IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

TERM 2024

23-6343

PATRICK BOWIE, Petitioner

v.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Petitioner Patrick Bowie respectfully petitions for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Second Circuit.

QUESTION(S) PRESENTED FOR REVIEW

1. Is the right to confrontation violated when inculpatory letters, turned over to the People by a non-testifying witness, are admitted into evidence without either an oral or written statement by a handwriting expert? Crawford v. Washington, 541 U.S. 36 (2004)

2. Did Defense Counsel render ineffective assistance when he failed to object to the admittance of unauthenticated letters which were inculpatory towards Petitioner? Strickland v. Washington, 466 U.S. 668, (1984)

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The opinion of the United States Court of Appeals for the Second Circuit is not reported (A2). The opinion of the United States District Court is reported at 2021 WL 6127048.

JURISDICTION

The United States Court of Appeals entered its decision on October 12, 2022. A copy of that decision appears in the Appendix at A2. An extension of time to file the petition for a writ of certiorari was granted to and including...The jurisdiction of this Court is invoked under 28 U.S.C. §1251(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him;...and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "...nor shall any State deprive any person of life, liberty or property, without due process of law."

THE STATEMENT OF THE CASE

1) This case raises the question of whether the petitioners right to confrontation was violated when inculpatory letters turned over to the District Attorney's office by a non-testifying witness, in which neither a written nor an oral statement was produced by an expert before the court allowed admittance of said letters into evidence. 2) Whether petitioner's Sixth Amendment right to counsel was violated due to ineffective assistance of counsel—failure to object to inculpatory and unauthenticated letters being entered into

evidence that were turned over to the District Attorney's office by a non-testifying witness.

Petitioner contends that the right to confront his accuser is an integral part of criminal jurisprudence and pursuant to both the due process and confrontation clauses, and in accordance with this court's ruling in Crawford v. Washington, 541 U.S. 36 (2004), the Confrontation Clause, proving that the accused has the right to confront and cross examine witness against him applies...also to out of court statements introduced at trial, regardless of the admissibility of statements under law of evidence. Accordingly, the Second Circuit erred by declaring that petitioner had not made a substantial showing of the denial of a constitutional right. Thus, adopting the District Court, Southern District of New York holding that the Confrontation Clause bars the use of testimonial out of court statements offered against in court testimony subjected to cross-examination. Bowie v. Lee, 2021 WL 6127048 at 24.

Petitioner Patrick Bowie was convicted of two counts of Murder in the First Degree, four counts of Robbery in the First Degree, one count of Criminal Possession of a Weapon in the Second Degree, and one count of Conspiracy in the Second Degree. He was sentenced to Life without parole

On December 30, 2006, Petitioner's estranged girlfriend, Fermina Nunez was murdered at Final Touch Salon in Middletown, N.Y., a business owned by Ms. Nunez. That evening Petitioner received a phone call from his sister informing him that something had happened to Ms. Nunez. Due to an alleged earlier argument between Petitioner and Ms. Nunez, Petitioner contacted an attorney who suggested that they meet with detectives at the Middletown Police Department. Petitioner and his codefendant Melvin Green were eventually charged with Ms. Nunez's murder and sent to Orange County Jail, where they encountered Marlon Avila.

At the time of Petitioner's arrest, Marlon Avila aka Rayquan Shabazz had a permanent injunction against him for having a history of making false reports. The injunction prohibits him from contacting law enforcement or providing information about criminal activity without prior permission of the court. This injunction was authorized by the Honorable Carol Berkman, Justice of the Supreme Court of the State of New York, New York County on November 20, 2003 (A. 76-93).[1] There is no documentation that supports that Avila received permission to contact the Orange County District Attorney's Office.

Petitioner and Green were detained in the Orange County Jail and housed in separate areas. During which time, they allegedly corresponded through letters which they passed through another inmate, Marlon Avila. On June 1, 2007, Investigator Reilly interviewed Avila with Avila's attorney present. Avila stated that he had separate conversations with Green and Petitioner regarding the murder. He reported that Petitioner instructed Green to change his statement made to the police.

