No. 19-6216

IN THE

SUPREME COURT OF THE UNITED STATES

9th CIRCUIT

M. HERRING — PETITIONER
(Your Name)

vs.

L.S. MC EWEN — 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

M. HERRING
(Your Name)

P.O. BOX 5004
(Address)

CALIPATRIA CA 92233
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

(1) If a self-represented defendant Takes THE witness stand in his or her defense whether, one continues To represent her or himself or whether the Trial court must appoint counsel To assist during This critical stage of the Proceeding. 8-18

(2). California fire arm enhancent STATUTE Penal Code § 12022.53 subd (b) [Personal use of A firearm"] Authorize The State To impose a "Mandatory minimum" Term of TEN YEARS, where other similar STATUTES guarantee A defendant a STATUTory right To a Lesser Term based ON THE SAME facts, "THE display of A firearm" during THE Commission of a crime. 19-27

(3) IN A STATE Court Proceeding, DURING Trial where a State Trial Court is Presented with a colorable claim of Jury misconduct. THE Trial court must do more Than re-instruct THE Jury. Pg 28-33

(4) IN a habeas corpus proceeding, If a defendant submits a Timely objection TO THE MAGISTRATES REPORT and reccommendation. whether, A defendant has A STATUTory right [28 U.S.C § 636 (b)(1)] To have The factual findings and Legal conclusions review de NOVO Pg 1-4

(5) DETERMINE whether, THE NINTH circuit incorrect Applied The CoA Standard OR whether The issues raised in The Original habeas Corpus action and 60(b) motion are adequate To deserve encouragement To Proceed further Pg 1-4

LIST OF PARTIES

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

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

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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

[X] 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,
[X] is unpublished.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,
[X] 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 State Superior Court court appears at Appendix D to the petition and is

[ ] reported at ________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was dec 4 2018.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Jan 28 2019, and a copy of the order denying rehearing appears at Appendix C.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including June 3, 2019 (date) on June 27 2019 (date) in Application No. 18 A 1249. The Petition was sent back on July 8, 2019 and I was required to resubmit on proper paper work in 60 days

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

United States Constitution Amendment[s] V, XI, and XIV

STATEMENT OF THE CASE

PART

THE district court abuse ITS discretion WHEN IT denied THE 60(b) MOTION AS untimely

• ON 9-15-18 I submitted a 60(b) motion respectfully requesting relief pursuant to 60(b)(4) and (b)(6). My Primary Argument WAS based on the ground the Judgment is void within the meaning of 60(b)(4)

Respectfully, THE district court acted in a manner inconsistent with due process. I Timely objected to the magistrates REPORT and reccommendation. Therefore, I had a STATUTORY right to be heard pursuant to 28 U.S.C §636(b)(1). THE district court WAS required to review THE R&R Report de NOVO [SEE, UNITED STATES v. Silverman, 861 f.2d 571, 576 [9th cir. 1988]; see ALSO, THOMAS v. Arn, 474 U.S. 140, 149-50 ("DE NOVO review means that THE reviewing Court "does NOT defer to the lower Courts ruling but freely considers the matter a new as if No decision had been rendered below")]

I Contested many of THE MAGISTRATES factual findings and Legal conclusions Moreover, My Primary claims RAISED in the habeas Petition THE Court did NOT make make factual findings and conclusions of Law as required. [SEE, Lincoln v. Sunn [9th cir. 1987] ["The district court MUST make Specific findings and Conclusions of law on Petitioners Assertions THAT STATE A valid claim for relief in order to SHOW that it has independently review the record"]; See ALSO, UNITEd STATES V. WITHERS, 638 f.3d 1055, 1062 [9th CIR 2011] ["WHEN A district court reviews A ... habeas motion, unless The motion and files And records of The CASE Conclusively SHOWS That The PETITIONER is entitled To NO relief. The court shall ... grant a prompt Hearing There ON determine The issues and make findings of fact and conclusions of law WITH respect To"]

The district court summarily denied the objection. However, There must be "some evidence the district court Actually Exercise its discretion rather Than summarily Accepting or denying the MAgistrate Judges findings", SEE., united STATES v. Howell, 231 f.3d 615, 622 [9th CIR. 2000]

Review of the objection is a fundamental requiste in A habeas Proceeding before dismissing The petition with prejudice. This omission WAS prejudical. Because, The I.A.C and Jury misconduct claims, STATE a valid claim for relief. And the claims RAISED IN The habeAS Proceeding cannot be raised AGAIN. see. 28 U.S.C § 2244 (b)(2) meaning i could NOT ever be heard on The merits of my claims.

Thus, The habeas Proceeding WAS void within The meaning of 60(b)(4)

THE district court did NOT reach the merits of The 60(b) motion. THE district Court MAde A finding That, "I did NOT Explain why I was entitled for consideration of the claims so many years later after his conviction became final and the conclusion of his habeas action in federal court". SEE., Apendix B There after, deny the motion as untimely.

