

No. \_\_\_\_\_

19-7877

IN THE  
SUPREME COURT OF THE UNITED STATES

TYRONE ROGERS — PETITIONER  
(Your Name)

vs.

IKUTA, "et al." — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FILED  
JAN 19 2019  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

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

PETITION FOR WRIT OF CERTIORARI

TYRONE ROGERS

(Your Name)

California Men's Colony, PO BOX 8103

(Address)

San Luis Obispo, CA 93409-8103

(City, State, Zip Code)

(Phone Number)

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QUESTION(S) PRESENTED

Has the U.S. Ninth Court of appeals entered a decision in conflict with the decisions of other U.S. court of appeals on the important subject of "sentencing error" and "procedural defaults?"

Is it a public issue when a U.S. court of appeals has decides an important question of law in conflict with this Court by allowing State courts to disproportionately allow expressed and implied sexual elements in trial to find defendant guilty of a crime that is non sexual exclusive?

Has the U.S. Ninth Court of appeals departed from the accepted and usual course of judicial proceedings: trial court failure to hear a motion for new trial once appointed a conflict caunsel?

Has the U.S. Ninth Court of appeals entered a decision in conflict with the decisions of other U.S. court of appeals on the important subject of "enhanced sentence" and "in-custody" and conflicts with relevant decisions of this Court?

Is the U.S. Ninth Court of appeals in conflict with the decisions of other U.S. court of appeals on the important subject of ineffective assistant of counsel during critical stage of prosecution when motioning for new trial?

## LIST OF PARTIES

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

Ikuta and N.R. Smith (Ninth Circuit Judges)  
Michael M. Anello (Southern District Judge)  
Bernard G. Skomal (U.S. magistrate judge)

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### OTHER

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**

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,  
 is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 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 \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 19, 2019.

- No petition for rehearing was timely filed in my case.
- A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Sept. 27, 2019, and a copy of the order denying rehearing appears at Appendix B.
- 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. § 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

Fourteenth Amendment- the right to due process and equal protection of the law.

Sixth Amendment- the right to have counsel at all critical stages of the criminal process.

Fifth Amendment- the right to an effective counsel.

18 USC 924(e)- due process violated when elements or factors are extremely disproportionate to create new offenses that requires separate punishment.

18 U.S.C.S. 3553- to a prisoner, this prospect of additional time behind bars is not some theoretical or mathematical concept. Any amount of actual jail time is significant and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarcerated.

28 USCA 404- to be probative of something other than criminal propensity, prior bad acts evidence must (1) prove material element of crime currently charged, (2) show similarity between past and charged conduct, (3) be based on sufficient evidence, and (4) not be too remote in time.

28 USCS 2254(d)(1)- resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States,

Federal Rules of Criminal Procedure 52(b)-Plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

Petitioner is in custody pursuant to his 2004 California state case No. SCD176027 of rape by a foreign object of an unconscious victim, California Penal Code 289(D), and attempted rape of an unconscious person California P.C. 261(A)(4), with his live-in exgirlfriend, in the San Diego superior court without a jury. His current case is enhanced by his prior 1994 case No. SCD106382 of two burglaries CA P.C. 459, while intoxicated and high off weed and with nothing taken from both apartments.

On January 9, 2004, during in-limine hearing, current case, he challenged the state courts admission that he was convicted in 1994 of intent to commit sexual assault. On June 26, 2015, Johnson v. United States, No. 13-7120 came out with statue 18 USC 924(e). The Johnson case referred to state cases and one in particular concerning James v. United States, 550 U.S. 192 (2007), in-which showed a violation of due process when elements or factors are extremely disproportionate to create new offenses that require separate punishment. Additionally, in United States v. Osiemi, 980 F.2d 344 (5th Cir. 1993), equally shown is the same violation. On December 20, 1994, Petitioner was convicted of burglary. His public defender orally motioned for a new trial because of her ineffectiveness.

