No. 20-350

In the Supreme Court of the United States

DANIEL FLORES,

Petitioner,

v.

CHRISTIAN PFEIFFER, WARDEN,

Respondent.

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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QUESTIONS PRESENTED

1. Whether the state court's ruling that petitioner voluntarily confessed to another jail inmate was contrary to, or an unreasonable application of, clearly established federal law.

2. Whether petitioner's Sixth Amendment right to counsel on murder charges had attached when the other inmate questioned him while petitioner was detained for an unrelated offense, eight months before prosecutors filed any complaint or formal information regarding the murder charges.

DIRECTLY RELATED PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit:

Flores v. Pfeiffer, No. 18-55344 (March 17, 2020) (this case below).

U.S. District Court for the Central District of California:

Flores v. Barnes, No. CV 13-03934 JLS-AFM (March 6, 2018) (this case below).

California Supreme Court:

In re Flores, No. S235622 (Aug. 24, 2016) (denying petition for writ of habeas corpus).

People v. Flores, No. S207728 (Feb. 22, 2013) (denying petition for review on direct appeal).

California Court of Appeal:

People v. Flores, No. B231789 (Nov. 29, 2012) (affirming conviction on direct appeal).

Ventura County Superior Court:

People v. Flores, No. 2008046499 (Feb. 18, 2011) (underlying criminal conviction).

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CONSTITUTIONAL PROVISIONS

STATEMENT

1. In January 2008, Rafael and Jesus R. were shot in the backyard of their home in El Rio, California. Pet. App. 8a. Approximately one month later, Armando Sepulveda was shot multiple times outside of his home on the same block and killed. *Id.* at 9a. Witnesses to that shooting described a young man running from the scene and getting into an older "SUV Blazer or Bronco" with one inoperative brake light. *Id.* Twenty minutes later, a police officer saw a 1987 Chevrolet Blazer that matched the description of the get-away car. *Id.* at 10a. The officer temporarily detained the occupants and identified petitioner as the passenger and Jose Velasquez, a fellow member of the Colonia Chiques gang, as the driver. *Id.*

In the following weeks, officers conducted additional investigation into the shootings, including wiretaps of phones used by several members of the Colonia Chiques gang. Pet. App. 10a; *see also* SER 32.[1] Officers also executed a search warrant at a home hosting a Colonia Chiques party. SER 26; *see also* 5 RT 796-801.[2] As an officer entered the home, he observed petitioner

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[1] Officers did not intercept any calls about the shootings, though they did capture petitioner speaking with Velasquez and others about plans to retaliate against the El Rio gang, with whom Colonia Chiques shared an "intense rivalry." Pet. App. 10a; SER 33. "SER" refers to respondent's supplemental excerpts of record filed at C.A. Dkt. 19. "ER" refers to petitioner's excerpts of record in the court below at C.A. Dkt. 7.

[2] Citations to "RT" are to the reporter's transcript in the state appellate court proceedings and citations to "CT" are to the clerk's transcript. Those transcripts are available at D. Ct. Dkt. 91.

sprinting towards the garage, where officers ultimately recovered a .25 caliber handgun that matched the cartridge casings from both shootings. SER 26; 5 RT 813-816. Forensic analysis of DNA on the gun later identified petitioner as one of three possible contributors. *See* 7 CT 1666-1667; SER 27.

In early March 2008, officers arrested Velasquez for an offense unrelated to the shootings and placed him in a jail cell next to a confidential informant who had been directed to record their conversation. Pet. App. 41a. Velasquez admitted that he drove petitioner and another Colonia Chiques gang member to Sepulveda's home where "several shots were fired." *Id.* Velasquez described how he and petitioner fled the scene in his Blazer and he acknowledged that the police subsequently "pulled [them] over." ER 456, 460, 463.[3]

