NO. 17-1106

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL SEXTON,

Petitioner,

v.

NICHOLAS BEAUDREAUX,

Respondent.

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

Motion to Proceed In Forma Pauperis

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TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

Pursuant to Rule 39 of the Rules of the Supreme Court of the United States, Respondent, Nicholas Beaudreaux, by undersigned counsel of record, respectfully requests leave to file his opposition to the petition for writ of certiorari *in forma pauperis* without payment of costs.

Undersigned counsel is appointed to represent Respondent in the Ninth Circuit Court of Appeals under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

Respondent seeks leave to proceed *in forma pauperis* because he is indigent and without sufficient funds to proceed in this Court.

Wherefore, Respondent respectfully prays that this motion be granted.

Dated: March 9, 2018

Respectfully submitted,

_____

Jamie Lee Moore
Counsel of Record for Respondent
Nicholas Beaudreaux

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Brief for Respondent
In Opposition to Petition for Writ of Certiorari

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COUNTERSTATEMENT OF THE CASE

A. The incident.

1. Brandon Crowder and Wayne Drummond had an argument.

Wayne Drummond, Raymond Nkele, Shandon Massey, and Dayo Esho were friends. ER 831-33. They tried to mentor Brandon Crowder, whom they met while playing basketball. ER 649-50, 857, 892, 962-65, 1013, 1065-67, 1148. After Crowder had a falling out with Drummond, he told people he would "get" or "stomp" Drummond, or "put him in a trunk." ER 717, 757-58, 891, 893-94, 967.

On September 3, 2006, Crowder went to Blake's Bar in Berkeley with friends. ER 725-27, 894-95. They smoked marijuana with others, including a man Crowder casually knew as "Nick," who was with two other men. ER 738-40, 894-98. Meanwhile, Drummond, Nkele, Massey, and Esho, had several drinks at a friend's house, a fraternity house, and Kip's Bar in Berkeley. ER 644-49, 834-35, 970-71.

Around 1:20 a.m., in an unrelated incident, a man accidentally shot himself across the street from Blake's, and police were on the scene. ER 604, 1069-70.

Around 1:30 a.m., Crowder stepped outside Blake's into a large crowd and said goodnight to people, including "Nick." ER 899-901. About the same time, Nkele, Esho, Massey and Drummond, arrived outside Blake's. ER 601-02, 834-35, 972-73. Massy noticed Crowder, but did not speak to him. ER 835. Esho greeted Crowder, but he did not reciprocate. ER 602. Esho noticed Crowder tapped a man behind him, pointed at Drummond, and said, "That's him. That's him." ER 601-03.

Drummond and Crowder "started trash talking back and forth," yelling and calling each other "bitch." ER 603, 716-17, 902-05. Massey heard them arguing, but didn't pay close attention. ER 835, 842, 973-77, 999. Esho tried to break up the argument, but Crowder and Drummond decided to fight around the corner away from police investigating the earlier shooting. ER 603-06, 836, 902-06.

A crowd, including Esho, followed by Massey, the man Crowder tapped, and a third man, followed Crowder and Drummond. ER 605-06, 837-38. The man Crowder tapped was "behind" Esho, but he heard the man say, "I don't know how to fight, but I know how to use this metal." ER 605, 607, 904, 1149, 1178-79.

2. A third man pointed a gun at Drummond and asked for his wallet; They struggled for the gun, it fired, and Drummond ran away.

Once around the corner from Blake's, Drummond and Crowder called each other "bitches," and pushed each other. ER 903-06. Drummond pointed at Crowder, the man Crowder tapped, and a third man, saying, "I'll fuck you up, I'll fuck you up," "I don't care. I'll fight anybody." ER 609-10, 838-39, 906-07.

Massey heard Crowder say, "Yo, somebody handle this," and saw a man (whom he did not recognize), emerge from the crowd and put a gun under Drummond's chin. ER 612, 839-40, 843-44. According to Esho, the man Crowder tapped earlier was the gunman. ER 602-03, 1149-50. Esho heard the gunman say, "You need to give me your wallet right now," but Esho thought he was embarrassing Drummond, not robbing him. ER 610-13, 631, 634, 642, 1161-62. Massey thought the man said, "give me your wallet or break yourself." ER 1106.

