No. 19.1467

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT S. ORTLOFF — PETITIONER
(Your Name)

vs.

ARIZONA ATTORNEY GENERAL, ETAL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROBERT S. ORTLOFF ADC NO. 230269
(Your Name)
ASPC - EYMAN, BROWNING UNIT - 4-L-7
P.O. BOX 3400
(Address)

FLORENCE, AZ 85132
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the Court of Appeals erred when it contravened long-established decisional law to deny a pro se habeas petitioner a certificate of appealability (COA) under the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA); 28 USC §2253(c), and determined no jurist of reason could debate whether a district court could conduct a habeas review under §2254(d) without first obtaining for consideration the relevant record upon which the state court decision was based?

2. Whether the Court of Appeals is abusing the COA process under the AEDPA when it issues summary denial orders which contravene long-established principles of habeas review and controlling decisional law, to arbitrarily screen out pro se habeas cases from the heavy volume of cases flooding its docket?

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:

Robert S. Ortloff – Petitioner

Arizona Attorney General;
Rodney Chandler; and
Charles L. Ryan, named as
Director of the Department of Corrections – Respondents

RELATED CASES

State v Ortloff, No. CR-2003-032707-001
Maricopa County Superior Court.
Judgment of conviction entered April 10, 2004.

State v Ortloff, No. 1-CA-CR-08-0508
Arizona Court of Appeals.
Decision entered April 5, 2011.

State v Ortloff, No. CR-11-0150-PR
Arizona Supreme Court.
Decision entered October 26, 2011.

State v Ortloff, No CR-2003-032707-001
Maricopa County Superior Court.
Post-Conviction Relief decision entered July 2, 2013.

State v Ortloff, No. 1-CA-CR-13-0662 - PRPC
Arizona Court of Appeals.
Decision entered June 25, 2015.

Ortloff v Ryan, et al, No. CV-16-01910-PHX-SRB
U. S. District Court for the District of Arizona.
Judgment entered January 23, 2019.

Ortloff v Arizona Attorney General, et al, No. 19-15871
U.S. Court of Appeals for the Ninth Circuit.
Judgment entered December 19, 2019. Judgment denying reconsideration entered February 11, 2020.

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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

[X] 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 B 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

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

The date on which the United States Court of Appeals decided my case was December 19, 2019.

[ ] 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: February 11, 2020, and a copy of the order denying rehearing appears at Appendix D.

[ ] 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C.§2253 – Appeal.

(a) In a habeas corpus proceeding or a proceeding under section 2254 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

****

(c)(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

(B) the final order in a proceeding under section 2255.

(2) A court of appeals may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The court of appeals under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. §2254 — State custody; remedies in Federal Courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

****

(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.

STATEMENT OF THE CASE

The very concept of justice requires that there is no more important commodity than fidelity to the law. From that perspective, aspects of this habeas corpus case and what they represent should trouble the Justices greatly. Beyond the procedural errors that deprived petitioner Ortloff, an Arizona state prisoner, [1] a full and fair federal habeas review within which to vindicate his constitutional rights and demonstrate actual innocence, the case is illustrative of the disparate treatment the lower courts are giving to habeas petitioners —— the vast majority of whom are disadvantaged and without the benefit of counsel[2] — who seek discretionary appellant review under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).

"The writ of habeas corpus indisputably holds an honored position in our jurisprudence" and remains "a bulwark against convictions that violate fundamental fairness." ***Engle v Isaac***, 456 US 107, 126 (1982) (internal quotation marks omitted); also ***Slack v McDaniel***, 528 US 473,

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[1] Compounding the considerable challenges of self-representation in preparing an effective argument that would persuade the Justices to accept review, petitioner Ortloff has been further encumbered by the lack of access to decisional law, arguably the most basic tool in litigation. Under Arizona Department of Corrections policy, inmates do not have access, either directly or through the assistance of an individual trained in the law, to Federal Reporters, Supreme Court Reporters, or services such as Westlaw or Lexis. Nor do inmates have access to research material such as law journals, law reviews or empirical studies related to legal issues. Department Order 902, Inmate Legal Access to the Court, and Attachment A, Legal Resource Catalog (listing 18 items of legal research material available); https://corrections.az.gov/sites/default/files/policies/900/902. pdf. What authority Ortloff presents herein was obtained previously while in the custody of another jurisdiction.

[2] The Supreme Court has recognized how litigation "is a perilous endeavor for a lay person and well beyond the competence of [the majority of state prisoners] ... who have little education, learning disabilities, and mental impairments." ***Halbert v Michigan***, 545 US 605, 620-21 (2005). With indigence as another prevalent condition in state prison populations, it is no surprise that 93% of habeas petitions are brought without the assistance of a lawyer. ***Federal Habeas Corpus Review 14;*** see generally ***Thomas C. O'Bryant, The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996***, 41 Harv. C.R. – C.L.L.Rev. 289 (2006); ***Symposium: Pro Se Litigation Ten Years After AEDPA***, 41 Harv. C.R. – C.L.L.Rev. 289, 289-412 (2006).

483, (2000); ***Smith v Bennett***, 365 US 708, 713 (1961). Some have even described the writ as "the most important human right in the Constitution." Chafee, ***The Most Important Human Right In The Constitution***, 32 B.U.L.Rev. 143 (1952).

Under the AEDPA, habeas procedures have been established to permit a full, comprehensive and independent inquiry into the legality of a state prisoner's detention and the conviction and sentence upon which it is based. 28 USC §2254. Before a state prisoner can appeal the dismissal of a habeas petition, a certificate of appealability (COA) must be issued by either the district court judge or a judge of the court of appeals. 28 USC §2253 (c)(2) ; also Rule 11(a), Rules Governing Section 2254 Cases in the U.S. District Courts.

In the instant case, after the district court dismissed the habeas petition and denied a COA, Ortloff filed a request for a COA in the U.S. Court of Appeals for the Ninth Circuit, which identified manifest procedural error that occurred at the outset of habeas review. (Appendix S). Rather than follow a long line of the circuit's decisions holding that ***a habeas court must independently review the relevant record upon which the state adjudication was based***— a command most recently emphasized in ***Nasby v McDaniel***, 853 F3d 1049 (CA9 2016) — the district court initially failed, then refused to obtain for consideration the crucial post-conviction pleadings and expansive evidentiary record. A defect so fundamental that the Circuit has consistently held that, as a threshold matter, there is "no alternative but to remand." Id. at 1053 (internal quotation marks and citation omitted).

