

No. _____

18-8975

IN THE
SUPREME COURT OF THE UNITED STATES

DERRAN SMILEY — PETITIONER
(Your Name)

vs.

WILLIAM MUNIZ, WARDEN

RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

NINTH CIRCUIT COURT OF APPEALS

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

PETITION FOR WRIT OF CERTIORARI

DERRAN SMILEY
(Your Name)

23500 KASSON ROAD
(Address)

TRACY, CA 95304
(City, State, Zip Code)

(Phone Number)

*OS
RESENT 4-4-19
CORRECTION*

WRONGLY QUESTION(S) PRESENTED

- 1.) WAS PETITIONER SMILEY CHARGED, CONVICTED AND SENTENCED WITH BREAKING A SPECIFIED STATUTE, (PC 667.6 (d)), WHICH USED LANGUAGE OF AN PREVIOUS (PRIOR) COMPLIANCE THAT WAS IN EFFECT ON THE DATE OF THE OFFENSE, PROVIDED THAT HE HAS BEEN PREVIOUSLY CONVICTED OF VIOLATING SECTION 220, FOR WHICH HE WAS NOT EX POST FACTO, WHEN IN FACT, THE
- 2.) DID THE SENTENCING COURT ERRE IN IMPOSING THE ONE STRIKE STATUTE OF PC SECTION 667.61, WHEN SMILEY WAS CONVICTED OF ONE KIDNAPPING COUNT PURSUANT TO SECTION 209, WHEN THE KIDNAPPING ENHANCEMENT PURSUANT TO 667.61, EFFECTIVELY RELIED ON THAT OFFENSE AS ONE OF ITS SPECIAL CIRCUMSTANCES?
- 3.) WAS SMILEY DENIED THE RIGHT TO ALLOCUTION WHEN THE COURT NEVER ALLOWED HIM TO DO SO AND, WAS HE DENIED DUE PROCESS OF HIS STATUTORY RIGHT PURSUANT TO PC 1203 (b) (D), TO RECEIVE THE PROBATION REPORT AT LEAST FIVE DAYS PRIOR TO SENTENCING IN ORDER TO MITIGATE THE SENTENCING FACTORS?
- 4.) DID THE FEDERAL COURT FAIL TO CONSIDER SMILEY'S CLAIMS WHEN HE MET THE TIME LINE AS HIS HABEAS PETITION WAS PENDING IN 2016 AND TOLLED IN PERIOD BETWEEN LOWER COURT JUDGMENT AND TIMELY FILING OF HIS NOTICE OF APPEAL, WHEN THE U.S. SUPREME COURT HELD IN WELCH ON 4-18-16, THAT ITS DECISION IN JOHNSON WAS RETROACTIVE, STATING, DECISIONS THAT INTERPRET A STATUTE ARE SUBSTANTIVE IF AND WHEN THEY MEET THE NORMAL CRITERIA FOR A SUBSTANTIVE RULE WHEN THEY ALTER THE RANG OF CONDUCT OR THE CLASS OF PERSON THAT THE LAW PUNISHES?
- 1.) WAS PETITIONER SMILEY WRONGFULLY CHARGED, CONVICTED AND SENTENCED WITH BREAKING A SPECIFIED STATUTE, (PC 667.6(d)), WHICH CHANGED THE LEGAL CONSEQUENCES OF ACTS COMPLETED BEFORE IT EFFECTIVE DATE (SB.1128, EFF. 9-20-06), WHEN THE ACTUAL EXISTING LANGUAGE ON THE DATE OF THE OFFENSE PROVIDED THAT THE PERSON HAD TO BE CONVICTED OF VIOLATING SECTION 220, WHILE PROVIDED THAT THE PERSON HAS BEEN CONVICTED PREVIOUSLY OF VIOLATING SECTION 220, FOR WHICH SMILEY HAS NOT?

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:

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TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>MCNALLY V. U.S.</u> , 483 U.S. 350, 97 L.Ed.2d 292, 107 S. CT 2875 (1987)	
<u>WELCH V. UNITED STATES</u> , 136 S. CT 1257 (2016)	
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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 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 B 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 F 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 SUPERIOR COURT OF CAL, COUNTY OF ALAMADA court appears at Appendix F 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 8-21-18.

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: 1-3-19, 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. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 6/10/15. A copy of that decision appears at Appendix D.

