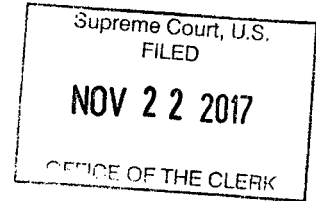


No. _____



IN THE

SUPREME COURT OF THE UNITED STATES

Timothy Moseley — PETITIONER
(Your Name)

vs.
Paul S. Kemper — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeal for the 7th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Timothy Moseley
(Your Name)

P.O. Box 900
(Address)

Sturtevant, Wisconsin 53177-0900
(City, State, Zip Code)

566117 - Dane East
~~Number~~ Number) + Housing

QUESTION(S) PRESENTED

- ① Where a Supreme Court decision clearly establishes a legal standard, (e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39; 107 S. Ct. 989; 94 L. Ed. 2d 40; 1987 U.S. LEXIS 558; 55 U.S.L.W. 4180, "plausible showing" standard), why are State Court decisions, entered after the Supreme Court decision, allowed to establish a legal standard that is different, (*State v. Green*, 253 Wis. 2d. 356; 646 N.W. 2d. 298; 2002 WISC. LEXIS 464; 2002 WI 68, "specific factual basis" standard), than the Supreme Court standard?
- ② Why can't newly discovered evidence be introduced to the Court of current jurisdiction, instead of having to backtrack to the Court of original jurisdiction?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] 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:

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Pennsylvania v. Ritchie
480 U.S. 39 (1987)

ii, iii, 5, 6, 7, 10

State v. Green
646 N.W. 2d 298 (Wis. 2002)

ii, iii, 6, 7, 8, 9

Cullen v. Pinholster
563 U.S. 170, 181-182 (2011)

iii, 9

STATUTES AND RULES

28 U.S.C. § 2254 (d) (1)

iii, 3, 5

28 U.S.C. § 1254 (1)

iii, 5

OTHER

U.S. Const. amend XIV

iii, 5

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION.....	10

INDEX TO APPENDICES

APPENDIX A	<i>The opinion of the United States court of appeals</i> <i>The opinion of the United States district court</i>
APPENDIX B	
APPENDIX C	
APPENDIX D	
APPENDIX E	
APPENDIX F	

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

☒ 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,

☒ is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ 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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was JUN 21, 2017.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals 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 November 24, 2017 (date) on September 15, 2017 (date) in Application No. 16 A 2247.

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

- ① The Fourteenth Amendment to the United States Constitution, the Due Process Clause.
- ② 28 U.S.C. § 2254 (d)(1).
- ③ 28 U.S.C. § 1254 (1)

STATEMENT OF THE CASE

On October 7, 2009, officers conducted a search of Moseley's apartment and seized his computer, amongst other things. A search of Moseley's computer revealed nude photographs of a woman identified as T.H. The photographs were on Moseley's computer because he and T.H. had been in a consensual, sexual relationship for years.

During their six year relationship, T.H. never reported Moseley's actions to anyone, including her husband. Only after Moseley's home was searched and the photographs were found did T.H. claim that their entire relationship was not consensual.

In previous Statements of the Case, a number of factual errors occurred. Moseley corrects two of those errors here. Moseley was charged with five counts of possession of a recording of nudity involving T.H. Despite the existence of dozens of photographs and dozens of videos on Moseley's computer and the testimony of T.H. revealing hundreds of sexual encounters, the jury found Moseley guilty of one count concerning T.H.

T.H. had been in counseling for decades, including the time she was involved in a consensual six year relationship with Moseley. After this case arose, T.H. voluntarily gave her mental health records to law enforcement. T.H. was never subpoenaed to do so. Instead, she went out of her way to help collect these documents and hand them over to the State.

On July 5, 2010, Moseley filed a motion for an in camera review of these records. Because no one other than Moseley and T.H. were present when the photographs in question were taken, the charges depended largely on T.H.'s credibility and memory. Despite this, T.H. was never interviewed by the South Milwaukee Police Department (SMPD). The SMPD was told by T.H. to review her mental health records because "all the details are in there!" T.H. encouraged officers with the Cheyenne Police Department (CPD) to "go get my records from the doctor, I told the doctors about this when it was happening." During interviews with CPD, which formed the basis for the charges against Moseley, T.H. told officers that

she "can't recall" what happened with Moseley, and that she has "memory problems", so they should review her records to "back this up."

