No. 18-798

In the Supreme Court of the United States

Joanna Blauch,
Petitioner,
v.
People of the State of Colorado by and through the
People of the City of Westminster,
Respondent.

On Petition for Writ of Certiorari to the Jefferson County District Court, Case No. 17CV30021; the Westminster Municipal Court, Case No. 2013-2484-DV

PETITION FOR REHEARING

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REHEARING PETITION JURISDICTION

Here presenting grounds limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented, Petitioner invokes Supreme Court Rule 44 granting Rehearing Petition, corrected as of directives in correspondence from Clerk's office dated March 26, 2019.

CONSTITUTIONAL PROVISIONS INVOLVED

Here Constitutional Provisions involved here, according with Sup. Ct. R. 14.1(f) in Petition, are Amendments VI and XIV.

FACTUAL NEXUS FOR REHEARING

I was strangled.

For the jury—simple. Multiple officers testified strangulation was reported. They confirmed they photographed visible strangulation marks on my neck and wrist/forearm bruising. (See Postconviction Record, Exhibit S and also Appendix H.)

Alleged victim denied strangling me. I testified making physical contact to get his squeezing hands off my neck; to save my life. Simply—multiple times over the jury's question—did he strangle her or not? (See *Tr.* 10/03/13, pp.304:4-16, 306-308:20-7, 320-322:16-13, 323:4-10, 339-34:24-24, 343-348:11-3, 351:19-22, and 354:14-18.)

The prosecutor twisted jury in denying strangulation. On the stand, alleged victim confessed forcefully stopping me from leaving, grabbing my wrist/forearm to "settle [me] into one place" *Tr.* 10/03/13, p.159:14-15. Never, was there any allegation of threat toward alleged victim. Later, he even laughed when 9-1-1 operator asked about potential threat. (See Trial Record, People's Exhibit B.)

Asserting the right to leave, I gathered my things. Alleged victim then grabbed and forcefully immobilized me. Simply because, also confessed at trial: "[S]he's very upset, and I didn't want anybody else to hear that." Further, alleged victim's confessed motive in forcefully detaining me: "Please don't do this. Please don't -- I said, You're going to ruin this." *Tr.* 10/03/13, p.155:4-5, 17-18.

On record in pre-trial hearing, alleged victim's preemptively forceful actions were recognized as "false imprisonment." *Tr.* 08/15/13, p.48:9-11. In closing, first, the prosecutor confused the jury by misstating that physical contact with alleged victim occurred first. Then, back-pedaling evidentiary misstatement, prosecutor told jury alleged victim admitted "provocation," "not the right thing to do" and justifying affirmative defense. However, prosecutor then instructed the jury—without defensive objection—to ignore affirmative defense as "not what we're here to talk about." *Tr.* 10/03/13, p.367:6-21.

REASONS FOR GRANTING PETITION REHEARING

Petition's claims here, on obviously recurring issues and fully exhausted in state courts, have discrete facts and arguments well-suited for broad-sweeping decision. This case is an ideal vehicle providing needed state court clarification that this Court's precedents in Federal Constitutional law abhor wasteful abuse of appellate process with unreasonable state court procedural inadequacies creating invalid adjudications.

I. Systematically inadequate state procedures for litigating claim merits produce unreasonably deferential invalid adjudications.

"A claim without any evidence to support it might as well be no claim at all." *Gallow v. Cooper*, 133 S. Ct. 2730, 2731 (2013).

Equitable doctrine ensuring fair state process prevents conviction of innocents—serving as ultimate precedent for robust state court appellate review—simultaneously catalyzes states to provide full and fair opportunity to validly adjudicate Federal claims. Beyond half-a-century ago, this Court recognized "[t]he growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process." *Griffin v. Illinois*, 351 U.S. 12, 24 (1956).

