

No. _____

IN THE
Supreme Court of the United States

ANDREW VALENZUELA,

Petitioner,

v.

W.L. MONTGOMERY, ACTING WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Cuauhtemoc Ortega
Federal Public Defender
PABLO ALMAZAN*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-2854
Facsimile: (213) 894-0081
Pablo_Almazan@fd.org

Attorneys for Petitioner
**Counsel of Record*

QUESTION PRESENTED

On November 6, 2009, nineteen-year-old Andrew Valenzuela—along with David Padilla and Jessica Garcia—got in a car with a 32-year-old serial killer who later forced all three to their knees at gunpoint and told Valenzuela, “You’re going to strangle [Padilla] or I’m going to shoot you.” Valenzuela eventually obeyed and was convicted of kidnapping and first-degree murder.

In this federal habeas case, Valenzuela contends that the trial court’s refusal to properly instruct the jury on his duress defense violated his constitutional right to present a complete defense.

The Ninth Circuit, however, held that Valenzuela was not prejudiced by the trial court’s refusal to specifically instruct the jury that duress is a defense to kidnapping because there was “no evidence” that Valenzuela was under duress during the kidnapping. But the jury explicitly found that Valenzuela was “engaged” in the kidnapping when the murder occurred—the exact time it is undisputed that Valenzuela was “certainly” under duress.

Did the Ninth Circuit’s clearly erroneous finding so depart from the accepted course of judicial proceedings as to justify summary reversal? U.S. Sup. Ct. R. 10(a).

TABLE OF CONTENTS

| | Page |
|--|------|
| QUESTION PRESENTED | i |
| LIST OF PRIOR PROCEEDINGS | vi |
| PETITION FOR A WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT | 7 |
| A. Valenzuela was Undisputedly Under “Duress” During the Kidnapping | 7 |
| B. The Trial Court’s Refusal to Properly Instruct the Jury on Valenzuela’s Duress Defense Violated His Constitutional Right to Present a Complete Defense | 8 |
| 1. Valenzuela was Entitled to Proper Duress Instructions Under State Law | 10 |
| 2. The Violation Deprived Valenzuela His Right to Due Process and to Present a Complete Defense | 12 |
| CONCLUSION | 14 |

INDEX TO APPENDIX

| | Page |
|---|---------------|
| 1. U.S. Court of Appeals for the Ninth Circuit Memorandum Affirming Denial of Habeas Petition Case No. 20-55867 (April 25, 2023) | Pet. App. 001 |
| 2. U.S. District Court Central District of California Judgment Denying Habeas Petition Case No. CV 17-8410 (July 21, 2020) | Pet. App. 006 |
| 3. U.S. District Court Central District of California Order Accepting Report and Recommendation Case No. CV 17-8410 (July 21, 2020) | Pet. App. 007 |
| 4. U.S. District Court Central District of California Report and Recommendation Case No. CV 17-8410 (May 11, 2020) | Pet. App. 008 |
| 5. California Supreme Court Order Denying Petition for Review Case No. S235274 (August 31, 2016) | Pet. App. 038 |
| 6. California Court of Appeals Opinion Affirming Conviction Case No. B259298 (May 26, 2016) | Pet. App. 039 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| Federal Cases | |
| <i>Bradley v. Duncan</i> , 315 F.3d 1091 (9th Cir. 2002)..... | 9, 10, 12 |
| <i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993)..... | 10 |
| <i>California v. Roy</i> , 519 U.S. 2 (1996)..... | 10 |
| <i>California v. Trombetta</i> , 467 U.S. 479 (1984)..... | 8 |
| <i>Clark v. Brown</i> , 450 F.3d 898 (9th Cir. 2006)..... | 12 |
| <i>Crane v. Kentucky</i> , 476 U.S. 683 (1986)..... | 8 |
| <i>Cupp v. Naughton</i> , 414 U.S. 141 (1973)..... | 9 |
| <i>Dye v. Hofbauer</i> , 546 U.S. 1 (per curiam)..... | 7 |
| <i>Estelle v. McGuire</i> , 502 U.S. 62 (1991)..... | 9 |
| <i>Mathews v. United States</i> , 485 U.S. 58 (1988)..... | 9 |
| <i>O'Neal v. McAninch</i> , 513 U.S. 432 (1995)..... | 8 |
| <i>United States v. Houston</i> , 648 F.3d 806 (9th Cir. 2011)..... | 9 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|---------|
| State Cases | |
| <i>People v. Anderson</i> , 28 Cal. 4th 767 (2002)..... | 5, 11 |
| <i>People v. Breverman</i> , 960 P.2d 1094 (Cal. 1998)..... | 11 |
| <i>People v. Heath</i> , 207 Cal. App. 3d 892 (1989) | 11 |
| <i>People v. Wilson</i> , 36 Cal. 4th 309 (2005)..... | 11 |
| Federal Statutes | |
| 28 U.S.C. § 1291 | 2 |
| 28 U.S.C. § 1254(1) | 2 |
| 28 U.S.C. § 2253 | 2 |
| 28 U.S.C. § 2254(d) | 2, 3 |
| Antiterrorism and Effective Death Penalty Act of 1996..... | 6 |
| State Statutes | |
| California Penal Code § 26 | 11 |
| Other Authorities | |
| U.S. Const. amend. VI | 2, 8 |
| U.S. Const. amend. XIV..... | 2, 6, 8 |
| U.S. Sup. Ct. R. 10(a)..... | i, 1 |

