

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JESSE WILLIAM MENDEZ, PETITIONER

vs.

GARY SWARTHOUT, Warden, RESPONDENT

and

SCOTT FRAUENHEIM, Warden. RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES SUPREME COURT FOR THE NINTH CIRCUIT

**MOTION FOR LEAVE TO PROCEED
*IN FORMA PAUPERIS***

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QUESTIONS PRESENTED

When a state court denied a habeas claim without a reasoned decision, in assessing whether “there was no reasonable basis for the state court to deny relief” under *Harrington v. Richter*, 562 U.S. 86, 98 (2011), can the district court reject the state appellate court’s clear statement that if it was presented with the circumstances in the 28 U.S.C. § 2255 petition it would have granted relief?

PARTIES TO THE PROCEEDING

Petitioner, Jesse William Mendez, is an individual. The Respondents are Gary Swarthout, Warden and Scott Frauenheim, Warden.

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PETITION FOR WRIT OF CERTIORARI

Jesse William Mendez petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The unpublished opinion of the Ninth Circuit Court of Appeals affirming the district court's denial of Petitioner's petition for writ of habeas corpus was entered on May 4, 2018. (Appendix A) The district court's judgment and order denying the Petition for Writ of Habeas

Corpus are attached as Appendices B and C. The California Supreme Court's denial of the Petition for Writ of Habeas Corpus is attached as Appendix D. The opinion of the California Court of Appeal is attached as Appendix E and F.

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment in this case on May 4, 2018. (Appendix A.) Petitioner's timely filed petition for rehearing was denied on August 22, 2018. (Appendices H.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portions of the statutory and constitutional provisions involved in this case are as follows:

* * *

U.S. CONST. amend. V

No person shall . . . be deprived of life, liberty, or property, without due process of law. . .

U.S. CONST. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; 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.

U.S. CONST. amend. XIV

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; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(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

Jurisdiction in the Courts Below

The district court had jurisdiction pursuant to 28 U.S.C. § 2254.

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

Facts Material to Consideration of the Question Presented

Jesse Mendez was one of two occupants in a Camaro stopped by Officer Kevin McDonald on Parker Avenue in Oakland California in the early morning hours of December 28, 2009. Mr. Mendez was the driver. Jeremiah Dye was the passenger. One of the Camaro's occupants shot at and wounded Officer McDonald.

At the preliminary hearing, Officer McDonald identified Mr. Mendez as the driver of the Camaro. Officer McDonald did not see which of the two occupants was holding the gun when he was shot. At trial, McDonald changed his testimony claiming he saw the gun in Mr. Mendez's hand.

Two young men, who were walking on Parker toward the Camaro, witnessed the shooting. They informed the police they saw the shooting and knew where the shooter was hiding. The police agreed to pay money if the information turned out to be correct. The witnesses spoke to several police officers all of whom said the witnesses' statements were highly credible.

The police relied on the information and located Mr. Dye under the house. One of the police officers shot and killed Mr. Dye. The

next day the lead investigator, Sgt. Jones, confirmed the witnesses received the promised payment for accurate information.

At the preliminary hearing, Sgt. Jones testified there was an eyewitness who identified Mr. Dye as the shooter. Other than trying a cell phone number for one of the witnesses one time after the preliminary hearing, Mr. Mendez's trial attorney did nothing to locate the witnesses.

At trial, Sgt. Jones testified the police did not have any information there were any other suspects besides Mr. Mendez. The statement was false and Mr. Mendez's attorney did not impeach Sgt. Jones with his contrary preliminary hearing testimony.

Later in the trial when asked by the jury if he ruled out the passenger as the shooter, Sgt. Jones testified he had. Mr. Mendez's attorney failed to object to this question, which impermissibly allowed Sgt. Jones to opine on Mr. Mendez's guilt. In addition, Sgt. Jones statement was a lie.

