No.

IN THE SUPREME COURT OF THE UNITED STATES

TROY G. SAXTON,

PETITIONER,

VS.

JAY FORSHEY, WARDEN,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

Whether a habeas petitioner satisfies his burden under 28 U.S.C. §2253(c)(2) for the issuance of a certificate of appealability when he demonstrates that "reasonable jurists" could debate whether state authorities "carved up" a single drug possession offense into multiple spatial units in a manner contrary to *Brown v. Ohio*, 432 U.S. 161 (1977) for purposes of subjecting him to multiple punishments for the same crime in violation of the Double Jeopardy Clause ?

LIST OF PARTIES

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

RELATED CASES

There are no cases related to the case that is the subject of this petition.

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Petitioner Troy G. Saxton ("Petitioner") respectfully prays that a writ of certiorari will issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in Case No. 22-3752 on February 13, 2023.

OPINION BELOW

On February 13, 2023, the United States Court of Appeals for the Sixth Circuit filed an unsigned order denying Petitioner's motion for a certificate of appealability as to the district court's dismissal of his petition for a writ of habeas corpus by a person in state custody. (App. 1a). The order is unpublished. The United States District Court had previously

entered a judgment of dismissal and an order denying a certificate of appealability on August 12, 2022. (App. 7a)

JURISDICTION

Petitioner seeks review of the order of the United States Court of Appeals for the Sixth Circuit entered on February 13, 2023. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), s*ee Hohn v. United States*, 524 U.S. 236, 253 (1998) ("We hold this Court has jurisdiction under §1254(1) to review denials of applications for certificates of appealability by a circuit judge or panel of a court of appeals.").

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be . . . twice put in jeopardy of life or limb[.]

United States Constitution, Sixth Amendment:

> In all prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense[.]

United States Constitution, Fourteenth Amendment:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. §2241(a):

> Writs of habeas corpus may be granted by the Supreme Court, by any justice thereof, by the district courts and any circuit judge within their respective jurisdictions.

28 U.SC. §2253(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.

28 U.S.C. §2254(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[.]

STATEMENT OF THE CASE

City of Whitehall, Ohio police officers seized a stash of 2,267 grams of cocaine and 866 grams of heroin during execution of a search warrant for a residence linked to Petitioner. *At the same time*, other Whitehall officers seized a stash of 68 grams of cocaine and 45 grams of heroin during execution of a search warrant for Petitioner's auto repair business. Both addresses are located in the same county.

In a single indictment, the State of Ohio indicted Petitioner for one pair of possession counts (possession of cocaine and possession of heroin) relating to the drug stashes from the residence, and one pair of cocaine/heroin possession counts relating to the drug stashes from the business. Petitioner pled no contest to all counts and was adjudicated guilty.

Ohio's sentencing scheme for controlled substance offenses is structured in a manner similar to the Unites States Sentencing Guidelines. That is, the Ohio statutes "impose different punishments depending on the type and amount of illegal substance upon which a criminal charge could be made[.]" *State v. Pendelton*, 168 N.E.3d 458, 463 (Ohio 2021). As such, the sentencing scheme "provide[s] a unique context for the application of the Double Jeopardy Clause." *Id.*

At the time of Petitioner's offense conduct, a drug offender's sentencing exposure for possession of cocaine or heroin maxed out at 100 grams. Possession of 100 grams of either substance required the court to impose a mandatory maximum prison term of 11 years. In Petitioner's case, the quantities of cocaine and heroin seized from the residence alone exceeded the 100-gram threshold.

The additional quantities of cocaine and heroin recovered from the business address should not have affected his overall sentencing exposure. Yet, an Ohio trial judge sentenced Petitioner to concurrent 11-year prison terms for the cocaine and heroin seized from the residence, and *consecutive* prison terms totaling 6 years for the cocaine and heroin seized on the same date from the business. Petitioner's attorney failed to raise a double jeopardy objection to the announced sentence.