When he saw the gun, Esho "froze." ER 611-13, 677, 1151. Drummond pushed the gun away, grabbed the barrel, and tried to wrestle it from the man. ER 613, 616, 841, 843. During the struggle, a shot fired and Drummond ran off. ER 614, 616, 750, 841, 845. Nkele heard gunfire, but didn't see what happened. ER 978. Massey didn't see the gunfire. RT 841-42. Esho and Crowder, only a few feet away, saw the gunman pull the trigger. ER 614-15, 744.

Massey retrieved Drummond's wallet from the sidewalk, and he, Nkele, and Esho ran after Drummond. ER 620, 845. Esho focused on Drummond while he and the gunman followed Drummond. ER 616-17, 1152. The gunman said, "he tried to grab my pistol." ER 616-17. Esho was behind the gunman, caught up to him, and speaking from the side, told him to leave, and the man ceased chase. *Id.*

3. No one realized Drummond was shot until it was too late.

Esho saw no blood or bullet wound on Drummond's white t-shirt. ER 618-20. When Massey and Nkele arrived, Esho told them what happened. ER 620, 845-46, 981-84, 1027-28. No one realized Drummond was shot. ER 619, 749, 846, 984, 1012, 1025, 1073. Nkele left to meet Crowder. ER 965-66. When Crowder left to meet a girl, Trevina, at a Chevron station, Nkele returned to Drummond only to find him unable to stand, slurring words, and asking for water. ER 752-55, 846, 986-87, 998, 1016, 1073. Esho left to buy water and bought it from the same Chevron station where Crowder met Trevina. ER 620-22. Esho left the station at 1:54 a.m. ER 625. Drummond could not drink the water. ER 626.

Around 2:00 a.m., Berkeley Police Officer McIntosh, who was on patrol, stopped to assist Drummond. ER 987-88, 1069-75. McIntosh saw no injuries or blood and Drummond appeared intoxicated. ER 1072-74. No one told McIntosh about the argument or gun incident. ER 987-88, 1074, 1085.

Nkele, Massey, and Esho took Drummond to a sorority house, where Nkele lived. ER 627, 965-66, 989-90, 1019-20, 1024-25. Inside, Esho, realizing Drummond was not responsive, called 9-1-1 while Nkele started C.P.R. ER 627-28, 848. Drummond died of internal bleeding from a gunshot to his hip. ER 953-54.

B. The investigation.

1. Nkele, Massey, and Esho identified Crowder but not the gunman.

Several hours later, Nkele, Massey, and Esho each identified Crowder as the man Drummond argued with the night he died. ER 633-34, 993-94, 1105-06, 1108.

Massey told police a man called "B" (Brandon Crowder, not Beaudreaux) was involved, but he did not see the gun when it fired and was not sure he would recognize the gunman if he saw him again. ER 833-35, 841-42, 862-63.

Esho initially told police he didn't know what happened, but eventually confessed someone put a gun to Drummond's neck and the gun fired. ER 1087-88, 1091-92, 1151-52. Esho told police he never saw the gunman before and did not know him. ER 564-66, 1166. Esho described the gunman as a black male, about 18 years old, his same height (6' 1"), skinny build with a darker complexion than his own, wearing a short-sleeved shirt. ER 564-66, 654-61, 1090-94, 1166.

2. Crowder did not identify the gunman during four interviews.

Two days later, Crowder told police he went to middle school with the gunman, but did not know his name. ER 685-86, 730, 914 917. Crowder refused to look at middle school yearbooks until the next day. ER 686, 917-18. The next day, Crowder looked at a 1997-98 yearbook containing Beaudreaux's middle school photo and name, and a 1998-1999 yearbook containing his name, but did not identify him. ER 686-87, 730. Crowder said Eddy Jones and Maurice Gamble were at Blake's the night of the incident, but did not say Michael Durant, Benjamin Petrofsky, Jack Nicholas, Khalid Stringer, Trevina, "T," and Joshua, were also there. ER 688-89, 724-25, 927-29. The next day, Crowder looked at yearbooks containing Beaudreaux's name and photo, but did not identify him. ER 689, 717-18, 730. Ten days later, Crowder again failed to identify the gunman. ER 689-90, 730-31.