Separately, officers arrested petitioner on an unrelated drug charge on March 5, 2008. Pet. App. 2a. They placed petitioner in a jail cell adjacent to the same confidential informant who had discussed the shootings with Velasquez. *Id.* at 43a. The informant introduced himself as a member of the Mexican Mafia and said that he had been tasked with learning whether Sepulveda was killed in a drive-by shooting in violation of Mexican Mafia rules. *Id.* Petitioner denied that Sepulveda was killed in a drive-by shooting, but confessed his involvement in Sepulveda's murder, providing accurate details

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[3] A complete transcript of Velasquez's conversation with the informant is available in the excerpts of record. *See* ER 445-482.

about Sepulveda's clothing and the shooting scene. *Id.* Petitioner also admitted that he shot Rafael and Jesus R. *Id.*[4]

2. Approximately eight months later, in November 2008, the Ventura County District Attorney filed a felony complaint charging petitioner with murder and attempted murder. *See* 1 CT 1-3. Prosecutors filed a formal information containing the same charges after a preliminary hearing in April 2009. *See* 1 CT 32; *see also* Pet. App. 17a.

Before the trial, the prosecution moved to admit petitioner's recorded confession. Pet. App. 44a. Over petitioner's objection, the court admitted the statements, concluding after an evidentiary hearing that the statements were voluntary and that petitioner was "assertive" during the conversation and "motivated in making the incriminating statements by his desire to get full credit for doing the killing 'right'"—not by fear. SER 3. Following the trial, a jury found petitioner guilty of first degree murder and two counts of attempted murder. Pet. App. 6a. The trial court sentenced petitioner to life in prison without the possibility of parole. *Id.*

The California Court of Appeal affirmed. Pet. App. 38a-51a. As relevant here, the court concluded that petitioner's recorded confession was properly admitted at trial as a voluntary statement. *Id.* at 41a-46a, 49a. The court

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[4] A complete transcript of petitioner's conversation with the informant is also available in the excerpts of record. *See* ER 55-323.

reasoned that the confession resulted from an "acceptable law enforcement ruse," not "coercion which caused [petitioner's] will to be overborne." *Id.* at 44a. And the court determined that petitioner was willing to speak "freely and without hesitation" and that his decision to confess was "essentially free." *Id.* at 44a, 45a. "The record shows nothing physically or emotionally coercive about the conversation, or any indication of vulnerability, intimidation or fear." *Id.*

The California Supreme Court denied a petition for review, which advanced the claim that petitioner's confession should have been suppressed because it was coerced by the informant's threats of violence. *See* SER 126, 95-112. Petitioner did not seek review in this Court.

Petitioner later filed a petition for habeas relief in the California Supreme Court, raising a new claim that the government had violated his Sixth Amendment right to counsel when he was questioned by the informant about the shootings. SER 127-148. The California Supreme Court denied the claim on procedural grounds, citing *In re Dixon*, 41 Cal.2d 756 (1953), for the rule that claims that could have been brought on direct appeal cannot be raised for the first time on collateral review. SER 155.

3. Petitioner next filed a federal habeas petition, asserting his coerced-confession and Sixth Amendment right-to-counsel claims. *See* Pet. App. 2a; D. Ct. Dkt. 76. The district court denied relief, adopting a magistrate judge's findings and recommendations in full. Pet. App. 4a, 5a-35a. It concluded that

the California Court of Appeal's decision on the coerced-confession claim was not contrary to, or an unreasonable application of, this Court's precedents. Pet. App. 26a-34a. The district court reviewed the Sixth Amendment claim de novo, holding that the recorded confession did not implicate the right to counsel because that right had not yet attached for the murder charges. *Id.* at 16a-18a.[5]

The court of appeals granted a certificate of appealability, C.A. Dkt. 3, and a three-judge panel unanimously affirmed the district court's judgment, Pet. App. 1a-3a. The court of appeals agreed that the state intermediate court's ruling that petitioner "voluntarily confessed was not contrary to, or an unreasonable application of, clearly established federal law." *Id.* at 2a-3a. The court of appeals also concluded that the jailhouse conversation with the informant did not violate petitioner's right to counsel because petitioner was questioned "regarding uncharged conduct, unrelated to the charge for which he was being detained, and therefore his right to counsel had not attached." *Id.* at 3a.

