*** CAPITAL CASE ***

No. _____

In the Supreme Court of the United States

CHARLES CHITAT NG, Petitioner

vs.

THE STATE OF CALIFORNIA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WAS PETITIONER DEPRIVED OF DUE PROCESS AND HIS RIGHT OF SELF REPRESENTATION UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS BY THE TRIAL COURT'S ERRONEOUS REVOCATION OF HIS SELF REPRESENTATION WITHOUT JUSTIFICATION WHERE THE RECORD SHOWED PETITIONER'S DILIGENT PREPARATION FOR TRIAL AS WELL AS HIS ASSURANCE TO THE COURT THAT IF HE WAS NOT READY FOR TRIAL IN SIX MONTHS, HE WOULD VOLUNTARILY ALLOW HIS ADVISORY COUNSEL TO TAKE OVER.

II. WAS PETITIONER DEPRIVED OF DUE PROCESS BY THE TRIAL COURT'S INSISTENCE THAT HE WEAR A STUN BELT THAT IMPAIRED HIS COGNITIVE ABILITY TO PARTICIPATE IN THE TRIAL, NOTWITHSTANDING THE LACK OF ANY RECORD OF COURTROOM DISTURBANCE OR MISBEHAVIOR, DEPRIVED HIM OF DUE PROCESS AND A FAIR TRIAL.

III. WAS PETITIONER DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND HIS RIGHT OF CONFRONTATION BY THE ERRONEOUS ADMISSION OF THE TESTIMONY OF DECEASED PROSECUTION WITNESS MAURICE LABERGE GIVEN AT A CANADIAN EXTRADITION HEARING AT WHICH THERE WAS NO INCENTIVE TO CONDUCT CROSS-EXAMINATION IN A MANNER COMPARABLE TO THE SIXTH AMENDMENT RIGHT OF CONFRONTATION AT A CALIFORNIA TRIAL.

LIST OF PARTIES

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

RELATED CASES

There are no related cases.

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IN THE SUPREME COURT OF THE UNITED STATES

Petitioner Charles Ng respectfully petitions for a writ of certiorari issue to review the judgment of the Supreme Court of California affirming his convictions and sentence of death.

OPINION BELOW

The opinion below is People v. Charles Ng, 13 Cal.5th 448 (2022); 2022 Cal.Lexis 4400, attached as Appendix A.

JURISDICTION

The Supreme Court of California issued its decision on July 28, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's rights were violated under Sixth, and Fourteenth Amendments to the United States Constitution. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." 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 may have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of 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.

STATEMENT OF THE CASE

A. The Circumstances of the Offense.

Regarding the circumstances of the offense, the following summary is taken from the Opinion of the California Supreme Court.

Between July 1984 and April 1985, 12 people went missing from Northern California. In July 1984, Harvey Dubs, his wife Deborah, and their 16-month-old son Sean disappeared from their San Francisco apartment. In November 1984, Paul Cosner disappeared from San Francisco; he tried to sell his car on his way home from work and was never seen again. In January 1985, Clifford Peranteau failed to show up for work in San Francisco and was never seen again. One month later, in February, Jeffrey Gerald disappeared from San Francisco after telling his roommate he was going to do a "side job" of helping someone move. In April 1985, Kathleen Allen disappeared from Milpitas after getting into a car with a stranger who was supposed to take her to see her boyfriend, Michael Carroll, in Lake Tahoe. Carroll also disappeared. Later that month, Lonnie Bond, Sr. (Bond), his fiancée Brenda O'Connor, and their infant son Lonnie Bond, Jr. (Lonnie), disappeared from the house they rented in Wilseyville. Their friend Scott Stapley, who often visited, also disappeared.

These disappearances remained unsolved and seemingly unrelated until defendant, along with accomplice Leonard Lake, attempted to shoplift a vise from a lumber store in June 1985. While Lake spoke with police officers, defendant walked away from the scene. After officers searched his vehicle, Lake was arrested for possession of a firearm and subsequently committed suicide while in police custody. Officers then began searching for defendant. This search led officers to Lake's property in Wilseyville, where they uncovered evidence that connected defendant and Lake to the missing persons.

Shortly after Lake's arrest, defendant fled to Canada. He was arrested in a shoplifting incident a few weeks later.

