

NO. 24-5725

UNITED STATES SUPREME COURT

JOSE GOMEZ,

Petitioner,

V.

STATE OF WASHINGTON

Respondent;

PETITION FOR REHEARING OF DENIAL OF WRIT
OF CERTIORARI, SUPREME COURT RULE 44(2)

Jose Gomez

Petitioner, Pro Se

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A. QUESTIONS PRESENTED FOR REVIEW

1. Was Gomez' Sixth Amendment right was violated when his counsel in refusing to follow his instructions and failed to accept the hung jury, and failed to move for mistrial, under Strickland standard?

2. Was Gomez' Sixth Amendment right violated when his counsel would not allow him or advised him to not testify on his own behalf, under the Strickland standard?

3. Was Gomez' Sixth Amendment right violated when his trial counsel told him not to take his medications, depression and pain meds, which is an "issue of first impression" for this Court, under the Strickland standard?

4. Was Gomez' Sixth Amendment Right to a Fair Trial and Fifth and Fourteenth Amendment Due Process rights violated when the trial judge impermissibly interfered with the verdict when, on two occasions when the presiding juror reported that the jury could not reach a unanimous verdict as to all counts, the judge directed the jury to continue its deliberations rather than granting a mistrial?

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3 Thurston County Superior Court, No. 19-1-00428-34, unpublished opinion
4 Washington State Court of Appeals, No. S6562-5-II, unpublished opinion
5 Washington State Supreme Court, No. 101033-8, unpublished opinion
6 United States District Court, Western District of Washington, No. 3:22-cv-05897-MJP
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8 Ninth Circuit Court of Appeals, No. 23-2236, unpublished opinion
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10 E. STATEMENT OF JURISDICTION

11 This Court has jurisdiction under Supreme Court Rule 44(2),
12 and 28 U.S.C. §§ 1251, and 1254.
13

14 F. CONSTITUTIONAL PROVISIONS

15 Fifth Amendment (Due Process)

16 Sixth Amendment (Right to Autonomy, fair trial, effective
17 assistance of counsel, unanimous jury verdict)

18 Fourteenth Amendment (Due Process)
19

20 G. STATEMENT OF THE CASE

21 Gomez moved for a Writ of Certiorari on September 26, 2024,
22 which was denied on November 18, 2024. Gomez timely files this Petition
23 for Rehearing within less than 25 days, pursuant to Supreme Court Rule
24 44(2), from the date his Writ of Certiorari was denied.

25 On 6/13/2023, the United States District Court denied Gomez'

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1 Habeas Corpus in their Report and Recommendation, EX2, R&R, Dkt. 16. Gomez
2 motioned for a Certificate of Appealability (hereinafter "COA"), which
3 the Ninth Circuit denied on 6/28/2024. Gomez Motioned for
4 Reconsideration En Banc for a COA, the Ninth Circuit denied it on
5 8/26/2024.

6 FACTUAL BACKGROUND

7 Gomez began an online communication on a dating site called
8 "Badoo," with an undercover cop acting under the name "Sam." RP 446,
9 464. "Sam" indicated she was 13 years old, and staying with a friend in
10 Olympia. RP 471-72. Gomez asked if she liked older guys and if she had
11 already had sex with an older guy? RP 472, 474. Gomez asked, "how old
12 is your friend, the one you are staying with?" And "Sam" responded "she's
13 12." RP 478. Gomez asked if she liked older guys? RP 478. Gomez continued
14 having a sexually explicit text conversation with "Sam" and discussed
15 whether adults were in the residence. RP 484.

16 The conversation discussed Gomez bringing alcohol and Gomez
17 described having sex with both girls. RP 485-86. Gomez continued discussing
18 with "Sam" to arrange to meet with the girls. RP 485-86. The detective gave
19 him an address for a business to go to. RP 490.

20 Gomez said he was in Fife and said he had condoms. RP 491. After
21 saying he was on his way. Gomez then indicated that he has car trouble on
22 I-5 and asked for the phone number of "Audrey," "Sam's" fictitious 12-year-
23 old friend. RP 498. Gomez asked to meet a different day. RP 495. Gomez was
24 also texting with the fictitious persona "Audrey," who was "Sam's" 12-year-old
25 friend. RP 509-10. The conversations with "Audrey" were also explicit. RP 511, 564-65, 570

1 Eventually, Gomez again arranged to meet with both girls for sex
2 and was given the address of a gas station to go to and told to send a picture
3 when he got there. RP520-21, Gomez provided the picture at the gas station
4 and law enforcement worked to locate him. RP522, 545-46. At that point,
5 Gomez was stopped by law enforcement and arrested. RP552.

