No. _____

IN THE

Supreme Court of the United States

JORGE ARMANDO HERRERA SALGUERO,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has repeatedly held that to receive a certificate of appealability ("COA"), a habeas petitioner need only show that "'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

At Petitioner's trial, Cristina Zavala, a babysitter for his five-year old daughter, testified that Petitioner admitted to her that he sexually assaulted his daughter but that she did not tell the police because a school teacher she looked to for advice told her not to, that the police don't do anything about such claims. Zavala provided the only evidence that Petitioner had allegedly admitted to abusing his daughter. Petitioner's attorney argued in closing that "[w]hat this trial is about is Cristina Zavala's credibility." In her rebuttal closing argument, the prosecutor improperly vouched for this pivotal government witness, stating, "I believe that what Cristina Zavala told us is absolutely the truth."

Is the Ninth Circuit's denial of a COA on Salguero's prosecutorial misconduct claim contrary to this Court's jurisprudence?

PARTIES AND LIST OF PRIOR PROCEEDINGS

The parties to this proceeding are Petitioner Jorge Armando Herrera Salguero and Respondent the People of the State of California; Craig Koenig is the Acting Warden of the Correctional Training Facility in Soledad, California, where Petitioner is incarcerated pursuant to the judgment he is challenging. The California Attorney General represents Respondent.

Salguero was convicted in the Riverside County Superior Court in *People v. Jorge Armando Herrera Salguero*, case no. SWF120846, Judge Michael J. Rushton, presiding, in 2014. Judgment was entered against Salguero on December 12, 2014. Reporter's transcript of trial, district court docket 33, lodgment 1, at 900, 908.

The California Court of Appeal affirmed the judgment on appeal in *People v. Salguero*, case no. E062563, on January 7, 2016 in an unpublished opinion. Petitioner's Appendix attached hereto ("Pet. App.") 32, 57-59. On December 19, 2016, Salguero timely filed a *pro se* habeas corpus petition in *Jorge Armando Herrera Salguero v. Craig Koenig, Warden*, C.D. Cal. case no. EDCV 17-0076-SJO (AFM). Pet. App. 32; district court docket 1. On September 2, 2017, United States Magistrate Judge Alexander F. MacKinnon appointed counsel for Petitioner. District court docket 28. On December 21, 2017, the magistrate judge stayed the federal case pending the exhaustion of state remedies. District court docket 38. On January 29, 2018, Salguero filed

a habeas corpus petition in *In re Jorge Armando Herrera Salguero on Habeas Corpus*, Cal. Supreme Court case no. S246807. District court docket 42, lodgments 6, 7. The court summarily denied the petition on June 27, 2018. Pet App. 56.

On February 8, 2019, the magistrate judge filed a report recommending that Salguero's habeas corpus petition be denied and the action dismissed with prejudice. Pet. App. 28-55. On April 1, 2019, United States District Judge S. James Otero accepted the recommendation, denied the petition, dismissed the action with prejudice, and denied a COA. Pet. App. 24-27. Judgment was entered against Salguero on April 2, 2019. District court docket 63.

Petitioner timely filed a notice of appeal on April 26, 2019. District court docket 65. He filed a motion for a COA on May 31, 2019 in *Jorge Armando Herrera Salguero v. Craig Koenig*, Ninth Circuit case no. 19-55480. Ninth Circuit docket 2. The court, per Circuit Judges John B. Owens and Mark J. Bennett, denied the motion on April 17, 2020, and recaptioned the case *Jorge Armando Herrera Salguero v. People of the State of California.* Pet. App. 23.

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

Jorge Armando Herrera Salguero petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals denying his request for a COA.

OPINIONS BELOW

The Ninth Circuit's order denying Salguero's request for a COA is unreported. Pet. App.23. The district court's judgment and its orders accepting the magistrate judge's report and recommendation, dismissing the habeas action against Salguero with prejudice, and denying a COA are unreported. Pet. App. 24-27.

