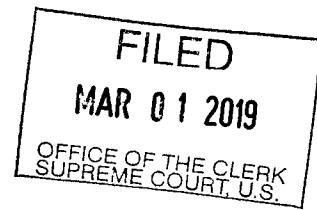


No. 18-8449

ORIGINAL

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SUPREMECOURTOFTHEUNITEDSTATES



JUAN BUSTOS-CHAVEZ— PETITIONER

vs.

MATHEW HANSEN— RESPONDENT

ONPETITIONFORAWRITOFCERTIORARI
TO THE TENTH CIRCUIT COURT OF APPEALS

Juan Bustos-Chavez
CDOC # 155884 *Unit 1*
Sterling Correctional Facility (SCF)
PO BOX 6000
Sterling, Colorado 80751

QUESTION(S)PRESENTED

- I. Whether the actual innocence exception established by *Murray v. Carrier*, applies to *alibi* evidence;
- II. Whether, based on the *alibi* evidence submitted in the *pro se* habeas application, Mr. Bustos-chavez was entitled to a review of the merits of his habeas claims in both the federal district and appellate courts.

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.

all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

A list of

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INTHE
SUPREMECOURTOFTHEUNITEDSTATES
PETITIONFORWRITOFCERTIORARI

Petitioner respectfully praysthatawritofcertiorariissueto reviewthejudgmentbelow.

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix 1 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 is unpublished.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 2 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 is unpublished.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[] is unpublished.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[] is unpublished.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 December 4, 2018.

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 _____ (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).

CONSTITUTIONALANDSTATUTORYPROVISIONSINVOLVED

U.S. Const. Amend VI right to effective assistance of counsel;

U.S. Const. Amend. XIV right to due process of law.

STATEMENTOFTHECASE

Mr. Bustos-Chavez is a Mexican immigrant. He was brought to the United States by his parents when he was ten. He met N.C. in California when he was sixteen. N.C. was twenty-one at the time and also an illegal Mexican immigrant. The two fell in love, N.C. got pregnant, and they eloped to Colorado where they lived together and raised their daughter for the next ten years. During that time they had another child. On April 6, 2004, Mr. Bustos-Chavez was arrested and deported back to Mexico. His wife and children remained in the United States, living in Colorado. When he was deported agents told him that he could not re-enter the United States for seven years.

In May of 2005 N.C. was staying with another man, R.H. That morning N.C. and R.H. exited their house and were confronted by a man in a red car. The man had a gun in his hand and shouted several threats to the couple. R.H. then got out of his car and "took off running". As he was running down an alley, the man from the red car shot him. Then, the man grabbed N.C., pointed the gun at her, pulled her into his car, and fled the scene. N.C. managed to escape the car, and returned to the scene approximately thirty minutes later. R.H. survived the ordeal, but disappeared. Authorities were never able to find him.

There were at least two eye-witnesses, besides N.C., to the incident. Neither identified Mr. Bustos-Chavez as the man in the red car. As a result of the incident, N.C.

(an illegal immigrant) was brought to the attention of authorities. She faced deportation and had a strong incentive to please the authorities in order to remain in the country. Prosecutors pressed N.C. to cooperate, informing her that if she didn't she would be deported. One prosecutor informed N.C. that he was close personal friends with an ICE official and if she helped the prosecution he'd ensure she was able to stay in the country. Based on these threats, N.C. blamed the incident on Mr. Bustos-Chavez. According to N.C.'s trial testimony, she did not actually know the man who'd shot R.H. and abducted her—but she blamed Mr. Bustos-Chavez for two reasons: (1) she was “angry” at him, and (2) she knew he was in Mexico and was not in danger of being arrested.

In 2011, seven years after he was initially deported, Mr. Bustos-Chavez again entered the United States. Because of N.C.'s statements to police and prosecutors in 2005 there was a warrant out for his arrest at the time he entered—and he was quickly arrested and charged.

Mr. Bustos-Chavez is not an English speaker, and he required a translator during the entirety of his criminal proceedings. Because he was indigent, he was appointed an attorney. However, the attorney did not speak Spanish and did not secure the services of an interpreter in order to communicate with his client. Mr. Bustos-Chavez was unable to communicate with his criminal attorney except during brief intervals during formal court proceedings when the court-translator was not otherwise engaged. Because of the obstacles to communication, Mr. Bustos-Chavez was never able to inform his appointed attorney that he had an *alibi* which was supportable with documentary evidence and testimony from Mexican witnesses.

