Supreme Court, U.S.
FILED

09-387 SEP 28 2009

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No. 09-______

IN THE

Supreme Court of the United States

ANTHONY T. DAVIS,

Petitioner,

vs.

BEN CURRY, WARDEN

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

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QUESTION PRESENTED

The Court of Appeals for the Ninth Circuit held that the admission of hearsay in violation of Petitioner's Confrontation Clause rights did not have a substantial and injurious effect upon the jury's verdict even though (1) not a single witness to the events at issue testified at trial; (2) the hearsay went to the crux of the case and was not cumulative; (3) the prosecutor relied heavily on the hearsay in his opening statement and closing argument; and (4) during deliberations, the jury asked to have the hearsay re-read twice.

The question presented is: By failing to consider the importance of the Confrontation Clause violation in the actual trial and the actual effect on the jury, does the Ninth Circuit's decision conflict with this Court's precedent and warrant summary reversal?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Ninth Circuit were Petitioner-Appellant Anthony T. Davis and Respondent-Appellee D. L. Runnels, warden of High Desert State Prison. Petitioner has been transferred to Soledad Correctional Training Facility, whose warden is Respondent Ben Curry.

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PETITION FOR A WRIT OF CERTIORARI

Anthony T. Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is unreported. An order denying rehearing and rehearing en banc (Pet. App. 49a) is unreported.

The district court's decision (Pet. App. 8a) is unreported.

The opinion of the California Court of Appeal affirming Davis's conviction on direct appeal (excerpted at Pet. App. 50a) is unreported.

JURISDICTION

Petitioner seeks review of a judgment of the court of appeals entered on May 20, 2009. Rehearing and rehearing en banc were denied on June 30, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

> compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 2254 of Title 28, United States Code, provides in relevant part:

> (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; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Introduction

This petition concerns the Ninth Circuit's decision to affirm the denial of Anthony Davis's petition for a federal writ of habeas corpus under 28 U.S.C. § 2254. Davis was convicted of assault with a deadly weapon (a hammer) and sentenced to 38 years to life in prison under California's "three strikes" law. His conviction came after only two and a half hours of trial testimony. No witness to the events at issue testified. Except for one medical expert, all the

testimony was in the form of conflicting hearsay statements by the alleged victim, Ella Alexander, and her mother.

Davis challenged on Confrontation Clause grounds the admission of testimony regarding an interview of Alexander that San Francisco Police Sergeant John Sanford, a domestic violence investigator, conducted eight hours after the incident. The Ninth Circuit panel (Sidney R. Thomas, Richard A. Paez, CJJ, and David A. Ezra, DJ) held that the California Court of Appeal unreasonably applied clearly established Federal law as determined by this Court by concluding that the admission of Sgt. Sanford's testimony did not violate Davis's Confrontation Clause rights. Pet. App. 3a–6a.

The Ninth Circuit held the constitutional error was harmless, but this holding rests on two legal errors. First, the Ninth Circuit reversed the correct burden of persuasion, requiring *Davis* to show harm. Pet. App. 6a. Next, the Ninth Circuit held the error did not have a substantial and injurious effect on the jury's verdict because the improperly admitted testimony was "one of several pieces of evidence the jury had before it that discredited Davis's self-defense theory." Pet. App. 6a–7a. This is the wrong legal standard. The presence of sufficient evidence of guilt is not enough to deem an error harmless. In each case, the reviewing court must analyze the actual effect the error likely had on the jury.

Here, that effect is indisputable. The prosecution introduced Sgt. Sanford's testimony specifically to rebut evidence that Davis acted in self-defense when he struck Alexander; Sgt. Sanford's testimony was the only direct evidence that Davis did not act in self-

defense; in closing arguments, the prosecutor relied extensively on Sgt. Sanford's testimony; and during deliberations, the jury *twice* asked for readbacks from his testimony.

The Ninth Circuit did not acknowledge or even advert to these circumstances, which were discussed in detail in Davis's briefing and in a timely petition for rehearing. As the Ninth Circuit's decision obviously and blatantly conflicts with the decisions of this Court, summary reversal is warranted.

