No.

In the
United States Supreme Court

Orlando S. Burgos,

Petitioner,

v.

Martin Gamboa, Warden,

Respondent.

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

Petition For a Writ Of Certiorari

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Question Presented

Petitioner Orlando Burgos was deprived of his Confrontation Clause right to cross-examine his accuser—the key prosecution witness—that he received a benefit for his testimony: a U-Visa. That Confrontation Clause violation was undisputed below; the only remaining question was prejudice.

When assessing that prejudice, as this Court has explained, courts must assume that the damaging potential of the cross-examination was fully realized. Courts must then apply various factors that look to the centrality of the witness to the prosecution's case. These factors suggest that when an accused is prevented from cross-examining his accuser, and that accuser was the primary or sole evidence of guilt, a Confrontation error cannot be harmless.

But the Ninth Circuit, in a published decision below, held that it was harmless. That opinion did not assume the damaging potential of the cross-examination was fully realized, and to the contrary, it imagined reasons to believe the witness. It also ignored that this witness's testimony was the prosecution's sole evidence of guilt. In other words, despite the witness being the sole evidence of guilt, the Confrontation Clause error was harmless.

Therefore, the question presented is:

> Whether a Confrontation Clause error can ever be harmless when an accused is prevented from cross-examining the key government witness—a witness who serves as the sole evidence against the accused—about his bias and motive to lie?

Parties to the Proceeding

Orlando S. Burgos is the habeas petitioner. Martin Gamboa is warden of Avenal State Prison, California, where Burgos is incarcerated. Previous case captions reflected the prior warden, Raymond Madden. *See* Fed. R. App. P. 43(c)(2).

Related Proceedings

U.S. Court of Appeals for the Ninth Circuit:

- *Burgos v. Madden*, 20-55816, 81 F.4th 911 (9th Cir. 2023) (opinion filed August 25, 2023, rehearing en banc denied October 11, 2023).

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

- *Burgos v. Madden*, 2:17-cv-00179 (C.D. Cal. 2020) (order denying petition and dismissing with prejudice entered July 14, 2020).

California Supreme Court:

- *People v. Zuniga et. al*, S228412 (Cal. 2015) (order denying petition for review entered on November 10, 2015).

California Court of Appeal:

- *People v. Zuniga et. al*, B254935 (Cal. App. 2015) (opinion affirming, in relevant part, entered July 28, 2015).

Superior Court for the County of Los Angeles:

- *People v. Zuniga et. al*, PA074799 (L.A. County Sup. Ct. 2014) (conviction and sentence entered on March 12, 2014).

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The Ninth Circuit's decision is published at *Burgos v. Madden*, 81 F.4th 911 (9th Cir. 2023), and reproduced at Pet. App. 2a. The Ninth Circuit's order denying en banc review is reproduced at Pet App. 1a. The district court's orders are reproduced at Pet. App. 15a-30a. And the state court opinions and orders are reproduced at Pet. App. 31a-63a.

Jurisdiction

The Ninth Circuit issued its published decision on August 25, 2023, and denied Burgos' timely request for en banc review on October 11, 2023. Pet. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. VI.

The Fourteenth Amendment, section 1, to the Constitution of the United States provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. Amend. XIV, § 1.

Statement of the Case

Burgos' liberty came down to the testimony of one man—Martin Moya. Moya *was* an undocumented Mexican national. Pet. App. 42a. He claimed that Burgos, along with future co-defendant Edward Zuniga, kidnapped and assaulted him. But every time Moya told this story, something critical changed, including: *who* kidnapped him, *where* he was kidnapped, and *when* he was kidnapped.

The first story. The first time Moya told the story, the kidnapping occurred on January 9-10, 2012. On that day, while Moya was at a park, a woman forced him into a vehicle, where Burgos and two others were present. The vehicle dropped off Moya at Zuniga's garage, where the kidnappers pistol whipped him—with six to seven gang members watching—and extorted him for money. Zuniga then ordered Burgos to drive Moya back to the park. 2-ER-238.[1]

Sometime thereafter, Los Angeles police officers arrested Moya in a stolen car, along with a woman who Moya was likely having an affair with. *See* 2-ER-166, 185, 228-29. The Government removed Moya to Mexico. 2-ER-185, 231.

