

No 18-8888

Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

NEXIS RENE GOMEZ, — PETITIONER
(Your Name)

vs.

CONNIE GIPSON, (Warden), RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

NEXIS RENE GOMEZ
(Your Name)

SOLEDAD STATE PRISON, P.O. BOX 705
(Address)

SOLEDAD, CALIFORNIA 93960
(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

Did the Ninth Circuit erred in finding that petitioner did not showed that jurist of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion?

Did the Ninth Circuit erred in finding that petitioner was not deprived of his constitutional right to effective assistance of counsel under the Sixth Amendment?

LIST OF PARTIES

- ☒ 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:

Petitioner, NEXIS RENE GOMEZ, is representing himself in this action. Respondent CONNIE GIPSON, is represented by the California's Attorney General Office. Last representative of record, ANN P. WATHEN, Deputy Attorney General, 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102.

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- APPENDIX F: Letter by the United States Supreme Court granting an extension of time to file the petition for writ of certiorari.

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 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☒ is unpublished.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 United States district court appears at Appendix D 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☒ is unpublished.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 _____ 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 _____ 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.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 25, 2018.

☐ 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: November 6, 2018, and a copy of the order denying rehearing appears at Appendix C.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including March 22, 2019 (date) on January 17, 2019 (date) in Application No. 18 A 742.

☒ 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 _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have committed, which districts shall have been previously ascertained by law, and to be informed of the and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

An information filed on June 3, 2010, charged petitioner with 16 offenses. Those charged offenses were: counts 1, 2 and 9 through 12, aggravated sexual assault on a child under 14 years old or 10 or more years younger than the defendant. (Cal. Penal Code § 269.); counts 3 through 8, lewd and lascivious conduct by force on a child under 14 years old. (Cal. Penal Code § 288, subdivision (b)(1).); count 13, sexual penetration by force. (Cal. Penal Code § 289, subdivision (a)(1).); count 14, oral copulation by force. (Cal. Penal Code § 288a, subdivision (c)(2).); count 15 and 16 possession of obscene matter depicting a person under the age of eighteen. (Cal. Penal Code § 311.11, subdivision (a).)

Jury trial began on July 15, 2010. On August 3, 2010 the prosecution filed an amended information that deleted count 16 one of the obscene matter charges. On the same day the jury returned its verdict found petitioner guilty as charged.

The trial court imposed sentence on December 3, 2010. On the conviction in count 15 the court imposed the two-year middle term. On the convictions on counts 3 through 8 and counts 13 and 14, the court imposed the six-years middle term and ordered that all of those terms would be served consecutively.

Finally, on the convictions in counts 1, 2 and 9 through 12, the court sentenced petitioner to consecutive terms of 15 years to life. The total sentence is thus 90-years-to-life consecutive to a 50-years term.

Petitioner timely appealed, and the California Court of Appeal, Sixth Appellate District affirmed, People v. Gomez, Santa Clara County Superior Court No. CC944457. The decision was not published.

On March 28, 2012 the California Supreme Court denied a timely Petition for Review, California Supreme Court Case No. S200302.

Petitioner then filed a timely petition for writ of habeas corpus in State Courts raising among other things an ineffective assistance of counsel claim. The claim was denied in all three levels of California's Courts.

On or about March, 2013, Petitioner filed a timely Habeas Corpus Petition in the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 2254, which included the Ineffective Assistance of Counsel claim exhausted in the California Supreme Court, Case No. S207151.

On July 23, 2014, the petition was denied. (See Exhibit 1.) Petitioner appealed, but the United States Court of Appeals for the Ninth Circuit denied a Certificate of Appealability (COA) on April 27, 2015.

On July 17, 2015, petitioner filed a timely petition for certiorari in this Court, which was denied on December 7, 2015, petitioner then filed a petition for rehearing in this Court, which was denied on June 6, 2016. (See Exhibit 2.), the decision is reported in Gomez v. Gipson 2016 U.S. LEXIS 3645 (U.S., June 6, 2016.)

On August 22, 2017, petitioner filed a motion to reopen the judgment under Rule 60(b) of the Federal Rules of Civil Procedure, which motion he amended on December 1, 2017 (See Exhibit 3.)

On January 29, 2018, the motion was denied in the United States District Court. (See Appendix D.)

Petitioner filed a timely Notice of Appeal from the denial of the motion under Rule 60(b), and the Court of Appeals for the Ninth Circuit remanded the case to the lower court for a determination whether a Certificate of Appealability should issue. (See Appendix A.)

On March 5, 2018, the District court denied a Certificate of Appealability based only on a review of the motion, the order denying the motion, the notice of appeal, and other records. (See Appendix E.) because petitioner did not filed a proper request for a COA in the district court.

On or about August 27, 2018, petitioner filed a motion requesting a Certificate of Appealability in the United States Court of Appeals for the Ninth Circuit. (See Exhibit 4.)

On September 25, 2018, the Ninth Circuit denied petitioner's motion requesting a COA. (See Appendix B.)

On or about October 4, 2018 petitioner filed a timely petition for rehearing in the Ninth Circuit, which the Court construed as a motion for reconsideration. (See Exhibit 5.)

