No. _____

IN THE

Supreme Court of the United States

PABLO BASTIDAS,

Petitioner,

v.

MATTHEW ATCHLEY, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has repeatedly held that to receive a certificate of appealability (COA), a habeas petitioner need only show that "'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

Before the Ninth Circuit Court of Appeals, Bastidas argued that his lawyer unreasonably failed to investigate and present an alibi defense at his robbery trial, and that trial counsel's failure prejudiced him. He supported each element of his claim with unrefuted evidence, and also demonstrated that 28 U.S.C. § 2254(d) did not bar relief on his claim. And yet the Ninth Circuit denied him a COA.

Is the Ninth Circuit's denial of a COA on Bastidas's ineffective assistance of counsel claim contrary to this Court's jurisprudence?

LIST OF PARTIES AND PRIOR PROCEEDINGS

The parties to this proceeding are:

1. Petitioner Pablo Bastidas, represented by the Office of the Federal Public Defender for the Central District of California; and

2. Respondent Matthew Atchley, Warden of the Salinas Valley State Prison in Soledad, California, represented by the California Attorney General represents.

The prior proceedings in this case are:

1. On August 23, 2002, a Los Angeles County Superior Court jury convicted Bastidas of three counts of robbery, three counts of possession of a firearm by a felon, and one count of assault with a firearm in *People v. Bastidas*, case no. BA240229. Petitioner's Appendix (Pet. App.) 110. On November 4, 2002, the superior court sentenced Bastidas to 55 years in prison. *Id.*

2. On March 22, 2004, the California Court of Appeal affirmed the judgment on appeal in *People v. Bastidas*, case no. B163483, in an unpublished opinion. In that same unpublished opinion, the California Court of Appeal denied Bastidas's counseled habeas petition in case nos. B163483 and B171850. Pet. App. 100.

3. On June 9, 2004, the California Supreme Court denied review of Bastidas's appeal in *People v. Bastidas*, case no. S124483. Pet. App. 99

4. On June 13, 2007, the California Supreme Court summarily denied Bastidas's habeas petition in *In re Pablo Bastidas*, case no. S148594. Pet. App. 98.

5. On August 4, 2009, the Los Angeles County Superior Court denied Bastidas's second habeas petition in *Bastidas v. Superior Court*, case no. BA240229. Pet. App. 96-97.

6. On October 16, 2009, the California Court of Appeal denied Bastidas's second habeas petition in *In re Pablo Bastidas*, case no. B218378. Pet. App. 95.

7. On May 20, 2010, the California Supreme Court summarily denied Bastidas's second habeas petition in *In re Pablo Bastidas*, case no. S178439. Pet. App. 94.

8. On October 26, 2011, United States Magistrate Jacqueline Chooljian filed a report recommending that the district court deny and dismiss with prejudice Bastidas's federal habeas corpus petition in *Bastidas v. Dexter*, C.D. Cal. case no. CV 07-8390-MMM-JC. Pet. App. 67-93.

9. On November 30, 2011, United States District Judge Margaret M. Morrow accepted the recommendation, denied the petition, dismissed the action with prejudice, and denied a COA in *Bastidas v. Dexter*, C.D. Cal. case no. CV 07-8390-MMM-JC. Pet. App. 63-66. Judgment was entered against Bastidas that same day. Pet. App. 62.

10. On February 11, 2015, the California Supreme Court summarily denied Bastidas's third petition in *In re Bastidas*, case no. S222837. Pet. App. 59.

11. On July 1, 2015, the Ninth Circuit Court of Appeals, per Judges Harry Pregerson, Kim McLane Wardlaw, and Marsha S. Berzon, reversed the district

court's judgment in a published decision in *Bastidas v. Chappell*, No. 12-55024. Pet. App. 39-58.

12. On August 30, 2019, United States District Judge David O. Carter accepted the recommendation of the magistrate judge to deny and dismiss Bastidas's petition with prejudice in *Bastidas v. Dexter*, C.D. Cal. case no. CV 07-8390-DOC-JC . Pet. App. 6-38. He denied a COA and entered judgment against Bastidas on the same day. Pet. App. 2-5.

