IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 2018

VIDAL LICEA MORALES,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner was denied a fair trial when a government expert witness provided improper testimony that informed the jury that Petitioner was in custody during trial?

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Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 7, 2018. Petitioner's petition for rehearing, and suggestion for rehearing en banc, was denied on October 12, 2018.

JURISDICTION AND CITATION OF OPINION BELOW

On September 7, 2018, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion, attached as Exhibit "A" to this petition. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on October 12, 2018. [Ex. "B"]. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

INTRODUCTION

Although this a fact-driven petition, Petitioner submits that the instant question, which is straightforward and raises application of the premise underlying Estelle v. Williams, 425 U.S. 501 (1976), merits review by the Court. Exclusively due to the fault of the government, the jury was informed that Petitioner was an in-custody defendant at trial. The jury did not reach this conclusion after seeing Petitioner in jail garb, as was the case in Estelle, or in shackles, as the Court examined in Deck v. Missouri, 544 U.S. 622 (2005), but the repeated impermissible testimony from the government expert witness, along with the circumstances of the trial, made it abundantly clear to the jury that Petitioner was in custody during trial. The district court and Ninth Circuit's conclusions to the contrary were clearly erroneous with no plausible basis in the entire record, and Petitioner asks the Court to review this case in order to correct these improper factual determinations which have precluded Petitioner the constitutional prejudice analysis this case warrants.

STATEMENT OF FACTS AND CASE

In November 2012, the grand jury returned an indictment charging Petitioner, and others, with conspiring to distribute controlled substances. [ER 128-

39].[1] As to Petitioner, the indictment alleged that he obtained methamphetamine from suppliers in Mexico for distribution in the United States, and then he and the co-defendants would arrange for the transportation of the drugs into the United States. Id.

Petitioner, as well as one other defendant, proceeded to trial in October 2014. The government introduced numerous intercepted phone calls in its case-in-chief. Carlos Soto, a Spanish-language linguist called by the government as a Rule 702 expert witness to translate the calls and identify the speakers, gave the following testimony regarding Petitioner:

> Q. Did you attend, in connection with this case, a court proceeding, Federal Court proceeding in September of 2014?
>
> A. Yes, I did. I was present at the arraignment hearing.
>
> Q. And why were you at the arraignment hearing?
>
> A. To identify the voices of the defendants.
>
> Q. And by "defendants," who do you mean?
>
> A. Vidal Licea Morales and Mauricio Licea Morales.
>
> Q. Did you see the defendants at that hearing?

[1]"ER" denotes Appellant's Excerpts of Record filed in the Ninth Circuit; "AOB" denotes Appellant's Opening Brief; "CR" denotes the U.S. District Court Clerk's Record.

A. Yes, I did.

Q. Are they the same persons that are present in court today?

A. Yes. **Mr. Vidal was in custody** –

THE COURT: Counsel, about that time. Please continue.

[ER 87](emphasis added).

Soon afterward, on cross-examination by Petitioner's counsel, Soto again told the jury that just prior to trial, Petitioner was in custody:

Q. So how did you now you were looking at Vidal Morales?

A. I don't understand your question.

Q. You said I'm not – you said you don't remember me hearing – you don't remember me saying – announcing my client's name who was standing next to me.
Did the Court announce the case name?

A. No, I didn't say I didn't hear you say it. I didn't see you standing next to Mr. Morales. When I first seen (sic) you, you were standing behind the podium, such as you're doing right now. **Mr. Morales was in custody in an area over to the left as to where I was sitting at.**

[ER 94](emphasis added).

At a break in the proceedings and outside of the presence of the jury, Petitioner's counsel moved for a mistrial due to the fact that Soto twice testified that

Petitioner was in custody in connection with that recent hearing. Id. at 95-97. Counsel stated that he did not raise this issue immediately because he did not want to call further attention to the improper testimony. Id. at 95-96. Counsel pointed out that this testimony was particularly prejudicial because co-defendant Licea was not in custody, and the witness "went out of his way" to give these prejudicial statements which suggested to the jury that Petitioner was "more dangerous." Id. at 97.

The district court initially stated that "I think if the jury knew or believed that your client was in custody at the present time, what I call the shackling cases, which are prejudicial to the defense, I would immediately declare a mistrial." Id. at 96. After the district court mistakenly thought the testimony referenced a 2011 hearing, Petitioner's counsel corrected it and noted that this testimony concerned Soto's observations from just a few weeks earlier. Id. The government stated that it did not anticipate this testimony, but the district court found that whether it was inadvertent or not was not the issue, as it was "prejudicial." Id. at 98. After discussing the possibility of a curative instruction or other means of addressing this error, the district court elected to reserve ruling on this issue. Id. at 98-102.

Later in the day, the district court denied the mistrial motion:

> I have to make too many assumptions concerning prejudice to declare a mistrial. I have to make certain that the jury has tied together that one defendant is in the hallway --

which is as a practical matter he has on occasion -- and if the jury sees that defendant and is smart enough and realizes that the other defendant isn't with him or in the hallway at the same time. That's a big jump. That takes me outside the confines of this courtroom.

