

No. _____

19-8159

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY RAMIREZ

— PETITIONER

(Your Name)

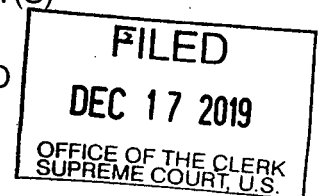
vs.

JOE ALLBAUGH, Director ODOC

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ORIGINAL



United States Court Of Appeals For The Tenth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jeffrey Ramirez

(Your Name)

Davis Correctional Facility, 6888 E. 133rd Rd.

(Address)

Holdenville, Oklahoma 74848

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

(1) When is it permissible for application of the time bar of AEDPA, without due consideration of the evidence provided throughout a diligently pursued actual innocence claim, that was not presented at trial by counsel, though counsel was aware of the fact?

(2) When a Petitioner follows the local court rule for submission of extra pages in his post-conviction and the court denies the submission, striking it from the record, is such action to be held as an improper filing for the purpose of denying habeas submission to the federal court although the record clearly reflects the appeal process was diligently pursued?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Loftis v. Chrisman, No. 15-7017, U.S. Court Of Appeals for the Tenth Circuit. Judgment entered February 10, 2016.

Finch v. McKoy , No. 17-6518 , U.S. Court Of Appeals For the Fourth Circuit. Judgment entered January 25, 2019.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix I 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☒ is unpublished.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 J 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 E 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 District Court of Oklahoma County court appears at Appendix K 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 12, 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: July 25, 2019, and a copy of the order denying rehearing appears at Appendix L.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including Dec. 23, 2019 (date) on Oct. 18, 2019 (date) in Application No. 19 A 416.

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 July 7, 2017. A copy of that decision appears at Appendix E.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Six

United States Constitution, Amendment Fourteen

Oklahoma Constitution, Article II, § 7

Oklahoma Constitution, Article II, § 20

STATEMENT OF THE CASE

The District Court Abused its Discretion by Failing to Find that the Actual-Innocence Gateway Applied in Petitioner's Case.

The Supreme Court has determined the AEDPA statute of limitations can be overcome by a showing of "actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 400 (2013). "[A] credible showing of actual innocence provides an outright equitable exception to AEDPA's statute of limitation." *Doe v. Jones*, 762 F.3d 1174, 1182 (10th Cir. 2014)(internal quotation omitted). To demonstrate actual innocence, a petitioner must establish that a reasonable juror viewing new and reliable evidence in light of the evidence, more likely than not, would not have found the petitioner guilty beyond a reasonable doubt. *Schulp v. Delo*, 513 U.S. 298, 329 (1995). To satisfy the actual-innocence standard, a claim must be "credible," meaning that it must be supported by new reliable evidence - "whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." *Id.* at 324. Here, Mr. Ramirez has established that a reasonable juror, viewing the content of the newly-discovered evidence secured by Oklahoma Indigent Defense System (OIDS) Investigator Jolene Perham, would not have found this Petitioner guilty beyond reasonable doubt. Hence, the district court abused its discretion by failing to apply the actual innocence exception to the statute of limitations.

Mr. Ramirez presented a free-standing actual-innocence claim in his post-conviction application to the Oklahoma County District Court. ROA at 147-54, 166-68. Ultimately, the OCCA affirmed the district court's denial of post-conviction relief. ROA 186-92. In evaluating Ramirez's "actual-innocence gateway" claim, this court need not review the OCCA's adjudication of Petitioner's stand-alone actual innocence under the deferential standard set out in § 2254(d).

STATEMENT OF THE CASE **cont.**

See Sharpe v. Bell, 593 F.3d 372, 378 (4th Cir. 2010)(holding § 2254(d) does not apply "[w]ith respect to a *Schlup* claim of actual innocence" because "[s]tate courts have no occasion to adjudicate a *Schlup* claim as such"); *Blackmon v. Williams*, 823 F.3d 1088, 111 n.2(7th Cir. 2016) (discussing *Sharpe* and assuming "that no § 2254 deference [was] due to the state court's resolution of [Petitioner's] actual innocence claim").