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

1.) FIFTH AMENDMENT

28 U.S.C 2244(d)(1)

28 U.S.C 2254

28 U.S.C 2244(b)(1), (b)(3)(C)

2.) FOURTEENTH AMENDMENT

1.) CAL. PC 209(b)(1)

2.) CAL. PC 667.61(c)(1)

3.) CAL. PC 667.6 (d)

CONSTITUTIONS

1.) ART. I, § 9, cl. 3 (FEDERAL GOVERNMENT)

2.) ART. I, § 10, cl. 1 (STATES)

STATEMENT OF THE CASE

BY INFORMATION FILED ON 3-28-06, AND AMENDED ON 2-21-06, THE ALAMEDA COUNTY DISTRICT ATTORNEY CHARGED APPELLANT/PETITIONER WITH ONE COUNT OF KIDNAPPING TO COMMIT RAPE (PEN. CODE 209(b)(1), COUNT ONE) AND FIVE RAPE COUNTS (PC 261(a)(2), COUNTS TWO THROUGH SIX), WITH ALLEGATIONS AS TO THE RAPE COUNTS THAT PETITIONER KIDNAPPED THE VICTIM AND THAT THE MOVEMENT SUBSTANTIALLY INCREASED THE RISK OF HARM TO THE VICTIM OVER AND ABOVE THE LEVEL OF RISK INHERENT IN THE COMMISSION OF THE OFFENSE (PC 667.61(d)(2), AND THAT THE RAPES WERE COMMITTED AGAINST THE VICTIM ON SEPARATE OCCASIONS (PC 667.6(d)).

ON MARCH 16, 2006, THE JURY FOUND PETITIONER/DEFENDANT GUILTY ON ALL COUNTS AND FOUND THE SPECIAL ALLEGATIONS TO BE TRUE. ON MAY 12, 2006, THE TRIAL COURT SENTENCED PETITIONER TO 25 YEARS TO LIFE FOR THE KIDNAPPING ENHANCEMENT BUT ATTACHED IT TO THE FIRST RAPE COUNT IN COUNT TWO AND THEN SENTENCED HIM ON COUNT ONE OF THE KIDNAPPING OFFENSE TO SEVEN YEARS TO LIFE BUT STAYED IT UNDER CAL. PEN. CODE 654. THE REMAINING RAPE COUNTS SIX YEARS EACH, CONSECUTIVE TO A DETERMINATE TERM OF 24 YEARS.

REASONS FOR GRANTING THE PETITION

THE FOLLOWING FACTORS WERE ALL PRESENT IN THIS CASE:

- (1). PETITIONER SMILEY WAS CHARGED AND CONVICTED OF ONE COUNT OF KIDNAPPING PURSUANT TO SECTION 209.
- (2). PETITIONER WAS ALSO CHARGED AND FOUND OF THE KIDNAPPING SPECIAL CIRCUMSTANCE PURSUANT TO 667.61.
- (3). PETITIONER HAS SO BEEN CHARGED AND CONVICTED OF FIVE COUNTS OF RAPE PURSUANT TO SECTION 261, WITH SIX YEARS IMPOSED EACH CONSECUTIVE PURSUANT TO 667.6(d).
- (4). AS CONVICTED OF ONLY ONE KIDNAPPING OFFENSE, THE KIDNAPPING ENHANCEMENT UNDER 667.61(e)(1), EFFECTLY RELIED ON THAT OFFENSE AS ONE OF ITS SPECIAL CIRCUMSTANCE.
- (5). THE LANGUAGE USED IN PETITIONER'S CASE UNDER 667.6(d), DID NOT APPLY TO HIM BECAUSE IT WAS NOT THE CORRECT LANGUAGE ~~OF~~ THE STATUTE AT THE TIME HE COMMITTED THE OFFENSE IN ORDER TO QUALIFY HIM UNDER THIS LAW WHEN THE LAW ~~WAS~~ PROVIDED THAT THE PERSON HAS BEEN CONVICTED OF VIOLATING SECTION 220, BUT FOR WHICH SMILEY HAS NOT.
- (6). CURRENTLY, AS IMPOSING THE ONE STRIKE STATUTE UNDER 667.61 WHEN DEFENDANT WAS CONVICTED OF SECTION 209 OFFENSE, THE IMPOSED SENTENCE IS IN EXCESS OF THE STATUTORY MAXIMUM FOR THAT OFFENSE.

