No.

IN THE

SUPREME COURT OF THE UNITED STATES

ALBERTO RODRIGUEZ,

Petitioner,

vs.

SCOTT KERNAN, WARDEN,

Respondent

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment fundamental right to notice of charges can be waived by the lawyer's failure to object or whether the defendant must personally waive the right?

RELATED PROCEEDINGS

California Court of Appeal

People v. Rodriguez, F070850

United States District Court

Rodriguez v. Kernan CV-17-1040-DAD (E.D. Cal.)

Ninth Circuit Court of Appeals

Rodriguez v. Kernan, 19-15396

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Petitioner Alberto Rodriguez respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on April 20, 2021. The decision is unpublished.

OPINION BELOW

On April 20, 2021, the Court of Appeals entered its decision affirming the denial of petitioner's habeas corpus petition under 28 U.S.C. § 2254. Appendix A . The petition for rehearing was denied on June 21, 2021. Appendix B.

JURISDICTION

On April 20, 2021, the Court of Appeals affirmed the denial of the 2254 petition. Appendix A. The petition for rehearing was denied on June 21, 2021. Appendix B. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is due for filing on November 18, 2021. Supreme Court Orders of March 19, and July 19, 2021. Jurisdiction existed in the District Court pursuant to 28 U.S.C. § 2254 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §§ 1291, 1294, and 2253.

CONSTITUTINAL PROVISIONS INVOLVED

Sixth Amendment (pertinent part)

> In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation

Fourteenth Amendment (pertinent part)

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

By information, Petitioner was charged, *inter alia*, in count one with attempted aggravated kidnapping in violation of California Penal Code §§ 664 and 209(b)(1). The allegation reads as follows:

> On or about August 11, 2013, said defendant(s), ALBERTO RODRIGUEZ, did commit a FELONY, namely: A violation of section 664/2099b)(1) of the Penal Code of the State of California, in that said defendant(s): did unlawfully attempt to kidnap and carry away K.D. to commit to wit, pull her into the car.

(1-ER-1.)

Count one provided notice that the offense was a serious felony [§ 1192.7(c)] and a violent felony [§ 667.5(c)]. There is no language in the information that would have alerted Petitioner he needed to defend against a lesser related charge of false imprisonment. "False imprisonment is the unlawful violation of the personal liberty of another." Penal Code § 236.

The trial court *sua sponte* instructed the jury on false imprisonment without objection from the defense. However, neither the prosecutor nor defense counsel argued that Petitioner was guilty of false imprisonment.

Petitioner was *acquitted* of count one and also *acquitted* of the lesser included offense of attempted simple kidnapping [§ 664 and-207(a)]. He was, however, convicted of false imprisonment [§ 236].

On direct appeal, Petitioner argued that conviction on a charge which was never made violated his right to due process under *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). The California Court of Appeal agreed that false imprisonment is not a lesser included offense of attempted aggravated kidnapping. It is only a lesser related offense. The court also agreed that "due process" is violated if a defendant is convicted of an offense that is "neither charged in the accusatory pleading nor necessarily included in a charged offense." Appendix D at 8. Nevertheless, because Petitioner failed to object to the instruction and verdict form he "impliedly consented." Appendix D at 9.

The district court agreed that under *Cole v. Arkansas* it is a denial of due process to be convicted of a crime that was not charged. However, the court found that the issue was subject to waiver. It held that Petitioner was bound by his lawyer's failure to object, citing *New*

York v. Hill, 528 U.S. 110, 528 (2000) ("the most basic rights of criminal defendants are . . . subject to waiver.") Appendix C, Report at 10.

