No. _____

In the Supreme Court of the United States

ERIC DAVID MARRUFO,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the Petitioner was denied his constitutional right to an impartial jury and to a fair trial when the District Court:

   a. After denying the Petitioner's motion for mistrial, did not instruct the jury, sua sponte, that the testimony about Petitioner being a prisoner during police interviews was neither relevant nor admissible evidence and that the jury cannot consider during its deliberations that Petitioner had been in prison;

   b. Denied the Petitioner's motion to conduct an evidentiary hearing and to subpoena jurors for their testimony pursuant to *Rule 606(b)(2)(A). Federal Rules of Evidence* when jurors disclosed to defense counsel that the Petitioner's prisoner status was discussed during deliberations;

      i. Ruled that the inadmissible testimony of Detective Garcia about the Petitioner's prisoner status was not "extraneous" evidence for the purpose of Rule 606(b)(2)(A) because it was evidence presented during trial;

   c. Conducted an invalid and unreliable "harmless error" analysis

B. Did the Ninth Circuit rule contrary to this Court's definition of "extraneous" when it held that the inadmissible testimony about the Petitioner's prisoner status was not "extraneous" evidence.

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PETITION FOR WRIT OF CERTIORARI

Petitioner ERIC DAVID MARRUFO respectfully petitions this Court for a writ of certiorari, and review of the decision of the United States Court of Appeals for the Ninth Circuit, issued on February 12, 2025, affirming the rulings of the United States District Court for the District of Arizona regarding the District Court's failure 1) to provide, sua sponte, a curative instruction precluding the jury from considering Petitioner's prisoner status during deliberations, and 2) to hold an evidentiary hearing and take the testimony of jurors regarding their discussions about Petitioner's prisoner status during deliberations, within the constraints of *Rule 606(b)(2)(A), Federal Rules of Evidence* and as provided by this Court.

Certiorari should be granted in this matter because the decision of the United States Court of Appeals for the Ninth Circuit, in its own decision, and in upholding rulings of the District Court, involves important questions of law that were wrongfully decided, infringing on the Petitioner's due process right to a fair trial and to a trial by an impartial jury. The Ninth Circuit's ruling that the inadmissible testimony regarding the Petitioner's prisoner status, wholly unrelated to this case, was not "extraneous" evidence for the purpose of Rule 606(b)(2)(A), Fed.R.Evid. is in

conflict with Rule 404(b), Fed.R.Evid., that is used to preclude only *extrinsic* evidence. The Ninth Circuit's Memorandum decision is tantamount to a holding that otherwise inadmissible evidence of the prior incarceration of a defendant becomes intrinsic evidence when it is improvidently, or intentionally (which can rarely be proven) mentioned by the Government's witness during their testimony.

This interpretation of the term "extraneous" has detrimentally affected the Petitioner's due process right to a fair trial by an impartial jury by precluding the Petitioner's use of Rule 606(b)(2)(A), Fed.R.Evid. to prove the jury's deliberative discussions regarding his prior inmate status, in a he said / she said case, and where the alleged victims did not agree on the facts purported to support the allegations. This is especially important because the inadmissible testimony was never stricken and the jury was not instructed that it could not consider that evidence during its deliberations, thus, the jurors freely discussed the Petitioner's inmate status during deliberations, likely because they believed it was permissible to do so.

The evidence against the Petitioner consisted of the testimonies of his two daughters, each of which conflicted with the

other's. Information about the Petitioner having been in prison likely had a negative influence on the jury's verdicts.

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below. The opinion of the United States Court of Appeals appears herein at Appendix A and is unpublished. The Ninth Circuit's order denying Rehearing En Banc appears herein as Appendix B. The United States District Court's Order denying the Petitioner's Motion for New Trial and Motion for Evidentiary Hearing and to Subpoena Jurors, appears in Appendix - 1, pp. 96-105.

STATEMENT OF JURISDICTION

On February 12, 2025, the United States Court of Appeals for the Ninth Circuit entered a Memorandum decision from which relief is sought. Doc. 56.1. (Appendix A). A Petition for Rehearing En Banc was filed March 12, 2025, Doc. 59.1, and was denied April 24, 2025. Doc. 62.1. (Appendix B). The Mandate of the United States Court of Appeals was subsequently issued on May 2, 2025. Doc. 63.1. (Appendix C). Petitioner requests review of the Ninth Circuit's Memorandum Decision pursuant to 28 USC §1254(1).

The United State's District Court had jurisdiction over this case pursuant to 18 U.S.C. § 3231, and the Ninth Circuit Court of

Appeals had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1291.

The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for a writ of certiorari within ninety days of the Ninth Circuit's denial of his Petition for Rehearing En Banc on April 24, 2025.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

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

RULES

Rule 606, Fed.R.Evid.

Rule 606. Juror's Competency as a Witness

(a) AT THE TRIAL. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) DURING AN INQUIRY INTO THE VALIDITY OF A VERDICT OR INDICTMENT.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

> (A) extraneous prejudicial information was improperly
> brought to the jury's attention;
>
> (B) an outside influence was improperly brought to bear
> on any juror; or
>
> (C) a mistake was made in entering the verdict on the verdict form.

