

No. _____

IN THE
Supreme Court of the United States

SAMUEL KWAME AMANKRAH
Petitioner-Appellant

v.

JOEL MARTINEZ, Warden
Respondent-appellee

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

SAMUEL KWAME AMANKRAH
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Petitioner in Pro Se

QUESTIONS PRESENTED

1. Whether Petitioner's Fifth Amendment right to the United States Constitution is violated when the Prosecutor makes five indirect comments on Petitioner's failure to testify, when evidence that could support acquittal exists, and the trial judge refuses to give corrective instructions.

2. Whether the California Court of Appeal unreasonably applied *Griffin v. California* and *Chapman v. California* to the facts of Petitioner's case and unreasonably determined the facts where the lower Court(s) overlook material facts required to resolve the Fifth Amendment claim.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

Petitioner Samuel Kwame Amankrah is a California state prisoner, who was sentenced to a total of 90 years to life in prison following a jury trial in San Bernardino County.

Respondent Joel Martinez is the warden at the prison where Amankrah is being incarcerated at the relevant time.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner SAMUEL KWAME AMANKRAH respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, denying Petitioner's appeal from the denial of his Petition for writ of Habeas Corpus by the District Court for the Central District of California.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A, and is unpublished.

The opinion of the District Court appears at Appendix B, and is unpublished.

The opinion of the California Court of Appeals appears at Appendix C, and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided the instant case was April 20, 2017. Petitioner filed a petition for panel rehearing and rehearing en banc on May 3, 2017 which was ultimately denied on December 8, 2017. This petition is filed within 90 days of latter date.

Prior to the denial by the Court of Appeal, Petitioner filed a timely petition for writ of federal habeas corpus in the United States District Court for the Central District of California, which was summarily denied. The District Court denied a Certificate of Appealability (hereafter "COA"), but the Ninth Circuit issued a COA.

The jurisdiction of this Court is invoked under 28 USC § 1254(1) on the ground that Petitioner's Fifth Amendment Right and Due Process Right to the U.S. Constitution are violated.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254

5th Amendment

STATEMENT OF CASE

Appellant/Petitioner SAMUEL KWAME AMANKRAH was convicted of kidnap, kidnap for rape, forcible oral copulation, and three counts of rape. The jury also found true special allegations of the use of a knife during the commission of the offenses. Appellant was sentenced to a prison term of ninety years to life. Appellate appealed his conviction, and the California Court of Appeal affirmed it in an unpublished opinion dated December 10, 2009. Appendix C.

On January 21, 2010, Appellant filed a petition for review in the state Supreme Court which was denied on February 24, 2010. In order to allow the state court to review the full effect of the prosecution's improper comments, Appellant refilled the Griffin claim again in the state court listing all five improper comments made instead of only two listed on direct appeal. Appellant filed a petition for writ of habeas corpus in the Superior Court of San Bernardino on June 28, 2010 which was denied on June 30, 2010. On July 28, 2010, Appellant filed a petition for writ of habeas corpus in the California Court of Appeal which was denied on August 5,

2010. On August 26, 2010, a habeas corpus petition was filed in the California Supreme Court which was denied on March 30, 2011.

Appellant filed a federal habeas corpus petition in the Central District Court which was denied on October 14, 2011 as was Appellant's request for a Certificate of Appealability. Appellant's Certificate of Appealability filed in the Ninth Circuit Court of Appeal was granted and counsel appointed on November 28, 2012.

Petitioner filed his petition in the Ninth Circuit Court of Appeal which was denied on April 20, 2017. A timely petition for Panel rehearing and rehearing en banc was filed on May 3, 2017. The petition was denied on December 7, 2017.

REASONS FOR GRANTING REVIEW

1.

PETITIONER'S FIFTH AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION IS VIOLATED WHEN THE PROSECUTOR MAKES FIVE INDIRECT COMMENTS ON PETITIONER'S FAILURE TO TESTIFY

This case presents an important issue over which the federal and state courts in this matter have so far failed to address. So far, all courts unreasonably defer to the California Court of Appeals resolution without a review of the claim Appellant presents. See Appendix A, B, C.

