No._____

_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

JOSEPH FLOWERS

Petitioner

v.

F. FOULK, Warden,

Respondent

_____

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Flowers was convicted of robbery, kidnapping and burglary based on an incident where two men robbed a massage parlor that had a history of prostitution. The only issue at trial was whether Flowers was correctly identified as one of the perpetrators. The questions presented are:

1. Under the clearly established rule in *Strickland v. Washingon*, 466 U.S. 668 (1984), was Flowers's trial counsel prejudicially ineffective when he failed to present evidence of Flowers's alibi at trial? Relatedly, has Flowers presented sufficient proof of actual innocence as either a stand alone claim under *Herrera v. Collins*, 506 U.S. 390 (1993), and/or as a gateway to overcome any procedural default under *Schlup v. Delo*, 513 U.S. 298(1995)?

2. Did the trial court violate Flowers's right to due process when it denied his motion for a mistrial on grounds that a prosecution witness told the jury that, at the time of the charged incident, he was a parolee at large?

3. Should the courts below have issued a certificate of appealability as to the following claims:

A. Whether the district court erroneously dismissed as procedurally defaulted Flowers's claim that his right to counsel was violated because he had been denied an opportunity for meaningful confidential visits with his trial attorney?

B. Whether the trial prosecutor violated Flowers's right to due process of law under *Brady v. Maryland*, 373 U.S. 83 (1963), when he failed to fully disclose impeachment evidence concerning one of the prosecutor's most important witnesses?

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PETITION FOR WRIT OF CERTIORARI

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Petitioner, Joseph Flowers, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed the district court's order denying habeas relief in an unpublished memorandum decision. App. 1. [1] The opinion and judgment of the

[1] "App." refers to the Appendix attached to this petition. "ER" refers to the Appellant's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit simultaneously with the Appellant's Opening Brief on Appeal. "CR" refers to the docket number of the Court of Appeals docket and "DCR" refers to the docket number of the federal district court docket.

district court denying Flowers's habeas corpus petition are unreported. App. 6, 8. The California Court of Appeal affirmed the conviction and sentence in an unpublished decision. App. 59. The California Supreme Court denied review in an unpublished decision. App. 58.

JURISDICTION

The final judgment of the Court of Appeals was entered on May 29, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

In pertinent part, the Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall enjoy the right . . ."to have "the assistance of counsel" for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law." Additionally, the Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

A. State Court Proceedings

On July 30, 2009, Flowers and co-defendant Douglas Patterson were charged by amended information, filed in Marin County Superior Court, with three counts of robbery (Cal. Penal Code § 211)(Counts 1-3), one count of kidnapping for robbery (Cal. Penal Code 209(b)(1))(Count 4), and one count of commercial burglary (Cal. Penal Code § 459)(Count 6). As to counts 1-4, the information alleged that Flowers had personally used a firearm pursuant to California Penal Code § 12022.53(b).

On the first day of trial, co-defendant Patterson entered a guilty plea and agreed to testify against Flowers. 6 RT 246. On May 11, 2010, Flowers was found guilty of all of the charged counts and the jury found the firearm allegations to be true. 2 CT 372-384. On August 11, 2010, the trial court sentenced Flowers to a determinate prison term of 29 years and four months and to a consecutive term of life in prison. 12 RT 959-962; 2 CT 418-423, 427-430.

On June 15, 2012, the California Court of Appeal affirmed the judgment and sentence.1 ER 54. Flowers's petition for review was denied by the California Supreme Court on August 22, 2012. 1 ER 53. Flowers's petition for a writ of habeas corpus filed in the Marin County Superior Court was denied on December 18, 2012. 1 ER 51. The California Court of Appeal denied his petition for a writ of habeas corpus on May 23, 2013. 1 ER 50. The California Supreme Court denied Flower's petition for a writ of habeas corpus on April 9, 2014. 1 ER 49.

B. Federal Court Proceedings

Flowers timely filed a petition for writ of habeas corpus in the district court on February 7, 2014. CR 1. After a stay was granted, an amended petition was filed on August 22, 2014. CR 32. On March 9, 2016, the district court granted the respondent's motion to dismiss some claims on grounds that they were procedurally defaulted.1 ER 24. On September 1, 2017, the district court denied the remaining claims on the merits. On the same date, the district court issued a certificate of appealability. 1 ER 2.

On May 29, 2019, the Ninth Circuit Court of Appeals issued a memorandum decision affirming the decision of the district court and denying Flowers's request to expand the certificate of appealability. App. 1, 2.

STATEMENT OF FACTS

A. The Christmas Eve Robbery at a Massage Parlor in San Rafael

The primary issue at trial was whether Flowers was correctly identified as the person who committed an armed robbery and kidnapping with co-defendant Douglas Patterson on Christmas Eve, 2008. On that date, Patterson and another man robbed the New Day Health Center, a massage parlor in San Rafael. Wei Chen, Wendy Zhang and Lin Juan Chen (known as "Lily") were working at the time. 8 RT 592. A video surveillance system recorded part of the incident, including footage where Patterson could be seen. RT 221-222, 330, 392, 512. The second robber could not be identified based on the videotape. RT 824, CT 96, CT 156-157, 160-161.

Wei Chen, testified that at about 6 p.m. on December 24, 2008, a "Hispanic" man (Patterson) came in and asked how much he would have to pay for a massage. Patterson also asked how many women were working there that night. RT 954. Patterson walked out and returned immediately, followed by a black man who was about 6 foot 3 inches tall and who was wearing a black beanie hat. RT 751.

According to Chen, Lilli Juan walked up to the two men and greeted them. Patterson then sat on a sofa in the waiting area. RT 597. The black man then grabbed Juan by her hair and pointed a gun at her head. He told Juan to take him to the back of the massage parlor where the money was. RT 595-596. Chen identified Flowers as the black male robber. RT 595.

Chen testified that she saw Flowers take Juan into the back room. He came out and grabbed Chen by the hair, pointed a gun at her head, pulled her into the back room and said "Go get money for me." RT 597-598. He also took money out of Chen's purse and grabbed some bags that belonged to Zhang and Juan. RT 599-600.

According to Chen, Flowers then grabbed Zhang and demanded money. Zhang argued that he had already taken money from her bag. RT 600. Flowers then grabbed Zhang by the hair and dragged her toward the front door. His gun was pointed at Zhang's head. He said "don't come out" and then he and Patterson dragged Zhang out the front door. RT 600-601. Chen denied that Flowers had exposed his penis during the robbery. RT 615.

Xiu He, the massage parlor manager, had been watching the robbery from her home based surveillance system. 6 RT 325. She saw a black man and a Hispanic man inside the massage parlor. The black man was holding a firearm. She also saw Zhang, Chen and Juan kneeling on the floor in front of the two men. She called the police. RT 325. She also denied that the New Day Health Center was a "house of prostitution." RT 350-351. She testified that the women who gave massages there did not exchange sex for money. RT 351.

