

UNITED STATES SUPREME COURT

TAUMU JAMES, ) Docket No. \_\_\_\_\_  
 )  
 Petitioner, ) United States Court of Appeal Case Nos.  
 ) 16-56783  
 vs. ) United States District Court Nos. CV-  
 WARREN L. MONTGOMERY, Warden,) 20-5651-SVW, CV-13-7523-SVW  
 )  
 Respondent. )  
 )  
 )  
 )  
 \_\_\_\_\_ )

PETITION FOR WRIT OF HABEAS CORPUS

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## **QUESTIONS PRESENTED FOR REVIEW**

Whether the exceptional circumstance of Petitioner being unable to have a federal court review the Fifth and Fourteenth Amendment due process violations that were properly preserved in the state trial court simply because his appellate counsel failed to raise them on direct appeal and thus could not raise them in the initial habeas petition filed in federal court warrant this Court exercising its discretionary powers to hear and decide these violations in an original habeas petition in this Court per the holding in Felker v. Turpin 518 U.S. 651 (1996)?

## **PARTIES TO THIS PROCEEDING**

The Petitioner is Taumu James.

The Respondent is Warren Montgomery, Warden.

No corporate disclosure statement is not required as Petitioner is not a nongovernmental corporation.

## **COURT PROCEEDINGS RELATED TO THIS CASE**

On December 11, 2020, The United States Court of Appeals for the Ninth Circuit in Taumu James v. Warren L. Montgomery, Case No. 20-73168, denied Petitioner's application to file a second or successive habeas corpus petition. A copy of the Ninth Circuit's opinion is included in the Appendix filed along with this Petition. In a decision entered on September 2, 2021, the United States District Court for the Central District of California denied the Petition. A copy of the United States District Court's opinion is included in the Appendix filed along with this Petition.

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The decisions of the United States Court of Appeals for the Ninth Circuit are not reported in the Federal Reporter.

## **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 2241.

## **CONSTITUTIONAL PROVISIONS AT ISSUE**

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” United States Constitution, Amendment V.

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” United States Constitution, Amendment VI.

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“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” United States Constitution, Amendment XIV.

### **STATEMENT OF THE CASE**

The People of the State of California filed an information charging Petitioner with eight counts of home invasion robbery while acting in concert with others pursuant to California Penal Code § 213, subdivision (a)(1)(A), kidnapping for robbery pursuant to California Penal Code § 209, subdivision (b)(1), personal use of a firearm pursuant to California Penal Code § 12022.53, subdivision (b), and a juvenile victim special allegation pursuant to California Penal Code § 667.9.

The prosecution’s case against the Petitioner was based upon the six pack and in-court identifications of four witnesses, Brenda Barragan, Annette Saavedra, Felicitas Gonzalez and Nancy Jardines, and evidence of Petitioner’s DNA on ski mask found near the scene of the robberies shortly after the incident occurred.

At the time they viewed the six pack of photographs, Barragan, Saavedra and Gonzalez admitted that their identifications of the Petitioner were based upon viewing his picture on the internet after receiving a letter from an anonymous

source that indicated the Petitioner might be a suspect in the robberies in which they were victims. All three identifications were not based upon their observations of the suspects at the time of the robberies. (Appendix at 666-668 (Vol. 2 Reporter's Transcript ("RT"), 1214, 1217, 1224 (Vol. 3 RT) and 1581 (Vol. 4 RT).

Prior to trial, Petitioner's counsel made a motion to exclude the six pack identifications of all four witnesses claiming this evidence had no probative value to the identification of the Petitioner as one of the suspects in the robberies and because the identifications were tainted. (Appendix at 307-08 (Vol. 2 RT). The trial court denied the motion finding that the identification evidence did not have to be based upon the crimes at issue. (Appendix at 323 (Vol. 2 RT).

During opening statements, the prosecutor argued that one of the suspects wore a ski mask with four holes in it. Jardines identified the Petitioner as the suspect who wore this mask based upon recognizing his nose and mouth as they were visible through the holes in the mask. (Appendix at 614-15 (Vol 2 RT). The prosecution stated that Jardines never saw the internet photograph of the Petitioner to taint her identification of him. Finally, the prosecutor stated in no uncertain terms that all four witnesses would be able to identify the Petitioner as the masked suspect who participated in the robberies. (Appendix at 618 (Vol. 2 RT).

