

No.

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY GILLARD,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent

On Petition for Writ of Certiorari to the
Court of Appeal of the State of California,
Second Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the California court's refusal to allow a witness to be impeached with his federal bank robbery conviction violated petitioner's clearly established Sixth and Fourteenth Amendment rights to confrontation, due process, and a fair trial?

RELATED PROCEEDINGS

People v. Gillard, Los Angeles County Superior Court, No. PA088987

People v. Gillard, California Court of Appeal, No. B301605

People v. Gillard, California Supreme Court, No. S273536

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TERRY GILLARD, Petitioner,

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STATE OF CALIFORNIA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION THREE

Petitioner, TERRY GILLARD, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Three, filed on February 9, 2022.

OPINION BELOW

The opinion of the Court of Appeal of the State of California is unreported. The slip opinion is reproduced as Appendix A to this petition.

The order of the California Supreme Court denying review is attached as Appendix 2.

JURISDICTION

The judgment of the California Court of Appeal was filed on February 9, 2022, affirming petitioner's sexual assault convictions. (Appendix A.) The California Supreme Court denied the petition for review on April 20, 2022. (Appendix B.) This petition for certiorari is due for filing on July 19, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment (pertinent part)

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him

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

Petitioner was a popular wrestling coach at a high school and a Boys and Girls Club in Los Angeles County. He was accused in a 47 count information of molesting 8 minor students between 2014 and 2017. He was also accused of molesting 1 other student 30 years before. The prosecution

alleged he had inappropriate sexual behavior with some student wrestlers and also made several team members have sex with each other. The prosecution contended that Petitioner took advantage of these minor students, many of whom came from troubled backgrounds and who had looked up to him as a mentor and father figure.

The defense conceded appellant was only guilty of count 47, which was corroborated by a video made by one girl which showed Petitioner groping her thigh and vagina. As for the rest of the counts, the defense argued the student witnesses were not credible, as they were impeached by other witnesses and by their police statements. The defense also argued they were motivated by money for being plaintiffs in a pending civil lawsuit. Seven students and eight coaches and parents testified for the defense.

One of the accusers, Abraham A, was at 39, much older than the other student accusers. He claimed that he had been molested at 10 years of age in 1989, when he was on the kid's wrestling team. He never told anyone about the molestation until he read about Petitioner's arrest in 2018, on the other counts.

Abraham A accused Petitioner of instructing him to have sex with an adult woman who was the mother of another child on the wrestling team. After he did so, petitioner had sex with this woman. (1 SCT 41.)¹

Defense counsel moved to sever the trial on the three counts involving Abraham A from the trial on the other charges. Counsel argued that these charges had taken place 30 years before the other charges. Nor were the charges similar. No other alleged victim testified that Petitioner made them have sex with an adult woman. Abraham A also alleged that the incident happened only one time, while the other allegations were said to take place over an extended period of time. (SCT 46-48.)

Abraham A also had credibility issues having been convicted of robbery in 1999, which was a crime of moral turpitude, and thus clearly impeachable under California law (SCT 50.) “Given the significant passage of time” the three counts involving Abraham A had no probative value in proving the other 44 counts. (1 SCT 49.)

The prosecution filed an opposition stating that there were common elements between the Abraham A and other counts. Appellant was the wrestling coach, the victims were minors who trusted appellant, and he abused this position of trust in taking advantage of them. (1 SCT 59-60.)

¹ “CT” stands for Clerk’s Transcript. “RT” stands for Reporter’s Transcript.

In reply, the defense argued that there would be substantial prejudice because the evidence on the Abraham A counts was weaker than the others, particularly given his prior conviction for robbery and the length of time that had elapsed. (1 SCT 76-77.)

On October 29, 2018, in a minute order, the court denied the motion to sever. (3 CT 547.)

