IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 2020

DASHEME HOSLEY,

Petitioner,

- vs -

RICK HILL, Warden,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

In a prosecutorial misconduct claim based upon a misstatement of law during closing argument, should courts presume that the jury followed the trial court's correct instruction at the end of trial even if the trial judge expressly ratified the misstatement at the time it occurred, and its correct instruction at the close of trial did not specifically address or correct its prior comment?

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Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 26, 2021. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on March 26, 2021.

JURISDICTION AND CITATION OF OPINION BELOW

On February 26, 2021, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion. [Ex "C"]. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing *en banc*, on March 26, 2021. [Ex. "D"]. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2254(a).

CONSTITUTIONAL PROVISION AT ISSUE

U.S. Const. amend. V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTRODUCTION

Petitioner asks the Court to grant review in the instant case to address the Ninth Circuit's application of the Court's curative instruction decision in *Greer v. Miller,* 483 U.S. 756 (1987), to the instant record. In *Greer*, the Court stated that "[w]e normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions . . . and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant . . . ." *Greer*, 483 U.S. at 766 n.8. In *Brown v. Payton*, 544 U.S. 133, 146-47 (2005), the Court found that an appropriate curative instruction may be sufficient even if not timely provided.

In this case, the improperly introduced material took the form of incorrect statements of law which the prosecutor made during closing argument, and which went directly to Petitioner's defense of voluntary manslaughter, imperfect self-defense of another. Specifically, the prosecutor incorrectly stated that Petitioner's beliefs in support of this defense theory had to be reasonable when, in fact, no such requirement exists.[1] The trial judge, instead of providing a proper curative instruction

[1] The two beliefs at issue were: (1) Petitioner actually believed that he or his mother were in imminent danger of being killed or suffering great bodily injury; and (2) Petitioner actually believed that the immediate use of deadly force was

at the time this misconduct occurred, expressly ratified the misconduct by incorrectly advising the jury that the voluntary manslaughter instruction contained a reasonableness requirement.

The Ninth Circuit affirmed the district court's denial of section 2254 relief, finding under AEDPA review that the state court reasonably found that the prosecutor's misstatements of law did not violate due process. Citing to *Greer* for its analysis of the trial court's overall handling of the misconduct, and to *Brown* to address the untimeliness of its actions, the Ninth Circuit found no prejudice because the trial court provided the proper voluntary manslaughter instruction at the end of the case, and also told the jury to follow its instructions rather than the prosecutor's statements. [Ex. "B" at 2-3].

This petition challenging the Ninth Circuit's application of the *Greer* presumption in its prejudice analysis should be granted because the Ninth Circuit improperly discounted the significance of the trial court's express ratification of the misconduct at the time it occurred, and its failure to specifically correct its erroneous instruction later. It is one thing when a trial court fails to take immediate action to address misconduct and provides an appropriate curative instruction at a later time; however, it is a completely different scenario when, at the time the misconduct

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necessary to defend against the danger. [ER 22].

occurs, the trial court expressly ratifies the misconduct to the jury, and its later instruction fails to correct or address the erroneous instruction explicitly. Because "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity[,]" *Francis v. Franklin*, 471 U.S. 307, 322 (1985), the Ninth Circuit's application of *Greer* and resolution of this important misconduct prejudice question directly conflicts with the relevant law of the Court and requires review by the Court.

STATEMENT OF FACTS AND CASE

In 2008, Petitioner was living in San Leandro, CA, while his mother, Carol Harris, lived about 45 minutes away in Modesto, CA with her husband, Karl Johnson. In August 2008, Harris and Johnson were at home with friends drinking and playing dominoes when she and Johnson began arguing. The argument escalated and became physical, and Harris called Petitioner and hysterically told her son that Johnson was beating her.

Petitioner subsequently tried to call his mother back to check on her but she would not answer, so he went to Modesto to check on her. Petitioner was very protective of his mother because of numerous incidents of domestic violence he had witnessed as a young child. Petitioner had a friend drive him and two others to Modesto. Petitioner took a handgun with him. At the house, Petitioner knocked on

the door, and after a few minutes, Johnson opened the door but Petitioner's mother was not present. After Johnson would not allow Petitioner to check on his mother, Petitioner and Johnson had a confrontation during which Petitioner shot Johnson in the torso. Johnson later died at the hospital.