The jury deliberated for four days and eventually returned a guilty verdict. Mr. Mendez was sentenced to life plus 23 years.

The California Court of Appeal affirmed the conviction. In its opinion, the Court of Appeal noted at least ten instances where the trial attorney failed to raise proper objections or arguments that might have changed the results. (*See*, Appendix E.) In particular, it called out the trial attorney for failing to alert the trial judge that Sgt. Jones testified at his preliminary hearing about an eyewitness who identified Mr. Dye as the shooter.

Subsequent to the appeal, the appellate attorney discovered the government failed to disclose the police officer's recorded statements detailing the information they received from the eyewitnesses. The officers' recorded statements provided persuasive assurances that the eye witnesses hearsay statements would warrant their admission for the truth of the matters asserted under the Due Process Clause.

In a later habeas petition to the California Supreme Court, the appellate attorney raised errors involving *Brady v. Maryland*, 373 U.S. 83 (1963) [withheld recordings] and *Napue v Illinois*, 360 U.S. 264 (1959) [lies by the government and Sgt. Jones at trial about the existence of the witnesses], and numerous ineffective assistance of counsel claims. The California Supreme Court denied the petition

without comment. (Appendix D) The district court for habeas corpus denied the petition and the Ninth Circuit affirmed the district court. (Appendix And B.)

REASONS FOR GRANTING THE WRIT

I.

IN EVALUATING A 28 U.S.C. § 2254 PETITION, WHERE THE STATE COURT DENIED THE PETITION WITHOUT A REASONED DECISION, THE COURT USUALLY LOOKS FOR A REASONABLE BASIS SUPPORTING THE STATE COURT DENIAL, HOWEVER, THE COURT SHOULD NOT IGNORE THE STATE COURT'S STATEMENTS IT WOULD GRANT THE PETITION IF THE ISSUE HAD BEEN PRESENTED TO IT.

Petitioner's primary defense was that he was not the shooter and the passenger, Jeremiah Dye, was the shooter. During the preliminary hearing Sgt. Jones, who was the primary investigator on the case, testified that Sgt. Wingate told him "that the citizen informant told him that he knew where the suspect who had done the shooting was..." (ER 660.)

Q. And the informant basically told Sgt. Wingate that he had actually observed the person who had done the shooting exit the vehicle and go into that yard of that house; is that correct? ...

A. Yes

(ER 662-663.) [Jeremiah Dye was the person the police found under the house.]

On cross-examination, Sgt. Jones reaffirmed the information from the citizen informant:

Q. Now when they went underneath there and found Jeremiah Dye, they believed that he was in fact the suspect that had done the shooting, isn't that true?

A. Yes.

(ER 664.)

At trial, Sgt. Jones lied about the witness and Jeremiah Dye. At the close of direct examination, after discussing the type of leads Sgt. Jones might have received and relied upon or rejected, the prosecution asked:

Q. Okay. Now, Sgt., in this particular case did you receive any information or leads that pointed to anyone else as the suspect in this case other than Mr. Mendez?

A. No.

(ER 1841.) Defense counsel did not impeach Sgt. Jones on this flat out lie.

Instead of impeaching Sgt. Jones with his prior testimony, defense counsel waited until later in the hearing to ask Sgt. Jones,

“And that person [who indicated he had seen the shooting] had advised the investigating officers that he had actually seen the person who had done the shooting go underneath that house?” (ER 1895.) The court sustained the prosecutor’s hearsay objection. (ER 1895.) This was the first time anyone mentioned to the court that there was a witness who saw the incident and said they saw the shooter go under the house. The trial judge was not the judge at the preliminary hearing.

Appellate counsel argued, that the hearsay statement was admissible to impeach Sgt. Jones with the witnesses statement as described in the preliminary hearing. (Appendix F at *9.) The Court of Appeal rejected the argument pointing out that it was raised for the first time on appeal. (*Id.*) It then stated, that “even assuming that Mendez’s trial counsel raised impeachment as a basis for admissibility, he did not make an adequate record that the out-of-court statement would, in fact, have impeachment value.”