Despite the injunction, Avila wrote several letters to the Orange County District Attorney's Office starting in May 21, 2007 and ending July 22, 2007, stating he was in possession of inculpatory letters regarding communication between Petitioner and co-defendant Green (A.66-74). Two weeks later, a meeting was arranged between Avila and Orange County Investigator Thomas Reinle to determine whether Avila's written statements (letters) he wrote to the District Attorney's Office coincided with the letters in Avila's possession—Avila provided the investigator with fifteen letters.

[1] A– Refers to the Appendix pages.

The letters were reviewed by the prosecution's handwriting expert (A.58, 62). However, at trial there was neither a written statement nor testimony provided from the expert that linked the letters Avila turned over to the prosecution. Id. In fact, out of the 15 letters inside the envelopes turned over by Avila, all of which were submitted for DNA analysis, only two envelopes had DNA that matched the petitioner and other envelopes matched Melvin Green's DNA profile, but the content of the letters from said envelopes is unknown (A.57). However, there was an envelope that contained DNA from a John Doe who was a major contributor (A.56, 61). The DNA analysis focuses on the Petitioner and Melvin Green, but not Marlon Avila, even though allegedly all communications between Petitioner and Green went through him (A.52).

At trial, it was never revealed how Avila a non-testifying witness actually came into possession of the letters, or if he wrote any of them or all, or his reason for surrendering them to the D.A.'s office. Moreover, neither the People's handwriting expert nor Avila testified regarding the authenticity to make a determination that petitioner wrote the letters Avila turned over. However, a Mr. Juan Nunez from the decedent's family was presented with a business document, in which he testified that the handwriting was consistent with the petitioner's handwriting, which the jury viewed in court (A.50, 51). The petitioner's trial counsel failed to make any objections to the letters Avila presented to the prosecution that were entered into evidence. They were admitted without a comparison being done to an authenticated specimen, like petitioner's business records by an expert witness or the trier of fact. *It was Avila's out-of-court inculpatory statements (letters to the D.A.), which gave form to an alleged conspiracy* (A.66-74).

Petitioner's counsel expressed that the prosecutor lacked evidence and was relying solely on the letter evidence to secure a conviction. However, the prosecutor reminded petitioner's counsel "that he never objected to the entrance of the letters into evidence. He only objected to

family members viewing and identifying the handwriting" (A.54, 59). After recognizing his error counsel sought to have the letters redacted, to no avail (A.60). Nonetheless, without testimony from Avila, or the People's handwriting expert there was no confirmation as to whether Avila, Petitioner, or Green wrote some, a portion, or all of the 15 letters admitted into evidence. The prosecution used the testimony of the DNA expert, regarding the DNA test on the envelopes---as there were no DNA test done on the 15 letters---to get the Court to allow both the envelopes and letters to be entered into evidence (A.53-54).

ARGUMENT

POINT I

THE PETITIONER'S RIGHT TO CONFRONTATION WAS VIOLATED WHEN INCULPATORY LETTERS TURNED OVER TO THE DISTRICT ATTORNEY'S OFFICE BY A NON-TESTIFYING WITNESS, IN WHICH NEITHER A WRITTEN OR AN ORAL STATEMENT WAS PRODUCED, NOR A VERIFICATION OF WHO WROTE THEM, BEFORE THE COURT ALLOWED ADMITTANCE OF THE LETTERS INTO EVIDENCE.

A. Avila's out-of-court Statements are Testimonial

In Crawford v. Washington, 541 U.S. 36,51 (2004), this Court explicitly held that "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Additionally, the Court stated that "the absence of an oath [is] not dispositive." Id at 52. This application also applies to out of court statements. This court emphasizes in applying a definition to testimony, "it is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact" Id. at 51. Moving forward, in Davis v. Washington, 547 U.S. 813, 822, this Court declared that "[Statements] are testimonial when the circumstances objectively indicate that there is no such

ongoing emergency, and that the primary purpose of the interrogation is to establish or to prove past events potentially relevant to later criminal prosecution."