On November 6, 2018, petitioner's motion for reconsideration was denied. (See Appendix C.)

On January 17, 2019, petitioner filed an application for extension of time within which to file a petition for certiorari in this Court. The application was presented to Justice KAGAN, who on January 17, 2019, extended the time to and including March 22, 2019. (See Appendix F.)

A. Statement of the Facts.

On April 29, 2004, petitioner moved in with the victim's family in apartment # 15 at Lexington Street in San Jose, state of California. He rented one bedroom in that apartment. (See Exhibit 6, RT 186-190.)

By November 1, 2007, when the family moved out of that apartment petitioner was not living with them, a witness who testified at trial supplied that when petitioner left that apartment he went straight to Las Vegas for an unspecified period of time (Exhibit 6, RT 188-189), the witness provided that he came back to San Jose in 2008, where he met the family again when they were living in a different apartment complex specifically at Camden apartments and petitioner rented his own apartment above them. (Exhibit 6, RT 190.)

The witness did not provided an approximate date when petitioner moved out of that apartment which was very significant issue in this case, and defense counsel failed to establish this relevant fact at trial. However, in his motion under Federal Rules of Civil Procedure 60(b) filed in the district court (Exhibit 3); (See also U.S.D.C. Docket Entry Nos. 25,26), petitioner presented reliable evidence demonstrating that the approximate date when he moved out of the victim's family apartment at Lexington Street, could be April 15, 2005 as described at page 1 of exhibit 7, (See Exhibit 7 at p.1.)

B. The Prosecution's Strongest Evidence of Its Case, Suffers Lack Of Authentication.

A video found in petitioner's laptop which was searched without his consent and without a warrant showed him removing the victim's clothing. The prosecution introduced the video into evidence as People's Exhibit 11. (See Exhibit 8.)

The prosecution alleged that the sexual assault counts under California Penal Code § 269, were divided in two groups. Counts 1 and 2, occurred before petitioner allegedly recorded the video, and counts 9 through 12 occurred after petitioner supposedly recorded the video and that according to the prosecution he used the images to threaten the victim and that the girl was 11, 12, 13 and under 14 years old when these crimes occurred with the purpose to gave petitioner a sentence of 90-years-to-life. (See Exhibit 9.)

Using testimonial hearsay, and without representing the scene depicted in the video (See Exhibit 10), the prosecution established that the video was recorded in petitioner's room, the one he rented when he lived with the victim's family in 2004. The prosecution failed to provide to the jury an accurate transcription in English of the dialogue in Spanish involved in the video between the girl and petitioner (See Exhibit 11), with the purpose to allow the self-authentication of the video as required by California Evidence Code § 1421 that in relevant part provides [authentication may be established by the contents in the writing.]) In this case none of these requirements was done by the prosecution which made the video and the still images taken from that video insufficient

authenticated or reliable to sustain petitioner's conviction on counts 1,2 and 9 through 12 under California Penal Code § 269, coupled with counsel's failure to call an expert (scenographer) to identify the scene depicted in the video with the purpose to establish by the defense that the video was recorded at petitioner's Camden apartment after he came back from Las Vegas to San Jose, California, and that the girl was 14 years old. but no 11,12,13, or under 14 as claimed by the prosecution, that would have reduced petitioner's culpability, but for counsel's unprofessional errors, petitioner received a potential sentence of 90-years-to-life on these counts because his counsel rendered ineffective assistance under Strickland v. Washington 466 U.S. 668, 687 (1984).

C. The Girl Depicted In The Video Was Not 11 Years Old As Claimed By The Prosecution in This Case.

By using testimonial hearsay, the prosecution established at trial that the girl depicted in the video was 11 years old based in the unreliable testimony of Police Officer Brian Alexander who testified at trial without any independent proof that the girl depicted in the video was 11 years old based in her appearance and her physical development despite that he never met the girl when she was 11 years old to render such inflammatory opinion. Petitioner contends that the Officer was not legally qualified to render an opinion concerning the age of the girl depicted in the video. The officer learned that the girl depicted in the video was 11 years old based in part on the out-of-court statements provided by the girl to

police officers documented in Officer WHARTON's police report (See Exhibit 12) that was not admitted into evidence at trial (See Exhibit 13). The prosecution later introduced this information at trial via hearsay through the testimony of Officer Brian Alexander (See Exhibit 14, RT at pp., 305-311), that was used to authenticate the video and still images taken from that video causing the evidence to be hearsay.

Petitioner contends that the jury may have relied heavily on the testimony of Police Officer Brian Alexander to return the guilty verdict on counts 1,2 and 9 through 12, under California Penal Code § 269, because counsel was ineffective for failing to present the testimony of a physician to refute the testimony of the Police Officer. A physician is appropriate to provide information regarding the age of child depicted in a video recording based on her/his physical development.

Furthermore, petitioner contends that the girl depicted in the video was not 11,12,13 or under 14 years old as claimed by the prosecution because when the girl was 10, turning 11 years old, petitioner had finally moved out of the girl's family apartment 15 at Lexington Street.

