

No. _____

IN THE
Supreme Court of the United States

HUNG LINH HOANG,

Petitioner,

v.

RAYMOND MADDEN,

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

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QUESTION PRESENTED

This Court has repeatedly held that to receive a certificate of appealability (“COA”), a habeas petitioner need only show that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

Petitioner’s trial counsel improperly insisted Hoang testify at trial and that he testify falsely. He coerced Hoang to testify by yelling at him and telling him it was the only way he could avoid going to jail, despite knowing that the proposed testimony was not true. The district court and the Ninth Circuit refused to grant a COA for Petitioner’s ineffective assistance of counsel claim, despite the fact that the claim was not subject to 28 U.S.C. § 2254(d) and despite the fact that had Hoang testified truthfully, there is a reasonable probability of a better outcome.

Is the Ninth Circuit’s denial of a COA on Hoang’s ineffective assistance of counsel claim contrary to this Court’s jurisprudence?

PARTIES AND LIST OF PRIOR PROCEEDINGS

The parties to this proceeding are Petitioner Hung Linh Hoang and Respondent Raymond Madden. The California Attorney General represents Respondent.

Hoang was convicted by jury in the Orange County Superior Court on July 14, 2004 in *People v. Hung Linh Hoang*, case no. 03WF1095, Judge Richard Toohey, presiding. Judgment was entered against Hoang on October 29, 2004. Clerk's Transcript, district court docket 49, lodgment 2, at 188-93, 265-67.

The California Court of Appeal affirmed the judgment on appeal in an unpublished opinion filed on April 28, 2006 in *People v. Hoang*, case no. G034779. Petitioner's Appendix G, attached hereto ("Pet. App.").

The California Supreme Court summarily denied Hoang's petition for review on July 21, 2006 in case no. S143982. Pet. App. E.

The California Supreme Court denied the petition for writ of habeas corpus in *In re Hung Linh Hoang*, case no. S255313 on July 10, 2019, in an unpublished order. Pet. App. F.

The United States District Court for the Central District of California, Judge R. Gary Klausner, presiding, dismissed the petition for habeas corpus in *Hoang v. Madden*, case no. 17-495, and denied a certificate of appealability (COA) on September 21, 2020. Pet App. B, C.

The Ninth Circuit Court of Appeals denied a COA in an unpublished memorandum in *Hoang v. Madden*, case no. 20-56054, on December 3, 2020.

Pet. App. A.

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

Hung Linh Hoang petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Hoang v. Madden*, No. 20-56054.

OPINIONS BELOW

The memorandum opinion of the Ninth Circuit Court of Appeals in *Hoang v. Madden*, No. 20-56054, was not published. Pet. App. A. The order of the United States District Court denying relief is also unreported. Pet. App. D. The California Court of Appeal's affirmance on direct appeal, No. G034779 is unpublished. Pet. App. G. The California Supreme Court's denial of the petition for review, No. S143982, is unpublished. The California Supreme Court's denial of the petition for habeas corpus, No. S255313, is unpublished. Pet. App. F.

JURISDICTION

The Ninth Circuit's order denying a certificate of appealability was filed and entered on December 3, 2020. Pet. App. A. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had

jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution

The Six Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

28 U.S.C. § 2253(c)

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

I. STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

Hoang is in state custody at California State Prison, Los Angeles County, in Lancaster, California. He filed a habeas petition under 28 U.S.C. § 2254 challenging the constitutionality of his conviction and sentence. The district court dismissed the petition on the merits with prejudice. Pet. App. C. It denied a COA pursuant to 28 U.S.C. § 2253. Pet. App. B. The Ninth Circuit also denied a COA. Pet. App. A.

B. Facts Material to the Consideration of the Question Presented

1. Trial

One evening in 2003, 17-year-old Sean Scarbrough was in his bedroom when he heard loud shouting outside, in Vietnamese.¹ He looked out his second-story window to see what was going on.

About 20 to 30 feet away, in a parking area below, he saw an Asian male get out of a car with a chrome revolver in his hand and chase another Asian male around the car several times. One of them was saying to the other something like, “Fuck you. I’m going to fucking kill you.”

