No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEONDRE ARTHUR STATEN, Petitioner,

vs.

RONALD DAVIS, Warden

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

CAPITAL CASE

The Petitioner, by his undersigned counsel, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Since 2001, the Petitioner has been represented by Jerry L. Newton and Norman D. James under appointment by the United States District Court for the Central District of California pursuant to 21 U.S.C. § 848(q)(4)(B) and the Criminal Justice Act. This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States of America.

Dated: October 27, 2020

s/ Jerry L. Newton
JERRY L. NEWTON*
Counsel for Petitioner
*Counsel of Record

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vs.

RONALD DAVIS, WARDEN, Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. Under 28 U.S.C. §2254(d)(2) and this Court's decision in *Harrington v. Richter,* 562 U.S. 86 (2011), does a federal court's deference to a state court's summary disposition of a habeas corpus claim include deference to the state court's established process and procedures for determining whether, on the record before it, a prima facie case has been made out?

2. Under *Richter v. Harrington*, 562 U.S. 86 (2011), a state court's determination that a claim lacks merit precludes federal habeas relief under 28 U.S.C. § 2254(d) so long as fairminded jurists could disagree on the correctness of the state court's decision. Does that same deference preclude federal habeas relief under 28 U.S.C.§ 2254(d) when a three judge panel finds under *Stickland v. Washington*, 466 U.S. 668 (1984) that the petitioner was denied effective assistance of counsel during the guilt phase of the trial, but two of the three judges have a disagreement with whether or not the petitioner was prejudiced because, in theory, some fairminded jurist might disagree with them?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner is not a corporation.

RELATED CASES

There are no related cases pending in this Court.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE

NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioner Deondre Staten (hereinafter "Staten") prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

I.

ORDERS AND OPINIONS BELOW

The decision of the California Supreme Court on direct appeal was issued on November 9, 2000 (docket no. S025122) and is reported at *People v. Staten*, 24 Cal.4th

434, *cert. denied sub nom. Staten v. California*, 534 U.S. 846 (2001) (1 App. 1-17).[1] The California Supreme Court summarily denied Staten's state habeas petition on September 10, 2003 (docket no. S107302) and denied two subsequent exhaustion petitions filed by federal habeas counsel on July 13, 2005 (docket no. S121789) and on December 20, 2006 (docket no. S141678) (1 App. 18-23). The United States District Court for the Central District of California denied all claims in the federal habeas petition on March 31, 2014, except for a portion of Claim 7 (ineffective assistance of counsel at the guilt phase) and all of Claim 11 (unconstitutionality of defense counsel appointment contract) (docket no. 2:01-cv-09178-MWF) (1 App. 24-137). The United States District Court for the Central District of California denied the balance of Claim 7 and all of Claim 11 on October 2, 2017 (docket no. 2:01-cv-09178-MWF) (1 App. 138-162). On June 18, 2020, the Ninth Circuit Court of Appeals (docket no. 17-99008) affirmed the judgment of the district court dismissing Claims 7 and 11. *Staten v. Davis, Warden*, 962 F.3d 487 (9th Cir 2020) (2 App. 163-177). On August 5, 2020, the Ninth Circuit denied Staten's petition for rehearing and rehearing en banc (docket no. 17-99008) (2 App. 178).

II.

JURISDICTION

The Ninth Circuit judgment was entered on June 18, 2020. A timely petition for rehearing and rehearing en banc was denied on August 5, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1] "App." refers to Staten's two volume Appendix filed concurrently with this Petition, preceded by volume number and followed by page reference.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Fourteenth Amendment Due Process Clauses

"No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(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 application of the facts in light of the evidence presented in the State court proceedings.

California Penal Code § 987.2(d)

"In a county of the first, second, or third class,[2] the court shall first utilize

[2] California Government Code § 28022 (1961 amendment) defines a first class county as one with a population over 4,000,000 people (Los Angeles County). Government Code § 28023 defines a second class

the services of a public defender to provide criminal defense services for indigent defendants. In the event that the public defender is unavailable and the county and the courts have contracted with one or mor responsible attorneys or with a panel of attorneys to provide criminal defense services for indigent defendants, the court shall utilize the services of the county-contracted attorneys prior to assigning any other private counsel. Nothing in this subdivision shall be construed to require the appointment of counsel in any case in which the counsel has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the county-contracted attorney after making a finding of good cause and stating the reasons thereof on the record."

California Government Code § 31000,

"The board of supervisors may contract for special services on behalf of the following public entities: the county, any county officer or department, or any district or court in the county. Such contracts shall be with persons specially trained, experienced, expert and competent to perform the special services. . . . The special services shall [include]. . . legal . . .services. . . The board may pay from any available funds such compensation as it deems proper for these special services. . ."

IV.

STATEMENT OF THE CASE

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county as one with a population between 1,400,000 to under 4,000,000 people. Government Code § 28024 defines a third class county as one with a population between 1,300,000 to under 1,400,000 people.

Staten was arrested in January of 1991 and charged with the murder of his mother Faye Staten and father Ray Staten in the early morning hours of October 13, 1990 in La Puente, California, a suburb of Los Angeles. Staten was indigent and originally assigned a public defender. However, the Los Angeles County Public Defender's Office declared a conflict of interest and Staten was reassigned to attorney John Tyre, a member of the Pomona Contract Lawyer's Association ("PCLA"). That appointment and Tyre's subsequent representation of Staten during the guilt phase of his trial are the subject of this petition for writ of certiorari.

A. The PCLA Contract

Four of Staten's claims allege constitutional violations resulting from appointment of counsel under the terms of a written contract between Los Angeles County and the Pomona Contract Lawyers Association ("PCLA").[3] Over the course of fourteen years of litigation in the California Supreme Court and federal district court the factual allegation that appointment of counsel was under the PCLA contract was never in dispute. Although denying the PCLA claims, the district court expressly found that Staten's counsel, John Tyre, was appointed to represent Staten pursuant to the contract (1 App. 145).

When the case reached the Ninth Circuit Court of Appeals, however, the court quickly disposed of the PCLA claims, holding under *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) and the deference required under §2254(d)(2), that

[3] The legal theories are due process (Claim 1), equal protection (Claim 2), ineffective assistance of counsel (Claim 3), and conflict of interest with state interference in counsel's performance (Claim 11).

the California Supreme Court could reasonably have concluded that Staten's allegation of the "underlying premise" that appointment of counsel was under the PCLA contract was "unsupported" and that his argument "therefore collapses." *Staten v. Davis*, 962 F.3d 487, 500 (9th Cir. 2020) (1 App. 171).[4]

As is argued more fully below, this determination contravenes this Court's decision in *Richter* because while hypothesizing what arguments and theories could support the California Supreme Court's summary denial, the Ninth Circuit wholly ignores firmly established state law as well as rules and procedures employed by California courts in disposing of habeas petitions. Irrespective of what other bases the California Supreme Court may arguably have had to summarily deny the PCLA claims, the panel decision erroneously theorizes that the claims could reasonably have been resolved by a single factual finding that the California Supreme Court would not and could not have reached under its controlling process and procedures for determining the existence of a prima facie case for relief in a petition for habeas corpus.