6 As a result of the investigation, Gomez was charged with two
7 counts of attempted rape of a child in the second degree and two counts of
8 felony communicating with a minor for immoral purposes through electronic
9 communication. CP4-5. The jury found Gomez guilty as charged on
10 counts 2 through 4 but were unable to reach a verdict on count one,
11 RP779-80, 798-99; CP36-39. At sentencing, the State moved to dismiss Count
12 One. RP812. The trial court sentenced Gomez to a low-end sentence of 109.5
13 months to Life on Count Two and high end sentences on Counts Three and
14 Four. RP828, CP80-96. The trial court also imposed lifetime community
15 custody pursuant to RCW 9.4A.507. CP85.

16 Gomez has procedurally exhausted all grounds through the Court
17 of Appeals, Washington State Supreme Court, U.S. District Court, and Ninth
18 Circuit.

20 H. SUMMARY OF THE ARGUMENTS

21 1. Ineffective Assistance Of Counsel-Failure To Accept Hung Jury 22 And Move For Mistrial

23 Gomez' counsel failed to accept the hung jury, and failed to move
24 for a mistrial which is not a sound trial strategy, and violated his Sixth Amendment
25 right to effective assistance of counsel, right to a fair trial, and jury trial. This

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1 structural error requires reversal and remand for a new trial.

2 Gomez' Sixth Amendment right was violated when his counsel in refusing
3 to follow his instructions, under the Strickland standard.

4 2. Ineffective Assistance of Counsel-Not Allowed To Testify On Own Behalf

5 It was not sound trial strategy, amounted to ineffective
6 assistance of counsel, when Gomez requested to testify on his own behalf.
7 This violated Gomez' Sixth Amendment rights.

8 3. Ineffective Assistance of Counsel-Advised To Not Take Medications

9 Gomez' trial counsel advised him to not take his medications during the
10 entire trial process which he needed for pain and headaches and depression,
11 which was not sound trial strategy, and violated his Sixth Amendment rights
12 to effective assistance of counsel. This is an "issue of first impression" requiring
13 judicial review.

14 4. Trial Judge Impermissibly Interfered With Verdict

15 The trial judge impermissibly interfered with the verdict when on two
16 occasions, the presiding juror reported the jury could not reach a unanimous verdict
17 as to all counts. When the judge directed the jury to continue to deliberate rather
18 than granting a mistrial, violated Gomez' Sixth Amendment rights to a fair trial,
19 unbiased jury, and unanimous verdict.

20
21 I. ARGUMENTS

22 Gomez prays this Court will GRANT his Petition for Rehearing his writ of
23 Certiorari due to the cumulative Constitutional Sixth Amendment errors of ineffective
24 assistance of counsel herein, and right to a fair trial, or the cumulative constitutional
25 errors in his case.

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INEFFECTIVE ASSISTANCE OF COUNSEL - STANDARD OF REVIEW

A criminal defendant has a right under the Sixth Amendment to effective assistance of Counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984). To prevail on a claim of ineffective assistance of counsel, Gomez must show deficient performance and that the deficient performance resulted in prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To establish deficient performance, Gomez has the "heavy burden" of showing that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S., at 687. Gomez can meet this standard by establishing that his attorney's conduct failed to meet an objective standard of reasonableness. Strickland, 466 U.S., at 488.

Gomez has shown deficient performance resulted in prejudice herein.

The two-part test in Strickland governs Gomez' claims of ineffective assistance of counsel. *Id.* The test requires a petitioner to show: (1) the defense attorney's performance was deficient, meaning "unreasonable under prevailing professional standards;" and (2) that there is a "reasonable probability that but for counsel's unprofessional errors, the result would have been different." Nis. v. Blaylock, 20 F.3d 1458, 1465 (9th Cir. 1994) (citing Strickland, 466 U.S., at 687-91, 694).

To determine whether conduct was objectively unreasonable, courts consider "the rules of contemporary assessments," which evaluates the performance at the time without considering the benefit of hindsight. Maryland v. Kuhlberg, 577 U.S. 1, 14 (2015). A lawyer's conduct falls below an objective reasonableness

standard it, viewed without the benefit of hindsight, it fails "under prevailing professional norms." Strickland, 466 U.S. at 688.