The opinion by the California Court of Appeal affirming Salguero's judgment on appeal is unreported. Pet. App. 57-59. The order by the California Supreme Court denying Salguero's habeas corpus petition is unreported. Pet. App. 56.

JURISDICTION

The Ninth Circuit's order denying Salguero's COA motion was filed and entered on April 17, 2020. Pet. App. 23; Ninth Circuit docket 3. The district

court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.1 and the Court's order of March 19, 2020 extending the filing deadline for certiorari petitions by another 60 days because of Covid-19.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2253

"(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the vaidity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the

United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

I. Trial

The prosecution presented evidence that Cristina Zavala babysat for Jane Doe, the daughter of Salguero's significant other and the child he was accused of sexually assaulting. RT 106-09.[1] At Salguero's first trial, Zavala testified that when Doe was five years old, she told Zavala that Salguero pulled his pants down and "put white stuff [semen] in her private parts." Doe also described Salguero's penis to her. RT 110-12. Zavala testified that Salguero admitted to her that "he had put his thing in the little girl's privates" "but he didn't know why, because he had never done that before. Supposedly he had a lot of remorse." RT 114-15. She testified that Salguero cried while he spoke to her. RT 114.

At a sidebar, the court noted that "some new evidence has been produced" by Zavala's testimony that she had not told to either party before trial. RT 116, 134. Defense counsel Richard Briones-Colman said that Salguero "has asserted all along that she is a pathological liar," noted that

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[1] "RT" refers to the reporter's transcript of Salguero's two trials (the first ended in a mistrial). *See* district court docket 33, lodgment 1.

her testimony involved a "completely different universe" of facts from what she had said pre-trial, and argued that the defense could not meaningfully confront her. RT 135. The court granted a mistrial based on this surprise testimony of Salguero's alleged admissions. RT 138, 141.

In his opening statement at the second trial, defense counsel told the jury that Zavala was at "the center of how the disclosure" of the alleged abuse came about. ART 260-61.[2] He said that Zavala was "an extraordinarily important player in this." ART 261. He said that Zavala was "not just a babysitter" but had "raised the girl from newborn" "and had a tremendous amount of influence on the alleged victim. And the disclosure that's alleged to be in this case is all through her." *Id.* Counsel said that Zavala would testify that she informed a school teacher of the alleged abuse, and that the teacher, who had a duty to report child abuse, told her to keep quiet about it. ART 262-63. Counsel said: "I'm hoping that you'll find that to be absolutely not credible. It's almost crazy." ART 263. Counsel further stated that the prosecution would present evidence that Salguero sternly disciplined Jane Doe (they lived together with Doe's mother and other children), and that Doe wanted to live with her natural father instead, who had become divorced

[2] "ART" refers to the Augmented Reporter's Transcript of portions of the second trial. *See* district court docket 33, lodgment 2.

from her mother. ART 265-66. Counsel framed the question in the case as whether Doe "wanted to stay with her father because she wanted to get away from this harsh disciplined environment where she was now one of four children, who, with less attention and less -- perhaps less focus and, in her eyes, less love -- or whether she didn't want to go back because Jorge [Salguero] was raping her. And that's the question that you need to answer." ART 266-67.

The prosecution presented Doe's testimony and played a video of a statement she gave recounting the alleged abuse. RT 210-18. Salguero was her mother's boyfriend and they lived together when the alleged abuse occurred. RT 216-18, 253-54, 265-67, 787-88, 793-94, 822-23.

Doe's mother testified that she never saw Salguero "do anything sexual" to Doe "anywhere in the house." RT 379.

Zavala repeated her testimony from the first trial, as described above. RT 419-51, 454-58; *see* especially 423-32 (Salguero "was crying like a baby," asked for forgiveness, and "was very remorseful"), 449 (she didn't call the police because a public school teacher told her not to).

Salguero did not testify. The defense presented a number of witnesses who testified that Salguero was a good father who was good around children and did not behave suspiciously. The court took judicial notice that public

school teachers are legally mandated to report suspected child abuse or neglect, and the jury was so informed. RT 755-56.