B. Procedural History

Petitioner stood trial in San Francisco Superior Court on charges that he hit his girlfriend, Ella Alexander, with a hammer during an altercation at her home. No witness to the altercation testified at trial. After two and a half hours of testimony by witnesses who repeated out-of-court statements by Alexander and her mother, Gloria Persons, the jury convicted Davis of assault with a deadly weapon, and found true the allegation of inflicting great bodily injury. Appellant's Excerpts of Record ("ER") 264, 357, 363–64. The trial court sentenced Davis to 38 years to life in prison under the California "three strikes" law.

On direct appeal, Davis argued, *inter alia*, that the trial court's admission of hearsay statements by Alexander and Persons violated his federal Confrontation Clause rights under the standards set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980) and *Idaho v. Wright*, 497 U.S. 805 (1990). With regard to the interview of Alexander by Sgt. Sanford eight hours after the incident, the California Court of Appeal held the hearsay was reliable enough to satisfy the Confrontation Clause because Alexander

had been drinking heavily and had suffered a serious head injury. Pet. App. 58a–59a. The California court also held that statements Alexander and Persons made at the scene were properly admitted as spontaneous statements. Pet. App. 60a–69a. Davis filed a timely petition for review, which the California Supreme Court denied without comment on February 21, 2001. ER 503.

Davis filed his petition for a federal writ of habeas corpus on January 30, 2002. ER 520. He challenged the admission of the hearsay statements by Alexander and Persons as violating his clearly established rights under the Confrontation Clause. The district court denied the petition on August 2, 2007, ruling that he had not met the standards of 28 U.S.C. § 2254(d). Pet. App. 34a–41a, 48a.

Davis timely appealed the district court's denial of his habeas petition. In an unpublished decision, the Ninth Circuit held that the California Court of Appeal unreasonably applied this Court's pre-*Crawford* Confrontation Clause precedent by concluding that Sgt. Sanford's interview of Alexander was reliable enough to render cross-examination unnecessary. Pet. App. 3a–6a.

The Ninth Circuit affirmed the denial of Davis's habeas petition, however, holding that the error did not have a substantial and injurious effect upon the jury's verdict. Pet. App. 6a–7a. The Ninth Circuit stated that it had no grave doubt about the effect of the error because Sgt. Sanford's interview was "one of several" pieces of evidence that "discredited" Davis's claim of self-defense. Pet. App. 6a–7a. The Ninth Circuit denied a timely petition for rehearing and rehearing en banc. Pet. App. 49a.

C. Evidence Admitted at Trial [1]

In its case in chief, the prosecution put on two witnesses.

Joseph Salazar, a police officer who reported to the scene of the altercation, testified that when he arrived Alexander told him that Davis had hit her in the head with a hammer, having earlier said, "All right, bitch, I got something for you." Pet. App. 77a–79a, 85a–86a. Officer Salazar also testified that he interviewed Alexander's mother, Gloria Persons, at the scene. Persons told him she had tried to separate Davis and Alexander, who were arguing. Pet. App. 90a. Davis pushed Alexander, who fell onto a couch, and hit her with a hammer. Pet. App. 91a–93a. Officer Salazar did not ask Persons any questions about the events that led up to Alexander being hit. Pet. App. 95a. Over defense objections, the trial court admitted these statements under California Evidence Code § 1240 as spontaneous statements. Pet. App. 78a–79a, 89a–90a.

The other prosecution witness was a police custodian of records, who authenticated a tape recording of a 911 call Persons made after the incident. Pet. App. 98a–102a. On the recording, Persons can be heard telling the dispatcher that Davis "jumped" on Alexander and "busted her head with a hammer." ER 524. The trial court admitted this hearsay as a spontaneous statement. ER 225.

The defense also called only two witnesses.

The first defense witness was the prosecutor himself, who testified that Alexander telephoned him to

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[1] All the witness testimony at trial is included in the Appendix, along with opening statements and closing arguments.

say she wanted him to drop the charges against Davis because the incident was a drunken accident, although she would not provide details. Pet. App. 107a–111a.