Due to the fact I requested relief Pursuant to 60(b)(4) and 60(b)(6), the denial does not directly address which requested ground for relief was denied as untimely. SEE., Appendix (B)

Part

ANAlysis

Motions to set aside the Judgment under rule 60(b)(1), (3) and (6) must be brought within a reasonable time. Fed. R. Civ. P. 60 (c)(1); see Lemoge v. United States 587 F.3d 1188, 1196 [9th Cir 2009]

What constitutes reasonable time depends upon the facts of each case, taking into consideration the interest in finality, the reasons for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties. See, Lemoge, 587 F.3d at 1196

There is no limit of time on a rule 60(b)(4) motion to set aside a Judgment as void. SEE., 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2862, Rule 60 (1973); Meadows v. Dominican Republic, 817 F.2d 517, 521 (9th Cir. 1987) [Rule 60(b)(4) was not barred because motions brought pursuant to rule 60(b)(4) constitute such exceptional circumstances as to relieve litigants from the normal standard of timeliness associated with rule 60(b)]; Owens-Corning Fiberglass Corp. v. Ctr. Wholesale, Inc ["if a judgment is void, a motion to set aside may be brought at anytime"]; See Also, SEC v. Internet Solutions for Business Inc., (9th Cir 2007) 589 F.3d 1161, 1164-65 ["A motion to vacate for lack of jurisdiction may be made at any time"]

Thus, the 60(b)(4) motion was properly before the court. The district court did not identify the correct legal standard when the court denied the Rule 60(b)(4) as untimely. See, Hinkson, 585 F.3d 1247 ["A district court would abuse its discretion if it applied the incorrect legal standard"].

Therefore, jurist of reason would find it debatable whether the question of untimliness could have been resolved in a different manner.

PART

THE habeas Petition STATED A VALID CLAIM of the denial of A CONSTITUTIONAL RIGHT

STATEMENT OF FACTS

ON direct APPEAL I WAS represented by STATE Appointed counsel. Appellate counsel RAISED A single claim of Jury misconduct. THE fourth Appellate district in an UNPublish opinion denied the claim ON the merits. Appellate counsel saught review of the Appellate Court decision from the California Supreme Court. The Supreme Court summarily denyed decretionary review.

During Trial The State Trial court violated my VI Amendment Right to counsel. The court improperly infringe-constructively denied my right to self-representation. (2) Improperly Terminated Self-Representation and (3) failed to Appoint Counsel once Self-representation WAS Terminated.

AT Sentencing the court committed an Apperendi error, by sentencing me to a mandatory 10 YEAR Term for the offense, Personal use of A firearm.

Appellate counsel did not raise these Two issues on direct APPEAL. Therefore, in a collateral Proceeding in Pro Per via habeas Corpus. I Argue Appellate counsel Performance WAS deficient for failing to Raise These issues on direct APPEAL. Counsel deficient Performance WAS prejudicial because had counsel RAISED The issue on direct APPEAL There is A resonable probability The outcome would have different, because The issues are Potentially meritous, I may have prevailed on direct APPEAL.

THE STATE superior COURT reach The I.A.C claim on The merits. The court determine Appellate counsel was NOT ineffective citing. (SMITH v. Robbins (2000) 528 U.S. 259, 285-286; See ALSO People v. Osband (1996) 13 Cal. 4th 622, 664. [See Exhibit

ThereAfter, I saught Appellate review from The fourth district. THE Appellate court summarily denied The petition. Next, I saught discretionary review from The California Supreme Court. THe court summarily denied review.

I Timely submitted a federal habeas Corpus. The Magistrate Judge issued A report and recommendation. WITH a recommendation To dismiss The Petition with prejudice. I Timely objected. ThereAfter, The district court Judge accepted The Magistrate Judge Report & dismissed the Petition with prejudice.

Since This point i have been unsucceful at having my claims heard on the merits. I Come before This Court with my final ATTempt requesting A C.O.A To Allow The NINTH Circuit review my claims on the merits.

PART

INEFFECTIVE ASSISTANCE OF COUNSEL

I I.A.C claim is govern by AEDPA and THUS relief is only available if The STATE COURTS decision WAS contrary To Clearly ESTABLISHED federal law, An unreasonable Application of Clearly

Established federal law or an unreasonable determination of facts. SEE, 28 U.S.C. §2254 (d)

It is clearly established that a criminal defendant has a constitutional right to effective assistence of Appellate counsel. SEE, Evitts v. Lucey, 469 U.S. 387, 396, 105 S.CT 830, 83 L.Ed.2d 821 (1985); SEE ALSO, Smith v. Robbins 528 U.S. 259, 288, 120 S.CT. 746, 145 L.Ed.2d 756 (2000)

To obtain relief on the basis of ineffective assistence of counsel. THE defendant AS A general rule bears THE burden to meet two standards. FIRST, THE defendant must show deficient performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S.CT. 2052, 80 L.Ed.2d 674 (1984). Second, The defendant must show that the attorney's error "prejudice the defense." Ibid

To determine whether counsel was ineffective for failing to raise a claim on APPEAL, The NINTH CIRCUIT looks to the merits of THE claim. See, MAN v. Ryan, 628 F.3d 1102, 1106-07 SEE, ALSO, Robbins 528 U.S. 259, 288

PART

"District Court Proceedings

RIGHT TO COUSEL.