The Fifth Amendment prohibits the prosecutor from commenting to the jury on the defendant's failure to take the stand in his own defense. *Griffin v. California* (1965) 380 U.S. 609, 615.

During closing argument, the prosecution made five improper indirect comments on Petitioner's failure to testify. Petitioner objected to the improper

comments but the trial court failed to issue corrective instructions. In fact, the court ruled the comments close but not erroneous. (4RT 833, 834) On direct appeal, the California Court of Appeal considered only two of the five improper comments and found them to be comments on Petitioner's failure to testify. The other three comments though identical to the two comments found to be erroneous were not reviewed or discussed.

The question of whether the three overlooked comments constitute comments on Petitioner's failure to testify is central to resolving the issue at hand.

TWO COMMENTS REVIEWED BY THE STATE COURT

The California Court of Appeal correctly identified *Griffin v. California*, as the controlling legal authority on prosecutorial comments on a defendant's failure to testify. The state court also correctly identified *Chapman v. California*, 386 U.S. 18 (1967) as the legal authority in determining harmless error. The state court however unreasonably applied *Griffin* and *Chapman* to the facts of the case and also unreasonably determined the facts to resolve the claim by overlooking material facts. The Ninth Circuit Court simply accepted the state court ruling (Appendix A) and overlook the same facts overlooked by the state court which are pertinent to the claim. The state court identified only the following two comments on Amankrah's failure to testify:

A

The only evidence you have that tells us what happened at that house came from Jane Doe on that stand Remember, all we can consider in this case is what

was presented on that witness stand. That's the evidence. (4RT 822) (Appendix C at p. 5) (italics added)

B

Now, again, why should we believe Ms. Doe in her testimony? *Well, we should believe Ms. Doe in her testimony because there's no evidence of anything contradicting what she said. Her version on that stand is the only version we heard. It's the only thing that we heard that happened in that house.* And there's nothing about her testimony that would make you not want to believe her. (4RT 826) See (Appendix C at p. 5) (italics added)

In its analysis of these comments, the state court stated "*it was clear to the jury at the conclusion of the evidence that only two people were in the house during the relevant time period – defendant and Doe.*" and "*because only defendant's testimony could contradict Doe's testimony as to what happened in the house, the prosecutor was necessarily commenting on defendant's failure to testify.*" (Appendix C at p. 8) This finding is on point with Griffin.

THREE COMMENTS OVERLOOKED BY THE STATE COURT

The prosecution's theory was that Jane Doe sustained a cut to her hand as she was kidnapped at a bus stop on Base Line road. The following was adduced at trial. Deputy Leichliter, the investigating Sherriff in this case testified that Base Line, the road on which Jane Doe reported she was kidnapped from is an open and busy street but nobody called about an attack that morning. (3RT 554, 555) Deputy

Leichliter further testified that there was no evidence the Jane Doe or Appellant were at the said bus stop other than Jane Doe's statements. (3RT 555, 556).

Not unlike the comments found to be improper comments on petitioner's failure to testify at trial, at the conclusion of evidence, it was similarly clear to the jury that only two people, Amankrah and Doe knew how Doe got her cut and whether or not she was locked in the trunk. The California Court of Appeal overlooked the following three material comments as did the Ninth Circuit Court:

C

There's Jane Doe's cut. As you can see, *the only evidence you heard about how she received that cut was from Jane Doe. Jane Doe was the only one that **explained** that cut. And Jane Doe got on the stand and said she doesn't know exactly where she got it, but she knows when Mr. Amankrah approached her with a knife that she did push away.* (3RT 828.) (italics and bold added)

D

And the only evidence we have that she was in the trunk is from Jane Doe.... (4RT 829.) (italics and bold added)

