No. 20-5174

ORIGINAL

Supreme Court, U.S.
FILED
JUL 17 2020
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD DEMETRIUS THOMAS — PETITIONER
(Your Name)

vs.

WILLIAM MUNIZ, Warden, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RONALD DEMETRIUS THOMAS
(Your Name)

44750 60th Street, West (B4-237L)
(Address)

Lancaster, California 93539
(City, State, Zip Code)

N/A
(Phone Number)

## QUESTION(S) PRESENTED

1. In applying Harrington Vs. Richter, 562 U.S. 86 (2011), to a habeas corpus claim based on the state's unreasonable application of Constitutional standard for effective assistance of counsel in violation of 28 U.S.C. § 2254(d)(1), can the federal courts undermine Constitutional guaranteed rights to the Petitioner to find the state courts' rulings are a reasonable applications of controlling precedent.

2. In applying Harrington Vs. Richter, 562 U.S. 86 (2011). to a habeas corpus claim based on the state's unreasonable application of Constitutional standard for effective assistance of counsel in violation of 28 U.S.C. § 2254(d)(2), can the federal courts affirm a possible "tactical choices" trial counsel made on the basis of facts which are known to be false and misleading pursuant to 28 U.S.C. § 2254(d)(1), underminded by clear and convincing evidence in the state court record.

## LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner Ronald Demetrius Thomas, is a California State Prisoner, who was sentenced to 40 years to life following a Jury trial in Alameda County.

Respondent William Muniz, is the warden at the prison where Ronald Demetrius Thomas was being incarcerated at the relevant times.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

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

The date on which the United States Court of Appeals decided my case was April 21, 2020.

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

An application for writ of habeas corpus on behalf of a person in custody pursuant to judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.§ 2254 (d)(1)-(d)(2).

Under 28 U.S.C. § 2254(d), a habeas court must determine what arguments or theories supported or could have supported, a state court's decision; and then must ask whether it is possible fairmined jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the U.S. Supreme Court.

The standard created by Strickland Vs. Washington 466 U.S. 668, 688-694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and 28 U.S.C. § 2254(d) are both '' highly deferential" and when the two apply in tandem, review is doubly so. The Strickland standard is a general one, so the range of reasonable applications is substantial.

Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d).

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. Harrington Vs. Richter 562 U.S. 86 (2011)

The United States Court of Appeal has entered a decision in conflict with the decision of another United States Court of Appeal on the same important matter. Supreme Court Rule, Rule 10 (a).

## STATEMENT OF THE CASE

The facts underlying the conviction, as set forth by the California Court of Appeal, are as follows:

Alvin Burns was fatally shot on the night of November 20, 2009. The Alameda County District Attorney filed an information charing the Petitioner Ronald Demetrius Thomas, with murder (§187) and alleging he had personally and intentionally discharged a firearm and caused great injury and death (§12022.53, subd. (d), had personally and intentionally discharged a firearm (§§12022.53, subd. (c)), and had personally used a firearm (§§12022.53, subd. (b), 12022.53, subd. (a)). (ER 33.)

At Petitioner's jury trial, he was tied to the shooting primarily through the testimony of two eyewitnesses, Z.T. and P.L.[1] (ER 170-237.)

Sixteen-year-old Z.T. and her teenage cousin P.L. met Petitioner, known as "D" in the fall of 2009. P.L. was being choked by a man on 88th Street in Oakland, California and Petitioner came to her rescue. (ER 172, 180, 232, 265-266.)

He was carring a small silver gun. The girls went to Petitioner's house that night and Z.T. saw him a few times after that. Petitioner and Z.T. spoke on the phone "probably every other day. (ER 245, 271, 302, 303.)

On the night of November 20, 2009, about a month after meeting Petitioner, Z.T. and P.L. were celebrating the birthday of Alvin Burns. (ER 171, 269.)

