

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JUAN CARLOS MENDEZ, Petitioner,

VS.

CALIFORNIA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a child molestation case, the defendant took the stand and denied that any abuse had occurred. The prosecutor then cross-examined him at length regarding whether the prosecution's witnesses had lied under oath, and why they would do so. The defendant's failure to explain why the prosecution witnesses would lie was the central theme of the prosecutor's closing and rebuttal arguments.

This case presents the following question:

Whether the prosecution's use of "were they lying" questions and argument to secure a criminal conviction constitutes prosecutorial misconduct and violates a defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner Juan Carlos Mendez (“Petitioner”) respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Sixth Appellate District, in Case No. H042638.

OPINIONS BELOW

The unreported opinion of the California Court of Appeal, Sixth Appellate District, affirming the judgment on appeal is attached as Appendix A. *See also People v. Mendez*, 2018 WL 1756641 (Cal. Ct. App., Apr. 12, 2018). The unreported order of the Court of Appeal denying rehearing is attached as Appendix B. The unreported order of the California Supreme Court denying the petition for review is attached as Appendix C.

JURISDICTION

The judgment of the California Court of Appeal, Sixth Appellate District, was entered on April 12, 2018. A timely petition for review was denied by the California Supreme Court on July 25, 2018. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The Sixth Amendment to the United States Constitution:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

The Fourteenth Amendment to the United States Constitution (§ 1):

“Section 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.”

STATEMENT OF THE CASE

On July 24, 2014, Petitioner was charged by information with four counts of aggravated sexual assault upon a child under the age of 14 years, in violation of California Penal Code section 269. A9. Counts One and Two were predicated upon a violation of Penal Code section 261(a)(2) (rape), and Counts Three and Four were based upon a violation of Penal Code section 288a (forcible oral copulation). A9. Each count alleged a date range of June 25, 2003 to June 25, 2009. (1ACT 2-3.)¹ Petitioner pleaded not guilty and was tried by jury.

At trial, the complainant, Maria, testified that Petitioner raped and orally copulated her repeatedly when she was between 9 and 12 years old. A4-A5. Maria, who was 18 years old at the time of trial, testified that Petitioner had previously been the boyfriend of her mother, Cynthia. A3-A4. During that time period, Cynthia was struggling financially and often stayed in motels or rooms for rent with her four children. A5-A6; *see also* 2RT 81-82.

The prosecution introduced no exhibits or physical evidence at trial. Apart from Maria's testimony, the prosecution relied almost exclusively on the testimony of Cynthia and Maria's sister Monique. A5-A6. Cynthia testified

¹ "CT" refers to the clerk's transcript and "ACT" to the augmented clerk's transcript on appeal. "RT" references the reporter's transcript.

to a physically abusive relationship with Petitioner, whom she identified as a lover but not a boyfriend. A5. Cynthia also testified that she twice witnessed Petitioner sexually abusing Maria, though not with respect to the misconduct alleged in the information. A5-A6.

Monique stated that she remembered occasions when her mother was not present and Petitioner would take Maria into another room. A6. Monique testified that she heard crying and moaning from the other room, and stated that her sister looked emotionally distraught when she emerged. A6.

The only other prosecution witness was Miriam Wolf, a social worker, who testified about the child sexual abuse accommodation syndrome (CSAAS). A7.

Marcella Gamboa, the defendant's wife, testified for the defense. She testified that Petitioner had spent time every day for years with her four children, including two girls, and that she never observed him doing anything inappropriate. A7-A8. Ms. Gamboa testified that Petitioner was a good father figure for her children. A8.

Petitioner then took the stand on his own behalf. On direct, he testified that he had an intermittent sexual relationship with Cynthia starting in 2004, but stated that he never physically abused her. A8. Petitioner, who had never been charged with or accused of child molestation before, firmly denied ever

touching Maria sexually. A8.

The prosecutor's cross-examination of Petitioner focused almost exclusively on why Cynthia, Maria and Monique would be motivated to lie about Petitioner's alleged abuse of Maria. *See* A18-21. After confirming that Petitioner had no contact with the three witnesses from 2008 to 2013 (3RT 220), the prosecutor asked Petitioner a long series of "were they lying" questions:

Q. [by Mr. Gillingham, the prosecutor] In your mind, Cynthia just made this up. Is that right?

A. Yes.

Q. And in your mind, she put Maria up to coming in and saying this. Right?

A. Yes.

Q. And you said that to the officer repeatedly that mom was putting the charges on you. Right?

A. Yes.

Q. Why do you think that?

A. Because when she tried to contact me, I did not respond to her.

Q. For many years before, you think she was still mad that you didn't contact her.

A. Yes.

Q. So that's why she would put charges on you. Right?

A. Yes.

Q. Does that make sense to you, Mr. Mendez?

A. Yes.

Q. And why?

A. Because people will do stuff to you to make you comply with them, just like the lady that was here, the C.H.P.,

like they could make false charges on you.