3. No physical evidence identified the gunman.

Police did not find the gun, blood, bullets or bullet casings at the scene, in Esho's car, or at the sorority house. ER 950-51, 1034-35, 1040.

Police did not interview any of the people Crowder told them were at Blake's the night Drummond was shot. ER 794-95, 927-32. Officer Murphy thought it important to do so, but didn't because she was not the lead investigator. ER 927-32.

In September 2006, Esho viewed lineup arrays containing photos of Eddie Jones and Maurice Gamble, but did not identify either. ER 634-35, 796-97.

Drummond's hands tested positive for gunshot residue. ER 631, 767, 849, 1079. The wound location was consistent with Drummond pushing the gun away

and turning to run when he was shot. ER 949. Gunshot residue on Drummond's hands made it possible he was holding the gun, pulled the trigger, or was in the gun's vicinity when it fired. ER 768-69, 958-59.

4. Crowder threatened to kill another man more than a year later.

More than a year later, on December 17, 2007, Crowder got into another argument — this time, with Roger Cox. ER 888-89. During a basketball game, Crowder threatened to kill him and have his friends jump him. ER 711-12, 888-89. Less than a month later, police found a Berkeley student I.D. for another person at Crowder's home and Crowder admitted threatening Cox. ER 889-90. Crowder was charged with terrorist threats against Cox and possession of the stolen I.D. ER 891. Crowder admitted his threats to Drummond and Cox were similar. ER 715-17.

5. Crowder identified Beaudreaux after police threatened murder charges.

A month later, Detective Sabins telephoned Esho and Nkele about the Drummond case. ER 635-36, 776.

A week later, Crowder turned himself in to police after receiving notice of the terrorist threats and possession of stolen I.D charges. ER 692, 711, 891.

That same day, Detective Sabins and Officer Murphy interviewed Crowder about Drummond's death for "several hours." ER 692, 725, 731, 777, 1114-15. Sabins repeatedly asked Crowder who shot Drummond, and Crowder repeatedly said he went to middle school with the man, but did not know his name. ER 778. As the interview wore on, Sabins "alluded" Crowder "could be held responsible for part of this," and told Crowder, "you're going to go to the jail for murder on your own," and "[i]t's either you sit in the defendant's stand by yourself or you sit there

with the guy that actually pulled the trigger." ER 779, 792-93. This prompted Crowder, "scared" and "nervous," to say, "Nicholas Broussard." ER 693.

Officer Murphy looked "through the yearbooks," "found the person" she was "looking for in a specific year," and took it to Crowder. ER 541-46, 694, 779-80, 932-33, 1115-16. Murphy "didn't do anything that would tell him what page to go to pick out someone," "didn't guide or steer" him in any particular direction, and did not show him a specific photo. ER 780, 934, 940, 1116-17.

Crowder identified Beaudreaux as the gunman. ER 694, 780-82. Although Beaudreaux's name and photo were in the yearbooks, Crowder didn't previously point him out to police because he did not know his name until December 2007. ER 541-44, 690, 732, 793-94, 939. Murphy prepared a six-man photographic lineup array containing a July 8, 2007 photo of Beaudreaux, and Crowder selected that photo. ER 259, 694-97, 780-82, 933-38, 1118-19; Trial Exhibit 13.

6. No one corroborated Crowder's identification of Beaudreaux.

The next day, Valentine's Day 2008, Detective Sabins and Officer Murphy showed Massey a photo lineup array (identical to the one they showed Esho the same day),[1] but Massey failed to make a positive identification. ER 229, 265 787-88, 852, 863, 922-23, 1121-23; Trial Exhibits 14 and 16. Massey said the police told him to choose the "closest" person in the array. ER 237, 863. According to police, Massey was "disinterested," "unconcerned," "kind of glanced over it," but eventually excluded the photograph in position two. ER 265-66, 274-76, 804-05, 1122-23.

[1] Petitioner mistakenly asserts the first lineups shown to Esho and Massey are not identical. Pet. 4.

The same day, Sabins and Murphy showed Esho a photo lineup array (identical to the one they showed Massey that day), to see if he would "corroborate" Crowder's identification. ER 260-61, 570-72, 782-84, 798, 923-25, 1119-21; Trial Exhibits 14 and 16. Esho did not make a positive identification; he said Beaudreaux's photo was the "closest" "the photograph shows his face a little wider and his head a little higher." ER 261-262, 570-72, 1120-21, 1173.