13. On December 11, 2020, the Ninth Circuit Court of Appeals, per Judges Jay S. Bybee and Andrew D. Hurwitz, entered an order denying Bastidas's motion for a COA in *Bastidas v. Dexter*, case no. 19-56096. Pet. App. 1.

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

Pablo Bastidas petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals denying his motion for a Certificate of Appealability (COA).

OPINIONS BELOW

The Ninth Circuit's order denying Bastidas's COA motion is unreported. Pet. App. 1. The district court's judgment and its order accepting the magistrate judge's report and recommendation and dismissing the habeas action against Bastidas with prejudice are also unreported. Pet. App. 2-38.

JURISDICTION

The Ninth Circuit's order denying Bastidas's COA motion was filed and entered on December 11, 2020. Pet. App. 1. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.1 and this Court's March 10, 2020 Order, which extended the time to file petitions for writ of certiorari to 150 days.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution

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

28 U.S.C. § 2253

"**(a)** In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

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

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

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

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

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

28 U.S.C. § 2254(a)

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the 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 determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

Late in the evening on August 16, 2001, the police arrested Pablo Bastidas and his eventual co-defendant, Wilmer Alberto, on suspicion of robbing a parking lot attendant in downtown Los Angeles earlier that night. The police later connected Bastidas to two unsolved robberies from August 2 and August 9, 2001. Bastidas

maintained at trial— and has maintained throughout his appellate and post-conviction proceedings—that he is innocent of these robberies.

A. Bastidas's 2002 trial

The prosecution's charging document alleged that Bastidas committed second-degree robberies in Downtown Los Angeles parking lots on three consecutive Thursdays: August 2, 9 and 16, 2001. Pet. App. 357-62. The prosecution only charged Alberto in the August 16 robbery. Pet. App. 360-61. The prosecution alleged that a firearm was used in each robbery; that Bastidas had a prior robbery conviction and was a felon in possession of a firearm; and that Bastidas and Alberto were guilty of attempted murder in connection with the August 16 robbery. Pet. App. 357-62. Bastidas and Alberto pled not guilty to all charges. Pet. App. 363. They were tried jointly before a Los Angeles County jury.

1. Opening statements

The prosecution emphasized in his opening statement that the August 2 and August 9 robberies were based solely on eyewitness testimony. Pet. App. 191-97.

In his opening statement, Bastidas's defense attorney laid out his theory of the case: After the police arrested Bastidas on August 16, they falsely pinned the two unsolved robberies from August 2 and August 9 on Bastidas, a prior felon who fit the vague eyewitness accounts from those robberies that "two young Hispanic males with short or shaved hair" committed those robberies. Pet. App. 198-203.

2. Prosecution case

a. The August 2 and August 9 robberies

There was no physical evidence linking Bastidas to the August 2 and August 9 robberies. The prosecution's case rested entirely on the eyewitness testimony of the robbery victims, Candelario Medina and Ricardo Espinoza.

Medina testified that on August 2, 2001, he was working at a parking lot. Pet. App. 204-06. Around 7:30 p.m., two men, one of whom was armed with a gun, took $100 from him. Pet. App. 208-10. Medina didn't report the robbery to the police, but the next day he told his supervisor, Espinoza, about it. Pet. App. 207, 210, 216. At trial, Medina identified Bastidas as the man with the gun who robbed him on August 2. Pet. App. 208-09.

Medina also testified that he was at work in the parking lot a week later on August 9. Pet. App. 210. Around 7:45 p.m., two people approached him. *Id.* He told Espinoza, who was on the lot at that time, that these were the people who had robbed him before. Pet. App. 211. He testified that one man put a gun to Espinoza's neck and the second person took $100-$120 from him. Pet. App. 211, 213-15, 217. In court, he identified Bastidas as the man with the gun, but testified that Bastidas's co-defendant, Alberto, was not the man who was with Bastidas on August 9. Pet. App. 213-14.

