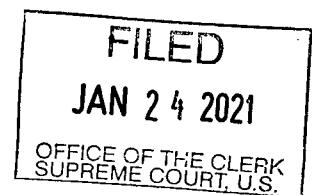


ORIGINAL

20-7328
No.



IN THE
SUPREME COURT OF THE UNITED STATES

ALBERTO MATIAS-MARTINEZ — PETITIONER
(Your Name)

vs.

DEAN WILLIAMS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ALBERTO MATIAS-MARTINEZ #81725, Pro Se
(Your Name)

AVCF, 12750 Hwy 96 Lane 13
(Address)

Ordway, Colorado 81034
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE LOWER COURTS ERRED IN FAILING TO FIND THAT Mr. MATIAS-MARTINEZ'S § 2254 HABEAS APPLICATION WAS TIMELY FILED, OR IN THE ALTERNATE, THAT HE WAS ENTITLED TO EQUITABLE TOLLING OF THE STATUTORY TIME LIMITATIONS SET BY §2244(D)(1)(A), DUE TO STATE-IMPOSED IMPEDIMENT OR BECAUSE HE IS ACTUALLY INNOCENT?

II. WHETHER THIS COURT, FOR THE BETTERMENT AND PROTECTION OF THE CITIZENS OF THESE UNITED STATES, MUST CLARIFY AND MAKE THE RULE ABSOLUTE FOR THE LOWER COURTS AND THE STATES IN REGARDS TO THE PROVISIONS SET FORTH BY THIS COURT IN MARTINEZ V. RYAN, 132 S.C.T. 1309 (2012), ALLOWING FOR EQUITABLE TOLLING OF THE STATUTORY LIMITATIONS SET BY 28 U.S.C. § 2244(D)(1)(A), UNDER SUBSECTION (B) OF THAT STATUTE, WHEN SUCH DEFAULT IS THE RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL?

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:

DEAN WILLIAMS, EXECUTIVE DIRECTOR COLORADO DEPARTMENT OF CORRECTIONS
AND

ATTORNEY GENERAL OF THE STATE OF COLORADO

RELATED CASES

Alberto Matias-Martinez, 19-CV-02993 (No. 20-1249) (10th Circuit)

Alberto Matias-Martinez, 19-CV-02993 (U.S. Dist. Court for Colorado)

People v. Matias-Martinez, 92CR873 (Weld County Colorado Dist. Court)

People v. Matias-Martinez, 14CA2142 (Colorado Court of Appeals)

People v. Matias-Martinez, 19SC271 (Colorado Supreme Court)

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CONSTITUTIONAL AUTHORITY

Fifth Amendment
Sixth Amendment
Fourteenth Amendment

PRO SE PLEADING

The Petitioner respectfully request that the Court notice the provisions of Haines v. Kernes, 404 U.S. 519, 520-21 (1972) which states in part, "In pro se pleadings, motions, and other papers, they must be construed liberally. As such, the pleadings should not be denied or dismissed merely because the pro se party fails to cite proper legal authority, confusion of various legal theories, poor syntax, sentence construction, or unfamiliarity with pleading requirements and give limited guidance."

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 A 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 B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 27, 2020.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

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

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS:

Fifth Amendment to the United States Constitution:

"No person shall be compelled, in any criminal case, to be a witness against himself nor be deprived of life, liberty, or property, without the due process of law."

Sixth Amendment to the United States Constitution:

"The accused has the right to the assistance of counsel in his defense."

Fourteenth Amendment to the United States Constitution:

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within jurisdiction the equal protection of the laws."

FEDERAL STATUTES:

§2254 (d) (2) :

"The State Court's decision resulted in a decision based upon an unreasonable determination of the facts."

§2254 (e) (2) :

"The petitioner shall demonstrate that a factual predicate that could not have been previously discovered through the exercise of due diligence exist."

STATEMENT OF THE CASE

In 1992, Mr. Matias-Martinez was convicted of two counts of felony murder pursuant to Colorado State Statute **§18-3-102(1) (b) C.R.S.** The predicate offense was attempted aggravated robbery pursuant to **§ 18-4-302 C.R.S.** These charges stemmed from the shooting deaths of Juan and Aurelia Lara, employers of Mr. Matias-Martinez, as well as many other undocumented migrant field workers, who were present on the day of the murders. Payroll was due that day and the Laras were transporting some \$26,000.00 dollars when they were ambushed and killed in their truck. Oddly, the payroll was not taken and found in the truck following their demise, as if the shooters were unaware of its existence.

