No.

IN THE SUPREME COURT OF THE UNITED STATES

TERRENCE A. MCKNIGHT,

Petitioner,

vs.

R. JOHNSON; TAMMY FOSS,

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*

GAIL IVENS
Counsel of Record
Attorney at Law
P.O. Box 664
King City, CA 93930
Telephone: (213) 247-5282
g.ivens.attorney@gmail.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. Under 28 U.S.C. § 2254(d)(1)&(2), did the California Court of Appeal unreasonably determine that the established prosecutorial misconduct in relying on hearsay identifying petitioner as the shooter was harmless?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Constitutional Provisions

Rules, Statutes and Codes

I. OPINION BELOW

On December 28, 2020, the Court of Appeals entered its decision affirming the denial of Petitioner's 2254 habeas petition. (Appendix A.) The decision in unpublished.

II. JURISDICTION

On December 28, 2020, the Court of Appeals affirmed the denial of Petitioner's 2254 habeas petition. (Appendix A.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment states, in relevant part: "No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law."

Title 28 U.S.C. § 2254(d) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to a 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 law Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented in the State court proceedings."

IV. STATEMENT OF THE CASE

A. Introduction

On May 17, 2002, someone shot and killed 15-year old Keith Frazier and shot and wounded his brother Kevin Wortham in the Alemany housing project in San Francisco. Petitioner Terrence McKnight was charged with and convicted of the crimes. The identity of the shooter was the key issue at trial. During closing argument, the prosecutor told the jury that the case had been cracked within 5 minutes of the shooting—an assertion based on hearsay evidence from an unidentified source that was admitted for an improper limited purpose. Despite continual objections, the prosecutor repeated the assertion multiple times. The other eyewitness testimony was fraught with inconsistencies and errors.

Two of the eyewitnesses, Kevin Wortham and Eric Hoskins, had issues with a group of individuals petitioner was said to associate with, referred to at trial as the Freeway Boys. Kevin was part of the Project Boys. The prior issues included the suspicion that Kevin had been responsible for the shooting death of another person, Jason Glaser, a few weeks prior. The prosecution's theory was that the shooter of Keith Frazier was aiming for his brother, Kevin, and hit Keith instead.

In a case with weak and extensively impeached eyewitness testimony, the introduction and use of hearsay identification testimony prejudicially impacted the verdict. The Ninth Circuit erred when it held that although it was clear the prosecutor committed misconduct, the California court reasonably concluded that the trial court's instructions "presumptively cured" the error. (Appendix A at 4.)

B. Procedural History

McKnight was convicted in San Francisco County Superior Court on March 4, 2013 of first-degree murder of Kevin Frazier, attempted murder of Keith Wortham, and finding true the firearm discharge enhancements as to those counts, in violation of California Penal Code §§ 187, 664, and 12022.53(c)&(d). (ER 2.) On December 18, 2014, the court sentenced McKnight to 25 to life and life on the

murder and attempted murder convictions, and 25 to life and 20 years for the firearm enhancements, for a total sentence of life with a minimum of 70 years before eligibility for parole.

Following imposition of sentence attorney Dirck Newbury was appointed to represent McKnight on appeal. He filed a brief addressing six issues, including the prosecutorial misconduct issue raised herein. The Court of Appeal affirmed in an unpublished decision, and Mr. Newbury filed a petition for review with the California Supreme Court. (ER 157.) The petition for review was denied on January 11, 2017. (ER 28.) McKnight did not file a state habeas petition prior to filing his pro se federal 2254 petition on March 14, 2018. (ER 49.)

The district court ordered a response to the petition, which was filed by the Attorney General on August 9, 2018. (CV 20.) The record was lodged electronically that same date. No Traverse was received from McKnight. On August 1, 2019, the district court denied the petition and issued a certificate of appealability on two of the issues raised. (Appendix B.) McKnight filed an appeal. (ER 1825.)

The Ninth Circuit appointed counsel. Following argument, the decision of the district court was affirmed in a Memorandum Opinion. (Appendix A.)

C. Facts of the Case

The shooting that resulted in the murder and attempted murder charges and convictions in this case occurred on May 17, 2002 in the Alemany housing projects in the city of San Francisco. Kevin Frazier was shot and killed and Kevin Wortham was shot and wounded.

