No. _____

IN THE

Supreme Court of the United States

JOSE OSVALDO ARTEAGA,

Petitioner,

v.

KEN CLARK, 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

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QUESTION PRESENTED

This non-capital habeas case arises from petitioner-appellant Jose Osvaldo Arteaga's 2003 California state conviction for an attempted murder that took place one year earlier. Arteaga is serving an indeterminate life sentence. He has always maintained his innocence.

There is no video of the crime, no physical evidence of the crime, and no confession. The only evidence against Arteaga came from the eyewitness identifications of the shooting victim, Richard Carlyle, and his boyfriend, Sergio Ulloa, who was with Carlyle when someone shot him. At various points in the police's investigation, the police gave Carlyle and Ulloa several opportunities to identify Arteaga as the shooter—and both did not. At trial, defense counsel called Bayron Peres in support of a misidentification defense. Peres observed the crime take place and testified that Arteaga was not the shooter. Counsel called no other witnesses.

But there was someone else counsel could have called: Mauro Ortega. Ortega would have testified that Arteaga could not have committed this crime because Arteaga was with him in a different part of Los Angeles when the shooting was taking place. Ortega's testimony would have been the difference maker, yet the jury never heard it.

Below, Arteaga challenged his conviction under the Sixth and Fourteenth Amendments, alleging that trial counsel was ineffective for failing to present Ortega

as an alibi witness. After the district court denied his petition, he sought a certificate of appealability (COA) from the Ninth Circuit, which denied his request.

The question presented is: Did the Ninth Circuit's order denying a COA violate this Court's mandate that a circuit court *must* issue a COA if a habeas petition makes "'a substantial showing of the denial of a constitutional right'"? *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (quoting 28 U.S.C. § 2253(c)(2)).

LIST OF PARTIES

1. Jose Osvaldo Arteaga, Petitioner

2. Ken Clark, Warden, California State Prison-Corcoran

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

APPENDIX INDEX

APPENDIX INDEX

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

STATE CASES

DOCKETED CASES

FEDERAL STATUTES, RULES, AND CONSTITUTION

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Jose Osvaldo Arteaga respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

ORDERS AND OPINIONS BELOW

On October 28, 2019, the Ninth Circuit issued an unpublished order denying Arteaga's request for a certificate of appealability in Ninth Circuit case no. 18-56591. *See* Petitioner's Appendix (Pet. App.) 1. That appeal arose from Arteaga's district court case, which concluded on November 5, 2018, after the district court issued its judgment dismissing Arteaga's 28 U.S.C. § 2254 petition. *See* Pet. App. 4.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13. Arteaga's petition was originally due January 26, 2020, but on January 8, 2020, Justice Kagan granted Artega's application to extend the time to file the petition to February 25, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S. Const., Amend. XIV, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2553(c)

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

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

(B) the final order in a proceeding under section 2255.

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

STATEMENT OF THE CASE

A. The crime and the police's investigation

1. August 9, 2002: A stranger confronts Richard Carlyle and Sergio Ulloa and then shoots Carlyle; the entire confrontation lasts just a "matter of seconds."

Around midnight on August 9, 2002, Richard Carlyle and Sergio Ulloa left a Hollywood club where they had been dancing. Pet. App. 113-15, 117-20. Carlyle had a "beer or two" at the club. Pet. App. 114. Ulloa drank a 32-ounce beer while there, but also had "a couple drinks . . . on the way to the club." Pet. App. 155. As Carlyle and Ulloa neared the intersection of Western Avenue and Santa Monica Boulevard, two strangers approached them. Pet. App. 115-16, 120. From about fourteen feet away one of those men asked Carlyle and Ulloa, "Where are you guys from?" Pet. App. 122, 157. That question is a question gang members ask to determine a person's gang affiliation. Pet. App. 146. Carlyle wasn't paying attention at that point but Ulloa was; he responded that he and Carlyle weren't gang members. Pet. App. 121, 156, 159. The same man then asked Carlyle and Ulloa if they were

boyfriends; Carlyle said they were. Pet. App. 121, 157, 161. Without warning, the stranger pulled out a gun and shot Carlyle several times, wounding him. Pet. App. 121, 125-27. Ulloa was unhurt. Pet. App. 161-62. The entire incident started and ended in a "matter of seconds." Pet. App. 141, 166.

