No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2024

MARK DOUGLAS HUBER,
Petitioner,

v.

RANDY VALLEY,
Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This is a federal habeas corpus appeal. Mark Douglas Huber, an Idaho prisoner, is serving a sentence of 30 years in prison based on his convictions for rape and lewd conduct with a minor. Over the last 14 years, Huber has maintained his innocence, and he did not receive a fair trial. Among other constitutional errors, a police officer perjured himself when he testified that Huber had confessed to him, and an expert witness was allowed to testify about another lab analyst's findings on critical forensic evidence, which this Court has held is a Confrontation Clause violation. In his federal habeas petition, Huber claimed, among other constitutional issues, that his Fourteenth Amendment right to due process was violated from the State's use of the perjured testimony and that his trial counsel was ineffective under the Sixth Amendment in failing to object to the expert's testimony on Confrontation Clause grounds.

But, despite his long journey through the state and federal courts, these constitutional errors have never been heard on their merits, much less corrected, because of the State's application of arbitrary procedural bars. Huber remains detained in state custody in violation of his constitutional rights. And the Ninth Circuit Court of Appeals has denied Huber even the opportunity to appeal the dismissal of his habeas petition when it denied his request for a certificate of appealability.

This petition raises the following question:

> Whether the Court of Appeals egregiously misapplied this Court's standard for issuing a certificate of appealability in the face of a substantial showing of the denial of constitutional rights.

PARTIES TO THE PROCEEDING

The petitioner is Mark Douglas Huber.

The respondent is Randy Valley, the Warden of the Idaho State Correctional Center.

STATEMENT OF RELATED PROCEEDINGS

State v. Mark Douglas Huber, Shoshone County, Idaho, Criminal Case No. CR-2010-3214, Amended Judgment entered on January 31, 2012.

State v. Huber, No. 39222, 2015 WL 1903624 (Idaho Ct. App. 2015).

Huber v. State, Shoshone County, Idaho, Case No. CV-2015-89 (post-conviction).

Huber v. State, No. 46897, 2020 WL 4917606 (Idaho Ct. App. 2020).

Huber v. State, Shoshone County, Idaho, Case No. CV40-20-0452 (post-conviction).

Huber v. Christensen, No. 48081, 2021 WL 609070 (Idaho Ct. App. 2021).

Mark Douglas Huber v. Randy Valley, 1:23-cv-00039-DKG, United States District Court for the District of Idaho. Judgment entered on March 1, 2024.

Mark Douglas Huber v. Randy Valley, Appeal No. 24-1927 (9th Cir. 2024), order denying a certificate of appealability entered on November 6, 2024.

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The Court of Appeals' denying Huber's request for a certificate of appealability is in Appendix A.

The District Court's Memorandum Decision and Order dismissing all claims in the Petition for Writ of Habeas Corpus is in Appendix B.

The Idaho Court of Appeals' unpublished opinion affirming the summary dismissal of post-conviction relief is in Appendix C.

The Idaho Court of Appeals' unpublished opinion affirming Huber's convictions and sentences on direct appeal is in Appendix D.

JURISDICTION

The Court of Appeals denied Huber's Motion for a Certificate of Appealability on November 6, 2024. App. 1a He has filed this petition within 90 days of that denial. *See* Rule 13-3. The Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law …"

* * *

Title 28 U.S.C. § 2254(d) provides:

(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

This case stems from a claim of a sexual assault in Joseph Haws's one-bedroom home in the small northern Idaho town of Kellogg during the overnight hours of October 25-26, 2010. The alleged victim was Haws' 14-year-old daughter, D.V. The State's theory of the case was that Haws had arranged with Mark Huber to have sexual contact with D.V. that night, and D.V. would later claim that Huber was the man who assaulted her, *see*, *generally*, Memo. Dec. and Order, App., 3a-5a, but there were serious problems with the prosecution's case.

