

No. _____

In the
Supreme Court of the United States

CEDRIC L. DANIELS.,

Petitioner,

v.

DAVE DAVEY, Warden, and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Could a jurist of reason find that petitioner was denied his Sixth Amendment right to confront and cross-examine witnesses and Fourteenth Amendment right to due process when the trial court:

- a. refused to admit impeachment evidence against the prosecution's key witnesses?
- b. admitted hearsay statements without any recognized exception?

Could a jurist of reason find that petitioner was denied his Fourteenth Amendment right to due process when the trial court:

- a. allowed the prosecution to impeach his expert witness, Scott Fraser, with highly prejudicial and irrelevant evidence,
- b. failed to properly instruct the jury on the use of co-conspirator statements
- c. instructed the jury that Mixon and Walker were accomplices as a matter of law.
- d. instructing the jury that it could consider how certain a witness claimed to be of his or her identification in evaluating the witnesses' identification of petitioner.
- e. finding that petitioner's juvenile adjudications constituted strikes for the purpose of California's Three Strikes Law, and/or
- f. denying petitioner's motion to strike his prior convictions and sentenced him pursuant to California's Three Strikes law?

Could a jurist of reason find that petitioner was denied his Fourteenth Amendment right to due process when there was no substantial evidence to support the jury's finding on the great bodily injury enhancement?

LIST OF ALL PARTIES

Petitioner

CEDRIC L. DANIELS.

Respondents

DAVE DAVEY, Warden, and PEOPLE OF THE STATE OF CALIFORNIA.

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**CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS
OF THE OPINIONS AND ORDERS ENTERED IN THE
CASE BY COURTS OR ADMINISTRATIVE AGENCIES.**

None of the orders and opinions were published. They are attached as an appendix.

BASIS FOR JURISDICTION IN THE SUPREME COURT.

1. Date of entry of order sought to be reviewed: February 12, 2020.
2. Date of any order respecting rehearing: none.
3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. United States Constitution

Fifth Amendment: No person shall be . . . deprived of . . . liberty . . . without due process of law. . . .

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by . . . jury . . . to be confronted with the witnesses against him . . . , and to have the Assistance of Counsel for his defence.

Fourteenth Amendment. Section. 1. . . . No State shall . . . deprive any person of . . . liberty . . . without due process of law. . . .

2. Federal statutes.

28 U.S.C. section 1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree

3. Federal court rules.

Supreme Court Rule 13. Review on Certiorari: Time for Petitioning: . . . a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment (The 90 day deadline in Rule 13 was

extended to 150 days by order of this Court dated March 19, 2020.)

4. State statutes.

Relevant state statutes are attached as an appendix at A-84 to A-85.

STATEMENT OF THE CASE

**1. Specification of Stage in the Proceedings
in Which the Federal Questions Sought to
Be Reviewed Were Raised, the Manner of
Raising Them, and the Way in Which They
Were Passed On.**

On December 21, 2011, petitioner was convicted of two counts of first degree robbery, Penal Code section 211, and one count of assault with a firearm, Penal Code section 245(a)(2), and a firearms use enhancement under Penal Code section 12022.53(b) was found true.

On July 9, 2014, following a direct appeal, the California Supreme Court denied petitioner's Petition for Review.

On December 6, 2016, the United States District Court for the Northern District of California denied petitioner's petition for writ of habeas corpus and denied a certificate of appealability.

On July 18, 2017, the United States Court of Appeals for the Ninth Circuit denied petitioner's application for a certificate of appealability.

This petition for writ of certiorari is filed within 150 days of the Ninth Circuit's denial of a certificate of appealability and is timely under Supreme Court Rule 13, as extended by this court's March 19, 2020 order.

2. Statement of Facts.

Petitioner adopts the statement of facts in the unpublished district court opinion, (Appendix pp. A-7 to A-10.)

ARGUMENT

1. Standard for granting a certificate of appealability.

In *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), this court held that a petitioner can must make a “substantial showing of the denial of a constitutional right” with respect to each issue sought to be appealed, simply by showing

“. . . that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.”

In *Miller-El v. Cockrell*, 537 U.S. 322 at 336-337 (2003), this Court held:

“We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.”

Miller-El v. Cockrell, 537 U.S. at 337-338.

