No. __-_____

THE SUPREME COURT OF THE UNITED STATES

JENNIFER LYNN MOTHERSHEAD,

Petitioner,

v.

DEBORAH JO WOFFORD,
Superintendent, Washington Corrections Center for Women,

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 Court of Appeals decision violates *Harris v. Reed*, 489 U.S. 255 (1989) and the bedrock habeas corpus principle of comity by treating a state's highest court's ruling, which affirms the lower court ruling on state procedural grounds and on the merits, as only being a merits determination reviewable under 28 U.S.C. § 2254(d)?

LIST OF PARTIES

Petitioner: Jennifer Lynn Mothershead was the Appellee on the above issue in the United States Court of Appeals for the Ninth Circuit.

Respondent: Deborah Jo Wofford, the Superintendent, Washington Corrections Center for Women was the Appellant on the above issues in the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Jennifer Lynn Mothershead respectfully petitions for a writ of certiorari to review the memorandum disposition of the United States Court of Appeals for the Ninth Circuit in *Jennifer Lynn Mothershead v. Deborah Jo Wofford*, No. 22-35756.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unpublished. *See Jennifer Lynn Mothershead v. Deborah Jo Wofford*, No. 22-35756 (9th Cir. Sept. 12, 2023). The opinion is attached as Appendix B to this petition at A2-3. The district court's order, in No. 3:21-cv-05186-MJP-JRC, is attached at Appendix E at A12-25.

JURISDICTION

The district court has jurisdiction over this habeas matter pursuant to 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction over the permissive interlocutory appeal under 28 U.S.C. § 1292(b). The circuit court denied the petition for rehearing and the petition for rehearing en banc on October 18, 2023. This Petition for a Writ of Certiorari is filed within 90

days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 2254 –State custody; remedies in Federal courts –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)
>
> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (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.

INTRODUCTION

Comity and finality undergird federal habeas review of a state court decision. In *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989), this Court directed that, on federal habeas review, the reviewing court must honor a state court's independent and adequate state procedural ruling even where the state court makes a simultaneous ruling on the merits under federal law.

Reviewing petitioner's collateral attack on her criminal judgment, the state's highest court explicitly affirmed a lower court's ruling on two grounds—one affirmed ground was application of a state procedural bar and the other affirmed ground was a merits ruling. The Ninth Circuit Court of Appeals memorandum decision, however, credits only the state court's merits ruling, ignoring the state court's application of an independent and adequate state ground. The memorandum contravenes *Harris v. Reed* and its progeny. It dispenses with comity.

This Court should grant certiorari.

STATEMENT OF THE CASE

1. Petitioner Jennifer Mothershead filed a pro se state collateral attack alleging ineffective assistance of her trial counsel, who consulted with but failed to retain an expert toxicologist who could rebut the state's 16 expert witnesses at trial. 2-ER-198-264. Mothershead was convicted of assault of a child and sentenced to 480 months in prison. 2-ER-55, 60. The state's theory at trial was that Mothershead adulterated with bleach eyedrops prescribed to her daughter and then administered the adulterated drops over at least a six-week period while taking her daughter to various doctors and specialists for treatment of an eye irritation. 2-ER-57-58, 101.

Mothershead's trial attorney retained the director of a private toxicology consulting firm, Richard Pleus, Ph.D., to review laboratory and state investigative data. 2-ER-60, 192. Dr. Pleus sent counsel two letters summarizing his preliminary opinion. 2-ER-60, 193. He reported there was a lack of scientific support for the conclusion that "the medication that was administered to [K.M.] caused the adverse effects that are reported in the medical records." 2-ER-60; *see* 2-ER-193-94.

"Dr. Pleus required an additional $8,000 to complete his opinion and provide a brief report and noted that he would require additional funding to prepare for and attend trial as an expert witness." *Id.*

"Trial counsel never retained Dr. Pleus to complete his opinion or to testify." *Id.* Counsel attests she misunderstood Dr. Pleus's initial conclusions. 2-ER-61, 67, 194. She sought funding for him to complete his opinion, but when funding was initially denied, she did not appeal the denial or otherwise seek funding for an expert. 2-ER-61, 67-69, 107-08, 194.

