No. _____

IN THE

Supreme Court of the United States

TEDROY DAVIS,

Petitioner,

v.

JEFFREY BEARD, 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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QUESTIONS PRESENTED

Did the Ninth Circuit misapply the standard for the issuance of a certificate of appealability (COA) articulated by this Court in cases such as *Buck v. Davis*, 137 S. Ct. 759 (2017), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Slack v. McDaniel*, 529 U.S. 473 (2000), in denying Petitioner's request for a COA when the prosecutor continually referenced Petitioner's post-*Miranda* silence constituting *Doyle v. Ohio*, 426 U.S. 610 (1976) error, the trial court failed to correct the error, and defense counsel acted ineffectively for failing to object, where Petitioner made a substantial showing that he was denied his constitutional rights?

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.

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

Tedroy Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

ORDERS AND OPINIONS BELOW

The Ninth Circuit issued an order on March 29, 2022, denying Petitioner's request for a Certificate of Appealability (COA) on four claims, all of which were denied on the merits in proceedings before the United States District Court for the Central District of California. Pet. App. 1, 2. The district court adopted the Report and Recommendation of the magistrate judge, dismissed Davis's habeas corpus petition with prejudice, and entered judgment against him. Pet. App. 3.

JURISDICTION

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 because Davis is filing his petition within 90 days of the Ninth Circuit's March 29, 2022 final order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the U.S. Constitution

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall...be compelled in any criminal case to be a witness against himself...."

Sixth Amendment of the U.S. Constitution

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his defense."

Fourteenth Amendment of the U.S. Constitution

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall ... abridge the privileges ... of citizens of the United States ... nor shall any State deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2253(c)

(1) Unless a circuit judge issues a certificate of appealability, an appeal may not be taken to the courts of appeal 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 substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Trial

On November 10, 2010, Petitioner Tedroy Davis was charged with the murder of Daren Dunning, in violation of California Penal Code section 187(a). It was further alleged that Davis used a firearm within the meaning of section 12022.53(b), (c), and (d). Pet. App. 48. Count two charged him with possession of a firearm by a felon, in violation of section 12021(a). Pet. App. 48.

Detective Eric Crosson interrogated Davis following his arrest for the murder of Dunning. Pet. App. 35-36, 42. Crosson read Davis the advisements required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Davis invoked his rights by telling police he wanted to speak with an attorney. Pet. App. 42-43.

On December 7, 2010, Davis pled not guilty and denied the enhancing allegations. Pet. App. 49-50. The jury trial began on August 25, 2011. At trial, Davis testified to shooting Dunning in self-defense. The prosecutor offered testimony from Crosson regarding his interrogation of Davis to rebut Davis's claim that he acted in self-defense. On four occasions during Crosson's testimony, the prosecutor referred to Davis's post-*Miranda* silence in

violation of *Doyle v. Ohio*, 426 U.S. 610 (1976) (The use of an arrestee's silence to impeach his testimony after electing to not speak post-*Miranda* warnings, violates due process) ("Doyle error"). First, the prosecutor elicited from Crosson that Davis declined to speak with the police before consulting counsel. Pet. App. 42-43. Second, the prosecutor asked Crosson whether Davis stated he shot the victim because he was scared; Crosson answered no and the prosecutor repeated his question. Defense counsel then objected to leading the witness. Pet. App. 44. The trial court sustained the objection, asked to see counsel at side bar, and explained to the prosecutor that, because Davis invoked his *Miranda* rights, she could ask him questions only about what he said, not about what he had not said. Pet. App. 44-45. The trial court did not advise the jury the objection it sustained was not the objection defense counsel made, nor did it strike Crosson's answer or admonish the jury to disregard the questions or the answer. Defense counsel did not make a motion to strike or request an admonition. Pet. App. 45. Third, immediately after the side bar exchange, the prosecutor asked Crosson what Davis told him about the murder. Crosson responded that Davis said he did not know anything about a murder. Pet. App. 45. Defense counsel did not object. Fourth, the prosecutor asked Crosson if he remembered Davis saying anything else about the murder and Crosson responded that Davis did not

say anything else about the murder. Pet. App. 46. Defense counsel did not object.

On September 6, 2011, the jury found Davis guilty of second degree murder and unlawful possession of a firearm. Pet. App. 51-52. It found all of the section 12022.53 allegations true.