Six hours later, Sabins, not entirely satisfied with the results of Esho's earlier viewing, returned alone and showed Esho a second lineup array that included a different photo of Beaudreaux in position two. ER 229, 262-264, 272-73, 567-69, 637-38, 784-86, 798-801, 1174-75; People's Trial Exhibit 17. Sabins used a 2007 photo of Beaudreaux in the first array, and a 2006 photo in the second array. ER 263, 784-86. Although Beaudreaux appeared in both arrays, none of the other men in the first array was included in the second array. ER 567-72. Once again, Esho did not positively identify Beaudreaux as the gunman; he merely said, "I feel No. 2 [Beaudreaux] is very close, based on my recollection of the events that occurred the night Wayne was killed." ER 264-265 568, 1175.

The next day, police arrested Beaudreaux even though no one corroborated Crowder. ER 268, 790, 1123-24. Two days later, Sabins met Massey at the police station, "to persuade" Massey "to get involved in the case" since his friend was murdered, and showed him a second lineup array. ER 806; Trial Exhibit 15. Seeing Beaudreaux's photo a second time, Massey said Beaudreaux's photo had "similar characteristics" but did not positively identify him. ER 268, 278-79, 593, 853-55.

C. Pretrial proceedings.

1. Crowder and Beaudreaux were each charged with first-degree murder.

Crowder and Beaudreaux were each charged with first-degree murder, in violation of California Penal Code § 187(a), and attempted second-degree robbery by means of force and fear in violation of Penal Code § 211, while armed with a firearm in violation of Penal Code § 12022(a)(1). ER 1142. It was alleged they each intended to inflict great bodily injury, inflicted great bodily injury, and personally used and discharged a firearm causing great bodily injury, in violation of Penal Code §§ 1203.075, 12022.5(a), 12022.7(a), and 12022.53(d). *Id.* Crowder also faced charges for terrorist threats and possession of the stolen I.D. *Id.*

2. Esho identified Beaudreaux when he saw he was Crowder's codefendant.

Crowder and Beaudreaux attended the preliminary hearing. ER 639, 1147. Esho read a newspaper report that police arrested a suspect for the Drummond shooting. ER 1180-81. When Esho saw Beaudreaux in court, it was "pretty easy to pick him out," and he "figured" Beaudreaux "was the man." ER 672, 1181-82.

Esho testified his memory was better the night of the shooting than at the preliminary hearing (more than two years later). ER 1158. Esho was closer to being drunk than sober the night of the shooting. ER 1156. Esho admitted he had forgotten "a few things because of the alcohol" he drank and because he was in shock, the night of the shooting. ER 654, 1157-58.

Esho never saw the gunman before the night of the shooting. ER 1150. He initially said the gunman walked next to him when Crowder and Drummond went around the corner to fight, but later said the man was "behind him." ER 1149, 1179.

When Police showed Esho the first lineup array containing Beaudreaux's photo, Esho was "was pretty sure it wasn't" the gunman. ER 1174. Although he told police Beaudreaux was the "closest," he was not sure because "it had been some time" since the event. ER 1169. Esho identified Beaudreaux when he saw him as Crowder's codefendant at the preliminary hearing. ER 1154-55.

3. Defense counsel complained of back pain.

During motions in limine, Beaudreaux's counsel apologized to the court for not standing up, and explained his back was "killing" him. ER 217, 1130.

D. The Trial

1. Crowder turned state's evidence after jury selection.

Crowder and Beaudreaux jointly selected a jury and Beaudreaux's counsel prepared his case not expecting Crowder to testify. ER 1048-57. After jury selection, Crowder plead no-contest to manslaughter, and agreed to testify against Beaudreaux, in exchange for probation (with time served) and dismissal of the remaining charges in his two cases. ER 881-82, 1128. Beaudreaux's counsel moved for mistrial and dismissal of the jury panel because he would choose different jurors than Crowder's counsel chose, would ask different voir dire questions, the jury saw Crowder and Beaudreaux as co-defendants, he did not expect Crowder to testify so he did not prepare his cross-examination; the motion was denied. ER 1048-1057.

