20-8450

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RONALD ANTHONY GOMEZ,
Petitioner,

vs.

CHRISTIAN PFEIFFER and
RALPH DIAZ,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

RONALD A. GOMEZ, #AL6739
R.J. Donovan State Prison
RJDSP-A4-127
480 Alta Road
San Diego, CA 92179

Petitioner In Pro Se,
RONALD ANTHONY GOMEZ

QUESTIONS PRESENTED

I. Does a state trial court's failure to give a unanimity instruction to a jury in a criminal trial raise a debatable valid claim of the denial of a constitutional right under the Fourteenth Amendment Due Process Clause (*Schad v. Arizona*, 501 U.S. 624, 631-633 (1991)), or do such claims involve Sixth Amendment Jury Unanimity, which had not been extended to the States at the time of trial. *Apodaca v. Oregon*, 406 U.S. 404 (1972)?

II. Does a state trial court's instruction to the jury in a criminal trial that the jurors need not be unanimous as to which act resulted in assault likely to result in great bodily injury, coupled with an instruction on the elements of a different charge, raise a debatable valid claim of the denial of a constitutional right under the Fourteenth Amendment Due Process Clause (*Schad v. Arizona*, 501 U.S. 624, 631-633 (1991)), or do such claims involve Sixth Amendment Jury Unanimity, which had not been extended to the States at the time of trial. *Apodaca v. Oregon*, 406 U.S. 404 (1972)?

III. Did the Court of Appeal err in denying Petitioner's request for a Certificate of Appeal following the District Court's denial of Petitioner's Petition for a Writ of Habeas Corpus from a state conviction on the grounds that no reasonable jurist would find it debatable whether a state trial court's failure to give a required unanimity instruction to a jury in a criminal trial states a constitutional right?

IV. Did the Court of Appeal err in denying Petitioner's request for a Certificate of Appeal following the District Court's denial of Petitioner's Petition for a Writ of Habeas Corpus from a state conviction on the grounds that no reasonable jurist would find it debatable whether defense counsel's agreement with the trial court's erroneous instruction and/or failure to object and/or request a unanimity instruction did not result in constitutionally deficient counsel under the Sixth Amendment?

LIST OF PARTIES

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

RELATED CASES

1. Gomez v. Pfeiffer, et al., District Court for the Central District of California, 2:19-cv-023756 DMGF-MRW
2. Gomez v. Pfeiffer, et al., District Ninth Circuit Court of Appeals, 20-56214
3. People v. Ronald A. Gomez, Second District Court of Appeal for California, B275656; review denied S246122.
4. In re Gomez (State Habeas Petition), Second District Court of Appeal for California, B288576; review denied S250113.
5. People v. Ronald A. Gomez, Los Angeles County Superior Court, KA111430

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears at Appendix A to the Petition and is unpublished.

The opinion of the United States District Court for the Central District of California appears at Appendix B to the Petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was January 14, 2021.

No petition for rehearing was timely filed in my case.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Petitioner relies on rights guaranteed by the United Statutes Constitution:

Fifth Amendment: "No state shall ... deprive any person of life, liberty, or property, without due process of law[.]"

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the ... right to have the Assistance of Counsel for his defense."

Fourteenth Amendment: "No state shall ... deprive any person of life, liberty, or property, without due process of law[.]"

Petitioner relies on rights guaranteed in statutory provisions:

28 U.S.C. § 2254: Petition for Writ of Habeas Corpus

28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b): Certificate of Appeal

STATEMENT OF THE CASE

Procedural Posture

On May 1, 2019, petitioner filed a petition for writ of habeas corpus in the United States District Court, Central District of California as a state prisoner pursuant to 28 U.S.C. § 2254, after exhausting his state remedies on appeal and habeas corpus.

On May 6, 2019, the district court issued an order to show cause and ordered the parties to brief the issues.

On January 8, 2020, a magistrate judge, filed the report and recommendation to the district court judge, finding that the state court decisions denying petitioner's claims were neither contrary to, nor unreasonable applications of, clearly established federal law and recommending that the petition be denied.