Sentencing took place on November 2, 2011. For count one, the murder conviction, the court ordered defendant to serve the statutorily prescribed term of 40 years to life in state prison, fifteen years to life for the second degree murder conviction plus 25 years to life for the 12022.53(d) enhancement. Pet. App. 53-54. The court also selected an upper term sentence of three years for the firearm conviction, which it imposed concurrently. Pet. App. 54-55.

B. Direct Appeal

Davis was appointed counsel to represent him on direct appeal to the California Court of Appeal. In an unpublished opinion, the Court of Appeal affirmed Davis's convictions in full. Pet. App. 4-12. Davis's appellate counsel filed a petition for review in the California Supreme Court; that petition was denied. Pet. App. 13.

C. State Habeas

Acting pro se, Davis filed a series of habeas petitions at each level of the California court system. The Superior Court, Court of Appeal, and California Supreme Court denied relief. Pet. App. 14-18.

D. Federal Habeas

1. The District Court

On September 29, 2014, Davis filed a pro se habeas petition in the District Court for the Central District of California. (Dkt. 1.) Respondent filed an answer. (Dkt. 14.) The magistrate judge granted Davis's request to amend the petition and granted him a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), to exhaust claims. (Dkt. 23.) The California Supreme Court denied Davis's exhaustion petition. (Dkt. 39, Lodgment 17.) Davis then filed a First Amended Petition ("Petition") in district court (Dkt. 29) and Respondent filed a supplemental answer. (Dkt. 60.)

On June 26, 2018, the district court appointed the Office of the Federal Public Defender to represent Davis. (Dkt. 84.) With the assistance of counsel, Davis filed his traverse on September 1, 2019. (Dkt. 113.) The magistrate judge recommended the district court deny relief on each of his claims. (Dkt. 116.) Davis objected and requested a certificate of appealability. (Dkt. 121.) The district court adopted the magistrate judge's final amended report and recommendation and denied a certificate of appealability. (Dkt. 122, 123,

125.) The judgment was entered on December 2, 2020 and Davis timely filed a notice of appeal on December 28, 2020. (Dkt. 124, 126.)

2. The Ninth Circuit Court of Appeals

Davis moved in the Ninth Circuit Court of Appeals for a COA on four of the claims he raised in his federal habeas petition: *Doyle* error, the trial court's failure to cure the error, the ineffective assistance of trial counsel for failing to object to the error, and the government's interference with his ability to obtain favorable witnesses. The Ninth Circuit denied Davis's request for a COA on March 29, 2022. Pet. App. 1.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S CERTIFICATE OF APPEALABILITY STANDARD

In *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court explained that: "a COA may not issue unless the applicant has made a substantial showing of the denial of constitutional right." *Id*. at 483-84 (internal quotation marks omitted). The "substantial showing" standard is "relatively low." *Id*. at 483. A petitioner can make "a substantial showing" when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Slack*, 529 U.S. at 484 (citing *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983)). A "substantial showing" is also made when "jurist could conclude that the issue presented [is] adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 327

(2003). Following *Miller-El*, this Court reversed the Fifth Circuit's denial of a petitioner's request for a certificate of appealability because the court only "pa[id] lip service to the principles guiding the issuance of a COA[.]" *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). Most recently the Court reiterated in *Buck v. Davis*, 137 S. Ct 759 (2017), that the "COA inquiry is not coextensive with a merits analysis." *Id*. at 773-74. The Court emphasized that a circuit court of appeals cannot "invert[] the statutory order of operations and first [decide] the merits of an appeal, ... then [justify] the denial of a COA'" because that would amount to the court "deciding an appeal without jurisdiction." *Id*.

This Court may grant certiorari when "a United States court of appeal has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Here, the Ninth Circuit only paid lip service to this Court's COA principles when it denied Davis a COA on his claims. *See Tennard*, 542 U.S. at 282. At the very least, Davis has met the relative low substantial showing standard with regard to his claim that he was denied his rights. Reasonable jurists could debate whether the prosecutor committed *Doyle* error, the court should have intervened, trial counsel was ineffective, and that the government intervened with Davis's ability to obtain favorable witnesses in support of his defense.

Put another way, reasonable jurists could conclude that Petitioner's claims deserve encouragement to proceed further.

II. BACKGROUND

After Davis was arrested in Tucson, Arizona on July 30, 2010, he was interviewed by Detective Eric Crosson. Pet. App. 35-36, 42. Crosson read him the advisements required by *Miranda v. Arizona*, 384 U.S. 436 (1966), and Davis invoked his rights by telling police he wanted to speak with an attorney before talking to them. Pet. App. 42-43.

