No. _____

In the Supreme Court of the United States

COURTNEY VALLE BISBEE,
Petitioner,

v.

CHARLES L. RYAN, Warden and
THOMAS C. HORNE, Attorney General,
Respondents.

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. Where a state trial judge summarily rejected, without a hearing, Petitioner's claim that counsel was ineffective because he induced Petitioner to waive her Sixth Amendment right to a jury trial based upon his personal relationship with that same judge, is Petitioner, on habeas review, entitled to an evidentiary hearing?

2. Would reasonable jurists find the district court's assessment of the constitutional claims debatable, warranting a certificate of appealability, where, in assessing "actual innocence", the court erroneously required Petitioner to prove that the offense never occurred, rather than considering whether it was "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" -- especially where newly discovered evidence and other facts reveal that the complainant and a key witness were threatened and coerced into testifying falsely?

PARTIES TO THE PROCEEDING

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

Petitioner Courtney Valle Bisbee respectfully prays that a Writ of Certiorari issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit in the above-captioned proceeding.

OPINIONS AND ORDERS BELOW

The Arizona Court of Appeals affirmed Petitioner's convictions and sentences. *See State v. Bisbee*, No. 1 CA-CR No 06-0372, 2007 WL 5249032 (Dec. 4, 2007). App.117 (unreported).

The Arizona Superior Court, Maricopa County, dismissed Petitioner's first Petition for Post-Conviction Relief without a hearing. App.110 (unreported). The Arizona Court of Appeals denied review. App.106 (unreported). The Arizona Supreme Court denied review. App.101 (unreported). The Arizona Superior Court, Maricopa County, dismissed Petitioner's second Petition for Post-Conviction Relief without a hearing. App.107 (unreported). The Superior Court denied Petitioner's motion for re-hearing. App.103 (unreported). The Arizona Court of Appeals denied review. App.86 (unreported). The Arizona Supreme Court denied review. App.84 (unreported).

The district court initially dismissed Petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2254 as premature. App.98 (unreported). However, the district court granted Petitioner's motion for reconsideration and stayed the habeas proceedings pending the conclusion of Petitioner's state post-conviction proceedings. App.88 (unreported).

The Magistrate granted Petitioner an evidentiary hearing. App.78 (unreported). The Magistrate denied Respondents' motion for reconsideration and reaffirmed the need for an evidentiary hearing on habeas review. App.73 (unreported). However, the district court vacated the Magistrate's order allowing discovery and setting an evidentiary hearing. App.62 (unreported).

The order and decision of the district court denying the habeas petition, and denying a certificate of appealability, is reproduced at App.3. *See Bisbee v. Ryan*, No. CV-12-00682-PHX-ROS, 2018 WL 740927 (D. Ariz. Feb. 6, 2018) (currently unreported). The district court adopted in part, and rejected in part, the Report and Recommendations ("R&R") of the Magistrate Judge. The Magistrate's R&R is reproduced at App.23. *See Bisbee v. Ryan*, No. CV-12-00682-PHX-ROS (DKD), 2017 WL 7411163 (D. Ariz. May 11, 2017) (currently unreported).

The unreported order and opinion of the Ninth Circuit, which declined to issue a certificate of appealability and dismissed the appeal, is reproduced at App.1.

JURISDICTION

The Court of Appeals for the Ninth Circuit issued its order on September 25, 2018. App.1. This Petition for Certiorari is being filed within 90 days of the order. The 90-day period for filing this Petition expires on December 24, 2018. *See* Rule 30.1.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury …, and to have the assistance of counsel for his defence.

28 U.S.C. § 2254 provides in relevant part:

> (d) 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.

* * *

(e)(2) 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 guilty of the underlying offense.

STATEMENT OF THE CASE

Petitioner Courtney Bisbee worked as a nurse at a high school in Paradise Valley, Arizona, while pursuing a master's degree in Elementary Education. She had no criminal history. Nevertheless, on February 11, 2004, Courtney was arrested. An indictment was returned charging her with public indecency and alleging that, on one occasion, she molested a male teenager for minutes. The indictment alleged that she permitted the teenager to touch her privates and that she briefly touched his genitals over clothing. Courtney denied any inappropriate touching. Several people, including the complainant's brother, were present at the time and none of them saw any sexual touching.

