CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October 2021 Term

ALBERT L. RICHARDSON, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari

To the Seventh Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner filed a motion under 28 U.S.C. §2255 alleging that his attorney denied his Sixth Amendment right to effective counsel by failing to investigate the identity and side-effects of a drug injected into his leg just before police taped their questioning of him relating to a charge of firearm possession. The prosecutor used the interrogating officer's claim that Petitioner's confused and beaten-down demeanor in the tape as her key proof of guilt claiming it reflected his consciousness of guilt. Petitioner alleged that an investigation would have revealed that the usual side effects of the medication he received before the interrogation included depression and confusion. Petitioner cited the jury's difficulty reaching a verdict and the trial judge's observation that the tape was the evidence that convicted him in an otherwise circumstantial case. Petitioner also challenged counsel's failure to object to the jury receiving a transcript of one officer's testimony which included an unobjected to statement that Petitioner's father said he was shooting a gun ostensibly to explain why the officer approached Petitioner. Trial counsel did not inform the court that Petitioner's father clarified to police that he did not actually see Petitioner shooting a gun. Petitioner asked for a hearing to challenge an affidavit trial counsel provided to justify his omissions.

The Seventh Circuit denied a certificate of appealability. The issues presented are these:

1. Could reasonable jurists find ineffective an attorney's failure to investigate the identity and effects of a drug administered to an accused at the time of a taped statement to police?

2. Could reasonable jurists find ineffective an attorney's failure to object to the jury getting a transcript during deliberations containing a hearsay statements inviting a mistaken inference that Petitioner's father saw him commit the charged crime?

3. Could reasonable jurists disagree on whether the foregoing issues and the denial of an evidentiary hearing thereon warrant a certificate of appealability pursuant to 28 U.S.C. 2253(c)(1)(B)?

LIST OF PARTIES

Petitioner Albert L. Richardson was represented in the lower court proceedings by his counsel, Lee T. Lawless, Federal Public Defender for the Eastern District of Missouri, and Mohammed G. Ahmed, Assistant Federal Public Defender, 1010 Market, Suite 200, Saint Louis, Missouri, 63101. The United States is represented by United Sates Attorney Steven D. Weinhoeft and Assistant United States Attorney, Amanda M. Fisher, 9 Executive Drive, Suite 300, Fairview Heights, Illinois, 62208.

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OPINION BELOW

The United States Court of Appeals for the Seventh Circuit's unexplained order denying a certificate of appealability appears in the Appendix at page 1 and is not published.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its order denying petitioner's case on October 8, 2021 and no motion for rehearing was filed. Appendix 1. Petitioner submits this petition for a writ of certiorari within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Amendment VI, U.S. Const.

> 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 defence.

28 U.S.C § 2253

> (a) In a habeas corpus proceeding or a proceeding under section 2255before 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.
>
> . . . . . .
>
> (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 [28 USCS § 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.

STATEMENT OF THE CASE

Petitioner filed a petition under 28 U.S.C. §2255 seeking relief from ineffective assistance of counsel due to his attorney's failure to investigate the identity and side-effects of a drug injection he received for his injured leg immediately before police questioned him. A jury struggled more than 7 hours over two days to decide if Petitioner was guilty of unlawfully possessing a pistol police found in the grass at an address behind his East St. Louis, Illinois home. Officers scanned the area after receiving reports of an unidentified man firing a "shotgun" or "long rifle" in the air around 10 a.m. on April 2, 2018. At sentencing, the judge said "the only thing that really convicted [Petitioner] was his statement [to police] because everything else was circumstantial. He basically gave up the ghost at that time." The prosecutor used the interrogating officer's claim that Petitioner's beat-down demeanor proved his guilty conscience as the government's key evidence of petitioner's guilt. Neither the jury, defense counsel nor the Judge knew that confusion and depression are side-effects of Toradol, a strong pain medication Petitioner received by injection at Touchette Regional Hospital just before his interrogation.

Petitioner's §2255 motion challenged his attorney's failure to investigate the identity and effects of the pain medication to determine whether grounds existed to suppress his taped statement as involuntary and to pursue evidence by which to contest his guilt at trial. Police Assistant Matthew Bradford told the jury he used "interrogation techniques" to get Petitioner talking, "because he seemed confused, or . . . apprehensive about letting us know that we had found a gun." Having escorted Petitioner from the hospital, Bradford knew he had just received some pain medication. Bradford questioned him anyway after Petitioner said he did not think the medicine "messed [him] up to where [he didn't] understand what's going on," or did not know who the officers were or where he was. Bradford claimed his experience as an interrogator taught him that Petitioner's "body language" and statements of hopelessness ("[m]y ass is cooked. They're going to say I'm an ex-felon in possession of a

firearm and it don't matter to nobody") was evidence that he was guilty. The transcript of the taped statement indicates that Petitioner denied Bradford's reference to "this gun that [police] got from you." No officer saw Petitioner holding an actual gun or seized one from him. Led by Bradford's questions, Petitioner said he bought a gun in Missouri in "June, July, [or] August" of 2017, yet the owner of the gun police seized reported it had been stolen in October of 2017. The prosecution made Petitioner's beaten demeanor its primary proof of guilt.

