NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

VERNELL CONLEY
PETITIONER,

v.

WENDY KELLEY, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION
RESPONDENT.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TO THE HONORABLE SUPREME COURT:

PETITIONER VERNELL CONLEY, through his counsel, J. THOMAS SULLIVAN, respectfully moves for leave to proceed *in forma pauperis* in this Court. In support of this motion, counsel attaches the following:

1. The order of the United States District Court appointing undersigned counsel to represent Petitioner in his Section 2254 action, which was held in abeyance while counsel exhausted state remedies;

2. The order of the Lincoln County (Arkansas) Circuit Court granting Conley leave to proceed *in forma pauperis* in his habeas corpus action pending in that court.

Based on the orders of lower courts finding Petitioner indigent and his confinement in the Arkansas Department of Corrections for over the past nine years, Petitioner respectfully requests the Court grant him leave to proceed *in forma pauperis* in this action.

Respectfully submitted this 11th day of December, 2021.

J. THOMAS SULLIVAN
MEMBER, BAR OF THE
SUPREME COURT
1122 WEST CAPITOL
LITTLE ROCK, ARKANSAS 72201
501/376-6280
sullivanatty@gmail.com

ATTORNEY FOR THE PETITIONER,
VERNELL CONLEY

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

VERNELL CONLEY
ADC #110709 PETITIONER

V. NO. 5:15cv00093-JLH-JTR

WENDY KELLEY, Director,
Arkansas Department of Correction RESPONDENT

ORDER

Pending in this § 2254 action is Vernell Conley's Motion for Appointment of Counsel, filed on his behalf by counsel, J. Thomas Sullivan. *Doc. 16.* The Motion seeks appointment of Mr. Sullivan to "assist Petitioner Conley in the presentation and argument of his claims in this proceeding." *Id. at 22.* Mr. Sullivan states that he is willing to represent Mr. Conley, who he believes has a "potentially meritorious" claim regarding trial counsel's failure to move for severance. *Id. at 3, 22.*

The Court has discretion to appoint counsel for a § 2254 habeas petitioner if "the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B); Rule 8(c), Rules Governing § 2254 Cases in United States District Courts; Eastern District of Arkansas Criminal Justice Act Plan IV(B)(2) ("CJA Plan"). Similarly, the Court may appoint a lawyer who is not a member of the CJA panel, if it "is in the interest of justice, judicial economy, or continuity of representation, or there is some other compelling

circumstance[.]" CJA Plan VII(D)(1)(c). The Court concludes that it is in the interests of justice to appoint Mr. Sullivan to represent Mr. Conley in this § 2254 action.

Accordingly, the Motion for Appointment of Counsel, *Doc. 16*, is GRANTED.[1] Mr. Sullivan is directed to file, within twenty-eight (28) days of the date of this Order, any supplemental pleadings regarding Mr. Conley's third claim, that trial counsel was ineffective for failing to move to sever the delivery of cocaine charge from the possession charges in Conley's state criminal case.

IT IS SO ORDERED THIS 12th DAY OF January, 2016.

J. Thomas Ray

UNITED STATES MAGISTRATE JUDGE

[1]The Court separately will enter a CJA Form 20 appointing Mr. Sullivan.

IN THE CIRCUIT COURT OF LINCOLN COUNTY, ARKANSAS
ELEVENTH JUDICIAL DISTRICT, WEST - FIFTH DIVISION

VERNELL CONLEY
Inmate # 110709

PETITIONER

v.

No. 40CV-18-15-5

WENDY KELLEY, Director,
Arkansas Department of Correction

RESPONDENT

ORDER GRANTING LEAVE TO PROCEED *IN FORMA PAUPERIS*

Upon consideration of the petitioner's motion that he be permitted to pursue this matter *in forma pauperis*, facts presented in the petition, and applicable law, the Court finds as follows:

1. Petitioner has presented a colorable cause of action.

2. The petitioner has presented a sufficient declaration to procced *in forma pauperis.*

3. The Clerk of the Circuit Court of Lincoln County, Arkansas, shall receive and file any necessary forms or pleadings incident to plaintiff's action without requiring the payment of fees or costs.

4. That the sheriffs of the several counties of the State of Arkansas shall serve writs or processes incident to plaintiff's action without requiring the payment of fees or costs.

IT IS SO ORDERED this 20th day of February 2018.

JODI RAINES DENNIS
CIRCUIT JUDGE

FILED

FEB 20 2018

14:30

CINDY GLOVER, CIRCUIT CLERK
LINCOLN COUNTY, ARKANSAS

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM. 2020

VERNELL CONLEY
PETITIONER,

v.

DEXTER PAYNE, DIRECTOR,
ARKANSAS DIVISION OF CORRECTION
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

J. THOMAS SULLIVAN
MEMBER, BAR OF THE
SUPREME COURT
1122 WEST CAPITOL
LITTLE ROCK, ARKANSAS 72201
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sullivanatty@gmail.com

COUNSEL OF RECORD FOR PETITIONER,
VERNELL CONLEY

QUESTIONS PRESENTED FOR REVIEW

Whether the lower courts erred in denying Petitioner Vernell Conley's application for a Certificate of Appealability where reasonable jurists could have disagreed with the denial of federal habeas relief on his claim that trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), where counsel failed to move to sever the charge of delivery of cocaine from two other, unrelated drug offenses joined on the basis of their similarity despite the characterization by the Arkansas Supreme Court of severance in such cases as a matter of "absolute right," claiming that this was a matter of strategy in attempting to protect Conley from being sentenced by two, rather than a single jury on these charges.

In this case of probable first impression, Conley's counsel had been found ineffective in failing to properly frame his challenge to the sufficiency of the evidence supporting the unrelated drug offenses and the Arkansas Supreme Court had ordered the convictions on those two counts vacated and the charges dismissed. The issue of Conley's right to appeal by grant of a Certificate of Appealability under *Slack v. McDaniel*, 529 U.S. 473 (2000), includes the following subsidiary issues:

- Whether the federal habeas court was bound to consider the *objective reasonableness* of trial counsel's claimed strategic decision based on fear of the

hostile reaction of two juries to Conley's prior criminal history where neither counsel, nor the lower courts, identified any statutory basis for concluding that waiver of Conley's severance right would result in any limitation on imposition of consecutive sentences upon convictions on all three counts charged;

- Whether the federal habeas court was bound to defer or consider Arkansas decisions in assessing whether trial counsel made an *objectively reasonable strategic decision* under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), in failing to move to sever the counts joined on the baseness of similarity, where the right has been characterized as "absolute";

- Whether the issue of counsel's ineffectiveness should necessarily include deference to the state supreme court's finding that counsel's representation was ineffective under *Strickland*, undermining the reliability of the totality of counsel's representation and reliability of the outcome; and

- Whether the Magistrate Judge properly held that Eighth Circuit precedent barred consideration of ineffectiveness claims cumulatively, where the Arkansas court had already found trial counsel ineffective under *Strickland* on related claims in his representation in the same case.

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OPINION BELOW

The United States Court of Appeals for the Eighth Circuit denied Petitioner Vernell Conley's application for Certificate of Appealability and dismissed his appeal in an unpublished order. A copy of the Judgment is included in the Appendix to this petition as Exhibit B. The order of the United States District Court dismissing the petition for federal habeas corpus is included in the Appendix as Exhibit C. The Recommended Disposition filed by the United States Magistrate Judge rejecting Petitioner's federal habeas claims is appended as Exhibit A.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The Eighth Circuit entered its Judgment on July 23, 2021 and this petition is timely if filed on or before December 20, 2021, pursuant to the Court's order of March 19, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner Vernell Conley sought relief in federal habeas corpus pursuant to 42 U.S.C. § 2254. His claim was based on the Sixth Amendment to the United States Constitution, which ensures, in pertinent part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence."

Section 2254 limits the authority of federal habeas courts to afford relief to state court defendants based on subsection (d), which provides:

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2253(c) sets the critical test in the process for obtaining appellate review of denial of relief by the habeas court. It provides:

> (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;
> . . . . .
>
> (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.
> . . . . .

Of critical importance to Conley's argument that trial counsel rendered ineffective assistance is Rule 22.2, Arkansas Rules of Criminal Procedure. The rule provides, in subsection (a):

> **(a)** Whenever two (2) or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.

STATEMENT OF THE CASE

Petitioner Conley asks the Court to review the denial of his request for a Certificate of Appealability by the Eighth Circuit Court of Appeals following dismissal of his federal habeas petition brought pursuant to 42 U.S.C. § 2254. In his federal challenge, he argued that trial counsel rendered ineffective assistance in failing to move to sever criminal charges joined for trial on the basis of similarity of the offenses. The right to severance of counts joined based on the same or similar character of the offenses charged is regarded as "absolute" by the Arkansas Supreme Court. *Turner v. State*, 280 S.W.3d 400, 403 (Ark. 2011); *Passley v. State*, 915 S.W.2d 248, 251 (Ark. 1996) ("A defendant has an absolute right to a severance of offenses joined solely on the ground that they are of same or similar character. *Clay v. State*, 886 S.W.2d 608 (1994)."). Conley's Motion for Certificate of Appealability to the Eighth Circuit included in the Appendix as Exhibit D.

A. Summary of Material Facts

Petitioner Conley was convicted by a jury of three counts alleging drug-related offenses. He was convicted on Count 1 of delivery of a controlled substance, 0.5813 grams of crack cocaine to an undercover officer for $100 in September, 2009. The evidence showed that two undercover officers met Conley on a rainy night in the parking area of a local park, having made contact with him

earlier by phone. The officers could not remember the make and model of the car in which Conley was sitting during the transaction, but identified him at trial as the individual who sold them crack cocaine despite the short period of time involved. After the exchange the officers testified that they followed Conley away from the scene by car, noting the residence where he parked.

The police researched the residence address where Conley parked on the night of the transaction and obtained a search warrant, which they executed in November, when Conley was not present in the residence. Based on the results of the search, he was arrested and prosecuted in Counts 2 and 3 of the information that charged that he possessed 32.5 grams of marihuana with intent to deliver and possession of drug paraphernalia—digital scales—respectively. The jury convicted him on the cocaine delivery and paraphernalia counts and on the lesser-included offense of possession of the marihuana, instead of possession with intent to deliver. *Conley v. State*, 385 S.W.3d 875 (Ark. App. 2011). On direct appeal, the Arkansas Court of Appeals held that trial counsel failed to preserve error on any of the three counts and, consequently, declined to consider Conley's insufficiency challenges on their merits. *Id.* at 878-79.

B. Summary of post-trial proceedings

Following affirmance of his convictions by the appellate court, Conley filed for post-conviction relief in the state trial court of conviction pursuant to Rule 37.1

of the Arkansas Rules of Criminal Procedure. The court denied relief on his multiple claims. On appeal the Arkansas Supreme Court reversed the post-conviction court's findings that trial counsel did not render ineffective assistance. Instead, it held that counsel rendered ineffective assistance with respect to his failure to preserve challenges to the sufficiency of the evidence supporting Counts 2 and 3. It found that the evidence supporting those convictions was legally insufficient and, thus, that trial counsel had rendered ineffective assistance:

> Consequently, we conclude that the evidence is not sufficient to support Conley's convictions for possession of a controlled substance and possession of drug paraphernalia. *In turn, we hold that trial counsel's performance was deficient and prejudicial*, because had trial counsel made a proper motion for directed verdict, the sufficiency-of-the-evidence argument raised on appeal would have been successful. Accordingly, we reverse and remand with directions to dismiss the charges of possession of a controlled substance and possession of drug paraphernalia.

Conley v. State, 433 S.W.3d 234, 242-43 (Ark. 2014) (emphasis added). The court specifically ordered dismissal of Counts 2 and 3 in concluding its opinion:

> Affirmed in part; reversed and remanded in part with directions to dismiss the charges of possession of a controlled substance and possession of drug paraphernalia.

Id. at 243. It did not order the case remanded for re-sentencing on Count 1 by a newly empanelled jury, however.

Moreover, the state supreme court did not address Conley's claim that trial counsel had rendered ineffective assistance in failing to move to sever Count 1

from Counts 2 and 3. The claim was specifically raised in his application for post-conviction relief and trial counsel testified at the evidentiary hearing conducted by the state post-conviction court, but the court rejected the claim. On appeal, the court noted:

> The circuit court also ruled that Conley suffered no prejudice from trial counsel's failure to seek a severance of the offenses or to make sufficient motions for directed verdict. Conley filed a timely notice of appeal from the circuit court's order.

Conley, 433 S.W.3d at 238-39.

Because the court granted relief on the two sufficiency challenges resulting in dismissal of Conley's convictions on Counts 2 and 3, it concluded that it was not necessary to address the severance-based ineffective assistance claim, explaining:

> Conley's final argument is that trial counsel was deficient for not moving to sever the possession offenses from the delivery charge. This issue is solely directed to the possession offenses. Because we have already found counsel's performance deficient with regard to those convictions, and because those charges are to be dismissed, *we need not address this claim of ineffective assistance of counsel.*

Id. at 243 (emphasis added).

Conley petitioned, *pro se*, for writ of habeas relief pursuant to 28 U.S.C. § 2254 in the Eastern District of Arkansas on March 26, 2015, alleging claims of ineffective assistance by trial counsel. These included the claim preserved in the state post-conviction process arguing that trial counsel's performance was defective based on his failure to move for severance of the trial on Count 1 from

trial on Counts 2 and 3. Only the severance claim was litigated fully in the habeas action.

However, Conley was afforded the option of raising the issue of on Count 1 in state proceedings when the District Court granted his motion to hold the federal action in abeyance in order to permit him to exhaust state remedies, pursuant to *Rhines v. Weber,* 544 U.S. 269 (2005).[1] The Magistrate Judge reviewed the exhaustion litigation in the Recommendation for Dismissal of the federal habeas petition. (APP. Ex. A, at 9-13).

C. Exhaustion of state remedies on abeyance from US District Court

During the stay, Conley sought relief from the state supreme court by petitioning for recall of the mandate and for leave to file an out-of-time petition for rehearing to re-visit the court's failure to order a re-sentencing proceeding on Count 1. Upon denial of this request for extraordinary relief, he filed a state habeas corpus action arguing that the Judgment and Commitment Order initially issued following conviction, but never corrected following the grant of relief ordered on appeal from the denial of state post-conviction relief, was defective because the order continued to reflect his conviction on Count 2 and 3. Moreover, he argued that because re-sentencing on Count 1 had not been ordered, he

[1] (DOC. 31: Motion for Abeyance; DOC 41: Order granting stay). [*Note:* all references to Docket entries are based on PACER references in *Conley v. Payne,* No. 5:15-cv-00093-DPM].

remained subject to the 60-year sentence imposed by the jury that had simultaneously imposed sentences on Counts 2 and 3. The Magistrate Judge, reviewing the procedural history of the case characterized Conley's argument as "forceful and compelling". [APP, Ex. A, at 13). Nevertheless, the Arkansas Supreme Court had rejected Conley's claim of jurisdictional error based on its own failure to order entry of an Amended Judgment that would have required re-sentencing. *Conley v. Kelley*, 566 S.W.3d 116 (Ark. 2019).

Conley then petitioned for certiorari, arguing that *Hicks v. Oklahoma,* 447 U.S. 343, 347 (1980), required the Arkansas courts to order re-sentencing because at the original sentencing proceeding the trial jury had been able to consider evidence adduced on the three charges on which it had convicted together in setting punishment. Because his convictions on Counts 2 and 3 had been ordered dismissed by the state supreme court, Conley argued that *Hicks* applied to require re-sentencing on Count 1, the only count surviving post-conviction review. This Court denied certiorari. *Conley v. Kelley*, 140 S.Ct. 185 (2019).

D. Disposition of federal habeas corpus claims following exhaustion

Following Petitioner's exhaustion of state remedies, the habeas action was restored to the District Court's docket, leading to substantial briefing by the parties. The Magistrate Judge then his Recommended Disposition recommending that all claims presented in Conley's *pro se* habeas petition be dismissed, [APP.

Ex. A; (DOC. 69)], specifically including the ineffective assistance claim based on counsel's failure to move to sever counts joined solely on the basis of the similarity of offenses charged. [APP. Ex. A; (DOC. 69), at 28-37].

The Magistrate Judge specifically found that trial counsel's failure to move for severance of the counts joined solely based on sameness reflected a *tactical* decision not subject to review. [APP. Ex. A (DOC. 69), at 31-35]. The court specifically held: "If the facts and circumstances suggest that defense counsel's decision not to seek a severance was based on trial strategy, *a reviewing court will not second guess that tactical decision*." *Id.* at 32, emphasis added The Magistrate Judge also found that counsel's failure to move to sever Count 1—delivery of cocaine—from Counts 2 and 3—possession of marihuana with intent to deliver and possession of drug paraphernalia/scales did not prejudice Conley on either the jury's determination of guilt or its sentencing decision. *Id.* at 35-37.

