No. _____

In the
Supreme Court of the United States

MICHAEL MORAN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Robert Joseph. Beles
California Bar no. 41993
Paul Gilruth McCarthy
California Bar no. 139497
1 Kaiser Plaza, Suite 2300
Oakland, California 94612-3642
Tel. No. (510) 836-0100
Fax No. (510) 832-3690

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Could a jurist of reason find that the state court unreasonably applied clearly established federal law in determining that admission of petitioner's in-custody statements in the absence of Miranda advisements did not deprive petitioner of due process of law under the Fifth and Fourteenth Amendments?

Could a jurist of reason find that the state court unreasonably applied clearly established federal law in determining that the trial court's exclusion of evidence did not violate petitioner's right to present a defense under the Fifth, Sixth and Fourteenth Amendments?

Could a jurist of reason find that the state court unreasonably applied clearly established federal law in determining that prosecutorial misconduct in voir dire and closing argument did not violate petitioner's right to a fair trial and right to counsel under the Fifth, Sixth and Fourteenth Amendments?

Could a jurist of reason find that even if none of these errors were prejudicial in themselves, the cumulative effect of these error deprived petitioner of a fair trial under the Fourteenth Amendment?

LIST OF ALL PARTIES

Petitioner

MICHAEL MORAN.

Respondent

PEOPLE OF THE STATE OF CALIFORNIA.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES.

None of the orders and opinions were published. They are attached as an appendix.

BASIS FOR JURISDICTION IN THE SUPREME COURT.

1. Date of entry of order sought to be reviewed: January 10, 2019

2. Date of any order respecting rehearing: none.

3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. United States Constitution.

Fifth Amendment: No person shall . . . . be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty. . . without due process of law . . . .

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by . . . jury . . .

Fourteenth Amendment. . . . No State shall . . . deprive any person of . . . liberty . . . without due process of law. . . .

2. Federal statutes.

28 U.S.C. section 1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

28 U.S.C. section 2244: (c) "In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding."

3. Federal court rules.

Supreme Court Rule 13. Review on Certiorari: . . . a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment . . . .

4. State statutes.

California Evidence Code section 1103: (a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of

specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character . . . .

California Penal Code section 261: (a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: . . . . (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

California Penal Code section 288a (renumbered to 287): (a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person . . . . (c)(2) (A) Any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years . . . .

California Penal Code section 288.5: (a) Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the

commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.

Stats 2018 ch 423 § 49: Section 288a of the Penal Code is amended and renumbered to read: 287.

STATEMENT OF THE CASE.

1. Specification of Stage in the Proceedings in Which the Federal Questions Sought to Be Reviewed Were Raised, the Manner of Raising Them, and the Way in Which They Were Passed On.

On July 7, 2010, following a jury trial in the Alameda County Superior Court, petitioner was convicted of forcible rape, California Penal Code section 261(a)(2), and forcible oral copulation, California Penal Code section 288a(c)(2) involving an adult female "Jessica", and continuous sexual abuse of a minor, California Penal Code section 288.5 involving a 12 year old female, "Andrea." Petitioner received two consecutive sentences of 15 years to life, plus an additional sentence of 6 years.

Petitioner pursued a timely direct appeal of his convictions. On November 28, 2012, the Court of Appeal affirmed the convictions in a written opinion. (A130327.) OnMarch 13, 2013, the California Supreme Court summarily denied his petition for review by order. (S207780.)

Petitioner filed a timely petition for writ of habeas corpus in

the United States District Court for the Northern District of California. On March 31, 2018, the district court dismissed the petition and denied a certificate of appealability. (5:14-cv-02641-EJD.) On January 10, 2019, the United States Court of Appeals for the Ninth Circuit denied petitioner's application for a certificate of appealability. (18-15869.)

This petition for writ of certiorari is filed within 90 days of the Ninth Circuit's denial of a certificate of appealability and is timely under Supreme Court Rule 13.

2. Statement of Facts.

a. Prosecution case.

i. Counts 1-5: Jessica Doe.