For valid adjudication of Federally-protected Constitutional claim merits this Court requires "fair assessment." Mandating "that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

Now, further supporting substantial grounds for Rehearing not previously presented, Appendix H shows BOTH ("before," set previously suppressed from jury consideration and now admitted postconviction) sets of authenticated photographs: clear and convincing innocence evidentiary nexus when strangulation by alleged victim caused visible neck bruising validly requiring affirmative self-defense to remain alive. (See also Postconviction Record Exhibit S.) While, Appendix I proves direct contradiction in trial counsel's postconviction testimony alongside copious record evidence, that counsel supposedly "never heard it before [trial] - that [alleged victim] choked [defendant], nearly into unconsciousness." *Tr.* 07/12/16, p.38:17-20. (See also Postconviction Record Exhibit AL.) And, Appendix J proves self-confessed conflicted counsel, factually unrebutted by any postconviction determination subject to deferential review. Well-established by this Court is clear general disfavor of inferred waivers of Constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1939). (See also Postconviction Record Exhibit J and docket # 18-798.)

The perfect vehicle—here—for this Court to curtail daily increasing systematic state court procedural inadequacies rendering substantial meritorious claims invalidly adjudicated. Well-established is that appellate review protected by 28 U.S.C. § 2254(d) "focuses on what a state court knew and did." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) Several decades ago, this Court found that although leeway exists for state courts in detailed findings of all evidence, subsequent significance of reasoning failure is not diminished. *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003) In *Miller-El*, this Court found "concerns heightened" with a state court that "somehow reasoned" not even an "inference" supporting the claim's meritorious basis when presented with substantive evidence. Id.

Diligently, when funds existed from my mother's retirement, appellate attorneys moved through exhausting all available state court procedural remedies:

- direct appeal (to district/appellate court)→
- rehearing petition→
- Colorado supreme court petition→
- post-conviction motions and hearings→
- second district/appellate court appeal→
- second rehearing petition→
- second Colorado supreme court petition.

Postconviction record further developed with new innocence evidence. Clearly stated by both reviewing judges here, they knew Federal Constitutional law sustained substantive merits of asserted claims

supported by substantial evidence admitted postconviction. (See Certiorari Petition, docket #18-798.)

This Court abhors "wasteful abuse" in state court appellate proceedings and prohibits states from denying Federal law protections. "[I]t must be recognized that § 2254 is directed to proceedings in the district [here, the trial] courts while § 2253 is directed to proceedings in the appellate [here, the district] courts." *Slack v. McDaniel*, 529 U.S. 473, 481 (2000).. Guaranteed Federal law protection under 28 U.S.C. § 2254(d) "does not require citation of [Supreme Court] cases — indeed, it does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002); see also, *Mitchell, Warden v. Esparza*, 540 U.S. 12, 16 (2003).

Documentary material evidence exemplified in Appendices here, authenticated and admitted post-conviction, carries no weight of credibility determination. (See *Rice v. Collins*, 546 U.S. 333, 341-42 (2006).) Ignoring materially relevant substance of authenticated and admitted documentary evidence, conjuring facts non-existent in or otherwise contradicting record, evading precedential Federal Constitutional law and substantive rights waiver requirements constructs systematic inadequacy in state court review procedures that unreasonably and wastefully renders adjudication invalid.

Fairly included in the functionally intersecting questions presented with Certiorari Petition is

substantial ground not previously presented: adjudication invalidated by unreasonable inadequacy in state court review procedures. Harmful prejudice results when inadequate state court procedures effectively erase unrefuted materially relevant documentary evidentiary support as with exemplifying Appendices here.

Eight times, only several years ago, this Court distributed *Gallow*'s petition for conference after requesting response and before ultimately denying certiorari without opinion. However, concise joint dissent by Justices Breyer and Sotomayor recognized this Court's ongoing outstanding implications of meritorious state habeas claims left facing procedural default because of postconviction counsel that "deficiently neglects to bring forward "any admissible evidence" to support a substantial claim of ineffective assistance of trial counsel." Further recognizing, this sort of ineffectiveness denies consideration of the "full contours" of "ineffective-assistance claim[s]" creating cause to excuse procedural defaults in order to provide valid adjudications. *Gallow v. Cooper*, 133 S. Ct. 2730, 2731 (2013).