2. August 14, 2002: The police show Carlyle photographs of possible suspects, including Arteaga; Carlyle does not identify Arteaga as the shooter.

Five days after Carlyle was shot, Detective Vicki Bynum visited him in the hospital where he was recovering. Pet. App. 171. She suspected that this crime was gang-related because the police considered the Western/Santa Monica intersection to be in gang territory. Pet. App. 172. She showed Carlyle a book of photos of gang members frequently seen in that area, one of which depicted Arteaga. Pet. App. 172, 174. Carlyle looked through the book and did not identify the shooter in any of the photos. Pet. App. 172-73. Carlyle did, however, point to a photo of Arteaga and said that Arteaga looked like "the guy with the shooter." Pet. App. 175-76.

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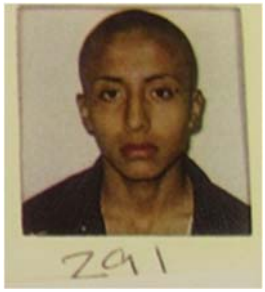
3. August 19-21, 2002: Carlyle and Ulloa identify Arteaga as the shooter while another eyewitness tells the police Arteaga was not the shooter.

Detective Bynum returned to the hospital five days later. Pet. App. 133. With her was a sketch artist who, with Carlyle's help, created this sketch of the shooting suspect:

Pet. App. 68, 129. This sketch resembles another gang member who was in the photographs Detective Bynum showed Carlyle:



Pet. App. 71.

Later that day, the sketch was sent to Officer Frank Flores, who was assisting Detective Bynum with her investigation. Pet. App. 147-49. Officer Flores was a member of the Los Angeles Police Department's "gang impact team"; he monitored and gathered intelligence, and enforced a gang injunction against, the gang Arteaga belonged to. Pet. App. 142-43. The goal of the gang impact division was to clean up the streets by preventing gang activity. Pet. App. 152-53. Like

Detective Bynum, Officer Flores suspected that the crime was gang-related. Pet. App. 149. He also suspected that Arteaga, whom he had encountered before, was the shooter. Pet. App. 144-45, 149. Officer Flores compiled the following six-pack photo array:

Pet. App. 69, 149. Arteaga's picture is the one in the bottom right-hand corner. Pet. App. 151. A day later, Officer Flores met Ulloa in a 7-11 parking lot. Pet. App. 150. He showed Ulloa the six-pack and Ulloa identified Arteaga as the shooter. Pet. App. 150-51. The next day, Officer Flores visited Carlyle at the hospital, showed him the six-pack, and Carlyle likewise identified Arteaga as the shooter. Pet. App. 130-33. Arteaga was then arrested.

Around this same time, Detective Bynum visited a man named Bayron Peres. Pet. App. 176. The night of the shooting Peres was stopped in his car at the Western/Santa Monica intersection, about fifty feet away from Carlyle and Ulloa. Pet. App. 178-79, 180. He saw the shooting occur and then the shooter and his companion ran in front of his car as they fled. Pet. App. 181. He went home and reported the crime. Pet. App. 182-83. During her interview with Peres, Detective

Bynum showed him the six-pack Officer Flores had created. Pet. App. 184. Peres, who at that time lived in the area where the shooting occurred, told her Arteaga looked "familiar" but he maintained that Arteaga was not the shooter. Pet. App. 184, 186.

4. February 5, 2003: At a live lineup, Carlyle identifies Arteaga as the shooter; Ulloa does not.

In early 2003, a live lineup was conducted at jail. Pet. App. 177. Here is a photograph of the lineup:

Pet. App. 70. Arteaga, pictured here with the number four on his torso, was the only person who was in both the six-pack and at the live line-up. Carlyle identified Arteaga as the shooter. Pet. App. 134. Ulloa found the lineup "confusing" because it contained people he had never seen before. Pet. App. 168. He thought Arteaga looked familiar, but did not positively identify him as the shooter. Pet. App. 167-69.

