No._____

In the
Supreme Court of the United States

NATHAN SMITH III, Petitioner

v.

SHERRY PENNYWELL, and P.L. VASQUEZ Respondents

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

PETITION FOR WRIT OF CERTIORARI

Charles R. Khoury Jr.
P.O. Box 791
Del Mar, California, 92014
State Bar Nr. 42625
Telephone: (858) 764-0644
Fax: (858) 876-1977
charliekhouryjr@yahoo.com
Attorney for Petitioner

QUESTIONS PRESENTED

1) **DID THE CCA SO STRETCH THE FACTS IN THIS CASE SO UNREASONABLY THAT NO DEFERENCE COULD BE POSSIBLE TO ITS INTERPETATION OF WHAT OCCURRED IN THE TACO RESTAURANT PARKING LOT AND THE CASE SHOULD BE EXAMINED DE NOVO BECAUSE OF THAT SATISFACTION OF THE 2254(d)(2) EXCEPTION ?**

2) **WAS TRIAL COUNSEL PREJUDICIALLY INEFFECTIVE IN FAILING TO IMPEACH THE PROSECUTION CASE WITH POLICE TESTIMONY THAT THE "VICTIMS" WERE ACTUALLY THE AGRESSOR'S IN THIS CASE?**

3) **DID CUMULATIVE ERROR DENY APPELLANT A FAIR TRIAL**?

PARTIES TO THE PROCEEDINGS

Petitioner is **NATHAN SMITH III**

Respondents are **SHERRY PENNYWELL and P.L. VASQUEZ**

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Petitioner Nathan Smith III respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the district court's denial of the petition for a writ of habeas corpus.

WHY THIS PETITION SHOULD BE GRANTED

This is a case where the memorandum opinion, like the state court below, leaves out crucial facts which are actually the strongest evidence to support the grant of the petition. By leaving out the crucial, clear, fact stated in the arrest report, that the "victim"Pacheco Prado was saying " to appellant "Lets Go" as a challenge to fight and not exhorting his family to leave the area, the Court of Appeals agrees with the unreasonable interpretation of the facts of the state court. A police officer on the scene took Pacheco Prado's statement and it clearly showed that Pacheco and his relative were about to beat up appellant and were advancing on him when a car full of people from across the street drove into the parking lot and pandemonium broke out while appellant watched in a drunken state from his car.

Defense counsel had a police report in front of him which totally undermined the prosectution case but did nothing to get into evidence what was in that report.

What was in that report, never put before the jury due to ineffectiveness of counsel illustrates why certiorari must be granted.

Officer Wallin would have testified to the contents of his report at the scene of the incident.

Crystal Pacheco told Officer Wallin , at the scene, that the "black guy" who the Mexican girl in the bathroom complained to about Crystal[1], pulled a stick out of his trunk and then put it back.4ER471.

At the prelim, Crystal was cross-examined by Nina Ortiz's lawyer, Mr. Nimmo. She said her memory was fresh about the event when she gave her account to Officer Wallin.(Lodgement 3, 1PHT[2] 16-17.) 2ER107-108.

Crystal never told Officer Wallin that Ms. Ortiz had struck her or her mother. (1PHT 19.)2ER110. She also never told Wallin that she saw appellant strike any of her family but appellant's attorney, Mr. Sanchez, never asked her about that discrepancy at the prelim or at trial.

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[1] The first names of the Pacheco family are used only to avoid confusion.

[2]PHT stands for Preliminary Hearing Transcript

Mr. Nimmo, the lawyer for Nina Ortiz at the prelim, had the first page of Officer Wallin's report again marked, this time as court's exhibit 3, when Prado Pacheco took the stand at the preliminary examination. That page is attached to Lodgment 8 as Exhibit C, attached to the petition in state court, in federal court and to the Traverse's memorandum.4ER470-471.

Officer Wallin wrote that Mr. Pacheco told him that when the argument about the restroom started, Mr. Pacheco said:

> I got out of the Jeep and told the black guy "Let's go" since it would be Gary and I against the black guy. The black guy backed off and started to talk shit telling me he was going to call his homies over here. I told the black guy to go ahead and call his homies because I really thought we would be gone before his friends showed up.

(Exhibit C.)4ER470

The statement from Prado Pacheco goes on to describe that a large group of black males came running from across the street to attack Pacheco's wife. Not one of the attackers were described by Prado Pacheco as being appellant in Officer Wallin's report or in any report taken at the

scene.