Rule 404, Fed.R.Evid.

Rule 404. Character Evidence; Other Crimes, Wrongs, or Acts

(a) CHARACTER EVIDENCE.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's

pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) OTHER CRIMES, WRONGS, OR ACTS.

(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

STATEMENT OF THE CASE

1. The Petitioner here seeks relief from the February 12, 2025 Memorandum Decision of the Ninth Circuit Court of Appeals (Doc. 56.1) (Appendix A), upholding the judgment of guilt and sentence imposed by the United States District Court for the District of Arizona, the Hon. Cindy K. Jorgenson presiding, (Doc. 445; (App-1, pp. 90-95), and from the District Court's rulings on the Petitioner's motions made during and after trial. (Docs. 431), (App-1, pp. 96-105).

2. On June 9th, 2021, the Petitioner was charged by Superseding Indictment with Aggravated Sexual Abuse of a Child in violation of 18 U.S.C. § 2241(c), 2246(2) and 1153 as to victim EM, Counts 1, 2 and 4; and Counts 3 and 5 as to victim RM, and, Abusive Sexual Contact of a Child in violation of 18 U.S.C. § 2244(a)(5), 2246(3) and 1153 as to victim EM, Count 6. (Doc. 248). (App-2, pp. 526-528).

3. The Petitioner twice stood trial for these charges; the first trial ending in a mistrial the result of a deadlocked jury. (Doc. 305). (App-2, p. 525).

4. The Petitioner was convicted of all charges in a second trial by jury. Docs. 389, 390, 391, 392, 393 and 394. (App-2, pp. 512-517). The difference between the first and second trials was the

testimony of Retired Pascua Yaqui Detective (Det.) Jacob Garcia.[1] Det. Garcia participated in two investigative interviews of the Petitioner while he was incarcerated in the Arizona State prison. He accompanied FBI Agent Brianna Grant who was the active and primary during the interviews, and solely provided the content of the prison interviews, without mentioning anything about the Petitioner being imprisoned at the time of the interviews.

5. The Government called Det. Garcia to testify in the second trial.[2] Questioning regarding the Petitioner's interviews was as follows:

> Q. Okay. Now, I don't want to get into the specifics of the first interview, Detective -- sorry. Mr. Garcia. That's going to be a tough habit for me to break. I don't want to get too much into the details of the first interview, but is it fair to say that the defendant denied sexually abusing his daughters in the first interview?
>
> A. Yes.
>
> Q. How would you describe his demeanor in the first interview?
>
> A. He was pretty positive. He talked about things that he was doing, ***how he was helping other inmates get along.***

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[1] Petitioner is a Native American and each of the offenses charged were alleged to have been committed within the confines of the Pascua Yaqui Tribe, Indian Country. Doc. 248. (App-2, pp. 526-528).

2 Only Agent Grant testified in the first trial. Agent Grant was also called to testify in the second trial about the Petitioner's statements made during both interviews.

R.T. 8/16/22, p. 236, ll. 13-23. (Doc. 409). (App-2, p. 493).

6. Defense counsel requested a sidebar, but the District Court allowed the Government to finish its questioning before addressing the objection. *Id.,* p. 236, l. 25 – p. 237, l. 1. (Doc. 409). (App-2, pp. 493-494).

7. Defense counsel moved for a mistrial. *Id.,* p. 239, ll. 12-13. (Doc. 409). (App-2, p. 496). A written motion for mistrial was also filed, arguing the improper admission of Rule 404(b)(1), Fed.R.Evid. (Doc. 372), (App-2, pp. 518-524). Government counsel argued that Det. Garcia's inadmissible testimony about the Petitioner being incarcerated at the time of the interviews was:

> "*really just a slip of the tongue*. I really don't think that there was any intent by -- he's a retired detective. He's got lots of time. *He knows he's not supposed to say that*, but I really don't think that he ever intended to slip one past anybody to -- or, any nefarious intent to let the jury know the defendant was an inmate. I think -- I think he made a mistake, your Honor. I don't think this rises to the level of a mistrial, though.

Id., p. 242, ll. 17-24. (Doc. 409). (App-2, p. 499).

8 The District Court asked defense counsel to think about whether he wanted a cautionary instruction given to the jury or if counsel preferred that nothing be mentioned. R.T. 8/16/22, pp. 244, ll. 4-6. (Doc. 409). (App-2, p. 501).

Defense counsel stated:

> MR. JACOBS: The Court puts me in a position of advocating for a remedy to which something that I think no remedy —- I can't think of a remedy that exists. So I don't know what to suggest because this is so serious. It's not just a slip. It was a — I mean, it was a whole statement. You know, Hey, he's getting along with the other inmates. I can't conceive of unringing that bell with any possible -- what would you tell them? Oh, the agent made a statement and you should just disregard.

Id., pp. 244, ll. 4-9, 16-24. (Doc. 409). (App-2, p. 501).

