

No. \_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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NICHOLAS HACHENEY,

Petitioner,

v.

MIKE OBENLAND,

Respondent.

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

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## QUESTION PRESENTED

In *Wilson v. Sellers*, \_\_ U.S. \_\_, 138 S. Ct. 1188, 1192 (2018), this Court held that when a state court issues a reasoned decision “a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable.”

Here, the habeas court did not review the reasons given by the state court for denying Mr. Hacheney’s ineffective assistance of counsel claim, but instead posited its own reasons. Does the Ninth Circuit’s decision failing to grant a certificate of appealability for this claim conflict with *Wilson*?

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

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

### **OPINION BELOW**

The opinion of the Ninth Circuit Court of Appeals appears at Appendix A to this petition and is reported as: *Hacheney v. Obenland*, 732 F. App'x 541 (9th Cir. 2018).

### **JURISDICTION**

The Ninth Circuit issued its panel decision on May 1, 2018. Mr. Hacheney's motion for rehearing or rehearing en banc was denied on June 8, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL PROVISIONS INVOLVED**

#### **U.S. Const. amend. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## **U.S. Const. amend. XIV**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **STATEMENT OF THE CASE**

#### **1. Procedural History**

Dawn Hacheney died in a house fire on December 26, 1997.

Initially, her death was classified as accidental.

On September 17, 2001, an information was filed in Kitsap County Superior Court charging Hacheney with murder. Hacheney proceeded to trial. A jury returned a guilty verdict on December 26, 2002. Hacheney was sentenced to life without parole on February 7, 2003.

He appealed. The Washington Court of Appeals affirmed Mr. Hacheney's conviction. 128 Wash.App. 1061 (2005); 1 ER 137.<sup>1</sup> Hacheney petitioned the Washington Supreme Court, which accepted review. On May 31, 2007, that court reversed and remanded for

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<sup>1</sup> "ER" refers to the four volumes of the excerpts of record filed in the Ninth Circuit.



resentencing after finding insufficient evidence of the aggravating factor. *State v. Hacheney*, 160 Wash.2d 503, 158 P.3d 1152 (2007).

Hacheney was resentenced on June 20, 2008. He filed a second appeal. The Washington Court of Appeals reversed a portion of Hacheney's sentence on October 27, 2009. 152 Wash.App. 1052 (2009). The Washington Supreme Court denied review on April 28, 2010. 168 Wash.2d 1032 (2010).

Mr. Hacheney filed a state post-conviction petition (PRP) on June 22, 2009. On June 26, 2012, the Court of Appeals denied reconsideration and dismissed the petition in a written decision. *In re PRP of Hacheney*, 169 Wash.App. 1,288 P.3d 619 (2012); Appendix D. Hacheney petitioned the Washington Supreme Court for review. That court denied review without comment on April 2, 2015. Appendix E.

Mr. Hacheney filed his habeas petition in the Western District of Washington on July 16, 2015. I ER 174. On August 31, 2016, the magistrate issued a *Report and Recommendation*. Appendix C. On October 4, 2016, District Court Judge Ronald B. Leighton adopted the *Report* and dismissed Hacheney's habeas petition. Appendix B.

Hacheney appealed. I ER 1. A certificate of appealability was issued, although it did not extend to the instant issue.

On May 1, 2019, the Ninth Circuit issued a memorandum decision affirming the district court but denied Hacheney's motion to expand the certificate of appealability. Appendix A. On June 8, 2018, the Ninth Circuit denied Hacheney's motion for en banc review. Appendix F.

## 2. Facts

Dawn Hacheney's deceased body was found after a fire consumed the bedroom of the Hacheney home the day after Christmas 1997.<sup>2</sup>

### *The Initial Investigations Concluded that Dawn Died in an Accidental Fire*

On December 29, 1997, Dr. Emmanuel Lacsina performed an autopsy and determined Dawn's cause of death was laryngospasm, likely caused by a flash fire. A fire investigator agreed, noting that there were propane canisters in the bedroom; that some had "vented" during the fire; and that the area around the canisters had burned more heavily than other areas in the room. Scott Roberts, the insurance

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<sup>2</sup> To avoid confusion, Mr. Hacheney refers to Dawn Hacheney by her first name. He intends no disrespect.

investigator, concluded that the fire was accidental, possibly caused by a faulty, sparking electrical cord.