B. Arteaga's 2003 trial

Later in 2003, Arteaga stood trial on one count of attempted murder. Pet. App. 104-06. He was represented by appointed counsel. During opening statements,

trial counsel admitted that Arteaga was a gang member and stated he would present a misidentification defense. Pet. App. 111-12.

1. The prosecution's case

The prosecution presented no physical evidence linking Arteaga to the crime. Its case hinged on Carlyle's and Ulloa's eyewitness identifications of Arteaga. During his testimony, Carlyle had trouble remembering exactly when the detectives interviewed him. *See, e.g.*, Pet. App. 128, 136-38. And he could not describe the shooter's gun or pants. Pet. App. 135, 140. Still, he identified Arteaga in court as the shooter. Pet. App. 116. So did Ulloa. Pet. App. 157-58.

While Carlyle and Ulloa agreed that Arteaga was the shooter, they disagreed about other details. First, Carlyle testified that the shooting occurred around 9:00 p.m. or 10:00 p.m. Pet. App. 115. Later, after being prompted by the prosecutor, he stated that the shooting occurred around midnight. Pet. App. 116-17. Ulloa thought the shooting occurred around 11:30 p.m. Pet. App. 155. Second, Carlyle recalled that the shooter and his companion traveled southward to meet him and Ulloa, while Ulloa though they traveled westward. Pet. App. 120, 156. Third, Carlyle initially testified that the shooter had hair just like Arteaga had at the time of trial. Pet. App. 122-23. Arteaga's hair at trial, which was long enough to be combed, was similar to his hair in the photograph of the live line-up. Pet. App. 70, 73, 122, 158. Again, after some prompting by the prosecutor, Carlyle changed his testimony, stating that the shooter was "bald with stubble." Pet. App. 124. Ulloa testified that the shooter had no hair. Pet. App. 158. Finally, Carlyle testified that the shooter

was wearing a "light color shirt, like yellowish or a cream color." Pet. App. 135. Ulloa said the shooter was wearing a "blue checkered shirt." Pet. App. 163.

On cross-examination, trial counsel highlighted how Carlyle had first identified Arteaga as a person who looked like the shooter's companion and how Ulloa was unable to identify Arteaga at the live lineup. Pet. App. 139, 167.

Officer Flores testified as a gang expert. He opined that the shooting was gang-related based on the location of the crime and the question "Where are you from?" Pet. App. 153-54. He also testified that, in a gang member's eyes, Carlyle showed disrespect by admitting he was gay, and a gang member would respond to being disrespected by retaliating with violence. Pet. App. 154.

2. The defense's case

Trial counsel called a single witness, Peres, who testified that Arteaga was not the shooter or the person with the shooter. Pet. App. 185. According to Peres, the shooter was 5'9" to 5'11", with a dark complexion. Pet. App. 187. Arteaga is 5'6", and as the photos above show, has a light complexion.

3. Closing arguments and verdict

During closing arguments, both sides emphasized that identification was a central issue to this case. *See, e.g.*, Pet. App. 188-91. The jury rejected Arteaga's misidentification defense and convicted him as charged.

4. Motion for new trial

Following the trial, Arteaga requested a hearing under *People v. Marsden*, 2 Cal. 3d 118 (1970). A *Marsden* hearing "is the California procedural mechanism through which a criminal defendant seeks to discharge his appointed counsel and

substitute another attorney on the ground that he has received inadequate representation." *Mahrt v. Beard*, 849 F.3d 1164, 1168 (9th Cir. 2017) (internal quotation marks omitted). Arteaga requested new counsel because his trial lawyer did not present an alibi witness. Pet. App. 193. At the hearing, trial counsel acknowledged that, before trial, his investigator spoke with a witness who told the investigator that Arteaga was with him at a nightclub several miles away when the shooting took place. Pet. App. 195. Trial counsel acknowledged that the witness's testimony "would have been an alibi defense," but he explained that he did not call the witness because he felt the "strongest case strategically and tactically was the [mis]identification defense, and that specifically involved -- revolved around witness Bayron Peres." (*Id.*) The trial court stated:

> I think if there is a witness or if there are witnesses that indicate that Mr. Arteaga is somewhere else at the time of the alleged shooting, . . . I would certainly want to hear from those witnesses so that I could ultimately make a decision if I think it would have made a difference to the jury in the trial.

