No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOE LOUIS ARMENTA

Petitioner,

v.

SCOTT KERNAN, Secretary of the California Department of Corrections

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Richard V. Myers (133027)
Attorney at Law
Counsel of Record

1908 Marcus Abrams Blvd.
Austin, TX 78748
(909) 522-6388
rvmyers428@gmail.com

Counsel for Petitioner

QUESTIONS PRESENTED

(1) Do prior decisions of this Court compel the conclusion that so long as the jury is properly admonished and instructed, there cannot be a viable claim of prejudicial prosecutorial misconduct in 28 U.S.C. 2254(d) habeas proceedings? (See, *Deck v. Jenkins*, 814 F.3d 954, (9th Cir. 2014).)

(2) Can the prejudice flowing from a procedurally defaulted claim (which is inexorably intertwined with prejudice from a non-procedurally defaulted claim) be considered in the calculation of whether a federal habeas petitioner has stated a prejudicial prosecutorial misconduct violation under the Fourteenth Amendment?

(3) In the context of 28 U.S.C. 2254(d) federal habeas proceedings under the AEDPA, is California's briefing rule (Cal. Rules of Ct., Rule 8.204) adequate as a procedural bar, insofar as it is purportedly firmly established and regularly followed? (See, *Johnson v. Lee*, 578 U.S. ____, 136 S. Ct. 1802 (2016).)

(4) In the context of 28 U.S.C. 2254(d) federal habeas proceedings under the AEDPA, is a state court's finding of procedural default completely unassailable, no matter how spurious the finding may be? (See, *Wainwright v. Sykes*, 433 U.S. 72, 81, 87-91, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); and *Coleman v. Thompson*, 501 U.S. 722, 728, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).)

LIST OF PARTIES

In accordance with Supreme Court rule 14.1(b), all parties appearing in the caption of the case on the cover page of the petition and are listed again below:

MANUEL HERNANDEZ, JR.

Petitioner,

v.

SCOTT KERNAN, Secretary of the California Department of Corrections

Respondent.

TABLE OF CONTENTS

APPENDIX VOLUME I

APPENDIX VOLUME II

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Joe Louis Armenta respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The October 19, 2018 Order of the Ninth Circuit Court of Appeals denying the Motion to Recall and Stay the Mandate is not reported, but is set forth in Appendix Volume I, Tab 1.

The September 28, 2018 Mandate issued from the Ninth Circuit Court of Appeals is not reported, but is set forth in Appendix Volume I, Tab 3.

The September 20, 2018 Order of the Ninth Circuit Court of Appeals denying the Petition for Rehearing is not reported, but is set forth in Appendix Volume I, Tab 4.

The May 18, 2018 Memorandum Decision of the Ninth Circuit Court of Appeals, Affirming the Decision of the Federal District Court, Central District of California, is not reported, but is set forth in Appendix Volume I, Tab 6.

The April 21, 2017 Order of the Ninth Circuit Court of Appeals, Granting the Request for Certificate of Appealability is not reported, but is set forth in Appendix Volume I, Tab 7.

The June 29, 2016 Judgment, filed in the Federal District Court, Central District of California, is not reported, but is set forth in Appendix Volume II, Tab 9.

The June 29, 2016 Order of the Federal District Court Judge Accepting the findings, Conclusions, and Recommendations of the Federal District Court Magistrate is not reported, but is set forth in Appendix Volume II, Tab 10.

The May 27, 2016 Report and Recommendation of the United States Magistrate Judge, Denying the Petition for Writ of Habeas Corpus is not reported, but is set forth in Appendix Volume II, Tab 11.

The December 11, 2013 Order of the California Supreme Court, Denying the Petition for Review on Direct Appeal, filed in Case No. S214066, is not reported, but is set forth in Appendix Volume II, Tab 12.

The September 11, 2015 Opinion by the California Court of Appeal, Fourth Appellate District, Division Two, Affirming the Judgment of Conviction in Case No. E054533 is not reported, but is set forth in Appendix Volume II, Tab 13.

JURISDICTION

Petitioner filed a petition for Writ of Habeas Corpus in the Federal District Court, Central District of California. The habeas petition challenged petitioner's state court criminal convictions. The petition was grounded on the contention

that the prosecutor committed misconduct during petitioner's criminal jury trial, in violation of the Fourteenth Amendment to the United States Constitution. The habeas petition was brought under the provisions of 28 U.S.C. section 2254(d).

After the habeas petition was denied in the Federal District Court, petitioner appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit granted petitioner's Request for Certificate of Appealability and heard petitioner's appeal. The Ninth Circuit thereafter issued a Memorandum Decision, affirming the decision of the Federal District Court on May 18, 2018.

The Ninth Circuit entered its order denying petitioner's Petition for Rehearing on May 25, 2018.