In this case, the district court in its decision clearly states, "Petitioner's Confrontation Clause rights were not violated because the letters were not testimonial and were admissible as statements in furtherance of a conspiracy between Petitioner and Green" (A.21;44). This statement is made without verification of who wrote the 15 letters that Avila turned over to the D.A.'s office. Allegedly, Avila came into possession of the 15 letters while he was working as a conduit for Petitioner and Mr. Green.

It can be considered that Avila made two out-of-court statements one written and the other oral. Avila's out-of-court statements (letters) to the D.A's office between the months of May through July, were inculpatory and conspiratory in nature regarding Petitioner's and Greens case (A:66-74). In June, Avila with his attorney present, received a visit from a representative of the D.A's office (A.6) to assess the credibility of the letters sent. Thus, it is not far fetched that Inv. Reilly of the D.A.'s office took an oral statement from Avila. In July, another meeting took place between Avila and a different agent of the D.A. office, Investigator Reinle, where Avila gave him 15 letters allegedly from Petitioner and Green.

Avila was never subjected to cross-examination despite the fact that the out-of-court statements interlock with the 15 letters entered into evidence. This detaches the Sixth Amendment requirement relating to out-of-court testimony that is "testimonial" from its constitutional foundation. If trial courts were permitted to introduce evidence in which a foundation had not been laid - and it had not faced adversarial scrutiny (cross-examination) - or was otherwise inadmissible, it would effectively eviscerate the defendant's rights.

The out-of-court statements-the letters Avila wrote between May and July alerting the D.A's office of his communications with Petitioner and Green included some of the very content in the 15 letters he turned over to the Investigator, which the District Court reference to in its decision. For instance, Avila states in one of his letters that he was told "Green was stupid for calling him when it was done," where as, the district court states that "Petitioner and Green spoke to each other...immediately after [the murder]" (A.36). In addition, Avila says, "I was talking with Bowie he's trying to set up an alibi for Green. You [D.A.'s office] need to read these letters that they are sending to each other" (A.66-74). The connection can be made to the District Court's decision when it states, "these letters are inculpatory...Petitioner and Green attempt to fashion a cohesive alibi..." Id. at 4. Thus, the Court's decisions refers to the 15 letters Avila turned over to the D.A.'s office, with various contextual information that was entered into evidence all of which, came from letters Avila wrote to the D.A.'s office offering to be an informant/agent for the prosecution. In this scenario, Avila's letters to the D.A.'s office form exactly what this Court held in *Davis* as testimony, "to establish or prove past events potentially relevant to later criminal prosecution." Thus, Avila's letters to the D.A.'s office are testimonial.

B. Letters Avila turned over to Investigator Reilly and entered into evidence are inadmissible.

The district court in its decision asserts that the court ordered injunction prohibiting Avila from reaching out to law enforcement ...has nothing to do with the petitioner's case and the admissibility of evidence (A.19, 40). It further states, the letters "were authenticated by, inter alia by DNA evidence, handwriting analysis, and the substance of the letters themselves" (A.44). In addition, the Court maintains that "the prosecution obtained the letters...with assistance from Avila and his attorney. They successfully established sufficient grounds to lay a foundation for

their admission. Therefore, the letters constitute valid, sufficient evidence supporting petitioner's guilt" (A.18, 19). The court's assessment that Avila's injunction does not apply to this case is untrue—his injunction applies to all cases in New York State (A.79-82), and has everything to do with the admissibility of the evidence. Had the prosecution - who knew about the injunction, but blatantly disregarded it - complied with said order the unlawful admissibility of the 15 letters, which connect to a conspiracy would not materialized. The basis for admission of the 15 letters into evidence is the letters that Avila wrote to the D.A.'s office from May through July notifying the D.A. of the inculpatory and conspiratory nature of the letters that were in his possession. The District Court's decision states, Therefore, the letters constitute valid, sufficient evidence supporting petitioner's guilt." Accordingly, the District Court's assessment that, "[t]hey [the prosecution] successfully established sufficient grounds to lay a foundation for their admission" is unsupported by the record, as a foundation was never laid to allow the Court to enter the 15 letters into evidence.