On October 18, 2012—the day before Burgos' preliminary hearing—the Government paroled Moya back into the country. Pet. App. 43a; 2-ER-258. As part of being paroled in, Moya filled out an

[1] "ER" refers to the excerpts of record, "RJN" refers to the request for judicial notice, and "SER" refers to the supplemental excerpts of record. All these are available on the Ninth Circuit Pacer page at: Dockets 27, 28, 41. *See Burgos v. Madden*, 20-55816 (9th Cir.).

application for a U-Visa. U-Visas are available to victims of certain, grave crimes—with kidnapping, extortion, and felonious assault being among them. 8 CFR § 214.14(a)(9). If a person has fallen victim to such a crime, and helps law enforcement, these visas offer temporary immigration status and a pathway to adjustment of status. *See* U.S. Citizenship and Immigration Services, *Victims of Criminal Activity: U Nonimmigrant Status* (2023), available here.

As part of the U-Visa application, Moya submitted an affidavit. While Moya spoke no English, the English affidavit begins with "I am applying for a U-Visa based on the horrific kidnapping, extortion, and felonious assault I fell victim to . . . ." RJN A-1. Moya again described the details of the alleged offense, but critical things changed.

The second story (on the U-Visa application). Now, the kidnapping occurred two days prior to the previous story, on January 7. Instead of being at a park, he was at the home of a "longtime family friend." When the woman kidnapped him, Burgos was not in the vehicle. After getting back to the garage, now almost a dozen people pointed guns at him. And, when that was over, three women drove Moya back to the park, with Burgos again not among them. RJN A-1-3.

The next day, having been paroled into the United States, Moya testified at Burgos' preliminary hearing. But, again, critical facts changed.

The third story (preliminary hearing). This version of the story was similar to the second. Except, now the kidnapping happened

at a relative's house. 2-ER-74-75. That man, Moya claimed, "he's a relative—well, he's not really a relative—well, he is a relative, but a far relative, so I don't know his last name." 2-ER-195.

During the preliminary hearing, defense counsel asked Moya about his U-Visa declaration. At that question, Moya grew hostile, claiming: "That has nothing to do with this case" 2-ER-182. Indeed, Moya dodged many questions throughout this hearing, requiring the judge to repeatedly admonish him to answer the questions.

Finally, Moya claimed that he'd never read the declaration and didn't know who prepared it or asked him to sign it (even though the declaration indicated he signed it the day before). 2-ER-186-87. Moya's wife, however, attested that Moya drafted it himself and sent it to an attorney. 2-ER-232. Ultimately, the judge found probable cause and held Burgos to answer to the charges at trial.

In preparation for the trial, the prosecution moved to exclude any evidence of the U-Visa. Defense counsel argued for its admission, because it went to Moya's bias and motive to lie. *See* 3-ER-324-27. The trial court ruled that defense counsel could cross-examine Moya about any inconsistencies between the statements in the declaration and his trial testimony. But counsel could not ask anything about the U-Visa, the fact that immigration officials had placed a hold on him, or the fact that he was paroled into the United States to testify for the prosecution. Pet. App. 43a.

Having precluded that critical cross-examination, the case proceeded to trial. The entire case against Burgos came down to Moya, who again changed parts of his story.

The fourth story (trial). Moya relayed a similar story to the third version of his story but, again, things changed. Now he claimed that he was kidnapped from his "uncle's" house. 3-ER-421, 433. Moya also now added to the story a more brutal beating. In this version of Moya's story, Burgos beat Moya all over his head and back, with another woman pistol whipping him. 3-ER-426-27. Moya had numerous bumps and injuries all over his body. 3-ER-503.

Nothing corroborated Moya's testimony about the kidnapping or Burgos—no physical evidence, no other witness's testimony. Not only did nothing corroborate Moya's testimony, but other evidence contradicted it. For example, Moya's wife observed a single bruise on Moya's head after the alleged kidnapping, but this conflicted with Moya's testimony of extensive injuries. *Compare* 3-ER-376 *with* 3-ER-503. To take another example, Moya and the prosecutor believed this was a gang-related kidnapping. But Burgos and Zuniga belonged to *different* gangs. And the prosecution's two gang experts could not think of a single example of two different gangs doing something like this in conjunction. 3-ER-541, 546, 555-56. Finally, detectives tried to locate the supposed witnesses to Moya's allegations, but could never find anyone. *See* SER-91.

Having presented this contradictory story that hinged on Moya's testimony, the prosecutor commented in closing that "the elephant in the room" was whether the jury believed Moya. 4-ER-565. She told the jury—in what the Ninth Circuit would later call a "patently false" statement—that Moya had "no motive to lie," he was "receiving no benefit from telling the story in this case," and that he got "nothing in return for testifying in this case." 4-ER-566; Pet. App. 14a.