Recognizing dissent lacks precedent, clearly this Court's members recognize controlling Constitutional significance expressed in *Gallow*'s dissent of denying consideration of the "full contours" of supporting innocence evidence with ineffectiveness. Factually inverse to *Gallow*, both functionally intersecting questions presented here Federal law and Constitutional protections obviously recognized as clearly

asserted in two layers of state court adjudicative review covered by 28 U.S.C. § 2254(d) involving unreasonable evidentiary determinations:

First—"Does ruling the substantive nature of materially relevant documentary evidence with apparent exculpatory value effected non-existent, without applying any statutorily required standards of evidentiary error, contravene constitutionally guaranteed substantial rights by applying standards of *Strickland v. Washington*, 466 U.S. 668 (1984) in a vacuum?"

And then functionally intersecting in Constitutional deprivation, like *Gallow*;

Second—"Does it breach well-established law to rule that actual existing conflicted representation, memorialized by counsel in writing, does not require upholding voluntary "knowing and intelligent" standards for valid waivers of substantial rights?" (See docket #18-798.)

Not previously presented, now included in Rehearing Appendix supporting substantial grounds of adjudications rendered invalid applied to guaranteed protections of 28 U.S.C. § 2254(d), referenced above are copies of three significantly representative pieces of court record evidence, among volumes, admitted during postconviction hearing supporting "substantial claim of ineffective assistance of trial counsel." *Gallow*, 2731.

As briefed in Certiorari Petition at Section I.C., uncharted multitudes of baseline state court cases like these are legally bound by district judge deferential review of municipal judge determinations. District judge here skewed reliance on deferential review standards of *Harrington v. Richter*, 562 U.S. 86 (2011). This Court actually clarifies "[t]he pivotal question is whether the state court's application of the Strickland standard was unreasonable." *Id* at 101.

Certiorari Petition clearly outlines how district judge legally charged with deferential review had no idea what specific evidence claim was based on. In referencing *Harrington* for applicable deference, he so far departed from reasonableness, that he applied so-called deference to a claim not raised nor decided by the municipal judge. He literally created his own claim and then ruled on it.

Three decades ago, this Court delineated parallel constructive intertwining of substantive and procedural aspects, serving against courts defying Federal Constitutional protections with unreasonable adjudications that omit evidentiary substance:

> It is axiomatic that procedural protections must be examined in terms of the substantive rights at stake. But identifying the contours of the substantive right remains a task distinct from deciding what procedural protections are necessary to protect that right. "[T]he substantive issue involves

> a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance."

Washington v. Harper, 494 U.S. 210, 220 (1990), citing to *Mills v. Rogers*, 457 U.S. 291, 299 (1982) (citations omitted).

Constructively inadequate state procedures erasing the "full contours" of substantial evidentiary support for claim merits continue producing unreasonably deferential invalid adjudications without this Court's curtailment. "A claim without any evidence to support it might as well be no claim at all." *Gallow v. Cooper*, 133 S. Ct. 2730, 2731 (2013)

II. This case sits in the literal docketed middle of pending cases with fairly included question of split circuits ripely conflicted about applying parameters to new innocence evidence under *Schlup v. Delo*, 513 U.S. 298 (1995).

Within these most recent months of 2019, Colorado's state legislators proposed severely curtailing Constitutionally guaranteed access to constructive habeas review. Further, SB19-026, ("...Concerning postconviction remedy proceedings") could punish

those defendants with financial sanctions for bringing forth new innocence evidence under Federal Constitutionally guaranteed protections. (Accessible at https://leg.colorado.gov/bills/sb19-026.) Notably, Colorado appears as one of few state supreme courts not appearing with decisions citing to *Schlup*.

While this Court exists outside political realm, its mandates define boundaries for state legislation to ensure equal protection of Federal Constitutional guarantees. Certiorari Petition outlined what happens for innocent people suffering unconstitutional convictions with legislation like this remaining unchecked by this Court's mandates.

Intervening among substantial circumstantial Reasons for Granting Rehearing are other certiorari petitions currently pending, also raising ripely conflicted split circuits implicated in cases like this lacking definitive parameters for substantial new innocence evidence under *Schlup*. Whether those petitions are granted, with any resulting fairly included precedent, applies here.

In 1996, Ricky Kidd's trial lawyer, on notice of substantial innocence evidence, failed to present it. Winding up the Eight Circuit, with state judges conceding substantive ineffectiveness, Kidd was still denied relief. Presented seven years ago with certiorari subsequently denied—whether this Court requires ignoring substantial innocence evidence tied to ineffectiveness because counsel "could have found and presented it?" (See *Kidd v. Norman, Warden* (docket #11-10271.)