Pursuant to 5A Practice-Evidence in New York State and Federal Courts "a foundation is laid that the witness is familiar with the person's handwriting by having ...seen the person write, or otherwise having observed the person's writing, he may testify that he believes the document in question was written or signed by that person. The degree to which the witness is familiar with the handwriting normally goes to weight and not admissibility....In court comparison of the writing in issue with a specimen writing can only be made by and expert". In uniformity with Federal Rules of Evidence Rules 901 (b)(3), which states, "A comparison with an authenticated specimen by an expert witness or the trier of fact."

Nevertheless, the district court concludes that the 15 letters from Avila were authenticated by multiple sources, one of which was Mr. Nunez. However, the handwriting

analysis provided by Mr. Nunez cannot be what the court relies upon to authenticate the 15 letters entered into evidence. In fact, Mr. Nunez's testimony reveals he viewed Petitioner's bank records and claimed the handwriting matched the petitioner's handwriting. The bank records were then viewed by the jury (A. 50), as a result, the handwriting goes to the weight and not the admissibility. Furthermore, the record is devoid of any other analytical testimony regarding petitioner's handwriting, and Mr. Nunez does not establish the handwriting of the 15 letters. Accordingly, without the testimony of the People's handwriting expert or Avila, the fifteen letters were entered into evidence without the proper foundation (See, People's Exh 18 and 19).

A close look at the testimony of DNA expert Andrea Lester, demonstrates the prosecution attempt to compensate for not utilizing their handwriting expert. Whereby, the People substituted DNA evidence of the envelopes for expert handwriting analysis. Despite whether this was done intentionally or unintentionally, the 15 letters are not properly entered into evidence. Ms. Lester testifies that she recognizes the People's exhibits 5-19 as envelopes, there being 15 of them---she performed DNA analysis on ten of them (A.53). On direct examination, Ms. Lester was asked "what specifically did you do with each of the items prior to testing them? She testified that she, "peeled back the part of the envelope that's being sealed....took a small cutting for DNA analysis, then marked the outer package..." (A.53, 54). She was then asked, "And any of the letters or envelopes contained in People's 5 through 19 did you alter or change any of the substance or anything on the documents, themselves. She replies, "No, I didn't even open them [the envelopes]" (A.54). The prosecution states, "At this time I'd show defense counsel People's 5-19 and offer them into evidence. Defense attorney replied, No objection. The Court states, Mark them into evidence" Id.

Accordingly, when the Court states "mark them into evidence," *them* is a clear indication of the envelopes along with the letters contained in them, when the evidence should have consisted only of the envelopes. The 15 letters Avila provided to the District Attorney's office were admitted into evidence without a proper foundation, under the guise of the envelopes being tested. Of course, the Petitioner and Green are the focus of the DNA analysis, but Avila is not included, despite being known for making false statements. This is especially salient because one of the envelope's test result indicated a major contributor whose profile was unknown and therefore declared a John Doe; other envelopes had mixture profiles, which were not an exact match (A.55, 56). The petitioner's DNA matched the DNA on 2 of the envelopes (A.57). There is a high probability that the John Doe is Avila—given his penchant for producing false statements, and the fact that there was no report or testimony from people's handwriting expert that the letters had been written by the petitioner, Avila or Green. (A.58, 62). The bank records were an authenticated exemplar based on Nunez's familiarity with Petitioner's handwriting and they were viewed by the jury. Yet, the District Court declared the handwriting on the bank records matched the handwriting in the 15 letters provided to the prosecutor by Avila (A.28). However, there was not a positive identification of the letters by an expert witness or the trier of fact. At no point during trial was a foundation made based on an in court identification of the 15 letters compared to the authenticated specimen (bank records) for them to be properly admitted into evidence. See, People v. Ely, 68 N.Y.2d 520 (1986) ("Admissibility...requires proof of the accuracy or authenticity...by "clear and convincing evidence" establishing "that the offered evidence is genuine and that there has been no tampering with it."); see also (FRE Rule 901[b][3]). Thus, due to Avila's nefarious nature, and the failure to lay a foundation before entering the 15 letters into evidence, the match the District Court alludes to is not authenticated or admissible.