Courtney wanted to have her case tried by a jury. However, trial counsel claimed that Courtney would not be convicted in a bench trial, and certainly would not go to jail, since he and the judge had a close, personal relationship. Counsel told Courtney that the judge was like a brother to him. Therefore, counsel induced Courtney to waive her constitutional right to a jury trial.

She was tried before Judge Warren J. Granville in Maricopa County Superior Court. After almost two weeks of testimony, the court dismissed the indecency charges. However, Courtney was convicted of the touching charges.

On April 14, 2006, Courtney was sentenced to imprisonment of 11 years on both counts to run concurrently. The Arizona Court of Appeals affirmed the convictions and sentences. App.117.

After trial the Complainant's brother, Nikolas, who was a key prosecution witness, revealed in a sworn affidavit that "[t]here was no crime" and "[n]othing happened" between his brother and Courtney. Nikolas detailed that the false accusations against Courtney were part of their mother's plot to obtain money from Courtney and the school district. Another witness also revealed admissions by the Complainant that their mother had forced him to make the false claims against Courtney.

Courtney sought Post-Conviction Relief based on numerous claims including ineffective assistance of counsel and the newly discovered evidence. Judge Granville, who had a close, personal relationship with Courtney's trial attorney, denied her petitions without a hearing on any claims including counsel's ineffectiveness. App.107, 110. The Arizona appellate courts eventually denied review. App.84, 86, 101, 105.

Courtney petitioned for habeas relief in the federal courts. Because the Arizona appellate courts were still considering Courtney's petitions, the district court initially dismissed the action without prejudice as premature. App.98. The district court subsequently reconsidered and held the habeas petition in abeyance pending final determination by the State courts. App.88. In granting the motion, the district court found that Courtney's "claims are not plainly meritless based on the limited information available to the Court." App.95.

After the State courts denied review, a federal Magistrate Judge granted Courtney an evidentiary hearing on certain claims of ineffective assistance of counsel. App.73-77, 81-82. However, the District Judge vacated the evidentiary hearing. App.62. The court ultimately denied the habeas petition and declined to issue a certificate of appealability. App.3. The Ninth Circuit denied a certificate of appealability and never addressed the merits of Courtney's claims. App.1.

Despite having completed her 11-year prison sentence, and 19 months of supervised release, Courtney Bisbee still maintains her innocence. Even though she has been released from prison, Courtney still cannot breathe free. Because of the conviction she is subject to severe collateral consequences, including registering as a sex offender for the rest of her life. As a consequence, Courtney continues to fight to clear her name from a conviction that resulted from clear violations of the federal constitution.

REASONS FOR GRANTING CERTIORARI

I. THE QUESTION OF WHEN A PETITIONER WHO HAS BEEN DENIED AN EVIDENTIARY HEARING BY THE STATE COURTS CAN OBTAIN A HEARING IN A HABEAS PROCEEDING IS OF RECURRING IMPORTANCE TO FEDERAL COURTS ACROSS THE NATION

This case presents compelling questions of national concern, left open in the wake of *Cullen v. Pinholster*, 563 U.S. 170 (2011), regarding when a habeas petitioner may obtain an evidentiary hearing.

In *Pinholster*, this Court held that federal habeas review under 28 U.S.C. § 2254(d)(1) is "limited to the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181. Therefore, a district court cannot conduct an evidentiary hearing to determine if the state courts' treatment of a habeas claim was contrary to, or involved an unreasonable application, of clearly established state law.

The rationale underlying *Pinholster* has an important surface appeal: An evidentiary hearing is not necessary in federal habeas review to determine the threshold question, under § 2254(d), of whether the state court determination was contrary to, or involved an unreasonable application of, clearly established federal law, or unreasonable in light of the evidence, because "state courts are the principal forum for asserting constitutional challenges to state

convictions." 563 U.S. at 186, quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

However, sometimes the state court record simply does not contain sufficient information to resolve the threshold inquiry under § 2254(d). As recognized by Justices Ginsburg, Sotomayor, and Kagan, "[s]ome habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own. Congress recognized as much" when it enacted 28 U.S.C. § 2254(e)(2) and "permitted therein the introduction of new evidence in federal habeas proceedings in certain limited circumstances." *Pinholster*, 563 U.S. at 206 (dissent). Justice Alito also recognized that while "evidentiary hearings in federal court should be rare," there may be limited circumstances where a hearing may be conducted where the new evidence the petitioner seeks to introduce "was not and could not have been offered in the state-court proceeding." *Pinholster*, 563 U.S. at 204 (concurring in part).

