

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

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2021

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JUAN M. ALCARAZ, *Petitioner*,

v.

BRIAN WILLIAMS, et al., *Respondents*.

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Did the Ninth Circuit err when Mr. Alcaraz made a substantial showing of the denial of a constitutional right as to trial counsel repeatedly telling the jury that Mr. Alcaraz was a gang member?
2. Did the Ninth Circuit err when Mr. Alcaraz made a substantial showing of the denial of a constitutional right as to trial counsel failing to object to the constitutionally improper closing arguments by the prosecution?

## TABLE OF CONTENTS

THE QUESTION PRESENTED.....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES.....	iii
I. PRAYER FOR RELIEF .....	1
II. OPINION BELOW.....	1
III. BASIS FOR JURISDICTION.....	1
IV. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE .....	2
V. STATEMENT OF THE CASE.....	2
A. JURISDICTION OF THE COURTS OF FIRST INSTANCE.....	2
B. FACTS MATERIAL TO THE QUESTION PRESENTED .....	2
VI. REASONS SUPPORTING ALLOWANCE OF THE WRIT .....	6
VII. CONCLUSION .....	15
APPENDIX A-Order of the Ninth Circuit Court of Appeals, December 13, 2021..	A-1
APPENDIX B-Order and Judgment in a Civil Case of the United States District Court for the District of Nevada, May 24, 2021.....	B-1

## TABLE OF AUTHORITIES

<u>Cases</u>	Page
<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993) .....	11
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068 (1970) .....	13, 14
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966) .....	13
<i>Mullaney v. Wilbur</i> , 421 U.S. 684, 95 S. Ct. 1881 (1975) .....	14
<i>Odom v. United States</i> , 377 F.2d 853 (5th Cir.1967).....	7
<i>Patterson v. New York</i> , 432 U.S. 197, 97 S. Ct. 2319 (1977).....	14
<i>United States v. Harding</i> , 525 F.2d 84 (7th Cir.1975).....	7
<i>United States v. Simon</i> , 964 F.2d 1082 (11th Cir. 1992) .....	14
 <u>Statutes</u>	
18 U.S.C. § 3231 .....	2
28 U.S.C. § 1254 .....	1
28 U.S.C. § 1291 .....	2
28 U.S.C. § 2253 .....	2

## I.

### PRAYER FOR RELIEF

Mr. Juan M. Alcaraz respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision that denied Mr. Alcaraz's request for certificate of appealability. The basis of this petition is that the Ninth Circuit erroneously decided that Mr. Alcaraz has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

## II.

### OPINION BELOW

The United States Court of Appeals for the Ninth Circuit entered an order that denied Mr. Alcaraz a certificate of appealability in an appeal from a district court denied petition for writ of habeas corpus. *Juan M. Alcaraz v. Brian Williams, et al.*, No. 21-15930 (9th Cir. December 13, 2021). *Appendix A*.

## III.

### BASIS FOR JURISDICTION

On December 13, 2021, the United States Court of Appeals for the Ninth Circuit delivered an order that denied Mr. Alcaraz a request for certificate of appealability. *Appendix A*. This is the final judgment for which a writ of certiorari is sought. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

#### IV.

#### CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Pursuant to Title 28 United States Code Section 2253(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).

#### V.

#### STATEMENT OF THE CASE

##### **A. Jurisdiction of the Courts of First Instance.**

The district court had jurisdiction under 18 U.S.C. § 3231. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253(a).

##### **B. Facts Material to the Questions Presented.**

On July 22, 2005, a shooting occurred at a strip mall located at 563 East Twain Avenue, in Las Vegas, Nevada. The shooting was a result of an altercation between Mr. Alcaraz and Mr. Rodriguez. According to law enforcement, the area where the incident occurred was a known gang area. Mr. Alcaraz was asserted to be a member of a gang called the “18th Street Gang,” and was wearing a sports jersey with the number

“18” on the back when the incident occurred.

Video surveillance showed words being exchanged between Mr. Alcaraz and Mr. Rodriguez, and then Mr. Rodriguez punched Mr. Alcaraz in the face. Mr. Alcaraz then pulled out a gun and shot Mr. Rodriguez, killing him. Mr. Alcaraz gave statements to law enforcement both before and after Mr. Alcaraz viewed the video capturing the incident.