Petitioner contends that due to the deficient performance displayed by his trial counsel for failing to conduct a pretrial investigation of the case in Las Vegas, at trial he did not have reliable evidence to offer to the jury indicating at least an approximate date when he moved out of the girl family's apartment 15 at Lexington Street in

San Jose straight to Las Vegas, which is very significant issue that counsel had the duty to establish at trial with the purpose to support petitioner's contention that he never committed the crimes charged in counts 1,2 and 9-12 when the girl was 11,12,13 and under 14 years old as claimed by the prosecution and that he did not recorded her in video when she was 11 years old. Furthermore, based in the x-rays images that petitioner claim is newly evidence that his counsel could and should have discovered by conducting a pretrial investigation of the crime in Las Vegas, he contends that the approximate date when he moved out of that apartment could be April 15, 2005 (See Exhibit 7 at p. 1), he contends that the girl was 10 turning 11 years old when he is finally out of that apartment because she was born in June 1994 (Exhibit 15.) Is supported by the record of this case the fact that when petitioner left the Lexington apartment, he went straight to Las Vegas, the record in this case indicates that when he came back to San Jose, he did came back at Camden apartments in 2008 where he met the family again (Exhibit 6, RT 188-190.) Petitioner contends that it was at his Camden apartment where he regain contact with the girl again on about September 2008 when she used to go willingly into his apartment as supplied by a witness at trial. (Exhibit 16, RT 377-381), for purposes of this petition only, petitioner contends that here is where the video was recorded, when the girl was 14 years old no 11 as claimed by the prosecution with the purpose to reduce his culpability. Counsel failed to establish this fact at trial prejudicing petitioner. Had trial counsel called an scenographer to establish that the video was recorded at petitioner's camden apartment when the girl

was over 14 years old as petitioner requested prior to trial (See Exhibit (17)) is reasonable probable that the jury would have never convicted him on counts 1,2 and 9 through 12, carrying 90-years-to-life, because the pretrial investigation would have provided in full petitioner's medical record in Las Vegas which contained relevant information concerning petitioner's fracture in his right leg that prevented him of doing the things described in the video, and a pretrial investigation would have uncovered additional evidence concerning the apartment that petitioner rented all the period of time he lived in Las Vegas to support his claim that he never sexually assaulted the victim when she was 11,12,13 and under 14 years old as claimed by the prosecution because when he moved out of the family's apartment he went stright to Las Vegas when the girl was 10 turning 11 years old, and when he returned to San Jose and met the family again or regain contact with the girl again, she was over 14 years old. Accordingly, counts 1,2 and 9 through 12, never occurred. Petitioner contends that these charges are the result of a malicious prosecution who charged him on counts that never occurred without providing the evidence necessary to support it, which is a continuing and growing problem in California.

D. The Ineffective Assistance Of Counsel Claim Presented In Petitioner's Original Habeas Corpus Petition.

In his original habeas petition, petitioner claimed among other things that his counsel rendered ineffective assistance with prejudice in multiple ways by: 1) failing to argue to the jury that

there were insufficient evidence that he sexually molested L. on any occasion other than when it was recorded in video; 2) improperly advising him to go to trial on the charges rather than accept a plea bargain offer for 19 years sentence; 3) failing to object to his sentence as violating Section 654; 4) failing to conduct a pretrial investigation, locate alibi witnesses, or introduce expert testimony supporting the defense; and 5) refusing to request California Jury Instruction, CACRIM No. 271. (See, Exhibit 1 at pp., 5-10.) The district court denied the ineffective assistance of counsel claim. In doing so, the district court reasoned:

Petitioner does not explain what favorable evidence a greater investigation would have uncovered, which alibi witnesses could have helped his defense, petitioner's claim is simply conclusory. He has not shown why counsel's performance was unreasonable or how a different result could have occurred but for counsel's errors. (Exhibit 1 at pp., 9-10.)

However, on October, 2014, four years after petitioner's trial concluded, and after his counsel rendered ineffective assistance by failing to conduct a pretrial investigation of the crime in Las Vegas, petitioner learned about the existence of some x-ray images of his right leg taken in a hospital of Henderson in the State of Nevada. The images shows that petitioner was sometimes living in Las Vegas, State of Nevada. (See Exhibit 7 ap pp., 1-5.) Petitioner claims that he did not know prior to trial or before the denial of his original habeas corpus petition that the images were in possession of a person in Nicaragua, which is petitioner's original

country, but he claims that he exercised due diligence and tried to

to contact this person in Nicaragua in order to secure the x-ray images, but it was not until May 4, 2017, that petitioner finally received the evidence via institutional mail as he provided in a declaration submitted to the district court (See U.S.D.C. Docket Entry No. 26 at pp., 10-11.)

On August 22, 2017, petitioner filed a motion in the district court requesting to reopen the judgment under Federal Rules of Civil Procedure 60(b), subdivision (2);(6), which motion he amended on December 1, 2017. (U.S.D.C. Docket Entry Nos. 25,26.), the motion was denied on January 29, 2018. (See Appendix D), petitioner appealed but the Court of Appeals for the Ninth Circuit denied a Certificate of Appealability on September 25, 2018. (See Appendix B.)

