Supreme Court, U.S.
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No. 00-5449

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

In re Emiliano Tony Lopez — PETITIONER
(Your Name)

VS.

On Habeas Corpus — RESPONDENT(S)

ON PETITION FOR A WRIT OF ~~CERTIORARI TO~~ Habeas corpus

U.S. court of Appeals for the Ninth circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF ~~CERTIORARI~~ Habeas corpus

Emiliano Tony Lopez # E06271
(Your Name)

P.O. Box 7500/D6-204
(Address)

Crescent city, Calif. 95532
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1.) whether under the sixth and fourteenth Amendments a criminal defendant is deprived of Due Process of Law by the introduction of a non-testifying co-defendants confession without the giving of a proper limiting instruction?

2.) whether under the fifth, sixth and Fourteenth Amendments, a criminal defendant is deprived of Due process of Law by a prosecutor's repeated references to defendant's failure to testify?

3.) whether the federal harmless error rule of Chapman v. California 386 U.S. 18, 24 (1967) must be applied in the first instance by the federal courts on collateral review when Chapman was not applied to constitutional errors by the state courts on direct appeal?

4.) whether under the federal harmless error rule of Brecht v. Abrahamson 507 U.S. 619 (1993), Bruton and Griffin errors can be found to be harmless in view of the lack of substantial or sufficient evidence to support the convictions?

Exceptional Circumstances Warrant the exercise of the Courts Discretionary Powers

In conformance to Rule 20.1, of the supreme court Rules of court, petitioner submits that issuance of the writ will be in aid of the court's appellate jurisdiction because it will reinforce the holding that passage of the AEDPA and its revision of federal habeas corpus statutes has not limited the court's original jurisdiction to grant a writ of habeas corpus under 28 U.S.C. § 2241. (see Felker v. Turpin, 548 U.S. 651 (1996)

Furthermore, petitioner asserts that extraordinary circumstances exist to allow the court to issue the writ and Grant the requested relief so as to avoid a miscarriage of justice as defined by habeas corpus jurisprudence. (Murray v. Carrier, 477 U.S. 478, 487 (1986)).

more specifically, petitioner submits that as an incarcerated prisoner confined to the most restrictive housing unit in the state of calif's most restrictive prison, possessing very little knowledge of the law and having only basic communication skills, he has had to rely exclusively on the assistance of others in the preparation and filing of this petition and all other court papers. (see exh.-K, declaration at p. 109)

moreover, petitioner asserts that because of the misconduct and unethical actions of Roger S. Hanson, who litigated the appeal of the U.S. District Court's denial of petitioner's habeas petition a timely petition for writ of certiorari was not presented to the U.S. Supreme Court. In fact, petitioner submits that he has filed a formal complaint with the calif. state Bar, which is pending at this time, bringing to issue Attorney Hanson's misconduct and mishandling of the case, and has offered proof that the attorney deceived petitioner into believing a petition would be filed on his behalf by the attorney. Petitioner has also shown that when the attorney abruptly withdrew from the case without forewarning and without filing the cert. petition, the attorney misinformed and/or mislead petitioner as to when the petition had to be filed, which as petitioner subsequently discovered, was three weeks from the date

he received the letter from the attorney advising him he was withdrawing from the case. (see exh.-K, motion to Recall mandate, pp. 97-176, exh.-L, letters from state Bar)

Petitioner asserts that a review of the evidence presented in support of the motion to Recall the mandate in the 9th Circuit Court of Appeals, as cited above, shows that genuine confusion existed as to the entry of the 9th circuit order denying the appeal and the petition for rehearing with suggestion for rehearing en banc, and it was not at all clear when the Court issued its mandate because petitioner was not provided with a copy of the order when it was issued, and the only order petitioner received was the one that had no less than five dates stamped on it, including Mar. 25, 1999, which petitioner took to be the controlling date. (see exh.-K, order at p. 161)

Additionally, petitioner asserts that the clerk of the court for the 9th circuit contributed significantly to the confusion concerning the date of the order, and was less than diligent in providing petitioner with the court's order, as evidence by his failure to notify petitioner that the motion to Recall the mandate had been denied. This lack of diligence caused for petitioner to not discover the motion had been denied until well after 90 days had passed and again through no fault of his own, and in spite of the diligence he displayed in attempting to received a full and fair review of his claims he was not able to file the petition for writ of cert. in a timely fashion. (see exh.-M, prison mail log.) Accordingly, petitioner submits that extraordinary circumstances exist warranting the exercise

of the court's discretionary powers, and because petitioner has exhausted all available state and federal remedies, adequate relief cannot be obtained in any other form or from any other court. (Rule 20.1)

