No. 23-5442

IN THE SUPREME COURT OF THE UNITED STATES

Wayne Johnson,

Petitioner
v.

California,

Respondents

On Petition for a Writ of Certiorari

To the California Supreme Court

And The California Court of Appeal

PETITION FOR REHEARING

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PREAMBLE

Pursuant to Rule 44.2 of this Court, Petitioner Wayne Johnson, respectfully petitions for a rehearing of the denial of a writ of certiorari to review the judgment of the Court of Appeal of the State of California.

The trial court convicted Petitioner of two separate batteries stemming from a single act. It called one battery domestic violence and the other assault with a deadly weapon, but it suspended sentence on the assault with a deadly weapon.

Petitioner cried foul and he appealed arguing calling one battery two strikes is a violation of the United States Constitution which is designed to protect citizens from double jeopardy, Cruel and Unusual Punishment, and violations of due process.

PETITION FOR REHEARING

The original certiorari petition asked this Court to resolve two issues of first impression: (1) whether Appellant could be convicted of two strikes for committing a single battery and (2) whether any of the crimes, which are all wobblers could qualify as a felony given there was no restraining order, great bodily injuries, or confirmation of use of an actual dangerous weapon. I.e., no one ever claimed to see a pellet or a gun on the scene.

REASONS FOR REHEARING

A petition for rehearing should present intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. See Rule 44.2.

Petitioner hereby sets forth the ineffective assistance of counsel as grounds for rehearing.

When Petitioner's family retained defense counsel, they did not have a clue he was suffering from cancer, diabetes, that he drank excessively, and that he was vindictive and he would be vindictive toward Petitioner for asking questions about his representation. The State Bar once disciplined defense counsel for vindictively making a false police report.[1]

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[1] On August 14, 2008, following an argument after a court hearing, defense counsel saw an opposing counsel leave the courthouse and drive away. Defense counsel called 911 and falsely reported opposing counsel was DUI. Defendant reported "I'm reporting a drunk driver," and he gave opposing counsel's license plate.

1) Defense Counsel acquiesced in the introduction of the void restraining order and he otherwise failed to challenge the introduction of the void restraining order or set forth all the reasons why it was unduly prejudicial to Petitioner at trial.

Defense Counsel had numerous in camera discussions outside Petitioner's presence. During the first in camera discussion defense counsel stipulated that two retired police officers could sit on the jury. Appellant, who had authored of a book on police misconduct, objected after he learned defense counsel made that stipulation. Not only that, they questioned Appellant while he was on the stand about his book on police misconduct.

The judge, prosecutor, and defense counsel conspired to try to get Petitioner to waive his objections to the introduction of the void restraining order. There were many damaging exchanges between Appellant, the prosecution, the judge, and defense counsel while Appellant testified about an unlawful detention by the police who unlawfully detained him on the freeway to serve the void restraining order.[2]

The judge, the prosecutor, and defense counsel mischaracterized the facts and the law, which gave the jury the false impression Petitioner, was dishonest when he was only attempting to stand up for his rights.

When other evidence contradicts testimony of a witness on a material fact, the jury is instructed that all testimony of that witness is false. (See CalCrim 226) However, Appellant was being truthful, and the judge, prosecutor, and defense counsel were misleading the jury.

The objective, scientific, and medical subjective evidence put on by the prosecution failed to corroborate the subjective evidence the prosecutor introduced.

Defense counsel failed to show the jury how the scientific and medical evidence disproved the prosecution's theories about the nature of the relationship, the supposed

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[2] An order that exceeds the jurisdiction of the court is void, and can be attacked in any proceeding in any court where the validity of the judgment comes into issue. (See ***Rose v. Himely*** (1808) 4 Cranch 241, 2 L.Ed. 608; ***Pennoyer v. Neff*** (1877) 95 US 714, 24 L.Ed 565; ***Thompson v. Whitman*** (1873) 18 Wall 457, 21 I ED 897; ***Windsor v. McVeigh*** (1876) 93 US 274, 23 L.Ed. 914; ***McDonald v. Mabee*** (1917) 243 US 90, 37 S.Ct. 343, 61 L.Ed. 608.

injuries, and the discussions between the parties. In that regard, he failed to make the trial a contest.

2) Despite being admonished by the court many times to use documents to impeach witnesses, Defense counsel failed to impeach the witnesses with medical evidence or prior inconsistent statements. He never impeached a single witness despite all the impeachment material as his disposal.

When defense counsel asked Jane Doe if she saw who shot her, the trial judge made an improper comment that it would be impossible to see anyone behind her. He rehabilitated her testimony beforehand. She may have replied she did.