Petitioner appealed his sentence to the Ohio Court of Appeals on the ground that the imposition of consecutive 6-year prison terms for the business cocaine/heroin counts violated the prohibition against multiple punishments for one offense under the Double Jeopardy Clause. He argued that this Court's decision in *Brown v. Ohio*, 432 U.S. 161 (1977) prohibits a state from "carving up"[1] a single offense into multiple spatial and/or temporal units for purposes of subjecting an offender to a greater penalty. He also raised a companion Sixth Amendment ineffective assistance claim premised on trial counsel's failure to raise a double jeopardy objection.

The state court of appeals ruled that the trial court's failure to merge the possession counts was not "plain error." (App. 2a-3a) It denied the ineffective assistance claim based on "its determination under plain error review that merger was not required under state law." (App. 4a) The Supreme Court of Ohio denied further review.

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254.[2] The petition asserted that the state court's ruling was contrary to federal law as determined by this Court in *Brown v. Ohio* . The district judge denied the claim, dismissed the petition, and refused to issue a certificate of appealability ("COA"). (App. 5a)

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[1]The "carving up" metaphor comes from a federal circuit court of appeals opinion interpreting and applying *Brown*. *See United States v. Reyes-Correa,* 971 F.3d 6, 12-13 (1st Cir. 2020) ("The prohibition against evading the double jeopardy bar by carving up a single conspiracy presents a problem for the government here," citing *Brown*)

[2]Th district court had jurisdiction under 28 U.S.C. §2241.

Petitioner filed a notice of appeal, and requested the Sixth Circuit Court of Appeals to grant him a COA. The court denied his request in an unsigned order. (App. 1a)

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

A HABEAS PETITIONER SATISFIES HIS BURDEN UNDER 28 U.S.C. §2253(c)(2) FOR THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY WHEN HE DEMONSTRATES THAT "REASONABLE JURISTS" COULD DEBATE WHETHER STATE AUTHORITIES "CARVED UP" A SINGLE DRUG POSSESSION OFFENSE INTO MULTIPLE SPATIAL UNITS IN A MANNER CONTRARY TO *BROWN V. OHIO*, 432 U.S. 161 (1977) FOR PURPOSES OF SUBJECTING HIM TO MULTIPLE PUNISHMENTS FOR THE SAME CRIME IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE.

A state prisoner does not enjoy an automatic right of appeal from a district court judgment adversely disposing of his petition for a writ of habeas corpus. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), he must persuade the district judge or a circuit judge of the potential merits of his appeal by making a substantial showing of the denial of a constitutional right. 28 U.SC. §2253(c)(2).

The "substantial showing" requirement means he must demonstrate 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.'" *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983)). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

The Sixth Circuit stated that "[g]iven its determination under plain-error review that merger was not required *under state law*, the state appellate court concluded that trial trial counsel's failure to address the merger issue at sentencing was not prejudicial." (App. 4a) It next concluded that the state court's reliance on its plain error ruling as a basis to deny Petitioner's ineffective assistance claim was "neither contrary to, or an unreasonable application of, *Strickland.*" (App. 5a, emphasis supplied)

Reasonable jurists certainly could "debate" whether a defendant's failure to satisfy a state's plain-error test in connection with a legal error by the trial court precludes him from establishing the ineffective assistance of his trial counsel relating to that same error. *See United States v. Carthorne*, 878 F.3d 458, 466 (4th Cir. 2017) ("the plain error and ineffective assistance of counsel standards do not necessarily generate identical outcomes with respect to the same alleged error."); *United States v. Span*, 75 F.3d 1383, 1389-90 (9th Cir. 1996) (counsel's failure to raise an objection to jury instructions was ineffective assistance, even though district court's instructions were not plainly erroneous); *People v. Randolph*, 917 N.W.2d 249, 250 (Mich. 2018).[3]

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[3]In *Randolph*, the court explained that:

> Because the[] standards of review have separate legal elements that focus on different facts, we hold that a failure to satisfy the plain-error test will not, without more, foreclose a defendant's claim of ineffective assistance of trial counsel. This is true even when the subject of each claim is the same. Therefore, even when a defendant cannot succeed on a claim being reviewed for plain error, courts may not simply conclude, *without independent consideration*, that a defendant is unable to succeed on an ineffective-assistance claim relating to the same underlying issue.

