No. 24-6138

IN THE

SUPREME COURT OF THE UNITED STATES

Andre Terial Love — PETITIONER
(Your Name)

vs.

J. M. Robertson — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeal for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andre Terial Love
(Your Name)

P. O. Box 7500 D8-207
(Address)

Crescent City, California 95532
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

IS THE STATE COURT'S FINDING THAT CLAIMS ONE AND TWO ARE PROCEDURALLY DEFAULTED ADEQUATE TO BAR FEDERAL REVIEW OF THOSE CLAIMS?

DOES THE STATE COURT'S DISPOSITION OF CLAIMS ONE AND TWO AUTHORIZE DE NOVO REVIEW OF THOSE CLAIMS IN THE DISTRICT COURT?

IS THE EXISTENCE OF APPLICABLE CLEARLY ESTABLISHED SUPREME COURT LAW REQUIRED TO GRANT RELIEF ON CLAIMS ONE AND TWO?

WOULD A REASONABLE JURIST AGREE THAT THE ADMISSION OF OTHER CRIMES EVIDENCE IN THIS CASE VIOLATED DUE PROCESS UNDER CIRCUIT PRECEDENT?

COULD REASONABLE JURISTS AGREE THE STATE COURT'S REJECTION OF CLAIM THREE WAS CONTRARY TO OR AN UNREASONABLE APPLICATION OF SUPREME COURT PRECEDENT OR INVOLVED AN UNREASONABLE DETERMINATION OF THE FACTS?

WAS THE STATE COURT DECISION CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, CHAPMAN V CALIFORNIA AND ITS PROGENY OR AN UNREASONABLE DETERMINATION OF THE FACTS?

DID THE ERRORS HAVE A SUBSTANTIAL AND INJURIOUS EFFECT ON THE VERDICTS?

LIST OF PARTIES

[x] 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

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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

[x] 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,
[X] is unpublished.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,
[X] is unpublished.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

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

The date on which the United States Court of Appeals decided my case was 8-23-24.

[X] 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. ___A_____.

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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment of the United States Constitution

28 United States Code Section 2254

STATEMENT OF THE CASE

On September 9, 2017, a jury convicted Petitioner of five counts of robbery(Cal.Pen.Code §211, 212.5) but found the allegation he personally used a firearm during the robberies not true. Based on the convictions and prior conviction allegations, Petitioner received a sentence of 75 years to life plus 15 years. On February 5, 2019, the California Court of Appeal affirmed the convictions and, on February 19, 2019, denied a petition for rehearing The California Supreme Court denied review on April 17, 2019.

On February 3, 2022, Petitioner constructively filed the petition for writ of habeas corpus in the United States District Court for the Central District which is the subject of the instant petition. In an order dated April 5, 2023, the Magistrate recommended the petition be denied and dismissed(app B). In an order dated June 29, 2023, the District Court accepted the recommendation(id). On August 23, 2024, The Ninth Circuit Court of Appeal denied a petition for certificate of appealability(app A)

EVIDENCE PRESENTED AT TRIAL

The evidence presented at trial is described in more detail in the body of the claims in this petition

The convictions were based on a set of robberies committed at three separate restaurants in Thousand Oaks California

On July 12 2015, Robert Engle a manager of the Bandits Grill and Bar was accosted by a man outside the restaurant wearing a hoodie and a bandanna The man put a gun to Engle s head and forced him to relinquish cash and employee

paychecks DNA consistent with Petitioner s profile was found on zipties placed on Engle

On May 2 2016, at Al Mulino s Italian Restaurant and Bar Lizandro Ovando a custodian was accosted by a man with his face covered and holding a gun Ovando was the only person present in the restaurant The armed man took money from Ovando s wallet and his cell phone

On May 8 2016 a man wearing a hoodie and bandanna entered the office at Cisco's Mexican Restaurant The man told two employees there Christian Barry and Amy Smith, to put the money they were counting into an office trashcan. The man then took the trashcan and money from the wallets of the two employees and a third employee Jeremy Newhouse. A cell phone bearing Petitioner's DNA and fingerprints was found near Cisco's.

Petitioner was not identified in either of the foregoing robberies.

Also admitted at trial was evidence of a 2011 traffic stop in which Petitioner was found in possession of a gun, ammunition, and items characterized as robbery tools Also admitted was evidence of a 2006 Florida robbery allegedly committed by Petitioner.

REASONS FOR GRANTING THE PETITION

See following pages.

I. STANDARDS FOR CERTIFICATE OF APPEALABILITY.

A prisoner seeking a certificate of appealability need only demonstrate a substantial showing of the denial of a constitutional right. A prisoner satisfies this standard by demonstrating that jurists of reason could disagree with the District Court's resolution of his constitutional claims and of any procedural issues or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further(Miller-El-v-Cockrell 537 U.S. 322,347-2003). The analysis requires a general assessment of the merits of the claims but does not require a full consideration of the factual and legal basis of the claims(Slack-v-McDaniel 529 U.S. 473,484-2000). A COA does not require a showing that the petitioner would succeed. Thus, a COA should not be denied merely because the reviewer believes the petitioner will not be able to demonstrate ultimate entitlement to relief(id).

II. IS THE STATE COURT'S FINDING THAT CLAIMS ONE AND TWO ARE PROCEDURALLY DEFAULTED ADEQUATE TO BAR FEDERAL REVIEW OF THOSE CLAIMS?

As argued in the District Court(app.B at 12:7-10), the State Court declined to address the constitutional claims by asserting that Petitioner had failed to explain precisely how the evidentiary error had violated the Constitution(app.C at 15-16 fn.5). In this case, reasonable jurists could agree the State Court was simply wrong that Petitioner had not articulated his constitutional claims. Under Ninth Circuit precedent, which was cited by the State Court(app.C at 15), evidence violates due process absent any permissible inferences and if the evidence is of such quality as to prevent a fair

trial(McKinney-v-Rees 993 F.3rd 1378,1384-9th Cir.1993). Evidence which is used to infer criminal propensity is of **that quality**(id at 1384-85). Petitioner's arguments on direct appeal follow this precise analysis. He argued the 2006 evidence was "irrelevant" (that is, there were no permissible inferences arising therefrom) because (1) not sufficiently similar to the charged crimes to prove identity and (2) not relevant to prove the charged conduct constituted robbery as such was beyond dispute(app.D at 46-51). The identical argument was made with regard to the 2011 evidence(id at 52,54-56). Petitioner further argued that the only inference arising from the evidence was a forbidden propensity inference and explicitly cites "McKinney" for the proposition the Federal Due Process Clause was thereby violated(id at 51-52,56-57; see id at 57[Citing this Court's authority for the proposition admission of propensity evidence likely violates due process]; id at 61[Citing the "particular due process abhorrence to use of propensity or disposition evidence"]).

