IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

NO. _____

ERICK DAVID LOPEZ,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit's sanctioning of the admission of a vile and obscenity-laced rap poem found inside the purse of a 16-year-old girl and not written by or belonging to petitioner or any of his co-defendants in the trial conflicted with established federal and state case law and violated petitioner's Fifth and Sixth Amendment rights.

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

The petitioner, Erick David Lopez, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered July 19, 2019.

OPINION BELOW

The Court of Appeals entered an unpublished memorandum opinion on July 19, 2019. A copy of this Opinion is annexed hereto as Appendix A.[1] Three co-defendants filed petitions for rehearing en banc that were joined in by petitioner which were denied on October 2, 2019. A copy of the Order denying the petitions is annexed hereto as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit's sanctioning of the admission of a vile and obscenity-laced rap poem found inside the purse of a 16-year-old girl and not written by or belonging to petitioner or any of his co-defendants in the trial conflicted with established federal and state case law and violated petitioner's Fifth and Sixth Amendment rights.

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[1] The caption of this Opinion contains a list of all parties to the proceedings.

STATEMENT OF THE CASE

Petitioner Erick David Lopez was indicted, along with 28 other defendants, in a fifty-nine count third superseding indictment filed on September 24, 2009 in the Northern District of California. JER 427-558.[2]

Petitioner was named in eight counts of the indictment. In addition to the first three counts which alleged RICO and VICAR conspiracies in furtherance of the LaMara Salvatrucha criminal street gang, petitioner was charged in five additional counts.

Counts Five-Eight alleged violent crimes in aid of racketeering ("VICAR") against Erick Lopez. Counts Five and Six alleged that on March 29, 2008, Lopez committed the premeditated murders in aid of racketeering of Ernad Joldic and Phillip Ng, in violation of 18 U.S.C. § 1959(a)(1) and (2), based on violations of Cal. Pen. Code §§ 187, 188, 189. JER 522-23. Count Seven charged Lopez with using and carrying a firearm in furtherance of the previously charged murders in aid of racketeering of Joldic and Ng, in violation of 18 U.S.C. § 924(j). JER 523-24. Count Eight charged Lopez with use and possession of a firearm in furtherance of the crime of violence charged in Counts Five and Six. JER 524. Count Nine charged him with brandishing and discharge of a firearm in furtherance of Counts 1-3, in violation of *id.* § 924(c). *Id.*

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[2] Abbreviation key: "JER" refers to the Joint Excerpt of Record.

Petitioner was tried along with six other defendants in a jury trial before the Hon. William H. Alsup in the District Court for the Northern District of California between April 4 and August 30, 2011. The jury found petitioner guilty on counts 1-3 and 5-9. JER 3394-3403.

On November 30, 2011, the court sentenced petitioner to the custody of the Bureau of Prisons for life imprisonment on counts 1, 5, 6, 7, and 8, the sentences to run concurrently, to 120 months on count two, to thirty-six months on count three to run concurrently, and to 300 months on count nine to run consecutively. JER 877-884.

The Ninth Circuit Court of Appeals, on July 19, 2019, vacated petitioner's convictions on counts eight and nine, and affirmed his judgment of conviction on the remaining counts. Appendix A. The court denied his petition for rehearing en banc on October 2, 2019. Appendix B.

REASON FOR GRANTING THE WRIT

THE RULING OF THE NINTH CIRCUIT SANCTIONING THE ADMISSION INTO EVIDENCE OF AN INFLAMMATORY RAP POEM FOUND IN A JOURNAL INSIDE THE PURSE OF A 16-YEAR-OLD GIRL AND NOT WRITTEN BY OR BELONGING TO ANY DEFENDANT IN THE TRIAL CONFLICTED WITH ESTABLISHED LAW AND VIOLATED PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS

A. Factual Circumstances.

During petitioner's trial, the district court, over defense objections, admitted into evidence and allowed the prosecution to read to the jury a rap poem found in a journal inside the purse of a 16-year-old girl, Veronica Hernandez, who was not named as a conspirator nor charged in the indictment. JER 1448-51.

The poem was read into the record at trial by San Francisco Police Sergeant Scott Lau who described it as, "it appears to be a poem or a rhyme or a -- a rap rhyme." JER 1469. Sergeant Lau read the poem with his own editorial comments, as follows:

"113 Ways to Take a Busterz Life."

A "Buster" is a derogatory term for Norteños.

