No. _____

IN THE

Supreme Court of the United States

SAUL CERVANTES,

Petitioner,

v.

M.D. BITER, WARDEN,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

AMY M. KARLIN
Interim Federal Public Defender
Central District of California

JONATHAN D. LIBBY*
Deputy Federal Public Defender
**Counsel of Record*
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2905
Facsimile: (213) 894-0081
Jonathan_Libby@fd.org

Attorneys for Petitioner

QUESTIONS PRESENTED

Petitioner, Saul Cervantes, is serving multiple consecutive life sentences, plus an additional 35 years to life for sentence enhancements, for his convictions on three counts of attempted premeditated murder. He has always maintained that he is innocent of the crimes and that, contrary to the state's arguments and the decision of the California Court of Appeal, it was the driver of a different vehicle who shot the victims without his prior knowledge, and that he (Cervantes) did not have a gun. Although petitioner's convictions were affirmed in 2005, his pro se federal habeas corpus petition was not filed until 2013. In order to overcome the statute of limitations bar, he presented evidence to show he is "actually innocent" of the crimes of which he was convicted. Specifically, petitioner submitted a sworn declaration from one of the victims of the shooting, whose testimony was most heavily relied on by the California Court of Appeal in affirming Cervantes's convictions—and who is now an attorney—indicating that Cervantes did *not* shoot him or anyone and did not have a gun. Nevertheless, the district court refused to hold an evidentiary hearing and concluded that Cervantes failed to demonstrate that he was entitled to pass through the actual innocence gateway. It dismissed the petition as untimely and denied a certificate of appealability (COA). The Ninth Circuit also denied a COA. Thus, the questions presented are:

1. Whether it was at least debatable among jurists of reasons that petitioner established actual innocence, or at least warranted an evidentiary hearing on the claim, to overcome the untimeliness of his habeas corpus petition, for purposes of granting a certificate of appealability.

2. Whether the Ninth Circuit's decision to deny a certificate of appealability without any analysis or explanation for its decision at all was so arbitrary and capricious that it deprived Petitioner of his right to due process under the Fifth Amendment or of his right to meaningful review in this Court.

LIST OF PARTIES

1. Saul Cervantes, Petitioner
2. M.D. Biter, Warden, Respondent

STATEMENT OF RELATED CASES

People v. Saul Cervantes, Los Angeles County Super. Ct., No. PA042004

People v. Saul Cervantes, Cal. Ct. App., Second Dist. Div. 8, No. B168802

People v. Saul Cervantes, Cal. Sup. Ct., No. S130514

Saul Cervantes v. M.D. Biter, Warden, U.S. Dist. Ct., Central Dist. Cal., No. CV 13-4880-R (SS)

Saul Cervantes v. M.D. Biter, Warden, U.S. Ct. App. Ninth Cir., No. 14-56205

Saul Cervantes v. M.D. Biter, Warden, U.S. Ct. App. Ninth Cir., No. 19-55168

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ON PETITION FOR A WRIT OF CERTIORARI TO
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Saul Cervantes, respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability in his case.

OPINION BELOW

On December 20, 2019, the Ninth Circuit issued an unpublished order denying Cervantes's request for a certificate of appealability (COA). Pet. App. A1. That appeal arose from Cervantes's district court case, which concluded after the district court issued its order adopting the findings, conclusions, and recommendation of the United States Magistrate Judge (Pet. App. A34-A35), its

judgment dismissing Cervantes's 28 U.S.C. § 2254 petition as untimely (Pet. App. A36), and its order denying a certificate of appealability (Pet. App. A37-42).

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 2241 & 2254. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 states, in pertinent part:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c) (1) Unless a circuit justice 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; or
>
> (B) the final order in a proceeding under section 2255.
>
> (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.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE[1]

In May 2003, a Los Angeles County Superior Court jury convicted Petitioner Saul Cervantes of three counts of willful, deliberate, and premeditated attempted murder in violation of California Penal Code ("P.C.") §§ 664/187(a) for attacks on victims Stephanie Webb (count 1), Arash Zad-Behtooie (count 2), and Arturo Cisneros (count 3). (Clerk's Transcript ("CT") 202-04, 207-09; Reporter's Transcript ("RT") 1205-11).[2] As to count 1, the jury also found it to be true that Petitioner used a firearm within the meaning of P.C. § 12022.53(b), personally and intentionally discharged a firearm within the meaning of P.C. § 12022.53(c), and personally and intentionally discharged a firearm causing great bodily injury within the meaning of P.C. § 12022.53(d). (CT 202, 207-08; RT 1206-07). As to counts 2 and 3, the jury found the P.C. § 12022.53(b) allegations true but the P.C. § 12022.53(c-d) allegations not true. (CT 203-04, 208-09; RT 1207-09). The trial court sentenced Petitioner to three consecutive terms of life imprisonment, with an additional

[1] Most of the facts are taken from the Report and Recommendation of the United States Magistrate Judge. Pet. App. A2-A31.