"The right to effective assistance of counsel," the Court reasoned "is a bedrock principle in our justice system." Martinez V. Ryan, 566 U.S. 1, 12 (2012). An exception to this general rule presumes a probable effect upon the outcome where the assistance of counsel has been denied entirely or during a critical stage other proceeding. Moore V. Taylor, 535 U.S. 162, 163 (2002).

The Sixth Amendment guarantees to each criminal defendant "the assistance of counsel for his own defense." The defendant does not surrender control entirely to counsel, for the Sixth Amendment in "granting to the accused personally the right to make his defense," "speaks of 'assistance' of counsel, and an assistant, however expert is still an assistant. Faretta V. California, 422 U.S. 806, 819-20 (1975).

1. JURY DELIBERATIONS - INEFFECTIVE ASSISTANCE OF COUNSEL

Gomez' Sixth Amendment right was violated when his counsel refused to follow his instructions, failed to accept the hung jury, and failed to move for mistrial, under the Strickland standard.

This issue was raised in the Habeas Petition Ground One on Pages 5-19, 20-36, Respondent's Answer Pages 9-16, and on the R&R Pages 11-14, and the COA was twice denied by the Ninth Circuit with no review or citation to case laws by the Court.

STANDARD OF REVIEW FOR THIS GROUND

Given the trial record of this particular case counsel's failure to object to permitting the jury to resume its deliberations after the trial judge declared

a mistrial and discharged the jury constituted objectively deficient performance. It was "not sound trial strategy," Strickland, 466 U.S. at 689 (quoting Mitchell v. Louisiana, 350 U.S. 91, 101 (1955)), for May's lawyer not even to attempt to preserve the mistrial based on a hung jury, because a mistrial here would have been a clearly advantageous result for May. A hung jury is never a desirable outcome in a criminal trial. Williams v. Cavazos, 646 F.3d 626, 652 (9th Cir. 2011) (citing Rock Island, Ark. & La. R.R. v. U.S., 254 U.S. 141, 143 (1920)).

When Gomez' counsel failed to move for a mistrial which he requested, is a used prejudice to his trial, violated his right to autonomy, was not a sound trial strategy, was objectively unreasonable, and requires reversal and remand for a new trial for the Sixth Amendment violation.

2. STRUCTURAL ERROR OF RIGHT TO TESTIFY ON OWN BEHALF, A CLIENT'S AUTONOMY VIOLATED

The lawyers province is trial management, but some decisions are reserved for the client--including whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forego an appeal. McCoy v. Louisiana, 584 U.S. 414, 422 (2018) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)). Because a client's autonomy, not counsel's competence, is in issue we do not apply our ineffective-assistance-or-counsel jurisprudence, Strickland, Id., or U.S. v. Cronin, 466 U.S. 648 (1984), to Gomez's claims. To gain redress for attorney error, a defendant ordinarily must show prejudice. Strickland, 466 U.S. at 692. Here, however, the violation of Gomez's protected autonomy right was complete when the court allowed counsel to usurp control of the issue

1 within Gomez's sole prerogative. McCoy, at 427.

2 Violation of a defendant's Sixth Amendment-secured autonomy ranks
3 as error of the kind our decisions have called "structural," when present,
4 such an error is not subject to harmless-error review. See, e.g., McKaskle v.
5 Wiggins, 465 U.S. 168, 177, n.8 (1985). Structural error "[a]ffects the framework
6 within which the trial proceeds" as distinguished from a lapse or flaw that is
7 "simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S.
8 279, 310 (1991). An error may be ranked structural, we have explained, "if the
9 right at issue is not designed to protect the defendant from erroneous conviction
10 but instead protects other interest," such "as the fundamental legal principle that
11 a defendant must be allowed to make his own choices about the proper way to
12 protect his own liberty." Weaver v. Massachusetts, 582 U.S. 286, 295 (2017); Farretta, at
13 834. An error might also count as structural when its effects are too hard to
14 measure, or where the error will inevitably signal fundamental unfairness. 582
15 U.S., at 296-97 (citing U.S. v. Gonzalez-Lopez, 548 U.S. 140, 149, n.4 (2006), and Sullivan
16 v. Louisiana, 508 U.S. 275, 279 (1993)).

17 "Counsel's override negated Cooke's decisions regarding his constitutional
18 rights, and created a structural defect, in the proceedings as a whole." Cooke, 977
19 A2d, at 849.

20 Gomez's trial counsel violated his Constitutional rights to autonomy in failing to
21 allow him to testify on his own behalf. This structural error is not subject to the
22 ineffective assistance of counsel jurisprudence, or prejudice standard, and was
23 complete when the court allowed his trial counsel to usurp his right to testify on
24 his own behalf, this structural error requires immediate reversal and remand
25 for a new trial.