Wortham testified that there were two "groups" in the projects, the Project Boys and the Freeway Boys, who hung out at different locations. Wortham testified that he was a member of the Project Boys and McKnight was affiliated with the Freeway Boys. Jason Glaser, a member of the Freeway Boys, was killed a few days before the shooting of Frazier and Wortham. Wortham testified that he was warned that other Freeway Boys believed he was involved in Glaser's murder. His family was worried about his safety.[1]

McKnight was known and referred to during trial as "Tee Baby" or "T33 Baby," and was identified by the eyewitnesses who testified. He was known to the

[1] Indeed, according to Hoskins, Wortham had been told to stay away from the Projects, but he stopped by to pick up some things before taking his brother Keith and sister Erica away for the weekend. (ER 873-74.)

witnesses before the shooting. McKnight had been over to the Wortham's house to visit and play video games. (ER 492.) Eric Hoskins knew appellant: about three months before the shooting, he began seeing appellant in the neighborhood, and appellant had come to Hoskins's house to see Wortham. (ER 703-05.)

1. Identification Evidence

There were two types of identification evidence presented during trial. First, the testimony of the three eyewitnesses, Kevin Wortham (Wortham), Eric Hoskins (Hoskins), and Krystal Willingham (Willingham). Second, the hearsay evidence of the police broadcast identifying "Tee Baby" as the suspect.

Prior to trial defense counsel moved to exclude testimony from police officers regarding the broadcast describing the suspected shooter and naming McKnight ("Tee Baby"). (ER 112, 197, 231.) No one could identify where the original identification information came from, so the defense argued that it was all inadmissible hearsay. (ER 112, 197, 231.) The prosecution argued that it was admissible to show the effect on the officers' state of mind and the trial court, having initially agreed it was inadmissible, admitted it for that purpose. (ER 198-99, 233.)

The California Court of Appeal determined the admission of the statements was error because the non-hearsay purpose was not relevant to the case, but found the admission not prejudicial and further found no Confrontation Clause violation because the challenged statements were non-testimonial. (ER 9, 13, 14.) The district court agreed, finding the statements non-testimonial. (ER 37-8.)

On the day of the shooting, May 17, 2002, Officer Curtis Liu responded to a police broadcast of a shooting at the Alemany Projects. (ER 309.) Over objection, Liu testified that the dispatch included a description, based on other officers speaking to unnamed "citizens," that described the suspect as "Black male, 5'11", all black clothing, goes by Tee Baby." (ER 316.) It was undisputed at trial that McKnight's nickname was Tee Baby. The broadcast alerted police to look for a "light blue Trans-Am" or "2002 Chrysler." (ER 349-51.)

Kevin Wortham, Eric Hoskins, and Krystal Willingham provided the only eyewitness testimony at trial. Wortham and Hoskins testified that the shooter ran up the hill, paused, and pulled of his mask, allowing an identification. Krystal Willingham provided a conflicting version, testifying that the shooter drove up in a car, got out, shot Frazier, got back in the car and drove away.

a. Kevin Wortham

On the afternoon of May 17, 2002, Wortham picked up his younger brother Keith Frazier from school and his three-or four-year-old sister, Erica Hoskins, from day care, and drove them to the Alemany housing project where they lived with their mother. Frazier was sitting in the front passenger seat and Erica was sitting behind Frazier. Wortham stopped to talk with Eric Hoskins, Erica's father, then drove a short distance up the street and parked. Wortham testified that he pulled up, parked, "kind of opened my door and. . . I just hear shots firing. . ." (ER 483.) Wortham ducked down below the dashboard; he was grazed by a bullet on the side of his stomach below his rib cage. (ER 490-91.) When the police arrived and asked Wortham what happened, he said he "didn't know." (ER 490.)

Wortham was taken by ambulance to the hospital. By that time, he was aware that "Taco," an associate of McKnight's, had been seen driving his blue car near the shooting and there was a police broadcast look for "Tee Baby" and a "light blue Trans-Am" or "2002 Chrysler." (ER 347-52.) Officer Sainez overheard Wortham on the phone saying he thought Tee Baby had something to do with the shooting. (ER 646.) When Wortham was interviewed at the hospital he said he was aware of

the police broadcast description. When he was asked about the shooter's skin color, Wortham responded "he don't drive." (ER 504, 513-14 [tape of interview played].)