On August 21, 2020, the magistrate judge filed a supplemental statement of decision finding that *Ramos v. Louisiana*, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (April 20, 2020), as there was no federal right to a

unanimous jury in a state criminal case in California at the time of petitioner's trial.

On October 19, 2020, the district court judge accepted the reports and recommendations of the magistrate judge, entered judgment, and dismissed the petition with prejudice, and denied a certificate of appealability in full. (Appendix B, Order of District Court.)

On November 11, 2020, petitioner, acting in pro per, sent to the district court a notice of appeal from the judgment and orders in his case. The notice was filed on November 17, 2020.

On November 18, 2020, petitioner filed an application for certificate of appeal and appointment of counsel in the court of appeal.

On January 14, 2021, the court of appeal issued an order denying appellant/petitioner's request for a certificate of appeal, "because appellant has not shown that 'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling'." The court also denied petitioner's request for counsel as moot. (Appendix A, Order of Court of Appeal.)

Statement of Facts

The State Court Conviction

On December 27, 2015, petitioner, who was homeless, was sleeping on the front porch of his mother's home in knowing violation of a court order that he stay away from her home. The front porch of the house was elevated about 4–6 feet above the ground and was accessed by a flight of stairs leading to the middle of the porch. The porch was surrounded by a short wall, approximately 3–4 feet tall. Petitioner slept there because he did not have anywhere to go and wanted to be safe.

The police were called, and an officer was dispatched. The officer was 6' tall and weighed 240 pounds, whereas petitioner was 5'6" tall and weighed 130 pounds.

The officer climbed the steps to the porch and spoke to petitioner, who was asleep. Petitioner gave the officer his name and told him he was on parole. Petitioner stood up at the officer's instruction so he could be handcuffed while they figured things out.

According to the officer, to detain petitioner, he grabbed him by the right arm as petitioner was starting to move away from him. Petitioner then grabbed the officer's right wrist or forearm and hurdled

over the short wall on the porch to ground below, pulling the officer over the wall. The officer said his legs hit the short wall around knee-high and he lost his balance, falling headfirst to the ground below, resulting in his injuries.

Petitioner testified that he decided to run away, as he believed there was a warrant for his arrest for failure to communicate with his parole officer and he did not want to go to jail. Once the officer directed him to turn around to apply the handcuffs, petitioner turned around, ran to the short wall around the porch and jumped over it to escape. As he was hurdling over the porch wall, petitioner felt the officer grab his shoulder to pull him back; however, their momentum carried them both over the wall to the ground. Petitioner got up and ran away. Petitioner was trying to run away and never grabbed the officer and never pulled him over the ledge. He argued that grabbing the officer was inconsistent with his intent to flee.

The trial court's and defense counsel's handling of the issues raised by these two versions of events are the source of the errors complained of by petitioner.

During deliberations, the jury asked for clarification as to which act constituted the assault in Count 1 (Cal. Penal Code § 245, subd. (c) [assault on a peace officer by means likely to result in great bodily injury]): the "dual grab between Ronald & the officer or the single grab to the shoulder from the officer to Ronald?" The Court did not directly answer the question; rather a written statement was given to the jury with the concurrence of defense counsel, which read as follows:

> "You are the sole and exclusive judges of the facts of this case. First, you must determine what facts have been proved from the evidence received in the trial and not from any other source. A 'fact' is something proved by the evidence or by stipulation.
>
> In this case you must unanimously agree that the defendant willfully committed an act which by its nature would probably and directly result in the application of physical force on another person. You were directed to CALJIC 9.00, page 24 of the instructions.[1]
>
> You do not have to unanimously agree as to which act the defendant committed upon another person."

Immediately after being given this written answer, the jury returned verdicts of Guilty to Count 1 (Cal. Penal Code § 245, subd. (c)

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[1] This is the instruction for *Simple Assault* (California Penal Code § 240), a different crime, not the charge in Count 1 that the jury asked about, which must include the requirement that the force likely result in great bodily injury. The crime charged is defined in CALJIC 9.20.

[Assault of a Peace Officer with Force likely to Result in Great Bodily Injury]) and Count 2 (Cal. Penal Code § 69 [Obstructing/Resisting an Executive Officer]) and found true that great bodily injury occurred as a result (Cal. Penal Code § 12022.7(a))[2].