LIST OF PRIOR PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit

Valenzuela v. Montgomery, No. 20-55867 (April 25, 2023)

U.S. District Court for the Central District of California

Valenzuela v. Montgomery, No. CV 17-8410 (July 21, 2020)

California Supreme Court

People v. Trejo et al., No. S235274 (August 31, 2016)

California Court of Appeal

People v. Trejo et al., No. B259298 (May 26, 2016)

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

Andrew Valenzuela petitions this Court for a writ of certiorari so that it may review and summarily vacate the Ninth Circuit's judgment and remand for a disposition that doesn't rely on a clearly erroneous finding of fact. U.S. Sup. Ct. R. 10(a).

OPINIONS BELOW

The Ninth Circuit's memorandum decision affirming the judgment of the district court against Valenzuela is unreported. Pet. App. 1-5. The district court's final judgment dismissing Valenzuela's pro se habeas petition with prejudice is unreported. Pet. App. 6. The magistrate judge's report recommending the dismissal of Valenzuela's petition is unreported. Pet. App. 8-37.

The order by the California Court of Appeal affirming Valenzuela's judgment on appeal is unreported. Pet. App. 39-60. The order by the California Supreme Court denying Valenzuela's petition for review is unreported. Pet. App. 38.

JURISDICTION

The Ninth Circuit issued its memorandum disposition on April 25, 2023. Pet. App. 1-5. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

The Sixth Amendment provides:

[T]he accused shall enjoy the right ... to be confronted with the witnesses against him; [and] to have a compulsory process for obtaining witnesses in his favor.

28 U.S.C. § 2254(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.

STATEMENT OF THE CASE

Andrew Valenzuela is serving a sentence of life in prison without the possibility of parole, plus ten years, because a jury convicted him of first-degree murder and kidnapping even though the evidence showed—and the prosecution agreed—that Valenzuela was “certainly in a position of duress.”

(2-ER-72.)¹

On November 6, 2009, David Padilla drove Robert Caballero and Jessica Garcia to Valenzuela’s house. (1-ER-38.) Caballero was a 32-year-old serial killer who led the gang to which Valenzuela and Padilla belonged. (6-ER-1127.) Valenzuela got in the car with them, and Caballero held Garcia at gunpoint in the back seat. (*Id.*; 3-ER-528.)

When they arrived at a freeway overpass, Caballero ordered everyone to their knees and ordered Valenzuela to strangle Padilla. (3-ER-528-531.) After initially refusing the command, (4-ER-651-53, 660; 6-ER-1066), Valenzuela pretended to comply by “faking” an altercation with Padilla.