San Rafael Police Officer Edward Chiu arrived at the massage parlor at about 6:25 p.m. He looked at the videotape of the incident, which corroborated the three women's statements about the robbery. 6 RT 267-268.

Shortly afterward, Zhang called the massage parlor and spoke to Xiu He. RT 268-269. Zhang said that the robbers drove her to Point Richmond and then released her. Zhang had been rescued by a man who saw her walking down the street in the rain wearing only a night gown. RT 299, 301.

About two weeks after the incident, Chen identified Flowers in a photo line up as the black man who had robbed the massage parlor with Patterson and who had abducted Zhang. 8 RT 630. Chen also identified co-defendant Patterson as the Hispanic male who came into the massage parlor with Flowers. 8 RT 629.

B. The Letter Sent To Chen With Her Checkbook

About a week after the robbery, Chen received in the mail an envelope with her checkbook and a letter that said she should deposit $10,000 in a bank account. RT 216, 603; Exh. 21. A crossed out phone number on the letter was associated with co-defendant Patterson. RT 456.

A fingerprint on the outside of the envelope matched Flowers's left ring fingerprint. RT 552. According to San Rafael Police Detective Lisa Holton, the print matched Flowers's right ring finger. 8 RT 631.

C. Testimony of Douglas Patterson and Fernando Guerrero

If convicted of all of the charged counts, Patterson was facing the possibility of a life term. RT 462. On the first day of trial, Patterson entered guilty pleas to a reduced charge of one count of second degree robbery and one count of acting as an accessory after the fact to one count of armed robbery. RT 370. In exchange for his plea and his testimony against Flowers, Patterson believed that he would receive a sentence of about three years and eight months in prison. RT 371.

Patterson testified that he had known Flowers for three or four years. RT 372. On Christmas Eve, 2008, Patterson and Flowers borrowed a Honda Element from Patterson's roommate, Fernando Guerrero, and drove to San Rafael. RT 375. When Flowers took over driving the car, he took Patterson to the New Day Health Center. Patterson did not know that Flowers intended to commit a robbery. RT 411, 417, 421, 428. [2]

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[2] Prior to trial, Patterson had told an investigating officer that Flowers had asked him to go to San Rafael so that they could interview some women to work as prostitutes for Flowers. RT 514; 7 RT 417.

Patterson went inside and asked how much it would cost to get a massage. He then realized he had left his wallet in the car, so he went back outside. RT 380. After he came back inside with Flowers, Patterson sat on a couch in the waiting room. RT 381. According to Patterson, Flowers told Chen he had something to show her and he exposed his penis. RT 381.

Flowers suddenly pulled out a gun and forced the three women to sit on the floor. He grabbed Chen by the hair and pulled her into the back room. Then, he came back holding two or three purses in his other hand. RT 382-383. He took money out of the purses and then dragged one of the other women to the back room. Flowers was saying "Where is the money?" Flowers grabbed Chen again and dragged her to the back room. RT 384.

When Flowers came back with Chen, he pointed his gun at all three of the women and demanded to know where the rest of the money was. RT 386. Flowers told Patterson to go outside and get in the car. Flowers then came out of the massage parlor with Zhang and forced her into the car. RT 387.

While they were on the Richmond bridge, Zhang opened one of the back seat windows. Flowers "attacked" her and the rear window shattered. RT 389. They released Zhang in Point Richmond RT 391. Patterson then dropped Flowers off in San Leandro. RT 450.

About a week later, Patterson learned that he was wanted for robbery and that there was a photograph of him at the New Day Health Center on the front page of the local newspaper. RT 452. Patterson called his cousin, who was a City of San Mateo Police Officer, and told him what had occurred. On January 6, 2009, Patterson turned himself in at the Santa Clara County Sheriff's office. RT 458. He spoke to a police detective and identified Flowers as the person who had committed the robbery. RT 488.

On cross examination, Patterson admitted that when he entered the New Day Health Center he understood that it was a house of prostitution. 7 RT 424.

Patterson's roommate, Fernando Guerrero, testified that he had loaned his car, a black Honda Element, to Patterson and Flowers. When the car was returned, the rear passenger side window was missing. RT 255-257.

D. Wei Chen Misidentified a Stranger as Wendy Zhang, Her Co-Worker Who Was Taken From The Robbery Scene in a Car with the Robbers

Jonathan Madarang, an Inspector with the Marin County District Attorney's Office, testified as a defense witness. RT 738. Madarang testified that, on April 30, 2010, he had obtained a photograph of a woman named Wendy Zhang. He showed the photograph to prosecution witnesses Wei Chen and Xiu He, and a woman named Nilda Hernandez who was a victim/witness advocate for the Marin County District Attorney's Office. RT 739-740. All three of the witnesses told Madarang that the woman in the photograph was the same Wendy Zhang who had been robbed and kidnapped from the New Day Health Center. RT 741-742.

Madarang later discovered that she was not in fact the person who had been robbed at the New Day Health Center. RT 742. According to Maderang, the woman in the photo looked "very similar" to the Wendy Zhang in the surveillance video of the charged incident. RT 743-744.

E. Expert Testimony Concerning Eye Witness Identification

Dr. Deborah Davis, a psychology professor, testified as a defense expert on the subject of eyewitness identification. RT 668. Dr. Davis explained that in incidents involving a weapon, witnesses perform "more poorly at identifying the person holding it" than a person who does not

have a weapon. RT 683. Studies have shown that people who experience traumatic events are less likely to "pick the right guy" or to identify the right person than others. RT 691. Moreover, cross racial identifications are more inaccurate than same race identifications. RT 684.

Finally, Dr. Davis testified that witnesses who are asked to identify a perpetrator in a line up show high rates of false identification when the line up does not include a photograph of the perpetrator. RT 698-699. It is not unusual to have 70 to 80 percent of people in that situation choose the wrong person out of the line up because they assume that the perpetrator must be among the individuals on display. RT 699-700. The likelihood of a false identification in that situation can be reduced if the witnesses are admonished (as Chen was in this case) that the perpetrator may or may not be included in the line up. RT 698-699. However, even with such an admonition, "you still get very high rates of choosing even if the right person isn't there." RT 699.

REASONS FOR GRANTING THE PETITION

1. This Court Should Grant Certiorari Because the Ninth Circuit's Decision Is In Conflict With This Court's Precedents Concerning The Effective Assistance of Trial Counsel

The Ninth Circuit's memorandum decision holds that petitioner procedurally defaulted his ineffective assistance of counsel claim related to his trial counsel's failure to present alibi evidence that would have demonstrated his actual innocence. App. at p. 3. The decision is contrary to this Court's decisions in *Strickland v. Washington,* 466 U.S. 668 (1984) and its progeny, which set forth the elements of a claim of ineffective assistance of trial counsel. Petitioner, who raised his claim pro se, plainly stated that his attorney was prejudicially

ineffective because he failed to present the alibi evidence at trial. Certiorari should be granted because the Ninth Circuit's decision is contrary to *Strickland*.