Additionally, petitioner submits that for the above stated reasons application cannot be made to the district court of the district in which petitioner is being held pertaining to petitions for writ of habeas corpus (Rule 20.4 (a) and as more fully discussed below a showing can be made that extraordinary circumstances exist to warrant issuance of the writ because petitioner can make a prima facie showing of actual innocence of the crimes (see infra., pp. 16-20) and because certainly the questions presented are of such exceptional importance in the context of federal habeas corpus jurisprudence, involve conflicts between the circuits on the standards of review, and involve other constitutional issues that have arisen since the passage of the Anti-Terrorism and effective Death Penalty Act that they should be addressed by the Court.

more specifically, petitioner asserts that a review of the history of the case reveals that petitioner was found guilty by a jury in Los Angeles Superior Court of Murder, multiple robberies and attempted robberies and gun use allegations in connection with the robbery of a restaurant and killing of a victim under calif. law on Dec. 19, 1988, in People v. Lopez, superior ct. No. A-475891. The court found true a prior serious felony. (Clerk's Transcripts of proceedings (hereinafter C.T.), 641-664) (see Exh. A, unpublished Opinion, Calif. Court of Appeals, # B040524, dated Aug. 29, 1990)

Petitioner was sentenced to a total term in state prison of 23 yrs. plus 27 yrs. to life without possibility of parole. The sentence included enhancement. (C.T. 746-55)

Petitioner thereafter filed an appeal with the calif. court of Appeal. On Aug. 29, 1990, the court affirmed petitioner's conviction, but modified his sentence. (see Exh.-A, unpublished opinion). Petitioner filed a petition for Review with the Calif. Supreme Court, which denied the petition without comment on Nov. 14, 1990. (see Exh.-B, order)

On Feb. 8, 1991, petitioner filed a petition for writ of habeas corpus with the U.S. District court for the central District of calif., which dismissed the petition without prejudice on June 11, 1991, for failure to exhaust state remedies. (see Exh. C, Judgment, order, Report and Recommendation, case No. CV-91-0660 TJH(T)).

On Mar. 17, 1992, petitioner filed a petition for writ of habeas Corpus with the Calif. Supreme Court so as to exhaust unexhausted claims, which the court denied on may 27, 1992, with citation to In re Waltreus, 62 Cal. 2d 218 (1969), and In re Lindley, 29 Cal. 2d 709 (1947). (see Exh. D, order)

On June 26, 1992, petitioner filed a petition for writ of Habeas Corpus with the Calif. Court of Appeals, which was denied on Sept. 21, 1992, as a contention previously raised and rejected on appeal. (see Exh. E, order)

On Aug. 11, 1992, petitioner filed a petition for writ of Habeas corpus with the Calif. Supreme Court in reference to a Sentencing issue, which was denied on Oct. 28, 1992, with citation to In re Waltreus, 62 Cal. 2d 218 (1969). (see Exh. F, order)

on Feb. 23, 1993, petitioner filed a second petition for writ of Habeas corpus with the u.s. District court, which was dismissed without prejudice on June 23, 1993, for failure to exhaust state remedies. (see exh. G, Judgment, order, Report and Recommendation, case No. CV-93-1048-TJH(T)).

Petitioner thereafter filed a petition for writ of Habeas corpus with the Calif. Supreme Court so as to fully exhaust his federal constitutional claims, which the court denied on mar. 30, 1995, with citation to In re Waltreus, 62 cal. 2d 218, 225 (1965) and In re Lindley, 29 cal. 2d 709, 723 (1947). (see exh. H, order)

on mar. 4, 1997, petitioner filed a petition for writ of Habeas corpus with the u.s. District court, asserting that he had been denied Due Process of Law and a Fair Trial by Bruton and Griffin error committed during his state trial, and made a showing that his conviction had been obtained on insufficient evidence. Addressing the claims on the merits, the court dismissed the petition with prejudice on July 9, 1997. (see Exh. I, judgment, order, Report and Recommendation case No. CV96-8863-TJH(CT)).

