No. 23-7737

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Raul Gardea Jr. — PETITIONER
(Your Name)

vs.

Raymond Madden, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For The Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Raul Gardeda Jr.
(Your Name)

Centinela A-2-236, P.O. Box 901
(Address)

Imperial, CA 92251
(City, State, Zip Code)

(Phone Number)

QUESTION PRESENTED

PETITIONER RAISED TWO CLAIMS OF INEFFECTIVENESS ON TRIAL COUNSEL FOR HIS PERFORMANCE IN FAILING TO ASK A PIVOTAL QUESTING AND NOT PRODUCING REQUESTED WITNESSES TO THE STAND AS VERBABLY AGREED, CONTRACTUALLY BINDING THUS BREAKING CONTRACT. AND ONE INEFFECTIVE CLAIM ON APPEAL COUNSEL FOR FAILING TO SECURE THE CLAIMS PETITONER HAD TO RAISE ON STATE HABEAS.

PETITIONER ALSO PRESENTS GRIFFIN ERROR ON THE MISCONDUCT OF THE PROSECUTION FOR SHIFTING THE BURDEN OF PROOF BY CASTING EVEN A SHADOW OF RESPONSIBILITY ON THE DEFENSE. ADDITIONALLY, PETITIONER AS A LAYPERSON OF THE LAW FEELS HE'S ATTEMPTED REMEDIAL EXHAUSTION FOR APPENDIX __. HOWEVER, THIS APPLICATION HASN'T PROVIDED AN EXACT TIME FOR REMEDY.

THE QUESTION PRESENTED IS MAY THIS COURT PLEASE PERFORM ITS INDEPENDENT FINDINGS IN RULING ON THE CONSTITUTIONAL ERRORS PRESENTED. FINALLY, DOES PETITIONER DEMONSTRATE THE OPPORTUNITY FOR REMEDIAL EXHAUSTION AT THE STATE LEVEL FOR THE BRADY VIOLATION PRESENTED IN APPENDIX D?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION .....

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....

STATEMENT OF THE CASE .....

REASONS FOR GRANTING THE WRIT .....

CONCLUSION .....

INDEX TO APPENDICES

APPENDIX A United States Court Of Appeal For The Ninth

APPENDIX B Opinion & Order From U.S. District Court, Central California

APPENDIX C Report & Recommendations U.S. District Court, Central California

APPENDIX D Exhibit In Support Of Certiorari Within Conviction Review Unit Application For Brady Violation

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

Strickland v. Washington 466 U.S
Griffin Error
Brady v. Maryland

PAGE NUMBER

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was MAY 12, 2023.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. 23A50.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

THE FOLLOWING STATUTORY AND CONSTITUTIONAL PROVISIONS ARE INVOLVED IN THIS CASE.

U.S. CONST., AMEND. VI

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 EFFECTIVE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

U.S. CONST., AMEND. XIV

SECTION 1. ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEDGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

28 U.S.C. § 2254

(a) THE SUPREME COURT, A JUSTICE THEREOF, A CIRCUIT JUDGE, OR A DISTRICT COURT SHALL ENTERTAIN AN APPLICATION FOR A WRIT OF HABEAS CORPUS IN BEHALF OF A PERSON IN CUSTODY PURSUANT TO THE JUDGEMENT OF A STATE COURT ONLY ON THE GROUND THAT HE IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES.

(b)(1) 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 UNLESS

It Appears That --

(A) The Applicant Has Exhausted The Remedies Available In The Courts Of The State; Or

(B)(i) There Is An Absense Of Available State Corrective Process; Or

(ii) Circumstances Exist That Render Such Process Ineffective To Protect The Rights Of The Applicant.

(2) An Application for A Writ Of Habeas Corpus May Be Denied On The Merits, Notwithstanding The Failure Of The Applicant To Exhaust The Remedies Available In The Courts Of The State.

(3) A State Shall Not Be Deemed To Have Waived The Exhaustion Requirements Or Be Estopped From Reliance Upon The Requirment Unless The State, Throught Counsel, Expressly Waives The Requirement.

(c) An Appellant Shall Not Be Deemed To Have Exhausted The Remedies Available In The Courts Of The State, Within The Meaning Of This Section, If He Has The Right Under The Law Of The State To Raise, By Any Available Procedure, The Question Presented.

(d) An Application for A Writ Of Habeas Corpus On Behalf Of A Person In Custody Pursuant To The Judgement 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.

(e)(1) In A Proceeding Instituted By An Application For Writ Of Habeas Corpus By A Person In Custody Pursuant To The Judgement Of A State Court, A Determination Of A Factual Issue Made By A State Court Shall Be Presumed

TO BE CORRECT. THE APPLICANT SHALL HAVE THE BURDEN OF REBUTTING THE PRESUMPTION OF [redacted]RECTNESS BY CLEAR AND [redacted]VINCING EVIDENCE.