The police were motivated to find and convict the persons responsible for the crimes, however, despite two persons' homes being in the immediate vicinity of the murders/killings of Juan and Aurelia Lara, it was not until several months later (and the following up of over one-hundred and twenty leads, that it was alleged that a bright yellow truck had been seen in the area of the murders.

It is important to note that neither of the two witnesses to the murders, one of whom lived within 150 feet of the crime and the other within 625 feet, said they saw this yellow truck. Rather, they identified a red and green car near the Lara's truck.

The facts of this case were set forth in detail in his state court post-conviction filings and in his Habeas Petition. They are long, detailed and support a claim of the actual innocence of Mr. Matias-Martinez.

In a nutshell, the facts of the case reflect that the Laras were murdered by Ramon Gonzales, and others, who were members of the Gallegos drug family or cartel. The Laras had confronted the Gallegos family, who had been selling to their field workers, informing them unless these ceased doing so, they would report them to the police. This threat incited the drug family to take

retaliatory action to protect their profits, i.e., the Laras had to be removed.

At the time the Laras were murdered, Mr. Matias-Martinez's wife, Tanya Mackey was involved in a sexual relationship with Ramon Gonzales. In fact she became pregnant with his child, a fact that later was proven to be true and created an impetus for her to fabricate her story initially. Ms. Mackey ultimately changed her story several times. While initially implicating Mr. Matias-Martinez in the Lara's murder, she later recanted, claiming first that her uncle held a gun to her head (an uncle she feared because he sexually abused her, which forced her to make such a statement), then later claimed the police coerced her. (It should be noted that Ms. Mackey's statements varied wildly from the actual physical facts of the case.)

Counsel sought to suppress Ms. Mackey's statements prior to trial to no avail. She was the only witness to place Mr. Matias-Martinez at the scene of the crime and without the original statement he would not have been convicted. It also should be noted that had trial counsel done his job and located alibi witnesses (Mr. Matias-Martinez's substantive claim pending before the trial court) i.e. field workers who were with him, it is clear that he also would not have been convicted. This may have been somewhat problematic as most were illegals and fled rather than to be apprehended by ICE, identified and deported.

As it turned out, the yellow truck seen in the area of the Lara's murders, belonged to another member of the drug gang who had been confronted by the Laras for selling drugs to their workers, i.e., Pablo Gallegos. (It was Mackey who said she saw Mr. Matias-Martinez point a gun at a person in a yellow truck.) Gallegos was interviewed and showed a photo array. Gallegos identified another from the photo array as the person who allegedly pointed a gun at him. The police then asked him if anyone else looked familiar and he identified Mr. Matias-Martinez.

The Laras were shot and killed by multiple caliber weapons, indicating there were multiple shooters. Mackey's statements said that Mr. Lara was shot while driving the truck and when Mrs. Lara got out of the truck and attempted to flee, she was shot in the back. In fact it was only Mackey's statement which connected Mr. Matias-Martinez to the shooting deaths of the victims, as no other person was able to identify him.

Mr. Matias-Martinez is an innocent man, who has been convicted and is serving a life without the possibility of parole sentence based solely on statements of a woman who had every reason and motivation to fabricate her story.

In Judge Gallagher's recommendations, he is dismissive of any claim of actual innocence on the part of Mr. Matias-Martinez, given that he was convicted of felony murder. Colorado's felony murder statute allows for the conviction of a person who did not actually commit said crime, if the other person intended to commit an underlying predicate felony (in this case attempted aggravated robbery), and someone, other than one of the participants in the underlying offense is killed during the course of commission of the predicate offense.

Sadly, despite overwhelming evidence indicating actual innocence in this case, i.e., that Mr. Matias-Martinez wasn't even at the scene, but rather picking onions in a nearby field, (again it is only Mackey's recanted and uncorroborated statement that connects Mr. Matias-Martinez to the killings), no one seems to care. Instead there is this presumption that, based upon Mackey's initial, coerced and uncorroborated statements, that Mr. Matias-Martinez is guilty.