2. This Court Should Grant Certiorari to Provide Guidance to the Lower Courts Concerning the Actual Innocence Gateway for Otherwise Procedurally Defaulted Claims and to Establish Whether A Habeas Petitioner May Obtain Relief Based on a "Freestanding" Claim of Actual Innocence

Certiorari should be granted because the The Ninth Circuit's decision in this case is in conflict with the Seventh Circuit decision in *Arnold v. Dittman*, 901 F.3d 830 (7th Cir. 2018), where the Court remanded the case for an evidentiary hearing concerning the credibility of the evidence of the petitioner's innocence, which was the complaining witness's recantation of his trial testimony. In this case, the Ninth Circuit held that the single declaration of an alibi witness was insufficient to meet "Schlup's high standard." App. 3. That holding is in conflict with *Arnold*, which remanded the case for a hearing as to the credibility of the witness. Certiorari should be granted to resolve the conflict between this case and *Arnold*.

As in this case, the petitioner in *Arnold* sought to excuse a procedural default on grounds of actual innocence and also to pursue a claim of actual innocence as a freestanding substantive claim. Accordingly, in both cases, the allegations of actual innocence are doing "double duty" in both as a gateway to habeas review of otherwise procedurally defaulted claims and as a substantive basis for granting the writ. *Arnold* at p. 835; *See Perrone v. United States*, 889 F.3d 898, 903 (7th Cir. 2018).

To date, an assertion of actual innocence based on evidence post-dating a conviction has not been held to present a viable claim of constitutional error. *See Herrera v. Collins*, 506 U.S. 390, 400–02, 113 S.Ct. 853, 860–61, 122 L.Ed.2d 203 (1993). This Court in *Herrera* assumed

without deciding that the Eighth Amendment precludes the execution of a person who has demonstrated his actual innocence. *Id*. at 417, 113 S.Ct. at 869; see also id. at 419, 113 S.Ct. at 870 (O'Connor, J., concurring); id. at 429, 113 S.Ct. at 875 (White, J., concurring in the judgment). But his Court has not yet indicated that an actual innocence claim could, standing alone, support the issuance of a writ in a non-capital case. *See McQuiggin*, 569 U.S. at 392, 133 S.Ct. at 1931 ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.");

In this case certiorari should also be granted to guide the lower courts as to whether a habeas petitioner may obtain relief based on a "free standing" claim of actual innocence.

3. **Certiorari Should Be Granted Because The Ninth Circuit's Decision is in Conflict With This Court's Precedents Concerning the Right to a Fair Trial**

The Ninth Circuit decision in this case holds that the Supreme Court "has not clearly held" that the trial court's admission of prior bad acts evidence violates due process. App. 4 citing *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). Certiorari should be granted to decide this important question of federal law that has not been, but should be settled by this Court.

Here, the trial court admitted testimony at trial that petitioner was a "parolee at large" which made his trial fundamentally unfair as it invited the jury to speculate about petitioner's criminal history. The Ninth Circuit's decision reasoned, incorrectly, that petitioner was not prejudiced because there was a curative instruction, no details were presented and the evidence against him was strong. In fact, as set forth in more detail below, this was a weak case, where the primary identification testimony was given by a co-defendant who received substantial benefits

in exchange for his testimony. Certiorari should be granted to guide the lower courts as to the constitutional standards for the admission of prior bad acts evidence at trial.

4. This Court Should Grant Certiorari and Grant a Certificate of Appealability As to Flowers's Claim That He Was Denied His Right to Counsel When Jail Officials Evesdropped On His Attorney Client Meetings

Without analysis, the Ninth Circuit denied Flowers's request for a certificate of appealability as to his claim that he was denied his right to counsel when jail officials evesdropped on his meetings with his trial counsel. App. 2. Certiorari should be granted to clarify the standard that applies when government officials intrude on or record conversations between incarcerated pre-trial detainees and their lawyers and to establish that such intrusions on the attorney client relationship are prejudicial per se. *See United States v. Cronic*, 466 U.S. 648 (1984); *Powell v. Alabama*, 287 U.S. 45 (1932); *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005). Specifically, when a prisoner's communications with his counsel are chilled to the extent that he cannot speak in confidence with his lawyer, he is constructively denied the right to counsel as if he has no counsel at all. *Id*.

In *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), this Court held that prison officials may open an inmate's legal mail in his presence because "the inmate's presence insures that prison officials will not read the mail," and therefore would not "chill [attorney-client] communications." *Id*. at 577, 94 S.Ct. 2963 (emphasis added). This Court noted, however, that "the constitutional status of the rights asserted ... is far from clear," *Id.* at 575, 94 S.Ct. 2963.

Certiorari should be granted in this case because the Marin County Jail's practice of recording attorney client conversations chilled petitioner's communications with his counsel such

that he was not able to adequate prepare for petitioner's trial. The Ninth Circuit has recognized that intrusion into their confidential communications by government lawyers can chill attorney client communications because prisoners have a legitimate concern that the prosecution will thereby learn of the prisoner's legal strategy. *See Gomez v. Vernon*, 255 F.3d 1118, 1123–24 (9th Cir. 2001). Moreover, the Marin County Jail's practice of intentionally recording attorney client communications is not unique. The practice has been described and condemned in several other published decisions. *See Lonegan v. Hasty*, 436 F.Supp.2d 419, 423 (2012) (OIG report stated that inmate meetings with counsel were routinely recorded); *State v. Walker*, 804 N.W.2d 284, 296-296 (2011) (video surveillance of attorney client meetings violated arrestee's right to confidential visits with counsel); *Case v. Andrews*, 603 P.2d 623, 626 (1979) (county jail policy of monitoring attorney client meetings violated constitutional right to counsel). This case is an appropriate vehicle to address the issue because the jail's practice of recording attorney client conversations was confirmed by numerous witnesses and apparently uncontested. ER 131-145. Accordingly, the issue as to whether such recordings violate the Sixth Amendment and whether the intrusion should be prejudicial per se is squarely presented.

5. This Court Should Grant Certiorari and Grant a Certificate of Appealability As to Flowers's Claim That The Prosecutor Prejudicially Withheld *Brady* Material Because the Ninth Circuit's Decision is Contrary to this Court's Precedents Concerning a Criminal Defendant's Right to Pre Trial Disclosure of Exculpatory Evidence

Without analysis, the Ninth Circuit denied petitioner's claim that the prosecution violated his right to due process of law under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d

215 (1963), when it failed to disclose to him prior to trial records that would have established that the state's complaining witness, Wei Chen, had been arrested for and engaged in prostitution. During the trial, Chen did not admit that she was a prostitute. As set forth in more detail below, the information was material to Flower's defense and should have been disclosed to him before Chen testified at trial.