Inexplicably, a motions-panel summarily denied Ortloff discretionary review, concluding that he failed to show that jurists of reason would disagree with the way the district court resolved his constitutional claims. (Appendix A). Because the ruling defied logic, reason, and the circuit's own weighty precedent, as well as that of five other circuits, Ortloff moved for

reconsideration of the order. (Appendix T). In a one-line ruling, a second motions-panel again denied the issuance of a COA. (Appendix D).

The Supreme Court has jurisdiction to review, on a petition for a writ of certiorari, a denial of a COA under the AEDPA. ***Hohn v United States,*** 524 US 236 (1998).

The Justices should find both motions-panel rulings — as well as those issued by the district court from which the COA request arose — as nothing short of disturbing. It is truly remarkable that four appellate judges and a senior district court judge somehow came to a non-debatability determination in the face of plenary decisional law that any federal habeas review without the relevant state record is statutorily impermissible. But what should be viewed as even more disturbing is that, respectfully, these rulings — each devoid of analysis — suggest strongly that non-legal factors were considered in a calculus to slam closed the door to discretionary appellate review to yet one more unrepresented habeas petitioner.

Moreover, given the nature of this habeas action, these rulings are especially egregious. It is a state cold-case with a complex history. It is fact-intensive, context-bound, and derives from a 1984 Arizona murder.[3] The 2003 indictment was obtained by Noel Levy, a prosecutor with a history of misconduct[4] leading to wrongful convictions, and was based on the 1999

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[3] In January 1986, Ortloff was arrested by federal authorities, convicted in the Western District of Texas, and had been in federal custody until October 23, 2019. ***United States v Ortloff***, No. 93-8820, 1994 WL 725019 (CA5 1994). On that date he was transferred to Arizona custody.

[4] Prosecutor Levy wrongfully sent Debra Milke and Ray Krone to Arizona's death-row. In 1992, Milke was convicted on the basis of an alleged confession to a known perjury-prone Phoenix detective. She remained on death-row until 2013 when the Ninth Circuit, in a scathing opinion, reversed the conviction. ***Milke v Ryan***, 711 F3d 998 (CA9 2013). Krone was convicted twice on the basis of known spurious bite-mark evidence. The first conviction was reversed in 1995 because Levy withheld a video-tape concerning that evidence until the day before trial. ***State v Krone***, 182 Ariz. 319, 321 (1995). Retried and again convicted on the bite-mark evidence, Krone was finally exonerated in 2002 by DNA testing. https://en.wikipedia.org/wiki/Ray_Krone.

assertions of a polished prison informant, Fredric Tokars, a former Georgia prosecutor turned wife-slaying drug racketeer serving five life sentences.[5] The case was assigned to the public defender's office and litigated as a death-penalty case up until the 2008 trial.

Ortloff was convicted of first-degree murder, first-degree burglary and arson of an occupied structure, and is serving a life sentence. He has steadfastly maintained his innocence. He is indigent and unrepresented. In state post-conviction proceedings, he was entrapped within a procedural maze. Pretrial the only physical evidence that linked the killer to the murder — shoeprints — ***proved to exculpate him***. The evidence against Ortloff in extremely weak and centered on the testimony from an untrustworthy criminal informant and an unreliable eyewitness identification — the two primary causes of wrongful convictions.[6] See ***Center on Wrongful Convictions, The Snitch System:*** ww.law.northwestern.edu/wrongfulconvictions.

The use of criminal informants is "dirty business," ***On Lee v United States***, 343 US 747, 755 (1952), and the Ninth Circuit has consistently recognized their inherent unreliability. ***Goldstein v City of Long Beach***, 714 F3d 750, 751-52 (CA9 2012); ***Maxwell v Roe***, 638 F3d 486, 504 (CA9 2010); ***Jackson v Brown***, 513 F3d 1057, 1060-61 (CA9 2008); ***Reynoso v Giurbino***, 462 F3d 1099, 1102 (CA9 2006); ***Hall v Dir. of Corr.***, 343 F3d 976, 978, 985 (CA9

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[5] See ***United States v Tokars***, 95 F3d 1520 (CA11 1996); ***State v Tokars***, No. 97-CR-18091, Superior Court of Walker County, Georgia.

[6] Wrongful convictions play a large part in eroding trust in the justice system. Amid the public's growing awareness of the scope of the problem, The National Registry of Exonerations has gathered data on wrongful convictions, from 1989 to 2018, logging more that 2,560 exonerations. This represents a staggering 22,540 years lost to exonerees; an average of 10.9 years. In 2018, the latest year analyzed, 151 prisoners were exonerated. A number that is only a fraction of the convictions that, like Ortloff's, are now being contested on the ground of actual innocence. http://www.law.umich.edu/special/exoneration/pages/detaillist.aspx. (last visited March 3, 2020).

2000) (*per curiam*). "Our judicial history is speckled with cases where informants falsely pointed the finger at suspects and defendants, creating the risk of sending innocent persons to prison." ***United States v Bernal-Obeso***, 989 F2d 331, 334 (CA9 1993). "[W]e expect prosecutors ... to take all reasonable measures to safeguard the system against treachery." Id. The prosecution committed misconduct with respect to the prison informant. For example, prosecutor Levy knew that:

- Informant Tokars was running a confession-trolling scheme involving at least 14 inmates and was contemporaneously soliciting cooperation agreements in Ortloff's case and three other cases. (Appendix G at 28-32, also at 17-21). "[T]hat 'professional snitch'" with his own "signature *modus operandi*" targeting inmates and then contacting authorities with a "spontaneous confession." ***Maxwell v Roe***, 638 F3d at 502-05; also ***Sanders v Cullen,*** 873 F3d 778, 790-91 (CA9 2017) (same); ***Gonzalez v Wong***, 667 F3d 965, 1009 (CA9 2011) (same).
- Tokars had rifled from Ortloff's property litigation-related notes that he then used as an outline to fabricate a confession — "probably the most probative and damaging evidence that can be admitted." ***Arizona v Fulminante***, 499 US 279, 296 (1991). In order to shield his prized informant from exposure at trial, as evidence discovered post-conviction shows, Prosecutor Levy supplied Tokars with information about security cameras within the federal facility and then rehearsed an elaborate canard that included an evidentiary prop in preparation for his testimony.(Appendix G at 6-11). A Fourth Amendment violation so severe that it requires "virtually automatic" reversal. ***United States v Rodriguez***, 754 F3d 1122, 1142 (CA9 2014) (quoting ***Hayes v Brown***, 399 F3d 972, 978 (CA9 2005) (*en banc*)).
- While suborning Tokars and being a source of invaluable information, he contemporaneously maneuvered the trial court into stripping Ortloff of his right to confrontation

— "a fundamental right essential to a fair trial," ***Pointer v Texas***, 380 US 400, 404 (1965) — under the forfeiture-by-wrongdoing doctrine based on intent-statements made by his informant, which resulted in the jury hearing a mass of prejudicial victim-hearsay.(Appendix G at 100-02). A prosecutor must never use "improper methods calculated to produce a wrongful conviction." ***Darden v Wainwright***, 477 US 168, 181 (1986).

