No._____

In the
Supreme Court of the United States

DAVID R. URIBE, Petitioner

v.

SCOTT KERNAN, Secretary, CDCR Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a certificate of appealability be granted to review whether there was a violation of *Jackson v. Virginia,* 443 U.S. 307, 317 and the Due Process Clause of the 14th Amendment? Once the gang allegations were reversed for insufficiency of the evidence, the underlying charges which depended on the gang evidence for conviction had to also be reversed, since, without the gang evidence, there was insufficient evidence to convict appellant of the underlying charge.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner DAVID R. URIBE respectfully petitions the Court for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability after the district court's denial of the petition for a writ of habeas corpus.

OPINIONS BELOW

Cases from Federal Courts:

On April 1, 2019, the Ninth Circuit Court of Appeals, in a one page order, denied a motion for reconsideration of the earlier denial of a certificate of appealability.

(Appendix A, 9th Ckt. Order .)

The motion for reconsideration , resulted from an earlier order of the Ninth Circuit dated March 1, 2019, denying the certificate of appealability, which Motion and earlier order is attached as Appendix B.

The judgment of the United States District Court for the Central District of California denying the petition for a writ of habeas corpus with prejudice and denying a COA, was issued on June 19, 2018 and is Appendix C.

The objections to the report and recommendation were filed May 14, 2018, and is Appendix D.

The Report and Recommendation of the magistrate filed on January 3rd 2018, is Appendix E.

The Civil Docket is appendix F

JURISDICTION

The Ninth Circuit denied the motion for reconsideration of the denial of the motion for certificate of appealability on April 1, 2019. 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 the right to Due Process of Law , and the Fourteenth Amendments to the U. S. 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 THE CASE

A. The Direct Appeal

David Uribe and codefendant Nathan Lucero were charged by a first amended information with two counts arising out of a single incident:

Count One was murder (Pen. Code, sect. 187) with three special circumstances: retaliatory murder of a witness, (Pen. Code, sect. 190.2 subd. (a)(10)); lying in wait, (Pen. Code, section 190.2, subd. (a)(15)); and murder to further the activities of a gang (Pen. Code, sect. 190.2, subd. (a)(22)); and enhancements for gang benefit (Pen. Code sect. 186.22, subd. (b)); and discharge of a firearm causing death or great bodily injury by a defendant personally (Pen. Code, sect. 12022.53 subd.(d)) and by a gang principal (Pen. Code, sect. 12022.53, subd. (e));

Count Two was active participation in a criminal street gang (Pen. Code, section 186.22, subd. (a)).

(4CT 1095 - 97[1].)

His conviction of all but the enhancement charging personally discharging a firearm causing death or great bodily injury (the jury was hung) resulted in a sentence of life without parole.

The Court of Appeal reversed all the gang charges but affirmed the remainder of the convictions.

A petition for review was denied and on remand David Uribe was sentenced again to life without parole.

Uribe ultimately filed a petition for certiorari to the Supreme Court of the United States on the issue of denial of confrontation.

The petition was denied on April 6, 2015.

B. Federal Court Proceedings

Appellant, through counsel, filed a First Amended petition for writ of habeas corpus under 28 U.S.C. 2254 on April 21, 2016. ECF5 of attached Civil Docket at Appendix F.

On January 3, 2018, the Magistrate Judge filed a Report and

[1]RT is Reporter's Transcript and CT is Clerk's TRanscript

Recommendation that the petition be denied. (ECF29; Appendix E.)

Objections, ECF42, were filed and rejected in the district court judge order, ECF43, accepting the R&R and denying a certificate of appealability (COA)ECF45 June 19, 2018.

A Judgment was filed denying the petition and the COA on June 19, 2018. ECF44.

On July 11, 2018, petitioner filed a notice of appeal, pro se, to the Ninth Circuit . ECF46.

On July 20, 2018, the district court granted a motion to proceed in forma pauperis. ECF49.

On March 1, 2019, the Ninth Circuit denied a motion for COA. ECF50.

After petitioner filed a motion for consideration of that denial, it was denied again on April 1, 2019. ECF51.