The California Court of Appeal outlined what was required to show impeachment value, “The informant’s out-of-court statement would only tend to impeach Jones if: (1) the informant said that he

saw the shooting, and (2) the informant said that he saw the person who shot McDonald hide under the house at 2635 Parker.” The Court of Appeal noted that the record was insufficient to satisfy those conditions. (Appendix F at *9.)

After a petition for rehearing alerted the court to Sgt. Jones’ preliminary hearing testimony, the Court of Appeals agreed the preliminary hearing testimony satisfied the conditions for impeachment value. (Appendix F at *9.) It added, “But, Mendez’s trial counsel did not alert the trial judge, who did not preside over the preliminary hearing, to Jones’s prior testimony.” (Id.)

The California Court of Appeal said that using the witness statements for the limited purpose of impeachment would not be sufficient to change the results. (Appendix F at *10.) The court added that “[r]eversal might be required if Mendez could establish some basis for admitting the informant’s statement for the truth of the matter asserted.” (*Id.* Emphasis added.) Unbeknownst to the California Court of Appeal and trial counsel, there was a strong basis for admitting the witness statements under the Due Process Clause.

During trial the defense requested any material the prosecution was required to disclose pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963). (ER 879.) Subsequent to the trial, Mr. Mendez's appellate counsel discovered several items that had not been disclosed including the following:

1. Recordings of Sgts. Wingate and Mork and Officer Roche giving detailed accounts of their meeting with the eye witnesses, including the description of the witnesses, and the details of what they saw. All of the officers commented favorably on the witnesses' credibility.

2. A recording of Sgt. Jones meeting the next day with the witness. (ER 324, 333-346.) The missing material was finally provided in January 2013, three years after the trial. (ER 323.)

The recordings established that all of the police officers, who interviewed the witnesses, believed their testimony was credible and the information they provided was accurate. The withheld material provided compelling reasons the hearsay statement could have been admitted because it "bore persuasive assurances of trustworthiness." *Chambers v. Mississippi*, 410 U.S. 284 (1973). "Even when evidence

is excluded on the basis of a valid application of the hearsay rules, such exclusion may violate due process if the evidence is sufficiently reliable and crucial to the defense.” *United States v. Hayat*, 710 F.3d 875, 898 (9th Cir. 2013).

Here the withheld evidence was sufficiently reliable and crucial to the defense:

- Each officer who was present and heard the witness made a point of saying the information was trustworthy. (*ER*¹ 337, 338, 339, 340, 341, 344.)

- Officer Roche, who shot and killed Mr. Dye, believed the witnesses information and relied on it (ER 276.) He was present when the witness gave the statement about seeing the shooting and seeing the shooter hide under the house. (*ER* 339-341.)

- The witnesses had a direct view of the shooting. According to Sgt. Mork, the witnesses were on the street looking toward the front of the vehicle at the time of the shooting. They had a direct view of the occupants and they would have seen who shot

¹ Italicized Excerpt of Record citations were to evidence withheld at the time of trial.

Officer McDonald. The witnesses would have been able to see the actual source of the flash from the gun in the dim lighting conditions. Officer McDonald was behind Mr. Mendez and did not see Mr. Dye at the time of the shooting. (*ER 337.*)

- The witnesses were able to follow the car after it drove past them and see the passenger get out of the car. They were able to identify the exact address where the passenger was hiding. (*ER 337, 340, 343, 344.*)

- The witness told the police the person under the house was the shooter. And confirmed the reason they knew he was the shooter was because they saw the shooting. (*ER 337, 338, 340, 344.*)

- Based on the information from the witness, Sgt. Wingate “had no doubt they had the shooter under the house.” (*ER 345.*)

- The witnesses were scared, but gave their information despite fearing for their safety and the safety of their family. (*ER 343, 344.*)