Beyond that, I can't assume that they notice him walking in or walking out at night -- referring to Mr. Mauricio and not your client.

Third, there is the problem of an expert again. My initial frustration, quite frankly, is just with experts.

And after reflection and getting over the frustration of the stupidity of that answer, it doesn't seem to me that there's prejudice that I can state on the record that justifies either the O.R. release, which was a creative thought on my part. But that doesn't cure it. Even if I released your client this evening on an O.R., the end result is he's been not in the hallway for two or three days. And now he walks in tomorrow. I don't know if that cures it.

Number two, I'm concerned because when the expert first volunteered that your client was in custody, I think you were in a very difficult position. And I agree with you tactically. And I hope that the Circuit does, also. I hope that they recognize that counsel can't put a red light on that and say, judge, I object, especially when sometimes courts say, well, why counsel -- not seeing the issue. I fortunately saw it immediately. And that's why I said, counsel.

But it was exacerbated again by -- and that you will find out at 0150 of the court reporter's transcript. On cross-examination at 0158 a similar area was asked -- finding no fault with Mr. Raphael. You're an excellent counsel. And because he wasn't warned, he did it again.

In other words, at 0158 he said, oh, I went down to the courthouse. And basically your client was in custody. And the other client wasn't. So, the bell got rung twice. I don't find any fault with that. It's just -- it would have been nice if we could have warned him not to tread into that area. And we went right on with the cross-examination. Therefore, I don't think he recognized on the second occasion that he had done anything even potentially improper. He hadn't been warned.

Now, naiveness doesn't mean that there's a fair trial going on. But I think that at least at this time I'm going to find that any risk of prejudice from this reference is minimal. Most lay people hearing that a party was in custody several months ago would not conclude that the party remained in custody to this date. Oftentimes, parties are arrested and incarcerated for a short period and subsequently released on bond.

If the jury took note of the reference, this would be their most likely conclusion. Therefore, the risk of prejudice in the jury believing one party is currently in custody I think is minimal.

Second, I don't think that I would propose any curative instruction unless the defense asks for it. I think it heightens the prejudice. So, if a mistake has been made and is prejudicial, I think that the prejudice is concrete from your perspective and would give rise to a new trial, that a curative instruction by this court would be rather a foolish act in my opinion and would heap additional potential prejudice on the defense by highlighting it.

So, at this time I'm going to deny your motion for new trial. But if there's a conviction, then, I would expect concerning the motion for new trial that this would be one of the areas that you would bring to the court's attention. Let me just

> see how that feels in terms of fairness at that time. Let me do some more reflection on it.

[ER 79-82].

Petitioner was convicted of the lone count against him. Petitioner again raised this issue in a motion for a new trial, [CR 439], and the district court denied relief:

> THE COURT: Finally, I believe the second is -- reason for the Counsel's concern and argument is the alleged prejudice of one brother being on trial and the other in the hallway, and the different charges that had been brought, including the weapons allegation. And I hope, Mr. Raphael, that that summarizes your argument.
>
> If this was a shackling case and the jury would've seen it, the Court would declare a mistrial. It's not. I can't find any case law that substantiates that. The government would have automatic severances, and the Court would have automatic severances, literally, with one defendant in custody and one defendant out of custody. And
>
> I think it would presume prejudice. No case law speaks to this. And I decline to find prejudice that's specific. Also, the Court continually cautioned -- although the defense was forced into the position after the Court made its initial ruling, so you're not waiving your argument on appeal that -- I reminded the jury that there is a disagreement between the parties about who these speakers are, and I continually admonished them not to be influenced by the name attached to the person allegedly making the statements. And I continually stated to the statements. And I continually stated to the jury that this would be their eventual determination.

> So, therefore, I find the defendant was not unfairly prejudiced by his custodial status versus the brother's noncustodial status. And I'm denying the Motion for New Trial.

[ER 124-25].

On direct appeal, Petitioner raised, among other issues, the claim that the district court abused its discretion in denying his mistrial motion because the only reasonable conclusion to be drawn from the record was that the jury knew that he was an in-custody defendant at trial, and the government informing the jury of this fact violated his constitutional rights. [AOB 26-38]. The Ninth Circuit panel denied this claim, finding that the "district court relied on reason and common sense to conclude that the purported connection between the jury's knowledge of Vidal's custodial status at arraignment and [the co-defendant's] physical freedom at trial would not lead the jury to conclude that Vidal remained in custody." [Mem at 3-4]. The Ninth Circuit denied Petitioner's petition for rehearing and suggestion for rehearing en banc without further comment. [Ex. "B"].