With respect to identifications, "[e]yewitness error remains the single most important cause of wrongful imprisonment." ***Scheck, Neufeld, Dwyer, Actual Innocence, 2000***, at p. XVII (study cited with approval in ***Mariana Islands v Bowie***, 243 F3d 1109, 1124 n. 6 (CA9 2001)). "The vagaries of eyewitness identification are well known." ***United States v Wade***, 388 US 218, 228 (1967). "[T]he influence of suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor." Id. at 228-29. The prosecution committed misconduct with respect to the identification. Among other things, Prosecutor Levy knew that:

- A grandmother and her 14-year-old granddaughter ***independently*** described the killer as blonde and clean shaven; which is in stark contrast to Ortloff's dark brown hair and black mustache; but the descriptions ***did match the other suspect*** who was blonde and clean shaven. (Appendix G at 120-23).
- The grandmother was adamant that the killer was ***not*** in the photo spread, while her granddaughter had only a split-second side view of the killer's face and thought that she was looking for one of the victim's friends who frequented the residence, which Ortloff did almost daily. The granddaughter then selected two photos as men "closet in appearance," one of which was Ortloff, but further explained that ***the hair and other features were not accurate.*** *(Id.)*

- He could take advantage of the ***pre-indictment*** death of the grandmother by eliciting false testimony mid-trial from the granddaughter that a single positive identification of Ortloff was made 23 years earlier.(Id.) The "deliberate deception of court and jury by the presentation of known false evidence is 'incompatible with the rudimentary demands of justice.'" ***Giglio v United States***, 405 US 150, 153 (1972) (quoting ***Mooney v Holohan***, 294 US 102, 112 (1935)).

The prosecution committed misconduct with respect to a series of shoeprints, the only evidence that linked the killer to the murder. Among other things, Levy knew that:

- For more than two decades the grandmother and her granddaughter also consistently maintained that the killer had fled through a muddy area with shrubbery, nearly falling when he slipped in the mud, and then sprinted down the sidewalk. This resulted in the collection of a distinct shoe impression, an undefinable slip-mark, and a muddy shoeprint on the sidewalk. (Appendix G at 115-19).

- Once the shoe impression — as the best representation of the evidence given to the state expert for analysis —***proved exculpatory,*** he could not submit the muddy shoeprint for similar evaluation and risk another exculpatory finding because there was no way to avoid the granddaughter and the detective testifying that the fleeing killer had slipped in the mud as he ran along the sidewalk. (Id).

- Because the grandmother was mainly responsible for the collection of the shoe impression he could, take further advantage of her 1993 death by eliciting coordinated perjury mid-trial from the granddaughter, the detective and informant Tokars that suddenly disassociated the exculpatory shoe impression from the crime.[7] (Id). A prosecutor may not "contrive [ ] a

[7] Levy's misconduct-strategy was to overcome more than the 2 independent eyewitness descriptions that matched the other suspect. After the state's expert excluded Ortloff, ***Levy***

conviction ... through a deliberate deception," ***Mooney***, 294 US at 112, and the rule "bans the knowing use of false evidence" and "false testimony", ***Napue v Illinois***, 360 US 264, 269 (1959), and the adve.

- .rtant misrepresentation of the nature of the evidence. ***Darden***, 477 US at 182.

The petition contained 48 grounds for relief.[8] (Appendix G). The first 30 grounds assert an array of interwoven claims of prosecutorial misconduct. Grounds 31-46 assert claims of ineffective assistance of counsel ("IAC"). Ground 47 asserts cumulative error and Ground 48 raises a claim of actual innocence. Against this backdrop, and in light of "the increasing frequency with which innocent people have been vindicated after years of imprisonment," ***Stanley v Schriro***, 598 F3d 612, 623 (CA9 2008), the *habeas* review of Ortloff's serious claims was narrowly limited to an analysis of the trial transcript record. (Appendix B at 2; M at 1-2).

The district court did not obtain for consideration the highly relevant and extensively cited post-trial record and evidentiary appendix, and post-conviction procedural pleadings, supporting affidavit and evidentiary appendix — the very record on which the state courts had based their decisions. As a result of this ***structural error***, the district court necessarily would, and did, repeatedly err when it then ruled on (1) the question of exhaustion as to Grounds 1-26 and 28-30; (2) the merits of Grounds 27 and 31-48; and (3) issues involving expert services and discovery.

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learned that that other suspect wore the same size shoe that made the shoeprint evidence. (Appendix G at 16-17).

[8] An index of the 48 grounds for relief raised in the petition can be found attached to Appendix O, as Exhibit B.

REASONS FOR GRANTING THE PETITION

I. THE COA MECHANISM UNDER THE AEDPA IS NOT A PROCESS WHERE A COURT OF APPEALS IS UNBOUND BY THE LAW AND ALLOWED TO ARBITRARILY DENY THE UNREPRESENTED PETITIONER DISCRETIONARY APPELLATE REVIEW.

The rule of law is paramount, regardless of a persons's status in society. There are principles. And fairness. In the context of habeas jurisprudence, these ideals are the framework of the writ. A remedy that "is not...static, narrow [or] formalistic... but one [with] the ability to cut through barriers of form and procedural mazes." ***Hensley v Municipal Court***, 411 US 345, 349-50 (1973) (internal quotation marks and citation omitted). Indeed, "'the very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected.'" Id. (quoting ***Harris v Nelson,*** 394 US 286, 291 (1969). "[H]abeas corpus is, at its core, an equitable remedy." ***Schlup v Delo,*** 513 US 298, 319 (1995) (quoted approvingly in ***Boumedrene v Bush***, 553 US 723, 780 (2008). It certainly is not a game of chance, ***Williams v Florida***, 399 US 78, 82 (1970), and its enabling statutes are to be construed liberally in favor of liberty. ***Peyton v Rowe***, 391 US 54, 58 (1968).