In July of 2005 Mr. Alcaraz was charged through a criminal complaint, and the case later proceeded to trial. The jury returned a verdict less than one hour after the conclusion of closing arguments, and the case was over before 5 p.m. on the second trial day. Mr. Alcaraz was found guilty of both counts, specifically second-degree murder with use of a deadly weapon and carrying a concealed firearm or other deadly weapon.

Mr. Alcaraz was sentenced to life with the possibility of parole after ten years for second degree murder and an equal and consecutive life with the possibility of parole for use of a deadly weapon. On the carrying a concealed weapon count, Mr. Alcaraz was sentenced to concurrent sentence of 24 to 60 months.

Mr. Alcaraz filed his direct appeal before the Nevada Supreme Court, which was later decided by an affirmance with the Nevada Supreme Court. Mr. Alcaraz then filed a *pro per* post-conviction petition, which was later denied. Mr. Alcaraz then appealed the denial of the petition with the Nevada Supreme Court. The Nevada Supreme Court reversed the lower court’s denial of the petition, and remanded to the state trial court for the appointment of counsel.

Counsel was later appointed, and a counseled petition was filed on behalf of Mr. Alcaraz. The counseled state petition later had an evidentiary hearing. One witness testified, trial counsel for Mr. Alcaraz. When asked about why trial counsel repeatedly raised the issue before the jury as to Mr. Alcaraz being part of a gang, trial counsel could not recall how the evidence was admitted, but represented he was intentionally embracing the gang nature and high crime element to explain Mr. Alcaraz's reaction to the punch by Mr. Rodriguez. Trial counsel did not testify that it was the right decision to admit to Mr. Alcaraz's gang membership, but that it was what was decided. Trial counsel thought he had discussed the idea of bringing up gang affiliation during trial with Mr. Alcaraz prior to trial, but trial counsel had no recollection of the specific conversation.

The counseled petition was denied by the state court. Mr. Alcaraz appealed the denial of the petition, which resulted in an order of affirmance with the Nevada Supreme Court.

Mr. Alcaraz then proceeded to the federal court with a petition for writ of habeas corpus. This court initially dismissed the petition, with a later re-opening of the case following a reversal and remand by the Ninth Circuit Court of Appeals.

Following the remand, Mr. Alcaraz filed a counseled first amended petition on April 9, 2018. Respondents moved to dismiss the first amended petition on June 8, 2018, arguing that it was not properly verified, untimely, and unexhausted, in part. The district court granted the motion in part, dismissing a certain ground without



prejudice; finding that another ground was unexhausted; determining that certain grounds were technically exhausted but procedurally defaulted; dismissing a ground as non-cognizable; and finding that a certain ground would proceed to the extent of any procedurally viable claims.

In response, Mr. Alcaraz filed a second amended petition on May 28, 2019 that deleted a certain ground. The grounds remaining in Mr. Alcaraz's habeas petition were:

- 1(1). His trial counsel improperly introduced bad act evidence.
- 1(2). His trial counsel failed to object to the state improperly commenting on his right to remain silent.
- 1(3). His trial counsel failed to object to the state improperly advising the jurors to test the evidence themselves.
- 1(4). His trial counsel failed to object to the state improperly shifting the burden of proof.
- 1(5). His trial counsel failed to investigate and present evidence showing that Rodriguez was the initial aggressor.
- 1(6). His trial counsel rushed through the proceedings.
- 1(7). His trial counsel failed to file a motion to suppress his confession due to his impaired condition at the time of his law enforcement interview and to present evidence showing that he lacked intent due to his impaired condition.
4. The state improperly commented that it would be a "freebie" to convict Alcaraz of manslaughter.
7. There were cumulative errors.

Respondents answered the remaining claims in Mr. Alcaraz's second amended petition on September 3, 2019, and Mr. Alcaraz filed a reply to his petition on November 22, 2019. On May 24, 2021, the district court issued an order and a judgment that denied Mr. Alcaraz's petition in full, and also denied Mr. Alcaraz a certificate of appealability as to his claims.

On June 28, 2021, Mr. Alcaraz, through counsel, filed a request for certificate of appealability with the United States Court of Appeals for the Ninth Circuit. On December 13, 2021, the Ninth Circuit issued an order that denied Mr. Alcaraz his request for certificate of appealability.