[2] The Clerk's Transcript and Reporter's Transcript of the state court proceedings were lodged in the United States District Court.

twenty-five years to life for the P.C. § 12022.53(d) enhancement and an additional 10 years for the count 2 P.C. § 12022.53(b) enhancement. (CT 227-31; RT 1804-06).[3]

At trial, the jury heard evidence that shortly after midnight on July 21, 2002, a group of friends—Chris Awada, Arash Zad-Behtooie, Stephanie Webb, Arturo Cisneros, Carlos Barajas, and an individual named Joaquin—drove in two vehicles to a party in Pacoima. (RT 396-97, 409-10, 437). Awada drove Cisneros in the first vehicle, while Zad-Behtooie drove the second vehicle in which Webb, Barajas, and Joaquin were passengers. (RT 397, 410, 437). Awada parked his vehicle a couple of blocks away from the party, and Zad-Behtooie parked behind Awada. (RT 411). Cisneros and Joaquin exited the vehicles and began walking to the party while Awada remained in his vehicle to take the face plate off of his stereo, Webb moved to the driver's side of Zad-Behtooie's vehicle to turn off the stereo, and Zad-Behtooie stood by the rear driver's side door of his vehicle. (RT 397-98, 411, 413, 438-39).

While these activities took place, an SUV and a red hatchback drove up and stopped alongside the parked vehicles, facing the opposite direction from Awada and Zad-Behtooie's vehicles. (RT 411-12, 438-40). The SUV was in front and the hatchback, which was driven by Petitioner, stopped behind the SUV and alongside Zad-Behtooie's vehicle. (RT 412-14, 450-53, 460-61, 755). The SUV's occupants

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[3] Petitioner appealed his conviction and sentence to the California Court of Appeal, which affirmed the judgment in an unpublished opinion filed December 9, 2004. Pet. App. A43-62 [Cal. Court of Appeal Decision]. Petitioner then filed a petition for review in the California Supreme Court. On March 2, 2005, the California Supreme Court denied the petition. Pet. App. A5.

began arguing with Cisneros and Joaquin, telling them "you guys gotta get out of here. You can't be here. Who are you guys? And stuff like that." (RT 415). The hatchback's occupants were yelling too. (RT 413-14). According to Webb, someone in the hatchback said "'Fuck you and your life. This is Pacoima[,]'" while someone else in either the hatchback or SUV asked "'Where are you from?'" (RT 439-40).

Zad-Behtooie testified that he focused on the argument between the SUV's occupants, Cisneros and Joaquin, and he saw the SUV's driver pulled out a gun and said "'You guys got to get out of here.'" (RT 418-19). After the SUV driver drew his weapon, Zad-Behtooie's friends agreed to leave and started to walk away when the SUV driver started shooting. (RT 419-20). Zad-Behtooie did not pay any attention to the hatchback, and once the SUV driver pulled the gun out, Zad-Behtooie's attention was completely focused on the SUV and he "didn't even think of looking at the other car anymore." (*Id.*). Accordingly, Zad-Behtooie could not identify the hatchback's driver, he did not see anyone in the hatchback with a gun, and he never heard any shots from the hatchback. (RT 422-23, 433).

Webb testified that Petitioner's vehicle was approximately eight feet away from her and that she saw Petitioner, who was wearing a blue Georgetown jacket, pull a gun out and extend his right hand toward her before she turned away, someone pushed her down, and she heard eight to ten gunshots. (RT 351-52, 441-44, 449, 471-72, 482). Zad-Behtooie was shot in the stomach, Webb was shot in her

left ankle, and one of the shots went through Cisneros's pants, making a hole in the pants without injuring Cisneros. (RT 339, 356, 420-21, 423-24, 443, 455-56).[4]

Effective June 26, 2013, Petitioner Saul Cervantes, proceeding *pro se*, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). Pet. App. A3. The Petition raised nine grounds for federal habeas relief, arguing, *inter alia*, that there was insufficient evidence to support his attempted murder convictions, that he received ineffective assistance of both trial and appellate counsel, and that he is actually innocent of the crimes. Pet. App. A6-A7. Respondent filed a Motion to Dismiss the Petition as untimely, and on June 10, 2014, the district court granted the Motion and entered Judgment denying the Petition and dismissing the action with prejudice. Pet. App. A3. Petitioner appealed to the Ninth Circuit Court of Appeals, which on December 12, 2016, granted Petitioner's unopposed motion for remand to this court to "consider what effect, if any, the Supreme Court's decision in *Montgomery v. Louisiana*, 136 S. Ct.

