No. ____________________

IN THE

SUPREME COURT OF THE UNITED STATES

James Derrick Hundley — PETITIONER
(Your Name)

vs.

Renee Baker, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Ninth Circuit Court of Appeals.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James Derrick Hundley #51212
(Your Name)

L.C.C. 1200 Prison Road
(Address)

Lovelock, Nv 89419
(City, State, Zip Code)

N/A.
(Phone Number)

LCC LL FORM 40.006

QUESTION(S) PRESENTED

1) Did The Federal Habeas Court improperly and Unconstitutionally Suspend and foreclose petitioners Habeas right?

2) Did petitioner receive Ineffective Assistance of Counsel?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Attorney General of The State of Nevada.

Table of Authorities Cited

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ______________________ court appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Feburary 27, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 5, 2018, and a copy of the order denying rehearing appears at Appendix ______.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______________ (date) on ______________ (date) in Application No. __A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was ______________. A copy of that decision appears at Appendix ______.

[ ] A timely petition for rehearing was thereafter denied on the following date: ______________, and a copy of the order denying rehearing appears at Appendix ______.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______________ (date) on ______________ (date) in Application No. __A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Statement of The Case

On January 8, 1996, The State of Nevada charged Petitioner Hundley with (3) Three Counts of Sexual Assault involving a minor, and (1) One count of gross misdemeanor Child abuse. After a preliminary hearing, The state amended The gross misdemeanor Child abuse To a felony Charge of Child abuse Causing Substantial bodily harm.

On July 23, 1996, Petitioner's Case proceeds to Trial. During Trial, The state's expert witness was unable To support a time frame in which The suspected injuries To The child victims hymen occured. No physical evidence linked petitioner To The alleged Sexual Assault. Furthermore The alleged victim only testified based upon The drawings She made upon prompts from The prosecutor. The States expert witness even Could not definitely say That it happened recently. These injuries Could have happened prior to The children's move to Reno, with Their mother and petitioner. Without any proof other Than The alleged victim's statements, which contradict her testimony during The preliminary hearing, The jury convicted petitioner on July 25, 1996 by a guilty verdict.

On August 30, 1996, The court sentenced Petitioner, after hearing testimony from The victim's mother about a possible recantation. That The children "pretty much have told me The Same Thing", as follows:

Count 1: Life with The possibility of parole after 20 years.

Count 2: Life with The possibility of parole after 20 years Consecutively to Count 1.

Count 3: Life with The possibility of parole after 20 years, Concurrent with Counts 1 and 2

Count 4: Fifty six (56) To one hundred fourty four months, Concurrent with Counts 1, 2, and 3

Petitioner appealed her Conviction and Sentence To The Nevada Supreme Court, raising Three grounds for review. First, Petitioner Claimed The "district Court abused it's discretion by granting The states motion to endorse Seven witnesses six days prior to trial, and by denying Petitioner's motion To Continue.

Second, Petitioner Claimed The district Court Conducted an insufficient Petrocelli hearing.

Finally, Petitioner Claimed The prosecutor Committed misconduct by referring to The defense Theory as "SODDI" meaning "Some other dude did it."

On April 21, 1999, The Nevada Supreme Court affirmed her Conviction and Sentence.

On Oct 13, 2010, Petitioner Took The first step Towards post Conviction action in her case by requesting a copy of her presentence investigation report. Shortly Thereafter, she filed a motion to modify her Sentence, Claiming The district court relied "on false information and /or misleading statements from The prosecutor during Sentencing." The district Court denied her relief, and The Nevada Supreme Court affirmed The district courts order.

On November 20, 2012, Petitioner wrote a letter asking The Court to accept This letter as a writ of Habeas Corpus, a request to proceed in Forma Pauperis, and a Motion for appointment of Counsel. In The letter, Petitioner raised The claim That she had recently discovered Crucial evidence not presented at my trial, That would have undermined The credibility of The alleged victim. Petitioner asked for The appointment of Counsel to assist her in The filing of a petition for assistance of Counsel.

On March 19, 2013, The district Court denied petitioners Writ for habeas Corpus Concluding That These statements were "reasonably available to petitioner since The preliminary hearing took place in January 1996. The Court finds Petitioner has failed to demonstrate good Cause for failing to raise This claim during The statutory period."