on July 29, 1997, petitioner filed a notice of Appeal Application for certificate of Appealability and motion to proceed in forma pauperis with the u.s. District court. on Aug. 1, 1997, the court granted the certificate as to the Bruton and Griffin claims, but without explanation did not certify for appeal the Insufficency of Evidence claim. (see Exh. I, Notice, motion, order, at pp. 62-66)

on Nov. 6, 1997, after the Appeal had been docketed with the u.s. court of Appeals and petitioner had submitted a pro se opening Brief, an order was entered reflecting the appearance of Attorney Lyle D. Herrick on petitioner's behalf. (see Exh. J,

Docket sheet, dated May 4, 2000, case No. 97-56053, at p. 71)

On Feb. 5, 1998, an order was entered in the 9th circuit, reflecting the appearance of new counsel on petitioner's behalf attorney Roger S. Hanson. (see Exh. J, Docket sheet at p. 72)

On Nov. 10, 1998, a three-judge panel from the 9th circuit affirmed the District Court's dismissal of the habeas petition holding that petitioner had not made a substantial showing of the denial of a constitutional right. (see Exh. J, order, at p. 75-78)

On Nov. 23, 1998, a petition for rehearing with suggestion for rehearing en banc was presented to the 9th circuit, which the panel voted to deny on Jan. 21, 1999. The full court was advised of the suggestion for en banc review, and no active judge of the circuit requested a vote on it. Suggestion for rehearing en banc was thus rejected. The mandate was issued by the 9th circuit on Mar. 1, 1999. (see Exh. J, Docket sheet, at p. 74)

On June 16, 1999, a petition for certiorari was submitted by petitioner in pro se to the U.S. Supreme Court after Attorney Roger S. Hanson had failed to file the petition as he had reassured petitioner he would. The clerk of the Court returned the petition unfiled on June 24, 1999, advising petitioner that the petition was out of time and should have been filed no later than Feb. 8, 1999. (see Exh. K, motion to Recall Mandate, at p. 167)

On July 5, 1999, petitioner resubmitted the petition for writ of certiorari to the U.S. Supreme Court with a letter explaining to the clerk that there had apparently been an error made in determining entry of judgment in the case because the order affirming the 9th circuit decision clearly reflected a last entry date of Mar. 25, 1999. (see Exh. K, Motion to Recall Mandate, at pp. 168-169)

on July 12, 1999, the clerk of the u.s. supreme court once more returned the petition for writ of certiorari unfiled, explaining that it was being returned as being out of time for the same reasons as previously stated. (see exh. K, motion to Recall mandate, at p. 170)

on oct. 17, 1999, after attempting to communicate with attorney Roger s. Hanson by letter in an effort to clear up the apparent confusion concerning the filing date of the 9th circuit's decision. (see exh. K, motion to Recall mandate, at p. 171), Petitioner resubmitted the petition a third time to the supreme court, explaining that because of the numerous dates on the 9th circuits order an error had been made, and requested that the petition be accepted for filing in view of the particular and extraordinary facts of the case, and especially in view of Attorney Hanson's unethical conduct and mishandling of the case over which petitioner had no control. (see exh. K, motion to Recall mandate, at p. 172-173)

on oct. 22, 1999, the clerk of the u.s. supreme court once more returned the petition for writ of certiorari to petitioner unfiled, and while acknowledging that the clerk also made an error in his previous calculation of the filing deadline, stated that the petition was still out of time. (see exh. K, motion to Recall mandate, at p. 174).

on Feb. 2, 2000, petitioner filed a formal complaint with the calif. state Bar in regards to Attorney Hanson's unethical conduct and mishandling of the case, which had led to the petition for writ of certiorari being rejected as out of time. (see exh. L, at p. 177-179).

on Feb. 3, 2000, petitioner filed a motion to Recall and Reissue the mandate with the 9th circuit so that he could then properly

resubmit the petition for writ of certiorari to the u.s. Supreme court. within 90 days after reissuance of the mandate as required by court rules. (see exh. K, motion to Recall and Reissue Mandate)

on Apr. 28, 2000, more than two months after petitioner had submitted the motion to Recall and Reissue the mandate to the 9th circuit and had received no order or other communication from the court in reference thereto (see exh. M, Prison Mail log), after numerous requests, petitioner was finally able to obtain from the court a copy of the civil Docket sheet in the case, which reflected the motion to Recall the mandate had been received and filed by the court on Feb. 3, 2000, and was denied by Judge Graber on Feb. 9, 2000. (see exh. J, civil Docket sheet, at p. 14; see also exh. M, prison mail log).

petitioner thereafter prepared and attempted to file the instant petition for writ of Habeas corpus so as to prevent a miscarriage of justice and because there existed no other means by which he could receive a full and fair review of his constitutional claims by the u.s. Supreme court. (Rule 20.4(a)).