Today, this case (docket #18-798) sits literally docketed in the middle of two pending cases for which this Court requested response: *State Correctional Institution at Fayette, et al v. Reeves* (docket #18-543) and *Hancock v. Davis, Director, TDCJ-CID* (docket #18-940.) Both presenting almost exactly the same specific question addressing ongoing ripe conflict directly related to the facts and fairly included in the questions presented of this case: whether substantial new innocence evidence, available but not presented at trial satisfies *Schlup*'s actual innocence gateway.

This case straddles novel intersection of ripely conflicted split circuit, otherwise also ideal vehicle for this Court's resolution. This case presents unrefuted authenticated documentary substantial new innocence evidence without triggering credibility determinations—none were ever attached (See Appendices H, I, and J.) Every reason exists, considering these intervening pending cases, for granting rehearing.

As here, briefed in both Certiorari and Supplemental Petitions, defendant multitudes so vast they defy statistical tracking find themselves remaining procedurally hamstrung around new innocence evidence claims like these. (See docket #18-798.) Systematically defying Federal law protections, state courts like these force defendants into what amounts to relentless circular blame games instead of validly adjudicating by complying with this Court's totality requirements.

This bootstrapping case speaks for masses most affected at America's procedural core. Baseline misdemeanors, numbers vastly uncharted, suffer exact same crippling lifelong collateral epidemic of civil deaths more fully briefed in both Certiorari and Supplemental Petitions. (See docket #18-798.) This is the perfect bootstrapping vehicle to address the ongoing ripe circuit split fairly included from both *Reeves*' and *Hancock*'s pending questions.

III. Evolving nationwide legislation recognizes strangulation as attempted murder.

"The minute you put pressure on someone's neck, you are really announcing that you are a killer," said Gael Strack, a former domestic violence prosecutor in California who is now one of the nation's leading strangulation experts." (See "A Legal Loophole May Have Cost This Woman Her Life," HuffPost, (January 18, 2016).

Self-defense, like that required from strangulation, is affirmative defense requiring prosecutor burden to disprove. Growing strangulation lethality recognition nationwide, as in Colorado, has motivated criminal felony strangulation relegation. (See C.R.S. 18-3-202, signed into law under HB16-1080, "Assault By Strangulation" by Colorado's Governor on June 10, 2016.) Duly instructed, police officers are logically recognizing strangulation as attempted murder. (See, e.g., "Longmont [Colorado] man faces attempted-murder charge in strangulation of

girlfriend," The Boulder Daily Camera, (July 30, 2018) and "Navy officer faces attempted murder charges," Navy Times, (November 27, 2018).)

When prosecution commenced in 2013, "Colorado Domestic Violence Benchbook," dedicated Chapter 7 (k) specifically to the "highly misunderstood" lethal nature of "Strangulation," stating "[l]aw enforcement, prosecutors, the judicial, and probation often do not appreciate the serious nature of this crime." Specialized "strangulation" chapter spanning nine pages, includes several medical neck diagrams and definitions.

Then, Colorado was one of significant number of states without statutorily-specific "strangulation" crime. Benchbook listed half-dozen classified crimes subsuming "strangulation." "Attempted Murder" last. Strangulation legislation, only recently evolving underscores simple logic: someone who squeezes your neck so you can't breathe has murderous intent.

Counsel only subpoenaed one defense witness—female officer who took and authenticated the only trial-admitted set of "after" photographs clearly showing strangulation marks inflicted by alleged victim. Defendant was sole other defense witness. When examined, officer answered counsel's last and only question about clearly visible neck strangulation marks: "I didn't see any marks on her neck at all." (*Tr.* 10/03/13, p.279:16. See also Appendix H.) Prosecutor, correspondingly, elicited testimony defendant reported strangulation to officer, while simultaneously emphasizing officer's denials of

seeing obvious neck strangulation marks three times. *Tr.* 10/03/13, p.281:1-25. Counsel allowed officer's denials of clearly visible strangulation marks to rest without further questions.