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[5] The State argued in the district court proceedings that petitioner had procedurally defaulted the Sixth Amendment claim. *See* C.A. Dkt. 18 (Ans. Br.) at 20-21. The district court did not address that argument, however, considering it "more efficient" to resolve the claim on the merits. Pet. App. 15a-16a.

ARGUMENT

Petitioner contends that he is entitled to habeas relief because his statements to a confidential informant, taking responsibility for killing one person and wounding two others, were obtained in violation of his constitutional rights. But his legal arguments lack merit; the decision below does not implicate any genuine conflict of authority among federal appellate courts or state courts of last resort; and petitioner's Sixth Amendment claim was procedurally defaulted.

1. Petitioner's claim that his confession was coerced in violation of his Fifth and Fourteenth Amendment rights (Pet. 13-21) is incorrect, and the state court's ruling certainly is not contrary to, or an unreasonable application of, clearly established federal law. Nor does petitioner identify any other consideration warranting this Court's review of that claim.

a. To obtain federal habeas relief, a petitioner must show that the state court's decision was "'contrary to, or involved an unreasonable application of, clearly established Federal law,'" or was "'based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding.'" *Harrington v. Richter*, 562 U.S. 86, 97-98 (2011) (quoting 28 U.S.C. § 2254). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* at 101. Petitioner does not acknowledge or address this standard of review. And, under the circumstances

of this case, he could not possibly establish that all fairminded jurists would disagree with the state court's ruling.

A confession is involuntary when the suspect's "will was overborne in such a way as to render his confession the product of coercion." *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991). The voluntariness of a confession is assessed by "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Those circumstances include "not only the crucial element of police coercion," but also "the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health." *Withrow v. Williams*, 507 U.S. 680, 693 (1993) (internal citations omitted).

As the court of appeals recognized, the state court found that the informant "did not threaten" petitioner and that petitioner did not "confess out of fear." Pet. App. 2a, 3a. The "deception employed by" the informant "was proper and not likely to produce an untrue or unreliable conviction." *Id.* at 44a. The informant never uttered explicit threats, and his reference to a gang rule against drive-by shootings did not necessarily imply a credible threat. *Id.* at 27a.[6] The record revealed "nothing physically or emotionally coercive about

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[6] Petitioner asserts that it "was well understood that a drive-by is a serious

the conversation, or any indication of vulnerability, intimidation or fear" from petitioner. *Id.* at 44a.[7] Instead, petitioner "was willing to speak about the shooting and explained his criminal conduct freely and without hesitation." *Id.* He volunteered details of the shootings near the beginning of the conversation and then again repeatedly throughout the lengthy exchange, *see id.* at 30a, even after the informant reassured petitioner that his name was "not dirty" and that the Mexican Mafia "just wanted to talk to [him]. That's it." ER 92.[8] The record also supported the state court's finding that petitioner confessed in order to bolster his standing with gang members and to receive credit for the crimes that he committed. ER 303.[9] Petitioner was "street smart" (1 RT 71;

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violation of Mexican Mafia dictates," and that "a 'job' to assassinate [petitioner] had been conditionally ordered, that the informant was 'running court,' and if [petitioner] did not convince the informant that he did not commit a drive by, the higher ups will kill him." Pet. 12. He does not identify anything in the record to support those assertions; both the state and lower courts concluded that those assertions were not supported in the transcript of the conversation. *See, e.g.*, SER 2-3; Pet. App. 27a-28a, 44a-45a. And petitioner elicited testimony from a prison gang expert that the Mexican Mafia did not even have a rule against drive-by shootings. *See* 1 RT 39-41.

[7] Indeed, petitioner repeatedly called the informant a "jackass" throughout the conversation (Pet. App. 55a; ER 69, 78, 154, 175, 190-91, 220, 230, 301), and referred to powerful gang members who would spread rumors about him as "jackasses," "motherfuckers," and "sons of bitches," ER 96, 136, 251, 267 269, 284.