The method the prosecution used to enter the 15 letters into evidence, and the trial Court allowing such admittance is befuddling. The prosecution had an handwriting expert analyze the 15 letters Avila provided to the D.A.'s office (A.58). However, the prosecution made a strategic decision to forgo the testimony of their handwriting expert and Avila. In eliminating the testimony of their handwriting expert, the People relieved themselves of Avila having to testify. In doing so, the prosecution prevented revealing that Avila wrote some of those letters, which comports with the injunction by the Honorable Carol Berkman placed on Marlon Avila aka Rayquan Shabazz (A.76-92). These two non-testifying witness leave many unanswered questions for the jury: How did Avila come in possession of the letters; how long was he accumulating Petitioner's and Green's letters; how many letters did he write; and what was his reason for wanting to serve as an agent of the prosecution? Nevertheless, the Court in permitting the prosecution to enter evidence through a surrogate witness—the DNA expert—conceals from the jury Avila's true role and motivation regarding the inculpatory and conspiratory letters he sent to the D.A's office. Because there was no DNA evidence, or handwriting analysis in regards to the 15 letters Avila turned over. The only foundation laid for admittance into evidence was in regards to the envelopes that contained the 15 letters which was established by the DNA expert. This does not sufficiently establish authenticity of the letters admissible as the District Court suggest.

C. Petitioner's Confrontation Rights were Violated

This Court in Delware v. VanArsdall, 475 U.S. 673, 678-79 (1986), stated, "[t]he Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution to be confronted with the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. Of particular [concern] here, [w]e have

recognized that the exposure of a witness' motivation on testifying is a proper and important function of the constitutionally-protected right of cross-examination."

The trial Court admitted 15 unauthenticated letters into evidence that Marlon Avila turned over to the D.A.'s office against petitioner. However, the alleged content of those letters stem from letters Avila had wrote the D.A.'s office between May and June. The petitioner's confrontation rights were violated because those out-of-court statements interlock with the 15 letters introduced by the prosecution, and they were improperly admitted into evidence to support the charged offense. Marlon Avila gave out of court statements to the D.A.'s office for reasons related to the anticipated prosecution of the petitioner, as his letters to the D.A.'s office explains in specific detail the inculpatory and conspiratory natures of letters allegedly written by petitioner and Mr. Green. Despite this fact, Avila's out of court statements were never subjected to cross-examination (A:66-74). The letters Avila sent to the D.A.'s office alerting them of an alleged conspiracy reads like exparte accusation. Bruton v. United States, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) ("[A]n out of court accusation is universally conceded to be constitutionally inadmissible against the accused"). The Confrontation Clause simply forbids the use of untested accusations against criminal defendants. See, Lilly v. Virginia, 527 U.S. 116, 143 (1999). Neither the prosecution nor the trial Court inquired into the reliability of Avila's out of court statements, which include the interlocking 15 letters turned over to the D.A.'s office, which were unlawfully entered into evidence. As this Court stated in Crawford v. Washington and applies here as well, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: Confrontation." supra at 69.

Many of the same untested accusations in Avila's letters were in the 15 letters. The following demonstrates that the prosecution and the Court found Avila's out of court statements

to be reliable: Avila had two meeting with agents of the D.A.'s office and they accepted the 15 letters; the D.A. disregarded the Avila injunction and introduced the letters at trial; and the Court permitted the letters into evidence. Thus, it is clear that the D.A. and the Court credited the veracity of Avila's statements. However, the right to confrontation is a procedural requirement wherein the government **must** prove its cause using live testimony that is subject to cross-examination. Petitioner's confrontation rights were violated when the prosecution obtained and used the 15 letters (incriminating statements) that are in connection with Avila's out of court testimony in its prosecution of Petitioner, and then made Avila unavailable for cross-examination. See, Bullcoming v. New Mexico 564 U.S. 647, 658 (2011) (Because the New Mexico Supreme Court permitted the testimonial statement of one witness,...to enter into evidence through the in-court testimony of a second person...we reverse that court's judgment).

