

No. _____

IN THE
Supreme Court of the United States

JOSE ANTHONY VERDUZCO,

Petitioner,

v.

MARION SPEARMAN, WARDEN OF THE CORRECTIONAL TRAINING FACILITY IN SOLEDAD,
CALIFORNIA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

HILARY POTASHNER
Federal Public Defender
Central District of California
ASHWINI S. MATE
Deputy Federal Public Defender
Counsel of Record
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-1417
Facsimile: (213) 894-0081
Ashwini_Mate@fd.org

Attorneys for Petitioner

QUESTIONS PRESENTED

Whether the prosecutor engaged in prejudicial misconduct during closing arguments such that petitioner is entitled to have his petition for a writ of habeas corpus granted?

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Petitioner, Jose Anthony Verduzco, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit is not reported in the Federal Reporter, but can be found online at *Jose Anthony Verduzco v. Marion Spearman*, 2018 WL 1223471 (9th Cir. 2018). (Pet. App. A1-A4) (Copy of Memorandum Disposition).

JURISDICTION

The Ninth Circuit entered its memorandum decision and judgment on March 9, 2018. This petition is filed within 90 days after that date pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

[N]or shall any State deprive any person of life, liberty, or property, without due process of law

U.S. CONST. amend. XIV, §1

STATEMENT OF THE CASE

I. Course of Proceedings

On March 4, 2009, a jury in Orange County Superior Court, California, found Mr. Verduzco guilty of murder in the first degree in violation of California Penal Code § 187(a), and found true the special allegation that he had personally discharged a firearm causing death in violation of California Penal Code § 12022.53(d). (RT 934-36; CT 290-91).¹ On June 12, 2009, the trial judge sentenced Mr. Verduzco to 50 years to life. (RT 947-48).

¹ “RT” refers to the Reporter’s Transcript of Mr. Verduzco’s trial in the Superior Court of California, Orange County, Case No. 05CF3963, lodged in the district court. It is followed by the applicable page number. “CT” refers to the Clerk’s Transcript of Mr. Verduzco’s trial in the Superior Court of California, Orange County, Case No. 05CF3963, lodged in the district court. It is followed by the applicable page number.

Mr. Verduzco appealed his case to the California Court of Appeal (“CCA”) on March 18, 2010. (3 LD)². Amongst other things, he argued that his due process rights were violated because the prosecutor committed misconduct in closing by denigrating the alternative verdict of voluntary manslaughter. (*Id.*). On January 6, 2011, the CCA denied this claim because it did not view the prosecutor’s comments as reprehensible under state law standards for reviewing prosecutorial misconduct. (Pet. App. E) (Copy of CCA Opinion).

After a one-line denial in the California Supreme Court on April 27, 2011, (Pet. App. F), Mr. Verduzco filed a habeas petition in the Central District of California on November 21, 2011, challenging his custody resulting from this conviction. (CR 1).³ The petition raised three grounds for relief, including that Mr. Verduzco was denied due process and a fair trial by the prosecutor’s misconduct in closing argument. (CR 1).

On February 27, 2012, the Warden filed an answer to Mr. Verduzco’s petition. (CR 7). The Warden contended, inter alia, that petitioner had only exhausted parts of his prosecutorial misconduct claim in the California Supreme Court. (*Id.*). The Warden then argued that the exhausted claims are subject to the deferential standard articulated in the Antiterrorism and Effective Death Penalty Act (“AEDPA”). (*Id.*). This standard requires a federal court to defer to a reasoned

² “LD” refers to all other documents lodged by the government (other than the RTs and CTs) in the district court under docket number 8. It is preceded by the Lodgment Number and followed by the page number.

³ “CR” refers to the Clerk’s Record in the district court, CV 11-1804-JSL (SP).

decision of a state court, when that court hears and denies any claim on the merits, unless that determination was either: (1) “contrary to, or involved an unreasonable application of, clearly established Federal law,” 28 U.S.C. § 2254(d)(1); or (2) “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” § 2254(d)(2). (*Id.*). The Warden argued that the state court was not unreasonable in denying Mr. Verduzco’s exhausted claims. (*Id.*). Mr. Verduzco replied on June 21, 2012. (CR 16). He removed the unexhausted parts of his claims, but persisted in his argument for relief. (*Id.*).