INTRODUCTION

David Uribe shot no one. The jury could not agree that he did. He warned the victim David Henslick not to come to the trailer where the son of a man Henslick had shot was present along with fellow gang members of that son. The Court of Appeal stated that "unfortunately for Henslick was a "cockeyed optimist " for coming to the trailer despite all the warnings. Yet they affirmed a conviction and sentence of life without parole, death in prison for "unfortunate" David Uribe.

The evidence was insufficient to convict David Uribe as an aider and abettor of whoever shot David Henslick but the "bombshell" of a dying declaration, which was not a dying declaration at all, carried the day for the prosecution. The judge let the jury decide whether it was a dying declaration or not, punting on that decision he had to make, in clear violation of the law.

What also carried the day for the prosecution was the prosecutor's argument to the jury that portrayed the killing of Henslick as a gang killing.

but the CCA reversed every substantive gang charge and gang enhancement and gang special circumstance due to insufficiency of the evidence.

Once those reversals occurred, there was nothing left of the prosecution theory to support the convictions of first degree murder. Certainly a COA should have been issued and that is the purpose of this petition.

STATEMENT OF FACTS

The statement of facts of the Report and Recommendation, Appendix E, are adopted here.

REASONS FOR GRANTING THE WRIT

Petitioner submits that federal law requires a grant of certiorari relief in this case to allow him to appeal the denial of his petition for writ of habeas corpus based on insufficiency of the evidence . The following argument illustrates in detail why the federal law requires a certificate of appealability to be granted. Namely, some fair minded, reasonable jurists would rule this case needs to move forward on the issue of insufficiency of

the evidence once the gang enhancements were reversed due to insufficiency of the evidence.,

I
CERTIORARI SHOULD BE GRANTED AS REASONABLE JURISTS COULD DIFFER ON THE DECISION TO GRANT OR NOT TO GRANT A COA

A COA must issue if jurists of reason could debate the decision of the district court to deny relief on this ground. This petition for certiorari seeks to illustrate this standard by pointing to specific cases, similar to this case, where reasonable jurists have differed on the decision to grant or not grant relief . Every case discussed is one where at least one jurist, if not the entire panel, voted to reverse the underlying criminal charges because the gang enhancements, which had an injurious effect on the fair trial rights of the defendant, were all reversed. That is exactly what happened here. What is set forth below is not a merits analysis nor should it be. What is set forth fits the criteria of *Barefoot v. Estelle,* 463 U.S. 880 (1983 (*Barefoot*) in that a denial of a constitution right occurred when gang evidence, admitted to be insufficient to sustain the true findings made by the jury, resulted in

the conviction of an underlying murder charge resulting in life without parole for a person, never found to be the shooter and who had no prior record, appellant Uribe.

What is set forth below meets the standard of *Barefoot v. Estelle,* 463 U.S. at 893 n.4. A certificate should issue if the appeal presents a question : 1) that is debatable among jurists of reason; 2) that a court could resolve in a different manner; 3) that is adequate to deserve encouragement to proceed further; and 4) that is not squarely foreclosed by statute, rule or authoritative court decision, or that has some factual basis in the record. *Id.*

A COA SHOULD ISSUE IF REASONABLE JURISTS COULD DIFFER ON THE DECISION TO GRANT OR NOT TO GRANT A COA

A COA must issue if jurists of reason could debate the decision of the district court to deny relief on this ground. It is submitted that this disagreement of "jurists of reason" has already occurred in the cases set forth below.

In *People v. Pettie,* 16 Cal.App.5th 23, (2017), the California Court of Appeal (CCA) reversed the gang enhancements in an assault and

attempted murder conviction for insufficiency of the evidence. (*Id.* at 32-33.)

As to two of the appellants, the CCA concluded the gang enhancements did *not* affect their underlying convictions but as to appellant Pettie [W]e conclude the violation requires reversal on all counts." (*Id.* at p. 33.)

There was evidence of Pettie's gang membership put before the jury at pp. 39-40. The prosecutor argued to the jury, similar to the prosecutor in appellant Uribe's case, that Pettie had a motive to "beat down" the victim in order to back up fellow gang members and participated in that "beat down" when summoned by the gang to do so. (*Id.* at p. 67.) The CCA went on to conclude that "[I]t is likely the jury relied on Pettie's membership in the Norteno gang to support its findings of guilt on the substantive offenses." (*Id.*) And the Pettie CCA reverse all of Pettie's conviction of the substantive

offenses.

