeas relief on a "procedural," as opposed to a "substantive," ground. See 529 U.S. at 484 (when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner show, at least, the jurists of reason would find it debatable whether the petition states a valid claim or the denial of constitutional right and the jurists of reason would find debatable whether the district court was correct on its procedural ruling."). *Barefoot*, 463 U.S. at 893 n. 4. It does not require the habeas petitioner to demonstrate a likelihood that he ultimately will prevail on appeal.

In *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003), the Supreme Court made clear that the *Barefoot* standard is not difficult for a habeas petitioner to meet. All that is required is for at least one claim raised by the petitioner to be reasonably "debatable" under the AEDPA's standards. As the court stated: "We look to the District Court's Application of AEDPA to petitioner's constitutional claims and ask whether the resolution was debatable among jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the

claims. In fact the statue forbids it....A COA does not require a showing that the appeal will succeed." A prisoner seeking a COA must prove "something more than the absence of frivolity" or existence of mere "good faith" on his or her part....we do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even through every jurist of reason might agree, after the COA has been granted and the case has been received with full consideration that the petitioner will not prevail. The question is the debate ability of the underlying constitutional claim, not the resolution of that debate. *Id.* at 1039-40, 1042 (citation omitted).

Note* As a general proposition, the single district judge of the Northern District of Indiana to whom the habeas petition and COA application was directed, has a legal obligation to rule on the merits of a habeas petition and COA application, applying the same legal standard that governs district and circuit judges in habeas and COA cases. Bohlinger filed a twenty-one (21) page petition for a writ of habeas corpus with two full pages of exhibits under rules governing 2254 cases, that not only support a constitutional violation but several exhibits prove on the face of the record Bohlinger was charged for a crime that he never committed in the State's information for probable cause in count two the habitual offender in case no. 02C01-8904-CF-11.

ARGUMENT III

COA applications filed with a Circuit Justice

The plain language of 28 U.S.C. § 2253 (c)(1) and corresponding procedural rule, Federal Rule of Appellate Procedure 22 (b)(1), empower a single circuit justice

to grant a COA. See 28 U.S.C. 2253 (c)(1)(A) (providing that " unless a circuit justice or judge issues a certificate of Appealability, an appeal may not be taken to the Court of Appeals" in a Section 2254 habeas case) (emphasis added); Fed. R. App. P. 22 (b)(1) "the applicant cannot take an appeal unless a circuit justice or judge issues a certificate of Appealability under 28 U.S.C. 2253 (c).") (emphasis added).

Although both speak of a single Circuit Justice, the U.S. Supreme Court has taken the position that section 2253 vests jurisdiction not simply in a single justice but the entire court as well. e.g. *In Re Hunt*, 348 U.S. 968 (1955) (mem.); See also *Davis v. Jacobs*, 454 U.S. 911, 913 (1981) (Steven, J., addressing denial of certiorari); i.d. at 919 (Rehnquist J. dissenting, joined by Burger, C.J., + Powell J.); of application of *Burwell*, 350 U.S. 521 (1956)(per curiam)(holding that 2253 vest jurisdiction in an entire court of appeals rather than a single circuit judge, notwithstanding the statue's reference only to a "circuit judge")(citing *Burwell v. Teets*, 350 U.S. 808 (1955) (mem.), and *Rogers v. Teets*, 350 U.S. 809 (1955)(mem); *Hohn v. U.S.* 524 U.S. 236, 242-45 (1998)(COA application decided by a single circuit judge actually is decided by the Court of Appeals as opposed to being decided by the individual circuit judge "acting excuria").

The Supreme Court possesses either "appellate" or "original" jurisdiction asset forth in Article III of the Constitution. *Exparte Vallandigham*, 68 U.S. 243, 250-53 (1863). The full court obviously does not possess "original" jurisdiction over COA applications, which do not fall within any of the limited categories set forth in Article III. *cf. Exparte Barry*, 43 U.S. 65, 65-66 (1844) (habeas petitions not within Supreme

Courts "original jurisdiction). It is questionable whether the full court-as opposed to an individual justice in his or her capacity as a circuit justice-possesses "appellate" jurisdiction over a COA application, except by way of its certiorari jurisdiction (where by the court reviews the judgment of a court of appeals denying a COA application as opposed to ruling on the COA application). In U.S.C. 2253, congress intentionally mentioned only a "circuit justice" and did not provide the full court with the ability to rule on a COA application. Under such circumstances, congress has regulated or made exceptions to the Supreme Court's appellate jurisdiction by limiting the full court's jurisdiction over COA applications filed there. See *parte Yerger*, 75 U.S. 85, 97-106 (1868) (discussing congress's ability to regulate "and make "exceptions" to the Supreme Court's "appellate" jurisdiction described in Article III; see also *Felker v. Turpin*, 518 U.S. 651, 659-61(1996)(same). When congress has wished to extend the Supreme Court's appellate jurisdiction to an individual circuit justice as well as the full court, it has done so. See 28 U.S.C. 2241(A)("writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district court's and any circuit judge within their respective jurisdiction.").