From 2005 to 2011, despite being an illegal immigrant, N.C. was permitted to stay in the United States. However, during Mr. Bustos-Chavez's trial N.C. recanted her previous statements to authorities. She unequivocally testified that Mr. Bustos-Chavez had not been the man in the red car, and that she'd only told authorities that because of her fear of being deported. As a result of her testimony, N.C. was deported back to Mexico after Mr. Bustos-Chavez's trial.

During Mr. Bustos-Chavez's trial the sole evidence relied upon by the prosecution to tie Mr. Bustos-Chavez to the crime was N.C.'s initial statements to police in 2005. Though she unequivocally testified during that she had lied to police to avoid being deported, the prosecution put on an expert who testified that it was common in domestic violence cases for the victim to feel guilty and recant during trial. The jury ultimately convicted Mr. Bustos-Chavez of Attempted Murder, Kidnapping, Assault, and Menacing. He was sentenced to fifty years. His conviction and sentence were affirmed on direct appeal.

After his direct appeal proceedings Mr. Bustos-Chavez was forced to represent himself in his postconviction proceedings. He remained largely unable to speak, read, and write English; he relied substantially upon the help of other inmates in the prisons he was confined in to draft and file his pleadings. To this day he substantially relies upon the help of English speaking inmates to draft and submit his pleadings.

On September 21, 2017, Mr. Bustos-Chavez submitted an Application for *habeas* relief pursuant to 28 U.S.C. § 2254 to the federal district court for the district of Colorado. Mr. Bustos-Chavez argued that his trial attorney was ineffective for not securing an

interpreter to communicate with him outside of court so that he could effectively participate in his defense. He argued that had he been able to communicate with his trial attorney he would have been able to present *alibi* evidence that he was in Mexico at the time of the crime. He also argued that though he had procedural issues with his ineffectiveness claims, his *alibi* evidence (some of which he attached to his pleadings) established he was actually innocent.

The federal district court determined that Mr. Bustos-Chavez's claims were procedurally defaulted in the State court, and that he had failed to demonstrate cause and prejudice for the defaults. Mr. Bustos-Chavez appealed, arguing that he'd sufficiently demonstrated his actual innocence, and that such a showing required the federal court to review and grant relief on his underlying constitutional claims. The Tenth Circuit upheld the district court's finding, refusing to grant a certificate of appealability.

REASONSFORGRANTINGTHEPETITION

The Court should rule that the Actual Innocence exception established by the Court in *Murray v. Carrier*, 477 U.S. 478 (1986) applies when a habeas applicant presents *alibi* evidence which was not presented at trial, and should provide guidance for when such evidence is sufficient to warrant habeas review.

The federal district courts are granted power under 28 U.S.C. § 2254 to provide habeas relief to a State prisoner when they can establish that their Constitutional rights have been violated. The principle of comity dictates that the courts should not exercise that power if a State prisoner has procedurally defaulted their claims in the state courts and failed to properly exhaust them. *Rose v. Lundy*, 455 U.S. 509 (1982).

In *Murray v. Carrier*, 477 U.S. 478, 496 (1986) the Court determined that in cases

where the State has likely convicted someone who is actually innocent, that principle of comity is overridden and the federal courts should conduct a review of the prisoner's claims on their merits. The Court has since repeatedly ruled that instances establishing actual innocence will be exceedingly rare. *Schlup v. Delo*, 513 U.S. 298, 321-22 and n.36 (1995); *House v. Bell*, 547 U.S. 518, 538 (2006); *McQuiggin v. Perkins*, 569 U.S. 383, 386-87 (2013). And it has been almost universal that the lower courts have refused to find viable claims of actual innocence outside of newly discovered DNA evidence.

Perhaps this is because it has been common for the lower courts to misconstrue the actual innocence exception as *factual* innocence rather than *legal* innocence. Indeed, the Tenth Circuit which denied Mr. Bustos-Chavez's habeas claims was under that misperception. See, *Prost v. Anderson*, 636 F.3d 578, 600 (10th Cir. 2011)(finding that actual innocence means factual innocence, not mere legal insufficiency, citing *Bousley v. United States*, 523 U.S. 614, 623 (1998)). But, notwithstanding the standard's somewhat misleading name, the "actual innocence" test actually focuses on a type of "legal innocence," namely, whether there is a sufficient probability that rational jurors presented with the evidence would have a "reasonable doubt" as to the petitioner's guilt. See *Schlup*, 513 U.S. at 327-29.

In his *pro se* habeas application Mr. Bustos-Chavez presented evidence establishing he'd been deported from the United States in April of 2004, and that the crimes the State charged him with occurred in May of 2005. Further, he submitted several affidavits from witnesses who'd lived and worked with him in Mexico at the time he was supposedly in the United States committing those crimes. The affidavits were of

Mexican origin and were in Spanish, but upon review they were authentic and reliable evidence that was unrebutted by the State during Mr. Bustos-Chavez's habeas proceedings. The affidavits were from upstanding Mexican citizens and were duly certified as true and authentic pursuant to Mexican law, which is substantially consistent with American law when it comes to affidavits.