(2) IF THE APPLICANT HAS FAILED TO DEVELOPE THE FACTUAL BASIS OF A CLAIM IN STATE COURT PROCEEDINES, THE COURT SHALL NOT HOLD AN EVIDENTIARY HEARING ON THE CLAIM UNLESS THE APPLICANT SHOWS THAT--

(A) THE CLAIM RELIES ON--

(i) A NEW RULE OF CONSTITUTIONAL LAW, MADE RETROACTIVE TO CASES ON COLLATERAL REVIEW BY THE SUPREME COURT, THAT WAS PREVIOUSLY UN-AVAILABLE; OR

(ii) A FACTUAL PREDICATE THAT COULD NOT HAVE BEEN PREVIOUSLY DISCOVERED THROUGH THE EXERCISE OF DUE DILIGENCE, AND

(B) THE FACTS UNDERLYING THE CLAIM WOULD BE SUFFICIENT TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT BUT FOR CONSTITUTIONAL ERROR, NO REASONABLE FACTFINDER WOULD HAVE FOUND THE APPLICANT GUILTY OF THE UNDERLYING OFFENSE.

(f) IF THE APPLICANT CHALLENGES THE SUFFICIENCY OF THE EVIDENCE ADDUCED IN SUCH STATE COURT PROCEEDING TO SUPPORT THE STATE COURT'S DETERMINATION OF A FACTUAL ISSUE MADE THEREIN, THE APPLICANT, IF ABLE, SHALL PRODUCE THAT PART OF THE RECORD PERTINENT T- A DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT SUCH DETERMINATION. IF THE APPLICANT, BECAUSE OF INDIGENCY OR OTHER REASON IS UNABLE TO PRODUCE SUCH PART OF THE RECORD, THEN THE STATE SHALL PRODUCE SUCH PART OF THE RECORD AND THE FEDERAL COURT SHALL DIRECT THE STATE TO DO SO BY ORDER DIRECTED T- AN APPROPRIATE STATE OFFICIAL. IF THE STATE CANNOT PROVIDE SUCH PERTINENT PART OF THE RECORD, THEN THE COURT SHALL DETERMINE UNDER THE EXSTING FACTS AND CIRCUMSTANCES WHAT WEIGHT SHALL BE GIVEN TO THE STATE COURT'S FACTUAL DETERMINATION.

(g) A COPY OF THE OFFICIAL RECORDS OF THE STATE COURT, DULY CERTIFIED BY THE CLERK OF SUCH COURT TO BE A TRUE AND CORRECT COPY OF A FINDING, JUDICIAL OPINION, OR OTHER RELIABLE WRITTEN INDICIA SHOWING SUCH A FACTUAL DETERMINATION BY THE STATE COURT SHALL BE ADMISSIBLE IN THE FEDERAL COURT PROCEEDING.

(h) EXCEPT AS PROVIDED IN SECTION 408 OF THE CONTROLLED SUBSTANCE ACT, IN

ALL PROCEEDINGS BROUGHT UNDER THIS SECTION, AND ANY SUBSEQUENT PROCEEDINGS ON REVIEW, THE COURT MAY APPOINT COUNSEL FOR AN APPLICANT WHO IS OR BECOMES FINANCIALLY UNABLE TO AFFORD COUNSEL, EXCEPT AS PROVIDED BY A RULE PROMULGATED BY THE SUPREME COURT PURSUANT TO STATUTORY AUTHORITY. APPOINTMENT OF COUNSEL UNDER THIS SECTION SHALL BE GOVERNED BY SECTION 3006A OF TITLE 18.

(i) THE INEFFECTIVENESS OR INCOMPETENCE OF COUNSEL DURING FEDERAL OR STATE COLLATERAL POST-CONVICTION PROCEEDINGS SHALL NOT BE A GROUND FOR RELIEF IN A PROCEEDING ARISING UNDER SECTION 2254.

STATEMENT OF THE CASE

The basis or lynchpin that revolved around Petitioners case was one eye-witness sole testimony. Trial Counsel's failure to ask the witness about her vision, given that the witness own family bloodline provided the information, was no where near tactical. There were numerous claims by witness family that wtiness suffered from vision impairment, and the unclairity behind the witness eyeglass prescription. The witness family produced an eyeglass prescription, which although acknowleged by Petitioner's first Public Defender Mary E. Tenant, (RT 2-106, 11-12) (See Exhibit. G.), became unavailable as trial Counsel Cavallucci became the third Trial Attorney assigned to handle Petitioner's discovery file.