The other defense witness was Nigel Phillips, a defense investigator, who testified that Alexander telephoned him shortly before trial to explain what had actually happened on the night of the incident. Pet. App. 113a–114a. She said she had been home drinking large quantities of malt liquor with Davis, and they got into an argument. Pet. App. 114a. Davis went upstairs, and Alexander went to the kitchen and grabbed knives. Pet. App. 114a–115a. When Davis came back downstairs, Alexander started lunging and swinging at him with the knives. Pet. App. 115a. She did not say whether she had landed any blows or intended to cut Davis. Pet. App. 118a, 120a.[2] Davis grabbed a hammer and tried to knock the knives out of her hands. Pet. App. 116a. During the melee, the hammer slipped and hit her in the head. Pet. App. 116a. Persons was upstairs at the time and came down afterward and called 911. Pet. App. 116a–117a.

When the defense rested, the prosecutor asked to introduce the statement Alexander had given to Sgt. Sanford from a hospital bed eight hours after the incident. The prosecutor stressed that the statement was more detailed than the other hearsay admitted (Pet. App. 125a) and was not cumulative because:

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[2] Alexander's statements regarding her use of knives were admitted for their truth as declarations against penal interest. (Cal. Evid. Code § 1230.) The remainder of Phillips' testimony regarding what Alexander said was admitted for impeachment purposes only.

> [i]t's rebutting the statement introduced by the defense through Mr. Nigel Phillips. The statement introduced by the People, the spontaneous statement, merely states that Anthony Davis was the one who swung the hammer, causing the injury, and that he made a threat or made a statement coupled with that. [¶] There is a great deal more detail in the statement of all the incidents leading up to that fact.

Pet. App. 127a. Over objection on Confrontation Clause grounds, the trial court allowed Sgt. Sanford to testify in rebuttal pursuant to California Evidence Code § 1370. ER 268.

Sgt. Sanford's testimony, admitted in violation of Davis's clearly established Confrontation Clause rights (Pet. App. 3a–6a), was as follows. Alexander said she and Davis had been drinking and started to argue. Pet. App. 137a, 140a. The argument escalated when Davis "would not leave her alone." Pet. App. 138a. Davis went upstairs and got a hammer. Pet. App. 138a. When Davis returned downstairs, he said "he was tired of her clowning him." Pet. App. 139a. She said, "Why don't you just leave?" Davis responded, "Yeah, but before I leave, I'm going to do something else." Pet. App. 140a. As Alexander sat on the couch, Davis hit her in the head with a hammer. Pet. App. 141a. She had earlier grabbed a knife to protect herself because she was afraid, but could not remember if she had put the knife under the couch before Davis came back downstairs. Pet. App. 142a–143a. Alexander told Sgt. Sanford that after Davis hit her, he said "Oh, my God" and ran out

of the house with the telephone receiver in one hand and the hammer in the other. Pet. App. 151a.

The prosecution called its final witness, Dr. Grant Gauger, to rebut evidence that the hammer may have "slipped" in Davis's hand, hitting Alexander in the head. ER 279-81. Dr. Gauger testified that Alexander's medical records showed that she suffered a skull fracture (Pet. App. 153a–154a); it would have taken considerable force to cause her injury (Pet. App. 154a–155a); it was likely to have been caused by a controlled blow rather than a "trivial" movement of a hammer (Pet. App. 156a–157a, 159a–160a); and the fracture was the size of a quarter on the top of her head (Pet. App. 158a, 163a). Dr. Gauger also testified that Alexander had a cut on a finger, for which she was referred to a hand clinic, and an injury to her left arm. Pet. App. 160a–161a.

D. Arguments and Deliberations

The prosecutor relied on Sgt. Sanford's testimony in closing arguments to persuade the jury that Davis was the aggressor. The prosecutor argued that although Alexander admitted getting a knife, she told Sgt. Sanford that she had put the knife under the couch: "[T]he fact is it doesn't rise to self-defense. She has the knife; she said she put it under the couch, which also explains why Officer Salazar never saw it." Pet. App. 174a; *see also* Pet. App. 191a ("Yeah, she grabbed [the knife], but she didn't have it in her hand."). The prosecutor portrayed Davis as causing the argument to escalate into a physical confrontation by going upstairs to get a hammer, "just like she had told John Sanford." Pet. App. 174a.