THE district court WAS asked To determine whether, I STATE COURT unreasonably Applied Strickland, WHEN THE Court found Counsel was NOT ineffective AND (2) whether, The STATE Courts conclusion That counsel PERFORMANCE WAS NOT deficient And Prejudical WAS based on an unreasonable determination of facts. 28 U.S.C § 2254 (d)(1); (d)(2)

THE district court did NOT Hold an evidentiary Hearing. Therefore, THE Courts resolution of the merits I.A.C claims and sub-claims WAS based Exclusively ON THE face Of The record.

THE district court recognize WAS arguing a I.A.C claim AND ~~THAT~~ The I.A.C WAS NOT procedurally defaulted. SEE., Appendix B However, its unclear whether The Court WAS aware That the faretta Question WAS apart of the I.A.C claim.

THE district court sumerize the facts AS follows: Before Trial, Petitioner moved To represent himself. After advising Petitioner of The risk associated WITH doing so [faretta v. California, 422 U.S 806

(1975). THE Court Allowed Petitioner To proceed Pro SE.

Petitioner Testified in his own defense, Petitioner Presented his direct Testimony in narrative form. (Id at 921) During Cross-Examination, Petitioner objected To Several of The Prosecutions Questions and Gave evasive and non-responsive Answers [Lodgment #17 at 943, 947, 949-950, 956-57] THE Trial Court allowed petitioner To object, but ALSO instructed Petitioner THAT HE was required To Answer THE Prosecution Questions After another of series of Non sensical and evasive responses That Petitioner Presented As "objections" THE Trial Court Stated: "You cant object, Your Now A witness You're NO Longer an Attorney. Just Answer THE Questions (Id at 950) ThereAfter, Petitioner Continued To Provide non-responsive Answers To Several cross-Examination questions. And on AT Least one occasion asserted an objection THAT The Trial court Sustain. SEE, Appendix B

PART

DISTRICT COURTS ANALYZE OF THE MERITS

THE district court begin by clearly STATING ONE of my sub-claims, "Petitioner claims THAT The Trial court denied him his right To self-representation by barring him from making objections To The Prosecutions questions on cross-examination" [see., Appendix B

Thereafter, The court determine That The "Argument is frivolous and raises no constitutional Question on habeas review" [

THE district court made a finding, "Petitioner Adequately and at his own request represented himself at Trial before, during and After his Testimony, THE Trial court attempted [Perhaps inartfully] To maintain order during The contentious and difficult Testimony of a pro se litigant". AS THE courts reviews THE record ON THE Trial That did Not infringe Petitioners right To self-Representation." SEE., Appendix B

LASTly, THE court held Petitioner points To NO clear prejudice That resulted from the Trial court's sensible efforts To Advance THE questioning of The witness. Rather Petitioner was ask A simple question To WHICH To WHICH HE made a nonsensical objection. under The circumstances THE Trial courts admonishment did NOT amount TO A constitutional violation. [see., Appendix B

THE court did not mention THE faretta claim as one of The issues Appellate Counsel fail To raise on direct Appeal. Therefore, IT is unclear whether The court view This claim as procedurally barred or part of I.A.C. Nonetheless, The court found Appellate counsel was not ineffective. SEE., Appendix B

PART

THE district court misstated the facts

Respectfully, THE district court begun its analyze of the merits by misstating the facts.

During cross-examination I attempted to make a total of objections. AT NO point did the trial court make a ruling on any objection. AT NO time did THE trial court sustain an objection while on the witness stand. Moreover, THE trial court completely disregarded my final objection by explicitly stating "forget THE objection".

THE trial court record does not support the facts stated by the district court. IT was an abuse of discretion for the district court to deny the VI amendment claim on the basis of the courts misstatement of facts. SEE, United States v. Ressam, 679 F.3d 1069, 1086 [9th Cir 2012] [" A district court abuses it discretion when it makes an error of law, when it rests it decision on clearly erroneous findings of fact, or when we are left with a definite and firm conviction that the district court committed a clear error of judgment"]

PART

THE district court misapplied THE law when it determine THE VI Amendment claim was meritless

IN THE original habeas Proceeding I RAised a credible NON-frivolous constitutional Question WHETHER, APPEllate Counsel WAS ineffective for failure To RAISE The claim: THE STATE COURT violated my VI amendment right To counsel. THE question WAS broken down into "3" similar but "distinct" claims for relief; (1) The Trial court infringe-Constructively denied my right To Self-Representation (2) THE STATE COURT improperly denied self-Representation and (3) ONCE self representation WAS TermiNated, The State court fail To Appoint counsel during a CRITICAL STAGE of THE Proceedings.