Thereafter, the prosecution filed an *in limine* motion requesting that the defense not be allowed to impeach him with this robbery conviction. (3 CT 575-577.) The prosecution averred that Abraham was sentenced only to three years of supervised release. (3 CT 575.) He was unable to get the conviction expunged because there is no such provision in federal law. (3 CT 575.)

The prosecutor's statement, however, was not accurate. According to the exhibit provided by the prosecution, Abraham A was sentenced to *30 months in prison* followed by 36 months of supervised release. (3 CT 591.) According to the docket sheet for his case, Case No. CR-98-1197-CAS (Central District of California), he pled guilty on March 15, 1999, and was sentenced to 30 months on August 4, 1999. He was also required to pay restitution of \$3,540 to California Federal Bank.

According to the federal Bureau of Prisons website, Abraham A was released from federal prison on February 16, 2001. (Reg. No. 14543-112).

The prosecution contended that because Abraham A's conviction was 20 years old it was of "extremely little to no probative value" and he had "completely turned his life around." (3 RT 575-576.) He was now a pastor at the Good Shepard Church and married with children. The robbery was committed when he was "barely a legal adult." (3 CT 576.) To allow this impeachment would be time consuming. (*Id.*)

In its *in limine* motion, Petitioner's counsel pointed out that robbery is indisputably a crime of moral turpitude and that "no witness" is "entitled to a false aura of veracity." (3 CT 626, citing *People v. Beagle*, Cal.3d 44, 453 (1972).) If Abraham A were allowed to testify without being impeached by the defense, the jury "will be deceived into believing that Abraham is an honest and forthright individual" who "has lived his life free from felony conduct. Such deception would result in an irreparable harm to the defendant." (3 CT 627.)

Furthermore, "there may be no conviction that is per se too remote to be used for impeachment." (3 CT 627, citing *People v. Burns*, 189 Cal.App.3d 724, 739 (1987) (20 year old robbery not inadmissible as a matter of law). So long as the conviction was suffered before the witness testified, it

should be allowed as impeachment. (3 CT 627, citing *People v. Hansley*, 21 Cal.App.4th 325 (1994).

The court's tentative ruling was that Abraham's prior robbery conviction would be excluded as "not relevant," and "remote." (2 RT A-84.) The court ultimately ruled that it would be excluded. (2 SCT1, 4 RT 1902.)

Petitioner was convicted by the jury on all counts as charged and sentenced to 71 years in prison.

On appeal, Petitioner argued that the refusal to allow Abraham A to be impeached with his robbery conviction violated Petitioner's Sixth and Fourteenth Amendment rights to a confrontation, due process, and a fair trial.

The Court of Appeal acknowledged that the California Constitution provides that "any prior felony conviction of any person" may be used without limitation for purposes of impeachment in a criminal trial. (Cal. Const., art. I, § 28, subd. (f), par. (4).)² (Appendix A at 27.) Nevertheless, the

² Cal. Const. Art. I, § 28 subdivision (f)(4) provides:

Use of Prior Convictions. Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

court held that there was no abuse of discretion in excluding the felony to prevent the trial from “degenerating into nitpicking wars of attrition over collateral credibility issues.” (Appendix A at 28.) Even if committing a robbery might reflect on his honesty generally it did not reflect on whether he was telling the truth at a trial 20 years later.

The Court of Appeal also held that the federal constitution was not violated because the jury was not given a “significantly different impression of his credibility” having heard that Abraham A had a troubled childhood. (Appendix A at 30.)

The Court of Appeal failed to address the argument that allowing Abraham A to accuse Petitioner of having committed a felony (lewd act upon child) 30 years before (but never telling anyone about it) while not allowing the jury to hear that Abraham A also committed a felony 20 years before violated due process.

