No. 20-6210

In the Supreme Court of the United States

DEANDRE ARTHUR STATEN,

Petitioner,

v.

RONALD DAVIS, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
LANCE E. WINTERS
Chief Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Solicitor General
DANA MUHAMMAD ALI
SCOTT A. TARYLE*
Supervising Deputy Attorneys General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 269-6073
Scott.Taryle@doj.ca.gov
**Counsel of Record*

CAPITAL CASE
QUESTIONS PRESENTED

1. Whether, under the standard of 28 U.S.C. § 2254(d), the court of appeals correctly rejected petitioner's claim that a county contract governing appointment of defense counsel operated to violate his Sixth Amendment right to effective assistance in this case.

2. Whether, under § 2254(d), the court of appeals correctly rejected, for lack of probable prejudice, petitioner's claim that defense counsel rendered ineffective assistance by declining to present additional evidence of third-party culpability.

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Staten v. Davis, No. 17-99008, judgment entered June 18, 2020, petition for rehearing and rehearing en banc denied August 5, 2020 (this case below).

United States District Court for the Central District of California:

Staten v. Chappell, No. CV-01-9178-MWF, judgment entered October 2, 2017 (this case below).

California Supreme Court:

In re Staten, No. S141678, petition denied December 20, 2006 (state collateral review).

In re Staten, No. S121789, petition denied July 13, 2005 (state collateral review).

In re Staten, No. S107302, petition denied September 10, 2003 (state collateral review).

People v. Staten, No. S025122, affirmed November 9, 2000 (state direct appeal).

California Superior Court, Los Angeles County:

People v. Staten, No. KA006698, judgment entered January 16, 1992.

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STATEMENT

1. In 1990, petitioner Deondre Staten's father and mother, Arthur and Faye Staten, were murdered in their home. Pet. App. 2-4. Petitioner lived with his parents and had a hostile relationship with his father. *Id.* at 2, 11, 33, 164. When petitioner was angry with his father, he would tell one of his friends, "I'll have to take Pops out." Pet. App. 33.

Petitioner stood to gain financially from his parents' deaths, as his parents owned a house, a beauty salon, and $303,000 worth of life insurance policies with petitioner as the main beneficiary. Pet. App. 2, 11, 164. Petitioner often had spoken with his friends about "taking out" or "bump[ing] off" his parents for the insurance money. *Id.* at 2, 11, 33, 164, 169.

While his parents were on vacation during the two weeks before the murders, petitioner went with a friend to the beauty salon to retrieve his parents' .38-caliber revolver. Pet. App. 2, 11, 164. Petitioner told a friend that he possessed hollow-point bullets. *Id.* at 2, 11, 164, 169. Friends saw petitioner at home with the gun in his waistband or pocket a few hours before the homicides. *Id.*

On the night of the homicides, neighbors heard three gunshots. Pet. App. 2, 11, 164. Arthur suffered a gunshot wound to the back of his head. *Id.* at 3. The bullet that killed him and two other bullets that were found lodged in the walls of his home were .38-caliber hollow-point bullets. *Id.* at 3, 11, 41-42, 47-48, 165, 169. Arthur and Faye's .38-caliber revolver was never found after the murders. *Id.* at 11. Faye sustained multiple stab wounds. *Id.* at 3.

Several fresh blood droplets were found near her body and throughout the house. *Id.* at 40-42. Some of the drops were consistent with petitioner's blood but not Faye's, and some were consistent with Faye's but not petitioner's. *Id.* at 3, 11, 165. Petitioner had a cut with dried blood on his right middle finger. *Id.* at 3, 11, 164.

Graffiti proclaiming "ESD Kills," an apparent reference to a local gang called the Eastside Dukes, had been spray-painted on the living room wall but did not resemble authentic Eastside Dukes graffiti. Pet. App. 2-3, 11, 164-165. A can of the same type of acrylic spray-paint was found in a closet inside the home. *Id.* at 3, 11, 165. A left palm print found just below the "E" in the graffiti matched petitioner. *Id.* at 3, 11, 165, 169. The house showed no signs of forced entry. *Id.* at 3, 99, 165, 169. And Faye's purse, with a large amount of cash, remained undisturbed on a table near her body. *Id.* at 41, 99.