At some point the question of whether innocence is relevant has to come into question. Mr. Matias-Martinez is a pro-se prisoner with limited educational Skills (he still has not completed his G.E.D.) Yet somehow he is

supposed to gather evidence to support his actual innocence.

Mr. Matias-Martinez's case has "[a] long and tortuous history."

Following his direct appeal, Mr. Matias-Martinez filed a pro-se Crim. P. Rule 35(c) motion for post-conviction relief in Colorado. Counsel, i.e. Jeffrey Edelman was initially appointed to represent Mr. Matias-Martinez. Again sadly, Mr. Edelman is one of the reasons lawyers get bad reputations. For almost 14 years, Mr. Edelman did nothing, except seek and obtain funding to investigate Mr. Matias-Martinez's case. This period was the time when Mr. Matias-Martinez had the best chance to gain supportive evidence for his actual innocence, but Mr. Edelman squandered that opportunity.

Finally, in 2011, Mr. Edelman was forced to withdraw and Kathleen Carlson was appointed to represent Mr. Matias-Martinez. Within less than a year, Ms. Carlson conducted the investigations necessary to discover sufficient evidence to support Mr. Matias-Martinez's claim of actual innocence. However, prior to her being able to present and properly argue these facts, Ms. Carlson died.

In 2013, new counsel was appointed. Counsel withdrew all but one claim. The only claim which remained was whether there was newly discovered evidence concerning Mackey's relationship with Gonzales. An evidentiary hearing was held, relief on this claim denied and the Public Defender's Office was appointed for appellate purposes.

The P.D. held the case for approximately 3 years. Ultimately, the P.D.'s Office determined there was conflict and they too withdrew, assigning another alternate defense counsel attorney, i.e., Brian S. Eneson. Mr. Eneson filed a detailed Opening Brief setting forth additional facts of Mr. Matias-Martinez's case. Again, despite these detailed facts, no review of Mr. Matias-Martinez innocence was done.

Mr. Matias-Martinez will show that he did in fact have a properly

filed Motion for Post-conviction Relief pending before the Colorado courts, i.e., since 1997, consequently his **S 2254** habeas application was timely filed. This is due to the fact that as a matter of Colorado law, an attorney cannot be appointed to represent a defendant merely for investigatory purposes.

This fact is supported by the idea that when Jeffrey Edelman was forced to withdraw and Kathleen Carlson made her entry of appearance, there had to have been a post-conviction motion pending or counsel could not have been assigned. In fact, the Colorado Court of Appeals never finds that there wasn't a properly filed motion for post-conviction relief pending before the Colorado courts, but rather, that the post-conviction action was one continuous event, i.e., since the filing of Mr. Matias-Martinez's 1997 motion.

It was only the Colorado Attorney General's Office, Assistant Attorney General Ellen Michaels who suggests otherwise. Ms. Michaels, for the first time argued in the Pre-Answer Response, that the reversal and remand which required the trial court to allow investigation into potential alibi witnesses, i.e., investigate and interview Mr. Matias-Martinez's codefendants who had been convicted of the murders and incarcerated in Mexico, was not connected to any 35(c) motion.

Ms. Michael's argument is clearly refuted by the fact that Jeffrey Edelman, Mr. Matias-Martinez's initial post-conviction counsel was appointed to investigate and support Mr. Matias-Martinez's claim of ineffective assistance of trial counsel for failure to investigate Mr. Matias-Martinez's alibi witnesses. Hence the Colorado court of Appeals Order remanding Mr. Matias-Martinez's claim to allow investigation of the codefendants being held in Mexico (following their convictions there), was based upon a valid claim of ineffective assistance of trial counsel.

In other words, the CCA's Order of Remand reinstated a valid 35(c) claim which remained pending throughout the course of Mr. Matias-Martinez's Colorado post-conviction proceedings. In turn this properly tolled the statutory limitations set by **§ 2244(d)(1)(A)**, and contrary to the lower court's ruling, Mr. Matias-Martinez's **§ 2254** habeas application was timely.

Assuming arguendo that this Court rejected the previous argument, Mr. Matias-Martinez will also assert an ends of justice exception, i.e., his actual innocence satisfies that narrow exception to warrant equitable tolling of the statutory time limitations set by **§ 2244(d)(1)(A)**.

