

JAN 27 2021

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SUPREME COURT OF THE UNITED STATES

DAVID FALCON)
 Petitioner,) NO. _____
 v.) MOTION FOR LEAVE TO PROCEED
 NEIL McDOWELL, Warden,) IN FORMA PAUPERIS
 Respondent.)

The petitioner, David Falcon, requests leave to file the attached Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeal, No. 18-55565 without prepayment of costs and to proceed in forma pauperis under Rules 12.2 and 39 of the U.S. Supreme Court Rules and 28 U.S.C. § 1915(a).

Petitioner has previously been granted leave to proceed in forma pauperis in the following courts: The United States District Court for the Central District of California, No. 2:14-cv-02867; The United States Court of Appeals for the Ninth Circuit, No. 18-55565.

On August 5, 2019 petitioner's undersigned counsel was appointed to represent petitioner in the Ninth Circuit proceedings pursuant to The Criminal Justice Act, 18 U.S.C. 3006A.

Accordingly, no affidavit of the petitioner is attached. U.S. Sup. Ct. R. 39.

Dated: 1/27/21

Respectfully submitted,


 Stephanie M. Adraktas
 2625 Alcatraz Avenue, #233
 Berkeley, CA 94705
 (415) 699-1507

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No.

IN THE SUPREME COURT OF THE UNITED STATES

DAVID FALCON,

Petitioner

v.

NEIL McDOWELL, Warden,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

STEPHANIE ADRAKTAS
Attorney for Petitioner
2625 Alcatraz Avenue, #233
Berkeley, CA 94705
(415) 699-1507
CJA Appointed Counsel for Petitioner

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QUESTIONS PRESENTED

David Falcon was convicted of murder based on an incident where two men approached and shot a stranger in a public park. Falcon's counsel raised an alibi defense. Mid-trial, defense counsel moved to suppress Falcon's alleged custodial statements admitting he was present at the scene of the shooting. Defense counsel argued that the detectives who interrogated Falcon violated his rights under *Miranda v. Arizona*.

The first question presented is: Was trial counsel prejudicially ineffective when he failed to introduce, at the suppression hearing and at trial, audio recordings of Falcon's interrogations that would have supported his motion to suppress and his trial defense?

The second question presented is: Was trial counsel prejudicially ineffective when he failed to obtain a ruling, prior to trial, as to the admissibility of Falcon's purported inculpatory statements before deciding to present an alibi defense?

No._____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID FALCON

Petitioner,

v.

NEIL McDOWELL, Warden

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Petitioner, David Falcon, 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 denial of habeas corpus relief in an unpublished decision and denied rehearing in an unpublished order. App. 1, 2.¹ The order and judgment of the district court denying petitioner's habeas petition are unreported. App. 8, 9.

The California Court of Appeal affirmed Falcon's conviction and sentence in an unpublished decision. App. 52. The California Supreme Court denied review in an unpublished order. App. 51.

JURISDICTION

The final judgment of the Ninth Circuit Court of Appeals was entered on November 9, 2020. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

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. . ."

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. "RT" refers to the reporter's transcript of the state Court of Appeal proceedings and "CT" refers to the Clerk's Transcript.

STATEMENT OF THE CASE

A. State Trial Court Proceedings and Post-Conviction Review

On October 11, 2005, in Los Angeles County Superior Court, a jury convicted Falcon of one count of first degree murder of Sean Allen (Cal. Penal Code § 187(a)) and one count of assault with a firearm of Jonathan Carroll (Cal. Penal Code § 245 (a)(2).) The jury also found the allegations that Falcon had personally shot Allen and personally used a firearm to assault Carroll were true. Cal. Penal Code §§12022.53 (d), 12022.5(a). 5 RT 841-842; 1 CT 133-134. On November 3, 2005, Falcon was sentenced to a prison term of 50 years to life. 5 RT 866; 2 CT 160-162.

On June 5, 2007, the California Court of Appeal affirmed the conviction and sentence. 1 ER 48. On the same date, the Court of Appeal denied Falcon's petition for a writ of habeas corpus. 1 ER 48. Falcon's petition for review was denied by the California Supreme Court on August 22, 2007. 1 ER 47.

B. Federal Court Proceedings

Falcon timely filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the district court on March 30, 2014. CR 1. On March 28, 2018 the district court denied the petition on the merits. App. 8, 9. On October 22, 2020, the Ninth Circuit Court of Appeals affirmed the district court in a memorandum decision. App. 2. On November 9, 2020, the Ninth Circuit Court of Appeals denied Falcon's petition for panel rehearing. App. 1.

STATEMENT OF FACTS

A. The Shooting

On September 17, 2004, Sean Allen was fatally shot in Jesse Owens Park in Los Angeles. 2 RT 189; 228-230. The issue at trial was the identity of the shooter. The prosecution argued that appellant, David Falcon, shot Allen, based on a cross racial identification of Falcon by two witnesses. Falcon's trial counsel argued that Falcon was at his girlfriend's home at the time of the shooting and presented evidence that the shooter was another man known by the alias "Joker."

On the date of the shooting, at about 3 p.m., Sean Allen and his friends Roshanika Williams and Jonathan Carroll, all African Americans, were sitting on a bench in the park when two Latino men in their late teens or early twenties rode by on a bicycle. One of the men, who had been sitting on the handlebars, fell off the bike. Williams, Carroll and Allen laughed. 2 RT 172-173, 241, 259.

Williams, who was fifteen at the time of the shooting, testified that she and her friends laughed silently, so they could not be heard. 2 RT 225-226, 239, 259. According to Williams, the two Latino men ignored them. 2 RT 242. She identified Falcon as one of the men, although she could not say if he had been pedaling the bike or sitting on the handlebars. RT 226. Afterward, the two men abandoned the bike and walked into the bleacher area. RT 225, 243. They came back and got back on the bike. Williams and her friends started laughing at them again. 2 RT 243. One of the men said "What are you looking at?" and Williams and her friends stopped laughing. 2 RT 244.

The two men got off the bike and approached Williams, Carroll and Allen. One of the men pulled out a gun. 2 RT 246-247. Williams went into the pool house and asked the attendant to call the police. Williams testified that she went back outside and saw the man pointing a gun at Carroll's shoulder. The other man then said "No, not him." The man then turned and shot Allen. 2 RT 228, 246, 254-255. Allen later died from the gunshot wound. 2 RT 149.

When Williams called 911, she said the shooter was Hispanic, that he had a mustache and was wearing a plaid shirt and a pair of shorts. 1 CT 90-93. At trial, Williams identified Falcon as the shooter. 2 RT 238, 262. However, on cross examination she admitted that she identified him based on his eyebrows or "eye area." 2 RT 262.

Before Williams testified at trial, a police officer had shown her a photo of Falcon and told her that he was the person she had selected from a photo line up. 2 RT 252. Williams admitted she had trouble remembering what the two men looked like. 2 RT 259.