REASONS FOR GRANTING THE WRIT

THE REFUSAL TO ALLOW ABRAHAM A TO BE IMPEACHED WITH HIS FEDERAL BANK ROBBERY CONVICTION VIOLATED PETITIONER'S CLEARLY ESTABLISHED SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONTATION, DUE PROCESS, AND A FAIR TRIAL

A. The Sixth Amendment right to confrontation was violated

The refusal to allow Abraham A to be impeached with his prior felony conviction is a classic confrontation violation. Abraham A's prior robbery conviction was highly relevant as standard impeachment evidence under both California and federal law. "The general rule that felony convictions bearing on veracity are admissible." *People v. Beagle*, 6 Cal.3d 441, 453 (1972). "In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity." *Id.* "An intent to commit larceny evidences a willingness to act dishonestly, and ipso facto reflects on the witness's credibility." *People v. Collins*, 42 Cal.3d 378, 395 (1986). Under California Penal Code section 211, "robbery is defined as the taking of property from the person of another, against his will, by force or fear. It is thus larceny aggravated by an assault and is likewise a felony that necessarily involves moral turpitude." *Id.* (citations omitted).

The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right” to “be confronted with the witnesses against him.” “Cross-examination” is the “greatest legal engine ever invented for the discovery of the truth.” *California v. Green*, 399 U.S. 149, 158 (1970).

“The right of confrontation ‘Contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.’” *Coy v Iowa*, 487 U.S. 1012, 1018-1019 (1988) quoting *Lee v. Illinois*, 476 U.S. 530, 540 (1986). “The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

“Confrontation means more than being allowed to confront the witness physically.” *Davis v. Alaska*, 415 U.S. 308, 315 (1974) quoting *Douglas v. Alabama*, 380 U.S. 415, 419 (1965).

“One longstanding purpose of cross-examination is to expose to the fact-finder relevant and discrediting information ‘revealing ... ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand,’ motives that cast doubt on the honesty of the witnesses’ testimony.”

Murdoch v. Castro 365 F.3d 699, 702 (9th Cir. 2004) quoting *Davis v. Alaska*, 415 U.S. at 316.

Abraham A was a convicted felon who served nearly three years in federal prison and was thereafter placed on three years of supervised release. To disallow his impeachment on this point violated the Sixth Amendment.

“We cannot overemphasize the importance of allowing full and fair cross examination of government witnesses whose testimony is important to the outcome of the case. Out of necessity, *the government frequently relies on witnesses who have themselves engaged in criminal activity and whose record for truthfulness is far from exemplary*. These witnesses often have a major personal stake in their credibility contest with the defendant. Full disclosure of all relevant information concerning their past record and activities through cross examination and otherwise is indisputably in the interests of justice. Ordinarily, such inquiries do not require the expenditure of an inordinate amount of time and courts should not be reluctant to invest the minimal judicial resources necessary to ensure that the jury receives as much relevant information as possible. Nor should unwarranted fear of juror confusion present any impediment. Federal jurors, who are expected to follow complex testimony and even more intricate instructions that are presented in many of our criminal cases, such as multiple conspiracy prosecutions, are unlikely to be confounded by a defendant’s inquiry into the bias and credibility of a key government witness.”

United States v. Brooke, 4 F.3d 1480, 1489 (9th Cir., 1993) (emphasis added)

B. The Fourteenth Amendment right to due process was violated

The trial court’s ruling excluding the robbery conviction for being too old while at same time refusing to sever the trial on Abraham A’s accusations – which were even older – was a clear violation of due process.

“The Due Process Clause” speaks “to the balance of forces between the accused and his accuser.” *Wardius v. Oregon*, 412 U.S. 470, 474 (1973) (requiring defendant to give notice of alibi without reciprocal discovery rights violated due process). See also *Washington v. Texas*, 388 U.S. 14, 23 (1967) (rule forbidding a coparticipant from testifying for the defense but allowing him to testify for the prosecution violates due process; “This is rather a case in which the State has recognized as relevant and competent the testimony of this type of witness, but has arbitrarily barred its use by the defendant. This, I think, the Due Process Clause forbids.”).

This Court should grant certiorari because the California Court of Appeal “has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Rule 10, Supreme Court Rules.

CONCLUSION

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

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