

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE WILSON GUZMAN — PETITIONER
(Your Name)

vs.

WARDEN Raymond Madden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOSE WILSON GUZMAN, AN 9717
(Your Name)

CENTINELA STATE PRISON, D3
(Address)

P.O. BOX 931, IMPERIAL, CA. 92251
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- I- whether the UNITED STATES DISTRICT COURT WAS CORRECT AND properly when IT dismissed all FOUR habeas corpus claims in the first amended petition, All claims were based in constitutional law as stated in this court.
- II- whether the UNITED STATES COURT OF APPEAL for the ninth Circuit was correct in its denial of a certificate of appealability based on the opinion of UNITED STATES DISTRICT COURT.
- III- whether the Trial Court consider the sentencing guidelines as an advisory starting point in imposing petitioner's sentence. (U. S. V. BOOKER, 543 U.S. 220, 245-46 (2005).)
- IV whether the Trial Court violated petitioner's fifth, sixth and fourteenth amendment, where it failed to instruct the jury on the elements of fear and force, as required for a conviction of forcible child molestation.
- V whether defense counsel failed below the standards set by the Supreme Court on Strickland v. Washington, 466 U.S. 668. (1984)
- VI whether petitioner's due process was violated by the Trial Court by allowing prosecution to amend the information to allege assault.

LIST OF PARTIES

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

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JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 8, 2017.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Feb. 11, 2015.
A copy of that decision appears at Appendix D.

☐ 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).

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 C 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 CALIFORNIA Supreme Court court appears at Appendix D to the petition and is

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In Claim ONE:

8th Amendment. EXCESSIVE SENTENCE

6th AND 14th Amendment: CUNNINGHAM V. CALIFORNIA (2007)

549 U.S. 270, 274, 127 S. CT. 856

Claim Two:

5th, 6th AND 14th Amendment.

UNITED STATES V. GAUDIN (1995) 515 U.S. 506, 509-510.

CARELA V. CALIFORNIA (1989) 491 U.S. 263, 270.

CHAPMAN V. CALIFORNIA (1967) 386 U.S. 18, 24.

Claim Three:

6th Amendment.

WRIGHT V. VAN PATTEN, 128 S. CT. 743, 169 L. ED. 2D 583.

(U.S. 2008).

UNITED STATES V. CRONIC, 466 U.S. 648, 104 S. CT. 2039 (1984)

Claim fourth:

5th AND 14th Amendment.

To due process, right TO A fair Trial

STATEMENT OF THE CASE

Appellant Jose Wilson Guzman, was charged in an information in counts 1, 2, 5 and 6 with aggravated sexual assault on a minor under 14 years of age (California P.C.¹ § 269, subd.(a)), in count 3 with premeditated attempted murder (§§ 664/187(a)), in count 4 with forcible child molest (§ 288 subd (b)(1)), in counts 7 and 8 with attempted aggravated assault on a minor under the age of 14 years old. (§§ 664/269 subd.(a)), and in count 9 with receiving stolen property (§ 469 subd.(a)).

Counts 1, 2, 5 and 6 also alleged multiple enhancements under 667.61 subds (d), (e), and (j) of the California Penal Code. (ICT 103-109.)

Guzman pleaded not guilty and denied the enhancements. (ICT 116.) On the first day of the jury selection, the prosecution's motion to dismiss count 9 was granted (ICT 149.)

At the close of the prosecution's case, the court granted the defense § 1118.1 motion to dismiss count 3, the attempted murder charge, and granted the prosecution's motion, over defense objection, to amend the information to allege assault with great bodily injury (§ 245 subd.(a)) on Jane Doe 1, the alleged victim of the dismissed attempted murder

¹ All statutory reference are to the California Penal Code, unless otherwise noted.

charge. (4RT 721.) The court also granted the prosecution's request to amend count 4 (the forcible child molest) to allege an attempted forcible child molest (§ 288.6)(1). (4RT 722.)

The court granted prosecution's motion to dismiss counts 7 and 8 (attempted aggravated assault on a minor under 14 years of age. §§ 664/269 subd. (a) (4RT 725.)

The prosecution filed an amended information reflecting these charges, and the following charges were submitted to the jury as follows:

COUNT 1: Aggravated sexual assault of JANE DOE 1 by means of sexual penetration (§ 269.(a)(5) with four section 667.61(d) enhancements, two sections 667.61(e) enhancements and one section 667.61(j)(1) enhancement;

COUNT 2: Assault with great bodily injury of JANE DOE 1 (§ 245 subd. (a).);

COUNT 3: Attempted forcible child molest (§ 288.6)(1) JANE DOE 2;

COUNT 4: Aggravated sexual assault of JANE DOE 3 by means of oral copulation (§ 269 (a) (4)) with one section 667.61 (d) enhancement and one section 667.61 (e) enhancement; AND

COUNT 5: Aggravated sexual assault on JANE DOE 3, by means of sexual penetration (§ 269(a)(5). with one section 667.61(e) enhancement (1CT 194-197.)

The jury found GUZMAN guilty of all counts and found section 667.61 enhancements true as alleged in the amended information. (1CT 199-200, 263, 272-278.)