Staten therefore believes that this case presents an opportunity for an essential further explication of this Court's decision in *Richter* with regard to the proper application of the §2254(d)(2) exception to state summary denials of habeas claims without reasoned opinions.

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[4] In briefing in the circuit court, Respondent maintained as its primary opposition to the PCLA claims that there was no showing of prejudice. However, for the first time in the case, in a footnote in its brief, while observing that the record didn't establish "whether [appointment under the PCLA contract] is true," Respondent asserted that for purposes of the appeal "it can be assumed that [counsel] was appointed pursuant to the PCLA contract." Other than this, there was no other briefing concerning whether appointment was under the contract

B. Ineffective Assistance Of Counsel During The Guilt Phase

Fay and Ray Staten, the mother and father of Staten, were murdered in their home on October 12, 1990. Staten was arrested in January, 1991, then tried, convicted and sentenced to death for the murder of his parents. The case was entirely circumstantial – no eye witnesses, no scientific evidence connecting Staten to the crime scene, no confession and no real motive. As the prosecutor conceded in his opening statement, he would not be able to prove that Staten was the actual murderer, only that Staten was somehow "involved" in the double homicide:

1. The Staten Family

In October 1990, the Staten family was a middle-class African American family living in their own home in La Puente, California. Staten's father, Ray Staten, was 44 years old and his mother, Faye, was 43 years old. Ray and Faye Staten had two children, Staten, age 24, who lived with his mother and father, and his younger brother Lavelle, age 21, who was mentally retarded and a ward of the state who resided at a state run home for developmentally disabled individuals in Covina. Staten graduated from high school, was a member of the school's football team and his only prior criminal conviction was for misdemeanor driving under the influence of alcohol.

Staten's parents owned and worked at a hair salon and beauty supply store in La Puente named "Najamah's." Staten worked part-time for his parents at Najamah's and was a member of a musical group called The First Amendment. Staten's parents owned their own home. As described by several neighbors and relatives, Staten had a warm

and loving relationship with his mother Faye. Several prosecution witnesses described Staten's relationship with his father Ray as "strained."

The Staten's residence was located in an area of La Puente, California which was the home turf of a local Hispanic street gang called the "Eastside Dukes." According to Deputy Los Angeles County Sheriff David Watkins, the Eastside Dukes were violent, known to kill people and were antagonistic towards African Americans. Watkins had personally observed graffiti near the Staten residence claiming "Eastside Dukes kills Niggers." Michael Hartman, the Statens' next door neighbor, testified that the Eastside Dukes claimed the neighborhood as their territory. Other neighbors testified that gun shots were fired by the gang almost every night. Still other neighbors described incidents where they had observed members of the gang drive with guns and threaten Staten. Staten testified at trial that he had lived at his parent's residence for thirteen years. His troubles with the East Side Dukes began while he was attending Nogales High School. Over the years since high school, Staten had been threatened on numerous occasions by Eastside Dukes gang members.

2. **The Parents' Vacation**

In late September 1990, Staten's parents departed on a two week vacation to Egypt. While his parents were on vacation, Staten was charged with looking after the family home and business. His parents had left the mother's car, a Cadillac, at home for Staten to use for transportation, but the car became inoperable just a few days after their departure and Staten had to rely on friends and neighbors for transportation while

his parents were on vacation. Staten went to the family business during his parents' vacation to collect rent checks from hair stylists working there. While there, he took a .38 revolver his mother kept at the business and brought it back to the family home.

Staten had several of his friends visit and stay at his home while his parents traveled. John Nichols, one of Staten's friends, was present one evening when Staten emerged from his bedroom with the .38 caliber revolver he had taken from his mother's business. Nichols heard Staten say that he heard a noise in the back yard. Staten told Nichols that "I wish they [Eastside Dukes] would leave my family alone and stop calling here and harassing me." Nichols observed Staten go into the back yard with the gun but Staten returned saying he did not find anyone there. The next day, Staten went outside to the back yard and discovered the words "ESD" painted in white on the patio. Nichols went to the Staten residence the next day and also saw the graffiti in the back yard. Nichols then heard Staten state that the Eastside Dukes were "going to get theirs."

Faye and Ray Staten returned from their vacation on Thursday, October 11, 1990 at approximately 11:30 p.m.. Instead of immediately going home from the airport, they decided to spend the night at Faye's parents' home in South Central Los Angeles, which was close to the airport. Faye's parents, the McKays, lived on West 73rd Street in Los Angeles, approximately 28 plus miles from the Staten residence in La Puente. The following evening, the McKays invited friends and family to their residence to welcome home Faye and Ray and to look at photographs and video of their trip to Egypt. Staten was invited to attend the gathering, but because his mother's car was

inoperable, he had no way to attend the function at his grandparents' home. The gathering at the McKay residence broke up sometime between 11:20 -11:25 p.m. and Staten's parents got into Ray's pickup and drove back to their residence in La Puente. As a subsequent autopsy performed three days later revealed, Ray had a blood alcohol level of 0.126%.[5]

According to Bertha and Raphael Sanchez, neighbors who lived two doors away from the Staten family home, Ray and Faye arrived home the evening of October 12, 1990, at 11:40 p.m. Mrs. Sanchez was doing laundry in her garage with the garage door open when she saw Ray's pickup arrive at the residence and pull into the driveway. Mrs. Sanchez then went back inside her house and she and her husband turned on the television and watched the television program "Nightline," which aired beginning at 11:30 p.m.. While watching that program, they heard gunshots coming from the vicinity of the Staten home. Bertha and Raphael Sanchez both testified that the gunshots took place during a car commercial while they were watching Nightline. The prosecutor established that the only car commercial played on Nightline that evening took place at 11:47 p.m.. Thus, the time of the murder of Staten's parents was established by the prosecution as being 11:47 p.m. the evening of October 12, 1990.

Staten disputed this assertion and testified that his parents did not get home until

[5] In California a person is presumed to be under the influence of alcohol if the blood alcohol level is above 0.08%.

shortly after midnight.[6] At approximately 12:31 a.m., Staten's aunt called to ask if her sister Faye and Staten's father had made it home safely from the gathering at the McKay residence. Staten told his aunt that his parents had returned home just a few minutes earlier. After this phone call, Staten asked his father if he could borrow the pickup to go get something to eat, as his mother's Cadillac was still inoperable. Staten drove to a fast food restaurant to get something to eat, returning home at approximately 1:00 a.m.. When Staten entered the residence, he found both parents had been murdered. Staten immediately ran to the home of his next door neighbor, Michael Hartman, and told Hartman what Staten had observed in his parents' home. Hartman went next door, confirmed what Staten had told him and immediately thereafter called the police.

