No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DONAVAN TROY FORTIN,

Petitioner,

v.

MARK NOOTH,

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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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision, which interpreted state law contrary to the state court's ruling, conflicts with *Estelle v. McGuire*, 502 U.S. 62 (1991).

2. Whether the Ninth Circuit's decision, which affirmed the denial of an evidentiary hearing even though the state court refused to adjudicate the claim, conflicts with fundamental habeas corpus principles, as recognized and applied in *Williams v. Taylor*, 529 U.S. 420 (2000).

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For The Ninth Circuit

The petitioner, Donavan Troy Fortin, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) entered on June 27, 2018. Appendix (App.) at 1-4.

OPINIONS BELOW

On May 16, 2016, the magistrate judge issued a findings and recommendation in which he recommended denial of Mr. Fortin's petition, dismissal of the case. App. at 8-35. The magistrate judge also recommended granting a certificate of appelability on Mr. Fortin's second and third grounds for relief. App. at 35. On September 1, 2016, the United States District Court for the District of Oregon (district court) adopted the magistrate judge's findings and recommendation on the merits of the petition. App. at 6-7. The district court also adopted the recommendation on the certificate of appealabilty. App. at 7.

On June 27, 2018, the Ninth Circuit affirmed the district court's denial of relief in a memorandum opinion. App. at 1-4.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2016).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. XIV, sec. 1 provides, in relevant part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

28 U.S.C. § 2254(b)(1) (2016) provides:

> 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 unless it appears that –

(A) the application has exhausted the remedies available in the courts of the State; or

B (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(d) (2016) provides:

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; or
>
> (2) resulted in a decision that 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(e) (2016) provides:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The application shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that

(A) the claim relies on –

(i)A new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) A factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilt of the underlying offense.

STATEMENT OF THE CASE

A. Lincoln County Trial Proceedings

On May 29, 2002, Mr. Fortin was charged in Lincoln County with rape, sexual abuse, and coercion. ER 504-07.[1] Counts 1-10 in the indictment addressed the allegations regarding SD. The remainder of the indictment dealt with a separate victim, who is not part of this federal habeas corpus challenge. SD, who turned 13 years old during the time, was a family friend who sometimes babysat for Mr. Fortin's family. ER 365.

At trial, SD told the jury that Mr. Fortin touched her breasts twice (ER 370-71) and that twice he had sex with her against her will. ER 377, 382. SD testified that she did not disclose these incidents right away and that she only told parts of the story over time. ER 387-89. Counsel cross-examined SD on some parts of her story. ER 398-410. The prosecutor's other witnesses included SD's mother (ER 413-22); and the woman who had conducted the

[1] ER refers to the Excerpts of Record filed in the Ninth Circuit case *Forth v. Nooth,* CA No. 16-35708

interviews with SD at the child abuse center. ER 425-33. He also introduced the recorded interview with SD. ER 423-24.

The prosecutor also called the investigating detective, Kenneth Real (Real). Real told the jury about inculpatory statements Mr. Fortin made about the events with SD (ER 331-33) and about SD's statements regarding the incidents. ER 336-37.

Testimony then turned to one of Real's reports. Real explained, among other things, that one of the dates in his report reflecting a day SD was raped was not correct. ER 338-39. Although Real had written in his report that SD had told him that the incident occurred on November 10, 2001, Real testified that SD had actually said that the incident occurred "maybe the second week of October or November," and that he had inserted the specific November 10 date on his own. ER 338. Real testified that "at the time, I thought I needed a specific date for the charge. That was a mistake on my part, and I guess because of lack of experience for no other reason." ER 338.

On cross-examination, counsel asked Real if he was aware that Mr. Fortin had been out of town on November 10 because he was celebrating his wife's birthday. ER 341. Real responded that he was not aware of that fact, and had not pursued any other investigation regarding the November 10 date. ER 341. He reiterated that SD never provided a specific date for the rape. ER 349.

