

In the Supreme Court of the United States

No. _____

Omar Valdivia, Petitioner,

v.

S. Frauheim, Respondent.



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



PETITION FOR WRIT OF CERTIORARI



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California Evidence Code section 913 provides that a trier of fact may not draw an adverse inference from a witness's invocation of her Fifth Amendment right against self incrimination.

Petitioner's defense at trial was that Candelaria Uribe and petitioner were engaged in different illegal activity together. Petitioner subpoenaed Uribe, out of the presence of the jury, Uribe invoked her Fifth Amendment right against self incrimination.

Question presented:

Whether California Evidence Code section 913, as applied, violated petitioner's Sixth Amendment right to present a defense when the trial court excluded evidence of witness Candelaria Uribe's invocation of her Fifth Amendment right against self-incrimination.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Omar Valdivia petitions for a writ of certiorari to review the judgment of the United States District Court for the Eastern District of California case number 2:14-cv-02097-TLN-DB.



OPINIONS BELOW

The Findings and Recommendations of the magistrate court in the Eastern District of California were issued on December 1, 2016, and were unpublished. App. 4. The district court of the Eastern District of California adopted the findings and recommendations without discussion on March 21, 2017. App. 2. The Ninth Circuit Court of Appeals denied the motion for certificate of appealability on January 30, 2018. App. 1.



JURISDICTION

The judgment of the court of appeals was entered on January 30, 2018. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides in relevant part that “In all criminal prosecution, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

California Evidence Code section 913 provides in relevant part:

If in the instant proceeding [] a privilege is or was exercised not to testify with respect to any matter [] neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

Cal. Evid. C. § 913(a)



STATEMENT OF THE CASE

A. Statement of Facts¹

In 2002, defendant moved in with his girlfriend and her two daughters. The older daughter testified that, when she was age 10, defendant began touching her inappropriately while her mother was at work. In subsequent years (when she was ages 11 through 13), defendant frequently touched her in sexual

¹ The facts as recited in the Third District Court of Appeal are reprinted here.

ways and often orally copulated her. The victim did not tell her mother because defendant threatened to do something bad to her mother and sister if she told anyone.

Defendant tried to rape the older daughter when she was 13. When she was 14, he forcibly raped her, locking her into a bedroom and putting a sock in her mouth. He forced her to have intercourse with him at least five more times.

The older daughter was afraid of defendant. She moved into the home of her boyfriend when she was age 14. After she moved out of her mother's home, defendant began sexual [sic] abusing her younger sister, who was age 10 at the time. The younger daughter did not tell anyone because defendant hit her and threatened her, and she had seen defendant hit her mother.

A maternal uncle's query at a family gathering near the end of 2009 ultimately brought the crimes to light. Defendant was arrested a few months later. He said he began living with a cousin after the family called the authorities.

Defendant claimed both victims lied to further a scheme concocted by their maternal grandmother. He said the older daughter had made a false accusation of inappropriate sexual conduct against his cousin's husband, Jesus Solis, during a family party. Before trial, however, the prosecutor moved to exclude evidence of the alleged false accusation, among other things. At a hearing conducted pursuant to Evidence Code section 402, several witnesses testified. After hearing the testimony and the argument of counsel, the trial court concluded that the evidence was weak, that there was insufficient evidence of a false accusation, and that allowing evidence on the issue would result in a "sub-trial" on the matter. The trial court excluded the evidence pursuant to Evidence Code section 352, ruling that the probative value of the evidence was not outweighed by undue prejudice or undue

consumption of time, and the evidence would confuse the issues and mislead the jury.

The jury found defendant guilty of the following offenses: lewd and lascivious act by force, violence, duress, menace or threat of great bodily harm against the older daughter when she was between the ages of nine and 10 (Pen. Code, § 288, subd. (b)(1) - count one); lewd and lascivious act by force, violence, duress, menace or threat of great bodily harm against the older daughter when she was age 11 (Pen. Code, § 288, subd. (b)(1) - count two); oral copulation against the older daughter when she was age 12 (Pen. Code, §§ 269, subd. (a)(4), 288a, subd. (c)(2) - count three); oral copulation against the older daughter when she was age 13 (Pen. Code, §§ 269, subd. (a)(4), 288a, subd. (c)(2) - count four); rape against the older daughter when she was age 13 (Pen. Code, §§ 261, subd. (a)(2), 269, subd. (a)(1) - count five); rape against the older daughter when she was age 14, using force, violence, duress, menace, or fear of immediate unlawful bodily injury (Pen. Code, § 261, subd. (a)(2) - count six); rape against the older daughter when she was age 14, on a different date than count six, using force, violence, duress, menace, or fear of immediate unlawful bodily injury (Pen. Code, § 261, subd. (a)(2) - count seven); lewd and lascivious act against the younger daughter [his hand on her breast] (Pen. Code, § 288, subd. (b)(1) - count eight); lewd and lascivious act against the younger daughter [his mouth on her breast] (Pen. Code, § 288, subd. (b)(1) - count nine); and digital penetration of the vagina of the younger daughter (Pen. Code, §§ 269, subd. (a)(5) - count ten). The jury also found true a special allegation that the offenses involved more than one victim.