On cross-examination, trial counsel impeached Medina with a lie he had told the jury about his criminal history. Pet. App. 218.

Espinoza testified that, on August 9, two men whom he had never seen before approached him and Medina. Pet. App. 220, 230-31. Espinoza tried to run away but

one of the robbers, whom he identified in court as Bastidas, pulled out a gun before taking $700-800 from him. Pet. App. 220-23. The robbery lasted two to three minutes. Pet. App. 232. He admitted that before trial he did not identify Bastidas in a sketch drawing or photographic six-pack. Pet. App. 225-28. Throughout his testimony, he had trouble remembering key physical characteristics of the men who robbed him. Pet. App. 234-37.

Officer Bernice Rivera testified that, several months after the robberies, Medina and Espinoza identified Bastidas at an in-person lineup as one of the robbers. Pet. App. 289-90, 293, 296. Rivera acknowledged that no fingerprints linked Bastidas to the August 2 or 9 robberies and that no gun or bullet casings had been recovered relating to those robberies. Pet. App. 298. She was unaware of any evidence relating to those robberies aside from the eyewitness identifications. Pet. App. 299.

b. The August 16 robbery

Julio Balladares testified that on August 16, 2001, at a little after 10:00 p.m., a red van drove onto the parking lot he supervised. Pet. App. 257-58, 260-63, 277. He testified that Bastidas was driving the van and Alberto was in the passenger seat. Pet. App. 263. Alberto put a gun to Balladares's neck and demanded money, which Balladares gave to him. Pet. App. 263-67, 79. Alberto demanded more money and yelled at the driver, who also had a gun, to shoot Balladares. Pet. App. 266-67, 287. Balladares heard, but did not see, the driver shoot his gun, and was not sure the gun was pointing at him when it was shot. Pet. App. 267-68, 280. Balladares gave the driver more money. Pet. App. 288. The driver fired another shot and the

robbers drove away and were then followed by the police. Pet. App. 268. Bastidas and Alberto took $1,800 in total. Pet. App. 273.

Officer Jesse Mojica testified that on August 16 at 10:00 p.m. he heard a gunshot while on patrol. Pet. App. 238-41, 251. Someone approached and said, "the van, the van," and then the police followed a red minivan. Pet. App. 242-44. Two people exited the minivan and ran away. Pet. App. 245-46. He testified that Alberto got out of the passenger side door of the van. Pet. App. 247. Mojica took Bastidas into custody and found a BB gun on the floor of the van. Pet. App. 248-50, 254. The BB gun appeared to be a replica of a 9-millimeter automatic. Pet. App. 255. The police found $192 on a sidewalk; they never recovered any guns or bullets. Pet. App. 254, 256.

The police told Balladares that they had caught the suspects. Balladares then identified Bastidas and Alberto separately in one-man field show-ups; each was handcuffed at the time. Pet. App. 274-75, 281-86. Balladares also identified Bastidas and Alberto as the robbers in court. Pet. App. 275.[1]

2. Defense case

The defense case primarily focused on how eyewitness identifications are flawed. Edward Geiselman, a psychologist and UCLA professor, testified about the accuracy, or lack thereof, of eyewitness identifications. Pet. App. 317-19. Among other things, Dr. Geiselman testified that eyewitnesses to events under emotionally

[1] The parties stipulated that Bastidas had been convicted of a felony. Pet. App. 297.

charged conditions have imperfect memories of what they saw; and that the accuracy of eyewitness identifications drops by 40% when a deadly weapon is involved and when there are multiple perpetrators. Pet. App. 322, 325-26. He also explained that an eyewitness's expressed confidence in their identification is only weakly related to the accuracy of their identification, and that courts have vacated convictions because they were based on mistaken eyewitness identifications. Pet. App. 326-27, 330.

The defense also presented evidence to show that there was insufficient evidence that a firearm was used in the August 16 robbery. Officers Robert Nelson and Kevin Holloman testified that shortly after they arrested Bastidas, they tested him for gunshot residue and found none. Pet. App. 300-01, 305, 308-09, 312.