18 year old Jessica had lived in the Baywood Apartments in Hayward, California, for six years. (2RT. 236, 288.) Melissa Moran and petitioner lived two apartments away. (2RT. 290-291, 294.) Jessica visited Melissa every other day to play with Melissa's three children or use the Morans' Xbox and computer. (2RT. 293-294.) Jessica was friendly with Melissa's 12 year old daughter, Andrea. (2RT. 297, 355-356.)

On May 23, 2008, Jessica went to petitioner's house to visit. (2RT. 303.) Melissa told Jessica that she was going to a Jack-in-the-Box restaurant and asked if Jessica wanted to go or have anything brought back. (2RT. 304.) Jessica said she did not want to go. (2RT. 305.) Melissa and her children left Jessica with petitioner. (2RT. 306-307.)

Jessica said that petitioner then pushed her on the bed, held her wrists, and told her that if she tried to stop him he was going to hurt her. (2RT. 311, 314.) Petitioner pulled Jessica's bra off and started kissing her breasts. (2RT. 317.) He then took off her slacks and her nylons and her underwear at the same time. (2RT. 321.) He put his fingers in her vagina, which hurt. She screamed loudly. (2RT. 323, 325.) He moved his two fingers in and out about five times. (2RT. 324.) Petitioner then put his penis in her vagina, which hurt. It moved, but it did not come out. (2RT. 327.) Jessica did not know if he ejaculated inside of her. (2RT. 330.) Jessica thought petitioner looked mad. He told Jessical to perform oral sex on him and she did. (2RT. 330-331.)

Jessica heard a sound like the front door opening. Petitioner then left. (2RT. 332.) Jessica dressed and went home. (2RT. 332-333.) When she used the bathroom, she noticed blood on the toilet paper. (2RT. 334.)

Jessica told her mother, Karen, that petitioner had raped her. (2RT. 334-335.) She and Karen went to the Morans' house and told Melissa (2RT. 336-337.) They then went home and called the police. (2RT. 339.) Then they went to Highland Hospital, where a staffer conducted a sex assault examination. (2RT. 340,341; 3RT. 595.)

Lydia Trepes, a neighbor in the same apartment building, testified that during that evening, she heard screaming and a door slam, and saw a woman crying. (3RT. 626.)

Officer Michael Carpenter interviewed petitioner "to get his side of the story." (3RT. 528.) During the interview, petitioner

told Carpenter: "I made a mistake," and said he was sorry a couple of times. (3RT. 534.)

Joshua Luftig, a physician's assistant at the hospital, conducted a sex assault exam. (3RT. 574-575.) Luftig did not document whether there was blood on the toilet paper and didn't see any blood (3RT. 600-601.) Luftig documented a hymen transection at the three to four o'clock position, a moist accretion at the vestibule at the six o'clock position, and two tears at the posterior fourchette. (3RT. 595.) He took swabs of Jessica's breasts, lips, and neck for DNA testing. (3RT. 609-610.) Luftig found no visible injuries to Jessica's body, wrists, or ankles. (3RT. 610.)

ii. Count 6: Andrea Doe.

12-year old Andrea Doe lived with petitioner in Hayward, California along with her mother, Melissa, and her brothers and sisters. (2RT. 447.) When Andrea was eight or nine, petitioner tried to put his private in her private. (2RT. 452-453.) There was a second time but Andrea did not remember when. (2RT. 454-455.) There was a third occasion when petitioner again tried to put his private in her private. (2RT. 456-457.) On another occasion, petitioner tried to put his private in her butt, but did not succeed (2RT. 459-460.) The final occasion was about a week or two before petitioner was arrested.(2RT. 458.) All incidents had occurred on different days, and at least three months passed between the first and last incidents. (2RT. 458.)

Andrea reported what petitioner did to her about a week or six days after petitioner got arrested for allegedly raping Jessica.

(2RT. 461.) She did not tell her mother everything, but finally told her aunt Laura. (2RT. 462; 3RT. 556.)

After her mother Melissa married petitioner, Andrea became reacquainted with her natural father, James and learned that she had other brothers and sisters. (2RT. 465-466.) She visited James in Mandioca, California, and liked it. (2RT. 466-467.) Melissa would yell at her and call her names. (2RT. 297, 356, 468.) James did not do that. (2RT. 468.)