Here, a habeas petitioner was denied a hearing to review whether counsel was ineffective because he wrongfully induced Petitioner to waive her Sixth Amendment right to a jury trial based upon his personal relationship with the trial judge. The gravity of this issue is magnified tenfold since the judge who allegedly had a personal relationship with trial counsel was the very same judge who summarily denied Petitioner's petition for Post-Conviction Relief without a hearing.

This Court should carve out an exception to the draconian rule of *Pinholster* to enable a petitioner, like Courtney Bisbee, who was deprived of a hearing in state court, and denied any opportunity to examine her trial lawyer about the pressures he exerted on Courtney and his relationship with the very judge deciding the post-conviction proceedings, to have an evidentiary hearing in federal court.

Indeed, legal scholars have cautioned about the perils presented to our justice system by *Pinholster*. For instance, "*Pinholster* threatens to substantially reduce the viability of federal habeas relief in cases where court assistance -- e.g., subpoenas or discovery orders -- is needed in order to substantiate a claim of constitutional injury." Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 Wash. & Lee L. Rev. 85, 122 (2012). In addition,

> *Pinholster* creates a stifling catch-22 for many federal habeas petitioners. On the one hand, *Pinholster* holds that "if the factual allegations a petitioner seeks to prove at an evidentiary hearing" would not satisfy the requirements for relief under (d)(1), then "there is no reason for a hearing." In other words, a hearing is generally not permitted unless the facts sought to be developed at the hearing would satisfy the strictures of (d)(1).
>
> But on the other hand, under the *Pinholster* rule, if the new evidence that would be adduced at a hearing would demonstrate that (d)(1) is satisfied, then the use of the evidence is conclusively barred because

> the review for relief eligibility under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits."
>
> A hearing is barred if it would not generate the sort of evidence that would justify relief, and yet evidence that is sufficiently new so as to justify relief is outside of the federal court's scope of review. *Challenging the Habeas Process Rather Than the Result*, 69 Wash. & Lee L. Rev. at 123–24.

Moreover, further guidance is needed from this Court because, in the seven years that have elapsed since *Pinholster* was decided, courts have had significant questions in determining when 28 U.S.C. § 2254(d) and (e), and Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts, permit a habeas hearing.

For instance, in *Hurles v. Ryan*, 752 F.3d 768, 791 (9th Cir. 2014), *cert. denied*, No. 14-191, 135 S. Ct. 710 (2014), decided three years after *Pinholster*, the Court found that the Arizona district court abused its discretion in denying a judicial bias claim without an evidentiary hearing. The Court reasoned that "[w]hen a habeas petition has not failed to develop the factual basis of his claim in state court as required by 28 U.S.C. § 2254(e)(2), an evidentiary hearing is required if (1) the petitioner has shown his entitlement to an evidentiary hearing" and "(2) the allegations, if true, would entitle him to relief."

The Ninth Circuit continued that a "petitioner who has previously sought and been denied an evidentiary hearing has not failed to develop the factual basis of his claim." 752 F.3d at 791. Moreover, a "federal court must grant an evidentiary hearing" where "(1) the state court's factual determinations are not fairly supported by the record as a whole, and (2) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing." 752 F.3d at 791.

Here, the Magistrate Judge who reviewed Petitioner's habeas petition initially granted a hearing and noted that it was "bound by the Ninth Circuit's interpretation and application of *Pinholster*." App.74. The Magistrate continued that the Ninth Circuit "has not interpreted *Pinholster* to preclude evidentiary hearings. Indeed, the Ninth Circuit has explicitly 'reject[ed]' the argument 'that *Pinholster* and [28 U.S.C.] § 2254(e)(2) categorically bar [a habeas petitioner] from obtaining [an evidentiary] hearing or from presenting extra-record evidence to establish cause and prejudice for [a] procedural default.'" App.74, quoting *Woods v. Sinclair*, 764 F.3d 1109, 1138, n.16 (9th Cir. 2014). The district court reversed the Magistrate's grant of a hearing. App.72.

