No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

JOSEPH HYUNGSEOP SHIM,

Petitioner,

v.

MICHAEL SEXTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Petitioner has made a substantial showing of a denial of a constitutional right to authorize the granting of a certificate of appealability under 28 U.S.C. §2253(c)(2)?

PARTIES TO THE PROCEEDING

The petitioner is JOSEPH HYUNGSEOP SHIM. The respondent is the MICHAEL SEXTON, the Warden of prison where petitioner is currently serving his sentence.

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PETITION FOR WRIT OF CERTIORARI

The petitioner JOSEPH HYUNGSEOP SHIM petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Order of the Court of Appeals denying a certificate of appealability dated May 22, 2019 is an unpublished Order and is attached as Exhibit "A". The Order of the District Court denying a certificate of appealability dated August 20, 2018 is attached as Exhibit "B". The Judgement of the District Court dismissing the petitioner's petition for writ of habeas corpus and incorporating the Report and Recommendation of the United States Magistrate dated August 20, 2018 is attached as Exhibit "C".

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C., §1254.

STATUTORY PROVISIONS

Title 28, United States Code, section 2253 (C) provides the following:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be

taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Petitioner, Joseph Hyungseop Shim [hereinafter "Shim"] was charged in Count One with continuous sexual abuse of Jiwon S. [hereinafter "Sarah"](Pen. Code § 288.5, subd. (a)), in Count Two with lewd act upon a child, Sarah, (Pen. Code § 288.5, subd. (c)(1), in Count Three with lewd act upon a child, Sarah (Pen. Code § 288.5, subd. (c)(1), in Count Four with continuous sexual abuse of Jieun S. [hereinafter "Joanna"] (Pen. Code § 288.5, subd. (a)), and in Count Five with continuous sexual abuse of Jisoo S. [hereinafter "Phoebe"](Pen. Code § 288.5, subd. (a)). (2 CT 398-402). It was further alleged that the crimes involved more than one victim. (Pen. Code § 667.61 (c)).

Petitioner pleaded not guilty. He was tried by a jury. He was found guilty of all five counts. He was sentenced to 25 years to life on Counts 1, 4, and 5, concurrently and to 2 years on Counts 2 and 3, concurrently. (3 CT 603-606; 625-628). He appealed to the California Court of Appeal. On February 1, 2017 the Court affirmed the convictions. On May 10, 2017, the California Supreme Court denied a Petition for Review.

Petitioner filed in the United States District Court for the Central District of California a Writ of Habeas Corpus alleging four federal constitutional claims. The District Court denied the petition and entered a final Judgement against Petitioner. The District Court also denied a Certificate of Appealability. Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. He also filed a Motion for a Certificate of Appealability with the Court of Appeals. The Court of Appeals denied the Motion for Certificate of Appealability.

STATEMENT OF THE FACTS

Introduction

Joseph Shim had three daughters, Sarah, Joanna, and Phoebe. In 2007, Shim and his wife, Victoria Choi, the daughters' mother, divorced. The divorce was contentious

and resulted in an extended custody dispute over custody of the three daughters. The custody dispute continued into 2012.

In 2012, the daughters disclosed Shim had touched their breasts on various occasions while they were visiting him as a part of the joint custody relationship. These events, although reported in 2012 were alleged to have occurred from 2008 through 2012. After multiple interviews by social workers and police, the daughters, a year later, in 2013, said that Shim, in addition to touching their breasts, had on multiple occasions pushed them onto a bed and put his foot on their vaginas. (3 RT 1285-1287.)

The Prosecution's Case

Victoria Choi and Joseph Shim were married in 1995. They had three daughters. In 2007, they divorced. Shim had custody of the daughters almost every weekend. Choi testified at trial that the divorce was bitter and in 2012 she had stopped her daughters from visiting Shim. The criminal investigation of Shim began on July 12, 2012, when Choi took her oldest daughter Sarah to the police after Sarah reported that Shim had touched her breast. (4 RT 2187-92.)

On August 22, 2012, Los Angeles Police Officer Mauricio Moisa interviewed Sarah. Sarah said Shim touched

her breast over and under her clothes as they drove, with her sisters, to Shim's house. (4 RT 1891-96, 1914-19.) During the interview, Officer Moisa encouraged Sarah to disclose that Shim touched not only them, but also their sisters. Moisa asked leading questions, thanked the daughters for their "courage" to come forward, introduced the word "uncomfortable" into the interviews and brought up the touching. (4 RT 2116-2138.)

On August 23, 2012, Moisa separately interviewed Joanna and Phoebe at Choi's house. Phoebe said Shim touch Sarah's and Joanna's breasts as Shim drove them to his house. (4 RT 1896-1902.) Joanna refused to say Shim touched her or her sister's breasts. (4 RT 1902.)

On August 24, 2012, Choi notified Moisa that Joanna did not tell him the whole truth. Choi drove her three daughters back to the police station for another interview. Joanna changed her story and now told Moisa that Shim touched her, Sarah's, and Phoebe's breasts as they sat in the car's front seat on the way to Shim's house. (4 RT 1903-1907.)

