No. 20-6210

IN THE SUPREME COURT OF THE UNITED STATES

DEONDRE ARTHUR STATEN,

Petitioner,

v.

RONALD DAVIS, WARDEN,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

I. PCLA CLAIMS

The Court of Appeals disposed of the PCLA claims by theorizing under §2254(d)(2) that the California Supreme Court could have summarily denied them on the basis that there was no evidence to support the threshold allegation that the PCLA contract had anything to do with the appointment of counsel in the first instance. No consideration was given to the merits of the claims.

Throughout this litigation a challenge to the fact of appointment under the contract had never been made and consequently that factual issue had not been argued or briefed by either party in the many years of state and federal proceedings. The Ninth Circuit's published decision was not only "out of the blue" but was contrary to the express finding of the District Court following extensive briefing and hearings in that court. [1]

Staten argues that not only would it have been unreasonable for the California Supreme Court to have summarily dismissed the claims on such a finding, but that it was unreasonable of the Court of Appeals to even theorize that the state court could have or would have so decided on the record before it and in clear contravention of state law, process, procedures and rules governing appointment of indigent counsel and for determining the existence of a prima facie case for relief. Respondent's Brief In

[1] At oral argument, the panel, having previously alerted counsel that its interest would be in the ineffective assistance claim, directed no questions or comments of any kind to the PCLA claims.

Opposition to Staten's petition essentially ignores the question presented, or even any derivation of it, as well as Staten's analysis of applicable facts and law supporting his position, and instead argues the merits of the claims—something that the Ninth Circuit panel avoided altogether.

This Court has interpreted federal review of a state court's summary disposition of a habeas claim under §2254(d) to require that a court "determine what arguments or theories ... could have supported the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). In accomplishing that task a court is to "focus[] on what a state court knew and [theoretically] did," applying a presumption "that state courts know and follow the law." *Woods v. Donald*, 575 U.S. 312, 316, 135 S.Ct. 1372, 1376, 191 L.Ed.2d 464 (2015) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002)(per curiam)). Unless the state court's decision, or determination of facts, so analyzed, is "unreasonable," federal relief is barred.

This Court has repeatedly cautioned against a §2254(d) analysis that is actually *de novo* masquerading as deference to a finding of the state court, or in this case a theoretical finding of the state court. *See*, *e.g., Shinn* v. *Kayer,*141 S.Ct. 517, 522, 524 (2020)(Ninth Circuit "essentially evaluated the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable" (quoting *Sexton v. Beaudreaux*, 138 S.Ct 2555, 2560 (2018)). Although *Shinn* and *Beaudreax* are cases in which the Court of Appeals had found that the state court's decision was unreasonable, Staten contends that this Court's

interpretation of AEDPA's requirements is equally applicable to an analysis resulting in a decision that the state court finding was reasonable. This Court is urged to take the opportunity to squarely hold that where, as here, the Court of Appeals has conducted an essentially *de novo* review that ignores what the state court actually "knew and did" as well as what its laws required it to do, tacking on a perfunctory statement of deference under §2254(d) does not cure the error whether the resulting erroneous decision is that the state court's decision was reasonable or unreasonable.

Finally, Respondent's invitation to this Court that it consider the merits of the PCLA claims is clearly contrary to precedent. When this Court reverses on a threshold question, it "typically remand[s] for resolution of any claims the lower courts' error prevented [it] from addressing." *Zivotofsky v. Clinton*, 566 U.S. 189, 201–202, 132 S.Ct. 1421, 1430–1431, 182 L.Ed.2d 423 (2012), citing, *Adarand Constructors*, *Inc. v. Mineta*, 534 U.S. 103, 110, 122 S.Ct. 511, 151 L.Ed.2d 489 (2001) (per curiam)(Supreme Court is a court of final review not first view); *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999)("ordinarily 'we do not decide in the first instance issues not decided below'"); *Accord*, *Lucia v. S.E.C.*, 138 S.Ct. 2044, 2051, 201 L.Ed.2d 464 (2018)("We ordinarily await thorough lower court opinions to guide our analysis of the merits" (internal quotation marks and citation omitted)).