E. The Claim Presented In The Motion 60(b).

Petitioner's motion under Federal Rules of Civil Procedure 60(b)(2) and 60(b)(6) filed in the district court were based upon the x-ray images of his right leg taken in a hospital of Henderson, in the State of Nevada on April 5, and July 21, 2005 (Exhibit 7 at pp., 1, 3), which he claims is newly discovered evidence that his counsel should have discovered prior to trial in conducting an expanded pretrial investigation of the crime in Las Vegas. In his motion petitioner claims that the x-ray images shows with accuracy the approximate date when he arrived in Las Vegas could be April 5, 2005, which could be the same approximate date when he moved out of

the victim family's apartment. The proffered evidence made it clear that when petitioner is finally out of that apartment the girl was 10 turning 11 years old, but she was not 11 or 12 years old as claimed by the girl or the prosecutor at trial (Exhibit 18, RT 214), which undermines the credibility of the prosecution, and the testimony provided by the girl to the jury stating that when she was 11 or 12 years old, petitioner took her clothes off for first time (Exhibit 19, RT 165-167), and committed the crimes in counts 1 and 2, under California Penal Code § 269, carrying a potential sentence of 30-years-to-life, and that he recorded her in video once when she was 11 years old. Petitioner claims that the prosecution's contentions regarding he committed these crimes lack of foundation, because when the girl was 11,12,13, and under 14 years old, he was established in Las Vegas, therefore the charged crimes never occurred.

In his motion 60(b) filed in the district court, petitioner claims that the proffered evidence is undermining the credibility of the prosecution's main witness, when at the age of 16 years old, the girl provided to the jury false testimony that the jury may have used to convict him on counts 9 through 12 under California Penal Code § 269. Specifically petitioner claims that the girl leaded by the prosecution testified that after petitioner moved out of the family's Lexington apartment 15, he moved into his own apartment like two apartments far away from her apartment (Exhibit 18, RT 213.) She supplied that when petitioner moved into his own apartment to commit the crimes charged in counts 9-12, she was around 11 or 12 years old (Exhibit 18, RT 214), she testified that she went into

that apartment in several occasions for sex because petitioner forced her to go in there using the video recording to threat her (Exhibit 18, RT 213-217.) The prosecution used this information to charge petitioner on counts 9 through 12 (Exhibit 9, RT 437-438) under California Penal Code § 269, carrying a potential sentence of 60-years-to-life. However, the record in this case supports petitioner's contention that when he moved out of the family's Lexington apartment in San Jose, California, he went straight to Las Vegas as supplied by a witness at trial (Exhibit 6, RT 188-189), where he rented his own apartment until 2008 in the County of Clark in Las Vegas, Nevada. When petitioner moved out of that Lexington apartment he did not moved into an apartment close to the girl's family apartment to commit the crimes charged in counts 9 through 12 and including other several counts as claimed by the prosecution, in fact the prosecution did not provided reliable evidence indicating that petitioner lived in the supposed apartment where these crimes occurred i.e., the rental agreement of the alleged apartment. Furthermore, the x-ray images shown with accuracy that the approximate date when petitioner arrived in Las Vegas could be April 5, 2005, that could be the same date that petitioner moved out of the family's Lexington apartment (Exhibit 7 at p. 1), is very clear that the girl was 10, turning 11 years old when this event occurred. Petitioner claim that the only evidence in the record of this case indicating an approximate date when he came back from Las Vegas to San Jose, California, could be 2008, when he met the girl and her family again at Camden apartments when he lived in an

apartment above them as supplied by a witness at trial (Exhibit 6, RT 190.)

The record in this case supports petitioner's claim that the first contact that he had with the girl after he came back from Las Vegas occurred at approximately September 2008 as supplied by a witness at trial (Exhibit 16, RT 377-381), when at the age of 14 years old, the girl used to go willingly into petitioner's apartment at Camden Avenue as supplied by this witness. All this amount of evidence is strongly indicating that counts 1,2 and 9 through 12, including many other several counts never occurred as claimed by the prosecution, and this conviction occurred for counsel's unprofessional errors for failing to conduct a pretrial investigation of the case in Las Vegas that could have uncovered the x-ray images and including some other relevant information i.e., the rental agreement of petitioner's apartment that he rented in Las Vegas all the time when the girl was 11,12,13 and under 14 years old, that would have reduced the punishment. Had trial counsel conducted this pretrial investigation in Las Vegas is reasonable probable that the jury would have never convicted him on counts 1,2 and 9 through 12 including other several counts where the prosecution claimed that petitioner molested the girl when she was 11,12,13 and under 14 years old. Had trial counsel called a scenographer to identify the scene depicted in the video, is reasonable probable that this expert should have identified with accuracy the scene depicted in the video to establish that the girl was 14 years old in the video because that was her age when used to go voluntary into petitioner's Camden apartment. Accordingly,

petitioner established ineffective assistance of counsel in his motion 60(b). Certiorari should be granted.

REASONS FOR GRANTING THE PETITION

I.

DID THE NINTH CIRCUIT ERRED IN FINDING THAT PETITIONER DID NOT SHOWED THAT JURIST OF REASON WOULD FIND IT DEBATABLE WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE RULE 60(b) MOTION?