- The witnesses made several attempts to meet with the police to provide the information. (*ER 339.*)

- The witnesses gave the police a valid phone number. (*ER 340.*)
- The witnesses followed up with a meeting with Sgt. Jones the next day. (*ER 335.*)
- Captain Israel authorized a \$5,000 payment if the witness gave “accurate info.” (*ER 340-341.*)
- The witnesses gave the information before they received the money. Sgt. Jones met with the one of witness the next day and confirmed that he had been paid. (*ER 335.*)
- The witnesses heard and saw the passenger throwing something with a metal sound from the vehicle as it drove down Parker. (*ER 335, 336, 337, 340, 345; ER 338-339, 665.*)
- The witnesses found a gun that was probably thrown from the car and made arrangements to give it to Sgt. Jones the next day. (*ER 335.*)
- Sgt. Jones took the gun back to OPD Homicide for processing. The gun had damage consistent with having been thrown from a moving vehicle. (*ER 277.*)

Based on the withheld recordings, Mr. Mendez had a basis for admitting the witnesses' statements as an exception to the hearsay rule under *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The situation in *Chambers* is analogous. Leon Chambers was charged with murder for shooting a police officer. Prior to trial, Gable McDonald provided a sworn confession that he was the actual shooter. He later recanted. *Chambers*, 410 U.S. at 288-289. The court excluded the testimony of three witnesses each stating that McDonald confessed to them that he was the shooter. *Id.* at 292-93. Although Chambers was able to introduce impeachment evidence, he was prevented from presenting critical evidence that McDonald was the actual shooter. *Id.* at 294. This Court noted, without the evidence, Chambers' primary defense was "far less persuasive that it might [otherwise] have been." *Id.* at 294.

In ruling the exclusion of evidence denied Chambers his due process rights, this Court held that where hearsay testimony bears persuasive assurances of trustworthiness, is critical to the defense, and "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanically

to defeat the ends of justice.” *Chambers*, 410 U.S. at 302. This Court concluded the denial of the critical hearsay evidence “denied [Chambers] a trial in accord with traditional and fundamental standards of due process” and “deprived Chambers of a fair trial.” *Id.* at 302-303. It reversed the case.

The situation here is more compelling because there was no other evidence before the jury, including impeachment testimony, to support Mr. Mendez’s defense that Mr. Dye was the shooter. The *Chambers* exception to the hearsay rule is especially important when the evidence is directly exculpatory. *See, United States v. Fowlie*, 24 F. 3d 1059, 1069 (9th Cir. 1994).

Because the California Supreme Court did not rule on the merits of Petitioner’s habeas petition, Petitioner must show “there was no reasonable basis for the state court to deny relief.” *Harrington v. Richter*, 562 U.S. 86, 98 (2011). To assess whether Petitioner has met this burden, this Court must ask “what arguments or theories supported or ... could have supported ... the state court’s decision,” and determine “whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a

prior decision of” the Supreme Court. *Id.* at 102.

The Ninth Circuit reviewed this argument and concluded, the “California Supreme Court could reasonably have concluded that the prospect of admitting the informants’ statements was not sufficient to undermine confidence in the trial’s outcome.” (Appendix A at 4.) This statement is incorrect both legally and factually.

The California Court of Appeal specifically stated, “Reversal might be required if Mendez could establish some basis for admitting the informant’s statement for the truth of the matter asserted.” Appendix F at *10. Thus this is a unique circumstance where, although the state court did not rule on the petition presenting the claim, the state court stated how it would have ruled if given an opportunity to admit the hearsay statement. Based on the standard enunciated in *Harrington v. Richter*, Petitioner met his burden of showing there was no reasonable basis for the California court to deny relief because the California Court of Appeal signified it would rule in Petitioner’s favor if the eye witness statements were admitted for the truth of the matters asserted.

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CONCLUSION

This petition for a writ of certiorari should be granted.

Dated: November 13, 2018 Respectfully submitted,

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