No. 19-6151

In the Supreme Court of the United States

AHMED ALI,

Petitioner,

v.

TAMMY FOSS, ACTING WARDEN, ET AL. ,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly denied a certificate of appealability with respect to petitioner's claim that the state trial court violated his constitutional right to present a defense by declining to give a proposed instruction on third-party culpability.

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Ali v. Grounds, No. 17-55457, judgment entered July 2, 2019 (this case below).

United States District Court for the Southern District of California:

Ali v. Grounds, No. 14-cv-00898-BAS-WVG, judgment entered February 22, 2017 (this case below).

California Supreme Court:

In re Ali, No. S213118, judgment entered January 29, 2014 (state collateral review).

People v. Ali, No. S209111, judgment entered April 17, 2013 (direct appeal).

California Court of Appeal for the Fourth Appellate District:

People v. Ali, No. D058357, judgment entered February 7, 2013 (direct appeal).

San Diego County Superior Court:

People v. Ali, No. SCD215890, judgment entered October 1, 2010.

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STATEMENT

1. On July 22, 2008, two shootings occurred at different apartment complexes in San Diego that were known gathering places for rivals of the Lincoln Park street gang. Pet. App. D-3. The first shooting took place at about 9:30 p.m., when two men shot at a car driving out of the Harbor View apartment complex. *Id.* Three men were in the car, at least two of whom were affiliated with the Neighborhood Crips street gang (a Lincoln Park rival). *Id.* Before the shooting began, one of the shooters asked, "What's up, cuz." *Id.* Although bullets struck the car and a nearby residence, no one was injured. *Id.* The second shooting took place shortly before 11:00 p.m. at an apartment complex on College Avenue. *Id.* Two men approached a group and opened fire, killing one man and injuring another. *Id.* Some of those who were fired upon were members of the O'Farrell Park or Skyline Piru street gangs, both of which were rivals of the Lincoln Park gang. *Id.*

Two weeks after the shootings, a Lincoln Park gang member named Jesse Freeman was arrested for an unrelated offense. Pet. App. D-4. Freeman discussed several crimes committed by other Lincoln Park gang members with police. *Id.* During that conversation, Freeman told the police that petitioner Ahmed Ali claimed to have committed both of the July shootings with someone named "L" or "Lex." *Id.* Ballistics evidence indicated that the same firearm had been used in both shootings. *Id.* The police later searched Ali's apartment and found a shell casing that matched the gun used in the shootings. *Id.*

2. Ali was arrested and charged with several offenses. Pet. App. D-4-5. At the preliminary hearing, Freeman testified that Ali told Freeman that he committed the July shootings "to 'put in some work' for the Lincoln Park gang and get at rival gang members." *Id.* at 4 (internal quotation marks omitted). The police relocated Freeman to Arizona for his safety; shortly thereafter, however, Freeman was found dead under a freeway overpass. *Id.*[1] At Ali's trial, the jury heard Freeman's preliminary hearing testimony and recordings of his interviews with police. *Id.* at 5. Two eyewitnesses also testified. *Id.* One identified Ali as the shooter, while the other testified that he had picked Ali out of a photographic lineup and was "60 to 70 percent certain" that Ali was the shooter when he made the identification. *Id.*

In his defense, Ali called several friends and family members who testified they were with him at his apartment at the time of the shootings. Pet. App. D-5. He also introduced evidence suggesting that someone else committed the shootings. *Id.*; *see also id.* at C-23-24. Among other things, Ali elicited evidence that the phrase "What's up, cuz," is typically used by one Crip to greet another, which suggested that the shooter was a Crip (and not Ali, who was a member of the Blood gang). Pet. App. C-23-24. Another witness suggested that the College Avenue shooting may have been committed by a Crip gang member in retaliation for an earlier altercation. *Id.* Ali's sister

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[1] Freeman died of blunt force head trauma. Pet. App. D-4. Police were unable to determine whether his death was a homicide, suicide, or accident. *Id.*

testified that Freeman was at Ali's apartment on the night of the shootings and that Freeman left the apartment for at least 30 minutes. *Id.* at 24. Other evidence suggested that Freeman sometimes slept in Ali's bed, under which the shell casing was found. *Id.*

In light of this evidence, Ali asked the trial court to give the following pinpoint instruction on third-party culpability:

> You have heard evidence that a person other than the defendant may have committed the offense with which the defendant is charged. The defendant is not required to prove the other person's guilt beyond a reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable doubt as to the defendant's guilt. However, its weight and significance, if any, are matters for your determination. If after consideration of this evidence, you have a reasonable doubt that the defendant committed this offense, you must give the defendant the benefit of the doubt and find [him][her] not guilty.