¹ “ER” refers to the excerpts of record filed in the Ninth Circuit case at ECF No. 22. The numbering preceding the citation is the volume number.

(3-ER-532; 4-ER-653.) It was only after Caballero pointed a gun at Valenzuela's head and repeatedly threatened to shoot him if he didn't "strangle [Padilla]" that Valenzuela succumbed. (3-ER-536, 557-558.) Following Caballero's orders while being held at gunpoint, Valenzuela strangled Padilla and hit him on the head with a rock, killing him. (3-ER-536; 4-ER-556.) Valenzuela was only nineteen years old at the time of this incident. (2-ER-168.)

At trial, the court failed to explicitly instruct the jury that duress was a defense to felony-murder based on kidnapping and to kidnapping itself, and further denied Valenzuela's request for a pinpoint instruction that the circumstances of duress are relevant to the premeditation or implied malice elements of first-degree murder. (1-ER-59-63, 65.) The court concluded that these instructions were duplicative of CALJIC 4.40. (*Id.*)

CALJIC 4.40—the sole duress instruction given to the jury—stated:

A person is not guilty of a crime other than malice murder when he engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances:

1. Where the threats and menaces are such that they would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged, and
2. If this person then actually believed that his life was so endangered.

This rule does not apply to threats, menaces, and fear of future danger, nor does it apply to the crime of malice murder.

(8-ER-1604.)

Valenzuela's rejected pinpoint instruction would have additionally informed the jury:

Although duress is not an affirmative defense to murder, *the circumstances of duress* are relevant to whether the evidence establishes the elements of premeditation or implied malice. The reasons a person acted in a certain way, including threats of death, are relevant to whether the person acted with a conscious or want disregard for human life.

(1-ER-66, 68 (emphasis added).) Valenzuela took this instruction verbatim from the text of *People v. Anderson*, 28 Cal. 4th 767, 779 (2002). (1-ER-66.)

In support of his request, Valenzuela also quoted the following passage from *Anderson*:

Defendant also argues that, at least, duress can negate premeditation and deliberation, thus resulting in second degree and not first degree murder. *We agree that a killing under duress, like any killing, may or may not be premeditated, depending on the circumstances.* If a person obeys an order to kill without reflection, the jury might find no premeditation and thus convict of second degree murder. As with implied malice murder, this circumstance is not due to a special doctrine of duress but the legal requirements of first degree murder.

(*Id.* (emphasis added).)

The jury deliberated for more than three days, asked for a readback of testimony from the state's star witness, and *twice* sent notes to clarify to whom the kidnapping charge referred in a case that involved three

defendants, three alleged murders (among other charges), and a confusing set of jury instructions. (1-ER-38.)

Valenzuela was convicted of kidnapping and first-degree murder with the special circumstance that the murder occurred while he was “engaged in the crime of kidnapping [Garcia].” (8-ER-1695-1697.)

On direct appeal, the CCA affirmed against Valenzuela’s challenge that the trial court violated his Sixth and Fourteenth Amendment rights to present a complete defense and to due process when it (1) failed to specifically instruct that duress is a defense to a felony-murder charge based on kidnapping and to kidnapping itself, and (2) refused his pinpoint instruction that the circumstances of duress can negate the premeditation and implied malice elements of first-degree murder. Pet. App. 39-60. The California Supreme Court summarily denied a petition for review. Pet. App. 38.

On federal habeas review under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), the district court denied Valenzuela’s petition raising the same claim. Pet. App. 6.

The Ninth Circuit affirmed, finding that “any error regarding the application of the duress instruction to the kidnapping charge could not possibly have been prejudicial” because “no evidence” supported that Valenzuela was under duress during the kidnapping. Pet. App. 3. It further determined that the trial court “made clear to the jury” that duress is a

defense to kidnapping by instructing that duress applies to a “crime other than malice murder.” (*Id.*) Lastly, the Ninth Circuit held that any error regarding the failure to provide a pinpoint instruction on the circumstances of duress could not have prejudiced Valenzuela because the jury found that the murder occurred while he was “engaged in the crime of kidnapping” and so he would have been convicted of first-degree murder under a felony-murder theory anyway. Pet. App. 4.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit based its rejection of Valenzuela’s habeas claim on the clearly erroneous finding that there was “no evidence” of duress. Because this error infected the entirety of the Ninth Circuit’s disposition, this Court should summarily vacate the Ninth Circuit’s judgment and remand for a disposition that doesn’t rely on a clearly erroneous finding of fact. *Cf. Dye v. Hofbauer*, 546 U.S. 1, 3 (per curiam) (summarily reversing unpublished habeas denial premised on misapprehension about district court record).