On January 6, 2015, the Honorable Sheri Pym, United States Magistrate Judge, recommended that the petition be denied for many of the same reasons argued by the government. (CR 22); (Pet. App. D)(Copy of Magistrate Report and Recommendation). On February 4, 2015, Mr. Verduzco filed his objections to this report and a request for a certificate of appealability (“COA”). (CR 24).

On March 2, 2015, Judge King accepted Judge Pym’s recommendation, dismissed Mr. Verduzco petition with prejudice, and denied the COA request. (CR 27, 28; Pet. App. A, B) (Copies of the District Courts Order Accepting the Magistrates Report and Judgment). One month later, Mr. Verduzco filed a notice of appeal requesting a COA from the Ninth Circuit, which was granted on November 12, 2015 as to the question of whether the prosecutor committed prejudicial misconduct in closing arguments. (CR 29; Ninth Cir. Case No. 15-55640, Dkt. # 3). The Ninth Circuit also *sua sponte* appointed counsel for the appeal on that day. (Ninth Cir. Case No. 15-55640, Dkt. # 3).

On April 28, 2017, Mr. Verduzco, through appointed counsel, filed an appeal based on the certified question. (Ninth Cir. Case No. 15-55640, Dkt.s # 28, 29, 30) The government responded on July 20, 2017. (Ninth Cir. Case No. 15-55640, Dkt.s # 37, 38, 39). And on March 9, 2018, the Ninth Circuit entered its memorandum decision and judgment denying Mr. Verduzco's petition. (Ninth Cir. Case No. 15-55640, Dkt. # 54); (Pet. App. A).

II. Statement of Facts

1. Evidence Presented of Events Leading Up To Incident

Mr. Verduzco was living with his common-law wife Luz Rodriguez for 24 years and they had four children together. (6 LD 2). During several months leading up to November 29, 2005, the date of the incident underlying his conviction, Mr. Verduzco's wife had been cheating on him with a man named Angel Martinez-Jimenez. (*Id.*). Mr. Martinez-Jimenez had been working as a construction contractor with family members, the Coronados, who lived across the street from Mr. Verduzco. (6 LD 2; RT 376). When Mr. Verduzco found out about the affair, he questioned Ms. Rodriguez about it and she repeatedly denied everything, telling him that he was crazy and imagining things. (6 LD 2; RT 240-41, 264-65, 304-05, 352, 380).

For example, at one point Mr. Verduzco caught them at 7-11 together, and also heard them on the phone together. (RT 301-04, 307). When he confronted his wife, she lied. (RT 330-35). She even called a friend so she could pretend she was on the phone with that friend. (RT 336). At another point, Mr. Verduzco asked to sit down and confront them about the affair. He told them it was breaking his heart,

but they both denied it and called him crazy and jealous. (RT 319-22). On another occasion, Mr. Verduzco begged his wife to stop when she was late to pick up their daughter from school because of the affair. (RT 313-16). Ms. Rodriguez told him that she had just gotten on the wrong bus and he was going crazy. (RT 316). Ms. Rodriguez also lied about going to dinner with a friend, and instead went to have sex with Mr. Martinez-Jimenez. (RT 327-30, 334-35, 380-81). Ms. Rodriguez could see that she was hurting Mr. Verduzco, but persisted in lying because she was scared that he would find out. (RT 207-208, 306).

Ms. Rodriguez could not recall her preliminary hearing testimony where she stated that she had hidden a knife that Mr. Verduzco had on his body when he declared that he was going to kill Mr. Martinez-Jimenez. (RT 280-82, 285-86, 383-384). Mr. Verduzco apparently owned an unloaded shotgun that Ms. Rodriguez got rid of for fear that he might use it against her lover. (RT 278-280). Officer Cuenca testified that Ms. Rodriguez told him that Mr. Verduzco told his son that he intended to kill someone the day before the incident, though on direct examination Ms. Rodriguez denied this statement ever happened. (RT 198-199, 385-86). Ms. Rodriguez also stated that she did not believe that Mr. Verduzco would ever be extremely violent with Martinez-Jimenez. (RT 205, 285, 340, 344-345).