Defendant testified he would have no way of knowing if his vehicle was on the scene the date alleged victim alleged she was attacked and he did not have knowledge of any attack. He frequented the club and others drove his vehicles. The trial judge improperly told the jury Petitioner had an obligation to tell the jury who was driving his vehicle that day even though it would be impossible unless he actually had knowledge. That comment improperly implied Petitioner was involved in the commission of the alleged crime when he testified he was not present and he was not involved.

3) Defense Counsel refused to demand his Petitioner's presence in the courtroom at all critical stages of the proceedings. The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense at all stages of the trial. (See ***United States v. Bess***, 75 M.J. 70 ***United States v. Hennis***, 79 M.J. 370.)

If Petitioner was present in chambers he would have objected to two retired police officers being on his jury given his writings on police misconduct and he would have pressed his attorney to fight the introduction of he void restraining order.

4) Defense Counsel sabotaged Petitioner's appellate rights by erroneously failing to make objections unduly prejudicially evidence or to preserve the issues for appeal. Defense counsel stated in open court: "Don't worry your honor, the judgment will be appeal proof," meaning he would purposely not preserve any of Petitioner's Appellate rights.

Alleged victim habitually wore eyeglasses that left marks on her nose, and she wore tops while droving a convertible in the sun that left marks on her shoulders. The judge at

the preliminary hearing recognized those marks and found them not to be bruises. The reporting officer and alleged victim are captured on the reporting officer's body camera denying they could see any injuries. At trial, they testified the marks were bruises. Defense counsel failed to address the matter.

5) Defense Counsel failed to address the legal standard for who can be charged with domestic violence in California. Petitioner did not qualify.

6) Defense Counsel failed to make a record of the erroneous comments the trial judge made in court. The judge treated Petitioner as though he was guilty before the trial began.

7) Defense counsel failed to challenge to jury pool based upon its systematic exclusion of Black people. Black people make up roughly 11 percent of the Population in Contra Costa County, but the jury pool had less than five Black people on the panel of over 100 and not one of them made it to the jury box.

8) Defense counsel stipulated in chambers to two former police officers sitting on the jury panel without subjecting them to prior examination like the rest of the jurors.

9) Defense counsel failed to use Petitioner's peremptory challenge to remove a woman from the jury who stated she believes all men batter and abuse women.

The jury convicted Petitioner based upon Defense counsel's blunders not on the strength of the evidence.

California Three Strikes Law

Defense counsel did not move to have the void restraining order excluded from the case, which prevented him from moving to have the felonies, which are all wobblers, from being reduced to misdemeanors. Reducing the felonies to misdemeanors would have prevented all the strikes because misdemeanors are not strikes.

In the legislative history the legislators opined that the three strikes law will send "a simple message that can be easily understood by those who engage in repeated criminal behavior: further criminal behavior will result in severe consequences."

Rendering one act as two strikes does not give a prospective defendant the opportunity to reflect on the consequences of committing crimes in he future.

Because no one saw or can describe a weapon, there are no acute or serious injuries, and there is no restraining order, the conviction should be treated as a misdemeanor or eliminated altogether.

Declaring two strikes for one act is arbitrary and capricious and it opens the door to racism and abuse of discretion.

An incompetent or negligent lawyer can so poorly represent a client that the court is justified in overturning a guilty verdict, that is: a lawyer's job performance can be so deficient as in this case that it renders the Sixth Amendment meaningless; and his deficient performance unfairly prejudiced the defense so seriously that it completely deprived the defendant of a fair trial.

The Defense Counsel's job is to

1) Investigate the facts
2) Educate one's self as to the law
3) Locate and interview witnesses
4) Present supporting witnesses
5) Cross-examine and impeach witnesses
6) Object to harmful evidence or arguments/statements
7) Seek Medical, Scientific evidence (where available)

Defense Counsel Failed In All Respects

Defense Counsel's failed to research the law to determine whether Petitioner met the criteria for being convicted of domestic violence, i.e., whether the parties had ever been married, shared children, lived together, or had an expectation of sex or affection. Allegedly being a "boyfriend is insufficient under California law.

This was clearly a relationship borne out of convenience, not romance. Alleged victim was embroiled in protracted litigation in the following matters in Contra Costa county: 1) her a criminal protective order in People v. McNemar 1-170503-7; 2) her family law litigation (Marriage of McNemar D13-04665); and 3) her husband's federal bankruptcy (In Re Thomas McNemar- 18-40206 CN11) that she did not have time for romance.