In support of his claim of actual innocence, Petitioner presented a memo drafted by direct-appeal investigator, Jolene Perham, dated April 18, 2014, ROA at 166-168. This memo reports the substance of Ms. Perham's April 11, 2014 interview with Gina Saulcedo, Petitioner's girlfriend at the time of the crime. (Appendix A) Ms. Saulcedo's statement indicate that on the night of July 15, 2012, the night before the crime, she, her children, and Mr. Ramirez attended a barbecue at the home of her mother, Lucia, another potential witness to the fact of innocence. They left Lucia's home some time between 2:30 a.m. and 3:00 a.m. on the morning of July 16, 2012, and they returned to their home. Shortly after arriving home, Ms. Saulcedo witnessed Homero Macias, the victim in the case, drive by and shoot at her home. Fearing for her safety, Ms. Saulcedo and Petitioner took the children back to Lucia's house around 3:00 a.m.

Next, Ms. Saulcido and her mother went to the home of Homero Macias's mother; Mr. Ramirez stayed with the children at Lucia's home. After Ms. Macias did not answer the door, Ms. Saulcedo and her mother returned to her mother's home. Ms. Saulcedo, her children, and the Petitioner at that time returned to their home, put the children to bed, and went to sleep themselves around 4:00 a.m. Homero Macias was shot and killed around 6:30 a.m. that morning. ROA at 180. Later that morning, Ms. Saulcedo was woken up by a call from Macias' mother who informed Ms. Saulcedo that Homero had been killed. ROA at 167.

The substance of Ms. Saulcedo's statement to Ms. Perham provides an alibi for Petitioner at the time of the crime, as well as information as to another witness who would confirm the fact

STATEMENT OF THE CASE cont.

that Petitioner was not involved in the theory of the murder the state put forth for the jury. The theory of defense at trial was that the Petitioner was not the perpetrator of the crime. ROA at 179. An alibi defense would have exponentially strengthened Petitioner's defense. Viewing this new alibi evidence in light of all the evidence, a reasonable juror, more likely than not, would not have found Petitioner guilty beyond a reasonable doubt.

"New" evidence for the purpose of the actual-innocence gateway must be "relevant evidence that was either excluded or unavailable at trial." *Johnson v. Medina*, 547 F. App'x 880, 885 (10th Cir. 2013)(unpublished), quoting *Schlup*, 513 U.S. at 327-28. This Court takes a limited view as to what evidence qualifies as "new." Specifically, this Court has held that evidence is not "new" if it could have been presented at trial. *See, e.g., Medina v. Archuleta*, 651 F. App'x 782, 784 (10th Cir. 2016)(unpublished); *Titsworth v. Mullin*, 415 F. App'x 28, 31 (10th Cir. 2011) (unpublished); *United States v. Starr*, 275 F. App'x 788, 789 (10th Cir. 2008)(unpublished) But other courts have found evidence is "new" if it simply *was not* presented at trial. *See, e.g., Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003); *Freeman v. Trombley*, 483 F.App'x 51, 57 (6th Cir. 2012)(unpublished). Because Ms. Saulcedo did not testify at Petitioner's trial, because defense counsel called no witnesses on Petitioner's behalf (ROA at 148), her alibi evidence most certainly qualifies as "new" under the more expansive view of the Seventh, Ninth, and Sixth Circuits.

This alibi evidence is reliable. Reliable evidence is not limited to the examples set out in *Schlup* - exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence. *Schlup*, 513 U.S. at 324. A correct reading of *Schlup* reveals that the examples were not meant to be an exhaustive list of everything upon which an actual-innocence claim may be based. The Court in *Schlup* specifically stated that "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial." *Id.* at 330. *See also Souter v. Jones*,

STATEMENT OF THE CASE cont.

395 F.3d 577, 593 n.8 (6th Cir. 2005). As does the newly discovered evidence Petitioner presented.

Petitioner was convicted at trial for the crime of First Degree Murder in Oklahoma County, State of Oklahoma, Case No. CF-12-5232, and sentenced to life with parole on October 1, 2013. The appeal was filed by the Oklahoma Indigent Defense System on May 7, 2014, case no. F-2013-933, raising three (3) propositions of error.