Pet. App. 198. The court relieved the defense lawyer of his appointment, and appointed a new lawyer for the new trial motion. (*Id.*)

In support of the new trial motion, new counsel submitted a statement from Mauro Ortega, the alibi witness. Pet. App. 99-101. In that statement, Ortega says he and Arteaga used to be members of the same gang, though he was no longer a member. Pet. App. 99. According to Ortega, on the night of the crime, Arteaga and another man named "Turtle" picked him up at his home around 10:30 p.m. Pet. App. 99-100. They drove to the PanAmerican Club in Los Angeles, about three miles

from the intersection where the shooting occurred. Pet. App. 100. "Around midnite [sic] or thereabout," a fight broke out between Ortega, Arteaga, Turtle, and five other men. Pet. App. 100. After a security guard broke up the fight, he, Arteaga, and Turtle "left the club and went back to their car . . . . All three men drove back to [Ortega]'s home." Pet. App. 100-01.

The trial court subsequently denied Arteaga's motion for new trial. Pet. App. 107.

C. State habeas

In state habeas, Arteaga raised an ineffective assistance of counsel claim based on trial counsel's failure to call Ortega as an alibi witness. He first petitioned the superior court for habeas relief. Pet. App. 93-94. In denying that petition, the state court reasoned:

> Ortega's statement does not even provide a firm alibi for the event. He states that they left the bar shortly after midnight, while the shooting a short distance away also occurred sometime around midnight. Given the close proximity of the locations, and the lack of precision for the times given by Ortega and [sic] for the shooting, it is far from impossible for petitioner to have been in the location to shoot the victim, even if Ortega's statement is to be believed.

Pet. App. 43-44. The court also reasoned that Arteaga could not show prejudice because "Ortega was a fellow gang member whose purported alibi testimony could have been easily rejected by a jury for that reason. *See, e.g.*, *People v. Ruiz* (1998) 62 Cal. App. 4th 234" and Ortega's "appearance would have been additional evidence of petitioner's gang membership." Pet. App. 44. Arteaga reasserted his claim in petitions filed with the California Court of Appeal (CCA) and the California

Supreme Court (CSC). Pet. App. 89-92. Both courts summarily denied his petitions. Pet. App. 39-41.

D. Federal habeas

In 2008, Arteaga filed a *pro se* petition with the district court, which included his claim that trial counsel was ineffective for failing to present an alibi defense. Pet. App. 72, 74-85. The district court denied the petition in 2009, finding it was untimely under 28 U.S.C. § 2244(d)(1). Pet. App. 51. Arteaga appealed and in 2013 the Ninth Circuit reversed and remanded for an evidentiary hearing to determine whether Arteaga was entitled to statutory tolling. *See Arteaga v. Allison*, No. 09-56004, docket no. 59 (9th Cir. Sep. 3, 2013).

On remand, the district court found that Arteaga was entitled to statutory tolling, and ordered the parties to file an answer and traverse. Pet. App. 35-38. Then, in 2018, relying on just the petition, answer, and traverse, the district court denied the petition and a certificate of appealability (COA). Pet. App. 2-34.

Arteaga timely appealed and sought a COA from the Ninth Circuit under 28 U.S.C. § 2253(c)(2). *See* Pet. App. 1. On October 28, 2019, the Ninth Circuit denied his request in an unpublished order "because appellant has not made a 'substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)." Pet. App. 1.

To date, no court has ever held an evidentiary hearing on Arteaga's ineffectiveness claim.