2. Evidence Presented of the Incident

Officer Cuenca testified that Ms. Rodriguez told him that Mr. Verduzco said he was going to get something from Townsend Street on the morning of the incident, though Ms. Rodriguez denied these statements when directly examined about them under oath. (RT 244, 249, 251, 389). She did, however, testify that Mr.

Verduzco appeared sad that morning. (RT 389-90). Ms. Rodriguez accompanied a friend to a health clinic and, on the way, contacted Mr. Martinez-Jimenez to warn him. (RT 244-245).

According to the Coronado's daughter, Isadora Macias, Mr. Verduzco came by the house twice the day of the incident, once to get lemons and another time to ask if Mr. Martinez-Jimenez was home. (RT 93-97). When the workers returned from work that day, one worker named Cirilo Castaneda saw Mr. Verduzco talking to another worker while riding his bike towards the Coronado's house. (RT 472, 477-478, 480). Mr. Castaneda testified that Mr. Verduzco then said "What's up Miguelito?" to Mr. Martinez-Jimenez and started towards him at which point Mr. Martinez-Jimenez started to run away and a chase ensued. (RT 488-493). Mr. Castaneda thought they were going to fight and wanted to intervene but saw a gun. (RT 492, 505). He testified that there was no fight, but a struggle ensued after the initial shots were fired. (RT 498-503). He saw Mr. Verduzco shoot Mr. Martinez-Jimenez twice in the chest and twice in the face. (RT 493, 504). He also testified that Mr. Verduzco appeared calm. (RT 513).

On previous occasions, Cirilo Castaneda gave several different stories to investigating officers about the incident, including that there was a fight and that Mr. Verduzco was not calm but very angry. (RT 457; 635-37, 873-75). The parties stipulated that Mr. Castaneda had been convicted of grand theft previously. (RT 756). At some point, Mr. Castaneda ran into the house and encountered Isadora Macias. (RT 508).

Isadora Macias, the victim's niece, testified that she heard shots, thought it was her brother's playing with a toy gun, and then saw her father's worker run in. (RT 102-06). At that point, she went outside and saw Mr. Verduzco shooting at Martinez-Jimenez. (*Id.*). She told Mr. Verduzco to stop, and he pointed the gun at her laughing. (RT 107-09). Mr. Martinez-Jimenez was on the ground and waived her to go inside. (RT 109, 115, 119). Ms. Macias saw Mr. Verduzco shoot her uncle again from two to three feet away and with both his hands on the gun. (RT 115-118).

Like Mr. Castaneda, Ms. Macias also told the officers a different story at the time of the incident – that she never went outside and interacted with Mr. Verduzco. (RT 139-42).

At some point during the incident, Ms. Rodriguez, Mr. Verduzco's wife, heard shots and came outside where she saw Mr. Verduzco sitting on a bicycle with a gun. (RT 255-60). Mr. Verduzco said he was not going to kill her because she was the mother of his children. (RT 247, 273-75). The parties stipulated that Mr. Verduzco fled to Mexico after the incident. (RT 631-32).

3. Closing Arguments

Mr. Verduzco was charged with Mr. Martinez-Jimenez's death as a murder with special enhancements for his firearm use. The jury was also instructed on the alternative verdict of voluntary manslaughter. (RT 905-906, 914-918; CT 255-59). After the close of the prosecution's case which presented the story above, the defense presented the victim's ex-wife. (RT 638-689). Ms. Maria Guadalupe Salazar had told the defense investigator that the victim physically abused her, although

she did not appear to recall the extent of it when directly examined about it. (RT 689-730). The case then proceeded to closing arguments.

As relevant to this appeal, the prosecutor said:

Don't split the baby out of equity. Don't decide to feel sorry.