Tainted and Misleading Evidence

After he was arrested, Huber admitted to the officers who arrested him that he was at Haws's home and saw D.V. there, but he adamantly denied having sexual contact with her. *See* Petition, at Dist. Ct. Dkt. No. 1, pp. 16-18. He claimed he had been set up. *Id*. This conversation was recorded surreptitiously on the lead officer's phone while he drove Huber to the police station. *Id*. That officer, Yergler, would mischaracterize Huber's denials as tacit admissions Yergler testified at trial. *Id*.

The audio recording, and the officer's description of what Huber said to him, would become central to some of Huber's later post-conviction claims.

Huber retained counsel for trial. Counsel filed no pretrial motions, other than a motion to reduce bond, and sought no expert assistance even though the State intended to use an expert to interpret certain forensic tests. The case proceeded to a jury trial. *See*, *generally*, Petition, Dist. Ct. Dkt. No. 1, pp. 1-5.

Yergler testified that Huber made incriminating statements to him during the patrol car ride to the jail, including that Huber said he "thought that girl was old enough" and that he "didn't know she was underage." App. 6a-7a. When pointedly asked by the prosecutor whether Huber denied committing the crime, Yergler said, "I didn't ask that question." App. 8a. While he testified that there was an audio recording, he claimed to have shut it off "en route to the jail." *Id*. at n.6.

This testimony was untrue, but it stood uncorrected. Huber actually *denied* committing the crime to Yergler, and Yergler did not turn off the tape recording, as the audio recording that was later introduced into post-conviction proceedings would show. Huber's trial counsel did not use the audio recording to impeach Yergler. App. 8a, at n. 6.

The State also presented the expert testimony of a forensic DNA analyst at trial. That expert witness testified about another, non-testifying lab analyst's conclusion that she had found a single spermatozoon in D.V.'s underwear, suggesting sexual contact with a male. App. 5a; Petition, Dist. Ct. Dkt. 1, p. 5. Oddly, though, the non-testifying lab analyst concluded that it was too small to be tested further. *Id*. The non-testifying analyst also completed a test that she claimed was positive of amylase, which the testifying expert claimed at trial was indicative of saliva, which matched D.V's claim that her assailant had conducted oral sex on her. *Id*. The non-testifying expert's report was admitted without an objection from counsel as violative of Huber's right to confrontation. *Id*. Counsel also did not object

to the testifying expert's testimony about the non-testifying expert's findings and conclusions. *Id.*

Additionally, a small amount of allegedly male DNA was found in a mixture taken from D.V.'s perineal area. The State's expert offered a kind of free-floating, enormous statistic to the jury about this DNA mixture. She claimed that "one in every 230 billion unrelated individuals would be expected to contribute to that mixture." App. 6a.

At best, this evidence was exceptionally misleading. It appears that the analyst meant that the probability of any random two unrelated people contributing to this DNA mixture was 1 in 230 billion. App. 6a, n. 5. But that says nothing about the probability that Huber contributed to the mixture as compared to any other random individual. *Id.* Yet this was an eye-popping statistic that a jury could easily take to mean that the odds Huber did not contribute to the mixture was 1 in 230 billion.

Huber was convicted as charged. The trial court sentenced him to 30 years in prison with 15 years before parole eligibility. App. 38a. On appeal, his appointed counsel challenged only the length of his sentence. *Id.* The Idaho Court of Appeals affirmed. *Id.*

In post-conviction proceedings, Huber unearthed the audio recording that contradicted Officer Yergler's testimony, noted above. He was also able to have another expert review the State's expert's work on the DNA evidence, Dr. Greg Hamipikian. Dr. Hampikian harshly criticized the evidence.

Dr. Hampikian highlighted several problems with the State's forensic evidence and proffered the type of evidence that trial counsel could have developed had he consulted with an expert. *See* Dist. Ct. Dkt. 14-3. Hampikian found that the tiny amount of "male" DNA may have been the product of cross-contamination in the Idaho State Police lab, but even if not, the probabilities cited by the State's expert were egregiously wrong and misleading. *Id*. He calculated that the perineal mixture was 3,459 times more likely assuming that Huber and D.V. are the contributors, rather than assuming, as the State's expert did, that unknown unrelated persons are the contributors when she offered a probability in the billions. *Id*. at ¶ 20. This was exponentially smaller than the statistic given by the expert at trial, which was in the billions.