When the police arrived, they found both parents dead. Ray had been shot once in the back of the head and Faye had been stabbed eighteen times with a knife. Inside the residence, the police found the words "ESD Kills" spray-painted on a mirror in the living room. No murder weapons were recovered and there was no evidence at the crime scene linking Staten to the murder of his parents. Staten was taken to the police station, interviewed and his hands checks for gunshot residue. That test came back negative. The following morning, blood samples were collected from the Staten residence and

[6] The prosecutor's time line had Staten's parents leaving Los Angeles between 11:20 and 11:25 p.m. and arriving at their residence at approximately 11:40 p.m. In order to travel the 28 miles from the gathering in Los Angeles and arrive at their residence in La Puente by 11:40 p.m., Staten's father would have had to average 85 miles per hour if he left the gathering at 11:20 p.m., and 113 miles per hour if he left the gathering at 11:25 p.m. – all while being legally intoxicated.

compared with Staten's blood but the results were inconclusive.[7] Staten's palm print was found on the wall next to the mirror where "ESD Kills" had been spray-painted, but of course Staten lived in that home and the prosecution's expert witness could not determine when the palm print had been made. David Watkins, a Los Angeles County Deputy Sheriff, testified for the prosecution as a gang expert. He was permitted to testify that, in his opinion, the graffiti found in the back yard of the Staten residence and the "ESD Kills" found on the mirror in the living room was not Eastside Dukes graffiti and that the murders of Staten's parents was not gang related.

Staten's relationship with his mother was described by four neighbors, six close friends, four family members and one of his mother's co-workers as close, loving and warm. As to why Staten would suddenly attack both of his parents – one with a gun and another with a knife – just minutes after they returned home from vacation, the prosecution argued that Staten's motive for killing his parents was that Staten was a contingent beneficiary on life insurance policies taken out by Faye and Ray worth approximately $300,000. To buttress that assertion, two young friends of Staten were called as witnesses to establish that Staten had told them, apparently while playing basketball, that if anything happened to his parents, he would come into a lot of money. However, both witnesses testified that they did not take Staten seriously and that Staten

[7] There was no DNA testimony. There was a stipulation to the effect that two blood samples did not come from the father, but "could have" come from the mother or Staten. Eight of the samples did not come from either of Faye or Ray but "could have" come from Staten. Three of the blood samples did not come from Ray or Staten but "could have" come from Faye. Stated another way, fourteen blood samples "could have" come from a person other than Staten, his father or his mother. That other person could have been the actual murderer.

had been laughing and joking when these statements were made. Staten's parents were murdered October 12, 1990 and Staten was arrested on January 10, 1991 and charged with their murders. Staten never made any claim to the insurance proceeds – the only claim that was made was by the funeral home to cover costs associated with the funeral.

3. **Evidence Adduced During The State Habeas Investigation**

In the state habeas proceeding, the California Supreme Court was presented with evidence of third party culpability that the jury did not hear. Dr. Armando Morales, a clinical social worker specializing in the study of Hispanic criminal street gangs, submitted a declaration in support of Staten (2 App. 320-335). In that declaration, Dr. Morales, based on his review of large portions of the trial record, came to the conclusion that "there is a very high probability that the Statens were murdered by the East Side Dukes" (2 App. 327). This opinion directly rebutted the testimony of the prosecutor's gang expert that the East Side Dukes had not killed Staten's parents. In addition to Dr. Morales, there were five independent witnesses who observed East Side Dukes animosity towards the Statens. Robert Osegara, an adult neighbor, and Brian Ellis, an acquaintance of Deondre, observed gang members for the East Side Dukes drive by the Staten family residence on October 13, 1990 – the day after the murders. Both individuals overheard the gang members in the car say "yeah we got them" (2 App. 336-339). Osegara's wife Pat Osegara and Quincy Murphy also observed the gang members drive by the Staten residence the morning after the murders (2 App. 340-343). Keith Taylor, a friend of Deondre, was standing on the corner of Faxina and Northern Avenues the

morning after the murders, watching the police and the media. While standing there, he observed several members of the East Side Dukes drive by in a Chevy Monte Carlos, smiling and nodding their heads up and down. Taylor overheard the gang members say "yeah we got them" (2 App. 344-345).

The evidence against Staten was circumstantial. Staten had a good relationship with his parents. He had no motive to kill the parents he lived with. There was a history of animus between Staten and the Eastside Dukes. Their graffiti was found in the back yard and at the scene of the crime inside the Staten residence. Five witnesses known to trial counsel were prepared to testify and would have testified if called a defense witnesses. Had all available evidence of his innocence been produced, there is a reasonable probability that the jury's verdict would have been different.

V

REASONS FOR GRANTING THE WRIT

This case is deserving of this Court's consideration because as it pertains to the PCLA Claim, it presents an opportunity for this Court to furnish an important clarification of a question remaining after *Richter* regarding the nature of the deference required in hypothesizing possible state court findings of fact in federal review of summary dispositions under §2254(d)(2) – namely, whether consideration must be given to a state's substantive laws, process and procedures for determining the existence of a prima facie case for relief. As it relates to the ineffective assistance of counsel claim, the California Supreme Court's decision that Staten had not been deprived of his right to the effective

assistance of counsel is objectively unreasonable in light of the Court of Appeals' opinion that trial counsel's performance was deficient and that Staten had been prejudiced as a result thereof.

A. The PCLA Claims

1. PCLA Claims History

Following Staten's conviction and sentence to death on January 16, 1992, and automatic appeal to the California Supreme Court, habeas petitions were filed in state and federal court. The PCLA claims were first alleged in the California Supreme Court in a habeas petition filed on February 24, 2006 (2 App. 207-288). These alleged the same claims as those in a federal petition that had been found to be unexhausted. On December 20, 2006, the California Supreme Court summarily denied the PCLA claims on the merits for failure to state a prima facie case for relief (1 App. 22-23).[8]

The PCLA claims allege a number of constitutional infirmities resulting from attorney John Tyre's representation under the terms of the PCLA contract, including a grossly inadequate fee of $991.67, the same as that for a misdemeanor. However, the central focus is on the assertion that under the terms of the PCLA contract, the appointment of second counsel in a capital case *at state expense* was prohibited (2 App. 185-186) – a condition not imposed on non-PCLA attorneys appointed to represent capital defendants. Under §987(d),[9] in all capital cases where counsel was appointed without the

[8] Procedural bars were also cited but those are not at issue in this petition.

