

No.

IN THE SUPREME COURT OF THE UNITED STATES

RODTRAVION WOODS,

Petitioner

v.

GREG LEWIS, 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
Cal. State Bar No. 215323
Attorney for Petitioner
2625 Alcatraz Avenue, #233
Berkeley, CA 94705
(415) 699-1507
CJA Appointed Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Was petitioner prejudicially denied his constitutional right to the effective assistance of counsel when his counsel failed to impeach a critical government witness with available evidence?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Rodtravion Woods, 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The Ninth Circuit Court of Appeals affirmed the district court’s denial of habeas corpus relief in an unpublished decision. App. 1.¹ The order and judgment of the district court denying petitioner’s habeas corpus petition are unreported. App. 6, 7.

The California Court of Appeal affirmed petitioner’s conviction and sentence in an unpublished decision. App. 42. The California Supreme Court denied his petition for a writ of habeas corpus in an unpublished order. App. 40.

¹ “App” refers to the Appendix attached to this petition. “ER” refers to the Petitioner’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.

JURISDICTION

The final judgment of the Ninth Circuit Court of Appeals was entered on June 16, 2023.

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

CONSTITUTIONAL PROVISION 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.” The Sixth Amendment of the United States Constitution provides that a criminal defendant shall have “the assistance of counsel” for his defense.

STATEMENT OF THE CASE

A. State Court Proceedings

On June 2, 2010, a Los Angeles County Superior Court jury convicted Woods of one count of premeditated attempted murder (Cal. Penal Code §§ 187(a), 664), one count of shooting from a motor vehicle (Cal. Penal Code §12034(c)), and one count of possession of a firearm after having been convicted of a felony (Cal. Penal Code §12021(a)(1).) The jury also found true the allegations that the crimes were committed for the benefit of a gang (Cal. Penal Code § 186.22 (b)) and that a principal used a firearm in the commission of the crimes causing great bodily injury (Cal. Penal Code § 12022.53 (d)(e)(1).) On July 27, 2010, the trial court sentenced Woods to a prison term of five years plus forty years to life. 1 CT 207-210; 212-215.

On August 10, 2011, the California Court of Appeal affirmed the judgment and issued an order denying the related petition for a writ of habeas corpus. 1 ER 48, 49. Woods' petition for a writ of habeas corpus filed in the California Supreme Court was denied without comment or citation to authority on July 31, 2013. 1 ER 47.

B. Federal Court Proceedings

Woods timely filed a petition for writ of habeas corpus in the district court on July 31, 2013. CR 1. On December 6, 2013, respondent filed his answer. CR 11. On June 25, 2014, the district court denied the petition on the merits. 1 ER 13-16. This Court issued a certificate of appealability on March 13, 2015. I ER 1. On November 18, 2015, the Ninth Circuit Court of Appeals denied Woods' motion to stay these proceedings pending additional state court exhaustion, without prejudice to refile with a written indication that the district court would consider a motion for relief from the judgment in the district court. Docket No. 19. On August 24, 2016, Woods filed his motion for a written indication from the district court. *Woods v. Lewis*, District Court Case No. 2:13-cv-05524-JFW-SS, Docket No. 41.

On August 10, 2017, the Court of Appeals conducted oral argument. On August 17, 2017, the Court of Appeals issued an order staying consideration of the appeal pending the outcome of Woods' second round of petitions for a writ of habeas corpus filed in the state courts. On April 12, 2023, the Court of Appeals conducted a second round of oral arguments. On June 16, 2023, the Court of Appeals denied the appeal. App. 1.

STATEMENT OF FACTS

A. The Shooting

On July 3, 2009, at about 7:35 p.m., Los Angeles Police Officer Mark Horta responded to a report of a shooting, and found Delorian Forman lying on the ground with a bullet wound to his abdomen. RT 136-37. Forman was taken to a hospital where his injuries were treated and he had surgery to remove his spleen. RT 84-85.

B. Forman's Preliminary Hearing Testimony

At the preliminary hearing, Forman admitted that he is a member of the Rollin' 30's Crips gang. II ER 96. Forman testified that at about 7:30 p.m. on the date of the shooting, he was "chilling" with friends on the corner of 36th Street and 7th Avenue in Los Angeles. II ER 92. A car pulled up. When asked to describe it, Forman said "I think it was like a black car." He could not see how many people were inside. II ER 93.

Forman testified that he "was in a vehicle" when the black car pulled up, but when asked to describe what kind of vehicle he was in, Forman said "I don't even remember." II ER 94. Forman said he recognized Woods as the driver of the black car and also identified him in court. II ER 94. Forman also identified the photo line up form where he had previously identified Woods. II ER 105-106.

When asked if he knew Woods at the time of the shooting, Forman said "I knew of him." II ER 95. When pressed on that point, Forman testified, "Like, I don't know [Woods] like that but I know of him." The prosecutor asked:

Q: Had you seen him places before?

A: No

Q: Had you heard people reference him before?

A: No.

Q: You just knew of his existence?

A: Mm hmm.

The Court: Is that yes?

Q: Is that yes?

A: Yes.

II ER 95.

When asked if he had heard that Woods was associated with "some group of people," Forman replied "Yeah, he is supposedly from some gang . . . I think Families" II ER 96.

When asked what happened after Woods pulled up in the black car, Forman said "We had words, then he just started shooting." II ER 97. When asked what Woods had said to him, Forman replied "I really don't remember what he asked me, but we had some words and he started shooting." II ER 97. Forman then said that the argument was "about a confrontation we had prior to this." II ER 98. During cross examination, Forman changed his story and denied that he had said anything to Woods immediately prior to the shooting. II ER 110.