Proposition I: That the trial court committed reversible error by permitting hearsay statements from the deceased that pervaded the proceedings and violated appellant's right to confront the witnesses against him under the Sixth, and Fourteenth Amendments of the United States Constitution and Article II, §§ 7, and 20 of the Oklahoma Constitution.

Proposition II: Appellant was denied effective assistance of counsel in violation of his rights under the Sixth, and Fourteenth Amendments to the United States Constitution and Article II, §§ 7, and 20 of the Oklahoma Constitution.

Proposition III: The accumulation of error in this case deprived Mr. Ramirez of due process of law in violation of the Fourteenth Amendments to the United States Constitution and Article II, § 7, and 20 of the Oklahoma Constitution.

Appellate counsel also filed an Application for Evidentiary Hearing on Sixth Amendment Claims raised at Proposition II.

The Oklahoma Court of Criminal Appeals affirmed the conviction on December 5, 2014, (Appendix B). Appellate counsel filed a Motion for Suspended Sentence in the Oklahoma County District Court on December 10, 2014. The motion was denied August 17, 2015.

On November 5, 2015, Petitioner, acting pro se, filed an Application for Post Conviction Relief in the Oklahoma County District Court. In his application he presented Four (4) Propositions of error.

STATEMENT OF THE CASE cont.

Proposition One: Petitioner's rights under the 14th Amendment were violated by the fact, based on evidence presented at trial, that no rational trier of fact could or should have found proof of guilt beyond reasonable doubt.

Proposition Two: Due process violation due to failure of the court to properly instruct the jury on the lesser included offense.

Proposition Three: Effective assistance of counsel.

Proposition Four: Petitioner was deprived of effective assistance of appellate counsel when counsel neglected to submit newly discovered material evidence, secured by an Investigator for the Oklahoma Indigent Defense System, of actual innocence to the court, and based upon the evidence request an evidentiary hearing. A hearing that not only would have supported fact of ineffective assistance of trial counsel, but utterly disproved the highly circumstantial evidence the prosecution used to obtain the conviction.

The court struck the application from the record on November 17, 2015 for violation of the twenty (20) page limit required under Rule 37 (B), Rules of the 7th and 26th Judicial Districts (Appendix C) with no mention of the Federal rights asserted in the application. The 'Oklahoma Court Rules and Procedures, Volume I - State', Judicial District Rules for the Seventh and Twenty-Sixth Judicial Districts, page 1270, Rule 37, states in relevant parts:

B. All motions, applications and responses thereto, including briefs, if required by Rule 4 of the Rules for District Courts, shall not exceed twenty (20) pages in length, excluding exhibits, without prior permission of the assigned judge. Reply briefs shall be limited to five (5) pages in length. **Page limitations herein exclude only the cover, index, appendix, signature line and accompanying information identifying attorneys and parties, and certificate of service.** No further briefs shall be filed without permission of the assigned judge. The use of footnotes is discouraged.

E. Any motion and/or brief filed in violation of this Rule shall not be considered by the assigned judge and shall be stricken from the record.

(Emphasis included)

STATEMENT OF THE CASE cont.

This Court determined in *Davis v. Wechsler*, 263 U.S. 22, 24, 68 L. Ed. 143, 143, 44 S. Ct.

13 (1923):

Whatever springs the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice...The state courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of Federal right. The principle is general and necessary. *Ward v. Love County*, 253 U.S. 17, 22, [. . .]. If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill v. Grand Lodge*, K

After the Rule violation was brought to his attention, in conformity to and direction of the Rule, Petitioner filed a Motion To Exceed Page Limit on the 30th day of November, 2015. As a matter of state law, this was a properly filed post conviction. *Robinson v. Golder*, 443 F.3d 718, 720 (10th Cir. 2006)(holding that a state post-conviction application is "properly filed" for tolling purposes "if it satisfies the State's requirement for filing such pleading").

Petitioner followed the state law for filing his post conviction, as well as the local Rule 37 after being made aware of it. Unlike what the state tends to imply, he is not restricted to a single filing of the post conviction when submission is struck from the record as if it had never been filed. Nor does the law allow that an improperly submitted application bars any further submissions on issues not adjudicated in previous filings.

