No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

VINCENT GINO CHAVEZ, PETITIONER

vs.

SULLIVAN, Warden, RESPONDENT

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

VICKI MAROLT BUCHANAN
Vicki Marolt Buchanan, P.C.
19201 Sonoma Highway, #243
Sonoma, CA 95476
(707) 343-1907

Counsel for Petitioner
Vincent Gino Chavez

QUESTION PRESENTED

In *Beck v. Alabama*, 477 U.S. 625, 638 (1980), this Court held that a criminal defendant is entitled to jury instructions on lesser included offenses in capital cases, but deferred ruling on whether the Due Process Clause requires giving such instructions in noncapital cases. *Id*. at 638 n.14. This Court has not yet answered the question, and the circuits are split on their answer.

Accordingly, the question presented is:

Does the Due Process Clause require giving lesser included instructions if warranted by the evidence in a noncapital criminal case?

PARTIES TO THE PROCEEDING

Petitioner, Vincent Gino Chavez, is an individual. The Respondent is Sullivan, Warden.

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Vincent Gino Chavez petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals affirming the district court's denial of Petitioner's Petition for Writ of Habeas Corpus was entered on December 17, 2020. (Appendix A.) The district court's Judgment and Order denying Petitioner's Petition for Writ of Habeas Corpus are attached as Appendices B and C. The California Court of

Appeal Opinion on Rehearing and the California Supreme Court Order Denying Petition for Review are attached as Appendices D and E. The Shasta County original Judgment and amended Judgment are attached as Appendices F and G.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Ninth Circuit Court of Appeals decision was entered in this case on December 17, 2020. (Appendix A.) Petitioner's timely filed Petition for Rehearing was denied on January 29, 2021. (Appendix H.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the statutory and constitutional provisions involved in this case are as follows:

U.S. CONST. amend. V

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . .

U.S. CONST. amend. XIV

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Jurisdiction in the Courts Below

The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

Facts Material to Consideration of the Question Presented

On Petitioner's sister, Jolean Roman lived in Anderson, California, across the street from the City Hall and the Anderson Community Center. (ER 757, 905[1].) Petitioner lived in San Jose but stayed with his mother, Rebecca Roman, in Redding for a couple of months. (ER 853.) On August 13, 2011, Jolean held a birthday party at her home. (ER 905.)

On the night of the party, Jolean's house and backyard were packed with people who were drinking heavily. (ER 758.) Jolean consumed so much alcohol she passed out once and her memory of the evening's events was spotty. (ER 905.) Around 11 p.m., she, her friend

[1] ER refers to the Excerpts of Record filed in the Ninth Circuit Court of Appeals.

Amber Kramer, and a Burger King co-worker, Anna Webb, left the party to pick up a friend and go to Burger King. (ER 906-907.)

On that same night, another group threw a birthday party for a friend at the Anderson Community Center across the street from Jolean's house. (ER 598.) Jim Saefong, Sue[2] Saetern, Sou Orn Sachao, and Kaochanh, "Joe," Saetern, "the Sachao Group," drove to the party from Oakland. (ER 598, 703, 744.) Their party ended between 10 and 11 p.m., and they stayed to help clean up. (ER 704.)

As they walked back to their car, Jolean's small dog ran toward them, barking. The men claimed they tried to shoo the dog away. (ER 602, 705, 737.) Jolean claimed they kicked her dog and sent it flying. (ER 908.) Jolean was irate. She confronted the men face to face, yelling and cursing. (*Id*.)

Anna Webb got out of the car and followed Jolean. Webb grabbed the dog and gave it to Amber Kramer. (ER 666.) Jolean's screaming drew people out of the house. (ER 666-667.) Rebecca, who was on the porch, said she saw the "dog fly up in the air." (ER 858-

[2] Sue is a male.

859.) She began yelling for Jolean to get back, but Jolean was out of control. (ER 859.)

At or about the same time, Petitioner came out on the porch to see what was happening. (ER 859.) Rebecca told him to get Jolean and bring her home. (*Id*.) Petitioner went down from the porch, crossed the street, and tried to grab Jolean. (*Id*.) She was still screaming. (*Id*.) Petitioner told Jolean to shut up, and Webb held her back. (ER 607, 618, 668.)

Jolean's partner, Pet, also went to help diffuse the situation. (ER 859.) Pet and Petitioner approached the Sachao group. (ER 706.) Pet talked to them in Laotian. (ER 706, 707-713, 859.) Petitioner was civil and non-confrontational. (ER 619.)