When asked when his previous confrontation with Woods had occurred, Forman testified "I'm not really sure." II ER 98. He then said it was "months to weeks" or a "a week to a couple of weeks" before the shooting. Forman said the confrontation was "about him being an enemy in my hood." II ER 98. Others had intervened during the confrontation. When asked what those other people did to intervene, Forman said "I don't know." Then he said "Well, some of my friends told me to chill it out." II ER 102.

When asked "Did you know or did you know of at the time of the shooting . . . did you know what type of car the defendant normally drove,?" Forman replied "No." II ER 103. When asked "Did you ever know him to be associated with some type of Camaro?" Forman replied "Not really." II ER 103.

When asked if he recalled being interviewed by police at the hospital, Forman said he had "Not much memory, but some sort." II ER 104. When asked if he remembered telling an

officer that he had been shot by a person who drove a green Chevy Camaro, Forman said "Might have." II ER 104.

When pressed as to whether he knew of any connection between Woods and a green Camaro, Forman said "I know he's from a car club, but I didn't really know what car he drove." II ER 104.

Forman testified that the previous conflict between him and Woods had been "face to face." When asked again if the argument on the date of the shooting had been about the prior confrontation, Forman said "Kind of." II ER 99. The testimony continued:

Q: He said to you that you were supposed to be looking for him?

A: Yeah, about a year or something, I guess. People was telling him I was looking for him.

Q: He said something to you along the lines of "I heard you're looking for me?"

A: Yeah

Q: Something like that?

A: Yeah, something like that.

II ER 99.

Forman testified that he replied to Woods "If I was looking for him then I would have, he would have saw me already . . . Then he started shooting." II ER 99.

On cross examination, Forman said that the shooter went by the street name D-Mac. II ER 110. Forman insisted that the shooter had said he was "D-Mac or B-Mac from Inglewood Families" as he drove away from the scene of the shooting. II ER 114.

Forman admitted he had smoked marijuana on the day of the shooting, but insisted that he had smoked only one joint that day "way earlier." II ER 108-109.

C. Forman's Trial Testimony

At trial, Forman also testified that he is a member of the Rollin' 30's Crips gang. II ER 134, 152-53. About two weeks before the shooting, Forman met Woods at a meeting of the Flawless Car Club, which was on the same block where the shooting occurred. II ER 133-34. Forman told Woods he was a member of the Rollin' 30s and asked Woods where he was "from." Woods said he did not "gang bang" but then said he was from "Family," which is a gang from Inglewood that is a rival of the Rollin' 30s gang. II ER 134-36; 106. The two men argued but other car club members intervened and they did not fight. II ER 136.

On the night of the shooting, Forman saw Woods at a car wash with a woman in a black Chevrolet Malibu. II ER 128. Forman knew that Woods drove a green Camaro. II ER 147.

About a half hour later, at 7:30 p.m., Forman was "rolling a blunt" of marijuana in a white 1999 Chrysler that was parked at 36th Street and 7th Avenue. 2 RT 76. Forman **was in the** Chrysler with his friends Rashad Howard and Christopher Lewis. II ER 123-24, 160.

Woods pulled up in a black car with Hello Kitty seat covers and called Forman, who then approached Woods on foot. II ER 124-25, 129. Woods said "Hey, What's up?" "I heard you were looking for me." II ER 129. Forman replied "If I was looking for you, I would have been done found you." II ER 130. Woods then fired four or five shots at Forman, striking him once in the abdomen. II ER 130-31. Afterwards, Woods said "I'm B-Mac from Inglewood Family." II ER 163. Forman said the shooter had star tattoos on his arms. II ER 138.

Los Angeles County Police Officer Paul Fedynich testified that, while hospitalized, Forman described the shooter as a person named "D-Mac" who drove a green Camaro and belonged to the Flawless Car Club. 2 RT 100-101; 130; 3 RT 249. "D-Mac" was the street name

of an Inglewood Family gang member named Donte Woods. When presented with a photographic lineup that included Donte Woods' photograph, Forman did not identify him as the shooter. RT 248-49.

Officer Fedynich reviewed an internet site for the Flawless Car Club and found that appellant, Rodtravion Woods, was the registered owner of a green Camaro. 3 RT 250. When presented with a photographic line up that contained Woods' photograph, Forman identified Woods as the shooter. 3 RT 251-252. Forman said he was one hundred percent sure that Woods was the person who shot him. 2 RT 95; 3 RT 252. Forman later identified a photograph of Woods' girlfriend, Lanica Flemming, as the person who was with Woods at the car wash. 2 RT 96-97; 3 RT 256-258.

Detective Fedynich testified that Woods had star tattoos on his arms. 1 RT 100, 3 RT 250, 295. His girlfriend Lanica Fleming owned a black Chevy Malibu with "Hello Kitty" seat covers. 1 RT 99, 3 RT 332. When officers searched Woods' home, they found several pieces of red clothing, which was a color associated with members of the Inglewood Family gang. 3 RT 253-264; 2 RT 152, 164.

Forman later identified a photograph of Lanica Fleming's black Chevrolet Malibu as the car Woods was driving at the time of the shooting. 2 RT 98-99; 3 RT 255-256.

