

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES GREGORY GARCIA, — PETITIONER
(Your Name)

vs.

ROBERT W. FOX, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

James Gregory Garcia, K-26584
(Your Name)

P.O. Box 2500
(Address)

Vacaville, CA 95696-2500
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

(1) A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required; pursuant to (*Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)), and whether this fundamental principle was violated under the Fourteenth Amendment of the United States Constitution, when the lower court's concluded that California Penal Code section 12021, subdivision (a)(1), (now codified in California Penal Code section 29800, subdivision (a)(1)), constitutes "armed" otherwise prescribed at California Penal Code section 25800, subdivision (a), and California Penal Code section 12022, subdivision (a)(1), violated Petitioners' constitutional liberty interest rights, pursuant to California Penal Code section 1170.126, subdivision (e)?

(2) Whether California Penal Code section 12021, subdivision (a)(1), (now codified in California Penal Code section 29800, subdivision (a)(1)), gave Petitioner fair notice, pursuant to California Penal Code section 952, that ex-felon convicted of *constructive*-possession of a firearm constituted being "armed," otherwise denying Petitioner his liberty interest, pursuant California Penal Code section 1170.126, subdivision (e), in violation of (*Wilkinson v. Austin*, 545 U.S. 209, 125 S. Ct. 2366 (2005)), under the Fourteenth Amendment of the United States Constitution?

(3) A fundamental principle in our legal system is that due process of law requires that an accused be advised of the charges against him, pursuant to (*In re Oliver*, 333 U.S. 257, 273 (1948)), and whether the lower court's violated this fundamental principle after concluding that Petitioner was "armed," otherwise prescribed at California Penal Code section 25800, subdivision (a)(1), and California Penal Code section 12022, subdivision (a)(1), violated California Penal Code section 952, under the Fourteenth Amendment of the United States Constitution?

(4) The ex post facto clause of the United States Constitution prohibits "a state" from applying an expanded definition of a crime, pursuant to (*Calder v. Bull*, 3 U.S. 386, 390 (1798)) (e.g. the Second *Calder* category: "a law that aggravates a crime, or makes it greater than it was, when committed," and the Fourth *Calder* category: "alter the rules of evidence to

reduce the legal sufficiency necessary to support a finding of guilt;" when the lower court's concluded that California Penal Code section 12021, subdivision (a)(1), (now codified in California Penal Code section 29800, subdivision (a)(1)), included the definition of "armed-with -a -firearm" during Petitioners' 1996 conviction, otherwise excluding Petitioners' re-sentencing liberty interest application, pursuant to California Penal Code section 1170.126, subdivision (e)?

(5) Pursuant to, *Martinez v. Ryan*, 566 U.S. 1 (2012) ("A petitioner should be provided with an attorney to assist him with raising that type of constitutional claim, just like IAC trial claims, the initial review collateral proceeding is the first opportunity for a petitioner to raise IAC appellate counsel claim;") and whether the lower court's violated Petitioners' constitutional rights under the Sixth and Fourteenth Amendment of the United States Constitution, after lower court's concluded otherwise?

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

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

☒ reported at Case No. 17-55245 : or.
☐ has been designated for publication but is not yet reported; or.
☒ is unpublished.

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

☒ reported at Case No. CV-16-5837-JFW-(DFM) : or.
☐ has been designated for publication but is not yet reported; or.
☒ is unpublished.

☒ For cases from **state courts**:

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

☒ reported at S232719 : or.
☐ has been designated for publication but is not yet reported; or.
☒ is unpublished.

The opinion of the State Court of Appeals court appears at Appendix "D" to the petition and is

☒ reported at Case No. B265149 : or.
☐ has been designated for publication but is not yet reported; or.
☒ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 21, 2017.

☒ 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

A. Constitutional Provision

The Sixth Amendment guarantees the right of criminal defendants, including the right to a public trial without unnecessary delay, the right to a lawyer, the right to an impartial jury, the right to know who the accusers are and the nature of the charges and evidence brought against a defendant; and the ex post facto prohibition.

The Fourteenth Amendment provides: "No state shall ... deprive any person of life, liberty, or property, without due process; nor deny to any person within its jurisdiction the equal protection of the laws.

B. State Statutory Provisions

California Penal Code section 12021, subdivision (a)(1), (now codified in California Penal Code section 29800, subdivision (a)(1)), and California Penal Code section 25800, subdivision (a)(1), and California Penal Code section 12022, subdivision (a)(1), and California Penal Code section 1170.12, and California Penal Code section 1170.126, subdivision (e), and California Penal Code section 1237, subdivision (a) and (b), and California Penal Code section 952.

