

22-6495

No. _____

ORIGINAL

Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

GENERO ZUNIGA — PETITIONER

(Your Name)

vs.

THE STATE OF COLORADO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Colorado Supreme Court/Colorado Court of Appeals

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

PETITION FOR WRIT OF CERTIORARI

Genero Zuniga, #83916

(Your Name)
B.V.C.F., Box #2017

(Address)

Buena Vista, CO. 81211

(City, State, Zip Code)

None

(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

Did the State of Colorado violate Mr. Zuniga's Fourteenth Amendment due process protections when it failed to apply a new rule of substantive law retroactively to his case, i.e., one where it should have been applied?

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

People v. Childress, 2015 CO 65M, 363 P.3d 155

People v. Zuniga, 2010 Colo. App. LEXIS 1996 (Colo. App. 2010) (attached as appendix "C")

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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 _____ 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 is unpublished.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 _____ 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 is unpublished.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 B/C 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 is unpublished.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 Colorado Supreme Court _____ court 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 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

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 Sept. 26, 2022. A copy of that decision appears at Appendix A.

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

"U.S. Const., amend. XIV: 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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."

"§ 18-1-603 Colorado Revised Statute: Complicity: A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense."

STATEMENT OF THE CASE

In 2004, outside of convenience store, a group of men were inside of a car parked near where Mr. Zuniga and his co-defendant were also parked. These men were all staring at Mr. Zuniga as he approached resulting in Mr. Zuniga displaying a gang sign to the men in the car. These men then flashed a rival gang sign and drove off. Mr. Zuniga followed the men (which ultimately turned out to be a group of highschoolers) and dependent upon which witness from the car you want to believe, the passenger in the vehicle fired a gun into their vehicle in turn killing one of the men and wounding another.

The next day a car matching the description of that which the shots came from was discovered and the police obtained a warrant and entered the home of the woman who owned the car. Inside they found the murder weapon and Mr. Zuniga and his co-defendant, Antonio Stancil.

Mr. Zuniga and Mr. Stancil were tried together, despite the fact that Mr. Stancil's counsel argued that the evidence identifying Mr. Zuniga as the shooter was stronger than that against Mr. Stancil. See Appendix C at * 6-7. It is clear that the witnesses from the vehicle receiving the shots fired from the other could not clearly identify Mr. Zuniga or Mr. Stancil. See Appendix C, * 8. At conclusion of the State's evidence, the prosecution sought and was allowed to tender an instruction on complicity. See § 18-1-603 C.R.S. The jury convicted Mr. Zuniga and Mr. Stancil under this theory and Mr. Zuniga received a life without the possibility of parole sentence.

On direct appeal of his conviction, Mr. Zuniga argued both that there was error in the jury instruction for complicity as tendered in his case, as it did not require the jury to find that he acted with the same mens rea, i.e., the principal's culpable state of mind, that is, with intent and after deliberation, in order to be held as accountable as the principal (see Appendix C, * 11-14) and that there was insufficient evidence to find him guilty of the "after deliberation" component of First Degree Murder charge. See Appendix C, * 14-15, see also, § 18-3-102(1) C.R.S.

STATEMENT OF THE CASE

In 2015, the Colorado Supreme Court redefined Colorado's complicity statute, overturning years of precedent and that which was relied upon to deny Mr. Zuniga's dual mental state argument in his direct appeal. See People v. Childress, 2015 CO 65M, 363 P.3d 155. As a result of this change in the law, Mr. Zuniga filed a second postconviction motion under Colorado Rule of Criminal Procedure 35(c) in which he argued that the decision in Childress was a "new rule of law," which was substantive in nature and hence should be applied retroactively to his case. The trial court accepted Mr. Zuniga's motion and summarily denied it on the merits by finding that Childress did not redefine what it takes to convict under the theory of complicity. Mr. Zuniga appealed.