E

Does it change the fact that *she was the only person in this trial that **testified to her cut and how she got it?*** Does it change that (4RT 830.) (italics and bold added)

The prosecutor's comments in C, D, and E above are directly on point with comments in A and B which the California Court of Appeal found constitutes

improper comments on Petitioner's failure to testify. Apart from Doe, only Amankrah could "*explain that cut.*" And only Amankrah could *testify* about whether or not Doe was in the trunk. Because Petitioner is the only other person who could explain or testify to these critical events described in comments C, D, and E, the Prosecutor's comments were manifestly intended to call attention to the Amankrah's failure to testify and are of such a character that the jury would naturally and necessarily take it to be comments on the failure to testify. The California Court of Appeal overlooked these comments which are material to the Griffin claim. The Ninth Circuit Court decision completely adopted this unreasonable determination of facts and overlooked the state court's misapprehension of the improper comments.

Petitioner objected to the improper comments but the trial court ruled the comments to be within legal limits because the prosecutor did not mention the Appellant by name. (4RT 833, 834)

GRIFFIN ERROR IS PREJUDICIAL

In resolving the *Griffin* issue on direct appeal, the state court correctly identified *Chapman* as the authority to determine prejudice but applied *Chapman* unreasonably. The court failed to review the entire record before it thereby overlooking *exonerating* evidence and considering only aggravating evidence. Even giving deference to the state court ruling, the Griffin error is prejudicial.

"[C]omment on a defendant's failure to testify cannot be labeled harmless error in a case where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported

acquittal” *Anderson v. Nelson*, 390 U.S. 523 (1968)

EVIDENCE THAT COULD SUPPORT AN ACQUITTAL

Jane Doe’s medical examination was conducted about 6 – 7 hours after the alleged sexual assault. Vaginal swabs and her clothing were seized. (3RT 580, 581, 201, 602) Jane Doe reported to the Medical examination nurse that she had never had any sexual contact prior to Petitioner assaulting her. (3RT 598, 599, 611, 612) Petitioner denies kidnapping Jane Doe and engaging in any sexual intercourse and/or oral copulation acts with her.

Jane Doe testified that Petitioner orally copulate her for several minutes. (1RT 259, 260) She further testified that Petitioner then engaged in three acts of sexual intercourse with her moving to apply Vaseline to his penis in between acts of intercourse. (1-2RT 261-263, 268, 407)

During her medical examination, the examining nurse testified she took photographs of Doe’s genital injuries (3RT 609) but later found out that the camera was not working so she has no pictures to show of the injuries. (3RT 609, 610)

Semen was discovered in Jane Doe’s genital area and in the crotch area of her underwear. Petitioner Amankrah is excluded as a possible source of any DNA from these samples of evidence. (3RT 690, 691, 702-704, 707, 713)

A light brown hair consistent with an eyebrow or eyelash hair was collected from Doe’s genital area. (3RT 706, 707) Petitioner’s hair is black. (3RT 620)

The medical examination nurse testified no Vaseline, gel, or lubricant was detected in Jane Doe’s vaginal/genital area. (3RT 600, 601)

Jane Doe had normal vitals during her medical examination. (3RT 590, 591)

Jane Doe is excluded as a possible source of any DNA from petitioner's penile swab. (3RT 710)

Jane Doe's blood was found in the trunk of petitioner's car. However, the circumstances under which this evidence was found raises doubt as to the credibility of the evidence. The seal placed on the trunk to prevent evidence tampering was broken before the criminalist arrived at the Sheriff's forensic yard to process the vehicle. (2RT 469, 470) Nobody could explain why the seal was broken prior to the vehicle being processed. Furthermore, the blood stain found contained a mixture of two blood types. Doe and somebody else, petitioner excluded. (3RT 715, 716). Jane Doe's blood was not found anywhere else. Not on the bed sheets on the bed she claims she was assaulted on, not anywhere in Petitioner's house, or the bus stop in question. (2RT 431-433, 535, 536, 541)

The totality of the evidence presented at trial i.e. semen in Doe's genital area and her underwear not belonging to Petitioner, no DNA from Petitioner's saliva present in Doe's genital area, no Vaseline in her genital area, light brown hair found in Doe's genital area whereas Petitioner's hair is black, and no DNA from Doe being on Petitioner's penis could have supported an acquittal and reveal Petitioner did not commit the offenses for which he is incarcerated..

