

In the Supreme Court of the United States

JAMES MICHAEL FAYED,

Petitioner,

v.

OAK SMITH, ACTING WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

ROB BONTA

Attorney General of California

MICHAEL J. MONGAN

Solicitor General

JAMES WILLIAM BILDERBACK II

Senior Assistant Attorney General

TERESA A. REED DIPPO

Deputy Solicitor General

DANA MUHAMMAD ALI

IDAN IVRI*

Supervising Deputy Attorneys General

STATE OF CALIFORNIA

DEPARTMENT OF JUSTICE

300 South Spring Street, Suite 1702

Los Angeles, CA 90013-1230

(213) 269-6168

Idan.Ivri@doj.ca.gov

**Counsel of Record*

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**CAPITAL CASE
QUESTION PRESENTED**

Whether the lower courts correctly denied a certificate of appealability with respect to petitioner's federal habeas claim that he was unlawfully detained and that his confession should have been suppressed on that basis.

DIRECTLY RELATED PROCEEDINGS

Supreme Court of the United States:

Fayed v. California, No. 20-244 (certiorari denied January 11, 2021).

United States Court of Appeals for the Ninth Circuit:

Fayed v. Warden, No. 22-99010 (certificate of appealability denied September 15, 2022; motion for reconsideration and reconsideration en banc denied October 27, 2022) (this case below).

United States District Court for the Central District of California:

Fayed v. Broomfield, No. 2:22-CV-05120-SPG (petition for writ of habeas corpus and certificate of appealability denied August 11, 2022) (this case below).

California Supreme Court:

In re Fayed on Habeas Corpus, No. S261155 (state habeas review) (pending).

People v. Fayed, No. S198132 (judgment affirmed April 2, 2020).

Superior Court of Los Angeles County:

People v. Fayed, No. BA346352 (judgment entered November 17, 2011).

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STATEMENT

1. Petitioner James Michael Fayed and his wife Pamela ran Goldfinger Coin and Bullion, a business that provided money and precious-metal transfer services. *People v. Fayed*, 9 Cal. 5th 147, 155 (2020). In 2007, Fayed began divorce proceedings and banned Pamela from the Goldfinger offices. *Id.* The following year, federal prosecutors charged Fayed and Goldfinger in a sealed indictment with operating an unlicensed money-transmitting business in violation of 18 U.S.C. § 1960. *Id.*

After Pamela learned about the federal investigation, her attorney contacted the federal prosecutor leading the investigation and said that she “want[ed] to come in.” *Fayed*, 9 Cal. 5th at 156. The prosecutor understood that to mean that Pamela wanted to cooperate in the investigation against Fayed and Goldfinger. *Id.*

Before Pamela had an opportunity to meet with the prosecutor, however, Pamela and Fayed met with their respective attorneys at a Century City office building. *Fayed*, 9 Cal. 5th at 156. As Pamela walked alone back to her car in the adjacent parking structure, she was repeatedly stabbed in the head, neck, and chest. *Id.* She died from her injuries. *Id.*

Cell phone records showed that, close to the time of the attack, Fayed had exchanged text messages with his assistant, Joey Moya, and that the cellphones of Moya’s associates, Gabriel Marquez and Steven Simmons, were near the parking structure when Pamela was killed. *Fayed*, 9 Cal. 5th at 157. Surveillance cameras recorded a red sport utility vehicle in the structure near

the time of the killing. *Id.* The vehicle's license plate matched that of a vehicle rented by Fayed and Goldfinger, and the parking ticket used by the vehicle to exit the parking structure bore Simmons's fingerprint. *Id.* Blood found inside the vehicle was identified as Pamela's. *Id.*

A few days after Pamela was killed, the federal indictment of Goldfinger and Fayed was unsealed and federal agents arrested Fayed for the federal offense of operating an unlicensed money-transmitting business. *Fayed*, 9 Cal. 5th at 157. The federal district court denied bail and ordered Fayed to be held in custody pending trial. *Id.* at 166.