A. Trial

Petitioner was arrested and charged with first degree murder, during the commission of which he personally used and discharged a firearm. Petitioner's trial defense was that he was not guilty of murder because he did not go to the house to shoot Johnson, but rather, went there simply to check on his mother and he shot Johnson after they had a confrontation at the door and he could not get inside the house to check on his mother's welfare. Under California law, Petitioner was not guilty of murder, and was guilty of the lesser offense of voluntary manslaughter, if he actually believed that his mother was in imminent danger of being killed or suffering great bodily injury, and he actually believed that the immediate use of deadly force was necessary to defend against the danger. Importantly, neither of these beliefs had to be reasonable.

During closing argument, the prosecutor, on multiple occasions, incorrectly stated that these two beliefs associated with voluntary manslaughter, imperfect defense of others, had to be reasonable:

"Voluntary manslaughter is another verdict form you're going to receive, and that is where there is no malice, it's the finding of no malice harbored by the defendant in the case. In that scenario, the killing occurred in self-defense because the defendant believed he was in imminent danger or because he believed it was a defense of others because he believed that person was in imminent danger.

"Now, the key word here is imminent, ladies and gentlemen. Imminent means now. There is no evidence to demonstrate that [Harris] was in danger at the time that [defendant] answered [sic] the door and fired the gun at [Johnson].... [¶] ... [¶]

"And the use of force that's necessary to defend against the danger. There is no evidence in this case to suggest that the use of force in him shooting [Johnson] was necessary to prevent any imminent danger. And because of that, ladies and gentlemen, you also must believe that that belief is reasonable, it's unreasonable in light of all the facts laid out before you—

"[DEFENSE COUNSEL]: Objection, Your Honor. That is not the law. Unreasonable beliefs can support voluntary manslaughter, that's simply wrong.

"THE COURT: [Defense counsel], I'll give you an opportunity.

"[DEFENSE COUNSEL]: I understand, Your Honor. But when she misstates the law, that needs to be pointed out, and I need to make an objection.

"[PROSECUTOR]: Judge, it says right in the instruction the belief must be reasonable.

"THE COURT: It's there. Go ahead, [prosecutor].

> "[PROSECUTOR]: Because it is not a reasonable belief in this case, because of the evidence that you have before you, you can take that verdict form and set it to the side, because you are not going to need it. It's a first degree premeditated murder."

[ER 19-20, 74-75].[2]

During rebuttal, the prosecutor incorrectly posited that the two beliefs underpinning voluntary manslaughter, defense of others, had to be reasonable:

> "[PROSECUTOR:] And the last thing when he talks about manslaughter, [defense counsel] is talking about two different kinds of manslaughter, he's talking about voluntary manslaughter and involuntary manslaughter—
>
> "[DEFENSE COUNSEL]: If I might, Your Honor, that is an incorrect statement. That is a voluntary manslaughter, imperfect self-defense.
>
> "THE COURT: Are you talking about her slide?
>
> "[DEFENSE COUNSEL]: Yes, her slide incorrectly states—
>
> "[PROSECUTOR]: You know, he's right. Actually, he's right. And I'll just correct that right now.
>
> "THE COURT: Not your words, but your slide?
>
> "[PROSECUTOR]: You know what? He's right. And I'm going to correct that right now. It should say invol—I mean vol. Excuse me. If I could just have a minute, folks.

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[2] "ER" refers to Appellant's excerpts of record filed in the Ninth Circuit Court of Appeals.

> "So voluntary manslaughter under ... CalCrim 571 is under imperfect self-defense. And, again, he doesn't meet the elements. Imminent danger of being killed or suffering great bodily injury. Who is in imminent danger here—
>
> "[DEFENSE COUNSEL]: Again, Your Honor, that is furthermore wrong. It is at least one of those beliefs were unreasonable.
>
> "THE COURT: Just so you folks know, I will be reading you the instructions, you will have a copy for you folks to look at. Part of the instructions does indicate if there's a discrepancy between what the attorneys say and my instructions that I read to you, you're to accept the instructions as they are read to you by me.
>
> "[PROSECUTOR]: And the Judge is absolutely correct. Just go with what the instruction says.
>
> "So let's talk about CalCrim 571, imperfect self-defense or defense of another. Again, the point is he doesn't meet the elements under this either, and that is imminent danger of being killed or suffering great bodily injury. [¶] ... [¶]
> "And the second element is that the belief that deadly force was necessary to stop that from happening, and at least one of those beliefs was unreasonable. That's correct. Unreasonable. So I will change that slide as well. I just don't want to take the time to do it now. It is unreasonable, at least one of those beliefs.
>
> "Well, all of those beliefs are unreasonable, and none of those elements have been met, because that's not what the facts support in the case...."

[ER 20-21, 76-77].