On January 19, 1995, the sentencing court assigned him a conflict counsel at a preappeal motion for a new trial, a critical stage of prosecution, to investigate a motion for new trial; he was not in court (Exhibit A.) Marshall v. Rodgers, 569 U.S. 58 (2013); 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 412 (2000); Knowles v. Mirzayance, 556 U.S. 111, 122(2009.) On February 23, 1995, and April 6, 1995, he received no continuance during the absent of his conflict counsel at a critical stage of

STATEMENT OF THE CASE

prosecution, to investigate why Petitioner's public defender verbally proclaimed herself ineffective (Id). Additionally, on April 6, 1995, the sentencing court sentenced him without hearing why his public defender was ineffective (Id) and (Exhibit A.) See Rosales-Mireles v. United States, 585 US \_\_, [No. 16-9493] (2018), quoting United States v. Olano.

On January 25, 2016, the 2004 sentencing court denied to hear on the merits Petitioner's claims of "structural errors" within his 1994 case when the sentencing court failed to hear a motion for new trial and burglary disproportionate with express and implied sexual elements according to Johnson v. United States, (13-7120) (2015). (Appendix F).

On April 1, 2016, the State appellate court summary denied to hear the merits of his claims stating: untimely, repetitive, successive, and an abuse of the writ (Appendix E.) On May 18, 2016, the California supreme court silently denied his petition. United States v. Davila, 569 U.S. 597 (2013). On August 10, 2018, the U.S. magistrate judge recommended the petition dismissed with prejudice (Appendix D.) See Rosales-Mireles, *supra*; United States v. Osiem, 980 F.2d 344 (5th Cir. 1993). Questions 1-5 address this Court.

The United States magistrate judge on April 1, 2016, failed to mention that Petitioner had, in 2005, filed a direct appeal in the California appellate court concerning two 5 year enhancements. When the case was remanded (People v. Rogers, D044637, 9/9/05) the trial court failed to strike a strike due to California spirit of the law. People v. Superior Court (Romero) (1996) 13 Cal.4th 497, 528. There are many structural errors associated in his 1994 case in which to have his trial attorney admit on record that she was ineffective as she motion for a new trial. United States v. Marcus,

STATEMENT OF THE CASE

560 U.S. 258 (2010). The U.S. magistrate judge also failed to mention that the 1994 case is so disturbed with errors, the government has tampered with the sentencing transcript to illegally show that Petitioner's conflict counsel was present on April 6, 1995, (Exhibit A) though the minute orders clearly demonstrates him as absent. **28 USCS 2254 (d)(1); Fourteenth Amendment; Fifth Amendment; Sixth Amendment.** Gathers v. United States, No. 09-CO-422 (D.C. Ct App. 2014).

On September 19, 2018, (Appendix C) the United States district court dismissed Petitioner's petition with prejudice and denied certificate of appealability. On July 19, 2019, (Appended A) the U.S. district court denied the petition. On September 27, 2019, (Appendix B) the United States appellate court denied motion for consideration enbanc and denied appointment of counsel, 18 U.S.C.S. 3553(a); 28 USCA 404; FRCP. 52(b).

## REASONS FOR GRANTING THE PETITION

This Court has the authority to insure that fundamental fairness remain the central concern of the writ of habeas corpus. In addition, Petitioners with noncapital and unpublished cases are many and are not heard when their claims of "sentencing error" and "state courts' failure to hear a motion for a new trial" occur. Also to provide an even balance between the eastern and western United States appellate courts as concerning state prisoners' unclear claim of "sentencing errors" and "state courts' failure to hear a motion for new trial."

Lastly, this Court's review will send a strong message to all lower courts to stop waisting tax payers money with erroneous rulings that directly and indirectly increases the cost of incarceration. As in Petitioner's case, excess of public money has been spent when it is clearly evident that he suffered from the 1994 sentencing court's failure to hear his motion for a new trial, because his appointed conflict counsel was not in court during three sentencing sessions. Tax payers' money has been unnecessarily spent when it is also clearly shown that Petitioner's trial counsel was ineffective because she motion for a new trial on her behalf. The reasons for her ineffectiveness never surfaced and though I tried many times to present her ineffectiveness in many habeas corpus claims, California's procedural bars estopped them. The Fifth and Eleventh Circuit courts seem to rule on the above issues correctly.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Tyron Roper

Date: 12/18/2019