No.

In the
Supreme Court of the United States

TED AMPARAN,
Petitioner -Appellant

v.

M. ELIOT SPEARMAN, Warden
Respondent-Appellee

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 20-55711

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should CERTIORARI be granted to review the following issues:

1) Did the State Violate Supreme Court precedent of *Apprendi v. New Jersey* and *Alleyene v. United States* by having a sentencing judge *not the jury* make a decision the offenses were on *separate occasions* which made a huge difference in sentence from concurrent to consecutive?

2) Should the Ninth Circuit panel have granted the motion to stay the appeal to allow appellant to exhaust the issue raised by the state Supreme Court which just granted review of the same issue which is before the federal court?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Amparan, respectfully petitions the Court for a writ of certiorari to review the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's denial of the section 2254 petition for a writ of habeas corpus. That court in turn upheld as reasonable the denial by the California Court of Appeal of a direct appeal issue that the sentencing of Amparan violated federal and state due process of law.

WHY THIS PETITION SHOULD BE GRANTED

1) Petitioner Amparan requested a stay of the appeal because the Supreme Court of California has before it at this very moment, the same issue being raised in this 2254 petition and appeal, that stay should have been granted to allow petitioner to go back into state court;

2) What the State of California has done is violate the precedent of *Alleyne v. United States,* 570 U.S. 99 (2013) which requires a jury, not a judge to decide if the criminal acts of the defendant were separated by time and/or space.

OPINIONS BELOW

On April 22, 2022, the Ninth Circuit Court of Appeals, (Ninth Circuit) in a three page Memorandum Opinion, affirmed the district court denial of petitioner's habeas corpus petition filed under 28 U.S.C. 2254. Dkt 59-1. Appendix A, 9th Ckt. Memorandum Opinion .

On May 9, 2022 the Ninth Circuit denied petitioner's motion to stay the appeal. Dkt 62.

On May 27, 2022, the Ninth Circuit denied petitioner's petition for rehearing and rehearing en banc. Appendix B; Dkt. 63.

Preceding these denials was the Order of the United States District Court for the Southern District of California denying the petition but granting a Certificate of Appealability. Appendix C, Dkt 12.

The Magistrate's Report and Recommendation (Dkt 8) is attached hereto along with the California Court of Appeal Opinion (Dkt 7-23) as Appendix D for both.

The Civil Dockets of both District Court and Ninth Circuit are in Appendix E.

JURISDICTION

The Ninth Circuit affirmed the denial of the habeas corpus petition an on April 22, 2022 and on May 27, 2022, denied a petition for rehearing. See above.

The jurisdiction of this Court is, thus timely invoked under 28 USC Section 1254, subdivision (1). *Hohn v. United States,* 524 U.S. 236 (1998).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A defendant in a criminal case must have the right to Due Process of Law, and the Fifth and Fourteenth Amendment to the U.S. Constitution.

28 U.S.C. section 2254, subdivision (d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This certiorari petition responds to the denial of petitioner's appeal to the 9th Circuit Court of Appeal.

INTRODUCTION

The Supreme Court of California granted review in *People v. Catarino* S271828 with the issue to be briefed as follows :

> The petition for review is granted. The issue to be briefed and argued is limited to the following: Does Penal Code section 667.6, subdivision (d), which requires that a "full, separate and consecutive term" must be imposed for certain offenses if the sentencing court finds that the crimes "involve[d] the same victim on separate occasions, " comply with the Sixth Amendment to the U.S. Constitution?

This case of Mr. Amparan involves California Penal Code section 667.6 subdivision (d) as does *Catarino* and has the added issue of the Federal District Judge's ruling granting a certificate of appealability as to two counts, counts 1 and 2, which involved that same penal code section, sentencing under 667.6, subd. (d) without submitting the issue to the jury in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 2000 and *Alleyne v. United States*, 570 U.S. 99 (2013).

Appellant will discuss how the *Catarino* grant of review affects this appeal.

Citations below are to the appendices attached to this petition by letter of appendix and page of each lettered appendix. Additionally, especially for the facts, cites are to the Excerpt of Record (ER).

SUMMARY OF RELEVANT FACTS

The relevant facts are those dealing with the only issue of this appeal as limited by the Certificate of Appealability (COA) the sentence resulting from convictions involving Laura M.