The prosecutor also emphasized that Alexander could not be the aggressor because she was sitting

down at the time: "[S]he tells [Sgt. Sanford] . . . 'I was sitting down when I was hit with a hammer. I was sitting.'" Pet. App. 171a; *see also* Pet. App. 177a ("Ella even admits she was sitting down . . . ."). Despite evidence that Alexander threatened Davis with a knife, "once she sat on the couch, well, the threat's over. Self-defense exists only as long as the real or apparent threatened danger continues to exist." Pet. App. 173a–174a; *see also* Pet. App. 174a ("[S]he may have gotten that knife in anticipation of trouble. We may not like it, but she was sitting on the couch."); Pet. App. 177a ("Because she was sitting down, there is not lawful self-defense."). The prosecutor told the jury no fewer than 22 times that Alexander was sitting down. Pet. App. 170a–177a.

The prosecutor concluded his closing argument by telling the jury that Davis was clearly guilty because he had run out of the house with the hammer in one hand and the telephone receiver in the other (Pet. App. 193a), evidence that Sgt. Sanford provided (Pet. App. 151a).[3]

After the start of deliberations, the jury asked to re-hear "the testimony by Sgt. Sanford regarding the physical confrontation between the victim &

[3] Earlier, in his opening statement, the prosecutor also emphasized evidence that Sgt. Sanford later provided. The prosecutor stated that although Alexander picked up knives, she had put them down before Davis hit her. Pet. App. 72a ("[Persons] got [Alexander] to put those knives down."). Sgt. Sanford was the only witness who testified that Alexander had put the knife under the couch at some point. Pet. App. 143a. The prosecutor told the jury that Davis had gone upstairs and grabbed a hammer. Pet. App. 73a. Sgt. Sanford was the only witness who provided this testimony. Pet. App. 138a. The prosecutor also suggested that Davis had left the house with the hammer and the phone receiver. Pet. App. 74a.

defendant." Pet. App. 194a. Before stopping deliberations that same day, the jury asked to re-hear Officer Salazar's and Sgt. Sanford's testimony about "Alexander's position prior to being struck." Pet. App. 195a. After an hour of deliberations the following day, the jury returned a verdict of guilty. ER 364.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT DISREGARDED THIS COURT'S HARMLESS ERROR PRECEDENT.

A. Principles of Harmless Error Analysis

On federal habeas review, constitutional error is harmful if it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993). Where the evidence on harmlessness is in equipoise, the petitioner must win. *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995).

In determining whether a constitutional violation had a substantial and injurious effect, the focus is on what the error meant to the jury:

> [T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. *The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.*
>
> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else

> that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. *This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.*

Kotteakos v. United States, 328 U.S. 750, 764 (1946) (citations omitted, emphasis added); *see also Brecht*, 507 U.S. at 642–43 (Stevens, J., concurring) (quoting *Kotteakos*); *cf. Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("Harmless-error review looks . . . to the basis on which 'the jury *actually rested* its verdict.'" (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991) (emphasis added in *Sullivan*))).

In determining whether a trial error had a substantial and injurious effect, key factors include the centrality of the error in the case and the strength of other evidence of guilt. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." *Kotteakos*, 328 U.S. at 765; *see Brecht*, 507 U.S. at 639 (error harmless where it was minor and cumulative, and evidence of guilt was "if not overwhelming, certainly weighty"); *Brumley v. Wingard*, 269 F.3d 629, 646 (6th Cir. 2001) (Confrontation Clause violation in admitting testimony could not be deemed harmless because witness was the State's principal witness); *Delguidice v. Singletary*, 84 F.3d 1359, 1364 (11th Cir. 1996) (error in admitting testimony not harmless where it "was the State's only rebuttal of Delguidice's insanity

defense"); *Shaw v. Collins*, 5 F.3d 128, 132–33 (5th Cir. 1993) (Confrontation Clause violation in admitting testimony not harmless because testimony "was the linchpin in the State's case").