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REASONS FOR GRANTING THE WRIT

1. Every year circuit courts entertain thousands of requests for COAs. In *Miller-El*, this Court explained that when a circuit court receives one of these requests, it *must* issue a COA if the petitioner makes "'a substantial showing of the denial of a constitutional right.'" *See Miller-El*, 537 U.S. at 327 (quoting 28 U.S.C. § 2253(c)(2)). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.*

The Ninth Circuit denies a striking number of the COA requests it receives: 95 percent of them in fact.[1] By comparison, the rate of denials are significantly lower in other circuits. *See* Brief for Petitioner, at *1A, *Buck v. Davis*, 137 S. Ct. 759 (2017), 2016 WL 4073689 (noting that "a COA was denied on all claims in 58.9% (76 out of 129) of the [capital habeas] cases arising out of the Fifth Circuit, while a COA was only denied in 6.3% (7 out of 111) and 0% of the cases arising out of the Eleventh and Fourth Circuits respectively"). The fact that the Ninth Circuit's rate of denial is so out of step with other circuits suggests that the Ninth Circuit is merely paying lip service to the principles this Court articulated in *Miller-El*.

[1] In 2015, the Ninth Circuit received 1,399 requests for COAs and granted only 65 of those requests. *See* Submitted COAs, found at *http://cdn.ca9.uscourts.gov/datastore/uploads/guides/habeas_training/2016.10.27%20materials%20revised_2.pdf* (last visited Feb. 13, 2020).

And this case proves that the Ninth Circuit is doing just that. Below, Arteaga sought to demonstrate that his trial counsel was ineffective for failing to present an alibi defense. A petitioner "who claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice." *Buck*, 137 S. Ct. at 775 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The district court addressed both prongs of Arteaga's ineffectiveness claim and denied relief. The Ninth Circuit then refused to issue a COA on Arteaga's claim. But any "jurist[] of reason [w]ould disagree with the district court's resolution of [Arteaga's] constitutional claim[]" and would also "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. As shown below, the Ninth Circuit's failure to issue a COA on the record that was before it, the record now before this Court, shows that it applied a COA standard much higher than the one this Court articulated in *Miller-El*—a standard that, in effect, conflicts with this Court's mandates. *See* Supreme Court Rule 10(a).

This case thus provides an opportunity for this Court to ensure that the Ninth Circuit gets back in line with the rest of this nation's circuit courts. And that is why this case is significant. The COA standard is an "important matter" in federal habeas law. *See* Supreme Court Rule 10(a). If a court is not correctly applying that standard, then that court strips habeas corpus of its all-important role in our criminal justice system. *See Harrington v. Richter*, 562 U.S. 86, 91 (2011) ("The writ of habeas corpus stands as a safeguard against imprisonment of those

held in violation of the law."). Thus, this case will not just allow this Court to ensure uniformity within the nation's federal system, but it will also allow this Court to preserve habeas corpus's vital role in our system of justice.

2. "[J]urists of reason could disagree with the district court's resolution of" the deficient-performance prong of Arteaga's ineffectiveness claim for three reasons. *See Miller-El*, at 327. *First*, the district court applied the wrong standard of review to this component of Arteaga's claim. Because this is a federal habeas case, this case is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). *See* 28 U.S.C. § 2254. As such, Arteaga had to show under 28 U.S.C. § 2254(a) that his constitutional rights were violated and also show that § 2254(d) did not bar relief. Section 2254(d) applies to a claim *only if* the state-court proceedings:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State a proceeding.