When police officers attempted to serve Forman with a trial subpoena, he said "Fuck you" and "I'm not going." 2 RT 104-105, 121. When he failed to appear in court, the prosecutor requested a material witness warrant. Forman was arrested and the prosecutor asked that he be booked into the county jail:

You know, Judge, just moments ago when I was talking to Mr. [Forman] outside in the hallway about his appearance, he thought the whole thing was a joke. He said I wasn't served the subpoena, he didn't hand it to me. I said well you told the police officers to "F off yesterday." He said that's just the kind of day I was having. And I said they knocked on the door this morning. He said I had a rough night. I overslept. And he was full of excuses. And I just don't trust he will return on his own volition. 1 RT 34. The trial judge granted the prosecutor's request and Forman was held in custody until after he testified. 1 RT 34-35; 2 RT 75-76.

D. Cell Phone Service and Tower Evidence

Prosecution witness Melanie Caldwell was a custodian of records and subpoena compliance technician for cellular service provider T-Mobile. II ER 276-77. Caldwell testified that according to the cellular service records, Woods' cell phone connected to a cellular service tower at 3125 West 54th Street at about 6:45 p.m. on the night of the shooting. II ER 283-290. Caldwell also testified that at 7:35 p.m. (about five minutes after the shooting) there was a 30 second outgoing call from Woods' cell phone to the T-Mobile company's general voice mail access retrieval number. II ER 302, 311, 316-17. Moreover, Woods' cell phone was used to send and receive text message starting at about 8:49 p.m. II ER 303.

At 9:13 p.m., Woods' cell phone had contact with a cellular service tower on 85th Street in Alhambra. II ER 3 RT 304. Between 9:40 and 9:58, calls from the phone were routed through various cellular service towers in Ontario and Fontana. II ER 3 RT 289-91.

Defense expert John Cosgrove, an engineer and cell phone technology expert, testified that the call made from Woods' cell phone to the voice mail retrieval number at 7:35 p.m. was not made using Woods' cell phone. II ER 337, 352, 355. Because the voice mail access call was

not routed through a cellular service tower, "it had to be done remotely." II ER 338. A call was made from Woods' cell phone to his father's number at about 9:13 p.m. At that time, the phone was traveling east on the I-10 freeway, between East Los Angeles and Alhambra. II ER 359.

E. Gang Expert Testimony

Based on Woods' tattoos, his association with gang members and clothing and property found in the search of his home, Detective Kerry Tripp, a prosecution gang expert opined that Woods was an Inglewood Family gang member. 2 RT 166-167; 181-183, 194.

F. Woods' Trial Testimony

Woods presented an alibi defense: that he was with friends in his girlfriend Lanica Flemming's car en route to Ontario on July 3, 2009, at 7:30 p.m., when the shooting occurred. Although Woods knew Forman, they were not enemies. II ER 204-214.

Woods also denied that he was a gang member. II ER 183. He explained that his tattoos were not gang related, but referred to his family members and to his residence in Inglewood. II ER 186. He knew members of the Inglewood Family Blood gang because his daughter lived in that gang's "area," his mother works there, and he had attended school with people from that area. II ER 184.

Woods testified that he had first met Forman, in the area of 36th and 7th Avenues. II ER 204. Forman stared at him and asked Woods "Where are you from." Woods replied that he did not belong to a gang but that he was a member of the Flawless Car Club. Forman said that he belonged to the Rollin' 40's Crips. Id.

Another day, Forman had pulled up next to Woods at an intersection and challenged him to a race. II ER 205-06. There was no hostility between them. Id. A couple of weeks later,

Forman again pulled up next to Woods' car and warned him that a couple of cars had been vandalized around the corner and to "watch out" for his car. II ER 206-07. The two men shared some "weed" that Forman had in his car. II ER 207.

Woods next saw Forman at a carwash fund raising event on the date of the shooting, July 3, 2009. II ER 207-08. Forman was in a white car with two other people. II ER 248. Woods was with his girlfriend, Lanica Fleming, in her black Chevrolet Malibu. Woods and Fleming were planning to go to Las Vegas for the Fourth of July weekend. II ER 207-208, 212-13, 222.

At the carwash, at about 5:10 p.m., Woods put his cell phone in his friend Derrick Smith's car so that he could use Smith's cell phone charger. II ER 226. Woods and his friends Lanica Fleming, Devin Bush, and Lanica's sister then drove to Bush's house. Woods inadvertently left his cell phone in Smith's car when he left the car wash with his friends. The group stayed at Bush's house with Bush's mother for about 20-25 minutes. II ER 210-211. During that visit, Woods used Bush's cell phone to send text messages and to call his own phone in order to communicate with Smith, who still had Woods' cell phone. II ER 211-12.

The group left Bush's house in Lanica Fleming's car and at about 8:15 p.m., they arrived at a party at the El Torito restaurant in Ontario, where they saw Wood's mother Terry Green and some other acquaintances. II ER 213-14. Woods' group planned to drive to Las Vegas after the party. II ER 212.

Shortly after he arrived at the El Torito restaurant, Woods left in his mother's car and drove to a highway off ramp where he met with Smith at about 9:10 p.m. and retrieved his cell phone. 3 RT 216, 227. As Woods returned to the restaurant with his cell phone, he received text messages from Lanica Fleming asking him where he was and "what was taking so long." II ER

217-18. After Woods returned to the El Torito restaurant in Ontario at about 10 p.m., he stayed there until around 10:30 p.m. II ER 217, 272.