[9] All references to §987 are to the California Penal Code.

restraints set forth in the PCLA contract, second counsel was available for appointment at state expense upon application of appointed counsel and an adequate showing of necessity. In short, if counsel was appointed under the PCLA contract, the County would not pay the fees for a second attorney, even in a capital case. [10] This, it is alleged, was the result of unconstitutional interference of the state by virtue of the terms of the PCLA contract.

Staten argued that the facts alleged a prima facie case of prejudice from ineffective assistance of counsel and conflict of interest, but also structural error as well as *per se* prejudice. However, these claims obviously relied initially on the foundational factual allegation that "Tyre's appointment was pursuant to a contract between the Pomona Contract Lawyer's Association (PCLA) and Los Angeles County." (2 App. 255-256 ¶70).

Although the California Supreme Court denied these claims for failure to state a prima facie case for relief, no explanation was furnished in the summary decision. Nevertheless, that court did not resolve the PCLA claims in a vacuum but rather in accordance with a well-established statutory, decisional, and rules-based process for determining whether a habeas claim states a prima facie case deserving of further review by the issuance of an Order To Show Cause. That process, Staten contends, was

[10] This restriction was subsequently eliminated later extensions of the PCLA contract. The two extended contracts, discussed *post,* contain significant changes from the original, providing for separate and greatly increased compensation in capital cases while eliminating capital cases from the provision permitting a defendant only one lawyer (2 App. 201, 204, ¶ 1-2).

erroneously ignored by the Court of Appeals in this case in what amounts to its own unreasonable *de novo* summary disposition of the PCLA claims.

2. California Law Governing Appointment of Indigent Counsel

In California, appointment of counsel, as required in capital cases under California Penal Code §987(b), is governed by §987.2. Section 987.2(d) sets forth the requisite source and priority of appointment in Los Angeles County courts: [11]

> "[T]he court shall first utilize the services of the public defender. . . In the event the public defender is unavailable and the county and the courts have contracted with one or more responsible attorneys or with a panel of attorneys to provide criminal defense services for indigent defendants, *the court shall utilize the services of the county-contracted attorneys prior to assigning any other private counsel. . .*" §987.2 (d)(emphasis added).

The law is clear that "courts *must* comply with section 987.2 when appointing counsel to represent indigent criminal defendants." *People v. Ortiz*, 51 Cal.3d 975, 989 & n.5 (1990) (emphasis added). Section 987.2(d) further provides that a court may depart from the prescribed order of appointment only in the "interest of justice," and in doing so it "must make 'a finding of good cause and stat[e] the reasons therefore on the record.'" *People v. Cole*, 33 Cal.4th 1158, 1184 (2004)(quoting *Alexander v. Superior Court*, 22 Cal.App.4th 901, 910 (1994)).

Absent specific statutory authorization, California courts lack the inherent power

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[11] The "class" designation in the statute refers to the separation of counties by population; Los Angeles County, with a population of over 4 million is considered a county of the first class as referred to in §987.2; See Cal. Gov. Code, § 28022; *Williams v. Superior Court*, 46 Cal.App.4th 320, 326 n.6 (1996). The order of appointment at the time of the instant case was governed by §987.2(d) because Los Angeles County did not yet have a second (alternate) public defender.

to order the expenditure of public funds to compensate an attorney for representation of indigent criminal defendants. *Arnelle v. City and County of San Francisco*, 141 Cal.App.3d 693, 696 (1983), citing *Jara v. Municipal Court*, 21 Cal.3d 181, 184 (1978).[12] Hence, California Government Code §31000, entitled "Contracts for special services," provides that a county board of supervisors may contract for direct payment to attorneys for legal services furnished in "any district or court in the county." *Phillips v. Seely*, 43 Cal.App.3d 104, 116-117 (1974). These would be the "county-contracted attorneys" referred to in §987.2(d) as distinguished from "private counsel," who have no contract in advance of appointment and are not similarly situated to county-contracted attorneys. *Seely, supra.; see, Arnelle v. City and County of San Francisco*, *supra,* 41 Cal.App.3d at 396.

Pursuant to §987.6, the cost of indigent counsel is primarily the responsibility of county government, the state only reimbursing up to 10% of those fees. No doubt it was with this in mind that sometime prior to September 18, 1990, the Los Angeles County Board of Supervisors directed all twelve of its judicial districts to implement "either the Alternate Defense Counsel (ADC) or a *contract attorney program*" so as to require the appointment under §987.2 of previously contracted attorneys rather than retaining private counsel to represent indigent defendants in the absence of a public defender (2 App. 180-81) (emphasis added).

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[12] Statutory authorization for a judge to determine the amount to be paid to appointed counsel out of a county's general fund is found in §987.2(a) which provides that a court may do so only in the absence of a public defender or contract-attorneys.

This gave birth in Los Angeles County Superior Court's East District (Pomona) to a written Agreement For Defense Services between Los Angeles County and the Pomona Contract Lawyer's Association ("PCLA Contract") which was formally adopted by the County on October 2, 1990 (2 App.182-199). Covering the period November 1, 1990 to October 31, 1991, the contract provided that in the absence of the public defender, pursuant to §987.2, one of the PCLA's member attorneys would be appointed to represent in all criminal cases in the Pomona courts, "including capital cases." The total contract amount was $495,833 for an estimated 500 cases, and $991.67 per case should the caseload exceed 500 cases (2 App. 185 ¶ 3a & 3b; p. 187, ¶ 4ciii). Consistent with §987.2(d), the contract provides that in any case in which such representation did not occur, the court would make "a written finding that a conflict of interest or other legal disability precludes any of [PCLA's] members from being appointed. . ." (2 App. 183-184 ¶ 1).

As for membership in the PCLA, the names of its members are not identified in the text of the contract, but it states that "No attorney may provide services pursuant to this Agreement or any extension thereof unless and until he has signed this Agreement . . ." (2 App. 188 ¶ 7). The copy of the contract that Staten was able to file in support of his state habeas petition does not include a signature page. However, copies of extensions of the contract for the following two years include at the end a page entitled "Contractor's Members." Each extension contains the signature of the same nine members, including Staten's attorney, John Tyre (2 App. 201-203, 204-206). Tyre signed the first extension

on October 29, 1991 (2 App. 203), which was eight days after the actual commencement of Staten's trial following months of pre-trial preparation. Nothing in the record reflects a modification of the basis of his appointment or compensation for his services from that of his original appointment on April 9, 1991, during the fourth month after the inception of the contract (2 App. 200). The official minute order recording Tyre's appointment states that "Due to conflicts of interest, Public Defender relieved" and "pursuant to section 987.2 Penal Code (Government Code §31000) Alternate Defense Counsel J. Tyre is appointed" (2 App. 200). [13] Simply put, Tyre could not have been appointed to represent Staten unless he was in fact a member of the PCLA.