The trial court's answer directed the jury to the jury instruction on Simple Assault (Penal Code § 240), not assault on a peace officer with force likely to result in great bodily ((Penal Code § 245, subd. (c)), which had been the subject of the jury's inquiry about Count 1. This invited the jury to convict the defendant for an act requiring less force than the crime charged, which required force likely to result in great bodily injury.

The trial court's answer also instructed the jurors that it was not necessary for them to be unanimous as to which act constituted the assault, petitioner and the officer grabbing each other or the officer grabbing the petitioner, permitting the jury to return a less than unanimous verdict by cobbling together a verdict from the two versions

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[2] The great bodily injury enhancement was reversed on appeal due to an error in the jury instruction on this issue. On remand, the government did not pursue the GBI enhancement.

of events, which supported different criminal conduct but not the elements of Count 1.

On direct appeal the state court of appeal ruled that the error of the answer to the jury and failure to request a unanimity instruction were forfeited on appeal due to trial defense counsel's agreement with the answer and failure to object. The court also ruled that any questions of constitutionally ineffective assistance of counsel (IAC) had been forfeited by appellate counsel's failure to raise them in the opening brief. The merits of the substantial constitutional claims were never reviewed on direct appeal; however, these issues were all raised in a subsequent petition for writ of habeas corpus and petition for review from the denial of the writ in the state courts. These petitions were denied without opinion.

The trial court's answer to the jury's inquiry and subsequent instruction, and defense counsel's concurrence with it and to failure to request a unanimity instruction, resulted in harm to petitioner's substantial statutory and federal constitutional rights, including the right to a unanimous jury, a verdict beyond a reasonable doubt,

effective assistance of counsel, and a fair trial. U.S. Const. Amend. 5, 6, 14.

REASONS FOR GRANTING THE PETITION

Standard for Granting a Certificate of Appeal

Ronald Gomez sought a certificate of appeal asking that the court of appeal review the district court's judgment denying his petition for writ of habeas corpus.

A habeas petitioner may not appeal a final order in a federal habeas corpus proceeding without first obtaining a certificate of appeal (COA). 28 U.S.C., § 2253(c)(2); Fed. R. App. P. 22(b). To obtain a COA, petitioner need not demonstrate that he would ultimately win the appeal. *Silva v. Woodford*, 279 F.3d 825, 833 (9th Cir. 2002). Petitioner needs to only demonstrate that jurists of reason could disagree with the district court's resolution of the claim or that jurists could conclude that issues presented are adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484-485 (2000). This standard is liberally construed in favor of appellate review and is not onerous. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *King v. Schriro*, 537 F.3d 1062, 1075 (9th Cir. 2009).

There were valid constitutional claims stated in the petition.

The court of appeal denied the request for a certificate of appeal because no reasonable jurist would find it debatable whether the petition stated a valid claim of the denial of a constitutional right and would find it debatable whether the district court was correct in its procedural ruling. (Appendix A.)

Petitioner sought habeas relief on the grounds that the state trial court violated his constitutional right to due process when it advised the jury in petitioner's criminal trial that the jury need not be unanimous in determining which act of petitioner resulted in the assault of a police officer by means likely to result in great bodily injury and then instructed the jury on the elements of a different crime. In addition, trial defense counsel provided constitutionally deficient representation when counsel agreed with the trial court's erroneous instruction to the jury and failed to request a unanimity instruction.

In denying the petition, the district court reasoned that no federal right was implicated, *Teague v. Lane*, 489 U.S. 288, 310 (1989), because the Sixth Amendment Right to a Unanimous Jury had not been extended to the states at the time of trial. *Apodaca v. Oregon*, 406 U.S.

404 (1972). The district court further ruled that the recently decided *Ramos v. Louisiana*, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (April 20, 2020) (*Ramos*), extending to the states the Sixth Amendment right to a unanimous jury, was not retroactive.[3]

Appellant's position was that the right to a unanimity instruction in a state criminal jury trial implicates the Fourteenth Amendment Due Process Clause, as was articulated by the Supreme Court in *Schad v. Arizona*, 501 U.S. 624, 631-633 (1991) (*Schad*). Further, because California is a state that has adopted the jury unanimity requirement for criminal trials, denying a defendant a unanimous jury, results in an unfair trial in violation of due process.