2. The state court of appeals denied Mothershead's state habeas petition. Appendix I. It first described state procedural requirements, including the adequate briefing rule under *In re Rice*, 828 P.2d 1086 (Wash. 1992). Appendix I at A75-77 (stating in quotation from *Rice*, for example, "If the petitioner's allegations are based on matters outside the existing record, [they] must demonstrate . . . competent, admissible evidence to establish the facts that entitle [them] to relief."). The court then denied the petition finding Mothershead failed to meet *Rice*'s procedural threshold:

> When a petitioner's evidence "is based on knowledge in the possession of others," the petitioner "must present their affidavits or other corroborative evidence" explaining what that person would say. *[In re] Rice*, [828 P.2d at 1092]; *see also [In re]* Davis, [101 P.3d 1, 50-51 (Wash. 2004)]. Mothershead fails to establish what Dr. Pleus's opinion ultimately would have been or what he would testify. Mothershead has therefore failed to meet her prima facie burden of showing prejudice. . . .
>
> Even if her counsel were deficient in not pursuing Dr. Pleus's opinion as an expert, an issue we do not decide, Mothershead has failed to make a prima facie showing that the alleged deficiency caused prejudice.

Appendix I at A79-80.

The lower state court also reasoned Mothershead failed to show that counsel's representation prejudiced the result of the trial. Appendix I at A80. It made clear this holding was secondary to Mothershead's failure to satisfy Rice's threshold requirement:

> Moreover, courts assessing the prejudice prong of "'ineffective assistance claims based on a duty to investigate must . . . [consider the claim] in light of the strength of the government's case.'" *Davis,* [101 P.3d at 50] (internal quotation marks omitted) (quoting *Rios v. Rocha*, 299 F.3d 796, 808-09 (9th Cir. 2002)). The State's experts' testimony amply demonstrated that the eye drops were contaminated and that the contamination caused KM's severe injuries. Even if the defense had called

> Dr. Pleus to testify, the practical effect on the jury of one defense expert, weighed against the testimony of the State's 15 expert witnesses, would likely have been minimal. [*In re*] *Yates*, [321 P.3d 1195, 1199-1200 (Wash. 2014)]. Defense counsel's primary strategy at trial tacitly acknowledged this by focusing on raising reasonable doubt as to who had contaminated the eye drops rather than on trying to prove that the eye drops were not contaminated.

Id.

3. The state's highest court denied review, finding no basis for further review on either of the two grounds set forth by the lower state court. Appendix H at A67-68. The lower court's grounds were a state-law procedural bar and a Sixth Amendment merits ruling. Appendix H at A67. The state's high court summarized the lower court's denial with approval as follows,

> the Court of Appeals found no showing of prejudice for two reasons: first, Ms. Mothershead did not show what Dr. Pleus's ultimate opinion would have been or what his testimony would have consisted of, and second, given the overwhelming expert testimony provided by the State (15 experts), there was no reasonable probability the outcome would have been different had Dr. Pleus testified.

Id. The court dismissed the petition. Appendix H at A69.

4. Mothershead filed a timely 28 U.S.C. § 2254 habeas petition alleging ineffective assistance of trial and post-conviction counsel. 1-ER-3. She continues her claim that trial counsel acted ineffectively in failing to retain and present the testimony of an expert toxicologist and that, after she raised the claim pro se with supporting evidence, her postconviction counsel failed to develop and provide additional evidence in her state collateral review proceeding. *E.g.*, *id.*

The district court found the state court applied an independent and adequate state procedural bar. Appendix F at A28-29; *see* Appendix G at A42-43 (magistrate's report and recommendation). It ordered an evidentiary hearing to determine whether postconviction counsel and trial counsel acted ineffectively, and the district court reconsidered its order following this Court's decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022).

The district court ruled the evidentiary hearing could go forward. Appendix E. Mothershead acted diligently and thus is not at fault for any failure to develop the record on her ineffective-assistance-of-trial-counsel claim in state court. *Id.* at

A21-24. The stringent provisions of 28 U.S.C. § 2254(e)(2) do not apply; therefore, the record could be developed through an evidentiary hearing. *Id.*; *see id.* at A19 (finding *Shinn v. Ramirez* "left open the possibility of holding an evidentiary hearing on procedurally-defaulted IAC claims that are not subject to § 2254(e)(2)").

5. The district court subsequently granted respondent's motion to certify the order for interlocutory appeal and stay proceedings. Appendix D. A motions panel of the Court of Appeals for the Ninth Circuit granted permission to appeal. 28 U.S.C. § 1292(b). Appendix C.

6. Respondent raised two issues in its permissive, interlocutory appeal: whether 28 U.S.C. § 2254(e)(2) bars an evidentiary hearing because respondent claims Mothershead failed to develop the factual basis of the claim in state court and whether 28 U.S.C. § 2254(d) also bars an evidentiary hearing because, as respondent claims, the state court ruled on the merits of the ineffective-assistance-of-trial-counsel claim.

Mothershead moved to strike the argument under § 2254(d) because it was not part of the order certified for

permissive interlocutory appeal and was not fairly included in the order certified for appeal. The court denied the motion.