ON April 5, 2013, The Trial Court SENTENCED PETITIONER TO LIFE without the possibility of parole ON COUNT 1 UNDER SECTION 667.61 Subd. (j) (1), plus Two consecutive 25 years-to-life sentence ON COUNTS 4 AND 5, plus a determined sentence of five years ON COUNTS 2 AND 3 consecutive TO COUNT 1. (2CT315-318, 4RT805-807.) The Court imposed a \$200 restitution fine AND stayed parole revocation fine OF THE SAME AMOUNT. (4RT 807.)

PETITIONER filed his Timely notice of appeal FROM the conviction ON April 5, 2013, (1CT 281.)

REASONS FOR GRANTING THE PETITION

SEE APPENDED PETITION FOR WRIT OF HABEAS CORPUS.
AS PRESENTED TO THE UNITED STATES DISTRICT COURT.
(PAGES 9 THROUGH 30)

Appendix To Ground One

A-IMPOSITION OF A ONE STRIKE LAW SENTENCE ON COUNTS 1, 4 AND 5 BASED ON THE AGGRAVATED ASSAULT CONVICTION UNDER SECTION 269(a)(4) AND (a)(5) WAS UNLAWFUL AS SECTION 269 IS NOT A QUALIFYING OFFENSE AS SPECIFIED IN SUBDIVISION (C) OF SECTION 667.61.

THE ERROR REQUIRES THAT PETITIONER'S SENTENCE ON COUNTS 1, 4 AND 5 BE VACATED AND THE CASE BE REMANDED FOR RESENTENCING.

IN COUNTS 1, 4 AND 5, THE JURY CONVICTED PETITIONER OF AGGRAVATED SEXUAL ASSAULT ON JANUARY 1 AND 3 IN VIOLATION OF SECTION 269(a)(4) AND (a)(5). THE SEX ACTS UNDERLYING THE ASSAULTS IN COUNTS 1 AND 5 WERE SEXUAL PENETRATION IN VIOLATION OF SECTION 289, AND IN COUNT 4, THE ACT WAS ORAL COUPULATION IN VIOLATION OF SECTION 288(a) (ICT 194-197.)

THE TRIAL COURT IMPOSED A SENTENCE OF "LIFE WITHOUT PAROLE" ON COUNT 1, AND SENTENCES OF 25 YEARS TO LIFE ON COUNTS 4 AND 5, PURSUANT TO THE ALTERNATE SENTENCING SCHEME IN SECTION 667.61, COMMONLY KNOWN AS THE "ONE STRIKE" LAW.

IT DID SO EVEN THOUGH COUNTS 1, 4, AND 5, CONVICTIONS UNDER SECTION 269, ARE NOT QUALIFYING OFFENSES SPECIFIED IN SUBDIVISION (C) OF SECTION 667.61.

1 B- THE TRIAL COURT ERRED IN IMPOSING ONE
2 STRIKE SENTENCE ON COUNTS 1, 4, AND 5. BECAUSE
3 AGGRAVATED SEXUAL ASSAULT IS NOT A QUALI-
4 FYING OFFENSE UNDER SECTION 667.61.

5
6 SECTION 667.61 REQUIRES A TRIAL COURT TO IM-
7 POSE A LIFE SENTENCE OF EITHER 15, 25 YEARS OR
8 LIFE WITHOUT PAROLE WHEN A DEFENDANT IS CON-
9 VICTED OF ENUMERATED SEXUAL OFFENSES UNDER ONE
10 OR MORE SPECIFIED AGGRAVATING CIRCUMSTANCES.
11 (PEOPLE V. RAYFORD (1994) 9 CAL. 4TH 1, 8; PEOPLE V.
12 JONES (1997) 58 CAL. APP. 4TH 693, 703.) THE TRIAL
13 COURT SENTENCED PETITIONER TO 25 YEARS TO
14 LIFE ON COUNTS 4 AND 5 UNDER SECTION 667.61(a)
15 WHICH PROVIDES, IN RELEVANT PART:

16 "ANY PERSON WHO IS CONVICTED OF AN OFFENSE
17 SPECIFIED IN SUBDIVISION (C) UNDER ONE OR MORE
18 OF THE CIRCUMSTANCES SPECIFIED IN SUBDIVISION
19 (D) OR UNDER TWO OR MORE OF THE CIRCUMSTANCES
20 SPECIFIED IN SUBDIVISION (E) SHALL BE PUNISHED
21 BY IMPRISONMENT IN THE STATE PRISON FOR
22 25 YEARS TO LIFE."

23 THE TRIAL COURT SENTENCED PETITIONER TO LIFE
24 WITHOUT THE POSSIBILITY OF PAROLE ON COUNT 1
25 UNDER SUBDIVISION (J)(1), WHICH PROVIDE IN RELEVANT
26 PART:

27 "ANY PERSON WHO IS CONVICTED ON AN OFFENSE
28 SPECIFIED IN SUBDIVISION (C), WITH THE EXCEPTION

OF A VIOLATION OF SUBDIVISION (a) OF SECTION 288 UPON A VICTIM WHO IS A CHILD UNDER 14 YEARS OF AGE, UNDER ONE OR MORE OF THE CIRCUMSTANCES SPECIFIED IN SUBDIVISION (d) OR UNDER TWO OR MORE OF THE CIRCUMSTANCES SPECIFIED IN SUBDIVISION (e) SHALL BE PUNISHED BY IMPRISONMENT IN STATE PRISON FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE"

THE PUNISHMENT IN SUBDIVISIONS (a) AND (j) (1) APPLY ONLY TO THOSE CONVICTIONS FOR OFFENSES ENUMERATED IN SECTION 667.61 (C) WHICH READS:

"(C) THIS SECTION SHALL APPLY TO ANY OF THE FOLLOWING OFFENSES

(1) A VIOLATION OF PARAGRAPH (2) OF SUBDIVISION (a) OF SECTION 261.

