No. _____

IN THE
Supreme Court of the United States

BRETT A. SINKEVITCH,
Petitioner,

v.

JAMIE MILLER,
Superintendent, Snake River Correctional Institution,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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A habeas petitioner seeking relief under 28 U.S.C. § 2254 must obtain a Certificate of Appealability (COA) to challenge a district court's denial of his habeas petition. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To obtain a COA, the petitioner need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2), which is demonstrated if jurists of reason could disagree with the district court's resolution or could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

QUESTION PRESENTED

Did the Ninth Circuit err in denying a COA where a substantial showing of the denial of a constitutional right was demonstrated because reasonable jurists could disagree with the district court's resolution of Petitioner's constitutional claims of insufficient evidence and ineffective assistance of counsel or could conclude the issues presented are adequate to deserve encouragement to proceed further?

PARTIES TO THE PROCEEDINGS

Petitioner, Brett A. Sinkevitch, is serving a sentence of 205 months in the Oregon Department of Corrections, and his earliest release date is listed as April 15, 2031. Respondent, Jamie Miller, is the Superintendent of the Oregon State Correctional Institution. Respondent is represented by the Office of the Oregon Attorney General.

RELATED PROCEEDINGS

Counsel for Petitioner is unaware of any related proceedings beyond the state and federal court proceedings in this case, which are attached in Appendices A through C.

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Petitioner, Brett A. Sinkevitch, respectfully requests that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit entered on October 30, 2024, denying a Certificate of Appealability (COA).

Opinions Below

The District Court denied habeas corpus relief in an unpublished opinion on March 26, 2024 (Appendix B). The Ninth Circuit refused to

issue a Certificate of Appealability (COA) on October 30, 2024. (Appendix A).

Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Relevant Statutory and Constitutional Provisions

Title 28, United States Code § 2253(c) 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.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C.A. § 2253(c).

Statement of the Case

A. Ground One — The State presented insufficient evidence to support the convictions on Counts 1, 2, 3, 4, 6, and 7.

In Ground One, Sinkevitch claimed that the State presented insufficient evidence to support the convictions on Counts 1, 2, 3, 4, 6, and 7. The State argued, among other things, that Sinkevitch was not entitled to relief on the merits. Finding that Sinkevitch was not entitled to relief on the merits of this claim, the district court correctly identifies the clearly established Supreme Court opinion that controls: "A petitioner 'is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.'" (App. 11a (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).) But the district court's finding that sufficient evidence was adduced at trial is incorrect.

That finding suffers from the same flaws as the state post-conviction relief (PCR) court's decision. The PCR court decision (App. 31a) involves an unreasonable determination of the facts based on the state court record. *See Taylor v. Maddox*, 366 F.3d 992, 1000–01 (9th Cir. 2004), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984,

999-1000 (9th Cir. 2014). Specifically, the PCR court (and the district court) conflate — (i.e., fail to separate) — alleged assaults against Daniel that occurred as separate incidents, to support duplicitous counts. Failing to individualize which facts support which counts is fatal to the PCR decision and the federal magistrate judge's Findings and Recommendation (F&R). Moreover, the state-court trial record (unlike the PCR judgment) shows no reliance on bodily "impairment" for the challenged counts of conviction, which exacerbates the PCR court's error. *See Maddox*, 366 F.3d at 1000–01.

When reviewing a claim of insufficient evidence in support of a state criminal conviction, federal habeas "courts must look to state law for the 'substantive elements of the criminal offense,' but the [ ] amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman v. Johnson*, 566 U.S. 650, 655 (2012).

To support a rational finding of guilt beyond a reasonable doubt, *Jackson* requires that the factfinder "'draw reasonable inferences from basic facts to ultimate facts.'" *See Coleman*, 566 U.S. at 655. And the state

court record must show more than a "mere modicum" of evidence — evidence that does more than "make the existence of an element of a crime slightly more probable than it would be without the evidence." *Jackson*, 443 U.S. at 320.

Even after viewing the state court record in the light most favorable to the prosecution, no rational trier of fact could have found Sinkevitch guilty beyond a reasonable doubt on Counts 1, 2, 3, 4, 6, and 7.

1. For Counts 1 and 3, the State presented insufficient evidence of substantial pain or physical impairment based on horseplay and-roughhousing punches.

Counts 1 and 3 involved only bruising from slug-bug play punches, and soreness related thereto. ECF 24-1 at 44, n.4. At trial, the State was required to prove "Physical injury," either by showing (1) impairment of physical condition or (2) substantial pain. Or. Rev. Stat. § 161.015(7). To qualify as "impairment of physical condition," the injury must reduce the victim's ability to use the body or a bodily organ. *In Matter of M. S. T.-L.*, 280 Or. App. 167, 168 (2016). To qualify as "substantial pain," the injury must be ample and more than fleeting. *Id*. at 168–69.