In non-capital cases, a COA application addressed to a single circuit justice typically will be ruled on in the first instance by the individual justice in an unreported order. See stern, etal., supra n. 2, at 755., and if "renewed" to another individual justice pursuant to Supreme Court Rule 22, typically will be "referred" to the entire court of disposition. See e.g. *Butler v. Cockrell*, 123, S. ct. 1340 (2003) (mem); *Lindow v. U.S.* 526 U.S. 526 U.S. 1108 (1999) (mem); *Smalis v. Court of*

Common Pleas Bail Agency, 506 U.S. 804 (1992). On rare occasions, when the full court has summarily denied a COA application, one or more justices have stated in dissent they would grant a COA. See e.g. *Anderson v. Collins*, 495 U.S. 943 (1990) (summary order denying a CPC with the notation that Brennan + Marshall, JJ., "would grant the application"). Logically, it would seem that, when at least one justice believes a COA should be granted, under the *Barefoot* "debatability" standard, a COA should automatically issue.

Neither section 2253 nor Rule 22 state whether a circuit justice (or the court itself) has "discretionary" jurisdiction over COA applications in the manner in which the court has such discretionary jurisdiction over virtually every other matter that comes before it. CF. Sup. Ct. Rule 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion."); sup. Ct. Rule 20.1 ("Issuance by the court of an extraordinary writ authorized by 28 U.S.C. 1651 (A) is not a matter of right, but of judicial discretion sparingly exercised."); See also *Felker*, 518 U.S. at 665 (discussing court's discretionary jurisdiction over petitions for original writs of habeas corpus); *Parr v. U.S.*, 351 U.S. 513, 520 (1956) (discussing court's discretionary jurisdiction over applications for writs of mandamus). A COA is not an "extraordinary" writ or any other type of extraordinary remedy or process that the court possesses complete discretion to grant or deny irrespective of the merits of the application. When congress bestows jurisdiction in a federal court, as it has on the U.S. Supreme Court (or at least on a single circuit justice) in 28 U.S.C. 2253, it is well established that there is a "strict duty" and "virtually unflagging obligation....to exercise the

jurisdiction given." *Quackeubush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (internal quotation marks and citations omitted). Therefore, the court (or at least a single circuit justice) appears obligated to supply the substantive *Barefoot* standard in the same manner in which a district or circuit judge is obligated to apply that standard. Of course, the Supreme Court possesses discretionary jurisdiction to grant certiorari and reverse a court of appeals decision denying a COA. See *Hohn v. U.S.*, 524 U.S. 236, 253 (1998) ("we hold that this court has jurisdiction under 28 U.S.C. § 1241 (1) to review denials of applications for certificates of appealability by a circuit judge of a panel of a court of appeals.") see also *Lozando v. Deeds*, 498 U.S. 430 (1991) (per curiam) (granting certiorari, vacating order of court of appeals denying CPC. And remanding with instructions to grant a CPC after concluding that the habeas petition had met the *Barefoot* standard). See also *Jimenez v. Quartermen*, 555 U.S. 133 ____ (per curiam) (granting certiorari, vacating order of appeals denying COA, and remanding with instructions to grant a COA after concluding that the habeas petition had met the provisions set under 28 U.S.C. 2244(d) due to timeliness. There appears to be no principled based for the exercise of a certiorari-type discretion over COA applications. Although no decision of the court itself has addresses the issue of whether a COA/CPC application addressed to a circuit justice or the full court falls within the court's discretionary or obligatory dockets, decisions of individual circuit justices in chambers have taken contrary positions. Justice White apparently believed that he had an obligation to grant a CPC when a case raised a "substantial question", while Chief Justice Rehnquist commented in 1979 that it would be an

"extraordinary step" for a circuit justice to grant a COA application after the lower courts have denied a CPC. See *Autry v. Estelle*, 464 U.S. 1301, 1302 (1983) (White, J., in chambers) (concluding that a habeas petitioner had raised a "substantial question" that did not" lack of substance," Justice White stated that "I am compelled to issue a certificate of probable cause to appeal, as I am authorized to do under 2253.") (emphasis added). See *Spenkelink v. Wainwright*, 442 U.S. 1301, 1303 n. (1979) (Rehnquist, J., in chambers).