¹ The following facts, unless otherwise indicated, are taken from the California Court of Appeal opinion, Pet. App. G, and are contained in the Reporters Transcript of trial, district court docket 49, lodgment 1.

After the gunman stopped chasing the victim, the two faced each other, and the victim lifted his arms as if to shield his face as the gunman pointed the gun at him, and appeared to pull the trigger. But when the gun didn't fire, he testified, the gunman opened the cylinder of the revolver and looked inside, then went back to the car and leaned in toward the floorboard.

At this point Scarbrough went to an adjoining room for a better view. But by the time he got to a window there, the victim in the chase had apparently left, and Scarbrough saw a third Asian male, later identified as Son Bui, wrestle the gun away from the gunman.

Scarbrough called 911, describing the gunman as Asian, 19 to 20 years old, wearing a black jacket, white shirt, and black shorts with white knee-high socks. He described the other person who'd been chased as a male Asian, wearing a white shirt and black pants with slicked back hair. But he told the 911 operator that he had "no idea" who "any" of these people were. Scarbrough testified that not long after, he saw police arrive and take the gun from Bui.

Bui was the only one with a gun—a revolver with the hammer cocked. The gun had a single round in the cylinder, a "reload." Bui had another four .38 caliber rounds in a sock tucked in his jeans pocket.

According to officer testimony, the bullet from the cylinder had what looked like a dimple on the primer area of the casing. Though this could have

been a "strike mark" (where the hammer had hit it and misfired), the dimple could have been caused by something else too, such as someone playing with the bullet itself.

But there was no way to tell when this dimple (whatever caused it) had been left on the bullet. Nor was there any way to tell whether this particular round had even been in the cylinder when Scarbrough claimed to see and hear the trigger pulled and the hammer click.

Ten days after the incident, officers showed Scarbrough two photographic "six-pack" lineups, from which he said he recognized Hoang as the gunman.

At trial, two other witnesses testified who'd been at the scene when police arrived—Tin Nguyen and Chuan Le.

Nguyen had agreed with prosecutors to testify truthfully in exchange for juvenile wardship rather than detention for an unrelated attempted murder charge.

He testified that he saw a friend of his named Hong "Snappy" Tran point a gun at Hoang ("Ronnie"). But Son Bui took the gun from Tran, and Tran fled. Hoang was crying. Nguyen also testified that when he told the police about "who did it," he'd used Tran's first name, "Hong," which sounds like "Hoang." No one called Hoang by his Vietnamese name "Hung."

Then there was Chuan Le. Like Nguyen, Le was in custody at the time of the trial, and was reluctant to testify because it could cause “problems” in jail.

But Le testified that at the time of the incident, he’d seen Hoang being chased around a car by someone he didn’t know holding a gun. And like Nguyen, he’d seen Bui take the gun away from the unidentified man, who then ran off.

The investigating officer testified that Nguyen and Le had given statements that were different from their testimony. Nguyen had told him at the time that he saw Hoang with a gun chasing someone around a car, and that he later saw Bui trying to calm Hoang down. And Le had first told him that he’d seen Hoang and Bui arguing, but had denied seeing either of them with a gun.

Le told the officer (on his account) that he didn’t understand much of the argument because it was in Vietnamese, but had understood Hoang saying something to Bui like “You’re not my homie anymore” and “I’m tired of this shit.” But the officer testified that Le said something different at the police station, while in custody. This time, according to the officer, Le said that he’d lied earlier, and that Hoang did have a silver handgun at the time, and was waving it around while arguing with Bui.

But both Nguyen and Le denied making statements like this to the police.

One other prosecution witness testified as an expert on gangs. The expert testified about the ways that gang members can join a gang, none of which involved pointing a gun at initiates. He testified about the paramount importance to gangs of respect and loyalty, and the violent retaliation members can expect for informing on or testifying against other members. And he testified that Hoang was among the gang's "elders."

When it came time to put on a defense case, the only witness Hoang's trial attorney Michael Molfetta called was Hoang.