On march, 29, 2013, Petitioner filed her Notice of Appeal

On September 19, 2013, The Nevada Supreme Court affirmed The district Courts order denying relief.

On June 19, 2014, Hundley filed a second state petition. The district court appointed Counsel to assist her in The preperation of her State habeas action. Counsel filed a supplemental petition on Petitioner's behalf. The Court found petitioners Second petition untimely and Successive and dismissed it. Petitioner appealed To the Nevada Supreme Court which affirmed on Procedual grounds.

On November 8, 2016, Petitioner filed her first federal petition for writ of Habeas Corpus and paid The filing fee. Petitioner presented an Actual Innocence Claim, along with (8) eight other Claims all dealing with Ineffective Assistance of Counsel and a Cumulative error Claim.

On November 16, 2016, The Honorable Judge H.D. mckibbon ordered Petitioner "To Show Cause why The Court Should not dismiss This action as barred by The Statutes of limitations." within 60 days.

On December 30, 2016, Petitioner filed her motion to show Cause explaining That she has an actual Innocence Claim, and Showing That a recantation is enough To pass Through The schlup gateway. Petitioner's Claim was not fully developed, as there was no evidentiary hearing to develop the claim.

On January 24, 2017, The Honorable H.D. Mckibbon ordered That "the Court determines That Hundley has made enough of a showing, with respect to her actual Innocence Claim, to warrant a response to her petition by the respondents.

On June 8, 2017, The respondents filed Their motion to dismiss asserting The Statute of Limitations. In Their Motion, respondents Claim That Hundley indicated she could overcome any time bars by showing her actual Innocence. The Court in it's order did not find That Hundley's "actual innocence evidence was available as early as her 1996 preliminary hearing. The Court found That The statements The child-victim made during the preliminary hearing, (see Exhibit 68, pg. 1-3 respondents motion to dismiss), were available during The ~~pre~~ preliminary hearing. Petitioner filed an opposition to The motion to dismiss and The respondents filed a reply on September 28, 2017.

On November 13, 2017, The Court Concluded That Hundley's reliance on The Testimony of "Jennifer Lockamy as heresay testimony by a witness who had plainly sided with The defense - falls substantially below The standard necessary to show actual innocence To overcome The

1) Did The Federal Habeas Court improperly and unconstitutionally suspend and foreclose petitioner's Habeas right?

Petitioner has presented a claim of actual innocence To The Federal District Court. On November 16, 2016, The honorable Judge H. D. McKibbon ordered petitioner To "Show Cause why the court should not dismiss This action as barred by The statute of Limitation. Failure to respond in The Time allowed, or failure To make the required showing, will result in The dismissal of This action."

Petitioner filed her Motion to Show Cause on December 30, 2016. The Court orders That on January 24, 2017 That "The Court determines That Hundley has made enough of a showing with respect to her actual Innocence Claim, to warrant a response To her petition by the respondents."

Then on June 8, 2017, respondents argue That The Statute of Limitation, and procedural bars apply and The petition must be dismissed.

On November 13, 2017, The Honorable Judge H. D. McKibbon dismisses petitioner's petition as dismissed by The statute of Limitation. Now The Court says That The petitioner has not made a Showing, as required under Schlup and McQuiggin.

Statute of Limitation bar in This action. The district Court also denied a Certificate of Appealability (COA). The Petition clearly states a valid claim of The denial of a Constitutional right. The district Court wants absolute proof That it is "beyond a reasonable doubt" That it was wrong in disposing This case.

On December 1, 2017, Petitioner filed her Notice of Appeal with The district Court. Petitioner filed her motion for Certificate of Appealability with The district Court on The same day. The district Court denied her motion for Certificate of Appealability on December 4, 2017.

On December 21, 2017 Petitioner filed her Application for Certificate of Appealability in The 9th Circuit Court of Appeals.

On Feburary 27, 2018, The 9th circuit denied her request for a COA. Petitioner filed a motion for reconsideration which was granted and deemed timely filed. The motion was denied. This petition follows.

1) Did The Federal Habeas Court improperly and Unconstitutionally Suspend and foreclose on petitioner's Habeas right?

See following pages.