In response to Petitioner's §2255 motion, the Government secured an affidavit from defense counsel responding to Petitioner's claims of ineffective assistance. Counsel did not deny failing to investigate the identity of the drug Petitioner received and its effects. Counsel acknowledged being "only a lay person when it comes to pharmaceuticals and mental health." Counsel claimed he did not pursue such investigation based on his impression that Petitioner spoke to Officer Bradford the same way he spoke to counsel in pretrial consultations, "including his slower speech when discouraged and his rapid speech when excited or trying to persuade." Counsel further dismissed his omission by reasoning that jurors might discount evidence of a medication's side effects as being akin to Roseanne Barr's attempt to blame the medication Ambien for racist tweets she wrote. Barr incurred ridicule when Ambien publicly repudiated her claim by declaring that "racism was not a side effect of the medication." Defense counsel did not explain why pharmaceutical evidence that Toradol did cause confusion and depression requiring immediate attention from a doctor would invite the infamy following the manufacturer of Ambien's declaration that the drug did not cause racism.

At trial, the government also called East St. Louis Housing Authority Officer Cortez Slack, who grew up in the area the police canvassed. Slack saw Petitioner's father on the porch of his home near Petitioner's and asked if anyone had been shooting. Slack testified Petitioner's father replied that Petitioner had. Trial Counsel did not object to the statement or request a limiting instruction and he did

not introduce any evidence of Petitioner's father's clarification that he did not actually see his son shooting a firearm, but merely thought "it was probably his son who had shot." Trial counsel's affidavit asserted that he did not object to Slack's account of Petitioner's father remarks or elicit his clarification of that statement to Officer Bradford, to avoid prompting the government to call the elder man. In fact, trial counsel had endorsed Petitioner's father as a witness "in case any law enforcement witnesses badly characterized what Albert Richardson Sr. told them." Counsel's affidavit did not identify the type of statement he believed would more prejudicially distort Mr. Richardson Sr.'s statements than the mistaken suggestion he saw his son shooting a gun.

The jury deliberated almost six hours the first day of deliberation. After the first two hours, it asked if Petitioner could be convicted regardless of whether the gun he possessed was the gun police seized. The Court told the jury it could only convict Petitioner for possessing the gun charged in the indictment. By mid-afternoon, the jury asked to return a 'hung jury' verdict, but the Court told them to resume deliberating. The jury later requested a transcript of officer Slack's testimony, which the Court initially denied. At day's end, the Court asked if the jury felt they could proceed with a transcript of Slack's testimony, and the foreperson answered that "would be very fruitful." Trial counsel did not object to giving the jury the transcript. The jury received transcripts of Slack's testimony the next day and issued a guilty verdict in 90 minutes.

The District Court for the Southern District of Illinois denied petitioner's claims of ineffective assistance of counsel. The Court ruled:

> [Trial counsel} met with Richardson many times and did not feel that Richardson's demeanor was any different during the interview nor did it show any impairment. [Counsel] was more familiar with Richardson than he was with pharmaceuticals and mental health. He was aware that Richardson's speech was slower when discouraged and rapid when excited or persuasive. [Counsel] also recalled the infamous Rosanne Barr incident when she tried to blame her racist statements on her use of Ambien and did not want to lose his credibility with the jury.

> As set forth in *Strickland* [*v. Washington*, 466 U.S. 668 (1984)], "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 690-691; *Wiggins v. Smith*, 539 U.S. 510 (2003). A fair-minded jurist could conclude that counsel's performance was not deficient because [Trial Counsel]] reasonably determined that investigation was not warranted and a motion to suppress would have failed. See *Premo v. Moore*, 562 U.S. 115[,] 124 (2011). [Trial Counsel's] performance was not deficient, and Richardson's argument fails.

Appendix at 11-12. The District Court likewise endorsed Trial Counsel's explanations for not objecting to the District Court's decision to give the jury a transcript of Officer Slack's testimony in deliberations:

> ....Again, [Trial Counsel] made a strategic decision. Neither he nor the prosecution could not know what testimony the jurors were considering or why they wanted the transcript of Chief Slack's trial testimony. While hindsight is twenty-twenty, it is impossible to say with certainty that the outcome would have been different, i.e. not guilty, without this transcript. As such, neither prong can be satisfied.

Appendix at 16.