Before trial, on the night of the incident, Hoang had told police (much like Nguyen and Le testified) that he didn't know anything, and that "the other guy had chased [him] with the gun." He said that he was with some friends when a guy named Hong, who'd been arguing with him, pulled a gun, and that Son Bui took the gun from him and put it away. Hoang told police that he didn't know what the argument had been about.

But in testimony, Hoang told a different story. Instead of saying that he'd been the one who was chased, he told jurors that what Scarbrough had witnessed was a "jumping in" ritual for Hong, who knew that Hoang was jumping him in. Just before starting the initiation, Hoang made sure the gun he was going to use was unloaded. And after pointing the gun at Hong, he

went to his car to get a bullet to put it in the gun and scare Hong. Later on, Son Bui wrestled the gun away from Hoang as part of the "act." The others "jumped [Hong] in" by beating him up. Afterward, Hoang and the others talked about whether they were going to admit Hong into the gang.

Hoang testified that his earlier, contrary statement to police was a lie. And that he'd lied became a recurring theme in the prosecution's cross.

However, as set forth in the petitions filed in the California Supreme Court and the district court, what Hoang first told the police was the truth, and the lie was what he'd said on the stand—which he'd only done at the behest of Molfetta. Pet. App. I.

Well before trial, Molfetta had visited Hoang in jail. He told Hoang that if he was "serious about [his] case," he would "have to do exactly as [Molfetta] told [him]." *Id.*

And what Molfetta told him to do was this: Testify that the whole thing was part of a gang initiation. Testify that he pointed a gun at the "victim" but didn't pull the trigger. And testify that he lied to the police when he told them that he himself had been the real victim. *Id.*

This, according to Molfetta, was Hoang's best chance to "go home" because all he could be convicted of (if the jury believed it) was a charge of weapon possession or brandishing. *Id.* But if Hoang testified consistent with his earlier statements to police, he'd be convicted and sentenced to life. *Id.*

Then in early July 2004, about one week before he was to testify, Hoang had a phone call with Molfetta and told him he didn't want to testify. But Molfetta got agitated and started to yell at him. Molfetta told him that if Hoang didn't trust him, he could fire him. *Id.* Molfetta also had Hoang's family persuade and pressure him to testify.

Hoang was pressured from his conversations with Molfetta. He knew that his parents had already paid Molfetta a lot of money. Pet. App. I, J. And ultimately, he still trusted Molfetta. So he did what Molfetta had told him he had to do to avoid possibly spending life in prison. Pet. App. I.

Hoang was convicted on July 14, 2004, of attempted murder and street terrorism.² He was sentenced to life in state prison, with the possibility of parole, plus a consecutive 10-year term.

2. State Direct Appeal and Post-Conviction

Hoang appealed to the California Court of Appeal and his conviction was affirmed on April 28, 2006. The California Supreme Court summarily denied his petition for review.

² This conviction was later vacated by the California Court of Appeal following a change in state law. The vacating of the street terrorism count had no effect on Hoang's sentence because the sentence on the street terrorism conviction had been stayed pursuant to California Penal Code § 654.

Hoang then filed a counseled petition in the California Court of Appeal, case G039413, claiming ineffective assistance of counsel (“IAC”) because trial counsel “abrogated his Fifth Amendment right to remain silent and improperly encouraged false testimony.” The California Court of Appeal denied the petition without prejudice so that Hoang could first file in the trial court. Petitioner filed a habeas corpus petition in the Orange County Superior Court (“OCSC”), case M11652, raising the same IAC claim. The OCSC denied the petition as untimely. Petitioner then returned to the California Court of Appeal, case G040197, raising the same IAC claim. The court denied the petition without comment.

It was not until 2019, when federal habeas counsel had been appointed in the district court, that the IAC claim was presented to the California Supreme Court and exhausted. Between 2007 and 2017, Hoang filed numerous actions in state and federal court that are not relevant to the claim at issue in this petition.

3. Federal Habeas Action

Initially proceeding pro se, the district court appointed counsel for Hoang in 2018. On March 7, 2019, counsel filed a petition containing the single claim at issue here and sought a stay to exhaust the claim, which was granted. On April 14, 2019, Hoang filed in the California Supreme Court the previously-mentioned petition for writ of habeas corpus, case S255313,

claiming ineffective assistance of trial counsel. The court denied the petition on July 10, 2019 with citations to *In re Robbins*, 18 Cal.4th 770, 780 (1998) and *People v. Duvall*, 9 Cal.4th 464, 474 (1995). Pet. App. F.