A. The Prosecution Case Regarding the Sexual Assault on Laura M., Counts One and Two.

In 2007, 18-year-old Laura M[1]. was working as a prostitute in the San Diego area. (ER-228.) She was the youngest and least experienced of a group of women who were managed by a pimp. (ER-229-232.)

On the evening of March 18, 2007, Laura had already met with two men for sexual activity, and went out on El Cajon Boulevard to look for additional tricks. (ER-233-234, 268.) She soon made eye contact with a male in a red pickup truck, who pulled over to talk to her. (ER-235.) He asked for a military discount, and they agreed he would pay $100 for sexual intercourse. (ER-236-237.)

He was not wearing a uniform, but Laura thought she remembered seeing dog tags. (ER-237.) He offered her extra money if she would get in the back seat and take her clothes off. (ER-236.)

[1] All the complaining witnesses, including Laura, were referred to by their first names in the reporter's transcript.

The man drove to a parking lot behind a large building next to a freeway. (ER-236.) Though she had been there before, Laura said the man picked the location himself. (*Id.*)

Laura was worried because the man did not pay first, which was unusual, but she wanted the money so she got into the back seat and took most of her clothes off. (ER-237-239.)

The man got into the back seat, and told her he was going to have sex with her, and he was not going to pay. (ER-239.) She said he could not do that, but then saw he was holding a small knife. (ER-239.)

He did not point the knife at her, but Laura complied with his demands because of it. (ER-239-240.)

He held her by the throat, and kissed her chest and ribs. (ER-240.) He pulled her thighs apart, put his fingers inside of her, and then raped her. (ER-240-241.) Laura could not remember if the man was wearing a condom. (ER-241.)

While it was happening, Laura got "lost" in her thoughts, hoping that it would be over soon so she could get back to work. (*Id.*)

She was worried that she was going to get in trouble with her pimp because she had sex without getting any money. Laura worried that she would be killed by either her pimp or by her assailant. (ER-241.)

She did not remember telling officers the assault lasted 30 seconds to a minute. (ER-288.)

After it was over, she got out of the truck and started walking away. (ER-242.) The man told her to get back in and he would give her a ride, but she did not want to get back in the vehicle with him. (ER-243.) She ran back up the street and called her pimp, who gathered up the other girls and came to pick her up. (ER-242-243.)

He was really angry, and yelling. (ER-243.) They drove around looking for the truck, and eventually saw it pulling out of a driveway. (ER-244.) The pimp, who was driving, rammed into the back of the truck. (ER-261.) They pulled over and everyone got out of the car, but the truck sped away. (*Id*.)

The pimp chased the truck onto the freeway, where the other girls rolled down windows in the car and started throwing bottles and hammers at the truck. (ER-245.) A thrown hammer broke out the rear window. (ER-281.)

The truck pulled off the freeway and stopped at a light, and the pimp, who was armed with a gun, jumped out and ran to the truck, but the truck took off again. (ER-245.)

The pimp's car was damaged from ramming the truck, and he made Laura file a police report so he could file an insurance claim. (ER-245-246.)

The lead prostitute called the police, and the pimp, after instructing Laura on what story to tell, left with one of the girls who had outstanding warrants. (ER-246, 249.)

When the police arrived, she told them she got in the truck with a man who offered to give her a ride to meet up with her friends, but he raped her instead. (ER-249-250.)

Laura identified appellant in court as the man who raped her. (ER-262.)

ARGUMENT

I

THE STATE COURT'S DECISION IN SENTENCING FULLY CONSECUTIVELY IN VIOLATION OF THE STATE SENTENCING STATUTES WAS SO ARBITRARY AND CAPRICIOUS THAT IT DENIED DUE PROCESS TO APPELLANT UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

A. Applicable AEDPA Law

Under AEDPA, this court must ask whether the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254, subd. (d)(1). A state court decision is "contrary to" clearly established Supreme Court precedent "if it 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases.'" *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529

U.S. 362, 405-06 (2000)); see also *Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir. 2008) (en banc). A state court decision constitutes an "unreasonable application of" Supreme Court precedent if it is "objectively unreasonable," not merely if it applies that precedent "erroneously or incorrectly." *Williams*, 529 U.S. at 409, 411; *Bell v. Cone*, 535 U.S. 685, 694 (2002).