The federal district court made no specific rulings concerning actual innocence. Instead, although actual innocence is an *exception* to the requirement of showing cause and prejudice for a procedural default, the district court lumped the actual innocence exception together with a finding that Mr. Bustos-Chavez had not established cause and prejudice. Apparently the court was under the impression actual innocence required a showing of cause and prejudice. It appears that the panel of the Tenth Circuit which reviewed Mr. Bustos-Chavez's appeal was under that same misperception. Without comment as to the actual innocence issue, the Tenth Circuit declined to grant a certificate of appealability.

These rulings from the lower courts are inconsistent with the spirit of the actual innocence exception. Normally, comity requires that when there is a procedural default of a *habeas* claim in the state court, a *habeas* applicant must make a showing of cause and prejudice in order to obtain *habeas* review. *Engle v. Isaac*, 456 U.S. 107, 129 (1982). This Court formulated actual innocence as an *exception* to having to demonstrate cause and prejudice. *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ

even in the absence of a showing of cause for the procedural default.”)

Apparently, in spite of the substantial evidence Mr. Bustos-Chavez presented showing his actual innocence, the lower courts did not find it sufficient enough for *habeas* review to be warranted. Considering the fact that Mr. Bustos-Chavez submitted several affidavits from Mexican witnesses who unequivocally stated that at the time of the alleged crime he was living with them in Mexico, it is clear that the lower courts held Mr. Bustos-Chavez to a higher burden than federal law requires for a showing of actual innocence. And this could only be the case because it was *alibi* evidence that Mr. Bustos-Chavez presented, rather than something more familiar such as DNA evidence.

One need not show with absolute certainty that one is innocence to qualify for the actual innocence exception. Instead, what is required is a *sufficient probability* that rational jurors presented with the evidence would have a “reasonable doubt” as to the petitioner’s guilt. See *Schlup*, 513 U.S. at 327–29 (“Carrier standard reflects the proposition, firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt”; “whether a court is assessing eligibility for the death penalty under Sawyer, or is deciding whether a petitioner has made the requisite showing of innocence under Carrier, the analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence.” (footnote omitted)).

This Court should grant *certiorari* to further elucidate how actual innocence claims relating to *alibi* evidence should be viewed and handled by the lower courts. It should also take the opportunity to set forth what the lower courts’ responsibility is when a *pro se*,

indigent, non-English speaking applicant attaches documents in another language as evidence. As far as the Petitioner is aware, the Court has never addressed these issues before. *Alibi* evidence is unlike DNA evidence in that it is rarely, if ever, scientifically proven. Rather, it is usually demonstrated through witness testimony or documentary evidence. But, like DNA, it is conclusive as to a person's innocence.

A great injustice was done in Mr. Bustos-Chavez's case. Were he an English speaker his important *alibi* evidence would have been presented at his trial because he would have been able to communicate with his appointed attorney about it. The lower courts have continued the grave injustice done to Mr. Bustos-Chavez by turning a blind eye to his affidavits proving his *alibi*. Though they are in the Spanish language that does not diminish their factual import.

Mr. Bustos-Chavez deserves at least one fair review of his *alibi* evidence in the American justice system. He respectfully asks that this Court—his court of last resort—do the right thing and provide it.

CONCLUSION

The Court should grant *certiorari* and clarify this important actual innocence issue for the lower courts. It should also grant *certiorari* because it is the just thing to do. Mr. Bustos-Chavez has not once had a review of the merits of his ineffective assistance claim relating to his *alibi* evidence, despite doing his best as a non-English speaker to present it in every court he could. Were it not for his poverty and inability to speak English, his *alibi* evidence would have been heard and fairly considered. If not during his trial (because he would have been able to relay it to his court-appointed attorney),

then at the very least in his postconviction proceedings.

Fifty years may not be a life-without parole sentence but it represents the majority of Mr. Bustos-Chavez's life in prison, separated from his family. Before this harsh punishment is cemented upon his shoulders, someone somewhere should at least once provide of fair review of the merits of his *alibi* claim. Those who have helped Mr. Bustos-Chavez draft this document know the Court rarely chooses to grant review—especially when no certificate of appealability has been granted—but this man, Mr. Bustos-Chavez, is worthy of the Court's grace.

Respectfully submitted,

Date: 3/11/2019

Juan Bustos Chavez,
Juan Bustos-Chavez, pro se