Petitioner appealed the ruling to the Seventh Circuit Court of Appeals and moved that Court to grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(B). He argued that reasonable jurists could reach a different conclusion than the district court, particularly given that the drug injected into Petitioner did have known side-effects consisting of confusion and depression—precisely the opposite scenario of Roseanne Barr's refuted claim that Ambien caused her to make racist tweets. He also argued that reasonable jurists could disagree with Trial Counsel's failure to object to the introduction of a transcript of Officer Slack's testimony based on the misleading and false impression it supported that Petitioner's father saw his son shooting a gun at the time in question. Petitioner also argued that reasonable jurists would not deny petitioner's claims without an evidentiary hearing.

The Seventh Circuit denied the motion for a certificate of appealability without explanation. Appendix at 1.

REASONS FOR GRANTING CERTIORARI

1 Certiorari is warranted because the Seventh Circuit's ruling conflicts with this Court's cases declaring that a certificate of appealability should be granted on a showing that reasonable jurists could reach a different result. Petitioner's pleadings and the record supports a finding that counsel's omissions caused a break down in the adversarial process of trial and were prejudicial under *Strickland v. Washington*.

Petitioner asks this Court to grant certiorari and remand his case to the Seventh Circuit Court of Appeals to reconsider its denial of a certificate of appealability ("COA") prerequisite to appellate review of the denial of post-conviction claims of ineffective counsel. 28 U.S.C. § 2253(c)(2). At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017), citing *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Claims "can be debatable," and thus entitled to a COA, "even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Buck*, at 773, citing *Miller-El*, at 338.

This Court frequently grants certiorari when a federal appellate court misapplies the standards governing post-conviction relief under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), from which 28 U.S.C § 2253(c)(1)(B) originated. *See, e.g., Dunn v. Reeves*, 141 S. Ct. 2405 (2021) (reversing the Eleventh Circuit's grant of post-conviction relief that state courts had rejected consistent with this Court's rule that a lack of evidence of cannot overcome the strong presumption that trial counsel's conduct fell within the wide range of reasonably professional assistance); *Shinn v. Kreyer*, 141 S. Ct. 517, 523 (2020) (reversing the Ninth Circuit's rejection of a state court denial of claimed ineffective assistance, "which was not so obviously wrong as to be beyond any possibility for fair-minded disagreement"); *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2557 (2018) (reversing a circuit's rejection of a state court's denial of relief for ineffective assistance of counsel without considering

grounds that could lead reasonable jurists to find effective assistance supporting the state court's ruling). The Seventh Circuit's failure to apply § 2253(c)(1)(B) properly also warrants this Court's review to uphold the right to post-conviction relief when ineffective assistance of counsel causes a breakdown in the adversarial process on which Americans rely to produce just verdicts. *See Strickland v. Washington*, 466 U.S 668, 697 (1984). As this Court found true of the federal circuit court rulings in *Shinn* and *Sexton*, the Seventh Circuit's unexplained denial of a COA here failed to consider the significant possibility that reasonable jurists could find unreasonable trial counsel's omissions here outside the broad range of reasonable professional conduct under the circumstances at hand.

Reasonable jurists could find counsel's failure to make a basic inquiry to identify the drug Petitioner received and its effects fell outside the range of reasonable professional assistance

The Sixth Amendment ensures the accused's access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690. To obtain relief from ineffective assistance, a petitioner must rebut a heavy presumption that counsel's acts or omissions fell within the broad range of reasonable professional conduct under the circumstances. *Id.* at 689. Counsel must also show that counsel's conduct resulted in prejudice by showing a reasonable probability that, but for such omissions, a reasonable probability exists that the result at trial might have been different. *Id.* at 694. Petitioner need not show prejudice by a preponderance of the evidence, but only a sufficient likelihood to "undermine confidence" in the outcome at trial. *Id.*

Reasonable jurists could conclude that the failure of Petitioner's trial counsel to make any basic investigation to identify the drug injected into his leg just before police questioned him and its side effects fell outside even the broad range of reasonable conduct in the circumstances of this case. The video of Bradford's questioning showed that the officers knew Petitioner had just been medicated, but

he only referred to the drug as "tram-tram-a-something." Postconviction Counsel obtained records from Touchette Regional Hospital in Illinois indicating that Petitioner received an injection of 30 mg of Toradol just before his taped statement. Pharmaceutical websites identify Toradol's side-effects to include depression and confusion requiring prompt consultation with a doctor. Defense counsel, however, did not obtain those records or any information about its known side-effects.