Reasonable jurists could agree that this Court's decision in "Cone-v-Bell"(556 U.S. 449-2009) controls this case. In "Cone," the state court imposed a procedural bar which this Court determined was, in fact, inapplicable on the facts. As a result, the Court ignored said bar and instead reached the merits of the allegedly defaulted claim. As noted in "Ayala-v-Wong": "In Cone, the Supreme Court held that when a state court erroneously finds a procedural default and therefore has not reached the merits of a claim, a federal court can do so"(Ayala at 721 fn 4; see also Richey-v-Bradshaw 498 F.3rd 344-6th Cir.2006[Disregarding an "improperly invoked" procedural bar and reaching the merits of the claim]).

Thus, reasonable jurists could agree that the District Court herein

could reach the merits of Petitioner's claims notwithstanding the State Court's procedural default finding.

FOOTNOTE ONE - Although the District Court declined to address the procedural default issue raised by Respondent(app.B at 9 fn.7), resolution thereof is necessary to determine whether the claims may ultimately be heard. Indeed, it might be said the District Court itself, as a reasonable jurist, harbored some doubt as to the validity of the procedural default [END FOOTNOTE]

III. DOES THE STATE COURT'S DISPOSITION OF CLAIMS ONE AND TWO AUTHORIZE DE NOVO REVIEW OF THOSE CLAIMS IN THE DISTRICT COURT?

28 U.S.C. 2254(d)(1) bars relitigation of any claim adjudicated on the merits in state court unless the state court decision was either contrary to or an unreasonable application of clearly established law "as determined by the Supreme Court of the United States" or was based on an unreasonable determination of the facts "in light of the evidence presented in the state court proceedings " Under "Harrington-v-Richter"(562 U.S. 86-2011) and "Johnson-v-Williams"(568 U.S. 289,292-2013), there is a "rebuttable presumption that, even though the state court was silent with respect to a fairly presented federal claim, the claim was adjudicated on the merits (Ayala v Wong 756 F 3rd 656,665-9th Cir 2014) "The Court s rationale was that, because the state court denied relief overall, it necessarily adjudicated (and rejected) the federal claim"(id at 645)

Richter' which involved a summary denial, stated: "when a federal claim has been presented to the state court and the state court has denied

relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state law procedural principles to the contrary"(Richter at 99).

Initially, the foregoing principles clearly demonstrate there was no on the merits adjudication of the constitutional claims in this case and, thus, that deferential review was not warranted. As noted, the State Court herein explicitly declined to address the merits of the claims due to a claimed procedural default(app.C at 15 fn.5). That default was, in fact, inapplicable and imposed in error. Thus, the "Richter" presumption is overcome by the State Court's reliance on "state law procedural principles ... contrary" to a merits ruling(Richter at 99). The State Court's procedural ruling provided "reason to think some other explanation for the state court's decision is more likely"(Richter at 99-100).

Dead on point is "Cone" where, due to a procedural default ruling, the state court failed to address the subject constitutional claim on the merits. As in this case, the procedural ruling was erroneous. Thus, this Court concluded that the state court's failure to address the merits of the claim authorized de novo review of that claim in the District Court(Cone at 472 citing Rompilla-v-Beard 545 U.S. 374,39-2005 & Wiggins-v-Smith 539 U.S. 510,534-2003; see also Williams-v-Cavazos 646 F.3rd 626,636-9th Cir.2011[Identifying as an example of an opinion lacking a merits determination one where "the claim was dismissed on a procedural ground that itself is inadequate to bar federal review [and thus] there was no need to address the claim"]).

Further, "Ayala" found the "Richter" presumption inapplicable when "it

was not necessary for the state court to reject the claim of federal constitutional error on the merits in order for it to deny relief to the petition." The Court pointed out that "the state court denied Ayala relief on his federal constitutional claim only because it concluded that the error (if any) was harmless"(Ayala at 665-66). Although this Court partially overruled "Ayala," it left this conclusion undisturbed(see Davis-v-Ayala 576 U.S. 257,265 fn.1-2015). The same is true herein. Even if one disregards the procedural default ruling, the State Court herein did not necessarily reject the claims on their merits because the State Court concluded that any constitutional error was harmless(app.C at 17 fn.6; see footnote two below).

FOOTNOTE TWO - Notably, the only indication the State Court ruled on the federal claims suggests the Court found there was constitutional error(see id[Stating that "the" errors were harmless]; see Ayala I at 664 fn.4[Suggesting a federal court would be required to defer to a state court finding of constitutional error]).

As noted, the District Court concluded that "Davenport" supported its conclusion that the State Court's adjudication of the harmless error issue under "Chapman-v-California"(386 U.S. 18-1967) on the merits justified application of deferential review and the Supreme Court law limitation to the underlying constitutional claims in this case. Reasonable jurists could agree that "Davenport" does not go that far.

In that case, the state court addressed the constitutional claim on the merits and found the claim meritorious but went on to conclude the error was harmless under "Chapman." Citing "Davis-v-Ayala," the "Davenport" Court

stated: "[A] state court's harmless error determination qualifies as an adjudication on the merits under AEDPA"(Davenport at 127). The Court thus held relief was unwarranted after determining that the state court's "Chapman" analysis was reasonable(id at 144-45). Reasonable jurists could agree that "Davenport/Ayala" stand only for the proposition that, if the state court's harmless error determination is reasonable, such is sufficient to bar habeas relief regardless of whether the constitutional claim itself was deemed meritorious or even adjudicated on the merits(see footnote three below; see Ayala at 267[Finding it unnecessary to rule on the constitutional claim in light of the state court's "Chapman" ruling and the AEDPA]) "Davenport" did not suggest an adjudication of the "Chapman" issue authorizes a federal court to reach back and apply a deferential standard of review to the constitutional claim itself. Indeed, in that connection, "Davenport" rejected the position that the state court's "Chapman" ruling therein could be contrary to or an unreasonable application of precedent governing the underlying constitutional claim, noting that said precedent addressed "whether a constitutional error occurred at all, not whether the alleged error was prejudicial"(Davenport at 142).