Q. She waited five years?

A. I don't know.

Q. What was she making you comply with in 2013?

A. She was – well, she was having trouble with her husband. I know that for sure. She was having problems again like she was before.

Q. You knew that in 2013?

A. Yes.

Q. How did you know if you hadn't had contact with her in five years?

A. When I read the police report, that's what it said.

Q. It said she was having problems with her present husband?

A. Yes.

Q. Where does it say that?

A. When Maria was talking to the counselor. It said it in the report.

Q. It said Maria was having problems?

A. No. The mom and dad were fighting. In the report, she told the counselor.

Q. How would that affect you, Mr. Mendez?

A. It would affect me. She would leave her husband and have no money. She always did. She would try to come back to me.

Q. Okay. Clarify that for me, Mr. Mendez, because I'm not following. You're telling me that she would put her two daughters up to allege that you sexually molested them, or, Maria, and she would come testify about that because if she broke up with her husband, she'd come back to you.

Mr. Endrawos [defense counsel]: Your Honor, this is calling for speculation in what Maria's thinking or

Cynthia.

The Court: Overruled. That was his testimony.

A. Repeat the question.

Q. Sure. What you're suggesting is, because she would break up with her husband, she'd have nowhere to go. So because of that, she put her daughter up to testify that you molested her and her other daughter to testify that she saw some things that suggested that you molested Maria and that she would come as well and purger [sic] herself five years later. Does that make sense?

A. I thought – yes.

Q. It does. Explain to me then how that makes sense because, if what they say is true and you can get convicted and she left her husband, there would be nowhere to go. Explain to me how that works.

A. Explain to you how it works?

Q. Yeah.

A. It's the same pattern when you look at it because the time that she was gone for the six months, she would find somebody else so she wouldn't cross my line. It's basically the same pattern keep [sic] repeating itself.

3RT 220-222.

The prosecutor's questions regarding why Cynthia and her daughters were lying continued later in the examination:

Q. [by Mr. Gillingham the prosecutor] So, again, explain to me how it fits that five years after she's seen you, she's going to organize a vast conspiracy amongst family members to get you in serious trouble.

A. 'Conspiracy'?

Q. Yeah, having three people get together to make up a story and come in and testify twice under oath and accuse you of sexual molest?

A. Well, I mean, it would be accurate if they got all the details exactly from three people that saw me, there would be accurate details of the situation that did happen and all the situations were wrong. And they have pretty different stories. How would that match? The stories? If the three people saw me, how can there be so many different stories? How much time changed? How much different things they saw if three people saw exactly the same thing?

Q. That was what I asked you. I asked you how much it makes sense to make this up after five years of not seeing you.

A. I don't know what they're thinking. I don't know what sense it makes.

Q. Isn't the more simple explanation they're telling the truth?

A. No.

Q. It's not.

A. No.

Q. Why not?

Mr. Endrawos [defense counsel]: Objection. Argumentative.

The Court: Sustained.

Q. Let me ask you this: You heard – you mentioned your inaccuracies. You heard Monique testify. Right? The youngest daughter?

A. Yes.

Q. She's, in your mind, part of making this story up about you. Right?

A. Yes.

Q. And in your mind, it's mom that put her up to it. Right?

A. Yes.

Q. Okay. And to put together a story to somehow harm you.

Right?

A. Yes.

Q. Again, after five years of not having seen you, having no contact with you. Right?

A. Yes.

Q. You had no contact with those people. Right?

A. Yes.

Q. So wouldn't – well, you heard Monique testify that she never saw you touch Maria. Right?

A. Yes.

Q. That's not a great story if you're involved in a conspiracy to frame you. Wouldn't she say –

Mr. Endrawos: Objection, argumentative.

Q. Wouldn't she say, I saw him touch Maria?

Mr. Endrawos: Objection, argumentative.

The Court: Sustained. Calls for speculation also.