Mr. Nimmo's cross-exam of Prado Pacheco continued as follows:

Q. Well Mr. Pacheco, you–basically–you basically challenged these individuals to a fight, did you not?
(DA Objection overruled)
The Witness: No
By Mr. Nimmo:
Q. Well, isn't it a fact that you went up–when the individual was standing next to the car with Ms. Ortiz that you went up to them and told him "Let's go," meaning, "Let's fight?"
A. My family is there with me sir.
(Objection nonresponsive)
The Witness: I would say no.
By Mr. Nimmo:
Q And isn't it a fact that you said–that you told the police that the reason you did that was because it was you–you and your brother were going to gang up on him?
The Court: "Him" being whom?
Mr. Nimmo: "Him" being Mr. Smith.
The Witness: That's not true
By Mr. Nimmo:
Q. So you didn't–you didn't tell the police that you told the black guy, "Let's go," since it would be just you and Gary and you against the black guy?
A. That's not true.
Q. And isn't it a fact that after you said that that the black guy backed off and told you he was going to call his homies?
A. That's not true.
Q. And isn't it a fact that you told the black guy, "go ahead and call your homies"?
A. That's laughable.
(1PHT 59.) 2ER150.

Pacheco went on to deny he ever said that to Officer Wallin. 2ER152. Yet, that is exactly what Officer Wallin wrote in his report the night of the incident after interviewing Prado Pacheco. The jury would not have found it laughable at all. But they never heard it due to counsel's ineffectiveness.

These were the facts before the CCA yet they concluded , unreasonably, that Pacheco was simply exhorting his family to leave. And the memorandum opinion of the 9th Circuit swallowed this objectively unreasonable conclusion hook line and sinker.

There is a point where a federal court cannot let AEDPA turn itself into a rubber stamp of approval where there should be none. That is what has happened here. The court below abdicated its duty and only a grant of certiorari can correct that abdication.

Finally, cumulative error denied appellant a fair trial.

OPINIONS BELOW

Cases from Federal Courts:

On July 18, 2018, the Ninth Circuit Court of Appeals, in a memorandum decision, affirmed the judgment of the district court

dismissing the petition for writ of habeas corpus by a state prisoner filed by petitioner. (Appendix A, 9th Ckt. Memorandum opinion.)

The unpublished order of the Ninth Circuit dated October 30, 2018, denying the petition for rehearing is Appendix B.

The judgment of the United States District Court for the Southern District of California denying the petition for a writ of habeas corpus with prejudice was issued on April 25, 2016 and is Appendix C.

The report and recommendation of the magistrate filed on August 15, 2014 is Appendix D.

Cases from State Courts:

The California Supreme Court denied a petition for review, raising the same constitutional claims asserted in this petition for certiorari but only after receiving additional briefing from the parties, on February 12, 2012, Appendix F.

The unpublished opinion of the California Court of Appeal's dual denial of petitioner's direct appeal consolidated with his habeas corpus petition, raising the same constitutional claims asserted in this petition for

certiorari was filed November 3, 2011, and is Appendix E.

JURISDICTION

The Ninth Circuit denied the petition for rehearing on October 30, 2018. The jurisdiction of this Court is, thus timely invoked under 28 USC section 1254(1). *Hohn v. United States*, 524 U.S. 236 (1998).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A defendant in a criminal case must have effective assistance of counsel under the Sixth Amendment and Fourteenth Amendments of the United States Constitution.

28 U.S.C. Section 2254(d) provides:

> (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 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.

STATEMENT OF PROCEDURAL FACTS

The facts relevant to this petition are that Nina Ortiz got a phone call from appellant that he was too intoxicated to drive and had called her for a ride home. Unfortunately she chose that time to go to the restroom at the taco shop where she picked up appellant who waited in the car for her. That indeed was unfortunate since it precipitated the nasty words between her and Crystal Pacheco when Crystal rattled the knob of the restroom door with Ortiz inside the restroom. Ortiz then described male members of the Pacheco family (2ER182) walking toward appellant and Ortiz. This dove tailed with the police report of Officer Wallin that the Pacheco males approached appellant and Mr. Pacheco told the Officer who then wrote in his report the following statement of Prado Pacheco:

> I got out of the Jeep and told the black guy "Let's go" since it would be Gary and I against the black guy. The black guy backed off and started to talk shit telling me he was going to call his homies over here. I told the black guy to go ahead and call his homies because I really thought we would be gone before his friends showed up.