Pet. App. D-28. The trial court declined to give the instruction. *Id.* But it gave several others, including the standard reasonable doubt instruction (CALCRIM No. 220), which told the jury that a "defendant in a criminal case is presumed to be innocent," and that the prosecution is required to "prove a defendant guilty beyond a reasonable doubt." *Id.* at 29. It also gave an instruction on eyewitness identification (CALCRIM No. 315), which restated the People's burden. Pet. App. B-25 n.8. And it gave another instruction (CALCRIM No. 373) providing that "[t]he evidence shows that another person may have been involved in the commission of the crime[s] charged against the defendant" and that it was the jury's duty to "decide whether the defendant on trial here committed the crimes charged." *Id.*

The jury found Ali guilty of one count of murder (Cal. Penal Code § 187(a)); four counts of attempted murder (Cal. Penal Code §§ 187(a), 664); two counts of shooting at an inhabited structure or vehicle (Cal. Penal Code § 246); one count of being a felon in possession of a firearm (Cal. Penal Code § 12021(a)(1)); and one count of unlawfully possessing a firearm (Cal. Penal Code § 12316(b)(1)). Pet. App. D-5-6. It also found true the criminal street gang and firearm enhancements (Cal. Penal Code §§ 186.22(b)(1), 12022.53(c), (d), (e)(1)). *Id.* The trial court sentenced petitioner to 135 years to life plus 60 years in state prison. *Id.* at 6.

3. On direct appeal, the California Court of Appeal affirmed Ali's conviction and sentence. Pet. App D-2. It rejected Ali's claim that the trial court violated his constitutional rights by refusing to give the proposed pinpoint instruction on third-party culpability. *Id.* at 27-29. The court recognized that there was "some evidence of third party culpability at trial." *Id.* at 28. But it concluded that any error was harmless because the third-party culpability instruction "add[s] little to the standard instruction on reasonable doubt," which affords defendants "ample opportunity to impress upon the jury that evidence of another party's liability must be considered in weighing whether the prosecution has met its burden of proof." *Id.* at 28-29 (quoting *People v. Hartsch*, 49 Cal. 4th 472, 500 (2010)). The court of appeal also noted that Ali's trial counsel had "stressed the concept of third party

culpability during closing argument." *Id.* at 29. The California Supreme Court denied review in April 2013. Pet. App. B-4.

4. Ali filed a petition for a writ of habeas corpus in the Southern District of California, which was superseded by his first amended petition. Pet. App. B-4, C-4-5. He raised several claims, including that the state trial court's refusal to give the third-party culpability instruction violated his constitutional right to present a defense. *Id.* at B-21-26, C-21-27. The magistrate judge recommended denying the petition. *Id.* at C-2. With respect to the claim of instructional error, the magistrate judge held that the state court's rejection of the claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. *Id.* at C-6-7, C-21, C-27; *see* 28 U.S.C. § 2554(d)(1). It reasoned that the evidence of third-party culpability was insufficient to require a third-party culpability instruction under *Mathews v. United States*, 485 U.S. 58 (1988), and that any error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Pet. App. C-24-27.

The district court adopted the magistrate judge's report and recommendation. Pet. App. B-1. The district court concluded that there was insufficient evidence of third-party culpability to warrant an instruction under *Mathews*. Pet. App. B-22-23. It also reasoned that the third-party culpability instruction was "essentially duplicative" of the standard reasonable doubt instruction and "added nothing material to the jury's understanding of its duty

in assessing Ali's guilt." *Id.* at 25. The court further noted that Ali's trial counsel had "argued its third-party culpability theory at length at closing argument," and had contended that the evidence that someone other than Ali was the shooter "prevented the State from carrying its burden of proof." *Id.* Accordingly, the district court held that the state trial court was "not required to give[] an additional instruction on third-party culpability," and that the state appellate court's denial of Ali's claim of instructional error was "neither contrary to, nor an unreasonable application of, clearly established federal law." *Id.* at 25-26. The district court also declined to issue a certificate of appealability with respect to any of Ali's claims, concluding that "[r]easonable jurists would not find the Court's resolution of Ali's constitutional claims debatable or incorrect." *Id.* at 33 n.13.