Q. If you were to put together a conspiracy, wouldn't you want to say they had seen you do illegal activity?

Mr. Endrawos: Objection. It's argumentative.

The Court: Sustained.

Mr. Endrawos: And it's irrelevant.

* * *

Q. And in your mind, it's Cynthia who put [Monique] up to that; is that right? To come and say that?

A. Yes.

Q. Why do you think that again?

Mr. Endrawos: Objection, asked and answered.

The Court: Sustained.

Mr. Gillingham: I don't know that I ever got an answer.

The Court: Yeah, you did.

Q. So, then, you also heard Monique say as far as she's aware, you didn't touch her, right?

A. I didn't touch her.

* * *

Q. Wouldn't it have been a powerful sword if she came in and said you touched her too?

Mr. Endrawos: Argumentative, speculative.

The Court: Sustained.

* * *

Q. You have no recollection in five years of ever being alone with her children.

A. No.

Q. That's not true when they come and testify there were times when you were alone with the children?

A. That's not true.

3RT 223-228.

The prosecutor returned to this line of questioning shortly thereafter:

Q. Cynthia was putting the kids up to this. Right? Right?

A. Yes.

Q. And that they came for some reason to court to frame you for the charges that you're being charged with. Right?

Mr. Endrawos: Objection, asked and answered.

A. Yes.

Mr. Endrawos: Multiple times.

The Court: Overruled.

Q. You read that she's not saying that she sees your penis in her daughter's vagina. Right?

A. What's the question?

Q. When you read it and you heard her testify, that she didn't see your penis in her daughter's vagina. Right?

A. Yes.

Q. But she saw your fingers in her daughter's vagina. Right?

A. No.

Q. She leaves out the most specific details. If she were here to frame you, that would prove you the most criminal

exposure. Right?

Mr. Endrawos: Objection, calls for a legal conclusion.

The Court: Sustained.

3RT 232-3.

The prosecutor turned to the issue once more at the end of the cross-examination:

Q. Now, then in your testimony, in your estimation, that somehow, because it was a little bit different when you talked to the officers, it was that somehow Maria had been 'devirginized.' Do you remember that conversation?

A. Yes.

Q. That was why they were making all this up?

A. Yes.

Q. Can you explain that to me?

A. There's no explanation. That's what I read in the report.

Q. You said that that was somehow what they were trying to get out from under [sic].

A. That's what I felt at the time.

Q. Has your feeling changed?

A. Yes.

Q. How has it changed?

A. Because I recognize the pattern of what was happening.

Q. What pattern?

Mr. Endrawos [defense counsel]: Objection, asked and answered.

The Court: Overruled. You can answer.

A. Oh. That she gets mad when I don't answer, when I don't come back to be with her.

Q. Mr. Mendez, let me sum up what you're saying. She texted you or called you just before she left to Antioch; is that right?

A. No.

Q. So then what's the pattern where you didn't respond to her that would have led us here today?

A. The pattern is that she, the mom and the daughter, messaged my brother on Facebook looking for me. And I didn't respond when they were looking for me.

* * *

Q. Right before you got charged, you mentioned them on Facebook. You didn't respond. That's why we're here.

Mr. Endrawos: Calls for speculation.

The Court: Overruled.

A. I don't know.

Q. When the police officers asked you, spent an hour with you, did you tell them that you didn't respond to a Facebook posting and that's why they must be making this up?

A. No, I didn't tell them.

* * *

Q. Now, it's because mom and daughter messaged your brother on Facebook that three people chose to come perjure themselves and accuse you of child molest. That's your testimony?

A. I don't know. I don't know what they were thinking.

Q. Nothing further.

3RT 234-237.

Petitioner's failure to explain why the prosecution's three percipient witness would lie became the central theme of the prosecutor's closing and rebuttal arguments. The prosecutor argued that Petitioner was not credible because he had "no explanation at all for anything in this case[.]" 3RT 281.

The prosecutor urged the jury to consider the lack of any explanation by the defense as to why the prosecution's witnesses were lying:

I would submit to you that, while you're considering this case and you're thinking and talking, . . . the question's why? Why? The question's why? If what Maria was saying on the witness stand is not true, then why? Why did she lie? What did she have to gain? What does she get out of it? What does her mother get out of it? What does her sister get out of it? Why? Why five years later does she come and say that?

