No. _____

IN THE

# Supreme Court of the United States

MARLON DARREL EVANS

*Petitioner,*

v.

AMY MILLER, 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

The question presented is whether the state court unreasonably applied this Court's precedents when it concluded that Evans's trial counsel was not constitutionally ineffective for failing to challenge the sole testifying eyewitness's identification as unreliably suggestive, after acknowledging the entire case hinged on identification.

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## LIST OF PRIOR PROCEEDINGS

Pursuant to Supreme Court Rule 12.4, the Petitioners listed below file a single petition of writ of certiorari to the Ninth Circuit Court of Appeals to cover multiple judgments below.

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

Marlon Darrel Evans ("Evans") petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in his case.

## OPINIONS BELOW

In the Appendix, Evans includes the Ninth Circuit's Unpublished Memorandum denying relief (Pet. App. 1-14); the Ninth Circuit's order granting a Certificate of Appealability ("COA") on Evans's ineffective assistance of counsel claim (as well as two others that are not raised in this petition) (Pet. App. 29-30); the district court's order adopting the magistrate judge's report and recommendation (Pet. App. [ ]); the district court's judgment (Pet. App. 70); and the magistrate judge's report and recommendation to dismiss the petition (Pet. App. 71-115).

On collateral review, the California Supreme Court issued a summary denial of Evans's ineffective assistance of counsel ("IAC") claim based on *Strickland v. Washington*, 466 U.S. 668 (1984). (Pet. App. 117.)

## JURISDICTION

Evans is in state custody at the California Substance Abuse Treatment Facility in Corcoran, California. He filed a habeas corpus petition under 28 U.S.C. §

2254 in federal district court challenging the constitutionality of his conviction and sentence. The district court denied the petition with prejudice on the merits. (Pet. App. 70-116.) The Ninth Circuit granted a COA but affirmed the district court's denial of relief. (Pet. App. 29-30, 1-23.) This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is filed within 150 days of the Ninth Circuit's April 6, 2021 order denying relief, rendering this petition timely pursuant to Supreme Court Rules 13.1 and 13.3, and this Court's Order of March 19, 2020.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

U.S. Const. Amend. XIV, § 1

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

28 U.S. Code § 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

In 1995 Evans was sentenced to life imprisonment for a quadruple murder which the dissenting Ninth Circuit jurist in this case found "there is a very good chance he did not commit." (Pet. App. 10.) Because Evans's trial counsel did not investigate or present evidence that Evans was actually at a nearby traffic stop with several others and two police officers at the time of the shooting, his conviction hinged on two eyewitnesses who purportedly placed him at the shooting. One never testified at trial and has since recanted. (Pet. App. 12, 53-58.) The other testified at trial that he was only 75% certain of his identification which was the result of a six pack and line up where Evans was the only individual shown more than once and dressed by police to match the shooter's description of a beanie. (Pet. App. 112, 127, 22.)

At a Los Angeles gas station on the night of December 13, 1992, Leroy Martin and Clarence Lavan were present when a shooting occurred resulting in the death of a gang member and three bystanders. (Pet. App. 11.)

Several hours after the shooting, Martin provided police an account of what he had seen. Weeks later, Martin was shown several photo arrays. Two of them (the first and sixth) included Evans's photo; Evans was the only person whose photo appeared twice. Martin did not identify Evans's photo from the first array. He did choose Evans's photo from the sixth array, which showed Evans wearing a beanie, saying he was "about 75% sure" that Evans was the person he had seen. (Pet. App. 10, 127.) Later, during a live lineup, Martin failed to identify Evans and, on his witness admonition card, wrote "none" when asked for the position of the suspect.

However, in the remarks section of the card, Martin wrote that "number five," Evans, "came the closest" to the man he observed at the gas station. (Pet. App. 11-12, 120.)

Both of the prosecution's witnesses, Leroy Martin and Clarence Lavan, inconsistently described the suspect, including at trial. Lavan was unavailable to testify at Evans's trial, so his testimony from the preliminary hearing, in which he identified Evans as the shooter, was read into the trial transcript. (Pet. App. 12-13.)

In 1998, Evans filed a timely pro se habeas petition in federal court. But it was dismissed for containing both exhausted and unexhausted claims. That same year, Evans returned to federal court after exhaustion. This time his petition was dismissed as untimely. Evans spent the next several years (from 1999 to 2011) fighting to have his exhausted claims heard in federal court. Simultaneously he was laboriously investigating his case and managed to collect several declarations from alibi witnesses about the traffic stop.

