No. 18-

IN THE

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

v.

CHARLES L. RYAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in construing a *pro se* petitioner's appeal from the denial of his petition for a writ of habeas corpus as only a request for a certificate of appealability on the merits of his habeas petition, and not also an appeal from the court's orders denying his motion for counsel and from its failure to even rule on his motion for discovery during the federal habeas proceeding.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Timothy S. Ring. Respondent is Charles L. Ryan. Neither party is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit entered its order denying Mr. Ring's request for a certificate of appealability on November 16, 2018. Petition Appendix at 1a ("Pet. App."). The order of the Ninth Circuit construing petitioner's petition for rehearing as a motion for reconsideration and denying such motion was entered on December 21, 2018. Pet. App. at 46a.

JURISDICTION

The Ninth Circuit entered judgment on November 16, 2018, Pet. App. 1a, and denied petitioner's petition for rehearing en banc on December 21, 2018, Pet. App. 46a. Justice Kagan granted Mr. Ring's timely application to extend the time to file. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The statutory provision involved is 28 U.S.C. § 2253(c)(1)(A), which provides that:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

STATEMENT OF THE CASE

Petitioner, Timothy S. Ring, was convicted of felony murder, armed robbery, conspiracy, burglary, and theft, related to the disappearance of a Wells Fargo van, the taking of all its money, and the shooting death of its driver, who was found inside the van, in Glendale, Arizona, on November 29, 1994.

Following trial and conviction, the trial court imposed a sentence of death for the felony murder and 72 years for the other convictions. On direct appeal, the Arizona Supreme Court upheld all of Mr. Ring's convictions and sentence, but noted that no trial evidence ever placed Mr. Ring at the scene. Instead, the court upheld Mr. Ring's death sentence based on evidence presented at a judge-only presentence hearing that had never been presented to the jury.

This Court granted certiorari, resulting in judge-only death penalty sentencing schemes being held unconstitutional. *Ring* v. *Arizona*, 536 U.S. 584 (2002). Following this Court's decision, the Arizona Supreme Court ordered resentencing and in 2007, Ring was sentenced to natural life for the felony murder, and maintained his actual innocence in comments to the court.

Following resentencing, Mr. Ring filed a timely notice for post-conviction relief and was appointed counsel. Mr. Ring's Rule 32 post-conviction relief (PCR) petition was filed on April 5, 2010 and raised numerous claims of newly discovered evidence, third-party defense, prosecutorial misconduct, *Brady* violations, and ineffective assistance of trial counsel. The trial court denied all relief, the Arizona Court of Appeals denied relief, and the Arizona Supreme Court denied review.

Mr. Ring then filed a timely petition for a writ of habeas corpus, under 28 U.S.C. § 2254, with the United States District Court for the District of Arizona. He also made two motions for the appointment of counsel that were denied and one motion for discovery that was ignored. The magistrate judge issued her Report and Recommendation denying all seven of Mr. Ring's grounds for his petition, finding that two of his claims were procedurally defaulted, three failed to state a cognizable federal claim, and the remaining two counts failed on the merits. The district court issued an order on March 5, 2018, adopting the Report and Recommendation in full. Pet. App. at 2a.

Mr. Ring appealed the district court's judgment to the United States Court of Appeal for the Ninth Circuit. He sought the appointment of counsel in the Ninth Circuit but his motion was ignored. On November 16, 2018, the Ninth Circuit construed his appeal to be a request for a certificate of appealability from the denial of the petition and denied him a certificate of appealability ("COA"). Pet. App. at 1a. Mr. Ring petitioned again for appointment of counsel and for reconsideration. The Ninth Circuit again ignored his request for appointment of counsel and denied his petition for reconsideration, stating that "no further filings will be entertained in this closed case."

INTRODUCTION

The panel incorrectly treated a proper appeal from the judgment of the district court, which included both the final order denying his petition for writ of habeas corpus and the orders denying his motion for appointment of counsel and ignoring his motion for discovery, as only a request for a COA on the denial of his petition for writ of habeas corpus. The panel thereby narrowed the scope of Mr. Ring's *pro se* ap-

peal, inoculating the district court's key procedural orders regarding counsel and discovery from any appellate review, disregarding the practice within the circuit of construing *pro se* appellate briefs generously. And it appeared to do so on the incorrect premise that Mr. Ring first needed a COA to appeal the denials of his motion for counsel and discovery, despite clear Supreme Court precedent in *Harbison* v. *Bell*, 556 U.S. 180 (2009), and precedent in at least one other circuit, that a COA is not required for those appeals.