If after reviewing the three comments listed above, this Court finds that the comments constitute comments on Petitioner's failure to testify the error cannot be deemed harmless in light of all the evidence presented at trial.

The prosecution's call for the jury to believe Jane Doe's testimony because of Petitioner's silence is a direct inference of guilt from silence as are the subsequent improper comments on Petitioner's failure to testify in his own defense. These comments served as a basis of conviction.

As in *Anderson v. Nelson*, the extensive comments on a defendant's failure to testify, the inferences of guilt stressed to the jury as a basis of conviction, and the presence of evidence that could support an acquittal cannot be labeled as harmless error. This is more so where the trial court failed to give corrective instructions after Petitioner's objection. In its ruling rejecting the Griffin error claim, the Ninth Circuit rejected its ruling in *Lincoln v. Sunn* 807 F.2d 805, 809 (9th Cir.1987)

FINDINGS FROM SISTER COURTS OF APPEAL

Other Circuits have considered such comments as presented here and found them improper.:

"[A]n indirect comment will be deemed improper 'only if (1) the prosecutor manifestly intended to refer to the defendant's silence or (2) a jury would naturally and necessarily take the remark for a comment on the defendant's silence" (United States v. Tucker, 714 F.3d 1006, 1014 (7th Cir.2012), quoting United States v. Mietus, 237 F.3d 866, 8741 (7th Cir.2001)).

"The Constitution does not permit the government to comment on the accused's silence. (Bates v. Lee, 308 F.3d 411, 420 (4th Cir.2002) The test is whether the "language used was manifestly intended to be, or was [] of such character that the jury would naturally and necessarily take it to be a comment of the failure of

the accused to testify[.]” United States v. Anderson, 481 F.2d 685, 701(4th Cir.1973), aff’d 417 U.S. 211, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974)).

The Ninth Circuit Court ruling on the Griffin claim conflicts with the ruling of other Circuit Courts. The Circuit Court as did the California Court of Appeal-the last court to present a reasoned decision applied *Griffin* and *Chapman* to the facts of this claim in an objectively unreasonable manner.

Petitioner urges this Court to take review in order to delineate whether comments asking for facts or information in the knowledge of only two individuals one of whom testified at trial and the other who did not amounts to comments on the failure of the non-testifying party to testify in violation of the Fifth Amendment.

2.

THE CALIFORNIA COURT OF APPEAL UNREASONABLY APPLIED GRIFFIN v. CALIFORNIA AND CHAPMAN v. CALIFORNIA TO THE FACTS OF PETITIONER’S CASE AND UNREASONABLY DETERMINED THE FACTS IN THIS CASE IN VIOLATION OF 28 USC §2254(D)(1) AND (D)(2) RESPECTIVELY

The California Court of Appeals ruling is the last reasoned state court ruling on the merits of Petitioner’s Griffin error claim and is the subject of review by this Court.

The California Court of Appeal’s 2254(d) decision overlooks material points of fact and law and conflicts with established law. The Ninth Circuit Court’s decision is based solely on the California Court of Appeal’s Griffin error analysis and fails to consider the comments listed in C, D, and E above. The Court also fails to review the evidence Petitioner describes as able to support an acquittal. The state

court's decision violates 28 USC §2254(d)(1)'s unreasonable application rule and 28 USC §2254(d)(2)'s unreasonable determination of the facts. The Ninth Circuit Court decision states in part:

The California Court of Appeal analyzed the prosecutor's entire closing argument and concluded that two of the comments were improper, but that the Griffin error was harmless under Chapman v. California, 386 U.S. at, 24. The state court's rejection of Amankrah's claim was not contrary to, nor an unreasonable application of, either Griffin or Chapman, nor an unreasonable determination of facts based on the evidence presented. (See Appendix A)

