

No.

In the
Supreme Court of the United States

Jermaine J. Campbell,

Petitioner,

v.

William Gittere, et al.

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Petitioner Jermaine Campbell is currently serving a sentence of 20 years to life based upon a factual predicate never found beyond a reasonable doubt by the jury in his case. During jury deliberations, jurors were instructed to find that Campbell possessed only 4 grams or more of cocaine and only 4 grams or more of heroin, which amounted to Level I trafficking; yet, the sentencing court gave him a sentence for Level III trafficking, NRS § 453.3385(3), sentencing him to two consecutive sentences of 10 years to life. To impose this sentence, clearly established federal law required that the jury find beyond a reasonable doubt that Campbell possessed at least 28 grams of each substance. Because the jury instructions required a finding of at least 4 grams and the general verdict form made no mention of the quantity of drugs, trial counsel should have objected to the sentence imposed. Trial counsel's failure to object to this obvious violation of clearly established federal law amounted to deficient performance; but for this deficient performance, Campbell would have received a sentence of 1 to 6 years under NRS § 453.3385(1).

In his amended federal petition under 28 U.S.C. § 2254, Campbell raised this claim. Because this claim of ineffective assistance of counsel at sentencing was raised for the first time during the state post-conviction appellate proceedings, it was procedurally defaulted in the federal § 2254 proceedings. Campbell argued that he could overcome the procedural default of the claim under *Martinez v. Ryan*, 566 U.S. 1 (2012), because his initial post-conviction counsel had never even ordered the sentencing transcript, let alone raised the claim in a supplemental state petition that

the sentencing judge did not have the authority to sentence Campbell to Level III trafficking. He also argued that the claim had some merit because the underlying ineffective assistance of counsel claim is substantial in light of this Court's decision in *Blakely v. Washington*, 542 U.S. 106 (2004).

The federal district court failed to even address many of the arguments raised by Campbell in his reply brief, found that Campbell could not overcome the procedural default of this claim, and that a certificate of appealability wasn't warranted.

Campbell sought a certificate of appealability on this claim, which the Ninth Circuit Court of Appeals denied. He then sought reconsideration, arguing that the court of appeals had misapplied the standard for a certificate of appealability. The Ninth Circuit denied the motion to reconsider as well.

The question presented is whether the Ninth Circuit Court of Appeals misapplied the standard governing the grant of a certificate of appealability for Petitioner Jermaine J. Campbell's claim of ineffective assistance of counsel in his federal habeas petition.

LIST OF PARTIES

Jermaine J. Campell is the petitioner. William Gittere and the Attorney General are the respondents. No party is a corporate entity.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jermaine Campbell respectfully prays that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Ninth Circuit. *See* App. 001, 028.

OPINIONS BELOW

Petitioner Jermaine J. Campbell brought a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the District of Nevada. The district court denied the amended petition on the merits and denied certificates of appealability (COA). App. 075. The Ninth Circuit Court of Appeals denied Campbell's request for certificates of appealability on Grounds 3 and 4 in his amended petition. App. 028-074. He then sought reconsideration of the Ninth Circuit's denial as to Ground 3 only. The Ninth Circuit denied the motion for reconsideration. App. 001-027.

JURISDICTION

Campbell sought habeas relief under 28 U.S.C. § 2254 to challenge his state court judgment of conviction. The Ninth Circuit denied Campbell's request for a certificate of appealability as to Grounds 3 and 4 of the amended § 2254 petition and denied Campbell's motion to reconsider its denial of Ground 3 of the amended § 2254 petition only. This Court has jurisdiction under 28 U.S.C. § 1254. This petition is timely per Sup. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Under 28 U.S.C. § 2253(c)(1)(B) & (c)(2), "an appeal may not be taken to a court of appeals from a final order in a habeas proceeding in which the detention

complained of arises out of process issued by a state court" unless "the applicant has made a substantial showing of the denial of a constitutional right."

The Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, guarantees a criminal defendant "the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On January 21, 2011, a criminal information charged Petitioner Jermaine J. Campbell with two counts of Trafficking in a Controlled Substance under NRS § 453.3385(3). The information alleged that Campbell was in actual or constructive possession of 28 grams or more of cocaine as well as 28 grams or more of heroin. After a two-day trial, the jury found Campbell guilty of both counts. The trial court sentenced Campbell to two consecutive sentences of 10 years to life.

