IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Case No. 18–3167

ANTHONY WHEELER, D.O.C. No. 892467, Petitioner-Appellant, v. **RON NEAL**, Superintendent, Indiana State Prison, Respondent-Appellee.	)	Appeal from The United States District Court for the Northern District of Indiana, South Bend Division Case No. 3:12-cv-238-PPS The Honorable Phillip P. Simon, Judge.

Petitioner-Appellant's Request for Certificate of Appealability

The Petitioner-Appellant, Anthony Wheeler, by counsel, now comes before the Court with his Request for Certificate of Appealability. For the reasons that follow, the Court should find that Wheeler has made a substantial showing that he was denied two constitutional rights at his sentencing: 1) he was denied his due process right to be sentenced based on accurate information; and 2) he was denied his Sixth Amendment right to the effective assistance of counsel, because his trial lawyer failed to investigate the circumstances of Wheeler's arrest for a sexual assault in an unrelated case. That arrest was the chief aggravating circumstance used to enhance Wheeler's sentence to 90 years; Wheeler, on his own, from prison, successfully litigated the expungement of that arrest, proving, necessarily, that he had had nothing to do with the unrelated sexual assault—and that's if the unrelated sexual assault even occurred.

1. Introduction

The District Court said in its opinion below: "'Federal habeas review . . . exists as a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal. *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (quotations and citation omitted).'" Wheeler doesn't disagree.

As Wheeler said in his motion for leave to proceed on appeal *in forma pauperis*, what happened at his sentencing should be shocking. See IFP Motion, Doc. 3-1 at 2. Wheeler's enhanced 90-year sentence related to two sexual assaults was 10 years more than twice then-presumptive 40-year sentence for murder. See *id*. As of today, Wheeler has been imprisoned for almost 30 years. If the Court assumes that Wheeler has not lost his one-for-one credit time, Wheeler has already almost fully served a 60-year sentence. That was the maximum sentence in Indiana for murder in 1988. *See Fuller v. State*, 639 N.E.2d 344, 349 (Ind. Ct. App. 1994).

That enhanced 90-year sentence was almost exclusively based on an unrelated sexual assault for which Wheeler was charged while released on bond. See *id*. at 4, 7-8. On his own, from prison, Wheeler quite expertly litigated the expungement of that arrest. See *id*. at 5. As a matter of (Indiana) law, the judicial expungement of that arrest constituted a judicial finding by a preponderance of the evidence that Wheeler had had nothing to do with unrelated sexual assault for which he had been arrested and charged. See *id*. at 5-6.

That is, Wheeler's enhanced 90-year sentence was based on a sexual assault Wheeler had nothing to do with, and that's if that unrelated sexual assault even happened.

The "extreme malfunction of the state criminal justice system" is plainly visible on the face of the Indiana Court of Appeals' decision in Wheeler's post-conviction appeal. Besides a couple of that court's absolutely astonishing

propositions that Wheeler will discuss in detail below, the Indiana Court of Appeals asserted that *a reason* to deny was society's "large interest in ensuring the finality of convictions and upholding the integrity of the criminal justice system." *Wheeler v. State*, Indiana Court of Appeals No. 49A02-1509-PC-1436 (Ind. Ct. App. August 4, 2016) (*mem.*) ("*Wheeler IV*"), *reh'g denied*, *trans. denied*. Wheeler's enhanced 90-year sentence was based almost entirely on pure fiction. Is there another case, not involving any question of retroactivity, in which a court has used society's "interest in finality of convictions and upholding the integrity of the criminal justice system" to defeat constitutional claims based on law almost older than dirt?

2. The standard for a certificate of appealability to issue is quite low.

To obtain a certificate of appealability, Wheeler must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That is not much.

Wheeler can satisfy this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (internal quotation marks omitted); *accord Buck v. Davis*, 137 S. Ct. 759, 773 (2017). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 773).

To obtain a certificate of appealability, Wheeler need not even "prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El*, 537 U.S. at 338. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*

And it is particularly important that the Court not deny a certificate of appealability by actually deciding the merits of Wheeler's two constitutional claims at this stage: "When a court of appeals sidesteps th[e COA] 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.