(Exhibit C; 4ER470).

What happened was that Nina Ortiz had called acquaintances asking

for help for the drunken appellant and those friends *did* show up and there was a melee in which the Pacheco family was assaulted while appellant said in his declaration, that he stayed in his car, drunk.

This challenge to fight by the Pacheco males was corroborated by Ortiz's prelim testimony which was that the two males of the Pacheco family approached her but approached mainly appellant in a very aggressive way, 2ER257, throwing their hands up as a form of challenge. They made statements to appellant challenging him to fight. 2ER208.

Trial counsel put before the CCA his declaration that he was an ill man, he died while this case was on appeal, and his heart medications hindered his representation.

Appellant filed both a direct appeal and a petition for writ of habeas corpus which was consolidated with that appeal for resolution in the CCA. Lodgments 8-10.

On November 3, 2011, the CCA issued a 42 page unpublished opinion denying all arguments in the direct appeal and the habeas petition. Lodgment 10. 1ER46-87

Appellant petitioned for review to the California Supreme Court (CSC) which denied that petition for review without comment on February 15, 2012. Lodgment 12.

On January 14, 2013, appellant filed his federal habeas petition in the Southern District of California. Doc. 1.

The initial petition was filed *pro se* then present counsel substituted in, Doc. 11, and filed a traverse on August 27, 2013. Doc.16.

On April 25, 2016, objections to the R&R were overruled, the petition was denied and a certificate of appealability was granted and judgment so ordering was filed. Doc.28.

On August 16, 2016, an order denying appellant's motion for reconsideration was filed. Doc 30.

On August 18, 2016, a notice of appeal was filed to the Ninth Circuit. Doc. 31.

On February 13, 2017 an Order clarifying the scope of the certificate of appealability was granted. Doc. 38.

Argument was had and the Memorandum Opinion issued on July 18,

2018.

A petition for rehearing was denied on October 30, 2018.

ARGUMENT

I

CERTIORARI SHOULD BE GRANTED SINCE THE FACT FINDING OF THE CCA WAS BEYOND UNREASONABLE AND COULD NOT BE DEFERRED TO

The jury never heard Nina Ortiz's testimony that she gave under oath at the preliminary hearing. She told the preliminary hearing magistrate that appellant was too intoxicated to drive and had called her for a ride home. Unfortunately she chose that time to go to the restroom at the taco shop where she picked up appellant who waited in the car for her. That indeed was unfortunate since it precipitated the nasty words between her and Crystal Pacheco when Crystal rattled the knob of the restroom door with Ortiz inside the restroom. Ortiz then described male members of the Pacheco family (2ER182) walking toward appellant and Ortiz. This dove tailed with the police report of Officer Wallin that the Pacheco males approached appellant and Mr. Pacheco told the Officer:

> I got out of the Jeep and told the black guy "Let's go" since it would be Gary and I against the black guy. The black guy backed off and started to talk shit telling me he was going to call his homies over here. I told the black guy to go ahead and call his homies because I really thought we would be gone before his friends showed up.

(Exhibit C; 4ER470).

The memorandum opinion stops at the point of the statement "Lets Go" and totally ignores what Pacheco actually told the officer which was set forth above as a challenge to fight "since it would be Gary and I against the black guy".

This challenge to fight was corroborated by Ortiz's prelim testimony which was that the two males of the Pacheco family approached her but approached mainly Mr. Smith (appellant) in a very aggressive way, 2ER257, throwing their hands up as a form of challenge. They made statements to Mr. Smith challenging him to fight. 2ER208.

Trial counsel put before the CCA his declaration that indeed he should have put the above evidence before the jury.

The RB argues at page 23 that appellant does not like the CCA interpretation of what Prado Pacheco said to appellant really was not a

challenge to fight but a statement "lets go" (1ER33-34) and that even a "stretch" as the District Court described that interpretation, deserves deference.

Appellant responds here that the RB and then the Memorandum Opinion would render 2254(d)(2) meaningless and that deference under these facts really means total *abdication* of the responsibility to test the CCA interpretation of facts for *objective reasonableness.*

The RB would have the CCA interpretation of the facts in the Officer's report, called a "stretch" to not be objectively unreasonable because of AEDPA deference. But deference cannot look the other way in the face of objective unreasonability. Justice may have a blindfold in its artistic representation but it cannot be blind to objective unreasonableness and that is what the Memorandum Opinion accomplishes. The Ninth Circuits panel opinion puts on a blindfold and sets forth an impossible interpretation of critical facts never presented to the jury due to ineffectiveness of counsel.