9. The District Court heard additional argument regarding Det. Garcia's improper testimony. R.T. 8/17/2022, pp. 19-24. (Doc. 418). (App-1, pp. 212-217), and asked defense counsel:

> THE COURT: Did we cover that issue of whether you wanted me to -- I think we did a cautionary instruction, **you decided it was better to leave it alone**? Was that a fair characterization?
>
> MR. JACOBS: **I didn't agree to any such thing.** What I told the Court was I saw no possible remedy.
>
> THE COURT: **Including giving them a cautionary instruction**?
>
> MR. JACOBS: Correct. And the Court did ask me, and I said, Judge, **I don't have anything in mind that fixes this other than a mistrial.**

R.T. 8/17/2022, p. 21, ll. 4-14. (Doc. 418). (App-1, p. 214).

10. Relying primarily upon *U.S. v. Yarbrough*, 852 F.2d 1522 (9th Cir. 1988) the District Court denied the Petitioner's motion for mistrial. R.T. 8/17/2022, p. 24. (Doc. 418). (App-1, p. 217).

11. The District Court did not strike the inadmissible testimony of Det. Garcia, and it gave no cautionary instruction. R.T. 8/19/2022, pp. 3-13; 68-72. (Doc. 419). (App-1, pp. 115-125, 180-184). The jury was instructed, however:

> Because you must base your verdict *only on the evidence received in the case and on these instructions*, I remind you that you must not be exposed to any other information about the case or to the issues it involves. *Except for discussing the case with your fellow jurors during your deliberations*, do not communicate with anyone in any way, and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it.

R.T. 8/19/22, p. 68, l. 24 – p. 69, l. 6. Doc. 419. (App-1, pp. 180-181).

12. Regarding the Petitioner's prior convictions, the District Court instructed:

> You have heard evidence that the defendant has previously been convicted of a crime. You may consider that evidence only as it may affect the defendant's believability as a witness. You may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial.

R.T. 8/19/22, p. 8, ll. 14-19. Doc. 419. (App-1, p. 120).

13. Each of the Petitioner's daughters, Erica and Rosalinda (Rosa) testified in the second trial. Their testimony was not materially different from their testimony in the first trial. R.T. 8/16/2022, pp. 50-114; pp. 128-169. (Doc. 409). (App-2).

14. Erica testified as follows:

> The Sex acts by her father took place between 8/1/2006 and 8/1/2008. Reporter's Transcript (R.T.) 8/16/2022, p. 56, (Doc. 409). (App-2, p. 313).
>
> She was age 6 when the sexual abuse started. R.T. 8/16/2022, p. 55, (Doc. 409). (App-2, p. 312).
>
> **No one else was around**, just her and the Petitioner – her father raped her once. R.T. 8/16/2022, p. 57, (Doc. 409). (App-2, p. 314).
>
> **No one else was with her, her siblings were in the living room**. R.T. 8/16/2022, p. 58, (Doc. 409). (App-2, p. 315).
>
> **No one found out about the rape**. R.T. 8/16/2022, p. 65, (Doc. 409). (App-2, p. 322).
>
> All sex acts occurred at night. R.T. 8/16/2022, pp. 70/73. (Doc. 409). (App-2, pp. 327, 330).
>
> Erica never told anyone until 2015. R.T. 8/16/2022, p. 77, (Doc. 409). (App-2, p. 334).
>
> **Erica didn't want Joseph (her younger brother) or Rosa to find out – she was trying to protect them**. R.T. 8/16/2022, p. 63, (Doc. 409). (App-2, p. 320).

15. Rosa testified:

> The Petitioner engaged in sex acts with her more than once. This happened on a regular basis from August 2006

through August 2008. R.T. 8/16/2022, p. 133, (Doc. 409). (App-2, p. 390).

The first act occurred in the living room with both her and Erica. Rosa was in kindergarten at the time. R.T. 8/16/2022, p. 133-134, (Doc. 409). (App-2, pp. 390-391).

She was age 5 when she started kindergarten. R.T. 8/16/2022, p. 140, (Doc. 409). (App-2, p. 397).

The Petitioner put his penis in Erica's mouth. R.T. 8/16/2022, p. 135, (Doc. 409). (App-2, p. 392).

Erica and Rosa took turns putting the Petitioner's penis in their mouths. Erica told Rosa that she (Rosa) was supposed to lick the white stuff when he was done. R.T. 8/16/2022, p. 136, (Doc. 409). (App-2, p. 393).

On other occasions the Petitioner would instruct them on what he wanted them to do. R.T. 8/16/2022, p. 139, (Doc. 409). (App-2, p. 396).

Rosa was in the first grade the last time it happened. R.T. 8/16/2022, p. 140, (Doc. 409). (App-2, p. 397).

On one occasion, someone approached the door while they were performing oral sex on the Petitioner and he told them to go into their rooms, to get dressed, stay in there for a little bit, then come out. R.T. 8/16/2022, p. 141, (Doc. 409). (App-2, p. 398).

They both would have sex with the Petitioner in his bedroom on his bed, when the Petitioner would put his fingers into her vagina. They both would be laying down. R.T. 8/16/2022, p. 142, (Doc. 409). (App-2, p. 399).

Erica was never in the room when the Petitioner would insert his fingers into her. R.T. 8/16/2022, p. 145, (Doc. 409). (App-2, p. 402).