The District Court adopted the Magistrate Judge's conclusion in his Recommended Disposition, ordering dismissal of Conley's habeas petition and that no Certificate of Appealability would issue. [APP. Ex. C, at 40 (DOC. 94)]. Conley petitioned for issuance of a COA on the severance ineffectiveness claim in the Eighth Circuit Court of Appeals, which denied the request without opinion. [APP, Ex. B, Judgment, at 38 (DOC. 102)].

Petitioner Conley pressed his ineffectiveness assistance of counsel claim

arising under the Sixth Amendment in state post-conviction and federal habeas corpus proceedings. It is fully exhausted and subject to review by this Court on certiorari. 28 U.S.C. § 1254(1); *Hohn v. United States*, 524 U.S.236 (1998).

REASONS FOR GRANTING THE WRIT

Petitioner Conley asks the Court review of the denial of his request for a Certificate of Appealability, ["*COA*"], by the Eighth Circuit, barring appellate review of the habeas court's rejection of his claim that trial counsel's failure to move for severance of counts joined based only on similarity offenses violated his Sixth Amendment right to effective assistance of counsel.

A. The standard of review applicable to grant of a COA

In *Slack v. McMcDaniel*, 529 U.S. 473, 483-84 (2000), this Court held that in order to obtain the Certificate for Appealability [COA] required for appellate review under 28 U.S.C. § 2253(c), the petitioner must show:

> . . . 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.'

The record here demonstrates the evidentiary support necessary for Conley's claim that trial counsel's failure to move for severance warranted additional review by appeal of the District Court's dismissal of his habeas petition.

B. Failure of the courts below to properly apply the Slack *test for COA*

In accepting the Recommended Disposition issued by the Magistrate Judge, the District Court held that trial counsel's failure to move to sever the offenses joined solely on the basis of sameness or similarity warranted deference as a matter of strategy, a defense to a claim of an ineffectiveness claim under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). [APP. Ex. C, at 39-40]. Further, the District Court impliedly upheld the Magistrate Judge's conclusion that that Conley failed to show that even if trial counsel's performance had been defective, there was a reasonable probability of a different outcome, or probable prejudice, necessary to meet *Strickland*'s second prong, 466 U.S. at 694.

Neither the District Court, nor the Eighth Circuit, applied the test required in *Slack* for determining whether the record in this case warranted grant of COA affording Conley an appeal from denial of relief and dismissal of the habeas petition. Because the courts below denied him appellate review on both the issues of trial counsel's defective performance and probable prejudice litigated before the Magistrate, Conley addresses both in this petition. The unique facts underlying Conley's claims and questionable legal reasoning in the denial of relief by the lower courts warrant review by certiorari in this case.

Because relief under *Strickland* requires the state court defendant petitioning for federal habeas relief to demonstrate both deficient performance and probable

prejudice, Conley addresses both elements of an ineffective assistance claim individually in this petition.

I. WHETHER REASONABLE JURISTS COULD DISAGREE WITH THE CONCLUSION THAT TRIAL COUNSEL'S FAILURE TO MOVE TO SEVER UNDER ARKANSAS RULE 22.2 REFLECTED AN OBJECTIVELY REASONABLE STRATEGY, WARRANTING ISSUANCE OF A COA.

A. The "reasonableness" test for counsel's claimed strategy

The test for determining whether counsel's performance is defective rests on whether counsel's claimed strategic or tactical decision has met the requirement for *effective* assistance under the Sixth Amendment guarantee of assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). In assessing counsel's claim that a course of action or, as here--inaction, was a matter of strategy, the *Strickland* Court explained that "[t]he proper measure of attorney performance remains simply *reasonableness* under prevailing professional norms." 466 U.S. at 688.

The requirement that counsel's strategic or tactical decisions be objectively reasonable has been consistently applied in post-*Strickland* decisions. *See, e.g., (Terry) Williams v. Taylor*, 529 U.S. 362, 395 (2000) (error in misinterpreting state law precludes deferral to claimed strategy); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (strategy must reflect "reasonable professional judgment"); *Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (failure to accept trial court's offer of additional funding to obtain assistance of qualified expert demonstrated lack of

reasonableness "under prevailing professional norms"); and *Andrus v. Texas*, 140 S.Ct. 1875, 1881 (2020).

B. Trial counsel's claimed strategy in not moving to sever offenses

Conley's retained trial counsel testified at the hearing on his petition for state post-conviction relief and responded to the question of why he did not move to sever the delivery and possession counts for separate trials. The Magistrate relied on this testimony in finding that his failure to sever was strategically sound:

> Q. Mr. Warren, why didn't you move to sever [the possession charges] from the separate Delivery of Cocaine charge alleged in Count 1?
>
> A. I did not move to sever that because it was a trial strategy in that I did not want my client at the time to face multiple juries as a *super habitual offender* and there was always the possibility that either way the convictions could be run consecutively and not concurrently.
>
> Q. So it's your understanding that the Judge, if we had one trial, two trials, three trials, could have run these consecutively if he wanted to?
>
> A. Yes.
>
> Q. What ended up happening to the Possession of a Controlled Substance Marijuana charge in relation to the other two charges?
>
> A. It was run concurrently.
>
> Q. Now, did you talk about the severance issue with your client?
>
> A. Yes.
>
> Q. What was his opinion on the issue?
>
> A. He didn't have an opinion either way.

Q. Left it up to you?

A. Yes.

[APP. Ex. A, at 33-34, citing post-conviction court findings, DOC 8-18 at 37-38, emphasis added].

Trial counsel offered only his concern that Washington County juries are hostile to drug trafficking cases, explaining that he did not want to have Conley face multiple juries as a "super habitual offender." There was no rational basis for not severing the charges, however, because the joint trial resulted in his jury considering the evidence on all three counts, rather than having two juries consider the evidence independently in finding guilt or setting punishment in two trials. Counsel offered no reference in Arkansas sentencing law to *super habitual offenders.* And, while the District Court credited counsel's concern based on his "recent experience with Washington County juries," [APP. Ex. C, at 40], counsel himself conceded that the authority to impose consecutive or concurrent sentences was vested in the trial court. Neither trial counsel, the Magistrate Judge, nor the District Court referenced statutory limitation that would have limited sentencing discretion as a result of counsel waiving Conley's right to sever Count 1 from Counts 2 and 3.

Moreover, with respect to deference to state court findings, neither the state post-conviction court, nor the Arkansas Supreme Court ever specifically found that

trial counsel's claimed strategy was objectively reasonable. The state post-conviction court entered three general, conclusory findings referenced by the Magistrate in his Recommended Disposition, in finding that Conley failed to demonstrate that trial counsel's performance fell below an objective standard of reasonableness. [APP. Ex. A, at 30-31]. It concluded:

> 5. That Defendant/Petitioner has failed to show that counsels' (sic) performance was deficient and fell below an objective standard of reasonableness.
>
> 6. That Defendant/Petitioner's trial counsel's performance did not fall below an objective standard of reasonableness for professional assistance.
>
> 7. That Defendant/Petitioner has failed to show there is a reasonable probability that absent any errors alleged by his trial counsel, a different and more favorable result would have occurred.
>
> [ORDER, denying relief, at B5, 6, and 7, entered September 18, 2012].

The Magistrate thus relied on the state court findings [APP, Ex. A, (DOC 69), citing the record of the post-conviction proceedings (DOC. 8-13, at 2-3) in upholding the state court's conclusion that Conley failed to show counsel's deficiency in his "failure" to move for severance. Neither the state post-conviction court, nor the Magistrate, explained why trial counsel's *strategy* was objectively reasonable.

Nor did the state supreme court, declining to consider the severance claim as mooted by the acquittal on Counts 2 and 3, make any finding that the failure to

move to sever reflected an objectively reasonable strategic decision by trial counsel. There was simply no support for deferring to the state courts with regard to this claimed strategy, since the state post-conviction court's general findings of no deficient performance and no prejudice on counsel's part were effectively rejected by the supreme court when it awarded relief from Conley's convictions on Counts 2 and 3 expressly because of counsel's failure to preserve error correctly in challenging those convictions based on evidentiary insufficiency.

Moreover, the Magistrate also rejected Conley's argument that the post-conviction court's misstatement of the *Strickland* standard to require Conley to show *a more favorable result* had counsel move to sever the joined charges was significant. The Magistrate simply concluded:

> While the trial court misstated the Strickland prejudice standard by adding the phrase "and more favorable," this lack of precision in no way undermines its holding that Conley's counsel's performance was not "constitutionally deficient."

[APP, Ex. A, at 31, n. 31]. It is unclear how a misstatement of the standard of proof would not undermine the finding that trial counsel's was not constitutionally deficient when neither court offered any explanation based on state law supporting the counsel's claimed strategy in not moving to sever the unrelated charges.

C. The Magistrate's mischaracterization of the defectiveness argument

1. Failure to apply correct legal standard for "strategic" decision

Despite the Court's consistent requirement that a claimed strategy be *reasonable* in order to warrant deference to trial counsel on an ineffective assistance claim, the Magistrate explained, relying on *Flowers v. Norris*, 585 F.3d 413, 417 (8th Cir. 2009), and *Nalls v. Kelley*, No. 5:15- cv-193-DPM, 2017 WL 2198380, at *1 (E.D. Ark. May 18, 2017):

> If the facts and circumstances suggest that defense counsel's decision not to seek a severance was based on trial strategy, a reviewing court will not second guess that tactical decision.

[APP. Ex. A, at 32]. Trial counsel's mere explanation that a decision was *strategic* does not itself automatically warrant deference, as *Flowers* held in rejecting a claim based on a failure to sever where the accused offered relied on "general denial," rather than a theory implicating potential jury misuse of evidence showing commission of unrelated offenses where the issue involved his prior conviction of a firearms offense. The court explained: "[Counsel] reasoned that if the jury believed that Flowers had not participated in the robbery, it would also find him not guilty of being a felon in possession of a firearm." *Flowers*, 585 F.3d at 417. There is no similarly well-developed strategy claimed by trial counsel or bound by the lower courts in Conley's case.

Further, neither *Flowers* nor *Nalls* involved representation by a trial counsel already found by state courts to have rendered ineffective assistance. In both cases, the severance issue was addressed as a matter of strategy, with the *Nalls*

court pointing out the lack of prejudice since jurors convicted on one of the four counts that rested on the testimony of one informant, while hanging on three counts where the prosecution relied on a *different* informant in the other three. *Nalls v. Kelley*, 2016 WL 8996949, at *6, *8. Additionally, the state court had declined to consider the prejudice claim made by Nalls for the first time argued on appeal. *Nalls v. State*, 449 S.W.3d 509, 513-14 (Ark. 2013). In stark contrast, here the state post-conviction court held that counsel had not been ineffective on any of the claims raised in the state post-conviction process, while the state supreme court reversed the post-conviction court as to Counts 2 and 3, ordering those convictions vacated and the charges dismissed.

While *Flowers* and *Nalls* rested on findings that counsel employed objectionably reasonable strategies in deliberately not moving for severance of unrelated counts or that had proved successful, there was no such explanation as to why Conley's trial counsel's claim of strategy was warranted deference. In fact, the Magistrate Judge mischaracterized Conley's defective performance argument, misstating the record, noting:

> Conley seemingly "presumes" that his trial attorney's failure to move to sever those charges constitutes constitutionally ineffective assistance of counsel; thereby satisfying the first prong of *Strickland.* Accordingly, *he focuses his initial argument on explaining why he has satisfied Strickland's prejudice prong*

[APP. Ex. A, at 28, emphasis added].

Conley formally objected to this mischaracterization that he relied on a *presumption* that trial counsel's claimed strategy was defective. He provided specific references to four pleadings [2] *See* (DOC. 91) OBJECTION No. 2, at 13-43, ¶¶ 13-30), submitted in support of his ineffectiveness claim elaborating on his argument that counsel's claimed strategy in not moving to sever the counts could *not* be deemed objectively reasonable. *See*, (DOC, 91, at page 14, ¶ 27). The District Court sustained Conley's Objection No. 2 while nonetheless adopting the Magistrate's recommendation. [APP. Ex. C, at 39].

2. Failure to consider Arkansas view of "absolute" severance right

Not only did the Magistrate Judge minimize Conley's persistent argument that trial counsel offered no objectively reasonable strategy in support of his claimed fear of trying cases to two different juries likely to see his client as a *super*

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[2] Conley consistently advanced this argument in his prior filings in this action, summarized in his OBJECTIONS TO THE RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE, (DOC 76), at 13-45, including:

- SUPPLEMENTAL BRIEF, (DOC. 21), at pages 24-37, ¶¶ 53-66.
- REPLY TO RESPONDENT'S RESPONSE TO SUPPLEMENTAL BRIEF, (DOC 30), at pages 35-44. ¶¶ 73-91.
- SUPPLEMENTAL BRIEF ON THE MERITS FOLLOWING EXHAUSTION OF STATE REMEDIES (DOC 61) at pages 55-63, ¶¶ 108-122.
- REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF, (DOC 66) at pages 30-44, ¶¶ 63-91.

habitual offender, he also failed to appreciate Arkansas law in applying it to the determination of the reasonableness of his claimed strategy.

In assessing what is an *objectively reasonable* strategy at least one important factor, if not the most important factor for the majority of cases, would certainly be the jurisdiction's directive regarding the options that might be available to counsel reflecting reasonable choices. The Arkansas Supreme Court has been especially clear in advising counsel on severance decisions with respect to offenses joined based solely on sameness or similarity of the offenses joined for trial. It has consistently characterized the severance option in this circumstance an *absolute right* afforded the accused. *See, e.g., Turner v. State*, 280 S.W.3d 400, 403 (Ark. 2011); *Passley v. State*, 915 S.W.2d 248, 251 (Ark. 1996) ("A defendant has an absolute right to a severance of offenses joined solely on the ground that they are of same or similar character"); *Bunn v. State*, 898 S.W.2d 450 (Ark. 1995); and *Clay v. State*, 886 S.W.2d 608 (Ark. 1994).

Conley relied on Arkansas law in arguing that counsel's failure to move for severance, this "absolute right," resulted in the grave risk of prejudice:

> [T]he liberal joinder rule is accompanied by a limiting severance rule that recognizes the *grave risk of prejudice from joint disposition of unrelated charges* and, accordingly, provides a defendant with an absolute right to a severance of offenses joined solely on the ground that they are of same or similar character.

Turner, 480 S.W. 3d at 403; *Clay,* 886 S.W.2d at 610, 613. *See* (DOC 21) SUPPLEMENTAL BRIEF at 24-25, ¶ 53; 36-39, ¶¶ 67-71].

In *Clay, supra,* the court specifically addressed the potential prejudice inherent in the joinder of drug trafficking offenses:

> In drug cases the State cannot ordinarily prove that the accused sold drugs on one occasion by proving that he sold them on other occasions. Such proof of other sales . . . would merely show that the accused had dealt in drugs before and hence was likely to do so again.

Id. at 611.

The Magistrate Judge wholly ignored state law characterizing Conley's right to sever counts joined based on similarity as *absolute* and its particular significance when multiple, unrelated drug charges are joined. Conley consistently argued that the Arkansas Supreme Court's cases characterizing severance in this situation an accused's "absolute" right. *See, e.g.*, (DOC 16) MOTION FOR APPOINTMENT OF COUNSEL, at 14-16, ¶¶ 21-23; (DOC 76) OBJECTIONS TO MAGISTRATE'S RECOMMENDATIONS, 83-84, ¶¶ 111-114; MOTION FOR COA, Ct. App. No. 21-1233, at 2-3, ¶ 2. Nonetheless, neither the Magistrate, nor the District Court, discussed the Arkansas decisions providing significant analysis relating to the reasonableness of trial counsel's failure to move to sever.

3. Relevance of state court's finding of ineffectiveness on Counts 2 and 3

Throughout the litigation, Conley has argued that the determination as to whether trial counsel was ineffective in failing to sever Count 1 from Counts 2 and

3 should include consideration of the Arkansas Supreme Court's finding that counsel was ineffective in failing to preserve error on his evidentiary insufficiency challenges to the convictions on the possession counts. *See, e.g.*, (DOC 2) PETITION at 85-86; (DOC 21), SUPPLEMENTAL BRIEF, at 31; and (DOC 78) OBJECTIONS TO RECOMMENDATION at 67, ¶¶ 80-81. In moving for COA in the Eighth Circuit, Conley argued that the supreme court's finding of ineffectiveness as to Counts 2 and 3 on the question deference to the state post-conviction court's findings that Conley failed to demonstrate ineffectiveness generally, and specifically--on the question of the failure to move for severance--raised an issue of first impression in the Circuit, given the supreme court's decision not to address the severance issue in the appeal from the denial of state post-conviction relief. [APP. Ex. D, at 19-20, ¶¶ 31-32].