For decades California courts have found that the requirement for a unanimity instruction in criminal trials is based in federal and state due process. When a verdict of Guilty is returned by a jury that has not been properly instructed as to the elements of the crime, the prosecution's burden has been lightened and proof of the defendant's conduct has not been established beyond a reasonable doubt.

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[3] This Court had not yet issued its opinion in *Edwards v. Vannoy* ___U.S.___ [141 S.Ct. 1547, ___L.Ed.2d___] (2021), holding that *Ramos* is not retroactive.

Although petitioner's direct state appeal was denied on procedural grounds because defense counsel concurred with the trial court's answer and instruction to the jury, the issues were reviewable in federal court, as the procedural error was the result of defense counsel's constitutionally ineffective assistance at trial.

These issues were properly raised in the petition in the district court and should have been reviewed by the court of appeal, as reasonable jurists could find debatable the questions of whether errors in jury instructions that effect jury unanimity in a state criminal trial can result in Fourteenth Amendment Due Process violations; whether due process was violated in the circumstances of petitioner's case; and whether defense counsel's agreement with the court's erroneous statements and instructions to the jury amounted to ineffective assistance of counsel under the Sixth Amendment.

Due Process

The district court denied the petition as federal relief is not available for a trial court's failure to give a unanimity instruction under *Teague v. Lane*, *supra*, 489 U.S. at p. 310. The decision is premised on the idea that at the time of appellant's trial the Sixth Amendment right

to a unanimous jury had not yet been extended to the States, and even if a defendant has been denied a unanimous jury verdict in a state criminal prosecution through failure to give a unanimity instruction, this cannot result in a federal constitutional violation and would require a new rule of procedure to be imposed on the State.

This is incorrect, as the right to a jury unanimity instruction flows from the Fourteenth Amendment Right to Due Process, the right to be convicted by a jury by proof beyond a reasonable doubt as to each element of the crime.

While the Supreme Court has held that the right to a unanimous jury is included in the Sixth Amendment, at the time of petitioner's trial, this right had not been extended to the States through the Fourteenth Amendment. *Apodaco v. Oregon*, *supra*, 406 U.S. at pp. 410-413; disapproved in *Ramos*, *supra*. For instance, defendants may be convicted by less than a unanimous jury in Oregon and Louisiana where those states have created systems permitting conviction by less than the unanimous jury. Until *Ramos*, this Court had held that the unanimity provision of Sixth Amendment Right had not been extended

to the states in these circumstances. *Apodaca, Id.* at 406, n. 1; *Johnson v. Louisiana*, 406 U.S. 356, 358, n. 1 (1972).

This type of case is inapplicable here, however, where California requires that juries in criminal cases will consist of 12 persons and must return a unanimous verdict beyond a reasonable doubt, just like the federal system and other states. Cal. Const., Art. 1, §§ 15, 16; *People v. Wolfe*, 114 Cal.App.4th 177, 186 (2003).

Petitioner was not requesting that the district court extend the reach of the Sixth Amendment. This Court has already recognized that failure to give a unanimity instruction in certain cases, violates the right to a verdict beyond a reasonable doubt and due process, which are recognized rights that apply to the states. This Court has recognized that Fourteenth Amendment Due Process violations can masquerade as Sixth Amendment jury "unanimity" problems. *Schad v. Arizona, supra,* 501 U.S. at pp. 631-633.

> "[W]e think the right is more accurately characterized as a due process right than as one under the Sixth Amendment. Although this difference in characterization is important in some respects (chiefly, because a state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict, [citations omitted]), it is immaterial to the problem of how to go about deciding what level of verdict specificity is constitutionally necessary."

(*Id.* at 634, n. 5.) The *Schad* Court then analyzed and ruled on this Arizona conviction on Due Process grounds. There has been precedent since at least 1991 establishing this circumstance as one involving a federal right, which would permit habeas relief. Other federal courts have reviewed claims of constitutional harm based on failure to give unanimity instructions on petition for habeas relief, e.g., *Villa v. Mitchell*, 2006 WL 707363, *20-21 (E.D.Cal.), although other cases have refused to find a federal issue based on the denial to give a unanimity instruction. *Arevalo v. Katavich*, 2015 WL 5074467.