A. INTRODUCTION

1. Key Events Below.

Petitioner seeks relief under Rule 60(b), which provides for relief from judgment on the basis of newly discovered evidence that by due diligence could not have been discovered before the district court decided the habeas corpus petition, or Rule 60(b)(6), which provides for relief upon extraordinary circumstances. See Federal Rules of Civil Procedure 60(b); Gonzalez v. Crosby, 545 U.S. 524, 535.

Petitioner motion under Federal Rules of Civil Procedure 60(b), is based upon x-rays images taken of his right leg in Nevada on April 15 and July 21, 2005 (Exhibit 7), which he claims is newly discovered evidence that his attorney could and should have discovered prior to trial in conducting an expanded pretrial investigation of the case in Las Vegas and that coupled with the record of this case, shows that he did not lived in California from April 15, 2005, through September 2008, and that he did not committed the sexual assault crimes charged in counts 1,2 and 9 through 12, carrying a potential sentence of 90-years-to-life, where the prosecution claimed that the alleged victim was 11,12,13, and under 14 years old. Petitioner claims that all the time when the girl was 11, 12, 13 and under 14 years old, he

was living in Las Vegas, therefore counts 1,2 and 9-12, including other several counts never occurred as claimed by the prosecution.

The district court denied the motion 60(b) on the grounds that: petitioner did not shown that with due diligence, he could not have discovered the x-rays before the petition of habeas corpus was denied, and that the x-rays images does not preclude or undermine the evidence against him, does not create a reasonable probability of different outcome, does not establish prejudice from counsel's representation, and does not establish that petitioner is entitled to relief from judgment under Rule 60(b) (See Appendix D.) The Ninth Circuit find it that petitioner has not shown that jurist of reason would find it debatable whether the district court abused its discretion in denying to reopen the judgment.

2. Petitioner Demonstrated That He Exercised Due Diligence In Order To Secure the x-rays Before Trial And Before The Denial of His Habeas Corpus Petition.

Petitioner claims that he exercised due diligence as required under Federal Rules of Civil Procedure 60(b)(2) in order to secure the x-ray images prior to trial and before the denial of his habeas corpus petition in the district court. Specifically, in a signed declaration submitted to the Ninth Circuit (See Ninth Circuit Docket Entry No. 10), petitioner claims that he informed his counsel prior to trial that he moved into apartment 15 at Lexington Street with the victim's family on April 29, 2004 (Exh. 5 at p. 13, ¶ 3.)

Petitioner claims that prior to trial he informed to his counsel that he lived in that apartment just for about 3 or 4 months

because he was forced to move out(Exh. 5, at p. 13, ¶ 4.), and he claims that he informed to his counsel that after he moved out of that apartment he went straight to Las Vegas, and that he never lived with this family again (Exh. 5 at p. 13, ¶ 5.)

Petitioner claims that during a visit that his counsel made to him in the County jail, he informed to her that two months after he arrived in Las Vegas he suffered a significant accident while working for a construction company in Las Vegas which made him unable to properly walk or drive for almost two years, petitioner further claims that he informed to his counsel regarding the medical record that was available in Las Vegas prior to trial that could be used as evidence that he lived in Las Vegas all the time when the girl was 11,12,13, and under 14 years old, because counsel informed to petitioner that the prosecution's intentions was to allege at trial that the video confiscated without a warrant was recorded when the girl was 11 years old with the purpose to give petitioner a life sentence. (Exh. 5 at pp., 13-14, ¶¶ 6-7.)

Petitioner claims that by informing to his counsel about the existence of his medical record in Las Vegas he exercised due diligence as required by Rule 60(b)(2). However, after his counsel failed to expand a pretrial investigation of the crime in Las Vegas to uncover the x-rays including another significant amount of evidence that until today is available in Las Vegas, i.e., the rental agreement of the apartment that petitioner rented in Las Vegas all the time when the girl was 11,12,13, and under 14 years old, then petitioner filed in pro-per the habeas corpus petition in State's courts claiming among other things ineffective assistance of

counsel for failing to conduct an expanded pretrial investigation of the case in Las Vegas, petitioner contends that he exercised due diligence in order to secure the x-rays by requesting an evidentiary hearing in every State and federal court because he knew that an evidentiary hearing would have produced the x-rays and including more evidence available in Las Vegas, but the courts denied him his request which prevented him from producing all the evidence located in Las Vegas including the medical record containing the x-rays images before the denial of his habeas corpus petition.

Petitioner claims that he cannot be found guilty of lack of negligence because as state prisoner without money to hire a good lawyer or a good investigator to secure all the evidence that is available in Las Vegas, he took the necessary available steps in prison in order to obtain favorable evidence located in Las Vegas that would have refuted the prosecution's allegations that he sexually assaulted the girl when she was 11,12,13, and under 14 years old and recorded her in video once when she was 11, and would have reduced his culpability. Therefore, petitioner claims that all the efforts that he had made in prison in order to produce evidence favorable to his case which includes the x-rays that his counsel failed to uncover prior to trial, is sufficient to establish due diligence required to obtain relief under Rule 60(b)(2). Accordingly certiorari should be granted, or the case should be remanded to the lower court for an evidentiary hearing to produce all the evidence available in Las Vegas, which includes the rental agreement of the apartment that petitioner rented in Las Vegas, bank account records,

utility bills, etc, with the purpose to give petitioner a fair opportunity to defend his position that he lived in Las Vegas all the time when the girl was 11,12,13 and under 14 years old, and that counts 1,2, and 9 through 12, never occurred as claimed by the prosecution and that the video was not recorded when the alleged victim was 11 or under 14 years old.