On appeal, the Colorado Court of Appeals found multiple reasons for denying Mr. Zuniga relief, including: A) Mr. Zuniga's motion was successive because his motion was filed more than 3-years after his direct appeal was decided; and B) Childress sets forth just a statutory right rather than a constitutional right, hence Mr. Zuniga's motion was successive. See Appendix B. With all due respect to the Colo. Court of Appeals, Mr. Zuniga was convicted of a Class-I felony, hence there are no time limits within which he must seek postconviction relief. See § 16-5-402(1) C.R.S.; see also, e.g., Robbins v. People, 107 P.3d 384 (Colo. 2005)(finding that while there are no time limits to comply with for defendants convicted of Class-I felonies, the doctrine of laches may nonetheless be applied.) As a matter of law, the Colorado Court of Appeals was incorrect in applying any time bar to Mr. Zuniga. This leaves the ruling concerning whether there is a constitutional right involved and whether the decision in Childress is substantive, which Mr. Zuniga argues herein.

REASONS FOR GRANTING THE PETITION

Did the State of Colorado violate Mr. Zuniga's Fourteenth Amendment due process protections when it failed to apply a new rule of substantive law retroactively to his case, i.e., one where it should have been applied?

It is a long standing principle that the Fifth and Fourteenth Amendment's due process protections require that in order to convict a defendant of a charged offense, regardless of the state he is charged in, the prosecution must prove each and every element of the offense beyond a reasonable doubt. Accord, In re Winship, 397 U.S. 358, 364 (1970); Sullivan v. Louisiana, 508 U.S. 275, 281 (1993)(finding that an erroneous jury instruction which inaccurately defined requirement of proving guilt beyond a reasonable doubt was structural error requiring reversal.) Colorado has also held this to be true. See Bogdanov v. People, 941 P.2d 247, 252 (Colo. 1997)(citing Winship supra).

Moreover, this Court has repeatedly held that a new rule of law is substantive, i.e., it applies retroactively, when the rule narrows the scope of a criminal statute by interpreting its terms and the rule is grounded in a substantive constitutional guarantee. See Welch v. U.S., 578 U.S. 120, 132, 136 S.Ct. 1257, 1266 (2016)(citing Beard v. Banks, 542 U.S. 406, 408, 416-17 (2004); Sawyer v. Smith, 497 U.S. 227, 233, 241-42 (1990)).

Colorado's change in the law requires that in order to hold a criminal defendant guilty of an offense under the theory of complicity, (see § 18-1-603 C.R.S.), the defendant/complicitor must be shown to have a dual mental state. See People v. Childress, 363 P.3d 155, 164, 2015 CO 65M, ¶ 29. This dual mental states requires not only that the complicitor must have the intent, as commonly understood, to aid, abet, or encourage the principal in completion of his/her criminal conduct; but also the complicitor must have developed the requisite mens rea for commission of the substantive offense actually committed by the principal. See Childress supra, 363 P.3d at 164, ¶ 29. In other words, the complicitor must have the requisite intent to commit the substantive offense and negligent conduct on the part of the complicitor no longer suffices the mens rea requirement necessary to hold the complicitor liable. Id, 363 P.3d at 164, ¶ 30.

The decision in Childress overturned previous decisions which held that the complicitor could be held liable even if he/she merely aided the principal after the fact, or as noted above, acted negligently, in turn aiding the principal's commission of the offense. Id, cf., Bogdanov supra, 941 P.2d at 250-56; People v. Wheeler, 772 P.2d 101, 103-04 (Colo. 1989). In fact, the pattern jury instruction tendered in Colorado prior to the issuance of the decision in Childress, and that which was tendered in Mr. Zuniga's case, allowed that a defendant could be held accountable under the theory of complicity if he committed "all or part of the crime." See COLJI-Crim 6:04; Childress supra, 363 P.3d at 158, ¶ 12; Bogdanov supra; see also, U.S. v. Hernandez-Cavillo, 39 F.4th 1297, 1305 (10th Cir. 2022).