Here the Court of Appeals erred in deciding the PCLA claims on a threshold question that prevented it from considering whether §2254(d) bars relief on the merits of the claims. This Court is urged to reverse and remand to the Court of Appeals for that

purpose.

II. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Staten's petition asserts that under Section 2254(d)(2) of Title 28, United States Code, the California Supreme Court's decision denying the claim for ineffective assistance of counsel during the guilt phase was an unreasonable determination of the facts in light of the evidence presented to the California Supreme Court in both the direct appeal and the state habeas proceedings. As noted in the respondent's opposition to the petition, the district court's characterization of the evidence presented to the California Supreme Court of Staten's guilt as "voluminous" and "compelling" (Opp. 16) is wrong.[2] As wrong as was the district court's finding that DNA testing confirmed that there was a trail of Staten's blood found throughout the house (1 App. 81).[3]

The prosecutor at trial did not think his case was voluminous and compelling. As he conceded to the jury in his opening statement, his case was entirely circumstantial:

> ". . . I will tell you right now there is no direct evidence; that (sic) is an entirely circumstantial case. [¶] That means that there are a number of bits and pieces of information, some from witnesses directly who saw and heard certain things. Some from the examination of physical evidence that

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[2] "Opp" refers to the Respondent's Brief In Opposition, followed thereafter by page reference.

[3] As noted in the Petition, p. 12 fn. 7, there was no testimony at trial about DNA testing. Rather, the only evidence pertaining to blood found at the crime scene was a stipulation regarding blood samples recovered from the crime scene stating that two of the samples were not from Staten's father, but "could have" come from Staten's mother or Staten himself, eight samples did not come from Staten's mother or father but "could have" come from Staten, and three of the samples did not come from Staten or his father but "could have" come from Staten's mother. In other words, the blood samples not identified as coming from Staten's mother or father "could have" come from anyone, including the Eastside Dukes.

> together we believe will lead you to the conclusion that Mr. Staten was *involved* in these murders. [¶] And I use the term involved because I do not necessarily expect to prove to you that Mr. Staten, that is, the defendant, killed these people himself or by himself. [¶] But that he was involved in the planning and the commission of those killings which as you will ultimately be instructed in the law, still makes him responsible for those killings." (6 RT 810)(emphasis added).

The majority and minority opinion concede that under the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), trial counsel rendered deficient performance by failing to present evidence from five witnesses – neighbors and friends – who told trial counsel before the trial that members of the Eastside Dukes street gang had claimed credit for murdering Staten's parents. *Staten v. Davis*, 962 F.3d 487, 495 (9th Cir. 2020). The panel split on the second prong of *Strickland* – the question of prejudice. The majority opinion held as follows:

> "If we reviewed only for prejudice under *Strickland*, Tyre's [trial counsel] failure to introduce the witness testimony [the five witnesses who heard the Eastside Dukes take credit for the murders] might be enough to 'undermine [our] confidence in the outcome.' [citing *Strickland*]. 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.,* at 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." *Id*., at 500.

The dissenting opinion disagreed with the majority on the question of prejudice by finding that the testimony of the five witnesses who heard the Eastside Dukes take credit for the murders would have altered the outcome. The dissent noted that this was indeed a circumstantial evidence case. "There were no witnesses to the murders; no murder weapon was found; blood samples from the crime scene were inconclusive." *Staten v. Davis*, 962 F.3d at 502. The dissent noted that the evidence presented to the California Supreme Court in the habeas petition with regard to the five third-party culpability witnesses was "direct and compelling." *Id*., at 502. The majority opinion characterized the evidence against Staten thusly: "the prosecution's case was not overwhelming" but nevertheless "compelling." *Id*., at 497-500. The dissenting opinion reviewed five evidentiary items relied on by the majority as compelling evidence and reached a contrary conclusion: (1) Staten's handprint was on a mirrored wall below the "ESD kills" graffiti. Of course, Staten had lived in this house with his parents for years; (2) blood samples recovered from the crime scene "could have been Staten's." These same samples could have been from anyone else, including members of the Eastside Dukes gang; (3) Staten was seen prior to the murders as wearing jeans and a subsequent