This Court should grant certiorari and grant a certificate of appealability because the Ninth Circuit's order declining to issue the certificate is contrary to this Court's decisions in *Brady*, *Kyles v. Whitley* and their progeny, which hold that prosecutors have an affirmative duty "to disclose [*Brady*] evidence ... even though there has been no request [for the evidence] by the accused," which may include evidence known only to police. *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); Kyles, 514 U.S. at 438, 115 S.Ct. 1555.

In this case, the prosecutor argued that he did not have a police report establishing what had occurred during Chen's arrest and there was no evidence that the New Day Health Center was operating as a house of prostitution. However, the prosecutor could have discovered that information if he had sought to obtain it. To comply with *Brady*, prosecutors must "learn of any favorable evidence known to the others acting on the government's behalf ..., including the police.'' *Strickler*, 527 U.S. at 281, 119 S.Ct. 1936 (internal quotation marks omitted) (quoting *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555). Because the Ninth Circuit's decision in this case is contrary to *Brady*, this Court should grant certiorari and grant a certificate of appealability.

ARGUMENT

I. This Court Should Reverse the District Court Decision Denying Flowers's Claims Related to His Actual Innocence

A. Flowers's Claim That New Alibi Evidence Establishes His Actual Innocence

Flowers's California Supreme Court and federal habeas corpus petitions allege that, upon his arrival at the Marin County Jail in January, 2009, Flowers told his attorney that at the time of the charged incident he "was at 2016 109th Avenue in Oakland." 3 ER 224-227; CR 25, ECF page 24. Flowers attached Exhibit G to his petition, which is the declaration of Claudette Winston. 2 ER 127; 3 ER 224-227; CR 25, ECF page 24. [3]

After jury selection and before the opening statements at trial, defense counsel told the court that he had just received from Flowers a list of people to subpoena. 2 ER 128-129. Trial counsel asked that the jury be discharged and that the trial be continued so that he could investigate the alibi that Flowers had provided to him. The trial judge replied that Flowers had been "pretty steady" in providing "writings" to the court and counsel. The judge said "I don't imagine that will ever change, so now is the time for trial." The motion to continue was denied. 2 ER 129.

Trial counsel did not present any alibi witnesses at trial. He argued in closing that there was reasonable doubt as to the identification of Flowers as the person who robbed the massage parlor and kidnapped Zhang. 2 ER 93-94.

After his sentencing, on November 8, 2011, Flowers obtained a declaration from Claudette Winston. 2 ER 126. Her declaration states that on Christmas Eve, 2008, (the date of

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[3] Flowers alleged that his pre-trial communications with his counsel were obstructed because the jail where he was confined did not allow confidential attorney client visits. 2 ER 134 (declaration of defense counsel Jon Rankin stating that Flowers had declined visits with him and his investigator because the visiting room was equipped with speakers and recording devices and that his conversations with Flowers in that area could be overheard); 2 ER 137 (declaration of Joseph Flowers concerning evesdropping in jail attorney client visiting room; 2 ER 130, 132 (declarations of other inmates verifying that attorney client visiting rooms were not private).

the charged incident), Flowers was at 2619 109th Avenue with her, Mack Wood Fox, Arthur Cregett, his wife and children, and other family members. Winston stated that she did not recall the exact time that Flowers arrived, but that it was "sometime before sundown" on Christmas Eve and that he "did not leave until sometime during the afternoon on Christmas Day." 2 ER 127. Winston stated that she had discussed the incident with the people named in the declaration and that she personally remembered those events because it was a long standing family tradition to spend Christmas Eve and Christmas morning together. 2 ER 127.

2. The Clearly Established Right to Effective Assistance of Trial Counsel

A claim of ineffective assistance of trial counsel requires proof that: (1) counsel's performance was objectively unreasonable and (2) but for counsel's errors there is a "reasonable probability that the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

When, as in this case, counsel has failed to present exculpatory evidence, the court must "focus on whether the investigation supporting counsel's decision not to introduce [exculpatory evidence] was itself reasonable." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). An attorney who fails to introduce evidence "that would have raised a reasonable doubt at trial renders deficient performance."' *Lord v. Wood*, 184 F.3d 1083, 1092 (9th Cir. 1999). *Strickland* instructs:

> . . . [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 690-91.

The duty to investigate derives from counsel's basic function, which is "to make the adversarial testing process work in the particular case. " *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (quoting *Strickland*, 466 U.S. at 690). This duty includes the obligation to investigate all witnesses who may have information concerning the client's guilt or innocence. *Bryant v. Scott*, 28 F.3d 1411, 1419 (5th Cir.1994).

2. The Ineffective Assistance of Counsel Claim Was Exhausted And Not Procedurally Barred

The district court denied Flowers's ineffective assistance of counsel sub- claim on grounds that it was a "new claim" and therefore procedurally defaulted:

> In his traverse, Petitioner construes this claim as an ineffective assistance of counsel claim, asserting in essence that his attorney failed to investigate his potential alibi. Petitioner did not raise this argument in support of his ineffective assistance of counsel claim, part of which Petitioner withdrew and the remainder of which the Court dismissed on September 6, 2016, as procedurally defaulted. The Court declines to consider this argument as a new claim for ineffective assistance of counsel. The new claim, like claims 1(b) and (c) would be procedurally defaulted under *Clark*. (Citations omitted).

1 ER 15.

The district court's decision should be reversed, because Flowers's claim that his counsel had failed to present evidence at trial of his actual innocence (i.e, his alibi witnesses) was plainly not a new, unexhausted or procedurally defaulted claim. Flowers's California Supreme Court and district court petitions clearly assert that his trial counsel was ineffective because he failed to present evidence of alibi witnesses, even though Flowers told his attorney about them prior to trial. 3 ER 224-227; CR 25, ECF page 24. The points and authorities submitted in support of Flowers's claim in the California Supreme Court petition and the federal

petition argue that "the denial of rights to effective assistance of counsel is hereby raised." *Id*. Flowers also requested an evidentiary hearing concerning "the Denial of Rights of Counsel" in his "inabilities to defend against said charges." *Id*.

Moreover, because Flowers filed his petitions pro se, they must be construed liberally. *Maleng v. Cook*, 490 U.S. 488, 493 (1989); *Balistreri v. Pacifica Police Dept*., 901 F.2d 696, 699 (9th Cir. 1988) ("This court recognizes that it has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements.") Accordingly, there was no procedural default. For all of these reasons, the district court decision that the claim was procedurally barred must be reversed.

3. Because Identity of the Second Robber Was The Most Important Issue at Trial, Defense Counsel Was Prejudicially Ineffective When He Failed to Call Witnesses Who Would Have Testified That Flowers Was At a Family Christmas Eve Party at the Time of the Robberies

In this case, it is undisputable that the identification of Flowers as the second robber was the most important issue at his trial. E.g, 2 ER 76, 79 (portions of prosecutor's closing argument concerning identity). Accordingly, evidence that Flowers was at a family Christmas Eve gathering at the time of the charged offense, such that he could not have been the man who robbed the massage parlor and kidnapped Wendy Zhang, was critical to Flowers's' defense.