The Magistrate *never* addressed the impact of the ineffectiveness findings made by the Arkansas Supreme Court when it reversed the state post-conviction court on the reliability of the lower court's finding that trial counsel was not ineffective in failing to sever the counts. The State argued that reliance on the ineffectiveness findings on Counts 2 and 3 performance could not properly be considered cumulatively to meet the *Strickland* prejudice requirement under *Middleton v. Roper,* 455 F.3d 838, 851 (8th Cir. 2006). *See* (DOC 82)

RESPONSE TO PETITIONER CONLEY'S OBJECTIONS, at 16. The Magistrate Judge adopted the State's argument, citing *Middleton.* [APP. Ex. A, at 37, n. 37].

Conley's claim does not require reliance on cumulative error to meet *Strickland*'s prejudice prong, however, because the state supreme court already found that trial counsel was ineffective at trial. The "cumulative error" approach arguably permits multiple defects in performance to be considered aggregately to assist the overall reliability of the result in light of these defects. *Williams v. Washington,* 59 F.3d 673, 682 (7th Cir.1995). *Williams* and *Middleton* clearly suggest a split in circuit authority with respect to whether *Strickland*'s prejudice prong can be demonstrated by reference to counsel's multiple errors of deficiencies in performance that remains unresolved, even though Strickland speaks in terms of counsel's errors in discussing deficient performance. *Compare, e.g., Williams, supra; White v. Thaler*, 610 F.3d 890, 912 (5th Cir. 2010); *Garcia v. State,* 678 N.W.2d 568, 578 (N.D. 2004); *Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009); *Ex Parte Welborn,* 785 S.W.2d 391, 393 (Tex.Crim.App.1990); *State v. Lane*, 838 S.E.2d 808, 810 (Ga. 2020); and *Garica v. Burton*, ---F.Supp.3d---, 2021 WL 1685966, 18-19 (N.D. Cal. 2021) (adopting or suggesting support for application of cumulative error analysis to *Strickland* claims), with *Fisher v. Angelone,* 163 F.3d 835, 852 (4th Cir.1998); (rejecting application of cumulative error to ineffectiveness determinations). The Court has yet to address this question

under *Strickland* or the impact of AEDPA on the issue. *E.g. Hill v. Stephens*, 2016 WL 1312152 (Not Published) (S.D. Tex. 2016). Nor has the question of whether lower courts are authorized to create rules expanding or modifying its precedents, such as limiting ineffectiveness determination to discrete, individual claims of defective performance. *See, Goetke v. Branch*, 514 U.S. 115, 120-21 (1995). Given the Court's consistent reference to counsel's errors in the plural and concern with the overall issue of reliability of the proceedings in *Strickland*, the question of cumulative consideration of prejudice flowing from multiple defects in representation and the disparate approaches apparently taken by lower courts, this issue should likely be addressed by the Court. But, that is not necessary in Conley's case because trial counsel was already found ineffective in the state post-conviction appellate process.

In *Harrington v. Richter*, 562 U.S. 86 (2011), the Court explained that in order to prevail on a claim of ineffective assistance, the petitioner must show that counsel's *unprofessional errors* were so serious as to deprive him of "a fair trial, a trial whose result is reliable," citing *Strickland*, 466 U.S. at 687. Clearly, the supreme court's finding that trial counsel was ineffective in failing to properly challenge the convictions on Counts 2 and 3 as resting on insufficient evidence warranted consideration by the habeas court in relying on the contrary findings of the state post-conviction court. This is particularly true since the supreme court

itself did not address the severance claim on the merits, believing the relief granted in dismissing the possession challenges mooted the severance issue.

4. Application of the Slack *test for COA*

The sufficiency issues and the severance issue were necessarily interrelated, moreover. Had the delivery and possession counts been severed, the jury would have considered the evidence on the delivery count separately, rather than in the position of considering evidence admitted on all counts in arriving at convictions on all three. Yet, trial counsel expressed no concern for the need to protect Conley from improper use of evidence insufficient to support his conviction on the possession counts by the jury in determining his guilt on all three counts. Instead, he focused solely on his fear that two juries would react negatively to his alleged commission of drug offenses, justifying his decision not to sever under Rule 22.1 only out of concern that multiple juries would react more negatively than a single jury to Conley's alleged drug trafficking. This is simply objectively unreasonable since his single jury heard evidence of three offenses, rather than one or two and counsel offered no explanation based on any restriction imposed by Arkansas sentencing laws that would have afforded a benefit from accepting the joinder of offenses based only on similarity of the drug offenses that counsel claimed were so susceptible to anger on the part of Washington County juries.

Denial of COA by the lower courts required a finding that reasonable jurists reviewing the evidence *could not have disagreed* with the disposition by the habeas court. On this record, a correct application of the *Slack v. McDaniel* test undoubtedly warranted issuance of the COA to permit Conley to appeal the habeas court's dismissal of his ineffectiveness claim with regard to trial counsel's failure to move to sever. The lower courts accepted counsel's explanation that this failure was a trial strategy without consideration as to whether the claimed strategy was objectively reasonable. There was no showing of any statutory restriction on the trial court's sentencing authority in terms of ordering the sentences imposed by the jury to be served consecutively, and as the Magistrate acknowledged, the 30 year concurrent sentence imposed on Counts 2 and 3 were ordered to be served consecutive to the 60 year sentence on Count 1, for delivery of 0.5813 grams of crack cocaine. [APP, Ex. A, at 34, n. 36].

The lower courts failed to consider trial counsel's claimed strategy without even acknowledging decisions of the Arkansas Supreme Court declaring the accused's right to sever charges as "absolute," warning about the potential for jury misuse of joined offenses to convict, a reasonable likelihood with respect to the delivery count in Conley's case. Moreover, this danger was shown to have been aggravated because the supreme court expressly held that the evidence on Counts 2

and 3 was legally insufficient to support convictions on those counts, indicating that the jury failed to apply instructions on required proof correctly.

Moreover, the lower courts rejected the state supreme court's finding of trial counsel's ineffectiveness in failing to challenge evidentiary insufficiency on Counts 2 and 3 as a factor of any kind in assessing the reliability of the post-conviction court's findings that Conley failed to show that trial counsel rendered ineffective assistance in failing to move to sever the offenses. Instead, the Magistrate mischaracterized the argument as one for cumulative error, not allowed by the Eighth Circuit with regard to ineffective assistance claims.

The record is thus replete with failures on the part of the lower courts to assess Conley's request for COA in light of the reasonable jurist test of *Slack, supra.* Reasonable jurists could well have rejected trial counsel's explanation in favor of counsel's more likely anger based on Conley's refusal to plead guilty to more than 10 years, and rejection of the State's plea offer of 40 years on all charges that would have left him eligible for parole in 24 years. *See* (DOC 8-13, TRIAL COURT'S ORDER DENYING RELIEF ON RULE 37 CLAIMS, at 2, ¶ 10/R46). Or, that trial counsel acted in his own self-interest in committing to a single trial on joined offenses rather than two separate trials on Count 1 and Counts 2 and 3.

II. WHETHER REASONABLE JURISTS COULD DISAGREE WITH THE LOWER COURTS IN FINDING THAT THE FAILURE TO SEVER RESULTED IN PROBABLE PREJUDICE UNDER *STRICKLAND*'S SECOND PRONG, WARRANTING ISSUANCE OF A COA TO PERMIT CONLEY TO APPEAL FROM DENIAL OF RELIEF ON HIS INEFFECTIVENESS CLAIM.

A. Reasonable probability of a different result generally

Conley argued that the record warrants grant of COA on both the issues of his guilt on Count 1 for delivery and the sentence imposed by the jury on Count 1 when it was permitted to consider evidence offered in support of Counts 2 and 3 in arriving at the 60-year sentence Conley now serves after the Arkansas Supreme Court vacated the 30-year concurrent sentence imposed on Counts 2 and 3 ordered to be served consecutively to the 60-years on Count 1. The failure to sever Count 1 from Counts 2 and 3—implicating the *absolute* right to sever under Arkansas Criminal Procedure Rule 22.2—subjected Conley to imposition of more aggravated sentences than might have been considered after separate trials, particularly in light of the court's order to dismiss the prosecutions on Counts 2 and 3.

B. Probability of a "different outcome" as to Conley's guilt on Count 1

Conley's trial counsel defaulted his claim of insufficient evidence to support conviction on Count 1, the delivery court. *Conley*, 385 S.W.3d at 878-79. In reviewing the evidence, the court of appeals found that he sold 0.5813 grams of crack cocaine to undercover narcotics officers who set up a controlled purchase

with him in September, 2009, based on intelligence. The officers had not known him previously, but testified that they had seen a photograph of Conley before the transaction and later identified him in open court and by voice from Detective Howard's pre-sale telephone conversation and from a recording made during the transaction. Howard could not testify as to the make and model of Conley's car when they met at night at a local park for the buy. Detective Lee testified that he got a good look at Conley's face through his passenger side window next to Conley's parked car, although Conley never exited his car. The officers followed Conley's car from the scene to the driveway of his residence, where he parked. He testified that the officers purchased "about one gram of cocaine," significantly less than measured when tested by the Arkansas Crime Lab. The court then referenced Conley's arrest at his residence in November, 2009, where officers recovered marijuana and digital scales. *Conley*, 385 S.W.3d at 876-77 (Ark. Ct. App 2011).

Conley challenged his identification by the officers. He argued that officers had no prior relationship with him (TR/142-43) prior to contact with him by telephone (TR/132) and the controlled buy of 0.5813 grams of cocaine (TR/140); that the transaction occurred at night--just after 8 p.m, when it was dark (TR/116, 128); that Conley never left his vehicle; that it was raining a "misty type rain" (TR/116); and that officers were apparently able to confirm Conley's identity by using the residence information gained when they followed his car (TR/119)—

which Howard could not identify from the sale—as he drove to the residence they subsequently searched. Detective French testified that he returned to Conley's residence to check to see if it matched the vehicle Conley was driving at the time of the transaction. (TR/121). French testified that the marijuana and scales were recovered from Conley's residence. (TR/124-25). On cross, however, French admitted that Conley was not present at his residence when the search warrant was executed and that he was brought to the residence after being arrested. (TR/128).

Conley conceded that the evidence on Count 1 was legally sufficient, applying the principle of deference to facts found by the jury as trier of fact in *Jackson v. Virginia*, 443 U.S. 307 (1979). The' Magistrate found: "The case against Conley for the delivery of cocaine was not a close one." [APP. Ex. A, at 18]. He further found the identification evidence "compelling and certainly strong enough to secure a verdict of guilty on the delivery charge, without a jury ever hearing any evidence related to the possession charges." *Id.* at 36.

Counsel's ineffectiveness in failing to move to sever, however, does not involve a direct challenge to the evidence supporting conviction, but whether there is a reasonable probability that severance of Count 1 from Counts 2 and 3 would have resulted in a different result of the proceedings. Certainly, the State was concerned about the evidence supporting the delivery charge. Detective French's testimony linked Conley's statements upon arrest relating to the marijuana and

digital scales seized from his residence, admitting that he had set up drug transactions while denying that he sold drugs, to support his identification on the delivery charge. (TR/122). Similarly, the prosecutor argued that evidence offered in support of Counts 2 and 3 was relevant to his guilt on Count 1:

> If you don't want to believe any of that evidence you can take it from this Defendant's word, from his own mouth. What did he say at the arrest when Detective French arrested him? What did he say? Detective French says you're under arrest for delivery of a controlled substance. Hey, man, I didn't sell, I don't sell. I just set people up to do transactions. Oh well, now he's a drug dealer and he's a drug broker. Anything for money. Anything to pass the buck. You know, times are hard. I guess especially if you're a stay at home person. You ain't working a real job. Times can be pretty hard. So by his own mouth he can sell it to you or he can put you in contact. Because he knows where to get crack cocaine. Do you? Who do you call when you want crack cocaine? I don't know. Because I don't live in that world. I don't operate in it. He does. He can hook you up with crack as much as you want and he said that. He said that in the transcript. Remember? Hit me up later, hit me up in an hour. Because he's got to make some money when he sells what he's got, he's gonna get re-supplied. That's how he operates. That's the world he lives in. So that is the evidence for Delivery of A Controlled Substance. . . . What else have we got? We've got Possession of a Controlled Substance with Intent to Deliver Marijuana. No, how are we gonna show that? Well, again, you got a prior delivery, we know he sells drugs for money. We know him a little, whatever will turn a buck. He'll sell drugs. We've got this happening. On September, out of his own mouth, even if he is not gonna sell it, he'll hook you up with it if that's what you want. So we've got those statements.
>
> We've actually got the marijuana there at the house, right? Detective Ingram was the one that found it right there on top of the laundry shelf. You saw photos of that. Detective French talked to you about how much would be for personal use, about a gram, that's personal use. And I think they got about, over an ounce, was what they found there. So, I don't know, I mean that's 28 grams or so. 28

> times person use that you'd use at one time I guess is what he's saying. Oh, and there's scales. See scales are important to that. Because why? That shows the intent. . . . Detective French, have you seen these scales, these types of scales before? Well, yeah, those are scales. That's what drug dealers use. That's what they have. Well, Detective French, don't you think that you could use those for personal use? No. No. . . . .

(TR/189-91). The prosecutor, aware of the strength or weakness of the case, was far better positioned to believe that he needed to argue the proof on Counts 2 and 3 to support conviction on the delivery count than the Magistrate reading the trial transcript, in hindsight. And the prosecutor's powerful response to Conley's identification challenge undermines the credibility of the Magistrate's finding, sufficiently so to show that reasonable jurists could readily disagree with the probability of prejudice warranting a finding of *Strickland* ineffectiveness and issuance of COA, as well.

C. Probability of a "different outcome" as to Conley's sentence on Count 1

Jurors were authorized to impose a sentence ranging from 10 years to life imprisonment upon conviction on Count 1. Had the jury imposed the mandatory minimum sentence, or close to it, Conley would have no argument that he was prejudiced by the joint trial on all three drug trafficking counts. But, the jury did not impose a minimal sentence, and more significantly, did not impose the maximum sentence of life. The Magistrate Judge conceded:

> Certainly, proceeding to trial on all charges carried the risk that the jury might not follow the Court's instructions and improperly consider

> the evidence of the possession charges in determining guilt and sentencing on the delivery charge.

But, he then charged that Conley was arguing from "hindsight" that the dismissal of Counts 2 and 3 necessarily meant that the jury "improperly aggregated evidence," charging that determinations of counsel's strategy cannot be based on hindsight. [APP, Ex. A, at 35].

Here, however, the failure to sever the charges joined because they all involved drug transactions is not viewed from hindsight because the joinder ensured that jurors in one trial would sentence based upon the evidence they had heard on all three counts presented at trial. It was necessarily the case that Conley's jury would have heard all the evidence adduced at trial and impose sentences based on what had been admitted. There was no instruction given at the guilt phase restricting consideration of evidence to the counts charged separately, (TR/176-83), as the prosecutor's closing demonstrated. Nor did the court order jurors to limit evidence by separate counts in its sentencing instructions:

> In your deliberations on the sentences to be imposed you may consider both the evidence presented in the first stage of the trial where you rendered verdicts on guilt and the evidence to be presented in this part of the trial. You'll now hear evidence that you may consider in arriving at appropriate sentences.

(TR/203-04). Trial counsel did not object to this instruction, nor request one advising jurors to consider evidence separately with respect to each count. While it was only later that the convictions on Counts 2 and 3 were ordered dismissed,

trial counsel must have foreseen the possibility that the supporting evidence would be insufficient because he challenged them on sufficiency, although he failed to do so correctly, resulting in the finding that he was ineffective.

As in *Hicks v. Oklahoma, supra*, Conley cannot prove what jurors would have done had the case been split into separate trials, because any argument would have been based on speculation about prospective jury behavior. The lower courts assumed, however, that the 60-year sentence reflected the evidence of his prior convictions, with the Magistrate speculating:

> Finally, during the sentencing phase of Conley's trial on the delivery charge, the jury was destined to hear of Conley's prior felony convictions, including eight previous convictions for delivery of cocaine. Thus, it is difficult to see how the jury's conviction of Conley for possessing only 32.5 grams of marijuana and a digital scale could have much, if any, impact on their deliberations about the appropriate sentence to impose on the delivery of cocaine charge.

[APP. Ex. A, at 36]. In fact, each of Conley's prior drug convictions resulted in imposition of mandatory minimum sentences of 10 years under Arkansas law applicable at the time, ARK. CODE ANN. § 5-64-401(a)(i), with suspension of substantial numbers of months and concurrent sentencing. (SENT. TR/204-08).

Conley's record of drug-related convictions cannot be dismissed in assessing the potential prejudice resulting from the jury's consideration of the sentenced imposed upon him as a habitual offender. Nevertheless, the 60-year sentence

imposed on Count 1 was substantially less than the life sentence that could have been imposed.