28 U.S.C. § 2254(d).

Here, Arteaga first raised his ineffectiveness claim in a petition to the Los Angeles County Superior Court, then in a petition to the California Courts of Appeal (CCA), and finally in a petition to the California Supreme Court (CSC). The superior court denied his claim in a reasoned decision and the CCA and CSC summarily denied his petitions. Pet. App. 39-45. In *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991), this Court instructed federal courts to look "to the last reasoned

decision" that resolved the claim. Because the last reasoned decision was the superior court's decision, that decision was the relevant state-court decision under § 2254(d). *See Ylst*, 501 U.S. at 799-800, 803 (analyzing the CCA's reasoned decision and not the CSC's subsequent summary denial). The district court got the AEDPA analysis right up to that point. *See* Pet. App. 13 (identifying district court decision as the relevant state-court decision). But the district court found that the superior court adjudicated both components of Arteaga's ineffectiveness claim in that decision, and therefore required Arteaga to show, under § 2254(d), that the state-court unreasonably determined each component. Pet. App. 13, 26-31.[2] But while the superior court adjudicated the prejudice component of Arteaga's claim, it never decided whether counsel was deficient. *See* Pet. App. 43 ("Even assuming that the decision not to call Ortega and instead focus on the weakness of the identification evidence constituted deficient performance, petitioner has nevertheless failed to show that he suffered actual prejudice as a result."). Because the state court "reserved judgment regarding counsel's deficiency," the courts below should have reviewed the deficient-performance prong of Arteaga's claim de novo. *See Porter v. McCollum*, 558 U.S. 30, 37, 39 (2009) (applying de novo review to deficient-

[2] The Ninth Circuit's decision ultimately amounts to nothing more than a summary denial. That decision merely articulates the governing COA standard and then concludes that Arteaga did not satisfy it. *See* Pet. App. 1. No other reasoning accompanies the decision. Because of that, presumably the Ninth Circuit agreed with all of the district court's reasons and thus the district court's reasoning is that which Arteaga discusses in this petition. *Cf. Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (explaining that when a higher court's decision is not accompanied by any reasons, a court "should presume that the unexplained decision adopted the same reasoning" employed by the lower court).

performance element of ineffectiveness claim when, as here, state court did not decide that issue).[3]

Second, the district court found that Arteaga had not shown that his counsel was deficient. Pet. App. 29. But he had. Under *Strickland* Arteaga had to show that "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. The Ninth Circuit has repeatedly found that a lawyer performs deficiently when, as here, he fails to adequately investigate and present evidence "that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict." *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002) (listing cases).[4] This failure has often arisen in cases where trial counsel failed to interview and subpoena alibi witnesses who would have placed the defendant at a different place at the time of the crime. *See, e.g.*, *Alcala v. Woodford*, 334 F.3d 862, 870-71 (9th Cir. 2003) (finding deficient performance where counsel failed to interview and present alibi witness who would have testified that defendant was with them in a different city from the one where the crime occurred); *Luna v. Cambra*, 306 F.3d 954, 958-60 (9th Cir. 2002) (same, except alibi witnesses—two family members—would have testified that defendant

[3] But even if the deficient-performance prong is reviewed under § 2254(d), Arteaga can still show that the state-court decision on that issue is unreasonable. *See infra*.

[4] As noted, because the state court did not adjudicate the merits of this prong of Arteaga's ineffectiveness claim, the Ninth Circuit was required to review deficient performance de novo. And under de novo review, Arteaga could rely on circuit law to support his claim.

was with them at their home at the time of the crime); *Brown v. Myers*, 137 F.3d 1154, 1156-57 (9th Cir. 1998) (same, except alibi witnesses—including one of defendant's friends—would have placed defendant at the friend's house instead of the crime scene). This case is no different than those cases. Trial counsel knew that Ortega could have offered an alibi for Arteaga's whereabouts when the crime was taking place. Specifically, Arteaga was in a different part of Los Angeles—first at a club and then at Ortega's house—when the crime was occurring. Pet. App. 195; *see also* Pet. App. 62-66. Yet trial counsel failed to call Ortega as a witness to testify to these facts.

At the *Marsden* hearing, trial counsel tried to justify his failure by asserting that he felt the "strongest case strategically and tactically" was a misidentification defense based on Peres's testimony. Pet. App. 195. In the district court's view, it was reasonable for counsel to not call Ortega because Ortega's testimony would have "place[d] Petitioner near the scene of the shooting, in a car able to travel quickly," as opposed to "the misidentification defense which could leave a jury assuming Petitioner was nowhere near the scene." Pet App. 29. This reasoning is flawed. Even if Ortega would have placed Arteaga in the same general vicinity as the crime, he still would have placed him in a *different* place around the same time Carlyle had been shot. That is compelling evidence no matter which way you look at it. Moreover, it was unlikely that Arteaga could have traveled from the Los Angles club to the Hollywood club during the relative time period. The shooting occurred at the Western/Santa Monica intersection in Hollywood around 12:20 a.m. Pet. App.

