

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD YARBROUGH, JR. — PETITIONER
(Your Name)

vs.

J. SULLIVAN, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

EDWARD YARBROUGH, JR.
(Your Name)

P.O. Box 409020
(Address)

Ione, CA 95640
(City, State, Zip Code)

901-262-2023
(Phone Number)

QUESTION(S) PRESENTED

1. Whether a prosecutor's uninvited inflammatory remarks made in summation, absent a timely/explicit curative instruction, so infected the trial with unfairness as to constitute plain error under Rule 52(b) of the F.R.C.P., and thus infringed a specific provision of the Bill of Rights?
-

LIST OF PARTIES

- ☒ 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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TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION.....	10

INDEX TO APPENDICES

APPENDIX A: Decision of United States Court of Appeals (for the Ninth Circuit) denying request for C.O.A.....	
APPENDIX B: Decision of United States District Court (Central District of CA); Findings and Recommendations of United States Magistrate Judge	
APPENDIX C: Order of United States Court of Appeals (for the Ninth Cir) denying timely filed petition for rehearing/reconsideration..	
APPENDIX D: Order of State Supreme Court of California denying petition without comment.....	
APPENDIX E	
APPENDIX F	

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Berger v. U.S. 295 U.S. 78, 89 (1935)	8
Boyde v. California 494 U.S. 370, 384 (1990)	6
Bruton v. U.S. 391 U.S. 123 (1968)	7
Darden v. Wainwright 477 U.S. 168, 106 S.Ct. 2464 (1986)	7
Donnelly v. DeChristoforo 416 U.S. 637, 94 S.Ct. 1868 (1974)	7, 9
Estelle v. McGuire 502 U.S. 62, 67-68 (1991) (Id. at 75 n.5)	9
Farrar v. Thompson 116 Fed.Appx. 811, 813 (9th Cir. 2004)	6
Freeman v. Lane 962 F.2d 1252 (CA7-1992)	9
Hart v. Gomez 174 F.3d 1067 (9th Cir. 1999)	8
 STATUTES AND RULES	
28 U.S.C. § 2253(c)(2)	3
28 U.S.C. § 2254(d)	3
28 U.S.C. § 2254(d)(1)	3
Cal. Pen. Code § 136(a)(2)	4
Cal. Pen. Code § 245(a)(4)	4
Cal. Pen. Code § 273.5(a)	4
Cal. Pen. Code § 1320.5	4
Fed. Rule of Crim. Proc. 52(b)	passim
 OTHER	
LexisNexis Headnotes (Criminal Law & Procedure)	7
U.S. Supreme Court Digest, Lawyer's Edition	9

TABLE OF AUTHORITIES CITED (CONT'D)

CASES	PAGE NUMBER
Hall v. Whitley 935 F.2d 164,166 (9th Cir.1991)	6
Harris v. Wood 64 F.3d 1432,1438 (9th Cir.1992)	8
Holley v. Yarborough 568 F.3d 1091,1101 (9th Cir. 2009)	9
In re Winship 397 U.S. 358 (1970)	9
Jackson v. Virginia 443 U.S. 307 (1979)	9
Miller v. Keeney 882 F.2d 1428,1434 (9th Cir. 1989)	9
Murray v. Carrier 477 U.S. 496 (1986)	8
Nixon v. Newsome 888 F.2d 112 (CA11-1989)	8
People v. Crimmins 36 N.Y. 2d 230,238,326 N.E.2d 787 (1975)	9
Reynoso v. Giurbino 462 F.3d 1099,1112 (9th Cir. 2006)	8
Silva v. Woodford 279 F.3d 825 (CA9-2002)	8
Sizemore v. Fletcher 921 F.2d 667 (6th Cir.1990)	7
Smith v. Bennett 365 U.S. 708,712,81 S.Ct 895 (1961)	9
Smith v. Murray 477 U.S. 527 (1985)	9
Smith v. Robbins 528 U.S. 259,285 (2000)	9
State v. Copening 101 Wis. 2d 700,303 N.W. 2d 821 (1981)	8
Strickland v. Washington 466 U.S. 668 (1984)	8
U.S. v. Delgado 631 F.3d 685 (CA5-2011)	7
U.S. v. Foster 982 F.2d 551 (D.C. Cir. 1993)	6
U.S. v. Friedman 909 F.2d 705 (2d Cir.1990)	7
U.S. v. Loud Hawk 628 F.2d 1139 (9th Cir. 1979)	5
U.S. v. Sanchez, Jr. 659 F.3d 1252 (9th Cir. 2011)	6,7
U.S. v. Weatherspoon 410 F.3d 1142 (9th Cir. 2005)	7
U.S. v. Young 470 U.S.1 (1985)	7
Wiggins v. Smith 539 U.S. 510 (2003)	8
Zapata v. Vasquez 788 F.3d 1106 (9th Cir. 2015)	7