Woods was "nowhere near" the scene of the Forman shooting when it occurred at about 7:30 p.m. Woods was on the highway in Lanica Fleming's car en route to Ontario at that time. II ER 218. He also denied that he had any hostile feelings toward Forman. Id. Woods had never been in a gang and he was not a gang member. II ER 219.

Woods admitted he had been previously convicted of one count of felony forgery and one felony count of willful discharge of a firearm or BB gun. II ER 257.

G. Alibi Witnesses

Woods' defense counsel called three witnesses to corroborate his testimony about his activities the night of the shooting. Devin Bush's mother, Terry Easter, testified that Woods was at her house with her sons Devin and Deon and a female friend that night. The group arrived before 6 p.m. and left before 7 p.m. 3 RT 373-380.

Woods' sister, Tiani Shell, and his mother, Regina Mikell, corroborated his testimony that he was at a party at the El Torito restaurant at 8:30 p.m. on the night of the shooting. Shell knew that Woods was planning to go to Las Vegas, which is where their father lives. 3 RT 389-406. Shell and Mikell were with Woods at the restaurant with Lanica Fleming, Devin Bush and Fleming's sister, Lanita. 3 RT 389. During the party, Woods borrowed his mother's car keys, left the restaurant and came back. 3 RT 406-407.

Shell also testified that the red shoe found in Woods' room belonged to her and that the red bandanna belonged to their grandmother. 3 RT 392-393.

H. Forman's Pre-Trial Statements to Anthony Jones That Woods Was Not the Shooter

While Woods was in custody awaiting trial, he met Anthony Jones, who was shooting victim Forman's friend and a member of the same gang that Forman belonged to. Jones and Forman had been friends for about seven years. III ER 442-43, 456-460.

Jones said that when he and Forman were at a mall, Forman got into an argument with a member of the Rolling 20's (aka "Black Pea Stones") gang. Jones told Woods that shortly after Forman was released from the hospital Forman told Jones and others that he had been shot by the member of the Rolling 20's gang who had argued with Forman at the mall. III ER 442-43, 458-59.

A defense investigator, Lee Baroni, interviewed Jones prior to trial, on January 15, 2010. During the interview, Jones told Baroni the same thing he had told Woods – that Forman said that a member of the Rollin' 20s/Black Pea Stones gang was the person who had shot him on July 3, 2009. II ER 458-60.

Jones told Baroni that he had known Forman for a long time and that they were both members of the Rolling 30s gang. According to Jones, Forman said that Woods was the shooter because Forman was jealous of Woods' vehicles and his attractive girlfriends. Forman was also afraid that the Rolling 20s gang would retaliate against him if he identified one of them as the shooter, so he identified Woods instead. III ER 458-59. Jones also said that Woods was not a gang member. III ER 458.

Woods' trial counsel arranged to have Jones transferred from prison to the local jail so that he could testify at Woods' trial. I ER79-84.

I. Although Defense Counsel Intended to Call Jones as His Star Impeachment Witness, He Failed to Lay the Necessary Foundation for Jones' Testimony

Under California Evidence Code § 1235, a witness's prior inconsistent statements are admissible both to impeach the witness and as substantive evidence of the truth of the matter asserted. However, such evidence is admissible only if the declarant is confronted with the inconsistent statement during his testimony. Cal. Evid. Code §§ 1235, 770; *People v. Brown*, 35 Cal.App.4th 1585, 1597-98 (1995).

When Forman testified at trial, defense counsel failed to ask Forman about his prior inconsistent statements to Jones. II ER 121 to 180. When Forman's testimony concluded, the trial judge excused him without indicating that he was subject to recall. II ER 180.

Jones was transported to court from custody to testify as a witness. I ER 79-84. However, when defense counsel attempted to call Jones to testify, the prosecutor objected, on grounds that defense counsel had not asked Forman about his prior inconsistent statements to Jones. I ER 79-80. The trial court ruled that because Forman was never asked about his prior inconsistent statements during his testimony, and because Forman had been excused as a witness, defense counsel was precluded from calling Jones to testify about Forman's statement that he had been shot by a Rolling 20's gang member, not by Woods. I ER 80-84.

Woods asked his counsel to recall Forman to testify. However, counsel said that it would be too difficult to get Forman to comply. III ER 443.

Defense counsel attempted to invoke an exception to California Evidence Code 770, arguing that Jones's testimony should be admitted because Forman's statements that Woods was not the shooter were essential to his defense and because the testimony should be admitted in the interest of justice. I ER 80-82. The trial judge found that because defense counsel had known

about Jones's testimony before trial, there was not good cause to excuse his failure to question Forman about his inconsistent statements. Accordingly, defense counsel was precluded from calling Jones as a witness. I ER 80-82.

After the guilty verdicts, defense counsel made a motion for a new trial, arguing that Woods should be allowed a new trial "in the interests of justice" because Jones had not been allowed to testify. I ER 75-76. The trial court denied the motion, on grounds that defense counsel had failed to lay a proper foundation for Jones's testimony by failing to question Forman about his prior inconsistent statements to Jones. I ER 77.

J. Defense Counsel Failed to Impeach Forman With Evidence That He Had Been Convicted of a Felony For Making Criminal Threats

About a year before Woods' trial, Delorian Forman was charged with one felony count of making criminal threats (Cal. Penal Code § 422) and one count of robbery (Cal. Penal Code § 211). III ER 471-72. On April 27, 2010, about one month before Woods' trial, Forman was convicted of making criminal threats. The robbery count was dismissed. III ER 472.