170. Around midnight, Arteaga and Ortega were being escorted out of a different club located at 2601 W. Temple in Los Angeles. Pet. App. 64-65. Arteaga then dropped Ortega off at his home at 453 N. Westmoreland Avenue, also in Los Angeles. (*Id.*) While the crime scene was only about two miles from Ortega's house, for Arteaga to have gone from the Los Angeles club to Ortega's house and then to Hollywood during a brief twenty-minute window would have required him to travel to two locations while navigating through a densely populated part of Los Angeles on a Friday night—a time when traffic is usually severely congested.

Trial counsel was also deficient for a separate reason. At the *Marsden* hearing, trial counsel admitted that while his investigator interviewed Ortega, he never *personally* interviewed that witness. Pet. App. 195. But as the Ninth Circuit has explained time and again, a defense lawyer performs deficiently if he fails to personally interview a key defense witness. *See, e.g.*, *Lord*, 184 F.3d at 1084, 1089, 1091 (concluding that counsel was deficient for not "personally interview[ing]" witnesses who claimed to have seen the victim after she was killed); *Howard v. Clark*, 608 F.3d 563, 569-71 (9th Cir. 2010) (counsel deficient where he failed to interview surviving victim who would have stated defendant was not the shooter); *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994) (counsel deficient where he failed to interview defendant's brother who had confessed to the crime). Given the potential importance of Ortega's testimony, trial counsel "had a duty, at the very least, . . . to make an independent assessment of [Ortega's] account of [what

happened on August 9] and [his] credibility as a witness." *Howard*, 608 F.3d at 570. This he did not do. And for this independent reason alone, he was deficient.

Third, even if the district court was correct and it was required to review this prong of Arteaga's claim under § 2254(d), reasonable jurists would disagree with the district court's § 2254(d) analysis. *Strickland* recognized that an attorney's duty to provide reasonably effective assistance includes the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691; *see also* ABA Standards for Criminal Justice: Prosecution Function and Defense Function 4–4.1(a) (3d ed. 1993) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case. . . .").[5] Thus, the superior court unreasonably applied *Strickland* because the record unmistakably showed that Arteaga's counsel failed to make a reasonable professional judgment when he decided to not call Ortega. *See Strickland*, 466 U.S. at 690-91.

3. Jurists of reason could also disagree with the district court's resolution of the prejudice prong of Arteaga's ineffectiveness claim. *See Miller-El*, at 327. To show prejudice, Arteaga had to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

[5] In assessing trial counsel's performance in other ineffectiveness cases, this Court has referred to the American Bar Associations Standards for Criminal Justice as "'guides to determining what [conduct] is reasonable.'" *Rompilla v. Beard*, 545 U.S. 374, 375 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

different." *Strickland*, 466 U.S. at 694. And because the state court did adjudicate this element of his claim, he also had to show that the state-court decision was unreasonable. *See Davis v. Ayala*, 135 S. Ct. 2187, 2188 (2015). Arteaga did both in the courts below.