There is no way to rationally avoid the conclusion that the jury relied on evidence offered to support the marijuana and drug scales counts in assessing punishment for the cocaine delivery charge in Count 1. This was a source of powerful closing argument by the State in the guilt phase and jurors were invited to consider his evidence in sentencing on all three counts based on the trial court's instructions which did not limit its consideration to the individual charges so that jurors could rely on evidence offered in support of Counts 2 and 3 in assessing punishment on Court 1. To suggest otherwise, as the lower courts did, reflects nothing other than irrational speculation.

Here, the Arkansas Supreme Court declined to address Conley's effective assistance claim based on trial counsel's failure to move for severance, but did reverse the state post-conviction court's rejection of his claims addressing counsel's performance in failing to preserve error on insufficiency of evidence offered in support of conviction on Counts 2 and 3. In order to obtain relief on the severance issue, *Harrington v. Richter,* effectively requires Conley to show that no reasonable conclusion could have alternatively supported rejection of an ineffectiveness claim. In this case there is no alternative, reasonable argument supporting the denial of relief by the state post-conviction court.

With respect to the *Strickland* prejudice prong, the conclusion that jurors were not influenced in sentencing Conley on Count 1 by evidence offered in support of Counts 2 and 3. His argument is not dependent on the reversal and dismissal of those counts on appeal in the post-conviction process, viewed in hindsight, as the Magistrate claimed. The danger of misuse of evidence of unrelated offenses in sentencing on any of these counts existed from the very point at which trial counsel claimed he made a strategic decision not to sever.

The unique circumstances here show that reasonable jurists could disagree on the dismissal ordered by the District Court, at least in raising *grave doubt* about the misuse of the evidence of other offenses in sentencing on Count 1, the "grave doubt" being the test for determining when a petitioner is entitled to relief on a claimed constitutional violation under *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995). The lower courts failed to properly *Slack* in denying COA.

CONCLUSION

The issues in this petition demonstrate "certworthiness" in affording refinement of the *Slack* test for COA. Petitioner Conley moves the Court issue the writ and summarily reverse the judgment of the Eighth Circuit and remand for further proceedings or set this cause for briefing and argument with respect to the proper consideration of a claim of trial strategy asserted in response to an allegation of ineffective assistance under the Sixth Amendment.

Respectfully submitted this 11th day of December, 2021.

s/ J. Thomas Sullivan
J. THOMAS SULLIVAN
MEMBER, BAR OF THE
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CERTIFICATE OF COMPLIANCE

I, J. Thomas Sullivan, certify, pursuant to Supreme Court Rule 33(h), that the foregoing document, Petition for Writ of Certiorari, contains 8,897 words not including those parts excepted under Rule 33(d).

s/ J. Thomas Sullivan
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM. 2020

VERNELL CONLEY
PETITIONER,
v.
DEXTER PAYNE, DIRECTOR,
ARKANSAS DIVISION OF CORRECTION
RESPONDENT.

APPENDIX

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Exhibit A: Recommended Disposition fled by the United States Magistrate Judge in *Conley v. Kelly,* No. 5:15-cv-00093-DPM . 1-37

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

VERNELL CONLEY
ADC #110709 PETITIONER

V. NO. 5:15-CV-00093-DPM-JTR

WENDY KELLEY, Director,
Arkansas Department of Correction RESPONDENT

RECOMMENDED DISPOSITION

The following Recommended Disposition ("Recommendation") has been sent to United States District Judge D. P. Marshall Jr. You may file written objections to all or part of this Recommendation. If you do so, those objections must: (1) specifically explain the factual and/or legal basis for your objection; and (2) be received by the Clerk of this Court within fourteen (14) days of the entry of this Recommendation. The failure to timely file objections may result in waiver of the right to appeal questions of fact.

I. Introduction

Pending before the Court is a § 2254 Petition for Writ of Habeas Corpus filed by Petitioner Vernell Conley ("Conley"). *Doc. 2.* Before addressing Conley's habeas claims, the Court will review the long and winding procedural history of this case in state court.

A. Conley's Convictions and Direct Appeal

On August 26, 2010, a jury in Washington County, Arkansas, found Conley guilty of delivery of crack cocaine, possession of marijuana, and possession of drug paraphernalia.[1] *State v. Conley*, Washington County Cir. Ct., Case No. CR-2009-2046-1 ("Conley I"); *see* Trial Transcript, *Doc. 15 at 202-203*. The jury sentenced Conley to five-years for possessing 32.5 grams of marijuana, thirty-years for possessing a digital scale, and sixty-years for selling three rocks of crack cocaine for $100.00.[2]

On August 30, 2010, Conley was sentenced, as a habitual offender, to sixty-years for the delivery of crack cocaine; thirty-years for the possession of drug paraphernalia; and five-years for the possession of marijuana. The 5-year sentence for possession of marijuana was imposed to run *concurrently* with the 30-year

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[1] On September 15, 2009, an undercover police officer paid Conley $100 for a single hand-to-hand sale of three rocks of crack cocaine from Conley, resulting in Conley being charged with delivery of crack cocaine. *See Conley v. State*, 2011 Ark. App. 597, 385 S.W.3d 875, 876-877 (2011).

On November 6, 2009, law enforcement officers executed a search warrant on Conley's residence. During the search, officers found 32.5 grams of marijuana and a set of digital scales. *Id.* The results of that search led to Conley being charged with one count of possessing marijuana with the intent to deliver (which included the lesser charge of possessing marijuana) and one count of possessing drug paraphernalia. *Id.*

[2] Conley had been convicted of twelve prior felony charges, eight of which involved delivery of cocaine. *See* Trial Transcript, *Doc. 15 at 204-208* (listing felony convictions).

In each of those eight drug convictions, the longest term of imprisonment imposed was ten years. This suggests that Conley's prior convictions for the delivery of cocaine was also based on relatively small drug transactions, similar to the one involved in this case.

sentence for possession of drug paraphernalia, but both of those concurrent sentences were ordered to run *consecutive* to the sixty-year sentence for delivery of cocaine. Thus, Conley entered the Arkansas Department of Correction facing an aggregate sentence of ninety-years.[3] *See* Amended Judgment and Commitment Order, *Doc. 8-4.*

On direct appeal, Conley argued that: (1) the trial court erred in denying his motions for directed verdict based on insufficiency of the evidence; and (2) the prosecutor engaged in prosecutorial misconduct, during the sentencing phase of his trial, by calling him a "drug dealer," something the trial judge allowed, without ruling on Conley's objection or giving a curative instruction. *Doc. 8-6 at 6-17.*

On October 5, 2011, the Arkansas Court of Appeals affirmed Conley's convictions. In doing so, the Court held that: (1) Conley's directed-verdict motions were "too general" to preserve his sufficiency of the evidence arguments; and (2) because Conley did not obtain a ruling from the trial court on his objection to the prosecutor calling him a drug dealer, during the sentencing phase of his trial, he

[3] Conley's status as a habitual offender affected the length of the range of punishment the jury could impose on the delivery of crack cocaine (10 years to life) and drug paraphernalia charges (3 to 30 years). *See* Ark. Code Ann. § 5-4-501 (eff. July 31, 2009 to July 26, 2011). However, none of Conley's prior felony convictions qualified for the "70% rule," which would have required him to serve 70% of his 90-year sentence before he became eligible for parole. *See* Ark. Code Ann. § 16-93-611 (effective July 31, 2009 to July 26, 2011, repealed effective July 26, 2011).

His convictions in *Conley I* were used in one of his earlier criminal cases (Washington County Circuit Court Case No. 2006-138-1) to revoke his suspended imposition of sentence and impose a seven-year sentence that he must discharge after he completes his sentence in *Conley I.*

failed to preserve that error. *Conley v. State*, 2011 Ark. App. 597, 385 S.W.3d 875 (2011) ("*Conley I*"); *Doc. 8-9.*

Conley did not seek review from the Arkansas Supreme Court. Thus, the Arkansas Court of Appeals' mandate became final on October 25, 2011. *Doc. 8-10.*

B. Conley's Rule 37 Proceeding

On December 27, 2011, Conley filed a *pro se* Rule 37 Petition in Washington County Circuit Court. *Doc. 8-11.* He later hired an attorney, D. Jason Barrett, who filed an Amended Rule 37 Petition asserting that Conley's trial attorney provided ineffective assistance of counsel by: (1) failing to provide Conley with enough information to make an informed decision regarding whether he should seek to negotiate a guilty plea; (2) failing to inform Conley of the possibility of a plea offer; (3) failing to sever the possession of marijuana and the possession of drug paraphernalia charges from the delivery of cocaine charge; (4) failing to call the witness he described in his opening statement, who would offer testimony proving that the marijuana and drug paraphernalia found in Conley's residence did not belong to him; and (5) failing to make proper motions for directed verdict on the possession of marijuana and drug paraphernalia charges. *Doc. 8-12.*

After conducting an evidentiary hearing, the trial court concluded that all of Conley's arguments lacked merit, and denied Rule 37 relief. *Doc. 8-13.* Conley

appealed, *pro se*, to the Arkansas Supreme Court. *Doc. 8-14.* However, he later hired a different attorney, Lee Short, to represent him in his Rule 37 Appeal.

In his Appellant Brief, Mr. Short argued that Conley's trial counsel was constitutionally ineffective because he: (1) failed to move to sever the marijuana and drug paraphernalia charges from the delivery of cocaine charge; (2) failed to deliver on the promise he made the jury in his opening statement to call a witness who would vindicate Conley on both possession charges; and (3) failed to move for a directed verdict on the possession of marijuana and drug paraphernalia charges based on insufficiency of the evidence. *Doc. 8-14.* Mr. Short's Appellant's Brief abandoned Conley's claim that his trial attorney provided ineffective assistance of counsel with regard to his alleged failure to communicate and discuss plea offers with Conley.[4]

On April 17, 2014, the Arkansas Supreme Court *granted Rule 37 relief* on the ground that Conley's trial counsel had provided ineffective assistance by failing to move for a directed verdict on the possession of marijuana and drug paraphernalia charges. *Conley v. State*, 2014 Ark. 172, 433 S.W.3d 234 (2014) ("*Conley II*"); *Doc. 8-17.* The Court held that, if a proper motion for directed verdict had been made, thereby preserving the error for appeal, it would have been granted. *Id.*, 2014 Ark. 172, at 9-12, 433 S.W.3d at 241-243. Accordingly, the Court *reversed* Conley's convictions for possession of marijuana and possession of drug paraphernalia, and

[4] The Brief does not explain why this claim was abandoned.

remanded the case to the trial court, with directions to dismiss those two charges. *Id.*, 2014 Ark. 172, at 13, 433 S.W.3d at 243.[5]

The Arkansas Supreme Court did *not* address Conley's severance argument, which it construed as "solely directed to the possession offenses . . . Because we have already found counsel's performance deficient with regard to those convictions [for possessing marijuana and drug paraphernalia], and because those charges are to be dismissed, we need not address this claim [that the trial court erred in not granting his motion to sever the delivery of cocaine charge from the possession charges that arose over one month later, during an unrelated search of his residence.]" *Id.*, 2014 Ark. 172, at 12-13, 433 S.W.3d at 243.[6]

For unknown reasons, after remand, the trial court waited *sixteen months* before entering an order dismissing the possession of marijuana and possession of drug paraphernalia charges. *Doc. 12-2 at 1.*[7]

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[5] As a result of this ruling, Conley's only surviving sentences were the 60-year sentence for delivery of cocaine and the 7-year sentence for violating the conditions of a suspended sentence imposed in an earlier case.

[6] In other words, the Court reasoned that its ruling dismissing the marijuana and drug paraphernalia charges "mooted" Conley's severance argument that his trial counsel should have moved to sever the possession of marijuana and drug paraphernalia charges from the delivery of cocaine charge.

[7] Because it was ordered to dismiss both possession charges, the trial court should have vacated the sentences on those charges and entered an Amended Judgment. For unknown reasons, the trial court never entered an Amended Judgment.

C. Conley's § 2254 Habeas Action

On March 19, 2015, Conley initiated this § 2254 habeas action, challenging the constitutionality of his conviction for delivery of cocaine. *Doc. 2.* In his habeas Petition, he asserts the following claims:

Claim 1 The evidence presented at trial was constitutionally insufficient to support his conviction for delivery of cocaine. *Id. at 17-20.*

Claim 2 His trial counsel provided constitutionally ineffective assistance by failing to make a proper motion for directed verdict based on the insufficiency of the evidence supporting the delivery of cocaine charge. *Id. at 3-8.*

Claim 3 By calling him a "drug dealer," during the sentencing phase of his trial, the prosecutor engaged in prosecutorial misconduct, which the trial court failed to address or correct with a curative jury instruction, all of which deprived Conley of a fair trial. *Id. at 8-10.*

Claim 4 His trial counsel provided constitutionally ineffective assistance by failing to adequately advise Conley about potential future plea negotiations and then failing to inform him of a possible plea offer so that he could make an informed decision on that issue. *Id. at 28-32.*

Claim 5 His trial counsel provided constitutionally ineffective assistance by failing to move to sever the delivery of cocaine charge from the possession of marijuana and drug paraphernalia charges. *Id. at 10-13.*

On May 12, 2015, Respondent filed a Response arguing that all of Conley's habeas claims should be dismissed because they are: (1) time-barred and/or procedurally defaulted; and (2) without merit, because they were reasonably

adjudicated in the state courts. *Doc. 8.* On June 10, 2015, Conley filed his Reply. *Doc. 10.*

On November 25, 2015, attorney J. Thomas Sullivan filed a Motion requesting to be appointed counsel for Conley. In this Motion, Mr. Sullivan asserted that at least one of Conley's ineffective assistance of counsel claims was "potentially meritorious" and justified the appointment of counsel. *Doc. 16.* On January 12, 2016, the Court granted the Motion and appointed Mr. Sullivan to represent Conley. *Doc. 18.*

On July 6, 2016, Mr. Sullivan filed a Motion to Hold Federal Habeas Petition in Abeyance so that Conley could return to state court to fully exhaust the still available remedies related to Claim 5. *Doc. 31.*[8] On February 1, 2017, I entered an Order staying all proceedings in this case until the conclusion of the state court proceeding that Mr. Sullivan intended to initiate. *Doc. 34.*

Respondent appealed my decision to stay to United States District Judge J. Leon Holmes. *Doc. 35.* On March 8, 2017, Judge Holmes entered an Order agreeing with my decision, and all proceedings in this case were stayed so that Conley could

[8] According to Conley: (1) his ineffective assistance of counsel claim raised in Claim 5 still had not been "actually litigated to finality" in *Conley II* because the Arkansas Supreme Court misconstrued the claim as being "solely directed to the possession [of marijuana and drug paraphernalia] offenses"; (2) the Arkansas Supreme Court failed to address how its decision to dismiss the possession convictions impacted his conviction and sentence for delivery of cocaine; and (3) the trial court failed to enter an Amended Judgment, after *Conley II*, to reflect that Conley's only remaining conviction and sentence was for the delivery of cocaine. *Doc. 31.*

return to state court to pursue the state court remedies that were still available to him in connection with Claim 5. *Doc. 41.*

D. Conley Returns To The Arkansas Supreme Court And Files A Motion To Recall Mandate

On April 7, 2017, Conley filed a Motion requesting the Court to recall the Mandate in *Conley II* and allow him to file an out-of-time petition for rehearing. In support of that relief, Conley cited the Arkansas Supreme Court's failure to address how the dismissal of the possession convictions and sentences (which together totaled 35 years) affected the constitutionality of the jury's simultaneous decision to convict and sentence him to 60 years on the delivery of cocaine charge; especially in light of his trial counsel's failure to move to sever the far more serious delivery of cocaine charge from the possession of marijuana and drug paraphernalia charges. *Doc. 42.*

On April 27, 2017, the Arkansas Supreme Court summarily denied Conley's Motion to Recall Mandate. *See Conley v. State,* Ark. S. Ct. No. CR-13-21 (April 27, 2017); *Doc. 43.*[9]

[9] *See* Conley's post-stay state court filings online at https://caseinfo.arcourts.gov.

E. Conley's State Court Habeas Actions

On May 22, 2017, Conley filed a habeas petition in Jefferson County Circuit Court, the county of his incarceration. *Conley v. Kelley*, Jefferson County Cir. Ct. No. 35-CV-17-349. After his Petition was denied by the trial court and, while his appeal was pending before the Arkansas Supreme Court, Conley was transferred to an ADC facility in Lincoln County. On December 14, 2017, the Arkansas Supreme Court dismissed the appeal because the Jefferson County Circuit Court no longer had jurisdiction over the case. *Conley v. Kelley*, Ark. S. Ct. No. CV-17-700 (December 14, 2017).