Petitioner typically wore blue jeans and was seen wearing them a few hours before the murders; but he was wearing shorts when the police arrived after the murders. Pet. App. 2-3, 11, 100, 164-65, 169. His jeans were never found. *Id.* at 3, 11, 43-44. Later, in a recorded conversation, petitioner told one of his friends that he had disposed of the gun and that, as long as the police never found it, he would stick to his story and continue to "blame it on the Dukes." *Id.* at 3, 11, 165.

2. Prosecutors charged petitioner with two counts of first-degree murder and also alleged, as special circumstances making the murders

punishable by death, that petitioner had committed multiple murders and murder for financial gain. Pet. App. 1; *see* Cal. Penal Code §§ 187(a), 189, 190.2(a)(1), (3). Attorney John Tyre was appointed to represent petitioner at trial at public expense. Pet. App. 200. The trial court denied two requests by Tyre for appointment of an additional counsel, finding no sufficient showing of need. *Id.* at 4, 66.

At the trial, the prosecution produced evidence of the crime as described above. Pet. App. 2-3. Petitioner's defense was that he had no involvement in the murders and that the Eastside Dukes were the actual killers. *Id.* at 3, 11. For example, the Eastside Dukes "claimed" territory adjacent to petitioner's block and their graffiti appeared throughout the neighborhood. *Id.* at 49, 92. The local high school vice-principal had seen "ESD" graffiti in the same style as that found inside the Statens' house, although normally it would include someone's moniker. *Id*. at 53. Confrontations had occurred between the Eastside Dukes and African-Americans (the Statens were African-American), and graffiti stating "ESD Kills Niggers" was visible in the neighborhood. *Id.* at 53, 92-93, 174. The Dukes repeatedly threatened petitioner personally, and shot at him on three occasions. *Id.* at 3, 54-55. One night, while petitioner stood on a corner, a group of Hispanic youths drove by, threw a beer bottle, and yelled "Dukettes" or "Eastside Dukes." *Id. at* 53-54. A few months before the murders, someone in a car shouted to petitioner, "This is Eastside Dukes territory," and "I know where you stay. I'm going to get you, fat boy." *Id*. at

54.

Petitioner testified that, on the afternoon before the murders, he had cut himself while gardening and might have left a trail of blood throughout the house. Pet. App. 3, 56, 165. He claimed that, after his parents had arrived home on the night of the murders, he left in Arthur's truck to get a hamburger but then returned home to discover his parents' bodies and the "ESD Kills" graffiti in the living room. *Id.* at 3, 57, 166.

The jury found petitioner guilty as charged. Pet. App. 1, 25. In the penalty phase of the trial, the jury recommended death sentences for both murders. *Id.* at 1. The trial court sentenced petitioner to death on both counts. *Id.* at 1, 26.

3. In 2000, the California Supreme Court affirmed the judgment on direct appeal in a unanimous opinion. Pet. App. 1-16. Rejecting petitioner's claim that the denial of Tyre's request for a second appointed trial attorney was an abuse of discretion, the court explained that "[d]efendant's application, consisting of little more than a bare assertion that second counsel was necessary, did not give rise to a presumption that a second attorney was required; he presented no specific, compelling reasons for such appointment." *Id.* at 4-5. For that same reason, the court rejected petitioner's related claim that the denial of second counsel had violated the Fifth, Sixth, or Fourteenth Amendments. *Id.* at 15, 66-67.