Erica was present on some occasions when he would put his penis in both of their mouths. R.T. 8/16/2022, p. 145, (Doc. 409). (App-2, p. 402).

The Petitioner had sex with both of them a few times a month. R.T. 8/16/2022, p. 163, (Doc. 409). (App-2, p. 420).

16. The Government argued in closing: "Like I said before, this case comes down to credibility of witnesses. Assess their credibility." R.T. 8/19/22, p. 68, ll. 16-17. Doc. 419 (App-1, p. 180).

17. The jury returned verdicts of guilty on all counts. (Docs. 389-394). (App-2, pp. 512-517)

18. After trial, the Government's counsel and defense counsel spoke with jurors in separate clusters. Two of the jurors with whom the undersigned spoke, stated that 1) they learned from Detective Garcia's testimony that the Petitioner had been in prison and 2) the jury discussed the Petitioner having been in prison before during deliberations. Defense counsel filed a Motion for New Trial (Doc. 415), (App-1, pp. 243-257) and a Motion for Evidentiary Hearing and to Subpoena Jurors pursuant to Rule 606(b)(2)(A), Fed.R.Evid. (Doc. 416), (App-1, pp. 239-242).

19. In the Motion for New Trial, the Petitioner argued the prejudicial nature of the information improperly disclosed to the jury through the prosecution's witness, and that the protocol in such situations is to presume prejudice and reverse the Petitioner's conviction unless the court finds that "it is more probable than not that the erroneous admission of the evidence

did not affect the jury's verdict." Doc. 415, Motion for New Trial, pp. 11-14. (Doc. 415). (App- 1, pp. 253-256).

20. In the Motion for Evidentiary Hearing and to Subpoena Jurors, the Petitioner argued the application of Rule 606(b)(2)(A), Fed.R.Evid. and the propriety of interviewing jurors to assess possible prejudice to the Petitioner, citing to *United States v. Madrid*, 842 F.2d 1090, 1094 (9th Cir. 1988). Doc. 416, Motion for Evidentiary Hearing and to Subpoena Jurors, pp. 1-4. (App-1, pp. 239-242).

21. The Government's counsel disputed defense counsel's claim because Government counsel didn't hear what the jurors said. *See* Response to Defendant's Motion for Evidentiary Hearing and to Subpoena Jurors, p. 2, ll. 21-24. (Doc. 424), (App-1, p. 107).

22. The District Court denied the Petitioner's Motion for Evidentiary Hearing and to Subpoena Jurors because it was disputed ***how many of the jurors were aware*** Mr. Marrufo was in custody when interviewed ***and whether his custody was discussed during deliberations***, (Order, 01/10/2023, p. 4, ll. 4-11), (Doc. 431), (App-1, p. 99)., and the District Court found "that the information the defense apparently seeks to glean from the jurors is the type

of information jurors are specifically prohibited from testifying about. Fed.R.Evid. 606(b)(1)." (Order, 01/10/2023, p. 5, ll. 5-7). (Doc. 431), (App-1, p. 100). The District Court further stated:

> The Court finds *the information was* ***not extraneous*** *– it was evidence presented during trial.* Although *no curative instruction was given,* ***this was at the request of the defense.*** In fact, no special attention was brought to the brief comment. As discussed *infra*, even if the information was extraneous, **the one time reference to an unspecified custodial status was harmless.**

Id., p. 5, ll. 20-24. (emphasis added) (Doc. 431), (App-1, p. 100).

23. The District Court also denied the Petitioner's Motion for New Trial, noting that the parties agree the admission of this testimony was improper. Although no curative or limiting instruction was given, this was at the request of the defense. In light of Marrufo's testimony that he had two prior felony convictions, (Order, 1/10/23. Doc. 431, p. 9, App-1, p. 104), the Court finds the one-time reference to possible incarceration due to a felony conviction was harmless. *Ibid.* Citing cases the District Court believed to support its decision. See *United States v. Allen,* 425 F.3d 1231, 1236 (9th Cir. 2005); *United States v. Arambula–Ruiz*, 987 F.2d 599, 604–05 (9th Cir.1993); *United States v. Yarbrough,* 852 F.2d 1522, 1540 (9th Cir. 1988).

24. The District Court also found that although Petitioner declined the Court's offer to give a curative or limiting instruction regarding the comment, the final instructions directed the jury to not consider a prior conviction as evidence of guilt of the charged crimes. Order denying Motion for New Trial, pp. 9-10. (Doc. 431). (App-1, pp. 104-105).

25. The District Court was incorrect. Defense counsel specifically informed the District Court that he did not agree that no cautionary instruction be given, only that he did not believe that a curative instruction would solve the problem. Counsel stated his belief that anything short of a mistrial would not be sufficient to cure the error. See R.T. 8/17/2022, p. 21, ll. 4-14. (Doc. 418). (App-1, p. 214); Ante, ¶ 9.

26. On appeal to the Ninth Circuit, the Petitioner argued the "extraneous" nature of Det. Garcia's improper disclosure of the Petitioner's inmate status during investigative interviews, and the impropriety of the District Court's decision that inadmissible testimony does not constitute extraneous evidence, (Doc. 47.1), (App-1, pp. 13-17), and further argued that, as evidenced by the Government's acknowledgement that Det. Garcia knew not to say anything about Petitioner's inmate status, (Doc. 409), R.T.