Andrea was close friends with Jessica. They talked about boys. Jessica said she would always be there for her if something happened. (2RT. 469.) Andrea had occasionally seen some X-rated stuff on TV. (2RT. 490.)

b. Defense case.

In June 2002, Melissa and petitioner lived at Melissa's friend's house for a month. Melissa's son Josh then went to live with a former coworker and Andrea went to live with her father, James. (3RT. 638.) After a few weeks with her father, Andrea went to live with Melissa's coworker, Carla Sanders. (3RT. 640.) Andrea lived with Sanders from August 2002 to November 2002 and went back to live with James. (3RT. 641.)

When Melissa was pregnant with Andrea, Melissa was addicted to drugs. (3RT. 639.) When she and petitioner moved to Hayward, they met Jessica.(3RT. 646.) Petitioner was working full time and would come home around 6 p.m. (3RT. 646-647.) Jessica would come over a lot and Melissa and Jessica would be on the computers (3RT. 647.)

Jessica did not have much interaction with petitioner. (3RT. 649-650.) Jessica knew that Melissa had boyfriends over the house for sex while petitioner was at work. (3RT. 650.)

Melissa had a friend name Rose Rivera (3RT. 650.) Sometimes Rivera took Andrea over to her house. Rivera had teenage children. (3RT. 651.)

On May 23, 2008, Jessica came to the apartment. (3RT. 651.) Melissa took the other children to Jack-in-the-Box (3RT. 652) and asked Jessica if she wanted to go, but she said no. The round-trip going to Jack-in-the-Box and returning took 15 to 17 minutes. (3RT. 653.) Jessica left, then returned with her mother Karen about 20 to 30 minutes later. Karen then accused petitioner of raping Jessica. (3RT. 655-656.) (3RT. 656.) About 20 to 30 minutes after Karen and Jessica left, the police arrived and arrested petitioner. (3RT. 658.)

Melissa admitted calling Andrea names including "bitch" frequently. She had hit her. (3RT. 662.) Petitioner never abused Andrea. (3RT. 663.) Andrea was known to exaggerate or fabricate.(3RT. 663-664.)

Melissa asked Andrea if petitioner had ever done anything to her. (3RT. 660.) Before the arrest she never had any reason to be worried about Andrea been molested by petitioner. (3RT. 661.) Andrea said no, nothing happened. Melissa asked her two more times. Finally, Andrea told Melissa that petitioner had kissed her like boyfriend/girlfriend, but that was all. (3RT. 665-666.) Melissa called police the next day. (3RT. 667.) An officer spoke with Andrea for about 15 minutes and told Melissa that the police were not going to do anything but if she

heard anything else they should call (3RT. 669.)

A few days later, Andrea told Melissa that she had more to tell. (3RT. 700.) Melissa had seen Andrea and Jessica talking in the complex after petitioner was arrested. Before that, Andrea and Jessica had hardly ever talked to each other. (3RT. 701.)

Melissa called Andrea's aunt Laura who came over on Thursday. Laura and Andrea went into a room together. (3RT. 670-671.) Laura then told Melissa to call the police. (3RT. 672.)

After this, petitioner's children Lina and Jessie went to live with Ruben and Teresa Reyez. Melissa's son Josh went to live with Laura. Andrea now lives with her dad, James. (3RT. 673.)

Three weeks after the alleged rape, Melissa asked Jessica what happened. (3RT. 676.) Jessica said she was sitting on the chair by the computer. Petitioner told her to stand up, attacked her, and threw her on the bed. Jessica remarked that if petitioner was going to rape somebody, he should at least know how to make it feel good. (3RT. 677.) Jessica was talking normally and did not seem upset. (3RT. 679.)

Rose Rivera testified that she had known petitioner since 1999 (3RT. 703), and had known Andrea since she was about five. (3RT. 704.) Rivera never saw any kind of behavior on the part of Andrea that caused her concern about Andrea's relationship with petitioner. (3RT. 705.) Rivera, however, saw Melissa being abusive physically and verbally and emotionally to Andrea. (3RT. 706.) Rivera had reported Melissa's behavior to Child Protective Services. (3RT. 707.)

