No.

IN THE

SUPREME COURT OF THE UNITED STATES

HSIU YING TSENG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

VERNA WEFALD
65 North Raymond Avenue, Suite 320
Pasadena, California 91103
Telephone: 626-577-2658
Email: verna@vernawefald.com

Counsel of Record

QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that the prosecutorial misconduct did not violate due process?

RELATED PROCEEDINGS

Los Angeles County Superior Court

People v. Tseng, No. BA394495

California Court of Appeal, Second Appellate District

People v. Tseng,No. B270877

California Supreme Court

People v. Tseng, No. S253560

United States Supreme Court

Tseng v. California, No. 18-9774

Central District of California

Tseng v. Houston, No. 20-CV-9036-AB (KES)

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Tseng v. Houston, No. 22-55401

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HSIU YING TSENG,

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vs.

MONA D. HOUSTON,

Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner Hsiu Ying Tseng respectfully prays that a writ of certiorari issue to review the memorandum decision of the United States Court of Appeals for the Ninth Circuit filed on March 1, 2024.

OPINION BELOW

On March 21, 2024, the Court of Appeals entered its decision affirming the denial of Tseng's 2254 habeas petition. Appendix A. The petition for rehearing was denied on May 6, 2024. Appendix B.

JURISDICTION

On March 1, 2024, the Ninth Circuit Court of Appeals affirmed Petitioner's convictions. Appendix A. The petition for rehearing was denied on May 6, 2024. Appendix B. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is due for filing on August 2, 2024. Supreme Court Rule 13. Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment (pertinent part)

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, a physician, was convicted of three counts of second degree murder (Penal Code § 187) after three patients (Vu Nguyen, Steven Ogle, and Joseph Rovario) died from drug overdoses. She was also convicted of twenty counts of unlawful controlled substance prescription (Health & Safety Code § 11153(a) and one count of obtaining controlled substance by

fraud (H & S § 11173(a).) Petitioner appears to be the first and thus far only physician in this country to be convicted of murder for prescribing opiates.

Prosecution experts testified that petitioner violated the standard of care by *e.g.* failing to conduct adequate examinations, failing to order drug or other testing, failing to contact prior physicians, and failing to check with state databases for prior drug use. One of these experts, Dr. Ezekiel Fink, however, testified that opioid overdose deaths happen to good doctors in the course of their practices as well. A death "does not mean that something wrong was done." (16 RT 5450.)

The prosecution theory of implied malice, necessary for a finding of second degree murder, was that the coroner and law enforcement investigators informed Petitioner that her prescriptions were the cause of her patients' deaths, yet she did not change her prescribing habits. Significantly however, not a single coroner or law enforcement investigator testified that they told Petitioner she had caused her patients' deaths – not one. All of them merely asked her what she was treating the patients for.

Petitioner did not dispute that her handling of several patients was negligent. Mere negligence cannot constitute implied malice murder under California law. Her pretrial offers to plead guilty to involuntary manslaughter were rejected.

Evidence was also presented that Petitioner did turn away patients who she believed were merely drug seeking. She argued at trial and on appeal that she was not guilty of implied malice.

Over defense relevance, more prejudicial than probative, and due process objections, the prosecution was permitted to introduce evidence that six other patients had died. Three of these deaths were uncharged (Matthew Stavron, Ryan Latham, and Naythan Kenney). Three more were patients were named in overprescribing counts (Joshua Chambers, Michael Katsnelson, and Joseph Gomez).

Significantly, Chambers and Gomez both died of heroin overdoses, which had nothing to do with Petitioner. Katsnelson died of a preexisting heart condition, which also had nothing to do with Petitioner. Latham's death was officially determined to be a suicide. Kenney's death was due to a methadone overdose, which Petitioner did not prescribe.