(2) A VIOLATION OF PARAGRAPH (1) OF SUBDIVISION (a) OF SECTION 262.

(3) A VIOLATION OF SECTION 264.1.

(4) A VIOLATION OF SUBDIVISION (b) OF SECTION 288.

(5) A VIOLATION OF SUBDIVISION (a) OF SECTION 289.

(6) SODOMY OR ORAL COUPULATION IN VIOLATION OF 286 OR 288a BY FORCE, VIOLENCE, DURESS, MANACE, OR FEAR OF IMMEDIATE AND UNLAWFUL BODILY INJURY ON THE VICTIM OR ANOTHER PERSON.

(7) A VIOLATION OF SUBDIVISION (a) OF SECTION 288, UNLESS THE DEFENDANT QUALIFIES FOR PROBATION UNDER SUBDIVISION (C) OF SECTION 1203.006.

1 looking AT the words of the statute, AND giving
2 them their issual AND ordinary meaning (people
3 v. LAWRENCE (2000) 24 CAL. 4TH 219, 230; people v.
4 NGUYEN (1999) 21 CAL. 4TH 197, 203), APPLICATION OF
5 THE CIRCUMSTANCES IN SUBDIVISION (d) AND (e) OF
6 SECTION 667.61 AND THE CORRESPONDING PUNISH-
7 MENTS UNDER DIVISION (a) AND (j)(1) ARE TRIGGERED
8 BY A "CONVICTION" OF A STATUTORILY ENUMERATED
9 OFFENSE. IN THE ORDINARY SENSE, THE WORD
10 "CONVICTION" GENERALLY MEANS "THE RESULT OF
11 A CRIMINAL TRIAL WHICH ENDS IN A JUDGMENT
12 OR SENTENCE THAT THE ACCUSED IS GUILTY OF THE
13 CHARGED" BLACK LAW DICT. (5TH ED. 1990) THE LE-
14 GISLATURE'S USE OF THE WORD "CONVICTION" WHICH
15 CANNOT BE READ OUT OF THE STATUTE (CODE CIV. PROC.
16 SECTION 1858; people v. LOPEZ (2003) 31 CAL 4TH
17 1051, 1061; people v. LAWRENCE, SUPRA, 24 CAL. 4TH
18 AT P. 230) MEANS THAT THERE MUST BE A VERDICT
19 OF GUILT AND CONVICTION ON AN ENUMERATED
20 OFFENSE FOR THE PUNISHMENT UNDER THE ONE
21 STRIKE LAW TO BE APPLIED. BECAUSE SUBDIVISIONS
22 (C), (d), (e), AND (j) REQUIRE A CONVICTION OF AN OFFENSE
23 SPECIFIED IN THE STATUTE AND SECTION 269 IS NOT
24 A SPECIFIED OFFENSE, THE COURT NEED NOT TO LOOK
25 PAST THE CLEAR LANGUAGE OF THE STATUTE TO CON-
26 CLUDE SECTION 269 DOES NOT TRIGGER APPLICATION OF
27 THE ONE STRIKE LAW. (SEE PRESTON V. Bd OF EQUALIZA-
28 TION (2001) 25 CAL. 4TH 197, 213.)

1 PETITIONER WAS CONVICTED OF THREE VIOLA-
2 TIONS OF SECTION 269 BASED ON AN ACT OF ORAL
3 COPULATION AS DEFINED IN SECTION 288a AND
4 ACTS OF SEXUAL PENETRATION AS DEFINED IN
5 SECTION 289. WHILE BOTH SECTIONS 288a AND
6 289 ARE ENUMERATED IN SUBDIVISION (C), UNDER
7 PARAGRAPHS (7) AND (5), RESPECTIVELY, SECTION
8 269 IS NOT AN ENUMERATED OFFENSE. HENCE,
9 PETITIONER WAS NOT "CONVICTED" OF AN ENU-
10 MERATED OFFENSE FOR PURPOSES OF SECTION
11 667.61, THEREFORE, THE ALTERNATE SENTENCING
12 SCHEME IS INAPPLICABLE.

13 THE COURT ALSO BOUND BY THE RULE OF STATU-
14 TORY CONSTRUCTION THAT STATES "THE EXPRESSION
15 OF SOME THINGS IN A STATUTE NECESSARILY
16 MEANS THE EXCLUSION OF OTHERS NOT EXPRESSED."
17 (GIRAS V. ZOLIN (1993) 6 CAL. 4TH 841, 852.) THE
18 LEGISLATURE COULD HAVE ADDED SECTION 269
19 TO THE LIST OF OFFENSES ENUMERATED IN SUB-
20 DIVISION (C) OF SECTION 667.61. HAD THE LEGIS-
21 LATURE SO INTENDED, "IT WAS CAPABLE OF
22 DOING SO. IT DID NOT" PEOPLE V. PALMER
23 (2001) 86 CAL. APP. 4TH 440, 446.) AS A RESULT,
24 THE LEGISLATURE'S OMISSION OF SECTION 269
25 FROM THE PURVIEW OF SECTION 667.61 INDIC-
26 ATED THE LEGISLATURE INTENDED SECTION 269
27 TO STAND APART. (SHOEMAKER V. MEYERS
28 (1990) 52 CAL.3D 1, 22 [LEGISLATURE DOES NOT PERFORM IDLE ACTS])