The defense presented evidence of Lake's involvement in several uncharged murders, including his brother, Donald, and his best friend, Charles Gunnar. Several witnesses, including defendant, testified that Lake frequently went by the name Charles Gunnar.

The defense presented evidence of Lake's controlling and abusive relationships with women. Witnesses also testified about Lake's interest in photographing women nude and in sexually provocative positions, including girls as young as 10 years old. Some women testified about their personal experiences being photographed by Lake, including one who was coerced into being photographed and was subsequently raped by Lake when she was 16 years old.

Lake carried cyanide in his pocket and told several witnesses that he would take it if he were ever captured. Lake also told witnesses about wanting to build a bunker to use in a nuclear war. Lake had fantasies of keeping women hostage in the bunker.

B. The Proceedings Below.

Petitioner was ultimately extradited from Canada in 1991, at which time proceedings in the present case began. At the time of his return, petitioner was represented by the San Francisco Public Defender on one of the charges. However, most of the charges had been filed in Calaveras County where the body remains had been found on Lake's property. The Calaveras County Justice Court refused petitioner's request that the San Francisco Public Defender be appointed on all charges, and instead appointed two local lawyers. VII CT CAL J 2252. After extensive litigation regarding representation issues, vicinage issues, and venue issues, the case was transferred over petitioner's objection to Orange County, XVI CT CAL S 5704, and the Orange County Public Defender was

appointed. I CT 143-44. Petitioner and the Public Defender had significant differences of opinion as to how the case should be defended, and eventually petitioner was granted self-representation. 19 CT 6713. Petitioner worked diligently to prepare for trial, but that was not fast enough for the Orange County Court, and his self-representation was revoked. 22 CT 7509. The Orange County Public Defender represented petitioner at trial, which began in September 1998. The jury returned guilty verdicts on February 24, 1999. 36 CT 12225-36 The penalty phase began on March 8, 1999; the jury returned a sentence of death on April 30, 1999. 40 CT 13235. The sentence was affirmed by the Supreme Court of California on July 28, 2022.

REASONS FOR GRANTING THE PETITION

INTRODUCTION AND OVERVIEW

Many of the rulings of the trial court and of the California Supreme Court violated petitioner's federal constitutional rights, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution. A grant of certiorari is necessary to address the important constitutional questions presented and to bring uniformity to the adjudication of these issues across the country.

ARGUMENT

I. APPELLANT WAS DEPRIVED OF DUE PROCESS AND HIS RIGHT OF SELF REPRESENTATION UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS BY THE TRIAL COURT'S ERRONEOUS REVOCATION OF HIS SELF REPRESENTATION WITHOUT JUSTIFICATION.

A. Summary of Facts.

Following the grant of self-representation on May 15, 1998, appellant actively and diligently pursued his self-representation during the next three months, and effectuated numerous steps toward trial preparation. The

transcripts of the applications for investigation and expert fees during the period of self-representation provide a clear demonstration that appellant was engaged in down-to-earth, nuts-and-bolts trial preparation, not in any fanciful or irrelevant directions, nor in any dilatory efforts, nor in any other misuse of self-representation.

B. The Trial Court's Erroneous Revocation of Self-Representation.

Petitioner calendared a hearing on a motion to continue the trial for August 21, 1998. The trial court questioned petitioner as to how he had selected the period of six months as the length of time requested. Petitioner responded that it was based on the estimate of his advisory counsel from the Public Defender's Office. The Court then unilaterally broached the subject of revoking petitioner's self-representation – "You know, I want to take a little break, and I want you to think about me revoking your Faretta status because I think that is about where we are at".

After the break, petitioner asked the court to permit his advisory counsel to argue and revocation, and counsel offered a robust attestation to petitioner's diligence since the grant of self-representation three months earlier:

> The record is from security personnel at the jail is that Mr. Ng has been working hard on his case sun up to sunset since the court appointed him, and the court's appointment was made because as the court explained it felt as a matter of law it had to grant that request. Not that it was discretionary. And it did not condition that grant on Mr. Ng's saying he would be ready.
>
> As the court read from the previous transcripts, he said would he [sic] try to be ready. And it seems to me from the effort he has put in and not just the fact that he is working morning to night on this according to the jailers, but for the motions that have been filed, albeit not written by Mr. Ng but approved by Mr. Ng, he is making progress. 5 RT 1061.