[8] *See, e.g.*, ER 93-94 (discussing details of the murder); ER 104-105 (explaining how the murder weapon was discovered), 149 (admitting murder occurred on Lemar Street), 187-190 (petitioner agreed that he yelled out gang name after the murder).

[9] Petitioner bragged about other crimes that the informant did not ask about, including a bank robbery, ER 106-108; an assault, ER 128-130; another

ER 394), and treated the informant as a valuable networking contact for future criminal endeavors. ER 201-207, 246-247. Given all of these circumstances, the state court correctly held that petitioner's statements were voluntary—and the court of appeals properly concluded that the state court's ruling "was not contrary to, or an unreasonable application of, clearly established law." Pet. App. 3a.

b. Petitioner argues (Pet. 15-18) that the decision below conflicts with the Court's decision in *Fulminante*, 499 U.S. 279, but he is incorrect. In *Fulminante*, a case that came to this Court on direct appeal, the Court held that the defendant's confession was coerced based on the particular circumstances of the case, while describing the question as a "close one." *Id.* at 287. As the district court recognized below, the facts of *Fulminante* "are readily distinguishable" from those here. Pet. App. 45a.

The defendant in *Fulminante* was a particularly vulnerable target who had failed to adapt well to the stress of prison life and had previously been admitted to a psychiatric hospital. 499 U.S. at 286 n.2. Here, the petitioner displayed no "indication of vulnerability, intimidation or fear," and there was no evidence that he was "unfamiliar with the criminal justice system or the jail

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shooting that occurred in an alley in rival "South Side" territory, ER 263-270; and a gunfight he had with a rival "South Side" gang member who was committing a drive-by shooting, ER 290-291. He also expressed pride about his skills with a gun. *See* ER 162, 259, 274-280, 297.

environment." Pet. App. 44a.[10] The informant in *Fulminante* offered to protect the defendant from believable and credible threats of violence "in exchange" for a confession to murder. 499 U.S. at 286. Here, the state court found that the informant's statements did not "communicate[] a credible threat to" petitioner. SER 3; Pet. App. 45a. And unlike the quid-pro-quo offer of protection in *Fulminante*, the state court here concluded that petitioner's confession was not in exchange for protection from "physical harm." Pet. App. 46a. Instead, petitioner confessed in order "to take full credit and obtain the 'respect' he was owed for the crime and to brag about his brazen gang related criminal behavior, as evidenced by his statements made about the killing and several other violent crimes." SER 4.

Petitioner's contrary characterization of his conversation with the confidential informant (Pet. 7-8, 17) is unsupported by the record. Petitioner claims, for example, that he "understood that the retaliation" for a drive-by shooting "was death" (*id.* at 7), that the informant "promised to call off" an attack if he confessed (*id.*), and that the informant held petitioner's "life in his hands" (*id.* at 17). None of those assertions is supported by a citation to the record and each one conflicts with the state court's determinations. But

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[10] The district court observed that petitioner was "well-familiar with the criminal justice system," Pet. App. 31a, and "street smart" from his experience in his gang, *id.* at 32a. And the record did "not reflect that petitioner was particularly vulnerable or unable to adapt during his prior incarcerations." *Id.* at 31a-32a.

petitioner does not contend that the state court unreasonably determined the facts in light of the evidence presented. *See generally Richter*, 562 U.S. at 98; 28 U.S.C. § 2254(d)(2). In any event, as the district court explained, "[a]t most, reasonable jurists could disagree as to whether any of the words uttered by the confidential informant raised an inference of a credible threat of physical violence." Pet. App. 28a.