(3RT 289.)²

During rebuttal argument, the prosecutor again emphasized to jurors that “[t]he question that you have to ask yourself is why. Why?” (4RT 319.) The prosecutor repeatedly hammered Petitioner’s failure to explain why the other witnesses would be lying and mocked the notion that the witnesses were in a “grand criminal conspiracy” to frame Petitioner. (4RT 321-324, 332.) The prosecutor argued that Petitioner had “[a]ll types of time, all types of ability to come up with an explanation for why this is going on or why this is happening. There just isn’t one.” (4RT 330.)

The jury found Petitioner guilty on all counts. (1CT 193, 199, 205, 211; 4RT 339-340.)

² Defense counsel objected that the prosecutor’s argument improperly shifted the burden to the defense, but the objection was overruled. (3RT 281, 289.)

On July 24, 2015, the trial court imposed a prison term of 15 years to life for each count, for a total sentence of 60 years to life. (4RT 356.)

Petitioner timely filed a notice of appeal on July 28, 2015. (1CT 254.) On appeal, Petitioner contended, *inter alia*, that the prosecutor’s “were they lying” questions and argument had violated his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The California Court of Appeal for the Sixth District disagreed, holding that both the questioning and the argument were permissible. A22-23.

Petitioner filed a petition for review in the California Supreme Court raising the same claim, which was denied on July 25, 2018. A39.

REASONS FOR GRANTING THE WRIT

This case presents the ideal vehicle to resolve a recognized and persistent conflict regarding whether a prosecutor may use “were they lying” questions to secure a criminal conviction.

In the majority of State and federal jurisdictions, prosecutors are categorically prohibited from asking a criminal defendant during cross-examination whether the prosecution witnesses were lying and why they would do so. According to the majority rule, “were they lying” questions invade the exclusive province of the jury as factfinder regarding the credibility of witnesses and impermissibly shift the burden of proof onto the defense. Courts

in the majority also recognize that such questions elicit irrelevant and speculative testimony, and place the defendant in an untenable position in front of the jury.

California does not follow the majority rule. Instead, in California, “were they lying” questions are examined “in context.” *People v. Chatman*, 38 Cal.4th 344, 384 (2006).

This case exemplifies how the minority rule can profoundly transform the very nature of a criminal trial and distort the prosecution’s burden of proof. The prosecutor here asked *dozens* of “were they lying” questions during his cross-examination of Petitioner, focusing repeatedly why the prosecution’s witnesses would “organize a vast conspiracy amongst family members to get [Petitioner] in serious trouble.” The prosecutor then made Petitioner’s failure to explain why the witnesses would lie the central organizing theme of his closing and rebuttal arguments. He told the jury that they should convict because Petitioner had “[a]ll types of time, all types of ability to come up with an explanation for why this is going on or why this is happening. There just isn’t one.”

While Petitioner was accused of horrible crimes, he deserved a fair trial. That is not what he received. A prosecutor’s persistent use of “were they lying” questions and argument makes a mockery of due process, undermines

the jury's role as factfinder, and unduly burdens a defendant's right to testify on his or her own behalf. This Court should grant certiorari to resolve this important issue of constitutional law.

I. The Court Should Grant Certiorari to Resolve a Recognized and Persistent Conflict as to Whether “Were They Lying” Questions Violate Due Process and Constitute Prosecutorial Misconduct

To resolve a recognized and long-standing conflict as to whether “were they lying” questions violate due process and constitute prosecutorial misconduct, this Court should grant certiorari.

A. In the Majority of Jurisdictions, a Prosecutor is Categorically Barred from Asking a Criminal Defendant “Were They Lying” During Cross-Examination

As numerous courts have acknowledged, there is a long-standing and persistent split in the United States regarding whether a prosecutor may ask a criminal defendant “were they lying” questions during cross-examination. In most State and federal jurisdictions, “were they lying” questions are “categorically improper.” *State v. Leutschaft*, 759 N.W.2d 414, 420 (Minn. Ct. App. 2009); see also, e.g., *State v. Duran*, 140 P.3d 515, 522 (N.M. 2006) (“The majority of jurisdictions . . . have followed the prohibition of ‘were they lying’ questions.”) Courts that follow the majority rule have concluded that “were they lying” questions constitute prosecutorial misconduct. *See, e.g., United States v. Harrison*, 585 F.3d 1155, 1159 (9th Cir. 2009); *Jensen v.*

State, 116 P.3d 1088, 1096 (Wyo. 2005); *State v. Graves*, 668 N.W.2d 860, 873 (Iowa 2003); *Duran*, 140 P.3d at 522.