The prosecutor, Julie Baldwin, began her closing argument by discussing Zavala's testimony. She said that "[t]he first time we became aware that there was anything amiss between (Jane Doe) and her mom's boyfriend was when (Jane Doe) was five. And you heard about that from Cristina Zavala." RT 758.

In his closing, defense counsel reiterated his theory of the case from his opening statement. He argued: "What this trial is about is Cristina Zavala's credibility. And she is not telling you the truth when she said, 'I told the public school teacher and the public school teacher told me, "you know, police never do anything about that. So don't bother calling it in. It doesn't matter."'" RT 797. "And if we can't trust somebody who comes into court who swears to tell the truth on one point, and it's an important point, then you can't trust them on other points either." RT 804. Counsel argued that "[t]his is a case where she says she was raped, and then he penetrated her, but she has a hymen." RT 793.[3] Counsel asked: "Who would want to believe that a

[3] A forensic pediatrician (and prosecution witness) testified that when she examined Doe, Doe's hymen was intact, and that the findings of the examination were "normal." The doctor could not offer an opinion on whether Doe had been sexually abused. Pet. App. 31.

child would lie about these things? Who would want to believe that people get bitter enough or crazy enough during divorces, lay low, appear normal, and poison a child's mind? . . . It is a reasonable inference based on the facts." RT 811-12.

In rebuttal, the prosecutor told the jury: "I believe that what Cristina Zavala told us is absolutely the truth." Pet. App. 62.

On October 29, 2014, the jury convicted on all counts. Pet. App. 58; RT 854-55. On December 12, 2014, Superior Court Judge Michael J. Rushton sentenced Salguero "to the upper term of eight years for the lewd act and consecutive terms of 25 years to life for each of the other two counts [for unlawful sexual intercourse with a child under age 10], for a total sentence of eight years plus 50 years to life." Pet. App. 59; RT 900, 908.

II. State Direct Appeal

Salguero's state appellate attorney filed a *Wende* brief raising no specific issues.[4] Pet. App. 59. The California Court of Appeal affirmed the judgment on January 7, 2016 in an unpublished decision. Pet. App. 32, 59. Salguero did not file a petition for review in the California Supreme Court. Pet. App. 32.

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[4] *People v. Wende*, 25 Cal. 3d 436 (1979).

III. Habeas Actions

Salguero timely filed a *pro se* federal habeas petition on December 19, 2016. *Id.* On September 2, 2017, the court appointed counsel for Salguero, and on December 21, 2017, the court stayed the federal case pending the exhaustion of state remedies. *Id.*; district court dockets 28, 38. On January 29, 2018, Salguero filed a habeas petition in the California Supreme Court. District court docket 42, lodgments 6-7. The court summarily denied the petition on June 27, 2018 in an order stating, "The petition for writ of habeas corpus is denied." Pet. App. 56. Salguero filed a first amended federal petition on July 27, 2018. District court docket 45. After the filing of an answer and a reply, Magistrate Judge Alexander F. MacKinnon recommended denying relief in a report filed on February 8, 2019. Pet. App. 28-55. On April 1, 2019, District Judge S. James Otero accepted the magistrate judge's findings and recommendations, denied the petition, dismissed the action with prejudice, entered judgment against Salguero, and denied a COA. Pet. App. 24-27. Salguero timely filed a notice of appeal on April 26, 2019. District court docket 65. Salguero filed a COA motion in the Ninth Circuit on May 31, 2019, which the court denied in an order filed and entered on April 17, 2020. Pet. App. 23; Ninth Circuit dockets 2, 3.