For these fundamental principles to have force and affect, however, it is imperative for a court to be an impartial and faithful administrator of the law. The "very essence of judicial duty," ***Marbury v Madison***, 5 US (1 Cranch) 137, 178 (1803), is for a court, "guided by consideration of justice," ***McNabb v United States***, 318 US 332, 341 (1943), to "exercise [its]... best judgment, and conscientiously to perform [its]... duty." ***Cohens v Virginia***, 19 US (6 Wheat) 264, 304 (1821).

When procedural rulings contravene long-settled habeas principles, as here, the courts allow themselves to become accomplices in injustice because they shield the State against an

independent and comprehensive federal review. This not only has devastating consequences for the petitioner, it openly frustrates public policy against criminal trials that impugn fundamental fairness, infringe constitutional rights, and compound wrongful convictions.

Equally tragic, such procedural rulings expose the way the lower courts manipulate the COA process. Acting unbound by the law whenever the need arises, the lower courts issue COA denial orders as pretense to restrict the availability of appellate review. They treat the gateway mechanism as a sort of lottery where the unrepresented habeas petitioner is given the longest of odds at having wrongs recognized and matters set on a correct path.

II. LEGAL STANDARD FOR GRANTING A COA.

A COA requires that the petitioner make a "substantial showing of the denial of a constitutional right." 28 USC §2253(c) (2). This inquiry "is not coextensive with a merits analysis," and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" ***Buck v Davis***, 137 S Ct 759, 773 (2017). The petitioner need only make "a preliminary showing that his claim was debatable," notwithstanding that "'every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.'" Id. at 775 (quoting ***Miller-El v Cockrell***, 537 US 322, 327 (2003)).

Similarly, when the district court's ruling is based on a procedural ground, the petitioner must make a preliminary showing that it is "debatable whether the district court was correct in its procedural ruling." ***Slack,*** 529 US at 478). When a court exceeds its preliminary function at the COA stage, it "depart[s] from the procedure prescribed by §2253" and "in essence decide[s] an appeal without jurisdiction." ***Buck v Davis***, 137 S Ct at 773-74.

The standard for obtaining a COA is "lenient." ***Hayward v Marshall***, 603 F3d 546, 553 (CA9 2010) (*en banc*). Any doubt about the propriety of granting a COA must be resolved in the petitioner's favor, ***Jennings v Woodford***, 290 F3d 1006, 1010 (CA9 2002), and a court should issue a COA unless the claim is "utterly without merit." ***Silva v Woodford***, 279 F3d 825, 833 (CA9 2002).

III. PROCEDURAL AND FACTUAL BACKGROUND.

a. STATE

In 2008, following 33 trial days, Ortloff was convicted on all counts. A motion for new trial was filed raising, among other issues, prosecutorial misconduct concerning shoeprint evidence, with an attached appendix — 3300 pages of interview transcripts, depositions and police summaries and reports. (Instrument "I" 332, 335- 347).[9] There was no evidentiary hearing. The trial court rejected each issue. (I353). Ortloff was sentenced to life, with the possibility of parole after 32 years, to run consecutively to his 54-year federal sentence. On appeal, the same misconduct issue was raised. (Appendix K, Exhibit A). On April 5, 2011, the Arizona Court of Appeals affirmed. (Appendix K, Exhibit E).

On December 16, 2011, Ortloff filed, pursuant to Ariz.R.Crim.P.32, a Notice of Post-Conviction Relief ("PCR"). (Appendix E at 1). Throughout the process, Ortloff asserted that, as an indigent federal inmate at the time, he neither had effective access to Arizona authority nor could he develop his claims without an attorney to perform discovery and obtain experts and an investigator. (Appendix I at 18-30). Counsel was appointed. Then without

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[9] Unless otherwise specified, citations to the state docket are consistent with those used in, but never obtained and reviewed by, the district court. The Electronic Index of Record, which enumerates the instruments filed in the state court, is attached to Appendix O, as Exhibit A.

obtaining defense counsel's file; communicating with Ortloff to discuss what occurred outside the trial record; or contacting experts or seek examination of untested shoeprint evidence; counsel notified the court in formbook fashion that no cognizable claim could be found. (Id. at 21-22).

Abandoned, Ortloff filed a PCR petition raising over 150 multifaceted issues within an array of newly developed prosecutorial misconduct claims and ineffective assistance claims ("IAC"), and a cumulative error claim. (Appendix K, Exhibit B). The record was expanded with a 265-page affidavit (I471) and an appendix — 5,500 pages of police interview summaries and reports; Federal Bureau of Investigation, Department of Justice and Federal Bureau of Prisons (BOP) records; transcript volumes of witness interviews, depositions, legal and scientific articles, and other relevant material. (I480-515; Appendix I at 6-8, 19, 31-44; Appendix L at 2-3, 6-9). Ortloff repeatedly asserted that, once newly discovered BOP records established a perjury-nexus between prosecutor Levy and informant Tokars, it was through that subornation-prism that other claims developed.[10] (I433; 435; 438-39; 439; 448; 453; Appendix K, Exhibit B at 2-4). The state filed a perfunctory response (I519) and Ortloff filed a reply. (I525; Appendix I at 25-26).

On Thursday, June 27, 2013, the massive record was assigned to the PCR court (I523; 527; Appendix I at 19 n.10)) and 3 work-days later, Tuesday, July 2, 2013, the petition was summarily dismissed under Ariz.R.Crim.P 32.6(c)[11](Appendix F). The court determined that the

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[10] Under Arizona law, a due process violation based on a prosecutor's knowing use of perjury is generally precluded from post-conviction review unless the petitioner can demonstrate that the claim is based on newly discovered evidence. ***Ferrell v Ryan***, 2015 U.S. Dist. LEXIS 50905 (D.Az, April 15, 2015); see ***State v Perez***, 2013 Ariz.App. LEXIS 960 (August 27, 2013) (claim of perjury independent of claim of newly discovered evidence is precluded under Ariz.R.Crim.P. 312(a)(3) because defendant did not raise issue on direct appeal).

[11] Under 28 USC §2254(d) (2), it will normally be presumed that the PCR court's factual determinations are correct. ***Miller-El v Dretke***, 543 US 231, 240 (2005) 231, 240 (2005).

prosecutorial misconduct and cumulative error claims were precluded under Rule 32.2(a) (2) because each was previously rejected on direct appeal,[12] and the IAC claims were dismissed under Rule 32.5 because they were based on speculation. (Id.). The PCR court did not address issues of discovery and expert services.