During subsequent interviews at the district attorney's office, Phoebe told Moisa that Shim rubbed his foot on her vagina and tapped his hand on her vagina over and under her clothes. Neither of the other daughters

mentioned any vaginal touching. (4 RT 1903-07.)

In May of 2013, almost a year after the initial interviews, Officer Moisa again interviewed the three daughters. During these interviews, Sarah, Joanna, and Phoebe told Officer Moisa that Shim had touched their buttocks with his hand and their vagina with his foot while they were laying on their bed. Video recordings of the interviews were played during the trial. (4 RT 1907-10.)

Sarah testified that after the divorce, from 2008 to April 2012, Sarah visited Shim on weekends three or four times a month. Shim picked up his daughters in his car. Sarah testified that, as Shim drove, Shim would touch Sarah's bare leg and breast area while she sat in the front seat of the car. (3 RT 1253-59, 1283.) This occurred three to four time a month for six months, when she was 11 or 12 years old. (3 RT 1260, 1272-76, 1280-82, 1560-61, 1570.) According to Sarah, when she was 14 or 15 years old, Shim would on several occasions, push her onto the bed and put his foot on her vagina. Sarah once saw Shim do the same to Phoebe. (3 RT 1259-72.)

Joanna testified that when she was 11 to 12 years old, Shim would touch her breasts as she was seated in the front seat of his car. This happened twice a month for a total of 20 times. Joanna saw Shim do the same to Sarah,

but not Phoebe. (2 RT 938-46.) Joanna testified that Shim put Joanna on the bed in her bedroom at Shim's apartment and put his bare foot on her vagina over her clothes and move it around. This occurred once every three or four months. Joanna saw Shim do the same to her sisters, Sarah and Phoebe. (2 RT 952-65.)

Phoebe testified that Shim touched her breasts, buttocks and vagina. According to Phoebe, Shim climbed onto her bed and put his hand onto her vagina every month for six months. Phoebe told Shim to stop but he said he could do what he wanted. (3 RT 1586-1609.) Pheobe admitted that in 2011 she lied to social worker Michael Oh when she said she did not have problems with Shim. (3 RT 1609-12.)

Clinical Psychologist Jayme Jones testified that a child may find it hard to disclose the molestation, that sexual abuse victims often recant, deny the abuse, and continue to live with the abuser. Victims may not initially disclose everything to police officers. They may test the waters with partial disclosures. However, she admitted that most false claims of abuse occur during family court proceedings involving divorce and custody disputes. (4 RT 1854, 1858-69, 1872, 1884-86.)

The Defense Case

Tiffany Park, Joseph Shim's current wife,

testified that Joseph Shim was the pastor of a church. In 2009, after his divorce from Victoria Choi, Shim met Tiffany Park at church. They married in 2010, the same year that Shim started a new church. Tiffany spent time with Shim and his three daughters on weekends and school breaks. (5 RT 2500-06.)

The three daughters had their own bedroom at Shim's and Tiffany's apartment and the bedroom door was always open. Tiffany never saw Shim sexually abuse his daughters. Tiffany never saw Shim touch the daughters' breasts in the car as they drove to Shim's apartment. (5 RT 2507-09.)

Casey Lee was a co-pastor with Joseph Shim at Shim's church. From 2009 to 2012, she and her two children would spend weekends with Shim, Tiffany, and Shim's three daughters. Lee never saw Shim abuse or improperly touch his daughters. (5 RT 2447-51, 2458.)

Social Worker Michael Oh interviewed Sarah in August of 2011. Sarah said that her mother Victoria Choi was upset because Shim did not pay child support. Choi had threatened Sarah and had gotten upset because Sarah had wanted to live with Shim. Upon interviewing Joanna and Phoebe, neither disclosed any problems with their parents. (5 RT 2464-68.) In October of 2011, Choi had reported that

Shim's new wife Tiffany had stepped on Sarah's toe, but upon his investigation he determined that the charge was unfounded. (5 RT 2491-92.)

Social Worker Steven Song interviewed the three daughters in June of 2012. Sarah did not mention that her father had inappropriately touched her. Sarah said he grabbed and pulled her hair. Neither Joanna nor Phoebe mentioned any sexual abuse. The mother, Victoria Choi, did not mention that she suspected any sexual abuse. (5 RT 2430-33.)

Steven Song interviewed the three daughters again in July and September of 2012. During those interviews Sarah said for the first time that Shim had touched her over her clothing in her "boob area." Phoebe said that Shim playfully touched Sarah's boobs. Neither Phoebe nor Joanna mentioned Shim had touched them. (5 RT 2434-43.)

Dr. David Thompson, an expert in child forensic psychology, testified how improper interviews directly affect a child's responses, statements, and recollections. An interviewer should be properly trained to avoid inaccurate or misleading outcomes in child sexual abuse investigations. (5 RT 2719. 2723-26.)

According to Dr. Thompson, the interviewer should start with open-ended questions and later ask more focused

questions. Leading questions can taint the child's responses and cause the child to make unreliable statements. (5 RT 2728-31.) Dr. Thompson testified that children may report things that did not happen. In such cases, the children will provide specific details and be convinced the non-events occurred. (5 RT 2731.)