Carroll testified at the preliminary hearing that he and Allen were "playing" at the park when he heard gunfire and "everybody got down." 2 RT 173. Allen stumbled and fell. Carroll then said he would not testify further because he was afraid for himself and his family. 2 RT 174. When asked if he saw who shot Allen, Carroll replied "I sure didn't." 2 RT 176.¹

Carroll admitted that he had previously told police detectives that two Hispanic men with shaved heads on a chrome BMX bike rode past him and his friends. One was pedaling the bike and the other was sitting on the handlebars. 2 RT 180. Carroll also admitted he told a detective that the man on the handlebars fell off the bike and Carroll and his friends had laughed. 2 RT

¹ Carroll did not testify at trial. Over a defense objection, the prosecutor was permitted to read his preliminary hearing testimony to the jury. 2 RT 172-200.

182-183. The two men left on the bike. A few minutes later, they returned on foot. One of the men was carrying a gun, which he pointed at Carroll's back but did not fire. 2 RT 185. About five minutes later, Carroll heard a gunshot and saw Allen falling. 2 RT 185-187.

Carroll testified that the men did not say anything to each other before the shooting. 2 RT 188. Carroll also denied that he had told a detective that one of the men had said "That's not him." 2 RT 188. After the shooting, both men ran toward a baseball diamond that borders Van Ness Avenue. 2 RT 189, 191.

About three days before the charged incident, Carroll had seen the same two men walking down Century Boulevard "coming from school." 2 RT 191. Carroll admitted that he had selected a photo of Falcon out of a photo line up prior to the preliminary hearing but when asked if he could identify Falcon as the shooter in court Carroll said "no." 2 RT 193-194, 196. Carroll said that if he identified the shooter in court, he would be afraid for himself and his family. 2 RT 197-199. Carroll reiterated that he did not see the person who shot Allen and he just saw a "spark" from the gun. 2 RT 200.

When asked on cross examination whether he had seen Falcon before Carroll testified that he did not know if Falcon was the shooter or not. 2 RT 200. Falcon was one of the two men who had walked up to him and the others before the shooting. 2 RT 201.

B. The Detention of Emmanuel Martinez After the Shooting

Los Angeles Police Officer Richard Mendoza testified that he was in the area of Jesse Owens park about two hours after the shooting. 2 RT 272. He had been told that the two shooting suspects were three male Hispanics, all with shaved heads. One was wearing a plaid shirt. 2 RT 272-273.

When he approached the area in his police vehicle, Officer Mendoza saw David Falcon and Emmanuel Martinez near an alleyway. RT 266-267, 271-272. Falcon was wearing a white t-shirt and brown pants. RT 266-267. Martinez was wearing a plaid shirt. RT 267. Falcon went into his home at 2133 Century Boulevard and Martinez was detained. Detective Steve Burciaga showed Carroll and Williams a photograph of Martinez but they did not identify him as one of the men involved in the shooting. RT 267-272, 280.

C. Williams's Pre-Trial Identification of Falcon

Prior to trial, Williams picked Falcon's picture out of a photo lineup. At that time, she said that he "looked like" the shooter. She said she picked Falcon's photograph because his age, eyes, and eyebrows looked the same as the shooter's. 2 RT 235-236, 238, 249. When later shown a photo array that contained a picture of Falcon's brother Eric Falcon, Williams thought Eric was the same person she had picked in the first photo array. She said "Isn't that the person I already identified?" 4 RT 589-590. When shown a photo array with Falcon's photo again, Williams said "No, that's the person I saw shoot." 4 RT 590.

At the preliminary hearing, Williams identified Falcon, but said that she was "sort of unsure." 2 RT 236-237, 247. His hair was longer at the preliminary hearing and he had more facial hair. 2 RT 237-238. She also did not remember if he was the person who pulled out a gun. 2 RT 247.

D. The Gun and Bullet Evidence

Police discovered a single expended .38 millimeter shell at the scene of the shooting. 2 RT 113, 115. About eleven days later, officers served a search warrant at Falcon's home in Los Angeles. They told him they were looking for a .38 caliber handgun and he directed them to a

closet, where they found a gun that was later identified as the one used to shoot Allen. 2 RT 137-139, 159-160.

E. Falcon's Alibi Defense

Falcon's fiancee, Josselin Hernandez, testified that he was with her at the time of the shooting. 3 RT 315-335. In the past, she had caught him "cheating" on her so she kept him on a "tight leash." 3 RT 326. On the date of the shooting, September 17, 2004, Falcon had spent the previous night at her home. They woke up that day at about 11 a.m. and took a shower. 3 RT 335.

They left the house together at about 11:30 to get lunch at McDonald's, returned home at about 2 p.m., and ate their lunch on the front porch. 3 RT 315, 317, 319, 336. The rest of that day they were either in the house watching TV, napping, or in the yard. 3 RT 317-319, 333, 338. They left the wrappers from their lunch in the front yard. One of the other tenants, Miguel Menjivar, confronted them about leaving trash in the yard. 3 RT 320.

At around 8 p.m., Hernandez's mother came by, woke them up and went to the kitchen to cook. 3 RT 338. Hernandez's sister also came over and the three of them watched television in her room. 3 RT 339. Hernandez insisted that she could remember the details of that particular day because it was the day before her sister left for El Salvador. 3 RT 340.

Miguel Menjivar corroborated Hernandez's testimony that Falcon was at Hernandez's home at the time of the shooting. Menjivar was able to recall the details of that date because his wife had left the day before and because he was at the house all day "on the lookout" waiting for a disability check to arrive. 3 RT 393-394. Menjivar testified that, on September 17, between 11:30 a.m. and 1 p.m., he saw Hernandez and Falcon eating lunch on the porch that is located in

front of his bedroom. When he went to the kitchen to get some water at around 3 p.m., he heard Falcon and Hernandez laughing. He also saw them in Hernandez's room at about 5 p.m. when he left his room to go to the bathroom. 3 RT 379-382.

On cross examination, Menjivar testified that he could recall the time he went to the bathroom because he takes medication at about 5:30 p.m. every day and he uses the restroom to empty his bladder before taking his medication. 3 RT 385. He also insisted that he could remember seeing Falcon at the house that day because he tended to "pay attention" to Falcon and Hernandez due to their habit of leaving trash around the property. 3 RT 387.

F. Evidence That "Joker" Was Observed at Jesse Owens Park on a BMX Bike

Naomi Ciao worked at a pizza restaurant across the street from Jesse Owen's Park. 3 RT 389. At about 5 p.m. on the day of the shooting, Ciao saw a bald Hispanic man with thick eyebrows wearing a white t-shirt riding a bike very fast down Van Ness Avenue near the park. 3 RT 492. Ciao remembered the incident because she and a co-worker had laughed about how fast the man was going. 3 RT 497, 499.

The man had a tattoo on the back of his head that said "Joker." 3 RT 492-493. When Ciao was going home that night, at about 6:20 p.m., she saw the same man walking out of an alley, with a BMX bicycle that had chrome parts. 3 RT 491-492. Ciao had seen him several times in the area before. 3 RT 508.

On cross examination, Ciao testified that appellant's brother, Eric Falcon, is also employed at the pizza restaurant where she works. 3 RT 494.