The trial court expressed dubiousness as to petitioner's ability to prepare for trial in six months, and petitioner offered the court an unqualified assurance that the case would go to trial in six months:

> The defendant: The suggestion is to have six months as the target date for my pro per trial date and if it is—if I couldn't be ready by then, that counsel would take over.
>
> The Court: Is that your request? Continue it for six months. If you are not ready, then counsel will take over; is that what you are saying?
>
> The defendant: That is my understanding, to eliminate any concern you may have about delay. That will, you know, ensure that I try to be – if I couldn't be ready by then, my status will be revoked. 5 RT 1062.

Notwithstanding advisory counsel's testimonial as to petitioner's diligence in preparation, and notwithstanding petitioner's assurance that he would be ready to try the case prop per in six months or voluntarily give up his self-representation, the court revoked it on the spot, commenting that petitioner was "just trying to delay and that is not allowed." 5 RT 1068.

Faretta v. California, 422 U.S. 806 (1975) noted that self-representation could be terminated in a manner consistent with the Sixth Amendment if the defendant was deliberately and repeatedly obstructionist in Court:

> We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. See Illinois v. Allen, 397 U.S. 337. 422 U.S. at 834, fn. 46.

Nothing in the record remotely reaches the threshold for revocation enunciated in Faretta. The court's unilateral revocation of self-

representation without constitutionally adequate cause warrants a grant of certiorari so that this Court can provide guidance regarding the permissible grounds for revocation of self-representation.

II. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S ERRONEOUS RULINGS THAT SUBJECTED APPELLANT TO ONEROUS AND UNJUSTIFIED PHYSICAL CONSTRAINTS, INCLUDING A CAGE AND A STUN BELT.

A. Summary of Facts.

At appellant's first appearance in Orange County Superior Court on September 30, 1994, the Orange County Sheriff unilaterally required appellant to wear a stun belt along with other physical restraints. 1 RT 9. Prior to arriving in Orange County, appellant had been held in administrative segregation in Folsom, and ferried to Calaveras County Superior Court for court proceedings, where armed guards had been stationed in the courtroom but appellant had not worn a stun belt. 1 RT 15. At the September 30 hearing, appellant's counsel expressed concern that "we have a situation of an escalating security here." 1 RT 11. The district attorney, however, argued that appellant was "now restrained a lot less securely than in Calaveras County." 1 RT 15. Additionally, the prosecution stated that there had been "at least two prior findings by courts in this case that there is a manifest need to restrain the defendant." 1 RT 9.

In response to appellant's objection to the use of the belt, the court replied that it did not "want to second guess the sheriff and everything at this particular stage" and would therefore allow the belt to remain. 1 RT 12. The court ordered appellant's leg irons and leg cuff to be removed, however, and noted that the use of the belt was "probably overkill." 1 RT 11-12. At a subsequent hearing, held on October 21, 1994, appellant was

not forced to wear the stun belt, although he was shackled at his arms, and legs.

In April 1997, the Public Defender filed a motion to have the shackles removed during court hearings. 7 CT 2294. At the hearing on May 9, 1997, 1 RT 43, the court reconsidered whether to require appellant to wear a stun belt. Appellant's attorneys argued that the evidence supporting the use of restraints was "incredibly remote," and in many cases relied on "double and triple hearsay." 2 RT 279. At the same time, appellant's attorneys emphasized that appellant "has been in court for 12 years in the courtroom and never had one incident." 2 RT 280. Appellant's attorneys also submitted a declaration provided by the lawyer who represented appellant in Canada and had experienced no outbursts or violent incidents during the six years he had spent with appellant. 2 RT 281. Additionally, they emphasized that the use of the stun belt was likely to create a "very serious" impediment to appellant's concentration because it would make appellant constantly aware that "some law enforcement officer had the ability to zap me." 2 RT 283-284.