1 Although the LANGUAGE OF THE STATUTE IS CLEAR,
2 NOT REQUIRING RESORT TO LEGISLATIVE HISTORY OR
3 EXTRINSIC EVIDENCE OF LEGISLATIVE INTENT, IT
4 IS NOTABLE THAT THE HABITUAL SEXUAL OFFENSES
5 STATUTE (§667.61) EXPRESSLY LISTS SECTION
6 269 AS A TRIGGERING OFFENSE, EVEN THOUGH,
7 LIKE THE ONE STRIKE LAW, IT ALSO LISTS OFFENSES
8 INCLUDED IN THE VIOLATION OF SECTION 269.
9 THIS FURTHER EVIDENCE AN INTENT TO EXCLUDE
10 SECTION 269 FROM THE ONE STRIKE LAW. INDEED,
11 THIS COURT RECOGNIZED THAT CERTAIN CONVICTIONS
12 TRIGGER THE HABITUAL SEXUAL OFFENDER LAW,
13 BUT NOT THE ONE STRIKE LAW, STATING THAT
14 SECTION 269 WAS NOT A TRIGGERING CONVIC-
15 TION FOR THE ONE STRIKE LAW. (PEOPLE V.
16 HAMMER, 30 CAL. 4TH AT P. 769 N.11.)

17
18 THE COURT OF APPEAL CONCLUDED THAT THIS
19 INTERPRETATION OF THE ONE STRIKE LAW WOULD
20 BE "ABSURD" BECAUSE IT WOULD MEAN THAT A
21 PERSON COMMITTING AN OFFENSE ENUMERA-
22 TED IN SECTION 667.61 (C) AGAINST A CHILD
23 UNDER THE AGE OF 14 YEARS IS NOT SUBJECTED
24 TO SENTENCING UNDER THE
25 ONE STRIKE LAW, WHILE A PERSON WHO COM-
26 MITS THE SAME OFFENSE AGAINST A PERSON
27 14 YEARS OF AGE OR OLDER MAY BE SENTENCED
28 UNDER THE ONE STRIKE LAW.

(opinion. pp 15-16.) That is not true. The prosecution could elect to charge the defendant who commits a violation of § 288a or 289 against a child under 14 with those enumerated offenses, and not under § 269, to trigger application of the one strike law. The prosecution did not elect to do that in the case.

And although court should "avoid a construction that will produce absurd consequences." (*In re Greg F.* (2012) 55 Cal 4th 393, 406.), a court "is not authorized to...rewrite the statute to conform to an assumed intention which does not appear from its language." *People v. Goodlife* (2009) 177 Cal. App. 4th 723, 729, quoting *In re Hoddinott* (1996) 12 Cal. 4th 992, 1002.) The "plain meaning" rule also does not apply "where a literal reading would achieve the absurd consequence of rendering other provisions of the same enactment ineffective." (*People v. Goodlife*, *Supra*, 177 Cal. App. 4th at p. 726.) But applying the plain meaning rule here does not have that effect, so this exception to the plain meaning rule does not apply.

The prosecution can still elect to charge a defendant with a violation of

1 SECTION 289 OR 288A, TO TRIGGER THE ONE STRIKE
2 LAW, AND SECTION 269 ALREADY PROVIDES FOR AN
3 AGGRAVATED SENTENCE-AN INDETERMINATE TERM
4 OF 15 YEARS TO LIFE-FOR SEX CRIME COMMITTED
5 AGAINST A CHILD

6
7 THE COURT CANNOT INSERT LANGUAGE INTO A
8 STATUTE WHICH IS UNAMBIGUOUS (SEE CODE OF
9 CIV. PROC., SECTION 18.58 [A COURT MUST NOT
10 "INSERT WHAT HAS BEEN OMITTED"].) THE CLEAR
11 LANGUAGE OF THE STATUTE COMPELS THE CON-
12 CLUSION THAT SECTION 269 IS NOT AN OFFEN-
13 SE TO WHICH THE ONE STRIKE LAW APPLIES,
14 REQUIRING THE SENTENCES ON COUNTS 1, 4
15 AND 5 BE VACATED AND REMANDED FOR
16 RESENTENCE.

Ground Two

1 AS TO PETITIONER Ground Two, The Trial Court
2 VIOLATED his 5th, 6th & 14th Amend. To U.S. Const.

3 A VIOLATION OF SECTION 288 (b)(1) requires that
4 the defendant use force or fear in accom-
5 plishing the child molest. (§ 288 (b)(1); CAL-
6 Crim 111; people v. pitman (1985) 170 CAL. App.
7 3d 38, 52.) The Trial Court's failure to ins-
8 truct the jury on this ESSENTIAL ELEMENT
9 OF THE OFFENSE IS A FEDERAL CONSTITUTIONAL
10 ERROR requiring reversal of this conviction

11 The failure to instruct on an essential
12 element of the offense VIOLATES the de-
13 fendant's federal 6th and 14th amendment
14 and California's ART. I sections 15 and 16 of
15 its constitution; constitutional rights to
16 trial by jury and due process.