Another key factor is the prosecutor's emphasis of the improperly admitted evidence in arguments. *See Satterwhite v. Texas*, 486 U.S. 249, 260 (1988) (explaining that the error was not harmless beyond a reasonable doubt, in part, because "the prosecution placed significant weight" on the inadmissible evidence); *Kyles v. Whitley*, 514 U.S. 419, 444 (1995) (the likely damage resulting from suppressed impeachment evidence "is best understood by taking the word of the prosecutor"); *Smiley v. Thurmer*, 542 F.3d 574, 585–86 (7th Cir. 2008) (prosecutor's emphasis of an inadmissible statement showed that "the State itself believed that this evidence was critical in obtaining [petitioner's] conviction."); *Murillo v. Frank*, 402 F.3d 786, 793 (7th Cir. 2005) ("Why would the prosecutor have introduced Luis's statement, given the considerable risk even under [*Ohio v.*] *Roberts*, unless he expected it to have punch and doubted the sufficiency of other evidence?"); *Brown v. Keane*, 355 F.3d 82, 92 (2d Cir. 2004) (court cannot find improper admission of evidence harmless where it was important to the prosecution's case and the prosecutor stressed it at trial); *Yohn v. Love*, 76 F.3d 508, 523–24 (3d Cir. 1996) (same).

Finally, as a matter of common sense, a jury's request to re-hear improperly admitted testimony is a strong indication the testimony substantially affected the verdict. *See Vasquez v. Jones*, 496 F.3d 564, 576 (6th Cir. 2007) (jury's request to review testimony indicates it was important to their deliberations);

Fulcher v. Motley, 444 F.3d 791, 811 (6th Cir. 2006) ("[T]he most logical reason as to why the jury asked to rehear the tape of Ash's interview was that they did not consider Wright's direct testimony alone to be sufficient for a guilty verdict"); *Ryan v. Miller*, 303 F.3d 231, 255 (2d Cir. 2002) ("[T]he prosecutor's reference to the erroneous evidence in his closing and the jury's request for a read back compounds the prejudice."); *Wray v. Johnson*, 202 F.3d 515, 530 (2d Cir. 2000) (jury's request for a read-back significant in determination of prejudice).

B. The Ninth Circuit's Decision Conflicts With All of These Principles.

The Ninth Circuit incorrectly stated that it could grant relief "only if *petitioner* shows that the error had a 'a substantial and injurious effect or influence in determining the jury's verdict.'" Pet. App. 6a (emphasis added). The Ninth Circuit reversed the correct burden of persuasion, under which Respondent bore the risk of failing to show harmlessness. *O'Neal*, 513 U.S. at 435–40; *see United States v. Dominguez Benitez*, 542 U.S. 74, 82 n.7 (2004) (*Brecht's* application of the *Kotteakos* standard to collateral review assigns the government the burden of showing that constitutional trial error was harmless).

The Ninth Circuit held the constitutional violation in admitting Sgt. Sanford's testimony regarding his interview of Alexander was harmless because it was "one of several pieces of evidence the jury had before it that discredited Davis's self-defense theory." Pet. App. 6a–7a. This decision is erroneous because the standard for determining the harmlessness of a constitutional error is not whether other evidence

supported the guilty verdict "[but] rather, even so, whether the error itself had substantial influence." *Kotteakos*, 328 U.S. at 765. Here, all factors pointed to harmfulness.