c. Petitioner also contends that the decision below is at odds with other lower court authority (Pet. 14-18), but there is no square conflict. The only appellate decision he cites is *Lam v. Kelchner*, 304 F.3d 256 (3d Cir. 2002), which granted habeas relief on the basis of a coerced confession. In that case, however, the "only reasonable conclusion" from the record was that the defendant's "will was overborne by the officers' threats of violence." *Id.* at 267. The threats at issue were "more direct" and the record contained undisputed testimony from the defendant that she feared gang violence if she did not pay the balance owed on a murder-for-hire contract. *Id.* at 265; *see id.* (threats involved in *Fulminante* "pale[d] in comparison" to the threats in *Lam*). The fact-specific ruling in *Lam* does not conflict with the decision below.[11]

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[11] The court in *Lam* also observed that the state courts in that case had never considered *Fulminante* or made findings of fact. *Lam*, 304 F.3d at 266-268. In contrast, the state courts in this case expressly distinguished *Fulminante* and made detailed findings of fact that are entitled to a presumption of correctness. *See* Pet. App. 45a; 1 CT 212-15; SER 2-4; ER 47-48; *Miller v. Fenton*, 474 U.S. 105, 117 (1985) (state court findings entitled to a presumption of correctness on federal habeas review).

Petitioner also invokes *Dominguez v. Stainer*, 2014 WL 1779546 (C.D. Cal. Apr. 30, 2014), which involved a similar ruse and the same informant as this case. Of course, that decision is not appellate authority; and in any event the informant was "much more aggressive" in that case, repeatedly promising "stop orders" of a "green light" to "lure" the defendant to confess to the crime." Pet. App. 33a; *see* ER 592; *Dominguez*, 2014 WL 1779546, at *14 and nn. 3-6.[12] Moreover, the defendant in *Dominguez* was "particularly vulnerable because he was inexperienced in the adult criminal justice system." Pet. App. 33a. And he "repeatedly begged the confidential informant to believe him that the shooting was not a drive-by," signaling fear. *Id.* Those "circumstances did not exist in this case." *Id.*; *see also Meraz v. Pfeiffer*, 2017 WL 7101154 (C.D. Cal. Dec. 12, 2017) (concluding that fairminded jurists could disagree about whether statements were improperly coerced in case involving a different informant, also posing as a Mexican Mafia member).[13]

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[12] A "green light" is an "immediate threat, which can be acted on immediately, upon the transfer or arrival to prison." D. Ct. Dkt. 96 at 4. Unlike in *Dominguez*, in this case the informant did not promise "stop orders" and never told petitioner that the Mexican Mafia had a "green light" on him. *See* D. Ct. Dkt. 97. (An excerpt of the transcript of Dominguez's interview is available in the excerpts of record. *See* ER 541-595.)

[13] Even if the circumstances of petitioner's statement to the informant were viewed as coercive, any error would be harmless (*see* C.A. Dkt. 18 (Ans. Br.) at 47-51), at least as to the murder of Sepulveda. Velasquez separately implicated petitioner in Sepulveda's murder and explained that police stopped them in his Blazer shortly after the shooting, a fact that was corroborated by the testimony of the officer at trial. *Id.* A gun matching the cartridge casings at both shootings was recovered from a garage after an officer observed

2. Petitioner also seeks review of his claim that the government violated his Sixth Amendment right to counsel on the murder charges when the informant questioned him while he was in custody for another offense. Pet. 21-35. But that fact-intensive claim lacks merit; petitioner identifies no persuasive reason for this Court to review it; and he ignores the fact that he failed to raise the claim on direct appeal before the state courts.

a. The court of appeals correctly rejected petitioner's claim that his Sixth Amendment right to counsel for the murder offenses had attached when he was in custody for an unrelated drug offense. Pet. App. 3a. The Sixth Amendment guarantees an "accused" the right to the assistance of counsel in "all criminal prosecutions." U.S. Const. amend. VI. The right to counsel "does not attach until a prosecution is commenced," whether "'by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). And the right is "offense specific" (*id.*): it attaches only to the particular offense that is the subject of the "adversary judicial criminal proceeding" that has been initiated, or any uncharged offense that would be considered "the same offense" under

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petitioner running towards it. DNA recovered from the gun matched petitioner as one of three possible contributors. *See* 7 R.T. 1666-1667; SER 27. And petitioner was overheard in wiretaps discussing plans to retaliate against the El Rio gang. *See* C.A. Dkt. 18 (Ans. Br.) at 51.

