

23-5768

ORIGINAL

FRANK NATHAN ESCALANTE (CDC# AX5865)

Pelican Bay State Prison

P.O. Box 7500

Crescent City, CA 95532

Petitioner in PRO PER
FRANK NATHAN ESCALANTE

FILED

AUG 07 2023

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT
OF THE UNITED STATES

FRANK NATHAN ESCALANTE

Petitioner-Appellant

JIM ROBERTSON, Warden

Respondents-Appellees

No.

USAP9 21-56342

QUESTIONS PRESENTED FOR REVIEW

PURSUANT TO RULE 14.1(a) IN SUPPORT OF

PETITION FOR A WRIT OF CERTIORARI

CONTENT OF A PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 14.1(a) of the Rules of the Supreme Court
of the United States states in part:

"The questions presented for review, expressed concisely in
relation to the circumstances of the case, without unnecessary
detail. The questions should be short and should not be argumentative
or repetitive. If the Petitioner or respondent is under a death
sentence that may be affected by the disposition of the petition,
the notation "capital case" shall precede the questions presented.
The questions shall be set on the first page following the cover."

1
2 QUESTIONS PRESENTED FOR REVIEW

3 1. Was Petitioner's due process violated at any time
4 through judicial proceedings?
5

6 2. Was Petitioner's trial "fundamentally unfair?"
7

8 3. Has Petitioner made a substantial showing
9 that a reversal is indeed possible by a simple
10 inclusion of a jury instruction?
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12 4. Is this a miscarriage of Justice?
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6 Petitioner in PRO PER
7 FRANK NATHAN ESCALANTE

9 IN THE SUPREME COURT
10 OF THE UNITED STATES

12 FRANK NATHAN ESCALANTE
13 Petitioner - Appellant

14 JIM ROBERTSON, Warden
15 Respondents - Appellees

No.

(TO BE SUPPLIED BY THE CLERK OF
THE COURT)

(NINTH CIRCUIT No. 21-56342)
PETITION FOR A WRIT OF CERTIORARI

18 PETITION FOR A WRIT OF CERTIORARI

20 Petitioner FRANK NATHAN ESCALANTE respectfully petitions
21 for a writ of certiorari to review the judgment of the United
22 States Court of Appeals for the Ninth Circuit, denying Petitioner's
23 application for Certificate of Appealability.

25 OPINIONS BELOW

RECEIVED

AUG 18 2023

OFFICE OF THE CLERK
SUPREME COURT, U.S.

27 The following opinions and orders below are pertinent
28 here, all of which are unpublished: [1] Opinion on direct appeal.

1
2 by the California Court of Appeal, Second Appellate District,
3 affirming Petitioner's conviction and case remanded back for
4 sentencing discretion (3/9/2018); [2] Petitioner then filed a
5 series of habeas petitions in the Los Angeles County Superior
6 Court (8/20/2018), California Court of Appeal (1/17/2019),
7 California Supreme Court (6/12/2019) reasserting that the trial
8 court is required to give sua sponte instructions only when
9 substantial evidence exists in the record to support them in
10 reference to instruct the jury with CALJIC No. 6.24 in
11 which habeas petitions were denied; [3] Order (9/24/2021)
12 and Judgment (11/5/2021) by U.S. District Court for the
13 Central District of California (Hon. Ronald S.W. Lew),
14 denying petition for writ of federal habeas corpus (9/24/2021);
15 [4] District Court Order Denying Request for Certificate of
16 Appealability (11/5/2021); [5] Order by The Ninth Circuit Court
17 of Appeals Denying Request for Certificate of Appealability
18 (5/12/2023) (See Appendix for copies)

19 STATEMENT OF JURISDICTION

20
21 The District Court and the Court of Appeals for the Ninth
22 Circuit denied Petitioner's request for Certificate of Appealability.
23 In *Johnson v. United States*, 524 U.S. 236 (1998), this court
24 held that, pursuant to 28 USC § 1254(1), the United States
25 Supreme Court has jurisdiction, on certiorari, to review a denial
26 of a request for Certificate of Appealability by a circuit judge
27 or panel of a Federal Court of Appeals.
28 //

STATUTORY PROVISIONS INVOLVED

The right of a state prisoner to seek federal habeas corpus relief is guaranteed in 28 USC §2254. The standard for relief under "AEDPA" is set forth in 28 USC §2254(d)(1).

STANDARD OF REVIEW: DENIAL OF CERTIFICATE OF APPEALABILITY

In *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003), this Court clarified the standards for issuance of a Certificate of Appealability [hereafter "COA"]:

... A prisoner seeking a COA need only demonstrate a "substantial showing of the denial of a constitutional right." A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further... We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Id., 123 S.Ct. at 1034, citing *Sack v. McDaniel*, 529 U.S. 473, 484 (2000)

"

"

"

STATEMENT OF THE CASE

Petitioner was convicted by a California jury of one count of first-degree murder, One count of conspiracy to commit murder (Cal. Pen. Code §§ 187, 182). A number of enhancements were also found to be true. Petitioner was sentenced to 25 years to life on the murder, plus 55 years in enhancements.