Oklahoma State Statute, **Title 22 § 1080** states:

Any person who has been convicted of, or sentenced for, a crime and who claims:

- (a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;
- (b) that the court was without jurisdiction to impose sentence;
- (c) that the sentence exceeds the maximum authorized by law;
- (d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

STATEMENT OF THE CASE cont.

(e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

Title 22, § 1081:

A proceeding is commenced by filing a verified "application for post-conviction relief" with the clerk of the court imposing judgment if an appeal is not pending. When such a proceeding arises from the revocation of parole or conditional release, the proceeding shall be commenced by filing a verified "application for post-conviction relief" with the clerk of the district court in the county in which the parole or conditional release was revoked.

Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct. The Court of Criminal Appeals may prescribe the form of the application and verification. The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the district attorney.

22, § 1084:

If the application cannot be disposed of on the pleadings and record, or there exists a material issue of fact, the court shall conduct an evidentiary hearing at which time a record shall be made and preserved. The court may receive proof by affidavits, depositions, oral testimony, or other evidence and may order the applicant brought before it for the hearing. A judge should not preside at such a hearing if his testimony is material. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment.

22 § 1086. Subsequent Application

All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

It was not until August 5, 2016 that the Oklahoma County District Court denied Petitioner's

STATEMENT OF THE CASE cont.

motion to exceed the page limit, and again struck the filing from the record (Appendix D), with not as single Federal right addressed. This action restarted Petitioner's habeas tolling. On August 25, 2016, Petitioner filed another submission of his application for post conviction within the twenty page requirement. This also constituted a properly filed application for post conviction relief before the expiration of his habeas tolling period. On February 21, 2017 the district court denied Petitioner's request for post conviction relief. On July 7, 2017 the Oklahoma Court of Criminal Appeals affirmed the denial of post conviction relief (Appendix E).

By Petitioner's assessment of applicable tolling, he had until August 6, 2017, to have his habeas submitted. He filed his habeas by placing same in the prison legal mail system of the Davis Correctional Facility on the 4th day of August, 2017, raising at *Ground One*, "Allowance of hearsay statements were in violation of Petitioner's 6th and 14th Amendment rights, and Article II, §§ and 20 of the Oklahoma Constitution." *Ground Two*, "Ineffective assistance of counsel." *Ground Three*, "Accumulation of errors at trial deprived Petitioner of due process." *Ground Four*, "Actual Innocence." *Ground Five*, "Failure to instruct on lesser included offense." *Ground Six*, "Ineffective assistance of appellate counsel."

The Magistrate Judge for the United States District Court for the Western District District of Oklahoma found Petitioner's petition untimely and recommended dismissal. (Appendix F) Petitioner exercised his right to object, arguing that he had followed the Rules the court pointed out to him for his subsequent filings of his post conviction, all well short of the timeline permitted for filing a habeas, and the inordinate delay in replying to his submissions after they were submitted in accord with Rule 37 falls upon the district court of Oklahoma County. The Chief Judge of the U.S. District Court [Document 13, pg. 3](Appendix G), stated "A pro se litigant could reasonably view the request for leave to exceed the page limit and to, in effect, reconsider the non-complying application, as something that need to be resolved before further filings or

STATEMENT OF THE CASE cont.

proceedings would be necessary or appropriate. And the timing of the state court's disposition of the motion for leave was beyond petitioner's control." The situation circumstances sufficiently extraordinary, to be a basis for equitable tolling. Concluding (Page 4) "both equitable and statutory tolling are applicable here, and therefore concludes the petition was timely filed." The case re-referred to the Magistrate for further proceedings.

The state was directed to respond to Petitioner's habeas, and filed a motion to dismiss the petition as time barred, arguing that Petitioner's post-conviction submission to the state district court was improper and as such was not subject to statutory tolling for a post conviction application. The state argued that each submission of the application for post conviction that was denied by Rule 37 was an improper submission and therefore could not overcome AEDPA tolling. The state did not address the fact that a properly submitted post conviction application with a motion to exceed the page limit, in accord with Rule 37, does constitute a properly filed application, and thereby stopped tolling. As the Chief Judge had already assessed.