A. Valenzuela was Undisputedly Under “Duress” During the Kidnapping.

The prosecutor in Valenzuela’s case conceded that Valenzuela was “certainly in a position of duress” when he was forced to kill Padilla. (2-ER-72.) Indeed, no one can reasonably dispute that being held at gunpoint by a serial killer amounts to duress. The jury also concluded that Valenzuela

murdered Padilla while he was “engaged” in the act of kidnapping. (8-ER-1695-1697.) It thus follows that the jury must have believed that Valenzuela was under duress during the kidnapping.

The Ninth Circuit, however, reached the opposite conclusion. It found that “no evidence” supported that Valenzuela was under duress during the kidnapping. Pet. App. 3. Consequently, the panel concluded that Valenzuela could not have possibly been prejudiced by the trial court’s refusal to specifically inform the jury that duress was a defense to kidnapping and also felony-murder predicated on kidnapping. *Id.* This finding was clearly erroneous.

A correct factual finding, in turn, would have shown that Valenzuela’s right to present a complete defense was violated.

B. The Trial Court’s Refusal to Properly Instruct the Jury on Valenzuela’s Duress Defense Violated His Constitutional Right to Present a Complete Defense.

The Sixth and Fourteenth Amendments guarantee state criminal defendants a meaningful opportunity to present a complete defense and to receive jury instructions to support their defense. *California v. Trombetta*, 467 U.S. 479, 484 (1984); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

Under this Court’s precedent, while failure to give a jury instruction required by state law alone is not a basis for federal habeas relief, relief is available when the failing instruction “by itself so infected the entire trial

that the resulting conviction violates due process.” *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Cupp v. Naughton*, 414 U.S. 141, 146 (1973).

This is so because the right to present a complete defense “would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense.” *Bradley v. Duncan*, 315 F.3d 1091, 1098-99 (9th Cir. 2002). And courts have granted habeas relief under this standard in cases involving the failure to give a requested instruction. *See, e.g., id.* at 1098-1101.

This Court has also clearly established that “[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists sufficient evidence for a reasonable jury to find in his favor.” *Mathews v. United States*, 485 U.S. 58, 63 (1988). “The legal standard is generous: a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility.” *United States v. Houston*, 648 F.3d 806, 816 (9th Cir. 2011). “A defendant needs to show only that there is evidence upon which the jury could rationally sustain the defense.” *Id.*

To succeed on his claim, Valenzuela must show that the failure to properly instruct the jury on his duress defense had a “substantial and injurious effect or influence in determining the jury’s verdict.” *Bradley*, 315

F.3d at 1099 (quoting *California v. Roy*, 519 U.S. 2, 5 (1996), in turn quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). If he does, a court “must grant the petition if [it is] ‘in grave doubt as to the harmlessness of the error.’” *Bradley*, 315 F.3d at 1099 (quoting *Roy*, 519 U.S. at 6, in turn quoting *O’Neal v. McAninch*, 513 U.S. 432, 437 (1995)) (quotation marks deleted).

Here, Valenzuela’s right to present a complete defense was violated when the trial court (1) failed to specifically instruct that duress is a defense to kidnapping and felony-murder based on kidnapping, and (2) refused to give Valenzuela’s requested pinpoint instruction explaining that the circumstances of duress are relevant to whether he had the premeditation or implied malice required to convict him of willful, deliberate, premeditated first-degree murder. (1-ER-5, 15-18.)