At a May 19, 2002 interview at the police station Wortham's recollection of the shooting continued to evolve. He marked an "X" on a diagram of the location where he claimed to have seen the shooter. (ER 515) At trial it was demonstrated that the position of the shooter as described by Wortham was a physical impossibility given the trajectory of the bullets and the location of the car and victim. (ER 452.) Then, at the preliminary hearing, Wortham included Andrew Glaser, the brother of Jason Glaser (who had been killed days earlier) as standing with McKnight on the landing at the time of the shooting. Wortham later testified that this testimony was false and that other statements he had made to the investigators were lies. (ER 550-51; 559; 590; 631-2.)

By the time of trial Wortham identified McKnight as the shooter. He again testified that he saw the shooter standing on the side of the building standing about 5-6 feet from the car, wearing a ski mask covering his entire face. (ER 675-76.) According to the forensic evidence, this location for the shooter was a physical impossibility. (ER 452) After the shots were fired, Wortham testified he say Eric

Hoskins chase him up the hill. (ER 485.) Hoskins stopped when he ran out of breath and the shooter stopped as well. (ER 487.) At the top of the hill the shooter turned back and removed his mask. Wortham recognized him as "Tee Baby." (ER 487.)

That suspicion fell on McKnight was understandable. Wortham explained that he was in a group called the "Project Boys." They hung out around the basketball court. McKnight was in a group known as the "Freeway Boys," who hung out on the freeway. (ER 493.) Wortham identified McKnight, Andrew and Jason ("White Boy") Glaser, "Taco," and "Younger Dave" as hanging together on the side of the freeway. (ER 617-18.) Wortham had a prior run-in with Jason Glaser at the basketball court. He described it as a "scuffle." (ER 495.) Wortham said the dispute involved Jason backing into his sister's car and not paying for the damage. (ER 497.) Wortham testified that this incident would not have supplied any continuing bad feeling because Glaser "fixed the problem." (*Id.*) However, when Glaser was killed on May 14, 2002, Wortham believed the police suspected him. (ER 498.) He was concerned that associates of Glaser might seek revenge. He told investigators that Marcus Mendez ("Taco") told him that Andrew Glaser, brother of the deceased, was coming to get him. (ER 537-38.)

b. Eric Hoskins

Eric Hoskins was identified as Wortham's godfather and Erica's father. (ER 662-63.) On the day of the shooting, he was detailing cars. Hoskins got into a dispute with "Younger Dave," who got out of a car that Taco was driving. McKnight was in the passenger seat. (ER 711.) During this dispute Hoskins was not worried about a revenge killing arising from the Glaser homicide because he did not associate Younger Dave with the Glaser group. "David's black and White Boy's [Glaser] Caucasian. So why he should worry about them?" (ER 878.)

About 15 minutes later, Wortham drove up with Frazier and Erica in the car. (ER 664.) Wortham was not supposed to be in the area of the Projects; he was supposed to drive straight home to Richmond with the two children because of concerns over retaliation for the Glaser homicide. (ER 873-74.) Hoskins did not explain the discrepancy between his belief as to his dispute with Younger Dave and the potential for revenge on Wortham for the Glaser homicide.

Hoskins testified he was about 30 yards away from where Wortham pulled up. (ER 669.) Hoskins was vacuuming the car he was detailing when he became aware of the shooting. (ER 708.) A friend of his, Keith Martin, who was with him, saw the

shooting and told him what had happened. (ER 747.) This description of the event was at variance with other testimony where Hoskins said he heard gunshots, "pop, pop, pop, pop, pop," and looked up to see a man in all black wearing a ski mask and hoodie four feet away from Wortham's car. (ER 670-71.) Hoskins testified he heard eight shots fired and the shooting stopped when "the gun clicked." (ER 674-75.) The "clicking" sound was debunked by expert testimony that a semi-automatic was used by the shooter and, unlike a revolver, they don't make a "clicking" sound when they are empty. (ER 450.) Hoskins ran toward the car, while the shooter was running about halfway up the hill, which had a fairly steep grade. (ER 676, 807-08.) Hoskins testified he asked Wortham who the shooter was and Wotham said "Tee Baby," despite the fact that according to both Hoskins and Wortham the shooter was wearing a ski mask covering his entire face. (ER 676.)

