No. 20-7295

IN THE SUPREME COURT OF UNITED STATES

Isidro Sauceda, Petitioner,

v.

David Shinn, Director of Arizona Department of Corrections, and the Attorney General of the State of Arizona, Respondents

On Petition For Writ Of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Sup. Ct. R. 44.2, Petitioner Isidro Sauceda ("Petitioner") respectfully requests this Court for an order (1) granting rehearing, (2) vacating the Court's April 19, 2021, order denying certiorari, and (3) accepting certiorari in order to resolve the split between the Fifth Circuit versus the Sixth and Tenth Circuits in determining whether a court should be able to issue a blanket denial of certificate of appealability without violating the Petitioner's due process rights.

This case involves Petitioner, an innocent man, who was convicted of first-degree murder[1] and sentenced to prison for the rest of his life on nothing more than circumstantial evidence. At all times, he proclaimed his innocence to the charges. The State's theory of the circumstantial case against Petitioner was that he was in a gang and, therefore, implicitly should have been found guilty. The "gang" theory was in turn based on the State's theory that Petitioner was wearing "red" including a "red rag" on the night in question, a color associated with the criminal

[1] Two counts of attempted first-degree murder, one count of aggravated assault, and one count of assisting a criminal street gang.

street gang. This "red" connection was stressed throughout the trial, beginning with the opening statement, continuing with the questioning of witnesses, and emphasized again in closing argument.

However, during the pendency of the appeals, counsel undersigned found two witnesses who were never even called by his defense counsel to testify before the jury. Both witnesses submitted affidavits which reflected that Petitioner was ***not*** in a gang, was ***not*** wearing red on the night in question, and did ***not*** have a weapon. These key witnesses, if defense counsel would have called them to testify, could have exonerated Petitioner at trial.

Without this Court's intervention, Petitioner will never receive the chance to present his appellate claims on the merits. Unless this Court of last resort steps in, Petitioner, an innocent man, will be forced to languish in prison for the rest of his life. The district court's preemptive *sua sponte* blanket denial together with Ninth Circuit's blanket denial of a COA in this case constitutes a travesty of justice.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") brought forth a drastic change to the appealability regarding the denial of habeas relief. Under the AEDPA, in order to

have an appeal heard on the merits, a petitioner is required to receive a certificate of appealability ("COA") from either the trial court or the appellate court. The appellate court can issue a COA when a petitioner demonstrates "a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). This standard is satisfied by demonstrating that "jurists of reason could disagree with the district court's resolution of his constitutional claims[.]" *Id.* at 327; *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As this Court has reasoned, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338; *see also Buck v. Davis*, 137 S. Ct. 759, 774 (2017).

As the Supreme Court stated in *Miller-El*, "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of each claim." *Miller-El*, 537 U.S. at 337. This function has been described as "a 'gatekeeping' function'" used to "screen out issues unworthy of judicial time and attention and ensur[ing] that frivolous claims are not assigned to merits panels." *Rose v. Guyer*, 961 F.3d 1238,

1243 (9th Cir. 2020) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012)).

In *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) the Sixth Circuit determined that the blanket and preemptive denial of a COA was improper. In *Herrera v. Payne*, 673 F.2d 307, 307 (10th Cir. 1982), the Tenth Circuit also vacated the blanket denial of a COA even though the denial referred to the extensive analysis in the decision to deny habeas relief.

In the present case, both the District Court and the Ninth Circuit issued blanket denials of the Petitioner's request for a COA. In the District Court, the Magistrate Judge's Report and Recommendation, adopted by the district court judge, included the statement: "The undersigned recommends that, should the Report and Recommendation be adopted and, should Sauceda seek a certificate of appealability, a certificate of appealability should be denied because he has not made a substantial showing o the denial of a constitutional right." (Report and Recommendation, p. 26). While Petitioner filed specific objections to the Report and Recommendation, he never had the chance to request a COA from the District Court. On April 29, 2020, just two days after

Petitioner's objection to the Report and Recommendation was filed, the District Court issued an order which reads in pertinent part: "A request for certificate of appealability will be denied because Petitioner has not made a substantial showing of the denial of a constitutional right about which reasonable jurists would disagree." (Order and Denial of Certificate of Appealability, 4/29/2020, p. 2). Similarly, the Ninth Circuit, upon Petitioner's request for a COA issued a one sentence denial of the COA reading: "The request for a certificate of appealability (Docket Entry No. 2 is denied because appellant has not made a 'substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)." The refusal to grant certificates of appealability by both the district court and the Ninth Circuit were blanket denials where none of the claims presented by Petitioner were analyzed on the merits.

In the Sixth Circuit decision of *Murphy*, the inmate challenged the denial of his request for COA before he even applied for such. *Murphy*, 263 F.3d at 467. The *Murphy* court, quoting *Porterfield v. Bell*, 258 F.3d 484, 486 (6th Cir. 2001), explained the reasoning why blanket grants or denials of a COA should not issue:

> Both of these approaches ***undermine the gate keeping function of certificates of appealability***, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability. Moreover, because the district court is already deeply familiar with the claims raised by petitioner, it is in a far better position from an institutional perspective than this court to determine which claims should be certified.