4. In 2002, petitioner filed a habeas petition in the California Supreme

Court, claiming that he was denied his Sixth Amendment right to effective assistance of counsel because trial counsel had failed to present additional third-party culpability evidence regarding the Eastside Dukes. Pet. App. 26, 81, 93. Petitioner alleged that counsel should have presented: (1) testimony that, on the morning after the murders, people who appeared to be Eastside Dukes members had driven through the neighborhood and said, "Yeah, we got them"; and (2) expert testimony by a clinical social worker and psychiatry professor, Dr. Armando Morales, who would have opined that there was a "high probability" the Eastside Dukes were the killers. *Id.* at 96-99. The state supreme court held that the claim was barred as "untimely" under *In re Robbins*, 18 Cal. 4th 770, 780-81 (1998), and in the alternative rejected it on the merits for failure to state a prima facie case for relief. *Id.* at 19, 26-27.

In 2004, petitioner filed a second state habeas petition, claiming among other things that the denial of a second appointed trial attorney violated his rights to due process and equal protection, and that trial counsel Tyre had rendered ineffective assistance by making an inadequate showing in support of his request for the appointment of a second attorney. Pet. App. 27, 64, 76. The California Supreme Court denied that petition in 2005, rejecting the equal protection claim as barred because petitioner had failed to raise it earlier in the direct appeal. Pet. App. 21, 27, 67, 76-77 (citing *In re Clark*, 5 Cal. 4th 750, 756 (1993), and *In re Dixon*, 41 Cal. 2d 756, 759 (1953)). The court also rejected all of petitioner's claims as barred because they were untimely, *id.* at 21, 27

(citing *In re Robbins*, 18 Cal. 4th at 780-81, and *Clark*, at 763-99), and because petitioner had failed to raise them earlier in the prior state habeas petition, *id.* at 21, 27 (citing *Robbins*, at 780-81). In the alternative, the court denied all of petitioner's claims on their merits for failure to state a prima facie case. *Id.* at 21, 27.

In 2006, petitioner filed a third state habeas petition. Pet. App. 22. He claimed that trial counsel Tyre had been appointed pursuant to a contract, between Los Angeles County and a group of criminal lawyers called the Pomona Contract Lawyers' Association (PCLA), that burdened Tyre with a conflict of interest in violation of petitioner's Sixth Amendment right to counsel. *Id.* at 23, 28, 129, 144, 148. The contract provided that the PCLA would be paid an annual flat fee of $495,835 to handle from one to 500 cases, plus an additional $991.67 per case for any cases beyond 500. *Id.* at 145. If the PCLA refused an appointment under the contract, other than for a court-declared conflict of interest, the PCLA would be liable for the county's costs in appointing a non-PCLA lawyer. *Id.* at 145-46. Petitioner presented a copy of the original 1990 PCLA contract, 1991 and 1992 extensions of the contract, and a 1994 letter by the county's chief administrator. *Id.* at 144, 179-99, 201-06. He further alleged that attorney Gerald Gornik, whose appointment Tyre had specifically sought in his requests for second counsel, was not a PCLA member. *Id.* at 146-47, 170-71.

Petitioner argued that the contract created an improper financial

incentive for the trial court to avoid appointment of second counsel, resulting in an "arbitrary and capricious" decision to deny petitioner's requests. Pet. App. 23, 28, 129, 144, 148. He also re-asserted, in light of his allegations regarding the PCLA contract, his previous due process and equal protection claims regarding the denial of a second appointed trial attorney. *Id*. at 23, 28, 129, 144, 148. The California Supreme Court summarily denied the petition as untimely, again citing *In re Robbins*, 18 Cal. 4th at 78-81; alternatively, it denied the claim on the merits for failure to state a prima facie case for relief. Pet. App. 23, 28.

5. Petitioner next filed a federal habeas petition, asserting that the denial of his requests for second counsel violated due process, equal protection, and the Sixth Amendment right to the effective assistance of counsel, and arguing that the trial court had arbitrarily and capriciously denied his requests on account of financial considerations. Pet. App. 29-30, 63-72. He also contended that the PCLA contract violated his Sixth Amendment right to representation by an attorney free of conflicts of interest and caused unconstitutional state interference with counsel. *Id.* at 129-134, 144, 148, 152-153. Further, petitioner claimed that Tyre's failure to present the additional third-party culpability evidence regarding the Eastside Dukes amounted to constitutionally ineffective assistance of counsel. *Id.* at 96-99.