This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No state…shall…deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case presents a claim that the Ninth Circuit Court of Appeals erroneously determined that prior decisions of this Court compel the conclusion that so long as the jury is properly admonished and instructed, there cannot be a

viable claim of prejudicial prosecutorial misconduct in 28 U.S.C. 2254(d) habeas proceedings under the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter "AEDPA").

This case also presents the claim that the Ninth Circuit Court of Appeals erroneously determined that the prejudice flowing from a procedurally defaulted claim (which is inexorably intertwined with prejudice from a non-procedurally defaulted claim) cannot be considered in the calculation of whether petitioner has stated a prejudicial prosecutorial misconduct violation under the Fourteenth Amendment.

This case additionally presents the claim that the Ninth Circuit Court of Appeals erroneously determined that, in the context of 28 U.S.C. section 2254(d) federal habeas proceedings under the AEDPA, California's briefing rule (Cal. Rules of Ct., Rule 8.204) is adequate as a procedural bar, insofar as it is purportedly firmly established and regularly followed.

This case additionally presents the claim that the Ninth Circuit Court of Appeals erroneously determined that a state court's finding of procedural default is unassailable, in the context of 28 U.S.C. section 2254(d) federal habeas proceedings under the AEDPA.

Factual and Procedural History

Facts

The salient facts of this case are that the police conducted a probation search of petitioner's home. During the initial part of the search, the police attempted to make a stealth entry at the rear of the home through a sliding glass window. But when they opened the window, a home alarm was sounded. Thereafter, appellant fired two to three warning shots from a lazar-sighted revolver, which ultimately precipitated the charges of attempt murder on police officers in this matter. (ER Vol. I, Tab 7 pp. 4-6; ER Vol. II, Tab 8 pp. 2-9; CT Vol. I pp. 30-31, 38, 46-47, 50-51, 80.)1/

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1 "ER" refers to the Excerpts of Record filed in conjunction with Appellant's Opening Brief in the Ninth Circuit Court of Appeals.

"CT" refers to the Clerk's Transcript of proceedings in the state trial court. (See, ER Vol. II, Tab 8; CT Vol. I; ER Vol. II, Tabs 9 & 10; CT Vol. II; ER Vol. II, Tab 11; CT Vol. III.)

"RT" refers to the Reporter's Transcript of proceedings in the state trial court. (See, ER Vol. III, Tab 12; RT Vol. I; ER Vol. III, Tab 13; RT Vol. IV; ER Vol. III, Tab 14; RT Vol. VI; ER Vol. III, Tab 15; RT Vol. VII; ER Vol. III, Tab 16; RT Augmented Vol. V.)

"Opn." refers to the Opinion of the state Court of Appeal. (ER Vol. I Tab 7; CT Vol. III.)

"Appendix" refers to Appendix Volumes I and II, which accompany this Petition for Writ of Certiorari, filed in this Court.

Petitioner's trial defense was that when the police opened the sliding glass window at the rear of his home and set off the alarm, he assumed that Eastside Riva's gang members had entered his home in an attempt to kill him. So he fired two or three warning shots from a lazar-sighted revolver in an attempt to dissuade the intruders. From here, the circumstances degenerated into an attempt at "suicide by cop" after petitioner realized that it was police officers who had entered his home. (ER Vol. I, Tab 7 pp. 4-8; ER Vol. II, Tab 8 pp. 2-9; CT Vol. I pp. 30-31, 38, 46-47, 50-51, 80; Appendix Vol. II.)

Procedural History

On July 18, 2011, following a jury trial in the Riverside County Superior Court, petitioner suffered state court convictions on four counts of attempted murder on a police officer, along with various subsidiary counts of conviction and true findings on enhancement allegations. Petitioner was sentenced to a determinate term of 62 years 8 months in prison, plus three consecutive indeterminate terms of life in prison, with an aggregate minimum parole period of 29 years. (Appendix II, Tab 13 pp. 2-3.)

On September 11, 2015 the California Court of Appeal, Fourth Appellate District, Division Two, issued an opinion affirming petitioner's convictions and sentence on direct appeal. (Appendix Volume II, Tab 13.)

On December 11, 2013, the California Supreme Court denied a petition for review on direct appeal. (Appendix Volume II, Tab 12.)

On March 5, 2015, petitioner sought relief in the Federal District Court for the Central District of California by way of a Petition for Writ of Habeas Corpus. The petition was brought under the provisions of 28 U.S.C. § 2254(d). The petition is subject to the provisions of the AEDPA. The federal habeas petition challenged the state court judgment on grounds that petitioner's conviction was obtained in violation of his right to due process of law under the Fourteenth Amendment to the United States Constitution.

On May 27, 2016, the Federal District Court Magistrate issued a Report and Recommendation, denying the petition for writ of habeas corpus. (Appendix Vol. I, Tab 11.)