In October 2011, his federal petition was reinstated due to *Rhines v. Weber*, 544 U.S. 269 (2005), but denied with prejudice in late 2012. The district court held that trial counsel was not ineffective for failing to challenge the admission of Martin's identification because Martin's in-court identifications were not tainted and a motion to suppress them would have been futile.[1] The district court never addressed prejudice. (Pet. App. 71-115.)

[1] That petition also raised procedurally-defaulted claims of IAC stemming from failure to investigate and present Evans's alibi defense, and also raised actual innocence as a means to overcome the procedural default. But the district court

The Ninth Circuit granted a COA on that claim (as well as a claim that Martin's identification was unreliably suggestive and a claim challenging the improper consolidation of unrelated charges) and appointed counsel.[2] (Pet. App. 14, 29-30.) On April 6, 2021 the Ninth Circuit affirmed the district court's denial of the IAC claim stemming from Martin's identification, which is the subject of this petition. (Pet. App. 1-23.)

## REASONS FOR GRANTING THE WRIT

Rule 10(c) provides that certiorari is appropriate when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Rule 10(c), Rules of the Supreme Court.) This case is extraordinary because, as Judge Kennelly concluded in his partial dissent, "there is a very good chance" Evans is innocent and the Ninth Circuit grossly misapplied this Court's precedent in denying his ineffective-assistance-of-counsel claim.

### A. The Ninth Circuit's decision conflicts with *Strickland* and *Richter*.

The panel majority's subsequent analysis of the IAC claim conflicts with this Court's decision in *Strickland v. Washington* and *Harrington v. Richter*. This Court should grant the writ to remedy the defective reasoning that supports Evans's life

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found that even with the new evidence of an alibi, the positive identifications of Martin and Lavan remained "substantial evidence" of guilt. (Pet. App. 90.)

[2] With counsel's help, Evans obtained a declaration from Lavan recanting his identification, among other evidence of his actual innocence. (Pet. App. 142-43; 128-41.) But this, and prior evidence of Evans's actual innocence, was dismissed on credibility grounds without the hearing he requested pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995). (Pet. App. 54-66.)

sentence for a crime "there is a very good chance he did not commit." (Pet. App. 10); Supreme Court Rule 10(c).

### 1. The Ninth Circuit improperly linked its deficient performance analysis to its analysis of the due process claim under AEDPA.

The panel majority improperly linked its rejection of the IAC claim to its previous rejection of the suggestive identification claim, deeming the former an automatic consequence of the latter:

> As noted, the California Supreme Court's denial of Evans's suggestive identification claim was not unreasonable. Thus, the California Supreme Court's denial of Evans's ineffective assistance of counsel claim was also not unreasonable.

(Pet. App. 4-5.) But a federal court's determination that a state court decision was not unreasonable, when considering that summary decision pursuant to *Cullen v. Pinholster*, 563 U.S. 170, 188 (2011), is not a determination of the merits. It means that there is room for fair minded jurists to disagree about the admissibility of Martin's identification. It does *not* mean that a motion to exclude that identification was futile or doomed. Therefore, the majority's rejection of Evans's suggestive identification claim cannot provide the basis for rejecting his IAC claim. *See, e.g.*, *Hinton v. Alabama*, 571 U.S. 263 (2014), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000) (all finding deficient performance under *Strickland* by judging the reasonableness of counsel's challenged conduct without considering whether that challenged conduct resulted in *another* constitutional violation that was beyond fairminded disagreement).

### 2. The Ninth Circuit's deficient performance analysis was flawed because the court imagined an unreasonable basis for counsel's failure that was rebutted by the record.

To meet the deficient performance element under *Strickland*, the petitioner must establish that counsel's representation "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). This is a case that hinged on eyewitness identification. Evans's trial counsel acknowledged to the jury that this case was "one obviously of identity," and he argued to jurors that Martin was mistaken. Martin was the sole testifying eyewitness who identified Evans as present before the shooting. Counsel's challenge to Martin's identification would have been colorable: (1) Martin was only about 75% certain that Evans was the man he saw; (2) detectives placed Evans's photo, and only his photo, in two separate arrays—with Martin identifying him only in the second array; (3) the picture Martin chose was taken so that it would match a description of the shooter (who wore a beanie); and (4) at the lineup, when Martin was seeing Evans for the third time during an identification procedure, he was able to say at most that Evans came closest to the man he had s before the shooting. The only other eyewitness who identified Evans as the shooter, Clarence Lavan, never testified at trial, and has since recanted. (Pet. App. 20.)