2. A jurist of reason find that petitioner was denied his Sixth Amendment right to confront and cross-examine witnesses and Fourteenth Amendment right to due process when the trial court took the following actions:

a. Refusing to admit impeachment evidence against the prosecution’s key witnesses.

i. Werner.

Petitioner sought to impeach Werner with her prior arrests in Los Angeles and Las Vegas for prostitution.

The confrontation clause guarantees a criminal defendant the right to explore a witness’s bias on cross-examination. See *Davis v. Alaska*, 415 U.S. 308, 316 (1974). “[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby ‘to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the

reliability of the witness.’’ *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).

The right to present a defense is a fundamental element of due process of law under the Sixth and Fourteenth Amendments. *Washington v. Texas*, 388 U.S. 14, 19 (1967.)

The Fifth, Sixth, and Fourteenth Amendments provide a right to present relevant exculpatory evidence to the jury. This necessarily includes evidence which calls into doubt the reliability of the evidence on which the state is relying. *Davis v. Alaska, supra*, 415 U.S. 308.

ii. Moushi.

Moushi testified from federal custody, as he was under an immigration hold. Trial counsel sought to impeach Moushi with this custody status, a firearm conviction, and the fact that he had an outstanding marijuana case. The trial court barred such impeachment. Such impeachment violated petitioner’s constitutional rights for the same reasons as the denial of impeachment for Werner.

b. Admitting hearsay statements without any recognized exception.

Werner testified that she overheard two conversations in which petitioner and Walker, planned a robbery. However, Werner could not attribute any statements about the robbery to petitioner. Werner also testified about a second conversation wherein petitioner and Walker discussed their pleasure regarding the proceeds of the robbery. However, again, Werner could not attribute any discussion to petitioner himself. The court admitted the testimony under the co-conspirator exception to the hearsay rule. Petitioner challenged this ruling on Sixth Amendment grounds in District Court.

Erroneous admission of hearsay statements under California’s co-conspirator exception violated the Sixth Amendment as the statements were not made during the course of and in the furtherance of the alleged conspiracy. *Bains v. Cambra*, 204 F.3d 964, 974 (9th Cir. 2000). Since there was no evidence Walker was involved in the robbery, and since some statements were allegedly made after any conspiracy to commit a robbery was over, the statements were not made in the course of a conspiracy. Evidence Code section 1223.

3. A jurist of reason could find that petitioner was denied his Fourteenth Amendment right to due process when the trial court took the following actions:

a. Allowing the prosecution to impeach his expert witness with highly prejudicial and irrelevant evidence.

The prosecution was allowed to impeach petitioner's eyewitness identification expert with a prior finding by a trial court that the witness had made material misrepresentations to the court. The witness, not being a party to the prior action, had no opportunity to have this finding corrected on review.

The admission of this prior incident was so unduly prejudicial to petitioner as to render the trial fundamentally unfair. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Reasonable jurists could disagree that this was merely an issue of state law, as the district court found.

b. Failing to properly instruct the jury concerning co-conspirator statements.

Jury instructions which relieve the government of its burden of proving guilt beyond a reasonable doubt violate a defendant's due process rights. See *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). Instructions containing presumptions which otherwise reduce the prosecution's burden of proof violate Fourteenth Amendment due process. *Yates v. Evatt*, 500 U.S. 391 (1991); *Carella v. California*, 491 U.S. 263 (1989); *Francis v. Franklin*, *supra*, 471 U.S. 307.

The trial court failed to instruct the jury that it couldn't consider a hearsay statement unless the prosecution has proved the existence of a conspiracy, that the parties were members of a conspiracy, that the statement furthered the goals of the conspiracy and that petitioner was a participant in the conspiracy. CALCRIM 418.

c. Instructing the jury that Mixon and Walker were accomplices as a matter of law.

The trial court instructed the jury that "If the crimes of robbery or assault were committed, then Lovelle Mixon and Johnnie Walker, also known as Bam, were accomplices to those crimes." (8, RT 1812.) This instruction directed a verdict that the two witnesses were accomplices and, by implication, that petitioner was the perpetrator of the alleged crimes since the other two were only accomplices. There was evidence that Walker committed the crime instead of petitioner. This instruction violated due process as specified in the discussion in b above.

d. Instructing that the jury could consider, in evaluating an eyewitness identification, how certain the eyewitness said he or she was.