The jury found Burgos guilty of criminal threats and assault with a firearm, but they deadlocked on whether Burgos extorted or kidnapped Moya for extortion. The trial court sentenced Burgos to 25 years to life, plus 33 years. Pet. App. 34a-35a.

Burgos appealed, arguing a violation of the Sixth and Fourteenth Amendments for depriving him of the ability to confront and cross-examine Moya with his U-Visa application and accompanying immigration facts. The California Court of Appeal determined that the trial court's restrictions on cross-examination violated Burgos' Confrontation Clause rights, but held any error was harmless beyond a reasonable doubt. That was so, the court reasoned, because several months passed between when Moya reported the kidnapping to the police and when he applied for the U-Visa. That time period, the court explained, essentially mitigated any inference that Moya fabricated this story to get himself an immigration benefit. Pet. App. 44a-46a.

After the California Supreme Court denied review, Burgos filed a federal habeas petition alleging a violation of the Sixth Amendment for depriving him of the ability to confront and cross-examine Moya. The district court denied relief, for largely the same reasons as the state court of appeal. Burgos appealed.

The Ninth Circuit affirmed in a published decision. Pet. App. 2a-14a; *Burgos v. Madden*, 81 F.4th 911 (9th Cir. 2023). Reasoning much the same as the state appellate court, the Ninth Circuit found a lack of prejudice because the delay between Moya reporting the kidnapping to the police to when he applied for the U-Visa mitigated any inference that Moya fabricated or exaggerated this story to get a benefit. Pet. App. 11a-12a (*applying Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (relevant prejudice standard of whether the error had a "substantial and injurious effect or influence in determining the jury's verdict.")).

Although Burgos had countered with numerous alternative explanations for this gap, the Ninth Circuit held that "there is nothing to suggest that Moya was motivated by the prospect of immigration benefits when he made his initial statement. . ." Pet. App 12a. It also concluded that—although the prosecutor made a patently false statement to the jury in closing that Moya received no benefits for his testimony—that misconduct also didn't warrant a finding of prejudice. Pet. App. 14a.

Burgos petitioned for rehearing en banc, arguing that the court's reasoning conflicted with this Court's precedent, created an intra-circuit split, and made establishing Confrontation Clause prejudice nigh impossible. But the court denied rehearing. Pet. App. 1a.

Burgos now petitions this Court for a writ of certiorari.

Reasons for Granting the Writ

A. The Ninth Circuit's published opinion conflicts with this Court's Confrontation Clause precedent.

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant an opportunity to cross-examine the witnesses against him. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). Cross-examination is integral to the truth-finding process of a trial, and when a court precludes or limits it, that limitation casts doubt on the ultimate integrity of the fact-finding process. *See Berger v. California*, 393 U.S. 314, 315 (1969). Cross-examination is, after all, "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis*, 415 U.S. at 316. Thus, an accused has the right to impeach a witness by "cross-examination directed toward revealing possible biases, prejudices, or ulterior motives . . . ." *Id.*

Burgos' trial lacked this critical component of its integrity and truth-seeking function: he could not cross-examine the key witness about his bias, prejudice, or ulterior motive of receiving immigration benefits. The question, instead, came down to prejudice.

To that question, this Court laid out a clear answer almost forty years ago: when determining whether prejudice occurred under the Confrontation Clause, courts must assume that the damaging potential of the cross-examination was fully realized. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). The Court also laid out a five-factor test in assessing that prejudice. That test largely looks to the

centrality of the witness to the prosecution's case and what the case would have looked like without them:

- the importance of the witness' testimony;
- whether the testimony was cumulative;
- the presence or absence of evidence corroborating or contradicting the witness' testimony on material points;
- the extent of cross-examination otherwise permitted; and
- the overall strength of the prosecution's case.

Id.

But the Ninth Circuit's flawed methodology does away with these two aspects of *Van Arsdall*. *First*, it does away with the assumption that the damaging potential of the cross-examination was fully realized. *Van Arsdall*, 475 U.S. at 684. If the Ninth Circuit had assumed this, as in all cases that hinge on a single witness, it would have had to assume that the cross-examination decimated the prosecution's only evidence. Instead, the court did the opposite: it assumed mitigating facts and assumed that the damaging potential *wasn't* realized—abandoning that key aspect of *Van Arsdall*.

There is wisdom in this Court's approach that the Ninth Circuit abandoned. Take, for example, the key fact relied on by the Ninth Circuit—Moya's delay in applying for the U-Visa. On one side of the coin, a jurist could find this mitigating. But on another side, a jurist could believe this delay could mean any number of things that still destroyed Moya's credibility, like: (1) the gap was caused by the

Government removing him to Mexico; (2) the gap was caused by a delay in securing the prosecuting entity's certification; or (3) the gap was caused by Moya's delay in securing counsel (a fact he lied about).

