

No. \_\_\_\_\_

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**In the**  
**Supreme Court of the United States**

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CRAIG FARLEY, Petitioner

V.

SCOTT KERNAN, Respondent-Appellant

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On Petition for Writ of Certiorari to the United States Court of  
Appeals for the Ninth Circuit

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**Petition for Writ of Certiorari**

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## QUESTIONS PRESENTED

1. Is there any reasonable argument that trial counsel satisfied the Strickland standard when he failed to introduce crucial lack of identification evidence at trial?
2. Is there any reasonable argument that trial counsel satisfied the Strickland standard when he failed to introduce crucial phone records and testimony that could have rebutted inculpatory prosecution's evidence purportedly showing consciousness of guilt.

## PARTIES TO THE PROCEEDINGS

Petitioner is Craig Farley

Respondent is Scott Kernan

## TABLE OF CONTENTS

QUESTION PRESENTED .....	ii
PARTIES TO THE PROCEEDINGS .....	iii
TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES .....	vi
PETITION FOR WRIT OF CERTIORARI .....	1
WHY THIS PETITION SHOULD BE GRANTED .....	2
OPINIONS BELOW .....	4
JURISDICTION .....	4
CONSTITUTIONAL PROVISIONS, STATUTES AND LAW AT ISSUE .....	5
FACTS OF THE CASE .....	5
ARGUMENT .....	11
<b>I. There is no reasonable argument that trial counsel's failure to introduce exculpatory lack of identification evidence satisfied the Strickland standard.</b> .....	13
<b>II. There is no reasonable argument that trial counsel's failure to rebut, rebuttable prosecution evidence satisfied the Strickland standard.</b> .....	17
<b>A. Failure to present defense evidence related to Petitioner's flight from San Diego to Louisiana.</b> .....	17
<b>B. Failure to rebut evidence of Petitioner's web searches purportedly showing consciousness of guilt.</b> .....	19

CONCLUSION ..... 22

CERTIFICATE OF WORD COUNT ..... 24

APPENDICES ATTACHED

A. Petitioner's Motion for New Trial

B. State Court Appellate Decision

C. Report and Recommendation

D. Order Dismissing Habeas and Denying Certificate of Appealability

E. Petitioner's Motion for Certificate of Appealability

F. Order Denying Motion for Certificate of Appealability

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

### **Constitutional Provisions**

U.S. Const. Amend XIV ..... 5

U.S. Const. Amend VI ..... 5

### **Federal Statutes**

28 USC § 1254(1) ..... 4

28 USC § 2254(d) ..... 5, 12

### **Case Law**

Buck v. Davis (2017) 137 S. Ct. 759, 772 ..... 21

Harrington v. Richter (2011) 562 U.S. 86 ..... 11, 12

People v. Bolin (1998) 18 Cal.4th 297 ..... 21

Strickland v. Washington (1984) 466 U.S. 668 ..... 2, 11, 12, 17

Woods v. Donald (2015) 135 S Ct. 1372 ..... 12

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**Petition for Writ of Certiorari**

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Petitioner Craig Farley respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability on the denial of Petitioner's writ of habeas corpus in the United States District Court, Southern District of California.

## **WHY THIS PETITION SHOULD BE GRANTED**

This case presents a question that could right a wrong and give our criminal justice system guidance on the constitutional standards of criminal defense representation in the United States of America.

At trial, Petitioner's trial counsel made two major errors that may have resulted in a wrongful murder conviction of Craig Farley. First, in a case where Petitioner's primary defense was lack of identity, trial counsel failed to introduce evidence of pretrial live lineups conducted with two percipient eyewitnesses, Corey Wishom and Breanna Sandle. During the live lineups, both witnesses failed to identify Petitioner as one of the participants in the crime. In one of the live lineups, witness Corey Wishom pointed to some other person, not Petitioner, and identified that person as a perpetrator. This failure was so direct, obvious, and hurtful to Petitioner's defense, that there is no reasonable argument that trial counsel met the Strickland standard for ineffective assistance of counsel. (See Strickland v. Washington (1984) 466 U.S. 668.)

Second, counsel failed to rebut prosecution's evidence of consciousness of guilt, even though such rebuttal evidence was available, plausible, and necessary to establish an innocent explanation of the circumstances of defendant's flight and internet searches.