Respondent asserted that all of these claims were barred because they had been rejected by the California Supreme Court on independent and

adequate state law procedural grounds. Pet. App. 65, 77, 81-82, 167. Respondent also asserted that federal habeas corpus relief was barred under 28 U.S.C. § 2254(d) because the state supreme court's denial of petitioner's claims on their merits in light of the record was neither "contrary" to nor an "unreasonable application" of "clearly established Federal law." *Id. at* 64-65, 77, 81-82, 148-49.

a. The district court rejected petitioner's claims on summary judgment. Pet. App. 67-73, 152-61. The court declined to decide whether the claims were procedurally barred. *Id*. at 63. But it concluded that the California Supreme Court's adjudication of the claims was not unreasonable under 28 U.S.C. § 2254(d). *Id*. at 67-73, 152-155, 158-161. The court explained that neither the Due Process Clause nor the Sixth Amendment provided a right to a second appointed attorney. *Id*. at 67-73. It further explained that this Court has never extended the concept of an "actual conflict" of interest—entitled to a presumption of prejudice under the Sixth Amendment—beyond the context of the joint representation of clients with conflicting interests. *Id*. at 152-55; *see also id*. at 132-34.

The court also observed that petitioner had failed to allege plausible facts demonstrating that the PCLA contract interfered with Tyre's representation—particularly given the fact that Tyre had requested the appointment of second counsel. Pet. App. 156-58, 161. Further, the court found that nothing in the contract would have required the PCLA to reimburse

the county for a second attorney appointed from outside the PCLA in a case in which one PCLA attorney already had accepted an appointment. *Id.* at 145-147.

Finally, the court concluded that it would not have been unreasonable for the California Supreme Court to rule that trial counsel had rendered effective assistance with respect his handling of the third-party culpability evidence cited in petitioner's petition. Pet. App. 98-100. As the court explained, Tyre had interviewed each of the proposed witnesses who allegedly heard Eastside Dukes members boast, "Yeah, we got them." *Id.* at 94, 97. Some of those witnesses indicated they were not even present or did not hear the remark, which in any event was vague; and there was no foundation for their assumption that the people who allegedly made the remark were Eastside Dukes. *Id.* at 97-98. The court further explained that the state supreme court reasonably could have found that the absence of opinion evidence such as Dr. Morales' proffered testimony was not prejudicial given the abundant evidence of petitioner's guilt. *Id.* at 98-100.

b. The court of appeals affirmed in an opinion authored by Judge Graber and joined by Judge Friedland. Pet. App. 163-71. It held that petitioner's claims did not survive the deferential review standard of 28 U.S.C. § 2254(d). *Id.* Because of that, the court declined to address the State's argument that petitioner's claims were barred by his state-law procedural defaults. *Id.* at 167

On the claim that counsel had failed to present the additional third-party-culpability evidence, the panel determined that the state court reasonably could have concluded that Tyre's decision not to call a gang expert such as Dr. Morales was within the range of competent professional assistance so that it could not support an ineffective-counsel claim under *Strickland v. Washington*, 466 U.S. 688 (1994). *Id.* at 168-69. The court concluded that Tyre had performed deficiently by not presenting testimony about the "Yeah, we got them" remark, and that the state court could not reasonably have concluded to the contrary. *Id.* at 167-68, 171. But it held that Section 2254(d) precluded relief because the state court reasonably could have rejected petitioner's claim for lack of prejudice under *Stickland*. *Id.* at 169-70. It observed that the many circumstances linking petitioner to the crime constituted "compelling evidence" of petitioner's guilt. *Id.* at 169. The additional third-party-culpability evidence cited by petitioner, in contrast, was no more reliable than the ESD-gang evidence presented by Tyre and would not have significantly changed the nature of the defense. *Id.* The additional evidence was also inconsistent and implicated the ESD gang only implicitly. *Id.* And it would have left intact the prosecution's evidence of petitioner's motive, his presence at the scene at the time of the murders, and his possession of a firearm consistent with the murder weapon. *Id.*