The DNA expert testified that tests were done on the envelopes but not the letters, and it was never verified who wrote them. However, the prosecution had no desire to let Avila testify based on his historic nature to fabricate truths. Yet, the trial Court allowed the letters to be admitted into evidence as truthful based on Avila's out of court statements, which were not corroborated by any other evidence at trial. Thus, the Petitioner's inability to cross-examine Avila violated his right to confrontation.

POINT II

PETITIONER'S SIXTH AMENDMENT RIGHT WAS VIOLATED DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL

The standard for determining whether counsel's assistance was ineffective differs depending on whether it is evaluated under the Federal or State Constitution. Under the Federal Constitution, the United State Supreme Court has articulated a two-prong test. Petitioners must

show: (1) that counsel's performance was objectively unreasonable under prevailing professional standards; and (2) that counsel's unreasonable performance was prejudicial to his case. Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S.Ct. 2052 (1984).

In establishing the first (performance) component of the test, a petitioner must show that counsel's errors or omissions were so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. The Supreme Court has advised courts to "indulge a strong presumption" that counsel's conduct fell within the range of reasonable professional assistance. Id. at 489 ("It is all too tempting for a petitioner to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission was unreasonable.").

With respect to the second (prejudice) component, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland, 466 U.S. at 690. A "reasonable probability" of a different result has been interpreted as a probability "sufficient to undermine the confidence in the outcome of the proceeding." Id. at 694.

Both the performance and prejudice components of the Strickland test must be assessed on the facts of the case at the time of counsel's representation. Id. 466 U.S. at 690, 694 ("a verdict or conviction only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support.").

A. Counsel's Failure To Make Objection Violated Petitioner's Confrontation Rights

The crux of the instant case revolves around letters, which were procured from an informant known by the courts to provide fallacious evidence. No other evidence connected

Petitioner to the crime or Mr. Green. Accordingly, when counsel failed to make an objection to the letters being admitted into evidence, without being examined by an expert handwriting analyst, his performance fell below the standard of effective assistance, as he aided in petitioner's confrontation rights being violated. Counsel's inaction is the source of his ineffectiveness.

When defense counsel belatedly realized his error, he attempted to mitigate the prejudicial damage. However, the prosecution and court were quick to point out his substandard performance stating, "he never objected to the entrance of the letters into evidence" (A:59). When that failed, counsel attempted to have the letters redacted. However, the Court admonished counsel that "[t]hese [letters] have been placed in evidence without objection. I'm not going to go line by line in an attempt to weed out one or two syllables here or there that may be objectionable..." (A.60).

That counsel provided ineffective assistance is indisputable, as the record puts trial counsel's deficient performance on full display. It is also evident in counsel's own admission: "I continued to let them come in" (A.58). Defense counsel fell a sleep at the wheel, allowing the prejudicial letters to be admitted into evidence, despite knowing that there was no evidence tying petitioner to the alleged conspiracy and that the prosecution's entire case hinged on tying petitioner to those letters (A.63,64).

It was counsel's failure to object to the admittance of the letters which caused a ripple effect of ineffectiveness, leading to the violation of Petitioner's Confrontation rights. As counsel clearly acknowledged there was no physical evidence (handwriting or DNA) linking Petitioner to the crime or Mr. Green. As counsel emphasizes the prosecution's case relied on the letters; yet, he did not object to the letters being entered into evidence. With no testimony from a handwriting expert or DNA evidence implicating the petitioner, the prosecutor took full

advantage of counsel's ineffectiveness by anointing the deceased's family members handwriting experts. Their testimony provided authentication of the bank records, and in the jurors minds the letters while at the same time cementing a relationship between Petitioner and Mr. Green – forming the foundation of the alleged conspiracy. Without testimony from Avila (who provided the DA with the letters), handwriting expert, or DNA to confirm those letters were actually Petitioner's, there is no conspiracy link between Green and Petitioner. "The statement (letter) need not have accused the defendant explicitly but may contain an accusation that is only implicit." Mason v. Scully, 16 F.3d 38 (1994); see also, United States v. Danzey, 594 F.2d 905, 917-918. In short, counsel's performance was deficient; it fell below the constitutional standard.