The defense called several witnesses who testified that Mr. Fortin was with them on November 10. ER 434-46. Counsel recalled Real pressed him on the November 10 date. ER 464-69. Mr. Fortin also testified at trial. He provided his side of the story and denied any improper behavior with SD. ER 478-95.

The jury convicted Mr. Fortin. ER 501-03. He was given 100 months for Count 1, 100 months for Count 4, and 36 months for Count 10. ER 501. With all charges, his sentence was 404 months imprisonment. ER 496. Thereafter, Mr. Fortin unsuccessfully sought appellate and post-conviction review of his convictions and sentences.

B. Initial Federal District Court Proceedings

On April 27, 2007, Mr. Fortin filed a pro se petition for writ of habeas corpus. ER 510 (ECF No. 2). In 2009, while the federal case was pending, SD recanted some of her trial testimony. ER 49-94. That recantation called into question Counts 1, 4, and 10.

In a recorded interview, SD told investigators, among other things, that she had tried to tell police and the prosecutor that the sexual contact with Mr. Fortin had been consensual, and that they had never had sex when she was too intoxicated to consent. ER 43, 48. SD stated that her trial testimony had included numerous lies that she had had trouble keeping straight. ER 72. SD also mentioned that during her pre-trial preparation with an

advocate and the prosecutor, the prosecutor disagreed with her version of the facts at one point and had handed her a document with a typed version of her story that she was supposed to recite. ER 74. Mr. Fortin's federal habeas case was stayed to allow him to exhaust his claims based on SD's recantation. ER 517 (ECF No. 90).

C. Second Post-Conviction Case

Mr. Fortin filed a second state petition for post-conviction relief alleging prosecutorial misconduct based on submitting perjured testimony and failure to disclose *Brady* material (the typed testimony the prosecutor provided to SD), and a claim of actual innocence based on SD's recantation. ER 37. Both parties engaged in additional factual investigation, including depositions and witness interviews.

1. The post-conviction depositions

In June 2011, the state deposed SD and the trial prosecutor John Mason (Mason), who was no longer a prosecutor with Lincoln County.

In her deposition SD said that her recent statements to Mr. Fortin's investigators had been a lie. She had told them "what they wanted to hear, just so it would all be done, over with." ER 171. She reiterated that the sexual contact she had with Mr. Fortin had not been consensual. ER 172. She reaffirmed that he had sex with her after she passed out drunk. She also stated that she had felt pressured into speaking with Mr. Fortin's

investigators because Mr. Fortin's family members had been harassing her. ER 172-73.

Mason detailed his contact with SD during Mr. Fortin's trial. He did not recall seeing anything in SD's demeanor that would suggest she was fabricating a story of abuse. ER 211-13. He testified that SD never indicated that any sexual activity between her and Mr. Fortin was consensual. ER 221-22. He recalled that he had handed some type of document to SD but he could not remember any specifics about the document. ER 226-27. He suggested that the document could have merely been a copy of the indictment. ER 227. He also stated that he was "absolutely 100 percent" did not pressure SD to change her story and did not disregard any statements that might have made it more difficult to convict Mr. Fortin. ER 228-29.

2. The post-conviction hearing

At the post-conviction hearing, counsel called several witnesses to testify in support of Mr. Fortin's claims. Ron Benson (Benson) was an investigator with the Lincoln County District Attorney's Office. ER 267. He had been contacted by Mr. Fortin's investigator Harold Nash about jointly interviewing SD because Mr. Nash believed the interview and recantation would lack credibility if he conducted it alone. ER 270. Benson stated that while SD seemed reserved during the interview, nothing in her demeanor indicated to him that she might be lying. ER 24.

Counsel then called Real, the officer who had investigated the original accusations against Mr. Fortin. Real stated that despite the case being his first sex abuse case, he thought he had done "it by the book" and had written down important facts and dates that were provided to him. ER 283. While preparing for his trial testimony, the prosecutor told him that "it appeared that [he] had written the wrong date in [his] investigation." ER 283. The prosecutor had also included SD in their conversation, and after talking with the two of them, Real felt "enough doubt to think that [he] had possibly messed up that portion of the investigation." ER 284.