Because the specific preclusion provision stated did not apply, to avoid a miscarriage of justice Ortloff filed a motion for rehearing under Rule 32.9(a) (I531) and — based on controlling Ninth Circuit precedent holding that Arizona permits post-denial amendments to PCR petitions — a motion to amend his petition under Rule 32.6(d).(I532). He asserted that, due to post-appeal evidentiary development of the prosecutorial claims, Rule 32.1(e) and (h) exception provisions to any procedural bar would nevertheless apply. (Appendix I at 27-29). The PCR court did not address either motion.

On June 25, 2015, the appellate court first ruled that the PCR court correctly concluded that the claims were raised on direct appeal.(Appendix E at 2).[13] Then because the Rule 32.1(e)

However, nothing about the resolution of this complex cold-case appears "normal." As Ortloff argued to the district court, "reasonable jurist[s] must suspend reason and common sense to conclude that the PCR court adjudicated the claims on the merits" within a "3 work-day" window. (Appendix N at 5). Indeed, it is highly implausible.

[12] Respondents would finally concede in its second answer that, as to Grounds 1-26 and 28-30, each "claim was ***not*** raised on appeal." (Appendix K at 7-20) (emphasis added). This admission is an indication of how objectively unreasonable the state PCR court factual and legal determinations actually had been, stripping away any semblance of a fair and thorough consideration of the claims. Initially the PCR court, then the appellate court, somehow determined that all of the distinct and fact-intensive prosecutorial misconduct claims (which were reformulated into the 30 grounds raised in the SAP), were "carefully considered" and "rejected" previously in a motion for new trial and on direct appeal. (Appendix F at 2; Appendix E at 2). Four judges claimed to have found 29 non-existent claims in the trial record – an astonishing 96.6% claim-preclusion error rate.

[13] Footnote 12, supra.

and (h) exception provisions were not raised in the petition but in motions for rehearing and to amend after dismissal, it found no abuse of discretion in denying the motions. Id. at 2-3).

b. FEDERAL.

On June 14, 2016, Ortloff timely filed his original §2254 petition. (Appendix J at 1-3). In a Second Amended Petition, ("SAP"), he presented 48 grounds for relief, which cited extensively to the post-trial and PCR record. (Appendix G). Where grounds overlapped, each was incorporated by reference to the correlating ground. (Id.). In its answer, Respondents argued that prosecutorial misconduct Grounds 1-26 and 28-10 were procedurally defaulted, either implied or expressly; the state court's resolution of prosecutorial misconduct Ground 27 and IAC Grounds 31-46 were correct; Ground 47's cumulative error claims likewise fail; and Ground 48's actual innocence claim lacked merit. (Appendix K).

Contemporaneously, to overcome both claim-development obstacles encountered in the state PCR court and procedural default issues raised by Respondents with a gateway demonstration of actual innocence, Ortloff filed a series of requests for expert services and discovery. (Appendix M at 43-44).

Respondents were ordered to file the relevant transcript volumes for review. (Appendix B at 2). Neither the relevant post trial appendix (I335-347) nor the PCR procedural pleadings, affidavit and appendix (I433-515) was ordered produced. Nor was an evidentiary hearing conducted

On September 28, 2018, the Report and Recommendation ("R&R") determined that prosecutorial misconduct Grounds 1-26 and 28-30, while erroneously barred under Rule 32.2(a)(2), were nevertheless technically exhausted but procedurally defaulted without excuse under either Rule 32.2(a)(1) or (3) because each ***could*** have been raised on direct appeal.

(Appendix M at 10-19). Then, following a merits review, Ground 27 failed to show that the state adjudication was incorrect. (Id. at 43). IAC Grounds 31-46 failed to show counsel was constitutionally ineffective or that the PCR court decision presented either an unreasonable application of federal law or of the facts. (Id. at 24-37). Ground 47's cumulative claim likewise failed (id. at 37-38), and Ground 48's actual innocence claim relies on demonstrating doubt as to guilt and not affirmatively proving innocence. (Id. at 38-39). Finally, addressing the discovery motions, each was based on "speculation", failed to show "good cause", and denied. (Id. at 43-45).

Ortloff filed objections to the R&R, arguing, among other points, that the entire review was flawed ***without the expansive post-trial and post-conviction evidentiary record.*** (Appendix N). The Respondents did not file a response.

On January 23, 2019, the district court overruled Ortloff's objections, adopted the R&R, and denied the SAP and a COA. (Appendix B). Ortloff filed a Rule 59(e) motion to alter or amend judgment, again arguing that it is manifest error to disregard controlling Ninth Circuit precedent and perform a habeas review ***without the complete state record.*** (Appendix O and P). The Respondents filed a bare-assertion response arguing that Ortloff was only attempting to "re-litigate" the *habeas* action (Appendix Q) and Ortloff filed a reply. (Appendix R). Without addressing the detailed error raised, the district court agreed that Ortloff was merely"relitigating old matters" and denied the motion. (Appendix C).

On April 24, 2019, Ortloff filed a timely notice of appeal. He then filed a request for a COA on May 6, 2019, which identified two questions for discretionary review, each premised on a long-established habeas principle: Whether reasonable jurists could debate (1) whether §2254(d) required the district court to obtain for independent review all relevant portions of the

record on which the state adjudications are based, and (2) whether the district court abused its discretion and committed clear error when it disregarded Ninth Circuit precedent and improperly denied a motion to alter or amend judgment pursuant to Fed. R. Civ. P 59(e). (Appendix T). On December 19, 2015, a motions-panel summarily denied a COA, holding that no jurists of reason could disagree with the district court's resolution of the petition. (Appendix A). Ortloff filed a motion for reconsideration on January 6, 2020 (Appendix T), and on February 11, 2020, a second motions-panel denied the motion in a one-line ruling. (Appendix D).

IV. THE COURT OF APPEALS CLEARLY ERRED AND ABUSED ITS DISCRETION WHEN IT CONTRAVENED THE LAW OF THE CIRCUIT AND DENIED PETITIONER A COA.

a. REASONABLE JURISTS COULD DEBATE WHETHER 28 USC §2254(d) REQUIRED THE DISTRICT COURT TO OBTAIN FOR INDEPENDENT REVIEW ALL RELEVANT PORTIONS OF THE RECORD ON WHICH THE STATE ADJUDICATIONS ARE BASED.