8/16/22, p. 238, (App- 2, p. 495), that the testimony was clearly extraneous and would be determined to be inadmissible pursuant to Rule 404(b), Fed.R.Evid., which applies only to limit the admission of other acts *extrinsic* to the one charged, *U.S. v. Chin,* 83 F.3d 83, 88 (4th Cir. 1996), and information *intrinsic* to the alleged crime do not fall under Rule 404(b)'s limitations on admissible evidence. *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir.1995). See Reply Brief, p. 22. Doc. 47.1. (App-1, p. 27).

27. The Ninth Circuit's Memorandum decision holds that the inadmissible testimony by Det. Garcia was not "extraneous" evidence for the purpose of Rule 606(b)(2)(A), Fed.R.Evid., and on that basis held that the District Court did not err in failing to conduct an evidentiary hearing and to question jurors about whether they discuss the inadmissible information. Memorandum decision, p. 3. Doc. 56.1. (Appendix A, p. 3).

28. The Ninth Circuit also ruled that the Petitioner's own testimony about his felony convictions suggested his incarcerated status, there was no error in failing to issue a limiting instruction sua sponte, and the isolated reference did not "'materially affect[ ] the verdict.' *United States v. Yarbrough,* 852 F.2d 1522, 1540 (9th Cir. 1988) (quoting *United States v. Guerrero,* 756 F.2d 1342, 1347

(9th Cir. 1984)." Memorandum decision., p. 3. (Doc. 56.1. (Appendix A).

29. Notably, the Ninth Circuit also commented on the fact that the District Court offered to give a curative instruction, but defense counsel declined. Memorandum decision, p. 2. Doc. 56.1. (Appendix A). This finding by the District Court and the Ninth Circuit Court of Appeals is not correct. See Ante, ¶ 9.

REASONS TO GRANT THE PETITION

A. The Petitioner was denied his constitutional right to an impartial jury and to a fair trial when:

a. The District Court abused its discretion by failing to instruct the jury that the testimony about Petitioner being in prison was neither relevant nor admissible evidence and that the jury must not consider it during its deliberations.

The District Court recognized that the parties "agree the admission of this testimony was improper." Order, 1/10/23, Doc. 431, p. 9. (App-1, p. 104). The Government claimed, however, that this experienced retired detective knows not to testify to facts related to the defendant's prior convictions, or other prior bad acts unless specifically authorized as an exception to Rule 404(b)(1), Fed.R.Evid. It was obviously an innocent mistake. But the

possible prejudice resulting disclosure to the jury of information that would otherwise be precluded pursuant to Rule 404(b)(1), Fed.R.Evid., is not gauged by whether the improper disclosure was a mistake or not. External contact need not be intentional. *Tarango v. McDaniel,* 837 F.3d 936, 946 (2016), citing *Gold v. United States,* 352 U.S. 985, 77 S.Ct. 378, 1 L.Ed.2d 360 (1957).

The question of providing a curative instruction takes on less importance where the court has already stricken the improper evidence and the jury is instructed to only consider evidence that has not been stricken. *United States v. Wilkerson,* 966 F.3d 828, 840–41 (D.C. Cir. 2020) (it was neither "clear" nor "obvious" that the district court should have sua sponte granted curative action beyond striking the challenged testimony), citing *United States v.* Olano, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

In this case, however, after defense counsel requested a side bar to voice his objection, the District Court delayed the objection until questioning was done, then heard counsel's oral motion for mistrial. R.T. 8/16/22, p. 236, l. 25 – p. 237, l. 1. (Doc. 409). (App—2, pp. 493-494). Upon denying that motion, the District Court did not strike the offending information.

However, the District Court did ask if counsel wanted a cautionary instruction and suggested that counsel "decided it was better to leave it alone", to which counsel informed the District Court that he agreed to no such thing. Counsel reiterated that he saw no viable remedy for the error except for mistrial. Ante, ¶ 9.

The District Court instructed the jury not be exposed to any information *that was not received in the case*, and except for discussing the case with their fellow jurors during their deliberations, they were not to communicate with anyone else in any way. R.T. 8/19/22, p. 68, l. 24 – p. 69, l. 6. Doc. 419. (App-1, pp. 180-181); Ante, ¶ 11.

This instruction is demonstrative of the fact that the Court is the gatekeeper for determining the admissibility of evidence prior to it making its way into the courtroom, and also to ensure that the jurors do not consider such inadmissible evidence when by happenstance it does reach the eyes and ears of an attentive jury. The Petitioner submits that in such cases, and especially where the evidence has not previously been stricken from the record, the District Court is obligated to protect the defendant from the jury's consideration of inadmissible and possibly prejudicial information, which did not happen in this case.

The District Court noted that the jury was also instructed that it had heard evidence that the defendant had previously been convicted of a crime, and the jury could consider that evidence only as it may affect the defendant's believability as a witness. The jury was instructed not to consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial. R.T. 8/19/22, p. 8, ll. 14-19. Doc. 419. (App-1, p. 120).