Moushi testified that he was 100% certain that petitioner was the second suspect that held him at gun point during the robbery. (6, RT 1223.) Hana testified she “never forgets a face.” (3, RT 574, 575, 583.) By instructing the jury that they could consider how certain the eyewitness claimed to be, the court allowed these witnesses to vouch for the accuracy of their identifications simply by claiming that they were certain.

This court has previously noted the issues created by the possibility of mistaken eyewitness identification. See *United States v. Wade*, 388 U.S. 218, 228-229 (1967); *Perry v. New Hampshire*, 565 U.S. 228, 132 S.Ct. 716, 738 (2012) (Sotomayor, J., dissenting). Although *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) held that in evaluating eyewitness testimony, the jury could consider “the level of certainty demonstrated by the witness at the confrontation”, in later years, scientific research has disproved the notion that witness certainty is a meaningful indicator of reliability. See *Perry v. New Hampshire*, *supra*, 132 S.Ct. at 739 (Sotomayor, J., dissenting, research shows “confidence is a poor gauge of accuracy”). Moreover, it is illogical that a witness could increase the weight to be given to his or her testimony by simply reciting a few magic words.

e. Finding that petitioner’s juvenile adjudications constituted strikes for the purpose of California’s Three Strikes Law.

The trial court imposed 25 years-to-life sentences on both robbery counts pursuant to California’s Three Strikes Law. (9, RT 1840, 1844.) Both of the alleged prior strikes were juvenile offenses, the latter of which was a Penal Code section 245(a)(1) disposition. Petitioner had allegedly punched another ward in juvenile custody who had provoked petitioner by insulting him with a racial slur. Petitioner’s requests for help from the juvenile authorities before the incident were ignored. (3, CT 772, 773.)

The prosecution relied on a partial transcript of the evidentiary hearing and a copy of the dispositional hearing to prove the prior finding. The sparse evidence provided by the disposition hearing indicates that petitioner was to be detained in juvenile hall until his 18th birthday and that his wardship and probation would be dismissed on his 18th birthday. (3, CT 693.)

California’s Three Strikes Law requires that a qualifying prior conviction be pleaded and proved beyond a reasonable doubt. *People v. Lee*, 111 Cal.App.4th 1310, 1315 (2003). Penal Code section 667(d)(1) holds that the determination of whether the conviction qualifies as a strike “shall be made upon the date of that prior conviction.” *In re Manzy*

W., 14 Cal.4th 1199 (1997) held that a juvenile court must exercise its discretion to determine whether a minor is to be treated as a misdemeanant where it has been found true that he committed a “wobbler” offense.

The District Court found that petitioner’s prior convictions were properly strikes simply because they were both felonies. (Dkt. No. 41 at p. 12.) However, not all felony violations of Penal Code section 245 qualify as “violent” offenses under California’s Three Strikes law. *People v. Haykel* (2002) 96 Cal.App.4th 146. Accordingly, where the District Court based its finding that petitioner’s juvenile offense was a strike only on the fact that it was a felony, reasonable jurists could disagree with the conclusion that there was sufficient evidence to support the finding that this was a strike.

f. Denying petitioner’s motion to strike his prior convictions and sentencing him under to California’s Three Strikes law.

In the District Court, petitioner argued that he was entitled to habeas relief because the trial court had abused its discretion in denying petitioner’s motion to dismiss his prior strikes pursuant to *People v. Romero*, 13 Cal.4th 497 (1996). Petitioner argued that the trial court’s abuse of discretion violated his Fourteenth Amendment right to Due Process under *Hicks v. Oklahoma*, 447 U.S. 343, 346-347 (1980). The magistrate’s finding, adopted by the District Court, was that it was reasonable for the court to impose a three strikes sentence given petitioner’s “extensive criminal history.” (Dkt. No. 41 at p. 14.)

Under *Romero*, a trial court must review a defendant’s background, the nature of his present offense and the objectives of rational sentencing and then decide whether it would be in the “interest of justice” to strike the prior conviction. *Romero, supra*, 13 Cal.4th at p. 632. It is not sufficient to consider the defendant’s criminal history alone.