3. California Process and Procedures In Habeas

At the outset, it must be observed that in exercising habeas jurisdiction, California courts "must" abide by statutory procedures set forth in the Penal Code §§ 1483 through 1508. *In re Cook,* 7 Cal.5th 439, 457 (2019). *See Adoption of Alexander S.*, 44 Cal.3d 857, 865 (1988)(reversing grant of habeas because the lower court "ignored explicit habeas corpus procedures").

Staten asserts that these rules governing the habeas process, discussed more fully below, including most particularly the assumption of the truth of factual allegations and the explicit requirement that a petitioner submit as support "reasonably available"

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[13] As described above, the judicial districts were directed by the County to utilize either an Alternate Defense Counsel or contract attorney program. Although this form refers to an "Alternate Defense Counsel," clearly Pomona had opted for the contract-attorney option, namely the PCLA contract. In either event, appointment of private counsel was not permitted in this case without a showing of good cause and statement of reasons in the record.

documentation, are in anticipation of the severe limitations to a petitioner's ability to take discovery in collateral proceedings prior to the issuance of an Order To Show Cause ("OSC"). Absent the issuance of an OSC, California petitioners lack the power to issue subpoenas and compel witness testimony. *Durdines v. Super. Ct.*, 76 Cal. App. 4th 247, 252, 254 (1999) (Penal Code §1484 authorizes compulsory process only *after* a writ has issued and a return has been filed). *People v. Gonzalez*, 51 Cal.3d 1179 (1990), cited in *Durdines*, explains that once a criminal proceeding is final in the trial court, nothing remains pending in the trial court to which discovery may attach. *Id*. at 1257. Nor do habeas corpus proceedings in appellate courts provide an appropriate discovery vehicle prior to the issuance of an OSC or writ:

> "A habeas corpus petition must be verified, and must state a "prima facie case" for relief. That is, it must set forth specific facts which, if true, would require issuance of the writ. Any petition that does not meet these standards must be summarily denied, and it creates no cause or proceeding which would confer discovery jurisdiction." *Id*. at 1258.

Accord, In re Steele, 32 Cal.4th 682, 690 (2004)(death penalty habeas petitioner not entitled to court-ordered discovery "unless and until this court has issued an order to show cause and thus has determined that the petition has stated a prima facie case for relief").[14]

As for the habeas process itself, it is axiomatic in California that for a habeas claim to survive summary denial, it must on its face state a prima facie case for relief.

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[14] *Steele* is concerned with a recently passed statute, Penal Code §1054.9, permitting, post-conviction, "limited discovery" of some materials in the possession of the prosecution and law enforcement authorities to which the defendant would have been entitled at the time of trial.

People v. Romero, 8 Cal. 4th 728, 737 (1994); *See In re Harris*, 5 Cal.4th 813, 827 (1993)("one seeking relief on habeas corpus need only file a petition for the writ alleging facts which, if true, would entitle the petitioner to relief"). Thus, a petitioner must "state fully and with particularity the facts on which relief is sought," *In re Clark*, 5 Cal.4th 750, 769, fn. 9 (1993); *People v. Duvall*, 9 Cal.4th 464, 474 (1995), and must also provide "reasonably available" documentary support for his allegations. *In re Cook*, *supra,* 7 Cal.5th at 457, citing Penal Code §§1474-1475 and *People v. Duvall*, *supra*, at 475 (1995).

Critical to the question presented here is that in determining whether a prima facie showing has been made, a California court "takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause." Cal. Rules of Court, rule 4.551(c)(1) (emphasis added); *People v. Duvall*, 9 Cal. at 474-75; *In Re Clark*, 5 Cal.4th at p. 769, fn. 9, citing *In re Lawler*, 23 Cal.3d 190, 194 (1979).

As expressed in *Maas v. Superior Court*, 1 Cal. 5th 962, 977-78 (2016),

> "When a judge summarily denies a habeas corpus petition for failure to state a prima facie case for relief, even in the absence of an informal response by the People, the judge has resolved a contested issue of law against the petitioner, that is, the judge has decided that the factual allegations set forth in the petition, even assuming they are true, do not entitle the petitioner to relief."

The *Maas* reference to an "informal response" is to a pleading that a court may request from a respondent under Rule 60, California Rules of Court, to assist in making the initial determination whether the petition states a prima facie case. The full function of the

informal response is explained in *People v. Romero*, *supra,* 8 Cal.4th at 742:

> "The informal response contemplated by rule 60 performs a screening function. (citation omitted). Through the informal response, the custodian or real party in interest may demonstrate, by citation of legal authority and by submission of factual materials, that the claims asserted in the habeas corpus petition lack merit and that the court therefore may reject them summarily, without requiring formal pleadings (the return and traverse) or conducting an evidentiary hearing. If the petitioner successfully controverts the factual materials submitted with the informal response, or if for any other reason the informal response does not persuade the court that the petition's claims are lacking in merit, then the court must proceed to the next stage by issuing an order to show cause or the now rarely used writ of habeas corpus. Deficiencies in the informal response do not provide a justification for shortcutting this procedural step."

It has been described more colloquially in *Durdines*, *supra*, 76 Cal.App. 4th at 253, as a mechanism used to "encourage the [Respondent] to look into whether or not factual assertions of the petitioner are accurate," and that "typically . . . the [Respondent's] informal response serves to fatally undermine the petition by providing the court with irrefutable evidence that the petition's allegations are factually unfounded. In such a case, the appellate court can speedily terminate proceedings, after the minimum expenditure of time and expense." *Id*, at 253.

That clearly cannot be said to have occurred in the present case with regard to the allegation that Tyre was appointed under the PCLA contract. Respondent's Informal Response to Staten's third habeas petition (2 App. 289-312) wholly failed to deny, rebut, refute, or challenge in any way the truth or accuracy of the assertion that Tyre's appointment was in fact under the PCLA contract. Rather, in addition to concentrating on procedural bars, Respondent presented a detailed argument that Staten failed to state

a prima facie case because "regardless of the terms of the PCLA contract," Tyre's representation did not result in the unconstitutional denial of a second counsel, conflict of interest, constitutionally inadequate representation, denial of due process or equal protection, or prejudice to Staten" (2 App. 304-305). Respondent asserted that the $991.67 fee for a capital case under the contract was nothing more than an allegation that Staten's attorney "freely and voluntarily entered into a contract whereby he consented to represent criminal defendants for a certain, agreed upon fee, albeit a fee that petitioner considers grossly inadequate" (2 App., p. 308). Missing from this Informal Response was even a hint that Respondent challenged the underlying fact Tyre was appointed under the PCLA contract. Thus, the Informal Response opened no discussion or debate and invited no need or opportunity for an Informal Reply from Staten addressing the truth of this essential allegation. As discussed, *ante*, this is one of the very purposes for the Informal Response.[15]

4. Proceedings in the District Court

The same basic opposition to the PCLA claims was maintained in federal district court. Over some fourteen years of proceedings, Respondent opposed a motion for evidentiary hearing, brought several motions to dismiss and supported an Order To

[15] " If the petitioner successfully controverts the factual materials submitted with the informal response, or if for any other reason the informal response does not persuade the court that the petition's claims are lacking in merit," then the court proceeds to the next stage, an order to show cause. *People v. Romero*, *supra,* 8 Cal.4th at 742; "Typically . . . the [Respondent's] informal response serves to fatally undermine the petition by providing the court *with irrefutable evidence that the petition's allegations are factually unfounded." Durdines*, *supra*, 76 Cal.App. 4th at 253.