After Davis testified to shooting Dunning in self-defense, the prosecutor offered testimony from Crosson regarding his interrogation of Davis to rebut Davis's claim. Crosson was the last witness and the only purpose of his testimony was to suggest to the jury that Davis's claim that he acted in self-defense was a lie. Davis contends that on four occasions during Crosson's testimony, the prosecutor engaged in misconduct under *Doyle v. Ohio*, 426 U.S. 610, by referring to Davis's post-*Miranda* silence.

The first *Doyle* violation. The first Doyle violation consisted of the prosecutor's eliciting that Davis declined to speak with the police before consulting counsel. Pet. App. 42-43.

The second *Doyle* violation. The following dialogue between the prosecutor and Crosson followed quickly on the heels of Crosson's testimony indicating that Davis had invoked his right to counsel:

[The prosecutor:] Did [Davis] ask any questions about why he was being there or why he was arrested?

[Crosson:] Yes.

Q. And did you respond?

A. Yes.

Q. And why, did you all say?

A. We told him we had a warrant for his arrest for the crime of murder.

Q. And did he ever tell you, during this interview, and give you any -- well, did he ever tell you that he shot the victim because he was scared of the victim?

A. No.

Q. Did he ever tell you that?

MR. WILLOUGHBY: Object. Counsel leading the witness. Pet. App. 44.

The trial court sustained the objection, asked to see counsel at the side bar, and explained to the prosecutor that, because Davis had invoked, she could ask him questions only about what he said-not about what he had not said. Pet. App. 44-45.

The trial court did not tell the jury that the objection it sustained was not the objection defense counsel made; nor did it strike Crosson's answer or admonish the jury to disregard the questions or the answer. Trial counsel did not make a motion to strike or request an admonition. Pet. App. 45.

The third *Doyle* violation. The following took place immediately after the bench conference concluded:

Q. Detective, what did he tell you during your interview with the defendant about any murder?

A. My recollection was that he didn't know anything about a murder. Pet. App. 45.

There was no objection to the question or the answer.

The fourth *Doyle* violation. The prosecutor's final question to Crosson and its answer, which were also received without objection, referred once again to Davis's silence:

[Prosecutor:] Do you remember the defendant say [sic] anything else about that murder that day?

[Crosson:] He didn't say anything else about the murder. Pet. App. 46.

This was the last testimony the jury heard.

III. DAVIS HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF HIS CONSTITUTIONAL RIGHTS

If the suspect, during a custodial interrogation, "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Also, if the arrestee "indicates in any manner that he does not wish to be interrogated, the police may not question him." *Id*. at

445. When an arrestee invokes his *Miranda* rights, the use of his silence later to impeach his trial testimony violates due process. *Doyle v. Ohio*, 426 U.S. 610 (1976). A prosecutor may not seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at time of his arrest. *Id.* at 611. The word "silence" in this context does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted. *Wainwright v. Greenfield*, 474 U.S. 284, 295 n.13 (1986). A single comment is sufficient to constitute a *Doyle* violation. *Greer v. Miller*, 483 U.S. 756, 764 n.5 (1987).

When *Doyle* error occurs, a trial court's failure to strike the evidence or to tell the jury to disregard it constitutes an implicit validation of the questions and the answer. Thus, there are two sides to a *Doyle* violation – the prosecution's attempt to use the defendant's silence improperly, and permission from the trial to use it in that manner. *Greer*, 483 U.S. at 765*; People v. Evans*, 25 Cal. App. 4th at 368-69.

A. The Denial of Davis's *Doyle* Error Claims Demonstrate a Substantial Showing of the Denial of his Constitutional Rights

The district court properly reviewed Petitioner's Claims 1 and 2 de novo because they were not adjudicated on the merits in state court proceedings. *See* 28 U.S.C. 2254(d) (Section 2254(d) does not apply to claims that were not

adjudicated on the merits in state court.); (Doc. 122 at 7-8.) It assumed *Doyle* error, but erroneously found the errors harmless. (*Id*. at 11.)

The first *Doyle* violation was informing the jury of Davis's request to have counsel appointed before speaking to the police. It is error for the prosecution to elicit evidence of a suspect's post-*Miranda* silence, because "the natural tendency of the use of the testimony in this manner is to prejudice the defendant by attempting to create an inference of guilt in the jury's mind." *United States v. Newman*, 943 F.2d 1155, 1157 (9th Cir. 1993*); see also United States v. Gentry*, 555 F.3d 659, 663 (8th Cir. 2009) (reference to defendant's silence was one of three instances of *Doyle* error.)