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[4] On or around May 7, 2007, some years after the California Court of Appeal and California Supreme Court affirmed the conviction, Petitioner filed a "Request for Order for Permission to File a Late Petition for Writ of Habeas Corpus" in the Central District of California, which denied the request without prejudice on May 11, 2007. (*See Cervantes v. Warden*, United States District Court for the Central District of California case no. 07-2982 R (MLG)). On or around November 5, 2012, approximately five years later, Petitioner filed a habeas corpus petition in the Los Angeles County Superior Court, which denied the petition on December 14, 2012. Pet. App. A5. Effective January 15, 2013, Petitioner filed a habeas corpus petition in the California Court of Appeal, which denied the petition on February 14, 2013. *Id.* Effective March 12, 2013, and April 2, 2013, Petitioner filed habeas corpus petitions in the California Supreme Court, which denied the petitions on May 22, 2013. Pet. App. A5-A6.

718 (2016), has on the timeliness" of the Petition. Pet. App. A3. Following remand, the parties briefed *Montgomery*'s effect on the Petition's timeliness, and Petitioner also argued he was entitled to an evidentiary hearing to address his purported actual innocence and to an equitable exception to AEDPA's[5] limitation period. Pet. App. A3.

In support of his actual innocence claim—being raised in order to excuse the untimeliness of his petition pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995)—Petitioner submitted a sworn declaration from victim Arash Zad-Behtooie ("Zad-Behtooie Decl."), who is now a licensed attorney. Pet. App. A32-A33. In his declaration, Zad-Behtooie states he "was not shot by anyone in the hatchback that was parallel to my car" but that he "was shot by the driver in the SUV" who Zad-Behtooie saw "extend his hand out the window and start shooting." Pet. App. A32, ¶¶ 3-4. Zad-Behtooie stated the SUV driver was shooting at Cisneros and Joaquin who were walking toward Zad-Behtooie when he was shot. *Id.*, ¶ 4. Zad-Behtooie also indicated that before the shooting he "heard the driver of the SUV yell out something like, 'Pacoima, Van Nuys Boys'" and the hatchback driver "yelled out something like 'Do you know these guys?'" *Id.*, ¶ 5. Zad-Behtooie stated that he was closer to the hatchback than Webb and "would have been able to clearly see the driver of the hatchback shooting," but he never saw anyone in the hatchback with a

[5] Antiterrorism and Effective Death Penalty Act (AEDPA). *See* 28 U.S.C. § 2254.

gun and "[a]t no point did the driver of the hatchback have his arm out the window." Pet. App. A32-A33, ¶ 6.

Zad-Behtooie also explained that, "given the angle at which I was shot, I could not have been shot by anyone in the hatchback [Cervantes's car]." *Id.* Finally, Zad-Behtooie stated that he "could tell from the sound of the shots that there was only one gun being fired" and that "[n]o shots were fired from the hatchback." Pet. App. A33, ¶ 7.

The Magistrate Judge, however, issued a Report and Recommendation finding that Petitioner had failed to establish actual innocence sufficient to excuse the untimeliness of his petition, and that he was not entitled to an evidentiary hearing on his actual innocence claim. Pet. App. A22-A30. It also recommended that a certificate of appealability be denied. Pet. App. A37-A42. The district court accepted the Report and Recommendation, dismissed the Petition, and denied a COA. Pet. App. A34-42.

Mr. Cervantes appeal to the Ninth Circuit Court of Appeals, which also denied a COA without explanation. Pet. App. A1.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ of certiorari for two reasons. First, under 28 U.S.C. § 2253(c)(2)), a petitioner is entitled to a certificate of appealability merely "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Mr. Cervantes overcame the low bar necessary for issuance of a certificate of appealability to challenge the district court's rejection—without an evidentiary hearing—of his actual innocence claim being raised to overcome the untimeliness of his habeas petition. Petitioner presented the sworn declaration from one of the victims—a licensed attorney—who states unequivocally that Petitioner did *not* shoot him or anyone and did *not even have a gun*, contrary to the state's argument at trial and on appeal, and contrary to the state court of appeal's decision affirming the conviction. That new evidence, at a minimum, should have warranted an evidentiary hearing, and because jurists of reason might have granted such an evidentiary hearing, a COA should have issued.

A second reason exists for granting the writ. This petition presents an important question—whether due process is satisfied where the Circuit denies a certificate of appealability without providing even a minimal explanation for its decision. Mr. Cervantes's COA application involved an important question about the actual innocence of a man serving what is tantamount to a life without parole sentence where one of the victims of that the crime states unequivocally that he did

not commit the offense. In the face of such argument, the Ninth Circuit's unreasoned and unexplained denial of the application for a certificate of appealability violates due process and deprives Mr. Cervantes of a meaningful opportunity for review.