On cross-examination, Real reiterated that he had written in his report the dates that SD had told him, but before trial, the prosecutor told him that he "messed this up. These dates are wrong." ER 286. Real said he did not believe he had selected an arbitrary date, and did not recall testifying at trial about picking an arbitrary date. ER 286-87. He was led to believe he had screwed up the investigation. ER 287.

Apart from the witness testimony, counsel also introduced affidavits from Mr. Fortin's wife and sister about their contacts with SD, including MySpace messages that indicated SD was the first to reach out to them about recanting. ER 95-106. He also provided information about the treatment program that SD recently completed, which included encouragement to make

amends for past wrongs. In her recantation, SD had explained that the recantation was based in part that desire. ER 107-16.

In closing arguments during the post-conviction case, the state argued that Mr. Fortin was "trying to add a new claim regarding the DA soliciting perjured testimony from Sergeant Real. Nowhere in the petition does he allege that . . . ." ER 297. The Court agreed, and held that "clearly, it's not a claim. You're right. It's not a basis for relief." ER 297. Accordingly, the post-conviction court only ruled on the claims premised on the allegations of a typed statement given to SD.

After hearing all the evidence, the post-conviction court denied relief. The post-conviction court found that:

> 1. Actual Innocence not a grounds for pcr.
>
> 2. No proof of any Brady violation. When the complainant was speaking to the DDA, he gave her something to look at which contained some statements she had made. No proof that it wasn't one of the reports contained in discovery. DDA's testimony is that he didn't prepare any summary of her statements or anything else that he might have handed to her.
>
> 3. No proof of any prosecutorial misconduct. No proof he told complainant to say anything other than the truth. He may have tried to get her to be more clear or provide more details, but no proof he tried to get her to change her story or add anything untrue. (But wouldn't be a basis for pcr even if proven[])].
>
> 4. Complainant spoke to the police, to the forensic team, to the grand jury, the jury, the defense investigators and the pcr attorneys. The grand jury, the jury and the deposition in this case were all under oath. Those sworn statements were all consistent.

> The interview with the defense investigators was not sworn and is not consistent. There is no evidence that the trial attorney had any reason to believe that the witness would make a statement 8 years later that denied that her trial testimony was true. Even that statement is extremely incriminating for pet since she says the sexual contact was consensual. That is still incriminating on all of the counts in the indictment that plead an age factor rather than force. (This complainant is named in counts 1-10 and a different minor is named in counts 11-16). This court cannot think of anything the attorney should/could have done at trial concerning her testimony. Pet has proven inconsistent statements, but not perjury.
>
> 5. No inadequacy in any aspect pled, no prejudice.

ER 32.

3. The post-conviction appeal

On appeal, Mr. Fortin challenged the post-conviction court's ruling that both prosecutorial misconduct and actual innocence were not bases for post-conviction relief. ER 306-09. He also challenged the court's denial of merits relief. ER 306-09. In response, the state asserted that actual innocence was not a basis for post-conviction relief, and even if it was, Mr. Fortin had failed to present sufficient evidence to win on that claim. ER 310-14. The state further argued that the post-conviction court had addressed the prosecutorial claim on the merits and correctly rejected the claim. ER 314-16. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. ER 318-19.

D. Continuation Of Federal District Court Proceedings

After the post-conviction case concluded, the district court lifted the stay. ER 518 (ECF No. 112). In Mr. Fortin's supporting brief he argued that based on the post-conviction court's ruling that actual innocence and prosecutorial misconduct were not bases for post-conviction relief, the state had failed to provide an available state court remedy. Accordingly, he argued that the district court should hold a hearing on his claims of actual innocence and prosecutorial misconduct. He argued that the evidentiary hearing would produce additional evidence on actual innocence, and provided examples. He further argued that he had proved his prosecutorial misconduct claims on the existing record.