Support for the proposition that a COA application falls within a circuit justice's obligatory jurisdiction is found in analogous decisions concerning bail applications submitted to individual circuit justice. Numerous such decisions have noted that a circuit justice must engage in an independent determination on the merits" of a bail application, at least with respect to questions of law as opposed to questions of fact. See e.g. *Hung v. U.S.*, 439 U.S. 1326, 1328 (1978) (Breenan, J., chambers) (noting that, although great deference must be given to decisions of district courts in denying bail," A circuit justice has a nonelegable responsibility to make an independent determination on the merits of the bail application") (citations omitted); *Mecom v. U.S.*, 434 U.S. 1340, 1341 (1977) (Powell, J., in chambers) (same); *Harris v. U.S.*, 404 U.S. 1232, 1232 (1971) (Douglas, J., in chambers) (same)" *Sellers v. U.S.*, 89 S. ct. 36, 21 L. Ed. 2d 64, 66 (1968). Chief Justice Rehnquist has taken a contrary position, requiring a bail application to show "a reasonable probability that four justices are likely to vote to grant certiorari" in his case. *Julian v. U.S.*, 463 U.S. 1308, 1309 (1983) (Rehnquist, J., in chambers); See also *Roth v. U.S.*, 77 S. ct. 17, 1 L. Ed.

2d. 34, 35 (1956) (Harlan J., in chambers) (when lower federal courts have denied bail application, circuit justice should be "generally reluctant to interfere with the considered view of the Court of Appeals"). These decisions interpreted the former version of Federal Rule of Criminal Procedure 46, which provided that "the trial judge, . . .the Court of Appeals, or any judge thereof or . . . a circuit justice" had authority to rule on a bail application. *Reynold v. U.S.*, 80 S. ct. 30, 32 (1959) (Douglas, J., in chambers) (quoting former version of Fed. R. Crim. P. 46 (A)(2)(emphasis added). The current version of the rule does not explicitly mention the authority of a circuit justice to grant a bail application. See Fed. R. Crim. P. 46. It's unclear whether such authority still exists, virtually identical language appears in the current version of Fed. R. App. P. 22(b)(1) and 28 U.S.C. 2253(1), which speak with the authority of a "circuit justice" to issue a COA in addition to that of a district or circuit justice.

A related but district question arises if one assumes that a single circuit justice (or the court itself) must apply the *Barefoot* standard pursuant to the court's obligatory jurisdiction: should there be any deference-afforded to the decisions of the lower court judges who deny a COA? As noted above, in bail cases, numerous in-chambers decisions by single justices have spoken of affording "deference" to decisions of lower court judges who denied bail. See authorities cited in n. 41, supra. Such deference was not required by the plain language of the former version of Federal Rule of Criminal Procedure 46(A)(2). No court has ever suggested that, under 28 U.S.C. 2253 or Federal Rule of Appellate Procedure 22, a habeas petitioner only must

seek a COA from either a circuit judge or circuit justice (following denial of a COA by a district court), but not both sequentially, the plain language of the statue and rule would not support such an interpretation. The Supreme Court has never addressed this issue directly, but in a per curiam decision in 1967, the court stated in passing that it is established law that a circuit judge or justice entering an application for a certificate of probable cause to appeal should give "weighty consideration" to its prior denial by a district judge. *Nowakouski v. Maroney*, 386 U.S. 542, 543 (1967) (per curiam).

The statement was dicta because the court was not reviewing a case where the district court had denied a CPC, rather the district court granted a COA. *Id.* at 542. Besides being dicta, the court's description of the law as established cited by the court was two Ninth Circuit decisions, each denying a CPC. See *U.S. ex rel. Sullivan v. Heinze*, 250 F. 2d 427, 428-29 (9th Cir. 1957) (Barnes, J., Circuit Judge) ("while I am not bound by the decision of the court below denying a COA, I am duty bound to give weighty consideration.") *Matter of Woods*, 249 F. 2d 614, 615 (9th Cir. 1957) (per curiam decision of three-judge panel, including Barnes J.,) (CPC" will rarely be issued where it is sought to review a decision of the lower federal court refusing to interfere with the custody of petitioner held under process of the State court.") The first matter of Wood, was premised on a misunderstanding of Supreme Court precedent which led the Ninth Circuit to conclude that its appellate review of a federal district court's decision denying habeas relief-as well as its review of a CPC denial-was for abuse of discretion. *Woods*, 249 F. 2d at 616 ("The action of the district court...is peculiarly a