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE ACTUAL INNOCENCE CLAIM PETITIONER RAISED TO EXCUSE THE UNTIMELINESS OF HIS PETITION PURSUANT TO *SCHLUP v. DELO* WAS SUFFICIENT TO OVERCOME THE LOW BAR NECESSARY FOR GRANTING A CERTIFICATE OF APPEALABILITY.

The standard for granting a certificate of appealability (COA) is an "important matter" in federal habeas law. Supreme Court Rule 10(a). If a court is not correctly applying that standard, then that court strips habeas corpus of its all-important role in our criminal justice system. *See Harrington v. Richter*, 562 U.S. 86, 91 (2011) ("The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law."). Thus, this case will not just allow this Court to ensure uniformity within the nation's federal system, but it will also allow this Court to preserve habeas corpus's vital role in our system of justice.

Indeed, every year circuit courts entertain thousands of requests for COAs. In *Miller-El*, this Court explained that when a circuit court receives one of these requests, it *must* issue a COA if the petitioner makes "'a substantial showing of the denial of a constitutional right.'" *See Miller-El*, 537 U.S. at 327 (quoting 28 U.S.C. § 2253(c)(2)). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims

or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* This is not a high bar.

Yet the Ninth Circuit denies a striking number of the COA requests it receives: 95 percent of them in fact.[6] By comparison, the rate of denials are significantly lower in other circuits. *See* Brief for Petitioner, at *1A, *Buck v. Davis*, 137 S. Ct. 759 (2017), 2016 WL 4073689 (noting that "a COA was denied on all claims in 58.9% (76 out of 129) of the [capital habeas] cases arising out of the Fifth Circuit, while a COA was only denied in 6.3% (7 out of 111) and 0% of the cases arising out of the Eleventh and Fourth Circuits respectively"). The fact that the Ninth Circuit's rate of denial is so out of step with other circuits suggests that the Ninth Circuit is merely paying lip service to the principles this Court articulated in *Miller-El*.

And this case proves that the Ninth Circuit is doing just that.

As shown below, the Ninth Circuit's failure to issue a COA on the record that was before it—the record now before this Court—shows that it applied a COA standard much higher than the one this Court articulated in *Miller-El*—a standard that, in effect, conflicts with this Court's mandates.

Mr. Cervantes wants to present on appeal an issue that "jurists of reason" could disagree with: the district court's resolution of whether the sworn declaration

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[6] In 2015, the Ninth Circuit received 1,399 requests for COAs and granted only 65 of those requests. *See* Submitted COAs, found at *http://cdn.ca9.uscourts.gov/datastore/uploads/guides/habeas_training/2016.10.27%20materials%20revised_2.pdf* (last visited Feb. 13, 2020).

of one of the victims of this crime—that Cervantes did not have a gun or shoot anyone—established actual innocence sufficient to excuse the untimeliness of his habeas petition under *Schlup*, or that Cervantes was at least entitled to an evidentiary hearing to establish that actual innocence. Certainly, a jurist of reason might conclude that the issue is "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. And that is all that was necessary for issuance of a COA.

In the district court, Mr. Cervantes argued that is entitled to the equitable exception to AEDPA's limitations period and to consideration of his habeas claims on the merits, or at least is entitled to an evidentiary hearing regarding his actual innocence claim. Indeed, a "credible claim of actual innocence constitutes an equitable exception to [the habeas] limitations period, and a petitioner who makes such a showing may pass through the *Schlup*[*v. Delo*, 513 U.S. 298 (1995)] gateway and have his otherwise time-barred claims heard on the merits." *Lee v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (en banc). In *Herrera v. Collins*, 506 U.S. 390, (1990), this Court held that the threshold for a *freestanding claim* of innocence would have to be "extraordinarily high," *id.* at 417, and the Ninth Circuit has indicated that a petitioner asserting such a claim must "go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent," *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997). But a showing of actual innocence under *Schlup* —the core of the miscarriage of justice doctrine—does *not* require that a petitioner affirmatively prove his innocence of the crime. Rather,

"where post-conviction evidence casts doubt on the conviction by undercutting the reliability of the proof of guilt, but not by affirmatively proving innocence, that can be enough to pass through the *Schlup* gateway to allow consideration of otherwise barred claims." *Sistrunk v. Armenakis,* 292 F.3d 669, 673 (9th Cir. 2002) (en banc) (citing *Carriger v. Stewart*, 132 F.2d 463, 477 (9th Cir. 1997) (en banc) (holding that petitioner need not show that he is "actually innocent" of the crime he was convicted of committing; he need merely show that "a court cannot have confidence in the outcome of the trial") (additional citations omitted)).