Hoskins ran after him. (ER 677.) When the shooter got to the top of the hill, he squatted down and put his pistol in his pocket. (ER 682.) He pulled his hood and mask back, and Hoskins could see it was McKnight. (ER 679, 682, 702.)

Hoskins headed back to the car, and saw Taco's car drive up the hill. (ER 692.) Hoskins tried to flag Taco down so he could continue to give chase, but Taco did not

stop. (ER 693, 828.) Hoskins also saw a Pontiac Sunbird follow Taco's Pontiac wagon up the hill. (ER 723-30.) Hoskins testified he had seen McKnight drive the Sunbird prior to the homicide. (ER 723.) He told the police he saw the suspect get into a car, but later explained that his knowledge was based on "streets talk," not personal knowledge. (ER 819.)

When Hoskins returned to the scene, he found Frazier dead and leaning against the dashboard. (ER 694.) Hoskins testified that he pulled Frazier out of the car. (*Id.*)

Hoskins said the shooter wore a ski mask and he said he did not know who the shooter was, that Wortham told him who it was. (ER 770.) He testified he did not talk to the police earlier because he "wanted to take the law into my own hands." (ER 708, 756.) On cross-examination, Hoskins admitted prior false or inconsistent statements about the shooting. In November 2002, he told the police appellant got into a car after running up the hill, but at trial he said the basis of the statement was "streets talk." (ER 809.) He gave the police conflicting accounts of his encounter with appellant, Younger Dave, and Taco prior to the shooting. (ER 725-32.) He told police that he saw Taco's car driving up the hill before the shooting, but at trial

testified he did not. (ER 816-21; 823-28.) He never told anyone prior to 2011 that he had been talking to Martin at the time of the shooting. (ER 747, 750.)

c. Krystal Willingham

Willingham was a reluctant witness who testified at trial she had no memory of the shooting. In an interview with police on May 30, 2002, Willingham said she saw the shooter drive up, get out of the car, shoot Frazier, and drive off. (ER 1579-80.) During her preliminary hearing testimony, she said the shooter was not wearing anything on his head, contrary to the testimony of Wortham and Hoskins regarding the full-face ski mask. (ER 1584.) She also differed from their reports in stating Frazier was "out of the car, on the curb" when he was shot. (ER 1578.) After the shooting occurred, she saw McKnight's picture on the news and recognized him as the shooter. (ER 1585-86.) Willingham contacted the police, gave a statement and picked McKnight out of a photographic lineup. (ER 1571-72.) Although she did not know appellant's name, she had seen him before at her neighbor's house.

2. Police Witnesses

Officer Gibbs was working undercover nearby when he saw people running out of the projects and pointing in the direction of the basketball court. (ER 1225.)

He did not hear the gunshots. (*Id.*) He called dispatch and was told seven shots had been fired and one person was on the ground. (ER 1040.) Gibbs arrived about twenty seconds later, and was the first officer on the scene. (ER 1045.) Frazier was lying on the ground and even though his eyes were fixed and there was no pulse, Gibbs attempted first aid. (ER 1043, 1045.) Gibbs asked Wortham who did it, and Wortham said he did not know. (ER 1047.) Gibbs did not notice any cars speeding away from the scene. (ER 1272.)

Gibbs obtained "information from officers that it was a person named Tee Baby" who was the shooter and he put out a description on the radio for an individual named Tee Baby driving a light blue Trans-Am, license plate 4UXX793, wearing a grey headband. (ER 1279.) He did not have a source for the information on the suspect; he said "it's hearsay; so it's third-party information." (ER 1281.) Officers Lui, Poon, and Moody all provided testimony on the content of the broadcast identifying "Tee Baby" as the shooter. (ER 324, 348, 359, 1050.)

3. Crime Scene Evidence

Frazier died of multiple gunshot wounds. (ER 1027.) Forensic evidence indicated he was sitting in the passenger seat of the car when he was shot. (ER 1673.)

Several .9mm shell casings were grouped on the sidewalk between the housing project building and Wortham's car. (ER 394, 476.) The path of the bullets angled downward, meaning the shooter fired from an elevated position. (ER 417.) The crime scene expert testified that in his opinion the shooter was standing above the sidewalk on the area raised by the 4-foot retaining wall. (ER 439-40.) This expert testimony contradicted Wortham's claim of where he saw the shooter. (ER 447-48.)