The prosecution introduced evidence that Petitioner left San Diego after the murder and drove to Louisiana. The prosecution characterized this as “jetting.” (See Appendix A, p. 23.) The prosecution also introduced evidence of Petitioner’s search history from Petitioner’s laptop while Petitioner was in Louisiana. This search history showed Petitioner searching case and arrest information of co-defendant and alleged co-participant Pierre Terry. (See Appendix A, p. 23.) The prosecution argued that Petitioner’s leaving San Diego and subsequent search history showed consciousness of guilt.

As shown in a motion for new trial, Petitioner’s trial counsel failed to, but could have, presented phone records of constant communication between Petitioner and his wife, Tamara Brumfield, who lived in Louisiana. This would have given the jury an alternative explanation as to why Petitioner left San Diego.

Further, Petitioner’s parents Michael and Carla Farley could have testified that they spoke with their son after he had arrived in Louisiana. They then told him that their house was searched by homicide detectives and that Pierre Terry had been arrested. This would have rebutted the prosecution’s theory that the internet searches showed consciousness of guilt, but instead were a normal and logical response to the information Michael and Carla Farley communicated to Petitioner.

Counsel's failure to present all of this evidence, lack of identifications, phone records, and testimony of Michael and Carla Farley, was not a reasonably tactical choice, but rather ineffective assistance of counsel. Review from this court would right this wrong for Petitioner. It would also give this court an opportunity to give much needed guidance to the nation regarding the constitutional requirements of adequate counsel in the American criminal justice system.

### **OPINIONS BELOW**

On March 3, 2017, the magistrate judge issued a Report and Recommendation denying Petitioner's claims. (See Appendix C.)

On February 26, 2018, the United States District Court for the Southern District of California dismissed Petitioner's petition for writ of habeas corpus. (See Appendix D.)

On August 29, 2018, the Ninth Circuit Court of Appeals issued an order denying Petitioner's motion for certificate of appealability. (See Appendix F.)

### **JURISDICTION**

The Ninth Circuit denied the motion for certificate of appealability on August 29, 2018. Thus the jurisdiction of this court is timely invoked under 28 USC § 1254(1).

## **CONSTITUTIONAL PROVISIONS, STATUTES AND LAW AT ISSUE**

- (1) The Fourteenth Amendment to the United States Constitution guarantees Due Process of Law to Petitioner;
- (2) The Sixth Amendment to the United States Constitution guarantees effective assistance of counsel to Petitioner;
- (3) 28 U.S.C. § 2254(d) provides Petitioner a right to habeas relief where a decision of a state court is “contrary to, or involved in an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or 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.”

## **FACTS OF THE CASE**

In 2011, Petitioner was convicted of murder in state court with special allegations increasing his sentence and other related felony offenses. Nearly a year after trial Petitioner, represented by new counsel, moved for a new trial on the grounds that he was denied effective assistance of counsel as guaranteed by the United States Constitution. The trial court denied Petitioner’s motion and sentenced him to life without the possibility of parole plus an additional consecutive sentence of 25 years to life.

At trial, the prosecution introduced evidence that the victim, Jonathan Pleasant, sold marijuana from his apartment.<sup>1</sup> On June 28, 2010, the night before Pleasant's killing, Petitioner Craig Farley came over to Pleasant's apartment to buy some marijuana. Pleasant's girlfriend, Esther Magnus, was there. Petitioner told Pleasant that he didn't have any money but would return later.

The next day, June 29, 2010, two men came to Pleasant's apartment. Pleasant's neighbor, Corey Wisham, was just leaving as the two men arrived. Pleasant said to one of the men "Oh, I've been waiting for you." One of the men stepped into the living room and said "This is my brother and he's cool." Corey Wishom testified that both men were African-American. The man who said "this is my brother and he's cool" was wearing black Nike shoes, black basketball shorts, white socks pulled up to his knees, a black hoodie, and a backpack strapped to his chest. The man had short clipped hair and a tattoo on the top of his arm.

Jonathan Pleasant was soon thereafter found shot in the buttox. Neighbors reported that Pleasant stated "They shot me. They shot me. Oh, God, they shot me." Pleasant was pronounced dead on the scene.

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<sup>1</sup> This summary, until specified otherwise, is based on the facts as outlined in the state case opinion on direct appeal submitted as Appendix B. See pages 3-8.

After the shooting, witness Breanna Sandle saw two men running from the apartment complex. She testified that the two men were African American males in their mid-twenties. One of them was wearing a backpack. Later, when shown a photographic lineup that contained a photo of Petitioner, she was not able to identify him as one of the men.

