

No. _____

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In The

Supreme Court of the United States

JOHN LEE YUN,

Petitioner-Appellant,

v.

JEFFREY A. BEARD,

Respondent-Appellee.

On Petition for Writ of Certiorari to the

United States Court of Appeals

For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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John Lee Yun, CDCR# AI-3812
CSP - Los Angeles County
P.O. Box 4430
Lancaster, California 93539

Petitioner-Appellant,
In Propria Persona

QUESTION(S) PRESENTED

- I. CERTIORARI SHOULD BE GRANTED, VACATING THE NINTH CIRCUIT COURT'S ORDER DENYING THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY ("COA") ON GROUND ONE OF INEFFECTIVE ASSISTANCE OF COUNSEL ("IAC"), FOR PREJUDICIALLY FAILING TO OBJECT TO PRIOR BAD ACTS, AND REMAND WITH DIRECTIONS TO GRANT COA.
- II. CERTIORARI SHOULD BE GRANTED, VACATING THE NINTH CIRCUIT'S ORDER DENYING THE ISSUANCE OF A COA ON GROUND TWO OF IAC, FOR PREJUDICIALLY FAILING TO OBJECT TO CLOSING ARGUMENT REGARDING PETITIONER'S PRIOR BAD ACTS, BY CODEFENDANT'S COUNSEL, AND REMAND WITH DIRECTIONS TO GRANT COA.
- III. CERTIORARI SHOULD BE GRANTED, VACATING THE NINTH CIRCUIT COURT'S ORDER DENYING THE ISSUANCE OF A COA ON GROUND THREE OF IAC, FOR PREJUDICIALLY FAILING TO OBJECT TO THE GANG'S EXPERT'S QUALIFICATIONS, AND REMAND WITH DIRECTIONS TO GRANT COA.
- IV. CERTIORARI SHOULD BE GRANTED, VACATING THE NINTH CIRCUIT COURT'S ORDER DENYING THE ISSUANCE OF A COA ON GROUND FOUR OF IAC, FOR PREJUDICIALLY FAILING TO REQUEST THIRD-PARTY CULPABILITY INSTRUCTION, AND REMAND WITH DIRECTIONS TO GRANT COA.
- V. CERTIORARI SHOULD BE GRANTED, VACATING THE NINTH CIRCUIT COURT'S ORDER DENYING THE ISSUANCE OF A COA ON GROUND FIVE OF IAC, FOR PREJUDICIALLY FAILING TO REQUEST ACCOMPLICE INSTRUCTIONS, AND REMAND WITH DIRECTIONS TO GRANT COA.
- VI. CERTIORARI SHOULD BE GRANTED, VACATING THE NINTH CIRCUIT COURT'S ORDER DENYING THE ISSUANCE OF A COA ON GROUND SIX OF IAC, FOR PREJUDICIALLY FAILING TO OBJECT TO THE OMISSION FROM GREAT BODILY INJURY JURY INSTRUCTION, THE PRINCIPLES OF ACCOMPLICE, SINCE THE JURY MAY HAVE FOUND THAT BROWN WAS AN ACCOMPLICE UNDER THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE, AND REMAND WITH DIRECTIONS TO GRANT COA.
- VII. CERTIORARI SHOULD BE GRANTED, VACATING THE NINTH CIRCUIT COURT'S ORDER DENYING THE ISSUANCE OF A COA ON GROUND SEVEN OF DUE PROCESS OF LAW VIOLATION, FOR THE TRIAL COURT'S FAILURE TO INSTRUCT THAT CODEFENDANT MATTER WAS AN ACCOMPLICE, AND REMAND WITH DIRECTIONS TO GRANT COA.