(7) NOTWITHSTANDING ALL OF THE ABOVE FACTORS, BASE ON THIS COURT'S DECISION, THE US SUPREME COURT HAVE LONG HELD IN BLOCKBURGER THAT THE DOUBLE JEOPARDY CLAUSE PROHIBITS SEPARATE OFFENSES FOR THE SAME CRIMINAL ACT OR TRANSACTION UNDER TWO CRIMINAL STATUTES WHENEVER EACH STATUTE DOES NOT REQUIRE PROOF OF A FACT THAT WHICH THE OTHER DOES NOT. PETITIONER MAINTAINS THAT CONGRESS INTENDED SUBDIVISION (e)(1) OF SECTION 667.61 TO BECOME ACTIVATED WHEN A PERSON IS CHARGE AND CONVICTED OF SECTION 209 AND FOUND TRUE OF SECTION 667.61. HERE IN THIS CASE, THE KIDNAPPING ENHANCEMENT IS BASED UPON THE SINGLE TRANSACTION OF THE KIDNAPPING OFFENSE WHICH MAKES THIS A SINGLE OFFENSE AS SHOWN THEREIN SUBDIVISION (e)(1) OF SECTION 667.61 FOR WHICH DIRECTLY REFER TO SECTION 209 OFFENSE.

(8) THE QUESTION IS WHETHER BOTH SECTION'S BEING VIOLATED BY A SINGLE ACT, THE ACCUSED COMMITTED TWO OFFENSES OR ONLY ONE?

(a) FURTHER, THE LAW PETITIONER WAS CHARGED, FOUND BY JURY, AND SENTENCED UNDER PURSUANT TO THE SECTION 667.6(d) WAS DIFFERENT FROM THE LANGUAGE IN LAW AT THE TIME OF THE COMMITTED OFFENSE. HOWEVER, PETITIONER SMILEY WAS CLEARLY DISADVANTAGED BECAUSE THE CHANGED LANGUAGE GIVEN IN HIS CASE APPLIES TO EVENTS OCCURRING BEFORE ITS ENACTMENT FOR WHICH IT ALTERED THE DEFINITION OF CRIMINAL CONDUCT AND INCREASED THE PUNISHMENT FOR THE CRIME. HAD SMILEY BEEN CHARGED WITH VIOLATING SECTION 220 AS IDENTIFIED WITHIN 667.6(d), WHICH EXISTED AT THE TIME OF THE COMMITTED OFFENSES AND SENTENCE, THE COURT WOULD HAD IMPOSED PUNISHMENT UNDER SECTION 220 FOR A PRISON TERM OF TWO, FOUR, OR SIX YEARS INSTEAD UNDER SECTION 261 PURSUANT TO PUNISHMENT OF THREE, SIX, OR EIGHT YEARS UNDER SECTION 264(a). PETITIONER NOTE THAT THIS WAS THE CLAIM THAT HE MOVED TO AMEND IN THE DISTRICT COURT.

(CONTINUING) BELOW REGARDING TO SECTION 667.61.

(10)

IN THE COURT OF APPEAL, FOURTH DISTRICT OF CALIFORNIA, IN PEOPLE V. JONES, NO. ED018547 10-21-97, THE COURT HELD THAT: FAILING TO SEPARATELY INSTRUCT JURY ON SIMPLE KIDNAPPING SENTENCING CIRCUMSTANCE UNDER THE ONE STRIKE LAW GOVERNING SEXUAL OFFENSES WAS NOT ERRONEOUS, AS IT NECESSARILY FOLLOWED FROM JURY'S VERDICT OF GUILTY OF SEXUAL OFFENSES AND OF KIDNAPPING THAT SIMPLE KIDNAPPING OFFENDER CIRCUMSTANCE APPLIED TO EACH SEXUAL OFFENSE, AND INSTRUCTIONS ON SUBSTANTIVE KIDNAPPING OFFENSES GAVE JURY SUFFICIENT GUIDANCE AS TO SIMPLE KIDNAPPING CIRCUMSTANCE. WEST'S ANN. CAL. PC 667.61(C)(1).

(11)

MORO, IN THE COURT OF APPEAL, SECOND DISTRICT OF CALIFORNIA, IN PEOPLE V. RODRIGUEZ, NO. B231579, G-25-12, THE COURT HELD THAT: THE SENTENCING COURT COULD NOT IMPOSE A LIFE TERM FOR KIDNAPPING DURING A CARJACKING, AS THE ONE STRIKE SENTENCE FOR FORCIBLE RAPE EFFECTIVELY RELIED ON THAT OFFENSE AS ONE OF ITS SPECIAL CIRCUMSTANCE. WEST'S ANN. CAL. PC 667.61(C)(1).