The jury apparently understood the limitation with respect to considering prior convictions, as well as the difference between a prior conviction and the Petitioner having been in prison, because the jurors were forthright about telling defense counsel that they discussed the Petitioner having been in prison during deliberations. See Motion for Evidentiary Hearing and to Subpoena Jurors, 10/7/22, pp. 1-2. Doc. 416, (App-1, pp. 239-240).

The District Court's instructions did not satisfactorily protect the Petitioner from the jury considering his prior imprisonment as evidence of guilt, or understanding that prison is reserved for the worst of the worst felony offenders, and considered that information in that context, and tacitly permitting the jurors to ignore the blatent discrepancies between

the alleged victims' testimony that might indicate prevarication, thus detrimentally affecting their verdicts.

b. **The District Court, after receiving information that jurors had discussed the Petitioner having been in prison during deliberations, violated clearly established federal law when it refused to conduct an evidentiary hearing and to subpoena jurors for their testimony pursuant to *Rule 606(b)(2)(A). Federal Rules of Evidence*;**

"When jurors consider material not introduced into evidence, the conviction must be reversed unless it is clear that the material was not prejudicial." *United States v. Renteria,* 625 F.2d 1279, 1284 (5th Cir. 1980). *See also Tarrango v. McDaniel*, 837 F3d 936 (9th Cir. 216) (The Supreme Court has identified an "extraneous influence" requiring judicial inquiry into prejudice in cases where the jury heard and read information about the defendant's propensity for murder, **which was not admitted into evidence**, *Mattox v. United States,* 146 U.S. 140, 150-151, 13 S.Ct. 50 (1892).

The bases, in part, for rejecting an evidentiary hearing was because the District Court could not determine 1) how many of the jurors how many of the jurors were aware that the Petitioner

was in custody when interviewed and 2) whether his custody was discussed during deliberations. (Order, 01/10/2023, p. 4, ll. 4-11), (Doc. 431), Ante, ¶ 22. As stated in *Tarrango,* however, "an external contact need only have influenced one juror, because a defendant is 'entitled to be tried by 12 ... impartial and unprejudiced jurors.'" *Tarrango*, at 946, *quoting Parker v. Gladden*, 385 U.S. 363, 366, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966). Further, the question of whether the jurors discussed his custody status during deliberations was answered in part when counsel told the court that is what the jurors told him. Given that prima facie evidence of improper influence by inadmissible potentially prejudicial information, a hearing conducted pursuant to Rule 606(b)(2)(A), Fed.R.Evid. was mandatory.

> Once a defendant shows an external occurrence having a tendency toward prejudice, federal law clearly requires a trial court to investigate the harmlessness or actual prejudice of the occurrence. *Mattox,* 146 U.S. at 150, 13 S.Ct. 50; *Smith*, 455 U.S. at 215, 102 S.Ct. 940 ("This Court has long held that **the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.**").

Tarrango, at 948.

This Court has stated that "prior trouble with the law ... is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States,* 335 U.S. 469, 475-76, 69 S.Ct. 213, 93 L.Ed. 168 (1948). The bad general record is exacerbated by knowledge of the Petitioner having served time in prison. Accordingly, the Petitioner submits that the information, however seemingly brief and innocuous, can be major reason for infecting the deliberation process, and affect the verdict.

In cases on direct appeal, the Government is required to prove that the error was "harmless beyond a reasonable doubt." *Davis v. Ayala,* 576 U.S. 257, 267, 135 S. Ct. 2187, 2197, 192 L. Ed. 2d 323 (2015). The focus of the harmless error determination is on whether the error could have affected the jury's verdict. If it is more probable than not that the error materially affected the verdict, reversal is required. *United States v. Yarbrough,* 852 F.2d 1522 (9th Cir. 1988) *United States v. Guerrero,* 756 F.2d 1342, 1347 (9th Cir. 1984), cert. denied sub nom. *Booth v. United States,* 469 U.S. 934, 105 S.Ct. 334, 83 L.Ed.2d 270 (1984).

The Government's task in establishing harmless error is exponentially easier when the defendant cannot exercise his right to a hearing and an opportunity to prove prejudice after having questioned the jurors. That is the situation here.

Had a 606(b)(2)(A), Fed.R.Evid. hearing been conducted, the District Court would have learned just how many jurors heard and discussed the Petitioner's prior imprisonment, and how they felt about it. It is possible that that opportunity may be lost.

The Petitioner submits that in this case, where he had a previous mistrial due to a deadlocked jury, and the conflicting testimony between the two alleged victims, it cannot reasonably be said that the information conveyed to the jury by former detective Garcia, did not have any impact on the verdicts.

Of course, the fundamental requirement for using Rule 606(b)(2)(A), Fed.R.Evid. is that the possibly prejudicial information be extraneous evidence that was improperly brought to the jury's attention.

In this case, avoiding the evidentiary hearing otherwise required under federal law, the District Court held that the

inadmissible prejudicial information blurted out by Det. Garcia was somehow **not extraneous evidence**. Ante, ¶ 22.