Mr. Ring respectfully asks this Court to exercise its supervisory powers and grant his petition, vacate the Ninth Circuit's November 16, 2018 order construing his appeal from the district court's judgment as just a request for a COA from the final order denying his habeas petition, and remand to the Ninth Circuit to consider his overlooked appeal of the district court's orders denying his motions for counsel and ignoring his motion for discovery. Mr. Ring has also filed a motion in the Ninth Circuit for appointment of undersigned counsel and leave to file a petition for rehearing or rehearing en banc out of time. Mr. Ring will supplement this petition when the Ninth Circuit acts upon his motion. In the event that the Ninth Circuit acts favorably on Mr. Ring's pending supplemental petition for rehearing or rehearing en banc, Mr. Ring respectfully requests that this Court hold the instant petition pending the outcome of those proceedings.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit erred in contravention of *Harbison* by treating Mr. Ring's timely appeal as only a request for a certificate of appealability. Mr. Ring respectfully requests that this Court grant, vacate, and

remand the case to the Ninth Circuit in light of its obvious error.

On March 5, 2018, the United States District Court for the District of Arizona issued an order denying Timothy Ring's *pro se* Petition for Writ of Habeas Corpus filed on November 23, 2016. Pet. App. at 2a. Mr. Ring timely appealed with one sentence: "Petitioner, Timothy S. Mr. Ring, appeals to the United States Court of Appeals for the Ninth Circuit, from the District Court's judgment entered March 5, 2018."

On November 16, 2018, this Court entered an order denying Mr. Ring a certificate of appealability. Pet. App. at 1a. It responded to Mr. Ring's one sentence appeal with a one-sentence answer: "The request for a certificate of appealability is denied because appellant had not shown that 'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'"

Undersigned counsel, appearing *pro bono*, respectfully submits that the Ninth Circuit's ruling was in error on the merits. Jurists of reason could find it debatable whether Mr. Ring had stated a valid claim of the denial of a constitutional right in his petition for writ of habeas corpus.

But Mr. Ring's focus in this petition is procedural: the panel improperly construed his "appeal[] … from the District Court's judgment" to be a "request for a certificate of appealability" on his petition. But Mr. Ring did more than simply appeal the district court's "denial of petition for writ of habeas corpus," under AEDPA. See 28 U.S.C. § 2253(c)(1)(A). Mr. Ring appealed the "judgment" of the District Court, which

included not only the final ruling on the merits of his petition, but also key orders twice denying his motion for appointed counsel and ignoring entirely his meritorious motion for discovery. The panel's obvious error of construction contravenes this Court's precedent and precedents of the Ninth Circuit.

Mr. Ring filed motions for appointment of counsel on November 23, 2016 and then again on June 6, 2017. The district court denied those motions on February 14, 2017 and July 7, 2017, respectively. Pet. App. at 39a-45a. In each denial, the court stated that "Petitioner has not made the necessary showing for appointment of counsel at this time" without any further explanation. Mr. Ring also made a motion for discovery on June 6, 2017 which the district court *never* ruled upon.

At the time the district court denied his motions for counsel and ignored his motion for discovery, Mr. Ring could not have appealed those decisions immediately, as such orders do not fall under the collateral order doctrine in the Ninth Circuit. *Weygandt* v. *Look*, 718 F.2d 952, 954 (9th Cir. 1983) (per curiam) ("We hold that an interlocutory order denying a motion for appointment of counsel in a habeas proceeding is … not appealable under 28 U.S.C. § 1291.)

However, those orders can be reviewed once the district court issues its final judgment. The *Weygandt* court explained that "an appeal from a final judgment … [would] provide an adequate remedy for an erroneous interlocutory order denying counsel." *Id*. at 954. That is because those interlocutory orders merge with the final judgment. *In re Subpoena Served on Cal. Pub. Utils. Comm'n*, 813 F.2d 1473, 1478 (9th Cir. 1987) ("Generally, review of a final order in a case encompasses all interlocutory orders over which the appellate court has jurisdiction.").

That is so even if the final judgment itself makes no reference to those earlier orders. *Sackett* v. *Beaman*, 399 F.2d 884, 889 n.6 (9th Cir. 1968) ("Thus the question of whether there was an abuse of discretion in denying leave to amend can be reviewed under the final judgment notwithstanding the fact that such judgment makes no reference to such denial. All interlocutory rulings merged in the final judgment and are reviewable on the appeal therefrom."). Mr. Ring's only opportunity to have those interlocutory decisions reviewed was upon appeal from the final judgment of the district court.