The key to review of this case under AEDPA is what the Supreme Court of the United States held describing the limitation to federal courts by section 2254 (d).

The Supreme Court of the United States stated that AEDPA requires federal habeas courts to "focus[] on what a state court knew and did." *Cullen v. Pinholster,* 563 U.S .170, 182 (2011).

B. The Federal District Court Was Correct to Decide this Issue Under the *Hicks v. Oklahoma* Doctrine of the Failure of a State to Abide by Its Own Statutory Commands

The District Court stated at ER8-9, Appendix C, p. 5-6 of its Order:

> Although a federal habeas petitioner generally may not bring a cognizable federal habeas claim based merely on an erroneous application of state law, there is a well-recognized exception providing that a Fourteenth Amendment violation can arise from a state court sentencing decision involving an arbitrary application of state law or an erroneous factual finding amounting to fundamental unfairness. See *Richmond v. Lewis*, 506 U.S. 40, 50 (1992) (holding that a state court's application of state law does not rise to the level of a federal due process violation unless it was so arbitrary or capricious as to constitute

> an independent due process violation); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1993) ("[T]he failure of a state to abide by its own statutory commands [regarding sentencing] may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (holding that a state statute which vested sentencing discretion in a jury created "a substantial and legitimate expectation that [a defendant] will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.") (citation omitted). Here, the trial court erred under state law in imposing consecutive sentences under Penal Code § 667.6 (d) because there is insufficient evidence counts 1 and 2 were separate incidents.....

The District Court was correct in the above analysis but then did not grant the petition because it erroneously concluded that the trial judge had the discretion to sentence appellant under section 667 (c) and on page 7, line 18 of its Order stated that "The appellate court found that the record supported a finding the trial court was aware it had discretion to impose either sentence, and that there was no basis to conclude the trial judge would have decided differently had it been asked by Petitioner's counsel to make a record." That error is next discussed.

C. The District Court and the CCA Both Erred In Misstating the Law Which Does Not Require an Objection By Defense Counsel When an Unauthorized Sentence Occurs

The sentencing court in this case expressly found that count Two should be consecutive to count One pursuant to section 667.6 (d).

She followed exactly the Probation Report at ER where the probation officer recommended consecutive sentencing under Penal Code section 667.6 (d). "Pursuant to PC 667.6 (d), a full, separate and consecutive term shall be imposed for each violation of PC 261 (a)(2), PC 289 (a) and PC 220 if the crimes involve separate victims or the same victim on separate occasions. Count 1 PC 261 (a)(2) and count 2 PC 289 (a), involve the same victim, but the crimes occurred on separate occasions in that the defendant had a reasonable opportunity to reflect upon his actions and nevertheless resumed his sexually assaultive behavior." 2 CT 348, 350-351; 17RT 1478-1479.

The probation officer did not see the trial transcript because it did not exist when the probation report was written. In fact, the probation officer depended on the trial judge by saying "this Court also presided over the trial phase of this matter and is fully aware of the facts of this case. The following narrative is solely a synopsis of the offense and may not include information which may have been presented as evidence during the trial." ER-63.

The prosecutor, before the actual sentencing, told the judge that sentence could also be consecutive for the counts involving Laura M. under section 667.6, subd. (c), (ER-316), which did not require time to have occurred on separate occasions but did require reasons for the

judge to sentence under that section. *People v. Belmontes,* 34 Cal.3d 335, 348 (1983).

Nonetheless, immediately after the prosecutor made that statement concerning 667.6 (c), the judge did not take that option and at line 27 of ER-316 stated that "count 2 should be consecutive under section 667.6 (d) ...."

Sentence was complete when the prosecutor then brought up section (c) once more and the judge responded at ER-318 at line 21

THE COURT: I thought I said (d).

MS. BARRETT [the prosecutor]: You said (d), but I am asking you to also say (c).

The judge agreed that she could sentence under (c) but said "but I believe it's –I think the (d) is controlling," But to counteract appellate review disagreeing with two separate acts the judge agreed to "say" (c). ER-318-9.

1. No Objection Was Required By Defense Counsel to The Multiple Failures of the Trial Judge to Follow State Law Since What Resulted Was an Illegal Sentence

The CCA in its opinion at page C-18. ER-31 asserts defendant waived his challenge to the sentencing by failing to object below. Two *Scott* cases are involved in this analysis.