2. Defense counsel was admitted to a hospital emergency room.

On Monday, June 29, 2008, defense counsel said he went "to the emergency room at Highland Hospital" the prior Saturday. ER 825. He had back pain for some time, and it was not tolerable. *Id.* The doctor prescribed Vicodin and referred

him for an MRI. *Id.* His symptoms were consistent with radiculopathy, which is a "compressed nerve," that might need surgery. *Id.* The doctor told him to "return to work in five days," and counsel told the court, "I don't feel I'm able to function today, but, you know, I have a pulse and I'm sitting here," and "I do feel the effects of the Vicodin I've taken, and I'm still in significant pain." ER 825-26.

The prosecution urged the court to continue the trial. ER 826. The court "didn't care what the People's position is, quite frankly." *Id.* The court said, "we all get these back issues as we age." ER 827. The doctor's note, stated, "[r]estrictions, no work requiring repetitive bending." *Id.* The court said, "you are going to have this back pain. There's not too much I can do about it, and I don't think there's much you can do about it." ER 828. Counsel was ready to question Massey, but concerned about questioning Crowder the next day. ER 829-30.

3. Massey did not corroborate Crowder's identification of Beaudreaux.

Massey testified Beaudreaux's photograph in the second line up shown to him had "similar characteristics" to the gunman, but Massey "did not know" whether Beaudreaux was the gunman or not and resisted identifying him unless he was "absolutely sure." ER 593, 805, 844, 854. Massey also was not "a hundred percent sure" the gunman asked Drummond for money. ER 850-52, 856-57. Massey was, however, sure that Crowder is a liar. ER 858-60.

4. A recording attributed to Beaudreaux was admitted into evidence.

On February 19, 2008, Martin Magree drove a van that transported Beaudreaux and Crowder to and from the jail and court. ER 866-69. Magree was

told a recorder was placed in the van. ER 869. Magree did not hear conversation between Drummond and Crowder, but listened to the compact disc recording. ER 871-72; Trial Exhibit 23. He agreed it was "sometimes hard to hear the exact words that were being said," and "parts of it are hard to understand," as the recording picked up other noises, but where words were unclear the transcript stated it was "unintelligible." ER 873, 877. Although he did not hear everything, he agreed a transcript (Trial Exhibit 23A) was accurate. ER 870-72, 877.

Defense counsel disputed the accuracy of the recording's transcript (Exhibit 23A) because the recording was largely unintelligible. ER 704-05. The court admitted the recording as evidence (Trial Exhibit 23), but did not admit the transcript (Trial Exhibit 23A) as evidence. ER 704-05, 563, Trial Exhibit 23. The court permitted the jury to use the transcript as an "aid" to comprehending the recording, but instructed the transcript was not evidence. ER 679, 700-01, 704-05, 915-16. The transcript attributes Beaudreaux as saying, "You think it's hard now? Shit's about to get real out here . . . . Respect my gangster . . . . No turning back." ER 563, 700-05; People's Trial Exhibit 23, 30:18. The transcript also attributes Beaudreaux as saying, "You just better start praying man because your life is about to change in about one damn minute now. You'll never see daylight again," and, "Man, fuck this . . . timing." ER 563, 700-05; People's Trial Exhibit 23 at 55:30.

5. Crowder identified Beaudreaux as the gunman.

Crowder testified Beaudreaux had pulled out a gun and pointed it at Drummond when Drummond told him he would "fuck him up." ER 906-07. He said

Beaudreaux told Drummond "You need to give me your money right now." ER 908. Drummond paused and grabbed the gun barrel. ER 908-09. Drummond and Beaudreaux were still struggling over the gun when it fired one shot. ER 614, 909. Crowder was only a few feet away and saw Drummond's hand on the barrel while Beaudreaux pulled the trigger. *Id.* Crowder identified the recorded comments attributed to Beaudreaux. ER 700-04; Trial Exhibit 23.