Minimally, Mr. Matias-Martinez would submit that there is need for appointment of counsel, as well as evidentiary development of his actual innocence claims, as innocence is relevant, especially given the particulars of his case and the extended work of some of his Colorado attorneys (officers of the Court), who believed in said. This need is exacerbated by the fact that he was never allowed evidentiary development of his innocence at the state level.

Instead, every lower court, as did Judge Gallagher, dismissed any such claim, because Mr. Matias-Martinez was convicted of felony murder. That is he must have been involved in some fashion despite clear evidence to the contrary. Mr. Matias-Martinez did file an appropriate petition for review and this Honorable Court should remand with

instructions for appointment of counsel and a full evidentiary hearing.

REASONS FOR GRANTING THE PETITION

The Petitioner's Fifth, Sixth and Fourteenth Amendment Rights have been violated in ways that conflict with the laws and Constitutions of the United States and violates precedent of this Court.

The decisions of the lower court are erroneous, but more importantly, the questions presented by the Petitioner are of national importance and should the decision of the lower court stand then those criminal defendant's that are actually innocent and incarcerated will never have the opportunity for relief due to error and technicalities that are not their doing.

The lower court's reasoning is flawed and is conflict with the prior standings of this court and other federal court of appeals.

I. WHETHER THE LOWER COURTS ERRED IN FAILING TO FIND
THAT Mr. MATIAS-MARTINEZ'S § 2254 HABEAS APPLICATION
WAS TIMELY FILED, OR IN THE ALTERNATE, THAT HE WAS
ENTITLED TO EQUITABLE TOLLING OF THE STATUTORY TIME
LIMITATIONS SET BY §2244(D) (1) (A), DUE TO STATE-
IMPOSED IMPEDIMENT OR BECAUSE HE IS ACTUALLY
INNOCENT?

All § 2254 habeas applicants must seek review of their state conviction within one year from the date their conviction becomes final. This one year period runs from one of several dates set forth within subsection (A)-(D) of that statute, and the one year period "during which [the applicant has] a properly filed application for State post-conviction or other collateral review...is pending shall not be counted toward any period of limitation under this subsection." **28** U.S.C. § 2244(d) (2); see also, Artuz v. Bennett, 531 U.S. 4, 8 (2000).

In the instant case, the U.S. District Court of Colorado found initially that Mr. Matias-Martinez's § 2254 habeas application was untimely, i.e., that the one year period set by § 2244(d) (1) (A) had expired due to the fact that when Mr. Matias-Martinez appealed the denial of his initial Crim. P. Rule 35(c) motion, which was ultimately

reversed in part by the Colorado Court of Appeals, there were insufficient issues remaining to find that a proper post-conviction motion remained pending before the state courts.

In doing so, the lower court sided with Assistant Colorado Attorney General and found that despite the court's reversal for issuance of Letters Rogatory, (to investigate/interview alibi witnesses), left no substantive claim for post-conviction relief before the district court to review.

Respectfully, this finding is flawed given that one of Mr. Matias-Martinez's initial claims for post-conviction relief was that counsel was ineffective in failing to interview and summon alibi witnesses at trial. Counsel's failure to call alibi witnesses meets the requirements of Davis v. People, 871 P.2d 769 (Colo. 1994)," a Colorado Supreme Court case that discusses the requirements set by the U.S. Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984) and the constitutional requirement that counsel conduct sufficient investigations so that he/she can make reasonable decisions as to how to proceed and/or what witnesses to call.

In other words, when the trial court failed to provide findings or issue the Letters Rogatory, a decision that was reversed by the Colorado Court of Appeals, there was in fact a substantive claim still

pending before the trial court. That claim was whether trial counsel was ineffective in failing to investigate and call the alibi witnesses.

Respondent-Appellee's arguments to the contrary, raised for the first time in their Pre-Answer Response to Mr. Matais-Martinez's **§ 2254** habeas application, was merely a means to an end, i.e., stop further review of a defendant's claim of actual innocence under a procedural rule.