Petitioner did not submit multiple applications for post conviction relief, he submitted the same post conviction each time he filed into the district court. The first submission was three (3) pages over the local rule for submission without an accompanying motion to exceed the page limit. It was rejected and stricken for not meeting the twenty page allowance of the local court rule. (Appendix C). His next, quickly resubmitted application had the required motion to exceed filed with it, as directed by Rule 37. This made his submission properly filed by provision of the local Rule 37, and Petitioner was well within his tolling timeline. The district court did not issue an order on the motion to exceed, or the post-conviction until well past Petitioner's tolling timeline for habeas, again directing that the submission be stricken from the record (Appendix B). Within days Petitioner had his application for post conviction shortened by three (3) pages and resubmitted to the district court, which was denied February 21, 2017. This initiated the state

STATEMENT OF THE CASE cont.

court exhaustion process through the Oklahoma Court of Criminal Appeals.

See also *Loftis v. Chrisman*, 812 F.3d 1268, 1272-73 (2016) where the court declared:

In sum, Petitioner made reasonable, diligent efforts to comply with state law under the unique circumstances he faced, and the state district court "led [him] to believe that he. . . had done all that [was] required under the circumstances" (...) *Burger*, 317 F.3d at 1142. The record clearly shows that Petitioner did not sleep on his federal rights, but rather diligently pursued his habeas claims through a state court process that he reasonably believed to be sufficient. *See id.* Thus, as in *Burger*, we conclude that the district court abused its discretion in denying Petitioner's request for equitable tolling of the statute of limitations in this case.

Accordingly, the court Reversed and Remanded for further proceedings.

Petitioner believes he had the right to file an appeal of his case by his understanding of the Oklahoma Post Conviction Procedures Act, and by statute he was not limited to a single post conviction when the issues presented were not properly presented or adjudicated. **22 § 1086.**

The Federal Magistrate's Supplemental Report and Recommendation [Document 25] at page 13 recommended "Because Respondent had not received notice or an opportunity to present his position on the issue of timeliness" the Chief Judge reconsider his finding that equitable tolling applies in the matter, and time bar Petitioner. The Magistrate neglected to address the fact that the Chief Judge had previously determined both equitable and statutory tolling were applicable in Petitioner's situation, and the local rule of such ambiguity that it could easily be considered a part of the submission process. The Magistrate again neglected to address the fact of Petitioner's actual innocence claim and new evidence in support thereof.

At no point did the Federal District Court address Petitioner's claim of actual innocence, or the evidence he provided.

The evidence offered by Petitioner brings to light at least two people who could have, and should have testified at the trial, but for defense counsel's errors were never put on the stand.

Evidence that not only puts to question the state's unsupportable claims of Petitioner's

STATEMENT OF THE CASE cont.

involvement in the death of the victim. This evidence also supports statements given to the police following the crime by Alejandrina "Alex" Ortiz, and her sister Isela Ortiz Guerrero, who were partying with the victim's friends and fellow gang members the evening of the victim's death. (Appendix H) The information they provided the police during investigation that morning excluded Petitioner from any part in the death of the victim. These statements were attached to Petitioner's "Application For Evidentiary Hearing On Sixth Amendment Claims," as 'Exhibits A and B.'

Had trial counsel bothered to place Ms. Saulcedo on the stand, as well as her mother, then brought to the juries attention the statements given to police by the sisters above named the very morning of the crime no reasonable minded juror would have found reasonable support to convict Petitioner of any crime. Especially one at least two witnesses could provide proof that he could not have done as the prosecution claimed. This testimony of fact would have clearly supported the statements made to the police by the sisters the morning of the crime. These facts would have also proven that the eye witness did not see Petitioner at the crime, that she did in fact see a man with a tattoo on his neck (as she told investigator the morning of the crime), which Petitioner does not have. Testimony from Ms. Saulcedo and her mother would have completely destroyed the state's theory of who was the killer.

Petitioner's trial counsel dropped the ball and deprived Petitioner of material evidence that would have brought to the forefront the fact that Petitioner did not, and could not have, committed or been involved in the crime, and raised question as to the fact that testimony at trial did not match what the investigators were informed on the morning immediately following the crime.