Dr. Thompson testified that on occasion, children cannot recall if they experienced a memory or had been told about it. (5 RT 2731-32, 2738-40.) There have been cases where a child hears that someone has negative characteristics. The child will then report negative behavior, even if no behavior occurred. (5 RT 2732-33.) Dr. Thompson testified that parental coaching, tension, and disputes can affect children's memories and statements. Discussions between children and rumors also affect a child's memory. (5 RT 2737-38.) Dr. Thompson testified that an interviewer can make comments that can have an effect on a child's answers. This is known as confirmatory bias. Also, repeated interviews or casual discussions can solidify false reports and fictitious versions of events. (5 RT 2736-41.)

REASON FOR GRANTING THE PETITION

I

PETITIONER HAS MADE A SUBSTATNTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT AND THE NINTH CIRUIT COURT OF APPEALS SHOULD HAVE GRANTED A CERTIFICATE OF APPEALABILITY

A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court may not appeal unless he obtains a Certificate of Appealability (COA). 28 U.S.C. §2253(c)(1). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case. Miller-El v. Cockrell, 537 U. S. 322, 336 (2003).

The test for granting a COA is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, supra, 537 U. S. 322, 327; Slack v McDaniel, 529 U.S. 473, 483-484 (2000); Buck v Davis, 137 S. Ct. 759, 773 (2017). This threshold question should be decided without "full consideration of the factual or legal

bases adduced in support of the claims." Miller-El v. Cockrell, supra, at 336. "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." Miller-El v. Cockrell, supra, at 336-337; Buck v Davis, supra, at 773.

In Buck v Davis, supra, the Supreme Court held that the Fifth Circuit exceeded the limited scope of the COA analysis, when it reached the merits of the petitioner's claims in denying a COA. The COA statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and, if so, an appeal is to be authorized. 28 U.S.C. §2253. At the first stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or . . . could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, supra, 537 U. S. at 327.

It was therefore error in Buck v Davis, supra, for the Fifth Circuit to deny a COA only after essentially deciding the case on the merits. The Court in Buck stated: "We reiterate what we have said before: A 'court of appeals

should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,' and ask 'only if the District Court's decision was debatable.'" Buck v Davis, supra, 137 S. Ct. at 773; Miller-El v. Cockrell, supra, at 327, 348.

In this case, the Ninth Circuit failed to properly apply the correct legal standard for granting a COA. Petitioner Joseph Shim has raised four substantial constitutional claims in his habeas corpus proceedings. Jurists of reason could disagree with the denial of those claims by the district court and the issues presented are adequate to deserve encouragement to proceed further.

A

THE TRIAL COURT'S COMMENTS TO THE JURY THAT MANY CLERICS HAVE COMMITTED CRIMINAL ACTS AND THE FACT THAT SOMEONE IS CLERGY IS NOT A DEFENSE TO ANYTHING, VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL

Petitioner Joseph Shim was the pastor of a church who was charged with sexually abusing his three daughters. During jury selection, defense counsel asked the prospective jurors if they knew that Shim was a pastor. The trial court stopped defense counsel, calling any such questioning improper.

The court then told the jury that a person's

religious affiliation or status "has no meaning in the criminal courts at all. Sorry to say, in my own faith many clerics have not only sinned, but committed criminal acts. So the fact someone is clergy, that's not a defense to anything." (4 ART 690.)

On appeal, Shim argued that the trial judge's comments violated his federal constitutional right to due process by undermining the burden of proof and the presumption of innocence. Estelle v Williams, 425 U.S. 501, 503 (1976); Taylor v Kentucky, 436 U.S. 478, 483 (1978). The Court of Appeals rejected the claim stating:

> "During voir dire on March 18, 2015, defense counsel asked prospective jurors whether they were aware defendant was a pastor. The trial court stopped her, calling any such questioning improper. It then told the jury that a person's religious affiliation or status "has no meaning in the criminal courts at all. [¶] Sorry to say, in my own faith many clerics have not only sinned, but committed criminal acts. So the fact someone is clergy, that's not a defense to anything." Setting aside whether the court was correct in limiting voir dire (and we can see potential religious bias as a proper area of inquiry on voir dire), in this case the trial court's example was particularly ill-chosen in a case where a clergy member was on trial for sexual abuse. . . At the end of the day, however, we believe these comments fall into the better left unsaid category and do not amount to judicial bias." Opinion pp. 28-29.

Petitioner argued in the District Court that his conviction should be set aside on the grounds that his

federal constitutional right to due process and to a fair trial before an impartial jury was violated by the trial judge's remarks during jury selection. He argued that the state court's denial of his claim constituted an unreasonable application of federal constitutional law as decided by the United States Supreme Court. 28 U.S.C. § 2254(d)(1); Williams v Taylor, 529 U.S. 362, 375-76 (2000).

A defendant in a criminal case has a constitutional right to be tried by an impartial jury. Berghuis v Smith, 559 U.S. 314, 319 (2010). The Sixth Amendment states that "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 been committed." Murphy v Florida, 421 U.S. 794, 800 (1975); Irvin v Dowd, 366 U.S. 717, 722 (1961).