After going to McDonald's restaurant and dropping another friend at his home, Burns and the girls decided to meet Tielee P, who lived at 88th Street and MacArthur Boulevard near the Youth Uprising center. (ER 171-174, 198, 250, 298.)

1. P.L. was declared unavailable as a witness and her preliminary hearing testimony was read to the jury. pursuant to California Evidence Code Section 1291.

At the time, Tielee was Z.T.'s boyfriend and P.L.'s best friend." Burns was driving his Honda sedan, with P.L. riding in the front passenger seat, and Z.T. in the back passenger seat. (ER 172, 175, 198, 250, 286, 290, 298.)

Burns parked the car near Tielee's apartment building with the engine still running. (ER 177, 178, 212, 213, 274.)

About 10 minutes, Z.T. noticed Petitioner walking by and said something about seeing "D." P.L. recognized Petitioner and called out to him. (ER 177-178.)

Petitioner approached the passenger side of the car to see who was inside, leaned in to the open back passenger window, and said "What's Up?" in a confrontation manner. (ER 180, 181, 185, 219, 274, 275.)

Burns looked up at Petitioner "like he didn't know him." Petitioner was wearing gold grills on his teeth and a diamond earring in his left ear. (ER 185, 217.)

The car began to roll and Petitioner accused Burns of trying to run over his foot. Petitioner pulled out a gun from his hip and shot Burns in the back of the head. (ER 185, 186, 240, 275.)

As far as Z.T. knew, Petitioner and Burns did not know each other., The car came to a stop against the curb across the street, in front of the Youth Uprising building. (ER 190,)191, 277, 278, 297.)

Burns was slumped in the seat. Blood was everywhere, P.L. unsuccessfully attempted to pull Burns's foot from the gas pedal but was able to do so, so she pulled the key from the ignition. (ER 192, 277, 278.)

Tielee told her Petitioner was the shooter and had been taking drugs and was drinking. (ER 191, 249, 250, 251.)

The Police were dispatched to the scene of the shooting. Burns was taken to the hospital, where he later died of a gunshot wound to the head. (AOB 3.)

An expended bullet was found on the floor of the car in front of the driver's seat and a spent 40 caliber casing was found in a gutter across the street,

indicating the weapon used was a semiautomatic. No weapons were found in Burns's car.(AOB 3.)

Z.T. and P.L. gave written statements at the scene, but did not say tney knew the shooter. (R AOB 3.)

They were placed in different patrol cars and taken to the Police station for questioning, where they were separately interviewed. Z.T. seem antagonistic and scared and did not want anyone to know she was at the Police station.(RAOB 3.)

P.L. seemed upset and withdrawn. Z.T. held back at first because she scared, but eventually she told Police it was Petitioner who had shot Burns. P.L. was afraid of retaliation if she identified the shooter, and did not give Petitioner's name at first.(RAOB 3, 4.)

She eventually admitted she knew the shooter and identified Petitioner. Both girls selected Petitioner's picture from a photographic line up.(RAOB 4.)

A few days after the shooting, officers approached Petitioner to arrest him as he was leaving a movie theater., Petitioner ran down a ravine behind the theater, but was taken into custody after he tripped and fell.(RAOB 4.)

Petitioner was wearing a diamond earring in his left ear and officers found a set of gold grills and a cell phone in his pants pocket.(RAOB 4.)

A second cell phone, later associated with Petitioner, was found about 30 to 45 feet away. (RAOB 4.)

Police searched the home of Petitioner's girlfriend, who was with the Petitioner at the time of his arrest, and found a birth certificate, social security card, and an identification card for the Youth Uprising center, all in Petitioner's name. (RAOB 4.)

The cell phone records showed that calls were made from Petitioner's and Z.T.'s phone near the time of the murder that utilized the same cell phone tower, suggesting the phones were in the same area, though other calls made

from Z.T.'s phone during that time frame utilized a different, nearby tower. (RAOB 4)

The records also showed calls were made from Petitioner's cell phone to Z.T.'s cell phone that same night after the shooting in which the caller from Petitioner's phone blocked the number. (RAOB 4.)