3. The X-Rays Images Undermines The Credibility of The Prosecution's Main Witness With Respect To Counts 1,2 and 9 through 12, Including Several No Identified Counts.

Petitioner was convicted of multiple sexual assault crimes involving a child under 14 years old in a California court. Under state law, the court was permitted to impose 90-years-to-life sentence only if the jury found unanimously and beyond a reasonable doubt that petitioner committed the charged crimes, and that the victim was 11,12, and under 14 years old at the time of the commission of the crimes.

The prosecution argued that the six sexual assault counts under California Penal Code § 269, were divided in two groups. Counts 1 and 2, occurred at the family's Lexington apartment before petitioner allegedly recorded the video (Exhibit 9, RT 437-438), and counts 9 through 12, occurred at petitioner's apartment, the apartment that according to the girl, petitioner rented after he moved out of the family's Lexington apartment (Exhibit 18, RT 213-217).

A. Counts 1 and 2.

The prosecution's main witness testified at trial that when she was 11 or 12 years old, petitioner took her clothes off for first time and recorded her in video once when she was 11 years old at the Lexington apartment (Exhibit 19, RT 165-16); (Exhibit 12, CT 13-15.) The prosecution used this information to charge petitioner on counts 1 and 2, the jury found him guilty on these counts based on the unreliable testimony of the alleged victim. However, petitioner contends that the x-rays images coupled with the record of this case provides that when the girl was 11,12,13 and under 14 years old, petitioner was not living with this family at the Lexington apartment, instead he was living in Las Vegas.

Petitioner contends that he was convicted on counts 1 and 2 due to the ineffective assistance performed by his counsel for failing to present evidence that he was living in Las Vegas all the time when the girl was 11,12,13 and under 14 years old. He claims that he was convicted on counts 1 and 2 because the girl testified at trial that when she was 11 or 12 years old, petitioner took her clothes off for first time and raped her two times and recorded her in video. However, the x-rays images coupled with the record of this case undermines the credibility of the prosecution's main witness, because the x-rays coupled with the trial record shows that when the girl was 11,12,13 and under 14 years old, petitioner was not living with this family. For example, the girl was born in June 1994 (Exhibit 15, RT 160), petitioner moved into the family's Lexington apartment on April 29, 2004 (Exhibit 6, RT 186), a witness testified that when petitioner left that apartment, he went straight to Las

Vegas (Exhibit 6, RT 188-189.) The x-rays images provides with accuracy that the approximate date when petitioner arrived in Las Vegas could be April 15, 2005 Exhibit 7 at p. 1), and is very clear that when petitioner left the apartment, the girl was 10 turning 11 years old. Moreover, the record in this case provides that the approximate date when petitioner came from Las Vegas to San Jose, California was at his Camden apartment. Here is when he reestablished contact with the girl again when she used to go voluntarily into petitioner's apartment in about September 2008 as supplied by a witness at trial (Exhibit 16, RT 377-378), is clear that when the girl used to go into petitioner's Camden apartment she was 14 years old. Petitioner contends that counts 1 and 2 never occurred as claimed by the prosecution, he contends that this conviction rest on the unreliable testimony provided by the alleged victim in this case due to the ineffective assistance of counsel for failing to conduct a pretrial investigation of the case in Las Vegas that certainly would have uncovered a significant amount of evidence located in Las Vegas proving beyond a reasonable doubt that petitioner was living there all the time when the girl was 11,12,13 and under 14 years old, and that the video recording do not existed when the girl was Under 14 years old. Had trial counsel been conducted an expanded pretrial investigation of the case in Las Vegas, it would have uncovered petitioner's complete medical record containing the x-rays images and much more relevant evidence, i.e., the rental agreement of petitioner's apartment in the County of Clark in Las Vegas, that could have provided with accuracy how long petitioner lived there to refute the prosecution's claims that he sexually assaulted the girl

at the Lexington apartment when she was 11,12 and under 14, years old. Had trial counsel presented to the jury the x-rays images, is reasonable probable that at least one juror would have rejected the prosecution's theory that petitioner raped the girl when she was 11 years old at the Lexington apartment. THEREFORE, petitioner has shown that jurist of reason would find it debatable that the Ninth Circuit erred in finding that the district court did not abused its discretion in denying the Rule 60(b) motion.