Blockburger v. United States, 284 U.S. 299 (1932), *e.g.*, *Texas v. Cobb*, 532 U.S. 162, 173 (2001).[14]

Petitioner does not contend that the decision below conflicts with those precedents. At the time of the conversation with the informant, petitioner was in custody for a drug offense that was unrelated to the murder charges. Pet. App. 2a, 17a. The conversation occurred more than eight months before prosecutors filed a complaint for the murder charges and more than a year before they filed a formal information. Pet. App. 17a; 1 CT 1-3. And petitioner does not identify anything in the record to support his assertion that "the government ha[d] committed itself to prosecute" petitioner for the shooting offenses at the time of the informant's questioning or that a murder prosecution had commenced. *United States v. Gouveia*, 467 U.S. 180, 189 (1984). Indeed, the record reflects that the officers' investigation into the

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[14] Petitioner asserts that the commencement of prosecution is a "technical or apparent" formality under the Sixth Amendment. Pet. 30. But this Court has explained that the "rule is not 'mere formalism,' but a recognition of the point at which 'the government has committed itself to prosecute,' 'the adverse positions of government and defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 198 (2008) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). And while some lower courts have left open the "possibility that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment," petitioner has not identified any decision concluding that the right to counsel attaches under circumstances similar to those here. *See, e.g.*, *Turner v. United States*, 885 F.3d 949, 954 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 2740 (2019).

shooting was ongoing at the time of the conversation. *See supra* pp. 1-2. Because the informant questioned petitioner "regarding uncharged conduct, unrelated to the charge for which he was being detained," the court below correctly held that the right to counsel on the murder offenses had not yet attached. Pet. App. 3a.

Instead of identifying any conflict with this Court's precedents or among the lower courts, petitioner asks this Court to adopt "a new rule for the right to counsel in the context of coerced confessions from criminal suspects who had no access to counsel." Pet. 22.[15] Even if it were appropriate for this Court to adopt a new constitutional rule in the context of a habeas case as a general matter, *but see Teague v. Lane*, 489 U.S. 288, 316 (1989), there would be no basis for it to adopt the rule proposed by petitioner. Whether a prosecution has commenced or not, involuntary confessions elicited through coercive interrogations are appropriately evaluated under the Fifth and Fourteenth Amendments. *Fulminante*, 499 U.S. at 288. Petitioner's proposed Sixth Amendment rule would flout the "plain language of the Amendment and its purpose" by attaching before a prosecution has commenced. *Gouveia*, 467 U.S. at 189; *cf. Moran v. Burbine*, 475 U.S. 412, 428-429 (1986) (rejecting Sixth

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[15] Petitioner refers (Pet. 21-33) to this Court's Sixth Amendment precedents, including *United States v. Massiah*, 377 U.S. 201 (1964), *United States v. Henry*, 447 U.S. 264 (1980), *Maine v. Moulton*, 474 U.S. 159 (1985), and *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), but does not contend that the decision below conflicts with any of them.

Amendment right to counsel for custodial interrogation before the commencement of formal criminal proceedings).

b. In any event, this case is not an appropriate vehicle for considering any such rule because petitioner procedurally defaulted his Sixth Amendment claim. As the State explained to the courts below, petitioner never raised a Sixth Amendment claim on direct appeal in the state courts. C.A. Dkt. 18 (Ans. Br.) at 20-21. Petitioner raised it for the first time in state habeas proceedings, but the California Supreme Court held it was procedurally barred under *In re Dixon*, 41 Cal.2d at 759. That procedural bar is an independent and adequate state ground that prohibits federal habeas relief. *See Johnson v. Lee*, 136 S.Ct. 1802, 1806 (2016). Petitioner failed to point to any circumstances that would be sufficient to excuse his procedural default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: December 11, 2020

Respectfully submitted,

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