Moreover, Flowers told his trial counsel about the alibi witnesses when he was incarcerated at the Marin County Jail and also after jury selection, before the first trial witnesses testified. 3 ER 224-227; CR 25, ECF page 24, 2 ER 128. Trial counsel acknowledged that the alibi evidence was important to Flowers's identity defense. 2 ER 128. No reasonable defense attorney under the circumstances would have failed to interview the witnesses and present their testimony.

Accordingly, the state court unreasonably applied *Strickland* when it denied Flowers's claim without comment or citation to authority.1 ER 49. Trial counsel's failure to call the alibi witnesses was clearly deficient and the AEDPA standard of review should not apply. *Foster v. Wolfenbarger*, 687 F.3d 702, 708-710 (6th Cir. 2012); *see Brown v. Myers*, 137 F.3d 1154, 1158 (9th Cir. 1998)

Under *Strickland*, a petitioner can show prejudice if "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*; *Hardy v. Chappell*, 832 F.3d 1128 (9th Cir. 2016).

Here, only two witnesses testified that Flowers was the robber: massage parlor employee Wei Chen and co-defendant Douglas Patterson. Patterson's testimony must be viewed with caution because he received an extraordinary deal in exchange for his testimony against Flowers. Rather than spend the rest of his life in prison, Patterson was permitted to enter guilty pleas to reduced charges and he expected to receive a sentence of approximately three years and eight months. RT 370-371, 406.

Moreover, the evidence against Flowers was otherwise flawed. Wei Chen, who identified Flowers as the robber, misidentified a stranger as Wendy Zheng, Chen's co-worker who she said was forced to leave the New Day Health Center with the robbers. If Chen could not reliably identify Zheng, a woman who was working with her for hours that evening, how could she have reliably identified the robber, whom she saw for only a few minutes?

Patterson's testimony was also so inconsistent with Chen's that neither could be believed beyond a reasonable doubt. Patterson told the jury that Flowers had exposed his penis to Chen

during the charged incident. RT 381-382. Chen insisted that did not happen. RT 615. Patterson also said that he had never been to the New Day Health Center before the charged incident. RT 459, 472. Chen told police that she recognized Patterson because he had been in the massage parlor before. RT 614.

Finally, the declaration of Claudette Winston clearly establishes that she would have testified that Flowers was with her and other family and friends on Christmas Eve, at the time of the charged incident. Under all of these circumstances, there was a reasonable probability that at least one juror would have entertained a reasonable doubt that Flowers was the second robber. For all of these reasons, trial counsel's failure to present the alibi witnesses was prejudicial and this Court should grant the writ.

B. In the Alternative, This Court Should Grant Relief Based on Actual Innocence Under *Herrera v. Collins*

Should the Court find that Flowers's ineffective assistance of counsel claim is not cognizable, it should grant relief based on the evidence of his actual innocence. Although this Court has not explicitly held that a freestanding claim of actual innocence may be raised in a non-capital habeas case under 28 U.S.C. § 2254, its decisions clearly establish that incarceration of an innocent person violates the Due Process Clause. *See In re Davis*, 557 U.S. 952, 130 S.Ct. 1, 1-2 (2009); *Herrera v. Collins*, 506 U.S. 390, 418-20 (1993) (O'Connor, J. concurring)(assuming without deciding that constitutional claim could be made if prisoner could "make an exceptionally strong showing of actual innocence").

In this case, for the reasons stated in sections above, Flowers's alibi evidence (II ER 126) provides the necessary showing of actual innocence to support relief under the more demanding *Herrera* standard.

C. The District Court Should Have Excused Any Procedural Defaults on Grounds That Flowers Has Shown Sufficient Evidence of Actual Innocence Under *Schlup v. Delo*

"Actual innocence" may also be asserted as a "procedural gateway" for an otherwise procedurally defaulted claim under *Schlup v. Delo*, 513 U.S. 298 (1995). A claim of actual innocence under *Schlup* is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claims considered on the merits." *Schlup*, 513 U.S. at 314-15; *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007). To satisfy the *Schlup* standard, the petitioner must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup* at p. 327.

Here, the district court held that Flowers could not satisfy the *Schlup* standard because the Winston declaration was not from a disinterested party and the declaration "must be considered in light of the proof of guilt at trial." 1 ER 15. However, Winston's close relationship with Flowers did not necessarily diminish the value of her potential trial testimony. Family members who testify as defense witnesses are not necessarily dismissed as incredible. Even a witness with a natural bias may raise a reasonable doubt at trial.

In *Ramonez v. Berghuis*, 490 F.3d 482, 488-89 (6th Cir. 2007) the Sixth Circuit found it reasonably likely that a jury would acquit if they had heard the testimony of the defendant's son, stepson, and an acquaintance whose recollections were inconsistent with the prosecution's theory of the case, even when substantial "inconsistenc[ies]" clouded their testimony. *Ramonez*, 490 F.3d at 485, 489-91. In this case, because the charged incident took place on Christmas Eve, the only witnesses who could have testified to Flowers's whereabouts were the friends and

family members who were celebrating the holiday with him. For all of these reasons, Flowers has provided sufficient evidence of actual innocence to excuse his procedural defaults. This Court should remand this case to the district court to consider the defaulted claims on the merits.

II. The Trial Court Violated Flowers's Right to Due Process When It Failed To Grant a Mistrial After a Witness Referred to Flowers as a Parolee At Large

A. Facts in Support of Claim

Prior to trial, the trial court held that "any reference" to Flowers being on parole or in custody was excluded. 2 ER 123. Moreover, the court ordered that the parties admonish their witnesses concerning the court's ruling. 2 ER 124.

Prosecution witness San Rafael Police Detective Christine Holton testified concerning the circumstances surrounding the preparation of the photographic line up that was displayed to Wei Chen. The prosecutor asked Holton why she had selected a particular photograph of Flowers for the line up and Holton replied that she did not want to "hesitate" to get the information about the incident before the public "for a public safety reason that we have a parolee at large who is possibly still armed in public." 2 ER 121.

The trial court admonished the jury to "disregard the portion of the answer that referred to the term parolee." The court also told the jury "Don't be biased by it or make any inferences from it. It's not part of this case and has no bearing on your consideration of the issues here. Disregard that in its entirety." 2 ER 121.

Outside the presence of the jury, defense counsel made a motion for a mistrial. 2 ER 116. Counsel argued that the prosecutor had been ordered to instruct his witnesses concerning the pre-trial rulings. Defense counsel argued that you could not "unring" the bell and the jury had been tainted by the improper reference to Flowers's parole status. 2 ER 116.

The prosecutor admitted that he had not mentioned to Detective Holton the court's ruling that she should not state that Flowers was a parolee at large. He did not think the issue was going to come up. 2 ER 117.