## VI.

### REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to correct the erroneous decision by the Ninth Circuit Court of Appeals that denied Mr. Alcaraz a certificate of appealability. The Ninth Circuit erred by deciding that none of the raised issues would be debatable among jurists of reason. The issues raised as identified herein as to: (1) trial counsel repeatedly admitting to the jury that the defendant was a gang member, and (2) trial counsel failing to object to improper arguments impinging upon the Fifth Amendment and improperly shifting the burden of proof state a valid claim of the denial of a constitutional right. As these material points of fact were overlooked by the Ninth Circuit, and by default the district court, it is respectfully requested that Mr. Alcaraz's petition for writ of certiorari be granted.

#### **A. Mr. Alcaraz's Petition Should be Granted When Defense Counsel was Ineffective by Repeatedly Admitting to the Jury that Mr. Alcaraz was a Gang Member.**

The district court denied Mr. Alcaraz a certificate of appealability as to Mr. Alcaraz's Ground 1(1) in his habeas petition, ineffective assistance of trial counsel in introducing gang evidence at this trial. The district court found that the Nevada

Supreme Court reasonably denied Mr. Alcaraz his ineffective assistance of counsel claim because: (1) the state district court did not err in finding defense counsel not deficient, and (2) Mr. Alcaraz could not demonstrate prejudice. The district court decided that prejudice was not found when surveillance tape of the incident was substantial evidence, and Mr. Alcaraz was convicted of second-degree murder instead of first-degree murder. (*See* Doc. No. 81 in Case No. 2:13-cv-00818-JCM-BNW, *at* ECF page 12.)

Admission of testimony irrelevant to the crime charged may prejudice a defendant and thereby deny him a fair trial. *Cf. United States v. Harding*, 525 F.2d 84, 88-89 (7th Cir.1975); *Odom v. United States*, 377 F.2d 853, 859 (5th Cir.1967). Such testimony may imply that a defendant “is more likely to have committed the offense for which he is being tried than if he has previously led a blameless life.” *Harding*, 525 F.2d at 89.

In Mr. Alcaraz’s case, defense counsel introduced at trial evidence of: (1) gangs and gang activity in the area where the incident occurred (2) Mr. Alcaraz being a member of the gang, and (3) general testimony about “gang culture.” The gang evidence was bad character evidence that was not the subject of a motion to admit by the prosecution. Mr. Alcaraz’s defense counsel made several arguments about gangs and elicited gang evidence testimony during trial, including opening statements:

[Y]ou’re going to hear from some witnesses in this case, and from police officers, that this area is what you would consider a very dangerous area - high crime activity. There is gang activity in that area, and you’re going

to hear that from witnesses in this case.

...

In fact, what the evidence will show is this is a very dangerous, volatile neighborhood, a lot of crime activity.

Mr. Alcaraz's defense counsel continued eliciting gang evidence during several witness' testimony:

Q I'd like to just start off where the prosecutor left off, and that is that the neighborhood seemed to be a gang neighborhood.

A Yes.

Q When you saw the individuals, my client here, Mr. Alcaraz, and three or four individuals that was with him, did it appear obvious to you that they were with a gang?

A Yes.

...

Q And you did testify that it's a high crime area.

A Yes, I did.

Q A lot of gang activity.

A Yes, sir.

Q In your experience would you say that even a gang member in that area could possibly fear retaliation from a rival?

A Sir, in my experience, especially in the recent years there, 18<sup>th</sup> Street gang is predominantly that area, and I don't know, quite honestly, that they fear retaliation from anybody in that neighborhood. They own that neighborhood, and the graffiti and everything else says it, so I mean it's possible. I don't doubt your statement, but as far as I know, and everyone that I've ever arrested or interviewed from that area they are very confident that's their turf

...

Q Now, Detective, once you concluded this interview, there were some words that the defendant used. At one point he said that the victim disrespected him, and the second point he said: disrespected my neighborhood. I'm just quoting him.

From your training and experience being a detective with the LVMPD, what significance can you inform the jury -- what does that mean?

A Criminal street gangs in most cases, not all cases, claim a geographic territory as their own or neighborhood, and the gang

and the neighborhood are synonymous meaning if you're disrespecting the gang, you're disrespecting the neighborhood. If you're disrespecting the neighborhood, you're disrespecting the gang. And they look at it as they are the rule or the control of the neighborhood, and that's what - if you disrespect their gang or their neighborhood you should expect some sort of retaliation or some sort of consequences for that.