3. Closing arguments

In his closing argument, the prosecutor emphasized the eyewitness identifications by Medina, Espinoza, and Balladares. Pet. App. 335, 340, 343. Referring to Bastidas, he also noted that "[w]e . . . know he's a felon." Pet. App. 335.

In his closing, Bastidas's counsel highlighted the "fatal flaw" in the prosecution's case: "little to no physical evidence proving that Pablo Bastidas committed any of the acts that he's accused of committing." Pet. App. 343. He emphasized that "nearly all of the prosecution's whole case as to all three of these crimes" was based on eyewitness identifications. Pet. App. 343-44. As to the August 2 and 9 robberies, he noted that Espinoza could not identify Bastidas in a six-pack a little less than one week after the August 9 robbery, and argued that the jury could not rely on a live lineup identification made five months later. Pet. App. 351. He

argued that the jury should not credit Medina's testimony given that trial counsel caught him in a lie and that his testimony showed he was exaggerating, and that his mind was made up to pin the robbery on anyone. Pet. App. 349-50.

4. Deliberations, verdicts, and sentencing

Jury deliberations took one full day. Pet. App. 364-65. The jury acquitted Bastidas of the attempted murder charge relating to the August 16 robbery, but found him guilty on the robbery, felon-in-possession, and assault with a deadly weapon charges. Pet. App. 366-69.

The trial judge imposed a 55-year sentence. Pet. App. 110-11. Eighteen years and eight months of that sentence related to the five counts arising from the August 2 and August 9 robberies. Bastidas also received five years for his prior conviction; the remaining thirty-one years and four months of his sentence related to the August 16 robbery, which included a twenty-year firearm enhancement.

B. The state direct appeal and initial state habeas proceedings

Bastidas raised two claims on direct appeal, neither of which is relevant to this petition for writ of certiorari. In 2003, while Bastidas's appeal was pending, his attorney petitioned the California Court of Appeal for habeas relief. Pet. App. 154-82. The petition included the claim that is the focus of this petition for writ of certiorari: An ineffectiveness claim based on his trial lawyer's failure to investigate and present the testimony of Andy Bacashihua, who could have provided an alibi for the August 9 robbery. Pet. App. 162, 166-74. The petition contained signed declarations by Bastidas and Bacashihua supporting the claim. Pet. App. 175-79. Bastidas declared that he gave his trial counsel and his investigator:

> the name of Andy Bacashihua who was an alibi witness to my whereabouts on the evening of August 9, 2001 when the robberies of Medina and Espinoza took place. To my knowledge, Mr. Holzinger never contacted Andy Bacashihua to determine whether he could be used as an alibi witness in my defense.

Pet. App. 176. Bacashihua declared Bastidas was with him the evening of August 9, 2001, watching a movie. Pet. App. 178.

The California Court of Appeal considered the appeal and habeas actions together. Pet. App. 100-09. In 2004, the court affirmed the judgment and denied the petition in an unpublished written opinion. *Id.* The court stated that Bastidas's allegations of ineffective assistance, if true, would entitle him to relief, but it denied relief because Bastidas "has offered no evidence of where, when or how this information [of the alibi witness] was given to counsel or the defense investigator." Pet. App. 107. The California Supreme Court denied review of Bastidas's appeal on June 9, 2004. Pet. App. 99. Bastidas did not petition this Court for certiorari.

Two years later, Bastidas petitioned the California Supreme Court for habeas relief, reasserting the ineffective assistance claim noted above. Pet. App. 113-53. In addition to submitting the Bastidas and Bacashihua declarations, the petition included the California State Bar court's 2006 decision recommending that Bastidas's trial lawyer be disbarred. Pet. App. 141-49. That decision noted the State Bar's inability to obtain Bastidas's trial lawyer's participation in the disciplinary proceedings. Pet. App. 143, 145. In June 2007, the California Supreme Court denied Bastidas's habeas petition in a one-line order stating: "The petition for writ of habeas corpus is denied." Pet. App. 98.