(Emphasis added). The *Murphy* court vacated the denial of a COA by the district court which was issued even before such was requested, as in Petitioner's case. In so doing, that court reasoned the denial was error because it "failed to provide any analysis whatsoever as to whether Murphy had made a 'substantial showing of the denial of a constitutional right.'" *Id.* at 467.

The facts in *Murphy* are virtually identical to the facts in the present case regarding the COA in the district court. Indeed, in *Murphy,* the Sixth Circuit discussed that a 92-page memorandum opinion and order was filed regarding the denial of the inmate's petition for habeas corpus. Similarly, in the present case, the Report and Recommendation adopted by the district court (although not 92 pages) was 26 pages long discussing all of Petitioner's claims. However, just as in *Murphy*, the denial of a COA was blanket and provided no analysis

regarding the constitutional claims raised. This approach denies a petitioner the right to have his habeas heard on the merits.

There exists a split in the authority between the Fifth Circuit versus the Sixth and Tenth Circuits regarding the blanket grant or denial of a COA. *Cf. Murphy*, 263 F.3d 466 and *Herrera*, 673 F.2d 307, with *Haynes v. Quarterman*, 526 F.3d 189 (5th Cir. 2008). In *Haynes*, the Fifth Circuit, regarding the issue of whether a COA should have been issued, determined that the memorandum opinion denying the petition for habeas corpus was specific enough to warrant the blanket *sua sponte* denial of a COA. *Haynes*, 526 F.3d at 194. The *Murphy* court, on the other hand, determined that even after setting forth the reasons denying habeas relief, the district court must consider each claim under *Slack*, 529 U.S. 473.

Petitioner submits that this Court should determine that the requirement announced in *Murphy*, that the preemptive blanket grant or denial of a COA, is improper. Rather, the appellate court should be required to provide an individualized analysis regarding each claim.

In the present case, Petitioner presented four different claims which established that it is debatable among jurists of reason that he

was denied a constitutional right. First, Petitioner claimed he was denied his due process right to the reasonable doubt standard when a lesser included offense instruction was not provided to the jury. Second, Petitioner claimed he received ineffective counsel due to trial counsel's failure to object to the lack of a lesser included offense instruction. Third, Petitioner claimed he received ineffective assistance of counsel when trial counsel failed to object to the lack of an instruction permitting the jury to make a negative inference against the State for lost, misplaced, or destroyed evidence. Finally, Petitioner claimed he received ineffective assistance of counsel when trial counsel failed to duly investigate exculpatory witnesses and evidence.

In *Beck v. Alabama*, 447 U.S. 625 (1980), this Court determined that it was a denial of due process and the right to the reasonable doubt standard to deny a charged person with lesser included offense instructions. *Id.* at 634 ("For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the 'third

option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted decision.").

In the present case, Petitioner was denied lesser included offense instructions. While Petitioner maintained his innocence, the innocence defense is not a bar to receiving a lesser included offense instruction. *United States v. Crutchfield*, 547 F.2d 496, 501 (9th Cir. 1977); *see also Beck*, 447 U.S. 625. Here, just as in *Beck*, Petitioner presented valid claims of the denial of due process and the reasonable doubt standard, both constitutional rights. A COA issued in *Lambright v. Stewart*, 220 F.3d 1022 (9th Cir. 2000) on the same issue regarding the lack of a lesser included offense instruction. Clearly, reasonable jurists could debate whether Petitioner was denied a constitutional right when he failed to receive a lesser-included offense instruction.

Second, Petitioner submits that he presented valid claims for the denial of his Sixth Amendment right to effective assistance of counsel. Trial counsel failed to object, or even create a record, regarding the lack of lesser-included offense instructions. Petitioner's trial counsel even submitted an affidavit, which Petitioner attached to his first state post-conviction relief petition:

> The most likely explanation or this is that there was an off-the record discussion about these particular instructions and the court denied them. It was my responsibility as trial counsel to object and make the necessary record so that the denial of these lesser-included instructions would be preserved for appeal. Assuming this is what happened, I failed to object and make the necessary record.

(Appendix, p. 214-15). As discussed above, the lack of a lesser-included offense instruction resulted in the denial of due process and the reasonable doubt standard. Additionally, by defense counsel's own admission, he was ineffective in his representation of Petitioner during trial.

This Court's landmark decision of *Strickland v. Washington*, 466 U.S. 668, 668 (1984) established that ineffective assistance of counsel required a two-part test: (1) defendant must show that counsel's performance was deficient; and (2) there is a reasonable probability that but for the errors the result of the proceeding could have been different. *Id.* at 687. Here, Petitioner's trial counsel ***admitted*** his performance was deficient. Moreover, that deficient performance resulted in requiring Petitioner to establish fundamental error (a drastically heightened appellate standard) in the denial of lesser-included offense instructions.