THE constitutional rights of effective assistence of Counsel and self-representation are clearly establish. SEE: Lucey 469 U.S. 387, 396 [1985]; see ALSO, faretta 422 U.S. At 807

THE district court is required To determine The merits of VI amendment claim inorder To determine whether Appellate counsel was ineffective. see, Moorman V. Ryan 628 f.3d 1102, 1106-07 [9th CiR 2010] ["To determine whether counsel was ineffective for failing to raise a claim on Appeal [THE Court] LOOKS To the merits of the claim"]

THE district courts conclusion That my Sixth Amendment rights WAS NOT violated by THE State court is Contrary To united STATES Supreme Court law.

THIS court has YET To Address what rights a Self-represented defendant Retains is he or SHE Takes THE witness stand in one's defense; (2) If self-representation is terminated, whether a court is required to re-appoint counsel or if a self-represented defendant no longer wishes to represent him or herself is the court required to appoint counsel. SEE,

NoneTheless, The Supreme Courts silence on This particular issued need not prevent [a court] from identifying and applying [This Court's] general governing principles to the case at hand." SEE, Ignacio, 360 F.3d 1056-57. As Explained in Ignacio "rules of law may be sufficiently clear for habeas purposes even when They are expressed in Terms of generalized standard Rather as a bright line rule" Id at 1057 (quoting williams 529 US at 382; See ALSO, MARSHALL v. Rodgers 133 S.CT. 1445, 1557-85

PART

Constructive denial of self-representation

THE STATE COURT constructively denied self-representation when THE COURT would not rule on the objections I made and when THE Trial Court explicitly STATED, "YOU CANT object"

THE Trial court actions were unconstitutional, THIS court has held, "A defendant's Choice To take THE STAND is constitutionally protected by "THE guilding hand of counsel" in... THis critical element of his defense." See Brook v. Tennessee 406 U.S. 605, 612; See ALSO, ferguson v. Georgia, 365 U.S. 570, 572, 5 L.Ed.2d 783, 785, 8 S.CT. 756 (1961) ["where The U.S. Supreme Court reviewed a Georgia STATUTE Providing That a CRIMINAL defendant Though NOT Competent To Testify under OATH, Could make an unsworn STATEMENT AT TRIAL. THE STATUTE did NOT permit defense counsel To aid The Accused by eliciting his STATEMENT Through Question. THE COURT held That THIS limitation deprived The accused of "The guiding hand of Counsel at every STEP of THE Proceeding"]

THE COURT Explained further, That "THE defendant is To Testify is an important Tactical decision as well as a matter of constitutional Right". See, Brooks, 406 U.S. 605, 612. A defendant's Choice to Take The Stand carries with it Serious RISK of IMPEACHMENT and Cross-Examination; IT MAY OPEN THE door to otherwise inadmissable evidence which is damaging to His case [Id at 609] And That, "NONE would deny THE CHOICE ITSelf MAY pose Serious dangers To THE Success of an accused defense". [Id at 609]

This courts holdings in BOTH Brooks AND ferguson clearly ESTABLISH THE constitutional right To "The guilding hand of counsel" before and while I was on The witness Stand.

THUS, The Trial court could NOT simply disregard me as A Self-Represented defendant While on The witness Stand.

Moreover, IN light of THE "Contemporaneous objection Rule" WHICH is embedded in both federal and STATE Jurispurdence. See, Puckett v. U.S. 556 U.S. 129, 133 (2009); SEE ALSO, WAIN v. Sykes 433 U.S. 72 (1977) ["Procedural default occured because Petitioner failed To make Timely objection under STATE Contemporaneous objection Rule..."] THus, making objections at certain points while on THE witness stand would necessarly be a responsibility of A Self-represented defendant. SEE, McKaskle v. Wiggins, 465 U.S. 168, 174 [A "Pro SE defendant must be allowed To Control THE organization and content of his own defense, To make motions, To Argue points of law"] AND a product of effective assistence of counsel, because of The general rule as a Pro se defendant I could NOT Argue ON APPEAL ineffective assistence of counsel.

THE STATE COURT could NOT simply NOT Rule on any objections an unequivocally STATE, "You CAN'T object". SEE, UNITED STATES v. MACK, 362 F.3d 597, 601-03 ["Structural error To forbid A Pro SE defendant from Cross-Examining witnesses, "making objections" Even where The defendant WAS disruptive"]

PART

Improper denial of Self-Representation

THE STATE TRIAL COURTS unequivocal STATEMENT:

YOU CANT object, You're NOW A witness. You're NO longer AN Attorney. JUST Answer THE Question

IS undebatable That The Trial court Terminated self-representation additionally, I attempted To re-Assert my Pro se STATUS by making another objection because The court did NOT Appoint Counsel. THE Court unequivocally STATed;

"forget THE objection THE ANSwer remains He disAgrees WITH your characterization"

MEaning MY right To self-representation WAS over.