B. Counts 9 through 12

The prosecution's main witness testified that after petitioner moved out of the family's Lexington apartment, he moved into his own apartment like two apartments far away from her, and that when he finally moved out of the apartment she was around 11 or 12 years old. (Exhibit 18, RT 213-214), she further stated that petitioner forced her to go into his apartment for sex in several occasions and that he threatened her with the video (Exhibit 18, RT 214-217.) The prosecution used this information to charge petitioner on counts 9 through 12, the jury convicted him of these charges based on the unreliable testimony of the alleged victim and the video that was improperly admitted into evidence. However, the x-rays images coupled with the record of this case provides that the prosecution's witness lied to the jury in several instances. For example she testified that when petitioner moved out of the family Lexington apartment, he moved into his own apartment close to her apartment in the same apartment complex when she was 11 or 12 years old and that she did go to his apartment for sex because petitioner threatened

her with the video (Exhibit 18, RT 213-214.) Petitioner contends that this statement is not true, but that the jury used this lie to convict him on counts 9-12, as he has explained in great details in section E, supra, when he left the family's Lexington apartment in San Jose, California, he went straight to Las Vegas, Nevada such statement is corroborated by the record of this case (See Exhibit 6, RT 188-189.) Petitioner contends that the approximate date when he arrived in Las Vegas could be April 15, 2005 as described in (Exhibit 7 at p. 1.), and the approximate date when he returned to San Jose, California could be September 2008 (See Exhibit 16, RT 377-381.) Here is when petitioner regained contact with the girl again when she used to go voluntary into petitioner's Camden apartment as provided by the record in this case.

However, for purposes of this petition only, petitioner contends at his Camden apartment is the place where the video was recorded as he always claimed when the girl was 14 years old no 11 as claimed by the prosecution. Accordingly, the x-rays images coupled with the record of this case undermines the credibility of the prosecution's main witness used by the jury to return the guilty verdict on counts 9-12 stating that when petitioner moved out of the family's Lexington apartment he moved into his own apartment like two apartments far away from her apartment (Exhibit 18, RT 213), to commit the charged crimes. The x-rays images coupled with the record of this case indicates that when the girl was 11,12,13 and under 14 years old, petitioner was living in Las Vegas he did not lived in an apartment close to the girl as she supplied to the jury, in fact the prosecution did not presented reliable evidence i.e., the rental

agreement of this apartment that according to the prosecution, petitioner rented to commit the charged crimes. THEREFORE, petitioner contends that counts 1,2 and 9-12, never occurred, and that the video recording that the prosecution alleged he used to threat the girl with the purpose to commit counts 9-12, did not existed when the girl was under 14 years old.

Based on the foregoing, petitioner has made a colorable claim that his counsel rendered ineffective assistance under Strickland, for failing to conduct an expanded investigation of the case in Las Vegas that would have uncovered a significant amount of evidence favorable to support his claim that he never committed the crimes charged in counts 1,2, and 9-12, and that the video recording used to support these counts was not recorded at the Lexington apartment when the girl was 11 years old. Had trial counsel been conducted an expanded pretrial investigation of the case in Las Vegas, is reasonable probable that the investigation would have uncovered not only the x-rays that were in petitioner's full medical record, but also would have uncovered additional evidence i.e., the rental agreement of the apartment petitioner rented in the County of Clark that would have provided with accuracy the time when he arrived and left Las Vegas to establish that he lived there all the time when the girl was 11,12,13 and under 14 years old to reduce the punishment. A jurist of reason would find it debatable that the Ninth Circuit erred in finding that the district court did not abused its discretion in denying the Rule 60(b) motion based on the facts presented in this argument, certiorari should be granted.

C. An Extraordinary Circumstance Exist In This Case, Which Warrant Relief Under Rule 60(b).

Relief under Federal Rules of Civil Procedure 60(b) is available only in "extraordinary circumstances". Gonzalez v. Crosby, 545 U.S. at 535. In determining whether such circumstances are present this Court may include a consideration of a wide range of factors, including "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863-864. To demonstrate the extraordinary circumstance required to obtain relief under Rule 60(b)(6), petitioner contends that the unexpected appearance of the x-rays images of his right leg taken in a hospital of Henderson, state of Nevada on April 15 and July 21, 2005, indicates that there will be more evidence located in Las Vegas that his counsel failed to uncover prior to trial, which denied him a fair trial and his constitutional right to effective assistance of counsel under the Sixth Amendment.

The x-rays images indicates that counsel performed deficiently for failing to expand a pretrial investigation of the case in Las Vegas that would have produced a significant amount of evidence including his medical record which contained full information of petitioner's medical condition including the x-rays images to support his claim that he never committed the crimes charged in counts 1,2 and 9-12 as claimed by the prosecution, because when the girl was 11,12,13 and under 14 years old, petitioner was living in Las Vegas. THEREFORE, petitioner has made the required showing under Rule 60(b). Certiorari should be granted.

II.

DID THE NINTH CIRCUIT ERRED IN FINDING THAT PETITIONER WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT?