4. Jason Glaser (White Boy) Homicide

As noted above, three days prior to the shooting in this case, Jason Glaser, known as "White Boy," was shot and killed in the Alemany projects. The prosecution tied McKnight to Glaser and others through his association with the "Freeway Boys." Gibbs testified that in 2002 Marcus Mendez, known as "Taco," Jason and Andre Glaser, "Younger Dave," Justin Wilson, and McKnight were all associated with 19 Carr and the 500 block of Alemany. (ER 1075-76.) Gibbs testified to spray paint on the building on the 500 block of Alemany that said "Freeway Boys," which he had not been aware of prior to May 17, 2002, the date of the Glaser homicide. (ER 1078-80.) Additional evidence of graffiti, T-shirts with the name "Freeway Boys" on them, a description of the Freeway Boys as a clique that sold

drugs on the freeway side, the arrest of McKnight on March 20, 2002, contact with Andre Glaser, etc., was introduced in aid of showing a connection between McKnight and Justin Wilson, who was also associated with the 500 block of Alemany. (ER 1074-75, 1263, 1286-87.) With this connection, the prosecution then introduced a letter from Texas signed "T33 Baby" which was sent to Justin Wilson. (ER 1352-53.) The letter included references to White Boy and Taco, and asked Wilson to have Glaser contact the author. (ER 1179.) The letter also encouraged Wilson to "keep smashin" and "break the necks of those that aren't our friends." (ER 1180.)

5. Location of McKnight

The prosecution argued that McKnight had "fled" after the homicide in support of consciousness of guilt. McKnight had a drug diversion hearing scheduled for May 30, 2002. He failed to appear. (ER 1433.) The parties stipulated that in June of 2003 McKnight was in custody in Texas. (ER 1673.) The letter signed "T33 Baby" was sent to Justin Wilson while McKnight was in custody in Texas. (ER 1353.)

The prosecution also introduced evidence of McKnight's relationships with two woman, Lateika Irving and Batanya Gonzalez. Irving met McKnight in May

2002 and last saw him about a week prior to the shooting. Her home was searched by the police. (ER 1322.) Gonzalez testified she has a child born January 24, 2002 and that McKnight was the father. Her residence was also searched by police, who did not find McKnight there. (ER 1435-36.)

6. Evidence of Prosecutorial Misconduct

In his federal petition McKnight argued that the prosecutor committed misconduct in three specific areas: during opening when he made three arguments not supported by the evidence at trial; during witness questioning; and when he argued in rebuttal closing that the identification of Tee Baby in the police broadcast was evidence that McKnight was the shooter.

In his closing argument, defense counsel emphasized the limited purpose of the crime scene identifications and reminded the jurors that the judge had ruled the evidence was admitted only to show what the police did, not for the truth of what was stated in the identifications. (ER 1708.) In rebuttal, the prosecutor stated:

> At 3:40, Officer Lui is responding . . . . He arrives at 3:43. By 3:44 Gibbs is given a description of the shooter that goes by the name Tee Baby, a black male in all black.

(ER 1765.)

The defense attorney objected, stating: "there is no evidence for the identity." (*Id.*) The court stated: "Okay. Ladies and gentlemen, as I have indicated before, statements of counsel are not evidence. If you need to verify something the court reporter will read that portion to you." (*Id.*) The prosecutor then stated:

> And understand, ladies and gentlemen, what I am telling you is that this is the person that they're looking for. This is the suspect description that they have. This is who they are patrolling around the area, trying to find, a black male in all-black that goes by the name of Tee Baby. At 3:45 Officer Liu describes the shooter, black male, all-black clothes, goes by Tee Baby.

(*Id.*)

Defense counsel again objected because the testimony was admitted only to show the effect on the listener, not as proof of identity. (ER 1765-66.) The court again told the jury that statements of counsel are not evidence. (ER 1766.) The prosecutor then stated:

> What it shows is who they're looking for. That's what it shows. It doesn't show that he was the person who did it; what is shows is who they're looking for. That's why it's important in terms of their state of mind. This is who they are searching for.