The trial court denied the motion for a mistrial. The court found that because Holton did not provide any details concerning Flowers's prior conviction and because the court had admonished the jury to disregard the information, there was no prejudice. 2 ER 117-118.

B. The Clearly Established Right to a Fundamentally Fair Trial

The Due Process Clause guarantees that a criminal trial must be fundamentally fair. *Estelle v. McGuire*, 502 U.S. 62, 70 (1991) *quoting Spencer v. Texas*, 385 U.S. 559, 563-64 (1967). The erroneous admission of inflammatory evidence at trial may violates a defendant's constitutional right to due process. *Dowling v. United States*, 493 U.S. 342, 352 (1990); *Alberni v. McDaniel*, 458 F.3d 860, 863-867 (9th Cir. 2006); *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009)*; Alcala v. Woodford*, 334 F.3d 862, 887 (9th Cir. 2003).

The petitioner must show that the challenged evidence was irrelevant and that the "erroneously admitted evidence was of a type that necessarily prevents a fair trial." *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993). Admission of inflammatory evidence violates due process if there are no permissible inferences that can be drawn from it. *Id citing Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991).

C. The Court of Appeal Opinion

The California Court of Appeal held that it need not "address whether prosecutorial misconduct occurred" when Holton referred to Flowers as a "parolee at large." 1 ER 60. The Court held that "no matter the answer to that question, the passing comment by Holton was cured

by instruction and not prejudicial." 1 ER 60. The Court of Appeal held that "the surveillance tapes, the testimony from Chen and Patterson, and the fingerprint evidence strongly support the jury's verdict and link defendant with the charged crimes. 1 ER 60.The Court of Appeal also "presumed" that the trial court's admonition about Holton's testimony "avoided prejudice." 1 ER 61.

D. The AEDPA Does Not Bar Relief On This Claim Because The Court of Appeal Failed to Adjudicate the Constitutional Question

When a state court denies a petition without expressly rejecting a particular federal claim, a federal habeas court must presume that the claim was adjudicated on the merits. However, when it is clear that the state court overlooked the federal claim, AEDPA deference does not apply. *Johnson v. Williams*, 133 S.Ct. 1088, 1094-97 (2013).

Here, the Court of Appeal's analysis of the trial court order denying Flowers's motion for a mistrial overlooked his federal due process challenge to that evidence. The Court of Appeal bypassed Flower's due process claim and ruled only on whether the evidence was prejudicial under state law. As in *Murdaugh v. Ryan*, 724 F.3d 1104, 1121 (9th Cir. 2013) the state court in this case simply did not analyze the federal due process issue in its otherwise thorough opinion. I ER 60-61. Accordingly, Flowers has overcome the presumption that the claim was adjudicated on the merits and AEDPA deference does not apply to his claim that the trial court violated his right to due process when it failed to grant a mistrial due to Holton's reference to him as a parolee at large.

The Court of Appeal Opinion also unreasonably determined the facts under 28 U.S.C. § 2254(d)(2) when it: (1) found that the testimony about Flowers's status as a parolee at large was

only a "passing" reference and (2) found that Holton's testimony on that subject, which portrayed Flowers as a violent and dangerous criminal, was not prejudicial.

When Detective Holton described Flowers as a "parolee at large" she was responding to questions from the prosecutor about why she had selected a photograph of Flowers to include in a photographic array. 2 ER 120-121. Detective Holton testified that the reason for her urgency in creating the photo array was that Flowers was a danger to the public:

> . . . I didn't want to hesitate in getting this information out to the public for a public safety reason that we have a parolee at large who is possibly still armed in public. I felt that there was an urgency in releasing that to the media.

2 ER 121.

Contrary to the Court of Appeal's Opinion, Holton's reference to Flowers's parole status was not made "in passing." The point she sought to make was that she had to act quickly because Flowers was a dangerous criminal who was "possibly still armed." Her statement about his parole status was the highlight of her testimony on that point, because it exposed Flowers's prior criminal record and the fact that he was "wanted" by law enforcement. She bolstered the sense of alarm created by that information by pointing out that he was "possibly still armed." For all of these reasons, the Court of Appeal's conclusion that Detective Holton only referred to Flowers's parole status in "passing" was an unreasonable determination of fact under 28 U.S.C. 2254(d)(2) and this Court should review the claim de novo.

E. Holton's Testimony Was Prejudicial

As this Court has repeatedly recognized, "the introduction of evidence of a defendant's prior crimes risks significant prejudice." *Almendarez–Torres v. United States*, 523 U.S. 224, 235

(1998); *see also Spencer v. Texas*, 385 U.S. 554, 560 (1967)(prior crimes evidence "is generally recognized to have potentiality for prejudice").

In this case, the information about Flowers's parole status had been expressly excluded by the trial court prior to trial because it was irrelevant and unduly prejudicial. The primary disputed issue at trial was whether Flowers was correctly identified as the person who robbed the New Day Health Center and kidnapped Zhang. Holton's testimony that Flowers was a "parolee at large" who was a danger to the public must have influenced the jury's decision to convict him of the charged counts based on her opinion that he was a danger to the community. *See Bowen v. Giurbino*, 305 F.Supp.2d 1131, 1142-1144 (C.D.Cal. 2004)(granting habeas corpus relief where prosecutor repeatedly mentioned defendant's prior convictions for similar offenses during trial).

Although the trial court instructed the jury to disregard the evidence, the presumption that the jurors followed the instruction is overcome by the probability that the jury could not have possibly disregarded Holton's testimony. Moreover, the statement that Flowers was a "parolee at large" who was a danger to the public because he was "possibly still armed" was so alarming on its face that no reasonable juror could have disregarded it. For all of these reasons, the error was prejudicial and this Court should grant certiorari and grant the writ.

UNCERTIFIED ISSUES

I. Flowers's Claim That His Right to Counsel Was Violated Because He Was Not Permitted Confidential Jail Visits With His Lawyer Should Not Have Been Dismissed As Procedurally Defaulted

A. The Marin County Jail Failed to Provide Flowers With Meaningful Confidential Visits With Counsel Because Jail Staff And Other Inmates Could Hear The Conversations Between Attorneys and Their Clients In The Attorney Client Meeting Room

Prior to Flowers's trial, on November 20, 2009, his counsel filed a motion with the Marin County Superior Court titled "Motion to Dismiss for Illegal Survillance and Visual or Video or Audio Invasion." CT 490. [4] On December 8, 2009, the trial court held a hearing on the issue. 2 ER 145. During the hearing, Flowers's counsel, Mr. Jon Rankin, argued that he was not able to conduct confidential attorney client meetings with Flowers because the rooms where attorney client visits were held in the jail were not private. 2 ER 145.

Rankin stated that "the situation" was "something we've all known about and we've all just kind of put up with because we figured there was, you know, nothing we could do about it." 2 ER 147. He described how correctional officers and inmates were able to hear attorney client conversations. 2 ER 145-148. Rankin said that he and Flowers had "never, ever, had a discussion between the two of us that wasn't overheard by somebody." 2 ER 148.