THIS court has held, A defendants right To represent himself is NOT Absolute. see, faretta, 422 US at 807, 95 S.CT. 2525, 45 L.Ed. 2d 562. ANd in certain situations a Trial court has discretion To Terminate self-representation. see faretta at 834 ["A Trial court has discretion To Terminate an unduly disruptive defendants Self-Representation"] seeALSO, united States v. Brugrara. 856 f.3d 1181; Indiana v. Edwards, 554 U.S. 164, 167]

However, In This CASE NONE of The circumstances are Present That would authorize The Court To deny Self-Representation

Here, THE Trial court Terminated Self-Representation simply because I Tried To defend my self by making objections.

The law is clear, "The right To proceed Pro SE is either respected or denied and NOT subject To harmless error" see, McKaskle 465 U.S. 168, 177

THe State Trial court did NOT respect my right To Self-representation while on The witness STand.

PART

THE Trial court fail To APPOINT Counsel ONCE Self-Representation WAS Terminated

AS a self-represented defendant on the witness STAND I WAS NOT allowed To function as Pro SE Nor did The TriAl court Appoint Counsel.

This Court has held, "The six Amendment safe gaurds TO AN accused who faces incarceration THE right To counsel at all critical STAGES of The criminal Process", See, IOWA v. Tovar, 541 U.S. 77, 80-81, 124 S.CT. 1379, 158 L.Ed.2d 209 (2004); united States v. Cronic, 466 U.S. 648, 653, 654, 104 S.CT 2039, 80 L.Ed. 2d 657 (1984)

THERE can be no debate That A defendant ON THE witness stand is a "critical" Part of The Proceeding. Therefore, I had A constitutional right To either Pro se OR counsel To ASSIST me during This point in Trial The Trial court could NOT deprive me of boTH. SEE, UNITED STATES V. MACK, 362 f.3d 567, 601 ["A defendant Does NOT forfeit his right To representation at Trial..." "He merely forfeits his right To represent himself in The Proceeding"]

Respectfully, IT MAY have been by mistake, but The STATE Trial court violated my right To counsel.

PART

Prejudice-Harmless error review

THIS court has "Adopted The general rule that a constitutional error does NOT automatically require reversal of a conviction". SEE, Arizona v. fulminante, 499 U.S. 279, 306, 111 S. CT. 1246, 113 L. Ed. 2d 302 (1991)

If The government can show "beyond A reasonable doubt That The error complained of did NOT contribute To The verdict obtain", Then The error is deemed harmless and The defendant is NOT entitled To reversal. Id at 24, 87 S. Ct. 824, 17 L. Ed. 2d 705

THIS COURT has also Recognize, That some errors sHould NOT be deem harmless beyond a reasonable doubt. These errors cane To be KNOWN AS STructural errors. SEE., fulminante, 499 US 97 309-310, 111 S.CT. 1246, 113 L.Ed. 2d 302

Denial of Self-representation and denial of counsel Are Part of This caTegory of STructural errors. SEE., faretta, 422 U.S. 806, 834 (1975); MCKASKLE, 465 U.S. 168, 177; SEE ALSO, CRonic, 466 U.S. AT 658-60 [Prejudice Presume when actual or constructive denial of counsel]

The The Trial court actions, constructive denial of Self-representation, denial of Self-Representation and denial of Of Counsel are STructural error and require Automatic reversal.

PART

California's firearm enhancement STATUTE P.C § 12022.53 violate The V and VI Amendment To due Process, Jury Trial and Proof guarantee

Habeas Corpus Proceeding

IN THE R&R report THe MAGISTRATE Judge reviewed The Apprendi claim as A sufficiency of evidence TEST. SEE., Appendix B

THE MAGISTRATE made a finding, "Additionally, The evidence Supporting The firearm enhancement ["Testimony That robber USEd a gun] WAS conclusive" [See., Exhibit (B) AND denied The I.A.C claim ON The basis That this claim was meritless see., APPENDIX B

THERE WAS NO findings of or conclusions of law Concerning whether The 26 year sentence imposed Pursuant To P.C. 12022.53 subd (b) Personal use of a firearm violates Dueprocess, Jury Trial & Proof guarantee's.

THE district court abuse its discretion when it denied THE I.A.C claim because it fail to identify and apply The correct legal principle to determine The subclaim of whether The Sentence imposed Pursuant To P.C.§ 12022.53 violates Apprendi V and VI Amendment gaurantee. [See., Ressam, 629 F.3d 1069, 1086 ["A district court abuses its discretion when it makes an error of law... or when we are left with A definite and firm conviction That The district court committed A clear error of Judgment"]

ANAlysis

facts

I was found guilty of four Counts of CALifornia P.C § 211 [Robbery which included an attachment of a conduct enhancement

"Personal use of a firearm" P.C § 12022.53 subd (b)

I was sentence To a Total Term of 33 years 4 months. 26 of The 33 is a product of THE conduct enhancement.