REASONS FOR GRANTING THE WRIT

I. COA Standards

A habeas petitioner has no absolute right to appeal a district court's denial of a petition but instead must obtain a COA to pursue an appeal. *Buck*, 137 S. Ct. at 773; *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). Obtaining a COA "'does not require a showing that the appeal will succeed.'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016). Indeed, "[t]he COA inquiry . . . is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773. "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* "The COA inquiry asks only if the District Court's decision was debatable." *Miller-El*, 537 U.S. at 348; *Buck*, 137 S. Ct. at 774. This is a "low" standard. *Frost v. Gilbert*, 835 F.3d 883, 888 (9th Cir. 2016) (en banc). The petitioner need only "prove 'something more than the absence of frivolity.'" *Miller-El*, 537 U.S. at 338 (quotation marks omitted).

II. AEDPA Standards

Salguero's petition is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Woodford v. Garceau*, 538 U.S. 202, 204 (2003). To obtain relief under AEDPA, a petitioner must show that his constitutional rights were violated under 28 U.S.C. § 2254(a) and that § 2254(d) does not bar relief on any claim adjudicated on the merits in state court. *Frantz v. Hazey*, 533 F.3d 724, 735-36 (9th Cir. 2008) (en banc).

Under § 2254(d), a habeas petition challenging a state court judgment:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–(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; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

There is a rebuttable presumption that a state court adjudicated the merits of a federal claim—triggering the application of § 2254(d)—when it

denies the claim in an unreasoned summary order. *Harrington v. Richter*, 562 U.S. 86, 97-100 (2011).

"'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). "Only Supreme Court holdings clearly establish federal law for the purposes of § 2254(d)(1), but circuit precedent is persuasive authority in assessing what law is 'clearly established' and whether the state court applied the law reasonably." *Smith v. Ryan*, 823 F.3d 1270, 1279 (9th Cir. 2016).

A "'state court decision is "contrary to" clearly established Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases *or* if the state court confronts a set of facts materially indistinguishable from those at issue in a decision of the Supreme Court and, nevertheless, arrives at a result different from its precedent.'" *Cudjo v. Ayers*, 698 F.3d 752, 761 (9th Cir. 2012) (original emphasis).

A state court unreasonably applies federal law when it identifies the correct governing legal principle but unreasonably applies it to the facts of the case. *Id.* "That the standard is stated in general terms does not mean the application was reasonable. AEDPA does not 'require state and federal

courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) ("a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'").

A state court unreasonably determines the facts under § 2254(d)(2) when its finding of fact is unsupported or contradicted by the record or when the fact-finding process itself was defective. *Brumfield v. Cain*, 135 S. Ct. 2269, 2278-82 (2015); *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004).

When a federal habeas court concludes that the state court decision is contrary to or an unreasonable application of federal law, or is based on an unreasonable factual determination (§ 2254(d)), it reviews the claim *de novo* in assessing whether the petitioner's constitutional rights were violated. *Panetti*, 551 U.S. at 953, *Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010).

III. Salguero Meets the Low Threshold for a COA on His Prosecutorial Misconduct Claim

Ground Two of Salguero's first amended federal habeas petition alleges that the prosecutor committed prejudicial misconduct by vouching for Zavala's testimony when she said in the rebuttal phase of her closing argument, "I believe that what Cristina Zavala told us is absolutely the

truth." District court docket 45 (petition) at 5; district court docket 45-1 (memorandum in support of petition) at 6-7.

Salguero presented this claim to the California Supreme Court in pages 13 to 15 of his exhaustion petition. District court docket 42, lodgment 6. The California Supreme Court denied the petition in an order stating: "The petition for writ of habeas corpus is denied." Pet. App. 56. In district court, Respondent did not try to rebut the presumption that the California Supreme Court's summary denial of Salguero's claims is a denial on the merits. Indeed, Respondent admitted that the state court denial is an adjudication on the merits and did not argue that any of Salguero's claims were procedurally defaulted under state law. District court docket 52 (Answer) at 2; district court docket 52-1 (memorandum in support of Answer) at 3. The magistrate judge ruled that the state court denial is an adjudication on the merits. Pet. App. 34. As shown below, the state court's denial of relief is contrary to and an unreasonable application of clearly established federal law, and is also based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1), (2). Therefore, § 2254(d) does not bar relief and Salguero's claim is reviewed *de novo*. *See supra* at 11-13.