FOOTNOTE THREE - The "Davenport" result does not compel the denial of relief in this case as Petitioner asserts that, unlike in "Davenport," the State Court s ruling was contrary to and unreasonable under "Chapman" itself(see below). [END FOOTNOTE]

"Ayala II," relied on by "Davenport," similarly does not support the District Court's conclusion. In "Ayala II," the state court found, as did the

State Court herein, that if constitutional error had occurred, it was harmless under "Chapman"(Ayala at 263-64). This Court thus found the state court's "Chapman" holding was the requisite determination on the merits triggering application of §2254(d)(1)(id at 269 citing Mitchell-v-Esparza 540 U.S. 12,17-18-2003), but only to "'[T]he harmlessness determination itself'"(id quoting Fry-v-Pliler 551 U.S. 112,119-2007). While the Court found that determination was reasonable(id at 285). the Court made no effort to resolve the constitutional claim itself and did not suggest that the state court's "Chapman" ruling required deferential review of the underlying constitutional claim. This is true notwithstanding the fact that, unlike in "Davenport," the state court in "Ayala" did not resolve the constitutional claims(id at 263-64)

Reasonable jurists could thus agree that a state court's resolution of the harmless error component of a claim does not justify deferential review of the component of the claim not adjudicated To the contrary, this Court has, on several occasions, "interpreted state court silence with regard to a particular issue as not constituting an 'adjudication on the merits'"(Ayala I at 668 citing Wiggins-v-Smith 539 U.S. 510,534-2005, Rompilla-v-Beard 545 U.S. 374,390-2005, and Porter-v-McCollum 558 U S 30-2009). "Ayala I" noted that this Court "has repeatedly interpreted that silence as a failure to reach the other prong and therefore not an 'adjudication on the merits'"(id at 668[Court s emphasis]).

In "Wiggins," the Court applied de novo review to the prejudice prong of an ineffective counsel claim because the state court, which had adjudicated the "performance" prong of the claim to which the §2254(d)(1) standard of review was applied did not adjudicate the prejudice prong(id at 534) This

Court followed the same course in "Rompilla"(at 390). Conversely, in "Porter," the Court addressed the performance prong de novo (because the state court had not addressed that prong) while applying AEDPA deference to the prejudice prong which the state court had adjudicated(id at 39-42).

It follows inevitably from "Wiggins," "Rompilla," and "Porter" that simply because the state court has rejected one component of a constitutional claim does not mandate application of AEDPA deference to components the state court left unadjudicated. Indeed, there is stronger justification for avoiding a unitary approach to the claims herein vis-a-vis the AEDPA standard of review than with ineffective counsel claims With ineffectiveness claims, the performance and prejudice prongs are components of a single constitutional claim(Wiggins at 521). In contrast, "Chapman" involves an analysis under a body of law completely distinct from that governing the underlying constitutional claims. Such provides an even stronger case for component by component treatment under AEDPA.

IV. IS THE EXISTENCE OF APPLICABLE CLEARLY ESTABLISHED SUPREME COURT LAW REQUIRED TO GRANT RELIEF ON CLAIMS ONE AND TWO?

As noted, the District Court herein concluded that relief is barred because there is no Supreme Court authority holding that admission of prejudicial evidence violates due process(B at 12-14 and cited cases) Reasonable jurists could agree that the very text of §2254(d)(1) forecloses debate on the question. The requirement of an on point decision of this Court is part and parcel of AEDPA's requirement of deferential review, both of which are conditioned on a merits determination by the state court. There was no

such determination in this case. The Ninth Circuit has so held(Williams-v-Cavazos at 642 fn.14 (overruled on other grounds)[Noting that, when subdivision (d)(1) does not apply, a petitioner is not limited to Supreme Court law to support his claim and going on to rely on circuit precedent to find constitutional error]; see also Ayala-v-Wong at 670[Finding constitutional error based on circuit precedent when the state court failed to adjudicate claim on the merits]; Davis-v-Ayala at 265 fn.1[Noting, without criticism, Ayala-v-Wong's de novo review]; Kipp v-Davis 971 F.3rd 939,954 fn.18, 956-58 fn.15-9th Cir.2016[Reviewing due process claim like that herein de novo and finding a due process violation based on circuit precedent and absent controlling Supreme Court precedent]; compare James-v-Schriro 2011 U.S.App.Lexis 20652 *50-9th Cir.2011[Noting that an "additional consequence" of the state court's failure to adjudicate a claim on the merits is that the federal court is not limited to the state court record as required under subdivision (d)(1)]).

However, this Court has not directly stated that the lack of a merits determination by the state court relieves a petitioner also of the "Supreme Court law" limitation In the above cited cases, this Court instead focused on the "deferential review" prong of subdivision (d)(1) and, quite naturally and not under compulsion of subdivision (d)(1), applied its own precedent(Wiggins at 534; Rompilla at 390; Porter at 39-42)

This case presents the opportunity for the Court to establish that circuit precedent can be relied on in cases like this.

V. WOULD REASONABLE JURISTS AGREE THAT THE ADMISSION OF OTHER CRIMES EVIDENCE IN THIS CASE VIOLATED DUE PROCESS UNDER CIRCUIT PRECEDENT?

Petitioner was convicted of three separate robbery incidents, each involving their own distinct facts, and the evidence was hardly conclusive that all three robbery incidents were committed by the same person, much less that Petitioner was the perpetrator in each incident. Thus, the question of whether due process was violated, the similarity or lack of similarity (and thus the relevance and admissibility) of the other crimes evidence, and whether relief is warranted should be determined separately as to each robbery incident.

Reasonable jurists in the Ninth Circuit have found due process violations based on the admission of other crimes evidence on facts identical or similar to those in this case(Kipp-v-Davis 971 F.3rd 939,957-9th Cir.2016; Garceau-v Woodford 275 F 3rd 769,775-776-9th Cir.2001; McKinney-v Rees 993 F.3rd 1378,1384-85-9th Cir.1993).