QUESTION(s) PRESENTED (continued)

- VIII. CERTIORARI SHOULD BE GRANTED, VACATING THE NINTH CIRCUIT COURT'S ORDER DENYING THE ISSUANCE OF A COA ON GROUND EIGHT OF DUE PROCESS OF LAW VIOLATION, FOR THE PROSECUTION'S COMMENTS ON PETITIONER'S FAILURE TO TESTIFY ON HIS OWN BEHALH, AND REMAND WITH DIRECTIONS TO GRANT COA.
- IX. CERTIORARI SHOULD BE GRANTED, VACATING THE NINTH CIRCUIT COURT'S ORDER DENYING THE ISSUANCE OF A COA ON GROUND NINE OF "CUMULATIVE EFFECT FROM MULTIPLE ERRORS, VIOLATING DUE PROCESS OF LAW," AND REMAND WITH DIRECTIONS TO GRANT COA.
- X. CERTIORARI SHOULD BE GRANTED, VACATING THE NINTH CIRCUIT COURT'S ORDER DENYING THE ISSUANCE OF A COA ON GROUND TEN OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL DURING THE FIRST APPEAL, FOR FAILURE TO RAISE THE GROUNDS RAISED IN PRO SE BY PETITIONER, AND REMAND WITH DIRECTIONS TO GRANT COA.
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LIST OF PARTIES

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

[X] 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:

1. Petitioner, John Lee Yun, a state prisoner, incarcerated at Lancaster State Prison, Lancaster, California 93539.

2. Respondent, Jeffrey A. Beard, former Secretary of the California Department of Corrections and Rehabilitation; former custodian.

3. Present Custodian, Scott Kernan, Secretary of California Department of Corrections and Rehabilitation.

4. The People of the State of California; Attorney General of California, Xavier Becerra, Real Party in Interest.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Buck v. Davis(2017)_U.S._, 137 S.Ct. 759	6, 7
Hicks v. Oklahoma(1980)447 U.S. 343	12, 13
Miller-El v. Cockrell(2003)537 U.S. 322	6
Parle v. Runnels(9th Cir. 2007)505 F.3d 922	13
People v. Flores(2005)129 Cal.App.4th 174	11, 12
Welch v. Simons(10th Cir. 2006)451 F.3d 675	7

STATUTES AND RULES

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28 U.S.C. §2254 et seq.	Passim

OTHER

14th Amendment to the U.S. Constitution	Passim
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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 _____; 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 _____; 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 _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; 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 February 22, 2018.

☒ 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

(1) Fourteenth Amendment to the United States Constitution:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws."

(2) 28 U.S.C. §2253(c)(1), (2):

"... Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
.... (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

(3) 28 U.S.C. §2254(d)(1):

"(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
(1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

STATEMENT OF THE CASE

A. Procedural and Factual Background of the Case

Petitioner is a state prisoner applying for a writ of habeas corpus pursuant to 28 USC §2254(d).

Petitioner was convicted in a California court of 4 counts of assault, on two alleged victims, Will Brown (counts 1 & 5), and Cono D'Amato (counts 3 & 6), and with gang enhancements, and a single great bodily injury enhancement on count 5.

(1) Trial

Petitioner adopts by reference the summary of the evidence recited by the Magistrate Judge in the Report and Recommendation ("R&R" attached as Appendix "B," at pp. 4-14), for the limited purpose of providing information necessary to understand the case.

(2) Post-Conviction Proceedings

Petitioner appealed to the California Court of Appeal (Case No.# B235694). On April 25, 2013, the court of appeal affirmed the convictions, but remanded the matter to the trial court with directions to correct an unauthorized portion of the sentence and certain clerical errors in the abstract of judgment. (See Appendix "C," Unpublished Opinion.)

Petitioner filed a petition for review in the California Supreme Court (Case No.# S210381), which was denied on July 17, 2013. (See Appendix "D," Order.)

On May 9, 2014, Petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court (Case No.# GA078803), which was denied on June 12, 2014. (See Appendix "E," Order.)

On July 3, 2014. Petitioner constructively filed a petition for writ of habeas corpus in the California Court of Appeal (Case No.# B257974), which was denied on August 20, 2014. (See Appendix "F," Order.)

On November 3, 2014, Petitioner constructively filed a petition for writ of habeas corpus in the California Supreme Court (Case No.# S222442), which was summarily denied on February 11, 2015. (See Appendix "G," Order.)