Woods' trial counsel, Edward Mizrahi, knew about the criminal charges against Forman. During pre-trial proceedings, Mizrahi asked Detective Fedynich:

It came to my attention that [Forman] had a case in this building, that came out as a misdemeanor perhaps in Department 127. Did you ever check to see whether or not he has got any kind of case at all either pending or that has been concluded? 1 RT 28.

The detective replied that Forman "did have a case" and that he had seen Forman in court in the last couple of weeks. The detective was "not sure" if the case had been concluded yet. 1 RT 28.

At trial, defense counsel cross examined Forman without making any attempt to impeach Forman's credibility with the evidence of his conviction for making a criminal threat. II ER to 121-180.

K. Post-Trial Interviews of Trial Counsel

During a post-trial conversation with Woods's state appellate counsel, Christopher Darden, trial counsel Edward Mizrahi said "I really screwed up. I forgot to lay the foundation for the admission of a statement. The judge wouldn't let our best witness testify." Darden's declaration about the conversation also states:

[Mizrahi] is an elderly gentleman. When another attorney approached, [Mizrahi] spoke of his recently deceased wife. During petitioner's trial, counsel's wife was apparently dying and it was clear from his comments that he was distracted from his work during that time.

III ER 463.

Woods' state habeas corpus counsel, R. Randall Riccardo, attempted to interview Mizrahi about his representation of Woods. Riccardo was apparently unaware that witness Forman had been convicted of making criminal threats and not robbery. Riccardo's declaration states:

On August 20, 2012, I had a telephonic conversation with Mr. Mizrahi in response to the letter I sent August 15, 2012. I asked Mr. Mizrahi why he failed to impeach Mr. Forman when he was on the stand, with his prior conviction for robbery. Mr. Mizrahi replied that it had been a long time since the trial and he could remember nothing. Mr. Mizrahi then hung up the phone before I could say anything further. III ER 466.

REASONS FOR GRANTING THE PETITION

I. This court should grant certiorari because the memorandum decision conflicts with this Court's precedents requiring appointed counsel to present exculpatory impeachment evidence at trial

A. The Sixth Amendment right to effective assistance of 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).

The California Court of Appeal's order denying Woods's petition conflicts with this Court's precedents concerning the right to effective assistance of counsel. Because counsel had a duty to present Anthony Jones's testimony impeaching Forman's testimony identifying Woods as the shooter and because counsel was deficient when he failed to impeach Forman with his criminal threats conviction, the Court of Appeal's analysis unreasonably applied *Strickland*. See *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982) ("At the heart of effective representation is the independent duty to investigate and prepare."); 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1203 1982 Supp.) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts

relevant to the merits of the case....").

The Court of Appeal's conclusion that Woods was not prejudiced by counsel's error also unreasonably applied *Strickland* because Forman's testimony was essential to the prosecution's case. The Court of Appeal reasoned that Forman's testimony had been consistent, which unreasonably determined the facts as Forman's account of the shooting had changed over time and even shifted repeatedly during his sworn testimony.

In summary, the California Court of Appeal's rationale that Woods was not prejudiced by counsel's omissions is contrary to this Court's decisions in *Strickland* and its progeny.

Accordingly, this Court should grant certiorari and grant the writ.

B. The decision affirming the denial of habeas relief conflict with Ninth Circuit's published opinions in *Howard v. Clark*, *Lord v. Wood* and other cases holding that counsel was deficient for failing to present defense evidence

This Court should grant certiorari to resolve the conflict between the memorandum opinion in this case and the Ninth Circuit's opinions in *Howard v. Clark*, 608 F.3d 563, 566-67 (9th Cir. 2010) and *Lord v. Wood*, 184 F.3d 1083, 1095 (9th Cir. 1999).

In this case, trial counsel admitted to appellate counsel that he was unprepared for Woods's trial. The Ninth Circuit's memorandum opinion and the California Court of Appeal opinion do not acknowledge counsel's admission, focusing instead on an argument that counsel's omissions were harmless.

However, it is not possible to fully analyze the harm flowing from counsel's omissions when counsel himself admitted he was unprepared for trial. Under those circumstances, the record that could have demonstrated the harm flowing from counsel's deficiencies is itself truncated and unavailable for fair review.

Failing to pursue “an important avenue of impeachment as to the prosecution’s “star witness” is prejudicial. *Cargle v. Mullin*, 317 F.3d 1196, 1215 (10th Cir. 2003); *see also Reynoso v. Giurbino*, 462 F.3d 1099, 1110-15 (9th Cir. 2006); *Driscoll v. Delo*, 71 F.3d 701, 709-10 (8th Cir. 1996).

Other Circuits have likewise held that trial counsel's failure to present impeachment evidence is prejudicial. *Brown v. Smith*, 551 F.3d 424, 431-32 (6th Cir. 2008)(counsel's failure to obtain primary witness's counseling records that would have impeached her testimony was prejudicial); *Ramonez v. Berghuis*, 490 F.3d 482, 489 (6th Cir. 2007)(failure to impeach witnesses with biases and inconsistencies was prejudicial); *Raygoza v. Hulick*, 474 F.3d 958, 964-65 (7th Cir. 2007)(failure to impeach eyewitnesses with alibi evidence was prejudicial); *Griffin v. Warden*, 970 F.2d 1355, 1358 (4th Cir. 1992)(“failure to call witnesses to contradict eyewitness identification of defendant” was prejudicial).

