

No. \_\_\_\_\_

---

---

IN THE  
*Supreme Court of the United States*

---

ANTHONY PAUL HERNANDEZ NAVARRO,

*Petitioner,*

v.

KIM HOLLAND, WARDEN,

*Respondent*

---

PETITION FOR WRIT OF CERTIORARI

---

HILARY POTASHNER  
Federal Public Defender  
MORIAH S. RADIN\*  
Deputy Federal Public Defender  
321 East 2nd Street  
Los Angeles, California 90012-4202  
Telephone: (213) 894-5192  
Facsimile: (213) 894-0081  
Moriah\_Radin@fd.org

Attorneys for Petitioner  
ANTHONY PAUL HERNANDEZ  
NAVARRO

*\* Counsel of Record*

---

---

## **QUESTION PRESENTED**

Whether the Ninth Circuit clearly erred in its decision that the state court decision denying Petitioner's motion for a new trial based on newly discovered exculpatory evidence was reasonable where the state court relied on reasons that were not supported by the record?

## **LIST OF PARTIES**

1. Anthony Paul Hernandez Navarro, Petitioner
2. Kim Holland, Warden

## TABLE OF CONTENTS

|                                                             | <u>Page</u> |
|-------------------------------------------------------------|-------------|
| QUESTION PRESENTED.....                                     | I           |
| LIST OF PARTIES.....                                        | I           |
| PETITION FOR A WRIT OF CERTIORARI .....                     | 1           |
| I. OPINIONS BELOW .....                                     | 1           |
| II. JURISDICTION .....                                      | 1           |
| III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... | 1           |
| A. 28 U.S.C. § 2254 (a); (d) .....                          | 1           |
| B. United States Constitution, Fourteenth Amendment.....    | 2           |
| IV. STATEMENT OF THE CASE .....                             | 2           |
| A. Proceedings in State Court.....                          | 3           |
| 1. The Motion For a New Trial .....                         | 4           |
| 2. Direct Appeal and State Habeas .....                     | 7           |
| B. Proceedings In Federal Court.....                        | 8           |
| V. REASONS FOR GRANTING THE WRIT .....                      | 8           |
| A. Fundamental Fairness .....                               | 8           |
| B. Fundamental Fairness as Applied to Petitioner .....      | 9           |
| VI. CONCLUSION .....                                        | 11          |
| CERTIFICATE OF SERVICE .....                                | 12          |
| APPENDIX INDEX.....                                         | 13          |

## TABLE OF AUTHORITIES

Page(s)

### Federal Cases

|                                                                 |       |
|-----------------------------------------------------------------|-------|
| <i>Engle v. Isaac</i> ,<br>456 U.S. 107 (1982).....             | 9     |
| <i>Estelle v. McGuire</i> ,<br>502 U.S. 62 (1991).....          | 11    |
| <i>In re Winship</i> ,<br>397 U.S. 358 (1970).....              | 9     |
| <i>Lisenba v. California</i> ,<br>314 U.S. 219 (1941).....      | 9     |
| <i>Miller-El v. Cockrell</i> ,<br>536 U.S. 322 (2003).....      | 9     |
| <i>Taylor v. Maddox</i> ,<br>366 F.3d 992 (9th Cir. 2004) ..... | 9, 11 |

### Federal Statutes

|                              |    |
|------------------------------|----|
| 18 U.S.C. § 3006A(b) .....   | 1  |
| 18 U.S.C. § 3006(A)(b).....  | 12 |
| 28 U.S.C. § 1254(1) .....    | 1  |
| 28 U.S.C. § 2253 .....       | 1  |
| 28 U.S.C. § 2254 (a) .....   | 1  |
| 28 U.S.C. § 2254(d) .....    | 9  |
| 28 U.S.C. § 2254(d)(2) ..... | 9  |
| AEDPA .....                  | 9  |

### State Statutes

|                                           |   |
|-------------------------------------------|---|
| California Penal Code § 654 .....         | 7 |
| California Penal Code § 667(a)(1).....    | 7 |
| California Penal Code § 667(e)(2)(B)..... | 7 |
| California Penal Code §1181(8) .....      | 5 |

## TABLE OF AUTHORITIES

|                                                                | <u>Page(s)</u> |
|----------------------------------------------------------------|----------------|
| <b>Other Authorities</b>                                       |                |
| Bill of Rights.....                                            | 8              |
| Eighth Amendment .....                                         | 9              |
| Fifth Amendment .....                                          | 9              |
| Fourteenth Amendment .....                                     | 2, 8, 9, 11    |
| Fourth Amendment .....                                         | 9              |
| Rules of the Supreme Court of the United States Rule 39.1..... | 1              |
| Sixth Amendment .....                                          | 9              |

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

Petitioner Anthony Hernandez Navarro requests that a writ of certiorari issue to review the judgment below.