On June 29, 2016, The District Court Judge issued an Order Accepting the Findings, Conclusions, and Recommendations of the Magistrate and denying the petition for writ of habeas corpus. (Appendix Vol. II, Tab 10.)

On June 29, 2016, Judgment was filed in the Federal District Court, Central District of California. (Appendix Vol. II, Tab 9.)

On June 30, 2016, petitioner filed Notice of Appeal in the Ninth Circuit Court of Appeals. Petitioner also sought a Certificate of Appealability in the Ninth Circuit Court of Appeals. The grounds for issuance of the Certificate of

Appealability were the same as those offered in his federal habeas petition. (Appendix Vol. II, Tab 8.)

On April 21, 2017, the Ninth Circuit Court of Appeals issued an Order Granting the Request for a Certificate of Appealability. (Appendix Vol. I, Tab 7.)

On May 18, 2018, the Ninth Circuit Court of Appeals issued a Memorandum Decision, affirming the decision of the Federal District Court, Central District of California, to deny the petition for writ of habeas corpus. (Appendix Vol. I, Tab 6.)

On May 25, 2018, petitioner filed a Petition for Rehearing in the Ninth Circuit Court of Appeals. The grounds raised in this Petition for Writ of Certiorari filed in this Court were raised in the Petition for Rehearing filed in the Ninth Circuit Court of Appeals. (Appendix Vol. I, Tab 5.)

On September 20, 2018, the Ninth Circuit Court of Appeals issued an Order Denying the Petition for Rehearing. (Appendix Vil. I, Tab 4.)

On September 28, 2018, The Ninth Circuit Court of Appeals issued a Mandate. (Appendix Vol. I, Tab 3.)

On October 1, 2018, petitioner filed a Motion to Recall and Stay the Mandate in the Ninth Circuit Court of Appeals. (Appendix Vol. I, Tab 2.)

On October 19, 2018, the Ninth Circuit Court of Appeals issued an Order denying the Motion to Recall and Stay the Mandate. (Appendix Vol. I, Tab 1.)

REASONS FOR GRANTING THE PETITION

This case presents four claims involving issues of first impression in this Court.

Claim I presents the following question: Do prior decisions of this Court compel the conclusion that so long as the jury is properly admonished and instructed, there cannot be a viable claim of prejudicial prosecutorial misconduct in 28 U.S.C. 2254(d) habeas proceedings? (See, *Deck v. Jenkins*, 814 F.3d 954, (9th Cir. 2014).)

Claim II presents the following question: Can the prejudice flowing from a procedurally defaulted claim (which is inexorably intertwined with prejudice from a non-procedurally defaulted claim) be considered in the calculation of whether a federal habeas petitioner has stated a prejudicial prosecutorial misconduct violation under the Fourteenth Amendment?

Claim III presents the following question: In the context of 28 U.S.C. 2254(d) federal habeas proceedings under the AEDPA, is California's briefing rule (Cal. Rules of Ct., Rule 8.204) adequate as a procedural bar, insofar as it is purportedly firmly established and regularly followed? (See, *Johnson v. Lee*, 578 U.S. ____, 136 S. Ct. 1802 (2016).)

Claim IV presents the following question: In the context of 28 U.S.C. 2254(d) federal habeas proceedings under the AEDPA, is a state court's finding of procedural default completely unassailable, no matter how spurious the finding may be? (See, *Wainwright v. Sykes*, 433 U.S. 72, 81, 87-91, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); see also, *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); and see, *Coleman v. Thompson*, 501 U.S. 722, 728, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).)

QUESTIONS PRESENTED

I

DO PRIOR DECISIONS OF THIS COURT FORECLOSE THE POSSIBILITY THAT PETITIONER CAN STATE A PREJUDICIAL PROSECUTORIAL MISCONDUCT VIOLATION UNDER THE FOURTEENTH AMENDMENT IN SECTION 2254(d) HABEAS PROCEEDINGS UNDER THE AEDPA?

In *Deck v. Jenkins*, 814 F.3d at page 980 the Ninth Circuit held that the stringent AEDPA standard under *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) and *Harrington v. Richter*, 131 S. Ct. 770 (2011) was met in a case where prosecutor's misstatements were not inadvertent or isolated: "the prosecutor's closing rebuttal argument were not mere 'stray words,' they were a direct response to the central theory of Deck's case."

The dissent in *Deck v. Jenkins* took issue with the majority's conclusion that prior decisions of this Court supported a finding of prejudicial prosecutorial misconduct under the AEDPA, "particularly where the jury was properly instructed." (*Deck* at p. 969, dissent of Bea J. from denial of rehearing; see also, p. 990-991, dissent of M. Smith J.) The position taken by the dissent in *Deck* is that no prior decision of this Court supports a finding of constitutional error based on prosecutorial misconduct, if the jury is properly instructed. This position includes an assertion that prior decisions of this Court in *Boyde v. California*, 494 U.S. 370, 386, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) and *Weeks v. Angelone*, 528 U.S. 225, 227, 237, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) compel the conclusion that there cannot be a valid finding of constitutional error based on prosecutorial misconduct, if the jury is properly instructed.