While Fayed was in federal custody, his cellmate, Shawn Smith, asked to speak to police. *Fayed*, 9 Cal. 5th at 157. After meeting with a Los Angeles Police Department detective, Smith wore a recording device when he returned to the cell with Fayed. *Id.* Smith surreptitiously recorded Fayed admitting that he had paid his associate Moya to kill Pamela. *Id.* Fayed also asked Smith to solicit a hitman to kill Moya before Moya could implicate Fayed in Pamela's murder. *Id.*

2. In September 2008, the State charged Fayed with the first-degree murder of Pamela and alleged, as special circumstances making the murder punishable by death, that the murder had been committed for financial gain and by means of lying in wait. *Fayed*, 9 Cal. 5th at 158; see Cal. Penal Code §§ 187(a), 190.2(a)(1), 190.2(a)(15). The State also charged Fayed with one count of conspiracy. *Fayed*, 9 Cal. 5th at 158; see Cal. Penal Code § 182(a)(1).

To avoid interfering with the murder investigation, the federal prosecutors moved to dismiss the federal indictment against Fayed on the same day. *Fayed*, 9 Cal. 5th at 160.

At the murder trial, the jury found Fayed guilty as charged. *Fayed*, 9 Cal. 5th at 158. After a separate penalty trial, it returned a verdict of death. *Id.*

3. The California Supreme Court unanimously affirmed the judgment. *Fayed*, 9 Cal. 5th at 154. It rejected various constitutional claims relating to the admission of Fayed’s recorded jailhouse confession. *Id.* at 159-172. In particular, it addressed Fayed’s argument that his confession should have been suppressed because, pursuant to the Bail Reform Act of 1984 (18 U.S.C. § 3142(f)), he should have been released on bail after his arrest on the federal licensing charge. *Fayed*, 9 Cal. 5th at 166. “Even assuming defendant was erroneously denied bail,” the court concluded that he “fail[ed] to demonstrate” that suppression was an appropriate remedy. *Id.* at 166-167. The court also denied Fayed’s claim that his confession was inadmissible under the Sixth Amendment, reasoning that the Sixth Amendment right to counsel is “offense specific” and had not attached to Fayed’s uncharged murder when he was in federal custody. *Id.* at 161-164.

Fayed, represented by counsel, filed a petition for a writ of certiorari raising the question whether admission of his confession violated his Sixth Amendment or due process rights. This Court denied certiorari. *Fayed v. California*, 141 S. Ct. 1050 (2021) (No. 20-244).

4. On March 10, 2020, Fayed filed a petition for writ of habeas corpus in the California Supreme Court. Pet. App. 4. Consistent with a procedure established by that court, Fayed filed a brief initial placeholder petition while he awaits the assignment of court-appointed counsel; he can amend that petition with additional claims after counsel is appointed. See generally *In re Morgan*, 50 Cal. 4th 932, 942 (2010). At this time, counsel has not yet been appointed and Fayed's petition remains pending.¹

5. On April 20, 2022, Fayed filed a pro se federal petition for writ of habeas corpus in the United States District Court for the Northern District of California. Pet. App. 4. The petition was subsequently transferred to the Central District of California. *Id.* The petition argued that Fayed's federal detention was unlawful and that his confession should have been excluded on that basis; it also claimed that Fayed had been deprived of various constitutional rights. D. Ct. Dkt. 1 at 6, 7.

Without asking for any briefing from respondent, the district court dismissed the petition without prejudice and denied Fayed's request for a certificate of appealability. Pet. App. 6. The court reasoned that the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner to exhaust state-court remedies before a federal habeas petition can be granted. Pet. App. 5. It held that Fayed had not exhausted state remedies

¹ The docket in Fayed's state habeas case is available on the California Supreme Court website. See <https://tinyurl.com/4kpfysex>.

because he had filed a state habeas petition that remained pending. Pet. App. 5-6 (citing *Schnepp v. Oregon*, 333 F.2d 288, 288 (9th Cir. 1964) (per curiam)). The court therefore dismissed Fayed’s federal petition without prejudice to Fayed reasserting the claims after satisfying the exhaustion requirement. *Id.* The court also denied a certificate of appealability because no jurist of reason could disagree with its denial of Fayed’s claims. Pet. App. 6 (citing 28 U.S.C. § 2253).

6. The court of appeals also denied a certificate of appealability (again without briefing from respondent) because Fayed did not show that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Pet. App. 2 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The court of appeals later denied Fayed’s motion for reconsideration. *Id.* at 1.