Rankin argued that the jail staff could not remedy the situation because that would be "really expensive and really time consuming." He asked the trial judge to dismiss the case. 2 ER 148.

The trial judge commented that he had become aware of the situation at Flowers's preliminary hearing and that he had told Flowers to file a noticed motion so that the court could address it. 2 ER 150. The court also stated that it was "evident" that the interview room was not "perfectly soundproof." The court credited Rankin's statement that he had been told verbatim what he had said to another client by an inmate at the jail. 2 ER 154.

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[4] The motion was included in the "Confidential" documents section of the Clerk's Transcript on appeal. The records lodged in the district court contain an index that includes the motion but do not appear to contain a copy of the motion.

However, the court found that Flowers's statement that he was not able to discuss his case with Rankin was "not completely believable." 2 ER 155-156. The court found that a "reasonable resolution" would be to allow Flowers to have an opportunity to meet with Rankin in a place where the conversation would be "completely private." The Court also found that there was no violation of the Sixth Amendment. 2 ER 156. At the conclusion of the hearing, the trial court ordered that Flowers be allowed a confidential conversation with his counsel. 2 ER 167-168.

On October 25, 2012, Flowers filed a petition for a writ of habeas corpus in the Marin County Superior Court, alleging, among other claims, that his right to counsel under the Sixth and Fourteenth Amendments was violated because he had been denied the opportunity for meaningful and confidential attorney client meetings prior to trial. CR 49, Exhibit 3. On December 18, 2012, the Marin County Superior Court issued a reasoned decision denying the claim. The Superior Court held that "all of petitioner's complaints, excluding his post-conviction complaints, are issues that could have been raised on appeal." 1 ER 52 citing *People v. Tulare County Superior Court*, 129 Cal.App.4th 324 (2005). The Superior Court also found that Flowers had failed to establish a "prima facie" case for relief. 1 ER 52.

On September 25, 2013, Flowers filed a habeas corpus petition in the California Supreme Court. The petition again asserted that Flowers's right to counsel had been violated because Flowers had been denied an opportunity for meaningful and confidential conversations with his counsel. 3 ER 189. However, the California Supreme Court petition included additional evidence in support of Flowers's claim. Flowers attached the declaration of Robert Scarbrough, a person who had been incarcerated at the Marin County jail at the same time as Flowers. Scarbrough stated in his declaration that his cell had been located next door to one of the attorney visiting

rooms. Scarbrough said he was able to hear conversations taking place in the attorney client visiting room from his cell. He heard conversations that took place between Flowers and his attorney. 2 ER 131.

Flowers's claim also included a new declaration from his attorney, Jon Rankin. Rankin's declaration states that he knew that the attorney visitation rooms "permitted" others to hear his confidential conversations with his clients. Rankin said that Flowers had repeatedly declined visits citing his right against self incrimination and that he had refused to provide details concerning his defense from the pre-trial stages and through jury trial. 2 ER 135. Flowers had been worried that co-defendant Douglas Patterson was evesdropping on his conversations with Rankin. 2 ER 135. On December 18, 2013, the California Supreme Court denied the petition without comment or citation to authority. 1 ER 49.

On February 7, 2014, Flowers raised the same claim in his petition for a writ of habeas corpus filed in the district court. CR 1. On August 22, 2014, the district court granted leave to file consolidated amended petitions. CR 32. On March 18, 2015, the respondent moved to dismiss Flowers's claim that he was denied meaningful confidential visits with counsel on grounds that it was procedurally defaulted. The respondent argued that the California Supreme Court's silent denial of the claim adopted the Superior Court's decision dismissing the claim under the doctrine set forth in *In re Dixon*, 41 Cal.2d 756, 759 (1953). CR 49, pp. 6-7, that the claim could have been but was not raised on appeal.

The district court agreed with the respondent. It applied the *Ylst* "look through" presumption and presumed that the California Supreme Court order denying the claim was based on the same ground (the *Dixon* procedural bar) as the order of the Marin County Superior Court.

On March 9, 2016, the district court dismissed the claim on grounds that it was procedurally barred. 1 ER 36-39.

As set forth in more detail below, the district court erred when it dismissed the claim as procedurally barred, because the claim filed in the California Supreme Court relied on new evidence, the declarations of Rankin and Scarborough, that were not presented in the Superior Court petition. The declarations are strong evidence that the California Supreme Court did not deny the claim on the same grounds as the Superior Court. Moreover, because the California Supreme Court claim relied on evidence outside the record on appeal, the *Dixon* bar could not apply. Accordingly, Flowers's claim should be remanded to the district court for a decision on the merits.

B. Because Flowers Included New Evidence Outside the Appellate Record to Support His Claim Filed in the California Supreme Court The Superior Court's *Dixon* Bar Did Not Apply

Ordinarily, where, as here, a state supreme court has denied a claim summarily, a federal habeas court "should 'look through' the unexplained decision to the last reasoned state-court decision that does provide a rationale. It should then presume that the later unexplained decision adopted the same reasoning." *Wilson v. Sellers*, ___ U.S. ___138 S. Ct. 1188, 1192 (2018). However, this presumption is rebuttable. *Id*. Specifically, the presumption may be rebutted by "showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." *Id*.

Here, the Court should find that the "look through" presumption has been rebutted. New evidence can transform a previously filed claim into a new one if the new evidence "substantially

improved" the "evidentiary posture" of the claim. *Dickens v. Ryan*, 740 F.3d 1302, 1320 (9th Cir. 2014) (en banc). Here, when Flowers filed his final state habeas corpus petition in the California Supreme Court, he included new evidence (the declarations of Rankin and Scarbrough) that had not been included in his Superior Court petition and that were not part of the state court record on appeal. Therefore, the claim filed in the California Supreme Court was not the same claim presented to the Superior Court and the "look through" presumption does not apply. *Wilson*, 138 S. Ct. at 1192.

Moreover, on this record, the *Dixon* bar plainly did not apply to Flowers's new claim. The Superior Court rejected Flowers's claim under *Dixon*, which can bar a claim that should have been but was not raised on direct appeal. *In re Dixon*, 41 Cal.2d 756 (1953).

Under California law, claims that rely on evidence that is outside the appellate record must be raised by way of a petition for a writ of habeas corpus. *See, e.g., People v. Lopez*, 42 Cal. 4th 960, 972 (Cal. 2008). Because Flowers's new claim filed in the California Supreme Court relied on evidence outside the appellate record, it was properly raised by way of a petition for a writ of habeas corpus and the *Dixon* bar does not apply.

II. The Prosecutor Committed Prejudicial Misconduct When He Failed to Disclose Impeachment Evidence Concerning Prosecution Witness Wei Chen

A. The Prosecutor's Disclosure of Wei Chen's Criminal History Was Incomplete

Prior to trial, the prosecutor disclosed to defense counsel that Wei Chen, the only trial witness who was a victim of the charged offenses, had suffered a "law enforcement contact" for a

charge of California Penal Code § 647(b) on February 6, 2009. 2 ER 179. Under that section, it is a misdemeanor to solicit, agree to engage in or engage in an act of prostitution. Cal. Penal Code § 647(b).

