

18-8490 ORIGINAL  
No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

BERNARD MITCHELL, — PETITIONER  
(Your Name)

vs.

STATE OF CALIFORNIA, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF CALIFORNIA  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Bernard Mitchell #BC8030  
(Your Name)

California Mens Colony, PO Box 8101  
(Address)

San Luis Obispo, CA 93409  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

## **LIST OF PARTIES**

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## QUESTION(S) PRESENTED

1. Did the court abuse its discretion in permitting the jury to be exposed to the nicknames "Crip" and "Scrap," which have been taken as a suggestion that appellant and co-defendant belonged to criminal street gangs?
2. Did the admission of the gang evidence prejudice the appellant under any standard of review?
3. Did the prosecutor commit "Griffin Error" and lower her burden of proof by telling the jury that "you haven't heard any evidence here, any evidence about what the appellant was doing in the area, other than what the people have presented?" Was counsel ineffective in failing to object, if an objection would not have been futile?
4. Did the prosecutor's remarks that appellant had a burden to testify in his own defense prejudice appellant?
5. Did the court abuse its discretion in imposing the high term based on appellant's prior history, and was counsel ineffective in failing to make this point?

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the THE SUPREME COURT OF CALIFORNIA court appears at Appendix B to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was 11/1/18. A copy of that decision appears at Appendix   A  .

[ ] A timely petition for rehearing was thereafter denied on the following date: January 30, 2019, and a copy of the order denying rehearing appears at Appendix   B  .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

United States Constitution, Amendment XIV: "... nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

United States Constitution, Amendment V,

United States Constitution, Amendment VI,

California Constitution, Article I, § 15.

## STATEMENT OF THE CASE

On December 8, 2015, the Los Angeles County District Attorney filed an information accusing appellant of six counts of second degree robbery (§ 211), with the additional allegation that each of those counts appellant personally used a firearm (§ 12022.53, subd. (b)) and damaged and destroyed property exceeding \$50,000 in value (§ 12022.6, subd. (a)(1)); and one count of possession of a firearm by a felon (§ 29800, subd. (a)(1)). (3CT 670-674.)

Opening statements in a jury trial began on January 17, 2017. (4CT 837.) Closing arguments were delivered on February 3 and 6, 2017. (4CT 887, 891.) On February 8, 2017, the jury convicted appellant on all counts and found true the special allegations. (4CT 983-989; 14RT 5417-5422.)

On March 30, 2017, the court sentenced appellant to 40 years in state prison. (4CT 1037-1039; 14RT 5710-5711.)

Appellant filed a timely notice of appeal on April 3, 2017. (4CT 1083.)



## REASONS FOR GRANTING THE PETITION

The improper admission of evidence is normally evaluated under the Evidence Code section 353 "miscarriage of justice" standard and requires reversal if there would have been a reasonable probability of a more favorable outcome in the absence of the error. (Evid. Code, § 353; People v. Richardson (2008) 43 Cal.4th 959, 1001.) On the other hand, the admission of evidence that violates the federal Constitution is evaluated under Chapman v. California (1967) 386 U.S. 18, 24, and requires reversal if it is not harmless beyond a reasonable doubt.

Secondly, The Fifth Amendment to the United States Constitution prevents an individual from being compelled to be "a witness against himself" in a criminal case. (U.S. Const., 5th Amend.) Because an accused may not be penalized for his invocation of his fundamental right, the prosecutor may neither comment on a defendant's choice not to testify nor urge the jury to infer guilt from such silence. (Griffin, *supra*, 380 U.S. 609, 614-615.)

Third, Counsel for appellant did not object to the court's exercise of discretion, and consequently waived any appellate challenge. (People v. Scott (1994) 9 Cal.4th 331,353.) In failing to do so, however, counsel rendered ineffective assistance of counsel. (Strickland, *supra*, 466 U.S. at pp. 687-696.) This is so because a reasonable attorney would recognize both that the court had given a poorly supported rationale for imposing the high term and that there was no possible downside to seeking a lower term.

Last, the Appellate Court agree that the prosecutor's argument in this case crossed the admittedly hazy line that separate proper comment on the state of the evidence and impermissible comment on a defendant's failure to testify. By not granting the "Griffin Error" the decision is in conflict with the decision of the 6th circuit; Girts v. Yanai, 501 F.3d 743, 758-761 (6th Cir. 2007). It would be of national importance to have uniformity on this issue.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bernard Mitchell

Date: March 6, 2019