(12)

PETITIONER RESPECTFULLY MAINTAINS THAT IT IS TIME FOR THIS COURT TO EXAMINE THE LEGISLATURE INTENT IN DRAFTING CALIFORNIA'S PENAL CODE SECTION 667.61(C)(1) WHICH DIRECTLY REFER TO AGGRAVATED KIDNAPPING SECTION 209, SIMPLE KIDNAPPING SECTION 207, AND KIDNAPPING DURING CARJACKING SECTION 209.5 OFFENSES.

(13)

THERE IS TWO RELEVANT QUESTIONS TO LEGISLATIVE INTENT OF SUBDIVISION (C)(1) OF SECTION 667.61 AND THEY ARE PRESENTED AS FOLLOWED:

- (1) DID CONGRESS INTEND DIVISION (C)(1) OF SECTION 667.61 TO APPLY WHEN A PERSON IS CONVICTED OF SECTION 209 AND FOUND TRUE OF SECTION 667.61?
- (2) COULD A PERSON BE SENTENCED UNDER SECTION 667.61, IF A PERSON WAS CONVICTED OF ONE COUNT OF KIDNAPPING PURSUANT TO SECTION 209, WHEN THE KIDNAPPING ENHANCEMENT EFFECTIVELY RELIED ON THAT OFFENSE AS ONE OF ITS SPECIAL CIRCUMSTANCE?

(14) THESE ISSUES HAS NATIONAL IMPORTANCE OF HAVING THIS COURT DECIDE THE QUESTIONS INVOLVED.

(15) FURTHER, ON 8-21-18 AS FILED, THE NINTH CIRCUIT AFFIRMED PETITIONER APPEAL OF THE THE DISTRICT COURT'S JUDGEMENT. REHEARING WAS SEEK BUT DENIED ON 1-3-19. HOWEVER, MATERIAL POINT OF FACT IN THE LAW OF A DECISION FROM THIS COURT WAS OVERLOOKED BY THE NINTH CIRCUIT, COURT OF APPEALS IN ITS DECISION. FIRST, PETITIONER SMILEY POINTS OUT THAT HE FILED HIS HABEAS PETITION ON 12-2-15 AND THE DISTRICT COURT JUDGEMENT WAS ON 10-11-16 WITH A TIMELY NOTICE OF APPEAL FILED ON 10-31-16.

(16) WHILE HIS CASE WAS PENDING IN THE US DISTRICT COURT, ON 4-18-16, THIS COURT HELD IN WELCH THAT ITS DECISION IN JOHNSON WILL HAVE RETROACTIVE APPLICATION ON PETITIONS FOR COLLATERAL REVIEW, AND STATING, DECISIONS THAT INTERPRET A STATUTE ARE SUBSTANTIVE IF AND WHEN THEY MEET THE MORTAL CRITERIA FOR A SUBSTANTIVE RULE WHEN THEY ALTER THE RANGE OF CONDUCT OR THE CLASS OF PERSON THAT THE LAW PUNISHES.

(17) HOWEVER, PETITIONER CITED WELCH AND JOHNSON IN SUPPORT OF HIS APPEAL, BUT THE LAW BY THIS COURT WAS OVERLOOKED IN ITS DECISION AS THE APPEALS COURT FAILED TO ADDRESS IF APPELLANT FALL WITHIN ONE OF THE EXCEPTION TO THE NEW LAW.

(18) OVERALL, CONSIDERATION BY THIS COURT IS NECESSARY TO SECURE OR MAINTAIN UNIFORMITY OF THIS COURT DECISION, SOUND PUBLIC POLICY, AND FUNDAMENTAL FAIRNESS WHILE THE ISSUES IN THE SENTENCING STATUTES INVOLVED HAS NATIONAL IMPORTANCE OF HAVING THIS COURT DECIDE THE QUESTIONS INVOLVED, PLUS THERES ONE THAT RAISES A GENUINE FACTUAL ISSUE OF WHETHER PETITIONER RECEIVED ACTUAL NOTICE OF THE PRECISE NATURE OF THE CHARGE AGAINST HIM REGARDING CAL PEN CODE 667.6(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Derran Smiley

Date: 2-14-19