To demonstrate a due process violation, it must be shown there are no permissible inferences to be drawn from the evidence which is of a nature to deny a fair trial(McKinney at 1384). Under a more refined analysis, a due process violation is shown if (1) the balance of the state's case was solely circumstantial, (2) the other crimes evidence was similar to the charged crime, (3) the prosecutor relied on the other crimes evidence at several points during the trial, and (4) the other crimes evidence was "emotionally charged"(Kipp-v-Davis at 957; Garceau at 775-76) In some circumstances, even if there is a permissible inference arising from the evidence, due process may

nevertheless be violated if the jury is additionally invited to draw an inference of propensity(id at 775-76).

1 The 2006 Evidence

The prosecutor in this case argued the 2006 evidence was admissible to prove a common plan and design to commit the charged robberies. The State Court effectively(see footnote four below) found the 2006 evidence was "'irrelevant and, hence, inadmissible" (that is, there were no permissible inferences to be drawn under state law) to prove common plan and design to commit such robberies because (1) common plan evidence is relevant only to prove the defendant engaged in similar criminal (rather than non criminal) conduct in the present case and (2) there was no dispute the conduct in the charged crimes constituted robbery(app C at 12 13; see Cal Evid Code Sections 351, 210[Stating that evidence is "relevant" only if it has a tendency in reason to prove or disprove any disputed fact that is of consequence]; McKinney at 1380[Stating that evidence is irrelevant if it fails to make any fact of consequence more or less probable]). This state law evidentiary finding is binding and non reviewable(Kipp at 955; Estelle-v-McGuire 502 U S 62,67-1991; see Beauchamp-v-McKee 488 Fed.Appx 987 992 6th Cir 2012[Citing Estelle and holding itself bound by state court finding evidence in question was inadmissible]) In addition the State Court at least strongly suggested the 2006 robbery was insufficiently similar to jusitfy admission on common plan(app C at 12).

FOOTNOTE FOUR - Concededly, the Court did not state directly that the 2006

evidence was inadmissible (as it did with the 2011 evidence). However, the import of the Court's opinion as a whole leads inevitably to that conclusion. As there was no dispute on the conduct issue, the Court effectively held no prior crimes evidence was admissible on the point(see app.C at 12). [END FOOTNOTE]

The State Court apparently agreed that the 2006 evidence was not sufficiently similar to the charged crimes to prove identity(app.C at 12) and reasonable jurists could agree. As the State Court noted, there must be a high degree of similarity between prior and charged offenses in order to identify the defendant as the perpetrator(app.C at 11; People-v-Ewodlt 7 C.4th 380,403-1994). Further, the similarities must be distinctive rather than commonplace(id).

Initially, any similarities between the 2006 incident and the charged offenses (an apparent firearm, threats, robberies committed at closing time apparently to avoid contending with customers) were simply too commonplace to constitute a signature identifying Petitioner in the charged offenses. The State Court itself, and the California Supreme Court cases cited by the State Court while discussing the 2006 evidence, hold that such characteristics are not remarkable or probative(app.C at 12 citing People-v-Vines 51 C.4th 830,857-2011[Noting that there is nothing particularly distinctive about an armed robbery of a McDonald's restaurant at closing time and implying that such alone was insufficient to prove identity]).

Further, there are significant and numerous dissimilarities with the 2006 evidence which a reasonable jurist could conclude further destroys any inference of identity. There are at least six significant differences between

the Bandits robbery and the 2006 case. No zipties were used in the 2006 case while the Bandits victim was ziptied(compare RT-485-90 with RT-70,97). Cell phones were taken in 2006 but not from the Bandits victim(compare RT-489 with RT-93-94). The robber threatened to shoot the 2006 victims while the Bandits robber made no such threat(compare RT-487 with RT-98). The 2006 victims were confined in a room while the robber escaped. Not so the Bandits victim(compare RT-486,487 with RT-70-71). The 2006 robbery involved eight or nine victims who had to be rounded up while there was but a single Bandits victim(compare RT-485 with RT-59-70). Finally, the 2006 victims were made to face a wall while the Bandits victim was not(compare RT-486 with RT-59-70).

There are also significant differences between the 2006 robbery and the Cisco's and Al Mulino's robberies. In contrast to the 2006 robber, the robber(s) in the charged offenses appear to have waited until there were only one or two victims to contend with before commencing the robbery(compare RT-137-44 with RT-209-13). The Cisco's and Al Mulino's victims were not made to face a wall(RT-id, id). The 2006 robber did not take money from the victims' wallets as did the Cisco's and Al Mulino's robber(s)(compare RT-490 with RT-143-44,213,245). There were two additional differences with the Cisco's robbery. The 2006 robber took the victims' cell phones with him. Not so at Cisco's(compare RT-489 with RT-216,222). Second, there is no evidence the 2006 robber had the victims' unplug their landline, something that the Cisco's victims were made to do(RT-214,245).

Thus, reasonable jurists could agree the 2006 evidence was irrelevant and thus violated due process.

2. The 2011 Evidence.

The State Court explictly found that, for aforested reasons, the 2011 evidence was not relevant to prove identity or common plan and design(app C at 10,11-12) Those findings are binding in this context. While there was evidence of the use of disguises in the charged offenses and that Petitioer was found, in 2011, in possession of tools (including a crowbar, handcuffs, rope, binoculars and a wig) the prosecutor asserted were a robbery kit, as the State Court noted, the 2011 disguise (the wig) differed in kind from that utilized in the present offenses (hoodie and masks)(app C at 10-11) The same is true of alleged robbery tools which, in the present offenses, consisted solely of zipties used in the Bandits robbery(id) 2011 was over five years prior to the charged offenses. Moreover the use of disguises and tools to facilitate a crime must be regarded as particularly commonplace As pointed out by the State Court with its citation to "People-v-Harvey"(163 C.A 3rd 100,102-1984), shared characteristics that are nevertheless commonplace do not yield a distinctive combination(app.C at 10-11). The foregoing factors, if anything indicate distinct, rather than common, robbery plans.

Reasonable jurists could thus agree the 2011 evidence was irrelevant and thus violated due process.