STATEMENT OF THE CASE

In 1996, sheriff deputies found petitioner in a house, and upon searching petitioner, sheriff deputies found a magazine to a firearm between the folds of petitioners wallet. Sheriff deputies conducted a search of the residence and later came upon an inoperable firearm. Petitioner was charged and convicted by a jury for being an ex-felon in possession of a firearm, pursuant to California Penal Code section 12021, subdivision (a)(1), (now codified in California Penal Code section 29800, subdivision (a)(1)). (Please refer to Appendix H.)

During jury trial, the prosecution gave CALJIC 12.44 jury instructions, convincing jurors that petitioner could be found guilty of "constructive" possession even though petitioner did not have physical control of firearm. (Please refer to Appendix I.)

At the sentencing phase, the trial court sentence petitioner to 25 years to life under the Three Strike law, pursuant to California Penal Code section 1170.12, subdivision (a)-(d). (Please refer to Appendix J.)

In November 6, 2012, the voters within the State of California approved Proposition 36, the Three Strike Reform Act of 2012 (Reform Act), which amended California Penal Code section 1170.12, and added section 1170.126. (*People v. Yearwood* (2013) 213 Cal. App. 4th 161, 167 (*Yearwood*)). Under the Three Strike law (Section 1170.12) as it existed prior to Proposition 36, a defendant convicted of two prior serious or violent felonies was subject as a third strike offense to a sentence of 25 years to life upon conviction of *any* third felony. (*People v. Superior Court (Kaulick)* (2013) 215 Cal. App. 4th 1279, 1285 (*Kaulick*)). Now, under the prospective provision of the Reform Act (set forth in California Penal Code section 1170.12), a defendant convicted of two prior serious or violent felonies is subject to the 25 years to life sentence *only* if the current third felony is a *serious or violent* felony. (*Kaulick*, at app. 1285-1286, 1292-1293). Thus, if the third felony is not a serious or violent felony and none of the four enumerated disqualifying exceptions or exclusions apply, the defendant shall be re-sentenced as a Second strike offender. (*Id.* at app. 1286, 1293).

Of particular importance here, the *retrospective* part of the Reform Act disqualifies an applicant for re-sentencing if the *prosecution* pleads and proves any of the following: (iii) ("During the commission of the current offense, the defendant ... 'was armed with a firearm' ..."). (Section 4 of the Reform Act, paragraph (c)(2)(C)(iii)).

Petitioner's current offense is neither *serious nor violent*, and Petitioner was not charged with being *armed*, pursuant to California Penal Code section 952, thus, Petitioner petitioned the lower court's on a petition for re-sentencing as a Second strike offender, pursuant to California Penal Code section 1170.126.

On April 23, 2015, an evidentiary hearing for eligibility under Prop 36 was held, and the presiding justice concluded that California Penal Code section 12021, subdivision (a)(1), (now codified in California Penal Code section 29800, subdivision (a)(1)) constituted being armed, pursuant to (*People v. White* (2014) 223 Cal. App. 4th 512), and denied Petitioners' re-sentencing application. (Please refer to Appendix K.)

On May 4, 2015, Petitioner appealed from the lower court's decision, (case No. KA031564-01). (Please refer to Appendix L.)

On August 23, 2015, Petitioner filed a State Petition for Writ of Habeas Corpus, (case No. B266519), asserting Petitioner's Constitutional rights. (Please refer to Appendix E.)

On September 24, 2015, the Court of Appeal of the State of California Second Appellate District denied Petitioners' Petition for Writ of Habeas Corpus, (case No. B266519) (Please refer to Appendix E.)

On January 25, 2016, the court of Appeal of the State of California Second Appellate District (case No. B263144) affirmed lower court's decision. (Please refer to Appendix D.)

On February 26, 2016, Petitioner filed a Petition for Review, (case No. S232719), in the California Supreme Court. (Please refer to Appendix C.)

On April 13, 2016, (case No. S232719), the California Supreme Court (En Banc) denied Petitioners' Petition for Review. (Please refer to Appendix C.)

On June 26, 2016, Petitioner filed a State Petition for Writ of Habeas Corpus, in the California Supreme Court, (case No. S236254), asserting Petitioners' Constitutional rights. (Please refer to Appendix G.)

On July 5, 2016, Petitioner filed a State "First Amended" Petition for Writ of Habeas Corpus, (case No. S235705), asserting Petitioners' Constitutional rights. (Please refer to Appendix F.)