The district court rejected Mr. Fortin's arguments. App. 6-7, 18-35. However, the district court granted a certificate of appealability of the claims of actual innocence and prosecutorial misconduct. App. at 7.

E. Ninth Circuit Proceedings

The Ninth Circuit affirmed the district court's denial of relief. App. at 1-4. On the issue of prosecutorial misconduct, the Ninth Circuit determined that Mr. Fortin could not prove an absence of state corrective process under 28 U.S.C. § 2254(b)(1)(B)(i) and (ii). App. at 2. The Ninth Circuit wrote that the

> Oregon court's statement that Fortin's allegations "wouldn't be a basis for [post-conviction relief] even if proven," fairly read in context, does not suggest that prosecutorial misconduct claims are not cognizable in Oregon post-conviction proceedings. *See* Or. Rev. Stat. § 138.530(1)(a) (authorizing post-conviction relief based on violation in criminal proceedings "of petitioner's rights under the Constitution of the United States"); *Berg v. Nooth*, 359 P.3d 279, 285 (Or. Ct. App. 2015) (reviewing and denying on the merits a post-conviction claim of prosecutorial misconduct).

App. at 2.

On the issue of actual innocence to excuse procedural default under *Schlup v. Delo*, 513 U.S. 298 (1995), the Ninth Circuit found S.D.'s recantation to be insufficient because of her subsequent retraction of it. App. at 3. The Ninth Circuit also rejected Mr. Fortin's explanations as to why her original recantation was credible. App. at 2. Next, the Ninth Circuit rejected Real's testimony as *Schlup* evidence, because of its unreliability. Finally, the Ninth Circuit affirmed the denial of an evidentiary hearing on actual innocence because

> Assuming arguendo that such a claim is cognizable in federal habeas, *see Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014), it would require "more convincing proof of innocence" than the showing required under *Schlup* to overcome procedural default, *House v. Bell*, 547 U.S. 518, 555 (2006). The new evidence Fortin would present at a hearing is not significantly different from evidence already in the record, which, as discussed above, is not sufficient to meet even the *Schlup* standard. *See Griffin v. Johnson*, 350 F.3d 956, 966 (9th Cir. 2003). Even if Fortin presented that evidence and it were credited in its entirety, the totality of the evidence would not compel the conclusion that Fortin is actually innocent of any of the offenses of which he was convicted.

App. at 4.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to review the Ninth Circuit's opinion that interpreted state law in a manner contrary to the state court's ruling. That opinion directly conflicts with *Estelle v. McGuire*, 502 U.S. 62 (1991).

This Court should also grant certiorari to review the Ninth Circuit's opinion that denied Mr. Fortin an evidentiary hearing on an issue that the state court refused to adjudicate. That opinion directly conflicts with fundamental habeas corpus principles, as recognized and applied in *Williams v. Taylor*, 529 U.S. 420 (2000).

ARGUMENT

A. Given The Post-Conviction Court's Explicit Ruling On State Law, The Ninth Circuit's Decision Conflicts With *Estelle v. McGuire*, 502 U.S. 62 (1991).

Before the district court and the Ninth Circuit, Mr. Fortin conceded that his claims of prosecutorial misconduct were not raised properly in the state court proceedings as required by 28 U.S.C § 2244(b)(1) (2016). However, he argued that the claims should have been considered on the merits in federal court because it was futile for him to raise them in the state court.

In support of that argument, Mr. Fortin relied upon the post-conviction court's ruling in his case. In its findings, the post-conviction court explicitly stated that prosecutorial misconduct "wouldn't be a basis for [post-conviction relief] even if proven." App. at 37. Accordingly, Mr. Fortin explained that even if he had properly raised and developed his claims regarding witness tampering and *Brady* violations with Real, they would have been denied. The lack of available process to adjudicate these claims made it futile for Mr. Fortin to raise them. *See* 28 U.S.C. § 2254(b)(1)(B)(i) and (ii).