On May 4, 2015, Petitioner constructively filed a second petition for writ of habeas corpus in the Los Angeles County Superior Court (Case No.# G078803), which was denied on July 21, 2015.

On August 21, 2015, Petitioner filed a petition for writ of mandate in the Court of Appeal (Case No.# B266285), and on September 17, 2015, Petitioner filed a petition for writ of habeas corpus in the same appellate court (Case No.# B266880), which case were consolidated on September 30, 2015 by the court of appeal. (See Appendix "H," Order, Sept. 30, 2015.) After further briefing, the Court of Appeal granted the petitions, and order remanded the case for resentencing and modification of the illegal sentence, on February 18, 2016. (See Appendix "I," Order, Feb. 18, 2016.) Petitioner sentence was reduced by 3 years.

Notably, prior to the Court of Appeal's February 18, 2016 decision, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court (Case No. S226493), which was denied on procedural grounds, on August 12, 2015.

On May 28, 2015, Petitioner filed his Protective Petition in the U.S. District Court, Central District (Case No.# 2:15-cv-04013-AG-(AFM)), which the Magistrate Judge reported and recommended to deny and dismiss with prejudice, on April 20, 2017. (App. "B," R&R.)

On July 30, 2017, the U.S. District Court denied issuing a COA on all the constitutional claims. (See Appendix "J," Order.) On July 31, 2017, then, the U.S. District adopted the R&R, and dismissed the case with prejudice. (See Appendix "K," Order.)

On February 22, 2018, the Ninth Circuit Court denied Petitioner's request for the issuance of COA on his claims. (App. "A," Feb. 22, 2018.)

This Petition for Writ of Certiorari now follows.

REASONS FOR GRANTING THE PETITION

B. Summary of Argument

The Ninth Circuit here, exceeded the limited scope of the COA analysis, as reiterated by this Court in Buck v. Davis, 137 S.Ct. 759, 773-776 (2017) ("Buck"). Instead, the Ninth Circuit was limited to determining whether Petitioner Yun has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims." (Id., (Quoting Miller-El v. Cockrell(2003)537 U.S. 322, 327).)

In Buck, this Court warned the lower courts that "[t]his threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims," because "[w]hen a court of appeals sidesteps the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." (Id.)

Here, the Ninth Circuit denied issuing a COA on the claims raised by Petitioner, on the ground that he failed to make a substantial showing of the denial of a constitutional right. (App. "A," Order.) However, review of the entire records, objections lodged in this case (Appendix "L," Obj. to R&R), against this Court's rationale in Buck, will reveal that the Ninth Circuit either adjudicated the merits of the claims raised, or determined that "[N]o jurists of Reason Could disagree with the district court's resolution of the claims"

Because the first reason would be in direct conflict with Appellate Court precedent, and this Court's Jurisprudence on COA, including Buck, the denial implies (albeit, unreasonably) that no jurists of reason would disagree here with the denial.

But as shown below, jurists of reason would disagree as to its resolution.

C. Argument

I.

DISTRICT COURT'S CONCLUSION THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT, AND THE STATE COURT'S CONCLUSION OF PREJUDICE WAS NOT OBJECTIVELY UNREASONABLE, IS DEBATABLE, THUS WARRANTING A COA, ON THE IAC CLAIM OF FAILURE TO OBJECT TO PRIOR BAD ACTS.

There is no dispute here, that the Supreme Court has never clearly established that admission of prior bad acts, prior uncharged crimes against a defendant at trial violates due process clause of the 14th Amendment. (See Welch v. Sirmons (10th Cir. 2006)451 F.3d 675, 682-684, cert. denied, 127 S.Ct. 2971 (2007).)

However, the Supreme Court has outlined the "General principle that, 'Due Process Clause of the 14th Amendment provides a mechanism for relief when the evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair.'" [Citations Omitted]. (Id.)

Hence, the question that was presented to the district court was whether due process was violated, if so, trial counsel's performance was prejudicially deficient. Thus, warranting federal habeas relief.

The district court's own analysis suggest strongly that the issue is "debatable." And, if debatable, a COA should have been issued here. (See Buck, 137 S.Ct. at 773-774 ["Absence of debatability means that the prisoner has failed to meet the §2253 requirements..."].)