17 (SEE UNITED STATES V. GAUDIN (1995) 515 U.S. 506,
18 509-510; CARELLA V. CALIFORNIA (1989) 491
19 U.S. 263, 270; PEOPLE V. FLOOD (1998) 18 CAL.
20 4th 470, 479-480.) BECAUSE the error im-
21 plicates the accused's federal constitu-
22 tional rights, the standard announced in
23 CHAMPMAN V. CALIFORNIA (1967) 386 U.S. 18,
24 24, applies, requiring that the judgment
25 be reversed unless the prosecution can
26 prove beyond a reasonable doubt that the
27 error did NOT contribute to the verdict.

28 OMISSION OF AN ELEMENT OF THE OFFENSE

will only be harmless " where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence. (NEDEK V. UNITED STATES (1999) 527 U.S. 1, 17.)

Here, evidence of force and fear was not uncontested or supported by "overwhelming" evidence. The evidence of force and fear consisted of Jane Doe 2's testimony that "there was a part where he said if I made noise, that he would shoot my dad." She could not recall when he said this. She also believed he put a gun against her at some unspecified time (2 RT 263-264.) He also waved a gun as he ran out of the bedroom. (2 RT 265.) On cross-examination, petitioner elicited Jane Doe 2's testimony that she told the police it might have been a toy gun because it felt "light" (2 RT 267-268.)

As defense counsel pointed out in arguing her Section 111b.1 motion as to this count, it was not clear when the gun pointing or the threat about shooting her father occurred, thus, whether force or fear was used to accomplish the act of pulling down

JANE DOE 2'S UNDERWEAR WAS NOT NECESSARILY
SUPPORTED BY THE EVIDENCE (4 RT 722-723.)
EVIDENCE OF FORCE OR FEAR WAS NOT UNCONTESTED,
AS THE DEFENSE CROSS-EXAMINED JANE DOE 2
ABOUT THE THREAT AND THE GUN, WHICH JANE DOE 2
TOLD THE POLICE SHE THOUGHT WAS A TOY (2 RT 267-268.)
FURTHER, ALTHOUGH THE TESTIMONY OF A SINGLE
WITNESS IS LEGALLY SUFFICIENT TO PROVE A FACT,
THERE WAS NOT CORROBORATION FOR JANE DOE 2'S
TESTIMONY REGARDING THE GUN AND THE THREAT. THUS,
HER TESTIMONY THAT THE PERPETRATOR POINTED A
GUN AT HER AND THREATENED TO SHOOT HER FATHER
CANNOT BE CHARACTERIZED AS "OVERWELMING" SUCH
THAT THE ERROR CAN BE CONSIDERED HARMLESS
BEYOND A REASONABLE DOUBT. THE ERROR REQUIRES
REVERSAL OF PETITIONER'S CONVICTION OF COUNT 3.

Appendix To Ground Three

IN THE CRONIC TEST FOR INEFFECTIVE ASSISTANCE, THAT SIXTH AMENDMENT VIOLATION MAY BE FOUND WITHOUT INQUIRING INTO DEFENSE COUNSEL'S ACTUAL PERFORMANCE, OR REQUIRING THE DEFENDANT TO SHOW THE EFFECT IT HAD ON THE TRIAL WHEN CIRCUMSTANCES EXIST THAT ARE SO LIKELY TO PREJUDICE THE ACCUSED THAT COST OF LETTING THEIR EFFECT IN A PARTICULAR CASE IS UNJUSTIFIED, APPLY WHEN THERE IS A BREAK-DOWN IN THE ADVERSARIAL PROCESS, SUCH THAT COUNSEL ENTIRELY FAILS TO SUBJECT THE PROSECUTION'S TO A MEANINGFUL ADVERSARIAL TESTING.

U.S.C.A. CONST. AMEND 6; WRIGHT V. VAN PATTEN, 128 S. CT. 743, 169 L. ED 2D 583 (U.S. 2008).

HERE IN THIS INSTANT CASE, PETITIONER ASKS THIS COURT TO PLEASE REVIEW THE WHOLE CASE SO THAT IT COULD FIND SO MANY ISSUES WHERE PETITIONER'S COUNSEL HAD FAILED. PETITIONER IS A LAYMAN IN LAW BUT WILL TRY TO SHOW A FEW OF THE ISSUES, TO DEMONSTRATE WHY THIS COURT MUST GRANT AN EVIDENCIARY HEARING AFTER REVIEWING THIS PETITION.

(1) DEFENSE COUNSEL'S FAILURE TO INVESTIGATE:

A COMMON BASIS FOR A FINDING OF INEFFECTIVE REPRESENTATION IS THE DEFENSE ATTORNEY'S FAILURE

1 TO INVESTIGATE THE FACTS OF THE CASE. DEFENSE
2 COUNSEL HAS THE AFFIRMATIVE DUTY TO CONSULT WITH
3 HIS CLIENT, TO INVESTIGATE THE FACTS, INCLUDING
4 FACTS RELATING TO POSSIBLE DEFENSE, AND TO PRE-
5 PARE FOR TRIAL. IN THIS RESPECT AFTER THIS COURT
6 REVIEW THIS CASE, WILL AGREE WITH PETITIONER, AS
7 SOME COURTS HAVE RECOGNIZED, THAT AN ATTORNEY'S
8 PERFORMANCE DEPENDS ON PREPARATION, AND THAT
9 AN ATTORNEY WHO HAS NOT INVESTIGATED AND PRE-
10 PARED A CASE, CAN NOT DEVISE A STRATEGY OR TO
11 MAKE INTELLIGENT TACTICAL DECISIONS.