3 The Remaining Due Process Factors

The 2006 and 2011 evidence was definitely of the sort to deny a fair trial Even the State Court found (at least as to the 2011 evidence) that it was relevant only to prove propensity(app C at 10,12) the very sort of evidence the Ninth Circuit holds violates due process(McKinney at 1384-85) This Court too has found admission of such evidence denied a fair trial(Boyd v-United States 142 U.S. 450,456-58-1892; see also Alcala v-

Woodford 334 F 3rd 862,887-88-9th Cir 2003[Due process violated by admission of irrelevant evidence of defendant's access to knives of the same brand used to commit the charged murder]; Kipp at 957-58[Due process violated by admission of prior crime (murder) when the prosecution case was circumstantial, the prior and charged crimes were the same, the prosecution relied on the evidence in opening argument and repeatedly in summation, and the testimony about the prior murder was emotionally charged])

The prosecution's case against Petitioner was solely circumstantial He was not identified by witnesses in any of the robberies and the physical descriptions were at best generic and at worst simply did not match Petitioner. The Bandits robbery occurred over ten months prior to, and bore little similarity to the Al Mulino's and Cisco s robberies(see below at 30) DNA evidence found at the Bandits scene, although consistent with Petitioner also implicated potentially hundreds of other African-American men(see below at 31-32). The evidence the prosecutor treated as most compelling a cell phone apparently belonging to Petitioner and found near Cisco s obviously did not implicate him in the other two robberies Moreover the phone was found some 40 feet away and around a corner from the Cisco s door where the robber entered(RT 199) No evidence was presented that Petitioner rather than someone else dropped the phone Another person's DNA was also on the phone(RT 285-86,288-92,526 29) and there was room for doubting the phone was even dropped at or near the time of the robbery(see RT 217 256; see footnote five below)

FOOTNOTE FIVE A more detailed description of the weaknesses in the

prosecution case is set forth below. [END FOOTNOTE]

Reasonable jurists could agree that, in light of the aforementioned weaknesses in the prosecution case and the identity between the charged and uncharged conduct, there is a significant possibility jurors relied on a propensity inference. Indeed, a jury instruction(see claim three) and the prosecutor invited such an inference as to the 2011 evidence(RT-681,688) The 2011 evidence thus alone violated due process As for the 2006 evidence, the evidence was simply not probative on any relevant issue thus leaving only a propensity inference(see People v-Ewoldt at 406)

Reasonable jurists could agree the priors evidence was emotionally charged Unlike the charged offenses, which involved only one or three victims, the 2006 robbery was a full takeover robbery in which eight or nine people were taken hostage, all of their cell phones taken and held at gunpoint (albeit possibly with a pellet gun) and threatened with death(RT-484-89,491). The 2011 evidence was even more inflammatory as it allowed jurors to imagine Petitioner had committed robberies of unknown number and to imagine how they were committed Jurors likely imagined Petitioner trolling the streets with binoculars for robbery targets, binding them with the implements found (features not present in the charged offenses) and, worse menacing or even injuring victims with a crowbar and actual firearm as compared to a possible pellet gun in the 2006 and the charged offenses(see RT 491) Reasonable jurists might find these circumstances analogous to those in McKinney' wherein due process was deemed violated by the admission of irrelevant knife possession evidence which offered the image of a defendant who was preoccupied with knives, sat alone sharpening knives and occasionally

venturing out with a knife strapped to his body(McKinney at 1385). The image painted of Petitioner is markedly worse Notable also is that, like the knives involved in "McKinney," which were irrelevant because not used in the charged crime, the alleged robbery implements from 2011 had no connection to the charged robberies in this case.

Reasonable jurists may thus agree that due process was violated

VI COULD REASONABLE JURISTS AGREE THE STATE COURT'S REJECTION OF CLAIM THREE WAS CONTRARY TO OR AN UNREASONABLE APPLICATION OF SUPREME COURT PRECEDENT OR INVOLVED AN UNREASONABLE DETERMINATION OF THE FACTS?

On direct appeal the State Court agreed that CALCRIM 375, an anti-propensity instruction was erroneous because, by omitting reference to the 2011 evidence the instruction invited the jury to infer propensity from that evidence(app C at 14; app D at 64 67) Petitioner asserted this claim in the District Court(app G at 3-5; see footnote six below) As to the federal constitutional claim, the State Court stated that constitutional error is shown "only if those errors lowered the prosecution's burden of proof and, as 375 had not lowered the burden no due process violation was shown(app C at 16 fn 5) Reasonable jurists could agree this reasoning contravened AEDPA

FOOTNOTE SIX The District Court declined to resolve the due process issue and did not address whether the State Court had applied the relevant due process precedents unreasonably(app B at 18:6-10) [END FOOTNOTE]

Due process is violated if an erroneous or ambiguous instruction so infected the entire trial as to violate due process(Estelle-v-McGuire 502 U.S. 62,72-1991), that is, when there is a reasonable likelihood the jury applied the instruction in an unconstitutional manner(id).

In "McGuire," this Court made clear that, contrary to the State Court's conclusion, lowering the burden of proof is not the "only" way an instruction may violate due process. "McGuire" found that the instruction therein did not violate due process only after concluding (1) that the instruction did not lower the burden of proof and (2) that the instruction did not invite a propensity inference(McGuire at 71,74-75). This mode of analysis demonstrates that invitation to a propensity inference might well have sufficed to demonstrate a due process violation(see footnote seven below). Thus, reasonable jurists in the Ninth Circuit have found due process was violated by an instruction inviting such an inference(Garceau at 775-76).