The trial court sentenced defendant to 10 consecutive terms of 15 years to life in prison. It imposed various fines and fees, including a \$600 fine pursuant to Penal Code section 243.4, and a \$270.17 main jail booking fee and a \$51.34 main jail classification fee pursuant to Government Code section

29550.2. In addition, the trial court ordered that defendant “not have visitation privileges with the victim” pursuant to Penal Code section 1202.05.

People v. Valdivia, No. C071353, 2014 WL 1465115, at *1–2 (Cal. Ct. App. Apr. 15, 2014), review denied, June 25, 2014.

B. Procedural Statement

On April 4, 2012, a jury found petitioner guilty of various offenses involving lewd and lascivious conduct with his two step-daughters, specifically, Penal Code section 288(b)(1) (four counts); Penal Code section 261(a)(2) (two counts); Penal Code section 269(a)(4) (two counts); Penal Code section 269(a)(1) (one count); and Penal Code section 269(a)(5) (one count). On June 8, 2012, the state trial court sentenced petitioner to 150 years to life.

Petitioner appealed his conviction to the California Court of Appeal, Third Appellate District. On April 15, 2014, the California Court of Appeal affirmed the judgment. *People v. Valdivia*, No. C071353, 2014 WL 1465115 (Cal. Ct. App. Apr. 15, 2014), review denied, June 25, 2014.

Proceeding *pro se*, petitioner commenced this federal action on September 10, 2014. The district court granted petitioner’s request

to stay the proceedings to allow petitioner an opportunity to exhaust his claims in state court. On January 13, 2016, the California Supreme Court denied the exhaustion petition.

On December 1, 2016, the magistrate court issued Findings and Recommendations (F&Rs) recommending the petition be denied. App. 4. The district court adopted the F&Rs on March 21, 2017. App. 2. The Ninth Circuit Court of Appeals denied the motion for certificate of appealability on January 30, 2018. App. 1.



REASONS TO GRANT THE WRIT

Mr. Valdivia Was Denied His Fifth, Sixth and Fourteenth Amendment Right to Present a Defense When the Trial Court Excluded Evidence of Candelaria Uribe’s Invocation of Her Fifth Amendment Right Against Self-incrimination.

A defendant has the right to introduce material evidence in his favor whatever its character, unless the state can demonstrate that the jury is incapable of determining its weight and credibility and that the only way to ensure the integrity of the trial is to exclude the evidence altogether. Peter Westen, *The Compulsory Process Clause*, 73 Mich. L.R. 71, 159 (1974). “Whether grounded in the Sixth

Amendment's guarantee of compulsory process or in the more general Fifth Amendment guarantee of due process, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *United States v. Stever*, 603 F.3d 747, 755 (9th Cir. 2010). "[N]o matter how strong the case for the prosecution may appear to the presiding judge," a defendant has the right to present a defense that is not precluded as a matter of law. *Herring v. New York*, 422 U.S. 853, 858 (1975). The right to present a defense does not give criminal defendants *carte blanche* to circumvent the rules of evidence, nor is the exclusion of defense evidence simply a matter of evidentiary "balancing" committed to the discretion of the judge. A court's discretion in evidentiary rulings is circumscribed by the rules of evidence *and* the defendant's constitutional right to present a defense. *See Chambers v. Mississippi*, 410 U.S. 284 (1973). As Justice Potter Stewart wrote, "any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (concurring).

California Evidence Code section 913 bars the trier of fact from

drawing any adverse inference from a witness's invocation of their Fifth Amendment right to remain silent. It is unconstitutional as applied in the present case. The statute permits the constitutional right of a witness to abrogate the constitutional rights of a defendant.

Petitioner testified at trial that he, his girlfriend, Candelaria Uribe,² and Uribe's mother, Maria deUribe, all worked together importing cocaine and heroin from Mexico and selling it in the United States. (RT 2:453-56.³) The drug trafficking business appeared to be fairly lucrative. At one point petitioner loaned \$20,000 to deUribe. According to petitioner:

The last time she went to the border to get some drugs, she - - she went and I lent her an amount of \$20,000. And she took Mayra P[.] And when they came back, she played a dirty trick on me. She stole from me. Later when all this happened, well, I was trying to get my money, and she threatened me telling me that I would regret this because I was pressuring her too much.

² When petitioner first met Candelaria Uribe she was using the name Elizabeth Ramirez (RT 1:452), counsel and petitioner used both names during the course of Valdivia's testimony at trial.

³ RT refers to the reporters transcript. This refers to page 465 of Volume 1.

(RT 2:454.)

Ultimately deUribe was unable to repay the loan and petitioner pressured her to settle up. (RT 1:465.) The essence of petitioner's testimony was that the testimony of both complaining witnesses was fabricated at deUribe's urging as retribution for petitioner pressuring deUribe to repay the loan.

Petitioner testified that Candelaria Uribe, the mother of the two victims, admitted to him that she knew the complaining witnesses lied. (RT 2:494.) After the allegations had been reported to law enforcement, but before petitioner was arrested, Uribe met with petitioner twice a week (RT 2:494), and on one occasion, brought the girls to a WalMart to allow petitioner and the girls to visit. (RT 1:291 & 2:469.)