One category of evidence that is sufficient to establish actual innocence is "trustworthy eyewitness accounts." *Schlup*, 513 U.S. at 324. In this case, the most important trustworthy eyewitness account—that of victim Arash Zad-Behtooie, who was standing next to the rear driver's-side door of his car, next to and mere feet away from Mr. Cervantes's hatchback, when he was shot in the stomach—now supports Mr. Cervantes's claim that he is actually innocent, or at least casts doubt on Mr. Cervantes's convictions sufficient to allow consideration of his habeas claims on the merits.

The district court found that Zad-Behtooie's trial testimony was that he was focused on the occupants of the SUV that was in front of Cervantes's hatchback and saw the SUV driver draw his weapon and started shooting, but was not paying attention to the hatchback. Pet. App. A18. The court also noted that Zad-Behtooie stated that the SUV driver was not firing at him and he did not know where the bullet that hit him came from. Pet. App. A19 n.14. In the California Court of

Appeal, the state relied on Mr. Zad-Behtooie's testimony to argue that Cervantes was guilty of everything he had been convicted of based on what it claimed was Zad-Behtooie's testimony that he "was not shot by the gunman in the Ford Explorer," and thus "[Cervantes], not the gunman in the Ford Explorer, fired the shot which struck Arash." (District Court Lodged Doc. 4, at 22). The Court of Appeal, apparently adopting the state's view of the testimony, concluded that Zad-Behtooie "recalled that the shooter from the SUV was not pointing a gun at him. His testimony indicates the bullet that struck him was not fired from the SUV, but was fired from elsewhere." Pet. App. A55. It further indicated that "Arash recalled that a person from the SUV did not point a gun at him," and then concluded that because "Arash was shot while standing a couple of feet from Stephanie . . . the inference can be reasonably drawn that Arash and Stephanie were shot by the same gunman," i.e., by Mr. Cervantes. Pet. App. A55.

But Zad-Behtooie's new Declaration makes clear that that's *not* what happened.

Indeed, Zad-Behtooie explained that to the extent his testimony has been interpreted to mean that he had not been shot by the driver of the SUV, that that is wrong. Pet. App. A32, ¶¶ 3, 4. Rather, he states, in no uncertain terms, that he was, in fact, shot by the driver of the SUV, and was *not* shot by the driver of the hatchback (Mr. Cervantes) or by anyone in the hatchback. Pet. App. A32-A33, ¶¶ 3,

4, 6, 7).[7] He also clearly and unequivocally explains that no shots were fired from Mr. Cervantes's car, that given the angle at which he was shot he could not have been shot by anyone in Mr. Cervantes's car, and he casts doubt on Stephanie Webb's testimony regarding what she saw. Pet. App. A32-A33, ¶¶ 6, 7). Moreover, Mr. Zad-Behtooie, now a licensed attorney in California (Pet. App. A32, ¶ 1), is entirely credible and had no reason to fabricate the sworn facts presented in his sworn Declaration.

The district court dismissed Zad-Behtooie's Declaration as nothing more than a "'clarify[ing]' declaration" and "unhelpful" to Cervantes. Pet. App. A24, A25 (alteration in original). But while aspects of the Zad-Behtooie Declaration were meant to "clarify" his trial testimony, Zad-Behtooie explained that what he meant was that "[t]o the extent [his] testimony—that the gun being shot by the driver of the SUV was not pointed at [him] and [that] the driver of the SUV was not firing at [him]—has been interpreted to mean that the driver of the SUV did not shoot at [him] [as the Court of Appeal determined], that would be incorrect." Pet. App. A32, ¶¶ 2, 4.

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[7] Although Mr. Zad-Behtooie testified that he saw the driver of the SUV shooting, he indicated when asked whether he had seen the driver of the SUV firing at *him*, that "He wasn't firing at me." (Zad-Behtooie Trial Testimony, RT 420). This was apparently interpreted by the Court of Appeal to mean Zad-Behtooie said "the shooter from the SUV was not pointing a gun at him" and thus "the bullet that struck him was not fired from the SUV, but was fired from elsewhere." Pet. App. A55. Mr. Zad-Behtooie now clarifies that the driver of the SUV was firing at Joaquin and Arturo when he was hit by one of the shots fired by the SUV driver. Pet. App. A32, ¶ 4.

In fact, Zad-Behtooie's Declaration makes many things clear that were not clear from the trial testimony:

- he was shot by the driver of the SUV, not by Mr. Cervantes—contrary to the Court of Appeal's determination in affirming the conviction. Pet. App. A32, ¶ 4.
- Cervantes never had his arm out of his car's window. Pet. App. A32, ¶ 6).
- Neither Cervantes—nor anyone in Cervantes's car—had a gun. Pet. App. A32-A33, ¶ 6).
- No shots were fired from Cervantes's car. Pet. App. A33, ¶ 7).