The men said they did nothing to the dog and planned to go home. (ER 707.) Jolean seemed calmed down. (ER 860.) Pet, Petitioner, and the men hugged and shook hands. (ER 607, 707, 883.) The Sachao group returned to and got into their truck. (ER 608, 621, 707, 861.)

Suddenly, Jolean burst forward and swung a set of keys shattering the truck's passenger side window. (ER 609. 913) When

Webb heard the window break, she headed toward Jolean as the driver and passengers got out of the truck. (ER 686.) She heard the driver yelling at Jolean. (ER 688.) She later told the police, "Smack. It happened that quick." (*Id*.)

When he got out of the truck, Jim, a backseat passenger, saw a tussle among Sue, Petitioner, Pet, Jolean, and others about 10-feet behind the truck. They were swinging and fighting. (ER 610-611, 674.) Petitioner stabbed Sue during the fight.

A moment later, Sue began walking back to the truck. (ER 611.) He said he could not breathe. (*Id*.) Jim helped him to the passenger side of the truck where Sue collapsed. (ER 611-612.) Before the emergency technicians arrived, Sue died. (ER 525-527.)

Rebecca was still on the porch at the time she heard the breaking sound. (ER 863.) When Jolean broke the window, people came out of the house and ran towards the fight. (ER 862.) When she saw a fight break out, she was afraid and ran to her vehicle. (*Id*.) She did not know where Petitioner was at the time. (*Id*.) She drove toward the stop sign. (*Id*.) As she was driving away, she yelled, "Vinny, if you're not at the stop sign when I leave, I'm leaving you." (ER 864.)

When Rebecca stopped at the sign, she saw one of the men hitting Webb. (ER 865.) She did not see Petitioner, but a few minutes later, he got into her car. (*Id*.) He had blood on his hands. (*Id*.) Before they left, he got out of the car and looked for his knife. (ER 865-866.) When he returned, he said, "I got him. I got him twice." (ER 865.) After he said, "I got him, Mom," he cried. (ER 886-887.) He cried again after a friend called and said the man died. (ER 887.)

Proceedings in the State and Federal Courts

On March 26, 2013, the Shasta County district attorney charged Petitioner with first-degree, premeditated murder. (ER 229-231.) Because Petitioner was a gang member in San Jose, the information alleged the offense was committed for the benefit of a gang. (*Id*.)

Petitioner admitted he stabbed Sue. (ER 1189.) His defense was the killing was a result of the "heat of passion" or "sudden quarrel." (ER 1131.) He requested a jury instruction for his defense. (ER 1125-1126.) The defense of heat of passion or sudden quarrel would reduce the crime from murder to voluntary manslaughter. The court refused to give this instruction.

On April 24, 2013, after a jury trial with days of gang evidence, the jury found Petitioner guilty of first-degree murder and that he committed the crime for the benefit of the gang. (ER 281-282.) The trial court sentenced him to life without the possibility of parole plus ten years. (Appendix G.)

Petitioner appealed. In a divided opinion, the California Court of Appeal agreed that there was insufficient evidence to support the gang-murder special-circumstance and gang enhancement findings but otherwise affirmed the judgment. After the initial opinion, a change in evidentiary law necessitated a rehearing on a hearsay issue. The court of appeal issued another divided opinion in which it again reversed gang findings and otherwise affirmed the judgment[3]. (Appendix D.)

Petitioner petitioned the California Supreme Court for review, which was summarily denied on January 11, 2017. (Appendix E.) On June 30, 2017, Petitioner was resentenced to 50 years to life plus one year. (Appendix F.)

[3] It is unclear why the Court of Appeal did not order a new trial. The gang evidence permeated and undoubtedly lead to the first-degree murder verdict.

Petitioner timely filed a pro se Petition for a Writ of Habeas Corpus to the District Court on March 31, 2018. ("Petition"); *see,* 28 U.S.C. § 2244(d)(1)(A) and 18 U.S.C. § 1257. (ER 1.) The District Court denied the petition and entered judgment. (Appendices B and C.) The Ninth Circuit affirmed the decision in a Memorandum decision on December 17, 2020. (Appendix A.) It denied the Petition for Rehearing on January 29, 2021. (Appendix H.)