In petitioner's case, the police conducted a probation search of his home. During the initial part of the search, the police attempted to make a stealth entry at the rear of the home through a sliding glass window. But when they opened the window, a home alarm was sounded. Thereafter, petitioner fired two to three warning shots from a lazar-sighted revolver, which ultimately precipitated the charges of attempt murder on police officers in this matter. (ER Vol. I, Tab 7 pp. 4-6; ER Vol. II, Tab 8 pp. 2-9; CT Vol. I pp. 30-31, 38, 46-47, 50-51, 80.)

Petitioner's trial defense was that he believed that it was Eastside Riva's gang members who had entered his home with the intent to kill him-- thus prompting him to fire warning shots. On a previous occasion, Eastside Riva's gang members had shot petitioner in the face and leg in an attempt to kill him, because he left the gang without being "jumped out." (ER Vol. I, Tab 7 pp. 4-8; ER Vol. II, Tab 8 pp. 2-9; CT Vol. I pp. 30-31, 38, 46-47, 50-51, 80.)

This defense was supported by petitioner's trial testimony. The prosecutor had become personally aware of this defense through testimony provided at the preliminary hearing by Police Investigator LeClair. (ER Vol. II, Tab 8 pp. 2-4, 7-9; CT Vol. I pp. 30, 31, 38, 50-51, 80.) Furthermore, petitioner had told Investigator LeClair, point blank, during his interview with him that he initially thought it was Eastside Riva's gang members who had entered his home. (ER Vol. II, Tab 9 pp. 3, 5; CT Vol. II pp. 384, 388.)

During her opening statement at trial, the prosecutor essentially told the jury that petitioner and his counsel were going to fabricate a defense. Petitioner's trial counsel interposed an objection and moved to strike the statement. The trial judge sustained the objection and granted the motion to strike. (ER Vol. III, Tab 16 p. 7; Augmented RT Vol. V p. 920.) Later, the trial judge denied the motion of petitioner's trial counsel to make a finding of prosecutorial misconduct. At defense counsel's request that the jury be admonished, the court admonished the

jury that the prosecutor's statement did not constitute evidence and should be disregarded. (ER Vol. I, Tab 5 p. 10-11.)

The statement that appellant and his counsel were going to fabricate a defense was just the beginning-- at the very beginning of trial-- of a vast expanse of relentless prosecutorial misconduct, much of it interwoven. In closing argument the prosecutor lied to jurors and essentially told them that petitioner and his counsel had fabricated a defense, because he never mentioned fear of the Eastside Riva's to anyone at the time of the incident (and the jurors were not informed otherwise). This was a direct and calculated assault on the central theory of petitioner's case-- that he thought it was Eastside Riva's gang members who had entered his home when he fired warning shots. (See, *Deck v. Jenkins*, at 980 [stringent AEDPA standard met under *Lockyer v. Andrade*, 538 U.S. at 75 and *Harrington v. Richter*, 131 S. Ct. 770 where the prosecutor's misstatements in closing rebuttal argument were not mere stray words, and were a direct response to the central theory of Deck's case].)

In its opinion in the instant case, the Ninth Circuit holds that the trial court's admonition to the jury cured any potential prejudice from the prosecutor's opening statement remarks, because the court instructed jurors that arguments of counsel were not evidence and because the jury was instructed to disregard the prosecutor's statements. (Dec. pp. 3-4; Appendix, Vol. I Tab 6, pp. 3-4.) This

holding mirrors the dissent in *Deck v. Jenkins*, which takes the position that prior opinions issued from this Court prohibit a viable finding of prejudicial prosecutorial misconduct under the AEDPA if a jury is properly admonished and instructed. (*Deck* at p. 969, dissent of Bea J. from denial of rehearing; see also, p. 990-991, dissent of M. Smith J.)

The decision from the Ninth Circuit in petitioner's case fails to even consider the interwoven prejudice as between the misconduct in opening statement and subsequent statements by the prosecutor during closing argument, wherein the prosecutor lied to jurors and told them that petitioner had not indicated his fear of the Eastside Riva's to anyone prior to trial, or told anyone prior to trial that he thought it was the Eastside Riva's who had entered his home.

Contrary to this falsehood, petitioner did indicate to Investigator LeClair on the day of the incident that he feared the Eastside Riva's and thought they had entered his home. (ER Vol. III, Tab 15 pp. 64-65; RT Vol. VII pp. 1612-1613; ER Vol. II, Tab 9 pp. 1-2, 3-4, 5-9, 10-14, 15-20; CT Vol. II pp. 367-368, 384-385, 388-392, 399-403, 429-434.) Furthermore, the fact that petitioner had told LeClair he feared the Eastside Riva's, and thought it was them in his home, came out during the preliminary hearing in this matter. (ER Vol. II, Tab 8 pp. 1, 2-3, 4, 5-6, 7-8, 9; CT Vol. I pp. 30-31, 38, 46-47, 50-51, 80.)