FOOTNOTE SEVEN - The Court declined to decide whether reliance on a propensity inference itself violates due process. [END FOOTNOTE]

The State Court thus relied on a rule "contrary to" that in "McGuire" regarding whether an instruction may violate due process other than by lowering the burden of proof(Williams-v-Taylor 529 U S 362,405-2000) At the least, it may reasonably be concluded the State Court conclusion was unreasonable in light of McGuire "(Williams at 407) The State Court acknowledged(app. C at 14), but failed to adjudicate the due process implications of, the fact 375 authorized a propensity inference Under McGuire a court must examine the "entire trial record"(McGuire at 72)

The State Court also relied on an unreasonable determination of the facts(§2254(d)(2)) Such occurs when the state court ignores evidence that supports a petitioner's claim(Taylor-v-Maddox 366 F 3rd 992,1001-9th Cir 2003) The State Court herein ignored not only the propensity aspect of CALCRIM 375, but also the fact that Defense Counsel reinforced that aspect in summation by himself omitting mention of the 2011 evidence from his anti propensity argument(RT-697-98). The Court ignored also other relevant factors such as the similarity between the prior and charged offenses (robbery related) and the circumstantial nature of the prosecution's case(see Garceau at 775)

As the State Court contravened AEDPA reasonable jurists could agree de novo review is authorized(Kipp at 955; see footnote eight below)

FOOTNOTE EIGHT For the reasons stated above(at 11) reasonable jurists could disagree with the District Court s conclusion that the State Court s adjudication of the Chapman issue justifies deferential review of the claim of constitutional error in the first instance [END FOOTNOTE]

Reasonable jurists would very likely agree due process was violated under Ninth Circuit precedent. "Garceau-v-Woodford" found that an instruction similar to that herein in that it invited reliance on propensity violated due process under the McGuire reasonable likelihood test and under McKinney v-Rees and did so notwithstanding that there was a valid, non propensity, inference to be drawn from the prior crime evidence Garceau relied on the multi factor test cited above(at 16-17) The same

circumstances warrant the same result in this case Even the State Court acknowledged CALCRIM 375 had the effect of authorizing the jury to draw a propensity inference from the 2011 evidence(app C at 14-15 citing Boyd v- United States 142 U S 450-1892) and found it "reasonably likely" the jury applied the instruction in this way(id at 14; McGuire at 72) Boyd," too, found an anti-propensity instruction which, like that herein, omitted reference to some prior criminal incidents. denied a fair trial by allowing reliance on evidence of the defendants bad character(Boyd at 458) Although the Boyd decision was not constitutionally based, it was decided by reasonable jurists who likely would have found due process had been violated had the question been presented.

As noted, the 2011 evidence was inflammatory, similar to the charged offenses in a circumstantial evidence case and relied on repeatedly by the prosecutor As in Garceau (at 775 76) Counsel in this case reinforced that the jury was allowed to draw a propensity inference(RT 697 98) Due process was thus violated

VII. WAS THE STATE COURT DECISION CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, CHAPMAN-V-CALIFORNIA AND ITS PROGENY OR AN UNREASONABLE DETERMINATION OF THE FACTS?

Under "Chapman-v-California", constitutional error warrants relief unless the error is proven harmless beyond a reasonable doubt(id at 24). Notably, the error confronted in "Chapman" itself, an instruction inviting a jury to improperly rely on evidence (in that case, the defendant s silence), is identical to that herein In concluding the error was not harmless, "Chapman" relied primarily on the prosecutor's repeatedly urging reliance on the improper inference and on the court's instruction authorizing the improper inference(id at 24-25). Reasonable jurists could agree the State Court decision herein was contrary to "Chapman" in this sense(see Williams-v-Taylor at 362[A decision is contrary to Supreme Court precedent when it confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to that precedent])

Contrary to "Chapman's" analysis, the State Court herein ignored in its analysis the prosecutor's repeated reliance on the 2006 and 2011 evidence As to the 2011 evidence, the prosecutor capitalized on CALCRIM 375 and twice argued that a propensity inference should be drawn from the evidence(RT 681,688) The State Court also ignored that Defense Counsel further perpetuated the prejudicial implication of 375 by arguing the instruction applied only to the 2006 evidence(RT 697 98) The State Court also ignored that 375 itself impliedly authorized and encouraged reliance on propensity as to the 2011 evidence. Reasonable jurists could thus find the 2011 evidence alone was prejudicial under "Chapman"(see Anderson-v-Nelson 390 U S 523,523

24-1968[Reliance on improper inference cannot be harmless where the prosecutor s comments asserting the inference are extensive, the inference is stressed to the jury as a basis of conviction, and there is evidence which supported acquittal]).

As to the 2006 evidence, the prosecutor cited it no fewer than ten times Although the prosecutor argued (during five of the ten mentions) that the relevance of the evidence was to common plan or identity, the evidence was simply irrelevant on those points (as shown above) All that was left was a propensity inference(see footnote nine below; Sullivan v-Louisiana 508 U S 275,279 1993[Stating that in harmless error analysis the court must address the effect the alleged errors had on the verdict])

FOOTNOTE NINE - The anti-propensity instruction was of little aid even as to the 2006 evidence The instruction told the jury the evidence was relevant to prove common plan or identity(RT 666 67) However the instruction did not describe the level of similarity necessary to render the evidence relevant on those points or that common plan was relevant only to prove a point beyond dispute That the charged conduct constituted robbery [END FOOTNOTE]

It may also reasonably be concluded the State Court s disregard of Counsels arguments and 375 was an unreasonable application of Chapman and constituted an unreasonable determination of the facts by ignoring relevant evidence(Williams at 405; §2254(d)(2); Taylor v Maddox 366 F 3rd 992,1001 9th Cir 2004)

FOOTNOTE TEN Despite being raised in Petitioner s reply and objections(app G

at 5 6), the District Court did not address the Court s application of "Chapman [END FOOTNOTE]

Reasonable jurists could agree the State Court s application of "Chapman was unreasonable for another reason. While citing the evidence it found supportive of the verdicts, the Court ignored facts undermining the probative value of that evidence(Taylor-v-Maddox at 1001; Fahy-v-Connecticut 375 U S 85,86-87-1963[Noting that the concern, in harmless error analysis, is not whether there was sufficient evidence absent the erroneously admitted evidence but whether the error contributed to the verdict]).