12 HERE THE DEFENSE COUNSEL FAILED TO MAKE AN
13 ADEQUATE INVESTIGATION OF THE FACTS RELATED
14 TO THE ALLEGED CRIMES AND POSSIBLE DEFENSES,
15 AND ALLOWED THE PETITIONER TO GO TO TRIAL WITH
16 INSUFFICIENT PREPARATION.

17 IN CASES WHERE DEFENSE COUNSEL CONDUCTED NO INVE-
18 GATION, SOME COURT HAVE PRESUMED PREJUDICE TO
19 THE DEFENDANT AND HAVE REVERSED THE CONVICTION.

20 INADEQUATE FACTUAL INVESTIGATION AND PREPARA-
21 TION COUPLED WITH SOME OTHER GROUND CONSTITU-
22 TING INEFFECTIVE ASSISTANCE, FOR EXAMPLE HERE,
23 A CURSORY PRETRIAL INVESTIGATION MAY RESULT
24 IN THE UNJUSTIFIED FAILURE TO CALL MATERIAL
25 WITNESSES FOR THE DEFENSE, AS PETITIONER HAD
26 REQUESTED COUNSEL TO DO, WHO RESPONDED THAT
27 IT WOULD NOT BE NECESSARY.

28 PETITIONER LIKE TO STATE THAT THROUGHOUT THE

6-1
p-2
1 ENTIRE TRIAL, he could observe the LACK OF
2 PREPARATION, AS he saw AT PRETRIAL by COUNSEL.
3 THIS LACK OF PREPARATION by his DEFENSE COUN-
4 SEL, RESULTED IN THE SUBSTANTIAL WEAKENING OF
5 A DEFENSE AND EVEN TO SUBJECT PROSECUTION'S
6 CASE TO A MEANINGFUL ADVERSE TESTING PROCESS.
7 (SEE UNITED STATES V. CRONIC, 466 U.S. 648, 80 L.ED. 2d 657,
8 104 S.C.T. 2039 (1984).)

9 HERE, THE TRIAL COUNSEL'S PERFORMANCE WAS
10 NOT ONLY INEFFECTIVE, BUT COUNSEL ABANDONED
11 THE REQUIRED DUTY OF LOYALTY TO HIS CLIENT;
12 COUNSEL DID NOT SIMPLY MAKE POOR STRATEGIC
13 OR TACTICAL CHOICES; HE ACTED WITH RECKLESS
14 DISREGARD FOR HIS CLIENT. AS A RESULT, HE WAS
15 DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS
16 THE UNITED STATES CONSTITUTION AND CALIFOR-
17 NIA CONSTITUTION SO REQUIRE.

18 ALSO, DEFENSE COUNSEL'S FAILURE TO ~~MOVED~~ FOR
19 A MISTRIAL, BASED ON THE PROSECUTORIAL AND
20 PERSONAL INTERPRETATION OF SECTION 602.5 OF
21 THE PENAL CODE, BY THE PROSECUTOR, COMPARED IT
22 SECTION 459, VIOLATING PETITIONER RIGHT TO
23 PRESENT DEFENSE, CONSTITUTED INEFFECTIVE
24 ASSISTANCE OF COUNSEL.

25 A CRIMINAL DEFENDANT IS ENTITLED TO AN ATTORNEY
26 WHO IS REASONABLY FAMILIAR WITH THE APPLICATION
27 OF LEGAL ISSUES AND RULES OF LAW INVOLVED IN
28 THE PARTICULAR CASE, AND THE ATTORNEY HAS AN

Obligation To Adequately Research The Law In-
volved. A Finding Of Ineffective Assistance
may be found based on the Trial Attorney's
Lack of Knowledge As To The Legal Issues
Involved. Thus, When A Defense Counsel Fails
To Raise Possible Defense, To make suppression
motion, or To Take some other possibly benefi-
cial action, and such failure is due to ig-
norance or mistake understanding of the law
which reasonable preparation would have cor-
rected, the defendant has received ineffec-
tive assistance of counsel.

APPENDIX TO GROUND FOUR

The prosecution is not allowed to amend the information with a new offense not pleaded in the information after the close of evidence over the defendant's objection.

The court may allow amendment of the accusatory pleading to correct or make more specific the factual allegations of the offense charge at any stage of the proceeding, up to, and including the close of trial if there would be no prejudice to the defendant. (SECTION 1009; PEOPLE V. BARNETT, (1999) 71 CAL. APP. 4TH 151, 165; PEOPLE V. WITT, (1975) 53 CAL APP 3D 154, 165; PEOPLE V. POSEY, (2004) 32 CAL 4TH 193.)

A defendant may not, however, be convicted of an offense which is neither specifically charged in the accusatory pleading nor necessarily included within a charged offense (PEOPLE V. LOHBAUER, (1981) 29 CAL. 3D 364, 367.