> What suffices for waiver depends on the nature of the right at issue. "[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). For certain fundamental rights, the defendant must personally make an informed waiver. See, *e.g., Johnson v. Zerbst,* 304 U.S. 458, 464-465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (right to counsel); *Brookhart v. Janis,* 384 U.S. 1, 7-8, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (right to plead not guilty). For other rights, however, waiver may be effected by action of counsel. "Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has-and must have-full authority to manage the conduct of the trial." *Taylor v. Illinois,* 484 U.S. 400, 417-418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). As to many decisions pertaining to the conduct of the trial, the defendant is "deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' " *Link v. Wabash R. Co.,* 370 U.S. 626, 634, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (quoting *Smith v. Ayer,* 101 U.S. 320, 326, 25 L.Ed. 955 (1880)). Thus, decisions by counsel are generally given effect as to what arguments to pursue, see *Jones v.Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), what evidentiary objections to raise, see *Henry v. Mississippi,* 379 U.S. 443, 451, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), and what agreements to conclude regarding the admission of evidence, see *United States v. McGill,* 11 F.3d 223, 226-227 (C.A.1 1993). Absent a

> demonstration of ineffectiveness, counsel's word on such matters is the last.

Hill, 528 U.S. at 114–15. Appendix C, Report at 10-11.

The district court denied the 2254 petition because it did not believe there was any Supreme Court decision on point. Appendix C, Report at 11.

In the Ninth Circuit, Petitioner argued that he could not be convicted of false imprisonment because notice of the specific charges is a fundamental constitutional right under *Cole v. Arkansas*, 333 U.S. at 201 ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.")

Petitioner further argued that notice is the type of fundamental constitutional right that cannot be waived by the failure to object. In order to waive this right he must personally make an informed waiver. *Johnson v. Zerbst*, 304 U.S. 458, 464-465 (1938) ("Courts indulge every reasonable presumption against waiver of

fundamental constitutional rights" and "we do not presume acquiescence in the loss of fundamental rights.")

The Ninth Circuit held that Petitioner failed to identify any Supreme Court precedent establishing that notice of a lesser related offense cannot be waived or what is required to waive such notice. Appendix A at 4. Therefore, it would defer to the state court decision. Appendix A at 5.

REASONS FOR GRANTING THE WRIT

THE FUNDAMENTAL RIGHT TO NOTICE OF CHARGES MUST BE MADE IN THE CHARGING DOCUMENT NOT A JURY INSTRUCTION AND THE RIGHT CANNOT BE WAIVED BY FAILURE TO OBJECT

The Ninth Circuit ignored one of its own cases in rejecting Petitioner's claim. Although cited by both Petitioner and Respondent, the court overlooked *Gautt v. Lewis*, 489 F.3d 993, 1004, n.11 (9th Cir. 2007), which is directly on point. The *Gautt* case illustrates why this Court should grant certiorari to decide whether notice of charges is a fundamental right that must be personally waived by the defendant.

In *Gautt*, the Ninth Circuit granted habeas relief when the defendant, convicted of murder, was additionally charged with a firearm

enhancement in violation of Penal Code § 12202.53(b) which adds 10 years to the sentence. He was instead sentenced under a different statute, § 12202.53(d), which adds 25 years to life to the sentence. There are major differences between the two statues. Subdivision (b) provides "personally used a firearm," while subdivision (d) provides "personally discharged a firearm" and that he did so "intentionally." *Id.* at 999.

The trial court gave additional instructions including the language of § 12022.53(d). Neither party objected to the instruction. *Gautt*, 489 F.3d at 999, n.3. In closing argument, the prosecutor "specifically disavowed" any need to show that Gautt personally and intentionally discharged a firearm, and focused only on his use of the handgun. *Id.* at 1000. The verdict form listed § 12022.53(b) but also listed some of the elements of subdivision (d)'s 25 years to life enhancement. *Id.* at 1001. The abstract of judgment also listed § 12022.53(b) but increased Gautt's sentence by 25 years to life. The state Court of Appeal ordered the judgment amended to refer to subdivision (d). *Id.*

The Ninth Circuit held that the Sixth Amendment "guarantees a criminal defendant the fundamental right to be informed of the nature and cause of the charges made against him so as to permit an adequate defense." *Gautt*, 489 F.3d at 1002, citing e.g. *Cole v. Arkansas*, 333 U.S. at 201 (due

process is violated to be convicted on a charge which was never made); *In re Oliver*, 333 U.S. 257, 2753 (1948) (a right to reasonable notice and an opportunity to be heard are "basic in our system of jurisprudence"); and *Jackson v. Virginia*, 443 U.S. 307, 314 (a person cannot incur loss of liberty for an offense without notice and a meaningful opportunity to defend).