**I. OPINIONS BELOW**

The Ninth Circuit affirmed the denial of Hernandez Navarro's petition for writ of habeas corpus in an unpublished opinion. (Petitioner Appendix ("Pet. App.") at 1-4). The district court adopted the magistrate judge's report and recommendation and entered judgment dismissing the petition. (Pet. App. at 10-12).

**II. JURISDICTION**

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction under 28 U.S.C. § 2253 and entered judgment on October 10, 2017. (Pet. App. at 1).

**III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

**A. 28 U.S.C. § 2254 (a); (d)**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person

in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

#### **B. United States Constitution, Fourteenth Amendment**

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.

#### **IV. STATEMENT OF THE CASE**

In 2009, Jessica Dickinson was assaulted with a box cutter outside of her apartment in Barstow, California. Anthony Hernandez Navarro was charged with

and convicted of aggravated mayhem, assault, and dissuading a witness for the assault and threats made in the days following the assault. Petitioner is serving a sentence of 140 years to life in prison.

**A. Proceedings in State Court**

The charges stem from a fight that occurred on the night of June 26, 2009, and threatening phone calls made in the days following.

At trial, the prosecution presented two eyewitnesses to the incident, Sandra Robles (“Robles”) and the victim, Jessica Dickinson (“Jessica”). They both testified that in the evening hours of June 26, 2009, they were outside of Robles’s apartment in the Virginia Terrace apartment complex with Jessica’s daughter, two of Robles’s children, and Jessica’s older brother, Anthony. A green van pulled up near Robles’s apartment and Hernandez Navarro’s dad, Michael Navarro (“Michael”) got out of the van. Michael asked if Robles and Jessica had a problem. Hernandez Navarro got out of the green van and was looking for Jessica’s brother, Jesse Dickinson (“Dickinson”). Both Hernandez Navarro and Michael smelled like alcohol, slurred their words, stumbled and appeared to be drunk.

While Michael, Hernandez Navarro, Jessica and Robles were arguing, Dickinson arrived in a car with friends. Dickinson and Hernandez Navarro started arguing. They were standing about 15 feet apart. Hernandez Navarro swung at Dickinson and hit him on the chin.

Jessica tried to stop the fight by stepping between Hernandez Navarro and Dickinson. Hernandez Navarro pulled her towards him with his left hand, and lunged at her. Robles saw Jessica grab her neck, heard her yell “I got stabbed” and

saw her fall to her side on the ground. Hernandez Navarro and Michael ran to the van.

On the night of the assault, Hernandez Navarro's uncle, Paul Hernandez, was having a birthday party at his home. A neighbor, Marina Garcia ("Garcia") was at the party. Hernandez Navarro and Michael were at the party. Garcia saw Shanna Cipriani ("Cipriani") leave the party with her daughter in a green van around 6 or 7 p.m. Garcia does not recall telling Detective Cortinas that Michael and Hernandez Navarro left with Cipriani around 10 or 11 p.m. Garcia does not remember telling Detective Cortinas that Michael, Hernandez Navarro and Cipriani returned to the party around 1 a.m. She also did not recall telling Detective Cortinas that they returned to the party in a white Chevy Tahoe or GMC Yukon.

Garcia saw Hernandez Navarro and Michael having a conversation at the party. She heard Hernandez Navarro state that something "went bad" but she doesn't recall telling Detective Cortinas that Hernandez Navarro said someone had their neck sliced. At the end of the night, right before Garcia went home, she saw Hernandez Navarro wearing gloves, with something that appeared to be a handgun.

In the defense case, Hernandez Navarro presented alibi testimony from several family members that he was at his uncle's birthday party, at his uncle's home, the entire night of June 26 and into the morning of June 27.

#### **1. The Motion For a New Trial**

Hernandez Navarro sought to have Jesse Dickinson testify on his behalf at trial. Jesse Dickinson, the brother of victim Jessica Dickinson, was present at the

time of the assault. Despite trial counsel's diligent efforts, Dickinson was not located. After trial, counsel learned that Dickinson was in the custody of the California Department of Corrections in Chino, California. Counsel submitted a transportation request to have Dickinson transported to court. But before the request was activated he was released. Counsel then attempted to locate Dickinson through his parole officer but this too was unsuccessful. It was not until October 2010 that counsel located Dickinson, who was then in custody on new criminal charges. Dickinson was subpoenaed and brought to court to testify on October 19, 2010, approximately six months after Hernandez Navarro's trial but before his sentencing.