Certiorari should be granted because the decisions in this case conflict with those holding that a defendant is prejudiced when his counsel failed to subject the prosecution's case, which relied almost entirely on one witness’s identification of petitioner as the shooter, to meaningful adversarial testing through necessary impeachment of that witness’s credibility. Although in isolation, each failure to impeach might not be sufficiently prejudicial, the cumulative effect of counsel's failure to impeach in all the above areas was prejudicial.

In summary, this Court should grant certiorari because the memorandum decision in this case conflicts with this Court's precedents as well as Circuit precedents that requires appointed trial counsel to present impeachment evidence at trial.

Argument

I. Trial Counsel Was Prejudicially Ineffective Because He Failed to Lay The Foundation to Present The Impeachment Testimony of Anthony Jones

A. 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 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).

B. The Court of Appeal Held Correctly That Trial Counsel's Failure to Impeach Forman Fell Below Professional Norms

Woods' claim that trial counsel was ineffective for failing to lay the necessary foundation to call Jones as a witness was presented on direct appeal and in his petitions for a writ of habeas corpus filed in the state courts. On direct appeal, Woods argued that trial counsel was prejudicially ineffective for failing to lay the necessary evidentiary foundation to impeach Forman with Jones' testimony, i.e., counsel failed to ask Forman if he had told Jones that another person was the shooter. Respondent's Lodged Record No. 1, Appellant's Opening Brief, *People v. Woods*, California Court of Appeal Case No. B226542, pp. 16-26. Woods also argued that his alibi defense was credible, as he could not have shot Forman in Inglewood at 7:30 p.m.

and arrived in Ontario by 8:15 p.m., given the fifty mile distance and the congested traffic patterns in Los Angeles, particularly on the Fourth of July holiday weekend. *Id.* at p. 25.

The Court of Appeal Opinion acknowledged that Mizrahi's failure to lay the foundation for Jones' impeachment testimony appeared to have fallen below professional norms. I ER 68. However, the Court of Appeal denied the claim on grounds that Woods had suffered no prejudice. I ER 69-70.

The Court of Appeal also reasoned that there was a "critical defect" in Woods' alibi defense, that is, the T-Mobile cellular telephone service records "showing that the 9:13 p.m. call originated in the Los Angeles-Alhambra area discredited the testimony of Woods and his alibi witnesses that he was in Ontario at the time of the call." I ER 70.

Finally, the Court of Appeal reasoned that because Woods testified that he and Forman had no animosity between them, there was no reason that Forman would have falsely accused Woods. I ER 70.

Woods' petition for a writ of habeas corpus filed in the California Supreme Court raised the same claim, asserting that trial counsel was ineffective not only due to his failure to lay the foundation for the impeachment of Forman, but also for failing to attempt to re-subpoena and recall Forman as a witness in order to remedy the error after Forman was excused. III ER 382, 413. The California Supreme Court denied the claim without comment or citation to authority. I ER 47.

The district court denied the claim on the same grounds cited by the Court of Appeal: that Forman's account of the shooting had been consistent and that Woods' alibi was flawed. I ER 31-32, 38.

The district court acknowledged that if Woods was in Ontario at 8:30 p.m. as the alibi witnesses testified, it was unlikely that he could have been the person who shot Forman in Inglewood at 7:30 p.m. I ER 38-39. However, Woods had testified that he called his father from his own cell phone at 9:14 p.m. the night of the shooting. The district court reasoned that experts had testified that the phone was in Alhambra at that time. Accordingly, the district court held that Woods could not have been in Ontario from 8:30 to 10:00 p.m. I ER 38.

As set forth in more detail below, the Court of Appeal unreasonably determined the facts and unreasonably applied *Strickland* when it held that Woods was not prejudiced by counsel's errors. First, Forman's statements about the charged events were not consistent or stable over time. Forman not only gave inconsistent sworn testimony on several important facts about the shooting, he also identified at least two other people as the shooter, a person named "D-Mac or B-Mac" and a member of the Rolling 20s/Black Pea Stones gang.

Moreover, Woods' cellular service records did not contradict Woods' testimony or that of his alibi witnesses. As set forth in more detail below, the Court of Appeal and the District Court misapprehended the trial testimony when they found that the cellular service records contradicted the alibi evidence.

C. Because The Credibility of Forman's Testimony That Woods Was the Shooter Was The Sole Contested Issue at Trial, Woods Was Prejudiced When His Trial Counsel Failed to Impeach Forman's Testimony

Under *Strickland*, a petitioner is prejudiced by his counsel's omissions if there was a "reasonable probability" that counsel's failures affected the verdict. A verdict "only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland, supra*, 466 U.S. at 696; *Thomas v. Chappell*, 678

F.3d 1086, 1106 (9th Cir. 2012)(petitioner was prejudiced by trial counsel's failure to call corroborating witnesses).

Here, counsel's failure to impeach Forman with his prior statement identifying another person as the shooter and with his conviction for making criminal threats must be considered in light of the charges, the prosecution evidence and petitioner's defense. *Hart v. Gomez*, 174 F.3d 1067, 1072-73 (9th Cir. 1999).

Here, the identity of the shooter was the most important issue at Woods' trial. Because the only evidence identifying Woods as the shooter was Forman's testimony, the verdict was necessarily based on Forman's credibility.

1. The Court of Appeal's Conclusion That Forman's Statements About the Shooting Were Consistent and Credible Was Objectively Unreasonable

A state court's fact finding may be objectively unreasonable when the court "plainly misapprehends or misstate the record in making their findings" or where the state court "has before it, yet apparently ignores, evidence that supports petitioner's claim." *Taylor*, 366 F.3d at 1000-01. "Only after the state court's fact-finding process survives this "intrinsic review" are they "dressed in a finding of correctness " *Id.* at 1000.