This is the full extent of the panel's 2254(d) determination on Petitioner's Griffin error claim and is in direct conflict with *Wiggins v. Smith*, 539 U.S. 527; *Cullen v. Pinholster*, __ U.S. __, 131 S.Ct. 1388, 1398 (2011). The backward-looking language of 2254(d) "requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at the same time i.e., the record before the state court." See *Cullen v. Pinholster*, __ U.S. 170, 131 S.Ct. 1388, 1398 . "State-court decisions are measured against this Court's precedents as of the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

2254(d)(1) STANDARD OF REVIEW

"[A] state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams v. Taylor* (2000) 529 U.S. 362, 407. "Stated simply, a

federal court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established law was objectively unreasonable.”
Id., at p. 409.

The state court correctly identified *Griffin v. California* and *Chapman v. California* as United States Supreme Court authority in determining whether the comments were improper and whether the error was prejudicial respectively. However, the state court’s application of the Supreme Court precedence to the facts of Petitioner’s case was objectively unreasonable.

First, in its review of the closing arguments, the state court identified and applied *Griffin* to only two improper comments made by the prosecution. The court failed to consider, mention, or discuss the three material comments listed above in comments C, D, and E. The state courts application of *Griffin v. California* to the facts of Petitioner’s case is objectively unreasonable.

Second, in its prejudice determination, in addition to the state court’s failure to discuss or mention all five improper comments on Petitioner’s failure to testify, the state court failed to consider material evidence presented at trial that could have supported an acquittal. The state court’s prejudice analysis failed to apply all five improper comments and exonerating evidence adduced at trial to its *Chapman* harmless error analysis thereby rendering its application objectively unreasonable. See *Williams supra*, at 397, 398.

Based on the foregoing, Petitioner presents the question of whether the state court’s application of *Griffin* and *Chapman* in this case is objectively unreasonable.

2254(d)(2) STANDARD OF REVIEW

The 2254(d)(2) “unreasonable determination” clause exists in situations where Petitioner challenges the state-court’s findings based entirely on the state record see e.g. *Wiggin v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2538-39 (2003). Where the “state court should have made a finding of fact but neglected to do so,” the state-court factual determination is perforce unreasonable and there is nothing to which the presumption of correctness can attach. See *Wiggins*, 123 S.Ct at 2539-40; *Taylor v. Maddox*, 366 F.3d 992, 1000, 1001 (9th Cir. 2004). “Similarly, where the state courts plainly misapprehend or misstate the record in making their findings and the misapprehension goes to a material factual issue that is central to petitioner’s claim,” the fact-finding process is undermined rendering the factual finding unreasonable. See *Wiggin*, 123 S.Ct. at 2538-39. “Failure to consider key aspects of the record is a defect in the fact-finding process.” See *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003). The state court failed to consider material key evidence-trial testimony that could support an acquittal and Griffin error comments made by the prosecution in his closing argument.

Because the decision overlooks the three groups of Griffin comments which are material to the claim, the ruling of the state court is unreasonable. The Ninth Circuit Court’s default acceptance of the state court factual determination failed to review Petitioner’s factual allegations. Petitioner respectfully asks this Court to grant the Petition in order to answer the question of whether the state court violated 28 USC § 2254 (d) in the first instance, whether the court violated the

Cullen v. Pinholster requirement for reviewing Court's to review the entire state court record, and whether the Ninth Circuit Court's default acceptance of the state court ruling without an independent review of the facts violated Petitioner's due process right.

Petitioner urges this Court to take review in order to delineate firmly the scope of a reviewing court's duty under 28 USC § 2254 to review facts present in a state court record.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant the petition for certiorari.

Dated: 1/30/2018

Respectfully Submitted,



Samuel Kwame Amankrah
Petitioner in Pro Per