The trial judge's admonition and jury instructions as to the prosecutor's misconduct in opening statement were patently insufficient to cure the inexorably intertwined harm created by the prosecutor's assertions in her closing statement to the effect that petitioner and his counsel had fabricated a defense, because petitioner never mentioned fear of the Eastside Riva's gang to anyone prior to trial. The combined prejudice from the prosecutor's statements struck at the heart of petitioner's defense and are more than sufficient to make out a prejudicial violation of the Fourteenth Amendment within the meaning of this Court's prior decisions in *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1972); *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); and *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Ultimately, the interwoven harm here is "off the charts" prejudicial, because appellant and his attorney did not, in fact, fabricate the defense and because the jury was never made aware that the defense was not, in fact, fabricated. Nothing contained in the Ninth Circuit's opinion in this case, or in the dissent from *Deck v. Jenkins*, is persuasive in concluding that this case does not state a constitutional violation under *Donnelly v. DeChristoforo*, *Darden v. Wainwright*, and *Smith v. Phillips*, in the context of section 2254(d) habeas proceedings under the AEDPA.

This Court should grant the petition for writ of certiorari in this matter and decide the question of whether there can be a valid finding of constitutional error based on prosecutorial misconduct, if the jury is properly instructed-- in the context of 28 U.S.C. section 2254(d) habeas proceedings under the AEDPA.

II

CAN THE PREJUDICE FLOWING FROM A PROCEDURALLY DEFAULTED CLAIM (WHICH IS INEXORABLY INTERTWINED WITH PREJUDICE FROM A NON-PROCEDURALLY DEFAULTED CLAIM) BE CONSIDERED IN THE CALCULATION OF WHETHER THERE IS A PREJUDICIAL PROSECUTORIAL MISCONDUCT VIOLATION UNDER THE FOURTEENTH AMENDMENT?

Overall the prosecutor's arguments in opening and closing told the jury that petitioner and his attorney were going to fabricate a defense-- and did fabricate a defense, because petitioner never told anyone that he thought it was the Eastside Riva's who had entered his home. And as far as the jury knew, a defense was fabricated, because the trial judge would not set the matter right by providing jurors with the transcript of petitioner's statements to LeClair, wherein he told LeClair that he feared the Eastside Riva's and initially thought it was them who had entered his home. Ultimately, the interwoven harm here is "off the charts" prejudicial, because appellant and his attorney did not fabricate the defense and because the jury was unaware that the defense was not fabricated. (ER Vol. II,

Tab 9 pp. 3, 5; CT Vol. II 384, 388; ER Vol. III, Tab 15 pp. 48, 59-60; RT Vol. II pp. 1581, 1067-1068.) Clearly, the prosecutor's statements had a substantial and injurious effect on the jury's verdict. (*Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).)

The Ninth Circuit's decision holds that petitioner's prosecutorial misconduct claim as to the prosecutor's statements during closing argument is procedurally barred. In accordance with the finding of procedural bar, the decision fails to consider any prejudice flowing from the prosecutor's remarks in closing statement. (Dec. pp. 7-8.)

Petitioner respectfully submits that the Ninth Circuit's decision in this matter creates a construct whereby the interwoven prejudice at issue could never be considered, because: (1) so long as the jury was properly admonished and instructed as to opening statement misconduct, any error is automatically harmless (Dec. pp. 3-4; Appendix, Vol. I Tab 6, pp. 3-4), and (2) under the procedural default rule, any prejudice flowing from the prosecutor's misconduct in closing statement cannot be considered (Dec. pp. 7-8; Appendix, Vol. I Tab 6, pp. 7-8).

But prejudice is prejudice. Prejudice cannot be procedurally defaulted if there is any valid claim to which it attaches. Therefore, interwoven prejudice emanating from a valid opening statement prosecutorial misconduct claim counts,

whether or not a closing argument prosecutorial misconduct claim is procedurally barred. Furthermore, acceptance of the Ninth Circuit's construct would be a significant extension of the procedural default rule that is unwarranted in the circumstances of this case. The bottom line is that the prejudice from the misconduct in opening statement, coupled with interwoven prejudice generated from the prosecutor's closing remarks, is extreme as set forth above.

This Court should grant the petition for writ of certiorari in this matter and decide the question of whether prejudice flowing from a procedurally defaulted claim (which is inexorably intertwined with prejudice from a non-procedurally defaulted claim) can be considered in the context of section 2254(d) habeas proceedings under the AEDPA.