Reasonable jurists could conclude that counsel could not make a reasonable strategic choice on whether the drug provided grounds for suppression without determining the medication's identity and its known effects. Courts examining whether a confession is voluntary must determine whether it was the "product of a rational intellect and free will or whether it was obtained by the authorities through coercive means." *United States v. Brooks*, 125 F.3d 484, 492 (7th Cir. 1997) (internal citations omitted). This entails an inquiry as to "whether the defendant's will was overborne." *United States v. LeShore*, 543 F.3d 935, 940 (7th Cir. 2008). While a statement to law enforcement will not be deemed involuntary absent evidence of coercive police conduct, *Colorado v. Connelly,* 479 U.S. 157, 165-67 (1986), in trial counsel's jurisdiction, "when the interrogating officers reasonably should have known that a suspect is under the influence of drugs or alcohol, a lessor quantum of coercion may be sufficient to call into question the voluntariness of the confession." *United States v. Haddon*, 927 F.2d 942, 946 (7th Cir. 1991). A diminished mental state stemming from drugs is relevant to the voluntariness inquiry "if it made mental or physical coercion by the police more effective." *United States v. Chrismon*, 965 F.2d 1465, 1469 (7th Cir. 1992). Reasonable jurists could decide that counsel's failure to take the simple step of determine the identity and effects of the drug petitioner received to assess the potential merit in a motion to suppress fell outside the wide range of reasonably professional conduct. *See Washington v. Smith*, 219 F.3d 620, 631-32 (7th Cir. 2000) (counsel's failure to determine evidence potential witnesses might have constituted "flagrant examples of ineffective assistance").

Likewise, reasonable jurists could conclude that Counsel's failure to do a basic investigation to determine the possible impact of the pain medication broke down the adversarial clash of evidence at trial. *See Strickland,* 664 U.S. at 687. Officer Bradford himself described petitioner as "seem[ng] confused" in response to which he used "interrogation techniques" to overcome Petitioner's hesitance to speak. Bradford tactically "minimalized" the severity of the acts he sought to get Petitioner to confess, because "[a]t first he seemed reluctant to converse with us." Even then, Petitioner did not explicitly state he had the gun police claimed to recover, but spoke in despair, bemoaning the experience unfolding before him: "They're going to say I'm an ex-felon in possession of a firearm and it's not gonna matter to nobody[.]" The only gun he hesitatingly referred to having was purchased in "June, July, [or] August" of 2017, whereas the gun charged in the indictment was not stolen from its owner until October 2017. The evidence that Toradol was known to cause confusion and depression would have provided additional grounds to doubt the government's claim that Petitioner's demeanor proved his guilt.

Reasonable jurists could conclude that counsel's omission of the most basic inquiry needed to determine if helpful evidence existed deprived Petitioner of his Sixth Amendment to counsel's assistance "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland,* 466 U.S. at 688. Reasonable jurists could also find that the omission was prejudicial. *Id.* at 694. "{A\ verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696. Reasonable jurists could conclude counsel's omission was prejudicial here, particularly considering the trial judge's statement that the taped statement was critical to the jury finally deciding to convict.

Reasonable jurists would likewise discredit Counsel's untested assertion that he omitted an investigation into the drugs identity and effects based on concern that jurors would liken pharmaceutical proof to Roseanne Barr's attempt to blame her racist tweets on Ambien, which its manufacturer

dismissed as farce. Reasonable jurists would see a stark difference between pharmaceutical evidence confirming that Toradol causes the type of demeanor the prosecutor claimed to be proof a guilty conscience from the flat rejection of Ambien's manufacturer of Roseanne Barr's claim that it led to her composition of racist tweets. An attorney does not reasonably forego obvious lines of investigation by assuming no defense will be found there.

Similarly, reasonable jurists could conclude that had Counsel done such basic investigation, he would have recognized the defense it provided at trial to rebut the government's key claim that Petitioner's beaten demeanor in the taped statement proved his guilt. This establishes prejudice by the reasonable probability that but for counsel's unreasonable omission of basic investigation, a result at trial might have been different. 466 U.S. at 694. The jury's difficulty reaching a verdict and the judge's observation that the tape convicted Petitioner easily establish that counsel's failure to investigate the actual pain medication petitioner received and its effects undermines confidence in the jury's verdict.

Reasonable jurists could find counsel's failure to object to the court's admission of a transcript of Officer Slack's testimony was professionally unreasonable and prejudicial.

Defense counsel's Sixth Amendment role "is to ensure the fairness and the integrity of the proceeding." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). However strategic trial counsel's failure to object when Slack testified that Petitioner's father said Petitioner was shooting a gun at the time in question (perhaps to avoid highlighting it), reasonable jurors could conclude that counsel's failure to point out to the judge that the transcript would increase the likelihood jurors would draw a prejudicial and inaccurate inference that Petitioner's father saw him with a gun on the day in question was professionally unreasonable The judge was likely unaware that that Petitioner's father clarified he did not actually see his son with a gun that morning. Trial counsel did not alert the judge that a transcript of Slack's testimony would highlight and invite the jury's reliance on a mistaken and prejudicial implication that Petitioner's father said Petitioner shot a gun that morning.