Systemically defying Federal law protections—nowhere in either judge's determination is unrefuted strangulation fact mentioned. Not even—"choking." (See Appendix I.) For six years since reporting alleged victim's strangulation, unrefuted postconviction, exhausting claim merits in state courts required seven separate civil actions. Here, completely sidestepping Constitutional claim merits attached to affirmative self-defense attached to unrefuted strangulation fact never shown to jury—nullified adjudication of claim merits.

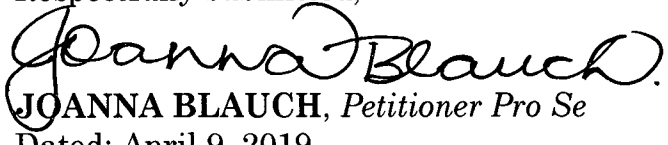
Obfuscating underlying circumstances doesn't erase existential simplicity of obvious provable innocence. Fending off "deadly attack is nothing less than the right to life itself, which [ ] our Constitution declares to be a basic right." *Perkins v. State*, 576 So.2d 1310, 1314 (Fla. 1991) The man who strangled me never had to answer for his crime. I was lucky that he didn't kill me. Or, as conflicted counsel put it, "could have killed you then and he could have bashed your head in, too, but those things did not happen." (See Appendix I.)

The next person who angers him when trying to leave him—likely not as lucky.

CONCLUSION

Petitioner respectfully requests this Court grant Rehearing of this Petition for a Writ of Certiorari and summarily reverse the decision below. Or, in the alternative, hold further ruling on this case in abeyance pending outcomes of *Reeves*' and *Hancock*'s cases or order full briefing and argument on the merits of this case.

Respectfully submitted,



JOANNA BLAUCH, *Petitioner Pro Se*
Dated: April 9, 2019

CERTIFICATION OF PETITIONER PRO SE PURSUANT TO RULE 44.2

I certify that the foregoing Petition for Rehearing is presented in good faith and not for delay. I further certify that the grounds are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented.

Respectfully submitted,

JOANNA BLAUCH, *Petitioner Pro Se*
Dated: April 9, 2019

NOTARIZED AFFIDAVIT
CERTIFICATION OF PETITIONER PRO SE PURSUANT TO RULE 44.2

Joanna Blauch, pro se
Petitioner
v.
People of the State of Colorado by and through the
People of the City of Westminster,
Respondent.

As required by Supreme Court Rule 44.2, I certify that the foregoing Petition for Rehearing is presented in good faith and not for delay. I further certify that the grounds are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented. I declare under penalty of perjury that the foregoing is true and correct. Executed on April 9, 2019.

Joanna Blauch

Joanna Blauch

STATE OF COLORADO, CITY/COUNTY OF Jefferson

This Notarized Affidavit Of Joanna Blauch was subscribed and sworn to, or affirmed, before me on this 9th day of April, 2019

by Joanna Blauch.

Notary Public Signature

Printed Name: Dominic J Otto

My commission expires: Oct 11, 2021

Notary Registration No.: 20174042462

DOMINIC JAMES OTTO
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20174042462
MY COMMISSION EXPIRES OCTOBER 11, 2021

NOTARIZED AFFIDAVIT
STATEMENT OF AUTHENTICTY

Joanna Blauch, pro se
Petitioner
v.
People of the State of Colorado by and through the
People of the City of Westminster,
Respondent.

With this Notarized Affidavit, I attest to the authenticity of all color copies of all admitted Court Record documents and certified as part of the Court Record on appeal for this case. These color copies are a fair and accurate representation of my body parts, as shown, on the respective evenings and times they were documented in photographs taken by third-party photographers. I declare under penalty of perjury that the foregoing is true and correct. Executed on April 9, 2019.

Joanna Blauch.
Joanna Blauch

STATE OF COLORADO, CITY/COUNTY OF Jefferson

This Notarized Affidavit Of Joanna Blauch was subscribed and sworn to, or affirmed, before me on this 9th day of April, 2019

by Joanna Blauch.

Notary Public Signature

Printed Name: Dominic J Otto

My commission expires: Oct 11, 2021

Notary Registration No.: 20174042462

DOMINIC JAMES OTTO
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20174042462
MY COMMISSION EXPIRES OCTOBER 11, 2021

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