III

IS CALIFORNIA'S BRIEFING RULE (Cal. Rules of Ct., Rule 8.204) ADEQUATE AS A PROCEDURAL BAR IN THE CONTEXT OF 28 U.S.C. SECTION 2254(d) HABEAS PROCEEDINGS UNDER THE AEDPA, INSOFAR AS IT IS PURPORTEDLY FIRMLY ESTABLISHED AND REGULARLY FOLLOWED?

The Merits of Petitioner's Knock-Notice Claim

Appellant's counsel had argued to the jury that the police violated knock-notice when they opened the sliding glass door at the rear of appellant's home--

which set off an alarm. (ER Vol. I, Tab 7 pp. 21-22 & fn. 4; Opn. pp. 21-22 & fn. 4; Appendix, Vol. II Tab 13, pp. 21-22 & fn. 4.)

In response, the prosecutor made the following argument during her closing statement:

> "Knock and announce is for those situations when officers walk up to somebody's house, kick a door open, with their guns blazing and someone is naked in the shower…" (ER Vol. I, Tab 7 p. 22; Opn. p. 22; Appendix, Vol. II Tab 13, pp. 22.)

From here, the prosecutor made additional statements to the jury in quick succession, which misstated the law on knock-notice with equal vigor. (ER Vol. I, Tab 7 pp. 22-24; Opn. pp. 22-24; Appendix, Vol. II Tab 13, pp. 22-24.)

This argument clearly misstates the law on knock-notice. Under California Penal Code section 844, the police have to knock and announce their presence before they can break open a door or window to a home to conduct a search or make an arrest. Period.

Among the interests protected by the Knock Notice Rule under Penal Code section 844 is the preservation of human life, "because an unannounced entry may provoke violence in supposed self-defense by the surprised resident." (*Hudson v. Michigan*, 547 U.S. 586, 594, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006); *People v. Murphy*, 37 Cal.4th 490, 495-496 (2005).)

Petitioner's counsel interposed a prosecutorial misconduct claim in regards to the prosecutor's argument. (*People v. Hill*, 17 Cal.4th 800, 829-830 (1998) [it

is improper for the prosecutor to misstate the law generally, and particularly to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements].) In addition to constituting misconduct, the prosecutor's argument was also highly prejudicial, as evidenced by the jurors request for read-back of LeClair's testimony concerning knock-notice. (ER Vol. II, Tab 10 p. 1; CT Vol. II p. 456; ER Vol. III, Tab 15 p. 52; RT Vol. VII p. 1600.) What the prosecutor's arguments accomplished was to confuse the jury on the simple and straight forward question of whether the officers violated knock-notice with the unannounced entry at the back sliding glass door.

The Ninth Circuit's opinion holds that the state Court of Appeal reasonably applied federal law when it concluded that the prosecutor's statements were legally accurate. The Court cites to *Payton v. New York*, 445, 573, 616 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) in support of this conclusion. (Dec. pp. 6-7; Appendix, Vol. I Tab 6, pp. 6-7.)

The citation to *Payton v. New York* does follow the legality of the entry analysis in the state Court of Appeal's opinion, but legality of the entry was never the issue in this proceeding. The fact of an unannounced entry was the issue, and the fact that an unannounced entry violated Penal Code section 844 resulting in an eruption of violence, was the point of defense counsel's argument.

Petitioner's claim clearly constitutes actionable prosecutorial misconduct under the AEDPA in regard to the prosecutor's closing argument, which misstated the law applicable to the Knock-Notice Rule. In the final analysis, the prosecutor's misconduct in misstating the Knock-Notice Rule was part of a pattern of misconduct which "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright*, 477 U.S. at 181, quoting *Donnelly v. DeChristoforo*, 416 U.S. at 642.)

Furthermore, petitioner's knock-notice violation claim lies at the heart of his trial defense. The knock-notice violation claim was intertwined with his assertion that he thought it was Eastside Riva gang members who had entered his home at the time he fired warning shots. (ER Vol. I, Tab 7 pp. 26-27; Opn. pp. 26-27; Appendix, Vol. II Tab 13, pp. 26-27.) The fact that the police made an unannounced entry in violation of Penal Code section 844 when they opened the back sliding glass door and set off an alarm was a critical part of petitioner's defense that he fired warning shots in response to an entry by gang members, and not the police. The prosecutor's endeavors to muddy the waters on the knock-notice violation (which has endured through trial and appellate proceedings, up to this point in this Court) was highly prejudicial and had a substantial and injurious effect or influence in determining the jury's verdict. (*Brecht v. Abrahamson*, at 637.)

Procedural Default Under Rule 8.204

In addition to denying petitioner's prosecutorial misconduct claim on the merits, the Ninth Circuit's opinion finds procedural default under California's Briefing Rule. (Dec. p. 6; Appendix, Vol. I Tab 6, p. 6.) California's Briefing Rule is codified under the provisions of California Rules of Court, Rule 8.204.