Show Cause why summary judgement shouldn't be entered on grounds of the relitigation bar of §2254(d). Respondent dismissed the PCLA claims as making "much ado regarding the contract" with "allegations [that] amounted to nothing more than a complaint that [Staten's] lawyer was unpaid" (Motion to Dismiss, January 19, 2012, pp. 115-116 [Doc 154]), that "[n]o matter how 'suspicious' or 'Faustian' Petitioner claims the PCLA contract to be, Staten's defense was not harmed by it" (Reply To Petitioner's Response To Order To Show Cause Re Summary Judgment, July 7, 2014, p. 8 [Doc 209]), and that "[n]o clearly established law dictates that an unconstitutional conflict of interest is created by a fee contract between a county and members of a state's Bar who agree to function as an *alternate public defender*" (*Id.* at p. 9)(emphasis added). But Respondent never took the position in the district court that Tyre had not been appointed to represent Staten pursuant to the PCLA contract.

Ultimately, as required by *Richter*, the federal habeas proceedings focused on §2254(d). Respondent claimed that Section 2254(d)(2) was wholly inapplicable to the analysis of the state court's summary denial. Respondent asserted that California's standards for determining a prima facie case assumed that all facts alleged in support of the habeas claims were true and that all declarations and documentary evidence Staten submitted were credible. Respondent claimed that the summary denial of the state petition was not because of any lack of convincing evidence, but rather because no factual determinations of any kind were ever made by the state court. Consequently, as a result of the summary disposition, Respondent took the position that there had been no

determination of the facts within the meaning of §2254(d)(2), and the California Supreme Court's summary denial was not based on a determination of the validity of any facts. (Reply to Petitioner's Response To Order To Show Cause, July 7, 2014, pp. 3, 23 [Doc 209]). In short, "The state supreme court's decision was therefore a legal ruling, not a factual finding, and must be reviewed under [only] §2254(d)(1)" (*Id.,* at p. 21). The district court, although "troubled by the terms of the PCLA contract," indeed expressing "suspicions of" and "disdain for" the contract (1 App. 138, 151), in its final lengthy analyses of the PCLA claims held that the state court's denial was reasonable under §2254(d). Just as in the state court, the district court found that trial counsel Tyre's appointment was under the PCLA contract (1 App. 145).

5. **Appeal in the Ninth Circuit Court of Appeals**

In its opinion affirming the district court the Ninth Circuit correctly cites *Richter* for the general proposition that when there has been a summary denial on the merits in the state court, Staten retains the burden to show that "there was no reasonable basis for the state court to deny relief." However, with respect to the PCLA claims, the court's judgment is founded entirely on a single determination of *fact* theoretically made by the California Supreme Court – a conclusion reached by the Ninth Circuit without regard to the state court's established rules and procedures for dealing with factual issues when deciding whether a prima facie case has been alleged in the state petition.

The Court of Appeals decision states that there is "*no evidence* in the record" that Staten's trial counsel was appointed to represent Staten pursuant to the PCLA

contract, "nor [any] evidence" that Tyre was a member of the PCLA "at the time the initial contract was signed or was a signatory to the original contract."[16] Accordingly, the decision declares, Staten's entire argument "collapses" because the California Supreme Court could have reasonably concluded that Tyre's appointment was not under the PCLA contract. *Staten v. Davis,* 962 F.3d at 500 (1 App. 171).

Aside from the fact that Staten believes this grossly misstates the state court record, notably absent is any reference to or apparent consideration of the applicable substantive law pertaining to appointment of indigent counsel in California, nor of the well-established process and procedures under which the California Supreme Court determines the existence of a prima facie case for relief. Staten contends this is not consistent with the deference contemplated by this Court in *Richter* under §2254(d)(2), deference not only to the ultimate determination of the state court, but also to the process and applicable state law under which the state court arrives at its determination. Notably, §2254(d)(2) finds no reference anywhere in the panel's decision.

To summarize, the California Supreme Court's process in deciding whether appointment in this case was under the PCLA contract would have mandated consideration of at least the following:

1. The allegation was *assumed to be true*;

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[16] It must be observed that whether Tyre was a signatory to the "original contract" or when the "initial contract was signed" is immaterial to whether he was a member of the PCLA when he *was appointed*, as was clearly required by law. Nothing whatever in the contract provides that no one can be appointed under it unless they are signatory to the document when it was first effectuated.

2. Respondent failed to refute or at least deny this important underlying allegation in its Informal Response as would be expected if there had been any question as to its truth;

3. Applicable state law *required* Tyre's membership in the PCLA in order to be appointed under §987.2(d) absent a statement *in the record* of good cause for appointing private counsel. No such statement is to be found in the record of this case;

4. The record shows that Tyre was appointed pursuant to §987.2 and Gov. Code §31000 as an "alternate defense counsel" and the only alternate defense counsel program in place at the time was the PCLA contract (2 App. 200);

5. Even though the contract members page is missing from the copy of the initial PLCA contract (2 App. 182-199), Tyre's signature as a member of the PCLA is found on the contract members page of the two PCLA contract extensions, including one signed while Tyre was in the middle of Staten's trial (2 App. 203, 206); and

6. Nothing in the record, including the clerk's transcript, reflects an agreement on the amount of or basis for payment of fees (flat rate or hourly) other than those under the PCLA contract; nor is there any record in the clerk's transcript, sealed or otherwise, showing application for or approval of payment for Tyre's fees.

Although the Court of Appeal's decision searches vainly for a valid basis in the record to support a determination that the California Supreme Court could reasonably have found there was no appointment under the PCLA contract, what has actually been undertaken is essentially a *de novo* resolution of a claim posing as a finding of fact that

could have been made by the California Supreme Court. Staten contends that under *Richter*, whether a federal district court's analysis affirms or rejects a state court's summary denial of a claim as failing to state a prima facie case, theoretical findings of fact under 2254(d)(2) may not be posited in disregard of the state's established process and procedures for making such findings.