Yet, both the district court and Ninth Circuit failed to heed this Court's warning in Buck.

For instance, trial counsel had a legal basis in which to object to co-defendant Matters' evidence that Petitioner engaged in prior bad acts, as to show Matters' equivocated statements, and conduct against D'Amato and Brown. No body disputed Petitioner's contention that under California law, such unduly prejudicial evidence of prior bad acts were not admissible against Petitioner himself. California Evidence Code §1101(a), (b), explicitly prohibits the admission of

such other crimes' evidence, unless it is for one of the listed purposes. Everyone, including the district court acknowledges that Petitioner's prior bad act evidence was admitted, not against him, but to explain codefendant's conduct and credibility at trial. (App. "B," R&R, at pp. 23-24 ["petitioner's threatening behavior in the park was relevant ... to prove Matter's defense to the charge of witness intimidation."].) Plus, no body disputes that the jury was not given a limiting jury instruction that the evidence applied only to Matters, and that it was improper to consider it against Petitioner in anyway.

One of the safety valves of Due Process Clause, as set by this Court, is that trial courts give a limiting jury instructions, to restraint the jury's ability to use such prejudicial evidence.

So, is it debatable, whether evidence that was legally relevant to Matters' defense only, but admitted in their joint trial, could render Petitioner fundamentally unfair, in violation of Due Process, as such evidence has no probative value against Petitioner -- it was completely irrelevant against Petitioner.

Petitioner believes that, without a limiting instruction ameliorating the visceral impact, due process was violated. Trial counsel is incumbent with the obligation to protect the right to a fair trial. He failed in that endeavor.

Petitioner presented his defense that he was defending himself, because Brown and D'Amato were calling him derogatory names for his Asian decendency, and attacked Petitioner.

However, with the prejudicial evidence that suggested that Petitioner is an aggressor, certainly the jury would reason to question his defense at trial. Thus, trial counsel's failure to object, and seek a limiting instruction, was prejudicially deficient performance, violating the Sixth Amendment and deprived Petitioner a fair trial.

The district court's conclusion is not dispositive, but debatable; and therefore, a COA should be issued.

II.

DISTRICT COURT'S CONCLUSION THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT, AND THE STATE COURT'S CONCLUSION OF PREJUDICE WAS NOT OBJECTIVELY UNREASONABLE, IS DEBATABLE, THUS, WARRANTING A COA, ON THE IAC CLAIM OF FAILURE TO OBJECT TO CODEFENDANT'S COUNSEL'S CLOSING ARGUMENT ON PETITIONER'S PRIOR BAD ACTS.

Petitioner realleges and incorporates by reference the factual and legal basis for Ground One, ante, as if fully set for below, in support of granting certiorari. (Cert., ante at pg. 7.)

Moreover, the district court's conclusion hinges upon its prior conclusion that the prior bad act-evidence was properly admitted. (App. "B," at pp. 25-27.) However, just as the district court's conclusion is debatable, on the admissibility of the prior bad act-evidence, it certainly follows that trial counsel's failure to object to such prejudicial closing argument, not by a prosecutor, but by a codefendant, was failing in his number one obligation to insure that Petitioner received a fair trial within the contours of Due Process Clause of the 14th Amendment.

The case cited by the district court (App. "B," at p. 26), are distinguishable because the closing argument were "[m]ade by a prosecutor," not a codefendant's attorney, to the detriment of another defendant."

It certainly appears that the district court's conclusion is debatable, warranting the issuance of a COA.

III.

DISTRICT COURT'S CONCLUSION THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT, AND THE STATE COURT'S CONCLUSION OF PREJUDICE WAS NOT OBJECTIVELY UNREASONABLE, IS DEBATABLE, THUS, WARRANTING A COA, ON THE IAC CLAIM OF FAILURE TO OBJECT TO THE GANG EXPERT'S QUALIFICATIONS.

Petitioner realleges and incorporates by reference the factual and legal basis from his Original Federal Petition (Dkt. No. 1, at pp. 7 & attachments), as if fully set forth below in support for the issuance of a COA.