Calls were made from Z.T.'s phone to Petitioner's phone between 4:25 a.m. and 6:11 a.m. on November 22, 2009. (RAOB 4.)

P.L. told the Police she received a threatening call a couple of days after the shooting from a woman with a high-pitched voice who said, "Bithch", you are going to die." (RAOB 4.)

The voice sounded similar to one of the bystanders who helped them at the scene after the shooting. (RAOB 4.)

P.L. was 100 percent positive Petitioner was the shooter. She did not talk to Tielee after the shooting. (RAOB 5.)

Z.T. did not received any threats, though Petitioner and other people called her. She had not answered her cell phone because she did not want to talk about what had happened. (RAOB 5.)

She liked Petitioner as a friend and thought both he and Burns were nice people. Z.T. had not spoken to Tielee since the shooting. She had no doubt Petitioner was the shooter. (RAOB 5.)

After giving an Opening Statement suggesting the evidence would show that Petitioner was not at the scene of the crime, defense counsel called a single witness, DeAnna Ashorobi, who testified Petitioner was a friend of her daughter's and she had known the Petitioner since he was 15 years old. (RAOB 5.)

Ashorobi had never heard of Petitioner being violent and had never known him to carry a gun. (RAOB 5.)

Ashorobi, believed Petitioner to be a good kid, mild mannered, and respectful, however, she had not heard of Petitioner owning or carrying guns, she had not

heard that Petitioner had been involved in fights with a gang, she had not heard of the Petitioner's involvemnt in a kidnapping, she had not heard that Petitioner's father and others held the kidnapping victim and fired shots at the victim's boyfriend when he arrived to retrieve the victim, she had not heard that Petitioner had held the kidnapping victim at gunpoint and threatened her when he released her. (RAOB 5.)

If she has heard about the kidnapping and gun possession, it would affect her opinion and she would assume he was violent if he went to jail or prison for such conduct. (RAOB 5.)

Ashorobi had heard about the current homicide, but this did not alter her opinion because Petitioner had not been found guilty and she did not see him as the kind of person who would shoot someone in the head. (RAOB 5.)

The jury was instructed on first and second degree murder and firearm enhancement allegations. (RAOB 5.)

The jury acquitted Petitioner of first degree murder, and convicted him ot second degree murder, and found the enhancement allegations to be true. (RAOB 5,6.)

Prior to sentencing, the court granted Petitioner's motion to relieve his retained trial attorney and substitute new retained counsel. (RAOB 6.)

This attorney filed a motion for a new trial, asserting the trial attorney had provided ineffective assistance of counsel in several respects, including (1) presenting an opening statement promising an alibi defense that never materialized; (2) calling Ashorobi as a character itness, knowing she would be impeached with highly prejudical "have you heard" questions about prior criminal acts and possession of firearms by Petitioner; and (3) failing to object to CALCRIM No. 371 regarding consciousness of guilt and threats to a witness by a third party. (RAOB 6.)

The trial court denied the motion. It stated it had some concerns with the

defense strategy of calling Ashorobi as a character witness, but that overall, some positive things came from her testimony in that she tended to humanize the Petitioner.(RAOB 6.)

And, though the court had "significant concerns" and was"bothered" about the decision to go forward with an opening statement promising an alibi defense, any error was harmless in light of the very strong and believable testimony by Z.T., which was corroborated by the preliminary hearing testimony of P.L., and the jury's verdict of second, rather than first degree murder.(RAOB 6.)

The Court noted if Petitioner testified and offered an alibi defense (as he apparently wished to do before his trial attorney convinced him not to take the stand), he would have been impeached by prior statements to the Police as well as prosecution witnesses who would have shown the substance of the alibi was "based on lies."(RAOB 6.)

As to counsel's failure to object to CALCRIM No. 371 by a thrid party, the court recounted its discussion of the instruction with counsel and indicated the instruction was appropriate.(RAOB 6,7.)