The disagreement between the Magistrate and District Judge underscore that reasonable jurists could differ on whether Petitioner was entitled to a hearing on her ineffectiveness claim that trial counsel wrongfully induced Petitioner to waive her constitutional right to a jury trial based upon counsel's alleged personal relationship with the judge. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Furthermore, the issues presented by this important case will continue to plague this Court through successive petitions for certiorari until they are resolved. This Court is constantly confronted with calls for further guidance regarding the fate of evidentiary hearings in habeas proceedings.[1] The Court will continue to receive similar petitions, and the lower courts will remain without guidance, unless this recurring question is finally resolved. If not now, when?

This is the perfect case to consider these issues because it presents violations of federal constitutional rights that, unless corrected by this Court, will have profound consequences beyond the boundaries of this case. A criminal defendant's right to trial by jury, embodied within the Sixth Amendment, is one of the

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[1] *See, e.g.,* Petition for Certiorari, *Rossum v. Patrick*, No. 11-1188 (March 28, 2012) (presenting the question of "[a]fter a habeas petitioner has presented facts to the state court that, if taken as true, establish a federal constitutional violation, and a state court thereafter summarily and unreasonably denies relief, does 28 U.S.C. § 2254 require the federal court to hold an evidentiary hearing when the petitioner presents the federal court with the same facts?"); Petition for Certiorari, *Schad v. Ryan*, No. 12-5534 (July 27, 2012) (asking "[w]here a general claim of ineffective assistance of counsel is presented to the state court, but is not supported by facts either because of ineffective assistance of initial review collateral counsel or state action which prevented fact development, is the federal habeas court's review of the claim limited to the record presented in state court under *Cullen*") (internal citations omitted); Petition for Certiorari, *Raymond v. Warren*, No. 11-1517 (June 11, 2012) (asking "whether it was clearly erroneous to deny petitioner an evidentiary hearing where state courts were objectively unreasonable in repeatedly denying requests for an evidentiary hearing"). This list is illustrative and by no means exhaustive.

most cherished policies of this nation. This Court has long recognized that "one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court." *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 277–78 (1942).

Waiver is a critical decision that resides exclusively within the defendant's hands. Indeed, this Court recently reaffirmed that some fundamental decisions are "reserved for the client -- notably, whether to plead guilty, waive the right to a jury trial, testify on one's own behalf, and forgo an appeal." *McCoy v. Louisiana*, No. 16-8255, 138 S. Ct. 1500, 1508 (2018), citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Despite the importance of this fundamental constitutional right, Courtney Bisbee has been deprived of a hearing -- in both the state and federal courts -- or any investigation into Courtney's credible claim regarding her lawyer's personal relationship with the trial judge who presided over her bench trial.

This issue, involving the right to evidentiary hearings, impacts defendants throughout the nation, as well as the proper administration of justice. The inherent importance of the question presented, combined with the substantial impact the Court's answer may have on criminal cases, justifies review by this Court.

II. REVIEW IS NEEDED TO RESOLVE THE PROPER STANDARD FOR A CLAIM OF ACTUAL INNOCENCE BASED ON NEWLY DISCOVERED EVIDENCE

This case calls into question the proper standard to be applied in assessing a free-standing claim of actual innocence based on newly discovered evidence.

More than 20 years ago, in *Schlup v. Delo*, 513 U.S. 298, 327 (1995), this Court indicated that to establish actual innocence to excuse a procedurally defaulted constitutional claim, a habeas petitioner must show that it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." The Court reaffirmed this standard in *House v. Bell*, 547 U.S. 518, 537 (2006). The test for actual innocence is "demanding." *House*, 547 U.S. at 538. However, it "does not require absolute certainty about the petitioner's guilt or innocence." *Id.*

Nevertheless, in denying this habeas petition the District Court, relying on recent precedent from the Ninth Circuit, required Courtney to "affirmatively prove that [she] is probably innocent." App.9, quoting *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014). Indeed, the District Court held that Courtney "has not established her innocence." App.10. However, that is not -- and should not -- be the standard for *actual* innocence, including freestanding claims. And, the Ninth Circuit's enhanced standard stands at odds with this Court's more reasonable standard set forth in *Schlup* and *House*.