*A Witness Seeks Immunity and Then Accuses Hacheney of Murder*

During the summer of 1997, Hacheney had an affair with a woman named Sandra Glass. Hacheney and Glass had both been employed at a conservative fundamentalist church. When, in the spring of 2001, their affair became public, Glass sought immunity and told police that Hacheney confessed the murder to her in 1998. According to Glass, Hacheney stated he gave Dawn some Benadryl, put a plastic bag over her head, suffocated her, set the house on fire and left.

*Hacheney Has Always Asserted an Alibi*

When questioned shortly after the death of his wife, Hacheney asserted when he left his house on the morning of his wife's death at 5:10 a.m. to go duck hunting, she was still alive.

At trial, it was uncontested that Mr. Hacheney was hunting with Phil Martini and Lindsey Latsbaugh on the morning of Dawn's death. When Hacheney left his home was a contested fact.

*At Trial, the State Claimed Hacheney's Alibi was a Lie*

The State presented a timeline of the morning of Dawn's death premised on the hunters arriving in the duck blinds just prior to sunrise, which was at 8 a.m. The State presented testimony regarding how long it would have taken Hacheney to drive from his home, meet up with the other two hunters, and then drive to the duck hunting location. The house fire was first reported by a neighbor who called 911 at 7:13 a.m.

In closing, the State argued Hacheney left his home after setting it on fire between 6:30 a.m. and 6:45 a.m. The State also strenuously argued that Hacheney's estimate of when he left home was a lie indicative of his consciousness of guilt.

*The Defense Contested the State's Timeline*

The defense at trial presented evidence contesting portions of the State's timeline. Most significantly, Jim White, a defense expert, conducted extensive fire modeling concluding that the burn patterns in the house were consistent with a flash fire. IV ER 59-60. He further opined that the fire lasted about 20 minutes. Given that the fire was

extinguished at approximately 7:25 a.m., using White's testimony, the fire started around 7:05 a.m.

*The Hunters Gave Detailed Descriptions of the Lighting At the Time of Their Arrival*

Neither Mr. Martini or Ms. Latsbaugh, who both testified for the State, knew what time they arrived in the duck blinds. But, both detailed the lighting conditions. Phil Martini was especially descriptive. He described the lighting at the time the group arrived in the duck blinds as: "Just the beginning of the cracks of dawn coming over the edge of the horizon." IV ER 48-49. "It was still dark, but you could see the beginnings of dawn." *Id.* at 21. "When I say daylight, I mean just the beginnings of the cracks of dawn coming over the edge of the horizon." I don't mean full sunrise." *Id.* at 48-49. Martini also testified that the hunters had been in the duck blinds 20-30 minutes when he saw two birds, but that it was not "fully daylight." *Id.*

Because the only evidence introduced regarding the lighting conditions was that sunrise occurred just before 8 a.m., when defense counsel argued an alternative timeline that had Hacheney arriving in the duck blinds around 7 a.m., the prosecutor argued at that time it "would be pitch black, and which would be a violation of the hunting

laws to be there hunting.” III ER 156. See also *id.* (“They would not be there when it's pitch dark, at 6:58 a.m.”).

*The Evidence First Presented in the Post-Conviction Proceeding*

To no avail, Mr. Hacheney’s father urged trial counsel to investigate the lighting conditions in the duck blinds before sunrise. Before and after his son’s conviction, Mr. Hacheney’s father, Dan Hacheney traveled to the hunting site and took pictures. IV ER 6; 10.

Those pictures, presented to the state post-conviction court, show that at 6:45 a.m. you can see the “cracks of dawn” on the horizon. In addition, those photographs show that it was “fully daylight” by 7:30 a.m.—much earlier than the timeline presented by the State at Hacheney’s trial.

The upshot of this evidence is clear: if Hacheney was an hour away from home in the duck blinds by 6:45 a.m., he could not have started the fire. Likewise, if Hacheney arrived at 6:45 a.m., then his estimated time of departure from his house was not far off the mark.

But, Hacheney’s jury did not hear this evidence.