G. Testimony That “Joker” Left a Backpack With a Gun at Falcon’s Home

Anna Maria Sevilla, Falcon’s aunt, was described as “developmentally slow.” 3 RT 429. Sevilla lived in a house on Century Boulevard with Falcon, his brother Eric, and their mother Yolanda, who is Sevilla’s sister. 3 RT 429-430.

Sevilla testified that a few days before Falcon was arrested, a man named “Joker” had come to the house and given her a package. 3 RT 476. When she opened it, she found a black gun. Sevilla was worried about getting in trouble so she hid the gun under the patio. 3 RT 476-478.

H. Police Misconduct Evidence

Falcon’s mother, Yolanda Sevilla, testified that she was at her home on Century Boulevard when the police came to arrest Falcon about eleven days after the murder. 3 RT 425, 445. They arrested him in the front yard and searched her home without showing her a warrant. The officers came back at about 5 p.m. and then left a copy of a warrant at the house. 3 RT 426. While the officers were at her home, one of them grabbed her by her hair and threw her against a window that was covered with metal bars. 4 RT 421.

Yolanda went to a hospital for treatment and returned at about 11 p.m. that night. 3 RT 421-422. Between 11:30 p.m. and 1 a.m., a man who had a “Joker” tattoo on his head came to the house. 4 RT 559, 561. As Yolanda was fixing some tea, he knocked on a window. She opened the door and he asked to speak to Anna and also said he was there to pick up his backpack. 4 RT 559-561. “Joker” ran away to a waiting car when Yolanda’s husband came to the door. 4 RT 560.

I. Prosecution Rebuttal Evidence

After the defense concluded its presentation, the prosecutor announced that he intended to present Falcon's custodial statements in rebuttal. 4 RT 516-517. Defense counsel objected on grounds that the statements were improper rebuttal and hearsay, and the trial court overruled those objections. 4 RT 519-523. The trial court then conducted a hearing outside the presence of the jury to determine whether the police complied with *Miranda v. Arizona*, 384 U.S. 436 (1966) when they obtained the statements. 4 RT 524-546.

1. The *Miranda* Hearing Outside the Presence of the Jury

Detective Myers testified that after Falcon was arrested, one of the investigating detectives read to him the *Miranda* warnings from a department issued card. 2 ER 241. Falcon said he understood his rights and he asked for a lawyer. 2 ER 242. According to Detective Myers, the detectives then ceased all questioning. *Id.*

Detective Myers testified that, as Falcon stood up to leave, he whispered to the detectives, "It was my brother." Falcon then said he wanted a lawyer. Detective Myers responded "Do you want to talk more about it?" Falcon looked at the tape recording equipment and said "Forget about it." 2 ER 242.

Detective Myers then turned Falcon over to two other officers for booking. 2 ER 242. "At some point" later, Officer Ramos told Detective Myers that Falcon wanted to talk again and that he was saying that he was present at the time of the shooting but that the shooter was his brother. 2 ER 243.

Detective Myers then approached Falcon again and asked if he wanted to talk. Falcon said he did and again, after he saw the detective's tape recorder, he changed his mind. He said "Nah, I don't want to say anything." 2 ER 243.

Detective Myers testified that he was "called down" to speak to Falcon a third time. He could not recall which officer told him that Falcon said he wanted to talk. 2 ER 244. Detective Myers told Falcon that it was the third time he had been "down here" and asked him if he wanted to talk. Falcon said yes, he wanted to tell Detective Myers "what happened." 2 ER 244.

Falcon then told Detective Myers that he and his brother had gone to the park to play handball. While there, they ran into two black males near the swimming pool. They were staring at Falcon and his brother. Falcon used the term "mad dogging." Falcon said his brother jumped off the bike and "busted on the fool." Then, on the way back to their house, his brother threw the gun in an alley. The next day, after smoking some marijuana, Falcon went back to the alley and retrieved the gun. 2 ER 244.

On cross examination, Detective Myers said that each time he spoke with Falcon, Detective Myers had reminded him that he did not have to speak with the detectives. 2 ER 245.

Los Angeles County Police Officer Richard Ramos testified that, during the booking process, Falcon said he was nervous. 2 ER 250. He also asked Officer Ramos to tell the detectives that he wanted to talk about his case. 2 ER 251. Falcon also said he had told the detectives that he was present during the crime but that he had not pulled the trigger. He also said that he and his brother had gone to the park on a bike to play handball. He said some black guys were "mad dogging" them and his brother jumped off the bike and shot one of them. 2 ER 251.

He said that after that, he and his brother ran home. At some point, Falcon told Officer Ramos again that he wanted to talk to the detectives. 2 ER 252.

After hearing all of the testimony, the trial court admitted the statements. 4 RT 547-550. The trial court found that the detectives had ceased questioning Falcon when he invoked his right to counsel and that he had spoken to them on his own initiative and voluntarily. *Id.*

2. Police Testimony About Alleged Misconduct

Detective Dan Myers testified that he had obtained a search warrant to search Falcon's home on September 28, 2004. He had arrested Falcon outside the house and presented a copy of the search warrant to Falcon's mother before he entered and searched the house. 4 RT 583. The officers searched the house for a plaid shirt but did not find one. 4 RT 616.

Detective Myers admitted that officers had placed Yolanda Sevilla in handcuffs. He testified that the Los Angeles Police Department had become more sensitive to complaints of police officer misconduct. 4 RT 616-617. He did not see any inappropriate conduct by the officers who were present during Falcon's arrest or during service of the search warrant. 4 RT 617-620.

Detective Myers denied that any officer had grabbed Yolanda Sevilla by the hair or threw her to the ground. 4 RT 619. However, Detective Myers admitted that if there was misconduct of that nature that he would have lost his job if he had failed to document it. 4 RT 617.

Los Angeles County Police Officer Jeanette Garcia testified that, during Falcon's arrest, Yolanda Sevilla was screaming and throwing rocks and dirt at the police officers. 4 RT 575-576. Yolanda had been placed in handcuffs, which were removed when she was allowed to go back inside her house. 4 RT 576. In the house, Yolanda had picked up a knife and had to be ordered to

drop it. According to Officer Garcia, Yolanda was not grabbed by the hair or thrown against a wall and she was not injured. 4 RT 577.

3. Police Testimony About Falcon's Custodial Statements

Los Angeles Police Officer Richard Ramos testified that he had booked Falcon into jail on the night of his arrest. 4 RT 567. Falcon told Officer Ramos that he was very "stressed out" and that he wanted to talk to the detectives. 4 RT 569-570. Falcon then said that it was not him who "did it" it was his brother. 4 RT 570. Falcon then said that he and his brother had gone to the park to play handball. Falcon was riding a bike and his brother was riding on the handlebars. Then a group of black males began "mad dogging" them. His brother then jumped off the bicycle and fired one shot at one of the men. 4 RT 570-571.

Officer Jeanette Garcia also testified that, during the booking process, Falcon said "he didn't do it" and his brother was the one who shot the victim. 4 RT 577-578. Falcon admitted he was present at the shooting and asked to talk to detectives. *Id.*

Detective Myers testified that he interviewed Falcon, who said he was present at Jesse Owens Park when Allen was shot. Falcon told Detective Myers that his brother had jumped off the bike and shot the victim after two men stared at them aggressively. Falcon said his brother tossed the murder weapon into an alley. The next day, after smoking marijuana, Falcon retrieved the gun from the alley. 4 RT 588-589.