Yet, the evidence presented at trial contradicted what the prosecutor stated in his opening statements. In particular, Saavedra and Gonzales each identified the Petitioner in court, but each based their identifications upon the six-pack of photographs they viewed in court and not upon their memory of the crimes that occurred six months prior. (Appendix at 1224 (Vol. 3 RT), 1581(Vol. 4 RT). Barragan testified that she could not identify the Petitioner as one of the suspects. (Appendix at 668 (Vol. 2 RT).

At trial, Jardines claimed that she based her identification upon what she observed on the night of the robberies and not upon viewing the Petitioner's photograph after the night of the robberies. (Appendix at 959-61 (Vol 3 RT). Jardines claimed that she did not view the photograph of the Petitioner on the internet. (Appendix at 986 (Vol. 3RT).

At the close of the prosecution's case, Petitioner made a motion to dismiss all counts. The trial court dismissed two of the robbery counts. (Appendix at 1589-90 (Vol. 4 RT).

During closing arguments, the prosecutor did not argue that Barragan, Saavedra and Gonzales identified the Petitioner as the masked suspect. After trial at the motion for reconsideration of the motion for a new trial, the prosecutor admitted that he strategically never asked these three witnesses if Petitioner was

one of the suspects in the house and admitted the three witnesses never identified the Petitioner as one of the suspects. (Appendix at 4206-4207 (Vol. 5 RT).

The jury convicted the Petitioner of six counts of robbery and found the allegations that he personally used a firearm, acted in concert and the crimes involved a juvenile all true. The jury found Petitioner not guilty of kidnapping for robbery. (Appendix at 2710 (Vol. 5 RT).

Petitioner's counsel made a motion for new trial arguing that the admission of the in-court identifications violated the Petitioner's due process rights. (Appendix at 3618-19 (Vol. 5 RT). The trial court noted that "I take exhaustive notes during my trial", and based upon her notes, made the following factual findings. Regarding Jardines, Saavedra and Gonzalez, "all three identified Mr. James as the man in the mask." "The mask was found after the incident at a location that was nearby and had his DNA on it." Saavedra said Jardines was not there when she looked at the photograph on the internet. Gonzalez's identification was not based upon the photograph viewed on the internet. (Appendix at 3629 (Vol. 5 RT).

Petitioner's counsel responded: "Are you saying that there were three identifications made by Mr. James at the trial as a suspect?" The trial court replied, "I am showing in my notes that." "I definitely have in my notes that

Felicitas did, Felicitas Gonzalez. I also have Annette Saavedra also having made an identification.” Gonzalez did not base her identification upon the internet photograph. (Appendix at 3630-31 (Vol. 5 RT). The trial court denied the motion. (Appendix at 3633 (Vol. 5 RT).

Trial counsel made a motion for reconsideration of the denial of the motion for new trial arguing that the record did not support the trial court’s findings that Saavedra and Gonzalez identified the Petitioner as a suspect. The record also showed that Saavedra was present when Jardines viewed the internet photograph. (Appendix at 4202-03 (Vol. 5 RT).

Trial counsel argued that there was no reason whatsoever to elicit identification testimony from these three witnesses other than to create the same effect on the jury as the trial court: to deceive the jurors into thinking that these three witnesses identified the Petitioner as the suspect. The trial court’s inaccurate notes showed the impact the prosecution’s trial strategy had upon the jury. Because they did not have the experience and training the trial court received both as a judge and trial attorney, the jury was more likely to be overcome by the prosecution’s deceptive maneuvers. (Appendix at 4209-10 (Vol. 5 RT).

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Despite the above-referenced issues, the trial court denied the motion for reconsideration. (Appendix at 4210 (Vol. 5 RT). Petitioner received a sentence of 71 years in prison. (Appendix at 4221 (Vol. 5, RT).