Although the government may have introduced Detective Slack's statement that Petitioner's father said Petitioner was shooting a gun to explain why Slack approached Petitioner, *see, e.g., Carter v. Douma*, 796 F.3d 726, 736 (7th Cir. 2015), trial counsel did not object, ask to strike the statement, or request a limiting instruction that the statement could not be considered for the truth of the matter asserted. "[T]he dangers of prejudice and abuse posed by the 'course of investigation' tactic are significant." *Jones v. Basinger*, 635 F.3d 1030, 1046 (7th Cir. 2011). Trial counsel's affidavit asserted that he did not object to the jury's receipt of a transcript of Officer Slack's testimony believing it to be the strongest evidence of innocence before the jury, since Slack agreed he had not personally seen Petitioner holding or shooting a firearm on the day in question. The problem with this reasoning is that the jury fully understood that Officer Slack only appeared on the scene after the unidentified shooter reported by 9-1-1 callers had disappeared and no one was shooting. Assuming counsel did not object to the "course of conduct evidence" to avoid highlighting Slack's reference to petitioner's father, counsel had no reason not to inform the judge of the prejudicial impact Slack's "course of conduct" statement invited considering Petitioner's father clarification he did not actually see him shooting a gun.

Reasonable jurists could easily conclude that any benefit from Slack's minimally probative concession paled against the prejudicial force of Slack's claim that Petitioner's father said his son was shooting a gun that day. Officer's Slack's lack of personal knowledge of Petitioner's conduct did little to prove or disprove petitioner's innocence for the simple reason Slack never claimed to see or hear anyone shooting a gun. Equally plain is the great prejudice of the transcript highlighting Slack's statement that Petitioner's father told him Petitioner was shooting a gun that morning because the elder man lived adjacent to Petitioner's home and clearly would recognize his own son. Reasonable jurists could deem counsel's failure to object to the jury's receipt of a transcript of Officer Slack's testimony unreasonable

under the circumstances because it would enhance the likelihood a reluctant juror would vote to convict on the false implication that Petitioner's father saw his son shooting a gun at the time in question.

The jury's difficulty reaching unanimity and the relative quickness with which it returned a guilty verdict upon getting the transcript of Slack's testimony would lead reasonable jurists to conclude counsel's ineffective failure to object or seek a limiting instruction played a decisive role in the jury's decision to convict. The claim is substantial enough to warrant a COA. *Buck*, 137 S. Ct. at 773.

Reasonable jurists would disagree with the denial of an evidentiary hearing on these claims.

Finally, Petitioner submits that reasonable jurists would disagree with the District Court's failure to grant an evidentiary hearing on the foregoing claims. Jurists in the Seventh Circuit have held that a petitioner is entitled to an evidentiary hearing on a §2255 motion unless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief. *Day v. United States*, 962 F.3d 987, 992 (7th Cir. 2020). Affidavits cannot form the basis for denial of an evidentiary hearing. *See Castillo v. United State*s, 34 F.3d 443, 446 (7th Cir. 1994). "[A] determination of credibility cannot be made on the basis of an affidavit." *Id.* at 445. When a habeas petitioner alleges detailed and specific allegations as Petitioner did, a court must determine the issue "not by the pleadings and the affidavits, but by the whole of the testimony." *Machibroda v United States*, 368 U.S. 487, 496 (1962). Clearly reasonable jurists within the Seventh Circuit itself would disagree with the denial of an evidentiary hearing on the petitioner's claims.

CONCLUSION

WHEREFORE, Petitioner requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 16, 2021
Decided October 8, 2021

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 21-1988

ALBERT L. RICHARDSON, JR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois.

No. 20-cv-99-SPM

Stephen P. McGlynn,
Judge.

ORDER

Albert Richardson has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal and find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, Richardson's request for a certificate of appealability is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ALBERT L. RICHARDSON, JR.,	
Petitioner,	
v.	**Case No. 20-cv-99-SPM**
UNITED STATES OF AMERICA,	
Respondent.	

MEMORANDUM AND ORDER

MCGLYNN, Judge:

Pending before the Court is an amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence (Doc. 14) filed by Petitioner Albert L. Richardson, Jr. ("Richardson"). Within the motion, Richardson asserts claims under *Rehaif v. United States*, ___ U.S. ___, 139 S.Ct. 2191 (2019) as well as ineffective assistance of pretrial and trial counsel. For the reasons set forth below, the motion is DENIED.

FACTUAL & PROCEDURAL BACKGROUND

On April 5, 2018, a Complaint was issued against Richardson for the offense of possession of a firearm by a felon in violation of Title 18 U.S.C. 922(g)(1). *United States v. Richardson*, 18-cr-30066 at Doc. 1 (S.D. Ill.)(CR. 1).[1] This charge is predicated upon an incident that occurred on April 2, 2018 when East. St. Louis police dispatcher called for assistance in the area of 35th and Market Streets in East

[1] All documents cited to the criminal case will be designated as "CR.", while all documents cited to this 2255 matter will designated as "Doc.".