J. Defense Surrebuttal

Falcon's neighbor, Francesca Amador, testified that she witnessed police misconduct during Falcon's arrest on September 28th. On that date, she saw Falcon coming home from work. He had not yet entered his home when police officers ran toward him with guns drawn. At that

time, Falcon's mother Yolanda Sevilla was standing by the door. Yolanda did not throw rocks or dirt at the police officers. 4 RT 623-625.

Amador saw a police officer grab Yolanda, slam her against a wall, throw her to the ground and handcuff her. Yolanda told the officers she was sick and needed her medication. Another officer approached and said "She's sick, let her go." 4 RT 626. During the incident, Yolanda cried and asked what was going on. 4 RT 629.

Falcon's sisters, Jennifer Falcon and Yoly Falcon, both testified that police officers had mistreated their mother Yolanda Sevilla in a manner that was consistent with Amador's account. 4 RT 632-640. When the police approached and asked to search the house, Yolanda had said they could not go inside without a search warrant. 4 RT 632. Yolanda did not throw rocks or dirt at the police officers. 4 RT 632, 638. A female officer grabbed Yolanda and slammed her against a wall. 4 RT 633. A male officer put his knee on Yolanda's back and then they handcuffed her. 4 RT 633. Yolanda suffered a scratch to her face. 4 RT 640. The two officers who did that removed their name badges. 4 RT 633.

K. The Post Conviction Declaration of Derek Porter

After the guilty verdicts and sentencing, Falcon's appellate counsel, Diana Teran, obtained a declaration from trial counsel's paralegal Derek Porter. 2 ER 86. Porter's declaration states that his first paid job as a paralegal was in trial counsel's office, where he was working at the time of Falcon's trial. Porter was unsupervised and was solely responsible for "any and all trial preparation and investigation" in Falcon's case. 2 ER 87.

Porter stated that trial counsel "never had any time" to conduct any trial preparation in this case. "Early on" in this case, Josselin Hernandez told Porter that Falcon was with her at the

time of the shooting. Porter then personally called Detectives Myers and Burciaga, two or three times, to tell them about Hernandez's statements and to ask them "to look into it." He also told them that another resident at the building would corroborate Hernandez's statement. 2 ER 87.

L. Post-Conviction Investigation by Appellate Counsel Diana Teran

Falcon's appellate counsel Diana Teran obtained trial counsel's file for this case, which contained numerous audio tapes and a copy of the chronological report of the police investigation. 2 ER 89-91. Two of the tapes contained audio recordings of Falcon's interrogation by police. Moreover, the police chronological investigation notes included entries that contradicted the prosecutor's argument and police testimony that: (1) alibi witness Hernandez had not come forward until the first day of trial and (2) no one had disclosed to police that Noemi Ciao was a potential witness. When Ms. Teran contacted defense counsel to discuss these issues, he did not return her calls. 2 ER 90-91.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS CONCERNING THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Trial counsel was prejudicially ineffective because he failed to present witness testimony, tape recordings and documents that would have impeached the police testimony about Falcon's purported statements and rebutted the prosecutor's argument that his alibi was a recent fabrication. Counsel was also ineffective when he raised an alibi defense without, prior to trial, making a motion to exclude the police testimony that Falcon had admitted he was present during the shooting.

The harmless error test the Ninth Circuit applied conflicts with *Strickland v. Washington*, 446 U.S. 668 (1984). *Strickland* requires a defendant to show only a “reasonable probability” that counsel’s errors affected the jury’s verdict. *Strickland*, 466 U.S. at 694. Under *Strickland*, a defendant need not demonstrate such prejudice by a preponderance of the evidence; he need only demonstrate a probability sufficient to undermine confidence in the outcome. *Id.*

But the court below focused, inappropriately, on the very type of “outcome determinative” test *Strickland* rejected. *Id.* at 696-97. While opining that Falcon had failed to provide a sufficient “explanation in the record,” the Ninth Circuit described some of the non-tainted evidence against Petitioner and concluded, without addressing the effects of counsel’s errors, that there was no prejudice. App. 3. This approach cannot be reconciled with *Strickland*, where this Court stated that the “ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Id.* at 696 (emphasis added); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006) (“Having derived the right to effective representation from the purpose of ensuring a fair trial, we have … also derived the limits of that right from that same purpose.”).

Falcon was prejudiced under *Strickland*, because, absent counsel’s errors, at least one juror would have found there was a reasonable doubt that Falcon was the shooter. The identifications of Falcon were at times equivocal and an unbiased alibi witness testified he was elsewhere at the time of the shooting.

The Ninth Circuit’s harmless error standard also placed a heavier burden on Petitioner than that required by *Strickland*. Despite *Strickland’s* focus on a showing that a reasonable probability exists that counsel’s errors undermined confidence in the outcome, *see Strickland*,

488 U.S. at 694, the Ninth Circuit's test imposed a more difficult standard, finding that Falcon had failed to present evidence explaining or rebutting the inculpatory evidence in the record. App. 4. The Ninth Circuit's decision amounted to a requirement that Falcon provide affirmative evidence of innocence in order to succeed in his *Strickland* claim.

If a single juror harbors a reasonable doubt, that is sufficient to change the outcome in a criminal trial, *see Johnson v. Louisiana*, 406 U.S. 356, 363 (1972). Therefore, a criminal defendant may be acquitted despite the existence of evidence that also inculpates him in the charged incidents. The Ninth Circuit should have granted the writ because Falcon demonstrated that there was a reasonable probability of a different result, i.e., a reasonable probability that at least one juror would have voted to acquit absent counsel's errors. The Ninth Circuit's ruling requiring Petitioner to instead present affirmative evidence contradicting circumstantial inculpatory evidence held him to a much higher standard than *Strickland* requires. Accordingly, this Court should grant certiorari and grant the writ.

Argument

I. Falcon's Trial Counsel Was Prejudicially Ineffective When He Failed To Impeach Police Officer Witnesses at the *Miranda* Hearing and at Trial With Audio Recordings That Contradicted Their Testimony

A. The Audio Recordings of Falcon's Interrogation

A portion of the initial police interrogation of Falcon, where he was advised of his *Miranda* rights and invoked his right to counsel, was audio taped by the interrogating officers and transcribed by a private transcription company about two months before trial. 2 ER 96. A second recording was transcribed by appellate counsel. 2 ER 103-107. Falcon's appellate

counsel, discovered the audiotapes and transcript in trial counsel's file after she was appointed to represent Falcon on appeal. 2 ER 89-92.

At the conclusion of the mid-trial *Miranda* hearing, the trial court asked whether either party wanted the recording of Falcon's interrogation "to be played or considered by the court." The prosecutor declined and Falcon's trial counsel said "No sir." 2 ER 253.

The audio tapes contradict the testimony of Detective Myers at the *Miranda* hearing and at trial in several important respects.