Petitioner was sentenced to prison for 40 years to life, consisting of a term of 15 years to life on the second degree murder count plus a consecutive term of 25 years to life for the finding he had intentionally and personally discharged a firarm causing death under section 12022.53, subdivision (d)[2](ER 19-22.) (RAOB 7.)

CALIFORNIA COURT OF APPEAL.

The California Court of Appeal issued its unpublished decision affirming Petitioner's conviction on July 10, 2014.(ER 19.)

The Court of Appeal rejected the ineffective assistance of counsel claim

2. Petitioner refer to the Excerpts of Record filed herein as ER, the Clerk's Records from the United States District Court as CR, the Court of Appeals, Ninth Circuit Record as AOB and evidentary record as DKt filing number. Respondent's Response, as RAOB.

correctly citing Strickland Vs. Washington 466 U.S. 668 (1984) as the controlling United States Supreme Court authority:[3]

The Court of Appeal held, we share the trial court's concern about defense counsel's decision to suggest an alibi defense when it appears he should have known at the time of the Opening Statement it would be improvident for Petitioner to testify. (EOR 24.)

Ultimately, though, we need not resolve whether counsel's action fell beyond the range of reasonable trial tactics because any error in making the Opening Statement was harmless. (EOR 24.)

The Court of Appeal adopted the trial court's findings that the two witnesses were credible in their identification of Petitioner as the shooter, and the prosecution presented "very strong evidence indeed, including corroborating circumstantial that petitioner's cell phone was in the area at the time of the murder." (ER 25.)

The Court of Appeal concluded in light of this "substantial evidence" that it was not reasonably probable Petitioner " would have sucured an acquittal " without counsel's errors. (ER 25.)

THE UNITED STATES DISTRICT COURT

The district court assumed it was deficient performance for defense counsel " to suggest an alibi defense," but agree[d] with the findings of the trial court and the California Court of Appeal" that Thomas cannot demonstrate prejudice." (ER 12.)

The district court continued, "Thomas cannot meet his burden of showing that had counsel not made the error, the result of the proceeding would have

3. The Court of Appeal is the last reasoned decision of the State Court.

been different.

Had counsel not mentioned the untimately never presented alibi defense, there was still "substantial evidence" of Thomas's guilt as ducussed above.

Thomas has not demonstrated that the state court decision was an unreasonable application of Strickland; therefore the claim is denied.[4] (ER 12.)

THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

The United States Court of Appeal For the Ninth Circuit granted Certificate of Appealability (COA) on December 21, 2018.

On April 21, 2020, The United States Court of Appeals, For The Ninth Circuit Affirmed Petitioner's conviction based on the information found in the California Court of Appeal's Opinion and the United States District Court's Order to Denied. (Appendix A.)

4. The Petitioner gave a taped statement to the Oakland Police Department of alibi witnesses who would support his claim that he was not present at the crime scene at the time that the murder took placed.
The Oakland Police Department conducted an investigation and tooked a taped statement from the two witnesses.
Terry P. gave a taped statement that he did not have a cell phone at the time. He had a residential phone only, and Petitioner had came to his home on the day in question, but had left immediately which contrdict Petitioner's statement that he was at Terry P's house until the early morning and was picked up by a young lady. There was an actual call from Petitioner's cell phone to Terry's house suggesting that he was not at the residence during the time of this alibi.
The Okaland Police Department conducted a taped interview with the Petitioner's second alibi witness N.J. the Petitioner's girlfriend at the time. N.J. gave a statement that she had not seen the Petitioner in several days, and the text messages in Petitioner's cell phone between N.J. and Petitioner admitted in to court as evidence show Petitioner and N.J. was actually texting one another at the time Petitioner claimed that he was with N.J.