This principle is based on the defendant's constitutional due process right to be advised of the charges against him in order that he may have a reasonable opportunity to prepare

1 AND PRESENT DEFENSE. (Id AT p.369)

2 FEW CASES ARE AS CLEAR-CUT AS GRANT V. ALDREDGE,
3 498 F. 2d 376 (2nd cir 1974.) WHERE LATE DISCLO-
4 SURE OFTEN APPEAR TO SERIOUSLY IMPAIR A DEFEN-
5 DANT'S PREPARATION, STRATEGY OR PRESENTATION,
6 MANY COURTS HESITATE TO FIND PREJUDICE FROM
7 THE DELAY, PARTICULAR WHEN THE EVIDENCE ULTIMA-
8 TELY IS DISCLOSED. IN WAIGHING CLAIMS OF PRE-
9 JUDICE FROM LATE DISCLOSURE, COURTS EMPHASIZE
10 SEVERAL FACTORS, INCLUDING. (1) THE PROSECUTOR'S
11 GOOD OR BAD FAITH IN DELAYING THE DISCLOSURE,
-12 (2) THE ABILITY OF DEFENSE COUNSEL TO USE THE INFO-
13 RMATION AND MAKE IT ACCESSIBLE TO THE JURY,
-14 (3) THE SIGNIFICANCE OF THE EVIDENCE,
-15 (4) THE NECESSITY FOR DEFENSE COUNSEL TO REPUDIATE
16 OR ALTER A PREVIOUS DEFENSE POSITION,
17 (5) THE ABSENCE OF ANY REQUEST FOR A RECESS TO
18 PERMIT A MORE THOROUGH EXAMINATION OF THE
19 INFORMATION, AND (6) MANIPULATION BY DEFENSE
20 COUNSEL OF THE LATE DISCLOSURE FOR TACTICAL REA-
21 SONS UNRELATED TO GUILT OR INNOCENCE.

22 HERE, IN PETITIONER'S CASE, THIS COURT MUST
23 COMPARE ABOVE NUMBERS 2, 3, 4, 5, 6. WHERE THE
24 COUNSEL COULD NOT MAKE THE INFORMATION AVAILABLE
25 TO THE JURY, THE EVIDENCE WAS VERY DAMAGING
26 AND PREJUDICIAL, IT WAS TOO LATE FOR THE COUNSEL
27 TO REORGANIZE, AND IT WAS NOT HIS MOVE TO
28 MANIPULATE THE COURT, BUT THE PROSECUTION'S.

ON THE OTHER HAND PETITIONER ASK THIS COURT
TO OBSERVE ITS DECISION ON LOHBOWER, SUPRA,
29 CAL.3D AT P. 367. ADDRESSING THE ISSUE OF WHETHER
DEFENDANT COULD BE CONVICTED OF AN OFFENSE
WHICH WAS NEITHER SPECIFICALLY CHARGED IN THE
ACCUSATORY PLEADING NOR NECESSARILY INCLUDED
WITHIN THE CHARGED OFFENSE WITHOUT CONSENTING
TO THE SUBSTITUTED CHARGE.

THE LOHBOWER COURT STATED, "IT IS FUNDAMENTAL
THAT WHEN A DEFENDANT PLEADS NOT GUILTY, THE
COURT LACKS JURISDICTION TO CONVICT HIM OF AN
OFFENSE THAT HE IS NEITHER CHARGED NOR NECESSA-
RILY INCLUDED IN THE ALLEGED CRIME. [CITATIONS]
THIS REASONING REST UPON A CONSTITUTIONAL BASIS:
"DUE PROCESS OF LAW REQUIRES THAT THE ACCUSED
BE ADVISED OF THE CHARGES AGAINST HIM IN ORDER
THAT HE MAY HAVE A REASONABLE OPPORTUNITY TO
PREPARE AND PRESENT HIS DEFENSE AND NOT BE
TAKEN BY SURPRISE BY EVIDENCE OFFERED AT HIS
TRIAL" [CITATION]."

AFTER THE PROSECUTION CONCEDED § 602.5
WAS NOT A LESSER OFFENSE WHICH NECESSARILY WAS
INCLUDED WITHIN A VIOLATION OF § 459, AND THE
§ 602.5 VIOLATION WAS NOT ENCOMPASSED WITHIN
THE LANGUAGE OF THE INFORMATION, THE COURT
CONCLUDED IT COULD NOT SUSTAIN DEFENDANT'S
CONVICTION FOR VIOLATION OF § 602.5 BECAUSE
HE DID NOT HAVE NOTICE OF THE CHARGE. THE COURT

1 CONCLUDED, "BECAUSE A VIOLATION OF § 602.5 WAS
2 NEITHER CHARGED NOR NECESSARILY INCLUDED WITHIN
3 THE BURGLARY CHARGE, DEFENDANT'S CONVICTION OF
4 THE LESSER OFFENSE MAY NOT BE SUSTAINED,
5 'WHETHER OR NOT THERE WAS EVIDENCE AT HIS TRIAL
6 TO SHOW THAT HE HAS COMMITTED THAT OFFENSE.
7 (ID AT PAGE 369.)