California courts have recognized that the right to a unanimity instruction emanates from the Fourteenth Amendment Due Process Clause – whether the 12 jurors required in California are convinced of the defendant's guilt beyond a reasonable doubt. Otherwise, the reasonable doubt requirement would become meaningless. The failure to give a unanimity instruction has the effect of lowering the prosecution's burden of proof. A failure to give the instruction when it is warranted runs the risk of a conviction when there is not proof beyond a reasonable doubt. *People v. Wolfe*, *supra*, 114 Cal.App.4th at p. 186; *People v. Hernandez*, 217 Cal.App.4th 559, 570 (2013) (*Hernandez*).

The instruction is not required in all cases. Trial courts must ask whether (1) there is a risk the jury may divide on *two discreet crimes* and not agree on any particular crimes, in which case the unanimity instruction should be given, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of the single discrete crime. *Hernandez, supra*, 217 Cal.App.4th 559, 569-570.

This analysis is similar to that used in *Schad* at 633-637, which analyzed the unanimity question in an Arizona conviction, upholding the conviction because the jury may have been divided on the defendant's state of mind when committing a single discreet statute that set forth alternative mental states.

This Court has explicitly held that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). Therefore, if the trial court failed to give a unanimity instruction where one was required and under the circumstances of the case the burden of proof

was lowered and the verdict was achieved by proof less than constitutionally required, this is a violation of due process.

In Mr. Gomez's case, the jury was at risk of dividing on multiple discreet crimes while not agreeing on any particular crime, requiring unanimity. The defendant was charged with multiple crimes with different elements and requiring different levels of force and different mental states. Petitioner and the police officer gave conflicting accounts of how the officer fell and was injured. The officer said he grabbed the defendant by the arm and that the defendant grabbed him back and jumped over the railing, causing the officer to lose his balance. The defendant admitted that he ran away from the officer but said the officer grabbed him while he was hurdling the railing and the officer lost his balance and fell. The prosecutor also argued that if the officer grabbed Mr. Gomez and then the defendant jumped over the railing while the officer had a hold of him causing the officer to fall, this was an application of force and also qualified as an assault. The defendant did not give a common defense to these charges, admitting things some, while denying others.

Under both the state and federal constitutions, a jury verdict in a criminal case must be unanimous. *People v. Russo*, 25 Cal.4th 1124, 1132 (2001). In addition, the jury must unanimously agree that the defendant is guilty of a specific crime. *Ibid.* Therefore, "when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." *Ibid.* In the absence of an election, a unanimity instruction is required in order " 'to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.'[Citation.]" (*Ibid.*) Where the instruction is warranted, the trial court must give the instruction sua sponte. *People v. Riel*, 22 Cal.4th 1153, 1199 (2000).

Hernandez has given perhaps the best summary of the law on unanimity instructions available in either federal or state court.

> "A unanimity instruction is given to thwart the possibility that jurors convict a defendant based on different instances of conduct. The giving of [a unanimity instruction] " 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' " (*Russo, supra*, 25 Cal.4th at p. 1132, quoting *People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) Moreover, a unanimity instruction is " 'designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude

> beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.' " (*Russo*, *supra*, 25 Cal.4th 1124.) Thus, the instruction is given to ensure that all 12 jurors unanimously agree, and are unanimously convinced beyond a reasonable doubt, which instance of conduct constitutes the charged offense.
>
> The importance of the unanimity instruction is rooted in the Fourteenth Amendment to the United States Constitution's requirement that all criminal defendants are afforded due process of law. The failure to give a unanimity instruction "has the effect of lowering the prosecution's burden of proof." (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 186.) Accordingly, a failure to give the instruction when it is warranted abridges the defendant's right to due process, as it runs the risk of a conviction when there is not proof beyond a reasonable doubt.
>
> In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on *two discrete crimes* and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a *single discrete crime.* (*Russo*, *supra*, 25 Cal.4th at p. 1135, italics added.) In the first situation, but not the second, it should give the unanimity instruction. (*Ibid.*)

People v. Hernandez, *supra*, 217 Cal.App.4th at 569-570.