search of his residence failed to uncover any jeans that would have fit Staten. The prosecution claimed that Staten got rid of the jeans he was wearing to conceal evidence of the crime. However, Staten had at least three pairs of jeans and the search failed to find any of his jeans, not just the ones he was wearing the night of the murders; (4) Staten told his cousin, who was crying the night of his parents' funerals that it was "time to party and get high." However, there was also evidence that Staten was distraught and emotionally affected by his parents' death; and (5) Staten was seen opening his parents' safe after their deaths. However, his parents' wills were in the safe. After reviewing these five items of evidence, the dissenting opinion noted "the evidence implicating Staten in the murders was fairly weak." *Id.,* at 504.

The majority opinion stated that if their review was limited to *Strickland*, the failure to call these five witnesses who heard the Eastside Dukes claim credit for the murders might have been enough for them to make a finding of prejudice. *Staten v. Davis*, 962 F.3d at 500. However, because of Section 2254(d) and this Court's decision in *Harrington v. Richter*, 131 S.Ct. 770, 178 L.Ed.2d (2011), the majority felt that they were compelled to make a finding of a lack of prejudice. Staten would argue that *Richter* involved an interpretation of Section 2254(d)(1), which lifts the bar of Section 2254(d) in cases where a reviewing court issues a decision which is contrary to or an unreasonable application of prior decisions of this Court. Here the issue is an evidentiary one and involves an interpretation of Section 2254(d)(2), which lifts the bar of Section 2254(d) in cases where the reviewing court issues a decision that is based on an unreasonable

determination of the facts in light of the evidence presented, in this case, to the California Supreme Court.

The touchstone of *Richter* is whether or not, in this case, the decision of the California Supreme Court, in finding no prejudice in the failure to call the five third-party culpability witnesses, was unreasonable. Even if the state court decision is wrong, *Richter* holds that the decision will be upheld unless the state court decision is unreasonable. *Harrington v. Richter*, 130 S.Ct. at 786. As noted, *Richter* was decided under Section 2254(d)(1), which lifts the bar of 2254(d) if the state court decision is an unreasonable application of this Court's decisions. Whether or not the state court decision is unreasonable depends on whether or not "fairminded jurists could disagree on the correctness of the state court's decision. *Id*., at 786.

Similarly, a state court decision would be unreasonable under Section 2254(d)(2) if the state court decision was unreasonable in light of the evidence presented to the state court. Here, the state habeas petition presented the testimony of five witnesses (and one expert witness) that the Eastside Dukes murdered Staten's parents. The state court denied the claim of ineffective assistance and Staten submits this decision was unreasonable in light of the evidence presented. The Circuit court decision unanimously held that the first prong of *Strickland* had been met – trial counsel's performance in failing to put on the evidence of third-party culpability was deficient/unreasonable. As for the second prong, the dissenting opinion found prejudice based on the evidence submitted to the state court. In so doing, the dissenting opinion necessarily found that

"fairminded jurists" could not disagree with the correctness of the state decision. The majority came close to agreeing with the minority opinion, but did not do so.

Since the California Supreme Court denied Staten's state habeas petition without a reasoned decision relating to the facts presented in the state petition, *Richter* requires that reviewing court "theorize" arguments to support a finding that the summary denial was reasonable. It's one thing for a federal court to look at the reasoning of the state court decision denying a *Strickland* claim based on the evidence presented in the state court proceeding. It is quite another for the federal court to try to guess the state court's reasoning in a summary denial and then speculate if in the universe of judges, one might find a judge who would agree with the state court denial. The theories that the majority speculated might uphold the reasonableness of the summary denial were effectively put to rest by the minority opinion's thoughtful and careful analysis of the actual evidence submitted to the California Supreme Court. Accordingly, even under *Richter*, Section 2254(d)(2) lifts the bar under Section 2254(d) as no fairminded jurist could ever conclude that the evidence of third culpability in this specific case would not have affected the jury's ultimate decision.

III. **CONCLUSION**

For the foregoing reasons, Staten respectfully requests that this Court grant his Petition for Writ of Certiorari.

Dated: February 8, 2021

s/ _____
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