3. What misconduct?!!?

In the state courts, Wheeler's due process claim under *Townsend v. Burke*, 334 U.S. 736 (1948) and *United States v. Tucker*, 404 U.S. 443 (1972) could hardly have been more straightforward. (It's not any less straightforward in this Court.) Under *Townsend* and *Tucker*, Wheeler had a due process right to be sentence on basis of materially accurate information. *Townsend*, 334 U.S. at 741; *Tucker*, 404 U.S. at 447. As the district court correctly said: ""A defendant who requests re-sentencing due to the use of inaccurate information at the original sentencing must show both that information before the sentencing court was inaccurate and that the sentencing court relied on the inaccurate information in the sentencing.' *Lechner v. Frank*, 341 F.3d 635, 639 (7th Cir. 2003). 'A sentencing court demonstrates actual reliance on misinformation when the court gives explicit attention to it, *founds its sentence at least in part on it, or gives specific consideration to the information before imposing sentence*.' *Id*." Opinion and Order, D.E. 52 at 5.

The state trial court absolutely "founded its sentence at least in part" and "[gave] specific consideration" to Wheeler's arrest for the unrelated sexual assault as an aggravating circumstance to enhance Wheeler's sentence: "'Deft. committed offense while out on bond on similar case.'" *Wheeler v. State*, Court of Appeals No. 49A02-1101-PC-22 (Ind. Ct. App. September 2, 2011) (mem.) ("*Wheeler II*"), slip op. at 5, n.1.

The judicial expungement court of Wheeler's arrest for the arrest for the unrelated sexual assault necessarily constituted a judicial finding that the case against Wheeler for the unrelated sexual assault was dismissed either: 1) because no crime was committed; or 2) because Wheeler was not the person who committed the crime. Ind. Code § 35-38-5-1(a)(2)(A) & (B) (Burns Supp. 2012) (repealed by P.L. 181-2014, § 3, effective March 26, 2014). See also IFP Motion, Doc. 3-1 at 5-7. So the information about the arrest—indeed that Wheeler had actually "committed offense while out on bond on similar case," was simply inaccurate.

Without ever stating the correct standard for the analysis of Wheeler's *Tucker* / *Townsend* claim, the *Wheeler IV* court disposed of the claim with a proposition that defies understanding: "Even if Wheeler's arrest record was expunged at the time of sentencing, the expungement would not have prevented the prosecution from discussing the September 11, 1988 incident. 'Uncharged misconduct is a valid aggravator.' Singer v. State, 674 N.E.2d 11, 14 (Ind. Ct. App. 1996)." *Wheeler IV*. slip op. at 14.

The expungement of Wheeler's arrest necessarily meant that there had been no misconduct by Wheeler to discuss: either there had been no unrelated sexual assault, or it was not Wheeler who had committed it. And even if this Court sets aside the expungement for a moment, the Court should recall that the State attempted to revoke Wheeler's bond because of his arrest for the alleged unrelated sexual assault. There was so little evidence that Wheeler had anything to do with the unrelated sexual assault for which he had been arrested that the state trial court denied the State's motion to revoke Wheeler's bond. *Wheeler IV*, slip op. at 4.

With respect to district court's decision and the effect of expungement, Wheeler respectfully suggests that the district court truly fumbled the ball when it said: "And no matter the import of the expungement determination in 2013, it was not available to the sentencing court in 1989." Opinion and Order, D.E. 52

at 8. What was "available" to the sentencing court in 1989 was materially inaccurate; the state trial court enhanced Wheeler's sentence to 90 years for something Wheeler had had nothing to do with.

The same goes for the district court's musing "Wheeler essentially suggests that issue preclusion flows backward from the 2013 expungement order to prevent the sentencing court, in a separate case over 10 years earlier, from finding or considering that Wheeler committed the September 11 attempted rape." Opinion and Order, D.E. 52 at 9. Wheeler has never suggested any such thing. The expungement of the arrest for the unrelated sexual assault is merely the means by which Wheeler has shown that, in fact, the state trial court relied on materially inaccurate information in sentencing him.