1. Misstatement of the Record.

In finding the errors harmless, the State Court cited the alleged similarities between the charged offenses as evidence they were committed by the same person(app C at 16) In so doing, the Court again relied on an unreasonable determination of the facts both because their findings were unsupported by sufficient evidence and plainly misapprehended or misstated the record on material factual issues(Taylor at 999 1001)

For example the perpetrator in each offense did not as asserted by the State Court, instruct victims to wait until he left before they called for help(app C at 16) In the Bandits robbery, the robber simply ziptied the victim and left(RT-70-71) The Al Mulino s robber locked the victims in a restroom and told them not to come out for 30 minutes(RT 144) The Cisco's robber told employees he would shoot them if they came out of the office or tried to call police(RT-214-15)

The State Court states that all three robberies were perpetrated by a

dark-skinned Hispanic or African-American man standing between 5' 8 and 6' 2 tall(app C at 16) Initially, the Court's attempt to characterize differing descriptions of race and height at each of the robberies as somehow pointing to the same perpetrator is a serious misapprehension of the record(Taylor at 1001)

Moreover the Court oversimplifies and even misstates testimony describing the robbers(Taylor at 999 1001) While Detective Sullivan claimed that victim Engle had identified the suspect as Black(RT 384), the State Court ignored that the detective s claim was seriously undermined by repeated statements from Engle himself, including on the stand, that he could not determine the race of the perpetrator(RT 62,858 86 384 557) Similarly, an officer s report indicating an Al Mulino s victim identified the perpetrator as Hispanic(RT 625) (which in any event would exclude Petitioner who is African American) is contradicted by the fact the victim could not state the race of the perpetrator either on the stand or earlier to a police officer(RT 145,156,157) Finally, while the Cisco s victims Barry and Newhouse could be said to have identified the robber as African American(RT 211 251,263 64) a third victim, and even Barry indicated that the robber could have been Hispanic(RT 236 270)

2 Dissimilarities Between the Three Sets of Charged Offenses

The State Court ignored significant differences between the three robbery incidents which jurors could have found pointed to the robberies being committed by different perpetrators. The Bandits robber used zipties(RT 70 97) which were not used in the other two robberies(RT 387) The Bandits robber did not confine his victim in a room while he made his escape(RT

71,88) as happened in the other two robberies(RT 144,214 15) The Bandits victim s cell phone was not taken and he was not made to unplug the landline(RT 93 94,388) both of which were features of the Al Mulino s and Cisco s robberies(RT 160,214,245) Further the Al Mulino s robber took and kept the victim s cell phone(RT 388) while the Cisco s robber left the victims cell phones behind after taking them, apparently intending only to prevent them from calling police(RT 214,216 222,245) The Bandits robber apparently did not take money from the victim's wallet as was done in the other two robberies(RT 143 44 213,245) The robber did not threaten the Bandits victim with death(RT 98) while the Al Mulino s and Cisco s robber(s) threatened to shoot the victims(RT 213 214) Finally 10 months separated the Bandits robbery from the other two robberies(RT 59 143 209 399)

The State Court thus ignored substantial evidence the Bandits robbery in particular was committed by a different perpetrator The Court also failed to note the differences between the Cisco s and Al Mulino s robberies

Analogous (albeit in a slightly different but related context) is Kipp v Davis in which the State Court had concluded there was no due process violation from the admission of prior crimes evidence because the prior crimes and the charged crime allegedly shared multiple similarities(971 F 3rd at 950 51) Kipp found the State Court s failure to consider multiple critical differences between the prior and charged offenses which defeated an inference of common plan was an unreasonable determination of the facts under subdivision (d)(2)(id at 952 955)

3 The DNA Evidence

The State Court placed particular reliance on its finding that

Petitioner's DNA was found on zipties used in the Bandits robbery(app C at 17) However, the evidence did not support the conclusion the DNA belonged to Petitioner(Taylor)

The prosecutor presented evidence merely that the DNA was consistent with Petitioner s (and a lot of others) DNA A computer analysis determined that it was 246 times more probable that the ziptie DNA belonged to Petitioner rather than an unrelated African American person(RT 505) However that claim of probability sounds downright irrelevant when one considers as the State Court failed to other DNA results For example regarding DNA found on the cell phone found near Cisco s the computer determined that a match to Petitioner was 13 1 quintillion times more probable(RT 503) a result characterized as a match to Petitioner(RT 526 27) The expert did not characterize the DNA on the zipties as a match to Petitioner(RT 526 27) The expert testified the chance of error with the ziptie DNA is 1 in 3,4300 or in other words that one in every 3,430 African Americans randomly selected from their population in the United States could be matched by random chance despite not in fact having deposited DNA on the ziptie(RT 506 07) This means that in a sampling of 30,000 African Americans 10 of them could be falsely matched to the ziptie sample(RT 533 34) Assuming there are several thousand African Americans just in Ventura County the stated and possible error rates severely undermined the probative value of the DNA result The State Court s statement that the DNA was Petitioner s was thus unsupported or at the least undermined by the above evidence not considered by the Court(Taylor)

4 The Cell Tower Evidence

The State Court s conclusion that cell tower evidence put Petitioner

near the location of all three robberies(app.C at 16) is an unreasonable determination of the facts or so a reasonable jurist could conclude. There were no cell tower pings for Petitioner's phone in Thousand Oaks at or near the time of the Al Mulino's 10:59 p.m. robbery(RT-432,444). Indeed, pings from the phone occurred almost two hours earlier and placed the phone outside of Thousand Oaks(RT-464-65; see app.E [cell tower map]).

As for the Bandits robbery, it cannot be said precisely where Petitioner's phone was as tower records gave the precise location of the tower rather than the phone(RT-461). Although the phone pinged on a tower in Thousand Oaks, it was not the tower that covered the location where the Bandits is located(RT-430,457-59) Moreover, no evidence was presented regarding the range of the Thousand Oaks tower(see RT-479) or the size of Thousand Oaks in miles. Without this information the State Court s conclusion Petitioner's phone was near Bandits at the relevant time is unsupported. The State Court also omits mention of the fact the Bandits ping occurred almost two hours prior to the robbery(RT-425,429-30,457).

Critically, the State Court also ignored evidence that Petitioner sometimes worked in Thousand Oaks and possibly at all hours of the day(RT-599,601) His wife also worked in Ventura County(RT 573) Both facts could have explained Petitioner's presence in that area the days of the robberies(see RT-426,427-28[Showing Petitioner s phone pinging in Ventura County on days other than those of the robberies]).

Reasonable jurists could agree the State Court's disregard of virtually all of the above-cited evidence renders its determination regarding the cell tower evidence unreasonable.