Investigators connected Petitioner to the scene because a small amount of his DNA was found on a roll of duct tape found in Pleasant's apartment. However, Petitioner was a frequent visitor of Pleasant's apartment.

Investigators connected Pierre Terry to the scene because his DNA was found on a gun slide found in the apartment, blood samples collected from the apartment, and fingernail scrapings taken from the victim Jonathan Pleasant. Terry's fingerprints were also found on artwork in the living room of the apartment.

Cell phone records introduced by the prosecution showed several short calls between Petitioner and victim Pleasant the morning of the shooting. Also, there were texts between Pierre Terry and Petitioner before and after the shooting and killing. Phone records also put Petitioner within two miles of the victim's apartment on the date of the shooting.

Farley was convicted of first degree murder and various other special circumstances. Before being sentenced to life without the possibility of parole, Petitioner, now represented by new counsel, filed for a motion for new trial alleging ineffective assistance of counsel.

At the motion for new trial, it was established that trial counsel for Petitioner failed to introduce identification evidence related to witnesses Corey Wishom and Breanna Sandle.<sup>2</sup> At trial, neither witness was able to identify Petitioner as one of the two men they saw in connection with the murder. Nonetheless, the prosecution introduced evidence that both witnesses keyed in on Petitioner when police presented them with a photo lineup during the course of the investigation.

Corey Wisham was shown a photo lineup containing Petitioner. He keyed in on Petitioner and told investigators that Petitioner looked like someone he had seen on TV. However, he did not identify Petitioner as one of the two people he saw arrive at Pleasant's apartment the morning of the murder.

Breanna Sandle was shown a photo lineup containing Petitioner, she focused on two of the photographs, one of which was Petitioner. She then told the police that she could not be sure.

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<sup>2</sup> The factual basis for these claims can be found in Petitioner's Motion for New Trial attached here as Appendix A.

At the motion for new trial, it was gleaned that both witnesses also participated in a live lineups containing Petitioner. Police obtained a “no haircut” order so that Petitioner would look similar to how he looked on the day of the murder. The live lineups occurred approximately three months after the killing. During the lineup, Petitioner was instructed to say “[t]his is my brother and he’s cool.”

Wisham did not identify Petitioner. Instead, he identified some other person in the lineup and said he was 80% sure that person was one of the two black men.

Sandle did not identify Petitioner. Instead she pointed to some other person and told investigators that the other person looked familiar.

The jury at Petitioner’s trial never heard any of the evidence related to the live lineups conducted with Wisham and Sandle. Trial counsel failed to present any of it.

At the motion for new trial, it was established that trial counsel failed to introduce defense evidence that could have rebutted prosecution evidence that purported to show consciousness of guilt. The prosecution introduced phone records that showed Petitioner left San Diego for Louisiana the day after the murder. The prosecution argued that this flight showed Petitioner was running to escape liability for the killing. However, there were phone records showing call

logs showing an extensive call history between Petitioner and his wife who lived in Louisiana. Along with the testimony of Petitioner's wife, Tamara Brumfield, these logs could have provided an alternative explanation for defendant's travel to Louisiana, i.e., that he was visiting her. However, they were never shown to the jury.

Also, the prosecution introduced internet search records that they argued showed Petitioner knew about the murder while he was in Louisiana. When Petitioner had been arrested in Louisiana prior to trial, law enforcement seized Petitioner's laptop computer. Upon searching the contents of the computer, law enforcement found internet search history for things related to the murder. For example, Petitioner visited the a San Diego Sheriff's website to see if Pierre Terry was in jail. Petitioner also performed a warrant check to see if there was an outstanding warrant for him. The prosecution argued that these actions were all consistent with a guilty state of mind and a person who was trying to evade capture and who had information that only one of the guilty parties would have.

However, trial counsel could have been easily rebutted this theory. evidence that trial counsel failed to present would have provided innocent explanations for the prosecution's evidence. Petitioner's parents Michael and Carla Farley could have testified that the homicide police conducted a search of their home looking

for evidence and looking for Petitioner. The detectives also told them that they had arrested Pierre Terry. Carla Farley then called Petitioner and told him that the police suspected him of being involved in a murder and that Pierre Terry had been arrested. This evidence would have provided innocent explanations for the internet search history, that Petitioner conducted the searches as a logical response to being given information from his mother. The evidence would have rebutted the prosecution's theory that Petitioner conducted the searches because he was guilty and was trying to evade capture. Yet, none of this evidence was presented by Petitioner's trial counsel.