Petitioner helped her locate attorneys to assist her with her legal issues and in return she favors for him. She occasionally helped him supervise his minor granddaughters, which he saw every other weekend by court order. However, even that reduced alleged victim to tears proclaiming it was unfair that Appellate be allowed to see his granddaughters when she was "barred from seeing her own flesh and blood" (her daughters).

There were never any breakups as alleged victims claims because the parties were not a couple. Petitioner was never interested in being her so-called "boyfriend." Alleged victim was often angry and explosive, mostly about her limited child visitation. That is why she was the subject of a criminal protective order. Alleged victim did frequently become upset and leave, but that was when the family court judge's rulings upset her or when she consumed too much alcohol and went on one of her rampages.

Defense Counsel Failed To Familiarize One's Self At To The Law

California law defines a void order, as one that is void from its inception has no legal significance. It is not an order and it does not have to be honored. It is as though it never existed. (See Cf. ***Brown v. Williams*** (2000) 78 Cal.App.4th 182, 186, fn.; and ***Pennoyer v. Neff, supra***, 95 US 714.)

Contrary to the Court of Appeal's statement, the void restraining order was mentioned at numerous intervals throughout the trial.

Moreover, the number of times a prosecutor mentions an issue in his closing argument is not determinative of whether a piece of evidence is unduly prejudicial. The issue is whether the evidence is unduly prejudicial and whether the jury heard it and whether it impacted the their thinking.

The void restraining order was part of one of the charges (Penal Code Section 646.9(b), and the actual void restraining order went into the jury room as an exhibit of the restraining order Petitioner supposedly acted while in effect. In ***People v. Allen*** (1978) 77 Cal.App.3d 924,934-935 a Court of Appeal reversed a conviction where a witness made a "one time slip" that the defendant was on parole.

In this case, the Court of Appeal falsely stated 1) the prosecutor did not rely heavily upon the restraining order, and 2) the jury only considered the restraining order after it found Appellant was guilty of stalking regardless of the restraining order. It erroneously deduced that flawed logic from ***People v. Muhammad*** (2007) 57 Cal.App.4th 484; however, the unduly prejudicial impact of the restraining was not the issue in the Muhammad case.

Moreover, Petitioner's appointed appellate attorney first advanced that erroneous position over the tapped prison telephones in his effort to get Petitioner to drop his challenge to the void restraining order. That is most likely where the prosecution got the idea. Not only is that violation of the attorney-client privilege, it is a breach of the fiduciary duty.

It was not Defense Counsel's well thought out strategy to not challenge the void restraining order. It is sheer incompetence and the withdrawal of crucial defenses, thereby reducing the trial to a farce or sham. (See ***In re Saunders (1970)*** 2 Cal.3d 1033, 1041-1042 [88 Cal.Rptr. 633, 472 P.2d 921]; **People v. Ibarra**, 60 Cal.2d 460, 464 [34 Cal.Rptr. 863, 386 P.2d 487]). See also ***People v. Lang*** (1974) 11 Cal.3d 134 (Id at 138-139), for duties of appellate counsel.[3]

Defense Counsel had a duty to raise the issue of the void restraining order each time it was mentioned at the trial. That would have preserved the issue and demonstrated how unduly prejudicial the document was and how often the void instrument was mentioned.

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[3] **1)** We have recently set forth in detail the obligations of appellate counsel, including the duty to prepare a legal brief containing citations to the transcript and appropriate authority, and setting forth all arguable issues, and the further duty not to argue the case against his client. (In ***re Smith***, 3 Cal.3d 192, 197 [90 Cal.Rptr. 1, 474 P.2d 969]; ***People v. Feggans***, 67 Cal.2d 444, 447-448 [62 Cal.Rptr. 419, 432 P.2d 21].)

(2a) In the instant case, appellate counsel breached both duties. He not only failed to argue the insubstantiality of the evidence but also affirmatively stated his belief that the point lacked merit. Such a concession could have had a devastating effect upon defendant's chances of a successful appeal, especially when coupled with counsel's waiver of oral argument.

Each time the judge, the prosecutor, and defense counsel told the jury the restraining order was valid it had the effect of impeaching Petitioner's credibility because he denied the document was valid. Jurors don't assume judge's issue void orders.
In addition to that, the prosecution introduced a video of Petitioner arguing with police on October 4, 2018, after they illegally stopped him on the highway to serve the void restraining order.