"Lets go" meaning to leave, according to the CCA interpretation,

had to be interpreted by the entire phrase of Officer Wallin's report which was that Pacheco told Wallin "I got out of the Jeep and told the Black guy 'Let's go' *since it would be Gary and I against the Black guy*." emphasis added.

Once one sees the entire sentence, the CCA interpretation is simply not reasonable and not plausible. If Officer Wallin had testified to the jury what he wrote in his report, there would have likely been at least *one* juror who would have concluded they had a reasonable doubt on the issue of *who was threatening who* in this case. A hung jury, according to *People v. Soojian,* 190 Cal.App.4th 491, 521 (2010) is a more favorable outcome under *Strickland v. Washington,* 466 U.S. 668 (1984). And this falls directly on defense counsel's shoulders as to why he did not get that trustworthy testimony before the jury.

Trial counsel's declaration which was before the CCA, the California Supreme Court and before the federal district court is simply a candid admission that he made a mistake by not calling Officer Wallin to testify to his report and that it was not a tactical decision to fail to call Officer Wallin.

The District Court said that the "more reasonable" interpretation of

Prado Pacheco's statement to Officer Wallin "in the police report is that they were words of aggression and escalation, not retreat. The appellant's defense likely would have been stronger if his trial counsel had elicited these statements on cross-examination or called Officer Wallin as an impeachment witness." (1ER12,34).

That statement by the Magistrate and adopted by the District Court really decides this case because it is a statement that the CCA interpretation of the facts is not reasonable and of course if that is the case, the bar to granting the writ under AEDPA is lifted, de novo review is carried out and the R and R adopted by the District Court said if this case were on de novo review, "it would likely agree that trial counsel erred" 1ER30.

Finally, the CCA statement that Officer Wallin's report of Prado Pacheco's statement to him was "essentially favorable to the prosecution" and trial counsel was not ineffective for not presenting to them at trial (1ER71-72) is more than objectively unreasonable, it is off the reasonability scale, it pegs the UNREASONABLE METER if one existed.

The state hangs its hat on the CCA statement that the testimony

from police officers at a chaotic scene was somehow less reliable than admittedly conformed testimony from the Pacheco family at trial. But the truth is that police officers are trained to write accurate reports and they did in this case but their reports never reached the jury's ears due to trial counsel ineffectiveness.

The State, at page 30 if its Answer, gives weight to this "chaotic scene" downgrading of the two officer's never-given testimony from their reports and gives weight to the CCA statement that it was more reliable to have "an investigation where a detective could question the witnesses in more detail"(1ER74-75). Great! Where were these investigating detectives at trial? They existed only in the imagination of the CCA.

The testimony at trial came from the conformed testimony of the Pacheco family not detached investigative detectives and the testimony of the two officers which greatly contradicted the prosecution theory of the case was never heard by the jury due to counsel's failings, which to his credit, he admitted in his declaration.

II

FAIRMINDED JURISTS COULD NOT DISAGREE THAT CUMULATIVE ERROR WORKED TO DENY APPELLANT A FAIR TRIAL UNDER THE US CONSTITUTION AND *BRECHT v. ABRAHAMSON*. CUMULATIVE ERROR EXEMPLIFIED BY WHAT HAS BEEN SET FORTH ABOVE AND ALSO BY ATTORNEY LIMBERG'S DECLARATION PLUS THOSE OF JESSICA HOLMES AND APPELLANT ILLUSTRATE THE FACT THAT DEFENSE COUNSEL WAS PREJUDICIALLY NOT PREPARED FOR TRIAL. AND THE TRIAL JUDGE ALLOWING TESTIMONY OF FEAR OF THE PACHECO WOMEN AT SEEING APPELLANT 8 MONTHS LATER AT THE SAME TACO STAND AND THEN THE PROSECUTION ARGUMENT EMPHASIZING THAT FEAR ALL CUMULATIVELY DENIED APPELLANT A FAIR TRIAL

A. Cumulative Ineffectiveness of Counsel Denied Appellant a Fair Trial

There was an avalanche of error in this case which swept appellant, arguably an innocent drunk, to imprisonment where he has been for the last ten years.

What did the Ninth Circuit memorandum say about this cumulative error issue?