The Ninth Circuit noted that *Cole* held the information must state the elements of the offense with sufficient clarity to apprise a defendant of what he must be prepared to defend against. *Gautt*, 489 F.3d at 1004. "Besides the information" *Cole* did look at the jury instructions, but "did not treat those instructions as a means of providing defendants with notice of the charges against them." *Id.*

> We therefore conclude that, for purposes of AEDPA's 'clearly established requirement, it is 'clearly established' that a criminal defendant has a right, guaranteed by the Sixth Amendment, to be informed of any charges against him, and that a charging document, such as an information, is the means by which such notice is provided.

Gautt, 489 F.3d at 1004.

The state Court of Appeal never actually scrutinized the information to see if it contained any factual allegations that would have sufficiently informed Gautt of a charge under § 12022.53 (d). By ordering the abstract of judgment amended to include subdivision (d), "the state appeals court did not acknowledge the multiple discrepancies that existed between

the information, the jury instructions, the verdict form, and the ultimate sentence." *Gautt*, 489 F.3d at 1006.

Because Gautt was charged with a 10 year enhancement but sentenced to a 25 years to life enhancement, his "constitutional right to be informed of the charges against him was violated by the stark discrepancy between the crime charged and the crime of conviction." *Gautt*, 489 F.3d at 1008. Thus, the Court of Appeal's opinion constituted an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). *Id.*

The Ninth Circuit noted that it is one thing to argue notice of a different theory (e.g. lying in wait or felony murder). "We have never held, however, that these same non-charging-document sources can be consulted when the defendant claims, like Gautt, that he never received sufficient notice of the actual underlying *charge*. *Gautt*, 489 F.3d at 1009 (emphasis in the original).

> Even more troublesome is the idea that jury instructions or closing arguments – sure signs that the *end* of the trial is drawing near – could substitute for sufficient notice to a defendant of the charges that have been leveled against him.

Gautt, 489 F.3d at 1010 (emphasis in the original). Jury instructions, "given their timing," are not adequate to provide notice of a charge. *Id.* at 1011.

As to whether Gautt's § 12022.53(d) enhancement should be overturned, this Court noted that the Supreme Court has never included the right to notice in *Cole* as a mere trial error, subject to harmless error analysis. *Gautt*, 489 F.3d at 1015. The Supreme Court's:

> prior characterization of the right to be informed of charges against you - as both 'basic in our system of jurisprudence,' and as a 'principle of procedural due process' that is unsurpassed in its 'clearly established nature,' makes us inclined to believe that this type of constitutional deprivation must be structural, because it 'affects the framework within which the trial proceeds, rather than simply being an error in the trial process itself.

Gautt, 489 F.3d at 1015, citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), *In re Oliver*, 333 U.S. at 273, and *Cole v. Arkansas*, 333 U.S. at 201.

Given that Gautt's sentence was increased by 25 years to life, the state court error was prejudicial and required the writ to be granted under *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993) and *O'Neal v. McAnnich*, 513 U.S. 432, 436 (1995). *Gautt*, 489 F.3d at 1016.

It follows that if the right to notice must be given in the charging document and not the jury instructions which come at the end of the case, *Gautt,* 489 F.3d at 1004, 1010, 1011, – and where neither party even argued the lesser related offense -- the right is so fundamental that it cannot be waived by failing to object. Indeed, the right is structural. *Id.* at 1015.

In the instant case, Petitioner was acquitted of attempted aggravated kidnapping and also acquitted of attempted simple kidnapping, the lesser included offense. There is no Supreme Court case which holds that even after being acquitted, a defendant can nevertheless be convicted of a lesser related offense that was never charged. This structural error cannot be waived by failing to object.

Certiorari should be granted to decide whether California's decision is contrary to and an unreasonable application of clearly established supreme court law. § 2254(d)(1). Because Petitioner was sentenced to an additional 8 months on a charge which was never made, the error would be prejudicial under *Brecht v. Abrahamson,* 507 U.S. 619 (1993). This is the perfect case to decide this important question.

CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: August 5, 2021 Respectfully submitted,

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Counsel of Record .