During Campbell's initial state post-conviction proceedings, Campbell was represented by two court appointed attorneys. Neither attorney ordered the sentencing transcript from Campbell's underlying state criminal proceedings.

The state court appointed new counsel to represent Campbell on appeal of his state petition. That attorney ordered the sentencing transcript and raise the relevant ineffective assistance of counsel claim at issue in this petition. The Nevada Supreme Court refused to consider the issue and affirmed Campbell's convictions.

Campbell filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254. The undersigned attorney filed an amended petition. The district court

ultimately denied the petition and declined to grant a certificate of appealability as to any of the claims in the amended petition.

Campbell filed an application for a certificates of appealability as to Grounds 3 and 4 of the amended federal petition in the Ninth Circuit Court of Appeals. The Ninth Circuit denied the request. Campbell moved for reconsideration as to Ground 3 only, which the Ninth Circuit also denied.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit misapplied the standard for a certificate of appealability and merits summary reversal.

A habeas petitioner is entitled to a certificate of appealability if he makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The threshold for a certificate of appealability is very low. *See Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003); *Buck v. Davis*, 137 S. Ct. 759, 767, 780 (2017). So long as one reasonable jurist could “disagree with the district court’s resolution of his constitutional claims,” or “conclude the issues presented are adequate to deserve encouragement to proceed further,” a certificate of appealability is warranted. *Buck v. Davis*, 137 S. Ct. at 773. Even if “every jurist of reason might agree [he] will not prevail,” if it is debatable whether his constitutional rights have been violated then a certificate of appealability should issue. *Id.* at 774. The Ninth Circuit failed to apply this standard correctly and erroneously denied Campbell a certificate of appealability on Ground 3.

II. Campbell satisfied the relaxed standard for a certificate of appealability.

The federal district court found in relevant part that Campbell had not shown cause and prejudice to excuse the procedural default of his claim that his trial attorney was ineffective for failing to make an objection at sentencing because the claim was not substantial. To be substantial, a claim merely must have some merit or factual support. *See Martinez v. Ryan*, 566 U.S. 1, 16 (2012).

But this claim clearly had factual support—the jury was never informed of or instructed on the levels of trafficking; its verdict form failed to specify that it was finding Campbell guilty of Level III trafficking and instead merely stated he was found guilty of trafficking in a controlled substance, which the jury instructions had defined as possessing 4 grams or more of a controlled substance; and the sentencing judge merely adjudicated Campbell guilty of trafficking in a controlled substance without specifying that he was sentencing him under the statute for Level III trafficking.

Accordingly, Campbell met the low threshold for a certificate of appealability, and respectfully requests that this Court grant his motion to reconsider on Ground 3 and allow him to continue to vindicate his rights.

A. Reasonable jurists could agree that Campbell has made a substantial showing of the denial of a constitutional right.

Campbell had the right to receive effective assistance of counsel at sentencing.

Daire v. Lattimore, 812 F.3d 766, 767 (9th Cir. 2016). Yet Campbell received constitutionally deficient representation at sentencing when his attorney failed to

object to the sentencing court's lack of authority to sentence Campbell to Level III trafficking when the jury's verdict did not clearly reflect they had found beyond a reasonable doubt that Campbell possessed 28 grams or more of each substance.

The federal district court denied relief on this claim, looking only to *Apprendi v. New Jersey*, 530 U.S. 366 (2000), in its analysis to find that the claim was insubstantial and therefore that post-conviction counsel was not ineffective for failing to raise it. This analysis was cursory at best and ignored discussion of *Blakely v. Washington* and post-*Blakely* case law in Campbell's reply brief.

Instead, the federal district court found that because Campbell was charged in the Information with subsection (3) of the relevant statute, the Information was included in the jury instructions,¹ and the prosecution argued in its closing that it needed to prove Campbell "had constructive or actual possession of drugs or a mixture containing those drugs in excess of 28 grams,"² the underlying claim of ineffective

¹ While the Information may have been included as an instruction, jurors are not lawyers and would therefore not be aware of the significance of the drug quantity relative to the charge. Even though the Information listed 28 grams or more, the jurors were never made aware that there were levels of drug trafficking, that 28 grams or more corresponded to Level III trafficking, or that the verdict form specifically corresponded to the charge of Level III trafficking. In other words, they were never made aware of the constitutional import of finding at least 28 grams or more of each controlled substance; instead, the definition of the crime "trafficking in a controlled substance" instructed them to find at least 4 grams, and there is simply no way to tell if all 12 jurors also found at least 28 grams as well.