Petitioner appealed his conviction. Appellate counsel did not raise on appeal the issues that the in-court identifications, the denial of the motion for new trial or the prosecutor's misconduct by manipulating the identification evidence violated his due process rights and right to a fair trial.

In a declaration signed on August 9, 2019, appellate counsel admitted that the Petitioner insisted on challenging the in-court identifications on direct appeal. Appellate counsel believed he included the in-court identification issues as part of his argument that it was reversible error for the trial court to admit the six pack identifications. Yet he conceded that the California Appellate Court's opinion only addressed the admission of the pretrial identification evidence, and as a result of his omissions, Petitioner was foreclosed from having the in-court identifications and the denial of the motion for new trial reviewed in the California Supreme Court and by any federal courts. Appellate counsel further conceded that he had no tactical reason for failing to address the in-court identifications or the denial of the motion for the new trial on direct appeal. (Appendix at 4237-38).

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Appellate counsel also did not raise the issues that the in-court identifications were inadmissible at trial, the denial of the motion for new trial or the prosecutor's misconduct in the Petition for Review filed in the California Supreme Court and in a Petition for Writ of Habeas Corpus in the United States District Court. Appellate counsel relied upon the same arguments regarding the identification evidence that were raised on appeal. The California Supreme Court denied review, and the United States District Court dismissed Petitioner's habeas petition.

Appellate counsel appealed the denial of his habeas petition. The Ninth Circuit also noted that appellate counsel for the first time in his appeal challenged the in-court identifications by Saavedra and Gonzalez. In its opinion, the Ninth Circuit found that appellate counsel limited his arguments on direct appeal to whether the trial court should have excluded the six pack identification evidence because the prejudicial value outweighed the probative value. Appellate counsel did not argue per the United States Supreme Court's holding in Payne v. Tennessee, infra, that the due process clause bars admission of this evidence because it is so unduly prejudicial that it rendered his trial fundamentally unfair. (Appendix at 4242).

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Because he did not raise these issues in the United States District Court, the Ninth Circuit would not address this issue in its holding. (Appendix at 4244, n. 1). The Ninth Circuit affirmed the dismissal of his habeas petition. (Appendix at 4246).

In order to exhaust his state remedies relating to the due process violations, Petitioner filed a petition for writ of habeas corpus in the California Court of Appeal alleging that appellate counsel was ineffective and violated his Sixth Amendment Right to effective assistance of counsel by not raising on appeal the following due process violations: (1) the in-court identifications by Barragan, Saavedra, and Gonzalez were inadmissible under the Fifth and Fourteenth Amendments; (2) the trial court's failure to grant his new trial motion; and (3) the prosecutor's misconduct by manipulating the identification evidence to deceive the jury and trial court. The California Court of Appeal denied the petition on February 11, 2020.

Petitioner then filed a petition for writ of habeas corpus in the California Supreme Court raising the same three issues that were raised in the appellate court. The California Supreme Court denied his petition on May 27, 2020. Petitioner immediately filed a motion for reconsideration on June 8, 2020. The California Supreme Court denied the motion on June 9, 2020.

After exhausting his state remedies, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court. The District Court issued an order to show cause why the petition should not be dismissed. In particular, the District Court made a preliminary finding that the Petitioner should be barred from filing a second or successive petition without the requisite authorization from the Court of Appeals.

In response, Petitioner filed a request to stay the proceedings in the District Court and then filed an application for leave to file a second or successive petition in the Ninth Circuit Court of Appeal. On December 11, 2020, the Ninth Circuit denied the application to file a second or successive petition finding the Petitioner did not make a *prima facia* showing under 28 U.S.C. § 2244(b)(2). (Appendix at 4247-48). On September 3, 2021, the United States District Court dismissed the Petitioner's Habeas Petition. (Appendix at 4249).