C. Federal habeas proceedings

With the assistance of counsel, Bastidas filed a four-claim habeas petition in federal district court in December 2007. Claim One alleged that trial counsel was ineffective for failing to investigate and present an alibi defense to the August 9 robbery. Between 2007 and now, Bastidas's case took a number of procedural twists and turns, none of which are relevant to this petition.[2]

In 2020, the district court denied Bastidas's petition, denied a COA, and entered judgment against him. Pet. App. 2-38. Bastidas timely appealed. He sought a COA from the Ninth Circuit on his ineffectiveness claim based on trial counsel's failure to present an alibi defense. The Ninth Circuit denied his request in a line one order: "The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a 'substantial showing of the denial of a constitutional right.'" Pet. App. 1.

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[2] Over the past twelve years the parties have litigated, among other things, the timeliness of Bastidas's petition. Below, Bastidas argued that the petition was timely under equitable tolling and actual innocence principles. The district court never ruled on the timeliness of Bastidas's petition.

During that same time, the parties litigated whether the magistrate judge had authority to deny, in a final order, Bastidas's request for a stay of his federal proceedings so he could exhaust an unexhausted claim that is not relevant to this petition. The Ninth Circuit Court of Appeals, in a published decision, found that the magistrate judge did not have that authority, and reversed and remanded with instructions for the district court to consider that request de novo. Pet. App. 39-58.

STANDARDS OF REVIEW

A. COA Standards

A habeas petitioner has no absolute right to appeal a district court's denial of a petition but instead must obtain a COA to pursue an appeal. *Buck*, 137 S. Ct. at 773. Obtaining a COA "'does not require a showing that the appeal will succeed.'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016). To receive a COA, a petitioner "need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id*. "The COA inquiry asks only if the District Court's decision was debatable." *Id*. at 348. A petitioner need only "prove 'something more than the absence of frivolity.'" *Miller-El*, 537 U.S. at 338 (quotation marks omitted).

B. AEDPA Standards

Bastidas filed his federal habeas petition after the effective date of the Anti-terrorism and Effective Death Penalty Act (AEDPA); therefore, his petition is governed by AEDPA. *Woodford v. Garceau*, 538 U.S. 202, 205, 210 (2003). To obtain relief under AEDPA, a petitioner must show that his constitutional rights were violated under 28 U.S.C. § 2254(a) and that § 2254(d) does not bar relief on any claim adjudicated on the merits in state court. *Frantz v. Hazey*, 533 F.3d 724, 735-737 (9th Cir. 2008) (en banc).

Under § 2254(d), a habeas petition challenging a state court judgment:

> 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 determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). A "'state court decision is "contrary to" clearly established Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases *or* if the state court confronts a set of facts materially indistinguishable from those at issue in a decision of the Supreme Court and, nevertheless, arrives at a result different from its precedent.'" *Cudjo v. Ayers*, 698 F.3d 752, 761 (9th Cir. 2012) (original emphasis). A state court unreasonably applies federal law when it identifies the correct governing legal principle but unreasonably applies it to the facts of the case. *Id*.

A state court unreasonably determines the facts under § 2254(d)(2) when its finding of fact is unsupported or contradicted by the record or when the fact-finding process itself was defective. *Brumfield v. Cain*, 135 S. Ct. 2269, 2277-2282 (2015); *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004).

REASONS FOR GRANTING THE WRIT

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

The Ninth Circuit denies a striking number of the COA requests it receives: 95 percent of them in fact.[3] By comparison, the rate of denials appears to be significantly lower in other circuits. *See* Brief for Petitioner, at *1A, *Buck v. Davis*, 137 S. Ct. 759 (2017), 2016 WL 4073689 (noting that "a COA was denied on all claims in 58.9% (76 out of 129) of the [capital habeas] cases arising out of the Fifth Circuit, while a COA was only denied in 6.3% (7 out of 111) and 0% of the cases arising out of the Eleventh and Fourth Circuits respectively"). The fact that the Ninth Circuit's rate of denial is so out of step with other circuits suggests that the Ninth Circuit is merely paying lip service to the principles this Court articulated in *Miller-El*.