6. Counsel said he could not effectively represent Beaudreaux.

On Tuesday, June 30, 2009, counsel told the trial court he didn't "feel that Mr. Beaudreaux has an attorney in the meaningful sense of the word. My back hurts real bad and I should be either getting my MRI or lying down." *Id.* Working the previous day "exacerbated the situation," he was in "bad pain" and was "unable to concentrate on what Mr. Crowder was saying yesterday." *Id.*

The court was "amazed with the amount of time that [counsel] spent and the issues that [counsel] took up with some of these witnesses." ER 817. The court said counsel performed "well and beyond anybody I've seen in any courtroom as it relates to cross-examining and dealing with issues with witnesses." ER 818. The court noted counsel doing something with the video after court recessed the prior day. *Id.* The court again complained of back pain that morning, and every day, due to sciatica, but boasted the court was "there." *Id.* The court said counsel's performance was "totally contrary to the state of condition" he indicated he was in "yesterday." *Id.* Counsel stayed after recess "yesterday" to get the computer to display Crowder's recorded interview, but it still didn't display it. ER 818-19. He left for another court because he already delayed it a week and lay down at 4:00

p.m. until morning. ER 819. He "got up this morning and I felt worse than I did yesterday, and was "unable to do the things that he needs to do and can't concentrate," and all he could think about was how bad his back hurt. ER 819-20. He took Vicodin at 5:00 a.m. ER 820. He said, "if the court thinks that I'm malingering or I'm just trying to make an excuse to delay the thing, that's an assessment the Court has to make," but "I'm telling you, I'm in pain. I'm not able to do my job. And if the Court is ordering me to proceed, that's what I'm going to do, but I'm just not --- I should be lying down." ER 819. He promised to "try to do the best I can, but my best at the moment is not much." ER 817. Counsel said his client's interests were prejudiced. ER 818. The court asked if he could not effectively represent Beaudreaux; counsel answered yes. ER 821.

7. Counsel's doctor directed him to stay off work.

The next day, counsel brought a doctor's note directing him "to be off work until the 6th of July." ER 683. He felt the same as the prior day, "which is not good." *Id.* He asked to put his County Medical Center letter in the court file. *Id.* He wasn't "trying to make any posture or tactics or anything" but he "just" didn't "feel good." *Id.* He was "in a lot of pain," but inexplicably agreed to proceed because he didn't "want all these people sitting here and waiting for me." *Id.* The court later said counsel "had an incredibly extensive cross-examination of each of the witnesses" and he "performed as he generally does" "It doesn't appear that anything suffered in terms of his abilities here." ER 812-13. Counsel replied, "I'm in some pain and distress, but I'm trying to do the best I can." ER 813.

8. Crowder admitted he repeatedly lied to police and identified Beaudreaux only after police threatened to charge him with murder.

At trial, Crowder testified he identified Beaudreaux because he didn't want to go to trial for murder. ER 709-10. As soon as Detective Sabins told Crowder he was going to be charged with murder by himself "if he didn't come up with a name," Crowder gave him a name: "Broussard." ER 732, 734, 762. Crowder was "pretty nervous," during the February 13, 2008 interview, and "the questions were coming fast," so he spoke "impulsively." ER 744-46, 755, 757, 761. Crowder justified his changed story by saying he didn't' want to go to jail for something he "had nothing to do with." ER 708-09, 734. Yet, Crowder admitted, by virtue of his no contest plea to manslaughter, he admitted he was "involved." ER 709-10. Crowder plead because he didn't' "want to risk going to prison" for the rest of his life, and wanted to "go home." ER *Id.* Unlike his lies to police and the court, Crowder claimed he was telling the truth so he could go home and didn't tell court he was innocent because he didn't want to risk going to prison for the rest of his life. ER 708-10.

Crowder did not identify Beaudreaux during the first four police interviews because he feared retaliation. ER 721, 734, 722, 732, 753, 916-17. He didn't confirm Beaudreaux's name until December 2007, when he saw him at a party, just "to make sure that he was the person who I see in the yearbooks." ER 732. Crowder said Beaudreaux told him he owed him one. *Id.*

Although Crowder lied to police for his benefit (to avoid retaliation and being labeled a snitch), he denied lying at trial to obtain his plea bargain benefits (time served). ER 685-87, 706-09. Once in jail, it became his "duty" to tell the truth. ER

707-08. Although he went to jail after he gave Beaudreaux's name, Crowder thought lying "got him into jail," but telling the truth would get him out. ER 708.