As for the mechanics of the procedural bar, petitioner respectfully submits that the Ninth Circuit Panel's holding that the procedural bar is adequate, "because it is firmly established and regularly followed" is not recognized in the case law issued from the Ninth Circuit Court of Appeals. The Ninth Circuit has never made this holding in any previously published case. Petitioner is unaware that the Ninth Circuit has even addressed Rule 8.204 in any unpublished opinion. Neither has the Ninth Circuit, or this Court, made a finding in any decision that Rule 8.204 represents a procedural bar that is "longstanding, oft-cited, and shared by habeas courts across the Nation." (*Johnson v. Lee*, 136 S. Ct. 1802.) The issue, therefore, is one of first impression in this Court, and in the Ninth Circuit.

Rule 8.204 is applied in civil proceedings in the vast majority of cases. (See, annotations for Rule 8.204 and cases cited therein.) More often than not, the Rule is applied in the criminal context in a case like *People v. Stanley*, 10 Cal.4th 764 (1995), where the defendant fails to specify argument and authority as to why there is insufficient evidence to support a conviction. (*Id*. at p. 793.)

But the Rule cannot qualify as procedural default bar under the jurisprudence of this Court, because it is inconsistently applied. In fact, the Rule itself contains provisions for inconsistent application. Under subdivision (e), subsection (2), paragraph (C) of Rule 8.204, an appellate court can simply elect to disregard noncompliance with the rule-- as appellate courts often do. (See, *Nelson v. Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115, 1122 (2012); and see, *Liberty Mutual Insurance Company v. Kleinman et al.*, 149 Cal.App.2d 404, 406 (1957).)

Petitioner further emphasizes that this is not a case where there are mere exceptions to Rule 8.204, coupled with discretionary application. (See, *Johnson v. Lee*, at 1806.) In the vast majority of cases, Rule 8.204 is simply not applied.

This Court should grant the petition for writ of certiorari in this matter and decide whether Rule 8.204 represents a procedural bar in section 2254(d) habeas proceedings that is "longstanding, oft-cited, and shared by habeas courts across the Nation." (See, *Johnson v. Lee*, 136 S. Ct. 1802.)

IV

IN THE CONTEXT OF 28 U.S.C. SECTION 2254(d) HABEAS PROCEEDINGS UNDER THE AEDPA, IS A STATE COURT'S FINDING OF PROCEDURAL DEFAULT COMPLETELY UNASSAILABLE NO MATTER HOW SPURIOUS THE FINDING MAY BE?

Procedural Default and the Rule of *Wainwright and Coleman*

The context of the instant case is a federal habeas petition brought under the provisions of the AEDPA. (28 U.S.C. 2254(d).) Under this Court's previous decisions, a state court finding of procedural default bars federal review of a claim, unless a petitioner can show "cause and prejudice," or that a "fundamental miscarriage of justice" will result from the failure to consider the claim. (*Wainwright v. Sykes*, at 81, 87-91; *Engle v. Isaac, supra*, 456 U.S. 107 129; *Coleman v. Thompson*, at 728.) But this Court has not expressly decided the question of whether or not a state court's finding of procedural default will absolutely bar federal review, even where the state court's finding of procedural default is obviously spurious.

The State Court's Invocation of Procedural Default was Spurious

Petitioner respectfully submits that the state court's finding of procedural default in this case was spurious in the extreme.

Petitioner submitted Appellant' Opening Brief (hereafter "AOB") to the state Court of Appeal. The AOB is contained in the record from the Ninth Circuit Court of Appeals at DkEntry 3-20, pp. 2-100. The Opening brief was 91 pages in length. It copiously addressed every conceivable issue that could be addressed relating to the claims of prosecutorial misconduct in this matter.

As for the question of prosecutorial misconduct concerning misstatement of the law pertaining to knock-notice, the AOB specifically addressed the failure by police to provide knock-notice. The AOB specifically focused on the provisions of California Penal Code section 844, which require an announcement by police prior to entry. (AOB at pages 60-62, 64; see, *People v. Lilienthal*, 22 Cal.3d 891, 900 (1978) [knock-notice provisions of Pen. Code sections 844 and 1531 apply to probation searches].) The ultimate argument from the AOB was that the knock-notice violation resulted in an explosion of gun fire, because petitioner initially thought it was Eastside Riva gang members who had entered his home to kill him. (AOB pp. 60-66.) These arguments from the AOB mirrored trial counsel's arguments in the state trial court. (ER Vol. II, Tab 11 pp. 9-10; CT Vol. III, pp. 9-10.) So the issue of the misstatements of the law surrounding knock-notice were thoroughly briefed, along with citation to the provisions of Penal Code section 844. No more was required under Rule 8.204.