The prosecution also sought to introduce evidence that two more patients named in the over-prescribing counts had died (Nicholas Mata and Michael Huggard). Because Mata and Huggard died after the patients alleged in the murder counts, the trial court ruled that the prosecution could not mention that these two patients had died. Nevertheless, the first question elicited from Nicholas Mata's father was, "when did your son pass

away?" (11 RT 3347.) After defense counsel objected, the court reminded the prosecutor that he was not supposed to mention Mata had died. The prosecutor conceded the error and said he would not let it happen again. (11 RT 11348-11349.)

After Mata's father finished testifying jurors told the judge that the testimony was "emotional" and asked to have Kleenex for the jury box. (11 RT 3364.) Defense counsel asked that Mata's testimony be stricken and the jury admonished: "And emotion is exactly what the People are trying to get in, and that's why it's more prejudicial than probative, and that was no accident when that question came out on direct." (11 RT 3367.)

The court told the jury that the testimony of Mata's father did not go to the murder counts but only to overprescribing. Even though it was "emotional testimony" the "death had nothing to do with this charge, the defendant is not being charged with that, so please do not consider that evidence for any purpose." (11 RT 3371-3372.)

The prosecutor next elicited that Huggard had died, which prompted defense counsel to move for a mistrial on grounds of prosecutorial misconduct. The prosecutor said he had in good faith thought Huggard's death was not in violation of the court's order. Significantly however, he failed to mention that just a few days before, the prosecution said it would not be

presenting evidence as to the deaths of Michael Huggard and Donald Bender, "trying to avoid that John Mata issue." (12 RT 3967.)

The jury was initially unable to agree on whether petitioner was guilty of murder or involuntary manslaughter. Over defense objection, the court allowed additional argument, after which petitioner was convicted of second degree murder. She was sentenced to 30 years to life in prison.

On direct appeal, the California Attorney General conceded and the Court of Appeal agreed that the prosecution committed misconduct when it elicited testimony that two more patients had died in violation of a court order. However, the court held the misconduct did not warrant reversal as it was not so pervasive as to infect the trial with such unfairness as to make the resulting conviction a denial of due process. Appendix D at 39.

The federal district court denied the § 2254 petition but granted a Certificate of Appealability ("COA") on all eight claims raised in the petition. Appendix C at 1. The Ninth Circuit affirmed the denial of the petition in a memorandum decision. Appendix A.

The Ninth Circuit rejected the argument that the evidence of second degree murder was insufficient. The memorandum stated that:

> even if Tseng were correct that no one explicitly informed her that her prescription practices were endangering the lives of her patients, that does not mean that Tseng lacked awareness that her patients were dying of drugs that she prescribed. A

> reasonable jury could find that Tseng, as a licensed medical doctor, could make that connection on her own.

Appendix A at 4.

The Ninth Circuit failed to acknowledge that the California Court of Appeal emphasized that even gross negligence is not enough to find implied malice, necessary for a conviction of second degree murder. "It is the 'conscious disregard for human life' that sets implied malice apart from gross negligence." Slip opinion at 18, citing *People v. Contreras*, 26 Cal.App.4th 944, 954 (1994). Appendix D at 18.

The Ninth Circuit also rejected the argument that the admission of the uncharged deaths was an unreasonable determination of the facts under § 2254(d)(2). The Ninth Circuit did not dispute the toxicologist's testimony as to the cause of death, but stated that Petitioner "emphasizes her own selective characterization of the testimony of a toxicology expert over the officer coroner's documentation" which said that the patients died of multiple drug intoxication. Appendix A at 5. The Ninth Circuit failed to acknowledge that the coroner merely tested for the drugs in the patients' system. It was only the prosecution toxicologist who could determine which of the drugs in the patients' system was the actual cause of death. The toxicologist was called by the prosecution to establish the cause of death. Appendix at 5-6.

The Ninth Circuit further held that the state court reasonably concluded that the two incidents of prosecutorial misconduct did not so infect the trial with unfairness, thereby denying due process. Appendix A at 7, citing *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT MEMORANDUM DECISION ON THE PROSECUTORIAL MISCONDUCT ISSUE MISCONSTRUED THE RECORD

Under Supreme Court Rule 10, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." This is one of those rare cases. See e.g. *Thompson v. City of Louisville*, 362 U.S. 199 (1960) (conviction for disorderly conduct and loitering devoid of evidentiary support thus violating Due Process).