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

A close review of this case reveals that, in fact, the Ninth Circuit is doing just that. As shown below, the Ninth Circuit's failure to issue a COA on the record that was before it shows that it applied a COA standard much higher than the one this Court articulated in *Miller-El*—a standard that, in effect, conflicts with this Court's mandates. *See* Supreme Court Rule 10(a).

Though this case involves a single person challenging his criminal convictions and sentence arising from a California state-court proceeding, this case is nonetheless significant and worthy of certiorari. The COA standard is an "important matter" in federal habeas law. *See* Supreme Court Rule 10(a). If a court is not correctly applying that standard, then that court strips habeas corpus of its all-important role in our criminal justice system. *See Harrington v. Richter*, 562 U.S. 86, 91 (2011) ("The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law."). Granting Bastidas's petition and reversing the Ninth Circuit's judgment will ensure uniformity within the nation's federal system and will allow this Court to preserve habeas corpus's vital role in our system of justice.

2. Following his conviction, Bastidas sought to demonstrate in state court that his trial counsel was ineffective for failing to present an alibi defense that would have exonerated him of the August 2 and August 9 robberies. Consistent with this Court's precedent, Bastidas provided evidence showing that his trial "counsel performed deficiently and that [trial] counsel's deficient performance caused him prejudice." *Buck*, 137 S. Ct. at 775 (citing *Strickland v. Washington*, 466 U.S. 668,

687 (1984)). He did not prevail on this claim in state court or in district court. Pet. App. 6-38, 98, 100-09. He then sought a COA in the Ninth Circuit to appeal the district court's decision, but the Ninth Circuit refused to issue one. Pet. App. 001.

3. The Ninth Circuit's denial of a COA here flouts established precedent. "The COA inquiry . . . is not coextensive with a merits analysis." *Buck*, 137 S. Ct. at 773 (2017). It is, rather, a "threshold question" that a Court should decide "without full consideration of the factual or legal bases adduced in support of the claims." *Id.* In deciding this threshold question, the Ninth Circuit was limited to assessing whether any "jurist[] of reason [w]ould disagree with the district court's resolution of [Bastidas's] constitutional claim[]." *Miller-El*, 537 U.S. at 327. Bastidas could make the requisite showing for a COA if he proved "'something more than the absence of frivolity.'" *Id.* at 338 (quotation marks omitted). And he more than did that.

4. To be sure, the district court reviewed the correct state-court decision in its AEDPA analysis. Under *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991), this Court looks "to the last reasoned decision" that resolved the claim. Here, Bastidas first raised his ineffectiveness claim in the California Court of Appeal, and that court denied it in a reasoned decision. Pet. App. 100-09.) He then raised it again in the California Supreme Court, and that court summarily denied it. Pet. App. 98. As the district court correctly determined (*see* Pet. App. 74), because the California Supreme Court summarily denied Bastidas's claim, this Court "looks through" that

decision to the California Court of Appeal's reasoned decision. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1193-95 (2018).

The district court also applied the correct standard of review to Bastidas's claim. (*See, e.g.*, Pet. App. 77.) Because the California Court of Appeal denied both elements of Bastidas's claim on the merits, review was under § 2254(d). Therefore, Bastidas had to show that the adjudication of his claim "(1) resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law" or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). But although it identified the relevant state-court decision and applied the correct standard of review, the district court plainly erred in assessing the two elements of Bastidas's ineffectiveness claim under that standard.