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 B 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 D 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 December 20, 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: January 28, 2020, and a copy of the order denying rehearing appears at Appendix C.

☐ 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 Dec 20, 2017. A copy of that decision appears at Appendix D.

☐ 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

The right of a state prisoner to seek federal habeas corpus relief is guaranteed in 28 U.S.C. § 2254.

The standard for relief under the "AEDPA" is set forth in 28 U.S.C. § 2254 (d)(1).

In *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003), this Court clarified the standards for issuance of a "COA".

In 28 U.S.C. § 2253 (c)(2), which requires a petitioner to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, and that the issues presented were adequate to deserve encouragement to proceed further. *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 2569, 159 L.Ed.2d 384 (2004) quoting *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct 1595, 1604, 146 L.Ed.2d 542 (2000).

Applying the standard for granting a COA, this court has acknowledged that the standard is "relatively low." *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002) [citing *Slack*, at 483]. Moreover, doubts about the propriety of a COA must be resolved in a habeas petitioner's favor. *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (en banc)

U.S. Const., Fifth Amendment passim.
U.S. Const., Sixth Amendment passim.
U.S. Const., Fourteenth Amendment passim.
Bill of Rights 9

STATEMENT OF THE CASE

Petitioner was convicted by a California jury in a Los Angeles County California State court of Count 1: Corporal injury to cohabitant (Cal. Pen. Code § 273.5(a)); Count 2: Assault by means likely to produce great bodily injury (Cal. Pen. Code § 245(a)(4)); Count 3: Attempting to dissuade a witness (Cal. Pen. Code § 136.1(a)(2)); Count 4: Failure to appear while on bail (Cal. Pen. Code § 1320.5); Count 5: Corporal injury to cohabitant (Cal. Pen. Code § 273.5(a)); Count 6: Corporal injury to cohabitant (Cal. Pen. Code § 273.5(a)). Petitioner admitted to having a prior strike conviction. On September 4, 2014, the court sentenced petitioner to a total of 29 years (including enhancements) in state prison.

REASONS FOR GRANTING THE PETITION

(1) A DISTINCT RESOLUTION FOR DEBATE OF REMEDIAL INSTRUCTIONS:

The granting of this writ may resolve confusion yet tarrying amongst lower courts / state Attorney Generals nationwide ... on the issue of curative instruction(s) sufficiency [the generalized standard or the more specific / forceful]; and the timing they're to be given to mitigate the harm of prosecutor's egregious remarks / conduct. (see #3)

(2) THE NATIONAL CALL FOR REFORMATION OF THE CRIMINAL JUSTICE SYSTEM:

A. This broad summon from the public, politicians, celebrities, judges, the current / past U.S. presidents and more has vastly stemmed from serious prosecutorial misconduct in the last few decades undermining countless fair trials across the U.S. ["The violation of the obligation to disclose favorable evidence to defendants accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by courts or disciplinary bodies; and media scrutiny reveals investigative journalists for several major newspapers / tv networks have documented numerous instances of p. misconduct and provided further evidence of the prosecutor's abuse of power / dominance in American Criminal law."] - West Group, *Prosecutorial Misconduct* by Bennett L. Gershman (emphasis added)

B. Former U.S.S.C. Justice Kennedy's concurring opinion in *U.S. v. Loud Hawk* - found that "the significant interest is to avoid the impairment of judicial integrity that would occur if the prosecution were allowed to manipulate court processes ... and that protective rulings or sanctions might be necessary to insure a fair trial in a specific case / deter future violations."