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3. "ISSUE OF FIRST IMPRESSION" REQUIRES JUDICIAL REVIEW

INEFFECTIVE COUNSEL FOR ADVISING NOT TO TAKE MEDICATIONS

Gomez argues that there are no cases on this ground of ineffective assistance of counsel requiring judicial review since it prejudiced his mental state, making it so he could not sleep, concentrate, or present a defense for a fair trial since he did not have his medications for headaches, migraines, depression, pain and more that combined was a perfect storm to make him incapacitated, which violated his right to ineffective assistance of counsel, and right to a fair trial, and autonomy. Since there is no established Supreme Court precedent on this issue, the Court should GRANT Certiorari on this issue.

In 2020, Gomez was on numerous medications, EXI attached, for depression, headaches, migraines, pain and more that affected his mental state making him incapacitated when his attorney advised him to quit taking them in the week before trial.

An "issue of first impression" requires judicial resolution to set precedent, Chevron Oil V. Huson, 404 U.S. 97 (1971).

4. UNANIMOUS VERDICT INTERFERENCE BY TRIAL JUDGE REQUIRES

AUTOMATIC REVERSAL

The Court found that the trial judge unnecessarily interfered with the deliberate process and held that per se reversible error is occurred when the judge continued the jury poll. U.S. V. Spitz, 696 F.2d 916, 917 (11th Cir. 1983). A criminal defendant has a constitutional right to a unanimous verdict by a fair and impartial jury. U.S. Const. Amend. 6, 14; Fuimaono V. Lizarraga, No. 18-CV-03650-51

(N.D. CA, 2019).

Never the less, because the right to a trial by jury as fact-finder in serious criminal cases is "fundamental to the American scheme of justice." Sullivan, 508 U.S., at 277, It is a "cardinal principle that the deliberations of the jury shall remain private a secret" in order to protect the jury from improper outside influences, U.S. v. Olano, 508 U.S. 725, 737 (1993), see generally, Diane E. Courselle, *Struggling With Deliberate Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. Rev. 203 (Autumn 2005). The judge's traditional role in a jury trial is thus limited to arbiter of the law and manager of the trial process, Quercia v. U.S., 289 U.S. 466, 469 (1933); the jury remains the primary finder of fact and essential check on arbitrary government, see U.S. v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977); see also, U.S. Const. Amend. 6, Duncan v. Louisiana, 391 U.S. 145, 151-54 (1968) (discussing historical development of jury trial as fundamental right in America). For these reasons, "the trial judge is barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused," Martin Linen Supply Co., 430 U.S. at 573, and "it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made," Remmer v. U.S., 350 U.S. 377, 382 (1956).

Accordingly, and because "the influence other trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received [from the jury] with deference, and may prove controlling," Quercia, 289 U.S. at 470, the court's exercise of discretion in managing deliberations is not without limits. For example, when responding to jury questions or requests during deliberations, every effort must be undertaken to avoid influencing or coercing a jury to reach one

1 verdict over another. See, e.g., U.S. v. Nickell, 883 F.2d 824, 829 (9th Cir. 1989)
2 (cited in U.S. v. Evanston, 651 F.2d 1080, 1084 (9th Cir. 2011)) v. U.S. v. Walker,
3 575 F.2d 209, 214 (9th Cir. 1978) ("Because the jury may not enlist the court as
4 its partner in the fact-finding process, the trial Judge must proceed circumspectly
5 in responding to inquiries from the jury"),

6 Extraordinary caution must be exercised when acting to break jury
7 deadlocks. This is particularly true with respect to the court's actions in giving
8 an Allen charge, which we have recognized as already "standing at the brink
9 of impermissibly coercion." U.S. v. Seawell, 550 F.2d 1159, 1163 (9th Cir. 1977). Even
10 slight deviations from the language and procedure approved by this court can
11 result in reversible error based upon likelihood of coercion.

12 Gomez proves automatic reversible error herein regarding reversal
13 and remand for a new trial.

14 15 J. CONCLUSION

16 Gomez prays this Court will GRANT Certiorari on any one or all 4
17 of his Sixth Amendment ineffective assistance of counsel claims; the judge's
18 violation of his right to a fair trial, by interfering with the jury.

19
20 Dated this 13 day of December, 2024.

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22 Jose Gomez
23 Petitioner, Pro Se
24
25