In Remmer v United States, 347 U.S. 227, 229 (1954) the Supreme Court held that any private communication, contact, or tampering with a juror during a criminal trial is presumptively prejudicial. In Remmer, the Court held that an FBI investigation of a third party's bribery remark to a juror presumptively prejudiced the defendant because both the remark and the investigation occurred during the trial and the defendant had no knowledge of either until after the verdict.

Numerous lower federal court cases have found prejudice from the jury's receipt of improper information amounting to unduly prejudicial tampering with the jury. See, United States v Rosenthal, 454 F.3d 943 950 (9th Cir. 2006) (prejudice found where juror received a newspaper stating the judge thought defendant's story was a "smoke screen," and trial court's curative instruction was insufficient to overcome the prejudicial impact); United States v Ofray-Campos, 534 F.3d 1, 18-25 (1st Cir. 2008) (prejudice found in conspiracy case because the trial judge's response to the jury's question contained extrinsic information not presented at trial about incarcerated co-defendants); United States v Schwarz, 283 F.3d 76, 98-99 (2d Cir. 2002) (prejudice found because jury's exposure to co-defendant's plea agreement would likely lead jurors to infer the defendant was guilty); United States v Lawson, 677 F.3d 629, 650-51 (4th Cir. 2012) (prejudice found because juror in case looked up elements of the crime on Wikipedia, an unreliable source).

While the Shim case was pending, the California Court of Appeals decided the case of People v Tatum, 4 Cal. App. 5th 1125 (2016). In Tatum, on the first day of voir dire, the trial judge told the jury that they were to decide the credibility of witnesses and then gave an example

involving plumbers. The judge stated that she had "horrible experiences with plumbers," and "if I hear somebody is coming in, and I hear he's a plumber, I'm thinking, 'God, he's not going to be telling the truth.'" People v Tatum, supra, 4 Cal. App. 3d at 1130-31.

The Court in Tatum reversed the defendant's murder conviction finding that the trial judge's comments about plumbers denied the defendant his right to due process and a fair trial. During the defense case, the defendant called an alibi witness, whose occupation was a plumber. The prosecutor argued in his final argument that the alibi witness was lying to help his friend. The Court stated that "The [trial] court's statement that plumbers who came into court were liars validated the prosecutor's argument, irreparably damaging Tatum's chance of receiving a fair trial." People v Tatum, supra, at 1131.

When the Tatum case was brought to the State Court of Appeal's attention by way of a petition for rehearing, the petition was denied. Shim argued in the district court that the State Court decision in his case constitutes an unreasonable application of federal constitutional law to the facts of his case. It is clear from the Tatum case, that jurists of reason could disagree with the district court's rejection of this constitutional claim.

The trial judge's comments in the Shim case that "in my own faith many clerics have not only sinned, but committed criminal acts. So the fact someone is clergy, that's not a defense to anything," is an obvious reference to the clergy sexual abuse scandal in the Catholic Church. Comparing Shim's case to the widely publicized Catholic Church clergy sex scandal was highly prejudicial.

Beginning in the 1980's numerous cases of child sexual abuse by Catholic priests began to appear in the media. The abused children included boys and girls, some as young as 3 years old, with the majority between the ages of 11 and 14.

By the 1990s, the cases began to receive significant media and public attention. In 2002, an investigation by the Boston Globe into clergy abuse in the Catholic Church in Boston led to widespread media coverage of the issue in the United States. In 2015, a motion picture entitled "Spotlight" dramatized the Boston Globe investigation of clergy abuse. Boston Globe Articles, http://www.bostonglobe.com/arts/movies/spotlight-movie

Reference to the Catholic Church priest sexual abuse scandal by the trial judge had the effect of telling the jury that Shim, being a clergy charged with sexual abuse of children, was probably guilty. It was more prejudicial

than the trial judge's comments in the Tatum case that she believed that plumbers would always lie. As the State Court Opinion in petitioner's case notes: "the trial court's example was particularly ill-chosen in a case where a clergy member was on trial for sexual abuse." Opinion, p. 29.

How then was it possible for Shim to receive a fair trial after the trial judge made such a comment? The comment of the trial judge was not simply ill-chosen, it was a comment that validated the prosecutor's charges and "irreparably damaging [the defendant's] chance of receiving a fair trial." People v Tatum, supra, at 1131. The judge's comments were also legally incorrect.

Under well established California Law, a defendant is allowed to offer evidence of his good character. Cal. Evid. Code § 1102 [In a criminal case, evidence of the defendant's good character is admissible]. Furthermore, evidence of a defendant's good character may be sufficient to create a reasonable doubt of the defendant's guilt. People v Jones, 42 Cal.2d 219, 222 (1954); People v Bell, 49 Cal. 485, 489-90 (1875); CALCRIM Inst. No. 350 [Evidence of a defendant's good character "can by itself create a reasonable doubt."]

The law permits a criminal defendant to introduce evidence of his good character as "a counterweight against

the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, Evidence: Practice Under the Rules, pp. 264-5 (2d ed. 1999). See also Richard Uviller, Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is").

