No. 20-7978

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Todd A. Winkler — PETITIONER
(Your Name)

vs.

The State of California — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Court of Appeal of the State of California
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Todd A. Winkler
(Your Name) CDCR# AV3989
Folsom State Prison, 1-A4-26
PO Box 715071
(Address)

Represa, CA 95671-5071
(City, State, Zip Code)

None.
(Phone Number)

QUESTION(S) PRESENTED

Did the California Court of Appeal err when it concluded that inflammatory propensity evidence, pervasively used and erroneously admitted in the petitioner's criminal trial, did not render the trial fundamentally unfair by violating petitioner's Fourteenth Amendment right of due process guaranteed by the U.S. Constitution?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

People v. Winkler, No. P13CRF0308, California Superior Court of El Dorado County. Judgment entered Dec. 8, 2014.

People v. Winkler, No. C077992, California Court of Appeal for the Third Appellate District. Judgment entered Nov. 2, 2020.

People v. Winkler, No. S265946, California Supreme Court. Judgment entered Jan. 27, 2021.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is partially published

[X] reported at People v. Winkler, 56 Cal.App.5th 1102; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the California Supreme Court court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was Jan. 27, 2021. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> "No State shall... deprive any person of life, liberty, or property, without due process of law[.]"

STATEMENT OF THE CASE

On October 22, 2014, in the California Superior Court for the County of El Dorado, petitioner was found guilty of first-degree murder and the use of a deadly weapon, scissors, in the homicide of his third wife, Rachel Winkler. Petitioner was sentenced to 26 years to life on December 8, 2014. On November 2, 2020, the California Court of Appeal affirmed the conviction and published the portion of its opinion related to the petitioner's federal due process claim that (a) evidence of a prior uncharged act, the fiery death of his second wife in a 1999 auto accident, lacked any permissible inferences and was erroneously admitted to prove propensity, and (b) this uncharged act was so inflammatory and pervasively used by the prosecution that it violated the fundamental fairness of his trial. (People v. Winkler (2020) 56 Cal.App.5th 1102.)

The Court of Appeal found that evidence of the uncharged act was erroneously admitted, citing four reasons. First, it lacked relevance: "[W]e conclude the trial court abused its discretion in determining the evidence of the second wife's death tended to prove material facts related to the charged offense." (Slip opn. 65.) Second, it lacked probative value: "We conclude that given the problems of proof concerning the asserted homicidal act and the dissimilarities, the probative value of the second wife's death was not substantial." (id. at 74.) Third, it consumed undue time: "Defense counsel was right in that the [uncharged act] evidence essentially involved a second murder trial... [N]o fewer than 13 witnesses testified, at least in part, about circumstances related to the second wife's death. This testimony was presented over parts of eight different days... over the course of 12 days [of trial testimony]." (id. at 75.) Additionally, during closing argument, the prosecutor significantly relied upon the uncharged act evidence (12 RT 2926-41). Fourth, it created undue prejudice: "[T]he evidence concerning the death of the second wife... presented a substantial danger of prejudice because it painted the defendant as someone who repeatedly killed his spouses... the evidence was not much more than speculative propensity evidence." (id. at 75.) Later, "[T]he danger that some jurors might want to punish defendant for his second wife's death was high.

Moreover... the evidence was potentially unduly prejudicial inasmuch as it gave rise to the likelihood of the jury employing circular reasoning in convicting him: Defendant [admittedly] killed his third wife in the charged offense, therefore he likely killed his second wife during the 1999 Georgia incident, therefore in the charged offense, he acted with intent to unlawfully kill and premeditation and deliberation[.]" (id. at 76.)

The reviewing court found that the trial court itself fell prey to this circular reasoning: "[T]he trial court gave a belated instruction telling jurors they must not consider evidence of the charged crime in determining whether defendant murdered his second wife. The problem here is that the trial court did that very thing in ruling on the admissibility of the uncharged event." (id. at 62.) Later, "The trial court used evidence related to the charged offense to establish defendant's culpability for murder related to the uncharged act. Thus... the trial court did exactly what it later appropriately admonished the jury it could not do." (id. at 64.)

The reviewing court also found the prosecution's case for first-degree murder (in the charged act) to be circumstantial: "[T]he evidence concerning whether he intended to unlawfully kill, premeditation, deliberation, and negating self-defense is circumstantial." (id. at 62, emphasis in the original.)

After determining the uncharged act evidence to be irrelevant, nonprobative, pervasive, and unduly prejudicial (and the charged act evidence to be circumstantial), the Court of Appeal nonetheless found that the petitioner's due process rights were not violated and his trial was fundamentally fair. That finding relieved the court from having to evaluate the error under the "harmless beyond a reasonable doubt" Chapman federal standard (Chapman v. California (1967) 386 U.S. 18). Instead, the court applied the more forgiving Watson state test of whether a "reasonable probability" of harm was created (People v. Watson (1956) 46 Cal.2d 818), and it found the error harmless.

Petitioner's appointed appellate counsel then timely filed a petition for review in the California Supreme Court. Petitioner argued that the Court of Appeal's finding of a fundamentally fair trial conflicted with U.S. Supreme Court precedent Estelle v.