8 ALSO, THE CALIFORNIA SUPREME COURT ADDRESSED
9 A SIMILAR ISSUE IN, IN ROBERT G. (1982) 31 CAL.
10 3D 437, 439.

11 SO THIS ISSUE MUST BE VERY FAMILIAR TO
12 THIS COURT.

C: The Trial Court erred in allowing the late amendment to the information over defense objection because assault with intent to commit great bodily injury was not charged nor is it a lesser included offense of attempted murder.

Assault with intent to commit great bodily injury is not a lesser included offense of attempted murder. "The definition of a lesser necessarily included offense is technical and relatively clear. Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, included all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. (People v. Birks (1998) 19 Cal. 4th 108, 117-118.) Because attempted murder may be accomplished by means other than assault People v. Johnson, (1978) 81 Cal. App. 3d 380, 388. See also People v. Korditz, (1984) 162 Cal. App. 3d 491, 496, assault is not an offense necessarily included in the offense of attempted murder. (People v. Young, (1981) 120 Cal. App. 3d 683, 690.)

1 THE ACCUSATORY PLEADING TEST LEADS TO THE SAME
2 RESULT. "UNDER THE ACCUSATORY PLEADING TEST, A
3 LESSER OFFENSE IS INCLUDED WITHIN THE GREATER
4 CHARGED OFFENSE." IF THE CHARGING ALLEGATIONS
5 OF THE ACCUSATORY PLEADING INCLUDE LANGUAGE
6 DESCRIBING THE OFFENSE IN SUCH A WAY THAT IF
7 COMMITTED AS SPECIFIED THE LESSER OFFENSE
8 IS NECESSARILY COMMITTED ("PEOPLE V. LOPEZ,
9 (1998) 19 CAL. 4TH 282, 288.)

11 HERE, THE INFORMATION ALLEGED THAT THE PETITIONER
12 ATTEMPTED TO MURDER JANE DOE 1 (§§ 664,
13 187.(a)(1). THE ACCUSATORY PORTION OF THE PLEADING
14 ALLEGED SIMPLY THAT PETITIONER "DID WILLFULLY,
15 UNLAWFULLY, AND WITH MALICE AFORETHOUGHT
16 ATTEMPT THE WILLFUL, DELIBERATE AND PREMEDITATED
17 MURDER, OF JANE DOE #1, A HUMAN BEING" (ICT106,

18 THE ACCUSATORY LANGUAGE ESSENTIALLY MIR-
19 RORS THE PROVISIONS OF THE STATUTE, AND INCLUDE
20 NOT DETAILS CONCERNING ANY PARTICULAR MANNER
21 IN WHICH PETITIONER COMMITTED THE CRIME.

22 HENCE, ASSAULT WITH INTENT TO COMMIT GREAT
23 BODILY INJURY IS NOT A LESSER INCLUDED OFFENSE
24 OF ATTEMPTED MURDER UNDER THE ACCUSATORY
25 PLEADING TEST.

26 BECAUSE ASSAULT IS NOT INCLUDED IN THE ATTEMPT MURDER CHARGE,
27 THE COURT ERRED IN ALLOWING THE LATE AMENDED UNDERLOBBAN
28 IN RE. ROBERT G. AND FED. AND STATE DUE PROCESS GROUNDS.

1 D- NO Showing of prejudice is required, AND
2 THE ASSAULT CONVICTION MUST BE REVERSED
3

4 TO OBTAIN REVERSAL, THE DEFENDANT NEED NOT
5 SHOW THAT HE WAS MISLED TO HIS PREJUDICE OR OTHERWISE
6 PREVENTED FROM PREPARING AN EFFECTIVE DEFENSE
7 (IN RE ROBERT G. SUPRA. 31 CAL. 3D AT P. 440.) NOR DOES
8 THE COURT WEIGH THE STRENGTH OF THE EVIDENCE
9 TO DETERMINE ITS SUFFICIENCY TO SUPPORT THE
10 CHARGE. (PEOPLE V. LOHBAUER, SUPRA, CAL. 3D AT P. 369.
11 IN RE. HESS (1955) 45 CAL. 2D 171, 175 [BECAUSE A
12 VIOLATION OF SECTION 602.5 WAS NEITHER CHARGED
13 NOR NECESSARILY INCLUDED WITHIN THE BURGLARY
14 CHARGE, DEFENDANT'S CONVICTION OF THE LESSER
15 OFFENSE MAY NOT BE SUSTAINED 'WHETHER OR NOT
16 THERE WAS EVIDENCE AT HIS TRIAL TO SHOW THAT
17 HE HAD COMMITTED THAT OFFENSE.''])

18 THUS, THE ERROR REQUIRES REVERSAL OF THE
19 ASSAULT WITH FORCE LIKELY TO PRODUCE
20 GREAT BODILY INJURY CONVICTION WITHOUT
21 RESORT TO PREJUDICE ANALYSIS AND
22 DISMISSAL OF THE CHARGE.
23
24
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28

PETITIONER ASKS THIS COURT TO REVIEW NOT JUST
THE OPINION OF THE DEPUTY ATTORNEY GENERALS DANIEL
ROGERS AND ANGELA M. BORZACHILLO, WHICH PETITIONER
RESPECT, BUT THE ENTIRE RECORD, WHICH WILL SHOW THAT
AN UNJUSTICE HAD BEEN COMMITTED.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to be 'W. C. ...', written over a horizontal line.

Date: 1 - 8 - 2018