A week after petitioner had been arrested, Andrea came over to see Rivera and they talked about the allegations. (3RT. 710-711.) Andrea described what had allegedly happened, while giggling and laughing.(3RT. 711.) Andrea also told Rivera that she had seen Melissa and petitioner naked when she walked into their bedroom. (3RT. 712.)

Rivera testified that Andrea clung to adults for a lot of attention. (3RT. 712.) During a party, Andrea wanted to play games and sit on the lap of a man who was there, hugging and clinging to him. (3RT. 713.)

Teresa Reyez, petitioner's mother, testified that petitioner, Melissa, and Andrea had lived with her. (3RT. 716-717.) Andrea lied sometimes about going to school. Melissa was not nice to Andrea and would sometimes takes Jesse and Lina and leave Andrea behind. (3RT. 718.) Andrea lacked attention and would try to get attention. (3RT. 721.)

Officer Rodney Johnson collected four or five articles of clothing at the scene, including pantyhose, an undershirt, a casual top, and pants. (4RT. 736-737.) These are the items that Jessica said she was wearing. (4RT. 740.) The officer didn't notice any damage to the clothing. (4RT. 741.)

ARGUMENT

1. Standard for granting a certificate of appealability.

In *Slack v. McDaniel*, 529 U.S. 473, 482, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), this court held that a petitioner must

make a "substantial showing of the denial of a constitutional right" with respect to each issue sought to be appealed. *Slac*k adopted the standard of *Barefoot v. Estelle,* 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983*)* that a habeas corpus petitioner can meet the requisite standard by establishing one of the following:

> ". . . that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further."

Barefoot v. Estelle, 463 U.S. at 893; *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

In *Miller-El v. Cockrell*, 537 U.S. at 337-338, the Supreme Court held that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail."

2. A jurist of reason could find that the state court unreasonably applied clearly established federal law in determining that admission of petitioner's in-custody statements in the absence of Miranda advisements did not deprive petitioner of due process of law under the Fifth and Fourteenth Amendments.

a. Facts.

During a hearing outside the presence of the jury, Officer Carpenter was one of five uniformed officers who opened the door of petitioner's home (1RT. 142, 169) and told petitioner to come outside to talk. Petitioner said "I know why you are here" and said that he knew they were coming. (1RT. pp. 143-144.)

They walked 20-25 feet away to a parking lot and stopped on the sidewalk, remaining there for 10-15 minutes. (1RT. 148.) Petitioner was not free to leave. (1RT. 174.)

Petitioner then said: "I made a mistake." "I'm sorry." Carpenter asked, "What happened?" (1RT. 145.) Petitioner said "I kissed her." Carpenter asked whether they had sexual intercourse and petitioner said no. Carpenter asked if it was the first time petitioner had ever kissed her. Petitioner said he just kissed her on the cheek and he gave her a friendly hug. Petitioner was very cooperative, emotional, and crying. (1RT. 146.)

Petitioner testified that the officers had ordered him him to come out of his house because they needed to talk to him. They

ordered petitioner to sit on the curb on the walkway. (1RT. 189.) They were in uniform with sidearms. (1RT. 190.) Petitioner did not feel free to leave. Carpenter asked petitioner what happened between him and "Jessica" before he advised petitione of his rights, and petitioner made statements. (1RT. 190.)

The court ruled that the statements "I know why you are here," "I made a mistake" and "I'm sorry" were volunteered. (1RT. 212-213.) The statements to the questions after that were ruled custodial interrogation and excluded. (1RT. 214-215.)

b. The trial court should have excluded petitioner's statements.

In *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United States Supreme Court held that a suspect may not be subjected to custodial interrogation unless he knowingly and intelligently waives his right to a remain silent, to the presence of an attorney, and to appointed counsel if he is indigent. Interrogation is "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The inquiry "focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Rhode Island v. Innis,* 446 U.S. at 301. An interview can be "interrogation" even when the police do not use express questioning. *Rhode Island v. Innis, id.* However, if a suspect in custody voluntarily makes statements not in response to police questions or conduct, those statements are admissible. *Miranda v Arizona*,

384 U.S. at 478.

Except for the initial "I know why you are here", petitioner made his statements in response to the officers directing him to talk to them. (1RT. 171.) Petitioner testified that Carpenter asked what had happened between him and Jessica prior to being advised of his rights, and made his statements in response. (1RT. 190.)