(*Id.*)

Defense counsel asked for a continuing objection, which the court sustained. When the prosecutor continued to talk about the identifying information, defense counsel objected again. The court told the jury, "Ladies and gentlemen, again, this -- a lot of this information, it is up to you – was offered only for – to show that the subsequent acts and what the police officers were looking, the intent of the police officers; not for the truth of the matter stated." (ER 1767.) The prosecutor then stated:

> So, again, what I'm trying to impress upon your minds as jurors is that this Tee Baby is who the cops were looking for, a black male adult, Tee Baby in all-black or in gray sweats, and that they are actively searching for that person.
>
> And the reason it's significant is because within five minutes, five minutes of Gibbs arriving on the scene, they're looking for a suspect that fits that description.
>
> And, in fact, the only thing that caused the case not to be made any sooner is the defendant's own conduct of leaving the state. But his case was made within that five-minute period of time. And then we have the identifications. And that's what I'm asking you to base your verdict on, is the identifications that were made by the three witnesses, by Mr. Hoskins, by Mr. Wortham, as well as Ms. Willingham.

(ER 1767.)

The California Court of Appeal acknowledged that some of the prosecutor's statements improperly relied on the evidence to support the truth of the identification but held that the trial court's admonitions to the jury and the prosecutor's own statement that he was relying on the identification of the three testifying witnesses rendered the error harmless. (ER 14.) The district court agreed that "[t]he challenged remarks [could] be characterized as prosecutorial misconduct," but denied relief on the basis that the error did not have a "substantial and injurious effect or influence the jury's verdict." (ER 42.) The Ninth Circuit also agreed that the statements were misconduct:

> We have no trouble concluding the prosecutor committed misconduct by making repeated references to hearsay statements that identified Tee Baby as the shooter. Appellees do not contest this point. The trial court permitted the description of the shooter to be introduced for the limited purpose of its effect on the responding police officers' state of mind.2 The court directed that the hearsay description was not to be used for the truth of the matter asserted, but the prosecutor used the hearsay description in his opening statement, elicited the description from testifying officers, and argued, in his closing argument, that "[t]his case was cracked within five minutes of [Officer] Gibbs arriving on that scene. Five minutes. Five minutes . . . . By 3:44 [Officer] Gibbs is given a description of the shooter that goes by the name of Tee Baby, a black male in all black." The prosecutor's

> comments were clearly calculated to encourage the jury to draw an impermissible connection between the description of the suspect given to the police and McKnight's guilt.

(App. A at 3-4.) The Circuit, however, found the trial court's curative instructions sufficient to ameliorate the obvious prejudice. (App. at 4.) But, as noted above, each curative instruction was followed by additional misconduct, calling into question the effectiveness of those instructions in the ears of the jury.

V. ARGUMENT

A. This Court should grant certiorari to review the Ninth Circuit's decision because it failed to find that the ruling of the California court was unreasonable when the prosecutorial misconduct was pervasive and prejudicial.

1. Standards

Under the AEDPA, a petitioner must demonstrate that the state court's decision on the merits was contrary to, or involved an unreasonable application of, clearly established federal law under United States Supreme Court precedent, or

that the decision was based on an unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 70-73 (2003). "A state court decision is an unreasonable application of clearly established federal law if the state court identified the correct governing legal rule but unreasonably applied it to the facts at hand." *Christian v. Frank*, 595 F.3d 1076, 1081 (9th Cir. 2010) (internal quotation marks and citation omitted).

Under the AEDPA, state court findings of fact are to be presumed correct unless petitioner rebuts the presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Ybarra v. McDaniel*, 656 F.3d 984, 989 (9th Cir. 2011). This presumption applies even if the finding was made by a state court of appeals rather than by the state trial court. *See Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.), amended by 253 F.3d 1150 (9th Cir. 2001).

In § 2254 cases, an error may be harmless unless it "'had substantial and injurious effect or influence in determining the jury's verdict.'" *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011).

2. This Court's clearly established federal law governing a prosecutor's misconduct

This Court has held that, because a prosecutor represents the government, his interest must be accomplishing justice rather than winning cases. *Berger v. United States*, 295 U.S. 78, 88 (1935), overruled on other grounds by *Stirone v. United States*, 361 U.S. 212 (1960). The Court explained, "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.* In *Berger*, therefore, upon finding that the prosecutor crossed the line into impropriety, the Court exercised its direct supervisory authority to grant the defendant a new trial. *Id.* at 89.