## **ARGUMENT**

In order to prevail on a claim of ineffective assistance of counsel, a defendant must “show that counsel’s performance was deficient.” (Strickland v. Washington (1984) 466 U.S. 668, 687.) The question is whether counsel’s performance fell within the “wide range” of reasonable professional norms and professionally competent assistance. (See Buck v. Davis (2017) 137 S. Ct. 759, 772.)

“To establish deficient performance, a person challenging a conviction must show that “counsel's representation fell below an objective standard of reasonableness.” (Harrington v. Richter (2011) 562 U.S. 86, 104 quoting

Strickland 466 U.S. at 688.) “A court considering a claim of ineffective assistance must apply a “strong presumption” that counsel's representation was within the “wide range” of reasonable professional assistance. (Citation.) The challenger's burden is to show “that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.” (Harrington 562 U.S at 104 quoting Strickland 466 U.S. at 674.)

With respect to prejudice, a challenger must demonstrate “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (Harrington 562 U.S at 104 quoting Strickland 466 U.S. at 694.)

As the magistrates report and recommendation correctly points out, claims for IAC under AEDPA are doubly deferential. (See Woods v. Donald (2015) 135 S Ct. 1372, 1376.) “The pivotal question is whether the state court's application of the Strickland standard was unreasonable.” (Harrington v. Richter (2011) 562 U.S. 86, 101.) “When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.” (Id. at 105.)

**I. There is no reasonable argument that trial counsel's failure to introduce exculpatory lack of identification evidence satisfied the Strickland standard.**

There is little question that evidence of Corey Wisham and Breanna Sandle's lack of identification of Petitioner in a live lineup was exculpatory. Yet, trial counsel did not present the evidence at trial. At a motion for new trial, trial counsel gave the following reasoning for this choice, "Because none of those witnesses identified him at trial. None of them made an in-court identification of Mr. Farley as the offender at trial. And given that nobody in the courtroom was pointing the finger at him as an offender in the case, I didn't want to go back and rehash the police's suspicion that he'd been one of the offenders and had been at a lineup. I made a conscious decision not to present that evidence." (See Appendix B, p. 11-12.)

The state appellate court's reasoning that trial counsel was not IAC seems grounded in the fact that the lack of identifications was of marginal benefit. The court of appeal found that "[g]iven that neither witness had identified Farley during direct examination at trial, Farley's trial counsel could have reasonably determined that additional evidence of the witnesses' failure to identify Farley was likely to be of marginal benefit to the defense." (Appendix B, p. 12-13.)

However this view was not shared by the trial court that found that counsel did not make a reasonable tactical decision in failing to present the live lineup evidence. (See Appendix B, p. 12.) Certainly the trial court, and not the California Court of Appeal, having presided over the trial proceedings would have been in a better position to judge whether this was a reasonable trial tactic.

Indeed, it was not. There was only upside and no downside to presentation of the lack of identifications. The killing occurred on June 29, 2010. The live lineups in question occurred on September 27, 2010, less than three months after the killing. Corey Wisham testified on October 14, 2011 and Breanna Sandle testified on October 17, 2011, both more than a year after the killing. Certainly both witnesses memory would have been fresher during the live lineup, rather than at trial.

Introductions of the lack of identification would have dispelled the possible belief that Wisham and Sandle refused to identify Petitioner at trial because they were scared. For example Breanna Sandle had pointed to Petitioner in a photo lineup earlier in the investigation, but said she could not be sure. (See Appendix A, p. 20.) During the live lineup, Corey Wisham did identify a participant that was not Petitioner, showing he was willing to make an identification.

At the live lineup, the participants, including Petitioner was told to say “This is my brother, he’s cool.”<sup>3</sup> This would have given Wisham an opportunity to identify Petitioner by face and voice. Wisham could not and the jury never knew this.

Counsel’s reasoning is flawed and cannot be seen as reasonably tactical. First, failure to call relevant evidence because it might highlight that the police were pointing the finger at Petitioner is not sound strategic reasoning. Of course the police are suspicious of Petitioner, that is why he is standing trial in the first place. It was not a factual dispute that the police believed he was guilty. Everyone knew that fact. Presenting evidence that the police were investigating him, when that part of their investigation revealed exculpatory evidence, would highlight that the police may have been wrong to suspect him. No reasonably competent attorney would use this reasoning to fail to present helpful evidence.