² The jury was required to rely upon the jury instructions *alone*, not the prosecutor's argument, to evaluate whether Campbell violated the law. Because the verdict form failed to specify the relevant subsection of the statute, the level of trafficking, or the corresponding drug quantity for Level III trafficking, the jury was left to look at the definition of "trafficking in a controlled substance" in the relevant jury instruction and check the box on the verdict form if only 4 grams or more had been proven beyond a reasonable doubt.

assistance of trial counsel was “not substantial.” This overlooks the fact that the jury was never instructed that there are levels to drug trafficking that correspond to specific quantities of a controlled substance and its verdict form failed to specify the relevant subsection of the statute, instead using the general “trafficking in a controlled substance” which the jury instructions had defined as requiring proof beyond a reasonable doubt of only 4 grams or more (this is inclusive of all three levels of trafficking).

1. Reasonable jurists could agree that Campbell’s rights were violated under *Blakely v. Washington*.

The State charged Campbell with two counts of trafficking in a controlled substance. The jury was provided with the content of the State’s charges in a jury instruction:

The defendant in this matter, JERMAINE JAMAICA CAMPBELL, is being tried upon an Information which was filed on the 21st day of January, 2011, in the Second Judicial District Court, charging the said defendant, JERMAINE JAMAICA CAMPBELL, with:

COUNT I. TRAFFICKING IN A CONTROLLED SUBSTANCE, a violation of NRS 453.3385(3), a felony, [] in the manner following:

That the said defendant on the 3rd day of December A.D., 2010, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully, unlawfully, knowingly, and/or intentionally, sell, manufacture, deliver, or be in actual or constructive possession of 28 grams or more of a Schedule I controlled substance or a mixture which contains a Schedule I controlled substance, to wit: cocaine at Reno, Washoe County, Nevada.

COUNT II. TRAFICCKING IN A CONTROLLED SUBSTANCES, a violation of NRS 453.3385(3), a felony, [] in the manner following:

That the said defendant on the 3rd day of December A.D., 2010, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully, unlawfully, knowingly, and/or intentionally, sell, manufacture, deliver, or be in actual or constructive possession of 28 grams or more of a Schedule I controlled substance or a mixture which contains a Schedule I controlled substance, to wit: heroin at Reno, Washoe County, Nevada.

While the Information charged Campbell with trafficking in a controlled substance and included a factual allegation that the quantity was at least 28 grams of each substance, the jury received a definition of trafficking in a controlled substance that required it to find only a minimum of 4 grams beyond a reasonable doubt. The relevant jury instruction provided:

The crime of TRAFFICKING IN A CONTROLLED SUBSTANCE consists of the following elements:

- (1) A person willfully, unlawfully, knowingly and/or intentionally
- (2) Sells, manufacturers, delivers or brings into this state
OR
- (3) Is in actual or constructive possession of any controlled substance listed in schedule I, except marijuana, or any mixture which contains any controlled substance
- (4) In a quantity of **four grams or more**

For a person to be convicted of Trafficking in a Controlled Substances under NRS 453.3385, it is not necessary there by additional evidence of any activity beyond the

possession of a quantity of controlled substance equal to or greater than four grams.

Heroin and cocaine are Schedule I controlled substances.

The jury, however, was never told that there were levels of drug trafficking that corresponded to specific quantities of the drug. In other words, while the Information may have alleged at least 28 grams, the instruction itself told the jury they needed to find only 4 grams to find Campbell guilty of the crime of trafficking in a controlled substance and it failed to make clear that the State had charged Campbell with Level III trafficking and that Level III trafficking required them to find 28 grams or more of each substance.