Thus, the trial judge's comments comparing Shim's case to the Catholic Church clergy sexual abuse cases was stigmatizing Shim because he was a member of the clergy. By telling the jury "the fact someone is clergy, that's not a defense to anything," the court was making a legally erroneous statement that took away a valuable defense to the charges, namely, that his being a member of the clergy may have been sufficient to raise a reasonable doubt concerning his guilt.

The judge's comments to the jury were highly prejudicial, legally incorrect, and had the effect of undermining the presumption of innocence and the reasonable doubt standard. Petitioner was not treated equally by the

state court, where a defendant under similar circumstances is granted relief in People v Tatum, 4 Cal. App. 5th 1125 (2016), but petitioner, whose case was pending at the same time, was denied relief. See, Myers v Ylist, 897 F.2d 421 (9th Cir. 1990)[California Supreme Court violated equal protection by treating identical defendants differently]; Bolling v. Sharpe, 347 U.S. 497 (1954)[Equal protection and Due Process are not mutually exclusive].

Petitioner has made a credible claim that he was denied his constitutional right to due process as guaranteed by the Fourteenth Amendment. The State Court decision in petitioner's case is arguably an unreasonable application of federal constitutional law. Petitioner has met the standard for the granting of a COA on this important constitutional claim.

B

THE TRIAL COURT'S CONTINUAL DISPARAGING REMARKS AIMED AT DEFENSE COUNSEL VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL AND ALSO VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JUDGE

Petitioner Joseph Shim was denied his federal constitutional right to Due Process of Law under the Fourteenth Amendment on the grounds that the trial court

continually made disparaging remarks aimed at defense counsel resulting in an unfair trial. The record discloses a great deal of animosity between the judge and defense counsel existing even before the start of the trial. The trial judge denied counsel's motion to continue the trial and deemed the case ready for trial over defense counsel's objection. (2 RT 27.) The court stated on the record that "I'm concerned whether you are the right lawyer for this case." (2 RT 27.)

During jury selection, defense counsel began to ask the prospective jurors concerning their own experiences with divorce and custody battles. The trial judge angrily admonished defense counsel in front of the jury, accusing her of subjecting jurors to a gross invasion of their privacy rights. The court stated "people should not be asked to come in and talk about custody disputes. Divorces. Broken hearts. Hard feelings. . . That's not what jurors came her to do." (3 ART 348.)

Counsel asked to approach the bench several times but was rebuffed. Counsel continued her questioning by asking whether the court's strong admonishment of counsel would affect their ability to be fair. The court again interrupted stating "Ms. Arfa, when I admonish you, you will know it. Such as referring to me in that way is improper. .

when you tell the jury I'm admonishing you, I don't like it. I think that's inappropriate." (3 ART 351.) The court then again scolded counsel by telling her to question the jury "about their attitudes, please, not about their personal life." (3 ART 351.)

This exchange caused defense counsel to ask for a five minute break to compose herself. (3 ART 351.) When she returned, she asked for a hearing outside the presence of the jury at which she stated that the court's harsh comments had caused the jury to loose all respect for defense counsel and that as a result her client could not get a fair trial. (3 ART 369.) The court stated that in his view defense counsel was overly sensitive, taking all of the court's comments as personal insults and telling defense counsel "you should question whether you should handle a case of this seriousness in trial." (3 ART 374.)

The court stated that it was counsel's behavior that was the problem, not the court's. (3 ART 377.) The court noted that he had tried over a hundred cases and he had never seen a lawyer walk out of the trial during jury selection. The court stated "I don't think we can have a display like we saw already this afternoon every time something doesn't go your way." (3 ART 378.)

Thereafter during the trial, the trial court

accused trial counsel of being wrong, of not paying attention, and wasting the court's time. (4 ART 710-13.) At one point during defense counsel's cross examination of one of the victim's, the trial judge accused defense counsel of engaging in a "passive aggressive stunt" by asking unnecessary questions of the witness simply to cause the witness to return for a second day of testimony. (3 RT 1308-09.) On another occasion, when defense counsel asked for a victim witness who had completed her testimony to be ordered to remain on call, the trial court accused defense counsel in front of the jury of simply trying to prevent the witness from going on a planned trip. (3 RT 1249.)

On appeal, Joseph Shim argued that the trial judge's disparaging remarks discredited the defense and deprived him of his federal constitutional right to counsel, to due process, and to a fair trial. In re Murchison, 349 U.S. 133, 136 (1955). The State Court of Appeal rejected the claim, stating:

> The record makes clear that defendant persisted with voir dire questioning that the trial court deemed inappropriate, and that counsel then went so far as to improperly accuse the trial court of "admonishing her," when the court was simply directing the scope of voir dire after counsel's repeated violation of the court's orders. Opinion, p. 17.
> . . . .

