

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

AHMED ALI,

Petitioner,

- VS -

RANDY GROUNDS, Warden,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred in denying a Certificate of Appealability on his claim that he was denied his right to present a defense by the trial court's refusal to give his jury instruction concerning his defense of third party culpability?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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The Petitioner, Ahmed Ali, hereby prays that a Writ of Certiorari issue from the decision of the United States Court of Appeals for the Ninth Circuit in case number 17-554579, denying his Application for Certificate of Appealability on the third issue raised before the district court, that he was denied his right to present a defense based upon the trial court's refusal to give his jury instruction that he need not prove his defense of third party culpability by a preponderance of the evidence, but only enough to raise a reasonable doubt as to his guilt. The Court of Appeals issued its decision affirming the denial of the habeas petition and denying a Certificate of Appealability as to the jury instruction issue on July 2, 2019 [Appendix A-1]. The opinion of the district court adopting the Report and Recommendation that the petition for writ of habeas corpus be dismissed with prejudice is

included at Appendix B1-B33. The Report and Recommendation of the United States Magistrate Judge recommending the petition for writ of habeas corpus be dismissed with prejudice is included as Appendix C1-C74. The last reasoned state court decision on the issues raised on direct appeal, by the California Court of Appeal for the Fourth Appellate District, Division One, in case number D058357, is included as Appendix D1-D50.

OPINION BELOW

On July 2, 2019, the Court of Appeals for the Ninth Circuit, in an unpublished memorandum opinion, affirmed the district court's denial on the merits of one issue raised in Mr. Ali's Petition for Writ of Habeas Corpus, and the district court's denial of a Certificate of Appealability on two issues raised before the district court in the same petition [Appendix A1-A4].

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1 provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATUTE INVOLVED

28 U.S.C. § 2253(c) provides in relevant part:

(1) Unless a circuit or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; . . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Introduction:

Ahmed Ali, the petitioner, was charged murder; attempted murder (counts two and four through six); shooting at an inhabited structure (counts three and seven); being a convicted felon possessing a firearm (count eight); and unlawfully possessing a firearm (count nine). The amended information also alleged various firearm-use and street-gang enhancements. The case arose from two shootings at two separate locations on the same date. It was Mr. Ali's defense that he was not the shooter, who was in fact Jesse Freeman, a gang member who testified at the Preliminary Hearing but was found dead prior to Mr. Ali's trial. Mr. Ali proposed a pinpoint jury instruction that informed the jury that he need not prove himself innocent, but that the jury should consider whether the evidence of third party culpability raised a reasonable doubt that Mr. Ali was, in fact, the shooter. The jury instruction was denied and Mr. Ali was convicted of all charges.

Prior to sentencing, Mr. Ali filed a motion for new trial with declarations from four jurors. One of those jurors stated that she "felt Mr. Ali was innocent, but did not see the evidence to prove" he was innocent. She also felt "very pressured to reach a verdict," and "was not left with an abiding conviction that Ali was guilty" Another juror declared that he "was

unaware [he] could find Mr. Ali not guilty without having a reason to justify [his] decision.”

Evidence at trial

The prosecution’s case

Two shootings occurred on July 22, 2008, in southeast San Diego. One on Harbor View, other on College Avenue. First, between 9:00 and 9:30 p.m., shots were fired at a yellow Ford Mustang as it pulled out of the Harbor View Apartments’ driveway. The driver and a passenger were Neighborhood Crip gang members, the other passenger was not. As the Mustang pulled out of the driveway, two black men walked up. One of the two black men said, “What’s up ‘cuz?” The two men then fired between 6 and 13 gunshots at the car. Although bullets struck the Mustang, none of its occupants were hit. Police found nine-millimeter shell casings on the Harbor View Apartments’ driveway.

A witness across the street saw a black Chrysler with spinning rims speed away from the area immediately after the shooting. The Chrysler was following a second car.^{21/} Although Ali’s vehicle was similar to the Chrysler, its window tint and rims did not match.

Later that same night, around 11:00 p.m., Larry Lumpkin was standing outside a College Avenue apartment complex. He was accompanied by one O’Farrell Park and two Skyline Piru gang members. Lumpkin was not a gang member. Two black men walked up to Lumpkin and the three gang members and started shooting. Lumpkin was shot in the head and died from the wound. One of the gang members was shot in the chest, but survived. All the shell casings found at the College Avenue complex were nine-millimeter casings.

Before the College Avenue shooting, a witness saw two African-American men walk past an alley toward the College Avenue complex. Initially, the witness failed to identify either man; but 31/after the preliminary hearing, he identified the petitioner, Ahmed Ali. He explained that he knew Mr. Ali as “50 Mo,” but had not previously identify him out of fear. A gang expert testified that Mr. Ali was a documented member of the Lincoln Park gang member, a “Bloods” gang, and a rival of the Crips, Skyline Piru, and O’Farrell Park street gangs. Ali’s moniker was “50 Mo.”