In the second incident, the prosecutor established that Davis did not claim that he acted in self-defense because he was afraid of Dunning. Pet. App. 44. In the fourth incident, the prosecutor established that Davis did not "say anything else about the murder" during the interview. Pet. App. 46. Both incidents were prototypical examples of prosecutorial misconduct under *Doyle*: the use of the defendant's silence after the *Miranda* advisements to impeach his testimony at trial. The indisputable implication of both of Crosson's statements is that Davis's trial testimony was a recent fabrication. Because Davis's silence during the police interview was indisputably the result of his exercise of his right to remain silent, the prosecutor's questions about his post-*Miranda* silence were improper and the jury should not have

been allowed to consider the answers. Because the jury was permitted to consider both the questions and answers in its deliberations, the second and fourth incidents constitute *Doyle* error. *Greer v. Miller*, 483 U.S. at 765; *People v. Evans*, 25 Cal. App. 4th 358, 368 (1994).

The third incident, in which Crosson testified that Davis said he did not know anything about a murder, was also improper under *Doyle*. A defendant who wishes to exercise his *Miranda* rights does not need to remain completely mute. *Bass v. Nix*, 909 F.2d 297, 301, 304, n.11, (8th Cir. 1990) disapproved on another grounds in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Indeed, in *Doyle* itself, one of the defendants asked the reason for his arrest and when told, exclaimed either, "You got to be crazy," or "I don't know what you are talking about." *Anderson v. Charles*, 447 U.S. 404, 407, n.2 (1980). Neither the question nor the exclamation was admissible because neither contradicted defendant's trial testimony. *Id.*; *Bass v. Nix*, 909 F.2d at 301, n.8.

Here, similarly, Davis's denial to Crosson that he knew anything about a murder did not contradict his trial testimony, which, if believed, indicated that he acted in self-defense. Thus, the prosecutor's question to Crosson eliciting Davis to testify that he said he knew nothing about a murder were inadmissible under *Doyle*, and could not serve as a legitimate ground for

impeaching Davis's trial testimony. *See Greer*, 483 U.S. at 765; *Evans*, 25 Cal. App. 4th at 368.

In order to prevail on a *Doyle* claim, Davis must show the errors had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). All of the factors that have induced other courts to reverse convictions due to *Doyle* error are present here: the prosecution's case was not overwhelming, the defendant's testimony was believable, and no curative instructions were given. *Government of Virgin Islands v. Davis*, 561 F.3d 159, 166-167 (3rd Cir. 2009); *United States v. Gentry*, 555 F.3d 659, 663-664 (8th Cir. 2009); *Guam v. Veloria*, 136 F.3d 648, 652 (9th Cir. 1998).

Contrary to this Court's binding precedent, the district court found that the extent of the comments was not enough to prejudice Davis, but the Supreme Court has held a single comment is sufficient to constitute a *Doyle* violation. (Dkt. 122 at 11.); *Greer v. Miller*, 483 U.S. at 764 n.5. Davis's trial included four instances where his right to silence was used against him and the trial court's failure to give curative instructions only compounded the error. The trial court clearly recognized that the prosecutor's questions to Crosson about the defendant's silence violated *Doyle*. Thus, the court sustained defense counsel's objection and, in a bench conference held out of the presence of the jury, instructed the prosecutor not to ask Crosson about

what Davis did not say. Pet. App. 45. The court's ruling did not go far enough because it should have told the jury to disregard both the question and answer. *Greer v. Miller*, 483 U.S. at 764-765; *see People v. Bonilla*, 41 Cal. 4th 313, 355 (2007) (trial court sustained hearsay objection, but erred when it failed to cure the harm by informing jury that objection had been sustained, by striking testimony, or by telling jury to disregard it).

Even assuming that, at the outset of the trial, the jurors had no concept of the significance of the leading objection, it must have been clear to them by the time of Crosson's rebuttal testimony, which was the last evidence the jury heard, that it was an objection to the form of the question, not to the admissibility of the answer. In short, the trial court's ruling sustaining defense counsel's objection that the prosecutor was leading the witness did not inform the jury that there was any reason for them not to consider the fact that Davis did not make his claim of self-defense during the police interview. Nor did the trial court communicate in any other way to the jury that it should not consider the fact that defendant did not tell the police he acted in self-defense in its deliberations.

