No.

In the Supreme Court of the United States

MICHAEL SEXTON, WARDEN,

Petitioner,

v.

NICHOLAS BEAUDREAUX,

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

Whether the court of appeals violated the deferential review requirements of 28 U.S.C. § 2254(d) by setting aside a state conviction based on its de novo analysis of an ineffective-assistance claim, without fulfilling its obligation to consider whether fair-minded jurists could agree with the state court's contrary conclusion.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of Michael Sexton, Warden of Corcoran State Prison, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS AND JUDGMENT BELOW

The opinion of the court of appeals (App. 1a-8a) and the order denying rehearing and rehearing en banc (App. 9a) are unpublished. The judgment of the district court (App. 10a-71a) is unpublished. The California Court of Appeal's affirmance of the state criminal judgment on direct appeal (App. 72a-97a) is unpublished. The state court of appeal's denials of habeas corpus relief (App. 97a, 98a, 101a) are also unpublished.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on September 18, 2017. App. 1a. The court of appeals denied the State's petition for rehearing and rehearing en banc on November 8, 2017. App. 9a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in pertinent part:

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[1] Michael Sexton has succeeded J. Soto as Warden of Corcoran State Prison. Warden Sexton is substituted as the named petitioner in this case in compliance with this Court's rule 35.3.

(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 in the state court proceeding.

STATEMENT

1. Wayne Drummond accompanied Dayo Esho, Shandon Massey, and Ray Nkele at a bar in Berkeley, California, on the night of September 4, 2006. App. 73a. They encountered Brandon Crowder, whom Esho and Nkele knew, and respondent Beaudreaux. *Id.* Pointing to Drummond, Crowder told Beaudreaux, "'That's him. That's him.'" *Id.* Crowder and Drummond argued and went outside to "settle" it. *Id.* Esho, Massey, and Beaudreaux followed. *Id.* at 73a-74a.

Esho heard Beaudreaux say, "'I don't know how to fight, but I know how to use this metal.'" App. 74a. As Drummond and Crowder faced each other, Crowder called out, "'Yo, somebody handle this.'" *Id.* Beaudreaux held a gun at Drummond's neck. *Id.* Esho heard Beaudreaux tell Drummond, "'You need to give me your wallet right now.'" *Id.* Drummond pushed the gun away and began to run. *Id.* Beaudreaux fired the gun, the bullet striking Drummond in the hip. *Id.* at 74a-76a. Beaudreaux fol-

lowed Drummond but departed when Esho told him, "'[L]eave us alone.'" *Id*. at 74a.

Esho, Massey, and Nkele found Drummond lying on the ground. App. 75a. He was moaning, could not stand, slurred his words, and had vomited. *Id*. at 75a-76a. His friends thought he was drunk or in shock—not shot—and took him to Nkele's room. *Id*. Drummond died a short time later from the gunshot, which had penetrated his pelvis and a major blood vessel. *Id*. at 76a-77a.

The next afternoon, Esho, Massey, and Nkele identified Crowder to Berkeley police as the person who had argued with Drummond. App. 77a. Crowder told the police that he knew Drummond's shooter from middle school but that he did not know his name. *Id*.

On February 13, 2008—after seventeen months had passed and after Crowder had been implicated in another crime—Crowder identified Beaudreaux in a middle school yearbook photo and in a photo lineup as Drummond's shooter. App. 77a. The next day, the police showed Esho a display containing photographs of the faces of six men. *Id*. at 78a. Esho tentatively identified Beaudreaux's photo as that of the man who had shot Drummond, saying his photograph was the "'closest to the person who shot Wayne.'" RT 621-623. Six hours later, the police showed Esho a different six-person display that included an older photo of Beaudreaux, taken closer in time to the Drummond shooting, and quite difference in general appearance. *Id*. at 623-626; *see* App. 103a-104a (reproducing photo displays). Esho said Beaudreaux's photo was "'very close, based on my recollection of the events that occurred the night Wayne was killed.'" RT 625-626.

Police also showed Massey a photo lineup, different from the ones shown to Esho. RT 626-627. Massey appeared disinterested and hardly looked at the display, except to exclude someone other than Beaudreaux. *Id*. When shown another photo lineup two days later, also different from the ones shown Esho, Massey said that Beaudreaux's photo depicted a man with "similar characteristics" to Drummond's shooter. *Id*. at 627-629.