6. **A Bridge Too Far**

A federal court's review under §2254(d) "focuses on what a state court knew and did," *Cullen v. Pinholster*, 563 U.S. 170, 182. And as this Court also observed in *Woods v. Donald,* 575 U.S. 312, 316, 135 S.Ct. 1372, 1376, 191 L.Ed.2d 464 (2015), "AEDPA's requirements reflect a presumption that state courts know and follow the law" (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002)(per curiam)). That presumably includes the state's own substantive laws as well as process and procedures for assessing habeas claims.

States such as California have established a process and procedures such as those detailed above to govern consideration of habeas petitions for purpose of determining whether a prima facie case for relief has been made sufficiently to avoid summary denial. Petitioners as well as respondents are guided by these as furnishing requisite allegations, evidentiary support, and pleadings, such as California's Informal Response, necessary to assist in the court's assessment of a claim at this initial stage of habeas proceedings. Staten contends that this process governing the nature of initial review is also intended to give recognition to strict limitations on available formal

discovery until and unless a claim is found to state a prima facie case for relief. Unlike pre – AEDPA federal habeas proceedings, state petitioners do not have the ability to compel testimony or subpoena documents; hence the requirement that a petition provide only "reasonably available" documentary support for a claim.

The question presented here does not involve conclusions of law or mixed questions of law and fact in determining whether §2254(d)(1) bars federal habeas relief. The issue here concerns a purely factual allegation that Staten's counsel was appointed pursuant to his membership in the PCLA county contract-attorney program. The Court of Appeals's decision in this case represents *de novo* fact finding, not a review of whether the state court's denial of a claim was reasonable. Whether such a *de novo* fact analysis, ignoring the state court's fact finding process and procedures, is for purpose of upholding or reversing a state court's judgment, it is, Staten respectfully submits, an erroneous precedent in this capital case that deserves the attention of this Court. The interpretation of §2254(d)(2) and *Richter* utilized by the Court of Appeals here as authorizing a purported hypothetical justification for the California Supreme Court's denial of the PCLA claims, a disqualification of a claim at the starting gate as it were, whatever the actual reason or reasons may have been, is a bridge too far, one not contemplated by the statute or authorized by this Court's construction of it. Although addressing more complex issues was thereby avoided, "even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Brumfield v. Cain*, 576 U.S. 305, 135 S. Ct. 2269, 2277, 192 L.Ed.2d 356 (2015) (quoting

Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

"The questions that remain in *Harrington's* wake – questions regarding not just whether, but also how AEDPA deference should apply to summary dispositions – await answers." Seligman, *Harrington's Wake: Unanswered Questions on AEDPA's Application To Summary Dispositions*, 64 Stan. L. Rev. 469, 497 (2012). Staten respectfully urges that the question presented here is among them.

B. Ineffective Assistance Of Counsel Claim

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) established the two prong test for ineffective assistance of counsel: (1) "that counsel's representation fell below an objective standard of reasonableness"; and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 688, 694.

1. Deficient Performance

Both the majority and dissenting opinions in the Court of Appeals found that the failure of trial counsel John Tyre to present the testimony of the five witnesses who heard members of the Eastside Dukes claim responsibility for the murders of Staten's parents was deficient performance as defined by *Strickland. Staten,* 962 F.3d at495, 501. As noted *ante*, Staten's defense was predicated on the claim that he did not murder his parents – they were instead murdered by members of the Eastside Dukes street gang. Staten's neighbors, the vice-principal of his high school and the Los Angeles County Sheriff's Office all offered testimony that Staten lived in an area of La Puente which was

claimed by the Eastside Dukes as their turf, that the Eastside Dukes did not like African Americans, and that Eastside Dukes had previously threatened Staten.

In the state habeas proceeding, the California Supreme Court was presented with the following evidence that could have been, but was not presented by trial counsel at Staten's trial: Five witnesses who were neighbors of Staten and his parents testified that the morning after the murders, they saw and heard members of the Eastside Dukes drive by the crime scene and claim "yeah we got them." In addition, as discussed *post*, the evidence presented in the state habeas proceeding included the testimony of a gang expert offered to rebut the testimony received at trial by a Los Angeles Sheriff's Department deputy, who testified as an expert witness and claimed that in his opinion Staten's parents were not murdered by the Eastside Dukes. As the majority decision states "We conclude that Tyre rendered deficient performance by failing to present testimony that ESD members appeared to claim credit for the murders. It was objectively unreasonable for the California Supreme Court to conclude otherwise." *Staten*, 962 F.3d at 495.

2. **Prejudice**

With respect to the prejudice prong, the majority opinion stated that "Claim 7 (the IAC claim) fails because fairminded jurists could disagree as to whether the testimony of the five witnesses regarding ESD members' boasting was reasonably likely to have changed the outcome of Petitioner's trial," citing *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). The *Richter* decision dealt with the provisions of

the relitigation bar in Title 28 U.S.C. § 2254(d). Federal courts may not grant a federal writ of habeas corpus with respect to any claim adjudicated on the merits in State court proceedings unless under (d)(1) the state court decision "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 (d)(2) the state court's decision "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

In the *Richter* decision, Richter was charged with the murder, assault and robbery. Richter was convicted of these crimes and subsequently petitioned the California Supreme Court for a writ of habeas corpus based on his claim of ineffective assistance of counsel at trial because of counsel's failure to present expert testimony as to blood analysis. The California Supreme Court issued a one sentence summary denial. Richter then filed a petition for writ of habeas corpus. That petition was denied by the district court, but subsequently granted in an en banc decision by the Ninth Circuit Court of Appeals. *Richter v. Hickman*, 578 F.3d 944 (9th Cir. 2009).

This Court reversed that decision. In so doing, this Court stated that "The pivotal question is whether the state court's application of the Strickland standard was unreasonable . . . For purposes of § 2254(d)(1), 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law . . . A state court's determination that a claim lacks merit precluded federal habeas relief so long as

'fairminded jurists could disagree' on the correctness of the state court's decision." (citing *Yarborough v. Alvardo*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)). In explaining this standard, this Court stated "As a condition of obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on a claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. *Harrington v. Richter*, *supra* at 103. The test under *Richter* is, for the most part, unworkable. The (d)(1) and (d)(2) exceptions to §2254(d) are based on the terms "unreasonable application" and "unreasonable determination." But under *Richter*, appellate judges can't make that call if they can theorize that some other "fairminded" judge somewhere out in the legal community who might disagree with them. That is always a theoretical possibility. Hence, the (d)(1) and (d)(2) exceptions have no meaning.

The dissenting opinion in the Court of Appeals concluded that Staten had met his burden demonstrating the California Supreme Court's determination was unreasonable.