### *The State Post-Conviction Decision*

Based on the photographic evidence, in his post-conviction proceeding Mr. Hacheney claimed that his trial attorneys failed to competently support his alibi by not investigating the time most consistent with Martinin's description of the "cracks of dawn coming over the edge of the horizon." The state court dismissed Hacheney's IAC claim without conducting an evidentiary hearing. While the state court recognized that the "evidence Hacheney presents with his PRP" demonstrates that "conflicting evidence exists about the timeline and his whereabouts when the fire started," it rejected the claim because "it does not conclusively demonstrate," that "[i]t was impossible for Hacheney to have started the fire.' "

The state court further speculated:

As the State points out, 'Counsel could well have determined that making too much of the time issue would only have served to prove that his statements to the insurance company and the police at the time of the murder had to have been false. He would have then only reinforced the State's theme of guilty knowledge.' Br. of Resp't at 55.

We hold that Hacheney's defense counsel's decision not to emphasize the timeline on the morning of Dawn's death can be characterized as a legitimate trial tactic, thus it did not constitute ineffective assistance of counsel.

I ER 81; App. D.

*The Habeas Court*

The *Report and Recommendation* (Appendix C) adopted by the district court did not examine the reasonableness of the state court's reasoning that counsel's strategy was to avoid the timeline of events.

In fact, the *Report* concluded that counsel adequately defended Hacheney's alibi:

During closing, counsel for Petitioner argued the evidence showed Petitioner was not home and could not have been home when the fire started. Dkt. 21, Exhibit 78, p. 5097. He challenged the State's reliance on Mrs. Latsbaugh's testimony and argued the testimony showed Petitioner was at the hunting location by 6:58 a.m. *Id.* at pp. 5098-99. Counsel also addressed any perceived inconsistencies in Petitioner's testimony regarding the time he left home on the morning in question. *Id.* at p. 5101. He further emphasized the weaknesses in the State's evidence regarding the time it took to drive from Petitioner's home to the hunting location. *Id.* at pp. 5101-02. Counsel argued the State's failure to provide specific evidence as to the amount of time it took Petitioner to reach the Hood Canal Bridge and the hunting location show the State failed to prove its timeline beyond a reasonable doubt. See *id.* at pp. 5102-04.

The *Report* continues:

The record shows counsel was aware of the conflicting timelines, impeached State witnesses, and presented their own expert to establish a timeline consistent with Petitioner's claim that he was hunting when the fire started. Counsel also argued the State's timeline was unreasonable during closing argument and reminded the jury the burden was on the State to prove its case beyond a



reasonable doubt. There is no evidence showing trial counsels' strategy was unreasonable.

Neither the *Report* nor the order adopting it indicated whether the court's review was of the Washington Court of Appeals reasoned decision or of the Washington Supreme Court's summary order denying review.

The Ninth Circuit denied Hacheney's request to expand the certificate of appealability to include this issue, summarily concluding "the record reflects that his trial counsel conducted a reasonable investigation into his purported alibi and then made appropriate tactical choices about how best to rebut the state's evidence." Appendix A.

## ARGUMENT

### 1. Introduction

This Court should grant certiorari because the decision of the habeas court conflicts with this Court's recent decision in *Wilson v. Sellers*, \_\_ U.S. \_\_, 138 S. Ct. 1188, 1192 (2018). Contrary to *Wilson* (which was decided days before the panel decision), the habeas court did not review the analysis of the last reasoned state court decision.<sup>3</sup> Because the state court reasoning is both contrary to and an

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<sup>3</sup> Because this case pre-dates *Wilson*, no argument has been advanced to rebut the presumption that an unexplained state-court decision on the merits relied on the rationale of the last-related state court decision.

unreasonable application of this Court’s constitutional jurisprudence, no deference was due. This Court should grant certiorari, vacate the decision below, reverse and remand to the Ninth Circuit with directions to grant a certificate of appealability.

## 2. A Habeas Court Examines the State Court Reasoning

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner who challenges (in a federal habeas court) a matter “adjudicated on the merits in State court” to show that the relevant state-court “decision” (1) “was contrary to, or involved an unreasonable application of, clearly established Federal law,” or (2) “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). Deciding whether a state court’s decision “involved” an unreasonable application of federal law or “was based on” an unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner’s federal claims. *Wilson*, 138 S. Ct. at 1191–92.

This Court in *Wilson* explained:

This is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion. In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. We have affirmed this approach time and again. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 39–44 (2009) (*per curiam*); *Rompilla v. Beard*, 545 U.S. 374, 388–392 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523–538 (2003).

*Wilson*, 138 S. Ct. at 1192. In other words, the focus of review under §2254(d) is on what the state court knew and did, not what it hypothetically might have done.