The State did not adduce evidence of impairment of physical condition and did not present argument concerning it. And the F&R does not

explicitly find that the State presented evidence to support finding that either Daniel (Count 1) or Nephi (Count 3) suffered impairment of a physical condition. But the parentheticals of the cases the F&R cites makes it appear that the F&R implicitly concludes that Sinkevitch caused Daniel both impairment of physical condition and substantial pain. App. 20a. However, as with the PCR court, this conclusion is unsupported by sufficient evidence.

Neither Daniel (Count 1) nor Nephi (Count 3) testified that they suffered substantial pain. For pain to be "substantial," it must be "ample" or "considerable" pain, not just "fleeting or inconsequential" pain. *State v. Poole*, 175 Or App 258, 261 (2001).

For Count 1, the evidence involved punching Daniel's arm or legs, which hurt for five to ten minutes and remained sore for a day or two. On one occasion, Daniel lost feeling in his arm. On another occasion a punch to the chest prevented Daniel from catching his breath for three to four minutes, with the chest pain persisting when breathing. App. 31a. The F&R's finding of sufficient evidence (App. 19-20a) fails because without

evidence of bruising or actual substantial pain, the evidence the F&R focuses on falls short of proof beyond a reasonable doubt under *Jackson*.

For Count 3, testimony indicated that Sinkevitch punched Nephi in the arm hard enough to leave a bruise that lasted several days and still caused Nephi some level of pain several days later when photographed at the hospital. App. 32a. Like with the roughhousing with Daniel, the minimal pain caused to Nephi from punches in the arm cannot constitute "substantial pain" sufficient to satisfy the statute despite slight bruising.

Here, the State failed to establish any objective facts from which the court could reasonably find that Daniel and Nephi suffered either substantial pain or impairment of a bodily function. And in discussing Count 3, the F&R seems to confuse Counts 3 and 4 when it ends its discussion of Count 3 by concluding: "Given that Nephi's physical evidence of injury, the bruising which was accompanied by her testimony of pain that lasted for more than a fleeting amount of time, the trial judge reasonably found petitioner guilty of felony fourth-degree assault as charged in Count **Four**." App. 21a (emphasis added). This conclusion is faulty because "[t]he term 'substantial pain' refers to the degree and duration of

pain suffered by the victim." *State v. Poole*, 175 Or App 258, 261 (2001). For pain to be "substantial," it must be "ample" or "considerable" pain, not just "fleeting or inconsequential" pain. *Id.*

In sum, even when the evidence for Counts 1 and 3 is viewed in the light most favorable to the prosecution, no rational trier of fact could find Sinkevitch guilty beyond a reasonable doubt as to Counts 1 and 3. Therefore, this Court should reject the F&R, grant the writ, and order that the state court vacate the convictions pertaining to Counts 1 and 3.

2. For Count 2, no rational trier of fact could find beyond a reasonable doubt that Sinkevitch caused substantial pain by shooting Daniel in the rear end with a BB.

The F&R's terse, one-paragraph, conclusion is unsupported by caselaw or analysis. Regarding Count 2, the F&R merely concludes: "Daniel's description supports the inference that the pain was more than fleeting and insubstantial and supports the trial judge's conclusion that petitioner was guilty of fourth-degree assault as charged in Count Two." App. 20a.

The F&R's conclusion is wrong because even if Daniel's pain was more than fleeting, the degree was not ample or considerable. Like the

testimony in *Curiel* [1] and *Capwell*,[2] Daniel's testimony that his butt "hurt" and was "sore" is insufficient to find the pain was ample or considerable for Count 2. And no circumstantial evidence in the record would make it reasonable to infer that his pain was greater than how he described it — no evidence of marks, bruises, or other injury; he did not seek medical treatment, and he did not miss work for Count 2.[3]

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[1] In *State v. Curiel*, 316 Or. App. 215 (2021), testimony describing the pain as "stinging shock" was insufficient to find the pain was ample or considerable. *Id.* at 219. The court determined that no circumstantial evidence was presented — no "marks, bruises, or other injury that would make it reasonable to infer that the victim's pain was greater than how she described it." *Id.* The only circumstantial evidence offered was testimony that her jaw continued to pop — "something that allows for the inference that defendant hit her hard enough to cause that effect but that does not, in any non-speculative way, speak to the quality of the pain that the victim experienced." *Id.* The court concluded that without more, it was too speculative to infer that the pain was ample or considerable despite the jaw popping. *Id.*

[2] In *State v. Capwell*, 52 Or. App. 43 (1981), the alleged victim testified that getting hit with a gas can "'hurt' and was painful." *Id.* at 46. But because there was no evidence of bruising or other injury, no evidence of medical treatment, and no evidence of missed work, the court concluded there was insufficient evidence to show "the degree of pain or that it was anything more than a fleeting sensation." *Id.* at 46–47.