The prosecutor's misconduct in *Berger*, like the prosecutor's misconduct in this case, was wide-ranging:

> [The prosecutor] was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a

> witness had said something which he had not said and persistently cross-examining the witness on that basis; . . . and, in general, of conducting himself in a thoroughly indecorous and improper manner.

Id. at 84. This Court has also disapproved of other specific misconduct, such as vouching for prosecution witnesses. *United States v. Young*, 470 U.S. 1, 18-19 (1985).

A federal habeas petitioner is entitled to a new trial where the prosecutorial misconduct rendered the trial fundamentally unfair or violated a separate constitutional right—such as the right to confrontation. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43, 643 n.15 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986). Once the petitioner has made this showing, he does not need to additionally establish that the error caused him prejudice because the inquiries "overlap[] completely." *Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2014). In this case, the prosecutor's misconduct violated both McKnight's right to due process and his right to confrontation.

3. Instances of Misconduct in Opening Statement

The prosecution fronted the argument that McKnight ("Tee Baby") was the person suspected of the shooting in opening statement.

> Then you will have evidence that law enforcement is actively looking for Tee Baby, black male, dark complected. They are actively looking for him within the first eight minutes of this case.
>
> [objection overruled]
>
> All right. The officers receive that information. And the reason that you will hear that information is because it shows what the officers did.
>
> And when I say "that information," the specific information is Tee Baby is the name of the suspect who we are looking for in this homicide; that he is a dark-complected African-American male, and that they have that information and are actively searching for him within eight minutes.

(ER 274.) The prosecution did not explain why "what the officers did" was relevant to any issue in the case. Initially, the prosecutor argued that a description of the suspect would be "relevant to show the effect on the officer's state of mind and hearing, as opposed to the truth of the matter that John Doe was actually the person who did the shooting." (ER 198.) Later, in opposing the motion for new trial, the prosecutor had massaged the explanation and said the "comments were only to provide context for the initial phases of criminal investigation, and that it was consistent with Wortham and Hoskins' identification of Defendant." (ER 139.) The prosecutor went on to say "[t]he colloquial understanding of the District

Attorney's statement is that people – not just police – knew who the killer was instantaneously." (ER 140.)

On appeal McKnight argued that the statement was irrelevant, and the Court of Appeal agreed. (ER 9.)

Also, during opening statements, the prosecutor repeatedly referred to facts outside the record, including: (1) that the "Freeway Boys," a group the prosecutor identified McKnight with, possessed guns and dealt drugs (ER 262-63); (2) that victim/witness Wortham "had been cleared" of the Jason Glaser homicide (ER 264); and (3) that McKnight had "abandoned" his child (ER 277-78). None of these statements were proved up with competent evidence during trial.

4. Instances of Misconduct During Examination of Witnesses

As was impermissibly foretold in opening and hammered on in closing, the prosecutor repeatedly used the computer record of police dispatch reports concerning the shooting ("CAD"), all of which was hearsay, as substantive evidence that "Tee Baby" had been identified as the shooter within minutes.

As argued in section C, *infra*, the introduction of this evidence violated McKnight's rights under the confrontation clause.

Evidence of the identification of "Tee Baby" as the shooter was elicited from Officer Liu (ER 316), Gibbs (ER 1053-54), and others. The CAD itself was prominently displayed on the big board during the examination of several police witnesses. Officer Poon highlighted the "big board" with a marker and drew a "box around" the CAD's suspect description broadcast under Poon's call sign. (ER 341-44.) The "big board" was also on display during Officer Moody's testimony. (ER 357-58.)

5. Misconduct During Closing Argument

Finally, and most devastatingly, the prosecutor used the anonymous hearsay suspect identification evidence in closing argument as substantive evidence of identification. Despite cloaking the narrative in the garb of "what the officers did next," the clear and intended import was to prop up the otherwise weak identification evidence introduced during trial.