Constitutional and Statutory Provisions involved

Petitioner argues That The recantation is enough to allow her to pass Through The gateway to allow The federal Court to hear her Constitutional claims. A recantation is a critical piece of evidence That, if proven, would establish petitioner's innocence. The Supreme Court in Schlup v Delo 513 U.S. 298 (1995) found That This claim was "not itself a Constitutional claim, but instead a gateway Through which a habeas petitioner must pass to have his otherwise barred Constitutional claims Considered on The merits." ID at 315.

Passing Through The Schlup gateway does not, by itself, provide a basis for relief. Id at 315. In This Case, any relief from her Sentence That petitioner might ultimately receive would flow from her Ineffective Assistance of Counsel Claim. Because of This, The Supreme Court distinguished The Schlup gateway from The actual innocence standard defined by Herrera, 506 U.S. 390 (1993), which required an "extraordinarily high" standard of review but would not allow for immediate relief. In Schlup, The Court adopted a Specific rule to implement This general principle. It held That prisoner's asserting innocence as a gateway to defaulted claims must establish That in light of new evidence, "it is more likely Than not That no reasonable juror would have found petitioner guilty beyond a reasonable doubt. Schlup 513. U.S. at 327. This formulation "ensures That petitioner's Case is truly 'extraordinary', while still providing petitioner a meaningful avenue by which To avoid a Manifest injustice." In The usual Case The presumed guilt of a prisoner Convicted in State Court Counsels against federal review of defaulted claims. Yet a petition supported by a Convincing gateway Showing "raises Sufficient doubt about The petitioner's guilt To undermine Confidence in The result of the trial without The assurance That The trial was untainted by Constitutional error," hence "a review of The merits of the Constitutional Claims" is justified. 513 U.S. at 317.

The Schlup standard does not require absolute Certainty about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to demonstrate That more likely Than not, in light of new evidence, no reasonable juror would find him guilty beyond a reasonable doubt or to remove The double negative, That more likely Than not any reasonable juror would have reasonable doubt. House v Bell 547 U.S. 518, 538 (2006).

If The Federal Habeas Court allowed petitioner an evidentiary hearing To fully develop her actual innocence Claim, along with her other Constitutional, Petitioner would have gotten affidavits and other relevant evidence That would cast doubt on The outcome of the trial and

and would more likely than not, no reasonable juror would find her guilty beyond a reasonable doubt.

Since The Federal Habeas Court chose not to allow petitioner The opportunity To develop her claims, The Court foreclosed and unconstitutionally Suspended Habeas Corpus action to The petitioner. The District Court and The Court of Appeals erred by having petitioner show she is actually innocent of The crime convicted of. A petitioner's burden at the gateway stage is to "demonstrate That more likely Than not, in light of The new evidence, which The state and federal courts did not allow petitioner access to develop and acquire The evidence needed To prove her innocence. This action is contrary To what The Schlup Court said when ruling on The Schlup Case. In an effort to "balance The Societal interests in finality, Comity, and Conservation of Scarce Judicial resources with the individual interest in Justice That arises in The extraordinary case." Schlup 513 U.S. at 324.

Since The District Court allowed petitioner The opportunity To proceed because she "has made enough of a showing, with respect to her actual innocence claim To warrant a response To her petition." The district Court allowed her To proceed. Then after The Respondents argue The statute of limitation, rule That The Petition is barred. This is abuse of discretion by The District Court. This error would have been presented to The 9th Circuit Court of Appeals, along with all other claims if given The opportunity to appeal.

II: Did petitioner receive Ineffective Assistance of Counsel.

In Strickland, This Court identified The Two Components To any ineffective assistance claim, (1) deficient performance and (2) Prejudice. Under This honorable Courts decision, a criminal defendant alleging prejudice must show "That counsel's errors were so serious as to deprive The defendant of a fair trial, a trial whose result is reliable." Strickland 466 U.S. 668, 687. See also Kimmelman v Morrison 477 U.S. 365 (1986) ("the essence of an ineffective assistance claim is That Counsel's unproffessional errors so upset The adversarial balance between defense and prosecution That the Trial was rendered unfair and The verdict rendered suspect").

A. Deficient Performance.

Representation of a criminal defendant

entails basic duties. Counsel's function is to assist The defendant, and hence Counsel owes The Client a duty of loyalty. From Counsels function as assistant To the defendant derive The overarching duty to advocate The defendant's Cause and The more particular duties to consult with The defendant on important decisions and to keep The defendant informed of importand developments in The Course of the prosecution. Counsel also has a duty to bring such skill and knowledge as will render The trial a reliable adversarial testing process. See Powell v Alabama 287 U.S. 45 (1932).