In *People v. Blesett,* 22 Cal.App,5th 903(2018), a dissenting justice

concluded that the highly prejudicial gang testimony was not forfeited by lack of objection and has the state shown beyond a reasonable doubt, that the jury would have rejected the substantial evidence that the shooting was in self-defense in the absence of the highly prejudicial, improperly admitted case-specific testimonial hearsay about appellant's past gang activity?" Based on the record and the prejudicial nature of the evidence in question, the justice would find that the People had failed to establish beyond a reasonable doubt that the error did not contribute to the first degree murder verdict.

In *People v. Ramirez,* 244 Cal.App.4th 800 (2016), another CCA ruled the gang testimony should be reversed as did the CCA in the instant case. The critical difference in the two CCAs is what the *Ramirez* CCA then ruled after reversing the gang enhancements for insufficiency of the evidence. That CCA ruled at page 822 that without the gang testimony there was a reasonable probability that Ramirez and his co-defendant would have achieved a more favorable result. The CCA held "[t]he prejudicial gang evidence resulted in a miscarriage of justice and violated Ramirez's state

and federal due process rights to a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 70 (1979); *People v. Partida,* 37 Cal.4th 428, 439, (2005)."

Reasonable jurists have concluded that improperly introduced gang evidence should result not only in the reversal of the gang enhancement but the reversal of the underlying charges to which the enhancements attached.

II

THE COURT OF APPEAL IN APPELLANT URIBE'S CASE CONCEDED THE GANG ENHANCEMENTS HAD TO BE REVERSED AND THE PROSECUTION ARGUMENT RELIED ON THE LATER REVERSED GANG EVIDENCE TO CONVICT APPELLANT URIBE AS HIS ARGUMENT TO THE JURY CLEARLY SHOWS

In the slip opinion at pages 2-3, the CCA in appellant's case stated "We agree with defendants that insufficient evidence supports the gang substantive offense, the gang enhancements and the gang special circumstance." They reversed all those but did not touch the underlying

crimes.

The CCA, stated that the gang enhancements were reversed due to insufficient evidence but then, at the top of the next page, the CCA states as to Lucero, the co-defendant, the jury believed the killing was a gang killing.

It was Lucero's father who was previously shot by Henslick and the prosecutor had to convince the jury that appellant was also guilty of murder as a gang member .

There was no proof appellant was the shooter so he had to resort to the following argument to the jury which underpinning was reversed but worked to convict the appellant.

> Ladies and gentlemen, we talked about, at the outset of this case, this is a murder carried out for the gang. You heard the evidence. The evidence clearly, overwhelmingly shows these two men conspired to kill and did kill David Henslick. (13RT2622.)They killed him as payback for what he did to the gang. They did it to further their own reputations in the gang and to earn respect in the gang.(13RT 2623.)

and

> What's the point of this? How can we hold another man liable

> for another person shooting? Because the policy is, we don't want gang members, who were found by a jury to have committed a crime in association with the gang, to be pointing the finger at each other trying to escape liability. Just to say, " I wasn't the shooter, so I can get off Scott free." No you don't. If you're both acting in association with the gang, they're associating with each other here with the intent to benefit the gang, they're both on the hook even if there was only one shooter. It doesn't matter. Count two active participation in the criminal street gang. This is the easiest count you're going to have this should take five minutes for you to decide the defendants actively participated in a criminal street gang. When participating, the defendants knew the gang had engaged in a pattern of criminal activity. We talked about. The defendants willfully assisted, furthered or promoted felonious conduct by members of the gang in this case, what's a felonious conduct? Murder. (13RT2651.)

There can be no doubt that these later reversed gang enhancements convicted appellant of murder and other reasonable justices, in the cases set forth above, would disagree with leaving the underlying convictions to stand and that is why the COA should be granted.

Appellant has given this Court reason to grant this petition, and remand the matter to the Ninth Circuit for issuance of a COA by the inclusion other cases set forth above where jurists of reason have disagreed with the CCA in this instant case, and a COA should issue to

proceed further.

CONCLUSION

Certiorari should be granted to the court of appeals for the Ninth Circuit so that a certificate of appealability may issue.

Respectfully submitted

/s/Charles R. Khoury Jr.
Attorney for petitioner