Follow the law, follow the facts, find [petitioner] guilty of murder. If you want to find him guilty of anything less than murder, just walk him out the door, find him not guilty. This is an everything or- nothing case.

There is no self-defense. There is no heat of passion when you plan an execution. Don't try to do his Honor's, Judge Froeberg's, job for him. If you don't want to find him guilty of murder, on behalf of my client, I'm telling you, give him a free ride. He's guilty of murder.

(RT 828). Defense counsel then responded by arguing that Mr. Verduzco, while not innocent, was only guilty of voluntary manslaughter. (RT 831-834). Counsel argued that the effect of all the suspicion, deceit and infidelity on his mental state was dramatic and he acted under heat of passion. (RT 832-34, 837-839). Mr. Verduzco had tried to resolve this reasonably, by meeting both the participants in the affair. (RT 840-41). However, during that meeting, and in other instances, he was repeatedly coerced into thinking he was crazy and he was the one who was acting badly in accusing them. (RT 840-41, 44-45). Because of this repeated strain, Mr. Verduzco was so crazed the day of the incident that he shot Mr. Jimenez-Martinez out of intense anger and rage. (RT 842, 850-51). Defense counsel also argued that Mr. Verduzco acted out of imperfect self-defense. Mr. Jimenez-Martinez was a

violent man, as evidenced by the abuse he heaped on his now ex-wife and his nickname – Sledgehammer. (RT 856-63).

In rebuttal, the prosecutor argued:

But you're going to go home and somebody is going to say to you, okay, can you finally tell me what happened? And you're going to be able to say yes, I can. And you're going to have one of two stories to tell. Boy, one would be fine.

You would be, honey, you'll never believe the case I was on. At first you would have thought it was murder, because you see, there was this guy named Verduzco, and his wife was cheating on him with somebody, and he seemed pretty calm and cool and rational. He went over to Townsend Street and got a gun, and he tracked the guy down after buying a shotgun, and after making a bunch of threats, and telling his wife he was going to kill that mother fucker who took his woman, and telling his little boy he was going to shoot him in the head.

He went to track him down, looking for him, and right in front of the guy, you would have thought was pretty dumb, maybe a little slow, not dumb, but not real educated, talking about Mr. Casteneda, it turns out he was a conspirator, there was a bunch of conspirators.

Isadora Macias, she was a sharp one, she cooked up this lie. There was a puppeteer, ran up this huge conspiracy to frame the defendant, because none of it really happened.

The fact that he shot this guy and he shot him twice in the chest and twice in the back and once in the head and once in a defensive wound, I believe, we found it was self-defense, and we walked him. We found it was imperfect self-defense, even though there is no evidence that he ever knew about this domestic violence case or — but we didn't care about that. But somebody should write a novel, somebody should tell the paper, we found him not guilty.

We found voluntary manslaughter, a nothing charge. We didn't find him guilty of murder.

You know what? We found him not guilty of murder. He's a wife beater. Is that the story that you're going to tell? Or are you going to tell the more mundane, more ordinary, less exciting story, it was a guy who was mad because his wife and another guy were cheating on him, and unlike most people who control their anger, he didn't, and he decided to commit murder, and despite his anger, he was rational, he was calculating, he was premeditating, and he went and got a gun and he did exactly – I'll end like I started, he did exactly what he told his little ten year old boy the night before that he was going to do, I'm going to get a gun and shoot somebody in the head.

(RT 889-90).

REASON FOR GRANTING THE WRIT

The Ninth Circuit's decision to deny Mr. Verduzco's petition ignored the applicable standard of review and misunderstood the prejudicial impact of the prosecutor's misconduct.

I. The Ninth Circuit should have applied a *de novo* standard of review.

The operative state court decision in this case was the CCA's opinion filed on January 5, 2011. (2 LD); Pet. App. E). The district court and Ninth Circuit appeared to apply the Antiterrorism and Effective Death Penalty Act ("AEDPA") which requires deference to that state court decision. (CR 22, 27, 28); (Pet. App. A-D). However, because the operative state court decision did not apply federal law, AEDPA should not apply and both courts were free to apply a *denovo* standard of review.