ARGUMENT

The lower courts correctly denied a certificate of appealability with respect to Fayed’s federal habeas petition. To obtain a certificate of appealability, Fayed was required to demonstrate (i) “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right” and (ii) “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Fayed fails at the first step: his fact intensive argument for seeking suppression of his confession that he paid an

associate to kill his estranged wife does not establish any debatable issue concerning the denial of a constitutional right. And neither that argument nor his critique of the district court's procedural ruling implicates a conflict of authority or any other consideration that would warrant certiorari review.

1. Fayed's underlying claim appears to be that he was detained in violation of the federal Bail Reform Act and that his confession to a cellmate should have been suppressed under the Fourth Amendment on that basis. Pet. 13.² That claim does not satisfy the substantive component of the certificate of appealability standard. *See Slack*, 529 U.S. at 484; *see generally* 28 U.S.C. § 2253(c)(2) (requiring "a substantial showing of the denial of a constitutional right").

As a threshold matter, Fayed cannot show that he was unlawfully detained under the Bail Reform Act, which governs bail in federal criminal prosecutions. That statute requires a defendant to be released on bail unless a court first holds a hearing, at which it determines that the defendant is a flight risk or a danger to the community and that no conditions of release can eliminate those risks. 18 U.S.C. § 3142(c), (e), (f). In Fayed's case, the district court held the requisite hearing, made credible findings under the statute, and properly denied bail. *See United States v. Fayed*, No. 2:08-cr-00224 (C.D. Cal.), Dkt. 28. The district court found that Fayed was a flight risk because he was

² The petition describes this argument as rooted in the "fruit of the poisonous tree" doctrine (Pet. 13), which is part of this Court's Fourth Amendment jurisprudence. *See Segura v. United States*, 468 U.S. 796, 804-805 (1984).

the immediate target of a serious state murder investigation and had millions of dollars in assets enabling him to flee. *Id.* at 2-3; *see also People v. Fayed*, No. S198132 (Cal. S. Ct.), 2 Ct. Tr. 419-420, 431-432. The court also found that Fayed was a danger to the community because of the brutal murder of Fayed's estranged wife and the facts suggesting Fayed's involvement, such as the presence of a car rented by Fayed at the scene of the crime. *United States v. Fayed*, No. 2:08-cr-00224 (C.D. Cal), Dkt. 28 at 2-3. Finally, the court concluded that no conditions of release could assure Fayed's appearance or the safety of others under the circumstances. *Id.* at 3. Fayed identifies no basis for a reasonable jurist to question the sufficiency of those findings or the lawfulness of the resulting denial of bail.

Even if the district court had misapplied the Bail Reform Act, moreover, Fayed's suppression argument would face several further obstacles. It is not clear that continued custody following an error under the Bail Reform Act would necessarily amount to a violation of the Fourth Amendment. *Cf. Manuel v. City of Joliet*, 580 U.S. 357, 368 (2017) (holding that Fourth Amendment governs a claim addressing pre-trial detention *without probable cause*). Even if it were, it is not clear that the exclusionary rule would apply. *See Herring v. United States*, 555 U.S. 135, 140 (2009) ("The fact that a Fourth Amendment violation occurred—*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies"). As the California Supreme Court reasoned, Fayed did not demonstrate that suppression was an

appropriate “remedy for any violation of the Bail Reform Act,” and the exclusionary rule generally “is designed to deter police misconduct rather than to punish the errors of judges and magistrates.” *People v. Fayed*, 9 Cal. 5th 147, 166-167 (2020) (citing *United States v. Leon*, 468 U.S. 897, 916 (1984); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). And even if the exclusionary rule could conceivably apply to such a claim in state court, that claim would not appear to provide any basis for federal habeas relief. *See Stone v. Powell*, 428 U.S. 465, 481 (1976) (“[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial.”).

Beyond the suppression argument, Fayed briefly asserts that the State violated his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. Pet. 13. But he has not articulated any persuasive factual or legal basis supporting those assertions. Even setting aside the deferential AEDPA standards that would normally apply to a federal court’s habeas review of a state court conviction, Fayed has not demonstrated that reasonable jurists could debate whether any of his theories state a valid substantive claim of the denial of a constitutional right. He cannot establish the “substantial showing of the denial of a constitutional right” that is necessary to obtain a certificate of appealability. 28 U.S.C. § 2253(c)(2).