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## ARGUMENT

### **A. THE IMPROPER DENIAL OF APPELLATE OR FEDERAL REVIEW OF CONSTITUTIONAL DUE PROCESS VIOLATIONS THAT WERE PROPERLY PRESERVED IN THE TRIAL COURT BUT WERE NOT RAISED ON DIRECT APPEAL BY APPELLATE COUNSEL WARRANT THIS COURT TO EXERCISE ITS DISCRETIONARY POWER TO CONSIDER AND GRANT THE WRIT OF HABEAS CORPUS.**

In Felker v. Turpin, 518 U.S. 651, 661-662 (1996), a petitioner sought habeas relief from this Court after the Eleventh Circuit denied his request for permission to file a second or successive petition pursuant to 28 U.S.C. § 2244. Respondent argued that this same statute prevented this Court from entertaining original habeas petitions. This Court disagreed and found that it had authority to hear and decide original habeas petitions.

United States Supreme Court Rules, Rule 20.4(a), sets forth the standards under which this Court will grant an original habeas petition. First, a petitioner must set forth a statement of reasons for not making application to the United States District Court. Second, the petitioner should set forth specifically how and wherein he has exhausted available remedies in state courts. Third, the petitioner must show exceptional circumstances warranting the exercise of this Court's discretionary powers. Finally, the petitioner must show adequate relief cannot be

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obtained in any other form or from any other court. Felker v. Turpin, 518 U.S. at 665.

**1. THE DISTRICT COURT HAS DISMISSED HIS HABEAS CORPUS PETITION.**

Petitioner filed a Habeas Corpus Petition in the United States District Court but has been denied the opportunity to be heard because the Ninth Circuit has not granted him permission to file a second habeas petition.

**2. PETITIONER HAS EXHAUSTED THE AVAILABLE REMEDIES IN STATE COURT.**

Petitioner has filed habeas corpus petitions in the California Court of Appeal and the California Supreme Court raising the due process and ineffective assistance of counsel claims set forth herein. These petitions have been denied by the California courts.

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**3. THE DENIAL OF PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN APPELLATE COUNSEL FAILED TO RAISE ON APPEAL THE NON-FRIVOLOUS, DUE PROCESS VIOLATIONS WHEN THE TRIAL COURT ADMITTED THE IN-COURT IDENTIFICATIONS OF THE PETITIONER BY THREE WITNESSES WHO DID NOT BASE THEIR IDENTIFICATIONS UPON OBSERVATIONS OF THE PETITIONER AT THE TIME OF THE ALLEGED CRIMES, THE DENIAL OF HIS MOTION FOR NEW TRIAL BASED UPON FACTS OUTSIDE OF THE TRIAL RECORD, AND THE PROSECUTION'S MANIPULATION OF THE IDENTIFICATION EVIDENCE TO CREATE THE IMPRESSION THAT THESE WITNESSES IDENTIFIED THE PETITIONER AS ONE OF THE SUSPECTS WHO COMMITTED THE ROBBERIES ARE EXCEPTIONAL CIRCUMSTANCES WARRANTING THIS COURT TO EXERCISE ITS DISCRETION AND GRANT THE HABEAS PETITION.**

A petitioner is deprived of effective assistance of counsel guaranteed under the Sixth Amendment to the United States Constitution when appellate counsel fails to raise non-frivolous, federal constitutional issues on appeal. Delgado v. Lewis, (9<sup>th</sup> Cir. 2000) 223 F.3d 976, 980; Mason v. Hanks, (7<sup>th</sup> Cir. 1996) 97 F.3d 887, 897 (Finding appellate counsel violated appellant's right to effective assistance of counsel when he failed to raise the issue of inadmissibility of a cooperating individual's hearsay statement when the testimony may have been inadmissible at trial under state law and the admission of this out of court statement prejudiced the appellant's criminal trial).

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A petitioner may also prove a Sixth Amendment ineffective assistance of appellate counsel claim by showing that appellate counsel acted unreasonably when he knew of a federal constitutional claim and failed to raise that claim before the state's highest court to exhaust it. By alleging a potentially meritorious claim of a violation of a federal constitutional right, a petitioner has shown that he has been prejudiced by appellate counsel's failure or error. Jackson v. Warden, CSP-Solano, (E.D. Cal. 1/30/2017) 2017 U.S. Dist. LEXIS 12617 \*12-13.