Federal circuit courts generally agree that such questioning is impermissible. *See, e.g., Harrison*, 585 F.3d at 1158 (“It is black letter law that a prosecutor may not ask a defendant to comment on the truthfulness of another witness.”) (citations omitted); *United States v. Harris*, 471 F.3d 507, 511-12 (3d Cir. 2006) (agreeing with “sister circuits” and holding that it is improper to “force defendants into choosing to either undermine their own testimony or essentially accuse another witness of being a liar.”); *United States v. Sullivan*, 85 F.3d 743, 749–51 (1st Cir. 1996) (“[W]e state the rule now emphatically: counsel should not ask one witness to comment on the veracity of the testimony of another witness”); *United States v. Richter*, 826 F.2d 206, 208 (2d Cir. 1987) (“Prosecutorial cross-examination which compels a defendant to state that law enforcement officers lied in their testimony is improper.”). The same holds true in most States. *See, e.g., State v. Singh*, 793 A.2d 226, 236-39 (Conn. 2002); *State v. Maluia*, 108 P.3d 974, 978 (Haw. 2005); *People v. Riley*, 379 N.E.2d 746, 753 (Ill. 1978); *Graves*, 668 N.W.2d at 873; *State v. Manning*, 19 P.3d 84 (Kan. 2001); *Com. v. Martinez*, 726 N.E.2d 913, 924 (Mass. 2000); *State v. Flanagan*, 801 P.2d 675, 679 (N.M. App. 1990); *Burgess v. State*, 495 S.E.2d 445, 447 (S.C. 1998); *Mason v.*

State, 449 S.W.2d 47, 49 (Tex. Crim. App. 1970); *State v. Emmett*, 839 P.2d 781, 787 (Utah 1992); *State v. Casteneda-Perez*, 810 P.2d 74, 79 (Wash. App. 1991); *Jensen*, 116 P.3d at 1097.

Courts identify a number of reasons in support of the rule barring “were they lying” questions.

First, courts have determined that “asking a witness to opine on the veracity of another witness . . . ultimately invades the province of the fact-finder.” *Liggett v. People*, 135 P.3d 725, 732 (Colo. 2006). “As a matter of law, ‘[t]he credibility of witnesses is exclusively for the determination by the jury, and witnesses may not opine as to the credibility of the testimony of other witnesses at the trial.’” *United States v. Forrester*, 60 F.3d 52, 63 (2d Cir. 1995), quoting *United States v. Scop*, 846 F.2d 135, 142 (2d Cir.), *rev’d in part on reh’g on other grounds*, 856 F.2d 5 (1988); *see also Com. v. Triplett*, 500 N.E.2d 262, 265-66 (Mass. 1986) (citation omitted) (stating that “[t]he factfinder, not the witness, must determine the weight and credibility of testimony”); *United States v. Akitoye*, 923 F.2d 221, 224 (1st Cir. 1991) (stating that “it is not the place of one witness to draw conclusions about, or cast aspersions upon, another witness’ veracity”).

Second, courts have held that “were they lying” questions elicit speculative and irrelevant testimony. “[W]here the witness expresses a belief

as to the veracity of another witness, that statement of belief is simply irrelevant; it does nothing to make the inference that another witness lied any more or less probable.” *Liggett*, 135 P.3d at 731; *see also, e.g., Knowles v. State*, 632 So.2d 62, 66 (Fla. 1993) (stating that “unless there is evidence that the witness is privy to the thought processes of the other witness, the witness is not competent to testify concerning the other’s state of mind”); *People v. Berrios*, 298 A.D.2d 597 (N.Y. App. Div. 2002) (citation omitted) (“Whether the defendant believed that the other witnesses were lying is irrelevant”).

Third, the majority of jurisdictions have concluded that “were they lying” questions “create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied.” *Singh*, 793 A.2d at 237. Such a view “involves a distortion of the government’s burden of proof.” *Id.* at 238, citations and quotations omitted; *United States v. Reed*, 724 F.2d 677, 681 (8th Cir. 1984) (“This form of argument is improper because it involves a distortion of the government’s burden of proof.”); *Liggett*, 135 P.3d at 732 (“In the criminal setting, this is particularly problematic as the fact-finder may assume that an acquittal turns upon finding that the other witness or witnesses lied.”).³

³ An objection of improper burden-shifting relates to the due process clause of the Fourteenth Amendment of the United States Constitution. *In re Winship*, 397 U.S. 358, 364 (1970); *see also Jackson v. Virginia*, 443 U.S. 307,