Beaudreaux and Crowder each were charged with the first-degree murder and attempted robbery of Drummond. CT 200-203. At Beaudreaux's preliminary hearing, Esho positively identified Beaudreaux as Drummond's killer. App. 78a.

2. a. At Beaudreaux's trial in 2009, Esho pointed him out in court as the gunman. App. 78a. Esho also testified that, when he saw the second photo lineup, he had been pretty sure Beaudreaux was the gunman but that he could not be 100 percent sure based only on a photo. RT 713-714. He further testified that he had told the police he wanted to see Beaudreaux in person to be sure; and that he had become sure at the preliminary hearing, when he was able to see Beaudreaux and "the way he walked," and things "basically clicked." *Id*. at 714-715.

Crowder—who had pleaded guilty to voluntary manslaughter and agreed to testify truthfully in exchange for a probationary sentence—also testified at Beaudreaux's trial. App. 78a. He recounted that he had met Beaudreaux at the bar and had smoked marijuana with him. *Id*. He further testified that, when he and Drummond were arguing outside, he had seen Beaudreaux break through the crowd, pull a gun from his waistband, point the gun at Drummond's neck, and demand his money. *Id*. at 79a. Crowder stated that he had seen Drummond reach for the gun

barrel and struggle with Beaudreaux, had heard a shot, and had seen Drummond run away. *Id.* Massey testified that he previously had identified Beaudreaux's photo as showing characteristics similar to the shooter. RT 389-391.

The prosecution also played for the jury a tape recording of a conversation that occurred between Beaudreaux and Crowder while they were being transported to court in a police van. App. 77a-78a. Beaudreaux was recorded telling Crowder: "'You think it's hard now? Shit's about to get real out here . . . Respect my gangster. . . . No turning back.'" "'You better start praying man because your life is about to change in about one damn minute now. You'll never see daylight again.'" "'Man, fuck this . . . timing man. If you would have kept your mouth shut, we wouldn't be in this shit. You just don't know where everything is.'" *Id.*

The jury found Beaudreaux guilty, and the court sentenced him to prison for a term of 50 years to life. App. 10a-11a, 72a-73a.

b. The California Court of Appeal affirmed the judgment on direct review in 2011. App. 72a-97a. It also summarily denied Beaudreaux's first state habeas petition, which alleged that defense counsel had been incapacitated and had rendered ineffective assistance at trial. *Id.* at 97a-98a. The California Supreme Court denied review in both the appeal and the habeas matter. *Id.* at 99a-100a.

In 2013, Beaudreaux filed a second state habeas petition, claiming among other things that his trial counsel had been ineffective by failing to move or object to Esho's identification testimony as the product of impermissible suggestiveness in the photo displays. *See* App. 11a, 62a-66a. The state court of ap-

peal summarily denied the petition, on the merits but without stating reasons. App. 101a.[2] The California Supreme Court again denied review. *Id.* at 102a.

3. a. Beaudreaux next filed a federal habeas petition raising various claims, including the claim that trial counsel had been ineffective in failing to challenge Esho's identification testimony. App. 62a-66a. Beaudreaux argued that the photo lineups had been unduly suggestive because each included a photo of Beaudreaux. *Id.* at 65a. The district court denied relief. *Id.* at 65a-66a. It reasoned that, even if assumed that trial counsel performed deficiently in failing to move to suppress the lineups, Beaudreaux could not establish prejudice, because Esho's in-court identifications were sufficiently reliable notwithstanding any alleged suggestiveness in the photo lineups. *Id.* The court granted a certificate of appealability on the ineffective-assistance claim and on a conflict-of-interest claim. *Id.* at 70a-71a.

b. A divided panel of the court of appeals reversed. App. 1a-7a. In a discussion consuming almost six of the opinion's seven pages (*id.* at 1a-6a), the court set out its evalution of the merits of Beaudreaux's underlying claim that his trial counsel, in failing to object to Esho's identification testimony, rendered ineffective assistance under the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.*

The court first concluded, under the "performance" prong of the test, that "reasonably proficient" counsel would have objected to the evidence. App.