If, as stated by Respondent-Appellee's there was no post-conviction action pending before the trial court for some seven (7) years, then not only would Mr. Matias-Martinez's 2012 Crim. P. Rule 35(c) motion would have been successive. Mr. Martinez would also not have been allowed the assistance of counsel during those 7-years, as the Colorado Supreme Court has repeatedly determined that as a procedural matter, counsel cannot be appointed for purely investigatory purposes. People v. Breaman, 939 P.2d 1348, 1351 (Colo. 1998); People v. Mills, 163 P.3d 1129, 1132 (Colo. 2007).

Again, respectfully, Mr. Matias-Martinez submits that according to these irrefutable facts, he did have a properly filed motion for post-conviction relief pending before the state courts since 1997 and thus his instant **§ 2254** habeas application was timely, i.e., filed within the time constraints set by **§ 2244(d) (1) (A)**.

Mr. Matias-Martinez respectfully submits that he is, if necessary, entitled to equitable tolling of the statutory time limitations set by § 2244(d)(1)(A) under subsection (B) of that statute, i.e., due to a state-imposed impediment, or alternatively because he is actually innocent.

State-Imposed Impediment:

28 U.S.C. § 2244(d)(1)(B) allows that the one year period within which a habeas applicant must seek review of his state conviction runs from:

"the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action"

As was noted in Mr. Matias-Martinez's Objections to Magistrate Judge Gallagher's Recommendations is whether there was an "impediment" which prevented him from discovery that his state post-conviction motion had been dismissed? "Impediment," is defined as being a hindrance, obstacle, barrier, block or restriction.

As already noted, Colorado law prohibits the appointment of post-conviction counsel for merely investigatory purposes. Given this fact, it is indisputable that Mr. Matias-Martinez relied on the fact that he maintained post-conviction counsel following the Colorado Court of Appeals remand in 2005, as understanding that he had a pending post-conviction action before the trial court.

Assuming arguendo that there wasn't a valid motion pending, i.e., the Colorado courts did not follow their own procedures. It then must be explained how Mr. Matias-Martinez is supposed to figure this out? He was represented by trained legal counsel and clearly that counsel believed something was pending. Otherwise counsel would not have continued to investigate.

Moreover, while there is no constitutional right to assistance of counsel in pursuit of post-conviction relief, (see Coleman v. Thompson, 501 U.S. 722 (1991)) there is well-established U.S. Supreme Court law which dictates that when a state fails to follow its own law, rules and regulations that such a failure may rise to the level of an independent Fourteenth Amendment due process violation. See Hatch v. Oklahoma, 58 F.3d 1447, 1460 (10th Cir. 1995) (citing Clemens v. Mississippi, 494 U.S. 738, 746 (1990), and Ross v. Oklahoma, 487 U.S. 81, 91 ((1988)).

Colorado law clearly creates a substantive procedural due process right which allows all criminal defendants to seek collateral review of their conviction, regardless of whether the defendant took a direct appeal or not. See S 18-1-410 C.R.S.; see also, Dooly v. People, 2013 CO 34, R 2, 302 P.3d 259, 261; People v. Germany, 674 P.2d 345 (Colo. 1983).

It is also true that when states, such as Colorado, regulate claims of constitutional entitlement to the collateral review venue, a defendant's initial-review post-conviction motion becomes the equivalent

of an extension of the defendant's first appeal as a matter of right. See Martinez v. Ryan, 132 S.Ct. 1309, 1317 (2012); see also, Ardolino v. People, 69 P.3d 73, 76 (Colo. 2003) (citing Massaro v. U.S., 123 S.Ct. 1690, 1694 (2003), and finding that claims of ineffective assistance of trial counsel are regulated to the collateral review venue in Colorado.

Consequently, one could argue that because Mr. Matias-Martinez is required to post a challenge to his trial counsel's effectiveness, i.e., failure to investigate and call alibi witnesses at trial, in a post-conviction motion, he is also entitled to receive effective assistance of counsel in pursuit of that initial-review motion. See e.g., Martinez supra, 132 S.Ct. at 1317-18 (fashioning a remedy which allows, due to either ineffective assistance of initial-review post-conviction counsel or failure of a state to appoint counsel on an initial-review motion, "cause" for procedural default of any claim of ineffective assistance of trial counsel, provided the claim is substantial, i.e., has "some merit.")