Finally, courts recognize that a prosecutor's "were they lying" questions create "a 'no-win' situation for the defendant: if the defendant states that a contradictory witness is not lying, the inference is that the defendant is lying, whereas if the defendant states that the witness is lying, the defendant risks alienating the jury." *Maluia*, 108 P.3d at 978; *see also Emmett*, 839 P.2d at 787 (stating that "it puts the defendant in the untenable position of commenting on the character and motivations of another witness who may appear sympathetic to the jury"). Accordingly, "the predominate, if not sole, purpose of such questioning is simply to make the defendant look bad." *Jensen*, 116 P.3d at 1096.

B. A Minority of Jurisdictions, Including California, Permit the Prosecutor to Ask "Were They Lying" Questions During the Cross-Examination of a Criminal Defendant

In a minority of jurisdictions, "were they lying" questions are not considered improper. *See, e.g., Whatley v. State*, 509 S.E.2d 45 (Ga. 1998); *see also, e.g., State v. Morales*, 10 P.3d 630 (Ariz. App. 2000) (adopting general prohibition, but finding that "were they lying" questions may not always be improper). California falls within the minority rule. In California, courts are supposed to "carefully scrutinize 'were they lying' questions in context." (*Chatman*, 38 Cal.4th at 384.) The questions "should not be

315-16 (1979).

permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative.” (*Id.* at 384.) “However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him [or her] to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions.” (*Chatman*, 38 Cal.4th at 384; see also *id.* at 382.)

As the case at bar demonstrates, nothing in *Chatman* prevents a prosecutor from making “were they lying” questioning the central organizing theme of his or her cross-examination of the defendant. 3RT 220-28, 232-37. In California, a prosecutor is free to insist during closing and rebuttal arguments that the jury should return a guilty verdict because the defendant has failed to explain why the prosecution’s witnesses would lie. 3RT 281, 289, 319, 321-24, 330, 332.

C. The Prosecutor’s Extensive Use of “Were They Lying” Questioning and Argument was Misconduct that Violated Petitioner’s Fundamental Rights

Under the Fourteenth Amendment, the relevant question is whether a prosecutor’s misconduct “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The prosecutor’s alleged misconduct should be evaluated in the context of the entire proceeding, and courts properly consider whether the

prosecutor manipulated or misstated evidence; whether his or her comments implicated other specific rights of the accused; whether the objectionable content was invited or provoked by defense counsel’s argument; whether the trial court admonished the jurors; and the weight of the evidence against the defendant. *Id.* at 181.

Taking into consideration the context of the entire proceeding (*ibid.*), this case is extraordinary in terms of the prosecutor’s emphasis on the “were they lying” questions throughout his cross-examination and closing arguments. The prosecutor asked *scores* of “were they lying” questions of appellant. (3RT 220-228, 232-237; *see also supra* at 5-12. Indeed, the improper questioning “was an organizational theme for the prosecutor’s entire cross-examination.” *Harrison, supra*, 585 F.3d at 1159. The prosecutor also persisted with his most inflammatory were they lying questions – about the prosecution’s witnesses “conspiracy” against appellant and the ways in which the prosecution’s witnesses would have embellished their stories if they had been “here to frame you” – even in the face of repeated sustained objections. 3RT 325-327, 231-233. As courts have repeatedly held, a prosecutor’s extensive reliance on improper “were they lying” questions constitutes prosecutorial misconduct. (*Harrison*, 585 F.3d at 1159; *see also, e.g., Graves*, 668 N.W.2d at 873 (“Unfairly questioning the defendant simply to make the defendant look

bad in front of the jury regardless of the answer given is not consistent with the prosecutor's primary obligation to seek justice, not simply a conviction."); *Jensen*, 116 P.3d at 1096 (same); *Duran*, 140 P.3d at 522 (stating that "this kind of questioning is inconsistent with the prosecutor's primary duty to seek justice and provide a fair trial to the defendant").

The prosecutor's misconduct only worsened during closing argument. The prosecutor contended that appellant was not credible because he had "no explanation at all for anything in this case[.]" 3RT 281. The prosecutor argued, "The question's why? If what Maria was saying on the witness is not true, then why? . . . Why five years later does she come and say that?" 3RT 289. Similarly, during rebuttal argument, the prosecutor told the jury that "[t]he question that you have to ask yourself is why. Why?" 4RT 319. The prosecutor hammered appellant's failure to explain why the other witnesses would be lying and mocked the notion that the witnesses were in a "grand criminal conspiracy" to frame appellant. 4RT 321-324, 332. The prosecutor argued that appellant had "[a]ll types of time, all types of ability to come up with an explanation for why this is going on or why this is happening. There just isn't one." 4RT 330.

