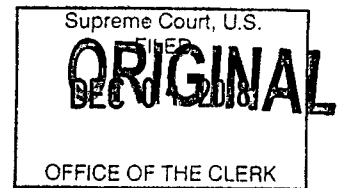


No. _____



IN THE SUPREME COURT OF THE UNITED STATES

JESUS GOMEZ

Petitioner

v.

STATE OF CALIFORNIA

Respondent

On Petition for Writ of Certiorari
to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether admission of evidence of uncharged burglaries violated petitioner's rights to a fair trial and due process of law under the Fifth and Fourteenth Amendments of the United States Constitutions?

PARTIES TO THE PROCEEDINGS

Petitioner, Defendant-Appellant below, is Jesus Gomez.

Respondent, Plaintiff-Appellee below, is the State of California.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jesus Gomez respectfully petitions this Court of a writ of certiorari to review the judgment of the California Court of Appeal, from which review was denied by the Supreme Court of California.

OPINIONS BELOW

The opinion of the California Court of Appeal is unreported. App. A. The order of the Supreme Court of California denying review is also unreported. App. B.

JURISDICTION

The Court of Appeal entered judgment on July 9, 2018. App. A. On September 12, 2018, the California Supreme Court denied Gomez's petition for review. App. B. This Court has jurisdiction from a final decision of the highest court in the State of California under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides:

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 offence 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 Fourteenth Amendment provides:

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 CASE AND FACTS

In 2015, a jury found petitioner Jesus Gomez guilty of first-degree burglary and resisting a peace officer.

On March 27, 2015, Chris Cattaneo ("Chris") was living in a ground floor condo at 950 Mission Road in South San Francisco. Residing there with him was his five-year old son and eighteen-year old daughter, Brianna Cattaneo ("Brianna").

Chris left the condo at about 5:30 on the afternoon of the 27th. He told Brianna, who was at home, that he would be returning later that evening. Brianna left the condo as well and returned some time around 9 o'clock. She found everything in order at the time and left moments later.

Chris returned home shortly after 9 o'clock to discover muddy footprints throughout much of the house. He also noticed that \$750 in cash was missing from atop a dresser in his bedroom. As Chris walked

through the residence, he saw a man wearing a hoodie, mask, and gloves step out of Brianna's bedroom. He attempted to apprehend the male intruder by grabbing his hoodie. The intruder broke free and ran from the condo. As the man fled, Chris noticed his black and white Nike brand shoes. He later described the intruder as standing six feet tall and weighing 200 pounds.

The police were immediately called. A backpack that held petitioner's birth certificate, driver's license and other personal documents was found outside the window through which the intruder entered the condo.

Following the discovery of the backpack, petitioner's photograph was broadcasted to police officers patrolling South San Francisco. One of the officers, Andrew Sargetti, spotted petitioner at around 10:30 on the evening of the 27th, standing at the intersection of Chestnut Avenue and Mission Road. Petitioner took off running when Sargetti attempted to speak to him. According to the officer, petitioner was wearing white shoes at the time.

Petitioner spoke to South San Francisco Police Officer Brian Swenson on March 29, 2015. At the time, petitioner was wearing red, white, and black tennis shoes.

Petitioner took the witness stand and denied committing the charged burglary. However, he admitted committing two residential

burglaries in 2012.

In early 2015, petitioner was living at his grandmother's home but often staying elsewhere. It was for this reason that he carried the backpack found at Chris' condo.

At about 2 o'clock on the afternoon on March 26th, petitioner was robbed by four gang members as he was walking along Centennial Trail in San Bruno on his way to his girlfriend's home. All of his belonging were taken, including his backpack. Petitioner did not report the crime to police, fearing reprisal by the men. However, he did tell his girlfriend, Melissa Lacombe about it.

Petitioner spent the evening of the 26th at his brother's home in San Francisco. He traveled to his mother's Antioch home the following day and was there at the time of the burglary.

The prosecution was permitted to introduce evidence of uncharged burglary committed by petitioner. The jury was instructed it could consider this evidence for the purposes of assessing petitioner's credibility and determining the identity of the Cattaneo burglar.

Michael Needham left his South San Francisco home on the morning of August 13, 2012. When he returned that afternoon, he noticed that the rear door to his attached garage and a pet door had been kicked in. Needham later discovered that a pistol had been taken from the home.