"13,000 more for a reason why.

"Murder killer murder.

"13 stabs make it rain blood.

"13 more make 'em choke till they die.

"Bum dat dirty tampon they call a rag.

"Bring the fire out of my eyes and to a busters grave.

"Eat on the ashes and stomp to da gates of hell.

"Puto you ain't knowin?"

That's "bitch" you ain't knowin.

"You shoulda done your homework.

"Bangin that red is another word for suicide.

"Grumpy loca puto you chapas know the name
Westborough's craziest.

"Beat your brain out your skull with your own
fuckin cuete."

"Cuete" is a name for a gun.

"Grab your fuckin hand.
"Move you take your own life."

I think that first word is "piss." I'm not a hundred percent.

Says:

"Piss on that bloody tampon they call a rag.
"Stuff it down a busters throat."

"Buster" is a derogatory term for Norteño.

"And make them taste that ugly color they love so much.
"Run their asses over.
"Flip it in reverse and hit 'em again.
"187 a buster freestyle with nothing but a blade.
"Behind bars put you chapetes to shame.

"Chapetes" is a derogatory term for Norteños.

"Have you drinking piss right off the ground.
"The south side will never die.
"Taking over worldwide.
"Murdress ways won't stop till every busters casket drops.
"I'll see you" --

"Chaputos" is a two-prong insult. "Chapete" is a derogatory term for Norteños. And she links it with "Puto," which is "bitch" in Spanish.

"I'll see you chaputos in hell where I'll kill you all over again.
"113 ways to take a busters life.
"13,000 more for a reason why."

JER 1469-71, 3797-801.

In its opinion, the Ninth Circuit ruled that the district court did not abuse its discretion by admitting the poem. Appendix A, p. 5. The Court found that the district court "appropriately exercised its discretion pursuant to Rule 403," and ruled that the poem posed "no risk of unfair prejudice to" petitioner. *Id.* at 6.

B. The Decision Upholding the Trial Court's Admission of the Poem Conflicts With Decisions of Federal and State Appellate Courts Including the Ninth Circuit.

The ruling of the appellate court below unreasonably minimized the significance of the vile poem and conflicts with virtually all of the opinions of federal and state appellate courts which have recognized that the admission of writings, such as this one, that reflect someone's political or social views, even those advocating violent criminal activity, should not be admitted as evidence of a defendant's commission of a crime.[3]

[3] Of note, the issue presented herein and arguments raised are essentially the same issue and arguments advanced by Petitioner Jonathan Cruz-Ramirez (co-defendant to Erick David Lopez) in his Petition for Writ of Certiorari, submitted December 23, 2019.

In the closely analogous case of *United States v. Gamory*, 635 F.3d 480 (11th Cir.), cert, denied, 565 U.S. 1080 (2011), the trial court admitted a rap video which was performed by someone other than defendant-appellant Gamory. The court of appeal ruled that it was error under Fed.R.Evid. 403 to play the rap video to the jury even though the video could be construed to discuss Gamory. The Eleventh Circuit wrote:

> [T]he substance of the rap video was heavily prejudicial. The lyrics presented a substantial danger of unfair prejudice because they contained violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle. At the same time, the video was not clearly probative of Gamory's guilt. We cannot ignore the simple fact that Gamory was not in the video. Neither was there any evidence that Gamory authored the lyrics or that the views and values reflected in the video were, in fact, adopted or shared by Gamory.
>
> *Id.* at 493.

See also *State v. Skinner*, 218 N.J. 496, 95 A.3d 236 (2014); *Hannah v. State*, 420 Md. 339; 23 A.3d 192 (2011).

In *Skinner*, the New Jersey Supreme Court found that, in the absence of any "strong nexus" to the specific charged crimes, the admission of such evidence flouted the traditional prohibition on criminal propensity and had the effect of penalizing artistic expression and free speech. *Skinner*, *supra*, 95 A.3d at 250. The court reasoned:

> [T]he violent, profane, and disturbing rap lyrics authored by defendant constituted highly prejudicial evidence against him for little or no probative value as to any motive or intent behind the attempted murder offense with which he was charged. The admission of appellant's inflammatory rap verses, a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture, risked poisoning the jury against defendant. Fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings about bad acts, wrongful acts, or crimes, are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged, and the probative value of that evidence outweighs its apparent prejudicial impact.
>
> Id-at 251.