On August 31, 2016, the California Supreme Court denied Petitioners' Writ of Habeas Corpus, (case No. S235705). (Please refer to Appendix G.)

On August 31, 2016, the California Supreme Court denied Petitioners' "First Amended" Petition for Writ of Habeas Corpus, (case No. S236254). (Please refer to Appendix G.)

On July 31, 2016, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California, (case No. CV-16-5837-JfW-(DFM)), asserting Petitioners' Constitutional rights. (Please refer to Appendix M.)

On September 6, 2016, the United States Magistrate Judge filed a Report and Recommendation to the District Judge, approving and excepting the Report and Recommendation, and directing that Judgment be entered summarily denying the Petition (case No. CV-16-5837-JFW-(DFM)), and dismissing the action with prejudice. (Please refer to Appendix B.)

On January 29, 2017, Petitioner filed an Objection to the Report and Recommendation of the United States Magistrate Judge. (Please refer to Appendix N.)

On February 8, 2017, the United States District Judge filed its Order Accepting findings of Report and Recommendation of the United States Magistrate Judge. (Please refer to Appendix B.)

On February 8, 2017, the United States District Judge filed its Judgment summarily denying Petitioners' Petition (case No. CV-16-5837). (Please refer to Appendix B.)

On February 8, 2017, the United States District Judge issued an Order denying a certificate of appealability. (Please refer to Appendix O.)

On February 19, 2017, Petitioner petitioned the Ninth Circuit for a Certificate of Appealability (case No. 17-55245). (Please refer to Appendix P.)

On August 21, 2017, the Ninth Circuit denied Petitioners' request for a Certificate of Appealability (case No. 17-55245). (Please refer to Appendix Q.)

REASONS FOR GRANTING THE PETITION

I.

In 1996, Petitioner was charged with being an ex-felon on possession of a firearm, pursuant to California Penal Code section 12021, subdivision (a)(1), (now codified in California Penal Code section 29800, subdivision (a)(1). (Appendix H.)

Petitioner challenged the lower courts on said charge, because Petitioner was not in physical possession of said firearm. The prosecution presented the jury with the theory that, Petitioner could be found guilty for being in constructive-possession, and based on that theory the jury found true to count 1, ex-felon in constructive-possession of a firearm. (Appendix I.)

Petitioner was sentence to a term of 25 years to life, pursuant to California Penal Code section 1170.12, subdivision (a)-(d), under the Three Strike law. (Appendix J.)

In 2012, the people within the State of California, overwhelmingly passed Proposition 36, known as the Three Strike Reform Act of 2012 (Reform Act), amending California Penal Code section 1170.12. (Appendix Q.)

Of particular importance here, Section 4, of the Reform Act, paragraph (c)(2)(C), states in part: ("If a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of section 667.5 or subdivision (c) of section 1192.7 that have been pled and proved, and the current offense is not a felony described in paragraph (1) of subdivision (b) of this section, the defendant shall be sentenced pursuant to paragraph (1) of subdivision (c) of this section, unless the prosecution pleads and proves any of the following: (iii) ("During the commission of the current offense, the defendant ... was armed with a firearm") (Appendix Q.)

Petitioners' current offense is neither serious nor violent, and prosecution did not pled or prove that he "was armed with a firearm" at the time of his arrest, thus, Petitioner petitioned the lower courts on a petition for re-sentencing. and at the re-sentencing eligibility hearing, the lower courts concluded that, Petitioner did not qualify for re-sentencing because, Petitioners current offense (ex-felon in constructive-possession of a firearm) constituted being "armed." (Appendix K.)

Petitioner asserts that, in order for the lower courts to arrive at the conclusion that, Petitioner was armed-with-a-firearm, the prosecution bears the burden of proof that in the initial indictment, Petitioner was advised of the charges against him, pursuant to (*In re Oliver*

(1948) 333 U.S. 257, 273 ("Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.")); (*Cook v. United States* (1925) 267 U.S. 517, 536-537); (*In re Digiuro* (1950) 100 Cal. App. 2d 260, 261). To conclude otherwise, would be an impingement upon, Petitioners constitutional rights, under the Fourteenth Amendment of the United States Constitution. This court must not allow the lower courts to circumvent the Fourteenth Amendment due process, by avoiding prosecution of defendant on criminal charge, pursuant to California Penal Code section 25800, subdivision (a) (Armed Criminal Action), or pursuant to California Penal Code section 12022, subdivision (a)(1) (Armed With A Firearm). (Appendix T and U.)