In Mr. Zuniga's first appeal as a matter of right (see Appendix C, ** 12-13), he argued that his right to due process of law requiring that it be proven he committed each and every element of the first degree murder charge he was charged with, (committed under the theory of complicity), beyond a reasonable doubt was violated by the pattern jury instruction tendered, as the jury was improperly instructed concerning the requisite "dual mental state" necessary to convict under that theory.

See Appendix C, ** 12-13. The gist of the argument was that it was not necessary, under the pattern jury instruction tendered in his case, to prove that he had the intent, upon which he acted following deliberation, that was necessary to convict the principal of first degree murder as defined by § 18-3-102 C.R.S. (noting that the jury instruction tendered in his case continued the "all or part of" language.)

The division of the Colorado Court of Appeals affirming Mr. Zuniga's conviction under the complicity theory relied on the decision of the Colorado Supreme Court in Bogdanov supra, which it later overturned in Childress supra. Had Childress been in effect at the time Mr. Zuniga's direct appeal was decided, his conviction would have been reversed. See Childress supra; see also, Appendix C, ** 12-13.

The question then becomes one of when Colorado redefines what it takes under the theory of complicity as defined by § 18-1-603 C.R.S. and whether that new definition should be considered substantive, as Colorado has always held previously that when a statute is interpreted by the Colorado

Supreme Court, the Court is defining what the statute has meant/required since its enactment. See People v. White, 179 P.3d 58, 62 (Colo. App. 2007)(citing Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994))? In essence, the question presented herein, is one of whether when a state refuses to apply a substantive rule of law retroactively to cases previously decided, does it violate those previously convicted defendants' due process rights? Mr. Zuniga respectfully submits that it does.

Mr. Zuniga takes this position given the decision in Childress narrowed the scope of § 18-1-603 C.R.S., in turn requiring a more onerous standard for the prosecution to prove beyond a reasonable doubt, his guilt under that theory. Accord Winship supra; see also, Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004).

An analogous case to that at bar is that addressed by this Court in Chaidez v. U.S., 568 U.S. 342 (2013). In Chaidez, this Court determined whether the opinion issued in Padilla v. Kentucky, 559 U.S. 356 (2010), created a new rule of law. Id., 568 U.S. at 344. Padilla had determined that it was ineffective assistance for an attorney to fail to advise his/her client concerning the potential for deportation if the defendant entered a plea of guilty. Chaidez found that Padilla would not have created a new rule if it had only applied the standards set by this Court in Strickland v. Washington, 466 U.S. 668 (1984). However, because deportation until then had always been considered a collateral consequence of a plea entry, and until then attorney's had no constitutionally imposed

obligation to advise their clients concerning any collateral consequence, until Padilla's issuance, such advice had always been categorically removed from Sixth Amendment consideration. In other words, Padilla broke new ground by imposing upon attorney's a new obligation under the Sixth Amendment's guarantee of effective assistance, thus creating a new rule of substantive law which must be applied retroactively. Chaidez, 568 U.S. at 348-49.

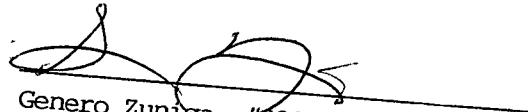
Here, like in Chaidez, the decision rendered in Childress imposed a new obligation upon the prosecution as to what it takes to convict a defendant under Colorado's theory of complicity as defined by § 18-1-603 C.R.S. As a result, the decision was substantive in nature and should have been applied retroactively to Mr. Zuniga's case, especially considering the fact that he raised this issue in his direct appeal. See Appendix C, Childress supra.

For these reasons, Mr. Zuniga respectfully submits his due process rights were violated and moves this Court to grant certiorari on this issue in order to provide uniform application of federal law across the states and specifically require it to be upheld in Colorado. This, as well as all available relief is respectfully requested.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Genero Zuniga, #8383916

Date: December 19, 2022