## REASONS FOR GRANTING THE PETITION

A defendant has a Sixth Amendment right to the effective assistance of counsel. Irwin Vs. Downd, 366 U.S. 717, 721-722 (1961); Pennsylvania Vs. Richie, 480 U.S. 39, 51 (1987). To prevail on a claim that Petitioner was denied that right, Petitioner must establish two things, first, that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms; and second, that he was prejudiced by counsel's deficient performance, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. " Strickland, supra at 688, 694. A reasonable probability is one sufficient to undermine confidence in the outcome." Id.

A "doubly"deferential judicial review applies to such a claim under § 2254 . Cullen Vs. Pinholster, 563 U.S. 170, 202 (2011); Harrington Vs. Richter, 562 U.S. 86, 105 (2011). Strickland's general directive to use great deference in reviewing counsel's effectiveness allows state courts greater leeway in applying that rule, narrowing the range of decision that are objectively unreasonable under AEDPA. " Cheney Vs. Washington, 614 F.3d 987, 995 (9th Cir 2010) (Citing Yarborough Vs. Alvarado, 541 U.S. 652, 664 (2004). "[T]he 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 ."

The state and federal courts all found that Petitioner's trial counsel's performance was deficient, i.e., fell below an objective standard of reasonableness under prevailing professional norms, but found that Petitioner did not meet the second prong under Strickland that if not for counsel's unprofessional errors, he would have been able to secured an acquittal[5] in light of the "substantial

[5]. The U.S. District Court and U.S. Court of Appeal use the word prejudice instead of acquittal in its Order to Denied and Affirmed (Appendix A and B)

evidence" (ER 25.)

In reviewing the sufficiency of the evidence on appeal, the California Appellate Courts, "must review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence - that is, evidence which is reasonable, credible, and of solid value - such that a trier of fact could find the defendant guilty beyond a reasonable doubt." People Vs. Johnson (1980) 26 Cal.3d 557, 578.

When reviewing the sufficiency of the of the evidence on appeal, the California Appellate Court 's decision involved an unreasonable application of state law, and the holding of the United States Supreme Court. 28 U.S.C. 2254(d)(1)

The California Appellate Court, found that the witnesses testimony in this case was reasonable, credible, and of solid value to support that Petitioner had committed the murder of Alvin Burns, but failed to established beyond a reasonable doubt under the "substantial evidence" that the jury in this case would have still found the essential elements of second degree murder if not for trial counsel's deficient performance where the proceedings would not been different. (ER. 25.)

The California Appellate Court's decision is based on an unreasonable determination of the facts in light of the evidence before the state courts. 28 U.S.C. 2254 (d)(2).

The facts of the case showed (1) The Petitioner was on drugs and been drinking and was talking with a slurred voice, when Z.T. had called him to the car. (ER 177, 178, 180, 181, 185, 212, 219, 274, 275.)

(2) Petitioner went to the car and leaned into the open window on the passangers side and said what's up ? who is that? in a confrontational manner. (ER 180, 181, 185, 219, 274, 275.)

(3) Alvin Burns looked at Petitioner but did not say anything, and at that moment, Z.T. opened the car door to get out of the car in which she had set her foot outside of the car door. At the same time she was getting out of the car Alvin Burns begin to roll the car forward hitting the Petitioner forcing to fall to the ground where both girls heard Petitioner telling Alvin Burns that he was rolling over his foot, and as the car continue to move forward to accelerate, Petitioner fired single shot. (ER 185, 186, 189, 240, 275, 309.)

(4) A reasonable Judge or Jury could have found that Alvin Burns had used his car as a weapon, when he struck Petitioner causing him to fall to the ground and again when he ran over his foot, and Petitioner had shot a single shot in an attempt to stop further injury to his person and to Z.T. who was also in the process of getting out of the car when Alvin Burns begin to drive off. (ER 185 - 189, 240, 275, 309.)

(5) Under the trier of facts, the jury would have been instructed with jury instructions relating to Voluntary Manslaughter- where the accused kills in fear or in the heat of passion as a result of the deceased's provocation.