Petitioner was interviewed by police on August 15, 2012. He denied committing the burglary and said that he had found Needham's gun in bushes outside of a South San Francisco liquor store. He later admitted committing the offense.

In 2015, a judge sentenced petitioner to state prison for a term of 17 years. Petitioner appeal.

In an unpublished opinion, the California Court of Appeal rejected petitioner's assignments of error, including, relevantly, the argument that admission of evidence of the uncharged burglary violated petitioner's rights to a fair trial and due process of law under the Fifth and Fourteenth Amendments of the United States Constitutions. App. A at pp. 11-13. The California Supreme Court denied review on September 12, 2018. App. B.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER ADMISSION OF EVIDENCE OF AN UNCHARGED BURGLARY TO PROVE IDENTITY VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTIONS

A. Introduction

The prosecutor moved by written motion on August 31, 2015, to introduce evidence of a series of burglaries for which petitioner had been convicted. She argued that the evidence was admissible under Evidence Code section 1101, subdivision (b) to prove identity, motive, intent, and lack of mistake.¹ Over petitioner's objection, the court ruled that the August 13, 2012 burglary of Michael Needham's home was admissible to prove petitioner's identity as the perpetrator of the charged crime. Evidence of the prior burglary was presented at trial and the jury was instructed that it was introduced for the limited purpose of proving the identity of the person who burgled Chris Cattaneo's condo.

Both sections 1101, subdivision (a) and 352 barred admission of the charged evidence. The Needham burglary was too dissimilar to the charged offense to support the inference that petitioner was the perpetrator of the latter crime. This same dissimilarity reveals the evidence of the prior crime to be more prejudicial than probative. The

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Unless otherwise noted, all statutory references are to the evidence code.

court's error deprived petitioner of his federal constitutional right to a fair trial and due process of law (U.S. Const., Amends. V, XIV).

B. The Prior Burglary Was Not Sufficiently Similar to the Charged Burglary To Be Admissible To Prove Identity

Section 1101, subdivision (a), makes inadmissible "... evidence of a person's character or a trait of his or her character . . . when offered to prove his or her conduct on a specified occasion." "The purpose of this rule is to avoid placing an accused in the position of defending against crimes for which he has not been charged, and to avoid having a jury convict an accused on prejudicial character evidence alone." (*Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 430; accord, *People v. Ewoldt* (1994) 7 Cal.4th 380.) However, Section 1101, subdivision (b), carves out an exception to this rule, allowing character evidence to be admitted in the form of specific acts when such evidence is relevant to prove a fact "... other than his or her disposition to commit such an act." Examples of facts which may be proved by such evidence are enumerated in the statute and include identity, intent, motive and plan. (Evid. Code sec. 1101, subd. (b).)

The California Supreme Court set forth standards for admissibility of evidence of prior uncharged acts depending on the purpose for which admission is being sought (See e.g., *People v. Kipp* (1998) 18 Cal.4th 349, 369-370, *People v. Ewoldt, supra*, 7 Cal.4th at p. 403; *People v. Thorton*

(1974) 11 Cal.3d 738, 756.) In accordance with this criteria, the evidence of petitioner's prior crime should not have been admitted to prove identity.

“[W]hen [other crimes] evidence is introduced for the purpose of proving identity of the perpetrator of the charged offense, it has probative value only to the extent the *distinctive* ‘common marks’ give logical force to the inference of identity.” (*People v. Haston* (1968) 69 Cal.2d 233, 247, emphasis in original; see also *People v. Kipp, supra*, 18 Cal.4th at pp. 369-370; *People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) “The strength of the inference in any case depends on two factors: (1) the *degree of distinctiveness* of the individual shared marks, and (2) the *number of minimally distinctive shared marks*.” (*People v. Thornton, supra*, 11 Cal.3d at p. 756, emphasis in original, citations omitted.; see also *People v. Edwards* (2013) 57 Cal.4th 658, 711; *People v. Kipp, supra*, 18 Cal.4th at pp. 370.) Thus, “[e]vidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a “pattern and characteristic . . . so unusual and distinctive as to be like a signature.”” (*People v. Kipp, supra*, 18 Cal.4th at p. 370, quoting *People v. Ewoldt, supra*, 7 Cal.4th at p. 403; see also *People v. Barnwell* (2007) 41 Cal.4th 1038, 1056.)