In this case, appellate counsel has admitted that he was ineffective for not raising the issues of the in-court identifications by three of the witnesses and the denial of the motion for new trial based upon the admission of these in-court identifications. Appellate counsel has not stated either way whether his failure to raise prosecutorial misconduct on appeal was an error on his part. For the reasons set forth below, the omission of all three issues violated Petitioner's right to effective assistance of counsel.

**a. The Denial of Petitioner's Right to Effective Assistance of Counsel When Appellate Counsel Failed to Raise on Appeal that There Were No Permissible Inferences the Jury May Have Drawn from the In-Court Identifications and Thus the Admission of This Identification Evidence Violated Petitioner's Right to Due Process and a Fair Trial.**

In Payne v. Tennessee, (1991) 501 U.S. 808, 825, the United States Supreme Court held that the due process clause of the Fifth and Fourteenth Amendments

bars admission of evidence so unduly prejudicial that it renders the trial fundamentally unfair. The Ninth Circuit in McKinney v. Rees, (9<sup>th</sup> Cir. 1993) 993 F.2d 1378, 1384, found a due process violation occurs when a trial court admits evidence in which there no permissible inferences the jury may draw from the evidence. To determine whether a due process violation occurred, a court does not engage in a weighing the probative versus the prejudicial value and/or conduct a relevance analysis of the evidence in question. Rather, the court determines whether there is any probative value of the evidence to an essential element of the prosecution's case.

In McKinney, the prosecution presented evidence that the defendant previously owned two knives in the past, one of which was not in his possession on the night of the murder. An expert opined that both of these knives could have inflicted the wounds that caused the victim's death. The prosecution argued that this evidence showed opportunity, making it more likely the defendant killed the victim. The Ninth Circuit held that this evidence was not probative of any element of the prosecution's case, but rather only showed that the defendant was the type of person who would own a knife. This evidence was only character or propensity evidence and did not prove a fact of consequence. McKinney v. Rees, 993 F.2d at 1382-83.

The Ninth Circuit found this evidence was of such a quality as to prevent the defendant from having a fair trial. This character and propensity evidence was emotionally charged creating an image of the defendant as a young man fascinated with knives and living a commando lifestyle and persuaded the jury to convict the defendant over a second suspect. This character and propensity evidence rendered the trial fundamentally unfair and violated the defendant's due process rights. Id. at 1385.

In this case, the prosecution had to prove that Petitioner was one of the suspects who committed the alleged robberies. Yet, the in-court identifications by Barragan, Saavedra and Gonzalez were not probative in any way as to this issue. The in-court identifications by these three witnesses were based solely upon each witness' viewing of the Petitioner's photograph after the robberies occurred. These identifications certainly were probative as to whether Petitioner was the same person as one of the persons depicted in the six-pack, but were not in any way probative as to whether the Petitioner was one of the suspects and/or committed the robberies in question. The six-pack of photographs posted on the internet had nothing to do with the robberies at issue in this case.

Appellate counsel failed to raise this non-frivolous, federal constitutional claim on appeal which has legal support in holdings by the United States Supreme

Court. In addition, appellate counsel was aware of this claim, as noted by the Ninth Circuit in its opinion from this matter, because this issue was raised by Petitioner's trial counsel. It should also be noted that appellate counsel admitted that omitting this issue on appeal was an error on his part. Failure to raise this issue on direct appeal was unreasonable and below the standard of performance expected from an appellate attorney.

The improper admission of the in-court identification evidence prevented the Petitioner from having a fair trial in this case. Despite knowing that these witnesses did not base their identifications of the Petitioner upon their observations from the night of the robberies, the prosecutor told the jurors in his opening statement that Barragan, Saavedra and Gonzalez would identify the Petitioner as one of the perpetrators of the robberies. Yet, the prosecutor, by his own admission after trial, deliberately refrained from asking each of these three witnesses whether Petitioner was one of the suspects who committed the robberies. Rather, he asked each of them about viewing the six pack of photographs, which photograph of the six each witness chose, and then asked if the person in the photograph chosen was in court. Each of the witnesses identified the Petitioner.