Despite marshalling this evidence, Huber's final post-conviction counsel wholly failed to develop and present it properly in the state district court. The state district court dismissed the post-conviction petition without permitting an evidentiary hearing. App. 8a – 9a. It also refused to appoint counsel to assist Huber on appeal and Huber proceeded pro se. App. 22a – 24a.

Huber's Pro Se Post-Conviction Appeal

Huber did the best he could, given the notoriously limited access to judicial resources in Idaho prisons and the COVID pandemic. *See* Dist. Ct. Dkt. 14-1. His briefing was typewritten and contained citations to federal and state case law supporting his constitutional arguments. *See* Dist. Ct. Dkt. No. 9, State's Lodgings E-1, E-2, and E-5. Huber filed an opening brief, a supplemental brief, and a reply

brief in the Idaho Court of Appeals. *Id*. The federal district court in this proceeding ultimately concluded that Huber raised all but two of his habeas sub-claims in his pro se appellate brief in the state court, including the claims centering on Yergler and Hamipikian. App. 15a.

Still, that was not enough for the state appellate court, which found that Huber "presented only general challenges to the district court's findings and conclusions and issues unsupported by cogent arguments and legal authority." App. 35a—37a. Relying on a purported state procedural bar, it declined to reach the merits of any of his federal constitutional claims. *Id*.

Huber filed a petition for rehearing arguing that the state court had erred in applying the waiver rule too stringently, but the state court denied the petition. Dist. Ct. Dkt. 9, State's Lodging E-8, E-9. He next filed a timely petition for review in the Idaho Supreme Court. *Id*. at State's Lodging E-10. He again argued, in part, that the Court of Appeals had improperly deemed his issues as waived. *Id*. at State's Lodging E-11, p. 3. He attached to his brief a copy of his post-conviction petition, which listed the substantive constitutional issues, and an affidavit in support, which included the factual allegations. The Idaho Supreme Court declined to review the case. *Id*. at State's Lodging E-12.

The federal district court honored the Idaho appellate court's application of the state procedural bar and dismissed all Huber's claims of constitutional error in his habeas petition. App. 24a. In doing so, it turned aside Huber's argument that his pro se filings in the state courts should be construed liberally for exhaustion and

procedural default purposes. *Id*. at 19a – 20a. The district court also determined that it could not review whether the state court was "correct" in applying its bar and that the application of the bar was not so egregious as to warrant overlooking it in federal court. *Id*.

The district court denied Huber a certificate of appealability. App. 32a. With the assistance of counsel, Huber filed a motion for a certificate of appealability in the Ninth Circuit Court of Appeals, which it denied on November 6, 2024. App. 1a. He now asks this Court to grant his petition over that decision.

REASON FOR GRANTING THE PETITION

The Court of Appeals egregiously misapplied this Court's standard for issuing a certificate of appealability in the face of a substantial showing of the denial of constitutional rights.

Huber respectfully contends that this case is a rare candidate for granting the petition, vacating the judgment, and summarily reversing to the Court of Appeals because that Court's denial of Huber's motion for a COA was so contrary to this Court's established legal standards as to warrant the correction of the error. Alternatively, this Court should grant the petition and allow full briefing and argument.

A. This Court's well-established standard for granting a COA.

A habeas petitioner has no automatic right to appeal an adverse decision. The petitioner must first receive a certificate of appealability, which requires the petitioner to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

This is not an onerous standard. According to this Court, a petitioner need only "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 481 (2000)). While "[t]he COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits," it "does not

require a showing that the appeal will succeed." *Miller-El*, 537 U.S. at 336. And "a claim can be debatable even though 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 338.