Contrary to this Court's precedent, the district court incorrectly found that the prosecutor did not use Davis's silence to infer his guilt. (Dkt. 122 at 11.) However, Davis's silence and invocation of his Fifth Amendment right

was a central feature of the prosecutor's case to prove Davis's guilt, exemplified by the prosecutor's constant use of it during trial.

Finally, in finding the error was harmless, the district court incorrectly found that there was not enough evidence to support a self-defense theory. (Dkt. 122 at 11-14.) However, the evidence presented at trial to support a second degree murder conviction was not overwhelming because the evidence supporting Davis's malice aforethought was extremely weak. Davis's testimony and theory of self-defense was believable because it was consistent with other evidence presented. Davis's veracity was central to his case to effectively establish a self-defense theory. There is no dispute about the fact that Davis fatally shot Dunning. The only question for the jury was how to classify the shooting, whether as justifiable homicide, because Davis actually and reasonably believed that he needed to defend himself from great bodily injury or death, as manslaughter, because Davis actually but unreasonably believed that he needed to defend himself from great bodily injury or death, or murder. There is not enough evidence on the record to demonstrate that Davis killed Dunning with malice aforethought and was guilty of second degree murder.

The *Doyle* error cannot be harmless where, as here, the case revolved around Davis's credibility. The evidence at trial was clear that Davis just wanted to be left alone, was in fear for his life, and acted in self-defense and

did not intend to kill Dunning. Davis's testimony, that Dunning, a member of the Rollin' 60's Crips, had threatened him because he was wearing a red shirt, sporting the color of a rival gang, has greater credibility. Pet. App. 38. According to Hubert McFarlane's testimony, Dunning was the aggressor: Dunning and a companion approached Davis and either ordered Davis to take off his red shirt or told him he was going to cut it off. Pet. App. 26-32. McFarlane also testified that Davis told Dunning he was not a gang-banger. Pet. App. 32, 38. McFarlane's account confirmed the essence of Davis's testimony that Davis believed Dunning's threat was gang-related. Pet. App. 34.

Three prosecution witnesses saw the shooting and the events leading up to it: two were related to Dunning, and McFarlane had been terrorized by men he believed were his friends. The district court attempts to erroneously use the testimony of McFarlane to prove Davis was not in fear for his life and did not acquire a gun for self-defense (Dkt. 122 at 12) without any acknowledgement that McFarlane was terrorized after the shooting. After the shooting, McFarlane's restaurant was vandalized and he was constantly threatened. (2RT 911-12, 916, 921.) McFarlane also acknowledged during his rebuttal testimony that he had complained to the police about the harassment, and had told them that after the shooting, four or five men whom he believed to be friends of Dunning's were coming by the restaurant

several times a day and threatening him. Pet. App. 40-41. Furthermore, Davis's testimony was consistent with the events depicted on the surveillance video.

Crosson's testimony impeaching Davis with his post-*Miranda* silence was the last evidence the jury heard. There were no curative instructions from the court; given the circumstances of this case, the jury was likely to "assign much more weight to the defendant's previous silence than [was] warranted" and to draw a "strong negative inference from that silence." *United States v. Hale*, 422 U.S. 171, 177 (1975).

Based on the totality of the evidence, reasonable jurors could debate whether the prosecutor's use of Davis's silence and the trial court's failure to correct them had a substantial and injurious effect on the verdict. Absent the objectionable testimony, at least one juror would have had a reasonable doubt about whether Davis was guilty of second degree murder. This Court has emphasized the modest COA standard, and Davis has demonstrated a substantial showing of the denial of his constitutional rights. A COA should have issued on these two claims. *Miller-El v. Cockrell,* 537 U.S. at 327.

B. The Denial of Davis's Ineffective Assistance of Counsel Claim Demonstrates a Substantial Showing of the Denial of his Constitutional Rights

To prevail on his ineffective assistance of counsel claim, Davis must show that counsel's performance was deficient, and the deficiency prejudiced

his defense. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). "To establish deficient performance, [Davis] must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Id*. (*quoting Strickland v. Washington*, 466 U.S. 668, 688 (1984).) To establish prejudice, Davis "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Wiggins*, 539 U.S. at 534 (*quoting Strickland*, 466 U.S. at 694).

The state court denied this claim for lack of deficient performance, finding there were possible reasons justifying defense counsel's failure to object; the state court did not address prejudice. (Dkt. 122 at 14-15.) AEDPA's deferential standard thus applies to the deficient performance prong, but not the prejudice prong. *Cone v. Bell*, 556 U.S. at 472; *See* 28 U.S.C. 2254(d) (Section 2254(d) does not apply to claims that were not adjudicated on the merits in state court.). The district court assumed that defense counsel performed deficiently and denied the claim on prejudice grounds. (Dkt. 122 at 15.)