The district court concluded that none of this would have made a difference in the outcome because the jury must have concluded that Cervantes "did not shoot at Zad-Behtooie" but convicted Cervantes anyway. Pet. App. A24-A26; A25-A26 n.20. But the conclusion is based on the erroneous belief that the jury's conclusions on the firearms enhancements meant it "clear" that the jury had concluded that Cervantes shot Webb but convicted Cervantes of the Zad-Behtooie and Cisneros shootings on an aiding and abetting theory. Pet. App. A25 n.20. Yet, that's not what the state argued or what the state Court of Appeal concluded. At all times, the determination was that *Cervantes* personally shot Zad-Behtooie and Webb, not as an aider and abettor. Pet. App. A53 ["Substantial evidence supports the finding that Cervantes shot Arash and Stephanie, aided and abetted in the shooting of Arturo, personally used a firearm, and that the shooting was premediated and

deliberate."]); *id.* at A55 ["Notwithstanding Cervantes' contention that the evidence was insufficient to establish he shot Arash and Stephanie, the prosecution witnesses supported the theory that it was Cervantes who shot Arash and Stephanie."]).

Moreover, the district court's conclusion that "it seems clear" the jury convicted Cervantes of Zad-Behtooie's shooting on an aiding and abetting theory because it found the state had not proven Cervantes personally discharged a firearm does not pass legal muster. There are myriad reasons the jury might have found as it did, not least of which is that it reached a compromise, or that the outcome presented an inconsistent verdict. For purposes of the court's analysis, what mattered is the newly presented evidence together with the evidence at trial. And that is what showed that Cervantes is actually innocent of his crimes, at least under *Schlup*.

In addition, the district court appeared to conclude that the actual innocence claim fails because Zad-Behtooie's Declaration "essentially reiterates [his] trial testimony that he never heard any shots fired from the hatchback" and that a petitioner may not make a showing of actual innocence based on what was known at the time of trial and presented to the jury. Pet. App. A27. But Zad-Behtooie's Declaration does not merely reiterate his trial testimony. To be sure, he did state some things in his declaration that he said at trial. But the crux of the Declaration

is plainly new evidence that was *not* presented at Cervantes's trial and makes clear facts that were not clearly presented at that time.[8]

To establish actual innocence here, Cervantes was required "to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. Cervantes did just that with the new testimony of an extremely credible and trustworthy eyewitness: a victim who now also happens to be an attorney.

Thus, the district court's conclusion that "Zad-Behtooie's declaration reaffirming a finding the jury already made does nothing to demonstrate Petitioner's actual innocence," Pet. App. A26, is both factually and legally incorrect—at least sufficiently arguable for jurists of reason to disagree.

The court also indicated that the testimony of Stephanie Webb, another victim of the shooting, was that she saw Cervantes "pull a gun out and extend his right hand toward her" before the shots rang out. Pet. App. A19. Yet, Webb's actual testimony did not support such a finding. The court made the same factual

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[8] The district court relied on *Bannister v. Delo*, 100 F.3d 610, 618 (8th Cir. 1996) ("[p]utting a different spin on evidence that was presented to the jury does not satisfy the requirements set forth in *Schlup*"), to support its dismissal of Zad-Behtooie's declaration. Pet. App. A27. But *Bannister* involved the declaration of a filmmaker who essentially reitereated defendant's theory based on his own interpretation of facts presented at trial and his own investigation. *Id.* at 615-16. That case had no relevance to this case. Here, an actual victim and witness presented new facts, using his prior testimony to put those new facts that had not previously been presented in context. Zad-Behtooie's Declaration is not merely putting "a different spin" on things by someone uninvolved in the incident.

error as the state Court of Appeal did, ignoring Webb's testimony that she did not recall seeing a gun in Cervantes's hand.

For example, Ms. Webb was asked at trial if she had "see[n] any guns," to which she replied, "I remember the driver extending his hand towards me. I didn't look exactly at it." (RT 441). She was later questioned about having previously testified at another hearing at which she apparently had said she saw the driver "pull the gun out." (RT 442). She confirmed that she had said that at the prior hearing. (RT 442). But she did *not* confirm that she actually saw Mr. Cervantes with a gun, only that she previously had testified to that. In fact, when then asked to confirm that Mr. Cervantes, whom she identified as the driver in court, was "also the one that you saw with the gun," she would only say, "He's the one that I saw extend his hand." (RT 443). On cross-examination, she explained that when she had said she saw Cervantes "extend his hand," she meant she "saw his hand pointed towards the car." (RT 471-472). When asked if she had seen a gun in Cervantes's hand, she said, "I wasn't paying attention," and confirmed that she was "not sure whether or not there was a gun in that hand." (RT 475). When again asked, "Did you ever see a gun?", her response was "I don't remember." (RT 476). She further testified that she "didn't see any shots fired," that she "just heard them," and that she "can't pinpoint exactly where they came from." (RT 480). And then, when again asked, "And you never saw a gun in Mr. Cervantes' hand?", she reiterated, "Not that I remember." (RT 480-481). On redirect examination, the prosecutor essentially tried to impeach Webb with her prior testimony, asking if at

the preliminary hearing she testified that she "did see the defendant pull a gun out of the car"; she responded, "I don't remember." (RT 481). And after refreshing Webb's recollection by showing her the transcript of her prior testimony, her response to the question "Did you see him pull out a gun?" was again, "I remember his hand being extended, but seeing a gun . . . it's hard to say now." (RT 482).