The situation contrasts with that in *Rhode Island v. Innis*, where a suspect in the back of a patrol car overheard two officers talking about the possible location of a gun and volunteered that he knew where it was. Here, the officers told petitioner to "come outside and talk."

c. The error was prejudicial.

A confession is the most damaging evidence that can be admitted against a defendant. *Arizona v. Fulminante*, 499 U.S. 279, 296, 311, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Improper admission requires reversal unless the confession's admission was harmless beyond a reasonable doubt. *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967.)

This was not a close case. Jury deliberations lasted about three and a half days (2CT. 370, 373, 375), and the jury was deadlocked on three counts. (2CT. 383, 394.) The evidentiary part of the trial lasted only a little longer. (2CT. 353-354, 362-363.) See *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995) (nine hours of deliberations "deemed protracted.") Such lengthy deliberations, and the incomplete verdict, showed that

the jurors likely found some deficiency in the government's case. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993.) The jury also requested 87 pages of testimony by the sex abuse examiner and victim read back. The prosecutor relied heavily on the statements during closing.. (4RT. 825.)

3. A jurist of reason could find that the state court unreasonably applied clearly established federal law in determining that the trial court's exclusion of evidence did not violate petitioner's right to present a defense under the Fifth, Sixth and Fourteenth Amendments.

a. Facts.

In 2007, Andrea claimed that when she was sleeping, a Hispanic teenager with spiky hair, wearing striped pants, and chewing "white gum", came into her room and started kissing her. The lights were off in her room, which was completely dark. The responding officer reported that Andrea's mom didn't see or hear any strangers in the house, that Andrea's bedroom window was latched from the inside, and that a partly-open sliding door had no pry marks. Andrea had described the incident "as if she was acting out a movie." She admitted that she'd seen a movie called "Faces of Death," had worried about people wandering on the street outside the apartment, and that it all "could have been just a dream". Andrea's mom told the officer that Andrea has "exaggerated stories before." (2CT. 339-341.) 11 months later, another officer tried to follow up on this case, but Andrea was

unavailable to view a lineup of a suspect. (Exhibit A, pp. 9-10.)

The defense sought admission of the evidence under California Evidence Code section 1103(a)(1). (2CT. 341.) The court barred the evidence, finding that it wasn't clear that Andrea had fabricated the incident. (2RT. 427-428.)

b. The trial court should have admitted the evidence.

"[A] criminal defendant states a violation of the [Sixth Amendment] Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-79, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).It is sufficient that a jury "might reasonably" have questioned the witness's reliability or credibility in light of the cross-examination. *Delaware v. Van Arsdall*, 475 U.S. at 680, see also *Olden v. Kentucky*, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988) (per curiam.)

Denial of defense cross-examination can violate the Sixth Amendment despite contrary state evidence rules. *Olden v. Kentucky,* 488 U.S. at 232, *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Where a trial turns on "a credibility contest between" the accuser and defendant, exclusion of evidence impeaching the accuser is not harmless. *Fowler v. Sacramento County Sheriff's*

Department, 421 F.3d 1027, 1042 (9th Cir. 2005), citing *Olden v. Kentucky*, 488 U.S. at 232-33.

c. The error was prejudicial.

"The constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis." *Delaware v. Van Arsdall*, 475 U.S. at 684.

Here, no physical corroborating evidence existed. Only when Andrea was repeatedly questioned did she accuse petitioner. (3RT. 665-666.) Andrea's mom Melissa had seen Andrea and Jessica talking in the apartment complex before Andrea she talked to the police. (2RT. 474-476.) The jury and asked that the testimony regarding this be reread. (2CT. 378.)

Andrea also had a motive to lie. She wanted to live with her father (2RT. 467) because Melissa regularly yelled at her. (2RT. 297, 356, 3RT. 662, 706-707.) Andrea had also treated her accusations as a joke, laughing when she described them. (3RT. 711.) Andrea admitted previously seeing pornography on TV. (2RT. 490.)

Both Melissa and Rivera testified that they never saw any kind of behavior on the part of Andrea that caused them concern about her relationship with petitioner. (3RT. 661, 706.) Melissa had been molested as a child and she would be familiar with the signs. (3RT. 661.) Andrea never appeared to be afraid to be alone with petitioner. (3RT. 662.)