In view of the fact that unpublished decisions may be cited in pleadings, it is inconceivable to reasonable minds to consider the extent to which this holding could detrimentally affect the concept of a defendant's due process right to a fair trial and an impartial jury. Especially since the Ninth Circuit reiterated this finding in its holding. Memorandum decision, p. 3. Doc. 56.1. (Appendix A).

i. The District ruled that the inadmissible testimony of Detective Garcia about the Petitioner's prisoner status was not "extraneous" evidence for the purpose of Rule 606(b)(2)(A) because it was evidence presented during trial.

The District Court's decision that the inadmissible testimony of Det. Garcia about the Petitioner having been in prison, because the evidence was presented in court, should give any reasonable minded jurist pause. The District Court's ruling conflicts with Rule 404(b)(1), Fed.R.Evid., which applies only to limit the admission of other acts *extrinsic* to the one charged, *U.S. v. Chin,* supra., unless the information may be used as excepted

in Rule 404(b)(2), Fed.R.Evid., and only after notice has been given to the defendant, neither of which applies in this case.

If the information conveyed by Det. Garcia in court, was noticed to the Petitioner prior to trial, it would have been precluded as being extraneous prejudicial evidence that serves no legitimate purpose at trial.

"Generally speaking, information is deemed 'extraneous' if it derives from a source 'external' to the jury." *Warger v. Shauers,* supra., 574 U.S. at 51, 135 S.Ct. 521, 190 L.Ed.2d 422 (2014) (quoting *Tanner,* 483 U.S. 107, 117, 107 S.Ct. 2739). Extraneous influence has been found to include publicity received and discussed inside the jury room, consideration by the jury **of evidence not admitted in court,** and communications or other contact between jurors and third persons, including contacts with the trial judge outside the presence of the defendant and counsel. *Virgin Islands v. Gereau*, 523 F.2d 140, 149 (3d Cir. 1975). Det. Garcia's testimony about the Petitioner's inmate status not having been lawfully admitted in court, was clearly extraneous evidence that warrants the conduct of an evidentiary hearing to with the opportunity for the Petitioner to question jurors in an

attempt to prove potential prejudice that likely would have impacted the jury's verdicts.

c. The District Court conducted an invalid and unreliable "harmless error" analysis

As stated above, the Government is required to prove the error was "harmless beyond a reasonable doubt." *Davis v. Ayala,* supra. Because the District Court found Det. Garcia's testimony not to involve extraneous, the harmless error analysis was limited to a subjective assessment by the District Court based solely on how pervasive the information, the Court's subjective impression of the Government's case against the Petitioner and, making these determinations without knowing whether the jury did consider the information during deliberations and how the jurors felt about it.

B. The Petitioner's due process right to a fair trial and an impartial jury was violated when the Ninth Circuit ruled that testimony about the Petitioner having been in prison was not "extraneous" evidence in terms of the application of Rule 606(b)(2)(a), Fed.R.Evid.

The Ninth Circuit's ruling that the inadmissible testimony regarding the Petitioner having been in prison was not "extraneous" evidence constitutes an unreasonable interpretation

of federal law and, deprived the Petitioner of his Fifth Amendment right to due process and a fair ruling on the District Court denial of a hearing pursuant to Rule 606(b)(2)(A), Fed.R.Evid.

As argued above, the Ninth Circuit's holding about the inadmissible testimony not being extraneous, conflicts with the application of Rule 404(b)(1), Fed.R.Evid. The jury certainly did not bring that information into the courtroom along with their other life experiences.

The Ninth Circuit also found that Detective Garcia's **single reference** to Petitioner's incarceration "extraneous" within the meaning of Federal Rule of Evidence 606(b)(2)(a). citing *Warger v. Shauers*, supra. Information or evidence is extraneous is not relegated to being intrinsic evidence by virtue of how many instances the jury heard it. *Tanner v. U.S.*, 483 U.S. 107, 117, 107 S.Ct. 2739 (1987) (the distinction is based on the nature of the allegation).

CONCLUSION

For the forgoing reasons, the Petitioner respectfully requests that the Court grant the petition for writ of certiorari.

RESPECTFULLY SUBMITTED this 23rd day of July, 2025.

LAW OFFICE OF HENRY JACOBS

By_____
Henry L. Jacobs, Esq.
Attorney for Petitioner

WORD COUNT CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 6436 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 23rd day of July, 2025.

By_____
Henry L. Jacobs, Esq.
Attorney for Petitioner

APPENDIX A

Memorandum Decision
United States Court of Appeals for the Ninth Circuit
Case No. 23-1606

NOT FOR PUBLICATION

FILED

FEB 12 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ERIC DAVID MARRUFO, Defendant - Appellant.	No. 23-1606 D.C. No. 4:17-cr-00976-CKJ-EJM-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding

Argued and Submitted February 4, 2025
Phoenix, Arizona

Before: HAWKINS, BYBEE, and BADE, Circuit Judges.