5 The Cell Phone Found Near Cisco s

The State Court placed particular reliance on the presence of a cell phone (which Petitioner had apparently handled) near Cisco's after the robbery(app C at 17) while ignoring that no evidence was presented that Petitioner was himself in possession of the phone or that the phone was even dropped at the time of the robbery Moreover the State Court ignored evidence that there was a mixture of DNA on the phone meaning someone else had been handling it and could have been at the time of the robbery(RT 285 86,288 92,526 29) As to when the phone was dropped, employees testified merely that they had not seen the phone an hour or half hour before the robbery(RT 217 256) and no evidence was presented the employees had looked precisely where the cell phone was later found(see RT 257 58) Newhouse s testimony that he would have seen the phone had it been there (apparently prior to the robbery) is speculative absent evidence he knew precisely where the phone was found Notable too, is that the phone was found some 40 feet away and around the corner from the door by which the robber entered the Cisco s(RT 199; see app.F [Cisco's diagram]).

6. The Effect of the Priors Evidence on the Jury

The State Court found it unlikely that jurors passions were inflamed by the uncharged offenses(app C at 17) However reasonable jurists could agree that jurors would not have to be inflamed in order to draw a propensity inference from the evidence. Citing evidence the Bandits robber had admitted to committing robbery before(id) the Court apparently reasoned the 2006 robbery was not a revelation to the jury That reasoning is circular The jury could obviously have relied on a propensity inference arising from the

2006 evidence to find Petitioner both committed the Bandits robbery and thus made the alleged admission. The Court also cited the not true finding on the charged firearm allegations as demonstrating jurors were not swayed by the 2011 gun possession evidence(app.C at 17). The Court ignored the prejudice flowing from the implication Petitioner was committing robberies (whether or not with a firearm) in 2011.

The Court also ignored the prejudicial impact of the 2011 evidence(see above at 22 ; Taylor).

Reasonable jurists may thus agree the State Court s Chapman analysis contravened AEDPA.

VIII. DID THE ERRORS HAVE A SUBSTANTIAL AND INJURIOUS EFFECT ON THE VERDICTS?

Reasonable jurists could disagree with the District Court s conclusion there was no substantial and injurious effect(app B at 14 citing Brecht v- Abrahamson 507 US S 619 637 1993) In so concluding the District Court focused on allegedly substantial evidence supporting the verdicts(app.B at 20-21) while ignoring factors weakening the incriminating value of that evidence which, absent the errors, may have led jurors to acquit Reasonable jurists have concluded that such weaknesses are relevant under 'Brecht and supported findings of prejudice(McKinney at 1386; Garceau at 777; Kipp at 959) Reasonable jurists could agree that, when the holes in the prosecution case are considered, the errors impacted the verdicts.

The District Court first cites the cell phone found near the Cisco's(app.B at 20:3-5). However, the robbery occurred inside of Cisco's

while the phone was found some distance away outside of the restaurant. Nor was there evidence it was dropped at the time of the robbery or by Petitioner

The District Court also cites an alleged DNA match to Petitioner found on zipties at Al Mulino's(app.B at 9). As noted, the prosecution expert did not describe the ziptie DNA as a match to Petitioner as the DNA was merely consistent with Petitioner's profile as well as the profile of many others There is thus a substantial likelihood the DNA evidence would not have carried the day absent the errors

The District Court also cites data from Petitioner's cell phone and notes that the phone was turned off at the time of each of the robberies(app.B at 20 10 26) Such is hardly probative given that the phone was apparently turned off on some Sundays not coinciding with the robberies(see RT-426,428-31,433-34). Moreover, the times the phone was off lasted over two or three hours each(RT-425,432,433-34), way longer than necessary for someone to commit the relatively brief robberies(see RT-59-71,142-44)

The District Court notes the nights of the robberies were some of the few evenings when Petitioner's cell phone was in Ventura County(app.B at 20:18-19). Initially, the passage implies (and the evidence demonstrates - RT 426,427 28) that Petitioner's phone was in Ventura County on nights there were no robberies Both Petitioner and his wife had legitimate work-related reasons for being in Ventura County(RT-573,599,601). As noted, there were many factors undermining the probative value of the cell phone evidence(see above at 32-33)

In support of a claim of similarity, the District Court states that "the victims [from each robbery] understood from the perpetrator's words and actions that they would be shot if they called for help before the perpetrator left"(app.B at 21 fn.10). However, no threat of any kind, express or implied, was made to the Bandits victim. The perpetrator simply ziptied him and left(RT-70-71). The robber's or robbers' warnings during the other two robberies are of the type so commonplace as to be irrelevant(RT-144,214-15).

The District Court notes jurors were instructed on the burden of proof and to consider each count separately(app.B at 21:10-23). However, jurors following those instructions could nevertheless have still relied on an improper propensity inference.

The District Court cites the differences between the prior conduct and the current charges as demonstrating admission of the prior conduct had little impact(app.B at 22:23-28 to 23:1-3). The Court overlooks that the prosecutor repeatedly urged reliance on the prior conduct as proof of Petitioner's commission of the charged offenses(RT-677-78,679,680,681,686,688,689,728,729-30) and explicitly urged a propensity inference as to the 2011 evidence(RT-681,688). Notably, prior robbery conduct need not be similar in commission to the charged offenses in order to suggest a criminal propensity. Reasonable jurists have concluded arguments such as the prosecutor's increase the likelihood a jury will misuse evidence(Chapman at 24; Kipp at 957-58).

Reasonable jurists could agree that the evidence related to each charged offense was weak enough to render it probable the jury relied on propensity.

In the Cisco's robbery, Petitioner was not identified and the descriptions given by the victims were generic at best(RT-211,251-52). Witnesses even suggested the robber could have been a different race than Petitioner(RT-236,270). As for the Bandits robbery, the victim, again, did not identify Petitioner and could not even say the robber was African-American(RT-62,85,86). Nor was Petitioner identified in the Al Mulino's robbery and a victim was uncertain of the perpetrator's race(RT-145-46,157) and may have even thought he was Hispanic(RT-157) which Petitioner is not.

In sum, there was plenty of room to doubt Petitioner committed any of the robberies and even that all of the robberies were committed by the same person. There is thus a reasonable probability of a substantial effect on the verdicts, that is, that the jury filled in the gaps in the evidence with a propensity inference, particularly given the prosecutor's argument on the matter.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Andre Jamal Jones

Date: Nov. 7, 2024

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