First, as to centrality to the case, the testimony recounted statements the *complaining witness* made to a domestic violence investigator describing the incident in which she was injured, and the testimony was by far the most detailed account of the events at issue. *Compare* Pet. App. 75a–80a, 88a–93a (Officer Salazar's direct examinations) *with* Pet. App. 130a–143a (Sgt. Sanford's direct examination). Moreover, the prosecution called Sgt. Sanford as a witness specifically to rebut the evidence of self-defense, and his testimony was the only such rebuttal evidence presented. *See* Pet. App. 127a (prosecutor arguing to trial court that Sgt. Sanford's interview is necessary to rebut the testimony of defense investigator Phillips). The error in admitting Sgt. Sanford's testimony thus went to the crux of the trial. As the prosecutor explained to the jury, self-defense was the only real issue because Davis did not dispute striking Alexander with a hammer. Pet. App. 170a.

The prosecutor's decision to introduce Sgt. Sanford's testimony demonstrates its importance to the State's case. Other than the exculpatory account provided by defense investigator Phillips and evidence that Alexander had a cut on her finger, Sgt. Sanford's testimony was the *only evidence* that Alexander had held a knife during the incident. The prosecutor nevertheless reopened his case to present Sgt. Sanford's testimony after the defense had rested, and elicited the admission about the knife, even though it partially corroborated Phillips' account.

Pet. App. 142a–143a. The most plausible explanation of the prosecutor's decision to introduce Sgt. Sanford's testimony, despite the potential damage from Alexander's admission, is the prosecutor believed the testimony was necessary to secure a conviction.

Second, the other evidence of guilt was far from overwhelming. Six witnesses testified at trial, with the testimony lasting only two and a half hours. All of the testimony about what happened during the events at issue was in the form of conflicting hearsay statements. As the prosecutor acknowledged to the jury, "You have conflicting stories on this. There is a lot of different accounts you've heard. *No two accounts are the same.*" Pet. App. 170a (emphasis added). Other than Sgt. Sanford's testimony, all of the hearsay statements introduced by the prosecution were fragmentary accounts related during a brief 911 call and by a police officer who responded to the scene of the incident and collected basic information from Alexander and Persons while dealing with a medical emergency. *See* Pet. App. 192a (prosecutor arguing to the jury that Officer Salazar did not have time to ask detailed questions).

Third, consistent with the critical importance of Sgt. Sanford's testimony in rebutting Davis's claim of self-defense, the prosecutor emphasized Alexander's statement to Sgt. Sanford during opening statements and especially in closing arguments. Among other things, the prosecutor mentioned *22 times* in closing arguments that Alexander was sitting down when she was struck, evidence that Sgt. Sanford provided. Pet. App. 170a–177a. In his opening statement and his closing argument, the prosecutor told the jury

that after striking Alexander, Davis fled with the hammer and the telephone receiver, testimony that Sgt. Sanford provided. Pet. App. 74a, 151a, 193a.

Finally, the jury asked to re-hear Sgt. Sanford's testimony about his interview of Alexander not once, but *twice*. Pet. App. 194a–195a. The jury's notes demonstrate that the jurors relied on Sgt. Sanford's testimony in reaching their verdict.

The Ninth Circuit did not address any of these circumstances in its harmless error analysis, but instead pointed to "several pieces of evidence" that "discredited" Davis's claim of self-defense. Pet. App. 6a–7a. This evidence is inconclusive:

- Alexander's statement to Officer Salazar that Davis had said, "All right, bitch, I got something for you" told the jury nothing about the circumstances of the utterance (*i.e.*, whether Davis made the statement as he was defending himself). Moreover, Sgt. Sanford had earlier given a different version of the statement, reducing his credibility. Pet. App. 79a, 86a. The trial judge noted that this "makes someone wonder what exactly was the hearsay in this case, what we have by the testimony of Officer Salazar." ER 235. The prosecutor *acknowledged* this testimony was not detailed enough to rebut Davis's self-defense claim, and this was why the prosecutor introduced Alexander's statement to Sgt. Sanford. Pet. App. 125a, 127a.

- Persons' statement on the 911 recording that Davis "jumped" on Alexander and "busted" her head simply showed that

Davis hit Alexander with a hammer, a fact not in dispute. Thus, the quantum of evidence on this point is irrelevant to the prejudice analysis. The statement told the jury nothing about whether Alexander was wielding a knife when Davis "jumped" on her.