This Court, and others, have determined that *Darden v. Wainwright*, 477 U.S. 168 (1986), is the source of clearly established law and the test for determining whether a prosecutor committed misconduct that violates the Constitution during trial. *See Deck v. Jenkins*, 814 F.3d 954, 977-78 (9th Cir. 2014); *e.g.*, *Drayden v. White*, 232 F.3d 704, 713 (9th Cir. 2000); *Weaver v. Bowersox*, 438 F.3d 832, 839-40 (8th Cir. 2006) (granting relief and rejecting State’s arguments that the Supreme Court’s law on prosecutorial misconduct was insufficiently developed for purposes of AEDPA, citing *Darden*); *Johnson v. Mullin*, 505 F.3d 1128, 1151-52, 1159 (10th Cir. 2007); *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003); *Jenkins v. Artuz*, 294 F.3d 284, 292 (2d Cir. 2002); *Riddle v. Cockrell*, 288 F.3d 713, 720 (5th Cir. 2002).

Although there is a rebuttable presumption that state courts apply clearly established federal law, *see Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013), in this instance that presumption is rebutted. *Johnson*, 133 S.Ct. at 1096 (stating that if a state standard is less protective, or too different from the federal standard, or if the Federal precedent was simply mentioned in passing – the presumption may be rebutted). The plain language of the state standard for prosecutorial misconduct applies to a narrower class of cases than the federal standard does. Conduct by a prosecutor “is prosecutorial misconduct under state law only if it involves ‘the use of deceptive or reprehensible methods to attempt to persuade either the court of the jury.’” *People v. Earp*, 978 P.2d 15, 36 (Cal. 1999) (citing *People v. Espinoza*, 3 Cal. 4th 806, 820 (Cal. 1992), *People v. Price*, 1 Cal. 4th 324 (Cal. 1991) (emphasis added)). The state standard has a second step where an error is reversible only if “it

is reasonably probable that a result more favorable to defendant would have been reached” absent the error. *People v. Wallace*, 44 Cal. 4th 1032, 1071 (Cal. 2008). Meanwhile, the federal standard applies to **any misconduct** that “so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Therefore it appears that only a narrow class of prosecutorial misconduct will meet the first step of the state standard – conduct that is reprehensible or deceptive. The second step of the state standard mirrors the federal standard. Therefore, the state standard adds another qualifying factor before prosecutorial misconduct will be deemed harmful to defendants. Because the federal standard applies to a broader range of prosecutorial misconduct, it is more protective of defendants.

The CCA mentioned the federal standard established in *Darden* and stated that the state standard was different.:

[O]n claims of prosecutorial misconduct our state law standards differ from those under the federal Constitution. With respect to the latter, conduct by the prosecutor constitutes prosecutorial misconduct only if it “[so infects] the trial with unfairness as to make the resulting conviction a denial of due process.” By contrast, our state law considers it misconduct when a prosecutor uses “deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ... ‘A defendant’s conviction will not be reversed for prosecutorial misconduct’ that violates state law, however, ‘unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.’

(6 LD 9-10); (Pet. App. E at p. 9-10) (citations omitted). After establishing the distinction between federal and state law, the CCA then applied state law to decide

Mr. Verduzco's claim.: "[w]hile we do not find the prosecutor's argument laudable, neither was it inflammatory or reprehensible." (6 LD 11); (Pet. App. E at p. 11).

Consequently, the CCA never reached the second half of the California test – whether there was a reasonable probability of a different result. Had it done so, then it would have reached the constitutional question. *See Deck v. Jenkins*, 814 F.3d 954, 979 (9th Cir. 2014) ("equating the *Darden* factors to California's "reasonable probability" standard.) By failing to do so, the CCA did not apply clearly established federal law. Instead, the CCA determined only that, under California law, there was no evidence that the prosecutor used deceptive or reprehensible methods. This single factor was therefore permitted to outweigh the *Darden* factors as outlined below. In applying *Darden* to prosecutorial misconduct cases, the Ninth Circuit has determined that "[n]o single consideration should be treated as either necessary or sufficient to reach a decision." *Deck*, 814 F.3d at 978. The district court and Ninth Circuit should not have deferred to this decision, and this Court should grant Mr. Verduzco's petition to clarify whether the state standard is broader or narrower than the federal standard.