St. Louis, Illinois regarding a subject firing shots into the air (Doc. 23, p. 2).

On April 9, 2018, the federal public defender was appointed, and on April 13, Dan Cronin entered his appearance (CR. 9, 11). On April 17, 2018, a grand jury indicted Richardson on one count of felon in possession of firearm in violation of 18 U.S.C. 922(g)(1) (CR. 12). There was also a firearm forfeiture allegation (*Id).*

On April 25, 2018, Richardson appeared for arraignment before a magistrate judge (CR. 17). On that date, this case was set for jury trial on June 4, 2018 (*Id.*). On May 21, 2018, Cronin filed a motion to continue to discuss plea negotiations, per Richardson's request (CR. 21). On May 22, 2018, this matter was continued to September 22, 2018 (CR. 22).

On August 22, 2018, Cronin filed a second motion to continue claiming that plea negotiations had broken down, and that, because his client wished to proceed to trial, additional investigation was needed (CR. 24). On August 23, 2018, an Order was entered continuing the jury trial from September 22, 2018 to October 15, 2018 (CR. 25).

On September 21, 2018, Cronin filed a motion in limine to prohibit impeachment of defendant by prior criminal convictions, along with supporting memorandum of law (CR. 27 – 28). On September 24, 2018, the government filed its notice of intent to introduce prior convictions (CR. 31). On October 15, 2018, the final pre-trial conference was held, at which time an Order was entered allowing prior convictions regarding theft and/or dishonesty, but barring prior convictions regarding guns and/or drugs (CR. 36).

On October 17, 2018, the jury returned a guilty verdict (Cr. 45). On January 25, 2019, Richardson was sentenced to the custody of the bureau of prisons for a term of 96 months, to be followed by a period of 3 years supervised release (CR. 55). Judgment was signed on January 29, 2019, executed on February 11, 2019 and returned on April 12, 2019 (CR. 57, 65).

On February 11, 2019, Richardson filed a *pro se* notice of appeal, which was dated January 25, 2019 (Doc. 60). On February 11, 2019, Richardson also filed a motion to withdraw the aforementioned notice of appeal (Doc. 61).

On January 23, 2020, less than one year after judgment was entered, Richardson timely filed his *pro se* motion to vacate, set aside or correct sentence pursuant to Section 2255 (Doc. 1). On April 14, 2020, after obtaining leave of court, Richardson filed an amended *pro se* motion (Doc. 5). On April 15, 2020, the public defender's office was appointed because Richardson raised a claim related to *Rehaif v. United States* (Doc. 6). On April 29, 2020, Cronin filed an entry of appearance, but also filed a motion to withdraw because the ineffective assistance of counsel claims involved his prior involvement (Docs. 7, 8). On April 30, 2018, Lee Lawless, of the federal defender's office for the Eastern District of Missouri, was appointed and Cronin was granted leave to withdraw (Doc. 9).

On August 12, 2020, Lawless filed an amended motion to vacate conviction and correct sentence under 28 U.S.C. §2255 (Doc. 14). Richardson raises four grounds for relief in his motion premised on the following: (1) *Rehaif v. United States*, 139 S.Ct. 2191 (June 21, 2019); (2) Ineffective assistance of counsel

Therefore, Richardson's *Rehaif* challenge is denied.

II. Ineffective Assistance of Counsel

Richardson raises three separate claims of ineffective assistance of counsel against Cronin (Doc. 14). First, Richardson asserts that Cronin failed to investigate Travadol and/or produce evidence about side effects of depression and confusion that would have provided a basis for a motion to suppress (*Id.*, pp. 9–14). Second, Richardson asserts that Cronin failed to object to Officer Slack's reference to Richardson's father's out-of-court statement (*Id.*, pp. 15-16). Third, Richardson asserts that Cronin failed to object to submission of Officer Slack's testimony transcript to jury (*Id.*, pp. 17-18). While the legal standard is the same, the discussion of each argument will be distinct.

A. Applicable Law

Claims of ineffective assistance of counsel "may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." *Massaro v. United States*, 538 U.S. 500, 504 (2003). Under the law of this Circuit, because counsel is presumed effective, Richardson "bears a heavy burden in making out a winning claim based on ineffective assistance of counsel." *United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 1995). In order to prevail on a claim for ineffective assistance of counsel upon collateral review, a petitioner must meet the two-pronged *Strickland* test and establish that "(1) his counsel's performance fell below an objective standard of reasonableness; and, (2) that his deficient performance so prejudiced his defense that he was deprived of a fair trial."