5. Ali filed a request for a certificate of appealability in the court of appeals, which the court granted with respect to one of Ali's claims (regarding the exclusion of certain hearsay statements). *See* C.A. Dkt. 5; C.A. Dkt. 6-1. The court of appeals did not, however, certify Ali's claim that the trial court erred by declining to give a third-party culpability instruction. C.A. Dkt. 6-1. The parties nevertheless briefed the merits of that claim. In its decision, which affirmed the district court on the certified claim, the court of appeals also held that Ali had not shown that a certificate of appealability on the claim of instructional error was warranted. Pet. App. A-4. The court reasoned that even if Ali were correct that the "state trial court had violated his rights" under

Mathews, "jurists of reason would agree with the district court that habeas relief is unwarranted because any error was not prejudicial" under *Brecht*. *Id.*

ARGUMENT

The court of appeals correctly denied a certificate of appealability. Even assuming that the state trial court's decision not to give the third-party culpability instruction violated the Constitution, any error was harmless because other instructions properly explained that the State had the burden of proving Ali's guilty beyond a reasonable doubt. In any event, there was no constitutional violation here: instructions on a potential defense are only required if a reasonable jury could find in the defendant's favor based on the evidence introduced at trial, and the evidence of third-party culpability in this case did not meet that standard. The district court was thus correct that the state court's denial of Ali's claim of instructional error was neither contrary to, nor an unreasonable application of, any clearly established federal law. And because no reasonable jurist would disagree with that conclusion, there is no basis for granting a certificate of appealability.[2]

1. A certificate of appealability may issue only if the "applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.

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[2] Ali asks this Court to grant certiorari "pursuant to the procedure approved by this Court in *Hohn v. United States*, 524 U.S. 236, 250-251 (1998)." Pet. 10. *Hohn* did not establish a special procedure for deciding whether to grant certiorari in cases involving the denial of a certificate of appealability. It merely recognized that this Court's certiorari jurisdiction includes review of such denials. *Hohn*, 524 U.S. at 253.

§ 2553(c)(2). The showing must demonstrate that jurists of reason could debate whether the petition should have been resolved differently or conclude that the issues presented are adequate to deserve encouragement to proceed further. *See Buck v. Davis*, 137 S. Ct. 759, 773 (2017); *Miller-el v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Where AEDPA's deferential review standard applies, the question is "whether the District Court's application of AEDPA deference . . . was debatable amongst jurists of reason." *Miller-el*, 537 U.S. at 341.

Under the circumstances here, the court of appeals properly denied a certificate of appealability on Ali's claim of instructional error. *See* Pet. App. A-4. A federal constitutional violation only merits habeas relief if the violation had a "substantial and injurious effect" on the jury's verdict. *Brecht v. Abramson*, 507 U.S. 619, 637-638 (1993); *see also Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (*Brecht*'s harmlessness standard "'subsumes' the requirements that § 2254(d) imposes when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless under *Chapman* [*v. California*, 386 U.S. 18 (1967)]").

Ali cannot make that showing in this case. The third-party culpability instruction reminds jurors that there is evidence that a "person other than the defendant may have committed the offense for which the defendant is charged," and that the defendant is not "required to prove the other person's guilty beyond a reasonable doubt." Pet. App. D-28. As the district court

explained, however, this instruction would have been "essentially duplicative" of others given by the state trial court. *Id.* at B-25. That court instructed the jury that the prosecution was required to prove that Ali was "guilty beyond a reasonable doubt"; that the jury was required to "impartially compare and consider all the evidence that was received throughout the entire trial"; that the evidence in the case "show[ed] that another person may have been involved in the commission of the crimes charged against the defendant"; and that the jury had a duty to "decide whether the defendant on trial here committed the crimes charged." *Id.* at 25 & n.8 (brackets omitted); *see also id.* (trial court also gave an instruction on eyewitness identification "which restated that the People had the burden to prove Ali's guilt beyond a reasonable doubt").

In light of these instructions, no reasonable jurist would conclude that the failure to also give the third-party culpability instruction had a "substantial and injurious effect" on the jury's verdict. *Brecht*, 507 U.S. at 637-638; Pet. App. A-4. As the California Supreme Court has held, the third-party culpability instruction "add[s] little to the standard instruction on reasonable doubt." *People v. Hartsch*, 49 Cal. 4th 472, 504 (2010). The third-party culpability instruction differs from the standard reasonable doubt instruction only in that it "stress[es] that the defendant was not required to *prove* third party culpability." Pet. App. D-28. But "[i]t is hardly a difficult concept for the jury to grasp that acquittal is required if there is reasonable doubt as to whether someone else committed the charged crimes." *Hartsch*, 49 Cal. 4th at

504. And that is especially true in a case like this one, where defense counsel's "closing arguments focused the jury's attention on that point." *Id.*; *see also* Pet. App. D-29 (Ali's defense counsel "stressed the concept of third party culpability during closing argument").