Accordingly, Mr. Matias-Martinez submits he has shown "state-imposed impediment" which results in a violation of Mr. Matias-Martinez's **Fourteenth Amendment** due process protections, as the trial court did not fully and fairly dismiss Mr. Matias-Martinez's initial-review post-conviction motion. Moreover, because the trial court allowed post-conviction counsel to remain on the case, Mr. Matias- Martinez

could not have reasonably learned that there was not a substantive claim remaining which would toll the statutory limitations set by § 2244(d)(1)(A).

Put simply, Colorado's failure to follow its own laws and rules with respect to how post-conviction review is conducted deprived Mr. Matias-Martinez and kept him from learning the truth, i.e. that there was no claim pending before the trial court. After all, it is clear post-conviction counsel believed such a claim remained.

Bottom line is that there was a state-imposed impediment which prevented Mr. Matias-Martinez from discovery of the lack of a properly filed motion for post-conviction relief that would have tolled the statutory limitations set by § 2244(d)(1)(A), and as such he should be allowed equitable tolling of those limitations under subsection (B) of that statute.

This Court has set forth an exception to the time limitations set by § 2244(D)(1)(A), through the allowance of equitable tolling of those limitations, provided the habeas applicant can make a colorable showing that he/she is actually innocent of the crimes he/she was convicted of. See McQuin v. Perkins, 569 U.S. 383, 392-93 (2013); Schlup v. Delo, 569 U.S. 298, 327 (1995); see also, House v. Bell, 547 U.S. 518, 53637 (2006). This exception is allowed in order that a manifest miscarriage of justice does not occur.

The record before this Court, which Mr. Matias-Martinez request this Court to take notice of, was before the lower court, as well as a separate affidavit from another prisoner, a compilation of facts relevant to Mr. Matias-Martinez's case (as set forth by an officer of the Colorado courts); and a letter showing that an investigation is being conducted by the Innocence Project of Colorado. All of these items, show facts that were not presented at trial and which make a credible showing that Mr. Matias-Martinez is actually innocent.

The plain and simple truth is that Mr. Matias-Martinez was at work picking onions when the Laras were murdered. He has no connection to those who committed said and other than his coerced wife, who had a baby with an alternate suspect, i.e., a suspect connected to a drug gang the Laras had confronted and threatened to turn into the police.

There is nothing to connect Mr. Matias-Martinez to the Lara's deaths. So we speculate that because Mr. Matias-Martinez knew the Laras paid in cash (as did all migrant workers picking in the fields, something that is not uncommon given the undocumented workers who perform such labor), he must have been involved? This speculation would require a conclusion that the plan was to rob the Laras. This speculation fails given they were not robbed.

Instead \$26,000.00 dollars was left in the cab of the Lara's truck, all without any eye witness to the crime (other than allegedly

Ms. Mackey, who did not state this in her initial statement and later recanted statements, statements she said were coerced. Why would anyone leave \$26,000.00 dollars lying in the cab of the Lara's truck if they killed them in order to rob them? Certainly this alone, even without all the other facts set forth in Mr. Matias-Martinez's 2012 post-conviction motion and attachments to his Reply to Respondents' Pre-Answer Response, is sufficient to make a colorable claim of actual innocence, i.e., one which if proven true would allow for equitable tolling. See e.g., Doe v. Jones, 762 F.3d 1174, 1182 (10th Cir. 2014).

Here, Mr. Matias-Martinez attempted to develop the facts of his actual innocence in the state courts and was denied said. Hence the failure to develop them cannot be attributed to him as he has acted with diligence. See Williams v. Taylor, 529 U.S. 420, 437 (2000); Milton v. Miller, 744 F.3d 660, 672-73 (10th Cir. 2014) (allowing for an evidentiary hearing because state courts denied development of claims of ineffective assistance of trial counsel.)

II. WHETHER THIS COURT, FOR THE BETTERMENT AND PROTECTION OF THE CITIZENS OF THESE UNITED STATES, MUST CLARIFY AND MAKE THE RULE ABSOLUTE FOR THE LOWER COURTS AND THE STATES IN REGARDS TO THE PROVISIONS SET FORTH BY THIS COURT IN MARTINEZ V. RYAN, 132 S.C.T. 1309 (2012), ALLOWING FOR EQUITABLE TOLLING OF THE STATUTORY LIMITATIONS SET BY 28 U.S.C. § 2244(D)(1)(A), UNDER SUBSECTION (B) OF THAT STATUTE, WHEN SUCH DEFAULT IS THE RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL?