Here, the Court of Appeal unreasonably determined the facts when it held that there was not a reasonable likelihood that Forman's credibility would have been impaired by the impeachment testimony of Anthony Jones or evidence of Forman's conviction for making criminal threats.

The Court of Appeal misapprehended the record when it found that Forman's statements about the shooting had been consistent over time. I ER 70.

First, Forman's testimony at the preliminary hearing was inconsistent with his trial testimony as to several important points.

At the preliminary hearing, Forman testified that he had never met Woods before the date of the shooting, but only "knew of his existence." II ER 95. Then, Forman changed his story and said they had been involved in a face to face confrontation once, weeks or months before the shooting. II ER 99. At trial, Forman claimed he had seen Woods at a car wash on the date of the shooting and had been in a confrontation with him two weeks earlier. II ER 127-28. When confronted at trial with the transcript of his inconsistent testimony at the preliminary hearing where he said he had not met Woods before the shooting, Forman said "I remember saying it that day but that's not true." II ER 159.

At the preliminary hearing, Forman denied being aware of any connection between Woods and a green Camaro. II ER 104. At trial, Forman testified that he had known that Woods drove that kind of car. II ER 147. According to Detective Fedynich, Woods was selected as a possible suspect in the shooting because he drove a green Camaro. RT 249-251.

There were numerous other inconsistencies between Forman's preliminary hearing testimony and his trial testimony. At the preliminary hearing, Forman said he had smoked one marijuana joint "way earlier" in the day prior to the shooting. II ER 109. At trial, he said he had two joints that day, and that he had been smoking marijuana and rolling a "blunt" when the black car drove up. II ER 160-61.

Forman also testified at the preliminary hearing that he could not recall what kind of car he himself had been sitting in prior to the shooting. II ER 94 At trial, he said he was in a white 1999 Chrysler. II ER 152.

Forman's preliminary hearing testimony was also internally inconsistent. He testified that he and Woods had exchanged "words" before the shooting. II ER 97. In the same hearing, he testified that he had said nothing to Woods before the shots were fired. II ER 110.

Moreover, even though Forman said he and Woods met face to face before the shooting, Forman told the police that the shooter was a person named "D-Mac" II ER 110. According to Detective Fedynich, "D-Mac" was the street name for a gang member named Donte Woods. 3 RT 247-248. There was no evidence that Rodtravion Woods had ever used the name D-Mac. III RT 260.

Prior to trial, Forman also told Anthony Jones that the shooter was not Woods, but a different person who was a member of the Rolling 20's/Black Pea Stones gang. III RT 279-280; II ER 373. The Court of Appeal Opinion unreasonably determined the facts because it failed to even acknowledge the evidence contradicting its finding that Forman had given a consistent account of the shooting. *Taylor*, 366 F.3d at 999.

Finally, Forman's conduct before and during trial contradicted the Court of Appeal's holding that he was a firm and unwavering witness. Forman had flatly refused to testify and had responded with obscenities when served with a subpoena. II ER 152. According to the trial prosecutor, Forman viewed the trial as a "joke" and he had to be incarcerated in order to assure his appearance at trial. RT 34. All of those facts contradict the Court of Appeal's holding that Forman's credibility could not have been impeached due to the "firmness" of Foreman's account. I ER 70.

For all of these reasons, the Court of Appeal unreasonably determined the facts when it found that, because Forman's testimony was consistent and stable, there was no prejudice arising

from counsel's failure to impeach Forman with evidence of his prior inconsistent statements and his criminal conviction.

E. The Court of Appeal Unreasonably Determined the Facts When It Held That Woods' Cell Phone Records Contradicted His Alibi

The Court of Appeal held that Woods was not prejudiced by counsel's omissions, because his alibi defense was "fatally undermined by a critical defect unrelated to Jones' proffered testimony. The Court held that "the T-Mobile cellular telephone service records showing that the 9:13 p.m. call that originated in the Los Angeles-Alhambra area discredited the testimony from [Woods] and his alibi witnesses that he was in Ontario at the time of the call." I ER 70. The Court of Appeal's analysis on that point, repeated by the district court, misconstrues the record. No witness testified that Woods retrieved his cellular telephone in Ontario or that he was in Ontario when he called his father at 9:14 p.m..

Woods testified that he and his friends had arrived at a party at an El Torito restaurant in Ontario at around 8:10 p.m. II ER 214. Woods then left the party in his mother's car to retrieve his cell phone from Derrick Smith. II ER 215-216. Woods' mother also testified that Woods left the restaurant in her car to get his cell phone from Smith. 4 RT 408-409.

Woods met Smith on a highway off-ramp at about 9:10 p.m., where Smith returned Woods' cell phone. II ER 216. Neither the prosecutor nor defense counsel asked Woods to specify the exact time he left the party at the restaurant or the exact location of the off ramp where he picked up his phone from Derrick Smith. The prosecutor asked Woods if he had left the restaurant at 9:10 p.m. and he denied that he had said that. II ER 267.

However, assuming Woods left the party around 8:30 p.m., and traveled at a typical highway speed of 60 miles per hour from Ontario toward Alhambra, Woods would have arrived

in the Los Angeles-Alhambra area at about 9:10 p.m, which is the time he said he picked up his phone from Smith on an off ramp. Accordingly, Woods' description of his activities on the night of the charged incident was consistent with the cellular service records showing a call handled by Alhambra area cellular service towers at about 9:14 p.m.