Mr. Ring did not need a COA to appeal the District Court's interlocutory orders. See *Harbison* v. *Bell*, 556 U.S. 180, 183 (2009) ("An order that merely … denies a motion for appointment of counsel … is … not subject to the COA requirement."). Petitioners must obtain a COA when they seek to appeal "final orders that dispose of the merits of a habeas corpus proceeding," but not interlocutory orders that just resolve preliminary and important procedural questions antecedent to the merits of the case like the request for appointment of counsel or discovery. *Id*. At least one other circuit also acknowledges this. See *Nichols* v. *Bowersox*, 172 F.3d 1068, 1070 n.2 (8th Cir. 1999) (en banc) ("We do not think § 2253(c) is intended to preclude all review of preliminary procedural issues ... We read § 2253(c) as addressing only the sort of showing required for a petitioner to obtain appellate review of the merits of his or her claims for habeas corpus or § 2255 relief. Otherwise, a final order entered by a district court based upon a question antecedent to the merits, if adverse to the petitioner, could never be reviewed on appeal."). Important interlocutory orders may be appealed directly upon issuance of the final order without the requirement of

first obtaining a COA. And they are reviewed in the Ninth Circuit under an abuse of discretion standard. *Stokes* v. *Roe*, 18 F. App'x 478, 479 (9th Cir. 2001).

There may, however, be some lingering uncertainty on the need for a COA for denials of motion for counsel and discovery in the Ninth Circuit, even after *Harbison*, that is ripe for clarification. See *Williams* v. *Payne*, No. C00-1199-JCC, 2007 WL 765200, at *2 n.1 (W.D. Wash. Mar. 9, 2007) (observing two years before *Harbison* that "There is some dispute as to whether a COA is required to appeal the denial of counsel during habeas proceedings."). The district court judge in *Williams* noted that while a COA was not necessary to appeal the denial of counsel during habeas proceedings in the Eighth Circuit, due to *Nichols* v. *Bowersox*, "*Nichols* is not binding on this Court however, and has never been relied upon by the Ninth Circuit." *Id*. That much is true, although other district courts in the Ninth Circuit have found *Nichols* and its progeny persuasive. See *Howard* v. *Davis*, No. CV 08-6851 DDP, 2015 WL 13415013, at *5 (C.D. Cal. Oct. 14, 2015) (citing *Pena-Calleja* v. *Ring*, 720 F.3d 988, 989 (8th Cir. 2013), which itself relied upon *Nichols*, for the proposition that "denial of habeas petitioner's motion for appointment of counsel … was clearly reviewable on appeal of a final order"); *Tran* v. *Macomber*, No. 11-cv-00877-CW, 2015 WL 4035111 (N.D. Cal. June 30, 2015) (same). In any event, the Eighth Circuit had it right – this Court's decision in *Harbison*, two years after *Williams* v. *Payne*, should have put an end to the earlier "dispute" and should have been the panel's guiding authority here.

Even if *Harbison* did not exist and Mr. Ring did need a COA to appeal these interlocutory orders, the panel should have construed his appeal from the

judgment of the district court to be a request for a COA not only on the denial of his petition for writ of habeas corpus, but also on the denial of his motions for counsel and discovery.

It is true that Mr. Ring did not cite the interlocutory orders (or failure to issue an order) in his one-sentence notice of appeal. But this Court requires courts to review *pro se* appeals generously and liberally. *Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007) (per curiam). The duty to generously construe *pro se* appellate briefs was especially relevant in this case, because Mr. Ring twice attempted to get counsel appointed to assist him with his appeal in the Ninth Circuit, to no avail. On April 30, 2018, he filed a motion with the Ninth Circuit court for appointment of counsel, but the court ignored it. Nearly seven months later, the panel issued its order denying him a COA, and adding in conclusory fashion that "any pending motions are denied as moot." On December 18, 2018, Mr. Ring again moved to have counsel appointed, but was again ignored.

After disregarding his motion for counsel, the panel failed to generously construe petitioner's appeal. Instead, the panel construed Mr. Ring's "appeal from the District Court's judgment" narrowly. It interpreted his appeal to waive his only opportunity to appeal the district court's decisions ignoring his motion for discovery and denying his two motions for counsel. In this way, the panel rendered unreviewable several key decisions by the district court that limited Mr. Ring's ability to effectively make his case in the legally complex, fact-intensive nature of his federal habeas petition.