The court concluded that there was "a manifest need" for appellant to wear the stun belt. 2 RT 291. The basis for this ruling, the court said, was that appellant "has been found with contraband relevant to a possible escape." 2 RT 291. The court did not explain what contraband it was referring to, but presumably was alluding to the metal clasp of an envelope that had been found six years earlier in the wall of a visiting booth used by many prisoners. 2 RT 289-290. Additionally, the court added, "all of the problems with [other types of] restraints are addressed by the use of that belt." 2 RT 291. The use of the belt, the court explained, would mean that appellant "won't have people looking at him

like he is in chains." The court told appellant that "I think you prevailed at the hearing" on the use of restraints. 2 RT 359. After all, the court noted, the belt "is a painless thing and it is not observant to anybody. So you are free at counsel table, and you have full movement and it is not uncomfortable like the chains." 2 RT 359. The court did not address the evidence of adverse psychological impact from the stun belt.

On October 14, 1998, shortly before trial, the Orange County Public Defender filed a Motion to Remove Stun Belt, accompanied by numerous exhibits. 31 CT 10213. A hearing was held on October 23, 1998, and counsel for appellant presented, inter alia, expert testimony from Dr. Stuart Grassian. Dr. Grassian explained that because of appellant's psychological background, the use of a stun belt was likely to create a "very, very, very substantial cognitive impairment in [appellant's] ability to participate meaningfully in trial." 12 RT 2895. Dr. Grassian explained that appellant was an individual who exhibited a tendency toward "obsessional thinking," meaning that "once he gets a thought in his mind, it become extremely difficult for him to get it out of his mind." 12 RT 2893. The stun belt would likely have some adverse impact on any detainee, but the adverse impact on appellant would be significantly worse, to the point that "he cannot pay attention adequately." 12 RT 2893. Instead of having an awareness of the trial, appellant would be like to develop "a kind of tunnel vision," fixating on the threat created by the belt. 12 RT 2893. The court denied the motion by minute order dated October 26, 1998. 33 CT 11118-11119

B. The Court's Erroneous Insistence on Petitioner Wearing the Stun Belt.

This Court has not directly addressed the constitutional limitations on forcing a stun belt on a defendant during the course of his trial. The

stun belt device inflicts a great psychological distress on a defendant far beyond the distress that accompanies physical shackles. This Court decision regarding the limitations on the use of shackles in Deck v. Missouri, 544 U.S. 622 (2005) provides a reference point for promulgating constitutional standards for the use of stun belts.

Deck noted that "[j]udicial hostility to shackling may once primarily have reflected concern for the suffering – the "tortures" and "torments" – that "very painful" chains could cause." However, "[m]ore recently, this Court's opinions have not stressed the need to prevent physical suffering (for not all modern physical restraints are painful)," but "[i]nstead they have emphasized the importance of giving effect to three fundamental legal principles." The principles involved were (1) the presumption of innocence; (2) avoidance of impairments of the defendant's ability to communicate in the courtroom; and (3) avoidance of affronts to the dignity of the court – "the use of shackles at trial "affronts" the "dignity and decorum of judicial proceedings that the judge is seeking to uphold." 544 U.S. at 632.

Each of these fundamental principles militates against the use of stun belts except in the most egregious of circumstances. The stun belt certainly brands the defendant as a dangerous and uncontrollable beast who need to be handled like a vicious animal even before the first witness has been called. The imminent threat of getting zapped with 50,000 volts of electricity is certain to inhibit the defendant's willingness to speak out for himself in the course of self-representation. Finally, the use of a stun belt is an affront to the dignity of the court in that it constitutes a 20th century version of the repressive shackles that were eventually outlawed in post-medieval England. See Deck, supra, 544 U.S. at 626.

The federal appellate courts that have addressed the constitutional limits on the use of stun belts have applied standards drawn from inter alia Illinois v. Allen, 397 U.S. 337 (1970), and have reached conclusions incompatible with that of the California Supreme Court in this case. Gonzalez v. Pliler, 341 F.3d 897 (9th Cir. 2003) found constitutional error in the imposition of a stun belt on a California defendant where the record contained no evidence of any serious disturbance by the defendant. In fact, the Ninth Circuit's description of defendant Gonzalez applies equally to petitioner – "Gonzalez did not create any disturbance at trial. He did not try to escape. He made no threats. Despite this, the trial court did not even hold an evidentiary hearing before ordering the use of the belt. This procedure did not satisfy the safeguards required by the Constitution." 341 U.S. at 902. Accord: Stephenson v. Neal, 865 F.3d 956 (7th Cir. 2017); United States v. Durham, 287 F.3d 1297 (11th Cir. 2002).