Returning to federal court and following briefing by the parties, on August 14, 2020, Magistrate Judge Karen E. Scott issued a report and recommendation to deny the single claim in the petition. Pet. App. E. Of note, the Magistrate Judge found de novo review appropriate here. The district court accepted the report and issued judgment denying the petition with prejudice on September 23, 2020. It also denied a COA. Pet. App. B, C, D.

Hoang filed a notice of appeal and sought a COA from the Ninth Circuit. It was denied on December 3, 2020. Pet. App. A.

II. REASONS FOR GRANTING THE WRIT

A. COA Standards

An applicant is entitled to a COA upon “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). “[A] COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right . . .” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

“Obtaining a certificate of appealability ‘does not require a showing that the appeal will succeed.’” *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016). Instead, the petitioner satisfies the standard “by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327. “The COA inquiry asks only if the District Court’s decision was debatable.” *Id.* at 348; *Buck v. Davis*, 137 S. Ct. 759, 774 (2017). This is a “low” standard. *Frost v. Gilbert*, 835 F.3d 883, 888 (9th Cir. 2016) (en banc). The petitioner need only “prove ‘something more than the absence of frivolity.’” *Miller-El*, 537 U.S. at 338 (quotation marks omitted).

Although claims decided on the merits in state court are reviewed under 28 U.S.C. § 2254(d), claims that are not are reviewed *de novo*. *Cone v. Bell*, 556 U.S. 449, 472 (2009). Because the California Supreme Court denied this claim on procedural grounds, *de novo* review is the appropriate standard here.

B. Hoang Meets the Modest COA Standard on his Ineffective Assistance of Counsel Claim

The magistrate judge correctly found that the California Supreme Court denied Hoang’s claim on procedural grounds and no state court ever reached the merits. Pet. App. E, at 13. The magistrate judge found that §

2254(d) did not apply and review of the claim should be de novo. Therefore, 2254(d) does not bar relief here.

To prevail on a *Strickland* claim, a petitioner must show two things.

Strickland v. Washington, 466 U.S. 668, 685 (1984). First, he has to show that trial counsel's performance was "deficient," that it fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 687-88. And despite the "strong presumption" of reasonableness accorded trial counsel's decisions, even "a single, serious error" may be enough.

Kimmelman v. Morrison, 477 U.S. 365, 383 (1986).

Second, he has to show that trial counsel's deficient performance "prejudiced" his defense. *Id.* at 687. This requires no more than a "reasonable probability" that but for the deficiency, "at least one juror" would have had a reasonable doubt about at least one essential fact. *Buck v. Davis*, 137 S. Ct. 759, 776 (2017). A reasonable probability is one "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Petitioner alleged that trial counsel, Michael Molfetta, improperly insisted Hoang testify at trial and that he testify falsely. Specifically, Molfetta encouraged him to testify falsely that: 1) Hoang was the gunman during the underlying incident; and 2) Hoang pointed the gun at the alleged victim in order to scare him in the course of "jumping" the alleged victim in to his gang. Pet. App. E. Hoang alleged trial counsel told him this was the only

way Hoang could win his case and avoid going to jail. Up until then, Hoang had informed his counsel that he was not the gunman in the incident, but was instead the victim that had a gun pointed at him by another gang member. *Id.* This was consistent with Hoang's statement to police officers at the time of the incident and to eyewitness testimony provided at the trial. *Id.*

The Report states that Hoang failed to show that trial counsel, Michael Molfetta, "coerced" Hoang to testify and to testify falsely. Pet. App. E, at 3. The Report first concludes that Hoang failed to show that trial counsel coerced his testimony because counsel had a "clear, and reasonable strategy." The Report goes on to conclude that Hoang failed to prove that counsel knew Hoang's testimony was false. However, the magistrate judge acknowledges that Hoang's declaration "does contain language which, read in a light favorable to Petitioner, could imply Molfetta knew the testimony to be false." Pet. App. E, at 3. This concession alone makes the district court's denial "reasonably debatable" under the COA standard.