Zad-Behtooie's Declaration now clarifies just how wrong the state Court of Appeal got it when it reviewed the trial testimony and it presented new evidence that, together with Webb's equivocal testimony—during which she never indicated she saw a gun in Cervantes's hand—establishes that Cervantes did not commit the crimes of attempted murder or engage in conduct to establish the 35 years of consecutive time for personally using a gun in commission of the crimes.

The new evidence from Mr. Zad-Behtooie making clear that Mr. Cervantes was *not* the shooter, shot no one, and did not have a gun, and thus it severely, if not completely, undercut the reliability of any proof of Cervantes's guilt and casts doubt on Mr. Cervantes's convictions and enhancements.[9] And because Cervantes at least

[9] The same holds true for convictions which might have been based on an aiding and abetting theory, such as the attempted murder of Arturo Cisneros. Mr. Zad-Behtooie's Declaration makes clear that shots were *not* fired from both vehicles, but were only fired from the SUV. Pet. App. A32-A33, ¶¶ 3, 4, 7). Moreover, the Court of Appeal's decision to affirm on an aiding and abetting theory as to Cisneros's attempted murder was premised on the victims having been threatened just before the shooting by people in Mr. Cervantes's car, and its belief that Stephanie Webb saw Cervantes point a gun at her, which the court believed together "indicate[d] [Cervantes's] active participation in the shooting." Pet. App. A58. But Zad-Behtooie's Declaration, together with the trial testimony, undercuts and casts substantial doubt on that belief as well because nobody in Cervantes's car

arguably established he is actually innocent of his crimes of conviction, he satisfied the *Schlup* "gateway" and did not need to demonstrate satisfaction of the one-year limitations period under AEDPA to have his claims considered on the merits.

For a COA, it was enough if any jurist of reason might disagree with the district court's decision here. Plainly, that was established.

At a minimum, the district court erroneously concluded that Mr. Cervantes was not entitled to an evidentiary hearing on his actual innocence claim for purposes of *Schlup*—and certainly a jurist of reason might have granted an evidentiary hearing under these circumstances.

The general rule concerning habeas evidentiary hearings was established prior to the passage of AEDPA in *Townsend v. Sain*, 372 U.S. 293 (1963) (holding that a federal court must grant an evidentiary hearing under any one of several circumstances, including when there is a substantial allegation of newly discovered evidence). Except as modified by AEDPA, "[t]hat basic rule has not changed." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). As a threshold matter, the petitioner must allege facts which, if proved, would entitle him to relief. *Townsend*, 372 U.S. at 312. The district court is not required to grant a hearing where "the record refutes the applicant's factual allegations or otherwise precludes habeas relief." *Schriro*, 550 U.S. at 474. But district courts regularly conduct evidentiary hearings to determine whether a petitioner has presented sufficient evidence of

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threatened anyone and Webb never saw Cervantes point a gun at her. Pet. App. A32-A33, ¶¶ 5, 6; RT 431-432).

actual innocence to excuse procedural defaults vis-à-vis the *Schlup* gateway. *See, e.g., Clark v. Cate,* 581 Fed. Appx. 654, 657 (9th Cir. June 27, 2014); *Larsen v. Soto,* 730 F.3d 930 (9th Cir. 2013); *Souliotes v. Hedgpeth*, 2012 U.S. Dist. LEXIS 58689, *23-25 (E.D. Cal. April 26, 2012); *Johnson v. Knowles,* 541 F.3d 933, 937 (9th Cir. 2008); *Jaramillo v. Stewart*, 340 F.3d 877, 883-84 (9th Cir. 2003); *Majoy v. Roe*, 296 F.3d 770, 776 (9th Cir. 2002).