This back-and-forth type argument could go on *ad nauseum*. But we don't know Moya's motivation precisely because Burgos couldn't cross-examine him about the U-Visa. In other words, the Ninth Circuit's ruling creates a constitutional Catch-22 that *relies* on the silent record *caused* by the constitutional violation. That is why this Court prevented this Catch-22 in *Van Arsdall* by requiring courts to assume that the damaging potential of the cross-examination was fully realized when assessing prejudice. By jettisoning *Van Arsdall*, the Ninth Circuit lost sight of this.

Second, a faithful application of the *Van Arsdall* factors dictates that Confrontation error—where the violation prevented the accused from cross-examining the sole witness against him—is never harmless:

- ***First factor***. The witness is necessarily extremely important (a factor the State conceded below), because he's the prosecution's entire case.
- ***Second factor***. The witness' testimony is necessarily not cumulative (another factor the State conceded below), because it's the prosecution's entire case.
- ***Third factor***. There is necessarily no corroborating evidence or testimony, because again, the witness is the prosecution's entire case.

- ***Fourth factor***. The accused was prevented from questioning the sole witness about his bias or motive to lie. While he might be able to cross-examine the witness *that* he lied, he'll never be able to explain to the jury *why*. And that why is what matters to the truth-finding process that the Confrontation Clause effectuates. *Cf. Davis*, 415 U.S. at 316 ("the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.").
- ***Fifth factor***. The overall strength of the prosecution's case is only as good as that witness.

Thus, a faithful application of *Van Arsdall* suggests this type of error can never be harmless when a defendant is prevented from cross-examining the sole witness against him about his motivations for testifying.

All told, the Ninth Circuit's published decision cannot be squared with *Van Arsdall*. It failed to assume that the damaging potential of the cross-examination was fully realized—indeed, it did the opposite. And it failed to faithfully apply *Van Arsdall*, which necessarily holds that this type of error cannot be harmless.

B. The Ninth Circuit's published opinion conflicts with other circuits and itself.

Unsurprisingly, given that the Ninth Circuit's opinion conflicts with *Van Arsdall*, it also creates a circuit split. Circuit Courts of Appeal hold that, when an accused is prevented or limited from cross-examining the primary government witness about their bias or motive to lie, and other evidence does not clearly point to guilt, the error is not harmless. This is true regardless of the prejudice standard involved. *See, e.g., Nappi v. Yelich*, 793 F.3d 246 (2nd Cir. 2015) (AEDPA); *United States v. Chandler*, 326 F.3d 210 (3rd Cir. 2003) (direct appeal); *United States v. Alexius*, 76 F.3d 642 (5th Cir. 1996) (direct appeal); *Clark v. O'Leary*, 852 F.2d 999 (7th Cir. 1988) (pre-AEDPA habeas); *Wealot v. Armontrout*, 948 F.2d 497 (8th Cir. 1991) (pre-AEDPA habeas); *United States v. Woodard*, 699 F.3d 1188 (10th Cir. 2012) (direct appeal); *United States v. Calle*, 822 F.2d 1016 (11th Cir. 1987) (direct appeal). Therefore, the Ninth Circuit's published decision creates a circuit split.

In addition to this circuit split, the Ninth Circuit's opinion creates an intra-circuit split. Until this case, when an accused could not cross-examine a key witness on issues affecting their credibility, and their testimony supplied the principal evidence of guilt, the Ninth Circuit uniformly found prejudice in habeas cases. *See, e.g.*, *Ortiz v. Yates*, 704 F.3d 1026, 1040 (9th Cir. 2012); *Holley v. Yarborough*, 568 F.3d 1091, 1099-1101 (9th Cir. 2009); *Fowler v. Sacramento County Sheriff's Dept.*, 421 F.3d 1027, 1042-43 (9th Cir. 2005). Indeed, the

Ninth Circuit put it simply in *Holley*: "[p]recluding cross-examination of a 'central, indeed crucial' witness to the prosecution's case is not harmless error." *Holley*, 568 F.3d at 1100 (*citing Olden v. Kentucky*, 488 U.S. 227, 232-33 (1988) (per curiam); *Davis*, 415 U.S. at 317-18). But here, it held that precluding cross-examination of the "central, indeed critical" witness was harmless. Thus, the Ninth Circuit's opinion creates an intra-circuit split.