California law defines The use of A firearm To mean, " To display a firearm in a menacing manner, To intentionally fire it or To intentionally Strike or hit a human being with it. " [See., People v. Johnson (1995) 38 CAL App. 4Th 1315, 1319, 45 CAL. RpTr. 2d 602; SEE., ALSO, CAL JIC NO. 17.19; People v. Hamilton (1998) 61 CAL. App. 4Th 149, [77 CAL. RpTr. 2d 359]; P.C § 1203.06 subd (b)(3)

I was sentence Pursuant To CAL. P.C § 12022.53 subd (b) WHICH Proscribes a MANDaTory minimum Sentence of 10 years for THE offense "Personal use of A firearm"

However, Pursuant To CAL. P.C § 12022 subd (b)(1), Personal use of a deadly or dangerous WEAPON, Term of imprisonment (1) year; 245 subd (a) (2) assault upon another with a firearm, Terms of Imprisonment 2, 3 & 6; 12022.5 subd (a), Personal use of a firearm, Terms of imprisonment 3, 4 and 10.

Therefore, Pursuant To P.C § 12022 subd (b)(1), 245 subd (a) (2) and 12022.5 subd (a) A defendant has a "STATutory" right To A Lesser Sentence for The offense "Personal use of A firearm"

ALSO, THE crimes were committed in 2006, which means the DSL in effect at that time controls. SEE., Cunningham v. California [2007] 549 U.S. 270, 288, 127 S.CT. 856, 166 L.Ed. 2d 856 ["The middle term prescribed in California's statutes, not the upper term is the relevant statutory maximum"] see also, Peugh v. United States 569 U.S. 530, 533, 133 S.CT. 2072, 186 L.Ed. 2d 84 (2013) ["There is an Ex Post facto violation when a defendant is sentence under guildlines after he committed his criminal acts and the new version provides a higher applicable guildlines..."]

Application of law

IN California's "Triparite system of government it is the function of the legislature branch to define crimes and perscribe punishment..." SEE., In Re Lynch [1972] 8 CAL. 3d 410, 414; SEE ALSO, People v. Superior Court [Romero] [1996] 13 CAL. 4th 497, 516 ["The power to define crimes and fix penalties is vested exclusively in the legislative branch"]

IN 1977 the legislature created the determinate sentencing law. from then until now it has been amended to include three seperate and distinct conduct enhancements and (1) substantive statute that penalize the offense personal use of a firearm: CAL. P.C.S 12022 subd (b)(1), personal use of a deadly or dangerous weapon; 245 subd (a)(2) Assault with a deadly weapon a firearm, 12022.5

subd (a) Personal use of A firearm and 12022.53 subd (b) Personal use of A firearm.

P.C § 12022.53 subd (b) proscribes a mandatory minimum Term of 10 YEARS for THE offense Personal Use of A FireArm. However, under CALifornia law THE STATE Need NOT Pled or Prove Any Additional facts That Justify a mandatory minimum Term. All THe STATE must do is Allege This STATUTE. Moreover, There are NO distinguishing factors between P.C § 12022.53 And The Other STATUTES That Authorize a lesser sentence for The offense Personal use Of A fire arm.

THUS, THE question before THE Court is whether a STATE CAN Authorize a mandatory minimum Term of 10 years based on THe Same facts That i could receive A minimum Sentence of one year. IN Other words, remove from The Jury or Judge The Assesment of facts which Justify The higher sentence.

Every defendant has The Right To insist That The Prosecutor Prove To The Jury All facts legally essential To The punishment Blakley v. WAshington, 542 U.S. 296, 313

IN Blakley This Court cautioned, "THE broad discretion To decide what facts may Support an enhanced Sentence, or determine whether an enhance sentence IS warrented in Any Particular CASE, Does NOT SHield A Sentencing SYSTEM from THE force of our decisions if THe Jurys verdict ALONE does NOT Authorize The Sentence ... THe six Amendment requirement is NOT SATISfied" Id at 305, 124 S.CT. 2531, 159 L.Ed. 2d 403

THe six Amendment was NOT satisfied in This CASE because, California is NOT required To PLEd or Prove Any additional facts That Justify the higher sentence.

THE ElEMENTS of Personal use of A fire arm is The display of A firearm and constitutional guarantees ATTACH. Due To The link between crime and Punishment There must be A requiste The government must Prove To Authorize a mandatory minimum sentence.

THE Constitution Permits Legislatures To MAKE The distinction between elements and sentencing factors, but iT imposes Some limitations As well, for if iT did NOT, Legislatures could evade indictment, Jury and Proof requirements by labeling ALMOST every relevant fact a sentencing factor. SEE., Harris, 536 U.S 545, 550

CAlifornia Legislature has constructed P.C § 12022.53 is such a WAY, That CAlifornia is NOT required To Prove The facts THAT Justify A mandatory minimum sentence for "Personal USE of A firearm" THE STATUTE has Successfully removed The indictment, Jury Trial and Proof guarantees. This STATUTE is WHAT This Court has TeRM "The TAil ThaT wAgs The dog"