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IV.

DISTRICT COURT'S CONCLUSION THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT NOR PREJUDICIAL, IS DEBATABLE, THUS, WARRANTING A COA, ON THE IAC CLAIM OF FAILURE TO REQUEST INSTRUCTION ON THIRD-PARTY CULPABILITY.

Petitioner realleges and incorporates by reference the legal and factual basis set forth in the written objections (App. "L"), as if fully set forth below, in support for the issuance of a COA.

Moreover, the district court's reasoned decision that at the time of Petitioner's trial, the law regarding "third-party culpability" jury instruction was widely considered duplicative and unnecessary, is debatable for a few reasons, mainly, had trial counsel requested, the trial court would have given it to the jurors. The jurors, having heard Michael Cardenas' testimony that he cut Brown; and Brown never complaining to police that he got cut more than once, the only inference is that Mr. Cardenas inflicted the assault with the sharp instrument; not Petitioner.

The district court ignored the fact that jurors were given aiding and abetting jury instruction (for codefendant Matters), in which the juror could have easily applied the legal reasoning to disregard the third-party culpability evidence without the jury instruction directing the jurors to use it, in considering Petitioner's guilt. Whether trial counsel was deficient, is debatable, and therefore, a COA should be issued.

As to the prejudice prong, the district court acknowledged the deficiency by trial counsel, but that, there is no reasonable probability that, but for trial counsel's failure to request the instruction, a different outcome would have occurred. (App. "B," at 29.) However, that conclusion is based on the debatable premise that, if the jury believed Cardenas, they would have acquitted Petitioner. (Id. at pp. 29-30.) But this ignores the fact that aiding and abetting instruction was given at trial, which could have provided jurors a legal basis to disregard the

testimony given by Cardenas. The district court's conclusion that because Brown's cut was clean, consistent with a box cutter, not a knife. But, those inferences just prove that the factual issue of this claim is more debatable than thought of first.

Therefore, a COA should be issued.

V.

DISTRICT COURT'S CONCLUSION THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT NOR PREJUDICIAL, IS DEBATABLE, THUS, WARRANTING A COA, ON THE IAC CLAIM OF FAILURE TO REQUEST ACCOMPLICE INSTRUCTION FOR GREAT BODILY INJURY

Petitioner realleges and incorporates by reference the legal and factual basis from the written objections (App. "L"), as if fully set forth below in support of granting the issuance of a COA.

As stated in the pleadings, the record shows there was sufficient evidence that Brown and D'Amato were accomplices to the assaults, under the "natural and probable consequence doctrine," and interpreted by California Court in People v. Flores, 129 Cal.App.4th 174, 182-183 (2005).

Neither the district court nor Respondent addressed the direct application of Flores's principle, extending liability to individuals that participate in their own assaults. The district court misconstrued California law, concluding that there must be a "target" crime for the doctrine to apply. (App. "B," at pp. 30-31.) Even if not plainly incorrect, is suffice at this stage for such conclusion to be debatable, in order for a COA to be granted here.

Therefore, a COA should be granted.

VI.

DISTRICT COURT'S CONCLUSION THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT NOR PREJUDICIAL, IS DEBATABLE, THUS, WARRANTING A COA, ON THE IAC CLAIM OF FAILING TO OBJECT TO OMISSION OF ACCOMPLICE THEORY OF LIABILITY.

Petitioner realleges and incorporates by reference the legal and factual basis from the written objections, and Ground Five above (App. "L"), as if

fully set forth herein, in support of granting a COA on the claim.

A corollary from Petitioner's contention is that the district court's conclusion is debatable; and therefore, a COA should be issued here, since the "natural and probable consequence doctrine," was misconstrued by the district court. (See People v. Flores, supra.) Because under that doctrine, D'Amato and Brown were liable, the jury could have reasonably concluded that the great bodily injury element was not satisfied by the prosecution, and found it to be not true.

Therefore, a COA should be granted.

VII.