B. Petitioner made a substantial showing that the State violated his constitutional right to due process of law under the Fourteenth Amendment when the prosecutor failed to correct perjured testimony at trial.

This Court has long held that a conviction obtained using knowingly perjured testimony violates due process. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court held that the knowing use of false testimony to obtain a conviction violates due process "regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared." *United States v. Bagley*, 473 U.S. 667, 680 n.8 (1985). A new trial is required if "'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citing *Napue*, at 271).

In this case, Huber made a substantial showing that he was denied his right to due process of law because Officer Yergler falsely testified without correction from the prosecuting attorney. Yergler testified that Huber had confessed to him during the ride to the jail that he "thought that girl was old enough" and that he "didn't know she was underage." App. 6a-7a. When the prosecutor asked Yergler "But did he deny – did he later indicate whether he had sexual contact with her or

not?" Yergler responded, "I never asked that question." App. 7a. Yergler also claimed to have shut off the recording quickly.. App. 8a.

Huber later recovered the audio recording of the conversation, which was not introduced at trial or used as impeachment. The recording shows that Huber repeatedly denied sexually assaulting the girl, telling Yergler, among other things, that he "never touched" the girl and that he was "being set up." App. 8a, n.6. The recording also contradicts Yergler's claim that he shut the recording off quickly. *Id*.

Officer Yergler's testimony that Huber essentially confessed this crime to him was false. The prosecutor knew it was false, as he had the audio recording in his possession, and he showed his knowledge of its falsity when he asked Yergler "but did he deny -- did he later indicate whether he had sexual contact with her or not," perhaps expecting a truthful answer. App. 7a. When Yergler misleadingly responded that he "didn't ask that question," the jury was left with the impression that Huber had *not* denied sexual contact. But that was untrue. He had denied it, and repeatedly. The prosecutor had a duty under the Fourteenth Amendment to correct the false testimony. He did not.

This false testimony was material to the verdict. A police officer who claims that a suspect has made incriminating statements comprises some of the most damning evidence against an accused at trial. *See*, *e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("[c]ertainly, confessions have a profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."). There is at least a reasonable likelihood that Yergler's testimony

contributed to the guilty verdict. This is an extremely concerning allegation that strikes at the core of the truth-seeking function of Huber's criminal trial.

But Huber has never been permitted to argue this claim on its merits. That is because, despite raising it in the Idaho appellate court, that court rejected it on state procedural bars – that he had not offered "cogent argument and citation to legal authority" and had failed to argue his claims with "specificity." App. 17a – 18a. It reached that conclusion despite not appointing Huber counsel to assist him and still having a written pro se brief that cited authority and offered cogent argument. Relying, in part, on this Court's decision in *Lee v. Kemna*, 534 U.S. 362 (2002), Huber argued in the district court that this was a case of an "exorbitant application of a generally sound [state procedural] rule," and, as such, the procedural bar need not be honored in federal court. App. 22a. The district court turned that aside, *see* App. 23a – 24a, but that decision was at least "reasonably debatable" for purposes of granting a certificate of appealability. This case would give this Court an opportunity to clarify the scope of *Lee* and similar cases.

Respectfully, the Ninth Circuit's refusal to grant a certificate of appealability in a case where the lead investigating officer lied, and Huber has clear evidence that he lied, is an affront to justice. Huber contends that the Ninth Circuit's denial of a COA on this constitutional claim went so far beyond the standards set by this Court in *Miller-El* that the Court should summarily reverse and allow Huber to proceed with his appeal below. Should the Court disagree for any reason, he alternatively asks that it grant the petition and set briefing and argument.

C. Petitioner made a substantial showing of the denial of his constitutional right to the effective assistance of counsel because his counsel failed to object, on Confrontation Clause grounds, when the State's forensic expert introduced a non-testifying analyst's findings.