A potential defense witness, Christina Hernandez, corroborated petitioner's testimony that Candelaria Uribe knew and admitted the complaining witnesses had fabricated their testimony at deUribe's request. Hernandez was willing and able to testify that Candelaria Uribe had told Hernandez that the complaining witnesses had fabricated their testimony. (RT 2:432.) The defense

sought to call Candelaria Uribe to question her about this conversation as well as petitioner's assertion that Uribe admitted the complaining witnesses had fabricated their testimony. Given petitioner's testimony that Uribe was involved in drug trafficking and an allegation that Uribe engaged in welfare fraud, the trial court appointed counsel to represent Uribe prior to testifying. Initially, trial counsel moved the court for an order directing Uribe to invoke in the presence of the jury which was tabled. The trial court allowed Uribe to invoke her Fifth Amendment right to remain silent outside the presence of the jury. (2RT 2:527-29.) Eventually, defense counsel withdrew its request that Uribe invoke in the presence of the jury.

Petitioner asserts he was denied his Fifth, Sixth and Fourteenth Amendment right to present a defense when the trial court concealed Uribe's invocation from the jury, which then rendered Christina Hernandez's corroborating testimony irrelevant. Petitioner further asserts he was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel when counsel ultimately withdrew the request to have Uribe invoke her

Fifth Amendment right to remain silent in the presence of the jury.

California Evidence Code section 913 provides in relevant part:

If in the instant proceeding [] a privilege is or was exercised not to testify with respect to any matter [] neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

Cal. Evid. C. § 913(a).

Contrary to the California Evidence Code, this Court has held that it *is* permissible for a trier of fact to draw adverse inferences from the invocation of the Fifth Amendment right to remain silent when the individual invoking the privilege is not a defendant in a criminal proceeding. In *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Court held that the self-incrimination privilege of the Fifth Amendment did not forbid drawing adverse inferences against a state prison inmate from his failure to testify at disciplinary proceedings against him. *Id.* at 316-20. Thus, there is nothing improper about drawing an adverse inference from the invocation of the right to remain silent when that person is not a criminal defendant.

In the present case, Uribe was not a defendant in any criminal action; no trier of fact would have been asked to find her guilty based on her invocation. Regardless, the trial court and the California Evidence Code placed Uribe's Fifth Amendment right against self-incrimination above petitioner's Fifth, Sixth and Fourteenth Amendment right to present a defense.

In order for the Fifth Amendment privilege to be given full effect, individuals must not be forced to choose between making potentially incriminating statements and being penalized for refusing to make them. Thus, in *Griffin v. California*, 380 U.S. 609, 613 (1965), the Court held that a prosecutor may not "tender[] to the jury for its consideration the failure of the accused to testify" as substantive evidence of guilt. "[T]he Fifth Amendment ... forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615; see also *Baxter v. Palmigiano*, *supra*, at 319 (noting that Griffin "prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt").

Here, Uribe was not forced to choose between making potentially incriminating statements and being penalized for refusing to make them. If the government ever sought to prosecute Uribe she would have been protected by the *Griffin* rule, her invocation would have been excluded from any criminal proceedings in which she was a defendant.

The California Supreme Court has considered Evidence Code section 913 and determined “inferring guilt from the mere exercise of the privilege would be improper[.]” *People v. Mincey*, 2 Cal.4th 408, 441 (1992). This contradicts this Court’s holding in *Baxter*, *supra*. Certainly, inferring guilt from the exercise of the privilege is improper against a criminal defendant in a criminal proceeding; however, it is not improper when the individual invoking the privilege is *not* a defendant in a criminal case.

Petitioner presented this issue to the California Supreme Court in the “exhaustion petition.” The California Supreme Court denied the claim without comment, it issued a “postcard denial.” Where the state court has provided an adjudication on the merits without a reasoned explanation, this Court conducts an

independent review of the record to determine whether the state court's final resolution of the case constituted an unreasonable application of clearly established Supreme Court precedent. *Greene v. Lambert*, 288 F.3d 1081, 1088-89 (9th Cir. 2002). "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003).

California Evidence Code section 913 and the California case of *Mincey* conflict with this Court's case of *Baxter*.

To the extent defense counsel withdrew the request based on the trial court's reference to section 913, petitioner asserts he was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. As noted above, only after an investigation of relevant law and fact can an attorney make an informed decision about how to proceed. In light of the trial court's reference to section 913, defense counsel withdrew the request. However, it does not appear defense counsel was aware of this Court's case of *Baxter*. Uribe could have corroborated Petitioner's testimony, thus,

its exclusion was prejudicial to the defense.



CONCLUSION

The California statute as applied in the present case places a witness's constitutional rights over that of a defendant's constitutional rights. Petitioner was denied his Sixth Amendment right to present a defense.

Moreover, the California Supreme Court's interpretation of a witness's invocation of her Fifth Amendment right against self incrimination conflicts with this Court's holding in *Baxter*.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,
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