THE [STATE] MAY NOT manipulate The definition of A CRIME in a WAY That relieves THE government of ITS Constitutional obligation To charge each element in The indictment, and submit each element To The Jury and Prove each element beyond A reasonable doubt. Jones, 526 U.S. 240-241; Mullany v. Wilber 421 U.S. 684, 699, 44 L.Ed.2d 508, 95 S.Ct. 1881 [1975] Moreover, "A STATE MAY NOT distinguish between similar offenses That have different maximum Penalities without requiring THE Prosecution To Prove beyond A reasonable doubt The facts That distinguish THE TWO offenses because The defendants interest in due process is implicated. SEE, Apprendi, 530 U.S. 466, 488-92

THE law is clear, "IT is unconstitutional for A legislature To remove from The Jury The Assesment of facts That increase The Prescribed range of Penalties To WHICH A criminal defendant is Exposed IT is Equally clear That such facts must be Establish by Proof beyond A reasonable doubt". SEE, Apprendi, 530 US AT 430 [Quoting Jones Supra at 252-53 [143 L.Ed.2d 311, 119 S.Ct. 1215]

THUS, CAL. P.C. § 12022.53 sub d (b) mandatory mini Term violates, THE indictment, Jury Trial and Proof guarantee, WHICH make THE STATUTE and sentenced imposed illegal.

<u>Prejudice</u>

Apprendi, "Sentencing errors are subject to harmless error analysis" SEE, Washington v. Recuenco, 548 U.S 212, 126 S.Ct. 2552, 165 L.Ed. 2d 466 [2006]

An Apprendi error is harmless only "where THE record contains 'over whelming' and 'uncontroverted evidence supporting an element of THE crime. [NEdar 527 US at 17-18] AN Apprendi error is NOT harmless if The defendant Contested THE omitted element and raised evidence sufficient To support A contrary finding"! Id Neder 527 US at 19

THE 23 year Term Imposed for THE offense, "Personal use of a firearm" was NOT Harmless.

AT SENTENCING i contested whether iT was Appropriate I was To be sentence Pursuant To THE 10-20-life enhancement CAL. P.C § 12022.53(b) due TO THE fact i was NOT a convicted felon and specifically why was i To be Sentence Pursuant To P.C § 12022.53 verses one of the lesser enhancement.

I could NOT present evidence To Support A Lesser Sentence because California IS NOT Required To Prove Nothing more Than THE minimum requirement. "The display of A firearm"

The Sentencing court Relied on The construction of The STATUTE, when i contested the sentence.

THIS STATUTE give That STATE A WEAPON TO over charge A defendant. As a matter of due Prosess There MUST be an requisite before A mandatory minimum may be imposed.

THe record holds NO evidence No one WAS STruck with the fire-arm, fired or for The matter any one injured. Therefore, based on The facts I could have received A lesser if sentence pursuant To The other enhancement sections.

THus, THe Sentence imposed based on The record cannot be considered harmless with in The meaning of O'Neal, 534 U.S. AT 463

PART

<u>INEffective assistence of APPEllate counsel</u>

IN order To Prevail on I.A.C I must MEET THE Strickland Standard. SEE., Strickland, 466 U.S. 668, 687 ["FirST, THE defendant must SHOW deficient Performance ... SECond, The defendant MUST SHOW That The ATTorney's error "Prejudice The defense"

ON direct APPEAL APPEllATe Counsel raised A Single issue [Jury misconduct] which WAS denied. THE Trial court record contain Sufficient facts for A reasonable aTTorney To discover THE credible NON-frivolous constitutional claims, denial of Counsel and

The Appendi error.

APPEllate counsel had a duty To raise these issue on direct Appeal. Due To CAlifornias Procedural bars That the court invoke in This case my claims could NOT be Reached as STand Alone. Meaning by burden in order To gain Relief is higher. Secondly. The claims Are poTenTally meriTous. There fore, counsel performance WAS deficienT.

Coun sel deficient performance WAS prejudical because had counsel RAISED These issues on direcT appeAL, "there a reasonable Probability ThaT buT for counsels unprofessional errors, The resulT of The Proceeding would have been diffenT." 466 U.S, AT 694. MEANING I MAY have prevaiL on direcT AppeAL.

PART

Jury MIS CondUCT

Habeas proceeding

IN THE R&R report THE MAGISTRATE determine, "The CAlifornia CourT of Appeals decision DENYING PeTiTioners Appeal was NOT ConTrary To federal law". ..." After recieving THE Jury Note early in deliberation, THE Trial Judge conducted

A HEARING ON THE ISSUE and re-instructed The Jury on its duty To deliberate Collegially... THE COURT NOTES That Trial Court gave Adequate consideration to THE ISSUE, both at The Time of The original Jury Note AND in POST-TRIAL Consideration. Under AEDPA, THE COURT Concludes That There WAS NO Due process violation. SEE, Exhibit (A)

RAND R ANALYSIS

Respectfully, THE district courts findings are NOT supported by The Record. AT No Time did The Trial court give adequate consideration To THE ISSUE, both AT THE Time of The original Jury Note and POST-TRIAL.