The Sixth Amendment's Confrontation Clause gives the accused, "[i]n all criminal prosecutions, ... the right ... to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 59 (2004), this Court held that the Clause permits admission of "[t]estimonial statements of witnesses absent from trial ... only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." The Court later declined to create a "forensic evidence" exception to *Crawford*, holding that a forensic laboratory report, created specifically to serve as evidence in a criminal proceeding, ranked as "testimonial" for Confrontation Clause purposes. *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). There, the Court ruled that the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the report's statements. 557 U.S., at 324. Most recently, the Court held that the Confrontation Clause also protects a defendant from an expert witness testifying about an absent lab analyst's factual assertions to support the expert's own testimony. *Smith v. Arizona*, 602 U.S. 779, ___ (2024).

Huber was constrained to raise this issue as a claim of ineffective assistance of trial counsel because his counsel failed to object to an expert witness's testimony, on Confrontation Clause grounds, that introduced into the trial an absent lab analyst's findings, and counsel failed to object to the introduction of that absent analyst's report. Huber had a Sixth Amendment right to the effective assistance of

counsel at trial. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). To prevail on a Sixth Amendment claim, he would be required to show that his counsel's performance fell below an objective standard of reasonable representation and that but for counsel's error, there is a reasonable probability of a different outcome. *Id.*

Huber had made a substantial showing that both of these Sixth Amendment rights were violated. At trial, the State presented the testimony of an Idaho State Police forensic expert. That expert testified that another analyst had found semen and a single spermatozoon in D.V.'s underwear and found amylase (a protein found in saliva and vaginal fluid) in a swab from D.V.'s perineal area. Dist. Ct. Dkt. 1, pp. 12-13. The analyst did not testify, but her report was also introduced without objection. *Id*. The "sperm" and the "amylase" evidence was extremely damaging to Huber. The presence of the sperm suggested a sexual assault. The State used the presence of amylase to argue that Huber had performed oral sex on D.V., as she had claimed.

By the time of trial in this case, this Court had decided *Melendez-Diaz, Massachusetts*. That case was part of an ongoing revolution in Confrontation Clause jurisprudence since *Crawford*, of which any reasonable defense counsel should have been aware. Had trial counsel objected, there is a reasonable probability that the judge would have excluded this evidence under the Confrontation Clause. Had it been excluded, there is a reasonable probability that jury would have acquitted due to the alleged victim's credibility problems.

Here, again, this claim has never been resolved on the merits because the district court concluded that it was procedurally defaulted in the state courts. But Huber made a strong case for cause and prejudice due to ineffective assistance of post-conviction counsel under *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). In *Martinez*, Court held that a procedural default of a substantial ineffective assistance of trial counsel claim at the district court level of a state post-conviction proceeding may be excused if the petitioner can demonstrate that appointed counsel in the post-conviction trial court was ineffective under the standards of *Strickland*. *Id*. A "substantial" claim of ineffective assistance is one that has "some merit." *Id*.

The *Martinez* exception is applicable in Idaho. Idaho channels all claims of ineffective assistance of trial counsel into post-conviction proceedings after the direct appeal. *See State v. Yakovac*, 180 P.3d 476, 482 (Idaho 2008) ("if a defendant wishes the court to consider evidence outside of the record on direct appeal, she must pursue post-conviction relief."). That is the level at which a prisoner in Idaho has his first, and only, true opportunity to develop these Sixth Amendment claims.

Despite his repeated attempts to get all his claims raised in state post-conviction proceedings, Huber was saddled with ineffective counsel and, then, was forced to represent himself. As with the first claim, Huber contends that the Ninth Circuit's denial of a COA was an egregious misapplication of the standards set by this Court.

* * *

Mark Huber has never had a full and fair hearing on his substantial constitutional claims. He could sit in prison for decades even though there is compelling evidence that he did not commit this crime. The Court of Appeals so misapplied this Court's COA standard that this Court should take up the case, reverse the Court of Appeals, and remand for further proceedings.

CONCLUSION

Mark Huber asks this Court to grant this petition and reverse the judgment of the Court of Appeals for the Ninth Circuit.

DATED this 4th day of February, 2025.

Respectfully submitted,

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