In this case, the prosecution presented evidence at trial that supported 5 different crimes: Assault (Pen. Code, § 240), Assault Upon a Police Officer by Means Likely to Result in Great Bodily Injury (Pen. Code, § 245, subdivision (c)), Assault on a Peace Officer (Pen. Code, §

241), Resisting an Executive Officer by Use of Force or Violence (Pen. Code, § 69), and Resisting Arrest (Pen. Code, § 148, subdivision (a)(1)).

This trial presented different sets of facts, some of which supported some crimes charged and some that supported others. The risk presented by the written answer to their question on Count 1 was that some jurors would believe petitioner grabbed the officer and pulled him over, while others may have believed the officer grabbed petitioner and petitioner then pulled the officer over the ledge, or that appellant was grabbed by the officer after he began his leap over the ledge, which pulled the officer over accidentally. Under the general rule, it might not matter if these were all different ways of committing the same crime, but they are not. In addition, the crime of assault (Pen. Code, § 240) requires proof of all elements concerning a defendant's *single* act. (See CALJIC 9.00; "an act", "the act", and "this act".)

The act of petitioner fleeing supports the resisting arrest charge, while it may not support other charges. The act of jumping off the ledge after having been grabbed by the officer might support a charge of resisting an executive by force or assault but might not support a charge of assault by means of force likely to cause great bodily injury.

By advising the jury that it did not need to unanimously agree on the specific act which constituted the assault by means likely to result in great bodily injury, they may well have assumed they were permitted to use petitioner's own testimony of being grabbed while in mid-air to reach agreement and any other possible scenario to cobble together a "unanimous" verdict.

If the court had advised the jury that they must unanimously agree on which act constituted the assault, the outcome may well have been different. Certainly, the jury instruction on assault required determination of a singular act and flies in the face of the court's statement that unanimity is not required.

The district court concluded incorrectly that that petitioner's acts fell within the *continuous course of conduct* exception to the requirement for a unanimity instruction. The exception holds that a unanimity instruction is not " 'required when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct,' " or " ' "when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them." *People v. Percelle*, 126

Cal.App.4th 164, 181–182 (2005); see also *People v. Stankewitz,* 51 Cal.3d 72, 100 (1990). The justification for the exception is that there is no need for an instruction when there is a single course of conduct because members of the jury cannot distinguish between the separate acts. Further, the instruction is unnecessary when the defendant proffers the same defense to multiple acts because a guilty verdict indicates that the jury rejected the defendant's defense in toto. *Hernandez, supra,* 217 Cal.App.4th at p. 572.

Here, although the acts described occurred close in time, and both involved contact between appellant and the officer, the jury could clearly distinguish between them (after all they clearly asked for clarification as to which of two acts constituted the crime). Also, appellant's defense was very different to each. He denied the prosecution claim that he grabbed the officer and pulled him over the ledge. However, concerning the conduct of fleeing the scene by jumping over the ledge, being grabbed by the officer and running away, he readily admitted this. The continuous course of conduct exception does not apply.

Reasonable jurists could conclude that petitioner's argument was correct and that the district court erred in finding that the state court answer and instructions to the jury were not erroneous and that no unanimity instruction was required under state law. It is clear that the question presented to the district court in the petition was whether the trial court's failure to instruct and answer to the jury violated petitioner's due process rights to a verdict beyond a reasonable doubt and to a fair trial and was not based in the Sixth Amendment unanimity requirement. A review of the briefs in the state courts of appeal and California Supreme Court in Mr. Gomez's case reveal that this was always petitioner's claim. It was respondent who injected the Sixth Amendment right to unanimous jury into this case in hopes of manufacturing a *Teague* violation, where none existed. They were successful, as the District Court adopted this argument, giving the right answer to the wrong question.

This Court should acknowledge the reality of what California courts know and practice, and *Schad* explicated: that federal due process requires unanimity instructions in certain cases such as this one, and failure to give the instruction when required results in a denial

due process and does not lie in the Sixth Amendment's requirement for a unanimous jury.