REASONS FOR GRANTING THE WRIT

The trial court refused to instruct the jury on Petitioner's defense theory that the murder resulted from heat of passion or sudden quarrel. The instruction was further required because it was a lesser included offense of first-degree, premeditated murder. The district court did not analyze the issue under federal law because, while *Beck v. Alabama*, 477 U.S. 625, 638 (1980) held the failure to instruct on a lesser included offense is a constitutional error in capital cases, it left open whether the Due Process Clause requires lesser included instructions in noncapital cases. (Appendix C at ER 89.)

The district court acknowledged that under federal law, a defendant has a right to present his defense and have the jury instructed

on that defense. (Appendix C at 89.) Instead of discussing Petitioner's right to present his defense, the district court focused on whether there was evidence to support the defense. *Id*. at 89-90. It relied on the California Court of Appeal's analysis of why the evidence might not support the heat of passion instruction. *Id*. The California Court of Appeal went out of its way to support the denial of the heat of passion defense, claiming there was "little evidence regarding defendant's state of mind." (Appendix D at 1412-13.)

The Court of Appeal's statement is contrary to its discussion of the facts related to the insufficiency of the evidence for the gang-related findings. The gang evidence discussion provides the factual basis supporting the heat of passion and sudden quarrel defense. The Court of Appeal found the "crime was unplanned;" the "defendant did not initially respond to the dispute between his sister and the four men with violence;" "to the contrary, he spoke to the four men, listened to their side of the story, and shook hands before they got in their truck to leave;" "had his sister not shattered one of the truck's windows, it appears from the record that defendant simply intended to return to the party;" and "it was only after his sister smashed the window a fight

ensued, and defendant resorted to violence." (Appendix D at ER 1406.) These facts describe the perfect circumstances for a heat of passion or sudden quarrel defense.

The district court adopted the Court of Appeal's justification for not giving the instruction. (Appendix D at ER 90-91.) The district court should have reviewed the reasons the trial court believed the defense did not apply.

As it turns out, the trial court refused to instruct the jury on the heat of passion or sudden quarrel because of its unreasonable determination of facts in light of the evidence. When discussing its reasons for denying the instruction, the trial court stated that when Jolean smashed the window, Petitioner was on the porch across the street with his mother. (ER 1287.) Therefore, the trial court concluded, "The defendant was not involved in a sudden quarrel. He, at best, was an observer from a distance, and he would have had to travel across that intersection to confront the victim." (*Id*.) The court erroneously believed Petitioner watched from afar as the fight began and decided to join the fray to purposefully murder Sue. Instead, the evidence conclusively established that Petitioner had not returned to Jolean's

house and was at the scene near the truck when Jolean smashed the window, and the fight erupted.

This case is an excellent example of why this Court should find, as *Beck* suggested, that the Due Process Clause requires giving a lesser included instruction. As discussed above, this Court held that in capital cases, a court must instruct on lesser included offenses where the evidence supports it. *Beck*, 447 U.S. at 638. This Court deferred on whether the Due Process Clause requires giving a lesser included instruction in a noncapital case. *Id*. at 638 n.14.

I. The Circuits Are Split as to Whether Due Process Requires Jury Instructions on Lesser Included Offenses in a Noncapital Case.

This Court has not yet answered whether the Due Process Clause question unanswered in *Beck*. Several decisions discuss aspects of *Beck*. *Hopper v. Evans*, 456 U.S. 605, 610 (1982) emphasized the *Beck* holding requires evidence supporting the lesser included offense. *Id*. at 610. *Spaziano v. Florida*, 468 U.S. 447 (1984) ruled that there was no right to an instruction on a lesser included offense if the statute of limitations had run unless the defendant agreed to waive the statute. *Id*. at 456. In *Schad v. Arizona*, 501 U.S. 624 (1991), the instruction on

first-degree murder and an instruction on second-degree murder satisfied *Beck*'s goal to provide the jury with a "third option" to a first-degree murder conviction or acquittal. *Id*. at 646-67. Finally, *Hopkins v. Reeves,* 524 U.S. 88 (1998), held that there was no requirement for instructions on lesser included offenses that are not recognized under state law. *Id*. at 99. All of the decisions involved capital cases. None of the cases dealt with whether the Due Process Clause required lesser included instructions in a noncapital context.

The circuits are split on their decisions grappling with the issue. The Third Circuit in *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3d Cir. 1988) applied the *Beck* rule that "a court must give a requested instruction on a lesser included offense where it is supported by the evidence" in noncapital cases. *Id*. at 1027.