On January 26, 2018, Conley filed a habeas petition in Lincoln County. *Conley v. Kelley*, Lincoln County Cir. Ct. No. 40CV-18-15. Among other things, Conley argued that, in sentencing him to 60 years for delivery of cocaine, the jury considered the highly prejudicial evidence of his possession of marijuana and drug paraphernalia. Because the Arkansas Supreme Court later held in *Conley II* that both of those charges should have been dismissed by the trial court, on directed verdicts, Conley argued his constitutional rights had been violated.[10] *Conley II*, 2014 Ark. at 11-12, 433 S.W.3d at 242-243.

[10] Specifically, Conley argued that it violated his right to due process under the Fourteenth Amendment for the Arkansas Supreme Court in *Conley II* not to also order that he be resentenced by a new jury that set his punishment *based solely on evidence of his conviction for delivery of cocaine.*

On May 8, 2018, the Lincoln County Circuit Court dismissed Conley's habeas petition, and he appealed. *Id.*

On January 31, 2019, the Arkansas Supreme Court affirmed. *Conley v. Kelley*, 2019 Ark. 23, 566 S.W.3d 116 (2019) ("*Conley III*"). According to the Court, because his sentences for the possession of marijuana and possession of drug paraphernalia convictions had been dismissed in *Conley II*, Conley's severance argument was moot. The Court summarily disposed of his constitutional challenge to the sixty-year sentence he received for the sale of $100 worth of crack cocaine by reasoning that as long as his sentence was within "the appropriate statutory range" it could not be unconstitutional.[11] *Id.*

Finally, the Court acknowledged that, in *Conley II*, it neither ordered the trial court to hold a new sentencing hearing on Conley's contemporaneous conviction for delivery of cocaine, nor directed the trial court to enter an amended judgment and commitment order. However, because Conley did *not* file a timely petition for rehearing raising those alleged errors, it was too late for him to revive those issues in a state habeas action. *Id.*

In a blistering dissent, Justice Josephine Hart saw things quite differently. She left "for another day a broad discussion of the dubious authority for the Arkansas

[11] Under Ark. Code Ann. § 5-4-501 (effective July 31, 2009 to July 26, 2011), the statutory range for delivery of cocaine, a class Y felony, for a defendant like Conley with more than four prior felonies, was 10 years to life.

Supreme Court's diminution of the writ of habeas corpus," but did note that it was "simply Orwellian [for the majority] to suggest that Mr. Conley's existing judgment and conviction is not 'facially invalid.'" *Conley III*, 2019 Ark. at 12, 566 S.W.3d at 123-124 (Hart, J., dissenting).

After reflecting on the "limited" relief the Court ordered in *Conley II*, Justice Hart concluded that:

> [T]he relief we granted in the Rule 37 case was unjust and wrong. While it may have been tempting to "split the baby," our disposition completely ignored the dynamics and realities of a trial. Simply dismissing the paraphernalia and marijuana counts was unjust to both the State and to Mr. Conley. The grant of a new trial was the proper remedy.

Id. at 13, 566 S.W.3d at 123.

Justice Hart also found the Court's decision in *Conley II* "unjust" because:

> [w]hile he did get his ninety-year sentence reduced to sixty years, it does not diminish the fact that he nonetheless received a 60-year sentence for selling $ 100 worth of narcotics that was based at least in part on the jury's consideration of evidence of crimes that this court later dismissed. The former is a violation of the Eighth Amendment and the latter a violation of due process.

Id. at 14, 566 S.W.3d at 124. Finally, in Judge Hart's view, Conley "is also wrongly imprisoned on a sentence so disproportionate as to violate the Eighth Amendment." *Id.* at 15, 566 S.W.3d at 124.

F. Conley Appeals the Arkansas Supreme Court Decision in *Conley III* to the United States Supreme Court

On May 1, 2019, Conley filed a Petition for Writ of Certiorari in the Supreme Court of the United States challenging the Arkansas Supreme Court's decision in *Conley III*. *Conley v. Kelley*, 566 S.W.3d 116 (Ark. 2019), petition for cert. filed, No. 18-9189 (U.S. May 1, 2019). The Petition made a forceful and compelling argument that Conley's due process rights were violated when the Arkansas Supreme Court allowed his sixty-year sentence for a selling $100 worth of crack cocaine to stand, even though it specifically found that the jury should not have heard any evidence of his possession of marijuana and drug paraphernalia because both of those charges should not have survived a motion for directed verdict.

On June 5, 2019, Respondent filed a Waiver declining to file a Response to Conley's Petition unless the Court requested one.

On October 7, 2019, the United States Supreme Court denied Conley's Petition for Certiorari. *Conley v. Kelley*, No. 18-9189, 2019 WL 4921820 (U.S. October 7, 2019). Thus, all constitutional claims related to Conley's conviction and sixty-year sentence for delivering cocaine have been fully and finally adjudicated and are now *res judicata*.

II. Discussion

For the reasons explained below, the Court concludes that all five of the habeas claims Conley raises in this action should be dismissed, with prejudice,

because each of them is either procedurally defaulted[12] or fails on the merit, after having been reasonably adjudicated in state court.[13]

A. Conley's Sufficiency Of The Evidence Claims (Claims 1 and 2)

Conley argues that the evidence presented at his trial was insufficient to support his conviction for delivery of cocaine (*Doc. 2 at 18-23*), and that his trial attorney provided ineffective assistance of counsel by failing to make a motion for directed verdict preserving this error for appeal (*Doc. 2 at 32-35*). Respondent argues that Conley procedurally defaulted the trial error claim when his attorney failed to raise it during Conley's trial, and then procedurally defaulted the ineffective assistance of counsel claim during the Rule 37 proceeding.[14] *Doc. 8 at 6-7, 11-12.*

A petitioner must "fairly present" his claims in state court before seeking § 2254 habeas relief in federal court. *Murphy v. King*, 652 F.3d 845, 848-49 (8th Cir.

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[12] The Court declines to reach Respondent's statute of limitations argument, which is complicated by the state trial court's sixteen-month delay in complying with the Arkansas Supreme Court's mandate to dismiss the two possession charges.

[13] On March 4, 2019, Conley filed a Supplemental Brief to address the impact of all post-stay state court proceedings. *Doc. 61.* On April 16, 2019, Respondent filed a Response to the Supplemental Brief. *Doc. 64.* On June 3, 2019, Conley filed a Reply in support of his Supplemental Brief. *Doc. 66.* Thus, all of the issues are now fully joined.

[14] While Conley's initial Rule 37 Petition, filed *pro se*, arguably raised this claim, his Amended Rule 37 Petition, filed by counsel, abandoned the claim at the trial court level:

> [P]etitioner cannot argue in good faith that the delivery charge would have resulted in a different verdict . . . it seems clear that there was more than ample evidence presented to find petitioner guilty of the charge of Delivery of Cocaine.

Doc. 8-12 at 6.

2011); 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State"); *Perry v. Kemna*, 356 F.3d 880, 886 (8th Cir. 2004) ("To avoid a procedural default, a habeas petitioner must present the same facts and legal theories to the state court that he later presents to the federal courts.") (internal quotation and citation omitted); *Miller v. Lock*, 108 F.3d 868, 871 (8th Cir. 1997) ("[B]oth the factual grounds and legal theories on which the claim is based must have been presented to the highest state court in order to preserve the claim for federal review."). By exhausting all available state court remedies, a habeas petitioner gives the State that convicted him an "opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam) (internal quotations omitted).

When a petitioner fails to fully exhaust his claims in state court and the time for doing so has expired, his claims are procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). Thereafter, a federal habeas court cannot consider the claim unless the prisoner can demonstrate "cause" for the default and "actual prejudice" as a result of the alleged violation of federal law, or demonstrate

that failure to consider his claim will result in a "fundamental miscarriage of justice."[15] *Id.* at 750.

Ineffective assistance of counsel can be "cause" excusing a procedurally defaulted trial error claim. However, a claim of ineffective assistance must be presented to the state courts as an independent claim *before* it can be used to establish cause for a procedurally defaulted trial error claim. *Williams v. Kemna*, 311 F.3d 895, 897 (8th Cir. 2002) (citing *Murray v. Carrier*, 477 U.S. 478, 481-81 (1986)). Ineffective assistance of counsel during state postconviction proceedings can also, in limited circumstances, constitute cause to excuse the default of "substantial" ineffective assistance of trial error claims that were not raised in the postconviction proceeding. *Martinez v. Ryan*, 566 U.S. 1, 17 (2012).[16]

Conley argues "cause" exists to excuse his procedural default based on both his trial and his postconviction attorneys' ineffective assistance. *Doc. 10 at 23; Doc.*

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[15] Conley also argues that his "actual innocence" excuses his procedural default of Claims 1 through 4. However, because he fails to present *any* new reliable evidence of his innocence, there is nothing to support a finding that his conviction constituted a "fundamental miscarriage of justice." The law is clear that, "[w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Schlup v. Delo*, 513 U.S. 298, 316 (1995); *see Nooner v. Hobbs*, 689 F.3d 921, 937 (8th Cir. 2012) (when habeas petitioner fails to present new, reliable evidence of innocence, "it is unnecessary to conduct a further *Schlup* analysis").

[16] Under *Martinez* and its progeny, cause may exist to excuse an otherwise defaulted ineffective assistance of trial counsel claim, if the claim is deemed substantial, such that post-conviction counsel (or petitioner, if he had no counsel) was ineffective in not raising it when seeking postconviction review. *Martinez*, 566 U.S. at 9; *see also Trevino v. Thaler*, 133 S.Ct. 1911 (2013) and *Sasser v. Hobbs,* 735 F.3d 833 (8th Cir. 2013).

2 at 34-35. Martinez's equitable exception does *not* apply to procedurally defaulted claims of trial error. *Dansby v. Hobbs*, 766 F.3d 809, 833-34 (8th Cir. 2014) (declining to extend *Martinez* to claims of trial error or ineffective assistance of direct appeal counsel). Thus, *Martinez* has no application to Claim 1. The Court assumes that *Martinez* applies to Claim 2, since the claim was not litigated at the trial court level of the Rule 37 proceeding.[17]

To save Claim 2 from procedural default, Conley must establish that the claim is substantial, that is, it has "some merit." *Martinez*, 566 U.S. at 14. This requires Conley to make a preliminary showing under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), requiring proof that: (1) his counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced Conley's defense.[18] *See Camacho v. Kelley*, 888 F.3d 389, 394, n. 3 (8th Cir. 2018) (observing that a *Martinez* procedural default analysis and a merits analysis each require application of the *Strickland* ineffective assistance standard).

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[17] The Court will consider the circumstances of the withdrawal of the claim from the trial court's consideration as bearing solely upon the claim's merit, or lack thereof, although it could be argued that the fact that the claim was initially presented and then consciously omitted from Conley's Rule 37 papers means that *Martinez* should not apply.

[18] "Failure to establish either *Strickland* prong is fatal to an ineffective-assistance claim." *Worthington v. Roper*, 631 F.3d 487, 498 (8th Cir. 2011). Similarly, Conley is required to make a "substantial" showing with respect to both the performance and prejudice prongs of the *Strickland* standard in order to avoid procedural default and obtain a merits review of Claim 2.

To establish *Strickland* prejudice, Conley must show that there is a "reasonable probability" that, but for his trial counsel's error in failing to properly move for a directed verdict on the delivery of crack cocaine charge, the result of the proceeding would have been different. *Strickland*, 466 U.S. 668 at 687-688, 694 (1984). A "reasonable probability" is one that undermines confidence in the outcome of the proceeding. *Id.* at 694.

Evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Coleman v. Johnson*, 566 U.S. 650, 654 (2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The case against Conley for the delivery of cocaine was *not* a close one. Based on the trial evidence, summarized below, "there was more than ample evidence presented to find petitioner guilty of the charge of Delivery of Cocaine[.]" This was the *stated reason* why Conley's counsel in filing an Amended Rule 37 Petition indicated that he, in good faith, could *not* assert the argument that Conley's trial counsel was constitutionally ineffective for failing to move for a directed verdict on the delivery of cocaine charge due to the purported insufficiency of the evidence supporting that charge. *Doc. 8-12 at 6.*

While this admission alone is arguably sufficient to support Claim 2's lack of substance, the Court will continue its *Martinez* analysis and discuss the evidence that supported the delivery conviction.[19]

On September 14, 2009, Fayetteville Police Officer Jason French received intelligence that Vernell Conley was selling crack cocaine in Washington County. Trial Testimony of Officer French, *Doc. 15 at 112, 114* (conventionally filed and maintained in the Clerk's office file). Officer French assembled the local drug task force and arranged a "controlled buy," in which two undercover detectives, Adam Howard and Andy Lee, would attempt to purchase crack cocaine from Conley. *Id. at 114.*[20]

Shortly after 8:00 p.m., on September 15, 2009, Howard and Lee met Conley at a park. *Id. at 116, 131-132.* Upon arrival, Howard exited his vehicle and walked over to the driver's side of Conley's car and handed Conley $100 in exchange for three rocks of crack cocaine.[21] *Id. at 139.*

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[19] The discussion is also relevant to the Court's merits resolution of Claim 5.

[20] The three officers each had participated in more than one hundred drug investigations before the controlled buy from Conley. *Doc. 15 at 113-114, 130, 147.*

[21] A forensic chemist testified that the substance provided for testing was ".5813 grams cocaine based with lidocaine and levamisole." *Doc. 15 at 168, 247.* She further explained that the weight of one gram initially reported by the field officers was due to them weighing it with the bag. *Id. at 169.*

Howard recognized Conley's voice from two earlier telephone conversations and his face from a photograph provided prior to the transaction. *Id. at 132, 239-240.* Howard wore an audio recording device during the transaction. *Id. at 133.* The audio recording was played in court. *Id. at 136.*[22] Although Lee did not exit the front passenger seat of the vehicle during the transaction, he witnessed the transaction from only a few feet away. *Id. at 140.* Both Howard and Lee identified Conley at trial as the individual who sold Howard the crack cocaine. *Id. at 140, 149-151.*

After the transaction, the officers providing backup for the controlled buy followed Conley's red Ford Focus back to his residence. *Id. at 119.* Officer French also drove by the residence about an hour and a half after the transaction and saw the red Ford Focus in the driveway. *Id. at 121-122.*

Conley argues that the officers' testimony is insufficient to sustain his conviction because: (1) it was dark and misting rain at the time of the transaction; (2) neither Howard nor Lee could provide a specific make and model of Conley's vehicle following the transaction; (3) neither Howard nor Lee could recall what particular clothes Conley was wearing during the transaction; (4) the audio recording was mostly inaudible and contained "absolutely no references to drugs or any illicit

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[22] The transcript of the audio is attached to the trial transcript. *Doc. 15 at 236-240.*

or illegal activity"; and (5) the cocaine purchased by the undercover officer was not a "usable amount." *Doc. 2 at 19-21, 34.*

Based on this evidence, a rational juror could have found the essential elements necessary to convict Conley of delivery of cocaine, beyond a reasonable doubt.[23] First, Conley's counsel adequately cross-examined the officers about the reduced visibility due to darkness and weather conditions. Both officers testified that, despite the weather, they were able to get a clear look at Conley's face during the transaction.[24] Second, while neither Howard nor Lee was able to report the

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[23] Under Arkansas law, "delivery" is defined as the "actual, constructive, or attempted transfer from one (1) person to another of a controlled substance . . . in exchange for money or anything of value." Ark. Code Ann. § 5-64-101(7) (Supp. 2009).

[24] The testimony of Howard and Lee leave little room for argument on the point:

> Prosecutor: You actually saw the person who sold you the drugs on the telephone with?
> Howard: That is correct.
> Prosecutor: Do you see the person who sold you the drugs in the courtroom today?
> Howard: I do.
> . . .
> Prosecutor: Detective Howard, is there any doubt in your mind at all that the Defendant sitting behind me is not the man who you bought crack cocaine from that day?
> Howard: Absolutely not.

Doc. 15 at 132-133, 140.

> Prosecutor: About how close did you get to the Defendant during this buy?
> Lee: He, when he pulled up he parked right next to us. I rolled my window down.
> . . .
> Prosecutor: Did you see the actual drug transaction take place?
> Lee: I did.
> . . .
> Prosecutor: Did you get a good look at his face?

specific make and model of Conley's car, their descriptions of the vehicle were consistent with the red Ford Focus identified by Officer French and the backup officers on the scene.[25] Third, it is neither surprising nor relevant that Howard and Lee could not recall the specific clothing Conley wore to the transaction given the testimony that Conley never exited his vehicle during the transaction. Fourth, while the recording did not capture any overt references to illegal activity, the recording provided strong circumstantial evidence to support the jury's finding that the transaction occurred.[26]

Lee: It was right – yes sir; he was face to face with me.

Id. at 148-149, 151.