The prosecutor's actions and strategy manipulated the jury into thinking that Barragan, Saavedra and Gonzalez also identified the Petitioner as one of the

suspects. This Court need look no further than how the trial court's basis for denying the Petitioner's motion for new trial to find proof of the prosecutor's manipulation of the jury into thinking that these witnesses identified the Petitioner as one of the persons who committed the robberies in question. The trial court proclaimed that she takes "exhaustive notes during my trial", and based upon her notes, found Saavedra and Gonzalez both identified the Petitioner as one of the suspects, which was not supported by the record. The trial court found the in-court identifications by both witnesses were probative of the issue of who committed the alleged robberies.

The six pack and in-court identifications impermissibly assisted the jury in resolving the issue of whether the Petitioner wore the recovered ski mask during the robberies. The ski mask contained the DNA of both the Petitioner and another person. The prosecutor claimed that Petitioner wore this ski mask during the commission of the robberies and used the identifications to bolster his argument.

If the trial court would have excluded both the six pack and in-court identifications by these three witnesses, the jury would have been left the following evidence to consider in making their decision: (1) both the Petitioner's and another person's DNA were found on a ski mask that was not identified as being worn by

any of the suspects; (2) Jardines' identification of Petitioner as a suspect based upon her observations on the night of the robberies; (3) the testimony of Saavedra that Jardines viewed the Petitioner's photograph on the internet a few days before picking the Petitioner's photograph from the six pack of photographs which impeached Jardines' claim that she did not base her identification of the Petitioner upon viewing his photograph on the internet; (4) and Jardines' own admission prior to trial that she viewed the Petitioner's photograph on the internet prior to viewing the photographs in the six pack which impeached her testimony at trial that she never viewed the Petitioner's internet photograph. The above evidence is not sufficient for a reasonable juror to find Petitioner guilty beyond a reasonable doubt of the charged robberies.

**b. Petitioner Was Denied Effective Assistance of Counsel When Appellate Counsel Failed to Raise on Appeal that the Trial Court Relied Upon Evidence or Facts Outside of the Trial Record to Deny the Motion for New Trial and Justify the Improper Admission of the In-Court Identifications.**

In his motion for new trial, Petitioner argued that the admission of the in-court identifications by Barragan, Saavedra and Gonzalez violated his right to due process guaranteed under the Fifth and Fourteenth Amendments. These identifications were not probative of any issue or element the prosecution had to prove at trial. The trial court denied the motion based upon the mistaken belief

that two of the witnesses, Saavedra and Gonzalez, identified the Petitioner as one of the suspects who committed the robberies, and thus were probative of the issue as to whether the Petitioner committed the charged crimes.

Petitioner filed a motion for reconsideration arguing that the trial court was mistaken in its factual determination, and thus should have granted Petitioner's motion for a new trial. The trial testimony from Saavedra and Gonzalez did not support the trial court's ruling. Neither of two witnesses identified the Petitioner as a suspect who committed the robberies. Instead, their identifications were based on their viewing of the Petitioner's photograph after the commission of the robberies and not upon their recollection of what they observed on the night the crimes were committed. Trial counsel pointed out that the jury was deceived in the same way as the trial court was into thinking that Petitioner was identified as one of the suspects by these two witnesses. As a result, Petitioner was prejudiced by the admission of this evidence.

Appellate counsel should have raised this issue in Petitioner's appeal as well. He was fully aware of the denial of the motion for new trial at the time he filed Petitioner's appeal because appellate counsel made reference to it in the opening brief as part of his argument that the six pack identification evidence was not relevant. Appellate counsel also admitted in his declaration that he erred by

not including the denial of the motion for new trial in the appeal. As noted in the previous section of this brief, the improper admission of the in-court identifications are not frivolous issues and are based upon federal constitutional legal grounds.

Petitioner hereby incorporates the arguments from Section 1 into this section of the brief. The admission of this evidence prejudiced Petitioner's trial and prevented him from having a fair trial in this case. The motion for new trial should have been granted by the trial court.