matter of sound discretion of the lower court,"). In support of this proposition, the Ninth Circuit cited three Supreme Court decisions-*Urguhart v. Brown*, 205 U.S. 179 (1907); *Johnson v. U.S.*, 352 U.S. 565 (1957); and *Farley v. U.S.* 354 U.S. 521 (1957)-none of which stands for this proposition. Two of those decisions, *Johnson* and *Farly*, were not habeas appeals but instead, concerned the application of the in forma pauperis statue, 28 U.S.C. § 1915, in criminal direct appeals. *Johnson*, 352 U.S. at 566; *Farly*, 354 U.S. at 521. The court in *Johnson* stated that a trial court's refusal to permit a defendant to proceed in forma pauperis on direct appeal" carries great weight," yet the court's held that the trial court's ruling "cannot be conclusive." 352 U.S. at 566. In *Urguhart*, which was a federal habeas case, the court addressed the issue of when a federal court should intervene in a State criminal case prior to the petitioner's exhaustion of State court remedies. 205 U.S. at 182. The court did not hold, as a general matter, that federal habeas relief should be granted only in "exceptional cases" or that any deference was due a district court's ruling on legal issues. The second Ninth Circuit decision, *Sullivan*, was simply a one-judge order issued subsequently in another case by one of the members of the three-judge panel in *Woods*. *Woods*, 249 F. 2d at 614.

Subsection (c)(2) specifies that "a certificate of appealability may issue...only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253 (c)(2). This provision adopts the standard set forth by the Supreme Court in Barefoot but requires that the petitioner show the denial of a constitutional right, rather than a federal, right. This shift from federal rights to constitutional

rights narrows the universe of claims that may be appealed and essentially precludes appeal of federal statutory claims and federal treaty claims. See, for example, *Slack v. McDanial,* 529 U.S. 473, 383 (2000). "We give the language found in 2253(c) the meaning ascribed it in *Barefoot*, with due note for the substitution of the word constitutional.") In light of the similarity between the CPC and COA requirements, the court extended the *Barefoot* standard to COA's in *Slack v. McDanial*, 529 U.S. 473, 383 (2000)., holding that the COA's substantial showing "requirement" includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Id.* at 484, *Slack* permits the issuance of a COA not only when the district court had redacted the petition on a substantial, debatable procedural ground, so long as the petitioner can also show an underlying debatable constitutional issue. Finally, subsection C (3) provides that a COA "shall indicate which specific issues satisfy the showing required in paragraph (2). 28 U.S.C. 2253(c)(3).

In other words, the COA must specify a substantial, debatable, constitutional issue, this comment focuses on primarily on the (c)(3) requirement; although subsection (c)(2) and (c)(3) are necessarily interdependent. . . Slack indicates that there are various ways in which a COA may be defective. My issue(s) are that a COA is improper under 2253 (c)(2) if no reasonable jurist could debate whether the petition should have been resolved in a different manner-that is, if the Constitutional issue is not substantial. 28 U.S.C. § 2253 (c)(2).

CONCLUSION

WHEREFORE, based upon the foregoing points and authorities, the Petitioner respectfully requests this Honorable Court to grant the within writ and reverse the judgment of the lower Court and for all other relief deem necessary in the premise.

Dated: 11-3-, 2021

/s/ Jason R. Bohlinger

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Appellant "*pro se*"

No. _____

In the

Supreme Court of the United States

JASON R. BOHLINGER
Petitioner,

v

RON NEAL d/b/a Warden
Respondent(s)

PROOF OF SERVICE

I, JASON R. BOHLINGER do declare pursuant to 28 U.S.C. § 1746, that on this 3rd day of November 2021, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

I hereby verify under penalty of perjury that a copy of the above and foregoing *WRIT OF CERTIORARI*, has been served upon:

OFFICE OF THE ATTORNEY GENERAL OF INDIANA
Indiana Government Center South, 5th Floor
402 West Washington Street
Indianapolis, IN 46204

by personally handing the document to the appropriate prison official for placement into the institution's internal mailing system designed for legal mail

/s/ Jason R. Bohlinger

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