It is clearly established federal law that a "prosecutor's improper comments" violate the federal Constitution when they "so infected the trial with unfairness as to make the resulting conviction a denial of due

process." *Parker v. Matthews*, 567 U.S. 37, 45 (2012) (per curiam) (quotation marks omitted); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

Prosecutors commit misconduct when they "vouch" for a witness by expressing their personal belief or opinion as the truth of the witness's testimony. *United States v. Young*, 470 U.S. 1, 8, 17-19 (1985); *United States v. Molina-Guevara*, 96 F.3d 698, 704 (3rd Cir. 1996) ("A prosecutor may not properly vouch for the credibility of a government witness."); *People v. Seumanu*, 61 Cal. 4th 1293, 1329 (2015) ("impermissible 'vouching' may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity"). "[T]he prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Young*, 470 U.S. at 18-19.

As noted above, Salguero's prosecutor told his jury in her closing argument: "I believe that what Cristina Zavala told us is absolutely the truth." Pet. App. 62. The prosecutor thus improperly vouched for the credibility of the key prosecution witness in a trial that hinged on that witness's credibility. *Young*, 470 U.S. at 8 (it is "'unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence of the guilt of the defendant'"); *id.* at 5

(prosecutor commits improper vouching by saying in closing: "'You can look at the evidence and you can remember the testimony, you remember what the witnesses said and what respondent admitted they said. I think it's a fraud."). Worse, the prosecutor vouched for Zavala in her rebuttal argument, getting in the last word before the jury began deliberations.

The Report and Recommendation states that the prosecutor's comment was "ill-advised" and that "[c]ase law supports the conclusion that it constituted improper vouching" but concludes that even assuming it was, the prosecutor's statement "did not render Petitioner's trial fundamentally unfair." Pet. App. 42-43. Cases cited by the Report show this is improper vouching. Pet. App. 42. In *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995), the government conceded that the prosecutor committed misconduct when he said in closing, "Drake is a credible witness. He was telling you the truth." In *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992), the court reversed a conviction where the prosecutor said, "'I think he (Al Butler) was candid. I think he was honest.'" Salguero's prosecutor one-upped these statements by telling his jury that "what Cristina Zavala told us is *absolutely the truth*." Pet. App. 62 (emphasis added).

The Report states that "the prosecutor may not have improperly vouched for Zavala's veracity but rather was properly responding to defense counsel's attack on Zavala." Pet. App. 41. But "[a]ny attacks on the

credibility of government witnesses were legitimate tools of advocacy and did not, standing alone, justify such a response." *Kerr*, 981 F.2d at 1053. Defense counsel's argument that Zavala was not credible was "vigorous advocacy entirely appropriate for a case that turned on the jury's assessment of the credibility of the witnesses" and does not amount to "invited error" excusing the prosecutor's misconduct. *Molina-Guevara*, 96 F.3d at 705; *see also United States v. Combs*, 379 F.3d 564, 574 (9th Cir. 2004) (rejecting argument that "the vouching was invited by defense counsel's closing argument, and therefore excusable"; "[i]t is well settled that 'the prosecution is not allowed to use improper tactics even in response to similar tactics by the defense'").

Salguero was prejudiced by the prosecutor's improper vouching. Zavala's testimony was central to the prosecution's case, and she alone provided evidence that Salguero had admitted abusing Doe. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (a "defendant's own confession is probably the most probative and damaging evidence that can be admitted against him"). Zavala's credibility was hotly contested, and the defense persuasively argued that she had lied about the teacher's alleged statement not to report the purported abuse and therefore could not be trusted on other matters, and that she had persuaded Doe to lie as well.