AT No Time was There a hearing into The veracity of The Jurors Note. All The Court did WAS re-instruct The Jury. This WAS NOT a full hearing in accordance with due process, because i WAS Never given An opportunity To prove bias.

THE Courts findings are erroneous. see., Hinkson, ("A Trial courts factual finding is clearly erroneous when Although there is evidence To support iT, THE reviewing on The entire Evidence is left with A definite AND firm conviction That A MISTAKE HAS been Committed") The district court abuses its discretion when it rest its decision on clearly erroneous findings. See., U.S. v. Ressam 679 f.3d 1069

PART

MERITS ANALYSIS

Under The Sixth and FOURTEENTH Amendments, A CRIMINAL defendant Has The right To be Tried by An IMPARTIAL Jury. [See U.S. CONST Amend VI; Turner v. Louisana, 379 U.S. 466, 472-73, 85 S.CT. 546, 13 L.Ed. 2d 424 (1965)

A Jury must "decide THE case Soley on The Evidence before it", And The Trial Judge must "determine THE effect of Prejudical occurrences when they happen." See, [Smith v. Phillps, 455 U.S. 209, 217, 102 S.CT. 940, 71 L.Ed. 2d 718]

DUE Process Does NOT REQUIRE A New Trial Every-Time A Juror has been Placed in A compromising situation. See, Smith 455 U.S. 209 217. THE Supreme COURT "Has Long held THE remedy for Allegations of Juror Partiality is A HEARING." Id AT 215

A HEARING WHERE A TRIAL Judge "Should determine THE circumstances, The impact There upon The Juror and whether or NOT IT WAS Prejudical In A HEARING with all interested PARTIES Permitted To PARTICIPATE." See, SMITH 455 U.S. AT 229-30

During Trial, THE STATE Trial court was presented with a credible Allegation of Juror misconduct. ON THE second day of Jury deliberation the Jury sent A NOTE TO THE Trial Judge that read:

"ONE Juror feels Another will NOT give the defense fair consideration despite HAVING BEEN Sworn To do so. NEED ANSWER A.S.A.P."

In response TO THE Note out of presence of THE Jury THE Court informed myself and prosecutor what THE courts intention To do about The NOTE. THE Court STATED!

"I cannot interefere in The Jurys deliberation RT 1067 Ln25-26 And Heres what I'm going To Do... I'm going To Re Read PART of Jury Instruction 42" CRT Ln 1067-68

When The Jury came out All The The court did was reread Jury Instruction 42

The Jury NOT WAS Prima facie Evidence To RAISE a colorable claim, That There WAS "A reasonable Probability

That At least One Juror Could No Longer serve As an impartial Juror"

The court did nothing. It is clearly establish, "That The remedy for Allegations of Juror Partiality is A hearing in which THE defendant has The opportunity To prove bias. See SMITH, 455 U.S AT 215-18

Thus, because The Trial court conducted no hearing my rights to dueprocess was violated.

PART

PREJudice - Harmless Error review

Due process does not Tolerate "Any ground of suspicion That The administration of Justice Has been interfered with by external factors," See., Mattox, 146 U.S. 140, 149, 13 S-CT. 50, ~~53~~ 36 L-Ed. 917 (1892)

Certain Kinds of Juror Misconduct "about The matter Pending before The Jury" Are Therefore "Presumptively PreJudicial", And "The burden rest Heavily upon THE STATE To establish ... That such contact with The Juror was Harmless," Remmer, 347 U.S. at 229

THE Supreme Court has further HELd That Prejudice is more Probable where The record reflects That The Jury Could NOT Agree As To The defendants guilt. See, Parker, 385 US AT 365 (Citing As Evidence of Prejudice The fact That "The Jurors deliberated for 26 Hours indicating A difference among THEM As To Guilt.

ON The Second day of Jury deliberations THE Note was sent To The Trial Court, well beyond 26 Hours. Moreover, After The Note The deliberation continued for 3 additional days until The Jury returned mixed verdicts.

The record contains sufficient evidence To RAISE A resonable Probability That AT LEAST one Juror could No Longer Be fair and impartial

REASONS FOR GRANTING THE PETITION

I WAS given 33 YEARS AND 4 Months which A de facto life Sentence as A first offender because of The erosion of The Jury Trial guarantee.

Under California law The STATE has The Power because of Mandatory minimum Terms To over sentence A defendant based on whim.

If i'm required To Serve more Than a Quarter of life Time i cannot get back at LEAST My Conviction Should NOT be in violation of The United STATES Constitution.

We All only get ONE Life. AND The Premise of The united STATES of America IS everyone IS Treated EQUAL. Each Person is guarantee Due process. Due process has evaded me. And All i'm Requesting is for me To get my ONE SHOT where The facts and laws are Applied Correctly if The government will force me To Serve This 33 year And 4 month.

Just ONE OPPORTUNITY. Thank you for Your Time.

we only get one life and i don't want To waste mine in a prison cell.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

M. Herring

Date: 9.07.19