ARGUMENT

THE ONLY REASONABLE CONCLUSION TO BE TAKEN FROM THE RECORD IS THAT THE GOVERNMENT WITNESS'S IMPROPER TESTIMONY MADE THE JURY AWARE THAT PETITIONER WAS IN CUSTODY DURING TRIAL

A. The Lower Courts' Findings That The Jury Was Not Made Aware Of Petitioner's Custodial Status At Trial Are Implausible And Clearly Erroneous

"Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" Holbrook v. Flynn, 475 U.S. 560, 572 (1986)(quoting Taylor v. Kentucky, 436 U.S. 478, 485 (1978)). In Estelle, 425 U.S. at 504-05, where defendant was forced to wear jail clothing before the jury, the Court noted that "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." Id. at 504-505. "Similarly troubling is the fact that compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial. Persons who can secure release are not subjected to this condition. To impose the condition on one category of defendants, over objection, would be repugnant to the concept of equal

justice embodied in the Fourteenth Amendment." Id. at 505. See also Deck v. Missouri, 544 U.S. 622, 630 (2005)("Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process.").

The clearly-erroneous standard of review is a deferential one, such that "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985). A finding "is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id.

The analysis as to what the jury took from Soto's testimony must begin with the fact that the jurors necessarily understood that, at the hearing that Soto attended the month before trial to listen to Petitioner's voice, Petitioner was in custody. Soto said this not once, but twice, and he referred to a hearing which had just occurred the prior month.

Next, and equally straightforward, the Court must look to whether anything occurred after this hearing which suggested to the jury that Petitioner's custodial status changed between that hearing and trial. In rejecting the mistrial

motion, the district court surmised that the jury somehow made such a leap even though no facts to support such a position existed:

> Now, naiveness doesn't mean that there's a fair trial going on. But I think that at least at this time I'm going to find that any risk of prejudice from this reference is minimal. Most lay people hearing that a party was in custody several months ago would not conclude that the party remained in custody to this date. Oftentimes, parties are arrested and incarcerated for a short period and subsequently released on bond.
>
> If the jury took note of the reference, this would be their most likely conclusion. Therefore, the risk of prejudice in the jury believing one party is currently in custody I think is minimal.

[ER 81].

The district court's analysis and conclusion cannot be squared with any reasonable interpretation of the relevant record. First, the hearing referenced by Soto occurred just a few weeks before trial, not "several months" prior. [ER 96]. Accordingly, the basis of the district court's finding – that "people hearing that a party was in custody several months ago would not conclude that the party remained in custody to this date" [ER 81] -- has no application to the instant determination.

Additionally, what the jurors saw as trial unfolded left no room for the jury to surmise that Petitioner had been released from custody prior to trial. Every day at trial, Petitioner's in-custody status was confirmed by the simple fact that while

he was only visible to the jury while seated at counsel table in court, the jury was able to see the co-defendant come and go to court on his own accord. The district court specifically noted this fact. [ER 80]. The district court highlighted this unavoidable distinction, noting that "[e]ven if I released your client this evening on an O.R., the end result is he's been not in the hallway for two or three days." [ER 80]. But ultimately, the district court found that no such link existed, as it could not "assume that [the jurors] notice him walking in or out at night . . . ." Id.

This clear record requires the finding that both the district court and Ninth Circuit panel's conclusions were clearly erroneous. It defies reason to think that the jurors, after hearing the testimony of Soto, and then seeing Petitioner appearing only at counsel table in the courtroom for the entirety of trial while the co-defendant moved on his own, could reasonably have concluded that Petitioner was not in custody for trial. Instead, given the time-frame of Soto's reference, and what the jurors inevitable noted during the trial as to both defendants' physical circumstances, the only conclusion the jurors reasonably could have reached is that Petitioner was in custody during trial. The Court has "frequently [] emphasized that 'where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" Amadeo v. Zant, 486 U.S. 214, 226 (1988)(citing Anderson, 470 U.S. at 574. Because here, there is only one

"permissible view[]" of the evidence, id., the lower courts' findings in connection with this custody issue meet this clearly erroneous standard.

B. This Case Must Be Remanded To The District Court For A Determination Of Prejudice

Following Soto's improper testimony and after subsequent discussion about the effect of this testimony, the district court made no bones about its belief that a mistrial was necessary if the jury had been informed that Petitioner remained in custody at trial. The district court stated that "if the jury knew or believed that your client was in custody at the present time, what I call the shackling cases, which are prejudicial to the defense, I would immediately declare a mistrial." [ER 96]. However, "after reflection and getting over the frustration of the stupidity of that answer," [ER 80], the district court concluded that the entirety of the proceedings had not informed the jury that Petitioner was in custody at the time of trial. As set forth above, the totality of the record does no such thing, and instead establishes that the only reasonable conclusion to be drawn is that the jurors were necessarily informed that Petitioner was an in-custody trial defendant.

The proper remedy for this constitutional error is to remand the case to the district court for a full consideration of prejudice. The government will be faced with establishing that, beyond a reasonable doubt, this constitutional error "did not

contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). Despite its comments when this issue was first raised, the district court should be entitled to make this determination in the first instance. [ER 96]. Petitioner therefore asks the Court to find that the conclusion that the jury was not aware of Petitioner's in-custody status was clearly erroneous, and to remand the case to the district court to see if it still believes that "if the jury knew or believed that your client was in custody at the present time . . . I would immediately declare a mistrial." Id. at 96.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: December 27, 2018

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