The prosecutor's trial brief describing his disclosure states "Case dismissed on June 16, 2009." The brief also states that it was "the People's position that "this misdemeanor law enforcement contact" was "not an offense involving moral turpitude." 2 ER 179. The prosecutor argued that the incident could not be used to impeach Chen and that it was irrelevant. 2 ER 179.

Outside the presence of the jury, the trial court held a hearing on the prosecutor's request to prevent defense counsel from questioning Chen about the incident. The trial judge pointed out that, at the preliminary hearing, the New Day Health Center witnesses would not admit that "there was anything unusual going on" there and that the evidence of Chen's "contact" with law enforcement for prostitution might supply a good faith basis to believe "Ms. Chen's done something like this before." 2 ER 175.

The prosecutor conceded that he would "agree" with the court "if we had some evidence about the circumstances of the arrest" and "had it happened in Marin close in time to this incident." The prosecutor stated that he did not have a police report concerning the incident. 2 ER 176. The prosecutor said there was no evidence that the New Day Health Center was involved in prostitution. 2 ER 176.

The trial judge replied:

> One might suspect based on the evidence simply that their wearing negligees at midnight on Christmas Eve, that was going on. I would call that evidence of that potential fact.

2 ER 176.

The prosecutor replied: That being said, there is no evidence [Chen] was actually arrested and charged with a crime involving moral turpitude. He clarified "I believe there was an offense charged though." 2 ER 176. However he then, again, referred to the matter as a "law enforcement contact." 2 ER 177.

The trial judge ruled that, whether or not the incident was a crime of moral turpitude, it would be admissible at trial because he expected Chen would deny that she was engaging in prostitution at the New Day Health Center on the date of the charged incident. 2 ER 177-178. The judge held that, ordinarily, without a police report, counsel could not ask good faith questions about the circumstances of a prior incident. The judge held that defense counsel could frame his questions in terms of the statutory elements of the crimes that could be charged under California Penal Code § 647(b). 2 ER 178.

During cross examination, Chen denied that the black male robber had exposed his penis to her during the incident. RT 615. According to co-defendant Patterson, Flowers told Chen he had something to show her and he exposed his penis. He asked Chen if she liked it and she said "yes" and got down on her knees. RT 381. Defense counsel did not ask Chen any questions concerning her previous law enforcement "contact" for prostitution. RT 612-621, 625-628.

Flowers's habeas petition alleges that by way of independent post conviction investigation, he learned that Wei Chen had in fact been charged with one count of prostitution pursuant to Cal. Penal Code § 647(b) and one count of the infraction of performing or engaging in the practice of massage without a permit or license to do so, pursuant to 6-32.030 of the Santa Rosa City Code. Attached to his petition, Flowers included a copy of the misdemeanor complaint filed against Chen in Sonoma County Superior Court on March 30, 2009. 2 ER 170. According

to the records obtained from the court file, Chen was referred to a diversion program. 2 ER 172. On October 20, 2009, the Office of Diversion Services recommended that the case be dismissed. 2 ER 174.

Flowers also presented in his habeas petition a July, 2013, declaration of his trial counsel, Jon Rankin. The declaration states that, as to the misdemeanor and infraction charges against Wei Chen, "although the state attorney has denied any charges were filed or investigated and/or police reports existed, under *Brady* clauses appellant requested criminal background information of any moral turpitude crimes of testifying state witnesses. If such information exists it should have been disclosed." 2 ER 136.

B. Flowers Should Receive a New Trial Because The Undisclosed Impeachment Information Was Material to the Outcome of His Trial

Flowers's claim of prosecutorial misconduct arises under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. at 87.

Three elements must be established to prove a *Brady* violation. First, the evidence at issue must be favorable to the accused, because it is either exculpatory or impeachment material. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). Second, the evidence must have been suppressed by the State, either willfully or inadvertently. *See United States v. Agurs*, 427 U.S. 97, 110 (1976). Third, prejudice must result from the failure to disclose the evidence. *See Bagley*, 473 U.S. at 678.

The State's duty to disclose is affirmative; it applies "even though there has been no request by the accused." *Agurs*, at 107. To satisfy its duty, the State must disclose evidence known to the prosecutor as well as evidence " 'known only to police investigators and not to the prosecutor.' " *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). Therefore, the prosecutor has an obligation "to learn of any favorable evidence known to the others acting on the government's behalf in [the] case, including the police." *Kyles*, 514 U.S. at 437.

Suppressed evidence is prejudicial if it was "material" for *Brady* purposes. *Comstock v. Humphries*, 786 F.3d 701, 710 (9th Cir. 2015). Evidence is "material if it could undermine confidence in the verdict, i.e., if the evidence had been disclosed, there was a reasonable probability of a different result. *Id*; *Bagley*, 473 U.S. at 676; *Agurs*, 427 U.S. at 111-112. The withheld evidence must be analyzed "in the context of the entire record." *Agurs*, 427 U.S. at 112.

Here, the withheld evidence, which consisted of the filed complaint against Chen and the underlying information that supported the charge (which has never been disclosed) was material for *Brady* purposes. Even if the trial prosecutor did not have that evidence at the time of trial, he had an obligation to learn about it and to provide it to defense counsel. Moreover, Chen was the only one of the three victims to testify at Flowers's trial. Accordingly, the credibility of her testimony was crucial to the prosecutor's case against Flowers.

As the trial judge himself pointed out, Chen had not admitted engaging in prostitution. Co-defendant Patterson testified that Flowers had exposed his penis during the robbery, asked Chen if she liked and that she said "yes" and got down on her knees. If true, Chen's response supported defense counsel's theory that she worked as a prostitute and that the New Day Health Center was a brothel.

Chen had denied that Flowers exposed his penis during the incident. Defense counsel could have questioned her with the withheld evidence that she had been charged with prostitution and that she had engaged in the practice of massage without a license.

The fact that the victims were engaged in an illegal business, if proved at trial, would have been particularly material to Flowers's defense as to the kidnapping count. Defense counsel argued that Wendy Zhang, who did not testify at trial, may have gone with the robbers willingly as she told the woman who assisted her after the robbery not to call the police. RT 300. Moreover, Zhang had begun working at the massage parlor on the same date of the charged incident and defense counsel argued that she may have been a participant on a theory that it was an "inside job." 2 ER 87-88. For all of these reasons, the suppressed evidence of Wei Chen's criminal history was material to Flowers's defense. This Court should issue a certificate of appealability and grant the writ.

CONCLUSION

For the reasons stated above, this Court should grant certiorari and grant the writ.

Dated: August ___, 2019.

Respectfully submitted,

/s/ Stephanie M. Adraktas

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