During the *Miranda* hearing, the prosecutor asked whether Detectives Myers and Burciaga had immediately ceased questioning Falcon when he invoked his right to counsel. Detective Myers testified as follows:

Q: What transpired after you admonished [Falcon] of his *Miranda* rights and he indicated he understood?
A: He indicated he wanted a lawyer.
Q: And at that point, did you cease all questioning?
A: Yes
Q: What happened next?
A: As he stood up to leave, he whispered "it was my brother."
2 ER 242.

When asked how many times Falcon had asked for a lawyer, Detective Myers said once. 2 ER 245. As set forth in more detail below, Falcon actually asked for a lawyer at least three times. Moreover, the audiotape shows that the detectives did not cease questioning Falcon after he asked for a lawyer.

On the tape recording, after reading Falcon the *Miranda* warnings, Detective Burciaga asked "Do you want to talk about what happened?" Falcon responded "Hum?" 2 ER 98. After Detective Burciaga explained that they were investigating the incident at Jesse Owens park, Falcon asked for a lawyer and invoked his right to remain silent:

Det. Myers: You want to talk to us about it?

Falcon: No. I'll (sic) I got to say. I (inaudible) if I get my lawyer? I ain't gonna. I ain't gonna help you. I mean, all I gotta say is I'm innocent and that's it. Stay out. 2 ER 99.

The detectives did not cease questioning and did not seek to clarify Falcon's request for a lawyer. Although Detective Myers claimed he was not trying to "talk [Falcon] into anything," he then attempted to persuade Falcon to give a statement. He told Falcon that he had "one side of the story" and that he wanted to hear Falcon's "side" or his "version." 2 ER 99. Detective Myers told Falcon he had the right to say "I don't want to talk" but that they were going to "take the time" and "see if you do want to talk to us." 2 ER 99-100.

Falcon then made a second request for counsel: "Like I told you man, I need, uh, I need – I need, I want to talk to my lawyer. (Inaudible). 2 ER 100.

Detective Burciaga then said "All right. Fair enough." He said he would "fill out some paperwork" about Falcon. Falcon then asked if he could find out "what's going on" and Detective Burciaga said that Falcon was being arrested for murder. He said "Looks like you want to say something." 2 ER 100-101.

Falcon then made his third request for counsel: "Well, I want, like, my lawyer. I need my lawyer. When can I – when can I talk to one?" Detective Burciaga said "As soon as you get one appointed to you after you get arraigned." 2 ER 101.

Falcon asked if he could "get a phone call or something" so he could ask his mother about a lawyer. Detective Burciaga replied that he could make a call after he was booked but suggested that Falcon could call the detectives from the jail "if you change your mind." 2 ER 101.

Falcon asked if he was suspected of being the shooter and Detective Burciaga said he couldn't talk to Falcon anymore because he had asked for a lawyer. Detective Burciaga then asked Falcon where he was from, whether he was sick, ill or injured and questioned him about his health and a token he had in his shoe. 2 ER 101-103. Detective Burciaga then said "I have to ask you are you an active member of any street gang?" 2 ER 103.

Falcon said he was a "little claimer" of "Evil Clown." 2 ER 103-104.¹ Detective Burciaga asked Falcon for his gang moniker and Falcon said his tagging name was Funny Boy. When asked what "Evil Clown" was "about," Falcon said "that's my brother's . ." At that point the transcription ends. 2 ER 104.

A second audiotape was transcribed by appellate counsel. 2 ER 106. There are three people present during the taped exchange, Falcon, a detective and an officer who identified himself as "Baker." At the beginning of the recording, Officer Baker said "But when I grabbed you to book you, you say you want to talk to this other detective. We're gonna document that. OK? 2 ER 107.

The detective then said to Falcon "Now you whispered it was your family." (Unintelligible.) Falcon's reply was unintelligible. 2 ER 107. The detective then stated "You were lying when you told me right now, before you came in the room, that it was your brother. You were lying . . . OK. You're making a mistake. You brought me back in here so . . . you wanted to talk." 2 ER 107.

¹ "Evil Clown" is probably a mistaken transcription of "Evil Klan," a Los Angeles Street Gang.

Falcon's response was unintelligible. The detective then stated "We'll be right back."

Falcon replied "I was framed." 2 ER 108. The following exchange occurred:

Detective: Were you lying to me now when you whispered to my ear that it was (unintelligible).

Falcon: He's not my brother.

Detective: He's not your brother. Is he a friend?

Falcon: (Unintelligible)

Detective: What's he look like? I can bring you a picture of him right now.

Falcon: (Unintelligible)

Detective: Okay. Quit calling me back here.

2 ER 107-108.

B. 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 relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000).

Here, it is undisputable that the credibility of Falcon's alibi was the most important issue at Falcon's trial. Accordingly, evidence that would have supported his *Miranda* motion to suppress police testimony about his purported inculpatory statements was of paramount importance to Falcon's defense. The tape recordings would have also demonstrated that the police testimony that Falcon told police that the shooter was his brother was misleading.

C. Trial Counsel Was Prejudicially Ineffective When He Failed to Present the Audio Recording Evidence at the Belated *Miranda* Hearing and at Trial

Trial counsel's failure to present the audiotapes of Falcon's interrogation at the *Miranda* hearing was professionally unreasonable because the tape recordings contradicted the testimony of Detective Myers in several important respects. Contrary to Detective Myers's testimony at the *Miranda* hearing, the interrogation of Falcon did not immediately cease when Falcon asked for an attorney. The first time Falcon asked for counsel, the detective did not stop questioning him. Instead, he attempted to persuade Falcon to talk about the shooting without a lawyer:

Okay. Well, I just want to make sure that you understand. I'm not trying to talk you into anything. But I'm – we're gonna present a case. *We have one side of the story. I'd like to hear your version. Your side, what you know about it.* Um, you have absolutely the right to say hey, you know what, I don't want to talk. But, uh, I'm gonna take the time and, you know, see if you do want to talk to us. But this has got to be on your own, all right?

2 ER 99. (emphasis added).

Falcon replied with his second request for counsel: "Like I told you man, I I need, uh, I need, I need, I want to talk to my lawyer (inaudible.) 2 ER 100 and later asked for counsel a third time 2 ER 101 ("Well, I want, like, my lawyer. I need my lawyer. When can I – when can I talk to one?").

Detective Myers and Detective Burciaga did not cease the interrogation and instead pressured Falcon to talk about his "side" and questioned him about his birthplace, health, and gang affiliation before the tape recording terminated. 2 ER 99-104.

Most important, contrary to Detective Myers's testimony that Falcon whispered "it was my brother" after being read the *Miranda* warnings, there was no discussion of Falcon's brother in the transcript where the *Miranda* rights were read. 2 ER 242, 96-104. When Falcon did discuss his brother in another audio recording, he apparently either recanted his statement or tried to explain that Detective Myers had misunderstood him. 2 ER 107-108. The recording therefore contradicts Detective Myers's testimony that Falcon gave a detailed statement implicating himself and his brother. 2 ER 107-108. On the audio recording, Falcon also told the detectives that he was framed. 2 ER 108.