The court next concluded that § 2254(d) also precluded relief on the PCLA-contract claim. Pet. App. 171. It explained that the California Supreme

Court reasonably could have rejected that claim on the ground that, although petitioner had submitted to the state court some declarations by Tyre and some documents about the PCLA contract, he had presented the state court with no evidence that Tyre signed the contract before he was appointed or that he was a PCLA member at the time. *Id.*

Judge Berzon dissented in part. She opined that it would be unreasonable for a state court to find that the omission of the added third-party-culpability evidence was not likely prejudicial under *Strickland*. *Id.* at 171-76.

ARGUMENT

Petitioner's claims lack merit and he does not identify any other persuasive reason for the Court to grant plenary review. He first argues that the court of appeals erred by holding that the state court reasonably could have held that a county contract governing the appointment of Tyre as defense counsel did not operate to violate petitioner's Sixth Amendment rights. Even assuming that Tyre's representation was governed by that contract, however, it would not establish that the state court's ruling was contrary to clearly established federal law; and, as the court of appeals noted, the state-court record is not sufficient to establish that the representation was subject to the contract. Petitioner next argues that the state court could not reasonably have determined that Tyre's failure to introduce additional third-party culpability evidence did not prejudice the defense. Pet. 14-40. As the majority below explained, however, that argument fails in light of the "compelling evidence of

Petitioner's guilt." Pet. App. 169. In any event, petitioner's claims are procedurally barred: the state court's rejection of them on state procedural grounds constitutes an independent and adequate basis for its judgment.

1. Petitioner first asserts that, in holding that the state court reasonably could have denied his PCLA-related claims based on his failure to prove that Tyre had been appointed under the PCLA contract, the court of appeals ignored California's own standards for determining whether a habeas corpus petition has presented a prima facie case for relief. Pet. 26-31. He says that the state court would have presumed his allegation of that fact to be true under *People v. Duvall*, 9 Cal. 4th 464, 474-75 (1995). Pet. at 22, 26-29.

As the State argued below, however, the state court's denial of petitioner's PCLA-contract claim was neither "contrary to" nor an "unreasonable application of" this Court's precedent. 28 U.S.C. § 2254(d)(1).[1] In a case such as this, where the state court did not issue an opinion explaining its reasoning, the federal court's task under Section 2254(d) is to determine

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[1] Staten says his claims must be analyzed under subsection (d)(2) of 28 U.S.C. § 2254 (whether the state court adjudication was "based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding") rather than subsection (d)(1) (whether the adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"). Pet. 5-6, 14, 27. But *Cullen v. Pinholster*, 563 U.S. 170, 187-88 (2011), explained that, where the California Supreme Court summarily denies a claim, a petitioner "can satisfy the 'unreasonable application' prong of § 2254(d)(1) only by showing that 'there was no reasonable basis' for the California Supreme Court's decision." Here, as respondent shows, there were reasonable grounds to reject petitioner's claims even if his factual allegations were provisionally accepted as true.

what arguments or theories could have supported the state decision and then to ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with prior holdings of this Court. *Harrington v. Richter,* 562 U.S. 86, 101-102 (2011). Here, petitioner asserts that the PCLA contract created financial obstacles and disincentives for his trial attorney to seek the appointment of a second attorney. Pet. 15-16. But this Court's precedents have never suggested, let alone "clearly established," a constitutional right to appointment of more than one attorney at state expense. Indeed, petitioner has conceded that point. Pet. App. 67.