Despite this, the state Court of Appeal ruled that petitioner never explained *how* the prosecutor's statements misstated the law, and petitioner never cited relevant authority. (ER Vol. I, Tab 7 p. 24; Opn. p. 24; Appendix, Vol. II Tab 13, p. 24.) The Court of Appeal alternatively found that the officer's entry was "legal" under such cases as *People v. Hoxter*, 75 Cal.App.4th 406 (1999) and *People v. Hoag*, 83 Cal.App.4th 1198 (2000). This finding was premised on the

actions of officers who entered the residence at the front door, after the officers at the back of the residence opened the sliding glass window and tripped the home alarm-- which was the provocation for "violence in supposed self-defense by the surprised resident." (*Hudson v. Michigan* at 594; *People v. Murphy* at 495-496.) But the "legality of entry" of officers at the front door was not at issue. The issue was an "unannounced entry" at the back sliding glass window which tripped the alarm, and which violated the provisions of Penal Code section 844.

Further, the opinion of the Ninth Circuit Court of Appeals holds that the state Court of Appeal reasonably applied federal law when it concluded that the prosecutor's statements were legally accurate. The Court cites to *Payton v. New York, supra*, 445 U.S. 573 in support of this conclusion. (Dec. pp. 6-7; Appendix, Vol. I Tab 6, pp. 6-7.) But here again, *Payton v. New York* represents a "legality of the entry" analysis, which is not on point (*Payton v. New York* is a suppression of evidence case). The point of petitioner's arguments on the prosecutorial misconduct claim in the AOB pertain to an "unannounced entry," which violated the provisions of Penal Code section 844, and which resulted in an explosion of gunfire.

Simply put, an unannounced entry in violation of the provisions of Penal Code section 844 does not require briefing under a complex analysis applicable to the question of an illegal entry under cases like *People v. Hoxter, supra*, 75

Cal.App.4th 406; *People v. Hoag, supra*, 83 Cal.App.4th 1198; and *Payton v. New York, supra*, 445 U.S. 573. Such an analysis is simply not required to understand that the police in this case violated the provisions of Penal Code section 844 by failing to announce entry, prior to the time they opened the back sliding glass window.

With this in mind, it is readily apparent that the Court of Appeal's requirement that an analysis under *Hoxter* and *Hoag* should have been briefed is spurious in the extreme. Likewise, the Ninth Circuit's requirement that an analysis under *Payton v. New York* should have been briefed is spurious in the extreme. These cases are not even on point-- and neither is a "legality of the entry" analysis on point. The point is an "unannounced entry" which resulted in an explosion of gun fire; and the authority on point is Penal Code section 844. Period.

Ultimately, the state Court of Appeal completely misapplied Rule 8.204 in determining that petitioner's knock-notice claim had been procedurally defaulted. So did the Ninth Circuit.

This Court should grant the petition for writ of certiorari in this matter and decide the issue of whether a state court's invocation of procedural default can ever be questioned in the context of 28 U.S.C. 2254(d) proceedings, under the *Coleman* line of authority.

CONCLUSION

For all the reasons expressed herein, this Court should grant the petition for writ of certiorari in this matter.

Respectfully submitted,

Dated: November 2, 2018

/s/ Richard V. Myers
Richard V. Myers (133027)
Attorney at Law
Counsel of Record

1908 Marcus Abrams Blvd.
Austin, TX 78748
(909) 522-6388
rvmyers428@gmail.com

Counsel for petitioner

STATUTORY APPENDIX

28 U.S.C. § 2254(d),(i) & (2)

"(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 or 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."

California Penal Code § 844

"To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired."

California Rules of Court, Rule 8.204(a)(1)(B) & (e)(1)-(2)(A)(B)(C)

"(a) Contents

(1) Each brief must:

(B) State each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority…

(e) Noncomplying briefs

If a brief does not comply with this rule

(1) The reviewing court clerk may decline to file it, but must mark it 'received but not filed' and return it to the party; or

(2) If the brief is filed, the reviewing court may, on its own or a party's motion, with or without, notice:

(A) Order the brief returned for corrections and refiling within a specified time;

(B) Strike the brief with leave to file a new brief within a specified time; or

(C) Disregard the noncompliance."

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOE LEWIS ARMENTA, PETITIONER
vs.
SCOTT KERNAN, RESPONDENT

I, Richard V. Myers, do swear and declare that on this date, November 2, 2018, as required by Supreme Court Rule 29, I have served the enclosed MOTION TO PROCEED IN FORMA PAUPERIS, PETITION FOR WRIT OF CERTIORARI, and APPENDIX VOLUMES I AND II on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States Mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days; together with electronic service.

The names and addresses of those served are as follows:

Vincent P. LaPietra
Deputy Attorney General
600 West Broadway
Suite 1800
San Diego, CA 92101

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

Executed on November 2, 2018.

/s/ Richard V. Myers
Richard V. Myers (133027)
Attorney at Law
1908 Marcus Abrams Blvd.
Austin, TX 78748
909-522-6388
Counsel for Petitioner