During the summer of 2008, Jesse Freeman, another Lincoln Park gang member, stayed with Mr. Ali in his apartment. On August 7, 2008, about two weeks after the shootings, the police arrested Freeman on a warrant for driving without a license. Officers took him to the station where he spoke with a homicide detective. Freeman claimed that Ali had confessed to committing the Harbor View and College Avenue shootings with “L,” another Lincoln Park member. Based upon Freeman’s interview, detectives obtained a warrant to search Ali’s apartment. The police found two cell phones. One phone [number (619) 665-9506] was found on the bathroom floor. The second phone [number (619) 370-9187] was found on a table near Freeman, who was sleeping on the living-room couch when the police entered the apartment. Police also found a nine-millimeter shell casing under Mr. Ali’s bed, and a magazine with five bullets inside a kitchen cabinet. The police also recovered a sock full of bullets from his downstairs neighbor. Allegedly, Mr. Ali had asked the neighbor to hide the sock.

Phone records showed that the (619) 665-9506 number was used near the time and location of the shootings. That phone's subscriber was "Ali Ali." Although Mr. Ali has a brother named Ali Ali, the subscriber's billing address did not match the brother's address. His brother did not recognize the number, although over 100 calls had been made from the (619)665-9506 phone number to Ali Ali's home. At trial, a detective testified that Freeman gave (619) 370-9187 as his phone number during his August 7, 2008 arrest. The detective also identified the (619) 665-9506 phone as belonging to Ali.

A firearms expert compared the shell casing found under Mr. Ali's bed with shell casings found at the College Avenue and Harbor View shootings, and concluded to a "practical certainty" that the same nine-millimeter handgun fired each bullet.

Detectives interviewed Freeman again on September 3, 2008. Freeman then testified at Mr. Ali's preliminary hearing. After the preliminary hearing, the district attorney's office re-located Freeman to Arizona as part of an agreement to secure his trial testimony. About week later, Freeman's body was found under a highway over-pass. Arizona authorities could not determine if his death was a suicide or homicide. The trial court admitted Freeman's preliminary hearing testimony at trial.

The defense case

Mr. Ali defense was alibi and he argued that the shooters were either Crip members or Freeman. There was evidence that Crip gang members may have committed the shooting on College Avenue retaliate against a resident, Canute Dawes. In early July, about two weeks

before that shooting, Dawes had slapped and spit on a young female Crip gang associate. in response, she threatened Dawes and said Crips would come back for him. The next day, there was a shooting at the apartment complex when Dawes was not present.

As for the shooting Harbor View shooting, there was evidence that one of the shooters said “what’s up, ‘cuz” — a challenge made by Crip gang members. Mr. Ali also presented evidence that Freeman may have committed the shootings because Freeman had no alibi. He left Mr. Ali’s apartment that night for 30 minutes to an hour or more. He took a 23-minute phone call at about 8:45 p.m., leaving enough time to commit the Harbor View shooting at 9:30 p.m. Further, Freeman had slept in Ali’s bed, providing him an opportunity to plant a nine-millimeter shell casing underneath his mattress, which the police later found during a search of Mr. Ali’s apartment. Freeman lived with Ali in July 2008. He had access to Ali’s bedroom, and sometimes slept in Ali’s bed. Ali’s sister, who also lived in the apartment, saw Freeman with two cell phones.

On the evening of July 22, 2008, Ali celebrated his birthday with his family. He spent the evening playing Playstation and caring for his son. He also spent time with his girlfriend, his cousin, his sister, and his sister’s boyfriend. He did not leave the apartment after it became dark outside.

Tiano Durham, a Lincoln Park gang member, testified that Mr. Ali was not a gang member. According to Durham, Mr. Ali was a “ladies man,” and gang members associated with Mr. Ali to get girls. A second gang member, Canute Dawes, also testified that Mr. Ali

was not a Lincoln Park gang member.

Post-trial juror declarations

In support of a new trial motion, Mr. Ali submitted three jurors' declarations prior to sentencing. In one of them, Juror 1 stated that she "felt Mr. Ali was innocent, but did not see the evidence to prove" he was innocent. Juror 1 "was very pressured to reach a verdict," and "was not left with an abiding conviction that Ali was guilty" Another juror declared that he "was unaware [he] could find Mr. Ali not guilty without having a reason to justify [his] decision."

State appeal and post-conviction proceedings

Mr. Ali appealed his convictions. On direct appeal, he argued that the trial court erred in refusing to give the following instruction:

You have heard evidence that a person other than the defendant may have committed the offense with which the defendant is charged. The defendant is not required to prove the other person's guilt beyond a reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable doubt in your minds as to the defendant's guilt. Such evidence may by itself raise a reasonable doubt as to the defendant's guilt. However, its weight and significance, if any, are matters for your determination. If after consideration of this evidence, you have a reasonable doubt that the defendant committed this offense, you must give the defendant the benefit of the doubt and find [him][her] not guilty.