Ineffective Assistance of Counsel

Both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution guarantee a criminal defendant effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 691–692 (1984); *People v. Ledesma*, 43 Cal.3d 171, 215 (1987). The right of a criminal defendant to counsel "entitles the defendant not to some bare assistance but rather to *effective* assistance." *In re Cordero*, 46 Cal.3d 161, 180 (1980). "Specifically, he is entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate. *Ibid.* This means that before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." *In re Marquez*, 1 Cal.4th 584, 602 (1992); *People v. Ledesma, supra,* 43 Cal.3d at p. 215. While scrutiny of an attorney's conduct of the defense is deferential, that deference is limited. "[I]t must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts

or omissions. Otherwise, the constitutional right to the effective assistance of counsel would be reduced to form without substance." *People v. Ledesma, supra,* 43 Cal.3d at p. 217.

A habeas corpus petitioner bears the burden of proof of the facts on which an incompetent counsel challenge to the validity of the judgment under which the petitioner is restrained is predicated, by a preponderance of the evidence. *In re Visciotti* (1996) 14 Cal.4th 325, 351. To prove he is entitled to habeas relief on a theory that he received constitutionally inadequate representation by counsel at trial, petitioner must establish by a preponderance of the evidence that counsel's performance did not meet an objective standard of reasonableness under prevailing professional norms and that he suffered prejudice thereby. *Strickland v. Washington, supra,* 466 U.S. at p. 694.

In petitioner's matter, trial counsel agreed with and failed to object to the Court's answer to the jury in response to their question about which act constituted the assault in Count 1, the police officer being grabbed by petitioner or the officer grabbing the petitioner. Defense counsel failed to request a unanimity instruction.

This resulted in the issues raised by this answer being forfeited on appeal. California case law holds that counsel's affirmative agreement with or acquiescence to the court's answer to a jury question forfeits the claim of error on appeal. (*People v. Salazar* (2016) 63 Cal.4th 214,248; *People v. Debose* (2014) 59 Cal.4th 177, 207; *People v. Rogers* (2006) 39 Cal.4th 826, 877; *People v. Roldan* (2005) 35 Cal.4th 646, 729.)

Defense counsel admitted her error in a declaration submitted in support of the state petition for a writ of habeas corpus. Trial counsel stated that she either mistakenly agreed with the court's answer at the time or failed to object on the record. (The record, however, shows she agreed to the court's answer on the record.) Defense counsel realized her mistake after the jury returned a verdict and tried to correct it through the motion for new trial. As she noted in the motion, the court's answer told the jury they need not be unanimous in which act they used in finding the assault, which could have resulted in the jury using either the police officer's or petitioner's version of event to convict petitioner. This would result in a less than unanimous verdict and a verdict that was not beyond a reasonable doubt. The answer also wrongly directed the jury to the instruction for simple assault, when

their question was about Count 1, assault with force likely to result in great bodily injury. Agreeing with the court's erroneous and misleading answer and failing to place an objection on the record fell below the objective standard of reasonableness under prevailing professional norms for trial defense counsel.

Petitioner, as previously stated, demonstrated the prejudice suffered by petitioner from the mistake of counsel.

Reasonable jurists could conclude that defense counsel erred in agreeing with the trial court's answer and instruction and failure to request a unanimity instruction and that the district court erred in finding that defense counsel did not commit an error because the unanimity instruction was not required and the that the court's answer to the jury was correct.

CONCLUSION

Reasonable jurists could find that the district court erred in reaching its conclusions denying relief and entering judgment against petitioner. Petitioner has demonstrated that he is deserving of a certificate of appeal and requests this Court accept his petition for

certiorari, appoint counsel to represent him[4], reverse the court of appeal's order denying the certificate of appeal, and remand the case with an order that the court of appeal issue the certificate of appeal and review the district court's judgment denying the petition for writ of habeas corpus on all grounds requested.

Ronald Gomez

[4] Christopher L. Haberman, who represented me on appeal by appointment in the state courts, and before the district court pro bono, is a member of the United States Supreme Court Bar and is familiar with my case. I am informed that he would accept appointment in this case if the petition for certiorari is granted and I request his appointment.