The CCA cited *People v. Scott,* 61 Cal.4th 363 (2015) but that case cited another *Scott*, case, *People v. Scott*, 9 Cal.4th 331, 356–357 (1994).

That second *Scott* expressly exempts unauthorized sentences from its waiver rule. *Id*. at p. 354 & fn. 17.

In this case, the trial judge clearly said they were sentencing under the (d) section because that was applicable. That was the unauthorized sentence.

The prosecution then asked the judge to just "say" the (c) section of the statute to insulate the sentencing from appellate reversal. The judge obligingly did "say" section (c) but at the same time reiterating she thought the (d) section was applicable. ER-318 lines 26-27.

It was clear that the trial court could not lawfully sentence appellant to consecutive terms on counts 1 and 2 under section 667.6, subdivision (d), because his offenses on those counts did not occur on separate occasions as that provision requires. He is correct, the sentence was unauthorized in this respect.

But simply "saying" the (c) section when the judge said the (d) section was actually applicable could not insulate this sentence from reversal.

Talismanic intonations as was done here by the judge at the urging of the prosecution cannot disguise the fact that appellant was sentenced under the (d) section.

Under *Hicks v.Oklahoma, supra*, certiorari must be granted as to the sentencing of Counts One and Two.

But that is not the end of this discussion because on January 19, 2022, the Supreme Court of California granted review in a case, *People v. Catarino, supra*, which affects the instant case due to both *Apprendi and Alleyn*. It is discussed below.

II

HICKS AND _ALLEYNE_, WORKING IN TANDEM, SHOW THAT APPELLANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO TRIAL BY JURY WHEN HE WAS SENTENCED WITHOUT THE JURY DETERMINING THE ELEMENT OF _SEPARATE OCCASIONS_ WHICH WAS ONLY DETERMINED BY THE SENTENCING JUDGE

"Separate Occasion" is an "element" that under the Sixth Amendment must be found by a jury, not a judge. *Alleyne v. United States, supra*, 570 U.S. at pp. 111-112.

Under section 667.6 (d), the fact of the alleged offense having occurred on a "separate occasion" increases the mandatory minimum sentence for each subordinate count.

Appellant is arguing, that because subdivision (d) of section 667.6 requires that subordinate counts carry a full term, rather than the term that would otherwise apply under section 1170.1, it has the effect of increasing both the minimum and the maximum sentences on these counts.

Appellant argues that this violates the Sixth Amendment rule of *Alleyne*.

The trial judge just "saying" (c) "as was done here by the judge at the urging of the prosecution, cannot disguise the fact that appellant was sentenced under the (d) section and that violated both *Hicks* and *Alleyne*.

This new case of *Alleyne* is not a new issue in the case as much as it is just a recognition of a new case which bears directly on this case.

This appeal could have been stayed to allow this counsel to file an *Alleyne* claim in state court and then return to this Court if necessary.

Also, the relief requested could be granted here on the basis of *Apprendi* and *Alleyne*.

The case could have been remanded to the district court to decide the effect of the *Alleyne* argument.

The State could have responded to the *Alleyne* argument.

All these options were available but could not be realized because the Ninth Circuit denied petitioner's motion to stay the appeal. Appendix E at Dkts 61-62.

A remedy is for this Court to Order the Ninth Circuit to grant the requested stay of the appeal to allow petitioner to return to the State Court and exhaust the *Catarino* issue which bears directly on this case.

CONCLUSION

It is respectfully requested that this Court grant Certiorari and order a stay of petitioner's appeal to allow him to exhaust the issue which is raised in *Catarino.*

Respectfully submitted,

/s/Charles R. Khoury Jr.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE PURSUANT TO SUPREME COURT RULE 33

This brief complies with the length limits permitted by Rule 33-1. The brief is under 40 pages excluding exempted portions. The brief's type size and type face comply with Rule 33.2(a)(b).

/s/ Charles R. Khoury Jr. August 2, 2022

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AMPARAN v. SPEARMAN

PROOF OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and not a party to this action and that on this 3rd Day of August, 2022 a petition for In Forma Pauperis Status and petition for Certiorari with volume of exhibits, were e- mailed to the email of counsel for the Respondent justain.riley@doj.ca.gov
I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 3, 2022

Respectfully submitted,
/s/CHARLES R. KHOURY JR.