The relationship between the "plain error" and *Strickland* standards is but a minor issue. The larger question presented by Petitioner's appeal is whether "reasonable jurists" could disagree on whether the ruling in *Brown v. Ohio* precludes state authorities from dividing one possession crime into two for purposes of subjecting an offender to punishment exceeding the statutory maximum for the crime.

The facts in *Brown* are instructive. Petitioner Brown stole a car and drove it around for nine days before police caught him. He was initially charged and convicted in an Ohio municipal court for operating the vehicle on his date of arrest without the owner's consent ("joyriding"), a misdemeanor. He was subsequently indicted and convicted of theft of the vehicle, a felony.

The Ohio Court of Appeals agreed with Brown that "joyriding" is a lesser included offense of vehicle theft, and that for double jeopardy purposes, they were one and the same offense. It nevertheless concluded that he "could be convicted of both crimes because the charges against him focused on *different parts* of his 9-day joyride." *Id.* 432 U.S. at 169 (emphasis supplied).

This Court was unpersuaded. It reasoned that "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Id.* The Court concluded that "the specification of different dates in the two charges on which Brown was convicted

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Id. (emphasis supplied).

cannot alter the fact that he was placed twice in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments." *Id.* at 169-70.

AEDPA requires a state prisoner to show that a state court's adjudication of his claim was "contrary to" clearly established federal law, as determined by a decision of the United States Supreme Court. *See* 28 U.S.C. § 2254(d). The "clearly established federal law" in *Brown* can be distilled into one sentence: prosecutors may not "carve up" a defendant's continuing offense conduct into multiple temporal or spatial units for the purposes of prosecuting and punishing him for multiple counts or charges.

"Carving up" one crime into two is precisely what the Ohio courts did during the prosecution of Petitioner. His two convictions for the possession of two stashes of cocaine on the same date and at the same time implicated a single violation of one offense statute. The same is true with respect to his two convictions for possession of heroin.

The sole distinction between Petitioner's case and *Brown* is the manner in which the offenses were "carved up." In *Brown*, the charges against the petitioner "focused on different parts of his 9-day joyride," *id.* 432 U.S. at 169, whereas the possession charges in Petitioner's case focused on different stashes of drugs. But this is a distinction without a difference; this Court in *Brown* plainly stated that the anti-"carving" prohibition applies, whether the cutting board is temporal or spatial.

Because "reasonable jurists" could debate whether the Ohio courts subjected Petitioner to multiple punishments for the same possession offense, it also follows that they could debate whether trial counsel rendered ineffective assistance under *Strickland v.*

Washington, 466 U.S. 668 (1984) by failing to raise a double jeopardy objection to the sentences. This Sixth Amendment violation provides an independent ground for habeas relief as well as "cause and prejudice" for excusing the procedural default of the double jeopardy claim. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)..

CONCLUSION

This Court has emphasized that a petitioner seeking a COA does not have a burden of demonstrating that "the appeal will succeed." *Miller-El,* 537 U.S. at 337. "When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* at 336-37.

The Sixth Circuit failed to apply the "reasonable jurists" standard in a realistic and even-handed manner contemplated by this Court in *Slack*. It essentially reached the merits of Petitioner's appeal without the benefit of a full record and briefing.

It has been 20 years since this Court had to remind a circuit court of appeals that this approach is inconsistent with the standard adopted in *Slack* for the issuance of a COA. *Miller-El.* It is time for this Court to issue another "reminder." For these reasons, Petitioner prays this Court will grant his petition for certiorari, vacate the Sixth Circuit's order, and remand his case to the court of appeals for the issuance of a COA and, after completion of briefing and argument, for a decision on the merits.

Respectfully submitted,

Dated: May 15, 2023

s/Dennis C. Belli
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ATTORNEY FOR PETITIONER