NO. 18-5694

IN THE

SUPREME COURT OF THE UNITED STATES

TAUMU JAMES – Petitioner

vs.

STATE OF CALIFORNIA –Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The argument that petitioner has made at every level of post-conviction review is simple, and it has stayed the same. He has asserted that evidence was introduced in his trial that was so confusing and misleading that it rendered the trial unfair. At this stage of review, it is notable that two different legal theories, both of which are incorrect, are being used to avoid the merits of his argument and to disregard the troubling record of what occurred at trial. Ironically, as discussed below, a basic factual mistake in respondent's briefing provides yet another illustration of the extraordinary prejudice that has flowed from the introduction of this evidence.

First, petitioner noted that the Ninth Circuit Court of Appeals applied *Perry v. New Hampshire*, 565 U.S. 228 (2012) much too broadly and incorrectly concluded that since this case did not involve suggestive circumstances arranged by law enforcement, due process could not be violated as long as petitioner was able to " 'test reliability through the rights and opportunities generally designed for that purpose' " such as cross-examination and standard trial procedures.

See Petition, 4. This case, petitioner noted, illustrates a tendency of courts to misinterpret *Perry* as setting a bar to due process claims even in cases where the basis of the due process argument has nothing to do with suggestivity.

Respondent's answer is that Ninth Circuit "did not rely solely, or even primarily on *Perry*." Opposition, 7. But the opinion speaks for itself, explicitly citing *Perry* and then applying the criteria of *Perry* to evaluate whether petitioner "tested the reliability" of the identifications. Petition, Appendix B, 4-5. This application of exactly the criteria that *Perry* articulates, and this explicit invocation of *Perry* as setting a standard for which trial protections will "suffice" to avoid a due process violation relies on *Perry* as the central plank of the analysis, and no other case is cited as providing any substantive standard to evaluate whether the trial was rendered unfair. But petitioner did not assert a suggestivity claim in the Ninth Circuit, and *Perry* consequently does not have any bearing on the issue that the appellate court was actually asked to consider.

In attempting to explain why *Perry* ever was mentioned at all, respondent advances a remarkable mischaracterization of the record

that, yet again, illustrates the misleading effect the challenged evidence has had on petitioner's case. Respondent writes that *Perry* was relevant because Felicitas Gonzales said her identification of petitioner was "based partly on her independent recollection of petitioner **as one of the robbers**." Opposition, fn. 1, emphasis added.

This is incorrect. All Gonzales ever did was to identify petitioner **as the person she had picked from a six-pack**, not as a robber. This basic point has been acknowledged again and again in this case, including by the Ninth Circuit itself, which noted that it is "incorrect" and a product of "confusion" to suggest that Gonzales "identified Mr. James in court as 'the man with the mask,' rather than as the man whose photo [she] had previously seen on the internet." Petition, Appendix B, 5. Indeed, in the District Court, respondent's *own briefing* asserted that "the jury was well aware that Barragan, Saavedra, and Felicitas [Gonzales] had merely identified Petitioner as the person whose image they saw on the internet, **not as one of the robbers**." Respondent's "Answer to Petition for Writ of Habeas Corpus" filed January 31, 2014 in CV 13-7523-SVW at 26, emphasis

added.[1] Nevertheless, respondent, just like the trial judge, now gets this basic fact wrong. See Petition, Appendix B, 5 (noting that the trial judge made the same error). Somehow the jury, with none of the legal training or sophistication that respondent and the trial judge have, was supposed to have avoided this error and thereby provided petitioner with a fair trial. This is wildly unrealistic.

In any event, the salient point for purposes of this petition is simply that the Ninth Circuit applied *Perry* to a due process argument that had nothing to do with suggestivity. The notion that the standard of *Perry* was not determinative, and that instead the Ninth Circuit simply reviewed "the entire record of proceedings" for fundamental fairness is belied by the fact that the Ninth Circuit never even *mentioned*, much less evaluated the impact of, the multiple in-court identifications that were made of petitioner by witnesses who admittedly were not claiming to say that he was the robber. Opposition, 8; see Petition, 7-9 (discussing the Ninth Circuit's failure to address these identifications, even after the petition for rehearing pointed out that they had been omitted from the analysis). In fact the

1 This citation is to the pagination at the bottom of the document rather than to the pagination assigned by Pacer.

only substantive thing the Ninth Circuit ever did related to these in-court identifications was to delete its footnote from the opinion claiming that petitioner had failed to challenge them. See Petition, 8-9. If a review of the "entire record" is necessary to evaluate fundamental fairness, the analysis that the Ninth Circuit actually delivered did not comply with that standard. What occurred instead was an invocation of *Perry* in a case to which *Perry* did not apply.