A court must exclude evidence of a defendant's uncharged crime if it does not sufficiently establish that inference that the same person committed both the charged and uncharged offenses. (*People v. Alcalá*

(1984) 36 Cal.3d 604, 631.) Because other-crimes evidence is so inherently prejudicial, its relevancy is to be “examined with care.” It is to be received with “extreme caution,” and all doubts about its connection to the crime charged must be resolved in the accused's favor. (*Ibid*; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395.) On appeal, the trial court’s determination of this issue is reviewed for abuse of discretion. (*People v. Edwards, supra*, 57 Cal.4th 658, 711; *People v. Scheid* (1997) 16 Cal.4th 1, 14.)

The Needham burglary and the charged burglary were not sufficiently similar to support the inference that petitioner committed the latter offense. The Needham burglary was committed during daylight hours. In sharp contrast, the charged burglary occurred at night. The perpetrator of the uncharged crimes kicked in doors to gain entry into the house. The person who burgled the Cattaneo condo entered through a window. Additionally, a gun was taken during the Needham burglary while cash was stolen during the charged burglary. As is readily apparent, the two crimes do not display a pattern and characteristic so unusual and distinctive as to be like a signature.

C. The Evidence of Petitioner’s Prior Bad Act Was More Prejudicial Than Probative Under Evidence Code Section 352

Assuming for the sake of argument that the evidence concerning petitioner's prior crime would otherwise be legally admissible under

section 1101, subdivision (b), it should have been excluded because it was more prejudicial than probative under section 352.

Even where evidence of an uncharged act is determined to be relevant to a disputed issue in the case pursuant to section 1101, subdivision (b), the court must undertake an evaluation under section 352 to determine whether the probative value of such evidence outweighs "the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404; *People v. Leon* (2015) 61 Cal.4th 569, 599.) "Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis.'" (*People v. Ewoldt, supra*, at p. 404, citations omitted; see also *People v. Lewis* (2001) 25 Cal.4th 610, 637.)

As demonstrated, the charged and uncharged crimes had very little in common with each other. Accordingly, the prior crime had little legitimate probative value in establishing that it was petitioner who burgled the Cattaneo condo. Instead, its value to the prosecution was that it improperly demonstrated to the jury that petitioner was disposed to committing the charged offense because he had committed a burglary previously. Consequently, if deemed relevant under section 1101, subdivision (b), the court should have excluded evidence of the Needham burglary under section 352 as it was far more prejudicial than probative.

D. Petitioner's Conviction Must Be Reversed

As stated previously, this evidence was prejudicial to petitioner because it demonstrated to the jury that he was disposed to committing the charged burglary because he had committed another burglary three years earlier. Additionally, it made it impossible for the jury to fairly consider petitioner's defense and appreciate the significant weaknesses in the prosecution's case. As is apparent from the statement of facts, petitioner's defense turned entirely upon his credibility. Once the jury heard evidence that petitioner had committed another burglary, it could hardly find believable petitioner's testimony that he had nothing to do with the charged crime.

In sum, the trial court clearly erred by admitting evidence of petitioner's prior conduct to prove identity. The improper evidence created a substantial risk that petitioner was convicted on the basis of his prior misconduct, in violation of due process of law. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 [erroneous admission of "other acts" evidence in state trial violated federal due process]; see also *Michelson v. United States* (1948) 335 U.S. 469, 475-476.) Further, it cannot be said that admission of this evidence was harmless beyond a reasonable doubt and therefore petitioner's convictions must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24; cf. *United States v. Bradley* (9th Cir. 1993) 5 F.3d 1317, 1321 [erroneous admission of uncharged crime

constituted prejudicial error].

Accordingly, this Court should grant the petition for writ of certiorari and remand the matter with directions that the judgment of conviction be reversed.

CONCLUSION

For all the reasons set forth above, petitioner Jesus Gomez respectfully asks the Court to grant certiorari.

DATED: December 4, 2018

Respectfully submitted

A handwritten signature in black ink, appearing to read 'Ross Thomas', with a long horizontal flourish extending to the right.

ROSS THOMAS
Counsel of Record for Petitioner
Jesus Gomez