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[2] *See Harrington v. Richter*, 562 U.S. 86, 102 (2011); *Stancle v. Clay*, 692 F.3d 948, 957 (9th Cir. 2012); *In re Reno*, 55 Cal. 4th 428, 447 (2012).

2a-3a. It cited counsel's post-trial statement that he did not recall considering such a motion, the lack of a countervailing risk in raising an objection, and the absence of any advantage in forgoing a motion. *Id.* It also discerned a "significant" chance that an objection would have succeeded, reasoning in part that the pretrial identification procedures had been "unduly suggestive." *Id.* at 4a-5a. It cited the facts that more than seventeen months had elapsed before Esho viewed the photo lineups; that both lineups, unusually, had included photos of the same suspect; that Esho had not been positive about his photo identification of Beaudreaux; and that Esho had identified Beaudreaux at trial only after seeing him at the preliminary hearing, "itself a suggestive situation." *Id.*

The court further concluded that the circumstances weighed against any finding that Esho's in-court identification might nonetheless have been reliable and admissible. App. 6a. It acknowledged that Esho had a good opportunity to view the gunman and had paid close attention to him. *Id.* But it cited, as contrary factors, the length of time between the shooting and the photo lineups, Esho's initial description of the gunman as taller and with a darker complexion than Beaudreaux, the "considerable" uncertainty of Esho's initial identifications, and his "repeated exposure to Beaudreaux's photograph" prior to seeing Beaudreaux at the "suggestive" preliminary examination. *Id.* at 6a.

Next, the court concluded that counsel's performance was "prejudicial" under the second prong of the *Strickland* test. App. 6a-7a. It declared that Esho's identification testimony had been "essential" and that the state's case otherwise had been "weak." *Id.* Recognizing that Crowder had also identified Beaudreaux at trial, the court suggested that

"Crowder was likely not regarded as a credible witness." *Id.* It discounted Beaudreaux's tape-recorded statements as possibly signifying only that he was angry at being falsely identified. *Id.* Based on its assessment of the evidence and of the likelihood that a motion to suppress all of Esho's identification testimony would have been granted, the court concluded there was a reasonable probability the jury would ultimately have reached a different result if counsel had made such a motion. *Id.*

In the last three paragraphs of its opinion, the court of appeals acknowledged that the state court's contrary judgment, rejecting Beaudreaux's ineffectiveness claim, was entitled to "doubly deferential" review under 28 U.S.C. § 2254(d) and *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). App. 6a-7a. In one sentence, the court held that the state court's application of *Strickland*'s performance prong "was not reasonable." *Id.* It pointed only to its own previously stated view regarding the merits of such a motion, the lack of any apparent tactical advantage in forgoing one, and the fact that counsel recalled no strategic motive for not filing one. *Id.* In another brief paragraph, the court concluded that the state court could not reasonably have relied on the prejudice prong of *Strickland*. *Id.* at 7a. After restating the *Strickland* standard, the federal court simply declared, based on its own previous merits analysis, that "[t]he only reasonable conclusion, given the weakness of the state's case and the critical importance of Esho's identification, is that a more favorable verdict was 'reasonably likely' absent the ineffective representation" by trial counsel. *Id.*

Judge Gould dissented. App. 8a. He reasoned that "corroborated accomplice testimony and recorded statements made by Beaudreaux" provided suffi-

cient grounds for a state court to conclude that any ineffectiveness relating to eyewitness Esho did not lead to prejudice under *Strickland*. *Id*. Citing *Harrington v. Richter*, 562 U.S. 86 (2011), Judge Gould concluded that the state conviction could not properly be set aside under AEDPA because "it cannot be said that the state appellate court decision to not give relief to Beaudreaux was an objectively unreasonable application of Supreme Court precedent." *Id*.

The court of appeals denied the State's petition for rehearing and rehearing en banc. App. 9a.