2. Because Fayed cannot make that showing, he is not entitled to a certificate of appealability, whether or not his remaining arguments about the district court's procedural ruling are persuasive. *See Slack*, 529 U.S. at 485 (“Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application” by “proceed[ing] first” to one component or the other). In any event, Fayed's procedural arguments do not identify any genuine conflict of authority or any other consideration that would warrant further review by this Court.

The district court denied Fayed's petition without prejudice on the ground that his federal habeas claims were barred by the exhaustion requirement. A habeas petitioner “shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.” 28 U.S.C. § 2254(c).

Fayed appears to argue (Pet. 23-26) that his claims are covered by a statutory exception to the exhaustion requirement, which allows a petitioner to seek habeas relief directly in federal court when “there is an absence of available State corrective process” or “circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(i), (ii). That exception does not apply here. California has an available and effective process for Fayed to seek state review of his claims of error. The California Supreme Court has already issued its decision in Fayed's

direct appeal, *see Fayed*, 9 Cal. 5th at 154, and he is now seeking another round of review on state habeas. The state supreme court has established a procedure to preserve Fayed's rights on state habeas review, in light of the "delay in recruiting qualified [capital habeas] counsel," by allowing him to file an initial placeholder petition which he can later supplement with the aid of counsel. *See In re Morgan*, 50 Cal. 4th 932, 942 (2010). Fayed has already invoked that procedure. *See* Pet. App. 4.

Fayed's case is thus distinguishable from *Carter v. Buesgen*, 10 F.4th 715 (7th Cir. 2021), which he cites as support. *See* Pet. 25. In *Carter*, the Seventh Circuit excused the petitioner from exhaustion because "[n]ot a single court ha[d] reviewed his sentencing challenge at any level of the state judiciary" after an unexplained delay, and the state courts had no procedure in place to detect or resolve that delay. *Carter*, 10 F.4th at 723. The two other Seventh Circuit cases cited by Fayed (Pet. 25) are also distinguishable. Each suggested that an unexplained delay in state review of "strong" post-conviction claims could warrant "an investigation by the district court." *Dozie v. Cady*, 430 F.2d 637, 638 (7th Cir. 1970); *see Lowe v. Duckworth*, 663 F.2d 42, 43 (7th Cir. 1981). Those decisions do not bear on whether the unsubstantiated constitutional theories advanced by Fayed here warrant further review of their merits.

Fayed also appears to argue (Pet. 15-20) that the claims he now wishes to present to the federal courts need not await resolution of his state habeas proceedings because they have already been exhausted through his state direct

appeal. The district court took a different view, holding that Fayed's federal habeas claims were not exhausted because he was continuing to pursue relief via state habeas proceedings. Pet. App. 5-6. The district court therefore dismissed Fayed's petition without prejudice, leaving the door open for him to re-assert these or other claims in a future federal habeas petition. *Id.* at 6. The question whether the district court properly applied the exhaustion bar does not warrant further review by this Court. Because Fayed did not squarely present his exhaustion arguments in the district court (*see* D. Ct. Dkt. 1 at 2-11), there is neither "a well-developed record" nor "a reasoned opinion on the merits" appropriate for this Court's review. *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 80 (1988). Fayed does not assert any conflict of authority relating to this issue. And as explained above, any problem with the district court's exhaustion ruling would make no difference to the availability of a certificate of appealability in this case because Fayed cannot satisfy the substantive component of the conjunctive standard in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROB BONTA

Attorney General of California

MICHAEL J. MONGAN

Solicitor General

JAMES WILLIAM BILDERBACK II

Senior Assistant Attorney General

TERESA A. REED DIPPO

Deputy Solicitor General

DANA MUHAMMAD ALI

IDAN IVRI

Supervising Deputy Attorneys General

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OAK SMITH, WARDEN, *Respondent*.

CERTIFICATE OF SERVICE BY MAIL

I, Idan Ivri, Supervising Deputy Attorney General, a member of the Bar of this Court, hereby certify that on **April 20, 2023**, a copy of the Brief in Opposition in the above-entitled case was mailed, first class postage prepaid to:

James M. Fayed
AK3340
San Quentin State Prison
San Quentin, CA 94964

I further certify that all parties required to be served have been served.

/s/ Idan Ivri

IDAN IVRI*
Supervising Deputy Attorney General
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013-1230
Telephone: (213) 269-6168
**Counsel of Record*