> The court's comments hardly disparaged counsel. Rather, the court was merely explaining that counsel was misrepresenting the record, and that her objections were noted but further discussion on the topic was not efficient use of time as the reporter's notes accurately recorded what was actually said. . . . We find nothing wrong with the court's comments. Opinion, p. 19.
>
> . . . . .
>
> We find no misconduct. It is clear that the court was attempting to manage the proceedings, and to ensure that both attorneys were effectively using their time. Opinion, p. 21

Petitioner argued in the District Court that his constitutional right to Due Process of Law and to a fair trial under the Fourteenth Amendment was violated because of the disparaging remarks of the trial court. He also argued that the State Court decision constitutes an unreasonable application of federal constitutional law. Williams v Taylor, 529 U.S. 362, 375-76 (2000).

In a criminal proceeding, the Due Process Clause requires the state courts to adopt those practices that are fundamental to principles of liberty and justice. Twining v. New Jersey, 211 U. S. 78, 106 (1908). A fair trial and appeal is one such right. See Lisenba v. California, 314 U. S. 219, 236 (1941); Aetna Life Ins. Co. v. Lavoie, 475 U. S. 813, 825 (1986). "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchinson, 349 U.S. 133, 136 (1955).

Although not a federal case, the California Supreme Court in People v. Sturm 37 Cal.4th 1218, 1233 (2006) set forth a due process test for determining when a trial judge's misconduct toward defense counsel might result in the denial of a defendant's right to a fair trial. In the Sturm case, the Court stated:

> "A trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution. [Citations.] Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. [Citation.] When the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witness is not believed by the judge it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary." People v. Sturm 37 Cal.4th 1218, 1233 (2006).

More recently, the United States Supreme Court decided a case involving a defendant's right to an impartial judge. Williams v Pennsylvania, 136 S.Ct. 1899 (2016). In Williams, the Chief Justice of the Pennsylvania Supreme Court was formerly the district attorney who provided the authorization for the death penalty against the defendant. Years later, the same Justice voted to deny a post-

conviction habeas petition that had been filed with the Pennsylvania Supreme Court.

The United States Supreme Court in Williams held that under the Due Process Clause, "there is an impermissible risk of actual bias" requiring the recusal of a judge, including an appellate judge, "when the judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." Williams v Pennsylvania, supra, at 1905. Furthermore, the unconstitutional failure to recuse constitutes structural error. Williams v Pennsylvania, supra, at 1909.

In addition to the above cited incidents during the trial in which the trial judge berated defense counsel in front of the jury, there were numerous other instances of discourteous conduct on the part of the judge toward defense counsel. Many occurred during defense counsel's cross examination of the witnesses, where the trial judge frequently criticized defense counsel's questions.

On one occasion, the court refused to allow defense counsel to cross examine Victoria Choi on a declaration she had filed in the divorce proceeding. The trial judge kept the declaration after reviewing it at a side bar to keep defense counsel from asking any questions

about it. The trial judge said the declaration had been prepared by her attorney and could not be used to impeach her, despite the fact that Choi had signed the declaration, adopting her attorney's language as her own. Cross examination on the declaration was very relevant impeachment because the statements in the declaration showed that the divorce proceedings between petitioner and Choi were in fact contentious, contrary to what Choi was saying on the witness stand. (4RT 2212; 2239-2240.)

On other occasions during the trial, the trial judge showed deferential treatment toward the complaining child witnesses, giving the jury the impression that he believed they were telling the truth in their accusations against petitioner. All of these instances are set forth in the State Court of Appeal Opinion. (See also, 3RT 1246, 1249; 4RT 1849-50.)

Petitioner has made a credible claim that he was denied his constitutional right to due process as guaranteed by the Fourteenth Amendment. The State Court decision in petitioner's case is arguably an unreasonable application of federal constitutional law. Petitioner has met the standard for the granting of a COA because a jurist of reason could disagree with the district court's resolution of this constitutional claim. Miller-El v. Cockrell, 537 U. S. 322,

327 (2003). The Ninth Circuit erroneously denied petitioner's request for a COA in his case because the constitutional claim petitioner has made deserves encouragement to proceed further.

C

THE TRIAL COURT'S DENIAL OF A CONTINUANCE OF THE TRIAL MADE ON THE GROUNDS THAT COUNSEL NEEDED TIME TO OBTAIN AN EXPERT WITNESS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL

Counsel for petitioner made a motion to continue the trial in order to have more time to hire an expert witness. Early in the case, defense counsel had requested that the court appoint Dr. Geoffrey Loftus as a memory expert. The trial court refused to appoint him and told counsel to select an expert witness from the court's list of approved expert witnesses. (In Camera Hg. 05/08/14) Thereafter, counsel selected Dr. Michael Perrotti.

Although Dr. Perrotti began work on the case, he continually made requests for authorization for more funding for his fees. Eventually, the trial court refuse to authorize the additional requested funding. Thereafter, Dr. Perrotti withdrew from the case, claiming he could not form an expert opinion unless he received further authorization

for payment by the court. (2 RT F24; In Camera Hg.)

It was at this point that defense counsel moved for a continuance of the trial in order to locate an expert witness to challenge the memory of the child witnesses. The trial court denied the motion for a continuance. (2 RT 27; Exh. B, p. 56.) Without funding from the trial court, defense counsel was able to persuade petitioner's family to hire Dr. David Thompson, a clinical psychologist, as an expert witness on the improper tainting of child witnesses through the interview processes. Dr. Thompson testified at petitioner's trial. (5 RT 2719-41.)