> "The case against Staten was based almost entirely on circumstantial evidence. There were not witnesses to the murders; no murder weapon was ever found; blood samples from the crime scene were inconclusive. The evidence Staten introduced in his state habeas filing, if credited, was direct and compelling. Given that contrast, even under the deference to the state courts required under § 2254(d) of the Antiterrorism and Effectiv Death Penalty Acto of 1966 ("AEDPA"), the conclusion of the jury would not likely have been swayed had five witnesses testified to the ESD gang's bravado is not minimally persuasive." *Id.,* at 502

The *Richter* decision involved the (d)(1) exception of § 2254(d), which requires

deference to the state court decision in its application of *Strickland*. Here, the question is not the (d)(1) exception but rather the (d)(2) exception, which requires deference to the state court decision in light of the evidence presented in the state court proceeding. The evidence before the state court adduced from the trial with respect to Staten's murder of his parents is as follows:

- Staten was a 24 year old African American male who lived at home with his parents. He had no prior criminal record (save a misdemeanor DUI conviction).
- Staten's relationship with his mother was described by several witnesses as a loving and caring relationship.
- The Staten family residence was located in a neighborhood inhabited by a violent Hispanic street gang, the Eastside Dukes, who harbored a deep dislike for African Americans.
- The Eastside Dukes had prior to the murders threatened Staten.
- Staten had no motive or reason to murder his parents. Staten was under no financial pressure, living at home with his parents.
- The prosecution theory was that Staten's parents were murdered at 11:47 p.m. on October 12, 1990, based on the testimony of Bertha and Raphael Sanchez, neighbors of the Statens, who stated they saw Staten's parents arrive home at around 11:40 p.m. Fay Staten's two sisters testified that she and her husband Ray departed Fay's parents home following a family

gathering on October 12, 1990. The distance between the two locations is approximately 28 miles. To arrive at the Staten residence at 11:40 p.m. would have required Ray Staten to average at least 85 miles per hour while driving with a blood alcohol content of 0.16% .

- Staten did not murder his parents to obtain $300,000 in life insurance proceeds. After his parents were murdered on October 13, 1990, no claim was ever made by Staten for the proceeds of the life insurance policies.
- Staten told two friends that he would inherit a lot of money if his parents died. Both friends said this conversation was made while Staten was joking around with them.
- One of Staten's friends cooperated with the police and approached Staten after the murders while wearing a wire. While engaged in conversation with Staten, this friend attempted to elicit from Staten that Staten had been involved in the murders. On five separate occasions during this conversation, Staten advised his friend that "I didn't do it."
- There was no evidence linking Staten to the murders. No murder weapon was found and the blood analysis at the murder scene was inconclusive. Staten did not have gunshot residue on his hands when tested shortly after the murders.
- The evidence suggested that someone other than Staten was responsible for the murders. Staten's father was shot in the head with a hand gun. His

mother was murdered at the same time by someone who stabbed her 18 times with a knife. This suggests that there was more than one person involved in the murders.

- Eastside Dukes gang graffiti was found inside the Staten residence and in the back yard of the residence.

The evidence before the state court which was obtained during the state habeas proceedings was as follows:

- The declaration of Robert Osegara, a neighbor of Staten, who stated that the Eastside Dukes hated African Americans. The morning after the murders Osegara was standing outside his residence near the Staten residence when a car load of Eastside Dukes gang members drove by saying "yeah, we got them."
- The declaration of Brian Ellis, who was a friend and neighbor of Staten. Ellis stated that he knew Staten and his parents for approximately ten years before the murders. The Eastside Dukes were a local Hispanic street gang that hated African Americans. Ellis was standing outside near the Staten residence with Robert Osegara when Eastside Dukes gang members drove by the morning after the murders and stated "yeah we got them."
- The declaration of Quincy Murphy, a close friend of Staten who grew up in the same neighborhood. Murphy knew the Eastside Dukes hated African Americans and knew that Staten had problems with that gang. Murphy

was also present outside the Staten residence the morning after the murders and was told by Robert Osegara and Brian Ellis that gang members had driven by the Staten residence and claimed "yeah we got them." While standing outside, Murphy observed several cars drive by filled with gang members who gave Murphy hard stares and flashed gang signs.

- The declaration of Keith Taylor, who stated that he had know Staten and his parents for around ten years. Taylor was present when the gang members drove by the morning after the murders and also heard them state "yeah we got them."
- The declaration of Pat Oseguera, the wife of Robert Oseguera. She knew Staten's parents and knew Staten was extremely close to his mother. She was also present when gang members drove by the following morning, but was unable to hear what they were saying.
- The declaration of Dr. Armando Morales. Dr. Morales has a doctorate in social work and was a member of the faculty at U.C.L.A. for over 30 years. He has worked with and studied Hispanic street gangs in Los Angeles for many years. He is also a former Los Angeles County probation officer. He has consulted with Eastside Dukes gang members on parole. The Eastside Dukes are a violent street gang well known for hating and killing African Americans. Dr. Morales reviewed that evidence from Staten's trial and

formed the opinion that "there is a very high probability that the Statens were murdered by the Eastside Dukes."

The majority of the panel in the Court of Appeals stated as follows:

> "If we reviewed only for prejudice under *Strickland*, Tyre's failure to introduce the witness testimony might be enough to 'undermine [our] confidence in the outcome.' *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. But when § 2254(d) applies, that is not the question. *Richter*, 562, U.S. at 105, 131 S.Ct. 770. Instead, the question is whether the state court reasonably could have concluded that the evidence of prejudice fell short of *Strickland's* deferential standard. *Id,* 111-12, 131 S.Ct. 770. Here, there were reasonable grounds for the California Supreme Court to conclude that the omitted testimony would not have altered the outcome." *Staten v. Davis, supra* at 500.

The majority concluded that the evidence of third party culpability was not persuasive under the deferential standard required by *Richter*. The dissent reached the exact opposite conclusion. With all due respect, if one juxtaposes the trial testimony with the testimony of five witnesses who heard the Eastside Dukes claim responsibility for the murders, and if one juxtaposes the testimony of the gang expert offered by the prosecution at trial with the testimony of Dr. Morales, it appears to be patently unreasonable for the California Supreme Court to reach the decision they did in light of the evidence before it. Staten submits fairminded jurists would agree with the dissenting opinion – "I would hold that '[w]ith all due respect to our state colleagues, the state court's application of *Strickland* was objectively unreasonable.'" (citation omitted)

VI

CONCLUSION

For the reasons expressed above, Staten respectfully requests that a writ of certiorari issue to review the decision of the Ninth Circuit Court of Appeals.

Dated: October 27, 2020

/s/ Jerry L. Newton

/s/ Norman D. James
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