Likewise, Appellate counsel on the direct appeal who secured this information then failed to present it to the court of appeal as free standing actual innocence claim, or as support to the fact

STATEMENT OF THE CASE cont.

that trial counsel was drastically ineffective for not putting these two witnesses on the stand to testify as to where Petitioner actually was during the time that the prosecution theorized he was involved in crime.

The Tenth Circuit Court of Appeals did not address the actual innocence claim beyond waiver for not properly presenting such as "an equitable exception to § 2244(d)(1)." [Document 01011088519, page 7, footnote 3] Reasoning that due to his appellate counsel's failure he "forfeited appellate review of whether actual innocence acts as an equitable exception."

However, Petitioner did submit an ineffective assistance of appellate counsel claim in his application for post conviction based on this very fact. This claim also left unaddressed due to application of time bar by the federal courts.

Petitioner is actually innocent of the crime he is imprisoned for and has been wrongfully denied consideration of the facts and evidence presented to the courts throughout his appeal process. He is a layman and has not been properly provided the protections of *Haines v. Kerner*, 404 US 519, 520, 30 L Ed 2d 652, 92 S Ct 594 (1972). Any failure to fully consider all the facts and evidence relevant to the crime due to his inadvertent misunderstanding in the process, as the state claims, is a denial of justice, and allows an innocent man to be imprisoned in the United States.

This is something This Court has not allowed by any means. Such a claim as Petitioner has presented does not hinge on time lines. His has been wrongful conviction of a crime he did not commit, and has shown evidence to this fact. He has been wrongfully incarcerated and restrained of liberty without the deference, and full consideration of the facts, that should be attributed to a pro se litigant that this case demands.

Petitioner, Jeffrey Ramirez , PRAYS this Honorable Court will review the case and direct appropriate action to protect his rights as a citizen of the United States and an innocent man

STATEMENT OF THE CASE cont.

wrongfully convicted and denied proper review of his claim as a pro se litigant.

REASONS FOR GRANTING THE PETITION

Petitioner is wrongfully incarcerated for a crime he did not commit, and the material evidence he provided has Not to date been properly reviewed, or assessed, for relevancy or merit by any court in accordance with this Court's directives regarding review of material evidence and actual innocence claims.

Ms. Saulcedo, Petitioner's girlfriend at the time of the crime, provided a statement to appellate counsel relating the fact that Petitioner did not and could not have been the perpetrator of the murder, or involved in any manner the state theorized. She also provided a witness who could corroborate her statement of the facts. Her statement directly contradicts hearsay trial testimony of the victim's mother, and finds support in statements provided police the morning of the shooting from other state witnesses.

Not one of the people interviewed at the time related any information that could be remotely attributed to Petitioner or his vehicle. The only eye witness stated the morning of the shooting that the person she claimed to be the Petitioner had a large tattoo on the side of his neck. Yet, Petitioner has never had a tattoo of any size on his neck. She also described a vehicle leaving the scene of the shooting that was not Petitioner's.

A single shell casing matching those recovered from the murder scene was found under the back seat of Petitioner's SUV. As far as he is aware no weapon had ever been fired from inside his vehicle. At no time was he or his vehicle subjected to a powder residue testing. The witnesses were clear, the shooting took place on the street. No gun was found, and all the shell casings were recovered on site, yet trial counsel failed to raise a question as to how the shell casing ended up in Petitioner's vehicle.

Other witnesses related information not remotely suggestive that Petitioner participated in

anything that took place through the evening and into the morning of the victim's death.

Information was provided the police of overheard conversations with the victim detailing a conflict between the victim and a rival gang, and provide a vehicle description for those in that conflict that was contrary to Petitioner's.

The circumstantial evidence relied upon by the state went uncontested as result of an abject failure of trial attorney to utilize readily available and abundant evidence to prove Petitioner innocent of any wrongdoing. Any failure to properly review and assess the evidence provided with a full hearing and entry of testimony into the record is a travesty and denial of justice.

CONCLUSION

Reverse and Remand to appropriate Court for hearing, and ruling on claim of actual innocence and supporting proof of evidence.

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Jeffrey Ramirez

Date: 12.16.19