Q Now, you're also familiar with the video, correct?

A Correct.

Q Is there any significance that you can add to the fact that this confrontation took place and -- I'll use his words -- homies were with him?

A Yes. The -- In the video the suspect's wearing an 18 jersey which is an 18<sup>th</sup> Street gang jersey. Another individual that's with him is wearing the 18 jersey as well. That's significant. That's their symbol for their gang. He says that those are his homies are his fellow gang members.

In an instance like that, what usually happens is gangs are like, like a pack of wolves or like a swarming insect. If one gang member gets involved in something they usually all start to attack, and that's what I viewed on the video, that that was starting to occur.

...

Q Now, in the gang subculture what if there was something that was said to the defendant by the victim, Roberto Rodriguez, and defendant did nothing, what would result?

A The gang subculture in 18<sup>th</sup> Streeter, which is a very complex gang, they all have bylaws or rules. They may not be written down, but everybody kind of knows the loose structure of the rules, and there -- it's just like in any facet of society, any type of job, any type of group you belong to, the rules have an enforcement, basically a person that enforces the rules, and those are usually the gang leaders and the shot callers, and if you're confronted with somebody that disrespects your neighborhood, or disrespects you, and you don't take affirmative action to defend it, they could hold you in what they call -- they could keep you in check or hold court on you, which is basically discipline for your failure to represent your neighborhood and act.

Q And is that, having viewed the video, is that consistent with what you saw on the video with the actions that the defendant took?

A Yes, and there's another caveat to that, if you stand -- if you fail to act, you get disciplined. But if you do act, and you take the challenge, and you confront the challenge, and you represent your neighborhood, you gain status within your subculture and just like how we go to work, and we try to do our best in order maybe get a promotion, and so forth, in the gang subculture by acting and representing your neighborhood and standing up for your gang you gain status and in this particular instance this would have elevated his status.

...

Q I want to just discuss briefly some of the, you know, and I discussed a little bit of this with Detective McNett as well, but I'm going to discuss briefly with you a couple of the things starting back with you indicated that prior to being a homicide detective you were with the gang unit.

A Yes

Q How long were you with the gang unit?

A Little over three years.

Q Okay. And so and part of your duties with the gang unit you obviously had very specific training in dealing with members of a gang.

A Yes.

Q And as you have stated a number of times, you used the word "culture" a number of times.

A Yes.

Q I mean, it is a completely different subculture than the ones that maybe that a juror or that you and I can understand or appreciate.

A Correct. I would agree with that.

Defense counsel then continued discussing gang culture with the witness, including disrespect and retaliation by gang members, none of which was relevant to a defense, but which was highly prejudicial to Mr. Alcaraz. Trial counsel injected the theme of this case with gangs and all of the negative connotations that go along with said evidence. The jury was inundated with this prejudicial evidence throughout the short trial.

The admission of gang evidence in this case had a “substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The jury likely convicted Mr. Alcaraz because he belonged to this gang, as portrayed by counsel, and not based on the evidence in the case.

The gang evidence was largely irrelevant to the incident, and could have been redacted from the surveillance video if a motion were raised by defense counsel as to the same. Where defense counsel made the choice to introduce evidence of the defendant’s character, a claim that the defendant was thereby harmed is essentially a claim that his counsel was not acting as counsel guaranteed by the Sixth Amendment should. Mr. Alcaraz respectfully requests a certificate of appealability be granted on this basis.

**B. Mr. Alcaraz’s Petition Should be Granted When Defense Counsel was Ineffective by Failing to Object to the Prosecution’s Separate Improper Closing Arguments as to the Fifth Amendment and Burden of Proof.**

Ground 1(2) as alleged was that defense counsel was ineffective in failing to object to the prosecution’s improper closing argument as to Mr. Alcaraz’s election to remain silent. Ground 1(4) as alleged was that defense counsel was ineffective in failing to object to the prosecution’s improper closing argument as to shifting the burden of proof to the defense.