To the other extreme, some circuits have taken the position that the issue is non-reviewable based on their circuits' precedents. In *Perry v. Smith*, 810 F.2d 1078 (11th Cir. 1987), the Eleventh Circuit believed it was bound by Fifth Circuit precedent that the Due Process does not require a state court to instruct on lesser included offenses. *Id*. at 1080. The court recognized that this Court had not yet decided the issue. *Id*.

The Fifth Circuit rendered a similar decision in *Valles v. Lynaugh*, 835 F.2d 126 (5th Cir. 1988). In *Bagby v Sowders*, the Sixth Circuit did not rule on the due process issues surrounding lesser included offenses because it concluded *Beck* was based on the Eighth Amendment. That Amendment would not apply in a noncapital case. *Bagby*, 894 F.2d 792, 796 (6th Cir. 1990). Finally, the Ninth Circuit in *Solis v. Garcia*, 219 F.3d 922 (9th Cir. 2000), relied on earlier circuit precedent in *Bashor v. Risley*, 730 F.2d 1128, 1240 (9th Cir. 1984) that held that the failure to instruct on a lesser offense in a noncapital case fails to present a federal constitutional question for habeas review. *Bashor* did not refer to *Beck* or the footnote leaving open the Due Process basis for requiring lesser included offense instructions. *Solis*, 219 F.3d at 929.

The remaining circuits rely on the "complete miscarriage of justice standard" discussed in *Hill v. United States*, 368 U.S. 424 (1962). The Seventh Circuit applied the standard in *Nichols v. Gagnon*, 710 F.2d 1267, 1271 (7th Cir. 1983) after refraining from extending *Beck* to noncapital cases. According to the Seventh Circuit, the case did not meet the standard. *Id*. at 1272. In *Trujillo v. Sullivan*, 815 F.2d 597 (10th Cir. 1987), the Tenth Circuit took issue with the Fifth, Eighth, and

Ninth Circuits' conclusions that failure to instruct on lesser included offenses does not present a constitutional question. *Id*. at 602. While the court declined to extend *Beck* automatically to noncapital cases, it agreed there should be a right to have cases examined for a fundamental miscarriage of justice. *Id*. at 604. It found no error based on the facts in that case. *Id*.

II. The Case Upon Which *Beck* Relied and Due Process Require Jury Instructions on a Defendant's Theory of Defense when the Evidence Supports It.

It should not be difficult for this Court to hold that instructions on lesser included offenses are required in noncapital cases. *Beck* relied extensively on the reasoning in *Keeble v. United States,* 412 U.S. 205 (1973), which was a noncapital case. *Beck* stated, "it has long been 'beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the later.' *Keeble v. United States, supra*, at 208, 93 S. Ct. at 1997." *Beck*, 447 U.S. at 636.

Although this Court was focused on the requirement to instruct on lesser included offenses, *Beck* discussed due process concerns when a court fails to give a lesser included instruction:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. 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 conviction.

Beck, 447 U.S. at 637. Here Petitioner admitted he stabbed Sue, so he was guilty of something. The jury should have had the "third option" to convict him of voluntary manslaughter because the killing resulted from the heat of passion or sudden quarrel.

In *Solis v. Garcia*, the Ninth Circuit recognized there was no federal requirement to instruct on lesser included offenses. *Solis*, 219 F.3d at 929. However, it recognized that under *Bashor*, a defendant also had a right to instructions on his theory of defense. *See, Bashor*, 730 F.2d at 1240. Such is the situation here.

Clearly established law requires instructions for the defendant's defense theory. "The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal citations omitted) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984). Therefore, "as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988) (citing *Stevenson v. United States*, 162 U.S. 313 (1896)). "This is so because the right to present a defense 'would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense.'" *Bradley v. Duncan*, 315 F.3d 1091, 1099 (9th Cir. 2002) (quoting *Tyson v. Trigg*, 50 F.3d 436, 448 (7th Cir. 1995).

Accordingly, *Beck* should be extended to require lesser included offense instructions in noncapital cases, at least to the extent the defendant asked for such an instruction, and there is evidence to support it. With a Constitutional requirement for such an instruction, Petitioner's petition for habeas corpus would have been granted and the

matter remanded for a new trial. It is time for this Court to confirm the *Beck* holding applies to noncapital cases.

CONCLUSION

This petition for a writ of certiorari should be granted.

Dated: April 21, 2021

Respectfully submitted,

s/ Vicki Marolt Buchanan

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Vicki Marolt Buchanan
19201 Sonoma Highway, No. 243
Sonoma, CA 95476
(707) 343-1907 (Telephone)
(707) 343-1771 (Facsimile)
Counsel of Record for Petitioner