The witness testimony was that during the incident, she had enough time to attempt to communicate with the suspect, observe a shotgun in one hand as a female guest of the house passed up the suspect, then heard one shot fired. All while being in a sitting position at the rear of the garage, with an old truck was on stilts along with the victim and another male guest standing towards the entrance of garage.

Available to Counsel was the female guest identity and police report (Exh. H) in contradiction to witness. She was coming from 711 and heard two shots. The reports of the victim and other male guest report no attempt of witness conversation to suspect, but only heard suspect speak one word as the matter happened in a seconds, as well as hearing two shots. To moments after the incident, the witness was transported to an alley next to Petitioner's residence for an in-field showup of two suspects arrested for public intoxication to possibly identify the assailant. Which as the reports read, the witness identifies the suspect in the alley as the brother of the shooter. (See Exhibit C, Of Appendix D) Whcih resulted in a clear misidentification as the suspect in the alley was the witness former lover not the brother of the shooter.

Though all of the above was available to trial Counsel, and he may claim a tactical reason for not introducing what was available, there is no clear

tactical reason for not asking the simple question surrounding the claims behind her vision. His performance was ineffective as for Petitioner's First Claim.

On to Claim Three of Petitioner's initial Claim's concerning shifting the burden of proof, there was a sub claim procedurally barred. The Respondent's claim that there was a failure to object on behalf of Petitioner's trial counsel. However, when viewing the objection in the context of the argument as a whole, it is more than clear that trial attorney's objection was more than timely and swift in direct connection to Prosecutor's comment's on Petitioner following bad advice from his first Public Defender.

Petitioner directs this most Honorable Court to RT 1828-1831 which has been attached as Exhibit. I, for quick access. Trial Counsel's objection was clear, swift, and timely covering the portion on RT 1829, 3-10. There is a clear narrative that lead to the objection with out a break in the link of "show up". Refrenced three times by the Prosecution originating from "bad advice" and"lawyer told" peppered in the portion covered by the objection.

While in chambers concerning the objection, it was asked to the stonagrapher when the cut off to the objection occured. In viewing the record, it is clear it occured specifically after "show up"(RT 1829,10). Much time had elapsed before actually addressing the objection as evidenced in the Judge's comments (1830, 9-11). Opposed to the Judge's request, the Prosecutor fill's in for the Reporter's duty and shares in chambers what had just occured in her mind when theres a transcribed document for accuracy.

The Prosecution's actions cannot be counted as harmless when indeed they were deliberate. Same goes to the comments of claiming Petitioner's innocence on the recorded phone calls. Though she had knowledge of such calls existing as pointed out by trial counsel in chambers, the prosecution makes an acknowledging comment in regards to those existing calls. (RT1831, 27).

As a Constitutional Right, a Defendant is to be presumed free of guilt and

free from any burden of proof. The wide latitude the Prosecution has displayed is erroneous in its continous commenting implicitly, inevitally, intentionally casting a shadow of burden on the Petitioner in the eyes of the trier of fact. Permitting Counsel to tell Jurrors that they did not hear all the evidence could lead these Jurror's to mistrust The Criminal Justice System and potentially speculate in future trial's about what evidence theyware notyhearing in court, leading to further speculation and improper deliberation's.[CA Rules Of Prof. Conduct] Evidence Code 1101 In People v. Ewoldt (1994) 7 Cal. 4th 380 "Substancial prejudicial effect" increased the likelihood of "confusing the issues" because the Jury had to determine wether the uncharged offenses had occured". People v. Falsetta (1999) 21 Cal. 4th 903, teaches us that a Defendant may be unduly prejudiced when an unadjudicated offense is admitted because the Jury may be inclined to punish the Defendant for that offense and that Jurror confussion may result from having to determine wether the offense occured...(RT 1829, 5-6)(RT1828-1831).

None of this conduct was harmless, it was direct and intentionally prejudicial on behalf of the Prosecution. Petitioner was not burden free beyond a reasonable doubt. Due process was violated besides Griffin Error occuring. Opposed to relying on the evidence to speak for it self as persuasive, as the open shut case Prosecution claims this case to be. Prosecution acted as the salesperson to make the otherwise unpersuasive evidence, persuasively alluring undermining the criminal justice system's due process and professional conduct. Confusing the Jury to believe that they were misled regarding the "true facts of the case". The Court's rulings are based in the rules of evidence and grounded by Due Process.

As to Claim Four, a verbal contract is as binding as a written contract. Mentioned just above in Claim One is the fact that there was available to trial counsel documentation of a misidentification that took place moments after the the incident of this case by key witness.