REASONS FOR GRANTING THE PETITION

The decision below sets aside a state murder conviction based on the Ninth Circuit's de novo review of a claim of ineffective assistance under *Strickland v. Washington*, 466 U.S. 66 (1984). In doing so, the decision "all but ignore[s] 'the only question that matters'" in federal review of a state conviction: whether the state court's contrary judgment is so objectively unreasonable as to overcome the stringent limitations on federal habeas relief imposed by Congress in 28 U.S.C. § 2254(d). *See Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Indeed, the Ninth Circuit in its decision below failed, as it did in *Richter*, to meet its basic § 2254(d) obligation. There, the Ninth Circuit "explicitly conducted a *de novo* review, and after finding a *Strickland* violation, it declared, without further explanation, that the 'state court's decision to the contrary constituted an unreasonable application of *Strickland*.'" *Richter*, 562 U.S. at 101-102. "Because the Court of Appeals had little doubt that [the] *Strickland* claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it." *Id*. at 102.

"AEDPA demands more." *Richter*, 562 U.S. at 102. A federal habeas court reviewing an unexplained merits adjudication by a state court "must determine what arguments or theories . . . could have supported[] the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 101. But the Ninth Circuit in this case failed to address or refute clearly available arguments that fair-minded jurists could conclude support the California Court of Appeal's rejection of Beaudreaux's claim.

As in other such instances, the Ninth Circuit's failure to observe § 2254(d)'s most basic limitation on federal habeas review is clear on the face of the record in this case, and the Court may wish to consider summary reversal. *See, e.g., Felkner v. Jackson*, 562 U.S. 594 (2011) (per curiam); *Cavazos v. Smith*, 565 U.S. 1 (2011) (per curiam); *McDaniel v. Brown*, 558 U.S. 120 (2010) (per curiam); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam).

1. In federal habeas review of an ineffective-assistance claim under § 2254(d), "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. . . . A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Richter*, 562 U.S. at 101. Where the state court has rejected the claim on the merits in an unexplained decision—as the California Court of Appeal did here—deferential review under AEDPA requires the federal court to consider all arguments and theories that could sup-

port that state-court judgment, and then determine whether every fair-minded jurist would have to agree that every one of those theories and arguments must be rejected as inconsistent with the holding in a prior decision of this Court. *Id*. at 101.

The majority decision below does not do that. Instead, it first explains at length the majority's own conclusion that trial counsel's failure to move to suppress the Esho identification evidence was deficient under the *Strickland* test. App. 2a-5a. Then, without citing or discussing anything further, it relies on the same analysis to condemn any contrary conclusion by the state court as objectively unreasonable. *Id*. at 6a-7a. In similar detailed de novo review, the decision reaches its own conclusion that counsel's failure to move to suppress resulted in prejudice under *Strickland*. *Id.* at 5a-6a. And then, acknowledging only Beaudreaux's recorded statements to Crowder as a remaining basis for conviction, the decision condemns the state court's judgment as unreasonable by citing, again, only its own assessment of the weight of the evidence. *Id.* at 7a.

2. There are many theories and arguments—presented to but ignored by the court below—upon which fair-minded jurists might agree with the California court's decision to deny relief on Beaudreaux's claim.

First, they could reasonably conclude that a competent lawyer might have chosen not to object to the Esho testimony because the objection was not likely to succeed.[3] The merit of a potential objection is an

[3] On this point, fair-minded jurists might discount the reliance in the decision below on "the lack of any apparent tactical advantage in declining to raise the issue." Pet. App. 6a-7a; *see id*. at 2a-3a. As this Court explained in reversing the court below (continued…)

essential component of a valid claim of ineffectiveness for failure to object. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). As this Court has explained, due process requires suppression of eyewitness identification evidence only if the pretrial identification procedure (1) was arranged by law enforcement, (2) was "both suggestive and unnecessary," and (3) was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Perry v. New Hampshire*, 565 U.S. 228, 238 (2012); *Simmons v. United States*, 390 U.S. 377, 384 (1968). Here, even the majority below, which had all the evidence in front of it, stopped well short of any ruling that an objection to the Esho testimony would actually have succeeded as a matter of federal constitutional law. *See* App. 3a ("significant chance of success on the merits"). If it is not even clear that an objection to the identification testimony would have succeeded, it can hardly be clear that the state court's rejection of an ineffectiveness claim based on failure to object was objectively unreasonable.[4]

(…continued)
in a previous AEDPA case, defense counsel is not required to pursue every claim or defense just because there is "nothing to lose." *Knowles v. Mirzayance*, 556 U.S. 111, 121-122 (2009).