C. Former California Trial Court Judge Jim Gray, when asked by Coast to Coast AM Radio host George Norrie (Feb 2020) what he'd do to help fix and better the criminal justice system, Gray replied, "I would start by taking away some of the power of the prosecutors." (JudgeJimGray.com)

REASONS FOR GRANTING THE PETITION

(3) THE FOLLOWING FACTORS WERE PRESENT IN THIS CASE:

- A. The prosecutor's exhortation to the jury in closing arguments -
"I ask you to do the right thing.....because he's going to go back and do the same thing to A. Hernandez." (Petitioner's girlfriend during trial whom testified that Petitioner was never violent with her and that all was fine.)
- B. Defense counsel objected as an improper argument; the trial court sustained; but gave no instruction to disregard the remark; only general instructions were given once before and once at the very end of trial.
- C. The A. General of CA argued that if the remark is deemed improper, it was corrected by a sustained objection / general instructions as he cites to *Farrar v. Thompson / Hall v. Whitley* - where standard instructions were deemed sufficient.
- D. The U.S. Magistrate Judge declared "the Court assumes (without deciding) that the prosecutor acted improperly with the suggestion, but he maintained that the trial judge took proper action to remediate the impact of the remark by sustaining objection / general instructions given as he cites to *Boyd* 494 U.S. at 384.
- E. However, these arguments / cases conflict with many other cases such as *U.S. v. Foster / U.S. v. Kerr* (where standard / generalized instructions were found insufficient where p.misconduct was serious and required more specific and forceful instructions.)
- F. Moreover, in direct conflict with *U.S. v. Sanchez, Jr.* - where the government also cites to numerous cases for the proposition that a general jury instruction can neutralize the effect of a prosecutor's misstatements, but the 9th Circuit Court responded, "we have held that curative instructions fail to neutralize

REASONS FOR GRANTING THE PETITION

- F. (cont'd)...the harm of improper statements by a prosecutor when they do not mention the specific statements of the prosecutor, and are not immediately given after the damage is done." *Weatherspoon*, 410 F.3d at 1151 quoting *U.S. v. Kerr*. All cases of which petitioner referred to U.S. Court of Appeals in request for COA /further briefing.
- G. The prosecutor in the instant case (as also in *Sanchez, Jr's*) urged the jurors to convict for reasons irrelevant to guilt or innocence.

LEXISNEXIS HEADNOTES - Criminal Law & Procedure > Trial > Closing Arguments > Inflammatory Statements > Prohibitions Against Improper Statements

"Prosecutors may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil orders, or deter future law breaking. The evil lurking in such appeals from prosecutors is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Further, it is improper to make statements designed to appeal to the passions, fears, and vulnerabilities of the jury."

- (4) Petitioner maintains that the egregious remark could not be cured even if given a proper instruction. *Bruton v. U.S.* (courts recognize some errors cannot be cured)

A. The remark carried multiple prejudicial factors within: It was not an invited response. *Darden v. Wainwright*; *U.S. v. Young*; No proper instruction given. *Sizemore v. Fletcher* (the absence of any instruction a significant factor in weighing impact of error); *U.S. v. Friedman* (no emphatic curative instruction by trial judge); *Donnelly v. Dechristoforo* (non-prejudicial p.misconduct cases have pointed to the use of a specific limiting instruction); It was a form of personal opinion. *U.S. v. Delgado*; It came after jury heard all the evidence in summation. *Zapata v. Vasquez* (Improper material at the end of trial magnifies its prejudicial effect because its freshest in the mind of jury when it retires to deliberate.)