The denial of Mr. Ring's two requests for counsel and his request for discovery warranted review. His case had the promise of success on the merits. New

ballistics evidence indicating the presence of gun powder near the victim's wound demonstrated that the fatal shot had been fired at very close range and contradicted the prosecution's theory (and purported evidence) that Mr. Ring had fired the fatal shot from a long distance. Moreover, Mr. Ring needed assistance as the record in his long-running, complex case was unusually voluminous, comprising 40 boxes in the possession of the Office of the Federal Public Defender in Phoenix, Arizona. That Office had offered to represent Mr. Ring in response to Mr. Ring's request for appointment of counsel.

Mr. Ring's inability to obtain counsel in his habeas proceeding appears to have been outcome-determinative. *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 439 (1985) ("[o]nly after assessing the effect of the ruling on the final judgment could an appellate court decide whether the [litigant's] rights had been prejudiced" when a litigant who was denied appointed counsel seeks to challenge that denial on appeal after final judgment). The district court denied five out of seven of his grounds for the petition on purely technical grounds, not even considering their underlying merits. It found that two of his claims had been procedurally defaulted for not having been raised as federal claims before the state courts below, and three of his claims were deficient for having failed to state a federal claim.

These claims were at the core of his defense of actual innocence. They included his claims that (1) the wiretap which served as the foundation for the government's case against him was invalid under the Fourth Amendment and Title III; (2) another person (Michael Sanders) had actually been responsible for the planning and murder of the driver of the armored car, not Mr. Ring, and that one of that person's ac-

complices (James Greenham) had later admitted this to Mr. Ring and two others (James Hudgens and Douglas Benge) who provided affidavits to that effect; (3) the State had presented no evidence that Mr. Ring or the money that officers collected from his house was connected in any way to the scene of the crime; (4) the State PCR Court improperly precluded the new ballistics evidence which showed gunshot reside on the victim's scalp proving that the fatal shot was taken at close range, rather than, as the prosecution maintained, from a distance of forty yards across a mall parking lot with a .22 caliber rifle and silencer that officers had collected at Mr. Ring's house and presented at trial, and which two jurors who voted for premeditated murder later indicated in affidavits might "raise some doubt about who actually pulled the trigger"; and (5) his trial counsel and PCR counsel had failed to take affidavits from two convenience store clerks at a store in Fountain Hills, Arizona, forty miles from the location of the shooting, who could have stated that Mr. Ring was at that store during the time of the shooting, but who had been approached by police and the FBI and told not to cooperate with investigators.

The district court's failure to even consider Mr. Ring's motion for discovery during his habeas proceeding also amounted to an abuse of discretion. Mr. Ring's June 6, 2017 motion for discovery sought, among other things, his FBI file, in order to prove his extensive background working for the FBI and the FBI's payment to him of approximately $105,000 in cash he received for his services, which he claimed was the source of much of the money the police later found in his house. With that file, Mr. Ring could have have cast into doubt the testimony of another FBI agent who testified that the FBI had paid Mr.

Ring only $458. A later FOIA response indicated that Mr. Ring's (still undisclosed) file spanned at least 211 pages, but the state had produced only 34 pages and had provided no explanation for withholding the balance.

On February 14, 2017, in its denial of his first motion for counsel, the district court noted that "Petitioner implies that he seeks to conduct discovery, but Petitioner has not filed a motion to that effect." Pet. App. at 43a. On June 6, 2017, Mr. Ring attempted to follow that instruction by filing a stand-alone motion for discovery. The government opposed Mr. Ring's motion for discovery on June 21, 2017. But the court never ruled on that motion. Instead, the magistrate judge proceeded to issue her Report and Recommendation on January 22, 2018, denying all his claims, over seven months after Mr. Ring had made his unanswered motion for discovery. Pet. App. at 5a-38a. Under Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts: "If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A." The district court's failure to rule on Mr. Ring's motion cries out for remand.

Mr. Ring therefore respectfully asks this Court to grant his petition, vacate the order of the Ninth Circuit that construed his appeal from the district court's judgment as only a request for a COA on the denial of his petition for writ of habeas corpus, and remand to the Ninth Circuit to have it consider Mr. Ring's appeal from the district court's denials of his two motions for counsel and its disregard of his motion for discovery. In doing so, Mr. Ring further requests that this Court clarify that, in light of *Harbison*, and in line with at least Eighth Circuit prece-

dent, a COA is not required to appeal an interlocutory order denying a motion for counsel or discovery in a federal habeas proceeding.

CONCLUSION

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

Respectfully submitted,

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