The habeas court did not do that in this case. If it had done so, it would have found that the state court decision was both contrary to and an unreasonable application of federal constitutional law as determined by this Court. Because the district court's analysis was flawed, the Ninth Circuit should have granted Hacheney's motion to expand the certificate of appealability to include this issue.

### 3. The State Court Decision was Contrary to and an Unreasonable Application of Constitutional Law

Although the state court post-conviction decision cites *Strickland v. Washington*, 466 U.S. 688 (1984), the court employed a much more demanding test. The state court concluded that relief was not warranted because Hacheney failed to “conclusively demonstrate” that

it was “impossible” for him to have started the fire. I ER 80. In other words, the test used by the state court to reject Hacheney’s claim was not the familiar IAC test of deficient performance and a reasonable likelihood of a different outcome, but a test that most resembles a free-standing claim of actual innocence. The Constitution does not require Hacheney to “conclusively” prove his innocence to prevail on an IAC claim. But, that is exactly what the state court required.

As this Court has made clear, it is the application, not the recitation of a standard that matters for § 2254(d) purposes. *See Sears v. Upton*, 561 U.S. 945, 952 (2010) (per curiam) (“Although the Court appears to have stated the proper [*Strickland*] prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case.”) (footnote omitted).

Moreover, the state court used the actual innocence standard to justify trial counsel’s failure to investigate. The state court concluded that because the post-conviction evidence did not unquestionably establish Hacheney’s innocence counsel’s failure to investigate was reasonable.

The state court also reasoned that trial counsel attempted to avoid the issue of when Hacheney left home. This reasoning is not only based entirely on speculation, it is patently unreasonable. Hacheney's defense was alibi. The State characterized the alibi as an obvious fabrication. The time that Hacheney left home was arguably the most important contested fact at trial.

Further, trial counsel could not have made a reasonable decision without conducting the investigation. *Strickland*, 466 U.S. at 690–91 (“strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation”).

A quick internet search would have been a helpful start. There are three types of twilight: astronomical, nautical, and civil. Nautical twilight is sometimes referred to as “first light.” During nautical twilight, during clear weather it is possible to see light at the horizon. Using Martini's description, counsel could have easily determined when, on or about the date that Dawn died, a person could see the “cracks of dawn” at nautical twilight, which occurred around 6:45 a.m.

Or, counsel could have heeded the urgings of Hacheney's father.

#### IV ER 6-7.

When that investigation was finally conducted in state post-conviction court, the evidence fully supports the answer that Hacheney arrived in the duck blinds before the house fire started. If Hacheney arrived in the hunting blinds around 6:45 a.m. when photographic evidence shows the “cracks of dawn”, that means he left home at around 6 a.m., at the latest—likely 15-20 minutes earlier. Hacheney’s home was not on fire at 6 a.m. Hacheney was prejudiced because the evidence developed in post-conviction fully supports his alibi.

#### 4. Hacheney was Denied Effective Assistance of Counsel

“The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.” *United States v. Nixon*, 418 U.S. 683, 709 (1974); *see also Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988). *See also Hendersen v. Sargent*, 926 F.2d 706, 711-12 (8th Cir. 1991) (reversing conviction where counsel presented alibi, but failed to investigate evidence that victim's husband, or possibly another man with ties to the victim, had killed her because “[t]he decision to interview a potential

witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial" (internal quotations omitted)). Such fact development cannot take place without investigation.

The “adversarial testing process” will not function properly in the absence of investigation by defense counsel. *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

Half an alibi is no alibi. Failing to fully investigate a defendant’s alibi is deficient, especially where the State contends the alibi is a lie.

Here, counsel failed to conduct an obvious investigation. When that investigation was conducted in state post-conviction, it supported Hacheney’s alibi and rebutted the State’s misleading claim about the lighting conditions. If the photographic evidence had been presented and only one juror found that the expert testimony of Mr. White regarding burn time created a reasonable doubt about when Hacheney left home, the result of trial would have been different.

Hacheney did not set the fire because he was at or near the hunting blinds when the fire started. When he left home that fateful morning, his house was not on fire and his wife was still alive.

## CONCLUSION

This Court should grant Mr. Hacheney's petition for a writ of certiorari.

DATED this 5<sup>th</sup> day of September 2018.

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