1. To satisfy Strickland a defendant must first show that counsel performed deficiently. 466 at 687. Petitioner contends that his counsel knew that at some point he lived in Las Vegas after he left the family's Lexington apartment, that he suffered a significant accident in Las Vegas, and that he received medical treatment and that obviously there was a medical record in Las Vegas as petitioner stated in his verified declaration submitted to the Court of Appeals for the Ninth Circuit (See Exhibit 5 at pp., 13-14), (See also Ninth Circuit Docket Entry No. 10.) Furthermore, petitioner contends that leads that he lived in Las Vegas at the time in question and regarding his medical record containing the x-rays images, were easily available to his counsel in the police report not admitted into evidence at trial, but that was always in counsel's possession before trial (See Exhibit 20), the police report was delivered to petitioner until July 24, 2017 as described in the letter sent to petitioner by his counsel on July 24, 2017 (Exhibit 20.) However, counsel failed to use this information, there was not tactical reason for counsel not to follow these leads that would have uncovered a significant amount of evidence located in Las Vegas including the x-rays that would have been used at trial to prove that petitioner was living in Las Vegas all the time when the

girl was under 14 years old and that counts 1,2 and 9-12, never occurred, and that petitioner did not recorded the video when the alleged victim was 11 years old.

Petitioner claims that counsel's failure to expand a pretrial investigation of the case in Las Vegas constitutes ineffective assistance under Strickland v. Washington, 466 U.S. 668, 687 (1984). He further claims that jurist of reason could debate that the x-rays images indicates that there will be more evidence located in Las Vegas that his counsel failed to uncover prior to trial to effective represent him. THEREFORE, this issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 327.

2. Strickland further requires a defendant to demonstrate prejudice "a reasonable probabiilty that for counsel's unprofessional errors, the result of the proceedings would have been different". 466 U.S. at 694. Petitioner contends that the prejudice he suffered is that for counsel's failure to expand the investigation of the case in Las Vegas, he was convicted on counts 1,2 and 9-12 carrying 90-years-to-life sentence. Had trial counsel been conducted an expanded pretrial investigation of the case in Las Vegas, is reasonable probable that such investigation would have provided a significant amount of evidence i.e., the rental agreement of petitioner's apartment he rented in the county of Clark, including the x-rays images to demonstrate that petitioner lived in Las Vegas all the time when the alleged victim was ~~11,12,13~~ 11,12,13 and under 14 years old and that counts 1,2 and 9-12 never occurred as claimed by the prosecution.

Accordingly, petitioner has made the required showing that the Ninth Circuit erred in finding that petitioner was not deprived of his constitutional right to effective assistance of counsel under the Sixth Amendment. This Court should grant certiorari.

A. Why Certiorari Should be Granted.

The Ninth Circuit's limited analysis of petitioner's application for a Certificate of Appealability (COA) is in conflict with this Court's precedent. The COA statute sets forth a two step process: an initial determination whether a claim is reasonable debatable, and if so, an appeal is the normal course. 28 U.S.C. § 2253. At the first stage, the only question is whether the applicant has shown that "jurist of reason could disagree with the district court's resolution of his constitutional claim or... could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327.

Petitioner contends that in this particular case, the unexpected appearance of the x-rays that his counsel could and should have been discovered by conducting an expanded investigation of the case in Las Vegas indicates at least, that there will be more evidence located in Las Vegas that his counsel failed to uncover prior to trial by conducting such investigation of the case in Las Vegas in violation of Strickland. Evidence that would have helped to prove that petitioner was living there all the time when the girl was 11 and under 14 years old, and that he did not committed the crimes charged in counts 1,2 and 9-12 as claimed by the prosecution, and that he did not recorded the video when the girl was 11 years old with the purpose to reduce the sentence.

Counsel knew that petitioner went to Las Vegas right after he left the family's Lexington apartment and that he suffered an accident in Las Vegas while working for a construction company, the information was easily available to counsel in the police report that for some unknow reason was not admitted into evidence at trial but counsel failed to use this information. Petitioner contends that the x-rays images at least demonstrates that at some point when the girl was 10 turning 11 years old he was in Las Vegas suffering from a significant injury in his right leg that could not have permitted him to do the things described in the video recording, and the x-rays demonstrates that of course there will be more evidence located in Las Vegas that counsel failed to uncover prior to trial to prove that petitioner did not committed the crimes charged in counts 1,2 and 9-12 including other several counts with the purpose to reduce his culpability, which demonstrate that counsel performed deficiently for failing to conduct an expanded pretrial investigation of the case in Las Vegas, and for failing to call an scenographer to identify with accuracy the scene depicted in the video. Petitioner's claim is very compelling and deserve encouragement to proceed further. This Court should grant certiorari.

Based on the foregoing, petitioner contends that he has demonstrated that the Ninth Circuit erred by applying a limited analysis of the COA statute to his case, jurist of reason would find it debatable whether the district court abused its discretion in declining to reopen the judgment, and that the court erred in

finding that petitioner was not deprived of his constitutional right to a fair trial and to the effective assistance of counsel guaranteed under the Sixth Amendment.

Petitioner contends that he had made the modest showing that the x-rays images at least indicates that there will be more evidence located in Las Vegas that his counsel failed to uncover prior to trial in order to prove that he did not committed the crimes charged in counts 1,2 and 9 through 12, with the purpose to reduce his sentence. Petitioner claim that this issue is at least debatable among jurist of reason and deserve encouragement to proceed further. Certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James", is written over a horizontal line.

Date: Monday April 1, 2019