Critically, the recordings also show that Falcon did not waive his right to counsel before the detectives began to re-interrogate him. Accordingly, counsel's decision not to play the audio tapes for the judge at the *Miranda* hearing was professionally unreasonable.

Under *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981) police must immediately cease questioning a suspect if he asks for an attorney. *Miranda* also unequivocally holds that a suspect may invoke her right to remain silent "in any manner."

Miranda v. Arizona, supra, 384 U.S. at 473-474 (1966). Once that occurs, officers must scrupulously honor the invocation and cease the interrogation. *Id.*

A suspect who has asserted his right to counsel may be questioned if his interrogation ceased when he invoked his right to counsel and he thereafter initiates a conversation with police officers. However, even when the suspect initiates a conversation, the police must obtain a valid waiver of *Miranda* rights before resuming the interrogation. *Minnick v. Mississippi*, 498 U.S. 146, 150-151 (1990); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983).

Moreover, police may re-interrogate a suspect who has invoked his right to remain silent only if (1) the interrogation ceased when the suspect said he did not want to talk; (2) there was a significant passage of time between the invocation and the second interrogation; (3) a fresh *Miranda* advisement precedes the second interrogation and (4) the renewed interrogation related to a different crime. *Michigan v Mosley*. 423 U.S. 96, 103-104 (1975).

Here, the trial court found that the detectives had “scrupulously honored” Falcon’s request for counsel and “ceased all questioning.” 2 ER 263. The trial court also found that the police had properly questioned Falcon when he initiated further discussion with them voluntarily. 2 ER 263-264.

The recordings of the interrogation would have demonstrated to the contrary, that Falcon’s interrogation did not cease when he repeatedly asked for a lawyer and that he was pressured and coerced by the detectives after he invoked his right to counsel.

Under those circumstances, Falcon’s statements should have been suppressed, even if he initiated his further conversations with police. *Martinez v. Cate*, 903 F.3d 982, 994-999 (9th Cir. 2018); *Rodriguez v. McDonald*, 872 F.3d 908, 919-925 (9th Cir. 2017). The interrogation in this

case was remarkably similar to those in *Rodriguez* and *Martinez*, where the petitioners also asked for an attorney during their interrogations. As in this case, the detectives responded by telling them they were going to be charged with murder and pressuring them to tell their side of the story. *Martinez* at p. 994; *Rodriguez* at 924.

As in this case, a taped transcript of the *Rodriguez* interrogation contradicted the sworn testimony of police officers who claimed that they had ceased interrogating the suspect when he asked for an attorney. *Rodriguez* at pp. 919-920. This Court found that, even though Rodriguez had initiated further conversations with police, his interrogation violated *Miranda* and his statements should have been suppressed. *Id.* Likewise, in *Martinez* this Court found that the detectives had failed to cease interrogating the petitioner when he invoked his right to counsel and so his subsequent waiver was invalid and his statements were inadmissible. *Martinez* at pp. 997-998.

The facts in this case are also similar to *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991)(en banc) where the suspect, Collazo, asked if he could “talk to a lawyer.” He was told “its up to you” but that it was his “last chance to talk to [police].” Collazo was also told that if he got a lawyer it would be “worse for him” because the lawyer would tell him not to talk to the police. *Collazo* at p. 414.

After Collazo spoke with his wife, he contacted a police sergeant and waived his right to counsel before making an incriminating statement. This Court found that the statements were psychologically coerced because the detectives pressured *Collazo* to change his mind after he invoked his right to counsel. *Collazo*, at 422-423; *See also Pollard v. Galaza*, 290 F.3d 1030, 1033 (9th Cir. 2002) (undisputed that police violated *Miranda* when they continued to speak

with suspect who had invoked his rights when police answered his questions and then questioned him about the crime.)

The detectives in this case not only failed to cease questioning when Falcon asked for counsel, they also pressured and misled Falcon by telling him he would not be able to talk to counsel until after his arraignment. When Falcon asked to call his mother so he could ask for a lawyer, a detective said he could do that after he was booked and “if you change your mind and want to call us” he could call them from the jail. 2 ER 101. The detectives’ response to Falcon’s repeated requests for a lawyer were coercive because they communicated to Falcon that his request to speak to a lawyer was futile. *See Rodriguez* at p. 925 (interrogation was coercive because, even though detectives told suspect he had a right to an attorney, no attorney was contacted and they continued to discuss the case with him.)

In summary, trial counsel’s failure to offer the audio tapes at the suppression hearing and at trial was professionally unreasonable. The audio tapes of the interrogation would have changed the outcome of the suppression hearing because they would have demonstrated that detectives did not stop questioning and pressuring Falcon after he repeatedly requested counsel during his interrogation.

Moreover, the tape recordings would have impeached the credibility of the police officers because they contradicted Detective Myers’s sworn testimony as to Falcon’s statements and his own conduct during the interrogation. If trial counsel had introduced the audio recordings at the suppression hearing, the trial judge would have been required to find that the detectives did not immediately cease questioning Falcon when he asked for a lawyer and it

would have had to suppress the police testimony that Falcon had made statements implicating himself and his brother in the shooting.

Moreover, if the tapes had been admitted at trial, they would have impeached any police testimony that Falcon had confessed, because one of the recordings strongly suggests that Falcon was asserting his innocence. Because the audiotapes were critical to Falcon's defense, no reasonable attorney under the circumstances would have declined to present the audiotapes at the suppression hearing or at trial.

II. Trial Counsel Was Prejudicially Ineffective When He Failed to Call Derek Porter as a Defense Witness and Introduce Police Investigation Records That Would Have Rebutted The Prosecutor's Argument That the Defense Alibi Testimony Was a Recent Fabrication

Falcon's two alibi witnesses were his girlfriend Josselin Hernandez and her neighbor, Miguel Menjivar. Hernandez testified that she had been telling Falcon's family that she could provide an alibi since "the day he got arrested." 3 RT 345. Yolanda Sevilla corroborated Hernandez's account. 3 RT 420. She also testified that she told Detectives Burciaga and Myers that Hernandez had said that Falcon was with her at the time of the shooting. 3 RT 465.

The prosecutor disparaged all of that testimony as a recent fabrication. When the prosecutor cross examined Hernandez, he insisted that she had not disclosed her alibi testimony until the day before trial. 3 RT 350. During a lengthy cross examination on this point, he accused Hernandez of failing to come forward with her alibi statement for 13 months while Falcon was in jail. 3 RT 345-352.

In the prosecutor's presentation on rebuttal, he re-called Detective Myers and asked if there was "any entry" in the chronological records of the police investigation related to the alibi witness, Josselin Hernandez. The prosecutor also asked if Detective Myers had any memory of

being approached or called with information about Hernandez. As to both questions, Detective Myers replied "No sir." 4 RT 585. Detective Myers also denied that anyone had ever told him that Noemi Ciao was a potential witness. 4 RT 587.

In closing argument, the prosecutor insisted that the alibi testimony was unreliable because the witnesses had not been disclosed until the day before trial. 2 ER 148-150, 154, 226-227 ("She never came forward until the day before jury trial") 2 ER 225 ("There is not a single shred of evidence . . . that she came forward before the day of jury trial".)