To restate what has been clearly stated and proven by the record is to beat a dead horse. However, it can not be over stressed the importance of counsel's failure to not object to those letters being entered as evidence. His inaction is all the more egregious when considering that the prosecution failed to produce Avila's testimony, a handwriting expert, or DNA connecting the petitioner to the letters or Mr. Green. As Petitioner is convicted of conspiracy to commit murder, and no other evidence tied him to the crime, demonstrates that petitioner was prejudiced by defense counsel's ineffectiveness. If not for trial counsel's failures to protect petitioner's right to Confrontation, the outcome of the trial would have been different.

B. Counsel's Failure to Call an Expert Handwriting Witness or Make Use of the People's Handwriting Witness or Avila Constituted Ineffective Assistance

In U.S. v. McCoy, 90 Fed. Appx. 201, 205 9th Cir. (2004), the Court stated, "Under Bruton [Bruton v. U.S., 391 US 123 (1968)] and its progeny 'the admission of a statement made by a non-testifying [witness] violates the Confrontation Clause when that statement facially, expressly, or powerfully implicates the defendant." United States v. Hernandez-Orellana, 539

F.3d. 994, 1001 (9th Cir, 2008) (quoting, United States v, Mitchell, 502 F.3d 931, 965 (9th Cir, 2007).

Petitioner, Mr. Green, and Avila had all submitted handwriting samples for the People's handwriting expert. The lower Court had also granted funds for defense counsel to acquire his own expert witnesses (A.94, 95). Defense counsel was aware the People's handwriting expert had concluded that some of the letters turned over by Avila had in fact been written by Avila. However, counsel allowed "the entrance of the letters into evidence" before ascertaining their author (A.60).

Counsel could have employed his own expert witness or used the witness hired by the People to inform the jurors that some of the letters were written by the prosecution's agent. Likewise, counsel could have call Avila as a witness to highlight that he had in fact written some of the letters himself. Additionally, counsel could have pointedly asked Avila about prior assistance that he had provided law enforcement officials and about the court order banning him from contacting law enforcement with alleged evidence. Since Avila would have been a witness called by the defense, counsel would not have been limited to the scope of questions potentially asked by the People on direct examination, had they called Avila to testify.

After having been provided with funds and armed with the knowledge that his client's handwriting had been forged by Avila, defense counsel inexplicably failed to bring these matters before the jury. Counsel allowed the letters to be admitted into evidence without the benefit of having the expertise that a trained handwriting analyst could have provided. The family members who testified about Petitioner's and Green's handwriting were untrained and therefore ill-equipped to distinguish between original documents written by Petitioner or Green verses a forged one.

Even after defense counsel dropped the ball, by failing to use the tools in his arsenal and by falling to object, he compounded the issue by failing to seek a "Missing Witness" charge after allowing petitioner's confrontation right to be violated, defense counsel could have made the jury aware that the People had other witnesses, whose testimony would have been favorable to petitioner, but chose not to call them. Had counsel asked for, and received, this charge it would have put the jury on notice that the prosecution was concealing evidence that was detrimental to its case.

For defense counsel to permit this evidence to be admitted without objection clearly fell below all reasonable expectations of effective assistance of counsel.

CONCLUSION

For the foregoing reasons this Court should grant petitioner the Writ of Certiorari to reaffirm that out-of-court statements that interlock with evidence introduced without a defendant having prior opportunity to cross examine the witness statements, this violates a defendant's Sixth Amendment right to Confrontation.

Dated: 10/23/2023

Respectfully Submitted,

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