During cross examination, Woods was about to explain why the 9:14 p.m. cell phone call had connected to a service tower in Los-Angeles-Alhambra but he was interrupted by his counsel's objection. When the prosecutor asked Woods "If you are out in Rancho Cucamonga at 9:00 o'clock, 9:15, and you have your phone and you are calling your Dad, can you explain how your phone is pinging off cell towers in L.A?," Woods replied "I can explain it sir." RT 434-435. Defense counsel objected on grounds that Woods did not have the expertise to answer the question and the objection was sustained. Id.

The prosecutor's question was unfair, because it assumed a fact not in evidence. No witness had testified that Woods had called his father from Rancho Cucamonga. If Woods had been given the opportunity to respond, he could have pointed out that he testified that he left the El Torito restaurant in Ontario at some point after 8:10 p.m. in his mother's car, and that he picked up his cell phone from Smith at a highway off ramp at about 9:10 p.m., and that he had called his father from the highway a few minutes later. II ER 215-216. Woods described the off ramp as being "the off-ramp of whatever street that was to get off the freeway going to Ontario." II ER 216.

The mistake concerning the location of the cell phone exchange may have occurred because of a confusing question the prosecutor asked Woods about his cell phone records during cross examination:

Q: See the call after that when column after that says “call started” on July 3rd at 10:15 and 9 seconds and ended at 9:14 and 23 seconds, see that?

A: Yes

Q: You made the call, correct?

A: Yes.

Q: You made the call back in Ontario, when you got your phone back?

A: Yes.

II ER 258.

Woods’ answer to that question is unclear, because a call could not have begun at 10:15 p.m. and ended at 9:14 p.m. Because Woods arrived back at the El Torito in Ontario at about 10 p.m., (II ER 272) any calls that he made at 10:15 p.m. would have originated in Ontario. Because the prosecutor described the call as beginning at 10:15, Woods’ testimony that he made the call from Ontario did not contradict his alibi.

Finally, no expert testified to the precise location of Woods’ cell phone at any time. There are many variables that determine which cellular service tower that will handle a particular call, including cell service traffic, weather, geography, and the cellular service provider’s software. See Aaron Blank, “The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of a Cellular Phone” *Richmond J. of L. & Tech.*, 3 <http://jolt.richmond.edu/v18i1/article3.pdf>.

The prosecutor’s questioning of defense expert witness John Cosgrove, an electrical engineer, suggests that the prosecutor did not recall the testimony that Woods drove to a

highway off ramp to pick up his cell phone from Derrick Smith. The prosecutor apparently had a mistaken impression that Smith drove to the El Torito restaurant in Ontario to give the phone to Woods. The prosecutor asked Cosgrove:

Q: Now, Mr. Woods got his phone back at 9:00 o'clock, correct?

A: I estimated it was some time after 9:00

Q: And that was in Ontario, right, where he got his phone back?

A: No. Actually it was probably closer to Alhambra.

Q: He didn't get his phone back at the El Torito out in Ontario?

A: . . . But recall that he received the phone back, not from the people in Ontario, but from the person who had it, namely Derrick Smith, and that meeting was not in Ontario, to my understanding, and the records show that.

Q: To your understanding it wasn't in Ontario?

A: He retrieved the phone from his friend sometime after 9:00. And there was no statement about his being in Ontario when he actually received the phone back from his friend. There was never any statement that was so.

Q: And then he went to Ontario after that?

A: That is what the records show about 30 minutes later. He is shown he initiated cell traffic from Upland and from Rancho Cucamonga, apparently while traveling.

II ER 356-57.

The Court of Appeal made the same mistake when it analyzed the prejudice that arose from defense counsel's error in failing to lay the foundation for Jones' impeachment of Forman. The Court of Appeal and the District Court erroneously assumed that Woods and his witnesses had testified that he had remained at the Ontario El Torito restaurant from the time he arrived at about 8:10 p.m. until after 10:00 p.m., and that he had obtained his phone from Smith in Ontario.

I ER 22, 37, 39 (“Accordingly, the evidence does not support Petitioner’s claim that he was in Ontario from 8:30 p.m. to about 10:00 p.m.”); I ER 54 (finding that Woods “met Smith in Ontario” to get his cell phone); I ER 68, 70.

Those factual findings are contrary to the record because no witness testified that Woods received his phone from Smith at the El Torito restaurant in Ontario. Woods had left the El Torito restaurant in his mother’s car and drove to an off-ramp, where he picked up the phone from Smith.

Because Woods likely travelled back toward Los Angeles to obtain his phone from Smith, and he called his father only a few minutes after retrieving the phone at 9:10 p.m., the T-Mobile cellular phone records of that call and the cellular tower site data do not contradict the alibi testimony, they corroborate it. As a result, the Court of Appeal’s conclusion that Woods’ alibi suffered from a fatal defect because it was contrary to the cellular service tower record data is objectively unreasonable.

For all of these reasons, the Court of Appeal’s analysis of the prejudice arising from trial counsel’s omissions was based on an unreasonable determination of the facts. This Court should grant certiorari, review the issue of prejudice de novo and grant the writ.

CONCLUSION

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

Dated: _____

Respectfully submitted,

Stephanie M. Adraktas, State Bar # 215323
CJA Appointed Attorney for Petitioner
Rodtravion Woods