Trial Counsel had informed Petitioner before trial that Petitioner's brot-

her had been identified by key witness the night of the incident in the alley next to Petitioner's residence for public intoxication. Upon reviewing the report Counsel spoke of, it became evident that the suspect in the alley key witness was referring to was in fact a former lover of the witness and not Petitioner's brother. At this point, it became a verbalized agreement that it is my wish for the Police Officers of the reports to be produced at trial to testify as to the accuracy of their documented report,(See Exhibit C, D, & E, of Appendix D).

As in Anderson v. Johnson, 338 F.3d 392 (5th Cir. 2003); "[T]here is no evidence that counsel's decision to forego investigation was reasoned at all, and it is, in our opinion, far from reasonable. Counsel's failure to investigation was not part of a calculated trial strategy but is likely the result of either indolence or incompetence." As the court put it in Bryant v. Scott, 28 F.3d 1411 1415 (5th Cir. 1994), [A]n attorney must engage in a reasonable amount of pretrial investigation and at a minimum...interview potential witnesses and...make an independent investigation of the facts and circumstances in the case" (quoting. Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985). Under the circumstances here, the State had the burden to show a strategy supporting the failure to inteview the reporting Police Officers of said document's. Because it failed to do so, Petitioner has clearly met the "performance prong" of the Strickland V. Washington, 466 U.S. 668, 687-88 (1934) test. The question for this Court to answer is wether Petitioner was prejudiced by counsel's ineffectiveness.

In order to make a reasonable interpretation of Strickland and its progeny we must look to Williams (Terry) Taylor, 529 U.S. 362 (2000). Which emphasizes that in determining Strickland prejudice, the court MUST EXAMINE both the trial testimony and the postconviction evidence to determine wither, had the omitted evidence been presented, there is a reasonable probability of a different outcome.

Here, had trial counsel conducted such an investigation and followed the Petitioner's request as in McCoy v. Louisianna, "defendant remains captain of the

ship, when facing life at stake", Counsel would'nt have simply rendered defeat when key witness answered "no, i never said that". At least calling to the stand the authoring Police Officers of the reports would have proven their stand and belief in the accuracy of whats been documented in regards to the key witness identifying one of the suspects in the alley as "the brother of the shooter". When in fact the identity of the suspect was the key witness former lover as shown in (Exhibits C, D of Appendix D).

In regards to Petitioner's final Claim for Appeal Counsels ineffectiveness Petitioner was relying on the same caselaw, rules and arguments presented for failure to secure the more than potentially meritorious Claims available and present within the discovery file fully available to Appeal Attorney.

As for the final Appendix containing the Conviction Review Unit application, Petitioner, as laymen of the law, was uncertain if the contents within classified as a Claim that has yet to be exhausted. The pictures of key witness wearing glassed as an adolecent and in adulthood, as well as the text messaging sudgesting the key witness receiving housing and witness protection money has only become available to Petitioner during incarceration. And in attempts to start exhaustion at the state level, considered the application presented in the final Appendix attached. Though theres no indication as to an exact response time, therefore, it only seemed appropriate to present Petitioner's attempt at a remedy at the State level in order to be able to present the argument as a whole. However, Petitioner's been at a standstill allowing the District Attorney to remedy the issue presented.

In any event, the withholding of such information is a clear violation of Brady v. Maryland. Withholding any and all exculpatory evidence. For neither Trial Counsel or the Prosecution made available or known the knowledge of the key witness being housed under witness protection or receiving witness protection money as is sudgested by the messaging in the text's of Exhibit A, Appndx, D.

Reasons For Granting The Petition

The Reviewing Court failed to recognize the Constitutional error's in failing to grant C.O.A.

There was misapplication of how the Strickland test applied to Petitioner's Claims and consideration of clear prejudice. In light of failing to consider postconviciton ommitted evidence, this Most Honorable Court must re-assess the full scope of the claims at hand.

The continuance in wide latitude alloted to Prosecution in closing arguments will accumulate such claims as here, where there is clear violation of due process in casting a glimpse of a shadow as to Defendant having an obligation to the burden of proof. Bringing about countless Griffin Errors and confusing one profession with another such as a salesperson, undermining the rules of conduct. Solely relying with the evidence to speak the truth and allowing the trier of fact to discover that truth as the evidence speaks it.

The rules behind newly discovered evidence are clear. Petitioner has no control how and when such evidence becomes available. Especially while incarcerated. An attorney could be faulted because he/she has an obligation to obtain all the necessary materials and has the resources available to do so. Petitioner as an incarcerated person has only the ability to bring to light what has developed that existed which there was a failure in discovering to the individual whom had such an obligation and resources to do so such as trial counsel and even to the Prosecution when it comes to excupatory evidence.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

DATE: Jan/16/2024

Respectfully Submitted,

Raul Gardea Jr. #B-1207
Centinela, C-2-235
P.O. Box 921
Imperial, CA 92251