This Court has recognized that "[c]riminal cases will arise where the only reasonable and available defense strategy requires" a specific act or inquiry. *Hinton*, 571 U.S. at 273 (in the context of expert consultation and evidence.) This was a case

where the only reasonable and available defense strategy required counsel to challenge Martin's identification.

Nevertheless, the Ninth Circuit panel majority hypothesized that counsel could have made a strategic choice not to seek exclusion of Martin's identification in favor of pointing out inconsistencies between that identification and Lavan's. (Pet. App. 5-6.) The majority's hypothesis is affirmatively undermined by the record: Evans's trial counsel *did not* argue inconsistencies between the two witnesses' descriptions to the jury. Indeed, there was no mention of it during counsel's argument. There is no question that counsel recognized this case was "one obviously of identity," and also that he did not argue inconsistencies between Martin and Lavan's descriptions to the jury. This Court's direction that federal courts consider for themselves what "could have supported" a state court's summary decision does not permit hypotheticals that are rebutted by the record. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

This Court's direction in *Richter* also does not permit the conjuring of objectively unreasonable hypotheticals (that inconsistent evidence is better than the absence of evidence) simply because they fall within the realm of human imagination. *Id.* at 102. Allowing such hypotheticals would mean that no habeas petitioner could ever prevail in *any* case. *Richter*, 562 at 101. All fair-minded jurists would agree that two identification witnesses with some inconsistencies in their descriptions is not better for a defendant than a single identification witness whose testimony, as in this case, was impeachable. As this Court has held, some failures

simply "could not be justified as a tactical decision." *Wiggins*, 539 U.S. at 522 (in the context of choosing not to present a mitigation defense). The hypothetical proposed by the majority is indefensible and cannot fairly be deemed "a tactical decision."

The majority's decision conflicts with this Court's analysis and decision in Strickland, based on how it was applied *in this case*. The *Strickland* reasonableness determination is case-specific. There was no reasonable strategic basis in Evans's case for counsel's failure to challenge the admissibility of Martin's identification.

### 3. The Ninth Circuit's prejudice analysis was based on an unreasonable presumption that is also rebutted by the record.

To prove prejudice from counsel's deficient performance, a habeas petitioner "must 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. The majority unreasonably concluded that without the admission of Martin's identification, Lavan's out-of-court identification alone foreclosed any reasonable probability of a different outcome.

To find that Lavan's identification alone would have supported a conviction in this case is contradicted by the record. With Martin's identification suppressed, there is a reasonable probability that the trial would have come out differently.[3] As the dissenting jurist points out:

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[3] As the dissenting jurist noted, Evans also surmounts the first portion of the prejudice showing in this case: that trial counsel had a reasonable probability to succeed if he had filed a motion to suppress Martin's identification as impermissibly suggestive. (Pet. App. 21-22.)

> Lavan did not testify live at Evans's trial. It was *Martin* the jury saw questioned, *Martin* whose credibility they were able to evaluate based on first-hand observation, and *Martin* whose testimony was the only evidence to corroborate the cold transcript of Lavan's preliminary hearing testimony. That cold transcript of Lavan's also included promises authorities made to obtain his cooperation.

(Pet. App. 22-23 (emphasis added)).[4] Without Martin's testimony, no one at Evans's trial had the ability to place him at the shooting. Even with Martin's testimony, the jury deliberated long and hard (over the course of three days following a six-day trial), and requested read-backs. (Pet. App. 145-58.) Without any trial testimony that Evans was at the shooting−much less the actual shooter−there is a reasonable probability that one or more jurors would have had reasonable doubt of Evans's guilt. All reasonable jurists would agree that the facts discussed in this section establish prejudice. *Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.")

The Ninth Circuit's decision on IAC is in conflict with this Court's precedent. Moreover, it directly impacts the important matter of Evans serving a life sentence for a crime "that there is a very good chance he did not commit." (Pet. App. 10.)

[4] Moreover, as the Ninth Circuit recognized, Lavan has since recanted. (Pet. App. 12.)

## CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: September 1, 2021

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## 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,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: September 1, 2021

By: _____
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