[25] Officer Howard described Conley's vehicle as a red passenger vehicle while Officer Lee described it as either a maroon or red passenger car. *Doc. 15 at 143-144, 150.*

[26] The following exchange was played for the jury during Officer Howard's direct examination:

Conley: What up man? From Bentonville?
Howard: You down here?
Conley: Huh?
Howard: How much, one bill is all you got?
(*Officer Howard testified one bill meant one hundred dollars, which was worth one gram of cocaine.*)
Conley: You'all ain't in no trickery is it?
(*Officer Howard testified that, at this point, he exited his car, raised his shirt, and turned around so Conley could see he was not wearing a body wire or carrying a gun.*)
That's what I like to see right there.
Howard: Man I'm straight up I ain't fucking around man I ain't trying to get caught up and I ain't trying to get you caught up.
Conley: Hit me up, hit me up later on man I have the weight for you.
(*Officer Howard testified that he was attempting to buy an eight ball of crack, or 3.5 grams, but at the time Conley only had a gram to sell.*)

Finally, whether the three rocks of cocaine that Conley sold to Officer Howard constituted a "usable amount" is *not* relevant to the *delivery* of cocaine. *See Ficklin v. State*, 104 Ark. App. 133, 137, 289 S.W.3d 481, 483–84 (2008) (citing *Gregory v. State*, 37 Ark. App. 135, 137, 825 S.W.2d 269, 270 (1992). The "usable amount" doctrine only arises in possession cases and is imposed as a requirement to prevent prosecutions for the *possession* of trace amounts of a controlled substance the accused may not even know is on his person or within his control. *Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990).[27]

Thus, Conley has failed to make any showing that, *if* his trial counsel had properly challenged the sufficiency of the evidence to support Conley's delivery of crack cocaine, that motion would have been granted and the charge would have been

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Howard: How much later? Cause I, I mean if it's going about an hour I'll just kick it down here.
Conley: Yeah kick it down hear (inaudible) about an hour or two.

. . .

Howard: How much on a ball?
Conley: Two dollars.
(*Officer Howard testified that two dollars meant two hundred for the next 2.5 grams of crack.*)

Doc. 15 at 136-140, 239.

[27] Here, the crack cocaine that Conley possessed *and* delivered weighed .5813 grams. Even in cases in which a defendant is charged only with possession of a controlled substance, Arkansas courts have found as little as .01 grams of crack cocaine to constitute a "usable amount." *Terrell v. State*, 35 Ark. App. 185, 186, 818 S.W.2d 579, 580 (1991); *Wells v. State*, 2017 Ark. App. 174, 4, 518 S.W.3d 106, 109-10 (2017).

dismissed. Accordingly, Conley cannot rely on *Martinez* to save Claim 2 from procedural default.

The Court recommends dismissing, with prejudice, Claims 1 and 2, as procedurally defaulted.

B. Trial Court's Alleged Error In Allowing Prosecutorial Misconduct (Claim 3)

During the sentencing phase of his trial, the prosecutor referred to Conley as a "drug dealer," and the trial court did not instruct the jury to disregard that remark. According to Conley, this alleged error deprived him of a fair trial. *Doc. 2 at 23-25.* Respondent argues that Conley procedurally defaulted this claim because his attorney failed to obtain a ruling on his objection to the prosecutor's remark, which precluded review of the issue on direct appeal. *Doc. 8 at 7-8.*

As "cause" to excuse his procedural default, Conley blames his trial counsel for this error, which he claims constituted ineffective assistance of counsel. *Doc. 10 at 27.* Regardless of whether "cause" exists, Conley cannot show he was actually "prejudiced" by the prosecutor referring to him as a "drug dealer." *See Roper*, 631 F.3d at 498.

During the sentencing phase of trial, Conley's wife, Monica Conley, testified on direct examination that her husband cared for their four-year-old child throughout the day, cooked dinners, did housework, and generally handled the "stay-at-home day to day" operation of the home. *Doc. 15 at 214-215.*

On cross-examination, the prosecutor questioned her about Conley being a "drug dealer":

Prosecutor:	Mrs. Conley, your husband is a drug dealer.
Mr. Warren:	Objection, your Honor. That's argumentative.
Prosecutor:	It's a fact.
Court:	Well, let's just move forward.
Prosecutor:	As a drug dealer he makes money?
Ms. Conley:	I'm unaware of the money . . . I pay all the bills . . . there was no extra money coming into the house.

Id. at 215.

Importantly, the prosecutor only referred to Conley as a "drug dealer" *after*: (1) the jury had returned its verdict finding him guilty of dealing drugs (*Doc. 15 at 202-204*); (2) the prosecutor had introduced evidence of Conley's twelve prior felony convictions, *including eight for the delivery of cocaine* (*Id. at 204-208, 249-275*); (3) Conley's former parole officer testified that, in his opinion, Conley was a "career drug dealer" and that he had never seen an offender with so many prior felony convictions for delivery of crack cocaine (*Id. at 212*); and (4) the jury had been instructed by the trial court that statements by the prosecutor or defense counsel were "*not evidence*" and should be "disregarded" if they were not supported by the

evidence (*Id. at 177*). Finally, Conley concedes, in his § 2254 habeas papers, that "his history as a convicted drug dealer was not contested." *Doc. 10 at 26.*

Under these circumstances, the prosecutor's characterization of Conley as a "drug dealer," during the sentencing phase of his trial, had a sound basis in fact, which was borne out by overwhelming evidence of his long-time drug dealing. Accordingly, the prosecutor referring to Conley as a "drug dealer" did not violate Conley's due process rights or result in any "unfair" prejudice during the sentencing phase of his trial. *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (prosecutorial misconduct amounts to a constitutional violation only if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process"); *James v. Bowersox*, 187 F.3d 866, 870 (8th Cir. 1999) (no due process violation based on prosecutor's statement that defendant was "a big time, drug dealing, murdering, robbing slime"). Thus, Conley has not shown a reasonable probability that, if his trial counsel had properly raised and preserved this claim, the outcome of Conley's trial would have been different.

Accordingly, because Conley procedurally defaulted Claim 3, it should be dismissed, with prejudice.

C. Trial Counsel's Alleged Ineffectiveness In Failing To Adequately Discuss With Conley a Plea Offer Made By The Prosecutor And Then Failing to Tell Conley About A Later Plea Offer (Claim 4)

Conley argues that his trial counsel failed to adequately advise him about a plea offer made by the state so that he could make an "informed decision" and then failed to inform Conley of a possible later plea offer. *Doc. 2 at 28-32.*

Respondent argues that this claim is procedurally defaulted because, even though Conley raised it in his Amended Rule 37 Petition, he did not renew it when he appealed the denial of Rule 37 relief to the Arkansas Supreme Court. *Doc. 8 at 11.*

According to Conley, his procedural default of this claim in his Rule 37 appeal to the Arkansas Supreme Court should be excused because it was the fault of the attorney who handled *his appeal.* In *Martinez v. Ryan*, 566 U.S. 1, 16 (2012), the Court held that, if a procedural default occurs due to mistakes made by counsel during the equivalent of a Rule 37 appeal, a claim of ineffective assistance of counsel does *not* constitute cause to excuse the procedural default. *Accord Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012) (*Martinez* provides "no support . . . for the contention that the failure to preserve claims on appeal from a postconviction proceeding can constitute cause.").

Accordingly, because Conley procedurally defaulted Claim 4, it should be dismissed, with prejudice.

D. Trial Counsel's Alleged Ineffectiveness In Failing To Move To Sever The Delivery Of Cocaine Charge From The Possession of Marijuana And Drug Paraphernalia Charges (Claim 5)

Conley argues that his trial counsel provided constitutionally ineffective assistance by not moving to sever the delivery charge from the possession charges. *Doc. 2 at 25-28.* According to Respondent, this claim must be dismissed because it was reasonably adjudicated by the trial court during the Rule 37 proceeding.[28] *Doc. 16-21.*

To prevail on this ineffective assistance of counsel claim, Conley must prove both that his attorney was constitutionally ineffective *and* the deficient performance by his attorney resulted in prejudice. *Strickland*, 466 U.S. 668 at 687-688, 694. Conley seemingly "presumes" that his trial attorney's failure to move to sever those charges constitutes constitutionally ineffective assistance of counsel; thereby satisfying the first prong of *Strickland.* Accordingly, he focuses his initial argument on explaining why he has satisfied *Strickland*'s prejudice prong.

Alternatively, Conley argues that his trial counsel's failure to move for severance amounted to a "structural error" for which prejudice should be presumed

[28] As previously explained, in *Conley II*, the Arkansas Supreme Court declined to address the merits of this claim because its dismissal of the two possession charges "mooted" Conley's argument that his trial counsel was constitutionally ineffective in failing to move to sever the delivery charge from the possession charges. *Conley II*, at *12-13, 433 S.W.3d at 243.

because his right to severance was "absolute" and "integral to the jury trial right." *Doc. 21 at 26, 37-39*; *Doc. 61 at 36, 40.*

In making both of these arguments, Conley ignores the Court's holding in *Flowers v. Norris*, 585 F.3d 413, 417 (8th Cir. 2009), and *Nalls v. Kelley*, No. 5:15-cv-193-DPM, 2017 WL 2198380, at *1 (E.D. Ark. May 18, 2017). Together, those two cases make it clear that the trial counsel's decision to forego moving to sever criminal charges cannot be "presumed" to constitute ineffective assistance of counsel, nor is such a decision "presumptively" prejudicial.

1. A Doubly Deferential Standard Applies In Analyzing Claim 5

While the *Strickland* standard is deferential, in and of itself, federal habeas review is "doubly deferential" when a state court has made a final adjudication of a habeas petitioner's ineffective-assistance claims.[29] *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (stating that the "pivotal question is whether the state court's application of the *Strickland* standard was unreasonable," which "is different from

[29] Where a state court has previously adjudicated a claim on the merits, a federal habeas court may grant habeas relief, on the adjudicated claim, in only three limited situations: the state court adjudication (1) was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); (2) "involved an unreasonable application" of clearly established federal law, *id.*; or (3) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

asking whether defense counsel's performance fell below *Strickland*'s standard"). Meeting this high bar is always a daunting task for a habeas litigant.

The trial court held that: (1) Conley had failed to show his trial counsel's performance "fell below an objective standard of reasonableness;" *and* (2) even if the performance of his trial counsel was deficient, Conley had failed to show he was "prejudiced."[30] *Doc. 8-13 at 2-3.*

Conley now argues that the trial court did *not* rule on the "performance prong" of *Strickland* because its order denying Rule 37 relief stated only that "he suffered [no] prejudice as a result of [his trial counsel's] *failure* to seek a severance." *Doc. 61 at 56* (emphasis added). Read in context, the court's use of the word "failure," does not support Conley's assertion that Rule 37 relief was denied only under the "prejudice" prong of *Strickland* - not the performance or cause prong. After all, the court's order *explicitly stated* that: (1) Conley "failed to show that counsel's performance was deficient and fell below an objective standard of reasonableness [the "cause" prong of *Strickland*];" and (2) Conley's "[trial counsel's] performance

[30] While the trial court's order did not specifically cite *Strickland*, it was *not* required to do so: "[A] state court need not cite or even be aware of [*Strickland*] under § 2254(d)." *Harrington*, 562 U.S. at 98. "Under § 2254(d), a habeas court must determine what arguments or theories supported . . . the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holdings in a prior decision of this Court." *Id.* at 102. "[T]he only question that matters under § 2254(d)(1)" is "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.*

did not fall below an objective standard of reasonableness [another specific finding related to the "cause" prong of *Strickland*]." *Doc. 8-13 at 3.*[31]

2. Conley's Trial Counsel Made A Strategic Decision Not To Move To Sever The Delivery of Cocaine Charge From The Possession Charges

Conley argues that the trial court's decision is not entitled to deference under § 2254(d) because "there was no reasonable advantage [to Conley] in proceeding to trial on all counts[.]" *Doc. 30 at 39-40.* According to Conley, because the delivery charge was not tried separately from the possession charges, the jury was allowed to aggregate unrelated drug charges to support one another, leading the jury to impose a sixty-year sentence for Conley's sale of $100 worth of cocaine to an undercover police officer. Conley contends that, if the charges been severed for trial, there is a reasonable probability that both the verdict and sentence on the delivery charge would have been different. *Doc. 21 at 27-32.*

The facts supporting Conley's convictions on the less serious "possession charges" are as follows. On November 6, 2009, almost two months *after* Conley sold cocaine to Officer Howard, Officer French arrested Conley outside his home

[31] Conley also argues the trial court's decision is not entitled to deference under § 2254(d) because it applied a prejudice test contrary to the one set out in *Strickland. Doc. 61 at 57.* The final paragraph of the trial court order denying Rule 37 relief states that Conley "has failed to show there is a reasonable probability that absent any errors allegedly made by his trial counsel, a different *and more favorable result* would have occurred." *Doc. 8-13 at 3* (emphasis added). While the trial court misstated the *Strickland* prejudice standard by adding the phrase "and more favorable," this lack of precision in no way undermines its holding that Conley's counsel's performance was *not* "constitutionally deficient."

and then executed a search warrant.[32] *Doc. 15 at 122-123.* During the search of Conley's home, Springdale Police Officer Justin Ingram discovered 32.5 grams of marijuana and a digital scale in the laundry room.[33] Testimony of Officer Ingram, *Id. at 163.*

Respondent *concedes* that, if Conley's trial counsel had moved for a severance, Conley would have been entitled to have the delivery of cocaine charge tried separately from the possession of marijuana and drug paraphernalia charges.[34] *Doc. 25 at 18.* However, that does *not* end the inquiry into whether Conley's counsel's decision not to move to sever those charges constituted ineffective assistance of counsel. If the facts and circumstances suggest that defense counsel's decision not to seek a severance was based on *trial strategy*, a reviewing court will not second guess that tactical decision. *See Flowers*, 585 F.3d at 417 (8th Cir. 2009); *Nalls*, 2017 WL 2198380, at *1.[35]

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[32] It is not clear from the record why almost two months passed from the controlled buy to Conley's arrest and the execution of the search warrant on his home.

[33] In *Conley II*, the Court held that this evidence did *not* demonstrate Conley, either actually or constructively, possessed the contraband because: (a) he was not inside the residence at the time the search began; (b) he was not the sole occupant of the residence; and (c) the contraband was discovered out of plain view. *Conley II*, 2014 Ark. 172, at 9-12, 433 S.W.3d at 241-243.

[34] Under Arkansas law, whenever two or more offenses have been joined for trial, solely on the ground that they are of the same or similar character, and they are *not* part of a single scheme or plan – as is the case here – *the defendant has the right to a severance of the offenses.* Ark. R. Crim. P. 22.2.

[35] In *Nalls*, the petitioner was charged with four counts of delivery of cocaine on January 25, 2011, January 27, 2011, February 1, 2011, and February 14, 2011. *See Nalls v. Kelley*, 2016

At Conley's Rule 37 evidentiary hearing, his trial counsel testified that his decision not to seek to sever the possession charges from the delivery charge was based on trial strategy:

> Q. Mr. Warren, why didn't you move to sever [the possession charges] from the separate Delivery of Cocaine charge alleged in Count 1?
>
> A. I did not move to sever that because it was a trial strategy in that I did not want my client at the time to face multiple juries as a super habitual offender and there was always the possibility that either way the convictions could be run consecutively and not concurrently.

WL 8996949, at 7-8. The jury heard testimony on all counts but convicted Nalls on only the February 14, 2011 count. *Id.*

In his habeas petition, Nalls argued he was entitled to severance of the other counts, from the count for which he was ultimately convicted, and that his counsel was constitutionally ineffective for failing to file a motion to sever those counts. During an evidentiary hearing to develop the facts related to Nalls' severance argument, his trial counsel testified that she never discussed filing a motion to sever with Nalls. Instead, she *unilaterally decided* not to file a motion as part of her trial strategy to prevent the State from stacking client's sentences should he be found guilty. *Id.*

In his order dismissing Nalls's habeas Petition, Chief United States District Judge D. Price Marshall discussed the heavy deference that *Strickland* gives to the tactical decisions of trial counsel:

> Nalls makes a hard run at trial counsel's reasons for not seeking a severance . . . but *Strickland v. Washington*, 466 U.S. 668, 687 (1984) requires much deference to counsel's choice. Avoiding the greater uncertainty, especially in the potential total sentence, that would have come with two juries instead of one was a reasonable strategic decision in the circumstances. . . . And though hindsight shows this didn't result in total victory, the Court can't consider that circumstance against Nalls's lawyer. *Strickland*, 466 U.S. at 689.

Nalls v. Kelley, No. 5:15-CV-193-DPM, 2017 WL 2198380, at 1.

Q. So it's your understanding that the Judge, if we had one trial, two trials, three trials, could have run these consecutively if he wanted to?

A. Yes.

Q. What ended up happening to the Possession of a Controlled Substance Marijuana charge in relation to the other two charges?