4. What All Parties were Aware of?

The second bit of fiction that the *Wheeler IV* court used to affirm the denial of state post-conviction relief with respect to Wheeler's *Townsend* / *Tucker* claim was this: "[a]ll parties, including Wheeler, were aware that the case from the September 11, 1988 incident was dismissed because the State had obtained eight other felony convictions and the victim was reluctant to testify." W*heeler IV*, slip op. at 13. That simply is not so.

The case against Wheeler for the alleged unrelated sexual assault was dismissed on March 15, 1989, a month before Wheeler was tried in April and two months before he was sentenced in May. Appellant's Post-Conviction App. at 45 (Chronological Case Summary Entry). The order of expungement establishes that case was dismissed either because no crime had been committed because it was not Wheeler who committed it. It cannot have been because the State had obtained a conviction in another case, because Wheeler had not been convicted for anything on March 15, 1989.

5. Even under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), Wheeler is entitled to habeas relief for his *Tucker* / *Townsend* claim.

The district court invoked *Brecht*. Order and Opinion, D.E. 52 at 5 (citing *Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008). It also applied it: "Wheeler has not shown that the consideration of the September 11 attempted rape had a substantial and injurious effect on the sentence."

In this the district court is mistaken. Two of the three aggravating circumstances the trial court used to enhance Wheeler's sentence were invalid. Wheeler had nothing to do with the unrelated sexual assault, his arrest for which was expunged; and "imposition of a reduced sentence would depreciate the seriousness of the offense" may only be invoked at sentencing when a court is deciding not to mitigate a sentence. *See Evans v. State*, 497 N.E.2d 919, 923 (Ind. 1986) ("As appellant suggests, that statutory factor appears to be applicable only when the trial court is considering the imposition of a reduced sentence.")

Additionally, Wheeler was only 19 when he committed the sexual assaults resulting in his convictions; he also had no criminal history. In Indiana, at least, these are the two eight-hundred-pound gorillas of mitigators. *See Merlington v. State*, 814 N.E.2d 269, 273 (Ind. 2004).

Wheeler's erroneously supposed commission of the unrelated sexual assault in another case was the central sentencing issue argued by the parties and the central aggravating circumstance found by the state trial court. How could it not have had a substantial and injurious effect on Wheeler's sentence?

6. Wheeler's Trial Ineffective-Assistance Claim

This is a failure-to-investigate case. If Wheeler, on his own, from prison, years after the fact, could litigate the expungement of his arrest that was the principal basis for his enhanced sentence, his trial lawyer would have likely achieved the same result had he looked into the circumstances of the arrest before Wheeler's sentencing. Because the trial court refused to revoke Wheeler's

bond for the alleged unrelated sexual assault, Wheeler's trial lawyer was certainly on notice that something was amiss with that charge. And for the same reasons that that the improper use of the expunged arrest—the inaccurate finding, in fact, that Wheeler had actually committed the unrelated sexual assault—had a substantial and injurious effect on Wheeler's sentence, there is at least a reasonable probability that Wheeler would have been sentenced to less than 90 years had his lawyer investigated the circumstances of Wheeler's arrest.

Conclusion

For the foregoing reasons, Wheeler respectfully requests that the Court issue a certificate of appealability with respect to both of his constitutional claims: 1) Wheeler was denied his due process right to be sentenced based on accurate information; and 2) he was denied his Sixth Amendment right to the effective assistance of counsel, because his trial lawyer failed to investigate the circumstances of Wheeler's arrest for a sexual assault in an unrelated case.

Respectfully Submitted,

/s/ Michael K. Ausbrook
Indiana Attorney No. 17223-53

P.O. Box 1554
Bloomington, IN 47402

Tel: 812.322.3218
Email: mausbrook@gmail.com

Counsel for Anthony Wheeler,
Petitioner-Appellant

Certificate of Service

I hereby certify that on January 28, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s Michael K. Ausbrook
Indiana Attorney No. 17223-53

P.O. Box 1554
Bloomington, IN 47402

Tel: 812.322.3218
Email: mausbrook@gmail.com

Counsel for Anthony Wheeler,
Petitioner-Appellant