“[D]rug quantity—even though usually labeled a sentencing factor—is the ‘functional equivalent’ of an element.” *United States v. Minore*, 292 F.3d 1009, 1116 (9th Cir. 2002) (citing *Apprendi*, 530 U.S. at 494, n.19). Therefore, if a drug quantity exposes a defendant to a higher statutory maximum sentence, “it fits squarely within the usual definition of an ‘element’ of the offense.” *Apprendi*, 530 U.S. at 494 n.19. At closing, the State began their argument by noting that they were asking the jury to find Campbell trafficked in a controlled substance of at least 28 grams. However, the prosecutor pointed out that trafficking in a controlled substance was defined in the instructions as possession of a controlled substance “in a quantity greater than four grams.” The instructions themselves never advised the jury that they must find *beyond a reasonable* doubt at least 28 grams of each substance and the Information failed to make clear it had charged Campbell with Level III trafficking specifically

which required 28 grams or more. Moreover, the verdict form also failed to specify that Campbell had been charged with Level III drug trafficking and that the jury MUST find beyond a reasonable doubt 28 grams or more of each substance in order to find him guilty of Level III drug trafficking. The jury was not even made aware that there were levels of drug trafficking corresponding to specific quantities of a controlled substance. Instead, the instructions made it seem like there was merely one crime of trafficking in a controlled substance, requiring a mere 4 grams or more of each substance.

Thus, so long as the jurors all agreed that Campbell had trafficked in at least 4 grams or more of each of the controlled substances—for instance, 4.1 grams of heroin and 4.1 grams of cocaine—he was guilty of the crime of Trafficking in a Controlled substance.

Reasonable jurists could certainly agree that this violated *Apprendi* because the jury was never instructed on the specific quantity element for the charged offense³ and the jury had no idea that the charged offense required by statute proof of 28 grams or more.

³ In other words, the jury was told it was determining whether Campbell had committed trafficking in a controlled substance and that this required at least 4 grams of the controlled substance. The jury had no idea what the significance of 28 grams was as alleged in the Information.

2. **Reasonable jurists could agree the sentencing court was not permitted to sentence Campbell to Level III trafficking and counsel was ineffective for failing to object at sentencing.**

Blakely v. Washington requires a judge to impose a sentence “*solely on the basis of the facts reflected in the jury verdict.*” 542 U.S. at 303. Yet here the judge sentenced Campbell under the greatest possible enhancement, assuming the jury had found beyond a reasonable doubt that Campbell possessed at least 28 grams of each substance as required for Level III trafficking. Yet the judge made no findings that Campbell had been adjudged guilty of Level III trafficking in a controlled substance. Instead, much like the jury instruction and verdict form, the sentencing court merely found that Campbell had been adjudged guilty of trafficking in a controlled substance, as if there was one crime with no levels requiring a mere 4 grams or more of each substance.

The “statutory maximum” under *Apprendi* is the “maximum a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely*, 542 U.S. at 303 (citations omitted, emphasis in original). Moreover, “a finding of drug quantity, when it exposes the defendant to a higher statutory maximum . . . must be made by the jury *beyond a reasonable doubt.*” *United States v. Minore*, 292 F.3d 1109, 1118 (9th Cir. 2002) (emphasis added). “*Apprendi* requires drug quantity—when it subjects a defendant to an enhanced sentence—to be both charged in the indictment and submitted to the jury.” *United States v. Westmoreland*, 240 F.3d 618, 633 (7th Cir. 2003). To submit the question of drug quantity to the jury, the jury instructions must “advise the jury that it must find the

defendant guilty *beyond a reasonable doubt* of . . . the drug types and quantities described in the indictment.” *United States v. Perez-Ruiz*, 353 F.3d 1, 16 (1st Cir. 2003).

There is no doubt that the jury was instructed to find a minimum of 4 grams of each controlled substance as an element of trafficking in a controlled substance, but there is no way to tell from the general verdict form in this case whether the jury found beyond a reasonable doubt that there were at least 28 grams of each controlled substance or that it was even aware that Campbell had been charged with Level III trafficking and that this charge required 28 grams or more of each substance. As noted, the jury was not even instructed that there were levels of drug trafficking or that subsection (3) of the relevant statute corresponded to Level III trafficking and required them to find 28 grams or more of each drug beyond a reasonable doubt. Simply put, the lower federal court’s reasoning that the charging document’s inclusion in the jury instructions or the prosecutor’s own argument are sufficient is not supported by federal law.

Under *Blakely*, the question is whether the jury verdict *clearly* reflects the relevant factual finding beyond a reasonable doubt—a finding of at least 28 grams—so as to authorize the judge to sentence Campbell for Level III trafficking. The verdict form indicated the following:

We the jury, being duly empaneled in Count I of the above-entitled matter do find (check only one):

The defendant, guilty of trafficking in a controlled substance.