After petitioner was convicted and while the case was on appeal, petitioner filed a petition for writ of habeas corpus alleging a denial of due process based on the trial court's denial of the motion for a continuance. The petition was supported by a declaration of Dr. Geoffrey Loftus, a memory expert. Dr. Loftus had been retained by Shim's family. He had reviewed the case and in his declaration he set forth a summary of his expert opinion.

Dr. Loftus stated in his declaration that if he had been retained prior to trial, he could have testified to general theories of memory, circumstances under which memory fails, the effects of attention, the effects of forgetting, the suggestibility of young children, the consequences of

post-event information on memory and witness confidence, and circumstances under which witness confidence cannot be relied upon as an index of reliability and accuracy. (State Court Opinion, Fed. Pet. Exh. B, p. 57.)

Defense counsel also filed a declaration stating the she did not have enough time prior to trial to hire Dr. Loftus. That was the reason for the continuance request. If the continuance had been granted, she would have been able to obtain Dr. Loftus as an expert witness to testify for the defense. (State Court Opinion, Fed. Pet. Exh. B, p. 57.) The State Court of Appeals denied the petition for writ of habeas corpus. The State Court decision states:

> Here, defendant had retained Dr. Perrotti, who would have testified as a memory and taint expert. It was only because of counsel's mismanagement of Dr. Perrotti's time that he was unable to render an opinion at trial. It was well within the court's discretion to deny counsel's eleventh hour request to retain new experts, and for a continuance of proceedings which had dragged on for nearly two years. Moreover, Dr. Thompson provided competent testimony on many of the proffered areas of expertise about which Dr. Loftus would have testified. Therefore, we can discern no possible prejudice. Opinion, p. 60.

Petitioner argued in the District Court that his constitutional right to Due Process of Law and to a fair trial under the Fourteenth Amendment was violated because of

the trial court's denial of his motion for a continuance of the trial. He also argued that the State Court decision constitutes an unreasonable application of federal constitutional law. Williams v Taylor, 529 U.S. 362, 375-76 (2000).

The matter of continuance is traditionally within the discretion of the trial judge. Avery v. Alabama, 308 U.S. 444 (1940). However, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

Two United States Supreme Court decisions are directly applicable to petitioner's claim that his right to due process was violated by the state court's refusal to grant a continuance. In the first case, the Court held that in certain circumstance, the denial of a continuance motion may result in a denial of due process. Chandler v. Fretag, 348 U.S. 3 (1954). In the second case, the Court held that the denial of the right to obtain critical expert witness assistance may also result in a denial of due process. Ake v. Oklahoma, 470 U.S. 68 (1985)

In Chandler v. Fretag, 348 U.S. 3 (1954) the defendant was indicted for housebreaking and larceny, which was punishable by imprisonment for three to ten years. At

his trial in a state court, he was advised orally for the first time that, because of three prior convictions for felonies, he would be tried also as an habitual criminal and if convicted would be sentenced to life imprisonment. He asked for a continuance to enable him to obtain counsel on the habitual criminal accusation. The motion was denied and he was forced to stand trial immediately and without counsel. He was convicted and given a life sentence on the habitual criminal charge. The United States Supreme Court granted his petitioner for writ of habeas corpus on the grounds that by denying the continuance request, the trial court deprived him of due process of law guaranteed by the Fourteenth Amendment. Chandler v. Fretag, supra, at 4-10.

In Ake v. Oklahoma, 470 U.S. 68 (1985) an indigent defendant was charged with murder. Defense counsel asked the court to appoint a psychiatrist to assist with the presentation of an insanity defense and to rebut the prosecution's expert witness at the penalty phase on the issue of future dangerousness. The trial court denied the request. The defendant was convicted and sentenced to death. The United States Supreme Court reversed, holding that a state trial court must provide an indigent defendant with expert witnesses necessary for the presentation of his defense. By denying the defendant an opportunity to obtain

the assistance of an expert psychiatrist, the trial court had denied the defendant his federal constitutional right to due process.

In petitioner's case, defense counsel needed more time to prepare for trial. She explained to the court that the expert witness originally appointed withdrew from the case for lack of funding. She was in the process of locating and hiring a replacement expert, but needed additional time. Although she was ultimately able to secure the testimony of Dr. David Thompson on the issue of the tainting of a child witness's testimony, she was unable to secure a memory expert.

After the trial, defense counsel was able to obtain the assistance of Dr. Geoffrey Loftus, a memory expert. If the trial court had granted another short continuance of the trial, defense counsel would have been able to present Dr. Loftus's testimony during the trial. Thus, petitioner was denied due process when the court denied his motion for a continuance under the Chandler case and he was denied due process under the Ake case because the trial court's ruling on the continuance request ultimately deprived petitioner of critical expert witness testimony at trial.