Clearly, jurists of reason could debate the denial of Petitioner's petition for habeas relief based upon this denial of a constitutional right. Indeed, in the Ninth Circuit decision of *United States v. Vargas-Lopez*, 243 F.3d 552 (9th Cir. 2000), trial counsel's admitted error of not executing a plea agreement was deemed to constitute ineffective assistance of counsel. While *Vargas-Lopez* involved a plea agreement, the same reasoning should apply here. In *Vargas-Lopez*, the defendant faced an increase in the counts to which he pled guilty, which in turn had the effect of increasing the offense level and sentencing guidelines, due to a lack of a stipulation to the low end of the guidelines. Here, with the lack of lesser-included offense instructions, not only did Petitioner face increased sentencing, but also faced the heightened standard of review of fundamental error, rather than harmless error which created a reasonable probability that, but for trial counsel's error, the outcome could have been different. Petitioner has presented a constitutional claim on which reasoned jurists could debate.

Third, Petitioner also submits that he received ineffective assistance of counsel regarding the denial of a jury instruction allowing the jury to make a negative inference against the State because it did

not preserve bullet/fragments for the Petitioner to test. In this case, Petitioner presented unchallenged evidence that the bullet/fragments were sent to the authorities. The testimony of Dr. Zacher, the surgeon who removed the bullet/fragments, reads in pertinent part: "We handed those directly off to the police officers usually waiting right outside of the operating room." (Appendix, p. 21). Moreover, Dr. Zacher's written medical report reads in pertinent part: "These bullets were sent to the authorities via the standard protocol." (Appendix, p. 215).

Petitioner has presented a claim that he was denied his constitutional right regarding the lack of a jury instruction about which reasonable jurists could debate. *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013) (an "insubstantial claim" is one that "does not have any merit or ... is wholly without factual support."). In the present case, not only does the testimony at trial establish that the State was in possession of the evidence, but also the surgical report of Dr. Zacher confirms such. However, despite all indications that the evidence was turned over to the authorities, Detective Lowe testified that the Glendale Police Department was not in possession of the bullets removed from a victim's head. Failure to object and receive the jury

instruction allowing the jury to make a negative inference against the state on this basis was not only deficient performance by counsel, but there is a reasonable probability that, but for the deficiency, the outcome could have been different.

Finally, Petitioner also presented a substantial claim regarding the denial of the constitutional right to effective assistance of counsel where trial counsel failed to investigate exculpatory witnesses. Indeed, failure to investigate is a denial of the constitutional right of effective assistance of counsel. *Rivera Alicea v. United States*, 404 F.3d 1, 3 (1st Cir. 2005); *Ryan v. Rivera*, 21 Fed. Appx. 33, 34 (2d Cir. 2001); *Gregg v. Rockview*, 596 Fed. Appx. 72, 76 (3d Cir. 2015); *United States v. Runyon*, 983 F.3d 716, 721 (4th Cir. 2020); *Smith v. Dretke*, 422 F.3d 269, 276 (5th Cir. 2005); *Cobble v. Smith*, 154 Fed. Appx. 447, 450 (6th Cir. 2005); *Carter v. Duncan*, 819 F.3d 931, 939 (7th Cir. 2016); *Harris v. Bowersox*, 184 F.3d 744, 756 (8th Cir. 1999); *Roberts v. Champion*, 18 Fed. Appx. 674, 677 (10th Cir. 2001); *Ojeda v. Sec'y for Dept. of Corr.*, 279 Fed. Appx. 953, 954 (11th Cir. 2008).

In the present case, while Petitioner's state post-conviction relief petition was pending, counsel undersigned was able to obtain two

affidavits, one from Sherise Ulibarri and the other from Steven DeLeon, which established that Petitioner could not have been the shooter. Both affidavits confirmed that Petitioner was not in a gang, was not wearing red clothing, and did not have any weapons or guns at any time. Neither of these witnesses testified during the guilt phase of trial. Clearly, jurists of reason could debate whether Petitioner was denied the Sixth right to effective assistance of counsel for failing to investigate exculpatory witnesses and testimony.

This Court of last resort is Petitioner's last chance to ever have his claims heard on the merits by an appellate court. Indeed, without waiting for any request from Petitioner, the district court adopted the Magistrate's Report and Recommendation and issued a blanket denial of a COA to Petitioner. The Ninth Circuit also issued a blanket denial of a COA to Petitioner in a one sentence order.

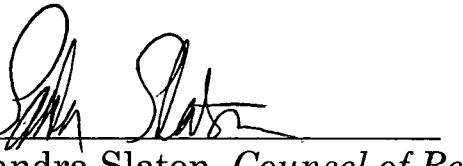
CONCLUSION

Petitioner requests this Court to adopt the position of the Sixth and Tenth Circuits, that no court should issue a blanket denial of a habeas petitioner's request for a COA. Rather, in accordance with the Fifth Amendment, as stated by the Sixth and Tenth circuits, courts

should be required to provide an individualized analysis regarding each claim presented by a habeas petitioner. Therefore, based upon the foregoing, Petitioner respectfully requests that this Court grant his Petition For Rehearing and accept certiorari in order to resolve the split in authority between the Fifth Circuit versus the Sixth and Tenth Circuits.

Dated: May 14, 2021.

Respectfully submitted,

By: 

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