The federal government has officially stated that "the Nation is in the midst of an unprecedented opioid epidemic" in which more than "130 people a day die from opioid related drug overdoses." www.hrsa.gov/opoids. (Health Resources and Services Administration). Petitioner's convictions for murder and resulting 30 years to life sentence are the result of hysteria over the opioid epidemic and not based on the facts or the law.

It is undisputed that the prosecution committed misconduct by eliciting that two additional patients died in violation of a court order. It is blatantly obvious that they did this in order to inflame the jury. Because of the frenzy surrounding the opioid crisis, the Ninth Circuit (and the California Court of Appeal) misconstrued the record and the law in order to uphold Petitioner's convictions.

The Ninth Circuit found that due process was not violated because the prosecutors immediately admitted the mistakes, did not connect Tseng to the improperly elicited testimony, gave curative instructions, and the other evidence was "weighty." Appendix A at 7.

First, the other evidence against Petitioner was not "weighty" as the prosecution produced no evidence Petitioner had been put on notice that she was responsible for her patient's deaths. The Ninth Circuit agreed there was no notice but held, contrary to California law, that because Petitioner was a physician she should have known she was guilty. Appendix A at 4.

As for the uncharged deaths that were admitted, five of the six could not be attributable to Petitioner. The Ninth Circuit failed to acknowledge that the toxicologist was the prosecution's only witness on the true cause of death.

Second, the Ninth Circuit failed to acknowledge when the prosecutors deliberately elicited the second death of Michael Huggard in violation of a court order, this was not some honest mistake. On September 11, 2015, after eliciting that Nicholas Mata had died in violation of a court order, Deputy District Attorney ("DDA") Niederman admitted that it was his "fault." (34-ER-6298-6299.) The court told him not to let it happen again. (*Id*.)

On September 28, 2015, when DDA Niederman again violated the court order by asking about Michael Huggard's death (40-ER-7316), he claimed the error was made in "good faith" because he erroneously thought the death was in 2009 not 2010. (40-ER-7321.) DDA Niederman failed to mention that a few days before, on September 16, 2015 (35-ER-6467) his co-counsel DDA Grace Rai, who was standing right next to him, said: "We're not presenting" "Huggard" "trying to avoid that John Mata issue." (35-ER-6533.)

Third, the fact that the prosecutors did not "connect" Petitioner to the "improperly elicited testimony" is the whole point. If the deaths of the patients were not connected to Petitioner they served absolutely no purpose whatsoever except to unfairly prejudice the jury against Petitioner.

Fourth, the Ninth Circuit failed to acknowledge just how inflammatory and prejudicial the deaths of Mata and Huggard actually were.

The Ninth Circuit did not acknowledge how the misconduct affected the emotions of the jury. After John Mata's father resumed testifying he broke down. The court told the prosecutor to "get him off the stand" and "move on." (34-ER-6304.)

The memorandum also failed to acknowledge that when DDA Niedermann elicited that John Mata had died, Juror No. 10 became very emotional. Juror No. 8 asked the court if they could have some Kleenex for the jury room. (34-ER-6313.) The trial court commented that it had been watching the juror and "thought she couldn't wait to get out." (34-ER-6315.) The bailiff added the juror told him hers distress was "emotional, not physical." (*Id*.)

The prosecutorial misconduct in this case most definitely "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974). The Ninth Circuit holding that the state court's opinion was a reasonable application of the facts in light of the evidence presented was itself unreasonable. § 2254(d)(2). This is particularly so, since the testimony was highly emotional as well as irrelevant, and the jury was initially hung on second degree or involuntary manslaughter. (52-ER-8783.)

The opioid epidemic should not be an excuse to deny Due Process. The petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant the petition for certiorari.

DATED: July 28, 2024 Respectfully submitted,

VERNA WEFALD

Counsel for Petitioner