Eric Marrufo ("Marrufo") appeals his convictions for five counts of Aggravated Sexual Abuse of a Child under 18 U.S.C. §§ 2241(c), 2246(2), and 1153, and one count of Abusive Sexual Contact of a Child under §§ 2244(a)(5), 2246(3), and 1153, raising claims related to the admissibility of evidence. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

There was no error in the admission of Marrufo's pretrial statements taken while he was in custody on unrelated charges. That he was in custody necessitated the *Miranda* warnings he was given, and any prefatory statements did not reasonably alter their meaning. *See United States v. Loucious*, 847 F.3d 1146, 1149 (9th Cir. 2017) ("[T]he inquiry is simply whether the warnings reasonably convey to a suspect his rights . . . ." (quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989))). Both his responses to those warnings, and his testimony from his suppression hearing, clearly show Marrufo understood the consequences of speaking with investigators.

Considering "the totality of all the surrounding circumstances" including "the characteristics of the accused *and* the details of the interrogation," Marrufo did not provide an involuntary confession. *United States v. Preston*, 751 F.3d 1008, 1016 (9th Cir. 2014) (quoting *Dickerson v. United States*, 530 U.S. 428, 434 (2000)). Marrufo fails to point to any evidence in the record tying the symptoms from his 2019 hospitalization to interrogations occurring two and four years earlier.

Nor did Tribal Detective Jacob Garcia's testimony mentioning Marrufo's incarceration warrant a mistrial. *See United States v. Allen*, 425 F.3d 1231, 1236 (9th Cir. 2005). Marrufo's trial counsel objected at sidebar and sought a mistrial. Although the court denied counsel's request, it offered a curative instruction which counsel declined. Detective Garcia's reference to Marrufo's incarceration was isolated and not repeated by the prosecution.

Further, considering that Marrufo's own testimony about his felony convictions suggested his incarcerated status, there was no error in failing to issue a limiting instruction sua sponte. *See United States v. Voris*, 964 F.3d 864, 875–76 (9th Cir. 2020). In sum, this isolated reference did not "materially affect[ ] the verdict." *United States v. Yarbrough*, 852 F.2d 1522, 1540 (9th Cir. 1988) (quoting *United States v. Guerrero*, 756 F.2d 1342, 1347 (9th Cir. 1984)).

Nor was Detective Garcia's single reference to Marrufo's incarceration "extraneous" within the meaning of Federal Rule of Evidence 606(b)(2)(a). *See Warger v. Shauers*, 574 U.S. 40, 51 (2014) ("Generally speaking, information is deemed 'extraneous' if it derives from a source 'external' to the jury." (quoting *Tanner v. United States*, 483 U.S. 107, 117 (1987))).

Neither did the district court abuse its discretion in declining to subpoena the jurors regarding the impact of the statement. *See Raley v. Ylst*, 470 F.3d 792, 803 (9th Cir. 2006) (determining that the court could not inquire into the jury's deliberations in the absence of proof that the jury had been exposed to extrinsic evidence).

Nor was there an abuse of discretion in certifying Shannon Martucci as an expert. *See United States v. Halamek*, 5 F.4th 1081, 1088 (9th Cir. 2021) ("Extensive experience interviewing victims can qualify a person to testify about the relationships those victims tend to have with their abusers."). Martucci had

previously conducted over 1,700 interviews with victims of child abuse, and her testimony described the possible modus operandi of adults who abuse children, but did not describe the character traits of perpetrators. *See United States v. Telles*, 18 F.4th 290, 302–03 (9th Cir. 2021) (stating that "typical behaviors of sex offenders of child victims" is admissible when it "illuminate[s] how seemingly innocent conduct . . . could be part of a seduction technique" (quotations and citations omitted)).

AFFIRMED.

APPENDIX B

Ninth Circuit Denial of Motion for Rehearing En Banc
United States Court of Appeals for the Ninth Circuit
Case No. 23-1606

FILED

APR 24 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ERIC DAVID MARRUFO, Defendant - Appellant.	No. 23-1606 D.C. No. 4:17-cr-00976-CKJ-EJM-1 District of Arizona, Tucson ORDER

Before: HAWKINS, BYBEE, and BADE, Circuit Judges.

Judge Bade has voted to deny Appellant's petition for rehearing en banc, and Judges Hawkins and Bybee so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

Appellant's Petition for Rehearing En Banc is DENIED.

APPENDIX C

United States Court of Appeals for the Ninth Circuit
Case No. 23-1606

MANDATE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 2 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ERIC DAVID MARRUFO, Defendant - Appellant.	No. 23-1606 D.C. No. 4:17-cr-00976-CKJ-EJM-1 District of Arizona, Tucson MANDATE

The judgment of this Court, entered February 12, 2025, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

APPENDIX D

Notice of Appeal
July 27, 2023

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Attorney for: Eric David Marrufo

IN THE UNITED STATES DISTRICT COURT
THE DISTRICT OF ARIZONA

United States of America, Plaintiff. v. **Eric David Marrufo,** Defendant.	No. 4:17-cr-00976-CJK **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that the Defendant, ERIC DAVID MARRUFO, appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment and sentence of the District Court entered in this action on July 24th, 2023 (Doc. 445), pursuant to Fed.R.App.P. Rule 4(b).

RESPECTFULLY SUBMITTED this 27th, day of July, 2023.

LAW OFFICES OF HENRY JACOBS
PLLC

By /s/ *Henry L. Jacobs*
Henry L. Jacobs, Esq.
Attorney for Defen