In a hearing requested by defense counsel in order to obtain Dickinson's testimony, Dickinson testified that he was present at the incident when his sister, Jessica, was assaulted. He was returning from the liquor store when he saw a blue van parked outside of his sister's apartment. There were several Black people outside of the van and Dickinson started to argue with one of them. That individual stabbed Dickinson and Dickinson ran inside to grab a rag. When he returned he saw his sister on the ground. The assailants ran back to the van. Dickinson knows Petitioner and verified that he was not present and did not cut Jessica. Dickinson said that Jessica and witness Robles would be lying if they said Petitioner cut Jessica.

Following the hearing, trial counsel filed a written motion for new trial. Counsel argued, *inter alia*, that under California Penal Code §1181(8), Dickinson's

testimony was material to Hernandez Navarro's defense and, despite due diligence, was not obtained until after trial. The new evidence was particularly important in light of the conflicting evidence relating to Hernandez Navarro's involvement. Counsel also argued the evidence was insufficient because of the inconsistencies in the testimony.

At the sentencing hearing on December 17, 2010, the prosecutor submitted that Dickinson's testimony was material but argued that Dickinson was evasive, avoided eye contact with the prosecutor, struggled to answer questions directly, and was not credible.

After finding Dickinson's testimony to be material and counsel to have been diligent in obtaining it, the court discussed its ruling:

It seems to me that Mr. Dickinson is well on his way to becoming a career criminal, and I think he has every reason on earth not to want to be labeled as someone who aids law enforcement, in the parlance of the trade, a snitch, and if it meant calling his own sister a liar that was fine. I find his testimony completely unbelievable, and for that reason, although finding it's material, . . . . entitled to no credibility . . . . I also find the evidence was more than sufficient to support the verdict, so motion for new trial will be denied.

The trial court sentenced Petitioner to consecutive terms of 25 years to life imprisonment on each count but stayed the sentence on count 4 pursuant to Penal Code § 654, for a total sentence of 100 years to life.

## 2. Direct Appeal and State Habeas

Petitioner timely appealed, alleging, *inter alia*, that the trial court erred in denying his motion for a new trial based on the new evidence in Dickinson's testimony. The California Court of Appeal modified the judgment to add a mandatory consecutive term of ten years' imprisonment for each count of conviction based on Petitioner's two prior serious felony convictions pursuant to California Penal Code §§ 667(a)(1) and (e)(2)(B), stayed the sentence as to count 4 pursuant to California Penal Code § 654, and affirmed the judgment in an unpublished decision on July 10, 2012. (Pet. App. at 43-57). Hernandez Navarro filed a petition for review in the California Supreme Court raising the issues of the denial of the motion for new trial and the insufficiency of the evidence, which was denied on October 17, 2012.

On October 10, 2013, Hernandez Navarro filed a petition for writ of habeas corpus in the California Supreme Court. In that petition, Hernandez Navarro alleged that his due process rights were violated by the trial court's denial of his motion for a new trial. He also alleged that his due process rights were violated because his convictions were not supported by sufficient evidence. The California Supreme Court denied that petition on January 15, 2014 without comment.

## **B. Proceedings In Federal Court**

Hernandez Navarro filed a pro se petition for writ of habeas corpus in the district court on February 4, 2014. He alleged five claims. As relevant here, he alleged that the trial court's denial of his motion for new trial violated his due process rights. He also alleged that his convictions violated his due process rights because there was insufficient evidence to support them. On October 10, 2014, United States Magistrate Judge Stephen Hillman issued a Report and Recommendation recommending that the district court deny the Petition and dismiss the action with prejudice. On December 22, 2014, the district court, Honorable David O. Carter, denied the petition and dismissed with prejudice. Hernandez Navarro appealed.

The Ninth Circuit subsequently affirmed the district court's decision, holding that the California Court of Appeal decision was not unreasonable. (Pet. App. 1-4).

## **V. REASONS FOR GRANTING THE WRIT**

This Court should grant the writ because the trial court's denial of Hernandez Navarro's motion for a new trial violated his due process rights under the Fourteenth Amendment. The California Court of Appeal made unreasonable factual determinations and unreasonably applied clearly established federal law.

### **A. Fundamental Fairness**

The Supreme Court has repeatedly held that the Due Process Clause protects against practices which violate the principles of fundamental fairness, even if not specifically in violation of the guarantees detailed in the Bill of Rights. "Today, as

in prior centuries, the writ [of habeas corpus] is a bulwark against convictions that violate fundamental fairness.” *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring) (internal quotation mark omitted)). The concept of fundamental fairness has been expanded to include protections against violations of the Fourth, Fifth, Sixth, and Eighth Amendments. “As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.” *Lisenba v. California*, 314 U.S. 219, 236 (1941); *see also In re Winship*, 397 U.S. 358, 372 n.5 (1970) (Harlan, J., concurring) (“I cannot refrain from expressing my continued bafflement at [the] insistence that due process, whether under the Fourteenth Amendment or the Fifth Amendment, does not embody a concept of fundamental fairness as part of our scheme of constitutionally ordered liberty.”).