Petitioner submits Appendix I, S, and T, to show how the lower courts circumvented the judicial due process by applying one statute definition to another. In this case, the lower courts concluded that Petitioner was ineligible for re-sentencing pursuant to Appendix T, however, Petitioner was never charged with Appendix T, pursuant to California Penal Code section 952.

Petitioner requests that this court: one, review all facts in this case, sentencing transcripts, reporter transcripts, and the full Appendix A-T attached hereto; two, issue an order directing the release of Petitioner from custody, pursuant to Proposition 36, the Three Strike Reform Act of 2012; and three, issue an order directing lower courts of Petitioners constitutional rights under the Fourteenth Amendment of the United States Constitution, liberty interest, due process, and equal protection.

II.

States cannot retroactively change the rules to allow prosecution of crimes that are already barred by an existing statute of limitations. (*Stogner v. California* (2003) 539 U.S. 607 ("A law enacted after expiration of a previously applicable limitation period violates the ex post facto clause when it is applied to revive a previously time barred prosecution."))

Petitioner asserts that the lower courts changed the definition within the meaning of California Penal Code section 12021, subdivision (a)(1), (now codified in California Penal Code section 29800, subdivision (a)(1) (Ex Felon in Possession of a Firearm), to include "armed with a firearm." (Appendix K.)

The change made by the lower courts was an attempt to exclude defendants convicted of simple possession of a firearm from benefiting relief under the Three Strike Reform Act of 2012, pursuant to 1170.126, subdivision (e). (Appendix R.)

Petitioner requests this court to: One, evaluate whether the lower courts violated the ex post facto clause, in this case; two, issue an order directing the lower courts to stop the change of definition of statute Penal Code section 29800, subdivision (a)(1) to wit "armed with a firearm;" three, issue an order directing Petitioners release from custody pursuant to Proposition 36, the Three Strike Reform Act of 2012.

The fact is, the State of California already had in place California Penal Code section 25800, subdivision (a) (Armed Criminal Action), and California Penal Code section 12022, subdivision (a)(1) (Armed With A Firearm), at the time of Petitioners arrest, 1996, thus, prosecution is time barred from retroactively changing the rules to include "Armed Criminal Action" or Armed With A Firearm" into California Penal Code section 12021, subdivision (a)(1), (now codified in California Penal Code section 29800, subdivision (a)(1) (Felon in possession of a firearm).

Pursuant to *Calder v. Bull* (1798) 3 U.S. 386, 390 ("The ex post facto clause of the United States Constitution prohibits a state from applying an expanded definition of a crime.") Here, Petitioner relies on the Second and Fourth of the *Calder* category, for example: the Second *Calder* category, "a law that aggravates a crime, or makes it greater than it was, when committed;" and the Fourth *Calder* category, "alter the rules of evidence to reduce the legal sufficiency necessary to support a finding of guilt."

Petitioner requests that this court: one, evaluate whether the lower courts violated the ex post facto clause in this case; two, examine whether California Penal Code section 29800, subdivision (a)(1) (Felon in possession of a firearm) is define to wit "Armed With A Firearm" prior to 1996; three issue an order directing Petitioners release from custody, pursuant to the California Three Strike Reform Act of 2012.

III.

Petitioner asserts that he retained the constitutional right to appeal lower courts decision of ineligibility for re-sentencing, pursuant to California Penal Code section 1237, subdivision (a)-(b) (Appeal by Defendant).

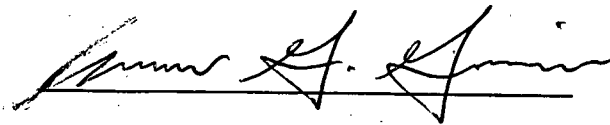
Further, ineffective assistance of appellate counsel was cause for denying Petitioner his constitutional claims in lower court, pursuant to *Martinez v. Ryan* (2012) 566 U.S. 1 ("A petitioner should be provided with an attorney to assist him with raising that type of constitutional claim, just like IAC trial claims, the initial review collateral proceeding is the first opportunity for a petitioner to raise IAC appellate counsel claim.")

Petitioner request that this court: one, issue an order directing lower courts to ineffective assistance of appellate counsel, failing to preserve Petitioners constitutional claims in lower court; two, declare the rights of Petitioner to effective assistance of counsel appointed; and three, release Petitioner from custody, pursuant to the California Three Strike Reform Act of 2012.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "James E. Quinn", is written over a horizontal line.

Date: 11-19-17