Even more profound is trial counsel’s reasoning that neither of the witnesses made an in-court identification, so the lack of a live lineup would have been of marginal value. This reasoning does not reflect a reasonable tactical choice. Both of the witnesses pointed to Petitioner in photo lineups. So the jury could believe

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<sup>3</sup> During the motion for new trial there was evidence related to a possible third party culpability defense that a person named Leroy Thomas, and not Petitioner, was the perpetrator of the crime with Pierre Terry. A police interview with Thomas established that he and Pierre Terry were like brothers. No such relationship existed between Terry and Petitioner. (See Appendix A, p. 23-29.)

there was some recognition. The live lineup lack of identification evidence could have damaged, neutralized, or diminished the photo lineup identification evidence presented by the prosecution.

The jury was free to believe that the witnesses' failure to identify Petitioner at trial may have been related to fear of retaliation rather than a true inability to identify him as one of the perpetrators. The court noted this point when it stated that Wisham's demeanor at trial was evasive and the court suspected Wishom "did not want to identify someone." (13 RT 3035.) This suspicion would have been dispelled if the jury learned that Wishom was willing to identify someone and did identify someone other than Petitioner (to an 80% degree of certainty) at the live lineup. If the jury believed that Wishom (and Sandle) were merely hesitant about identifying Petitioner, the live lineup evidence would have put that notion to rest.

Trial counsel's reasoning was also based on the fact that he did not want to give the witnesses an opportunity to "clean up" their prior identifications. (11 RT 2568.) This reasoning is nonsensical considering that trial counsel could have simply presented the testimony of the police officer conducting the live lineup and that would have prevented the witnesses from cleaning up anything.

There was simply no downside to presenting the live lineup evidence and there was a substantial upside. As such there is no reasonable argument that counsel's conduct satisfied Strickland.

The failure to introduce the evidence was prejudicial. The case against Petitioner was highly circumstantial. The DNA evidence was not compelling, since Petitioner was a frequent visitor of Pleasant's. No one identified Petitioner as one of the two men who came into, or ran away from, Pleasant's apartment on the date of the shooting. The communications between Pleasant and Petitioner only explain that Petitioner was a frequent purchaser of marijuana. The communications between Terry and Petitioner before and after the shooting hurt Petitioner's case, but again, were merely circumstantial.

The bulk of the prosecution's case was the evidence of flight and consciousness of guilt, which was rebuttable, and trial counsel (as discussed later) failed to rebut.

**II. There is no reasonable argument that trial counsel's failure to rebut, rebuttable prosecution evidence satisfied the Strickland standard.**

**A. Failure to present defense evidence related to Petitioner's flight from San Diego to Louisiana.**

The prosecution introduced evidence at trial that purportedly showed consciousness of guilt. All of this evidence could have been rebutted by trial

counsel, but was not. There was as no reasonable tactical reason to fail to present the rebuttal evidence.

First, the prosecution presented phone records that showed Petitioner drove to Louisiana the day after the murder. The jury was left to have no explanation as to why Petitioner would just up and leave San Diego and the defense gave no explanation. The prosecution argued (9 RT 2267-2268) and the jury was instructed (1 CT 47) that they could use the “flight” evidence to prove Petitioner’s guilt. However, Petitioner’s phone records established a long history of communication between Petitioner and his wife, Tamara Brumfield, who resided in Louisiana in the months preceding the trip. (1 CT 192-199.) Trial counsel admitted that the Louisiana trip was an important part of the case. (11 RT 2593.) Trial counsel attempted to admit Petitioner’s phone records, but could not lay a proper foundation. (8 RT 1887.) Trial counsel did not subpoena Petitioner’s wife’s phone records, nor did he call a custodian of records from the phone company to admit the records.

As laid out in Petitioner’s motion for new trial, phone records between Petitioner and Brumfield established a long history of communication between he and her. Between May 15 and June 14, 2010, there were 93 calls or attempted calls between the two. (Appendix A, p. 22) They obviously had a strong relationship

and could have provided an alternative explanation, consistent with innocence, for Petitioner's trip to Louisiana, i.e., he went to see his wife.

Failure to admit the evidence of Petitioner's communications with his wife prior to the Louisiana trip was not a reasonable tactical decision. There was no downside. He could have called the wife to establish that they communicated and admitted the phone records to corroborate it. There would have been no risk and only an upside as to present a reasonable explanation, consistent with innocence, for the trip to Louisiana.