This case consequently illustrates the need for this Court to clarify the scope of the holding of *Perry*.

Petitioner also argued that a circuit court does not fairly apply 28 U.S.C. § 2254 if it sets up its own standard of what constitutes "clearly established federal law" and then ignores that standard when an appellant invokes it to argue for relief. Petition, 10-11. Respondent reframes this issue, claiming that petitioner is arguing that it is an error for an appellate court to rely on the law of this Court in weighing "clearly established federal law." Opposition, 11.

Respondent is dodging the issue, which is not an attempt to dispute that this Court's opinions define "clearly established federal law" but rather an argument that circuit courts deny fairness when

they gatekeep due process arguments by engrafting their own standards *on top of* the standards that this Court has established. If a circuit court sets up its own criteria for what constitutes a due process violation, the circuit court forces appellants to argue in terms of those criteria, because there is no way for a habeas petitioner to prevail under the AEDPA except by showing that the state court misapplied established federal law.

If petitioner had ignored the Ninth Circuit's "no permissible inferences" standard, his claim would have been rejected for failure to show that the state court was unreasonable in finding that there were "permissible inferences" to be drawn from the identification evidence. This is clear because this is the standard that the Ninth Circuit and California state courts normally apply, and have applied in more than 250 cases to deny claims of due process violations stemming from the introduction of evidence. See petition, p. 11.

But attempting to argue in the terms that the Ninth Circuit typically uses in evaluating due process claims is also a trap, because the Ninth Circuit invoked that focus on *its own gatekeeping standard* for due process claims to suggest that appellant was not arguing that

there was a misapplication of the "fundamental unfairness" standard of *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Appendix B, Amended Memorandum 2-3. This occurred in spite of the fact that petitioner explicitly cited *Payne* and asserted, in the headings of his arguments, that the evidence denied due process because it was "highly misleading."

The "no permissible inferences" standard of the Ninth Circuit thus creates a damned-if-you-do-and-damned-if-you-don't scenario for habeas petitioners. It is impossible to prevail *without* addressing that standard since that is the standard that California courts use to comply with Ninth Circuit precedent, and at the same time it is also impossible to prevail *by* addressing that standard, because that standard is not actually grounded in any opinion of this Court, and was instead simply invented by the Ninth Circuit itself in *Jammal v. Van de Kamp*, 926 F.2d 918 (9th Cir., 1991).

Respondent is wrong to suggest that this standard is actually equivalent to an evaluation "of fundamental unfairness," for two reasons. Opposition, 12. First, as the language of *Jammal* makes clear, the due process standard the Ninth Circuit uses is not an

either/or standard, it is a both/and standard: a petitioner must show *both* that there are "no permissible inferences" to be drawn from the evidence *and* that the evidence rendered the trial fundamentally unfair. 926 F.2d at 920 ("only if" there are no permissible inferences is a due process violation possible, and "even then" the evidence must also prevent a fair trial). Since there is virtually no guidance about what the term "no permissible inference" means (and no guidance at all in the opinions of this Court),[2] this standard provides the Ninth Circuit with unfettered discretion to find that any sort of hypothetical inference, relevant or not, defeats a due process argument.

Second, and relatedly, as the analysis supplied by the Ninth Circuit in this case pointedly illustrates, the requirement that appellants focus on the question of whether "permissible inferences" exist gives the circuit court considerable leeway to suggest that a petitioner is simply arguing about state-law evidentiary matters, and therefore to deny relief precisely for a supposed failure to engage with questions of established federal law.

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2 This Court has never used the expression "no permissible inferences" except in a footnote that summarized a petitioner's argument and quoted *Jammal* as the basis for what the petitioner claimed. *Duncan v. Henry*, 513 U.S. 364, 370, fn. 1 (1995).

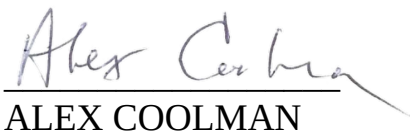
Channeling and gatekeeping claims in this way, such that the merits are simply ignored, is unfair. It is particularly unfortunate in a case such as this, where it is clear that the jury was exposed to extremely confusing evidence, and where the comments of the trial judge herself, and even respondent's own argument before this Court, demonstrate exactly the misleading impact that this evidence produced.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: January 2, 2019

Respectfully submitted,



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