Taken in the context of the entire proceeding, the prosecutor's reliance on the "were they lying" evidence during his questioning and closing argument

was egregious. *Darden*, 477 U.S. at 181.

Given the prosecutor's closing argument, the misconduct also "implicated other specific rights of the accused," namely appellant's constitutional right to a jury verdict of guilt beyond a reasonable doubt. *Darden*, 477 U.S. at 181; *In re Winship*, 397 U.S. 358; U.S. Const. Amends. 6 & 14. The prosecutor improperly used the "were they lying" testimony to argue that the defense had the burden of showing *why* the witnesses were lying, which misstated the burden of proof to the jury. *See*, e.g., *State v. Fleming*, 921 P.2d 1076, 1079 (Wash. Ct. App. 1996) (holding that the prosecutor's argument that the defense failed to present any evidence that the witnesses were lying "improperly shifted the burden to the defendants to disprove the State's case"). The prosecutor's argument was improper "because the jury could have believed that the witnesses told the truth and yet still found that the government had failed to prove [the defendant's] guilt beyond a reasonable doubt." *United States v. Cornett*, 232 F.3d 570, 574 (7th Cir. 2000) (citation omitted).

In addition, by placing Petitioner in the wholly untenable position of having to explain why the prosecution's witnesses would be motivated to lie, the "were they lying" questions burdened his constitutional right to testify on his own behalf, as guaranteed by the Fifth, Sixth and Fourteenth Amendments.

See Rock v. Arkansas, 483 U.S. 44, 49-53 (1987) (discussing the constitutional provisions underlying the right to testify on one's own behalf); *see also Ferguson v. Georgia*, 365 U.S. 570, 573-82 (1961); U.S. Const. Amends. 5, 6 & 14.

The remaining *Darden* factors also support a finding that the prosecutor's misconduct violated the federal Constitution. The prosecutor's conduct was not "invited or provoked by defense counsel's argument," and Petitioner never testified on direct that the other witnesses were lying. A8. The trial court nowhere admonished the jurors. *Darden*, 477 U.S. at 181. In addition, as set forth above, the weight of the evidence against Petitioner was not strong; it boiled down to a credibility conflict between Petitioner and three members of a single family. It is precisely under these circumstances that this type of prosecutorial misconduct has the greatest impact. Given the extent to which the "were they lying" evidence dominated the relatively short trial, the prosecutor's misconduct rendered the proceedings fundamentally unfair. U.S. Const. Amends. 5, 6 and 14; *Darden*, 477 U.S. at 181.

D. The Court Should Grant Certiorari to Resolve the Conflict Regarding "Were They Lying" Questions

Because the issue goes to the heart of due process and the right to testify on one's own behalf, this Court should grant certiorari to resolve the recognized and persistent conflict regarding a prosecutor's use of "were they

lying” questions and argument.

Where a prosecutor relies on “were they lying” questioning throughout cross-examination and argument, the result is a profoundly transformed criminal trial. Instead of a trial where the jury must resolve whether the prosecution proved its case beyond a reasonable doubt, the key issue becomes the defendant’s inability to explain why the prosecution’s witnesses would lie. That result encroaches on the jury’s role as factfinder, severely distorts (and impermissibly reduces) the prosecution’s burden of proof, and shifts the burden to the defense in violation of the Sixth and Fourteenth Amendments. *See, e.g., United States v. Alcantara-Castillo*, 788 F.3d 1186, 1198 (9th Cir. 2015), *citing United States v. Combs*, 379 F.3d 564, 573 (9th Cir. 2004) (holding that the prosecutor’s use of “were they lying” questions was “fundamentally unfair”).

As noted above, allowing the prosecution to cross-examine a criminal defendant with “were they lying” questions also profoundly chills a defendant’s right to testify on his own behalf. *Rock*, 48 U.S. at 49-53; U.S. Const. Amends. 5, 6, & 14. In “were they lying” jurisdictions such as California, criminal defendants who wish to testify are forced to weigh whether a prosecutor will painstakingly cross-examine the defendant regarding whether or why each State witness may be lying, and then use the defendant’s

inability to provide an explanation as a reason to convict. That unduly burdens the right to testify, in violation of the Fifth, Sixth and Fourteenth Amendments.