**c. Petitioner Was Denied Effective Assistance of Counsel When Appellate Counsel Failed to Raise on Appeal that the Prosecutor Committed Misconduct and Poisoned the Jurors' Minds When He Told the Jury in Opening Statements that Barragan, Saavedra and Gonzalez Would Identify the Petitioner as One of the Suspects Who Committed the Robberies Knowing that None of These Witnesses Would Testify to This Fact and Manipulated the Inadmissible In-Court Identifications to Rehabilitate the Contradicted Identification Made by Jardines and to Resolve Any Conflicts the Jury May Have Had About the DNA Evidence.**

A prosecutor's statement to the jury that infects the trial with unfairness violates a defendant's right to due process guaranteed under the Fifth and Fourteenth Amendments requiring reversal of his conviction. Caldwell v. Mississippi, (1985) 472 U.S. 320, 339 (a prosecutor's statement that the responsibility for determining the appropriateness of a death sentence rests with an appellate court violated a defendant's Eighth Amendment rights as well as his due process rights to a fair trial at the penalty phase portion of his capital trial). A

prosecutor's statements meant to deceive either the trial court or jury constitute misconduct. A defendant need not show bad faith on the part of the prosecutor, nor does good faith excuse the prosecutor's misconduct. People v. Price 1 Cal.4<sup>th</sup> 324, 447 (1991).

A prosecutor's opening statement provides the jury with broad outlines of the case and a map of the evidence that will be presented. A prosecutor's remark during opening statements promising certain evidence will be presented when none in fact was introduced at trial is highly improper. United States v. Thomas (D.C. Cir. 1997) 114 F.3d 228, 247; United States v. Sawyer, (11<sup>th</sup> Cir. 1986) 799 F.2d 1494, 1507; Government of the Virgin Islands v. Turner, (D.C. Cir. 1968) 409 F.2d 109, 103.

In this case, the prosecutor promised the jury in his opening statement that Barragan, Saavedra and Gonzalez would identify the Petitioner as one of the suspects who committed the robberies in question, despite knowing at the time he made his opening statement that these witnesses did not base their identifications of the Petitioner upon their observations from the night of the robberies. The prosecutor, by his own admission during the hearing on the motion for reconsideration of the motion for new trial, deliberately refrained from asking each of these three witnesses on direct examination whether Petitioner was one of the

suspects who committed the robberies. Rather, he asked each of them about viewing the six pack of photographs, which photograph of the six each witness chose, and then asked if the person in the photograph chosen was in court.

The prosecutor's strategy manipulated the jury into thinking that Barragan, Saavedra and Gonzalez also identified the Petitioner as one of the suspects. Clear evidence of this manipulation is found in the trial court reasoning for denying the motion for new trial. At the hearing for the motion for new trial, the trial court proclaimed that she takes "exhaustive notes during my trial". Based upon her notes, the trial court found both witnesses identified the Petitioner as one of the suspects, when neither witness identified the Petitioner as one of the robbers.

The prosecutor used the in-court identifications by Saavedra and Gonzalez to create the illusion that these witnesses also identified the Petitioner as one of the suspects which in turn resolve any doubt in the jurors' minds that ski mask found near the scene was worn by one of the suspects and that the Petitioner wore that mask at the time of the robberies. According to the prosecutor, if these two witnesses identified the Petitioner as one of the suspects, it was no coincidence that a ski mask found near the crime scene also contained the Petitioner's DNA. The fact that another person's DNA was also found on the ski mask was of no

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consequence to the issue of whether it was the Petitioner who committed the robberies.

The manipulation of the in-court identifications of these two witnesses also served to rehabilitate Jardines after she was impeached by Saveedra's testimony that Jardines viewed the internet photograph at the same time as Saavedra prior to picking the Petitioner's photograph out of the six pack lineup and by Jardines' own admission prior to trial that she viewed the Petitioner's photograph on the internet prior to viewing the photographs contained in the six pack. In an effort to rehabilitate Jardines, the prosecutor manipulated the jury into believing that Saavedra and Gonzalez also identified the Petitioner as one of the suspects who committed the robberies to make Jardines' identification of the Petitioner at trial as one of the suspects appear credible and to discount her prior inconsistent statement.