(6) Under the trier of facts, the jury would have been instructed with jury instructions relating to Petitioner's intoxication during the time of the incident. In criminal law, voluntary intoxication is no defense against crimes of general intent, but may operate to refute the existence of mens rea necessary for crimes of "spectic intent". Intoxication may also be a mitigating factor reducing punishment meted out for certain crimes. Barron's Law Dictionary. (1995).

(7) Under the trier of facts, there is a reasonable probility that Petitioner would have not been convicted of second degree murder, if not for trial counsel's errors.

(8) Under the trier of facts, there is a reasonable probablity that Petitioner would not received a true findings on all firarm enhancements of personally and intentionally discharged of a firearm causing death while intoxicated off drugs and alcohol, and provocation by the deceased running him over with his car, if not for trial counsel's errors.

By trial counsel telling the jury in his Opening Statement that he would present an exonerating alibi evidence, that he had no intention of presenting, trial cousel deprived the Petitioner of a fair trial that would have resulted in a different outcome of the trial proceedings based upon the trier of facts of the case. Strickland Vs. Washington, 466 U.S. 687-689.

II.

THE STATE COURT UNREASONABLY APPLIED THE FACTS TO THE LAW WHEN TRIAL COUNSEL CALLED DEANNA ASHOROBI AS A CHARATER WITNESS

The California Court of Appeal considered and rejected this claim as follows:

Appellant contends defense counsel was ineffective in calling Ashorobi as a charater witness, knowing should would be cross-examined with a series of "have you heard" questions about a "litany of unsavory behavior on Appellant's part. "The decision to call a particular witness is generally a matter of trial tactic "unless the decision result from unreasonable failure to investigate. People Vs. Bolin, (1998) 18 Cal. 4th 297, 334.

The decision to call Ashorobi does not appear to be the product of ignorance on the part of defense counsel, who knew in advance she would be impeached by the "have you heard" questions.

Even assuming the tactical decision to call Ashorobi was unreasonable, Appellant has failed to demonstrate prejudice for the reasons stated in the

preceding section of this opinion.

Given the evidence presented, and the strength of Z.T.'s testimony in particular, there was very little potential for a verdict other than first or second degree murder.

The jury chose the lesser of these options, showing it was not unduly swayed by the prosecutor's references to the prior kidnapping and pessession of firearms. The trial court specifically instructed the jury it could not consider the prosecutor's questions for the truth of the matters asserted.

Though, as Appellant's notes, the prosecutor referred to this line of cross-examination during closing argument, the jury was instructed the attorney's remarks during Opening Statement and closing argument were not evidence.

We presume the jury followed these admonitions. People Vs. Coffman and Marlow, (2004) 34 Cal. 4th 1, 83. (ER 25 - 26.)

The "have you heard" questions asked by the prosecution to Ashorobi in part:

Q. Now, did you heard that back in March 2009 the defendant, Ronald Thomas was involved in a kidnapping where they kidnapped a woman by the name of Erica Walton and held her as a hostage?

A. No, I have not.

Q. Did you hear that specifically on the date of March 31, of 2009, the defendant, Ronald Thomas, his father and several other people took Miss Walton to 90 Lund Avenue, which was an aprtment building, made her sit in her car, and while she was sitting in that car when her boyfriend arrived on the scene shots were fired at the boyfriend? Did you hear that?

A. Are you meaning this case or-the only thing I know of right now is what he's being charged with right now. That's the only thing I'm aware of.

THE COURT: So your answer is "no" you haven't heard about those alleged events from March of 2009?

THE WITNESS: No.

THE COURT: Next question.

Q. Did you hear on the date of April 1, 2009, the defendant, Ronald Thomas held miss Walton at gunpoint?

A. No sir, I have not.

Q. Did you hear that on the date of April 2, 2009 the defendant, Ronald Thomas, agreed to release Erica Walton and he did this by of phone, but he said to her when he said to her when he agreed to release her is ..."We don't want anyone-no one's going to hail here, don't go to the cops, and if you do go to the cops, we will kill you."