[3] Daniel did not indicate in his testimony that he was unable to panhandle or collect cans for redemption — his main sources of income while waiting for Nephi's monthly tribal income.

Daniel did not describe his pain with enough specificity or detail to support a finding of substantial pain. Because the State failed to present sufficient evidence that Daniel's pain was ample or considerable, any finding of substantial pain is based on unreasonable inferences. *See Maddox*, 366 F.3d at 1000-01. Therefore, even when the evidence is viewed in the light most favorable to the prosecution, no rational trier of fact could find beyond a reasonable doubt that Sinkevitch caused Daniel substantial pain.

3. For Counts 6 and 7, no rational trier of fact could find beyond a reasonable doubt that Sinkevitch caused substantial pain by shooting S.A.'s thigh/glute area with a BB.

The F&R tersely concludes that sufficient "evidence supports an inference that S.A. suffered more than momentary pain." App. 23a. As indicated above and in the Brief in Support of Petition for Writ of Habeas Corpus, "more than momentary pain" is not sufficient.

Because S.A. did not testify at trial, all evidence presented was circumstantial, requiring the trier of fact to draw only non-speculative inferences. Here, the evidence presented was insufficient from which to reasonably infer that S.A.'s pain was ample, considerable, or more than fleeting. The testimony that described S.A.'s injury did not indicate a sufficient degree or duration of pain to be substantial.

In fact, S.A.'s injury was described as a superficial, nonpenetrating, skid mark-like scratch with a little bit of blood. No photographs of the injury were entered into evidence. S.A. did not receive medical treatment. And though S.A. cried, his demeanor after the injury is not sufficient to infer that the pain was ample or considerable. First, he was already crying before the injury occurred just from frustration about not being able to "go potty," minimizing any significance of the fact that he continued to cry after the shot. And second, children frequently cry from minor injuries, so it is not a fact from which one can infer that the degree of pain was ample or considerable.

No evidence was presented to show the duration of S.A.'s alleged pain: no one testified to how long he cried or if he expressed that he felt any lingering pain after the incident. Even though the mark on S.A.'s thigh was still visible one to two days after the incident, at the hospital Dr. Kranitz described S.A.'s demeanor as positive, undermining any argument that S.A. was still experiencing pain. To establish that S.A.'s scream and a bit of crying after the shot was sufficient evidence that the pain was more than fleeting, the State needed to establish that the degree of S.A.'s pain was of such an intensity that a shorter duration was sufficient to rise to the level of substantial pain. But the State failed to make

that showing. S.A.'s scream minimally supports a finding that the pain was ample or considerable, and that mere modicum of evidence is not enough.

Because the State failed to present sufficient evidence that S.A.'s pain was ample or considerable and more than fleeting, any finding of substantial pain is speculative. Therefore, even when the evidence is viewed in the light most favorable to the prosecution, no rational trier of fact could find beyond a reasonable doubt that Sinkevitch caused S.A. substantial pain for Counts 6 and 7. The F&R's contrary conclusion lacks merit and should be rejected.

4. For Count 4, the State presented insufficient evidence to support the coercion charge.

"'[T]he target of the [coercion statute] is the effective use of fear [of physical injury] to induce compliance with a demand.'" *State v. Powe*, 314 Or. App. 726, 731 (2021) (quoting *State v. Robertson*, 293 Or. 402, 418 (1982) (interpreting a prior version of the statute)). A defendant's **intent** to compel cannot be speculative. *State v. Hendricks*, 273 Or. App. 1, 19 (2015).

As the F&R states, the State must prove that Sinkevitch "**intentionally** compelled or induced the victim to abstain from doing something … that the victim has a right to do …" App. 22a (emphasis added). But there is no evidence Sinkevitch **intended** to prevent Nephi from walking to the bathroom.

The F&R stretches too far to infer intent, citing *State v. Phillips*, 206 Or. App. 90, 96–97 (2006). Although intent to compel can be inferred from implicit demands and implicit threats of physical injury, *State v. McNair*, 290 Or. App. 55, 59 (2018), the facts here don't support such an inference. In *Phillips*, the child victim objected to watching a pornographic movie and attempted to leave the situation, but the adult defendant locked the door and pushed the child back down onto the couch. *Id.* at 96. So, the court held that a reasonable juror could infer from the evidence that by pushing the child onto the couch, the defendant implicitly demanded that the child abstain from leaving and made an implicit threat of physical injury if she failed to comply. No such conduct occurred here.