At the conclusion of the trial, the trial court provided a correct voluntary

manslaughter instruction to the jury. The trial court made no reference, however, to its prior comments in response to the prosecutor's misstatements of law to the jury when it agreed that the reasonableness requirement was in the instruction. The jury convicted Petitioner of first degree murder, and the trial court sentenced him to 75 years to life, plus five years, in prison.

B. Direct Appeal and Collateral Attack

In his direct appeal, Petitioner raised three prosecutorial misconduct claims, including the claim that he was denied his due process right to a fair trial when the prosecutor committed highly prejudicial misconduct repeatedly misstating the law regarding murder and manslaughter. [ER 57] . In May 2014, the California Court of Appeal affirmed the judgment in a reasoned opinion. [ER 56-113]. It found that the prosecutor had committed misconduct as alleged by Petitioner in each instance, but found each occasion to be harmless. The California Supreme Court summarily denied the petition for review. [ER 55].

Petitioner subsequently filed a section 2254 petition, raising the same misconduct claims. [ER 114-285]. In its findings and recommendation, the magistrate judge recommended that the district court deny each of these claims. [ER 6-54]. As to the instant claim, the magistrate judge agreed that the prosecutor, on multiple occasions, misrepresented the law of second-degree murder and voluntary

manslaughter based upon imperfect self-defense or defense of another. [ER 23-27]. The magistrate judge found, however, that there was no prejudice because at the end of trial, the judge properly instructed the jury as to the applicable law. Id.

The district court adopted the magistrate judge's findings and recommendation in full, dismissed the petition, and denied a COA. [Ex. "B"]. The Ninth Circuit issued a Certificate of Appealability on the issue of whether the "prosecutor committed prejudicial misconduct." [ER 1-2]. The Ninth Circuit affirmed the district court in a Memorandum decision. [Ex. "C"]. As to the area of prosecutorial misconduct raised herein, the panel found:

> It was not contrary to or an unreasonable application of federal law for the state court to conclude that the prosecutor's misstatements of law did not violate due process. Generally, "[a] jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citation omitted). This presumption extends to curative instructions, *Greer v. Miller*, 483 U.S. 756 766 n.8 (1987) even when the curative instructions are not given immediately after the error is made, *see Brown v. Payton*, 544 U.S. 133, 146-47 (2005). Here, the prosecutor misstated the law regarding second degree murder and imperfect self-defense during her closing argument and rebuttal. The trial court then correctly instructed the jury on the law and told the jury to follow the instructions rather than the prosecutor's statements. The prosecutor herself also emphasized that the jury should follow the court's instructions rather than her statements of the law. Under these circumstances, it was not "objectively unreasonable," *Lockyer*, 538 U.S. at 76, for the state court to presume that

> the jury followed the correct instructions, rendering the prosecutor's misstatements harmless.

[Ex. "C" at 2-3].

The Ninth Circuit denied Petitioner's petition for rehearing and suggestion for rehearing *en banc* without further comment. [Ex. "D"].

ARGUMENT

THE COURT SHOULD GRANT THIS PETITION TO DETERMINE WHETHER THE *GREER v. MILLER*, 483 U.S. 756 (1987), PRESUMPTION APPLIES IF A TRIAL COURT EXPRESSLY RATIFIES A PROSECUTORIAL MISSTATEMENT OF LAW AT THE TIME IT OCCURS AND ITS INSTRUCTIONS AT THE END OF TRIAL DO NOT CORRECT ITS ERRONEOUS RATIFICATION

In both her closing argument and rebuttal, the prosecutor repeatedly misstated the law regarding Petitioner's imperfect defense of others theory of defense at trial. The government argued that Petitioner was guilty of a premeditated first degree murder. The jury, however, was given a range of lesser options, including acquittal based upon imperfect self-defense or defense of another. Given this framework, the jury was required to determine whether Petitioner came to the house with the intent to kill Johnson, or whether he shot Johnson based on his genuine belief that his mother was in imminent danger and he had to use this force to enter the house to protect her from the threat.

In her argument that the jury should reject this lesser-included option, the prosecutor repeatedly told the jury that Petitioner's belief that his actions were necessary to defend against the danger to his mother had to be reasonable. [ER 19-21]. These were incorrect statements of law, and went straight to the key trial issue of Petitioner's intent and state of mind at the time of the shooting. Defense counsel

immediately objected, affording the trial court its turn to address the misstatements and protect Petitioner's right to a fundamentally fair trial. *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (a prosecutor's improper comments violate the Constitution if they "so infect the trial with unfairness as to make the resulting conviction a denial of due process"). This did not happen at the time, as the trial court agreed with the prosecutor and expressly told the jury that reasonableness requirement was in the instruction. [ER 19-20]. Nor did it happen at the end of trial, when the trial court provided a correct voluntary manslaughter instruction, but failed to address or correct its earlier erroneous ruling in any fashion. [ER 21-22, 77-79].