Although the district court concluded that an evidentiary hearing was not required because "even crediting Zad-Behtooie's declaration, Petitioner is not entitled to pass through the *Schlup* gateway, Pet. App. A30 n.27 (citations omitted), as discussed above, that's not true. And the state's sur-reply made clear that there were substantial disputes as to the merits and reliability of Zad-Behtooie's declaration, including the state's position that it is "unreliable and incredulous," (Dist. Ct. Dkt. 63, at 5), and that the evidence against Cervantes was "overwhelming," (Dist. Ct. Dkt. 61, at 5). Moreover, because the declaration cast doubt as to the Court of Appeal's interpretation of Webb's testimony, an evidentiary hearing would have aided in determining whether Zad-Behtooie's statement established actual innocence in relation to the other witnesses' recollection. Thus, Cervantes at least should have been entitled to an evidentiary hearing, and because jurists of reason might agree with him on that point, a COA should have been granted to permit him to make that argument on appeal.

The Ninth Circuit's order denying a certificate of appealability fails to heed this Court's clear pronouncements about when a reviewing court should issue a

COA. This case thus provides an opportunity for this Court to ensure that the Ninth Circuit gets back in line with the rest of this nation's circuit courts in correctly applying the low bar required for granting a certificate of appealability and to allow this Court to preserve habeas corpus's vital role in our system of justice. This Court should therefore grant the petition for a writ of certiorari.

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARD FOR A CIRCUIT COURT'S EXPLANATION WHEN IT DENIES A CERTIFICATE OF APPEALABILITY.

Mr. Cervantes's COA application presented an important question on the application of the actual innocence gateway to excuse the untimeliness of habeas corpus petitions—and to permit a man who is actually innocent of multiple attempted murders for which he is serving multiple consecutive life sentences the opportunity to litigate his constitutional claims in habeas corpus. But without any analysis or stated reasoning, the Ninth Circuit denied the certificate of appealability. Just as a district court must provide some reasoning for its sentencing decisions, and agencies must provide some basis for the exercise of their decision-making power, the Circuit should be required to state some minimal reasoning for its decision to deny a certificate of appealability.

Due process requires at least a minimal explanation for denial of a certificate of appealability. Indeed, it's unclear here why the Ninth Circuit declined to grant a COA. Though the Court was presented with these arguments, its order reflects no discussion of any of these points. In its one-page order, the Court merely quoted the

standard for a certificate of appealability and denied the application without explanation. Due process requires more.

A court's adequate explanation of its decision is a necessary component of due process. Indeed, this Court has insisted that sentencing judges "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall v. United States*, 552 U.S. 38, 50 (2007). A requirement of a statement of reasons at sentencing has been held to "further[] the proper administration of justice" by "communicat[ing] that the parties' arguments have been heard, and that a reasoned decision has been made." *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc). Four courts have gone so far as to say that the failure to make such an explanation is prejudicial plain error, without a specific showing of prejudice. *See United States v. Lewis*, 424 F.3d 239, 247-49 (2d Cir. 2005); *In re Sealed Case*, 527 F.3d 188, 193 (D.C. Cir. 2008); *United States v. Blackie*, 548 F.3d 395, 402-03 (6th Cir. 2008); *United States v. Parks*, 823 F.3d 990, 997 (11th Cir. 2016).

In the same vein, this Court has held that a most "basic procedural requirement" applicable to administrative agencies is that they "give adequate reasons for [their] decisions. *Encino Motorcars, L.L.C. v. Navarro*, 136 S. Ct. 2117, 2125 (2016). That is not to say that the explanation need be encyclopedic in all cases; the requirement is satisfied where "the agency's explanation is clear enough that its 'path may reasonably be discerned.'" *Id.* (citation omitted). But "where the

agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Id.*

While the Ninth Circuit has been happy to heap on requirements on the district court's exercise of its decision-making authority, it has adopted a postcard-denial format for certificates of appealability. This is error because the denial effectively prevents this Court from reviewing the lower court's decision. There is no way to tell, from the Ninth Circuit's order, whether it made some error in the legal standard for a COA—which is extraordinarily low—or whether it harbored some factual misunderstand about the record. Indeed, it's not apparent from the face of the order whether the court was even aware of all of the Petitioner's claims. There is, in *Encino Motorcar*'s parlance, nothing from which the Court's "path may reasonably be discerned." *Encino Motorcars*, 136 S. Ct. at 2125. It's one thing to do so in a context where review is discretionary and where there is no higher court in which to seek review, as when a state's highest court or this Court deny review. It's another to do so in the context of a certificate of appealability.

Due process is violated by arbitrary and capricious government conduct. Here, the Ninth Circuit's failure to provide even minimal reasons why the arguments above do not satisfy the low bar for granting a certificate of appealability violated due process. And, if this Court will not clarify the Circuit's responsibility to provide a meaningful—if minimal—explanation for the reason for denying a COA, there is no other entity that will.

The Court should grant the writ of certiorari.

CONCLUSION

For all the foregoing reasons, Petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

AMY M. KARLIN
Interim Federal Public Defender

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/s/ Jonathan D. Libby

JONATHAN D. LIBBY
Deputy Federal Public Defender
Counsel of Record
Attorneys for Petitioner