Petitioner claims that the PCLA contract nonetheless constituted state interference, in violation of his Sixth Amendment right to conflict-free counsel, that amounted to structural error for which prejudice is presumed. Pet. 16. Again, however, no decision by this Court clearly establishes that petitioner's constitutional rights were violated. Instead, this Court explained in *Mickens v. Taylor,* 535 U.S. 162, 175 (2002), that its precedents did *not* clearly establish a Sixth Amendment conflict-of-interest violation in the absence of active representation of clients with conflicting interests. *Accord Earp v. Ornoski*, 431 F.3d 1158, 1173, 1184 (9th Cir. 2005).

Nor has this Court ever held that prejudice may be presumed from the type of state interference with counsel alleged here. At most, the Court has suggested that such a presumption might arise where: (1) the defendant has been completely denied counsel; (2) counsel was prevented from assisting the

defendant during a critical stage of proceedings; or (3) counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. *See United States v. Cronic*, 466 U.S. 648, 659 & n. 25 (1984); *Strickland v. Washington*, 466 U.S. 688, 692 (1984). None of those situations is presented here. In the absence of a holding by this Court that "squarely establishes" petitioner's claimed constitutional right, it cannot be said that the state court's adjudication was contrary to or an unreasonable application of this Court's controlling law under Section 2254(d). *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006).

In any event, even if this Court's precedents clearly established a presumed-prejudice rule for state interference with counsel, the state court reasonably could have concluded that petitioner's allegations showed no interference with Tyre's seeking the appointment of a second attorney in this case. In fact, Tyre twice requested appointment of a second attorney. Pet. App. 4, 65-66. The trial court rejected those requests for lack of a showing of need, without any suggestion that the PCLA contract played a role in the decision. *Id.* at 4, 66. The trial court observed this was "a fairly straightforward case with not [sic] tremendous legal issues, complex issues involved." *Id.* Further, as the district court found, nothing in the contract would have required the PCLA to reimburse the county for a second attorney appointed from outside the PCLA in cases in which one PCLA attorney had accepted an appointment. *Id.* at 145-147.

The court of appeals did not consider these multiple deficiencies in petitioner's claim because it instead relied on the apparent absence of evidence in the state court record of a critical premise of the claim: proof that Tyre and his appointment were governed by the challenged PCLA contract in the first place. Pet. App. 171. Although that was not the focus of the State's arguments below, the State agrees that the state-court record is unclear on this point, and has never conceded that the record was sufficient to establish that Tyre's representation was governed by the PCLA contract. To be sure, petitioner asserted that the PCLA contract governed Tyre's representation, but state law allowed the California Supreme Court to decline to provisionally assume the truth of a habeas petitioner's factual assertions if they were not supported by "reasonably available documentary evidence." *Duvall*, 9 Cal. 4th at 475. Here, as the court of appeals noted, petitioner introduced a version of the PCLA contract that lacked signatures or the names of the PCLA attorneys; Tyre did not meet the contract's description of attorney qualifications; and the Tyre declarations submitted to the state court never addressed whether he had been a PCLA attorney covered by the contract at the time of his appointment. Pet. App. 171.

2. Petitioner next argues that his Sixth Amendment rights were violated because Tyre did not present additional evidence about the Eastside Dukes. Pet. 31-39. In the context of that argument, petitioner criticizes this Court's well-established standard for determining the availability of habeas

relief under 28 U.S.C. § 2254(d). Under that standard, the operative question is whether the state court decision 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*, 562 U.S. 86 at 103; *accord White v. Woodall*, 572 U.S. 415, 419-20 (2014). Petitioner argues that this standard is "unworkable" because it prevents federal appellate judges from assessing the reasonableness of a state court ruling so long as there may be "some other 'fairminded' judge somewhere in the legal community who might disagree with them," which he says "is always a theoretical possibility." Pet. 34. But the "fairminded disagreement" concept entails the standard of objective reasonableness reflected in the language of Section 2254(d). That concept does not prevent federal judges from considering the reasonableness of a state court decision—it requires it.

