

No. 19-7066

ORIGINAL

Supreme Court, U.S.
FILED

NOV 14 2019

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Evaristo Toscano — PETITIONER
(Your Name)

vs.

Joe A. Lizarrage, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Evaristo Toscano#AN3063

(Your Name)

P.O.Box-409060

(Address)

Ione, Ca. 95640

(City, State, Zip Code)

n/a

(Phone Number)

1
2
3
4 A.

QUESTIONS PRESENTED FOR REVIEW.

5
6 Whether a violation of petitioner's right granted by the
7 Confrontation Clause of the United States Constitution was
harmless beyond a reasonable doubt;

8 Whether loss evidence interfered with petitioner's United
9 States Constitutional 6th amendment right to present a defense;

10 Whether admission of petitioner's redacted statement
11 violated both petitioner's rights granted by the Confrontation
12 Clause and the Due Process Clause of the United States
13 Constitution;

14 Whether petitioner's United States Constitutional right to
due process and his right to a trial by jury were violated when
15 the trial judge made prejudice comments regarding petitioner's
16 expert witness;

17 Whether petitioner was deprived of his United States
18 Constitutional right to effective assistance of trial counsel.

19
20
21 i.
22
23
24

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

TABLE OF CONTENTS

Question Presented For Review	i
Table Of Contents	ii
Table Of Authorities	iii
Petition For Writ of Certiorari	1
Opinion Below	2
Jurisdiction	2
Provision Of Law Involved	2
Statement Of The Case	3
Reason For Granting The Writ	4
Conclusion	6
Certificate Of Service	7

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

28 U.S.C. 1254 (1)

2

U.S. Const, amend. 14

6

U.S. Const, amend 5

5

U.S. Const, amend 6

6

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EVARISTO TOSCANO
petitioner

vs.

JOE A. LIZARRAGA, WARDEN
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT.

Petitioner was convicted in Alameda County Superior Court of California, of second-degree murder and three attempted murder. The trial court sentenced him to a total of 87 years to life in state prison. His appeals were rejected by all California state courts. Thereafter, his original and only federal petition for a writ of habeas corpus was denied and he was also denied a certificate of appealability by the Ninth Circuit Court of Appeals.

Petitioner, Evaristo Toscano, petitions for a writ of certiorari to review the judgment of the lower state and federal courts.

2 B.

OPINIONS BELOW.

Following a denial of his petition in the United State District Court for the Northern District of California, petitioner requested for Certificate of Appealability in the United States Court of Appeals for the Ninth Circuit. (see request for certificate of appealablility at appendix-A). The Ninth Circuit then denied petitioner's request for certificate of appealablility. The opinion and order of the Ninth Circuit is attached hereto at appendix-B. The opinion of the district court is unpublished and is attached hereto at appendix-C.

C.

JURISDICTION.

This court's jurisdiction is invoked under 28 U.S.C. section 1254 (1).

D.

PROVISION OF LAW INVOLVED.

The fourteenth amendment to the United States Constitution provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S.. Const, amend. XIV, §1.

2.

1 E.

2 STATEMENT OF THE CASE.

3 All agree that petitioner's Confrontation Clause right were
4 violated when the trial court permitted a police sergeant to
5 testify to statements made by the graffiti vandals. The parties
6 dispute whether that error was harmless beyond a reasonable
7 doubt.

8 The evidence at issue came from Sergeant Sean Fleming, who
9 testified that Navarro (one of the graffiti vandals) told him
10 that Macias (the other graffiti vandal) had sent a text message
11 to Navarro stating that it was "Risk or Rask that went over to
12 [the murder scene] and was shooting." Sergeant Fleming ~~did not~~
13 testify as to how Macias came to learn the information that
14 Macias sent in the text message to Navarro. The trial court
15 overruled a defense hearsay objection, finding that the statement
16 was not being offered for the truth but instead to show what the
17 sergeant did subsequently in his investigation.