The California Court of Appeal found that there was some evidence of third party culpability, but found no prejudicial error based upon California cases finding no prejudicial error arising from the state court's refusal to give a pinpoint instruction on third party culpability [Appendix D-28]. His convictions and sentence were therefore affirmed on appeal. He also

raised the claim in a before the California Supreme Court in a petition for review to exhaust state remedies. That court summarily denied his petition for review.

District court proceedings

Before the district court, Mr. Ali the claim that the trial court's refusal to give his jury instruction on third party culpability was an unreasonable application of this Court's decision in *Mathews v. United States*, 485 U.S. 58 (1988). [Appendix C-23]. The Magistrate Judge considered the claim under *Mathews*, but recommended denying relief because he found that the evidence of third party culpability was "too speculative" to require a pinpoint instruction on how the jury should consider that evidence, and therefor Mr. Ali failed to prove prejudice under *Brech v. Abrahamson*, 507 U.S. 618, 637 (1993). [Appendix C23-C24].

Mr. Ali filed objections to the R&R, which the district court overruled. The district court that under *Mathews*, Mr. Ali had a right to a jury instruction on a recognized defense to the criminal charges, where ther was sufficient evidence to support that defense. [Appendix B-21]. It found, however, that the evidence was insufficient to support a defense of third party culpability, and adopted the recommendation that the petition be denied. [Appendix B22-B23]. The district court also denied a Certificate of Appealability. [Appendix B-33].

Decision of the Court of Appeals

On appeal to the Court of Appeals to the Ninth Circuit, Mr. Ali raised three claims, one of which is raised in this petition: whether Mr. Ali was denied Due Process, contrary to

Matthews v. United States, 485 U.S. 58, 63 (1988), when the trial court refused his proposed pinpoint jury instruction on how the jury should consider evidence of third party culpability. The Ninth Circuit, in an unpublished memorandum opinion, affirmed the denial of the petition and affirmed the denial of a Certificate of Appealability on this one issue. [Appendix A4]. The Court of Appeals wrote the “even if Ali is correct that the state court violated his rights under *Matthews*,” the error was not prejudicial under *Brech v. Abrahamson*, 507 U.S. 619, 637-38 (1993).

REASONS FOR GRANTING THE PETITION

THE COURT OF APPEAL FOR THE NINTH CIRCUIT ERRED IN DENYING A CERTIFICATE OF APPEALABILITY ON WHETHER THE STATE TRIAL COURT VIOLATED HIS RIGHTS UNDER *MATTHEWS v. UNITED STATES*

This petition for writ of certiorari is brought pursuant to the procedure approved by this Court in *Hohn v. United States*, 524 U.S. 236, 250-251 (1998). It requests that a certificate of appealability issue under 28 U.S.C. § 2253(c)(2).

A. The petitioner has made a substantial showing of the denial of a constitutional right

The standard to determine whether a certificate of appealability should issue under 28 U.S.C. § 2253(c)(2) is whether the petitioner has made a “substantial showing of the denial of a constitutional right.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Mr. Ali alleged that he and shown he was denied the rights to present a defense and Due Process of Law, as interpreted by this Court in *Chambers v. Mississippi*, 410 U.S. 284 (1973); and *Mathews v.*

United States, because his proposed third-party-culpability instruction presented a recognized defense that was supported by the evidence.

At trial, Mr. Ali argued that someone else, either Crip gang members or Freeman, committed the College Avenue and Harbor View shootings. Regarding the College Avenue shooting, evidence showed that Crip gang members may have committed the shooting as retaliation against Canute Dawes for spitting and slapping a young female Crip gang associate two weeks earlier. The young woman threatened Dawes, saying Crips would come back for him. The next day, there was a shooting at the apartment complex, even though Dawes was not present. As for the Harbor View shooting, there was evidence that one of the Harbor Drive shooters said “what’s up, ‘cuz” — a challenge made by Crip gang members.

In addition, Mr. Ali presented evidence that supported his defense that Freeman, who had no alibi, was the shooter. Freeman had no alibi. He left Ali’s apartment for 30 minutes to an hour or more. His phone records show he took a 23-minute phone call at about 8:45 p.m., leaving enough time to commit the Harbor View shooting at 9:30 p.m.²⁵³ Further, Freeman slept in Mr. Ali’s bed, providing him the perfect opportunity to plant the nine-millimeter shell casing, which the police found underneath the mattress during a search of Mr. Ali’s apartment. Mr. Ali’s trial counsel requested a pinpoint jury instruction on the third-party-culpability defense. The proposed instruction read:

You have heard evidence that a person other than the defendant may have committed the offense with which the defendant is charged. The defendant is not required to prove the other person’s guilt beyond a reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable doubt

in your minds as to the defendant's guilt. Such evidence may by itself raise a reasonable doubt as to the defendant's guilt. However, its weight and significance, if any, are matters for your determination. If after consideration of this evidence, you have a reasonable doubt that the defendant committed this offense, you must give the defendant the benefit of the doubt and find [him][her] not guilty.