A. No, I have not heard that.

Q. And you're not saying it didn't happen, you're saying you didn't heard it?

A. I have no knowledge of that, no.

P.L. was declared unavailable as a witness and her testimony was read to the jury., pursuant to Penal Code Section 1291.

The Court of Appeal's opinion that Petitioner has failed to demonstrate prejudice under the "substantial Evidence Standard" was unreasonable under 28 U.S.C.§ 2254(d)(2). Harrington Vs. Richter,562 U.S. 86 (2011).

I The Petitioner was never charged, convicted, or even questioned by law enforcement officers about a kidnapping of Erica Walton.

By allowing the jury to hear "have you heard" questions about a kidnapping of Erica Walton and alleging that the Petitioner had committed the kidnapping and threaten Erica Walton not to go to the cops or she would be killed.

The Prosecution and trial counsel allowed the jury to have a false impression that Petitioner had kidnapped P.L. in order to prevent her from

coming to court to testify.

The California Court of Appeal noted that it is well established that a conviction should be reversed where the evidence shows the prosecution silently allows misleading impression to be presented to the jury, "it is settled that due process proscribes a criminal conviction obtained through prejured testimony knowingly used by the prosecution against the accused. People Vs. Westmoreland, (1976) 58 Cal.App. 3d 32, 42.

In fact, outright falsity need not be shown if the testimony taken as a whole gave the jury a false impression. [citation omitted.]

Thus, a denial of due process can result if the prosecution, although not soliciting false evidence, allows a misleading and false impression to go uncorrected when it appears, it matters little that the false impression goes only to the credibility of a prosecution's witness or that the prosecution silence was not the result of guile or desire to prejuice." People Vs. Westmoreland, (1976) 58 CalApp. 3d 32, 42.

In this case the prosecution or trial counsel did not correct the misleading impression that Petitioner had kidnapped and threaten Erica Walton, or P.L. that was unavailable to testify at Petitioner's trial, which deprived the Petitioner of due process of law.

## III.

## THE UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Under 28 U.S.C.§ 2254(d)(1), a habeas court must determine what argument or theories supported or as here, could have supported, the state court's decision; then it must ask whether it is possible fairmined jurists could disagree that those arguments or theories are inconsistent with the holding

in a prior decision of this court. Harrington Vs. Richter, 562 U.S. 86, Lockyer, Vs. Andrade, 538 U.S. 63, 71 (2003).

A federal habeas court must use "a' doubly deferential' standard of review that gives both the state and the defense attorney the benefit of the doubt|" Burt Vs. Titlow, 134 S. Ct. 10 13 (2013).

The United States Supreme Court held that where, as here, a state high court's decision" ' "did not announce a new rule of law" 'but rather" merely clarified the plain language of the statute," ' " the Due Process Clause of the Fourteenth Amendment forbids the state from convicting a defendant" ' 'for conduct that its criminal statute, as properly interpreted, does not prohibit.' Fiore Vs. White, 531 U.S. 225, 228 (2001).

Under federal law is was clearly established that Due Process guarantees require reversal of a conviction [that is not supported by the substantial evidence standard.] regardless of the Attorney General's arguments. Fiore Vs. White, 531 U.S. 225 (2001).

The United States Court of Appeals found under the substantial evidence standard, that there was strong evidence to support that Petitioner had committed the shooting of Alvin Burns, but did not find the essential elements of the allegation of second degree murder was proven beyond a reasonable doubt based upon the trier of facts of the case, where the Petitioner kills in fear or in the heat of passion as a result of the deceased's provocation where he had struck the Petitioner twice with his car. (Appendix A. page 3) 28 U.S.C.§2254(d)(2).

The United States Court of Appeals's Order to Affirm was objectively unreasonable, where there are no Supreme Court holding that authorized a trial counsel to make misleading or false statements to a jury as a tactical decision. 28 U.S.C. § 2254(d)(2).