Salguero was prejudiced by the vouching because "there is a reasonable probability that it rendered the trial fundamentally unfair," and no reasonable court could conclude otherwise. *Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2016). The prejudice was compounded by the fact that the vouching occurred in rebuttal, just before the jury began deliberations. *United States v. Maloney*, 755 F.3d 1044, 1046 & n.2 (9th Cir. 2014) (en banc); *see also United States v. Weatherspoon*, 410 F.3d 1142, 1152 (9th Cir. 2005) (granting relief on vouching claim in "a comparatively close case that boiled down to a battle over credibility"); *Combs*, 379 F.3d at 576 (reversing conviction and stating that "'vouching is especially problematic in cases where the credibility of the witnesses is crucial'"); *Molina-Guevara*, 96 F.3d at 705 (finding prejudice where the defense advanced plausible theories as to why prosecution witnesses might have misrepresented the facts).

Despite this record, the magistrate judge concluded that "Zavala's testimony was not critical to Petitioner's guilt on any of the charged offenses," and therefore "[e]ven assuming that the prosecutor's argument constituted improper vouching, . . . it did not deprive Petitioner of a fair trial." Pet. App. 42. But Zavala was the only witness who testified that Salguero had admitted abusing Doe. *See Fulminante*, 499 U.S. at 296.

The Report emphasizes the "the trial court instructed the jurors that 'you alone must judge the credibility or believability of the witnesses,' and set

forth the factors the jurors should consider in assessing a witness's credibility." Pet. App. 42-43. But these standard instructions "did not specifically address the improper vouching" or cure the damage from it. *Combs*, 379 F.3d at 575. "The trial judge gave only general advice to the jury that they, alone, were to determine the witnesses' credibility. . . . '[I]t is very doubtful that the generalized observations of the court really conveyed a sufficient sense of judicial disapproval" to dispel the harm from the prosecutor's statement. *Kerr*, 981 F.2d at 1053. "A trial judge should be alert to deviations from proper argument and take prompt corrective action as appropriate," even when counsel does not object. *Id.* at 1054. That didn't happen here, and the standard instructions did not alleviate the harm from the prosecutor's vouching of a key government witness. The state court could not reasonably conclude that "the standard instructions together with the weight of the evidence cured the damage from the improper vouching," *Combs*, 379 F.3d at 575, and therefore 28 U.S.C. § 2254(d) does not bar relief.

The Report cites two cases in support of its conclusion that any error was harmless, but both involved much stronger evidence than present here. Pet. App. 43-44. In *United States v. Harrison*, 585 F.3d 1155, 1158-1159 (9th Cir. 2009), the defendant testified in his own defense and was found guilty of two counts of assaulting a federal officer. "[T]he government presented physical evidence of Harrison's guilt, including an injury to one of his

knuckles," and law enforcement officers testified that Harrison "used profanity and struggled while being arrested" and had been extremely intoxicated. *Id.* at 1159. In *Linderman v. Lackner*, 2015 WL 5026061, at *3, 23 (C.D. Cal. Aug. 10, 2015), "the prosecution presented nine different complaining witnesses who testified that Petitioner engaged in similar sexual misconduct with women in his custody [as a sheriff's deputy] on twelve different occasions." The petitioner therefore could not show prejudice to vacate his convictions on 15 counts of sex crimes and related bribes. *Id.* at *3.

By contrast, the prejudice is apparent in Salguero's case, a credibility battle where the prosecutor vouched for the sole witness claiming that Salguero had admitted abusing Doe. *See* cases cited *supra* at 17-18; *see also United States v. Smith*, 962 F.2d 923, 933-36 (9th Cir. 1992); *United States v. Roberts*, 618 F.2d 530, 536-37 (9th Cir. 1980). At a minimum, the district court's denial of the vouching claim is reasonably debatable, and therefore a COA should issue. *Buck*, 137 S. Ct. at 774.

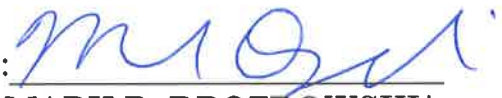
CONCLUSION

For the foregoing reasons, the Court should grant Salguero's petition, reverse the judgment of the Ninth Circuit, and grant a COA on Salguero's prosecutorial misconduct claim.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

DATED: July 16, 2020

By: 
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