The CPD did access these records and attached them to subsequent police reports as supporting documentation. These reports were given to the Milwaukee County District Attorney's Office and to the SMPD. Despite Moseley's requests, he was never provide a copy of these records.

Moseley explained, he and T.H. had sex hundreds of times during their six year relationship. Over the course of these encounters, countless photographs and videos were taken. T.H. told CPD that she couldn't remember many of these encounters, yet she still alleged that they were not consensual. T.H. even admitted that she was scared about the gaps in her memory. The State did not dispute these facts. Yet, the Milwaukee County Circuit Court denied Moseley's request for an in camera review.

On May 10, 2016, in the United States District Court for the Eastern District of Wisconsin, Chief Judge William C. Griesbach presiding, Moseley's petition for relief under 28 U.S.C. § 2254, was Denied and Dismissed. The Judge did find that Moseley did make a substantial showing of the violation of a constitutional right such that further review should be allowed on one of his claims. A certificate of appealability was issued on Moseley's claim that his right to Due Process was violated by the trial court's failure to conduct an in camera review of T.H.'s counseling records.

On June 27, 2017, the United States Court of Appeals for the Seventh Circuit affirmed the district court's denial of Moseley's petition for a writ of habeas corpus. The Court stated, "this is the third time that we have held that Wisconsin's standard for obtaining in camera review of confidential documents is not contrary to *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987).

REASONS FOR GRANTING THE PETITION

Moseley believes that the arguments presented in Appellants' Brief and Appendix submitted to the United States Court of Appeals for the Seventh Circuit, are clearly, and articulately stated. Moseley would ask this Honorable Court to adopt those arguments for this Petition.

Moseley would concisely paraphrase the opinion rendered by the United States Court of Appeals for the Seventh Circuit as: The wording in *Ritchie*, and the wording in *Green* are similar in nature and not contrary to each other. This opinion prompts Moseley to address two questions to the Supreme Court of the United States by Petition for Writ Certiorari. These questions could potentially effect all 50 States, and potentially thousands of defendants.

1. Where a Supreme Court Decision firmly establishes the rule of law on a subject, (e.g., *Pennsylvania v. Ritchie*, 486 U.S. 39, "plausible showing" standard), why are State Court Decisions, that are entered after the fact, allowed to establish a standard that is different (e.g., *State v. Green*, 253 Wis. 2d 356, "specific factual basis" standard), than the Supreme Court Standard?

Moseley, an indigent pro se litigant, would argue that the standard in *Ritchie*, 480 U.S. at 59, n.15., "the defendant must make a plausible showing that the evidence sought would be both material and favorable to his defense.", is different than the standard in *Green*, 646 N.W. 2d 298 (Wis. 2002)., "a defendant must set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain information necessary to a determination of guilt or innocence and is NOT merely cumulative to other evidence available to the defendant."

The United States Court of Appeals for the Seventh Circuit rendered an opinion on June 27, 2017, which addresses the differing language in *Ritchie* and *Green* by concluding, "... the standard under

Ritchie is more burdensome than Moseley presumes; the Green standard less so. Consequently, the standards do not diverge in any meaningful way and are not "contrary to" one another in the way that the Supreme Court has defined the phrase."

Moseley believes that the United States Court of Appeals for the Seventh Circuit has correctly determined the definitions of the two standards in Ritchie and Green; however, Moseley states that merely defining the words used in different standards is NOT a sufficient test to determine if the two standards are in fact "contrary to" each other.

Moseley would submit that a more practical determination of whether differing standards are "contrary to" one another would be to look at a statistical analysis of the actual application of the differing standards. The Wisconsin Innocence Project, a special program of the Wisconsin School of Law, collects statistical data from all of the Circuit Courts in all of the Counties in Wisconsin. Data collected in Milwaukee County indicates a 58% reduction of in camera reviews granted from 2002 until 2016, even though the number of Motions for in camera reviews has largely remained the same from 1987 to 2016. Moseley believes that this statistic is significant enough to prove that Ritchie and Green are in fact "contrary to" one another.

Moseley's questions are directed to State Court decisions that produce legal standards that are different than the legal standard established by the Supreme Court of the United States. If a State Court decision fails to overturn the standard set by the Supreme Court, shouldn't that State Court decision be dismissed? States should adopt the existing Supreme Court decision.