DISTRICT COURT'S CONCLUSION THAT THE STATE COURT'S REJECTION OF PETITIONER'S DUE PROCESS CLAIM, THAT THE TRIAL COURT FAILED TO GIVE CALCRIM NO. 334 BECAUSE OF CODEFENDANT MATTERS, WAS NOT OBJECTIVELY UNREASONABLE, IS DEBATABLE, THUS, WARRANTING A COA.

Codefendant Matters gave prejudicial testimony, to the effect that he was coerced into committing the crimes he was charged.

Petitioner realleges and incorporates by reference the factual and legal basis set forth in the pleading below, including his written objections (App. "L"), as if fully set forth herein, in support for the issuance of a COA.

More importantly, the district court overlooked at this Court's holding in Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), that "Due Process of Law guaranteed by the Fourteenth Amendment protects a defendant's interest against arbitrary deprivation by the State."

Here, the state of California created the liberty interest, pursuant to Penal Code §1111, that a person won't be convicted for a crime based on an accomplice's testimony." In addition, state courts, in interpreting this law, have concluded that the juror must be instructed on these principles, so that they can make the determination of whether the witness is an accomplice, and if so, is he or her testimony corroborated. Hence, by the state arbitrarily denying

Petitioner this created liberty interest, is "contrary to" Hicks. At the threshold stage of a COA, it certainly debatable.

Therefore, a COA should be issued.

VIII.

DISTRICT COURT'S CONCLUSION THAT THE PROSECUTION'S COMMENTS DID NOT AMOUNT TO A VIOLATION OF GRIFFIN V. CALIFORNIA, IS DEBATABLE, THUS, WARRANTING A COA.

Petitioner realleges and incorporates by reference the factual and legal basis set forth in the pleadings below, including the objections (App. "L"), as if fully set forth below, in support for the issuance of a COA.

The district court's conclusion is debatable, as demonstrate by the R&R's citation to multiple Ninth Circuit cases, that dealt with comments regarding non-testifying codefendants. (App. "B," at pp. 35-36.) Under the De Novo standard of review, the prosecutor's comments in this case, clearly implicated the Petitioner's right not to testify, as acknowledged by the district court.

Therefore, a COA should have been issued.

IX.

DISTRICT COURT'S CONCLUSION THAT THERE WERE NO ERRORS TO ACCUMULATE, WITH RESPECT TO PETITIONER'S CUMULATIVE-EFFECT OF THE ERRORS ASSERTED VIOLATED DUE PROCESS OF LAW, IS DEBATABLE, THUS, WARRANTING THE ISSUANCE OF A COA.

This conclusion is certainly debatable, especially where the district court itself acknowledge error (albeit harmless), but then concluded that there are no errors to accumulate.

Moreover, the district court's suggestion that each error must be of constitutional dimension first, before they may be properly accumulated, also is contrary to this Court's rationale and set principle interpreted by the Ninth Circuit themselves in Parle v. Runnels, 505 F.3d 922, 926-928 (9th Cir. 2007). Consequently, a COA should have been issued.

X.

DISTRICT COURT'S CONCLUSION THAT APPELLATE COUNSEL'S PERFORMANCE WAS NOT DEFICIENT NOR PREJUDICIAL, IN LIGHT OF THE ERRORS ACKNOWLEDGED BY THE DISTRICT COURT, IS DEBATABLE, THUS, WARRANTING A COA.

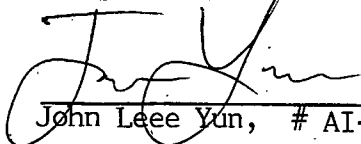
Petitioner realleges and incorporates by reference the factual and legal basis set forth in the pleading below, including the objections (App. "L") and in this Petition and Appendices, as if fully set forth hereinafter, in support of issuing a COA.

More importantly, Petitioner was deprived of an opportunity to have his Pro Per claims raised on direct appeal by a professional attorney, and considered on their merits under a more generous standard of review than the onerous one set by AEDPA. That procedural hurdles, crippled Petitioner's ability to demonstrate entitled to relief. A COA should have been issued.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



John Lee Yun, # AI-3812

Date: May 17, 2018