We the jury, being duly empaneled in Count II of the above-entitled matter do find (check only one):

The defendant, guilty of trafficking in a controlled substance.

No level of trafficking or subsection of the relevant statute is noted on the verdict form, and the relevant instruction defined trafficking in a controlled substance as requiring the jury to find beyond a reasonable doubt at least 4 grams of each controlled substance or a mixture thereof. Without context as to the differing levels of drug quantity necessary for finding Campbell guilty of Level III trafficking under the relevant statute, the jury's verdict does not clearly reflect that it found 28 grams or more of each substance based upon the jury instructions as a whole or the general verdict form. At best, it reflects only that the jury unanimously found at least 4 grams of each substance beyond a reasonable doubt.

At the sentencing hearing on February 24, 2012, the court sentenced Campbell to two consecutive life sentences for trafficking in a controlled substance. The judge did not make any factual findings about the drug quantities found by the jury nor indicate that he was sentencing Campbell to Level III trafficking.

Trial counsel did not object to the fact that the sentencing judge did not have the authority to sentence Campbell for Level III trafficking. Where an attorney fails to object to application of a sentencing enhancement on the basis that the enhancement does not apply to a defendant, this amounts to deficient performance. In *Tilcock v. Budge*, 538 F.3d 1138 (9th Cir. 2008), the Ninth Circuit Court of Appeals

found that there was “nothing strategic about [counsel] failing to object at sentencing to categorically non-qualifying convictions that would prevent a defendant from being eligible for” a sentencing enhancement.

In Campbell’s case, trial counsel’s failure to object at sentencing on the basis that the factual basis for a sentencing enhancement had not been found beyond a reasonable doubt had no strategic advantage and had no strategic advantage. Under the relevant statute, drug quantity acted as both an element of the offense and the basis for a sentencing enhancement. Because the jury instructions failed to make clear (1) Campbell had been charged with Level III trafficking or (2) that there even were levels of trafficking under Nevada law, its verdict does not reflect that it found the specific drug quantity necessary for Level III trafficking, and reasonable jurists could certainly agree that counsel’s failure to object at sentencing was patently ineffective because it was a failure to object to the violation of a constitutional right to be tried by a jury.

3. Reasonable jurists could agree that this failure to object was prejudicial.

Had trial counsel objected that the sentencing judge did not have the authority to impose a sentence for Level III trafficking, “either the sentencing judge would have agreed with the objection, or the issue would have been preserved for appeal.” *Burdge*, 290 F. App’x at 79. In short, had counsel objected, there is a reasonable probability that Campbell would not have received a sentence of 20 years to life.

At a minimum, reasonable jurists could debate the merits of this claim, and to receive a certificate of appealability on this issue, Campbell did not need to prove prejudice to obtain a certificate of appealability.

4. Reasonable jurists could disagree with the district court's ruling that this claim is not substantial and could also agree that initial post-conviction counsel was ineffective for failing to raise it.

The federal district court found that this claim was without merit and therefore that post-conviction counsel was not ineffective for failing to raise it in the initial collateral proceeding, but reasonable jurists could disagree with this finding.

Appellate post-conviction counsel was the first attorney to order the sentencing transcript in this case, where she learned that trial counsel never objected at sentencing to the court's authority to sentence Campbell to Level III trafficking when the jury's verdict did not clearly reflect the jury had found the requisite drug quantity beyond a reasonable doubt. At that point, however, the Nevada courts would not entertain the claim. Had this claim been raised in the first instance by McGinnis, who was appointed to supplement Campbell's petition, there is a reasonable probability the outcome of the post-conviction proceedings would have been different and Campbell would have been resentenced. Moreover, the fact that an attorney raised this claim on post-conviction appeal shows that the claim is debatable amongst reasonable jurists.

Reasonable jurists could therefore disagree with the district court's denial of this claim, and Campbell asks that this Court reconsider its previous order and grant him a certificate of appealability on Ground 3.

The Ninth Circuit should have granted Campbell a COA as to this ground for relief.

CONCLUSION

For the foregoing reasons, this Court should grant Campbell's petition for a writ of certiorari, reverse, and remand to the Ninth Circuit.

Dated December 6, 2024

Respectfully submitted,

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/s/ Alicia R. Intriago

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