Courtney was wrongfully convicted of improper momentary touching. There were a number of people in the room at the time of the alleged incident although no one observed any touching, which purportedly occurred under a blanket. It was essentially a "he said, she said" situation. There was no physical or forensic evidence to support the allegations. There were material discrepancies between the Complainant's pretrial police statements, trial testimony, and post-trial civil deposition testimony. Moreover, newly discovered evidence revealed that the prosecution, in violation of *Brady v. Maryland*, 371 U.S. 812 (1962), suppressed pages from the Complainant's statement to the police which could have impeached his trial testimony and established that his claim of being touched was false.

In addition, the Complainant's brother, who was present at the time of the alleged incident, submitted a sworn affidavit after trial asserting that he and his brother were coerced into testifying falsely and he can "no longer allow an innocent woman to remain in prison for a crime that she did *not* commit" (emphasis in original). The Complainant's father also submitted a sworn affidavit after trial establishing that the prosecution used his sons as "pawns to ensure a wrongful conviction" and his son made false allegations against Courtney. Newly discovered evidence also showed that the Complainant and his mother were motivated by financial interests to lie about the alleged touching. And, several witnesses confirmed that the Complainant and his friends testified falsely at trial.

Despite this compelling evidence of perjury and collusion, the District Court summarily rejected Courtney's claim of actual innocence because the Complainant's brother "did not have personal knowledge regarding the crimes" since any touching occurred out of view of the other people who were just a few feet away. App.10.

However, it makes no difference that this important witness was not personally under any alleged blanket. The Complainant's brother's testimony was critical to the prosecution's case. There were no eyewitnesses to the actual alleged touching. There was no DNA, surveillance, or other forensic evidence. The prosecution had nothing except the equivocal claims of a male teenager.

Given the District Court's impermissible approach, Courtney could never affirmatively prove that she is probably innocent of the momentary touching that allegedly occurred under the blanket. However, the affidavits and other newly discovered evidence do make it "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."

Significantly, the Complainant's brother revealed, after trial, that he "felt threatened" by his mother and the State of Arizona "to not testify truthfully." Nikolas also observed the Complainant, their mother, and other State witnesses "discuss this case, their testimony, and the made-up statements that led to Courtney Bisbee's conviction." Reasonable jurists would find these allegations of perjury, collusion, threats, and coercion -- by the State and its witnesses -- alarming and call into

doubt whether Courtney received her constitutional rights to a fair trial and due process.

Here, the outcome is susceptible to debate among reasonable minds after considering the following newly discovered evidence:

1. The affidavit from the Complainant's older brother -- who was present at the time of the alleged incident -- asserting that he was threatened and coerced to testify falsely against Courtney Bisbee regarding material issues;

2. the Complainant's good friend's concession that on five different occasions before trial the Complainant told her that there was no inappropriate contact between himself and Courtney;

3. the affidavit of the Complainant's father which detailed that the prosecution used his sons as "pawns to ensure a wrongful conviction" against Courtney. The affidavit also developed that his former wife was "coercing" their sons to "make false allegations" against Courtney; and

4. the revelation that the accusations made against Courtney were part of a plot to recover money from Courtney and the Paradise Valley School District.

In determining whether to grant a certificate of appealability the "threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 323. In

fact, a petitioner is not required to demonstrate that the appeal will succeed. *Id.* Rather, a petitioner need only make "a substantial showing of the denial of a constitutional right." *Id.* This standard is fully satisfied where, as here, "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 537 U.S. at 338, citing *Slack v. McDaniel*, 529 U.S. 473 (2000).

III. THIS CASE PRESENTS A PERFECT PLATFORM FOR RESOLVING THESE RECURRING ISSUES

Even though Petitioner has been released from prison, this appeal is not moot because she was in custody when she commenced this habeas proceeding. Moreover, she has been condemned to lifetime registration as a sex offender. Therefore, Petitioner has suffered, and continues to suffer, an actual injury traceable to the Respondents that is likely to be redressed by a favorable judicial decision. And, she is enduring severe collateral consequences which are concrete and continuing injuries. See *Spencer v. Kemna*, 523 U.S. 1 (1998); *United States v. Juvenile Male*, 560 U.S. 558, 560-561 (2010) (requirement that defendant may remain as a registered sex offender is a potential collateral consequence).

The compelling issues presented by this petition are fully preserved and eligible for review.

CONCLUSION

For all these reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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