A. It was run concurrently.[36]

Q. Now, did you talk about the severance issue with your client?

A. Yes.

Q. What was his opinion on the issue?

A. He didn't have an opinion either way.

Q. Left it up to you?

A. Yes.

Doc. 8-18 at 37-38.

This testimony makes it clear that Conley's attorney made a *tactical decision* not to file a motion to sever the charges because he believed it gave Conley the best chance to avoid serving what might otherwise be substantially longer consecutive sentences, if the charges were severed and tried separately. Likewise, Mr. Warren

[36] The court actually ordered Conley's sentence for possession of marijuana to run concurrent to the sentence for possession of drug paraphernalia and consecutive to the sentence for delivery of crack cocaine. *Doc. 8-4.*

believed that, tactically, he had a better chance of creating reasonable doubt before one jury, which heard and decided all three charges, rather than splitting the charges between two juries.

Certainly, proceeding to trial on all charges carried the risk that the jury might not follow the Court's instructions and improperly consider the evidence of the possession charges in determining guilt and sentencing on the delivery charge. Using the benefit of hindsight, Conley now argues that, because the Arkansas Supreme Court later concluded in *Conley II* that the possession convictions were not supported by sufficient evidence, this must mean the jury "improperly aggregated evidence." *Doc. 61 at 41-43*; *Doc. 61 at 50*. Strategic decisions made by defense counsel during a criminal trial carry both risks and rewards, but courts are *not* permitted to second guess those decisions using hindsight. *Evans v. Luebbers*, 371 F.3d 438, 445 (2004) (holding that "strategic and tactical decisions made by counsel, though they may appear unwise in hindsight, cannot serve as the basis for an ineffective-assistance claim under *Strickland*").

Conley also argues that severance was the *only* reasonable strategy because the evidence offered in support of the possession charges induced the jury to believe the testimony of Officer Howard and Officer Lee identifying Conley "on a dark and rainy night for the short time necessary to complete a drug transaction." *Doc. 61 at 50*. However, as previously explained, the evidence identifying Conley as the

individual who delivered the cocaine to Detective Howard was compelling and certainly strong enough to secure a verdict of guilty on the delivery charge, without a jury ever hearing any evidence related to the possession charges. Given the circumstances that existed at the time Conley's trial attorney made the strategic decision not to move to sever the charges, he had a reasonable basis for believing that trying the possession charges alongside the delivery of cocaine charge would have little effect on the jury's consideration of the evidence supporting the delivery charge and would give Conley the best chance of avoiding consecutive sentences.

Finally, during the sentencing phase of Conley's trial on the delivery charge, the jury was destined to hear of Conley's prior felony convictions, including eight previous convictions for delivery of cocaine. Thus, it is difficult to see how the jury's conviction of Conley for possessing only 32.5 grams of marijuana and a digital scale could have much, if any, impact on their deliberations about the appropriate sentence to impose on the delivery of cocaine charge.

Given the strong evidence supporting Conley's guilt on the delivery charge and his lengthy drug-related criminal history, the Rule 37 trial court reasonably concluded that Conley's trial counsel's decision to limit Conley's exposure to one trial and one jury – in a county known to be particularly hard on accused drug dealers – was a reasonable tactical decision aimed at minimizing the sentences Conley

received if he was convicted.[37] Thus, the trial court's rejection of Claim 5 was not contrary to, or an unreasonable application of *Strickland*, nor was it based on an unreasonable determination of the facts in light of the state court record.

Accordingly, the Court recommends dismissing Claim 5, with prejudice.

III. Conclusion

IT IS THEREFORE RECOMMENDED THAT:

1. All claims asserted in Petitioner Conley's 28 U.S.C. § 2254 Petition, Doc. 1, be DENIED, and this case be DISMISSED, WITH PREJUDICE; and

2. A Certificate of Appealability be denied pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 2253(c)(1)-(2).

DATED this 19th day of November, 2019.

UNITED STATES MAGISTRATE JUDGE

[37] Conley makes a number of other arguments directed at his trial attorney's competence. For example, he states it was his "first jury trial;" during the Rule 37 evidentiary hearing he did not remember that Conley's sentence for the possession of marijuana ran consecutive to the sentence for delivery of cocaine (*see* footnote 36, *supra*); and he was constitutionally ineffective in connection with his motions for directed verdict. None of those arguments are relevant or material to whether Conley's trial counsel was constitutionally required to move to sever the delivery charge from the possession charges. *Doc. 21 at 28-31*; *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006) (holding that cumulative error does not call for habeas relief, but rather each habeas claim must stand or fall on its own).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-1233

Vernell Conley

Plaintiff - Appellant

v.

Dexter Payne, Director, Arkansas Division of Correction

Defendant - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:15-cv-00093-DPM)

JUDGMENT

Before LOKEN, GRUENDER, and BENTON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

July 23, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

VERNELL CONLEY
ADC #110709 PETITIONER

v. No. 5:15-cv-93-DPM

DEXTER PAYNE, Director,
Arkansas Division of Correction* RESPONDENT

ORDER

1. Motion to supplement objections, *Doc. 92*, granted.

2. Conley concedes Claims 1 & 2 and offers no particularized objections on Claims 3 & 4. The Court adopts the recommendation on those claims.

3. On Claim 5: The Court sustains Conley's objections 1, 2, 5 & 7 and overrules objections 3, 4, & 6. *Doc. 78 & 92*. Nonetheless, the sustained objections don't change this Court's assessment of Conley's claim here. On *de novo* review, the Court therefore adopts the remainder of Magistrate Judge Ray's thorough recommendation, *Doc. 69*. FED. R. CIV. P. 72(b)(3). Trial counsel believed that, even if

* Dexter Payne is the Director of what is now known as the Arkansas Division of Correction. The Court directs the Clerk to amend the docket accordingly. FED. R. CIV. P. 25(d).

Conley's sentences were ultimately run consecutively, the chance of receiving an overall lower sentence was better with a single jury. And that belief wasn't unreasonable, particularly given the wide ten-years-to-life range Conley faced on the delivery charge and trial counsel's recent experience with Washington County juries. Whether reviewed *de novo* under *Strickland* or through § 2254(d)'s doubly deferential lens, the strategic decision not to sever fell "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

Conley's petition will be dismissed with prejudice. No certificate of appealability will issue. 28 U.S.C. § 2253(c)(1)–(2).

So Ordered.

D.P. Marshall Jr.

D.P. Marshall Jr.
United States District Judge

6 January 2021

NO. 21-1233

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VERNELL CONLEY
ADC #110709 APPELLANT,

v.

DEXTER PAYNE, Director,
Arkansas Department of Correction APPELLEE.

MOTION FOR ISSUANCE OF A
CERTIFICATE OF APPEALABILITY

TO THE HONORABLE UNITED STATES COURT OF APPEALS:

VERNELL CONLEY, APPELLANT, respectfully moves, through appointed counsel, J. Thomas Sullivan, for issuance of a Certificate of Appealability to permit him to appeal the United States District Court's Order entered on January 6, 2021, adopting the recommendation of the United States Magistrate Court and denying relief, with prejudice, on his petition for federal habeas relief brought pursuant to 28 U.S.C. § 2254 and denying the COA. [PACER DOC. 94, at 2].

1. Petitioner/Appellant Conley was sentenced to serve 60 years for delivery of $100 worth of cocaine to undercover officers following a trial in which the delivery charge (Count 1) was joined with separate, but similar, offenses charging possession of marihuana and drug paraphernalia. He was convicted on these

charges, (Counts 2 and 3), and ordered to serve 30 years on these counts, which the trial court ordered to be served consecutively for Count 1 for a total sentence of 90 years, reflecting enhancement with multiple prior convictions. On appeal in state post-conviction proceedings, the Arkansas Supreme Court found trial counsel ineffective in failing to properly challenge the evidence on Counts 2 and 3 as legally insufficient and ordered the charges on these counts dismissed, finding that the evidence failed to support Conley's convictions on Counts 2 and 3. *Conley v. State*, 2014 Ark. 172, at *12, 433 S.W.3d 234, 243.

2. Conley also alleged in his Rule 37 challenge that trial counsel's representation was ineffective because of counsel's failure to move to sever Count 1 from Counts 2 and 3. The Arkansas Supreme Court has explained that the right to sever counts joined based on similarity is *absolute*. *Passley v. State*, 323 Ark. 301, 308, 915 S.W.2d 248, 251 (1996) ("A defendant has an absolute right to a severance of offenses joined solely on the ground that they are of same or similar character. *Clay v. State*, 318 Ark. 550, 886 S.W.2d 608 (1994)."); *Turner v. State*, 2011 Ark. 111, at *4--*5, 280 S.W.3d 400, 403:

> *[T]he liberal joinder rule is accompanied by a limiting severance rule that recognizes the grave risk of prejudice from joint disposition of unrelated charges* and, accordingly, provides a defendant with an absolute right to a severance of offenses joined solely on the ground that they are of same or similar character.

Id. at *4--*5, 280 S.W.3d at 403 (emphasis added). The *Clay* Court specifically addressed the potential prejudice inherent in joinder of drug trafficking offenses:

> In drug cases the State cannot ordinarily prove that the accused sold drugs on one occasion by proving that he sold them on other occasions. Rios v. State, 262 Ark. 407, 557 S.W.2d 198 (1977); Sweatt v. State, 251 Ark. 650, 473 S.W.2d 913 (1971). Such proof of other sales, as we pointed out in Sweatt, would merely show that the accused had dealt in drugs before and hence was likely to do so again.

Clay, 318 Ark. at 554–55, 886 S.W.2d at 611 (quoting *Teas v. State*, 266 Ark. 572, 575, 587 S.W.2d 28, 30 (1979) (Smith J., concurring)); *see also Boyd v. United States,* 142 U.S. 250, 258 (1892).

3. The trial court's post-convicting found that counsel did not render ineffective assistance in failing to sever the counts joined only based on similarity. On appeal, the supreme court concluded that the severance ineffectiveness issue was essentially mooted by its dismissal order on the latter two counts. *Conley*, 2014 Ark. 172, at *13, 433 S.W.3d at 243. It did not rule on the post-conviction court's finding on the severance issue on the merits. Moreover, because the supreme court did not remand for re-sentencing on Count 1, Conley remains sentenced to serve a 60-year term imposed by the jury that considered the insufficient evidence requiring dismissal of Counts 2 and 3 in deliberating both on his guilt and punishment.

4. After sustaining Conley's objections 1, 2, 5, & 7, the Court held that:

> [T]he sustained objections don't change this Court's assessment of Conley's claim here. On de novo review, the Court therefore adopts the remainder of Magistrate Judge Ray's thorough recommendation, Doc. 69. FED. R. CIV. P. 72(b)(3). *Trial counsel believed that, even if Conley's sentences were ultimately run consecutively, the chance of receiving an overall lower sentence was better with a single jury. And that belief wasn't unreasonable, particularly given the wide ten-years-to-life range Conley faced on the delivery charge and trial counsel's recent experience with Washington County juries.* Whether reviewed de novo under *Strickland* or through § 2254(d)'s doubly deferential lens, the strategic decision not to sever fall "within the range of competence demanded of attorneys in criminal cases."

[DOC. 94, at 2], emphasis added.

5. Conley recognizes that his Sixth Amendment ineffectiveness challenge requires a showing that counsel's performance was defective, and that there is a reasonable probability that but for the defective performance, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Here, trial counsel explained that his decision not to move to sever the counts joined solely on similarity was a matter of trial strategy.

6. The Magistrate Judge and District Court both credited trial counsel's concern that Conley not have "to face multiple juries as a super habitual offender.," based his claimed experience with Washington County juries and the possibility that Conley could suffer an "astronomically high sentence."

[RULE 37 HRG. TR. 94].

Trial counsel's claimed "strategy" in not moving to sever

7. At the hearing on Conley's petition for post-conviction relief brought pursuant to ARK. R. CRIM. PRO. 37, counsel testified and explained his strategy:

> Q. Mr. Warren, why didn't you move to sever Counts 2 and 3 from the separate Delivery of Cocaine charge alleged in Count 1?
>
> A. I did not move to sever that because it was a trial strategy in that I did not want my client at the time to face multiple juries as a super habitual offender and there was always the possibility that either way the convictions could be run consecutively and not concurrently.
>
> Q. So it's your understanding that the Judge, if we had one trial, two trials, three trials, could have run these consecutively if he wanted to?
>
> A. Yes.
>
> Q. What ended up happening to the Possession of a Controlled Substance Marijuana charge in relation to the other two charges?
>
> A. It was run concurrently.
>
> Q. Now did you talk about the severance issue with your client?
>
> A. Yes.
>
> Q. What was his opinion on the issue?
>
> A. He didn't have an opinion either way.
>
> Q. Left it up to you?
>
> A. Yes.
>
> Q. How much time was the Defendant facing on Counts 2 and 3?
>
> A. Sixty years, I believe.

Q. And what time did he receive that was consecutive on those two counts?

A. Fifteen, I believe.

Q. Thirty?

A. Is it thirty, okay.

[RULE 37 HRG. TR. 94-95).

8. However, on further examination, trial counsel testified:

Q: Prior to handling Mr. Conley's cases, how many criminal cases had you handled at that point?

A: I couldn't tell you the exact number, sir, but it was, I would guess it was probably up into the 60's or 70's. I just, I don't have an exact number on that.

Q: Had you taken any to trial?

A: No, sir.

Q: So this was your first jury trial?

A: Yes, sir.

[RULE 37 HRG. TR. 99].

9. *Strickland* requires Conley to show that trial counsel's decision not to move to sever the charges joined based on similarity of offenses was not the product of reasonable strategy. The Court explained: "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." 464 U.S. at 688.

Here, Conley is required to show that trial counsel's decision was not reasonable, overcoming the presumption that under the circumstances in the case, trial counsel's decision not to sever "might be considered sound trial strategy." Id. at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1995).

The state post-conviction court's rejection of Conley's IAC claim

10. The state trial court, in its capacity as the post-conviction court under Rule 37, made no finding that trial counsel's explanation for his claimed strategic decision not to move for severance constituted an objectively reasonable strategy. Instead, its conclusion characterized counsel's performance as a *failure*, holding:

> 2. That Defendant/Petitioner has failed to demonstrate that he suffered prejudice as a result of trial counsel's *failure* to seek a severance of the courts relating to possession of marijuana and possession of drug paraphernalia.

[ORDER denying relief on Petitioner's Rule 37 claims PACER DOC. 2-0, at page 90, Order, at ¶ B 2, entered September 18, 2012] (emphasis added).

11. The state post-conviction court also made three general, conclusory findings:

> 5. That Defendant/Petitioner has failed to show that counsels' (sic) performance was deficient and fell below an objective standard of reasonableness.
>
> 6. That Defendant/Petitioner's trial counsel's performance did not fall below an objective standard of reasonableness for professional assistance.
>
> 7. That Defendant/Petitioner has failed to show there is a reasonable probability that absent any errors alleged by his trial counsel, a different and more favorable result would have occurred.

[ORDER denying relief on Petitioner's Rule 37 claims (DOC. 20), at page 90 ¶¶ B5, 6, and 7].

Trial counsel's failure to offer a "reasonable" strategic explanation

12. Trial counsel cited no adverse consequence Conley would suffer if tried before two different juries had the offenses been severed.

13. Trial counsel conceded that the trial court would have authority to impose Conley's sentences to be served consecutively or concurrently, regardless of whether the charges had been served. Had Arkansas law limited the trial court's authority to sentence in a joint trial, such as by only permitting concurrent sentencing of convictions obtained in a joint trial, that limitation would have provided support, or even compelling support, for a decision to waive the accused's *absolute* right to sever joined offenses and proceed with a joint trial, but the court's authority is not restricted at all under ARK. CODE ANN. § 5-4-403.

14. Trial counsel's fear of Conley being treated as a *super habitual* has no significance in the Arkansas sentencing statutes. Super habitual never appears and counsel offered no explanation for what he meant, other than generally expressing his concern that two juries would react adversely to the evidence they would hear.

15. Moreover, in an apparent effort to draw some reasonable inference from trial counsel's claimed strategy, the Magistrate Judge found, with respect to trial counsel Warren's decision:

> *Likewise, Mr. Warren believed that, tactically, he had a better chance of creating reasonable doubt before one jury, which heard and decided all three charges, rather than splitting the charges between two juries.*

[RECOMMENDATION (DOC. 69), at 34-35 (emphasis added)]. Conley objected however, that there was no evidence in the record in which trial counsel (Mr. Warren) actually expressed this reasoning for his failure to move to sever the charges. [OBJECTION NO. 7 (DOC. 92)]. The District Court sustained the objection to the cited language in its Order. [ORDER (DOC. 94)].