5. Beginning first with the deficient performance prong of that claim, Bastidas had to show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

Applying *Strickland*, the Ninth Circuit had repeatedly held that a lawyer performs deficiently if he fails to adequately investigate and present evidence "that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict." *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002). This failure has often arisen in cases where, as here, trial counsel failed to interview and present alibi witnesses who would have placed the

defendant at a different place at the time of the crime. *See, e.g.*, *Alcala v. Woodford*, 334 F.3d 862, 870-71 (9th Cir. 2003) (finding deficient performance where counsel failed to interview and present alibi witness who would have testified that defendant was with them in a city different from where the crime occurred); *Luna v. Cambra*, 306 F.3d 954, 958-60 (9th Cir. 2002) (same, except alibi witnesses would have testified that defendant was with them at their home at the time of the crime); *Brown v. Myers*, 137 F.3d 1154, 1156-57 (9th Cir. 1998) (same, except alibi witnesses—including one of defendant's friends—would have placed defendant at the friend's house instead of the crime scene).

The state-court record showed that trial counsel failed to investigate and develop evidence that would have "demonstrated his client's factual innocence" or "raised sufficient doubt as to that question to undermine confidence in the verdict." *Avila*, 297 F.3d at 919. Bastidas's theory of the case at trial was that he was innocent of the August 2 and 9 robberies, and he had an alibi defense to support that theory: He was with his friend, Andy Bacashihua, on August 9 at the time of the August 9 robbery. Both he and Bacashihua declared as much in corroborating declarations.

Significantly, though Bacashihua only provided an alibi for Bastidas on August 9, he could have helped Bastidas raise a reasonable doubt as to the August 2 robbery too. That's because Medina testified that the person who robbed him on August 9 also robbed him on August 2. It follows, then, that if the jury believed

Bacashihua about being with Bastidas on August 9, then they would have acquitted Bastidas of the August 2 and the August 9 robberies.

But the jury never had an opportunity to consider Bacashihua's testimony because trial counsel never interviewed him. Under controlling law, trial counsel was deficient for failing to investigate Bastidas's alibi. *See Avila*, 297 F.3d at 919.

The state-court decision holding that Bastidas had not established deficient performance was unreasonable under § 2254(d). In its decision, the state court acknowledged that failing to develop "defendant's crucial defense of alibi" would amount to deficient performance. Pet. App. 107. The court nevertheless held that Bastidas had not established deficient performance because he had "stated insufficient facts to support his contention that counsel was made aware of these facts prior to trial"; and had not submitted a "statement" from "trial counsel regarding his awareness of the alibi witness." Pet. App. 108.

But Bastidas included allegations in his petition that trial counsel knew of his alibi defense, and the state court was required to assume the truth of those factual allegations. *See Cullen v. Pinholster*, 563 U.S. 170, 188 n.12 (2011) (citing *People v. Duvall*, 9 Cal. 4th 464, 474-75 (1995)). What's more, he supported those allegations with a declaration, in which he swore under penalty of perjury, that he "gave Mr. Holzinger and his investigator the name of Andy Bacashihua who was an alibi witness to [his] whereabouts on the evening of August 9, 2001 when the robberies of Medina and Espinoza took place." Pet. App. 176. He further declared that "Mr. Holzinger never contacted Andy Bacashihua to determine whether he

could be used as an alibi witness in my defense. *Id.* Thus, the state-court record showed Bastidas had made his trial counsel "aware of these facts before trial." The contrary factual determination made by the state court rendered its decision unreasonable under 28 U.S.C. § 2254(d)(2). *See Brumfield v. Cain*, 135 S. Ct. 2269, 2277-2282 (2015); *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004).

The state court was also unreasonable for penalizing Bastidas because he had not included a "statement" from his trial lawyer. As the state-court record showed, just a few years after Bastidas's trial, the California State Bar Court recommended that Bastidas's trial lawyer be suspended from the practice of law for, among other things, not responding to the California Supreme Court's order to answer the charges against him in his bar proceedings. Pet. App. 143, 145. If the California Supreme Court could not obtain Bastidas's trial lawyer's participation in a bar proceeding alleging misconduct against him, certainly Bastidas should not have been faulted for not including a declaration from that same lawyer in his habeas proceeding, especially given that Bastidas's allegations would have potentially subjected that lawyer to further discipline from the State Bar.