This quote is so opaque that cert should be granted on this issue alone: "Although Smith and the CCA have identified several actual and potential errors in Smith's trial, Smith has failed to establish a unique symmetry of errors that amplify a key contested issue. Therfore the district court's denial of this claim is affirmed."

Why is there no unique symmetry in these errors which cumulated had to deny appellant a fair trial. What follows is a cataloguing of counsel's failures which sadly do not have the "symmetry" demanded by the 9th Circuit. They were harmful to appellant's fair trial rights and that should have been enough for relief:

Attachments, 4ER479-483,are conclusive proof that trial counsel was woefully unprepared to proceed to trial in this case. In the "Preliminary Information from Trial Counsel" form attached to Exhibit E, 4ER482. Mr. Limberg, who by then was trial counsel, wrote as potential issues on appeal:

> IAC: trial counsel lost most of the discovery and half the preliminary hearing transcript, failed to meet with the defendant in the six months prior to trial, and failure to

investigate. See enclosed letter from trial counsel to my office.

Attached also to Mr. Limberg's declaration is a letter from Mr. Sanchez telling Mr. Limberg to contact the prosecutor, Mr. Lawson, for the missing items. Mr. Sanchez also noted in the letter:

> "with respect to any notes taken, during the six months Mr. Smith was out of custody between the prelim and the trial, he did not come and see me or call me at any time, therefore there were no conferences with Mr. Smith."
> 4ER483

Exhibit F is the declaration of Jessica Holmes. She confirms that she and appellant were in frequent contact with Mr. Sanchez to pay his fee but no more than that, and even living with Sanchez's daughter. Mr. Sanchez appeared confident right up to the day of trial and that is when he told appellant, "You are going down."4ER484-487;4ER489-498.

Exhibit's G-1 and G-2 are declarations from appellant which clearly set out that appellant was approached by two angry men who "backed" him up to the car where he then grabbed a stick from the trunk, used to hold up the hood of the car, and a second cell phone belonging to Nina

Ortiz. He said out loud to the two angry men that he was calling for help but he never did that, it was Nina Ortiz instead who called on her phone saying appellant was about to get jumped. Appellant finally agreed to the request of a "lady" in the Pacheco party to put the stick back in the trunk and he did that. It was then that "the family" was attacked. Appellant had nothing to do with it and never hit anyone but drove away with Nina Ortiz driving.

This account fit perfectly the statement from Mr. Pacheco to Officer Wallin. Had Mr. Sanchez done even a modicum of investigative work on this case he would have seen that contrary to Mr. Smith "going down", Sanchez had a very triable case and an innocent client. The failure to perform appropriate investigation renders trial counsel's performance inadequate.

Here, most of the work had been done by Mr. Nimmo at the preliminary examination stage. All Mr. Sanchez had to do was follow up on Mr. Nimmo's lead and subpoena Officer Wallin and Officer Luth and move to have Nina Ortiz's testimony, elicited by Mr. Nimmo at the

preliminary hearing, read to the jury.

CONCLUSION

Seldom has a federal court seen such a clear path to both AEDPA exceptions to the litigation bar. There has been an unreasonable application of clearly established law of the Supreme Court's ineffective assistance of counsel decisions and an unreasonable determination of the facts. Only one of those exceptions need be found to allow de novo review. *Hurles v. Ryan*, 752 F.3d 768,778 (2014).

Once the AEDPA ban is lifted, as the Magistrate stated in the R and R, ineffective assistance of counsel is apparent as is cumulative error.

Certiorari should be granted.

Respectfully submitted,
/s/Charles R. Khoury Jr.
Attorney for Appellant NATHAN SMITH III
By Appointment of the Court of Appeals

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Supreme Court Rule 33.1(h) Certification

As required by Supreme Court 33.1(h), I certify that the document filed with this certification contains 4,372 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d), according to the word-count function of the word processing used to prepare it.

Dated: January 27, 2019

/s/ *Charles R. Khoury Jr.*
Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

SMITH v. PENNY WELL and VASQUEZ

PROOF OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and not a party to this action and that on this 27TH Day of JANUARY 2019 a petition for In Forma Pauperis Status and petition for Certiorari with volume of exhibits, were mailed postage prepaid, to the Attorney General of the State of California
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266 counsel for the Respondent.

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

Respectfully submitted,
/s/CHARLES R. KHOURY JR.

Executed on JANUARY 27, 2019

By: _____
/S/CHARLES R. KHOURY JR.
Attorney for PETITIONER