As to the latter comment, defense counsel objected and told the court at sidebar "He knows that's not true." 2 ER 225. Defense counsel argued that the prosecutor was "lying to the jury." The court overruled the objection on grounds that the argument was a "fair comment" on the evidence. 2 ER 226.

Trial counsel failed to impeach the police witnesses with records that were in his file. The records of the police investigation that appellate counsel obtained from trial counsel's file show that Hernandez had come forward long before trial and that the investigating detectives knew that Hernandez was a potential witness about a week and a half after Falcon's arrest. 2 ER 113. According to the chronological notes of the investigation, a paralegal from defense counsel's office also told the detectives that Falcon had an alibi about a month after the charged incident, on November 3, 2004. 2 ER 110. Detective Burciaga's notes include the name, address and phone number (blacked out in discovery) for Falcon's girlfriend, Hernandez. 2 ER 113.

Defense counsel could also have conclusively rebutted the prosecutor's argument that the alibi was a recent fabrication with testimony of Derek Porter, a paralegal from counsel's

office, who had told the investigating detectives about the alibi testimony about ten months before trial and asked them to “look into it.” 2 ER 87.

Defense counsel asked Detective Myers and Burciaga no questions about the notes in their file where they recorded Hernandez’s contact information and the information they had received about Falcon’s alibi. Moreover, counsel failed to present Porter’s testimony.

Defense counsel also failed to impeach the police testimony about defense witness Noemi Ciao. Ciao had testified that on the day of the shooting she saw a man named “Joker” riding a BMX bicycle very fast in the area of Jesse Owens Park. 3 RT 490, 500. Detective Myers testified that no one, including “defendant’s family or anybody” had ever identified Ciao as a witness. 4 RT 587.

However, on October 11, 2004, the police chronological notes in trial counsel’s file include a statement “Joker on bicycle, Central and 99th, chrome bike” which is information that must have come from Noemi Ciao. The same page of notes includes “Niomi (sic) knows Joker” and “Niomi works at Dominos.” 2 ER 113. Defense counsel also failed to impeach Detective Myers with this evidence.

There was no possible tactical reason for counsel’s omissions. Counsel himself had selected the alibi defense and chosen to present it to the jury. His failure to present evidence that would have bolstered the credibility of the alibi witnesses and rebutted the prosecutor’s arguments that the alibi was a recent fabrication was professionally unreasonable.

This case is comparable to *Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003) where trial counsel failed to present an alibi witness and failed to offer records at trial that would have supported the petitioner’s alibi defense. In *Alcala*, trial counsel sought to present an alibi that

his client was at Knott's Berry Farm at the time of the charged offense. However, the witnesses who testified were unable to specify a precise time that he was there, a fact that the prosecutor emphasized in his arguments. This Court held that trial counsel was prejudicially ineffective, because he failed to present various business records in his file and an additional witness who could have established Alcala was at Knott's Berry Farm at the time of the offense. *Alcala*, at pp. 870-874.

In this case, trial counsel also failed to present documents and testimony that would have supported Falcon's alibi and impeached the police testimony. As in *Alcala*, this Court should find that counsel was prejudicially ineffective.

III. Trial Counsel's Decision to Present An Alibi Defense Without First Obtaining a Ruling Excluding Police Testimony That Falcon Had Said He Was at the Crime Scene Was Professionally Unreasonable

After the defense presented its alibi witnesses, the prosecutor announced that he would be presenting evidence of Falcon's statements to police in rebuttal. After holding a mid-trial *Miranda* hearing where defense counsel failed to present readily available evidence that would have impeached the police witnesses, the trial court admitted the statements. 2 ER 233. In his closing argument to the jury, defense counsel argued that Falcon's statements to the police were "stupid" and that counsel had no idea why Falcon would say such things. 2 ER 214.

No reasonable attorney under the circumstances would have failed to seek a ruling, prior to trial, as to the admissibility of the police testimony that Falcon had admitted he was present during the shooting and his statement that the shooter was his brother. *Kimmelman v. Morrison*, 477 U.S. 365, 384-385 (1986)(trial counsel's failure to file a suppression motion prior to trial was professionally unreasonable.)

The police testimony about Falcon's purported statements directly contradicted Falcon's alibi defense. No reasonable attorney under the circumstances would have chosen to present an alibi defense without first securing a pre-trial ruling excluding that testimony.

There is no reasonable tactical basis for counsel's actions, as he undermined the defense he selected and argued to the jury. Worse, the disastrous sequence of events that essentially guaranteed a guilty verdict was entirely avoidable. If counsel had presented the tape recordings and documents demonstrating that the police testimony concerning Falcon's interrogation was not true, the police testimony about Falcon's purported statements should have been excluded.

IV. Trial Counsel's Errors Were Prejudicial Because They Allowed the Prosecutor to Unfairly Undermine and Disparage Falcon's Alibi Defense

To establish that he was prejudiced, Falcon must show that, 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). A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id; Hardy v. Chappell*, 832 F.3d 1128 (9th Cir. 2016).

When, as in this case, counsel makes multiple errors or omissions a reviewing court must consider their cumulative prejudicial effect. *Phillips v. Woodford*, 267 F.3d 966, 985 (9th Cir. 2001). In this case, the cumulative effect of counsel's errors in failing to impeach the police witnesses and corroborate Falcon's alibi and in failing to seek a pre-trial ruling excluding the testimony about Falcon's purported statements to police was prejudicial.

Falcon was prejudiced by counsel's failure to impeach Detective Myers at the *Miranda* hearing because the impeachment evidence would have required the trial court to suppress the

police testimony that Falcon confessed. Absent that testimony there was a reasonable doubt that Falcon was the shooter or that he had even been present at the time of the shooting.

The two alibi witnesses, Hernandez and Miguel Menjivar testified that Falcon was at Hernandez's apartment at the time of the shooting. It was particularly striking that Menjivar, who had no apparent connection to Falcon, was quite sure he was at the building with Hernandez at that time of the shooting. 3 RT 379-387.

Moreover, Ciao's testimony and that of Yolanda and Anna Sevilla tied "Joker" to the shooting. Ciao was not related to Falcon and had no motive to perjure herself at his trial. Her description of Joker as a bald Latino male with thick eyebrows riding a BMX bicycle matched the description of the shooter. She told the jury that she saw "Joker" leaving the area of the shooting, very fast, on a BMX bike with chrome parts. 3 RT 492-499. Anna Sevilla's testimony about "Joker" also explained the presence of the gun in their home. 3 RT 476-478.

If Falcon's purported confession had not been admitted and his alibi witnesses had not been unfairly impeached, that evidence would have been sufficient to convince at least one juror that there was reasonable doubt as to Falcon's participation in the crime. The jury could not have given fair consideration to Falcon's alibi defense when it was unfairly impeached by false police testimony and where the prosecutor was permitted to mislead the jury with false statements that the alibi was a recent fabrication.

Finally, counsel's failure to seek a pre-trial ruling excluding Falcon's statements to the police before selecting an alibi defense was prejudicial. Had counsel competently litigated a *Miranda* motion prior to trial, he could have made an informed decision about presenting an alibi defense. As it was, counsel was forced to litigate the *Miranda* motion mid-trial, after he

had already presented witnesses whose testimony contradicted Falcon's purported confession.