II. The prosecutor committed prejudicial prosecutorial misconduct.

The Ninth Circuit also misinterpreted *Darden* in determining that the prosecutor did not commit misconduct in Mr. Verduzco's case. Under *Darden*, some of the factors which a court may take into account in determining whether misconduct rises to a level of due process violation are: (1) the weight of evidence of guilt, (2) whether the misconduct was isolated or part of an ongoing pattern, (3)

whether the misconduct relates to a critical part of the case, (4) whether a prosecutor's comment misstates or manipulates the evidence. *See Darden*, 477 U.S. at 182. *Darden's* analysis is a highly generalized standard. *See Parker v. Matthews*, 567 U.S. 37 (2012) ("The highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden* bears scant resemblance to the elaborate, multistep test employed by the Sixth Circuit here."). The Ninth Circuit did not mention the last three factors which all lead to the conclusion that the prosecutor's misconduct was prejudicial.

The entirety of Mr. Verduzco's defense was that he was guilty only of voluntary manslaughter. He never claimed that he was innocent or that he should walk away from sanction. But instead of arguing that there was sufficient evidence to prove that Mr. Verduzco had committed a murder and not voluntary manslaughter, the prosecutor incited the jury to believe that voluntary manslaughter was not a valid verdict. He shamed the jury, impliedly vouched for witnesses, repeatedly denigrated the alternative verdict of voluntary manslaughter as a nothing charge, and mocked the defense. These were "not mere 'stray words,' they were a direct response to the central theory of [defendant's] case." *Deck*, 814 F.3d at 980.

For example, the prosecutor led the jury to believe that finding Mr. Verduzco guilty of anything less than murder was tantamount to acquittal. The prosecution stated that if the jury did not believe he had murdered the victim, that they should simply "walk him", (RT 828), and "give him a free ride." (*Id.*). The prosecutor

further implied that if the jury didn't find him guilty of murder, that that was "nothing" because "this is an everything or - nothing case." (*Id.*) In rebuttal, the prosecutor once again directly referred to voluntary manslaughter as a "nothing charge" equating it with acquittal. (RT 890). "But somebody should write a novel, somebody should tell the paper, we found him not guilty. We found voluntary manslaughter, a nothing charge. We didn't find him guilty of murder." (*Id.*) The jury likely believed the prosecutor that finding anything less than murder would be tantamount to acquittal. Consequently, the prosecutor committed clear misconduct. *See Sechrest v. Ignacio*, 549 F.3d 789, 808-10 (9th Cir. 2008) (determining that it was misconduct for the prosecutor to imply that anything less than the death penalty would result in defendant being released early based on the parole board's determinations.)

Furthermore, these comments were embedded in a long narrative designed to shame the jury into a murder conviction. The prosecutor asked the jurors to think about what story they would tell when they left the jury room and how they would feel about telling their families that they found a "nothing charge" like voluntary manslaughter. (RT 889-90). This was also clearly improper. *See Sechrest*, 549 F.3d at 811 (determining that by telling the jurors that if they "[fell] for that [the defense argument] fraud,' they would be 'risk[ing] the life of some other person or child' the prosecutor committed misconduct); *see also Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (per curiam) (describing the prosecutor's statement that maybe next time the victim "will be someone you know" as "highly inflammatory and wholly

impermissible.”) A conviction should not be based on a juror’s feelings about reporting their decision when they return home, it should be about the law.