The prosecutor should have informed the jury of the following facts during his opening statement: (1) that both the Petitioner's and another person's DNA was found on a ski mask that was not identified as being worn by any of the suspects; (2) that Jardines would identify the Petitioner as one of the suspects based upon her recollection of the events from the night of the robberies; (3) her identification of Petitioner will be called into question per her own admission and the testimony of Saavedra that Jardines viewed Petitioner's photograph on the internet a few days

before picking his photograph out of a six pack. If the prosecutor would have provided the above map of the evidence, the jurors' minds would not have been poisoned and they would not have been misled into thinking Saavedra and Gonzalez corroborated the identification of the Petitioner as one of the suspects and that the ski mask found near the crime scene was worn by one of the suspects. With only the above evidence to consider, no reasonable juror would have found the Petitioner guilty beyond a reasonable doubt of the charged robberies.

**4. ADEQUATE RELIEF MAY ONLY BE OBTAINED FROM THIS COURT BECAUSE THE NINTH CIRCUIT HAS USED THE TECHNICAL REQUIREMENTS OF 28 U.S.C. § 2244(b)(2) TO DENY PETITIONER THE OPPORTUNITY TO HAVE A FEDERAL COURT HEAR HIS CONSTITUTIONAL CLAIMS.**

The Ninth Circuit Court of Appeal is using the statutory requirements of 28 U.S.C. § 2244(b)(2) to deny the Petitioner the opportunity to have a federal court hear his claims of federal Constitutional violations because these claims were raised for the first time in a second habeas petition. As noted above, appellate counsel filed the first habeas petition to have the federal courts address the issues he raised on appeal. The three issues raised in the second habeas petition were only included therein because of the failures of appellate counsel to raise them first on appeal and then properly exhaust Petitioner's state remedies and raise them in the first habeas petition.

Thus, it is impossible for these issues, which were properly preserved at trial, to be successive when they have never been heard previously by any federal court due to appellate counsel's failure to include them on direct appeal. For these issues to be included in the first habeas petition, it would have required appellate counsel to argue that he did not provide the Petitioner with effective assistance of counsel.

It should be noted that the Ninth Circuit highlighted the due process violation and the error of appellate counsel which prevented the panel from addressing this issue on appeal. Due to the technical requirements of 28 U.S.C. § 2244(b)(2), Petitioner is now precluded from raising substantive Fifth, Sixth and Fourteenth Amendment violations in a habeas petition. Petitioner cannot obtain adequate relief in any other form or from any other court other than from this Court.

## **CONCLUSION**

For the above reasons, this Court should grant the Petition for Writ of Habeas Corpus.

Dated: March 25, 2022

Respectfully submitted,

s/Michael S. Evans  
Attorney for Petitioner  
TAUMU JAMES

## **CERTIFICATE OF COMPLIANCE**

I, Michael S. Evans, state that I am the attorney for Petitioner Taumu James. I certify that the foregoing petition uses a proportional space, 14 point New Times Roman font. Based upon the word count of my computer program, Microsoft Word, the Petition in this matter contains a total of 8442 words, and thus does not exceed the 9000 word limit per Rules of the Supreme Court of the United States, Rule 33.1, subdivision (g) (Effective July 1, 2019).

I declare under penalty of perjury that the foregoing is true and correct.  
Executed this 25th Day of March, 2022 at Los Angeles, California.

s/Michael S. Evans  
Attorney for Petitioner  
TAUMU JAMES

## **CERTIFICATE OF FILING AND SERVICE**

I hereby certify that I electronically filed the foregoing Petition for Writ of Habeas Corpus along with the Appendix and Motion for Leave to Proceed In Forma Pauperis with the Clerk of the Court for the United States Supreme Court on March 22, 2022. I certify that all participants in the case are registered users of this Court's electronic filing system and that service will be accomplished using this system. I also certify that on March 25, 2022 I placed a copy of the Petition for Writ of Habeas Corpus in the United States Mail, postage prepaid addressed to the Clerk of the Court, Supreme Court of the United States, 1 First Street NE, Washington, D.C. 20543 and the Attorney General of California, 300 South Spring Street, Suite 1700, Los Angeles, CA 90012.

s/Michael S. Evans