McGuire (1991) 502 U.S. 62, 70 (due process violated when unnecessarily suggestive evidence is conducive to irreparable mistake), and conflicted with Ninth Circuit precedent McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378 (other act evidence violates due process where there are no permissible inferences to be drawn from it, it was used to bolster a circumstantial case, it bore a degree of similarity to the charged act, it was pervasive throughout the trial, and it was emotionally charged). Petitioner also argued that in applying the Watson test, the court substantially relied on the state of the prosecution evidence.

On January 27, 2021, the California Court of Appeal denied the petition for review.

REASONS FOR GRANTING THE PETITION

In the instant case, a state court has decided an important question of federal law that has not been, but should be settled by the Supreme Court: the California Court of Appeal decided that the erroneous trial admission of pervasive, inflammatory, and speculative propensity evidence did not violate the petitioner's federal due process rights.

Federal circuit precedents disagree with this California holding. (See McKinney v. Rees (9th Cir. 1993), supra, 1380 ("The use of 'other acts' evidence as character evidence is... contrary to firmly established principles of Anglo-American jurisprudence."); Kipp v. Davis (9th Cir. 2020) 971 F.3d 939 (pervasive, emotionally-charged evidence of a prior uncharged homicide effectively staged a double-murder trial, violating fundamental fairness); U.S. v. Varoudakis (1st Cir. 2000) 233 F.3d 113, 126 (improper admission of a prior bad act not harmless); U.S. v. Curley (2d Cir. 2011) 639 F.3d 50, 60-62 (evidence with little probative value had a primary effect of showing bad character, resulting in prejudice that affected fundamental fairness); Lesko v. Owens (3d Cir. 1989) 881 F.2d 44, 52 (when the prejudicial effect of other act evidence greatly outweighs its relevance, then its admission may violate due process); U.S. v. Miller (7th Cir. 2012) 673 F.3d 688, 700-01 (improper admission of prior conviction not harmless because of prejudice, prominence in government case).)

U.S. Supreme Court opinions also cut against this California holding. (See Boyd v. United States (1892) 142 U.S. 450 (admission of prior crimes committed by the defendants so prejudiced their trial as to require reversal); Michelson v. United States (1948) 335 U.S. 469, 475-76 ("courts that follow the commonlaw tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt"); Payne v. Tennessee (1991) 501 U.S. 808, 825 (when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."); Old Chief v. United States (1997) 519 U.S. 172, 182

("there is... no question that propensity would be an 'improper basis' for conviction").)

Despite these high court opinions, some federal circuits opine that no clear Supreme Court precedent has established if and when erroneously admitted propensity evidence creates a due process violation. (See Garceau v. Woodford (9th Cir. 2001) 275 F.3d 769, 774 ("the Supreme Court has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith"); McKinney v. Rees (9th Cir. 1993) supra, 1380 ("The [Supreme] Court did not address the questions of whether the admission of irrelevant evidence could violate the due process guaranteed by the Fourteenth Amendment (Estelle v. McGuire (1991) 112 S. Ct. 475, 483-84), or whether the use of character evidence to show propensity would violate the Due Process Clause. (id. at 484 n.5.)"); Holland v. Allbaugh (10th Cir. 2016) 824 F.3d 1222, 1229 ("we may not extract clearly established law from the general legal principles developed in factually distinct contexts").)

These interpretations, that a clear Supreme Court precedent is lacking, are currently restricting some federal courts from granting habeas relief in cases where erroneously admitted propensity evidence has violated the Due Process Clause. (See Holley v. Yarborough (9th Cir. 2009) 568 F.3d 1091, 1101 fn. 2 ("Under AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by 'clearly established Federal law,' as laid out by the Supreme Court. 28 U.S.C. §2254(d). In cases where the Supreme Court has not adequately addressed a claim, this court cannot use its own precedent to find a state court ruling unreasonable. Carey v. Musladin, 549 U.S. 70 at p. 77... [W]e are therefore without power to issue the writ on the basis of Holley's additional claims."); Zapien v. Davis (9th Cir. 2015) 849 F.3d 787, 794; Holland v. Allbaugh (10th Cir. 2016), supra; Davis v. Sec'y, 2021 U.S. Dist. LEXIS 26208 (11th Cir.); De Los Rios v. Inch, 2020 U.S. Dist. LEXIS 215950 (11th Cir.); Hutchinson v. Folino, 2018 U.S. Dist. LEXIS 124573 (3d Cir.); Torres v. Barnes, 2014 U.S. Dist. LEXIS 132081 (9th Cir.); Phea v. Pfeiffer, 2021 U.S. Dist. LEXIS 30444 (9th Cir.); Klippenstein v. Frauheim, 2021 U.S.

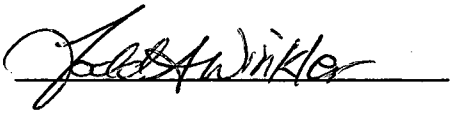
Dist. LEXIS 52484 (9th Cir.).)

In the instant case, the lower reviewing state court found that evidence of an inflammatory, uncharged act was erroneously admitted because it was irrelevant, non-probative, pervasive, and unduly prejudicial. (Slip opn. 65, 74-76.) The court labeled the evidence as "not much more than speculative propensity evidence." (id. at 75.) This case provides the court with a unique opportunity to hold if, and under what set of circumstances, erroneously admitted propensity evidence violates the due process guaranteed by the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



April 25, 2021