The Ninth Circuit ruled against Mr. Fortin on this point, writing that "the Oregon court's statement that Fortin's allegations 'wouldn't be a basis for [post-conviction] relief even if proven' fairly read in context does not suggest that prosecutorial misconduct claims are not cognizable in Oregon post-conviction proceedings." App. at 2. In support, the Ninth Circuit cited the Oregon post-conviction statute and one Oregon post-conviction case that had denied a claim of prosecutorial misconduct on the merits. In so doing, the Ninth Circuit violated one of the basic principles of federal habeas corpus law – that a federal court must defer to the state court's interpretation of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Even if the Ninth Circuit believed that Oregon law may permit adjudication of prosecutorial misconduct claims, it had no authority to make that ruling, because the state court had already ruled to the contrary. The Ninth Circuit's decision thus

conflicts with this Court's well-established precedent, and calls for this Court's review.

B. Because The State Court Refused To Adjudicate The Issue Of Mr. Fortin's Actual Innocence, The Federal Courts' Determination To Decide The Issue Without An Evidentiary Hearing Conflicted With Precedent.

When Mr. Fortin presented his claim of actual innocence to the state post-conviction court, the court refused to consider it. The post-conviction court ruled that "ruled that "Actual Innocence not a grounds for pcr." App. at 37. Because he was not given a fair opportunity to litigate actual innocence in state court, Mr. Fortin requested an evidentiary hearing in the federal district court to fully develop the evidence – both to support an independent claim for relief, and to establish the *Schlup* gateway to excuse procedural default. The district court denied an evidentiary hearing and found that Mr. Fortin's showing of actual innocence was insufficient to prove either the *Schlup* gateway or an independent claim for relief. App. at 28-34. The Ninth Circuit affirmed that decision. App. at 2-4. As explained below, the Ninth Circuit's decision conflicts with controlling precedent.

The state process which adjudicated the petitioner's claims must have been fundamentally fair, because Fourteenth Amendment due process requires, at a minimum, that a petitioner have one full and fair opportunity to litigate his federal constitutional claims. *See Wright v. West*, 505 U.S. 277,

298-99 (1992) (O'Connor, J., concurring); *Daniels v. United States*, 532 U.S. 374, 386 (2001) (Scalia, J., concurring in part) (suggesting that due process would require one fair opportunity to litigate a claim); *see generally Don't Forget Due Process: The Path Not (Yet) Taken In § 2254 Habeas Corpus Adjudications*, Justin Marceau, 62 Hastings L.J. 1 (2010).

Thus, the fact that 28 U.S.C. § 2254(d) contains no specific language requiring a full and fair hearing in state court does not mean that Congress could eliminate that requirement. First, habeas corpus is at its core an equitable remedy and the AEDPA has to be interpreted in that context. *See Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (internal quotations omitted) (holding that equitable tolling applies to 28 U.S.C. § 2244, even though it is not specifically contained in the statute in part because "equitable principles have traditionally governed the substantive law of habeas corpus" and "we will not construe a statute to displace courts' traditional equitable authority absent the clearest command"). It would be inequitable to defer to a decision resulting from a fundamentally unfair state process, thereby denying a petitioner any fair consideration of his constitutional claims.

Second, if the statute is interpreted not to require one full and fair hearing, serious constitutional questions arise under both Fourteenth Amendment due process, *see Boumediene v. Bush*, 553 U.S. 723, 780-82 (2008), as well as the Suspension Clause. *See id.* at 790-91 (distinguishing

the Detainee Treatment Act procedures from habeas proceedings under 28 U.S.C. § 2254 (2016) because in the latter "the prisoner already has had a full and fair opportunity to develop the factual predicate of his claim"). Therefore, under the doctrine of constitutional avoidance, the habeas statutes should be interpreted to require one full and fair adjudication of a petitioner's federal constitutional claims before application of the deference provisions are authorized. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (recognizing that "when deciding which of two plausible statutory constructions to adopt . . . if one of them would raise a multitude of constitutional problems, the other should prevail").