TABLE OF CONTENTS

OPINIONS BELOW..... 1

JURISDICTION .....

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....

STATEMENT OF THE CASE .....

REASONS FOR GRANTING THE WRIT .....

CONCLUSION .....

INDEX TO APPENDICES

APPENDIX A; unpublished opinion, calif. court of Appeals

APPENDIX B; calif. supreme court petition for review
case No. S017823, dated Nov. 14, 1990

APPENDIX C; u.s. District court, case No. CV91-0660-TJH
1) Judgment, dated June 11, 1991
2) order Adopting Report and Recommendation, date June 11, 1991
3) magistrate's Report and Recommendation, dated may 7, 1991

APPENDIX D; calif. supreme court, petition for writ of Habeas corpus
Case No. S025683, dated may 27, 1992

APPENDIX E; calif. court of Appeals, petition for writ of Habeas corpus,
case No. B068064, dated July 16, 1992; B069906, dated July 21, 1992

APPENDIX F; calif. supreme court, petition for writ of Habeas corpus
case-No. S028169, dated oct. 28, 1992

APPENDIX G; u.s. District court, case No. CV93-1048-TJH(T)
1) Judgment, dated June 2, 1993
2) order adopting Report and Recommendation, dated June 2, 1993
3) magistrate's Report and Recommendation, dated may 20, 1993

APPENDIX H; calif. supreme court, petition for writ of Habeas Corpus, Case NO. S043569, dated Mar. 30, 1995

APPENDIX I; U.S. District court, Petition for writ of Habeas Corpus, Case NO. CV96-08863-TJH(CT)

1) Judgment, dated July 9, 1997

2) Order Approving Report and Recommendation, dated July 8, 1997

3) Magistrate's Report and Recommendation, dated June 2, 1997

4) Notice of Appeal

5) motion for certificate of Appealability

6) order Granting certificate of Appealability

APPENDIX J; U.S. Court of Appeals, 9th circuit, case NO. 97-56053

1) civil docket sheet, dated May 4, 2000

2) order, dated NOV. 11, 1998, Mar. 1, 12 & 25

3) unpublished opinion, dated NOV. 10, 1998

APPENDIX K; U.S. court of Appeals, 9th circuit

1) motion to Recall Mandate, dated Jan. 25, 2000

APPENDIX L; Letters to state Bar

APPENDIX M; prison mail Log

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was NOV. 10, 1998.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Jan. 21, 1999, 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. § [illegible]. 2241

[ ] 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).

STATEMENT OF THE CASE

The facts of the case as developed on direct appeal (see exh. A, opinion) show that at approximately 10 p.m. on Nov. 5, 1987, three armed men wearing gloves and Halloween masks entered the bar at Felipe's Restaurant in Downey, Calif., At least on of the robbers was wearing surgical gloves, and one was wearing black gloves. Someone said: "This is a hold-up and don't any of you move." The robber took the wallets from those in the bar who had them, including Lonnie Seegret, George Callahan, Leo Jasso, and Richard Cardwell.

Jose Encinas was the cook at Felipe's. He was in the kitchen with several other employees when Ibanez entered with the gun, which was a pellet gun, and told everyone to lay down. They refused, one of the employees, apparently Enicinas, approached Ibanez, who shot him with pellets. Somehow, Encinas picked up a two-by-four and went after Ibanez. Encinas ran out of the kitchen and towards the bar, and one of the robbers fired at him. The owner of Felipe's took advantage of the commotion to run into his office and call the police.

Larry Galindo lived in a nearby apartment. Hearing gunshots, he looked out his window and saw a green or gold color plymouth driving out of the restaurant parking lot. Encinas was running alongside the car, hitting it with a stick. Galindo heard a thud.

Lonnie Seegret saw Encinas and one of the robbers scuffling by the front door, he heard the door open, and he heard shots. He also heard a car start and then pull away. Encinas was found shot and laying in the street in front of the restau-

rant. He died of multiple gunshot wounds.