REASONS FOR GRANTING THE PETITION

- B. The State's case against Petitioner was not strong and she likely engaged in misconduct to strengthen a weak case. *State v. Copening*
- C. Petitioner's trial/appellate counsel noted the weakness of the prosecutor's case. (see attachment 2)
- D. The Prosecutor's own declaration in summation: "Each incident testified to (from the two chief witnesses) would be difficult to prove on its own." Also multiple objections sustained for prosecutor coaching/leading chief witnesses; uncredible motives; inconsistencies; evidence of collusion amongst both chief witnesses; and admitted to falsehood from both witnesses.
- E. There's an overwhelming probability that the improper remark influenced the jury and was devastating to petitioner at trial. *Berger v. U.S.*

OTHER FACTORS PRESENT IN THIS CASE

- (5) Petitioner maintains that his trial counsel rendered performance that
A. was constitutionally defective for the failure to follow up on and argue vital point to jury (after a vehement request by counsel and granted the opportunity to do so in closing arguments) where the chief witness labels the injury an "accident" in a jail phone conversation with the petitioner... (consistent with petitioner's testimony that the witness led petitioner to believe he threw one accidental blow in the midst of his sleep only to cover up that another male committed the crime before petitioner returned to the residence late that night)... though the word "unintelligible" was typed on the transcript to jury instead of "accident" by the prosecutor's team. *Murray v. Carrier* (a single critical error can support claim of IAC); *Nixon v. Newsome*; *Strickland v. Washington*
- B. Petitioner's trial counsel failed to investigate and introduce evidence of the fact the chief witness had ex-husband arrested for D. Violence and could've been the culprit of the crime. *Wiggins v. Smith*; *Reynoso v. Giurbino*; *Hart v. Gomez*
- C. Petitioner's trial counsel failed to discover/use missing phone conversation central to defense which corroborated petitioner's statements - the only call out of eight not given any transcript/nor was the call played. *Silva v. Woodford*; *Harris v. Wood* (Multiple errors from trial counsel had cumulative effect)

REASONS FOR GRANTING THE PETITION

- (6) A. Petitioner's appellate counsel's choice of issues for appeal fell below an objective standard of reasonableness. Strickland; for failure to raise prosecutorial misconduct on direct appeal. Freeman v. Lane; failure to weed out weaker issues and focus on those more likely to prevail. Miller v. Keeney; Smith v. Murray; Smith v. Robbins
- B. The insufficiency of the evidence in Count 5, could likely clear the tall hurdle of "Jackson review." Jackson v. Virginia; In re Winship
- (7) The granting of this writ could also bring about the highly anticipated opinion from This Court on whether a state law would violated the Due Process Clause if it permitted use of prior crimes evidence to show propensity to commit a charged crime. A breaking of new constitutional ground / law announced beneficial to litigants nationwide.. As the prosecutor in the instant case admitted to relying on uncharged acts / allegations. Estelle v. McGuire; Holley v. Yarbrough
- (8) Petitioner maintains the significance in which a fundamental miscarriage of justice has occurred (Counts 1,2,5,6); and the power of the mere accusation of such offenses is often sufficient to convict before trial in modern society. IN THE INSTANT CASE - A female prospective juror declared on record, "I will not be able to judge the defendant fairly due to the alleged offense alone"... which brought instant depression and the fear of injustice leading the Petitioner to "fail to re-appear" after the noon trial break. A promising career on hold in the Hollywood film / writing industry - S.A.G. #00700485
- (9) THUS, THE PETITIONER RESPECTFULLY REQUESTS THE GRANTING OF THE PETITION:
In the interest of Justice, by the Great Writ / highest safeguard of liberty - Smith v. Bennett, through the Cardinal right to a fair trial, highly noted in People v. Crimmins - where the N.Y. Court of Appeals declared this right must be assured to defendant and the public at large / when such misconduct of a prosecutor or inadequacy of defense counsel occurs, that the reviewing court must reverse conviction and grant new trial whether the errors contributed to the conviction or not.
- Though Petitioner maintains the errors in the instant case, heavily contributed to the wrongful conviction. (when specific guarantees of the Bill of Rights are involved, the U.S.S.C. takes special care to assure that p. misconduct in no way impermissibly infringes them - Donnelly v. Dechristoforo: Headnotes - U.S.S.C. Digest / Const. Law § 101 - Bill of Rights - P. Conduct)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Edward Yarbrough Jr.

Date: April 16, 2020