Not only were Defense Counsel, the prosecutor, and the judge pressuring Petitioner to forfeit his valid claim the restraining order was void, Petitioner had taken the Fifth Amendment so they should not have even mentioned the void restraining order. (14RT pp. 4078-4080.)[4]

Defense Counsel did nothing to protect Petitioner's credibility or his rights. Defense counsel simply lied to Appellant and told him he would attack the void restraining order knowing all the time he would not and he did not. Because Petitioner paid defense counsel with his last funds, and Defense counsel would not withdraw and return his money, as required by State Bar Rules, so he could hire competent counsel. Instead, Defense counsel left Petitioner in a precarious situation, without representation throughout the trial.

California also defines a relationship that is subject to domestic violence law. See Penal Code Section 13700.

Defense counsel had an obligation to ensure Petitioner was not charged with committing acts of domestic violence if he did not meet the criteria. He was not married to alleged victim, he never lived with her, he was never in a long-term relationship, and he did not have an expectation of sex or affection.

Petitioner questioned alleged victim's sanity. She was obsessed with her estranged husband, and often spoke of harming him, the child custody evaluator, and the family court judge, despite being subject to t a criminal protective order for causing physical harm to him and her own mother.

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[4] Following Petitioner's testimony, Defense counsel told Petitioner in front of the courtroom deputy if Petitioner was not in handcuffs, he would give him a real boxing lesson. That is a total breakdown of the attorney-client relationship.

Medical professionals define the term medical file and they describe the notations that are entered into a medical file.

Defense Counsel's job was to ensure that notations relating to the operation of the CT scanner were not considered part of alleged victim's medical record and that unrecovered foreign objects possibly detected in the beam are not confused with things that are related to history, diagnosis, and treatment of a patient.

People v. Lochtefeld (2000) 77 Cal. App. 4th 533, 538 stated that for purposes of Penal Code § 245, a deadly weapon is "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury." California law states all BB and pellet guns are not deadly weapons. Any device designated as a deadly weapon has to discharge objects at a certain velocity, and in this case the record is completely void of any weapon or device or velocity.

Alleged victim's medical records do not even corroborate a single acute injury.

It was defense counsel's job to make sure his client was not charged with crimes that did not occur. The trial judge removed the only remaining great bodily injury allegation sua sponte based upon the medical records and testimony, and because he had no choice.

Defense counsel allowed Contra Costa County to try his client on crimes that investigating officers in San Francisco did not believe amounted to probable cause to make an arrest.

Any object could have come from any location, near or far, and no lay witness testified or expert witness opined that anything came from a vehicle.

It is speculation to even suggest someone discharged pellet gun or any device. It is speculation to assume any device possesses the ability to discharge an object without knowing what it is or being able to assess the damage it allegedly caused.

The prosecution failed to produce the supposed pellet that alleged victim says some unknown person gave her at the hospital to see if it showed signs of being discharged from a device and/or whether it had been discharged with sufficient velocity to result in great bodily injury.

Petitioner contests all the possible findings as they are based upon inadequate or non-existent evidence.[5]

Not only did Defense Counsel fail to keep abreast of the law, he failed miserably to object to harmful evidence or arguments/statements relating to the relationship, the great bodily injuries that were dismissed, or the void restraining order.

Defense counsel did not address the issue in his closing argument. Defense counsel just accepted the prosecutions narrative.

Defense Counsel Never Located and/or Interviewed Witnesses

Appellant still enjoys a stellar reputation in his community and he has many friends who stand by him. Many of them wrote letters stating they had known Appellant over thirty years. They have never found him to be disagreeable. However, defense counsel failed to subpoena even one.

Defense Counsel Never Properly Cross-Examined or Impeached Witnesses

In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to impact his case.

The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. Defense counsel just appeared in court and tried litigate from the seat of his pants. He did no trial preparation. He did not even bring the impeaching documents into the courtroom.

For example, defense counsel asked alleged victim if she ever suffered a fractured nose, an issue that had been disposed of in Appellant's favor at the preliminary hearing by a previous attorney. When she denied it and he did not have her medical records in court

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[5] The Court of Appeal falsely stated there was evidence to support the stalking apart from the void restraining order. It falsely stated there was video evidence Petitioner was captured on video at alleged victim's home when she claims someone unknown person tampered with her locks. Alleged victim testified she installed the cameras after that event. Moreover, there is no video evidence Petitioner was ever on her block. It also falsely stated Appellant followed alleged victim outside the Allegro Ballroom when she testified Petitioner was there first and she noticed him already outside after she went outside to make a call. Defense Counsel failed to address any of those issue on closing argument.

so he just moved on to the next question, leaving the jury with the false impression Petitioner fractured her nose.