The district court assumed that defense counsel performed deficiently in failing to object to the *Doyle* violations and did not address whether the state court was unreasonable under § 2254(d) in finding otherwise. The

district court's opinion should be construed to implicitly hold that the state court was unreasonable in finding that defense counsel did not perform deficiently. Defense counsel failed to object to three of the four *Doyle* violations; the objection he made to the second *Doyle* violation was on the non-meritorious ground that the prosecutor was leading the witness. There was no tactical reason to abstain from objecting. Counsel had a lack of knowledge of the case, was unprepared to zealously assist his client, made stipulations that harmed his client, and was unprepared throughout trial. *See e.g.*, Pet. App. 20-25. The state court's finding that counsel did not perform deficiently was an unreasonable application of *Strickland* and based on an unreasonable determination of the facts.

In federal court, the prejudice prong is reviewed de novo because the state court did not decide this prong of *Strickland*. *See* 28 U.S.C. 2254(d). To the extent the Ninth Circuit denied a COA, as the district court did, because it found that Davis was not prejudiced by his defense counsel's ineffective assistance because Davis did not adequately present a theory of self-defense at trial, that too was error. (Dkt. 122 at 15.) As discussed above, however, there is ample evidence to corroborate Davis's self-defense theory. Had defense counsel objected to the errors and requested curative instructions, there is a reasonable probability the trial court would have sustained the objections and issued the requested instructions in light of the clear *Doyle*

error, and a reasonable probability the result of the proceeding would have been different. Jurors are presumed to follow the law, thus courts must presume that jurors would have heeded the curative instructions not to consider the testimony that resulted from the errors.

Defense counsel's failures to object correctly only served to confuse the jurors and damage Davis's reputation. Defense counsel did not object to the prosecutor's first question-whether Davis had mentioned that he shot Dunning because he was afraid of him. He allowed the question and the answer to be received without comment, then interposed an incorrect objection when the prosecutor followed up with an attempt to get Crosson to repeat what he had said. Defense counsel's objection was not to the impropriety of the subject matter, but to the prosecutor's leading the witness. Pet. App. 44. This objection was sustained. Without the trial court properly advising the jury that the first question and answer were also objectionable, the jury had no way of knowing that the court's ruling encompassed them as well. By the time the *Doyle* violations occurred, the jury had heard a number of objections to leading during the course of the trial, some of them sustained by the trial judge. It is defense counsel's responsibility to ensure the trial court correctly instructs jurors and preserve errors. For example, when McFarlane mistakenly identified Davis as Brown in a video recording, the prosecutor asked a leading question and defense counsel objected. Pet. App.

33. The trial court sustained the objection, and the prosecutor rephrased the question. On another occasion, the trial court sustained the prosecutor's leading objection during Davis's direct. As in the previous example, defense counsel rephrased the question and elicited the information he was seeking. Pet. App. 39.

Defense counsel's failure to object to three instances of *Doyle* error severely prejudiced Davis because the court did not strike Crosson's answers or the prosecutor's questions or instruct the jury to disregard either. The factors courts have traditionally considered in evaluating the harm flowing from *Doyle* error include the strength of the prosecution's case, the believability of the defense theory of the case, whether the trial court attempted to cure the harm, and whether the *Doyle* violation went to the heart of the defendant's case. All of those factors support a finding that prejudice occurred in this case. The COA standard is "modest" and the "petitioner need not show that he should prevail on the merits." *Lambright v. Stewart*, 220 F.3d at 1024-25. A COA should have issued for this claim.

Reasonable jurists could conclude the issues presented are adequate to deserve encouragement to proceed further, thus a COA should have issued on this claim. *Miller-El*, 537 U.S. at 336-38; 28 U.S.C. § 2253(c)(2).

At the very least, Davis has met the standard to be granted a COA on his claims. The Ninth Circuit's denial of Davis's COA request is a result of

the court sidestepping this Court"s standard for the issuance of a COA, and instead denying the request based on its determination of the merits of the claim. *Buck,* 137 S. Ct at 759. Because this Court has clearly prohibited such a misapplication of the COA standard, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, Davis respectfully requests that this Court grant his petition for a writ of certiorari to review the Ninth Circuit's denial of his motion for a certificate of appealability.

Respectfully submitted,

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