Given the exceptional importance of the constitutional issues presented and the persistence of the existing conflict, this Court should grant review.

II. This Case Provides an Excellent Vehicle to Resolve the Persistent Split Regarding a Prosecutor’s Use of “Were They Lying” Questions During the Cross-Examination of a Criminal Defendant

This case represents an excellent vehicle for the Court to resolve the conflict regarding a prosecutor’s use of “were they lying” questions.

First, for the reasons set forth above, this case is extraordinary in terms of the prosecutor’s emphasis on “were they lying” questions throughout his cross-examination and closing and rebuttal arguments. Given the prosecutor’s extensive reliance on “were they lying” questioning, the case involves a clear violation of the defendant’s constitutional rights and thus an excellent vehicle for review.

Second, the case is an ideal vehicle for review because it perfectly illustrates the reasons underlying the majority rule. Through the extensive use of “were they lying” questions and argument, the prosecutor interfered with the jury’s role as fact finder, forced Petitioner to speculate to the jury about the motivations of witnesses whom he had not seen for over five years, impermissibly shifted the burden of proof onto the defense, and deeply

undermined Petitioner’s right to testify on his own behalf. The case therefore exemplifies the distorted criminal trial that results from permitting prosecutors to use extensively “were they lying” questions.

Third, the case is an excellent vehicle for review because the error was prejudicial. Where, as here, a prosecutor pursues an extensive “were they lying” strategy during the cross-examination of a defendant and closing argument, courts recognize that the error is not harmless. *See, e.g., Combs*, 379 F.3d at 574 (error prejudicial where the improper questioning was not an “isolated incident” and “the prosecutor revived the error in her closing argument by explicitly referencing the prejudicial testimony”); *Allen v. United States*, 837 A.2d 917, 921-922 (D.C. 2003) (improper questioning was prejudicial where “the questions were not asked merely once or twice” and where “the prosecutor drove [the point] home in closing argument”).

The prosecutor’s “were they lying” strategy was also prejudicial because it devastated Petitioner’s credibility. There was no physical evidence, medical evidence, pretext calls or admissions by Petitioner. The case thus boiled down to a credibility conflict between Petitioner and the three main prosecution witnesses. Through the extensive questioning and the closing arguments, the prosecutor effectively told the jury that it could only acquit Petitioner if jurors agreed that the prosecution witnesses were in a “grand

criminal conspiracy” against him. 4RT 321. In other words, under the prosecutor’s formulation, someone was guilty of a crime: either Petitioner (of sexual abuse), or Cynthia and her daughters (for falsely reporting a crime). Yet it was “misleading” to argue “to the jury that the only alternatives are that the defendant or the witnesses are liars.” *Daniel v. State*, 78 P.3d 890, 904 (Nev. 2003) (citations and quotations omitted). Even if jurors had believed that Cynthia and her daughters were probably telling the truth, and that Petitioner was probably lying, “it would have been proper to return a verdict of not guilty because the evidence might not be sufficient to convict defendant beyond a reasonable doubt.” *United States v. Vargas*, 583 F.2d 380, 387 (7th Cir. 1978). And, with regard to the charged offenses – rape and forcible oral copulation – there were good reasons to doubt Maria’s vague and generalized testimony, especially given the inconsistencies with Cynthia’s testimony and the internal inconsistencies within Maria’s own testimony. *See Fleming*, 921 P.2d at 1079 (distinguishing between the evidence of sexual misconduct and evidence of the charged sexual offense).

Because the evidence presented “a duel of credibility, asking a witness to opine as to the honesty of the other witness’s testimony cannot have a non-prejudicial [nor] inconsequential effect on the deliberations of the jury.” *Triplett*, 500 N.E.2d at 266; *see also, e.g.*, *United States v. Geston*, 299 F.3d

1130, 1137 (9th Cir. 2002) (“In a case where witness credibility was paramount, it was plain error for the court to allow the prosecutor to persist in asking witnesses to make improper comments upon the testimony of other witnesses.”).

Given that this case presents the ideal vehicle to resolve a recognized and long-standing conflict about an exceptionally important issue of constitutional law, the Court should grant certiorari.

CONCLUSION

For the reasons expressed above, a writ of certiorari should issue to review the judgment of the California Court of Appeal, Sixth Appellate District.

Dated: October 23, 2018

Respectfully submitted,



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