> This case was cracked within five minutes of Gibbs arriving on that scene. Five minutes. Five minutes . . . . By 3:44 Gibbs is given a description of the shooter that

> goes by the name of Tee Baby, a black male in all black. [objection overruled, statements of counsel not evidence]
>
> MR. BARRETT: And understand, ladies and gentlemen, what I am telling you is that this is the person that they're looking for. This is the suspect description that they have. This is who they are patrolling around that area, trying to find, a black male in all-black that goes by the name of Tee Baby.
>
> [continuing objection]

(ER 1765.) After briefly qualifying that the "evidence" was necessary to show what the police were doing, "it's important in terms of their state of mind. This is who they are searching for," (ER 1766), the prosecutor continued to reiterate that "Tee Baby" was the object of the search. (ER 1766.) And the trial court's admonition that the "it is up to you" . . . "offered only . . . to show what the subsequent acts and what the police officers were looking, the intent of the police officers, not for the truth of the matter stated" didn't deter the prosecution. (ER 1767.) He ended his argument with the same reference, "[f]ive minutes is what it took to crack this case. Five minutes ass what it took to crack the case. . . . And that's your – that's your killer. Thank you." (ER 1775, objections omitted.)

6. The Ninth Circuit and the District Court were wrong; Individually and Cumulatively the Misconduct Denied McKnight a Fair Trial

The Ninth Circuit held that although there was clearly misconduct by the prosecutor in this case, the trial court's admonitions to the jury cured any prejudice. This Court should grant certiorari because the prejudice was not ameliorated by the instructions. This was not a case with overwhelming evidence of identity. The problems with the identification evidence of the three witnesses–Wortham, Hoskins, and Willingham—goes a long way to explaining why the prosecution felt it necessary to use improper hearsay evidence from an unknown source to bolster their story.

Wortham's credibility was severely damaged: "Mr. Wortham's credibility – let's face it, it has been severely checked." (ER 588, prosecution.) Wortham admitted perjury and other lies. (ER 550-51, 559, 631.) Wortham testified at the preliminary hearing that Andre Glaser was present at the shooting. (ER 590.) Hoskins' testimony was also suspect. In his first statement to investigating officers he said he did not know the shooter, but

Wortham had told him who it was. (ER 770.) At one point he said he heard shots and looked up to see the shooter but at another point he said his friend Martin interrupted him while he was detailing his car to tell him someone was shooting. (ER 708.) And the third eyewitness, Willingham, testified to a completely different scenario. She said the car drove up, the driver popped out, fired, and drove away. This version was contracted by the physical evidence of shell casings and bullet trajectory. (ER 447-48.)

The trial court recognized the weakness of the evidence, as did the appellate court.

> To be sure, appellant correctly contends that the prosecution's three eyewitnesses – Wortham, Hoskins, and Willingham – all had substantial weaknesses. Wortham and Hoskins both made inconsistent prior statements, and significant aspects of Willingham's testimony differed from that of Wortham and Hoskins.

(ER 13.) The court also noted that McKnight was known to all three eyewitnesses prior to the shooting, so their identification testimony is not as compelling as if they had identified someone unknown to them. The fact that Wortham and Hoskins identified McKnight as part of the "group" who

suspected Wortham of the Glaser shooting made him an obvious target for identification. The court of appeals erred in finding the misconduct harmless.

The Ninth Circuit identified several places where the trial court admonished the jury that the argument of counsel was not evidence. Citing this Court's decision in *Darden*, the court stated:

> In *Darden*, the Supreme Court held that prosecutorial misconduct did not render the trial fundamentally unfair because "[t]he trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence," and the "weight of the evidence against petitioner was heavy . . . [which] reduced the likelihood that the jury's decision was influenced by argument." 477 U.S. at 182.

(App. A at 4.) But the weight of the evidence against petitioner was *not* heavy; the three eyewitnesses recounted events that could not have happened and contradicted each other. And when the trial court did admonish the jury, the prosecutor followed up with another improper statement or argument.

In sum, McKnight was denied a fair trial due to multiple instances of prosecutorial misconduct, and the Ninth Circuit's affirmance of the district court's denial of his petition should be reversed.

VI. CONCLUSION

For the foregoing reasons Petitioner Terrence McKnight asks that this Court issue a writ of certiorari to review the decision of the Ninth Circuit in his case.

Respectfully submitted,

GAIL IVENS

DATED: March 18, 2021

GAIL IVENS
Attorney at Law
Counsel of Record