6. The district court also plainly erred in assessing the second prong of the *Strickland* test, prejudice. To establish prejudice, Bastidas had to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A verdict "only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

The prosecution's case here was weak. There was no physical evidence linking Bastidas to the August 2 or August 9 robbery. The only evidence connecting Bastidas to either crime was suspect eyewitness testimony. Trial counsel impeached Espinoza, an eyewitness to the August 9 robbery, based on his failure to identify Bastidas on two different occasions at the police station a week after the crime. And Medina, an eyewitness to the August 2 and August 9 robberies, was an unreliable witness, too. Medina lied on the stand about his criminal history, which undermined his credibility.

Also, through expert testimony, Bastidas underscored for the jury that there is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation, and that this risk is amplified when the observation was made at a time of stress or excitement, like a robbery. *See United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

As for the alibi defense that trial counsel failed to investigate and present, it was stronger than the prosecution's evidence. According to Bastidas's alibi witness, Bacashihua, he and Bastidas were watching a movie when the August 9 robbery was taking place. Bacashihua explained in his declaration that he remembered the date well because he and Bastidas were discussing whether to go to Bacashihua's girlfriend's party, which happened to fall on her birthday: August 9. Pet. App. 178.

There was no evidence in the record to refute Bastidas's allegations or Bastidas's and Bacashihua's signed declarations.

Given the weaknesses of the prosecution's case and the strength of the alibi evidence, there is a reasonable probability that Bacashihua's testimony would have resulted in a different outcome of the trial. *See Strickland*, 466 U.S. at 696. Indeed, the Ninth Circuit had found prejudice in cases weaker than this one. *See, e.g.*, *Alcala*, 334 F.3d at 872 (granting habeas relief where counsel failed to present an alibi witness and no physical evidence linked petitioner to the murder); *Luna*, 306 F.3d at 961-62, 966 (granting habeas relief where counsel failed to present the testimony of petitioner's mother and sister to show he was home at the time of the crimes); *Brown*, 137 F.3d at 1157-58 (granting relief where petitioner claimed he was with friends at time of crime, even though three witnesses testified they saw petitioner shoot the victim).

The state court's harmlessness determination was unreasonable under § 2254(d). The state court reasoned that, "given the similar modus operandi of the crimes of August 2 and 9 – dates *for which Bacashihua did not claim to give alibi information* – and the August 16 robbery in question, it is unlikely Bacashihua's testimony would have had any weight with a jury that found defendant guilty of the earlier robberies." Pet. App. 108 (emphasis added). But Bacashihua's alibi *was for the August 9* robbery, which necessarily made it relevant to the August 2 robbery, too. The state court could not properly assess prejudice given that it plainly did not understand the nature of Bastidas's allegations or his evidence.

Furthermore, to the extent that the state court found Bastidas's and Bacashihua's declarations not credible, the state court acted unreasonably. The state court never held a hearing, and thus it was improper for it find their declarations not credible on a cold record, especially considering that the declarations were inherently believable credible and internally consistent with one another. *See Brumfield*, 135 S. Ct. at 2277-2282; *Taylor*, 366 F.3d at 999-1001.

7. Thus, contrary to what the Ninth Circuit held, "jurists of reason could disagree with the district court's resolution of" Bastidas's ineffectiveness claim. *See Miller-El*, at 327. The Ninth Circuit should have issued a COA, as this Court's case law required it do. Its failure to do so is part of its longstanding practice of ignoring this Court's binding precedents about when to issue COAs.

CONCLUSION

For the foregoing reasons, the Court should grant Bastidas's petition, reverse the judgment of the Ninth Circuit, grant a COA on his ineffectiveness claim, and grant relief on that same claim.

Respectfully submitted,

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DATED: May 5, 2021

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No. _____

IN THE

Supreme Court of the United States

PABLO BASTIDAS,

Petitioner,

v.

MATTHEW ATCHLEY, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

CERTIFICATE PURSUANT TO RULE 33

Pursuant to Rule 33.2, I hereby certify that this petition is less than 40 pages, and therefore complies with the page limit set out in Rule 33. This brief was prepared in 12-point Century Schoolbook font.

Respectfully submitted,

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