[4] The Ninth Circuit's reliance on the "significant chance of success" standard as demonstrating deficient performance also undercuts *Strickland*'s prejudice standard. A defendant alleging that counsel should have filed a motion to suppress must prove that the underlying claim "is meritorious." *Morrison*, 477 U.S. at 375. Finding counsel deficient in failing to make a suppression motion based on nothing more than a "significant chance of success," and then evaluating prejudice based on the assumption of a motion having been granted, improperly bypasses *Strickland*'s "reasonable probability" standard for prejudice. Notably, in *Strickland*, the Court declined the dissent's invitation to use the less rigorous "significant chance of success"
(continued…)

Indeed, there is no sound basis for concluding that either photo identification procedure with Esho was marred by police practices that were either unnecessary or suggestive—let alone so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *See Perry*, 565 U.S. at 238. Esho was shown two different photo lineups, each including a (significantly different) photo of Beaudreaux, App. 103a-104a; but there is no constitutional prohibition against the police conducting more than one identification procedure in a given case. There is no suggestion that the police's methods in any other way conveyed to Esho a belief that Beaudreaux was the culprit. Beaudreaux has never claimed that physical differences between the men in the photo arrays would have drawn undue attention to Beaudreaux's picture. A fair-minded jurist could conclude that the photo displays were not unduly suggestive at all, and certainly not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

It is true, as the majority observed, that "[t]he officer who presented the photographic arrays to Esho testified that it was not common practice to show the same individual in successive arrays." App. 4a. However, Detective Sabins explained why he showed Esho a second lineup: "[T]he photograph in the first lineup was a very current photograph of Nicholas Beaudreaux. I was able to find an older picture that

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(…continued)
standard for the prejudice prong. *See Strickland*, 466 U.S. at 716-717 (Marshall, J., dissenting) (criticizing the rejection of a "significant chance" standard for prejudice in favor of the "reasonable probability" standard, citing his dissent in *United States v. Agurs*, 427 U.S. 97, 121-122 (1976)).

was closer to—a picture of Nicholas Beaudreaux that was closer to the date of these events." RT 624. In failing to address that testimony, the panel completely ignored a perfectly plausible reason for the state court to deny relief: Due process did not require the police to stop investigating a tentative identification of Beaudreaux based on a very recent photo when a different photo, nearer in time to the shooting, was also available.

A state court jurist also could reasonably disagree with the assertion in the decision below that the circumstances of Esho's in-person identification of Beaudreaux at the preliminary hearing were "undoubtedly suggestive." App. 4a, 5a. The decision relies on *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995), which is neither apposite nor capable of "clearly establishing" any rule binding on state courts for purposes of review under AEDPA. *See Parker v. Matthews*, 567 U.S. 37, 48-49 (2012) (per curiam) (only Supreme Court holdings count as clearly established law under § 2254(d)). Indeed, *Johnson* ruled admissible the identification of the defendant at trial by a witness who had not identified him in a photo lineup but who had succeeded in identifying him at a suppression hearing, despite the assertedly suggestive atmosphere of the suppression hearing. *Id.* at 929. That is like what happened here, except that in this case, prior to the preliminary hearing, Esho had already given a tentative identification of Beaudreaux in the photo lineups.

Finally, even if there had been unconstitutional suggestiveness in the photo displays, a fair-minded state court judge reasonably could have determined that Esho's testimony identifying Beaudreaux at the preliminary hearing and at trial remained reliable and admissible. *See Manson v. Brathwaite*, 432 U.S.

98, 114 (1977) ("reliability is the linchpin in determining the admissibility of identification testimony"); *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) ("the central question [is] whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive"). Esho paid attention during the altercation. App. 66a. He actually spoke with Beaudreaux immediately after the shooting. *Id.* And he demonstrated a high degree of certainty when he positively identified Beaudreaux after seeing him in person at the preliminary hearing and at trial. *Id.* He expressly testified at trial that he became sure at the preliminary hearing that Beaudreaux was the shooter because of Beaudreaux's appearance and "the way he walked." *Id.* at 64a.