The trial court refused the third-party-culpability instruction. As a result, as seen from the declarations presented with the post-trial motions, at least two jurors erroneously believed that they had to vote for guilt unless evidence proved Mr. Ali was innocent. Juror 1 signed a declaration stating that she "felt that Ali was innocent, but did not see the evidence to prove it." Additionally, Juror 2 believed that he "could only consider the evidence that was presented" that "pointed to Ali's guilt." Juror 2 "was unaware that [he] could find Ali not guilty without having a reason to justify [his] decision."

On direct appeal, the state conceded that Mr. Ali "presented some evidence of third-party culpability." Nevertheless, the state appellate court rejected his federal constitutional claim on two bases: (1) no instructional error occurred because "[t]he jury could not have understood from the instructions given that [Mr.] Ali was required to prove that someone else committed the crimes and (2) that any error was harmless because Mr. Ali's trial counsel argued third-party culpability in closing argument.

In 1988, in *Mathews v. United States*, this Court held that "[a]s a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Because the state appellate court rejected Mr. Ali's due process claim without applying *Mathews'* principle, that decision

was contrary to clearly established Supreme Court law for purposes of 28 U.S.C. § 2254(d)(1). That last reasoned state court decision was contrary to *Mathews* because it failed to identify and apply that decision's two-factor standard for determining whether due process requires a defense instruction. *Mathews* requires an instruction for (1) any recognized defense, (2) if sufficient evidence exists to justify giving the instruction.^{273/} This Court has recognized that third-party culpability is an important defense in *Chambers v. Mississippi*, 410 U.S. 284 (1973). Hence, because Mr. Ali presented evidence of third-party culpability, the failure to give the proposed instruction violated Due Process under *Mathews*.

The fundamental flaw in the state court's decision, and in the subsequent decisions by the district court and the Ninth Circuit, is that they required a quantum of evidence sufficient to prove an affirmative defense in order to get a pinpoint instruction, not whether the defense evidence was sufficient under a lower threshold to raise a reasonable doubt as to whether Mr. Ali was the shooter. Third party culpability is a recognized defense, as all of those lower courts recognized; but that defense need only be enough to raise a doubt that Mr. Ali was the shooter. Had at least two jurors been instructed on how they could consider the evidence of third party culpability, there is at least a reasonable probability that the result would have been different. The failure to give that pinpoint instruction therefore had a pervasive and injurious effect upon the unanimous jury verdict of guilt, and error under *Brecht*.

B. The issues raised by the petitioner are “debatable among jurists of reason” under the test of *Slack v. McDaniel*, 529 U.S. 473, 483-484 (2000)

In *Slack*, 529 U.S. at 484-484, this Court adopted the “debatable among jurists of reason” standard to determine a “substantial showing of a denial of a constitutional right” necessary for the issuance of a certificate of appealability under 28 U.S.C. § 2253(c)(2).

As indicated *supra*, the California Court of Appeals recognized that Mr. Ali had presented third-party-culpability evidence. The Ninth Circuit, in denying the COA, did not dispute that there was evidence of third party culpability when it found that any error would be harmless under *Brecht*. That finding, that any instructional error did not have a pervasive and injurious effect upon the jury’s verdict, is belied by the juror declarations presented at the motion for new trial. One juror specifically wrote that she did not vote for to acquit Mr. Ali because he has failed to prove he was innocent. The proposed jury instruction would have directly addressed and corrected that erroneous view of the applicable law and would have supported Mr. Ali’s argument that he need prove he was innocent, but instead that the evidence of Freeman’s culpability was enough to raise a reasonable doubt of his guilt.

Reasonable jurists could disagree as to whether the quantum of evidence needed to give a pinpoint instruction on properly admitted evidence that would raise a reasonable doubt as to a fact necessary to prove guilt is lower than that necessary to prove an affirmative defense that would negate guilt. This Court should therefore grant review and remand to the Court of Appeals to consider this issue on the merits.

CONCLUSION

For the foregoing reasons, Ahmed Ali requests the Court grant his Petition for Writ of Certiorari, and order that the Court of Appeals grant a Certificate of Appealability on the following issue: whether Mr. Ali was denied his right to present a defense by the trial court's refusal to give his jury instruction concerning his defense of third party culpability?

Respectfully submitted,



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