The magistrate judge's analysis is flawed and her conclusion is error. First, Hoang's declaration makes it clear that Molfetta told him that he could not testify "to what really happened" because otherwise he would get life in prison. One does not need to read Hoang's declaration "in a light favorable to Petitioner" to understand that Hoang alleged that Molfetta was told what really happened, i.e. the truth, and told Hoang he could not testify to that, i.e.

encouraged false testimony. That is a plain and clear reading of the evidence. Hoang sufficiently alleged and demonstrated that Molfetta knew that Hoang's testimony was false and, therefore, trial counsel's performance was deficient.

In addition, trial counsel's strategy to coerce and encourage testimony could not be "clear, and reasonable," as the magistrate judge concludes, given that counsel knew the testimony was false. The magistrate judge's conclusion that trial counsel had a clear strategy may be accurate but it cannot be a sound strategy to encourage your client to testify to something he states is not the truth, or is not "what actually happened." This was not simply a matter of making a strategy decision. Rather, as set forth in the petition, trial counsel told Hoang he had to testify and had to testify to a particular set of facts, though not true, in order to have a chance of a not guilty verdict. Encouraging one's client to testify to anything other than the truth falls below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688; see, e.g., *People v. Riel*, 22 Cal. 4th 1153, 1217 (2000) ("[A]n attorney, including a criminal defense attorney, has a 'special duty ... to prevent and disclose frauds upon the court.'") (quoting *Nix v. Whiteside*, 475 U.S. 157, 173 (1986)). Therefore, the magistrate judge's conclusion that trial counsel was not ineffective for coercing Hoang to testify because he had a sound strategy is error.

Finally, the magistrate judge's conclusion that Hoang failed to demonstrate prejudice is also error. In so concluding, the magistrate judge relies heavily on the testimony of Sean Scarbrough and finds that it is not reasonably probable that a juror would have harbored a reasonable doubt if Hoang testified truthfully or chose not to testify, because Scarbrough was the most reliable witness and his testimony was corroborated. Pet. App. E, at 20-21. However, there were weaknesses in his testimony that would have been more impactful if the jury had a consistent and believable alternative. For example, his identification of Hoang from a photographic lineup came ten days after he'd witnessed the incident—through a closed glass window, in the early evening light, from 20 to 30 feet away. Despite these conditions, Scarbrough asserted at trial that he had "no doubt" about his identification, that he'd "seen [Hoang] before," a "couple of times, like, around the street." Yet during the 911 call, he'd said that he "ha[d] no idea" who "any" of the people he witnessed were. Pet. App. H, at 3.

These inconsistencies, had Hoang testified, could, with reasonable probability, have led at least one juror to harbor a reasonable doubt. This is true because, had Hoang testified truthfully, his testimony would have corroborated his earlier statements, as well as the testimony of Nguyen and Le. This would have been a far more favorable set of facts for Hoang if three witnesses told a consistent, or relatively consistent, version of the incident.

Reasonable jurors would have given Hoang's testimony, together with Nguyen and Le's, more weight as each corroborated the other as well as the earlier statements to law enforcement.

At a minimum, the district court's denial of the IAC claim is reasonably debatable, and therefore a COA should issue. *Buck*, 137 S. Ct. at 774. The nature of the penalty is also relevant in determining whether to issue a COA. Because Hoang is serving a life sentence imposed for a crime allegedly committed when he was 18 years old (for an offense he maintains he did not commit) the Court should resolve any doubts about whether to issue a COA in his favor. *Valerio v. Crawford*, 306 F.3d 742, 767 (9th Cir. 2002) (en banc); *Lambright v. Stewart*, 220 F.3d 1022, 1024-25 (9th Cir. 2000). It should grant certiorari with instructions to grant a COA here.

III. CONCLUSION

For the foregoing reasons, the Court should grant Hoang's petition, reverse the judgment of the Ninth Circuit, and grant a COA.

Respectfully submitted,

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DATED: February 18, 2021