- Persons' statement to Officer Salazar that Davis pushed Alexander was unclear as to whether Alexander fell to the couch before or after being struck. *Compare* Pet. App. 92a–93a (fell before being struck) *with* Pet. App. 95a (fell after being struck). Persons' account was also suspect because the evidence suggested she was upstairs at the time of the incident and had not witnessed the events at issue. Pet. App. 115a–116a, 145a. Indeed, the prosecutor repeatedly used Sgt. Sanford's testimony that Alexander was sitting on the couch when Davis struck her to corroborate and strengthen Persons' account of Davis having pushed Alexander onto the couch.[4]

- Medical evidence that the hammer blow was "controlled" and delivered with "great force" told the jury nothing about

[4] *See* Pet. App. 171a (arguing that Persons and Alexander both said Alexander was sitting down); Pet. App. 173a (arguing that neither Persons nor Alexander had motive to lie, and "they both say [Alexander] was sitting down when she was hit"); Pet. App. 174a ("[Alexander] had to be sitting down, just like she told Sergeant Sanford, just like Glory Persons told Officer Salazar."); Pet. App. 177a ("The witness Glory Persons has her sitting down. Ella [Alexander] even admits she was sitting down, even admitting conduct we wouldn't like.").

whether Davis acted in self-defense. Dr. Gauger testified that he could not say what Alexander was doing with her arms before being hit. Pet. App. 160a–161a. The prosecutor presented Dr. Gauger's testimony specifically and exclusively rebut the suggestion that the hammer blow was an accident, caused by the hammer having "slipped." ER 279–81; *see* Pet. App. 116a, 118a–119a. This testimony went to the element of willfulness (Pet. App. 169a–170a) and had no bearing on the element of unlawfulness (*i.e.*, whether or not Davis acted in self-defense).

- Finally, the absence of evidence that Davis received defensive wounds is immaterial given that the prosecution had the burden of proof on this issue. ER 322–23 (court instructing jury that "[t]he burden is solely on the prosecution to prove beyond a reasonable doubt that the defendant did not act in self-defense in this case."). Moreover, that Alexander did not land a blow, and may not have intended to land a blow (Pet. App. 118a, 120a), does not show that Davis's use of force was unjustified.

Even if the evidence relied on by the Ninth Circuit were sufficient to convict Davis, that is not the correct standard. *See Kotteakos*, 328 U.S. at 764–65. The evidence does not come anywhere near to overcoming the plainly prejudicial impact of Sgt. Sanford's testimony that Davis did not act in self-defense, but struck the unarmed Alexander as she was sitting down.

The Ninth Circuit's decision leaves the following questions unanswered. Why did the prosecutor reopen his case after the defense had rested to present Sgt. Sanford's testimony despite Alexander's admission to him that she had held a knife? Why did the prosecutor repeatedly rely on Sgt. Sanford's testimony in closing arguments? Why did the jury ask for Sgt. Sanford's testimony to be re-read twice? The only plausible answer to these questions is that his testimony was crucial to the prosecution's case.

II. GIVEN THE OBVIOUS ERRONEOUSNESS OF THE NINTH CIRCUIT DECISION, SUMMARY REVERSAL IS WARRANTED.

Measured by any standard, the improper admission of Sgt. Sanford's testimony had a substantial and injurious effect on the jury's verdict. At an absolute minimum, the evidence as to harm is in equipoise, requiring a finding of prejudice. *See O'Neal*, 513 U.S. at 437. The judges on the Ninth Circuit panel may have concluded the error was harmless by relying on their own impressions of Davis's guilt. The judges may have believed that other evidence of guilt was sufficient to convict Davis, and therefore no substantial harm occurred. Both approaches are patently erroneous under *Kotteakos*, *Brecht*, and *O'Neal* and summary reversal is warranted. *See Olden v. Kentucky*, 488 U.S. 227, 232–33 (1988) (summarily reversing after finding Confrontation Clause violation harmful).

CONCLUSION

For the reasons set forth above, the petition should be granted and the judgment of the Ninth Circuit summarily reversed.

Respectfully submitted,

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September 2009