For all of these reasons, this Court should find that Falcon was prejudiced and he should receive a new trial.

V. The AEDPA Does Not Bar Relief on These Claims Because the Court of Appeal Opinion Unreasonably Applied *Strickland* and Unreasonably Determined the Facts

The last reasoned decision is that of the California Court of Appeal. As to Falcon's claim that his trial lawyer was ineffective for failing to impeach Detective Myers at the *Miranda* hearing, the Court of Appeal held that "For the most part, the tape recordings corroborated and supported the People's motion." 1 ER 65. It held that whether Falcon had asked for a lawyer three times or only once was immaterial. 1 ER 66. The Court of Appeal also held that Falcon's conversation with Detective Myers where he apparently denied that he said the shooter was his brother and said "I was framed" would not have established that the police testimony was inaccurate. 1 ER 66. Finally, the Court of Appeal found that Falcon's request for a lawyer was "unintelligible and largely incomprehensible" and that the detectives' subsequent conversation with him was not an interrogation. 1 ER 67.

The Court of Appeal opinion unreasonably determined the facts. Falcon's repeated requests for counsel were material to the *Miranda* hearing because they contradicted Detective Myers's sworn testimony that Falcon only asked for a lawyer once and that Detective Myers had immediately ceased interrogating Falcon after his first request for counsel. Moreover, it was objectively unreasonable to conclude that Falcon's request for counsel on the recording was not intelligible. Falcon's first request for counsel was not transcribed in its entirety, but the detectives clearly understood that he was asking for counsel. Moreover, his second statement

“Like I told you man, I need, uh, I need – I need, I want to talk to my lawyer” is clearly an invocation of the right to counsel. *See Anderson v. Terhune*, 516 F.3d 781, 788-789 (9th Cir. 2008)(state court unreasonably determined the facts when it found that suspect’s statement “I plead the Fifth” was ambiguous and not an invocation of the right to silence.)

Accordingly, the Court of Appeal unreasonably determined the facts and unreasonably applied *Strickland* when it held that counsel’s failure to introduce the tape recordings at the *Miranda* hearing was not professionally unreasonable.

As to counsel’s failure to raise the *Miranda* issue prior to trial and prior to presenting an alibi defense, the Court of Appeal did not address that question but instead addressed a different issue that Falcon did not raise: whether counsel was ineffective for arguing inconsistent defenses. ER 82.

Falcon did not argue that his counsel was ineffective for arguing inconsistent defenses or for selecting an alibi defense over a theory that Falcon was present but not the shooter. His argument is that his counsel failed to litigate a pre-trial motion with readily available evidence that would have impeached the police testimony and required suppression of his purported statements to police prior to presenting an alibi defense at trial.

The Court of Appeal decision acknowledged Falcon’s argument that counsel was ineffective for failing to corroborate Hernandez’s alibi testimony with the detective’s hand written notes demonstrating that she was identified as a witness about ten months before trial. The Court of Appeal decision unreasonably determined the facts under 28 U.S.C. 2254(d)(2), when it held that the notes were “unhelpful” because they contained “nothing suggesting Hernandez had provided any information regarding an alibi.” 1 ER 79. Of course, the notes

would have established that Porter or another family member had provided Hernandez's contact information to the detectives. Moreover, Porter could have testified that he called the detectives and personally told them Hernandez could supply an alibi. 2 ER 87.

Finally, the Court of Appeal's conclusory holding that counsel "could have made a reasonable tactical decision" to forego impeaching the police testimony was objectively unreasonable. 1 ER 80. There was no conceivable downside to impeaching the detective with the audio recordings and with the chronological notes that trial counsel had in his own file. The notes and Porter's testimony that he called the detectives two or three times to tell them about Falcon's alibi would have bolstered the credibility of the defense witnesses and corroborated their account.

The Court of Appeal decision acknowledges that Porter could have impeached Detective Myers's testimony that he had never received any notice of Hernandez's alibi testimony. 1 ER 81-82. It fails to explain how any reasonable defense attorney under the circumstances could have chosen to forego impeaching Detective Myers on that critical point. *Id.*

As to prejudice due to counsel's failure to admit the records corroborating that the alibi was not a recent fabrication, the Court of Appeal decision focuses on only one factor: whether Hernandez was arguably biased, when it should have considered the entire record in deciding whether Falcon was prejudiced. The Court of Appeal decision also fails to acknowledge that the cumulative impact of all of counsel's errors, including his failure to call Porter as a witness to impeach the police witnesses, was sufficient to undermine confidence in the outcome.

The Court of Appeal also unreasonably found that the evidence against Falcon was strong. The first eye witness, Carroll, did not identify Falcon at the preliminary hearing and did

not testify at trial. Carroll had only identified Falcon from a photograph during a pre-trial photographic line up. 2 RT 175-179, 187, 193, 199-200.

The second witness, Williams, identified Falcon in court but when she first saw his photograph in a line up she said he only looked like the shooter. 2 RT 236. When shown a photo array that included a photograph of Falcon's brother, she thought he was the same person (Falcon) that she had picked in the earlier photo line up. 4 RT 589-590. At the preliminary hearing, Williams was "sort of unsure" that Falcon was the shooter. 2 RT 237. Williams was also shown a photograph of Falcon before she identified him as the shooter at trial. 2 RT 228, 252, 262. As a result, her identification of Falcon was uncertain and tainted.

Finally, Carroll and Williams gave different descriptions of the charged events. Carroll testified that after the first encounter, the two men left on the bike. A few minutes later, they returned on foot. One of the men was carrying a gun, which he pointed at Carroll's back but did not fire. 2 RT 185.

Williams said that before the shooting, the two men had abandoned the bike and walked into the bleacher area. RT 225, 243. They then came back and got back on the bike after which Williams and her friends started laughing at them again. 2 RT 243.

Carroll said that the two men did not say anything to each other before the shooting. 2 RT 188. According to Williams, the man who did not have a gun said "No, not him" when the shooter had initially pointed at Carroll. 2 RT 228, 246, 254-255. Because the eyewitness testimony about the charged events was inconsistent, the identification of Falcon as the shooter was subject to reasonable doubt. Accordingly, the Court of Appeal's conclusion that Falcon was not prejudiced because of the strength of the eyewitness testimony was objectively unreasonable.

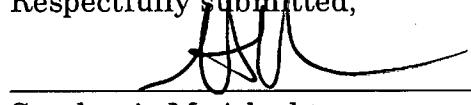
Accordingly, no AEDPA deference is due to the California Court of Appeal decision, because the Court of Appeal unreasonably determined the facts and unreasonably applied clearly established federal constitutional law when it denied Falcon's claims. *Williams*, 529 U.S. at 405-06. This Court should reverse the judgment of the district court, grant the writ, and order that Falcon receive a new trial.

CONCLUSION

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

Dated: 1/27/21

Respectfully submitted,



Stephanie M. Adraktas
CJA Appointed Attorney for Petitioner
David Falcon