Detective Compton of the Downey Police Department saw a green, full size American car, fitting the description given in a police radio broadcast speed by. He and other patrol units chased the car. When it ran into a curb and stopped, two individuals ran from the vehicle. A search perimeter was set up. Petitioner was arrested in the backyard of a house a block and a half away, with a pair of black gloves nearby. Ibanez was arrested as he ran down a nearby street.

Inside the Plymouth was a pellet gun. Detective Compton returned to the car, found a .38 revolver on the gound outside the passenger door, a knit ski mask in the car, a Halloween mask outside the driver's door, and a surgical glove on the passenger floorboard and part of one finger from a surgical glove on the driver's floorboard.

Testimony at trial alleged that sometime during the evening on the day the crimes were committed, petitioner picked Ibanez up in a car that was only somewhat similar to the one used in the robbery, but which was never positively identified as such.

REASONS FOR GRANTING THE PETITION

I.

Petitioner was denied his right of confrontation and due process of law under the 6th and 14th Amendments to the u.s. constitution by the introduction of non-testifying co-defendant's redacted confession without giving a proper limiting instruction.

The facts underlying the Bruton claim are set forth in the opinions below (see exh. A, p. 8-11), and show that non-testifying co-defendant Ibanez's confession was introduced by the state over defense objection during guilt phase of trial by the testimony of Detective compton after a pre-trial motion by the defense for severance was denied. No limiting instruction was given at the time evidence of the confession was introduced and only a very short, four line instruction was given to the jury some time later as part of its general instructions before it began its deliberations that it should not use Ibanez's confession to infer petitioner's guilt.

The calif. courts on direct appeal concluded that because Detective compton's testimony concerning Ibanez's confession did not directly implicate petitioner, no Bruton error had occurred.

The u.s. District court on petition for writ of Habeas corpus deferred to the state court findings, and ruled that the claim did not warrant federal habeas relief.

The 9th circuit on appeal after dismissal of the habeas petition by the District court held that because testimony regarding the confession did not expressly implicate petitioner, and because a proper limiting instruction had been given, the mere fact that

it was put before the jury had a substantial and injurious effect or influence in determining the jury's verdicts (Brecht v. Abrahamson, 507 U.S. 619 (1993)), and submits that because Ibanez did not testify he could not be cross-examined and confronted about his confession, and because there was no evidence linking petitioner to the commission of the crimes the errors rendered the entire proceedings fundamentally unfair. (Estelle v. McGuire, 502 U.S. 62 (1991), and requires reversal of his conviction and sentence.

II.

Petitioner was denied his rights under the 5th, 6th and 14th Amendments to the U.S. Constitution by the prosecutor's repeated and extensive indirect references to petitioner's failure to testify and by the prosecutor's comments made during closing arguments alluding to questions only petitioner could have answered by his direct testimony.

The facts as developed by the state courts on direct appeal and in the U.S. District court and U.S. court of Appeals in reference to the Griffin claim, show that the prosecutor during closing argument in the guilt phase of trial made four separate and extensive indirect references to petitioner's failure to testify. The extent of the prosecutor's statements are fully set out in the petition filed in the U.S. District court.

The Calif. Court of Appeals on direct appeal only recognized one of these statements, and on this basis held that no Griffin error had occurred. (see Exh. A, opinion). Likewise, the U.S. District court on petition for writ of habeas corpus, incorrectly deferring to the state court decision did not acknowledge or take under

who could have had any information about the event in question, the 9th circuit in this case failed to address how the jury could have been led to understand that a source other than petitioner could have supplied evidence why petitioner was hiding, why he discarded the gloves, why he had the gloves, and whether petitioner knew that a warrant was out for his arrest. The most damaging comment by the prosecutor which emphasized that if petitioner was capable of giving an alibi he would have, unquestionably was a reference to petitioner's failure to testify. And while the prosecutor at some point was cut off by the trial Judge, considering the extent of his improper statements surely the damage was already done.

Finally, petitioner asserts that in light of the glaring lack of evidence to support the conviction, the Griffin error unquestionably had a substantial and injurious effect or influence in determining the jury's verdict (Brecht v. Abrahamson, supra., 507 u.s. 619, denied petitioner his 5th, 6th and 14th Amendment rights as guaranteed by the u.s. constitution, and rendered the entire proceedings fundamentally unfair. (Estelle v. Mc Guire, supra, 502 u.s. 62) As such, as a matter of law, and in the interests of justice, reversal of petitioner's conviction and sentence is required.

III.