18 The California Courts determined that the admission of
19 Fleming's testimony violated petitioner's right under the
20 Confrontation Clause because Navarro could not be located to
21 testify at trial and Navarro's statement about the text
22 conversation was testimonial in that it was given to an
23 investigating officer about a complete crime. However, the state
24 courts erroneously determined that the Confrontation Clause
violation was harmless beyond a reasonable doubt, and the lower
federal court erroneously agreed.

Failure to Preserve Evidence: The Ayeshes were interviewed
several times by the police: On June 12, 2010, just hours after
the shooting; on August 6, 2010; in February 2011; and March 2011.
In the August 6 interview, the Ayeshes [REDACTED] reported that the
older teenager, Navarro, returned to the store with a group and
shot Samier.

Sergeant Fleming, who had conducted the interviews, put the DVDs containing the August 6 interviews into the case file but failed to comply with Oakland Police Department policy that require an additional copy of DVDs of witness interviews be put in the central evidence section at the police department. During discovery, Sergeant Fleming could not locate the DVDs that he thought he placed in the case file. In addition to losing the August 6 DVDs sergeant Fleming had lost two of six photo-lineup cards he had shown to the Ayeshes.

The lost DVD clearly had exculpatory value for petitioner that was apparent and could not have been substituted. Because all the witness identified some one else as the shooter and the evidence showed that there was only one shooter.

Failure to sever: A severance issue came about in this case because the prosecution sought to introduce at trial petitioner's statement that he gave to the police, where the petitioner admitted being at the scene of the shooting and implicated Vilchis as the actual shooter. The prosecution sought admission of the statement in redacted form. Petitioner objected to the statement being admitted in redacted form and argued it either should be admitted or excluded in its entirety, or the court should grant the alternative remedy of severing his trial from that of his co-defendant. The trial court ultimately allowed the statement to be admitted in redacted form.

Trial Judge's Comments and Questions to Expert Witness: In this case, the trial judge made a brief comment regarding the defense expert witness fee and asked the expert several questions about his identification procedures that purportedly conveyed to the jury that the trial judge's disapproval of the expert.

1
2 Ineffective Assistance of Trial Counsel: During the court
3 proceeding in this case the trial counsel fail to conduct certain
4 investigation; fail to use the preliminary-examination transcripts
5 from another case to cross-examine the investigating officer;
6 Fail to file a motion for discovery to obtain the investigative
officer's personnel file; Fail to present a defense that Vilchis
was the shooter.

7 On Federal Petition. The lower federal court erroneously held
8 that the state courts conclusion regarding the issued now raised
9 was neither contrary to nor an unreasonable application of
10 clearly federal law from the United State Supreme court. Thereby,
petitioner was denied a certificate of appealablity.

11
12 F.

13 REASON FOR GRANTING THE WRIT

14 Violation of petitioner's right granted by the Confrontation
15 Clause of the United States Constitution "was" in fact prejudice
16 and did deprive petitioner of a fair trial;

17 The loss evidence interfered with petitioner's United States
18 Constitutional 6th amendment right to present a defense and did
deprive petitioner of a fair trial;

19 The admission of petitioner's redacted statement violated both
20 petitioner's right granted by the Confrontation Clause and the
21 due Process Clause of the United States Constitution, and did
deprive petitioner of a fair trial;

22 Petitioner's United States Constitutional right to due process
23 and his right to a trial by jury were violated when the trial
24 judge made prejudice comments regarding petitioner's expert

witness;

Petitioner was deprived of his United States Constitutional right to effective assistance of trial counsel.

G₁

[CONCLUSION]

Mr. Toscano respectfully requests this court to either: grant his petition for a writ of certiorari as to the questions presented, reverse the decision of the lower courts, and remand this case back to the circuit court; or (2) grant his petition for writ of certiorari as this court deems necessary.

Dated, 12/16/19

Name, Ernesto Gomez