By allowing these State Court decisions to co-exist with the Supreme Court decision a legal quagmire becomes the natural consequence. Moseley believes that once a Supreme Court standard is set, the "bright line" rule should establish this Supreme Court standard as the controlling authority to be used in all court cases, federal, state, county, municipal, etc. Allowing all fifty

states to establish legal standards in direct conflict with the Supreme Court standard creates undo confusion, and it has the added consequence of significantly slowing down our Criminal Justice system.

State Courts and State legislatures are free to enact laws to govern their State. Moseley believes the laws enacted, that conflict with existing Supreme Court decisions, and that DO NOT overturn the Supreme Court decision should be overturned, and deleted from the State Court or State legislature system. States should be self-policing with these laws. Moseley does not discount the legal definitions of competing standards, but feels that the impact of the actual application of these standards is a better predictor of any conflict.

Green has caused a fifty-eight percent drop of in camera inspections allowed since this law was passed in 2002. Moseley believes that a fifty-eight percent decline of in camera inspections is significant enough to warrant a change in this law. Moseley would request that Green will be overturned.

2. Why can't newly discovered evidence be introduced to the Court of current jurisdiction, instead of having to backtrack to the Court of original jurisdiction?

Moseley has two packets of newly discovered evidence that are critical to his appeals.

Packet #1 - Moseley utilized an open records request, made to the Cheyenne Police Department on 10-12-14. Moseley was able to obtain a copy of the dismissed criminal case brought against Moseley in the Laramie County Circuit Court, Cheyenne, Wyoming. Contained in the dismissed criminal case were all of Titi's mental health records. These records were the source of the nine facts contained in Moseley's original writ of habeas corpus.

Packet #2 - Moseley's representative contacted the Wisconsin Innocence Project on 08/12/17 and obtained statistical data revealing the 58% reduction of in camera inspections. Moseley's representative requested documentation to support the statistical data and they

they were informed that documentation is only provided to defendants who are accepted by the Wisconsin Innocence Project (current 7 year waiting list) or to anyone presenting a court-ordered subpoena.*

Moseley was able to obtain this new evidence through diligent investigation years after the 2010 conviction. This evidence was not presented to any Wisconsin State Court, quite simply because Moseley did not have this evidence to present.

Moseley understands the precedent set forth in *Cullen v. Pinholster*, 563 U.S. 170, 181-182 (2011), but does NOT believe it applies in this instance. The evidence in question was available to be presented to the Milwaukee County Circuit Court. In fact this evidence sat on the corner of the prosecutor's table during the Motion Hearing. It was the Court that decided NOT to view the evidence, and because of that Moseley does NOT believe that *Cullen* applies.

Moseley agrees if evidence is never presented to a State Court, then the Court's decision can't be ruled unreasonable. However, Moseley advocates that if evidence is available to be presented to a State Court and that Court decides not to look at it, and that evidence is later found to be exculpatory in nature, then the Court's decision must be considered unreasonable.

Moseley believes that a new precedent needs to be set concerning evidence available for an in camera inspection that is not considered by the Court, but later is determined to be exculpatory in nature! Failure to set a new precedent would result in Moseley having to abandon seven years worth of Appeals, to start back at the beginning.

* Moseley is unaware of the proper procedure for the issuance of a subpoena but would respectfully request a subpoena be issued for all statistical data concerning the Green decision and in camera inspections of mental health records. The subpoena should be directed to:

Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School
Attn: Jennifer
975 Bascom Mall
Madison, WI 53706-1399

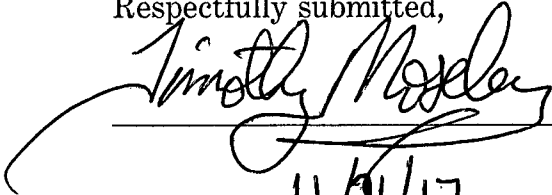
Moseley and his attorneys never requested to view T.H.'s medical records. Moseley's claim is merely that a judge should have reviewed the records in camera. Moseley's interest in "ensuring a fair trial can be fully protected by requiring that the "medical records " be submitted only to the trial court for an in camera review." Ritchie, 480 U.S. at 60.

CONCLUSION

Moseley fully appreciates the magnitude of his request. He does not make it lightly. Errors occurred that can and should be corrected.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 11/21/17