A jury is presumed to follow its instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (upholding instruction regarding consideration of mitigating evidence in capital case). The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (holding that Confrontation Clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction).

The Court addressed this presumption in the context of prosecutorial

misconduct curative instructions in *Greer,* 483 U.S. at 759. There, the prosecutor committed misconduct by attempting to violate the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976), by asking an improper question during the cross-examination of defendant in the presence of the jury. Defense counsel objected, and the trial court sustained defense counsel's objection to the prosecutor's question. *Id.* at 766. The trial court then provided an immediate curative instruction, as well as another instruction at the end of trial that the jury should "disregard questions . . . to which objections were sustained." *Id.* at 766 n.8. The Court denied Petitioner relief, writing that "[w]e normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." *Id.* at 767 n.8 (citations omitted).

In *Brown v. Payton*, 544 U.S. 133, 146-47 (2005), the Court addressed the situation where the trial court failed to take immediate curative action to address misconduct. There, the prosecutor improperly argued to jurors during his closing that they should not consider any of defendant's post-crime mitigation evidence in his capital case. *Id.* at 143-46. Defense counsel immediately objected, and after a side-bar, the trial court admonished the jury only that "the comments by both the

prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective." *Id.* at 146.

The Court found that although the trial judge should have immediately advised the jury that it could consider defendant's post-crime mitigating evidence and allowed counsel simply to argue that evidence's persuasive force, reversal under AEDPA deference was not required. *Id.* at 146-47. The Court found that "[e]ven in the face of the trial court's failure to give an instant curative instruction, however, it was not unreasonable to find that the jurors did not likely believe Payton's mitigation evidence beyond their reach. The jury was not left without any judicial direction." This was due to the fact that prior to deliberations, the trial court instructed the jury to consider all evidence received "during any part of the trial in this case, except as you may be hereafter instructed," and it was not instructed to disregard anything. *Id.* at 146-47. Additionally, the trial court also instructed the jury properly as to which evidence it could consider that might lessen a defendant's culpability. *Id.*

Greer and *Brown*, taken together, stand for the general rule that courts should presume that a jury followed an appropriate curative instruction to disregard improperly presented evidence or argument, even if the instruction is not provided at the time the misconduct occurs. *Greer*, 483 U.S. at 766 n.8; *Brown*, 544 U.S. at 146-47. The instant case, however, presents an additional element to this curative

instruction analysis which the Court addressed in *Francis*, 471 U.S. at 322. In *Francis*, the Court examined whether the jury charge on the issue of intent could have been interpreted by a reasonable juror as a mandatory presumption that shifted to the defendant a burden of persuasion on the intent element of the offense. *Id.* at 322-26. In finding that contradictory instructions on intent provided by the trial court required reversal, the Court found that "[n]othing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other." *Id.* at 322. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Id.*

The instant record presents important and unresolved questions regarding application of the *Greer* curative instruction presumption. All courts which have reviewed Petitioner's claim have agreed that the prosecutor committed misconduct in misstating the law as to voluntary manslaughter, and that the trial court's immediate reaction to the misconduct was incorrect and actually ratified the prosecutor's misstatements. While the Ninth Circuit found that, pursuant to *Greer* and *Brown*, this misconduct failed to prejudice Petitioner because the trial court provided proper voluntary manslaughter instructions at the end of the case, this conclusion is in conflict with *Francis* because the trial court's final instructions which

merely "contradict[ed] and d[id] not explain [its] constitutionally infirm instruction [did] not suffice to absolve the infirmity." *Francis*, 471 U.S. at 322.

In addition, this unreconciled conflict between the trial court's comments at the time of the misconduct and its instructions at the end of trial implicates the language from *Greer* which applies the presumption to curative instructions to "disregard inadmissible evidence inadvertently presented to it[.]" *Greer*, 483 U.S. at 766 n.8. By simply providing the jury with proper instructions as to voluntary manslaughter at the end of the case, and failing to direct the jury specifically to disregard the comments of the prosecutor and its improper ratification of them, the record is void of any directive from the trial court to "disregard [the argument or instruction] presented to it." *Greer*, 483 U.S. at 766 n.8. Petitioner asks the Court to review this case to correct the Ninth Circuit's application of *Greer* which is directly contrary to *Francis*, and also to provide lower courts guidance regarding application of the *Greer* presumption generally.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: May 28, 2021

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