The Ninth Circuit has consistently held that 28 USC §2254(d) mandates that a *habeas* court "conduct [ ] an independent examination of the [state] record." ***Nasby,*** 853 F3d at 1054). A district court "***must*** either obtain and review the relevant portions of the record on which the state based its judgment, or conduct an evidentiary hearing of its own." Id. at 1052 (emphasis added) (citing ***Jones v Wood***, 114 F3d 1002 (CA9 1997)). Every *habeas* review "requires an 'independent' assessment of the basis of the state court's decision," "rather than accept the state court's determination of the facts on faith." Id. at 1053 (quoting ***Jones***, 114 F3d at 1008). "Without such an independent assessment, the district court would be unable to 'determine whether the state court adjudication rested on an unreasonable application of clearly established federal law or an unreasonable determination of fact.'" Id. (quoting ***Jones***, 114 F3d at 1013 and discussing ***Lincoln v Sunn***, 807 F2d 805, 808 (CA9 1987)("We may not affirm a district court's dismissal of a writ of *habeas corpus* unless the court either held a hearing, or the record shows

that the district court independently reviewed the relevant portions of the state court record."); see ***Richard v Picketts***, 774 F2d 957, 961 (CA9 1985) (same); ***Johnson v Lumpkin***, 767 F2d 630, 636 (CA9 1985)(same)(citing , ***Rhinehart v Gunn,*** 598 F2d 557, 558 (CA9 1979) (*per curiam*); ***Turner v Chavez***, 586 F2d 111, 112 (CA9 1978)("In considering a petition for a writ of *habeas corpus*, the district court must make its determination as to the sufficiency of the state court findings from an independent review of the record, or otherwise grant a hearing and make its own findings on the merits.'" The very nature of the *habeas corpus* action demands an independent review."')(internal citations omitted)); ***Vicks v Bunnell***, 875 F2d 258, 259 (CA9 1989) (the district court was obligated to review the entire state record); see ***Ruff v Kincheloe***, 853 F2d 1240, 1242-43 (CA9 1988)(When a *habeas* petition presents a mixed question of law and fact, the district court has a duty *sua sponte* to obtain the state record and to conduct a "complete and independent review" of that record.) (citing ***Chaney v Lewis***, 801 F2d 1191, 1194-95 (CA9 1986)); ***Hamilton v Vasquez***, 882 F2d 1469, 1471 (CA9 1989)(same); ***Dyer v Wilson***, 446 F2d 900, 900 (CA9, 1971)(district court erred in presuming state court findings are correct under §2254(e) without first ordering and reviewing relevant transcripts); Rule 5 of the Rules Governing Section 2254 Cases in the U.S. District Courts; compare ***Cullen v Pinholster***, 563 US 170, 180 (2011) ("[F] or purposes of review under 28 USC §2254(d)(1), federal allegation must be based on the record that was before the state court that adjudicated the claim on the merits.")(quoted and cited in ***Poyson v Ryan,*** 879 F3d 875, 895 (CA9 2012); ***United States v Hasting***, 461 US 499, 509 n.7 (1983) (constitutional error can be found harmless only after consideration of the entire record); ***Townsend v Sain***, 372 US 293, 319 (1963) ("Ordinarily [the complete state court] record — including the transcript of the hearing..., the pleadings, court

opinions, and other pertinent documents — is indispensable to determining whether the habeas applicant received a full and fair state-court evidentiary hearing resulting in reliable findings.").

When a court of appeals is presented with a habeas case where "[t]he district court failed to examine important parts of the [state]record," it "face[s] a threshold obstacle to reviewing [the] petition." ***Nasby***, 853 F3d at 1052. Under these circumstances, the appellate court has "'no alternative' but to remand" the case for consideration of the petition in light of the full record. Id. at 1053 (citing ***Jones***, 114 F3d at 1008) (citing ***Vicks***, 875 F2d at 259); see ***Magouirk v Phillips***, 144 F3d 348, 363 (CA5 1998) ("This case must be remanded so that the record can be supplemented with those portions of the state record necessary to conduct a meaningful review."); ***Jeffries v Morgan***, 522 F3d 640, 644 (CA6 2008) ("[W]here substantial portions of [a trial] transcript were omitted before the District Court, a habeas case should be remanded... for consideration in light of the full record); ***Aliwoli v Gilmore***, 127 F3d 632, 633-34 (CA7 1997)(Because key parts of the state record are missing, "we are unable to examine Aliwoli's claims in light of the whole record... and we must... remand this case to the district court..."); **Thames v Dugger,** 848 F2d 149, 151 (CA11 1988) ("Absent careful review of the record, a district court has no measure to determine whether the petitioner's constitutional claim received a full and fair hearing.").

Here, the district court confined its *habeas* review to an analysis of the trial transcript record. (Appendix B at 2). This limitation is especially confounding given that the SAP itself asserted a citation-based factual predicate for each of the 48 claims that is based in huge part on information ***outside the transcript record*** (Appendix G at 6-152). In fact, the district court was left with no doubt that the claims principally turn on an expansive evidentiary record made post-trial (Appendix I at 6-8; Appendix L at 6-9; Appendix N at 10; Appendix O at 4-5; Appendix R

at 1-4), and then in post-conviction.[14] (Appendix I at 19, 31-36, 41-43; Appendix L at 2-3; Appendix N at 2; Appendix O at 5-10; Appendix R at 1-4).

Nor was there any doubt that the full record was necessary in making determinations regarding context-bound issues of procedural default (Appendix I at 25-29; Appendix L at 3, 10; Appendix N at 3-5; Appendix O at 10-16; Appendix R at 1-4), and those involving expert services and discovery. (Appendix I at 17-23, 47, 52 and n.26; Appendix L at 4, 11, 15 and n.4; Appendix N at 3; Appendix O at 17-19; Appendix R at 1-4).

Consequently, the district court necessarily would, and did, commit manifest error. A comprehensive review of the relevant state record demonstrates that:

1. Grounds 1-26 and 28-30 ***were developed post-appeal and therefore not subject to any preclusion provision*** under Ariz. R. Crim. P. 32.2(a). A factual basis for application of a procedural bar is, after all, a "matter of constitutional fact" that must be "decide[d] through an examination of the entire record." ***Ashe v Swenson***, 397 US 436, 443 (1970); see ***Miller-El v Dretke,*** 545 US at 240 (to avoid a procedural bar, a petitioner must show that the state court's conclusion "to be an reasonable determination of the facts in light of the evidence presented in the state court proceeding.")(quoting 2254(d)(2)).

In the alternative, Ortloff's motion to amend his petition exhausted the claims. A fair reading of the ***full record*** shows "good cause" to amend and the appellate court's ruling that barred post-denial amendment was irregular and invalid. The Arizona Supreme Court allows liberal amendment of PCR petitions, ***Scott v Schriro***, 567 F3d 573, 581 n.6 (CA9 2009) (citing

[14] The district court was additionally provided with a detailed compilation of those portions of the PCR record as they pertain to the individual 48 grounds for relief (Appendix P), and an index of the 632 appendices in that record. (Appendix O, Exhibit C).