Therefore, by finding a lack of prejudice in a case when the accused was limited from cross-examining the key prosecution witness on his bias and motivation to lie, where no other evidence supported the guilty verdict, the Ninth Circuit created a circuit split.

C. The Ninth Circuit's published opinion guts the Confrontation Clause, undermining both the fairness to the accused and the public's confidence in verdicts.

In addition to violating *Van Arsdall* and creating the above circuit split, the opinion undermines the idea that any Confrontation Clause violation could be prejudicial. Precluding cross-examination of the central witness is as straightforward as a prejudice inquiry can get: the accused couldn't cross-examine the sole witness and no other evidence supported guilt. Such an error is necessarily not harmless.

Instead of arriving at this straightforward conclusion, the Ninth Circuit found the error wasn't prejudicial because it assumed the jury wouldn't have credited the proffered cross-examination. But one can

almost always imagine a jury would have found the proffered cross-examination unpersuasive for some hypothetical reason.

To demonstrate this problem, take the example of this Court's decision in *Davis*, where this Court reversed for Confrontation Clause error. The witness in *Davis* was on probation and might have committed the crime at issue, making him more likely to blame the defendant to avoid scrutiny against himself or risk his probation status. *Davis*, 415 U.S. at 311. But one could have imagined that he remained credible, because making false statements to law-enforcement officers is a crime, and therefore, falsely blaming the defendant would risk his probation status. *Cf.* Alaska Stat. § 11.56.800(a)(1)(A) (criminalizing false statements to police with the intent to implicate another in a crime).

This example reflects that one can always imagine the jury wouldn't have credited the restricted impeachment for some reason. And doing so would make the Confrontation Clause error harmless—even in cases like *Davis* which granted relief. Thus, by employing reasoning that can make almost all Confrontation Clause errors harmless, the opinion risks undermining any Confrontation Clause error.

And undermining the Confrontation Clause has grave ramifications to both the accused and the public. To the accused, he loses the right to ensure the reliability of his own trial. As Justice Scalia once noted, "the Clause's ultimate goal is to ensure reliability of

evidence . . . by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). Yet, the Ninth Circuit's ruling deprives Burgos and those like him of the crucible of cross-examination.

Having removed the crucible of cross-examination, a court can then say there's no prejudice—forever depriving the accused of the Confrontation right. In doing so, a court can reason, like the Ninth Circuit did here, that it doesn't find the impeachment persuasive and the witness remained reliable. But, again, Justice Scalia had words of wisdom refuting this flawed reasoning: "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford*, 541 U.S. at 62. Thus, dispensing with confrontation because the error was, and will almost always be, harmless, has grave consequences for the accused and the Confrontation Clause.

To the public, we lose confidence in verdicts. The right to cross-examination is more than a desirable trial rule. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). It is essential to a fair trial and ensuring the integrity of the fact-finding process of trials. *Id*. Indeed, as this Court has commented, cross-examination is nothing less than the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (cleaned up). But by employing reasoning that can almost always find such an error

harmless, a court stalls this truth-seeking engine. And the public, as they should, loses confidence in trials where we abandon the search for truth.

At bottom, because this opinion functionally guts the Confrontation Clause, and gutting the Clause has grave ramifications, this Court should grant certiorari to again stress the importance of the Confrontation Clause.

D. This case is a perfect vehicle to address this issue.

This case is the perfect vehicle to address this incorrect application of *Van Arsdall,* circuit split, and problem of gutting the Confrontation Clause. This case came entirely down to prejudice. And prejudice was squarely presented below and was the Ninth Circuit's entire reason for affirming. Therefore, this case is the perfect vehicle to address this issue.

Conclusion

Depriving an accused of cross-examination into the believability of a witness calls into question the integrity of the fact-finding process. *See Davis*, 415 U.S. at 316. Due to the lack of integrity in the fact-finding process where an accused is deprived of this cross-examination, this Court has carefully laid out a test to assess Confrontation Clause prejudice. Courts must first assume the damaging potential of the cross-examination was fully realized, and courts must then look to various factors that analyze the centrality of the witness to the prosecution's case. The upshot of this test is straightforward: when a defendant is prevented from cross-examining the sole witness against him about his motivations for testifying, that error cannot be harmless.

Yet, the Ninth Circuit did not arrive at this straightforward conclusion. Instead, it abandoned this test and employed reasoning that risks making almost any Confrontation Clause error harmless—turning this right into nothing more than a nullity. For that reason, and because the Ninth Circuit's decision conflicts with this Court's precedent and creates a circuit split, the Court should grant Burgos' petition, vacate the Ninth Circuit's judgment, and remand.

Respectfully submitted,
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