Petitioner Contends she was denied The full panoply of protections afforded her by the U.S. Constitution by her Constitutionally deficient Counsel. This ineffectiveness resulted in The Conviction of one who is actually innocent. This ineffectiveness by not further investigating The possibility of a recantation. The recantation was started from The victim to her grandmother, great grandmother, Then To her mother, Jennifer, who Then called Larry Carlson, who Then called Defense counsel. Petitioner's trial Counsel, and The investigator went to see The victim. Ms. Schmuck (trial Counsel) and Mr. Larry Carlson, defense investigator where both present when The victims recanted Their statements against Ms. Hundley. Upon review of the transcripts defense counsel knew of The recantation and failed To bring This critical piece of evidence before The Court. Instead, trial Counsel brought The child victims mother in to testify. This failure to work for The defense, and not bring The Child victims before The court, or even get affidavits from The victims stating That nothing happened is deficient performance.

An error by Counsel, even if professionally unreasonable, does not warrant setting aside The Judgement of a criminal proceeding if the error had no effect on The judgement. CF. U.S. V. Morrison 449. U.S. 361, 364-365 (1981). The purpose of the Sixth Amendment guarantee of Counsel is to ensure That a defendant has The assistance necessary To justify reliance on The outcome of The proceeding. Accordingly any deficiencies in Counsel's performance must be prejudicial to The defense in order to Constitute ineffective assistance under The Constitution.

B. <u>Prejudice</u>

The second prong of Strickland is to Show Prejudice. To demonstrate prejudice, a petitioner "must Show That There is a reasonable probability That, but for Counsel's unproffessional errors, The result of The proceeding would have been different. A reasonable probability is a probability sufficient To undermine confidence in The outcome." Strickland, 466 U.S. at 694.

The U.S. Supreme Court adopted The rule of Contemporary assessment of counsel's Conduct because a more rigid requirement "Could dampen The ardor and impair The independence of defense Counsel, discourage The acceptance of assigned Cases, and undermine The Trust between attorney and client. But The "prejudice" Component of The Strickland Test does not implicate these Concerns. It focuses on The question whether counsel's deficient performance renders The result of The trial unreliable or The proceeding fundamentally unfair. Strickland 466 U.S. 668, 687. See Kimmelman, 477 U.S at 393. Unreliability and unfairness does not result if The ineffectiveness of Counsel does not deprive The defendant of any Substantive or procedural right to which The law entitles him. See Lockhart v Fretwell 506 U.S. 364, 372 (1993).

The Supreme Court has emphasized That The Sixth Amendment right to Counsel exists "in order to protect The fundamental right to a fair trial" Strickland 466 U.S 684, United States v Cronic 466 U.S. 648, 653 ("without Counsel, The right To a Trial itself would be of Little avail"). This failure of Trial Counsel To bring before The Trial Court Critical and extremely important evidence That nothing happened, extremely prejudiced The petitioner and The result of The outcome would be different. The Complete breakdown of Loyalty and Trust That defense

Counsel owes to The defendant prejudiced petitioner as The defense Counsel acted on behalf of The prosecution by not allowing The Court To hear critical testimony, by The mouth of The victim. Instead, having The mother Come and say That she believes Hundley "didn't do These Things and her children have pretty much told me That"

Petitioner has satisfied both prongs of strickland and asks This honorable court to reverse The lower courts dismissal on procedural grounds, and allow her to proceed on to hearing The merits of her claim

Reason for granting The Petition

The petitioner asks This honorable Court to grant her petition because The issues are of major importance, especially now That it seems like everyone is being accused of a sex crime. It is also a matter of First impression. The lower Courts decided This case in Conflict with clearly established law. The Federal district Court allowed petitioner, after an order by The Court to show Cause, To have her petition responded To by The respondents Then to have it dismissed on The statute of Limitations. This is an abuse of discretion, especially not allowing petitioner to develop, or even have an evidentiary hearing on her actual innocence claim. The petitioner humbly asks This Court To grant This petition.

Written and prepared
by Inmate Snure #90557
under The direction of
The petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 27 June 18