Canion v Cole, 115 P3d 1261, 1264 (Ariz 2005)), and Rule 32.6(d) ***permits post-denial amendments***. ***Greenway v Shriro***, 613 F3d 780, 798 (CA9 2010).

2. Grounds 27 and 31-48 are not, as the district court repeatedly admonished, "unsupported" allegations based on "speculation" or that "rel[y] on supposition." (Appendix M (R&R) at 24-38, 42-43; Appendix B at 10-20, 21-23). These conclusions are fundamentally unfair and also easy to make ***when the specific evidentiary support for each allegation remains unreviewed in the state court***.[15]

3. When Ortloff entered federal *habeas* proceedings, he sought to overcome claim-development obstacles encountered in the PCR court with a series of requests for expert and investigative services and discovery. Without the underlying state record before it, the district court continued to admonish Ortloff for allegations based on "speculation" and for failing to demonstrate "good cause." (Appendix M (R&R) at 43-45; Appendix B at 23-24). Moreover, the district court's analysis is improperly premised on perceived failures committed by Ortloff when such failures are justly attributed to the PCR court's abuse of discretion in denying the discovery in the first instance. The "services of investigators and ... experts" were "critical" in the preparation of Ortloff's PCR effort. ***McFarland v Scott***, 512 US 849, 855-56, 860 (1994). A fair reading of the full record reveals that each motion demonstrated "good cause" to conduct the requested discovery and the district court abused its discretion in their denial.[16]

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[15] Ground 48's actual innocence claim itself required the district court to conduct a careful review of the entire record, which includes "'all the evidence,' old and new." ***House v Bell***, 547 US 518, 538 (2006) (quoting ***Schlup,*** 513 US at 327-28); also ***Lee v Lampert***, 653 F3d 929, 938 (CA9 2011)(*en banc*).

[16] Prosecutorial machinations surrounding the shoeprint evidence aside, given the evidence prosecutor Levy adduced at trial — that the killer "slipped in some mud" and then fled along the sidewalk (Appendix G at 117-18; Appendix U) — it remains inexplicable that neither the state courts nor the district court would provide the services of an expert to evaluate the muddy

Bracy v Gramley, 520 US 899, 908-09 (1997); ***Pham v Terhune***, 400 F3d 740, 443 (CA9 2005); ***Calderon v U.S. Dict. Ct.***, 144 F3d 618, 622 (CA9 1998).

"[I]t is clear that in order to provide adequate *habeas* review as contemplated by [§2254], the [district] court [was] ***required*** to review the state record." ***Nasby***, 853 F3d at 1054 (emphasis added); also ***Jones***, 114 F3d at 1008. The district court's failure to conduct an "independent review" of the complete state record is patently "debatable," or wrong, and therefore Ortloff was entitled to a COA. ***Slack***, 529 US at 484.

b. REASONABLE JURISTS COULD DEBATE WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION AND COMMITTED CLEAR ERROR WHEN IT DISREGARDED CONTROLLING NINTH CIRCUIT PRECEDENT AND IMPROPERLY DENIED A MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO FEDERAL RULE CIVIL PROCEDURE 59(e).

In his motion, Ortloff respectfully asked the district court to exercise its "considerable discretion," ***McDowell v Calderon***, 197 F3d 1254, 1255 n.1 (CA9 1999)(*en banc*), and "correct manifest errors of law [and] fact upon which the judgment rests" and "prevent manifest injustice." ***Allstate Ins. Co. v Herron,*** 634 F3d 1101, 1111 (CA9 2011) (citing ***McDowell***, 197 F3d at 1255 n.1). In order to demonstrate clear error of law or fact, or manifest injustice under Rule 59(e), Ortloff must show that the judgment is "clearly erroneous." ***McDowell***, 197 F3d at 1255 n.4. Clear error occurs where "the reviewing court ... is left with the definite and firm conviction that a mistake has been committed." ***Anderson v City of Bessemer***, 470 US 564, 573 (1985) (citation omitted).

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shoeprint. And this, despite the fact that defense counsel raised his own ineffective performance post-trial, lamenting that the shoeprint should have been subject to expert examination. (Appendix G at 133 – IAC Ground 33). "When an attorney fails to examine potentially exculpatory evidence..., the ***Strickland*** presumption that the failure is 'sound trial strategy' is surmounted." ***Jones***, 144 at 1011 (citing ***Sim v Livesay***, 970 F2d 1575, 1580 (CA6 1992) (counsel's failure to have potentially exculpatory physical evidence examined "cannot be characterized as a reasonable exercise of professional judgment.").

Ortloff presented 5 instances of clear error: (1) The scope of *habeas* review under §2254 must be "complete and independent" (Appendix O at 3-4); (2) The merits review of Grounds 27 and 31-48 failed to comport with the requirements of §2254(d) (id. at 4-10); (3) Grounds 1-4, 6-13, 15-26 and 28-30 are not subject to an implied procedural bar (id. at 1015); (4) Grounds 5 and 14 were properly presented in the PCR court (id. at 15-16); and (5) The discovery motions were essential to full development of the underlying IAC and actual innocence claims and the PCR court abused its discretion in denying discovery in the first instance. (Id. at 17-18).

In response, the Respondents chose to ignore each enumerated error and instead asserted that Ortloff "appears to be re-litigating" his SAP and he nevertheless could have requested produced the "additional record ..., but he did not do so." [17] (Appendix Q at 2).

The district court also elected not to recognize the enumerated error and address the detailed arguments. Instead, the district court diluted the arguments down to Ortloff merely having "opine[d] that the Court should correct the manifest error of law and fact upon which the judgment rests," then declined to alter or amend the judgment because Ortloff was only attempting "to relitigate old matters." (Appendix C at 2).