In the instant case, Mr. Matias-Martinez's initial-review collateral attack motion continued to represent him upon remand following appeal, all the while failing to refile a proper state collateral attack motion. As a result, when the A.E.D.P.A. was enacted in April of 1996, Mr. Matias-Martinez's one-year time limitation commenced and then expired, as counsel represented him for some 9-plus years, all the while doing nothing to benefit him. As a result, counsel's performance was deficient and prejudicial as assessed under this Court's standards set in *Strickland v. Washington*, 466 U.S. 668 (1984), Mr. Matias-Martinez therefore submits that he should be entitled to equitable tolling of the one-year limitations set for seeking federal habeas review.

In Martinez v. Ryan, 132 S.Ct. 1309, 1317-18 (2012), this Court

fashioned a remedy which allows an exception to the exhaustion doctrine, i.e., when a state regulates a claim of constitutional entitlement to its collateral review venue and then either fails to provide assistance of counsel in review of that claim, or counsel is ineffective, the prisoner is allowed "cause" for default of any such claim.

In doing so, this Court recognized that "an attorney's errors during an appeal on direct review may provide cause to excuse procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims." *Id.* at 1317 (citing Coleman v. Thompson, 501 U.S. 722, 754 (1991)).

This claim regulated in Martinez was one of ineffective assistance of trial counsel which numerous states require to be reviewed in a collateral attack motion, as it allows for evidentiary development of what the most part is a fact based claim. See e.g., Massaro v. U.S., 123 S.Ct. 1690, 1694 (2003); Ardolino v. People, 69 P.3d 73, 76-77 (Colo. 2003) (citing Massaro and other Colorado cases, which require claims of

ineffective assistance of counsel to be raised in a Crim. P. Rule 35(c) motion, rather than on direct appeal). Further, this Court found that when a state regulates a claim of constitutional entitlement to its collateral review venue, the prisoner's initial-review collateral attack motion is analogous to being an extension of the prisoner's direct appeal. *Id*, 132 S.Ct. at 1317.

So, again, this Court in Martinez fashioned a remedy which would allow a prisoner review of a procedurally defaulted claim of ineffective assistance of trial counsel if a state fails to either appoint counsel on the prisoner's initial-review post-conviction motion, or post-conviction-counsel is ineffective on that action and the prisoner's claim is substantial, i.e. it has "some merit." *Id* at 1318.

This decision was one that protected a prisoner's due process rights, as in Coleman it was clearly established that when there is a constitutional right to receive effective assistance of counsel, and during that representation counsel defaults a claim or procedure, that default may correctly be imputed to the state. *Id*, 501 U.S. at 754.

The question before this Court is whether protection of a prisoner's due process rights to receive review of a claim of ineffective

assistance of trial counsel regulated to a State's collateral review venue results in procedural default by counsel, in turn causing the prisoner to be time barred from review under **28 U.S.C. § 2254**, by the federal courts, requires that such default be imputed to the State as well. Petitioner submits that it does and that he should have been allowed equitable tolling of the statutory limitations set by **28 U.S.C. § 2244(d)(1)(A)**, under subsection (B) of that statute.

In other words, does the exception set forth in Martinez supra, also require toiling of the limitations set by the Anti-terrorism and Effective Death Penalty Act? This Court must clarify the issue and make the rule absolute for the lower court's and the states.

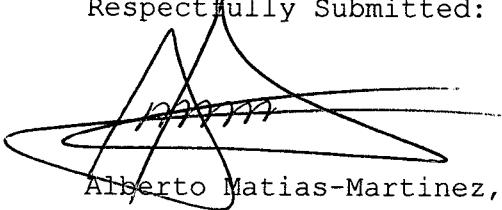
CONCLUSION

WHEREFORE, the Petitioner prays that for all of the issues contained in this Writ of Certiorari and in all of his previous filings his petition will be granted.

The lower court's have failed the petitioner and have allowed these unjust actions to stand. The petitioner has more than met his required burden to justify a form of relief.

The Defendant prays for mercy and justice as afforded him as an incarcerated member of these United States.

Respectfully Submitted:


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