And, in *Skinner* the rap lyrics were the defendant's. Here, the poem was not authored by petitioner or any of his co-defendants.

The opinion below also conflicts with a series of Ninth Circuit decisions. See, e.g., *United States v. Waters*, 627 F.3d 345, 354-57 (9th Cir. 2010); *United States v. Curtin*, 489 F.3d 935, 950-56 (9th Cir. 2007) (en banc); *United States v. Ellis*, 147 F.3d 1131,1135 (9th Cir. 1998); *United States v. McCrea*, 583 F.2d 1083,1086 (9th Cir. 1978). See also *Boyd v. City and County of San Francisco*, 576 F.3d 938, 949 (9th Cir. 2009).

And, specifically, in cases in which appellate courts have found literature or videos admissible -- such as *United States v. Giese*, 597 F.2d 1170 (9th Cir.), cert, denied, 444 U.S. 979 (1979), and *United States v. Pierce*, 785 F.3d 832, 840-41 (2d Cir.), cert, denied, 136 S.Ct. 172 (2015) -- the document in question was authored by or found in the possession of die defendant. Here, the rap poem was found in the

purse of young Ms. Hernandez and, as discussed supra, there was no evidence that petitioner or any of the other defendants had seen it or had been aware of its existence, let alone endorsed its contents.

The poem admitted and read to the jury in its entirety herein was not written or possessed by (1) any of the trial defendants, (2) any of the 29 defendants named in the indictment, (3) a named conspirator, or (4) a member of the MS-13 gang. Second, the poem had no nexus to the specific crimes charged against the defendants. While it generally discusses stabbings, guns, and murder -- all crimes that were alleged against the defendants — the poem does not refer to any of the stabbings, shootings or homicides alleged in this case. See *Hannah*, *supra*, 420 Md. 339; *Skinner*, *supra*, 95 A.3d at 250. The only similarity was the poem's mention of stabbing and the fact that stabbing assaults occurred. The lack of a particularized nexus shows that the rap was admitted as propensity evidence, to show the violent character of the associates of MS-13. Indeed, the government essentially conceded this by contending that the poem was admissible because it glorified violence, as a "vile and disgusting verbal act of rumination ..." JER 1454-55. As such, it should have been excluded, not admitted, because its probative value was not the type of probative value that is admissible: the rap embodied propensity evidence.

The Ninth Circuit wrote in *United States v. Ellis*, *supra*, that the book, "The Anarchist Cookbook," found in the appellant's possession was likely to elicit a verdict "based on emotion rather than the evidence presented." 147 F.3d at 1136. This is exactly the situation here. It is more likely that the jurors would find all of

the defendants guilty of conspiracy, murder and the assaults charged in the indictment because of their emotional reaction to the abhorrent content of the rap poem admitted as to all of them without any limiting instruction.

C. The Admission of the Vile Poem Was Prejudicial And Was Not Harmless.

Contrary to the conclusion of the Ninth Circuit, the admission of the rap poem was not harmless as to petitioner Lopez or any of his codefendants. A more vile and offensive document cannot be imagined. And, its prejudicial impact was heightened because it was read to the jury by a San Francisco police inspector who offered his own personal interpretations of some of the lyrics' meanings. Providing this rap to the jury early in the case created an inflammatory foundation upon which the government built the rest of its case. The language of the rap poem is so chilling that its effect is analogous to showing child pornography. The poem is so inflammatory that it necessarily affected the verdict. The jury could not be expected to have placed its minimal probative value in proper perspective when evaluating the rest of the evidence, which was largely circumstantial or presented by cooperators.

The lack of harmless error is further demonstrated by the prosecutor's reference to the poem in his closing argument. JER3386-A. This Court has recognized that "the likely damage is best understood by taking the word of the prosecutor." *Kyles v. Whitley*, 514 U.S. 419,444 (1995). The government used the erroneously admitted poem to prove that petitioner and his co-defendants committed particular crimes of violence , despite the fact that the poem lacked a

connection to any of them.

In summary, this Court should grant this petition because the admission of "113 Ways To Take A Busterz Life" was immensely prejudicial, minimally probative and not harmless. Its admission conflicts with the previously-cited opinions of federal and state appellate courts.

CONCLUSION

For the foregoing reasons, petitioner Erick David Lopez respectfully suggests a writ of certiorari should issue in this case.

DATED: December 24, 2019.

Respectfully submitted,

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