In analyzing whether counsel's errors prejudiced Arteaga, this Court has instructed lower courts to consider the relative strength of the prosecution's case. A verdict "only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. This was not a case where the prosecution's evidence was overwhelming. The trial judge, who had firsthand knowledge of the strengths and weaknesses of the prosecution's case, tacitly recognized as much. That is why he held a hearing on Arteaga's motion for a new trial, rather than deny it outright. *See* Pet. App. 523. He understood that Ortega's testimony could have resulted in a different verdict. And his opinion of the case squared with the record. As noted above, no physical evidence linked Arteaga to the shooting and there was no confession. The prosecution's only evidence was the eyewitness testimony of Carlyle and Ulloa. But their testimony was seriously flawed. Both men had affirmatively stated at some point during the police's investigation that Arteaga was *not* the shooter. Pet App. 139, 167. And while both eventually identified Arteaga as the shooter, the probative value of their identifications was limited because both had been drinking right before the crime occurred. The shooting also took place "in a matter of seconds," Pet App. 141, 166, which explains why Carlyle and Ulloa could not remember basic

details, like the type of gun used by the shooter and what type of pants the shooter wore. Pet App. 135, 140, 165. Finally, both men contradicted each other on several points, including when the crime occurred; the direction from which the shooter approached them; how much hair the shooter had; and the color of the shooter's shirt. *Contrast* Pet App. 115-17, 120, 122-23, 135 *with* Pet App. 155-56, 158, 163.) In other words, the prosecution's entire case was built on questionable eyewitness identification testimony and no other testimony or physical evidence linked Arteaga to the crime.

On the other side of the ledger, Ortega's testimony would have strengthened counsel's chosen misidentification defense and, together, Peres's and Ortega's testimony would have been a powerful counterweight to the prosecution's evidence. If Arteaga was at a different location at the same time as the crime, then it would have bolstered Peres's testimony and made it all the more likely that Carlyle and Ulloa had misidentified Arteaga. Given that Peres's testimony was the only proof of misidentification, Ortega's testimony, which buttressed that point, creates a reasonable probability that the fact-finder would have entertained a reasonable doubt concerning guilt.

Despite the weaknesses in the prosecution's evidence and the strengths of Arteaga's omitted defense, the state court found Arteaga was not prejudiced by trial counsel's failures, and the district court found that decision reasonable. Pet App. 30-31. It was not for three reasons. *First*, the state court reasoned that "Ortega was a fellow gang member whose purported alibi testimony could have been easily

rejected by a jury for that reason." Pet App. 44. Ortega's status as a gang member was certainly a factor to consider in determining his credibility, but it was not a reason by itself to find him not credible. In rejecting Ortega's status based largely on his status, the state court essentially made an adverse credibility finding without holding an evidentiary hearing. That is the hallmark of an unreasonable determination of the fact.

Second, the state-court decision is also unreasonable because the state court gave undue weight to the fact that Ortega's "appearance would have been additional evidence of petitioner's gang membership." Pet. App. 44. It is unclear why that matters. During trial counsel's opening statement, he stated that Arteaga admitted to being a gang member, Pet. App. 110-11, so that issue had already been resolved against him. Ortega's relationship to Arteaga would not have significantly aided the prosecution.

Finally, the state court made a clear factual error in its analysis. The court concluded that Ortega's statement did not provide a "firm alibi" because it was vague as to time. Pet. App. 43. Not so. Ortega's statement reflects that he and Arteaga were at a different club from around 10:30 p.m. to around midnight. After they were kicked out of the club they went back to Ortega's house. Pet. App. 65-66. Notably, the statement does not reflect that they took a detour anywhere else after being kicked out of the club. The statement therefore fully accounts for Arteaga's whereabouts during the relevant time period. The contrary conclusion reached by the state court renders its decision unreasonable. *See Wiggins*, 539 U.S. at 528

(state-court decision unreasonable under § 2254(d)(2) where state court made "clear factual error").

4. This Court's mandate is clear: a circuit court *must* issue a COA if the petitioner makes "'a substantial showing of the denial of a constitutional right.'" *See Miller-El*, 537 U.S. at 327 (quoting 28 U.S.C. § 2253(c)(2)). Arteaga satisfied this standard because he demonstrated "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* The Ninth Circuit's failure to find, on this record, that Arteaga deserved a COA shows that the Ninth Circuit applied a standard that conflicts with the one this Court adopted in *Miller-El*.

CONCLUSION

The decision below fails to heed this Court's clear pronouncements about when a reviewing court should issue a COA. This Court should therefore grant the petition for a writ of certiorari.

Respectfully submitted,

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