Fountain v. United States, 211 F.3d 429, 433 (7th Cir. 2000) (*citing Strickland v. Washington*, 466 U.S. 668, 688-94 (1984)). Stated another way, under the *Strickland* test the defendant must show that his counsel's actions were not supported by a reasonable strategy, and that the error was prejudicial. *Massaro*, 538 U.S. at 501.

The first prong of the Strickland test, classified as the "performance prong," calls for a defendant to direct the Court to specific acts or omissions forming the basis of his claim. *Trevino*, 60 F.3d at 338. The Court then must determine whether, in light of all the circumstances, those acts or omissions fell "outside the wide range of professionally competent assistance." *Id.* While making this assessment, the Court must be mindful of the strong presumption that counsel's performance was reasonable. *Accord Fountain v. United States*, 211 F.3d 429, 434 (7th Cir. 2000).

In evaluating an ineffective assistance claim, a court does not always need to analyze both prongs because failure to satisfy either prong is fatal to the claim. *United States v. Ebbole,* 8 F.3d 530, 533 (7th Cir. 1993) *citing Strickland,* 466 U.S. at 697. In other words, if the defendant fails to satisfy the first prong, there is no need to address the second prong.

If, however, the defendant satisfies the "performance prong", he must then meet the "prejudice prong" of *Strickland. Ebbole,* 8 F.3d at 533. This requires the defendant to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Emezuo v. United States*, 357 F.3d 703, 707-08 (7th Cir. 2004) *citing Strickland*, 466 U.S. 52 (1985).

Finally, a reasonable probability is one that undermines confidence in the outcome of the trial. *Strickland,* 466 U.S. at 694. The likelihood of a different outcome "must be substantial, **not** just conceivable." *Richter v. Harrington,* 562 U.S. 86, 112 (2011).

B. Discussion

1. Travadol

Richardson first asserts that Cronin failed to investigate Travadol[2] and/or produce evidence about possible side effects that could include depression and/or confusion (Doc. 14, pp. 9-14). Specifically, Richardson argues that this evidence would have supported a successful pretrial challenge to the voluntariness and admissibility of the evidence, i.e. suppression of Richardson's statement, but that is a conclusory statement (*Id.*).

While approaching the police, Richardson slipped and fell on icy pavement. He was taken to Touchette Regional Hospital in Centreville, Illinois with a knee injury and he received an injection of Toradol (Doc. 14, p. 3). Upon discharge, Richardson was interviewed by investigators who were aware he had received an injection of something that he called, "Tram-tram-a something." (Doc. 14-1, p.11). When asked, Richardson denied any history of mental illness and stated he understood what was going on and he did not think the pain medicine was messing

[2] Throughout the amended motion to vacate conviction and correct sentence (Doc. 14), Richardson refers to his injection as both Travadol and Toradol; however, there is no medication "Travadol". When conducting a medication search, you are directed to Tramadol and Taradol, which are not interchangeable and belong to different drug classes. Toradol is a nonsteroidal anti-inflammatory and tramadol is a narcotic pain reliever. *See* www.rxlist.com/toradol_vs_tramadol/drugs-contidion.htm

him up in the head (*Id.*, p. 12). At no point did the investigators stop the interview to look into the medication and/or potential side effects.

Richardson argues that Cronin was ineffective for not investigating the medication he was provided and for not moving to suppress the statement he gave to investigators (Doc. 14). Richardson further claims he asked his attorney to challenge the voluntariness of the statement and was told that the medication did not provide grounds (*Id.*, p. 9).

When the claim of ineffective assistance is based on counsel's failure to present a motion to suppress, we have required that a defendant prove the motion was meritorious. *Owens v. United States,* 387 F.3d 607 (7th Cir.2004). Although Richardson claims an investigation into the side effects of the Toradol medication would have supported a successful pretrial challenge to the voluntariness and admissibility of the evidence, there is no guaranteed outcome.

Generally, when an attorney articulates a strategic reason for a decision, the court defers to that choice. *Strickland,* 466 U.S. at 690–91. If an attorney's decision was sound at the time it was made, the decision cannot support a claim of ineffective assistance of counsel. *Winters v. Miller,* 274 F.3d 1161, 1166 (7th Cir.2001).

In their response, the government provided an affidavit of Dan Cronin regarding his representation of Richardson (Doc. 23-12). In it, Cronin advised that he did not seek to suppress the statement because he did not have a good basis in fact to do so (*Id.*). Cronin met with Richardson many times and did not feel that Richardson's demeanor was any different during the interview nor did it show any

impairment (*Id.*). Cronin was more familiar with Richardson than he was with pharmaceuticals and mental health (*Id.*). He was aware that Richardson's speech was slower when discouraged and rapid when excited or persuasive (*Id.*). Cronin also recalled the infamous Rosanne Barr incident when she tried to blame her racist statements on her use of Ambien and did not want to lose his credibility with the jury (*Id.*).