Trial counsel noted that Brumfield's negative feelings about Petitioner would have made her a risky witness. However, without her the jury was left in the dark about why Petitioner left San Diego. Trial counsel was left with no good defense or answer to the prosecution's theory that Farley left San Diego to escape detection after participating in a murder.

**B. Failure to rebut evidence of Petitioner's web searches purportedly showing consciousness of guilt.**

Another significant aspect of the prosecution's case was evidence showing Petitioner's knowledge and concern about the murder and resulting investigation while he was residing in Louisiana. The prosecution introduced evidence of web searches performed on Petitioner's laptop while residing in Louisiana. The

prosecution argued that Petitioner checked online at the San Diego Sheriff's website to see if Pierre Terry was in jail and whether Petitioner had a warrant out for his arrest. The prosecution used the records of Petitioner's online inquiries as evidence to argue his consciousness of guilt.

This argument was particularly persuasive during the prosecution's closing argument. The prosecution asked "Why is he going to these databases? Because at the end of the day he's not just putting in Pierre Terry's name, is he? What other names did he put in when it came time to look for warrants? Who was he worried about for getting warrants?" (See Appendix A, p. 30.) An unidentified juror then yelled out "[h]imself." (Id.)

Without any defense rebuttal, this evidence was potent. However, there was ample evidence to rebut this evidence and these arguments, and trial counsel never presented any of it. Petitioner's mother called Petitioner after police executed a search warrant on her home. She told him about the homicide investigation. She told him that Pierre Terry had been arrested for the murder. Petitioner's father consulted with an attorney who advised that they could check the sheriff's website to see if Petitioner had a warrant. Petitioner's mother gave Petitioner this information over the phone. This evidence would have provided an innocent explanation for the internet research conducted by Petitioner, i.e., that he conducted

the internet searches after learning from his parents that he was a suspect in a murder investigation and about a website that allows warrant searches and that Pierre Terry had been arrested for that murder.

Failure of defense counsel to present such evidence was not a reasonable tactical choice. Defense counsel stated that Petitioner's mother was "hostile" and would have been a terrible witness. However, no specifics were given as to why he felt this way. Nonetheless, she and Michael Farley were the only witnesses who could have explained otherwise damaging evidence. No matter how "hostile" she appeared to defense counsel, he should have called her.

Finally, she could have also rebutted the claim that Petitioner changed his phone number the day of the arrest. Petitioner's mother would have testified that she changed his number, not him.

It was also discovered during the motion for new trial that trial counsel failed to formally interview the parents about this information. "Whether to call certain witnesses is . . . a matter of trial tactics, unless the decision results from unreasonable failure to investigate." (People v. Bolin (1998) 18 Cal.4th 297, 334.) Because trial counsel failed to even investigate Petitioner's parents helpful statements, trial counsel's failure to call them as witnesses could not have been a reasonable tactical choice.

Such choice was prejudicial to Petitioner. As discussed above, the case against Petitioner was circumstantial. The prosecution used the defense's failure to rebut much of this evidence as a weapon against him. For example the prosecution stated in closing, "Now, it would have been fundamentally different for us if Mrs. Farley, who's been here every day, okay, in support of her son, which she has an absolute right to do. It would have been very, very different if Ms. Farley would have take the witness stand..." (See Appendix A, p. 23.) After Carla Farley yelled out "I will" the judge admonished her and instructed the jury that "it's fair to comment on the failure to call logical witnesses." (Id.)

The court was right, it is fair. And the jury surely considered the lack of explanation for those web searches having not heard crucial evidence that would have given them a plausible innocent explanation. Much of the prosecution's case was based on this so called "consciousness of guilt" evidence. Given the circumstantial nature of the case, it was prejudicial for trial counsel not to call Michael and Carla Farley as witnesses because, had the evidence been presented, there is a reasonable probability the result would have been different.

## **CONCLUSION**

Petitioner respectfully requests this petition be granted and this court review the issues presented herein. This is an opportunity to right a wrong for a person

who may have been wrongfully convicted. It is also an opportunity to resolve and define the extremely important legal rights and standards related to ineffective of assistance of counsel and its relation to AEDPA.

DATED: November 24, 2018

/s/ *Matthew J. Speredelozzi*

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CRAIG FARLEY