The United States Court of Appeal also held, We do not fault the district

court's observation that without the charater witness testimony, it is feasible that the jury would have elected to find Petitioner guilty of the higher charge of first - degree murder. Moreover, the state court reasonably determined that even if trial counsel's was deficient, it did not result in prejudice to Petitioner because of the overwelming evidence condemning him. (Appendix A. page 4.)

The United States Court of Appeals's Order to Affirm was objectively unreasonable, where there are no Supreme Court holding that authorized a trial counsel to present character witnesses knowing that the prosecutor would impeach its witness or witnesses with misleading or false questions against his client under "have you heard". 28 U.S.C. § 2254(d) (2).

"A trial court has a sua sponte duty to 'instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser. [Citation.] Substantial evidence in this context is evidence from which a reasonable jury could conclude that the defendant committed the lesser, but not the greater, offense." People Vs. Shockley, (2013) 58 Cal. 4th 400, 403, italics added.

In reviewing the sufficiency of the evidence for this purpose, the court resloves any doubt in the defendant's favor. People Vs. Tufunga, (1999) 21 Cal. 4th 935, 944.

Regarding second degree murder, "a finding of implied malice require only an 'intent to do an act dangerous to human life with conscious disregards of its danger,'" People Vs. Landry, (2016) 2 Cal. 5th 52, 96.

For involuntary manslaughter, a person committs the crime "either by committing 'an unlawful act, not amounting to a felony' or by committing 'a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' (§ 192, subd. (b)" People Vs. Cook, (2006) 39 Cal.

4th. 566, 596.

Generally, involuntary manslaughter is a lesser included offense of murder. People Vs. Gutierrez, (2002) 28 Cal. 4th 1083, 1145.

Under the Substantial Evidence Standard, The United States Court of Appeals's Order to Affirm was objectively unreasonable where the Court did applied the United States Supreme Court holding under in Napue Vs. Illinois, 360 U.S. 264 (1959) Where a conviction obtained through use of false testimony know to be such by the representatives of the State, though not soliciting false evidence, allows it to go uncorrected when it appear. Napue Vs. Illinois, 360 U.S. 266.

The Supreme Court held, It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. *** That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair. Napue Vs. Illinois, 360 U.S. 269, 270.

In applying whether there is any reasonable argument that counsel satisfied Strickland's deferential standard under Harrington Vs. Richter, 563 U.S. 86, it was clearly established that the false or misleading evidence provided to Petitioner's jury by trial counsel in its opening statement that: (1) Petitioner was not present at the crime scene, (2) that the evidence will show that Petitioner was somewhere else required that it be corrected when it appeared to the jury, that it was counsel's conduct and not that of the Petitioner. Napue Vs. Illinois 360 U.S. 266.

It was also clearly established that the false statements that the

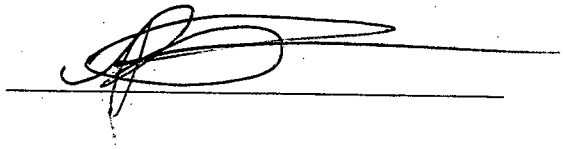
Petitioner had kidnapped Erica Walton, and told her not to go to the cops, and if she do go to the cops, we will kill you required to be corrected when it appeared before the jury as the Petitioner's character. Napue Vs. Illinois, 360 U.S. 266.

The false questions under "have you heard," that Petitioner had kidnapped Erica Walton, and threaten to kill her if she go to the cops, prejudice the Petitioner, because the jury was lead to believe that Petitioner would act with malice, instead of fear, or in the heat of passion in order to support the prosecutor's case for a conviction of first or second degree murder, instead involuntary manslaughter, which deprived Petitioner of Due Process of Law.

## CONCLUSION

The petition for a writ of certiorari should be granted, in accordance to Supreme Court Rules of Court, Rule 10(b)-(c).

Respectfully submitted,



Date: July 16, 2020