In evaluating all these arguments and theories on state habeas review, the state court was not bound to come to the same conclusions that a divided panel of the Ninth Circuit would eventually reach, reviewing the case years later. *See, e.g.*, *Richter*, 562 U.S. at 101; *Woodford v. Visciotti,* 537 U.S. 19, 27 (2002) (per curiam) ("The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable."). The California Court of Appeal reasonably could have concluded, in rejecting Beaudreaux's ineffective-assistance claim, that there was no impermissible suggestiveness in the identification procedures, that the ultimate identification was in any event reliable, that a challenge to the identification testimony would have failed, and that the failure to lodge such an objection therefore was not ineffective.

3. Moreover, even if competent counsel would have lodged an objection, and even if such an objec-

tion would have been meritorious, the state court still could reasonably have concluded that there was no prejudice under *Strickland* because there was no "reasonable probability" that, but for the failure to seek suppression, Beaudreaux would have been acquitted. *See Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

The state court could reasonably have concluded that, even setting aside evidence of Esho's identifications, the evidence against Beaudreaux was strong. Beaudreaux's long-time acquaintance, Crowder, testified that Beaudreaux shot Drummond. App. 78a-79a. Crowder told the police immediately after the shooting that he knew the gunman from middle school; and seventeen months later he identified Beaudreaux from a middle school yearbook. *Id.* at 77a. Crowder also testified that, when he ran into Beaudreaux several months after the shooting, Beaudreaux had told him, "you owe me one." RT 514. Crowder, of course, was demonstrably and inextricably linked to the crime. There was no dispute that Crowder had witnessed the shooting and knew the shooter, but that he was not himself the shooter. The victim's friends knew Crowder personally, and identified him as a participant in the altercation but not as the shooter. App. 77a.

The decision below speculates that the jury "likely" did not regard Crowder as credible. App. 5a-6a. The jury was aware that Crowder had lied to police, cooperated only after he had been arrested and charged with a separate crime, and was testifying pursuant to a plea agreement. App. 78a-79a. But, as Judge Gould noted in dissent, Crowder's testimony

was corroborated by other evidence that the state court reasonably could deem significant. App. 8a.

The jury also heard evidence of Beaudreaux's consciousness of guilt in the form of his recorded comments to Crowder in the transport van. App. 77a-78a. The decision below again speculates that those comments might have been explained away as showing only the outrage of a man falsely accused. App. 6a. But the state court could reasonably have construed the comments instead as strong evidence that Beaudreaux had committed the murder and was "livid" (*id.*) at Crowder for having betrayed him to the police. Indeed, that is by far the more plausible construction. But even if the question were close, on points such as these AEDPA requires that the state court decision must be given the benefit of the doubt. *Visciotti*, 537 U.S. at 24; *Richter*, 562 U.S. at 101.

In addition, although Shandon Massey testified at trial that he was "not absolutely sure" Beaudreaux was the gunman, App. 78a, he also acknowledged that during the investigation he had said a photo of Beaudreaux showed a man with "similar characteristics" to the shooter, RT 389-391, 627-629. The decision below never mentions Massey's testimony. And, finally, even a successful motion to suppress Esho's ultimate identifications based on supposedly suggestive repetitive confrontations would have afforded no basis to exclude the tentative identification Esho made in the *first* photo line-up. There, Esho said Beaudreaux's photo was the "closest to the person who shot Wayne." RT 621-623.

On the record in this case, the state court of appeal could reasonably have determined that Beaudreaux suffered no *Strickland* prejudice. Likewise, as discussed above, the state court could reasonably have concluded that there was no need to

assess potential prejudice at all, because there was no showing that failing to seek suppression of Esho's identifications of Beaudreaux amounted to deficient performance in the first place. The Ninth Circuit in the proceedings below was authorized to set aside Beaudreaux's state murder conviction only if it could explain, not why it would have reached a different conclusion as to either performance or prejudice in the first instance, but why the state court's contrary judgment was "objectively unreasonable." *Visciotti*, 537 U.S. at 27.

The decision below is devoid of any such explanation. Here once again, therefore, "it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA." *Richter*, 562 U.S. at 101. And here once again the State must ask this Court to enforce the clear limitations that Congress and the Court have placed on federal habeas review in order "to ensure that state [criminal] proceedings are the central process, not just a preliminary step for a later federal habeas proceeding[.]" *Id*. at 103.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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