STATEMENT OF PERTINENT FACTS

Key Evidence At Trial Was AKuna's Recorded Conversation

The incident in question is when AKuna was later arrested on an unrelated burglary charge and booked at the Norwalk Sheriff's Station. An elaborate part of an undercover operation, confidential informants were placed in AKuna's cell and their conversations were recorded on March 20, 2013. AKuna's 'Spillover theory' is the basis for charging Petitioner with murder and conspiracy to commit murder along with gang and gun allegations. Conversation in which all was learned from the following:

REASONS FOR GRANTING THE WRIT

Argument Summary

The following factors were all present in this case:

(1) The police, after conducting this operation with AKuna, tried to conduct the same operation with Petitioner in hopes of a inter-locking confession. The operation failed to

1 produce any incriminating evidence.

2 (2) The murder of Mr. Palacios happened on
3 June 14, 2012, while AKuna's conversation with two
4 informants happened on March 20, 2013. Practically, A
5 year later.

6 (3) The evidence in question consisted of
7 AKuna's surreptitious recorded conversation in which
8 consisted of the basis for charging Petitioner with conspiracy
9 to commit murder, as well, foundational for establishing
10 the conspiracy in the first place.

11 (4) There is a failure upon which the trial court
12 is responsible for its duty in not fulfilling the duty to
13 instruct sua sponte on the general principles of law
14 governing the case when it gives the standard instructions
15 on the issues framed by the evidence.

16 (5) The trial court produced a product of
17 negligence when not affording Petitioner CALJIC 6.16,
18 6.21, but most importantly CALJIC 6.24.

19 (6) In the absence of not instructing CALJIC
20 6.24, it deprived Petitioner of a fair trial since the
21 jury questionnaire inquiry about whether it could find
22 Petitioner not guilty of murder and guilty of conspiracy
23 to commit murder.

24 (7) The strength of the prosecution case was
25 impaired by the fact that there be no direct evidence
26 that connected Petitioner to this murder because of
27 the jury questionnaire inquiry, but rather the psychological
28 reality the prosecution relied on, that this particular trial

involved two conspirators in which, a weak case against Petitioner is strengthened by a mass of evidence relevant only to AKuna.

Notwithstanding all of the above factors, relying on this Court's decision in *Henderson v. Kibbe*, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed 2d 203, 431 U.S. 155 (1977), Petitioner's due process claim arising from the trial court viewing the evidence as inherently incredible and totally unbelievable, the trial court is still bound to accept the evidence for the purpose of instructing the jury. Petitioner maintains that the omission of a wholly applicable instruction rendered the entire trial fundamentally unfair, since the trial court error had a substantial and injurious effect or influence in determining the jury's verdict. Consequently, and for all the reasons advanced below, Petitioner respectfully maintains that it is time for this court to re-examine the *Henderson v. Kibbe* case for clarification on the essence of applying fundamental fairness.

Reasons Why This Court Should Accept *Henderson v. Kibbe*

1. *Henderson v. Kibbe* constitutes what is intended

In *Henderson v. Kibbe*, entitlement of habeas Corpus relief be granted based upon the misdirection of the jury in which admission of evidence caused error upon findings of an existence of a conspiracy to result in a miscarriage

1 of Justice.
2

3 2. The Petitioner basically has proven throughout his
4 moving papers on habeas corpus relief that the trial court,
5 as well, District attorney have moved forward on bad
6 faith which proves a bias has existed against Petitioner
7 that results in the evidence of an existence of conspiracy,
8 based upon AKuna's conversation is virtually impossible
9 for the burden to prove otherwise. Consequently, this will
10 necessarily result in a innocent person being denied the
11 Constitutional right to present a resonable doubt to the
12 jury.
13

14 3. Henderson v. Kibbe, encourages that an error
15 by itself, so infected the entire trial, that the resulting conviction
16 violater due process. Here, Petitioner's burden is not even close
17 to being "especially heavy" because the omission is more
18 probable to be prejudicial than a misstatement of the law.
19

20 4. Henderson v. Kibbe, requires the dismissal of
21 the charge of conspiracy to commit murder where the
22 trial court or district attorney have engaged in provable
23 bad faith, even if the Petitioner is guilty.
24

25 5. An evidentiary hearing would overcome the
26 serious problem of analyzing prejudicial evidence while
27 retaining the relevance of trial court and district
28 attorney conduct in exercising good faith as an important

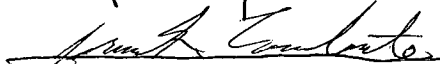
CONCLUSION

Based on the foregoing, Petitioner has complied with the content requirements of the Rules of the Supreme Court of the United States, specifically Rule 14.1(a).

Therefore, questions presented for review pursuant to Rule 14.1(a) are in support of Petition for a writ of Certiorari.

Date: September 11, 2023

Respectfully submitted,


FRANK ESCALANTE
Petitioner in
PRO PER