In addition, there was strong evidence that Ali was involved in both shootings. Ali confessed that he had participated in them to Freeman. Pet. App. D-4. A shell casing matching the gun used in both shootings was found under Ali's bed. Pet. App. D-4. And an eyewitness identified Ali as one of the shooters in the second shooting. *Id.* at 5.[3] The evidence that someone else committed the shooting, on the other hand, was quite weak. *See infra* 12. This evidentiary imbalance further supports the court of appeals' conclusion that all jurists of reason would agree that any error in this was case "not prejudicial under *Brecht*." Pet. App. A-4.

In arguing otherwise, Ali points to "juror declarations presented at the motion for a new trial," Pet. 14, including one in which a juror stated that she "'felt Mr. Ali was innocent, but did not see the evidence to prove' he was innocent," *id.* at 8; and another in which a juror declared that he "'was unaware [that] he could find Mr. Ali not guilty without having a reason to justify his decision,'" *id.* (brackets omitted). As an initial matter, reviewing courts typically do not consider statements regarding the mental processes of jurors

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[3] Another eyewitness testified that he was "60 to 70 percent certain" that Ali was the shooter in the second shooting. Pet. App. D-5.

to impeach a verdict, absent unusual circumstances. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 863-866 (2017) (rule is supported by "long-recognized and very substantial concerns"); *see also* Fed. R. Evid. 606(b)(1) (codifying common law no-impeachment rule).[4] In any event, even if the juror declarations were admissible in this case, they would not establish that Ali was prejudiced by trial court's decision not to give the third-party culpability instruction. The trial court clearly (and repeatedly) instructed the jury that the prosecution had the burden of proving Ali's guilt beyond a reasonable doubt. *See supra* 9. And while the declarations might be read as suggesting some confusion on that point, neither makes any reference to third-party culpability or otherwise demonstrates a misunderstanding about third-party culpability. As the district court explained, the third-party culpability instruction would have "added nothing material to the jury's understanding of its duty in assessing Ali's guilt." Pet. App. B-25.

2. Nor has Ali made the necessary "substantial showing" with respect to his underlying claim of instructional error. 28 U.S.C. § 2553(c)(2). This Court has recognized that a "defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). At

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[4] Although this Court has not directly addressed the question, the Ninth Circuit has applied Federal Rule of Evidence 606(b) to habeas corpus petitions filed by state prisoners seeking relief under 28 U.S.C. § 2254. *See Estrada v. Scribner*, 512 F.3d 1227, 1236-1238 (9th Cir. 2008).

trial, Ali argued that the shootings may have been committed by an unidentified Crips gang member or by Freeman. Pet. 11. In support of his theory that a Crip was the shooter, Ali noted that the statement made by one of the shooters in the first shooting—"What's up, cuz?"—is a typical Crip greeting. Pet. 11; Pet. App. B-22. He also relied on a witness's testimony that the second shooting may have been committed by Crip gang members in retaliation for an earlier altercation. Pet. 11; Pet. App. B-22. In support of his theory that Freeman was the shooter, Ali elicited testimony that Freeman had no alibi for at least 30 minutes the night of the shootings and that Freeman sometimes slept in Ali's bed (which could explain why a shell casing matching shells found at the shootings was found in Ali's apartment). Pet. 11; Pet. App. B-22-23.

No jurist of reason would conclude that this evidence was "sufficient for a reasonable jury to find in [Ali's] favor." *Mathews*, 485 U.S. at 63. As the district court concluded, whether "taken alone or together," the evidence presented by Ali did not "sufficiently link[] a third party to the shootings such that due process required the trial court to give Ali's proposed instructions." Pet. App. B-23; *see also* Pet. App. C-24-25 (same conclusion by the magistrate judge). While the testimony suggested a "possible motive by Crip gang members" and "possible opportunity by Freeman," evidence of that sort is "insufficient to raise a reasonable doubt as to Ali's guilt." Pet. App. B-23; *see also People v. Hall*, 41 Cal. 3d 826, 833 (1986) ("[E]vidence of mere motive or

opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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