As to Ground 1(2), the district court found that the claim was not “substantial” and that the prosecution did not improperly comment upon post-arrest silence. (*See* Doc. No. 81 in Case No. 2:13-cv-00818-JCM-BNW, *at* ECF page 14.) As to Ground 1(4),

the district court found that it could not be determined that the comments made by the prosecutor amounted to burden-shifting, and instead were “merely casting doubt on Alcaraz’s trial counsel’s closing argument by commenting that the evidence did not support the argument that [the victim] was the initial aggressor.” (*See* Doc. No. 81 in Case No. 2:13-cv-00818-JCM-BNW, *at* ECF pages 17-18.) As to Ground 1(4), the district court additionally found that even if trial counsel was deficient, there is a failure to demonstrate prejudice under *Strickland* when the jury received instruction regarding the burden of proof. (*See* Doc. No. 81 in Case No. 2:13-cv-00818-JCM-BNW, *at* ECF page 18.)

As to Ground 1(2), trial counsel failed to object to arguments that commented on Mr. Alcaraz’s Fifth Amendment right to remain silent:

[Prosecutor] If this truly was a case of self-defense, you would rest assure that the defense attorney would have been harping on that a lot more because the defendant would have even offered that as an excuse when he got caught. Not one time in that statement that you heard -- the second statement -- did he ever say: I had to do it in self-defense ‘cause I was worried. Not one time. And you know, just by listening to his statement, there was a lot more that he could have offered by telling Detective McNett or Detective Wallace, but he didn’t offer that. No. He just kind of sat there quietly.

But let’s take common sense and logic again. If this was done in self defense he would have stayed put right there waiting for police and say: Oh, my God. This guy -- I think he was gonna kill me. He said he was gonna kill me. It looked like he had a weapon. I had to kill him.

The prosecution is forbidden at trial to comment upon a defendant’s election to remain silent following his arrest and after being advised of his rights as required by



*Miranda v. Arizona*, 384 U.S. 436 (1966). Where a prosecutor's comments are meant to draw a negative inference or give meaning to an accused's silence, the comments are prohibited. Here, the prosecutor implied that the fact that he did not, that he remained silent was evidence against him that he did not act in self-defense. The comments by the prosecutor intended to imply to the jury that Alcaraz's silence should be used against him in violation of the Fifth Amendment. Trial counsel was ineffective in not objecting to said arguments, and a certificate of appealability should be granted on this basis.

As to Ground 1(4), during closing argument the prosecutor impermissibly shifted the burden of proof to Mr. Alcaraz:

[Prosecutor] First, of all, here's a man who's basically hanging out with an individual by the name of Elisa Pena. He's drinking beer. Where's the aggressiveness? They started trying to argue that this man was drunk, he was aggressive, he was brazen, he was in a bad mood. Where is that evidence? What he says is not evidence.

The testimony that you do have is that nobody was drunk and aggressive buying beer that night according to Miss Lopez, and so did Jose Cotila say, hey, he was in a pretty good mood that day. He was kind of laughing and they were just discussing about getting an air conditioning repaired. So where is this aggressive, brazen attitude that the defense is trying to argue? It's just not there.

The requirement of proof beyond a reasonable doubt in a criminal case is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372, 90 S. Ct. 1068, 1077 (1970) (Harlan, J., concurring). In recognizing the

government's burden of proving guilt beyond a reasonable doubt, courts have held that a prosecutor's comment may be so prejudicial as to shift the burden of proof. *United States v. Simon*, 964 F.2d 1082, 1086 (11th Cir. 1992).

It is impermissible to shift the burden of proof of any element of the crime. *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 2327 (1977); *Winship*, 397 U.S. at 364, 90 S. Ct. at 1072. The Due Process Clause of the Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364, 90 S. Ct. at 1073. The burden additionally cannot be constitutionally placed on a defendant to prove by a preponderance of the evidence that the killing occurred in the heat of passion on sudden provocation. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975).

Here, the prosecutor stated that Mr. Alcaraz needed to prove that the victim was drunk, aggressive, brazen and in a bad mood in order to not be found guilty at trial. The prosecution impermissibly sought to shift the burden of proof by forcing the defendant to prove that the killing was something other than in the heat of passion on sudden provocation. Mr. Alcaraz respectfully requests that a certificate of appealability be granted on this basis.

**VII.**

**CONCLUSION**

For the foregoing reasons, Mr. Juan M. Alcaraz respectfully asks this Court to grant this petition for writ of certiorari.

Dated: March 11, 2022.

Respectfully submitted,

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