For these reasons, petitioner request that this Court grant certiorari and set the constitutional standard for determining whether a stun belt is a permissible restraint at trial.

III. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND HIS RIGHT OF CONFRONTATION BY THE ERRONEOUS ADMISSION OF THE TESTIMONY OF DECEASED PROSECUTION WITNESS MAURICE LABERGE GIVEN AT A CANADIAN EXTRADITION HEARING.

A. Summary of Facts.

On September 24, 1998, the Public Defender filed a Motion to exclude the prior testimony of Canadian jailhouse informant, Maurice LaBerge, which had been given in a Canadian extradition hearing in 1988. 26 CT 8668. The Public Defender noted that LaBerge had been named as a prosecution witness, but that LaBerge had been killed in an automobile accident in Alberta, Canada in May 1998. Notwithstanding his death, the

prosecution had announced an intent to introduce portions of his testimony from the Ng extradition hearing held ten years earlier in November 1988 in Canada. 26 CT 8670. The motion argued for exclusion on the grounds that 1) the extradition testimony was not admissible under California Evidence Code Section 1291 (a) (2); 2) that LaBerge was so inherently incredible as a witness that the admission of his prior testimony would undermine the truth seeking function of the trial process and deprive appellant of due process; and 3) appellant's federal constitutional right to confront and cross-examine LaBerge would be violated by the admission of the prior testimony. 26 CT 8691.

Counsel argued that since the Canadian government attorney in the extradition proceedings had only to establish a prima facie of appellant's involvement in the charges to sustain the government's burden of proof, defense counsel had little incentive to significantly challenge the credibility of the government witnesses, including LaBerge 7 RT 1614. In addition, defense counsel pointed out that the strategy of appellant's Canadian attorney in the extradition proceedings was primarily to resist extradition on the grounds that appellant would certainly be prosecuted for and likely receive a death penalty in California, which was a sufficient reason for Canada to refuse extradition regardless of the strength of the evidence of guilt. There was no incentive to conduct cross-examination at the Canadian extradition hearing in a manner that comports with the Sixth Amendment right of confrontation.

B. The Court's Constitutional Error in Rejecting Petitioner's Sixth Amendment Claim.

Crawford v. Washington, 541 U.S. 36 (2004) held that actual confrontation on cross-examination is guaranteed by the Sixth Amendment as a pre-condition for the admission of testimonial

statements. "That incriminating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes Clause's demand most urgent." Id. at 66.

Thus, the fact that LaBerge incriminated appellant in the testimonial setting of a Canadian extradition proceeding increases the urgency of the cross-examination requirement. Crawford held that the Sixth Amendment Confrontation Clause barred "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Id 53-54. The "opportunity" contemplated by Crawford was an opportunity that carried a comparable incentive and interest to cross examine, which did not occur here for the reasons set forth in part two above. Cal v. Green, 399 U.S. 149 (1970) affirmed the admission of preliminary hearing testimony at a subsequent jury trial on the same charges, and this type of evidence was approved in Crawford with the following proviso – "prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine." 541 U.S. at 58. The focus of petitioner's attorney at the Canadian extradition hearing was to argue that if petitioner was returned to California and convicted of one or more of the murder charges, the prosecution might seek the death penalty. Petitioner's attorney attempted to convince the extradition judges that assuming that petitioner would be found guilty in California, the accompanying possibility of the death penalty was a sufficient ground to deny extradition. Counsel made no effort to defend against the merits of the charges because of the distinct nature of the issues at the extradition, such that the nominal cross-examination at the extradition hearing is not the constitutional equivalent

of cross-examination at a preliminary hearing. For this reason, petitioner urges the Court to grant certiorari and address the issue of whether testimony given at an extradition in a foreign country constitutes an "adequate opportunity" for cross-examination as to satisfy the Sixth Amendment right of confrontation.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner requests that this Court grant certiorari, and after full consideration, vacate the judgment of the Supreme Court of California.

Dated: October 23, 2022

Respectfully submitted,

eric s. multhaup

ERIC S. MULTHAUP