#### **B. Fundamental Fairness as Applied to Petitioner**

A state court unreasonably determines the facts under § 2254(d)(2) when its finding of fact is unsupported by sufficient evidence. *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (2004); *see also Miller-El v. Cockrell*, 536 U.S. 322, 340 (2003) (“A federal court can disagree with a state court’s credibility determination and, when guided by AEDPA, conclude the decision was unreasonable . . .”). The trial court’s ruling was unreasonable under § 2254(d)(2) and denial of the motion for new trial was a deprivation of due process.

The trial judge’s determination that Dickinson’s testimony lacked credibility was not supported by the record. At most, the judge knew Dickinson was *charged*, not convicted, of criminal conduct and had been or was on parole. An individual

could be on parole for any number of offenses any one of which does not make them a career criminal. In fact, the very idea that someone is a career criminal based on one conviction is illogical and demonstrates the trial court's flawed reasoning. Indeed, were Dickinson convicted of a white collar offense it is unlikely the judge would have determined he was a career criminal who was only concerned with avoiding the label of "snitch." Yet the trial court did not have any information about Dickinson's criminal record beyond an allegation of new criminal conduct and a single prior conviction for an unknown offense.

Instead, the judge revealed his own bias and unsupported assessment of Dickinson in determining he lacked credibility. Rather than basing his decision on his opportunity to observe Dickinson -- facts argued by the prosecutor in support of denying the motion -- the trial judge chose *not* to base a finding on Dickinson's presentation on the stand, and instead provided his own flawed and unsupported reasoning. Thus, the very rationale for giving deference to a trial judge's credibility determination, that it was based on an opportunity to observe the witness, does not exist in this case.

Absent this unreasonable determination, there is no justification in the record to deny Hernandez Navarro the opportunity to present Dickinson's eyewitness exculpatory testimony in a new trial. Because the evidence at Hernandez Navarro's trial was conflicted and contradictory, Dickinson's testimony would have made a different result probable on retrial.

The trial court's denial of Hernandez Navarro's motion for a new trial was objectively unreasonable under § 2254(d) because the newly discovered evidence was material and exculpatory. The denial thus rendered the proceeding fundamentally unfair under the clearly established federal law of *Estelle v. McGuire*, 502 U.S. 62, 68-70 (1991) and was based on a flawed and unreasonable determination of the facts. *Estelle v. McGuire*, 502 U.S. at 68; see *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004). The California Court of Appeals decision upholding the judgment is a violation of fundamental fairness guaranteed by the Fourteenth Amendment.

## VI. CONCLUSION

For the reasons stated above, Anthony Hernandez Navarro respectfully asks this Court to grant his petition for writ of certiorari.

Respectfully submitted,

HILARY POTASHNER  
Federal Public Defender

DATED: January 4, 2018

By



MORIAH S. RADIN\*  
Deputy Federal Public Defender

Attorneys for Petitioner  
ANTHONY PAUL HERNANDEZ NAVARRO

\* *Counsel of Record*

## CERTIFICATE OF SERVICE

---

I, Moriah Radin, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b), hereby certify that on January 5, 2018, a copy of **PETITION FOR A WRIT OF CERTIORARI** was mailed postage prepaid to:

---

Jennifer Jadovitz  
Deputy Attorney General  
California Department of Justice  
600 West Broadway, Suite 1800  
San Diego, CA 92101  
Jennifer.Jadovitz@doj.ca.gov  
Counsel for Respondent

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 4, 2018.

  
MORIAH S. RADIN  
Attorney for Petitioner

## APPENDIX INDEX

|                                                                                                     | <u>Page(s)</u> |
|-----------------------------------------------------------------------------------------------------|----------------|
| Appendix 1:<br>Memorandum Decision .....                                                            | APP 001-009    |
| Appendix 2:<br>Judgment .....                                                                       | APP 010        |
| Appendix 3:<br>Order Accepting Report and Recommendation of United States Magistrate<br>Judge ..... | APP 011-012    |
| Appendix 4:<br>Report and Recommendation of United States Magistrate Judge<br>.....                 | APP 013-042    |
| Appendix 5:<br>Opinion of the California Court of Appeal .....                                      | APP 043-058    |