Conley's argument for "reasonable probability of different outcome"

16. Conley recognizes that proof of deficient performance necessary to meet the first prong of *Strickland* does not, without proof of probable prejudice, warrant relief based on trial counsel's demonstrated defect. Instead, *Strickland* requires:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

466 U.S. at 694. Here, Conley demonstrated that the standard for probable prejudice impacting the credibility of the trial process was implicated both during the guilt/innocence phase of trial and the sentencing phase.

17. In arguing that inclusion of the three counts in a single trial impermissibly permitted jurors to use evidence of the separate counts to support the convictions returned on the other counts. In objecting to the Magistrate Judge's

Recommendation, Conley summarized the trial evidence to show why the juror's ability to consider evidence supporting the differing episodes reflected in Count 1 and then, Counts 2 and 3, improperly bolstered the prosecution's evidence that would not have been available to the jury in its deliberations had the counts been severed and tried separately. The trial evidence showed the following with respect to the issue of Conley's guilt on the three count, as recounted by Magistrate Judge and consistent with the findings of the Arkansas Court of Appeals on direct appeal in *Conley v. State*, 2011 Ark. App. 597, at *1-*2, 385 S.W.3d 875, 876-77:

> • The evidence adduced during the guilt/innocence phase of trial thus showed that officers had no prior relationship with Petitioner (Trial Tr. 142, 143) prior to contact with him by telephone (Trial Tr. 132) and the controlled buy of 0.5813 grams of cocaine (140); that the transaction occurred at night--just after 8 p.m, when it was dark (Trial Tr. 116, 128); when Conley never left his vehicle; that it was raining a "misty type rain" (Trial Tr. 116); and that officers were apparently able to confirm Conley's identity by using the residence information gained when they followed his car (Trial Tr. 119)—which Howard could not identify from the sale—as he drove to the residence they subsequently searched. Detective French testified that he returned to Conley's residence to check to see if it matched the vehicle Conley was driving at the time of the transaction. (Trial Tr. 121).
>
> • Detective French testified that the marijuana and scales were recovered from Petitioner's residence (Trial Tr. 124-125) and that he was present in the house at the time of the search. (Trial Tr. 126). No additional drug activity was detected at the residence following Conley's arrest. (Trial Tr. 127). On cross, however, French admitted that Petitioner was not present at his residence when the search was executed; that he was brought to the residence after being arrested. (Trial Tr. 128).

- The officers offered no description of Petitioner's clothing at the time of the transaction, (Trial Tr.144-45, 151), nor the license plate number on his car. (Trial Tr. 144, 150). Petitioner Conley is an African-American individual. (R/4—Amended Judgment and Commitment Order, at 4, identifying Defendant's Race as "B."

- Officer Ingram testified about photos he took of the contraband and its locations in Petitioner's residence during the search. (Trial Tr. 157-62). He confirmed that Petitioner was taken to the residence by officers once they were searching it and was not present there when officers first commenced the search. (Trial Tr. 162).

[OBJECTIONS TO MAGISTRATE JUDGE'S RECOMMENDATION, (DOC. 78), at 85-86].

18. Conley thus argued that the officers' testimony was insufficient to sustain his conviction because: (1) it was dark and misting rain at the time of the transaction; (2) neither Howard nor Lee could provide a specific make and model of Conley's vehicle following the transaction; (3) neither Howard nor Lee could recall what particular clothes Conley was wearing during the transaction; (4) the audio recording was mostly inaudible and contained "absolutely no references to drugs or any illicit or illegal activity"; and (5) the cocaine purchased by the undercover officer was not a "usable amount."

[OBJECTIONS TO MAGISTRATE JUDGE'S RECOMMENDATION, (DOC. 78), at 86].

19. The joinder of Count 1 with Counts 2 and 3 effectively permitted jurors to resolve any doubt as to the identification testimony offered by the State to conclude that the seizure of marijuana and scales seized from Conley's residence

(Trial Tr. 122-26) by reinforcing the description of Conley as the individual who sold cocaine, as charged in Count 1. This included the identification of Conley at his residence subsequent to execution of the search warrant in conditions conducive to a more accurate basis for identification than that afforded officers on the night of the controlled buy. Additional evidence based on the arrest following execution of the search warrant at Conley's residence—*and not objected to by trial counsel*—would have been particularly prejudicial with respect to the jurors' consideration of the evidence supporting conviction on Count 1.

20. Here, the joinder of Counts 1 and Counts 2 and 3 was demonstrably prejudicial because the trial judge did not instruct the jury that jurors could only consider evidence relating specifically to the cocaine transaction in arriving at a verdict on Count 1. Nor, did the instructions admonish jurors that they could only consider the evidence relating to the marijuana and scales in their deliberations on Petitioner's guilt with respect to Counts 2 and 3. (Trial Tr. 176-183).

21. The evidence supporting Count 1, delivery of cocaine, was not overwhelming. In *Burton v. State*, 367 Ark. 102, 110-14, 238 S.W.3d 111, 113-16 (2006), the court explained that where evidence is not overwhelming on the counts joined based on similarity of the offenses charge, counsel's failure to sever resulted in ineffective assistance. Here, as in Burton, the record demonstrates a reasonable

probability that trial counsel's failure to move for severance made a difference in the outcome of the proceedings.

22. Further, because the evidence of guilt on Counts 2 and 3 was insufficient, severance would have precluded any jury misuse of the inadequate evidence in finding Conley guilty on Count 1, proof of an actual prejudice undermining confidence in the outcome of the jury's finding of guilt on the delivery count.

Conley's argument for probable prejudice in sentencing

23. In adopting the recommendation of the Magistrate Judge, the District Court unequivocally endorsed his findings, explaining:

> Trial counsel believed that, even if Conley's sentences were ultimately run consecutively, the chance of receiving an overall lower sentence was better with a single jury. *And that belief wasn't unreasonable, particularly given the wide ten-years-to-life range Conley faced on the delivery charge and trial counsel's recent experiences with Washington County juries.*

[ORDER (DOC. 94) at 1-2] (emphasis added). The District Court's conclusion could hardly be acceptable to any reasonable jurist because it rests on the Court's apparent belief that a jury imposing a sentence in the ten-years-to-life range would return a less onerous sentence if also considering the additional criminality alleged in Counts 2 and 3 at the same time as deciding the sentence on Count 1. This conclusion is illogical, as recognized by our courts at least since the decision in *Boyd v. United States*, 142 U.S. 450, 458 (1892), where the Court held "the

defendants were entitled to be tried upon competent evidence, and only for the offense charged."

24. More credible is the conclusion that the jury's imposition of the 60-year sentence on Count 1 was the result of its consideration of the evidence deemed insufficient by the Arkansas Supreme Court with respect to Counts 2 and 3 and the trial court's sentencing instruction that did not require jurors to limit their consideration of evidence to the counts on which it had been admitted. The instruction provided:

> In your deliberations on the sentences to be imposed *you may consider both the evidence presented in the first stage of the trial where you rendered verdicts on guilt and the evidence to be presented in this part of the trial.* You'll now hear evidence that you may consider in arriving at appropriate sentences.

[Trial Transcript, Sentencing Hearing, at 204] (emphasis added).

25. There is a reasonable probability that the trial jury did consider the evidence admitted on Counts 2 and 3 in setting punishment on Count 1 at 60 years for sale of $100 worth of cocaine. Thus, there is a reasonable probability that had the charges had been severed the outcome of the proceedings would have been different, meeting the second Strickland prong requiring proof of probable prejudice.

REASONS FOR GRANTING THE CERTIFICATE OF APPEABILITY

26. Because the state court rejected Conley's ineffective assistance claim on the merits, *Harrington v. Richter*, 562 U.S. 86, 101 (2011), requires him to not only challenge whether trial counsel's strategy was objectively reasonable, but also whether any view of the record supports the state determination based on AEDPA's requirement of deference to the state court's decision. The Court explained:

> Under [illegible] § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Conley urges the Circuit Court's consideration of the following factors that would lead reasonable jurists to reject the District Court's disposition:

27. At the outset, deference to the state post-conviction court's rejection of Conley's ineffective assistance claim based on trial counsel's failure to sever the charges in this instance was unwarranted because;

A. Arkansas courts routinely accept trial counsel's statement that a claimed deficiency in performance, the first prong for proof under *Strickland*, actually reflected a *strategic* decision on counsel's part without conducting any inquiry into whether the claimed strategy was reasonable. In Slocum v. In *State v.*

Slocum, 332 Ark. 207, 213, 964 S.W.3d 388. 391 (1998), the state court explained its approach:

> We have written on many occasions that a lawyer's choice of trial strategy that proved ineffective is not a basis for meeting the *Strickland* test. *See, e.g., Vickers v. State,* 320 Ark. 437, 898 S.W.2d 26 (1995); *Monts v. State,* 312 Ark. 547, 851 S.W.2d 432 (1993).

But, *Strickland* insulates those choices of strategy made by counsel from Sixth Amendment violations only when the choices are "within the range of reasonable judgments." 466 U.S. at 699. Here, there was no finding as to the reasonableness of trial counsel's failure to sever the charges. Counsel's claim of strategy is not a sufficient response to a charge of deficiency in performance; a strategic decision only affords counsel a defense for pursuing a strategy shown to have failed when it is a *reasonable* strategy.

B. In its finding that Conley failed to demonstrate that Conley failed to show that "there is a reasonable probability that absent any errors alleged by his trial counsel, a different and *more favorable result* would have occurred." [ORDER denying relief on Petitioner's Rule 37 claims PACER DOC. 2-0, at page 90, Order, at ¶ B 7, entered September 18, 2012] (emphasis added). The requirement to show a reasonable probability of a *more favorable result* misstates the prejudice showing in *Strickland*'s second prong. In *Woodward v. Visciotti*, 537 U.S. 19, 22 (2002), the Court confirmed the required proof of prejudice

imposed in *Strickland*, observing the Court "specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered," citing *Strickland*, 466 U.S. at 693. The state post-conviction court's finding that Conley failed to demonstrate a reasonable probability of a different outcome from trial counsel's inexplicable decision not to sever the charges.

C. The state post-conviction court's overall performance in assessing Conley's ineffectiveness claims was repudiated by the Arkansas Supreme Court in granting relief on appeal from the denial of Rule 37 relief by the trial court based on its determination that counsel failed to make a proper objection that the evidence supporting conviction on Counts 2 and 3 was meritorious, requiring dismissal of those charges. *Conley*, 2014 Ark. 172, at *13, 433 S.W.3d at 243.

D. Similarly, in declining to address Conley's ineffective assistance claim based on counsel's failure to move to sever the charges, the state supreme court did not expressly affirm the decision of the state post-conviction court at all. Instead, it found that it was not necessary to address the severance issue because it was only directed to Counts 2 and 3, but appellate counsel expressly requested relief on all three counts in both his opening and reply briefs:

> This Court should reverse and remand for a new trial on all three counts so Vernell Conley may receive a fair trial. At a minimum, Vernell Conley should receive a new trial on counts two and three.

[RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS, EXHIBITS, (DOC. 8-14, 16, Appellant Conley's Opening Brief, Arg. at page 9, and Appellant Conley's Reply Brief, Arg. at page 8].

28. Neither the state court, nor Magistrate Judge, evaluated the reasonableness of trial counsel's claimed strategy by considering whether his failure to move to sever the counts joined as a result of similarity of offenses offered any possibility of a better disposition at trial given Arkansas law and procedure governing sentencing in Conley's case. In *Strickland*, 466 U.S. at 699-700, *Harrington v. Richter*, 562 U.S. at 107-13, and *Knowles v. Mirazayance*, 556 U.S. 111, 115-18 (2009), the Court's resolution of the deficient performance claim included substantial discussion of the reasoning of lower courts, or inferred reasoning that could warrant a finding of reasonableness in the absence of an opinion detailing the reviewing court's findings was fully developed. Here, there is nothing in the lower court opinions explaining why trial counsel could reasonably have concluded that Conley would be strategically or tactically better served by going to trial on the three counts jointly instead of severing.

29. Moreover, neither the state post-conviction court, nor the Magistrate Judge, weighed trial counsel's claimed strategy against Arkansas decisions clearly recognizing the dangers of joint trials involving similar offenses, particularly drug offenses, in terms of affecting jury determinations of the accused's guilt or sentence when jurors may refer to evidence of joined offenses in reaching their

verdicts. In this case, the dangers acknowledged by the Arkansas decisions on point was unquestionably realized because the Arkansas Supreme Court ultimately held the evidence adduced in support of Counts 2 and 3 was legally insufficient to support Conley's conviction on those counts, requiring dismissal of those charges, even though jurors were instructed that they could consider all the evidence adduced during the guilt phase of trial in setting Conley's sentence, including his enhanced, 60-year sentence on Count 1 for delivery of $100 worth of cocaine.

30. In assessing the reasonableness of the strategy adopted by defense counsel, the state and lower federal courts wholly failed to consider applicable Arkansas decisions establishing the standard for reasonableness in terms of counsel's failure to move to sever the offenses joined for trial based on similarity, which recognize the prejudice in permitting jurors to consider unrelated offenses in deliberating and deciding the guilt or sentence on the different counts alleging offenses subject to the accused's *absolute* right to sever.

31. Second, in what Conley believes represents a matter of first impression with respect to the deference to be accorded the state post-conviction court's findings rejecting Conley's ineffective assistance claim, the Arkansas Supreme Court reversed that court in holding that trial counsel's assistance was ineffective in failing to preserve the insufficient evidence claims with respect to Counts 2 and 3 where he failed to make a proper directed verdict motion on those charges,

requiring relief and dismissal of those charges on appeal from the denial of relief on Conley's Rule 37 motion.

32. Moreover, Conley believes that the question of deference to the state court's findings in denying post-conviction relief is a matter of first impression here because the Arkansas Supreme Court did not uphold the post-conviction court's findings with respect to trial counsel's failure to move for severance, but held the claim mooted by its grant of relief on Counts 2 and 3, leaving the accuracy of the Rule 37 ruling on the severance claim legally in doubt.

33. In failing to evaluate counsel's claimed trial strategy in failing to sever the counts for trial, neither the state court, nor Magistrate Judge, expressly addressed the reasonableness of trial counsel's claim—apart from his concern that Conley's record of prior convictions—that there was any potential benefit to Conley from a joint trial. Trial counsel admitted that in any event, the sentences on all counts could be ordered to served concurrently or consecutively by the trial court, and in light of the potential danger in proceeding with a joint trial on drug offenses joined only as a result of similarity recognized by the Arkansas Supreme Court, which characterized the accused's right to severance as *absolute* because of this concern.

34. Neither the state court, nor the Magistrate Judge, addressed the fact that the convictions and sentences imposed by jurors on Counts 2 and 3, met *Strickland*'s

prejudice prong because they were instructed to consider evidence relating to those counts in determining Conley's sentence on Count 1, while trial counsel obviously questioned the sufficiency of prosecution evidence on Counts 2 and 3 in moving for directed verdict, even though his motion was defective, ultimately leading to the finding that he performed defectively, rendering ineffective assistance. In moving for the directed verdict on Counts 2 and 3, even though procedurally defaulting the claim of insufficiency, trial counsel anticipated that the State's evidence on those counts would be insufficient, raising the questioned not addressed by the state and lower federal courts: How could trial counsel's strategy have been reasonable if he believed—as the record later showed—that the prosecution's evidence supporting the charges on Counts 2 and 3 was not sufficient to support conviction. In short, how could trial counsel have reasonably risked the threat to integrity of the trial process by not moving to sever the charges on which the State's evidence was not sufficient to support Conley's conviction? The *strategy* of not moving to sever simply could not have been reasonable.

35. Similarly, because jurors were instructed to consider all evidence adduced in the guilt phase, no reasonable jurist could agree that in these circumstances Conley failed to demonstrate that but for trial counsel's failure to sever the outcome of the proceedings would have been different.

CONCLUSION

Based on the foregoing argument and in light of the likely unique facts underlying his ineffective assistance claim, Conley prays the Court reverse the Order of the District Court and issue the COA to permit him to appeal.

Respectfully submitted this 7th day of February, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2021, I electronically filed the foregoing with the Clerk of Court using CM/ECF system, which shall send notification of such filing to the following:

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(s)J. Thomas Sullivan

Attorney for Vernell Conley, Petitioner/Appellant

Dated: 02/07/2021

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

VERNELL CONLEY,

Petitioner,

v.

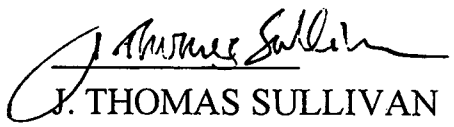
DEXTER PAYNE, DIRECTOR,
ARKANSAS DIVISION
OF CORRECTION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the Petition for Writ of Certiorari and Motion for Leave to Proceed *in forma pauperis* have been served upon counsel for the Respondent: Attorney General of Arkansas, 200 Catlett-Prien Tower Building, 323 Center Street, Little Rock, AR 72201, on December 11, 2021.



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