He even left Petitioner in the holding tank and refused to discuss the case with him. Petitioner did not even know he would be testifying until Defense counsel called him to the stand.

California courts have developed precedent holding that an attorney has "implied authority regarding 'procedural' matters, but a client retains the right to make ultimate decisions affecting the client's 'essential,' or 'substantive' rights. But there is no bright-line test to distinguish between procedural and substantive issues." See ***Blanton v. Womancare***, Inc., 38 Cal. 3d 396, 403–405 (1985).

Some actions taken by an attorney could be considered sound trial strategy as defined in ***Strickland v. Washington***, 466 U.S. 668, 689 (1984). However, being ignorant of legal concepts such as when an order of the court is deemed void for all purposes as opposed to potentially voidable is not competent legal strategy.

See ***United States v. Midgett***, 342 F.3d 321 (4th Cir. 2003) (while client's story was "far-fetched" and contrary to other witnesses' testimony, he consistently maintained to attorney it was true; defense counsel found ineffective for refusing to present it).

Defense Counsel Never Sought Medical or Scientific Evidence

First, no witness ever testified alleged victim was actually struck by a pellet, and no witness alleged they saw any kind of weapon or knew if a projectile was fired, or saw any weapon or projectile on the scene.

Alleged victim testified she was walking and she felt a blow to the back of her head and when she turned in response she saw Appellant seated in a dark Volkswagen 3-6 six feet away. However, she did not claim he was armed. In addition, that is not what the statement she reported to the police on body camera on the scene. She told the police she did not see anyone at all.

Aside from that, the jury believed Jane Doe had a restraining order because she testified she did, and the prosecution charged Appellant with acting with a valid restraining

order in place, and the court admitted the void restraining order in evidence as proof of its existence.

The police did not see a pellet or confirm any injuries on the scene. Alleged victim never showed the police a pellet at any time. The showed them a photograph of a pellet that she testified someone at the hospital gave her and told her they removed it from her scalp.

The physician who testified had no recollection of the event and she could not confirm the existence of a pellet or an acute injury in her medical records.

Not a single hospital employee testified he or she saw or recovered any foreign object, and alleged victim's medical records do not describe anyone seeing or recovering a pellet or any foreign object.

Appellant retained an expert who was willing to testify that alleged victim reported no acute injuries that evening. However, Defense counsel would not question him on the stand about the lack of a pellet or acute injuries in the medical records.

Although Defense Counsel smelled of alcohol and appeared to be under he influence, the Supreme Court has ruled that being drunk alone is insufficient. One must prove that being under the influence resulted in inadequate representation. Appellant asserts his attorney was not only drunk and incompetent, but also his incompetence the resulted in the guilty verdict. Defense counsel's conduct assisted the prosecution.

He refused to put on exculpatory medical evidence and he refused to attack the issuance of the void restraining order. He refused attack the absence of a pellet gun, or a pellet and he failed to attack the second great bodily injury. In fact, he reintroduced testimony of the first great bodily injury. The courts dismissed both and both bodily injury claims were dismissed because they were unfounded.

One hires an attorney because he or she is supposed to be trained and have superior knowledge. Defense counsel was a handicap. There is no objective evidence that points to Petitioner's guilt.

Inn this case, all the evidence relating to elements of the crime, identity of the suspect, and the ultimate question of guilt are tenuous, at best. If Defense Counsel had

made the proper motions, and produced the proper witnesses and evidence Appellant would not have been convicted of a single offense.

CONCLUSION

This will be a grave injustice unless this Court grants a Writ Of Certiorari.

Dated: October 30, 2023

Wayne Johnson

CERTIFICATION RELATING TO PETITION FOR REHEARING

I certify that this Petition for Rehearing is restricted to grounds specified in Rule 44.2 of the Rules of the United States Supreme Court, issues not previously raised in the Petition For Writ Of Certiorari executed August 13, 2023 and his Petition is presented in good faith and not for delay

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 30, 2023.

Wayne Johnson, Petitioner- Appellant

CERTIFICATE OF SERVICE BY MAIL

I hereby certify I am a citizen of the United States, over the age of 18 years and not a party to the action; that my business address is P.O. Box 27115, Oakland, California; that I on October 30, 2023, I served a true copy of PETITION FOR REHEARING EN BANC by first Class mail on the following persons and or entities as follows:

Honorable Rob Bonta
Attorney General
California State Attorney General's Office
455 Golden Gate Ave #11000
San Francisco, CA 94102

I declare under penalty of perjury the foregoing is true and correct.

Dated: October 30, 2023

A. Harmachis