At bottom, petitioner simply disagrees with the court of appeals' application of the § 2254(d) standard to the facts of his case. *See* Pet. 39. The court of appeals was correct, however, in ruling that it would not have been unreasonable for a state court to deny petitioner's ineffective assistance claim for lack of a showing of probable prejudice as required by *Strickland v. Washington,* 466 U.S. at 694. As the courts below held, "voluminous" and "compelling" evidence supported petitioner's conviction. Pet. App. 99-100, 169. Petitioner and his father had an antagonistic relationship and petitioner repeatedly talked to his friends about the possibility of killing his parents for

the insurance money. *Id.* at 2, 11, 33, 164, 169. A few hours before the murders, petitioner was seen at home with his parents' .38-caliber revolver, which he had recently retrieved from their place of business; he previously had told a friend that he possessed hollow-point bullets; and the bullet that killed Arthur was a .38-caliber hollow-point bullet, as were two others found lodged in the walls of the home. *Id.* at 2-3, 11, 35, 41-48, 88, 164-165, 169. Some of the blood found at the crime scene was consistent with petitioner's blood but not Faye's. *Id.* at 3, 11, 165. Although petitioner typically wore blue jeans and was seen wearing them just a few hours before the murders, he was wearing shorts when the police arrived after the murders and his jeans were never found. *Id.* at 2-3, 11, 100, 164-65, 169.

Moreover, contrary to petitioner's defense theory that the Eastside Dukes were the actual killers, the spray-painted "ESD Kills" graffiti did not resemble authentic Eastside Dukes graffiti, petitioner's palm print was found just below that graffiti, and a can of the same type of spray paint was found inside the home. Pet. App. 3, 11, 165. The Staten house showed no signs of forced entry; and Faye's purse—which contained a large amount of cash—remained undisturbed on a table near her body. *Id.* at 3, 41, 99, 165, 169. Finally, in a recorded conversation, petitioner told one of his friends after the murders that he had disposed of the gun and that, as long as the police never found it, he would stick to his story and continue to "blame it on the Dukes." *Id.* at 3, 11, 165.

Conversely, as the district court recognized, the alleged "Yeah, we got them" remark was vague and did not clearly refer to the murders; several of the proposed witness-declarants were not even present or did not hear the remark; and there was no foundation for their assumption that the people in the car were Eastside Dukes. Pet. App. 96-98.

The court of appeals correctly held that "a reasonable jurist could conclude that testimony about the overheard boasting of ESD members would not have had a reasonable probability of changing the outcome of the guilt phase of the trial." Pet. App. 169. That fact-bound determination does not warrant further review in this Court.

3. Finally, each of the claims raised by petitioner in the petition was deemed forfeited by the California Supreme Court under the state's procedural rule requiring timely presentation of such claims without substantial delay. Pet. App. 19, 23, 26-28; *see In re Robbins*, 18 Cal. 4th 770, 780-781 (1998). As this Court has recognized, a determination that a claim has been forfeited under California's timeliness rule serves as an adequate and independent state-law ground supporting the challenged judgment. *Walker v. Martin*, 562 U.S. 307, 315-21 (2011). Such a claim, accordingly, is subject to a procedural bar in federal court. *Id.* at 315; *Beard v. Kindler*, 558 U.S. 53, 55 (2009); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Harris v. Reed*, 489 U.S. 255, 265-66 (1989). The bar applies even if the state court alternatively rejected the claim on its merits, as it did here. *Sochor v. Florida*, 504 U.S. 527, 534 (1992);

Harris, 489 U.S. at 264 n.10. Although petitioner in theory could avoid the bar by somehow demonstrating adequate "cause and prejudice," *see Martinez v. Ryan*, 566 U.S. 1, 13-14 (2012), he has never made such a showing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
LANCE E. WINTERS
Chief Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Senior Assistant Attorney General
DANA MUHAMMAD ALI
Supervising Deputy Attorney General
DONALD E. DE NICOLA
Deputy Solicitor General

SCOTT A. TARYLE
Supervising Deputy Attorney General

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