That interpretation is supported by the legislative history of the AEDPA. The statute's final language was a centrist compromise between two proposals – one restrictive and one more moderate. *See AEDPA's Wrecks: Comity Finality and Federalism*, Lee Kovarsky, 82 Tul. L. Rev. 443, 463-64 (2007) (summarizing history of legislation). The term "full and fair" was a catch-phrase for the more restrictive proposal. *Deference and Doubt: The Interaction of AEDPA § 2254(d)(2) and (e)(1)*, Justin F. Marceau, 82 Tul. L. Rev. 385, 430 (2007). Its exclusion can thus be interpreted as appeasing many in Congress who "seemed worried that any use of the phrase would dominate the provision's interpretation" such that courts would read it as incorporation of the restrictive proposal. *Id.* at 431.

That Congress intended to retain a requirement that a minimum level of procedural fairness be afforded by state courts is evident from the congressional record. During floor debates on a proposed amendment that would have stricken the deference standard from the statute, Senator Hatch said,

> the [deference] standard proposed allows the Federal courts to review State court decisions that improperly apply clearly established Federal law. In other words, if the State court unreasonably applied Federal laws, its determination is subject to review by the Federal courts . . . There is simply no reason that Federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts.

142 Cong. Rec. S3446–47 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch).

Indeed, even conservative proponents of habeas corpus reform recognize that a petitioner must have one fundamentally fair opportunity to litigate his constitutional claims. *See, e.g., Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, Paul M. Bator, 76 Harv. L. Rev. 441, 455 (1963) ("if the conditions under which a question was litigated were not fairly and rationally adapted for the reaching of a correct solution of any issue of fact or law, . . . that issue should be redetermined."). Professor Bator continued:

> [If the state fails to] provide a reasoned method of inquiry into relevant questions of fact and law, . . . the due process clause itself demands that its conclusions of fact or law should not be respected: the prisoner's detention can be seen as unlawful, not because error was made as to a substantive federal question fairly litigated by

> the state tribunals, but because the totality of state procedures did not furnish the prisoner with a fair chance to litigate his case.

Id. at 456.

This Court has also recognized the inherent requirement for the state court to provide a full and fair process for adjudicating claims. In *Williams v. Taylor*, 529 U.S. 420 (2000), this Court distinguished between petitioners who diligently attempt to develop facts in state court and petitioners who do not. *Id.* at 433-37. This Court interpreted 28 U.S.C. § 2254(e) to permit a federal evidentiary hearing for those in the first category, but not for those in the second. *Id.* at 436. Elemental to this Court's ruling in *Williams* was the assumption that the state courts would, in fact, exercise their "first opportunity" to rule on federal constitutional claims. *Id.* The petitioner's factual development was assessed to determine whether he impeded the state courts in any way:

> For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court unless the statute's other stringent requirements are met.

Id. at 437.

Here, Mr. Fortin did not "himself contribute to the absence of a full and fair adjudication in state court" – the state court's ruling that actual

innocence was not a basis for post-conviction relief did that. No matter what evidence Mr. Fortin produced, the post-conviction court would not have granted relief. Comity is therefore not offended by a federal evidentiary hearing, and under the reasoning of *Williams*, Mr. Fortin should not have been considered to have failed to develop the facts in state court.

As a result, the Ninth Circuit should not have affirmed the district court's decision to rely solely upon the state court's evidence when assessing issues of actual innocence. Instead, the Ninth Circuit should have remanded with instructions to grant an evidentiary hearing on the issue of Mr. Fortin's actual innocence. Its failure to do so resulted in a decision that conflicts with controlling precedent, and calls for this Court's review.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted September 6, 2018

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