In *Hendricks,* the victim announced she wanted her books and, as she was walking to retrieve them, the defendant assaulted her. 273 Or. App. at 5. The court held the evidence was insufficient because the record failed to show what the defendant said to the alleged victim or if he made any expressive gesture that reasonably indicated he intended to compel her to abstain from going to her books. *Id.* at 19. As the alleged victim described, the defendant "was just kind of w[h]aling. Just trying to hit wherever he could." *Id.* at 18. *Hendricks* should control here because merely shooting BBs without making any demands is insufficient to induce or compel compliance. In fact, here there is no evidence to support the notion that Sinkevitch sought to coerce compliance. Based on *Hendricks*, the need for reversal is obvious.

Thus, this Court should conclude it reasonable to encourage full examination of whether there was sufficient evidence of intent to compel compliance. Similarly, this Court should encourage further analysis of whether Nephi acted out of fear-induced compliance.

B. Ground Two — Trial counsel provided ineffective assistance by failing to explicitly move for acquittal on Count 4.

In rejecting Ground Two, the F&R concludes: "the PCR trial judge's conclusion that the outcome of the trial would not have been different had counsel filed a formal motion for acquittal on the coercion charge was not objectively unreasonable and is entitled to deference in this Court." App. 25a.

Sinkevitch's trial counsel failed to exercise reasonable professional skill and judgment when he failed to explicitly move for acquittal on Count 4 and there is a reasonable probability that but for trial counsel's error the result of the trial would have been different. When the State fails to present sufficient evidence for one or more elements of an allegation, moving for acquittal is a standard defense procedure. This statement is so well established that it is enshrined in the American Bar Association's Criminal Justice Standards for the Defense Function, Standard 4-7.11 ("Motions for Acquittal During Trial"). *See* ABA Crim. Just. Standards for the Def. Function, Standard 4-7.11 (4th ed. 2017), available at https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ (last visited March 11, 2025).

Here, the State failed to present sufficient evidence to prove beyond a reasonable doubt all the elements of coercion, and as the ABA standard indicates, an effective attorney would have moved for acquittal to focus the judge's attention on Count 4. Thus, there can be no question — defense counsel's performance was subpar and prejudicial and thus ineffective.

If not for trial counsel's failure to move for acquittal on Count 4, there is a reasonable probability the judge would have dismissed the charge. If trial counsel had moved for acquittal, it would have given the judge an opportunity to read the caselaw with more factual and legal support than counsel's cursory statements during closing argument. And based on the judge's comments during closing and her suggestion of an overbroad reading of the statute, (*see* ECF 25-1 at 591–93) there is a reasonable probability that had she read arguments supported by case law she would have dismissed Count 4. Therefore, Sinkevitch was prejudiced by trial counsel's deficient performance or this claim at least warrants issuing a COA.

Reasons for Granting the Petition

Here, Supreme Court review is necessary to secure and maintain uniformity of this Court's decisions, and because the proceeding involves a question of exceptional importance.

The procedures and standards applicable in the case are controlled by the habeas corpus statute codified at Title 28, chapter 153, of the United States Code, most recently amended in a substantial manner by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

At issue here are the standards AEDPA imposes before a court of appeals may issue a Certificate of Appealability (COA) to review a denial of habeas relief in the district court. Congress mandates that a prisoner seeking postconviction relief under 28 U.S.C. § 2254 must obtain a COA to appeal a district court's denial of a habeas petition. This Court has repeatedly made clear that deciding whether to grant a COA, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Slack v. McDaniel*, 529 U.S. 473, 481 (2000). Under AEDPA, a COA must issue based on "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That standard is satisfied where "jurists of reason could disagree" with the

district court's rejection of constitutional claims or where jurists could conclude that one or more issues sufficient to "deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (holding that reasonable jurists could have debated whether the prosecution's use of peremptory strikes against African-American prospective jurors was the result of purposeful discrimination, and thus petitioner was entitled to COA).

Just as in *Miller-El*, the issues Sinkevitch presented were debatable among reasonable jurists and were sufficient to deserve encouragement to further proceed.

Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari directing the Ninth Circuit to issue a COA.

Dated March 19, 2025.

s/Kurt David Hermansen
Kurt David Hermansen
Attorney for Petitioner

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Certificate of Compliance

I, Kurt David Hermansen, counsel of record and a member of the Bar of this Court, certify that the Petition for a Writ of Certiorari complies with the 9,000-word limit of Supreme Court Rule 33.1(g)(i), as it contains 3,393 words, excluding the table of contents and the table of authorities.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 19, 2025, in Eugene, Oregon.

s/*Kurt David Hermansen*
Attorney for Petitioner