At other points in the closing argument, the prosecutor also degraded the defense and implicitly vouched for Isadora Macias and Cirilo Castaneda. The prosecutor mocked the defense by arguing that the jury would have to find that Cirilo Castaneda and Isadora Macias were liars and co-conspirators in some elaborate plan in order to determine that Mr. Verduzco acted in the heat of passion or imperfect self-defense. “[T]alking about Mr. Castaneda, it turns out he was a conspirator, there was a bunch of conspirators. Isadora Macias, she was a sharp one, she cooked up this lie. There was a puppeteer, ran up this huge conspiracy to frame the defendant, because none of it really happened.” (RT 889). This was also clearly misconduct. *See Sechrest*, 549 F.3d at 811 (determining that calling the defense a “fraud” was misconduct); *see also United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir. 1999) (holding that the prosecutor committed misconduct “denigrating the defense as a sham.”) By stating that the jury would have to find these witnesses were co-conspirators to find that their stories were not credible, the prosecutor implicitly vouched for their veracity.

These errors rose to the level of due process violations because Mr. Verduzco’s entire defense was that he was guilty of voluntary manslaughter. The prosecutor’s denigration of voluntary manslaughter as a valid verdict was directly prejudicial to this defense.

The Ninth Circuit also erred in believing that the jury instructions in this case cured any misconduct. (Pet. App. A at p. 4). The jury was instructed generally that statements by the attorneys were not evidence, (RT 893, CT 211), but they were not instructed that voluntary manslaughter was not the equivalent of an acquittal. *See Deck*, 814 F.3d at 982 (“[I]mproper prosecutorial statements cannot be neutralized by instructions that do not in any way address ‘the specific statements of the prosecutors.’”) (citing *Weatherspoon*, 410 F.3d at 1152).

The Ninth Circuit also erred in its assessment of the first factor. The evidence that Mr. Verduzco was guilty of murder was not overwhelming as it came from several unreliable sources. All the prosecution eyewitnesses changed their stories in important ways over time. For example, Isadora Macias claimed she was outside and that Mr. Verduzco appeared calm, was laughing and pointing the gun at her; yet she told the officers right after the incident that she was never outside and never interacted with Mr. Verduzco at all. (RT 139-142). This was a completely different story that directly related to whether Mr. Verduzco was acting in the heat of passion or not.

In another example, Luz Rodriguez claimed to the officers that Mr. Verduzco threatened Mr. Jimenez multiple times, but did not recall such events during her trial and preliminary hearing testimony. (RT 213-17, 222, 244, 251-52, 267, 282-83). Furthermore, the magistrate noted that much of the evidence of premeditation/planning came from Mrs. Rodriguez prior statements about Mr. Verduzco’s threats. (Pet. App. D at p. 15). But she did not recollect any of this on

the stand. In fact, she emphatically denied that Mr. Verduzco told his son the night before that he was going to kill Mr. Jimenez-Martinez, (RT 198-99), a central theme of the prosecutor's argument in closing and also cited by the magistrate. (RT 759, 774, 776, 804, 889-90); (Pet. App. D at p. 15). Additionally, Cirilo Castaneda told a completely different story to officers about the events of the day two separate times, including that Mr. Jimenez and Mr. Verduzco were actually fighting and that Mr. Verduzco was not calm but angry. (RT 457; 635-37, 873-75).

Consequently, the eyewitness evidence that Mr. Verduzco acted in a calm, premeditated and deliberate manner was not credible. The jury could have mitigated to voluntary manslaughter. But if the jury thought that Mr. Verduzco would walk if they found him guilty of manslaughter, perhaps they did not want to. What if they felt ashamed of reporting a manslaughter verdict to their families, or felt that they had to find some elaborate setup/conspiracy occurred before they could mitigate to manslaughter? By denigrating a manslaughter verdict, shaming the jury, vouching for witnesses and mocking the defense, the prosecutor clearly committed prejudicial misconduct. The Ninth Circuit incorrectly held that this was not misconduct and that this was not prejudicial. Mr. Verduzco is, therefore, entitled to a new trial because the prosecutor's misconduct rendered his trial fundamentally unfair. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43, 643 n.15 (1974).

CONCLUSION

The issues presented by Mr. Verduzco are, at least, debatable. A “claim can be debatable even though every jurist of reason might agree after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). For the foregoing reasons, Mr. Verduzco respectfully request that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

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By: s/Ashwini S. Mate
ASHWINI S. MATE
Deputy Federal Public Defender
Counsel of Record

Attorneys for Petitioner