In this case, there was significant cause to find that it was in the “interest of justice” not to sentence petitioner to an indeterminate life term in prison.

First, petitioner was only 25 years old at the time of his conviction, strongly suggesting that rehabilitation was possible without an indeterminate sentence. The District Court did not address this factor.

Second, petitioner’s only strikeable offenses were juvenile dispositions – not criminal convictions. The District Court, therefore, was incorrect to rely on that factor alone in finding that the state court did not abuse its discretion. See *Graham v. Florida*, 130 S. Ct. 2011 (2010), *Roper v. Simmons*. 543 U.S. 551, 569-570 (2005) ((1) juveniles are less mature and responsible, characteristics which produce “impetuous and ill-considered actions and decisions”; (2) juveniles are more susceptible to “negative influences and

outside pressures"; and (3) a juvenile's character is not as well developed as that of an adult.)

As the state court did not actually consider the proper factors under *Romero* and relied substantially on two *juvenile* adjudications to find that petitioner should be sentenced to a period of 25 years-to-life, it acted arbitrarily. Under California law, where a trial court's exercise of discretion rests on an error of law, its decision is an abuse of discretion. *People v. Patterson* (2017) 2 Cal.5th 885, 894. The trial court must exercise its discretion to accomplish the purpose of the law granting such discretion. *People v. Rodriguez* (2016) 1 Cal.5th 676, 685. And the court exercising discretion must know and consider all material facts and evidence together with legal principles essential to an informed, intelligent, and just decision. *People v. Davis* (1984) 161 Cal.App.3d 796, 801. These rules are similar to the federal rule that an arbitrary decision is one made "without adequate defining principles." *United States v. Carmack*, 329 U.S. 230, 244, fn. 14 (1946). A reasonable jurist could find that where the state court failed to apply the relevant law, its decision was not guided by any defining principle, the decision was arbitrary and violated due process.

4. A jurist of reason could find that petitioner was denied his Fourteenth Amendment right to due process when there was no substantial evidence to support the jury's finding on the great bodily injury enhancement.

To be supported by sufficient evidence, the record must contain substantial evidence of guilt from which a trier of fact could reasonably find the defendant guilty of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1970). The jury's true finding on the great bodily injury enhancement, on less than sufficient evidence, violates the Fifth and Sixth, and Fourteenth Amendment guarantees of due process and a jury trial. *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993).

Penal Code section 12022.7(f) defines "great bodily injury" as "a significant or substantial physical injury." To qualify as great bodily injury, it is not necessary that the injury be permanent, protracted or prolonged, as opposed to transitory. However, great bodily injury does not include injury which amounts to minor, trivial, insignificant, or even moderate harm. *People v. Escobar*, 3 Cal.4th 740, 746, 748-750 (1992).

The District Court adopted the magistrate's finding that the jury had sufficient evidence to find that petitioner, rather than Mixon, personally caused great bodily injury to Moushi. (Dkt. No. 41 at p. 12.) The court relied on testimony that Moushi had bled from his head during the attack to show "great bodily injury". However, the court could not point to any testimony that petitioner, rather than Mixon, caused that bleeding. Hana testified that she was not sure if the man she identified as petitioner hit her son. (2 RT

466.) Moushi also admitted that he wasn't even sure if petitioner had hit him. (5 RT 900, 901.)

On the issue of whether the injury qualified as "great bodily injury", Moushi testified that he was hit with the butt of a gun resulting in some facial bleeding. Moushi did not testify as to any loss of consciousness, broken bones or persistent symptoms resulting from the blow to the head. There was no description of Moushi's injuries by any witness, no medical records or other evidence to show that Moushi suffered great bodily injury aside from the bleeding, and no testimony from Moushi himself that described "great bodily injury" as defined by section 12022.7(f). The only evidence presented with respect to the issue of great bodily injury were photos of Moushi's injuries purporting to show his face following the assault. These photos only show that the injury bled.

A reasonable juror could find that this was insufficient evidence either that petitioner caused Moushi's or that the injury was qualifying.

CONCLUSION

For these reasons, this court should accept certiorari and remand to the Ninth Circuit with instructions to grant a certificate of appealability.

Dated: Oakland, California, Thursday, July 9, 2020.



Robert J. Beles
Attorney for Petitioner