1. Valenzuela was Entitled to Proper Duress Instructions Under State Law.

As the CCA noted in affirming the judgment, California trial courts are “required to ‘instruct’ the jury ‘on general legal principles closely related to the case.’” (1-ER-40 (quotation marks deleted).) “It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. . . . The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary

for the jury's understanding of the case." *People v. Breverman*, 960 P.2d 1094, 1100 (Cal. 1998).

State law thus entitled Valenzuela to a specific instruction explaining that duress was a defense to kidnapping, both to the charge itself and as the predicate for felony-murder. Under California Penal Code § 26, a person who commits a crime under duress is not liable for that crime. As *People v. Anderson*, 28 Cal. 4th 767, 779, 784 (2002) explained, "[i]f one is not guilty of the underlying felony due to duress, one cannot be guilty of felony murder based on that felony."

Additionally, the circumstances of duress negate the element of intent for first-degree murder. *People v. Heath*, 207 Cal. App. 3d 892, 901 (1989). When a defendant is under threats or menaces—as Valenzuela was when Caballero held a gun to his head and threatened to shoot him—he has reasonable cause to believe that his life would be endangered if he refused to commit the offense. *People v. Wilson*, 36 Cal. 4th 309, 331 (2005); Cal. Penal Code § 26. And because "the circumstances of duress are relevant to whether the evidence establishes the elements of premeditation and implied malice," the trial court was required to so instruct the jury on willful, deliberate, premeditated first-degree murder. *Anderson*, 28 Cal. 4th at 779.

Both instructions were "necessary for the jury's understanding of the case." *Breverman*, 960 P.2d at 1100.

2. The Violation Deprived Valenzuela His Right to Due Process and to Present a Complete Defense.

The trial court's omissions deprived Valenzuela his right to present a complete defense. *See Bradley*, 315 F.3d at 1094 (in a drug case, failure to instruct on defendant's "only defense," entrapment, "violated his due process right to present a full defense"); *Clark v. Brown*, 450 F.3d 898, 903, 906-07 (9th Cir. 2006) (failure to provide special circumstance instruction prevented defense from arguing that arson was "merely incidental" to the actual murder, and therefore "violated due process under *Trombetta*").

The jury found Valenzuela guilty of first-degree murder with the added special circumstance that the murder occurred while he was "engaged" in the kidnapping. (8-ER-1696). Quoting this language, the Ninth Circuit found no prejudice, indicating that the jury—at the very least—convicted Valenzuela on a felony-murder theory.

But as the magistrate judge pointed out in the report and recommendation adopted by the district court below, the record is not clear on which theory—intentional or felony-murder—Valenzuela was convicted. (1-ER-17.) Furthermore, the facts themselves demonstrate the jury's confusion on the interplay of kidnapping and murder as it pertains to duress.

There was no dispute that Valenzuela was “certainly” under duress when he killed Padilla. And because the jury found that Valenzuela was still “engaged” in the kidnapping when the murder occurred, it follows that the jury must have believed that Valenzuela was also under duress during the kidnapping since the two events overlapped. Yet the jury found Valenzuela guilty of kidnapping despite knowing that he was under duress *during* the kidnapping. This confusing result can safely be assumed to have stemmed from the confusing duress instructions given to the jury.

On the one hand, the jury was instructed that duress is a defense to a “crime other than malice murder.” On the other hand, the jury was instructed that duress is *not* a defense to murder. From the latter, the jury likely understood (wrongly) that duress was also *not* a defense to *felony-murder predicated on kidnapping*. And if duress is not a defense to felony murder predicated on kidnapping, then duress must also not be a defense to the underlying kidnapping itself. In other words, because the murder and kidnapping overlapped, the jury misunderstood that duress couldn’t have applied to either.

Had the trial court specifically instructed the jury that duress *is* a defense to kidnapping *and* a defense to felony-murder predicated on kidnapping, this confusion would have dissipated.

CONCLUSION

For the reasons above, the Court should grant certiorari, vacate the Ninth Circuit's judgment, and remand for further proceedings.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: July 21, 2023

By: 

PABLO ALMAZAN*
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*