Petitioner has made a credible claim that he was

denied his constitutional right to due process as guaranteed by the Fourteenth Amendment by the trial court's denial of his pre-trial motion for continuance to secure an expert witness. Petitioner has met the standard for the granting of a COA on this important constitutional claim. Miller-El v. Cockrell, 537 U. S. 322, 327 (2003). The Ninth Circuit should have granted a COA on this constitutional claim in petitioner's case.

D

PETITIONER'S SENTENCE OF 25 YEARS TO LIFE WAS A CRUEL AND UNUSUAL SENTENCE IN VIOLATION OF THE EIGHTH AMENDMENT

Petitioner was sentenced to 25 years to life for his three convictions of continuous sexual abuse of his daughters. Pen. Code § 288.5(a). The sentence was imposed under California's One Strike Law. Pen. Code § 667.61; People v Anderson, 47 Cal. 4th 92,99 (2009). The One Strike Law was enacted to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction. People v Palmore, 79 Cal. App. 4th 1290, 1296 (2000).

Petitioner objected at the time of sentencing that a 25 year to life sentence would constitute cruel and unusual punishment. He also argued on appeal to the State

Court of Appeals that the sentence was grossly disproportionate to the crimes and the background of the petitioner. He had no prior criminal record and submitted a large number of letters from family and members of his church attesting to his good character. However, his Eighth Amendment argument was rejected by the State Court of Appeals. The Court stated:

> [D]efendant's punishment is not grossly disproportionate to his crimes. Defendant continuously sexually abused his three daughters over a period of years, subjecting them to almost weekly violations. Defendant's lack of prior record though worthy of consideration, does not diminish his culpability. The length of the sentence, when considered in light of the severity of the offenses and defendant's culpability does not give rise to an inference of gross disproportionality. . . . We therefore conclude that defendant's sentence does not constitute cruel or unusual punishment under either the state or federal Constitutions. Opinion, p. 51-52.

Petitioner argued in the District Court that his 25 years to life sentence was a cruel and unusual sentence in violation of the Eighth Amendment. He also argued that the State Court decision constitutes an unreasonable application of federal constitutional law. Williams v Taylor, 529 U.S. 362, 375-76 (2000).

The Eighth Amendment commands that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const.

Amend. VIII. The Clause against cruel and unusual punishment prohibits "not only barbaric punishments, but also sentences that are disproportionate to the crime committed." Solem v. Helm, 463 U.S. 277, 284 (1983); Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980); Ewing v. California, 538 U.S. 11 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003); Harmelin v. Michigan, 501 U.S. 957 (1991).

In Solem v. Helm, supra, the Supreme Court announced three factors that serve as guidance in reviewing a sentence under the Eighth Amendment. First, "we look to the gravity of the offense and the harshness of the penalty." Solem, 463 U.S. at 290-91. Second, "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction." Id. at 291. Third, "we may compare the sentences imposed for commission of the same crime in other jurisdictions." Id.

The Supreme Court applied these factors to a conviction for uttering an insufficient funds check for $100 under South Dakota's recidivist statute, where the defendant also had priors for three burglaries, obtaining money under false pretenses, grand larceny, and driving while intoxicated. Solem, 463 U.S. at 281-82. The Court found that the sentence violated the Eighth Amendment, noting that Solem's offense was "one of the most passive

felonies a person could commit" and did not involve violence or the threat of violence to any person. Id. at 296 .

In People v. Dillon, 34 Cal.3d 441 (1983), the California Supreme Court vacated a defendant's sentence for first degree felony murder on the grounds that the sentence violated the constitutional prohibition on cruel and unusual sentences. Dillon was a seventeen year old who was one of the group of individuals trying to steal marijuana growing in a field when the guard was accidentally shot. All of the defendant's companions received lesser sentences as a result of pleading guilty. The Court held that because of the defendant's lack of criminal record, that a sentence of twenty-five year to life constituted cruel and unusual punishment and the Court reduced the sentence to fifteen years to life, the sentence for second degree murder.

In petitioner's case, Joseph Shim had no prior criminal record of any kind. He had been living a law abiding life. He had worked his whole life as a pastor of a church. His first marriage ended in a divorce. A bitter child custody dispute existed between him and his ex-wife and the alleged child molestation charges arose out of a bitter custody dispute. Several people from the community wrote letters on behalf of Mr. Shim, attesting to his good character. (3 CT 541-81.)

The penalty for second degree murder in California is 15 years to life. Pen. Code § 187. Yet, in a case where no one was killed, Mr. Shim received a longer sentence. It is "particularly striking when a more serious crime is punished less severely than the offense in question." People v Dillon, supra, at 487 n. 38.

Petitioner has made a credible claim that he was denied his constitutional right under the Eighth Amendment, which prohibits cruel and unusual punishment. Petitioner has met the standard for the granting of a COA on this important constitutional claim. Miller-El v. Cockrell, 537 U. S. 322, 327 (2003). The Ninth Circuit should have granted a COA on this constitutional claim in petitioner's case.

CONCLUSION

Based on the foregoing, petitioner urges the Court to grant certiorari and direct the Ninth Circuit to grant a certificate of appealability in this case on all four constitutional issues.

Respectfully submitted,

/S/ Joseph F. Walsh

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