Far from attempting to "relitigate" his *habeas* action, as noted above, Ortloff sought to have his claims of serious constitutional error receive for the ***first time*** the "***independent and***

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[17] This bare assertion is equally baseless. Ortloff argued that his claims are based on a "substantial amount of information that cannot be found in the trial record" (Appendix I at 47), and asserted that he "does not have the ability to provide [the] Court with the record, and 28 USC §2254 and the Rules Governing the statute relieve him of any obligation to do so and requires the State to file the relevant record." (Id. at 47 n.22) (citing ***Pliler v Ford***, 542 US 225, 232 (2004)). "[I]t is the district court's ***independent obligation to obtain the relevant part of the record.***" ***Nasby***, 853 F3d at 1053 (emphasis added) (citing ***Jones***, 114 F3d at 1008) ("[T]he district court had ***the duty to obtain the record itself.***")(emphasis added); ***Ruff***, 853 F2d at 1243 (same).

complete" assessment that §2255(d) "***demands***." ***Nasby***, 853 F3d at 1054 (emphasis added). It is a "principle" of law that ***required*** the district court to independently review Ortloff's *habeas* action. Id. at 1042. By failing in its obligation at the outset to obtain the relevant record on which the state courts based their decisions, and then failing to rectify that clear error under Rule 59(e), the district court effectively rendered §2254 ***meaningless***. (Id.).

Based on the "wholesale disregard ... or failure to recognize controlling precedent," ***Oto v Metro. Life Ins. Co.,*** 224 F3d 601, 606 (CA7 2000), the district court's rulings would leave a reasonable jurist "with the definite and firm conviction" that "clear error" occurred. ***Anderson***, 470 US at 573. That the rulings are "dead wrong." ***Hopwood v State of Texas***, 236 F3d 256, 273 (CA5 2000). Because the district court's failure to follow unambiguous Ninth Circuit precedent constitutes clear error and the denial of the Rule 59(e) motion was an abuse of discretion, each is patently "debatable," or wrong, and Ortloff was entitled to a COA. ***Slack***, 529 US at 484.

V. THIS CASE PRESENTS EXTRAORDINARY CIRCUMSTANCES WHICH JUSTIFY THE EXERCISE OF THE SUPREME COURT'S SUPERVISORY POWER.

This is a disturbing case that deserves stern and unqualified judicial condemnation. It would be an understatement to characterize each COA denial as a procedural ruling disharmonious with the overwhelming weight of controlling decisional law. Each decision is, respectfully, legally indefensible and strikes at the fundamental integrity of the AEDPA's gateway process itself.

The district court gave no operation or function to §2254(d)'s independent review requirement. At no time did it undertake the formidable inquiry into the expansive state record necessary to make fact-determinations within appropriate legal frameworks. As a consequence,

the district court lacked critical facts. It lacked context. It had no apprehension of the nature of the claims. No backdrop to the events that transpired prior to trial, at trial, or those that occurred afterwards. No ability to conceptualize the manifest constitutional error and resultant prejudice.

Nor did the district court give operation or function to §2253(c)(2)'s gateway mechanism. Despite repeated reminders of its obligation to obtain for consideration and review the entire state court record,[18] the court rather remarkably determined that that long-established habeas principle and the extensive decisional law of the circuit were either unpersuasive or unreasonable, and refused to grant a COA.

Equally offensive to the AEDPA, the Court of Appeals also gave no operation or function to these habeas statutes. Unbound by the facts and the law, the appellate court twice summarily denied the issuance of COA.

The only question for the Court of Appeals was whether Ortloff had shown that jurists of reason could disagree with the district court's resolution of his claims and that the issues presented are adequate to deserve encouragement to proceed further. ***Buck***, 137 S Ct at 173-74. As noted above, it is plain as a pike staff that Ortloff made the requisite showing that it is "debatable whether the district court was correct in its procedural ruling[s]" to conduct a habeas review of his claims without the relevant state record. ***Slack***, 529 US at 478.

The purpose of the gateway mechanism creating discretionary appellate review was to eliminate abuse of the writ in federal court by undue interference with state process incident to

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[18] It strains credulity to believe that the lower courts did not treat Ortloff's habeas action as a game. After all, in a six-year-old habeas case, the same senior district court judge was aware of her duty to, and did, independently review the relevant state court record. ***Sansing v Ryan***, 2013 U.S. Dist. LEXIS 16597 (February 7, 2013). Then in a habeas case only eight months prior to reviewing Ortloff's petition, she punched another petitioner's lottery ticket and conducted an independent review of the entire record that was before the state court. ***Jones v Ryan***, 2018 U.S. Dist. LEXIS 87375 (May 24, 2018).

protracted appellate proceedings in frivolous cases. ***Bell v Cone***, 535 US 684 (2002). It was never meant, as here, to become a process where an expedient procedural bulwark could be arbitrarily raised before the unrepresented petitioner on the path to appellate review.

If procedural rulings such as those entered against Ortloff are to be accepted, even tacitly, the very concept of justice would be invalid, rendering federal habeas review to have no meaning. In fact, what was metted out to Ortloff, as with many habeas petitioners who are neither well-to-do nor connected, is the antithesis of justice. And the most significant and unsettling impact of such acceptance will be that an ever-greater number of future requests for a COA, regardless of the issues and legal argumentation, are going to be unsuccessful. It is the power of inertia. The lower courts will be further emboldened to dispose of habeas cases in slap-dash fashion, and continue to produce troublesome results, create procedural anomalies, and unjustly cast the unrepresented petitioner into legal oblivion.

An ever-growing portion of the public has an honest and real skepticism against the criminal justice system because more and more individuals and their families and friends have lived it. All too often the public sees a broken system, one where constitutional rights, and legal remedies to vindicate those rights and correct miscarriages of justice are contingent on status and politics. This is why the Supreme Court must remain vigilant and play an active role in injecting vitality and fairness back into federal habeas review. A proceeding deprived of a court's fidelity to the law or the facts has grave consequences for society. For any jurist that genuinely believes in the administration of the AEDPA and uniformity in its application, there can be no retreat from these habeas principles here.

Unfortunately for the unrepresented habeas petitioner, it is virtually impossible to demonstrate the extent of the problem, its adverse ramifications, and the ineffectiveness of the

gatekeeping process. Rulings that deny a COA are hidden within unpublished procedural orders, often, as here, without identifying the issues raised, while the majority of petitioners have limited, if any, access to legal studies, journals or reviews addressing the subject. The only substantive way to reduce these tragic abuses of discretion in habeas corpus, if not eliminate them in the future, is for a petitioner like Ortloff to expose the problem to the Supreme Court.

The Justices should not allow anarchy in habeas cases to prevail, as untenable procedural rulings will continue to erode the public's trust. The Justices should now reiterate their commitment to the principles of habeas review and the COA process. If the purpose of the writ is to give one whom the state deprived of his freedom the opportunity to open an inquiry into the intrinsic fairness of his trial, then Ortloff was patently denied habeas proceedings that were "full and fair". ***Keeney v Tomayo – Reyes***, 504 US 1, 10 (19092); ***Townsend***, 372 US at 319.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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