As set forth in *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland,* 466 U.S. at 690-691; *Wiggins v. Smith,* 539 U.S. 510 (2003). A fair-minded jurist could conclude that counsel's performance was not deficient because Cronin reasonably determined that investigation was not warranted and a motion to suppress would have failed. *See Premo v. Moore,* 562 U.S. 115 at 124 (2011). Cronin's performance was not deficient, and Richardson's argument fails.

2. Failed to Object to Trial Testimony

Richardson's second claim for ineffective assistance of counsel was that trial counsel was ineffective in failing to object to a statement made by officer Slack during trial and/or to request a limiting statement (Doc. 14, pp. 15-16). As set forth previously, in order to succeed on his claim of ineffective assistance of counsel, Richardson must show that Cronin's performance was deficient such that he was

prejudiced as a result. *Strickland,* 466 U.S. at 687. Performance and prejudice do not need to considered in a particular order nor do both even need to be addressed if Richardson makes an insufficient showing on one. *Id.* at 697.

To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.*, at 689. Indeed, surmounting *Strickland's* high bar is never easy. *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687.

With respect to the performance prong, Cronin provided a reasonable basis for not objecting when he stated in his affidavit:

> "I did not object to Chief of Public Safety Cortez Slack's hearsay testimony about Albert Richardson, Sr. stating that Albert Richardson, Jr. had shot a gun, because I was concerned that a successful objection might prompt the government to call the elder Richardson as a witness. I feared that testimony from my client's father would be more damaging than the hearsay which came in through Chief Slack's testimony. I participated in an interview of Albert Richardson, Sr. prior to the trial, and only included him on the defense's witness list in case any law enforcement witnessed badly characterized what Albert Richardson, Sr. told them. On that note, while Chief Slack's testimony that Albert Richardson, Sr. told him he saw his son shoot a gun was inconsistent with the clarification written by Matthew Bradford, it was consistent with the report written by Officer Keith Randolph "who did not testify" and with Chief Slack's own report." (Doc. 23-12, ¶3).

Cronin had to make an instantaneous decision whether to remain quiet about

Slack's testimony or whether to potentially open the door to more potentially more damning testimony, that of Albert Richardson, Sr. He made a choice and he has wide latitude in making tactical decisions and a constitutionally protected independence of counsel." *Strickland,* 466 U.S. at 689.

After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Richter,* 562 U.S. 86, 110. *Strickland,* however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. *Id.*

Beyond the general requirement of reasonableness, "specific guidelines are not appropriate." *Id.* at 688. There is "[n]o particular set of detailed rules for counsel's conduct that can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions. Id. Indeed, "[t]here are countless ways to provide effective assistance in any given case," and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way". Because Richardson cannot show that Cronin's performance was unreasonable for not objecting during chief Slack's testimony, this argument also fails.

3. Failed to Object to Submission of Transcript

Richardson's final argument of ineffective assistance of counsel against Cronin is that he failed to object to the court's submission of the transcript of chief Slack to the jurors during deliberation, which highlighted the statement allegedly

made by Albert Richardson, Sr. (Doc. 14, pp. 17-18). During the course of deliberations, the jury requested the trial transcript of chief Slack's testimony. The Court discussed this matter with both the prosecutor and Cronin, and after neither side objected, submitted the transcript. Shortly thereafter, a guilty verdict was reached.

In his affidavit, Cronin averred,

> "I did not object to the jury being given a transcript of Chief Slack's testimony because I believed that – despite the damaging aspects of his testimony – his concessions that he did not know if Albert Richardson, Jr. had either shot or possessed a gun were the best hope for the jury concluding there was reasonable doubt of my client's guilt. An instruction for that jury to consider all other evidence as well would have only taken the jury's focus away from what I thought was the best chance for an acquittal or a hung jury for Albert Richardson, Jr." (Doc. 23-12, ¶4).

Again, Cronin made a strategic decision. Neither he nor the prosecution could not know what testimony the jurors were considering or why they wanted the transcript of Chief Slack's trial testimony. While hindsight is twenty-twenty, it is impossible to say with certainty that the outcome would have been different, i.e. not guilty, without this transcript. As such, neither prong can be satisfied. First, Cronin's conduct met the performance prong in that he had a rational, reasonable argument for his stipulation. Second, Richardson cannot meet the prejudice prong as there is no evidence to support the substantial probability of a different verdict without the submission of the transcript or whether it is "reasonably likely" the result would have been different. Without more, this argument of ineffective assistance of counsel must also be denied.

CONCLUSION

Albert L. Richardson's Amended Petition to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 14) is **DISMISSED** with prejudice. The Court **DECLINES** to issue a certificate of appealability.

IT IS SO ORDERED.

DATED: March 26, 2021

/s/ Stephen P. McGlynn
STEPHEN P. McGLYNN
U.S. District Judge