4. A jurist of reason could find that the state court unreasonably applied clearly established federal law in determining that prosecutorial misconduct in voir dire and closing argument did not violate petitioner's right to a fair trial and right to counsel under the Fifth, Sixth and Fourteenth Amendments.

a. Facts.

During voir dire, the prosecutor told the jury "I will never try to trick you. I will always be straightforward with you." (ART 12:8-10.) The defense asked for an admonition that the jury disregard the prosecutor's arguing his own credibility. (ART 43.) The court agreed that the prosecutor seemed to be self-vouching, but wouldn't give an admonition. (ART 43.)

Later in voir dire the prosecutor asked the protective jurors to think about the most embarrassing thing that ever happened to them and to imagine having to explain that to 12 strangers. (ART 17:20-25.) Defense counsel objected that this was improper argument and the court sustained the objection. (ART 17.) The prosecutor then asked "do you think it would be difficult for a child to sit on the stand and talk about something that's embarrassing?" (ART 18:1-3.) Defense counsel again objected, but the court overruled it. (ART 18.)

In closing, the prosecutor also vouched for his case by using the phrases, "What do we know?" "How do we know?" "How do we know?" (4RT. 812:24, 812:27, 816:19, emphasis added.)

In rebuttal, the prosecutor repeatedly described defense counsel's argument about inconsistent statements, failure to present DNA evidence, and reasonable doubt as "the okie-doke . . . . a sleight-of-hand" and asked the jury not to "fall for the okie-doke," (4RT. 852:12-853:13), mentioning the phrase "okie-doke" about ten times. (4RT. 853:17-18, 25, 854:28, 855:14, 857:26, 860:1, 27, 860:26-27.

The prosecutor also gave his personal opinion of defense witness Rivera, saying "I think her testimony is suspect." (4RT. 858.)

b. The prosecutor's vouching and attacks on the defense function was misconduct depriving petitioner of a fair trial.

Prosecutorial attacks on the defense function burdened petitioner's Sixth Amendment right to counsel and Fourteenth Amendment due process right. *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983). citing *Chapman v. California*, 386 U.S. at 24 and *United States v. Valle-Valdez*, 554 F.2d 911, 915 n. 5-8 (9th Cir. 1977).

"Vouching" suggests to the jury that "evidence not presented to the jury, but known to the prosecutor, supports the witness' testimony. *United States v. Brown*, 720 F.2d 1059, 1073 (9th Cir. 1983).

Pervasive improper remarks by a prosecutor can so infect the trial with unfairness as to make the resulting conviction a denial of due process. *Darden v. Wainwright* (1986) 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).

c. Defense counsel's failure to object to misconduct during closing was ineffective.

Defense counsel objected to the comments in voir dire related to vouching, but the court, but didn't object to the vouching and other misconduct in the closing argument.

A defendant has a right under the Sixth Amendment to the United States Constitution to the effective assistance of counsel. *Strickland v. Washington* (1984) 466 U.S. 668, 684-688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defense counsel's failure to object to the misconduct during closing argument was ineffective.

5. A jurist of reason could find that even if none of these errors were prejudicial in themselves, the cumulative effect deprived petitioner of a fair trial under the Fourteenth Amendment.

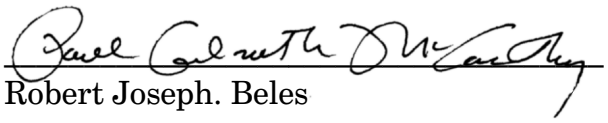
State law errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone may cumulatively produce a trial setting that is fundamentally unfair. *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007), citing *Chambers v. Mississippi*, 410 U.S. 294, 298, 302-03, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973.) *Montana v. Egelhoff*, 518 U.S. 37, 53, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996), *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). Cumulative error warrants relief "where the errors have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d

431 (1974).

CONCLUSION

For these reasons, this court should grant certiorari.

Dated: Oakland, California, Tuesday, April 2, 2019.



Robert Joseph. Beles
Paul Gilruth McCarthy
Attorneys for *Petitioner MICHAEL MORAN*