After oral argument, the Ninth Circuit Court of Appeals issued an unpublished memorandum disposition finding the district court "erred in its predicate determination that Mothershead's claim was procedurally barred and not subject to review under § 2254(d)." Appendix B at A3. The state's highest court's decision should be treated as a determination on the merits. *Id.*

Mothershead's petition for panel rehearing or rehearing en banc was denied. Appendix A.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit Court of Appeals' decision contravenes the enshrined principle of comity, which counsels that a state court's application of a procedural bar is not undermined by a simultaneous ruling on the merits.

In *Harris v. Reed*, the Court instructed federal courts on habeas review to respect a state court's application of an independent and adequate state ground even where the state court also makes a merits determination based on federal law. 489 U.S. at 264 n.10. "By its very definition, the adequate and

independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." *Id.* Therefore, "a state court need not fear" providing the litigants their day in court by "reaching the merits of a federal claim in an alternative holding." *Id.*

As this Court set forth in *Harris v. Reed*, a state court's application of a procedural bar precludes federal review, even if issued alongside a merits ruling. The procedural bar precludes review unless the petitioner can establish cause and prejudice to excuse procedural default.

The Ninth Circuit appears to generally follow this Court's edict in *Harris v. Reed*. In *Apelt v. Ryan*, for example, the Ninth Circuit held "where a state court expressly invokes a procedural bar, the claim is defaulted, even though the state court goes on to discuss the merits of the claim." 878 F.3d 800, 825 (9th Cir. 2017). Likewise, in *Zapata v. Vasquez*, the court noted "Although the [state] court went on to discuss the merits of the claim, because it separately relied on the procedural bar, the claim is defaulted." 788 F.3d 1106, 1111-12 (9th Cir. 2015). In

Bennett v. Mueller, the court explained, "A state court's application of a procedural rule is not undermined where, as here, the state court simultaneously rejects the merits of the claim." 322 F.3d 573, 580 (9th Cir. 2003). These are far from the only examples of the Ninth Circuit following the principle of comity enunciated in *Harris v. Reed*. *E.g.*, *Loveland v. Hatcher*, 231 F.3d 640, 643 (9th Cir. 2000) ("if the state court's reliance upon its procedural bar rule was an independent and alternative basis for its denial of the petition, review on the merits of the petitioner's federal constitutional claims in federal court is precluded"); *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (merits review precluded where state court's merits ruling was in the alternative to its dismissal on procedural grounds); *Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1991) (state court's application of procedural bar precludes review despite alternative statements on the merits).

Mothershead knows of no other case where the Court has disagreed with the *Harris v. Reed* rule, and Respondent-Appellant pointed to none. That is, no case other than the one at bar.

The Ninth Circuit's decision here contravenes *Harris v. Reed*. The state court made alternative procedural and merits rulings, yet in conflict with *Harris v. Reed* the panel decision credits only the merits determination. Appendix B at A3.

The state court ruling here, in relevant part, summarizes the lower court's opinion as having decided two issues and then affirms its decision of both "these issues." Appendix H at A67 ("Ms. Mothershead does not show that a reference hearing is necessary to resolve these issues."). One of "th[o]se issues" is the independent and adequate state procedural bar and the other is the merits ruling. *Id.* ("the Court of Appeals found no showing of prejudice for two reasons: first, Ms. Mothershead did not show what Dr. Pleus's ultimate opinion would have been or what his testimony would have consisted of, and second, given the overwhelming expert testimony provided by the State (15 experts), there was no reasonable probability the outcome would have been different had Dr. Pleus testified"); *accord* Appendix I at A75-77, A79-80 (lower state court decision based on alternative state procedural and merits rulings). By using the plural form and affirming lack of error on two grounds decided

simultaneously by the lower court, the state court made clear its alternative application of a merits ruling and a state procedural bar.

These are alternative rulings, even though the court spends more space on the merits ruling. Accordingly, under *Harris v. Reed* and its progeny, the state court's reference to state law precludes addressing in federal court the state court's alternative merits ruling.

In sum, certiorari is warranted because the Ninth Circuit's decision conflicts with *Harris v. Reed*, 489 U.S. 255. The last reasoned state court decision found no error in the lower court on two grounds, one of which was a state procedural bar. Under *Harris v. Reed* and its progeny, federal courts on habeas review must honor the state law ground.

If, after granting certiorari, the Court agrees with Mothershead and reverses the Ninth Circuit, the Court could review the district court's decision under § 2254(e)(2) and *Shinn v. Ramirez* in the first instance or remand for further review in the Court of Appeals.

CONCLUSION

The Court should grant certiorari in this case.

Respectfully submitted this 4th day of January, 2024.

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