The constitutional error should have been measured under the federal harmless rule of chapman v. calif., 386 u.s. 18 (1967), because the state courts failed to apply chapman on direct appeal.

petitioner in his pleadings in the u.s. District court and u.s. court of Appeals for the 9th circuit asserted that the state courts

review when the state did not apply Chapman on direct appeal. (See e.g. Williams v. Clarke, 40 F.3d 1529, 1541 (8th Cir. 1994) cert. denied 514 U.S. 1033, 115 S.Ct. 1397, 131 L.Ed. 2d 247 (1995); Starr v. Lockhart, 23 F.3d 1280, 1290-91 (8th Cir. 1994), cert. denied 513 U.S. 995, 115 S. Ct. 499, 130 L.Ed. 2d 409 (1994); Lowery v. Collins, 988 F.2d 1364, 1372-73 (5th Cir. 1993); Lyons v. Johnson, 912 F. Supp. 679 (S.D. N.Y. 1996) [federal courts applying Chapman on collateral review to constitutional errors when the state courts failed to do so on direct appeal] In contrast, see e.g. Davis v Executive Director, 100 F.3d 750, 772, N.20 (10th Cir 1996), cert. denied - U.S. -, 117 S.Ct. 1703, 137 L.Ed. 2d 828 (1997); Sherman v. Smith, 89 F.3d 1134, 1140-41 (4th Cir. 1996), cert. denied - US -, 117 S. Ct. 765, 136 L.Ed. 2d 712 (1997); Tyson v. Trigg, 50 F.3d 436, 446, 447 (7th Cir. 1995), cert. denied - U.S. -, 116 S.Ct. 697, 133 L.Ed. 2d 655 (1996); Horsley v. State of Alabama, 45 F.3d 1486, 1492 N.11 (11th Cir.), cert. denied - U.S. -, 116 S.Ct. 410, 133 L.Ed 2d 328 (1995) [cases refusing to apply Chapman, but recognizing inter-circuit conflict, and acknowledging ambiguity of whether even under Brecht it is the state that bears the burden of proving harmlessness]

Finally, petitioner asserts that because he has shown that the Bruton and Griffin errors committed during trial were not proven by the state to have been harmless beyond a reasonable doubt in view of the lack of substantial, or even sufficient evidence to support the convictions, this court should issue the writ and grant the requested relief.

IV.

Because the constitutional errors as measured under the federal harmless error rule of Brecht v. Abrahamson, 507 U.S. 619 (1993) had a substantial and injurious effect or influence

in determining the jury's verdict in view of lack of sufficient evidence to support the conviction the District court and 9th circuit's dismissal of the petition was an unreasonable application of clearly established federal law pursuant to Title 28 U.S.C.§ 2254(d)

Notwithstanding petitioner's argument that the federal courts should have applied Chapman standard of review to his constitutional claims (see supra., p.21-23), a review of the lower court rulings here shows that the federal constitutional errors committed during trial cannot said to have been harmless because the trial evidence was far from overwhelming, was relatively weak, and as argued in the District court was insufficient to support the convictions as a matter of law pursuant to the supreme court's decision in Jackson v. Virginia, 443 U.S. 307 (1979). As more fully expressed below petitioner asserts that the Bruton and Griffin errors had a substantial and injurious effect or influence in determining the jury's verdict, and because the convictions were obtained in violation of federal constitutional law and no rational trier of fact would have found petitioner guilty of the crimes beyond a reasonable doubt absent the committed errors, a showing can be made that petitioner is factually innocent. (Murray v. Carrier, 477 U.S. 478 (1986)

more specifically, an examination of the trial evidence as developed on direct appeal indicates that the 9th circuit in affirming the District Court's dismissal of the habeas petition erred in deferring to the Calif. Court of Appeals ruling that there was sufficient evidence to support the convictions (see exh. J, order), and made an unreasonable application of law to the facts of the case.

ORDER DENYING WRIT OF HABEAS CORPUS

No. S043569

IN THE SUPREME COURT OF CALIFORNIA

IN RE EMILIANO TONY LOPEZ

ON

HABEAS CORPUS

SUPREME COURT
FILED
MAR 3 0 1995
Robert Wandruff Clerk
DEPUTY

Petition for writ of habeas corpus DENIED. (See In re Waltreus (1965) 62 Cal.2d 218, 225; In re Lindley (1947) 29 Cal.2d 709, 723.)

Chief Justice