9. The lineup procedure was unusual and a departure from training.

Sabins showed the photo lineup arrays containing Beaudreaux's photo to Esho and Massey to see if they would "corroborate" Crowder. ER 270, 798-99. Sabins admitted it was not common practice to show the same witness two different lineups that included the same person at different times, as with Esho. ER 274, 567-72, 802; Trial Exhibits 16 and 17. Murphy, when asked why Sabins employed the successive lineup sequence with Esho, testified police officers "are not trained that way," and "this was an unusual thing because they are not trained to go back and try it again if they can get an idea earlier in the day." ER 926-27.

10. Esho corroborated Crowder' identification although Beaudreaux did not match his initial description of the gunman and he did not identify him in two pretrial photo lineup arrays.

At trial, Esho testified his best description of the gunman was the day of the incident. ER 288, 661. He admitted his memory was affected by the alcohol he drank the night of the incident, but his recollection was better the night of the incident than at trial three years later. ER 288, 654.

Esho admitted Beaudreaux did not match his initial description to police the day of the incident, and he did not recall all of the details about the shooter. ER 288-92, 654-59; Trial Exhibit 18. Esho initially told police the gunman was his height, about 6' 1", and, at trial, agreed Beaudreaux was shorter. ER 290-293, 655-59. Esho initially told police the gunman's complexion was darker than his own, but backed away at trial saying Beaudreaux's was "medium." ER 290-293, 656-57.

Although he never mentioned it to police or at the preliminary hearing, Esho testified he didn't positively identify Beaudreaux in the first array because he couldn't say for sure "with the photo." ER 281-283, 57072, 674; Trial Exhibit 16.

Esho admitted he may have relied on the first lineup photo to assist him in focusing on Beaudreaux's photo in the second array, but didn't do it "on purpose," "it might just be a thing that happens unconsciously." ER 283-84, 567-69, 673.

Esho told the jury he identified Beaudreaux at the preliminary hearing because "he was the right person." ER 675. Esho testified when he saw him in court, it "just basically clicked." ER 284-85, 640. Although Esho did not mention it to police, he testified he wanted to see Beaudreaux in person because "there were a few things that I just remember just about him." ER 284, 639. Esho did not say what those "things" were other than he recognized "sort of the way that he walked." ER 284-85, 649. At the preliminary hearing, Esho testified there was nothing unusual about the gunman and said nothing about his walk; at trial, he did not say he recognized anything distinctive or unusual about the walk. ER 285, 1166-67. He testified he was positive Beaudreaux was the gunman who asked for Drummond's wallet, but didn't think the man intended to rob Drummond. ER 640-44, 1161.

11. Beaudreaux was convicted and sentenced to 50 years to life

The jury convicted Beaudreaux of all charges. ER 552-53. The trial court sentenced Beaudreaux to 25 years to life for murder, with a 25 to life enhancement, for a total indeterminate term of 50 years to life in prison, but stayed a 27 year to life sentence for attempted robbery. ER 536-40.

E. The state courts affirmed the convictions and denied habeas relief.

Beaudreaux filed a direct appeal and companion habeas corpus petition. ER 392, 535. The state court of appeal affirmed and denied habeas corpus, and the state supreme court summarily denied petitions for review. ER 309-11, 341-51.

Beaudreaux filed a petition for writ of habeas corpus, contending counsel was ineffective for failing to object or move to exclude Esho's in-court identification as the product of suggestive police identification procedures in violation of the Sixth and Fourteenth Amendments and *Strickland v. Washington*,466 U.S. 668 (1984).[2] ER 161. Counsel filed a declaration, under oath, stating, in relevant part:

> Had I been functioning at full capacity, I would have moved to exclude the identifications as unduly suggestive. I do not remember considering such a motion in this case. I can only say again that I was in great pain and mental distress as the result of my back injury and being forced to continue with the trial to my own detriment as well as Mr. Beaudreaux's.

ER 129. Counsel stated, "this is another example of my difficulties that denied Mr. Beaudreaux the effective representation of counsel." *Id.* The state courts summarily denied the petition. ER 47, 137, 160.

F. The federal district court affirmed, but the court of appeals reversed.

Beaudreaux filed a federal petition under 28 U.S.C. § 2254. ER 48, 82. The district court denied relief, but certified the issue for appeal. ER 35-37, 41-42.

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[2] It is unclear whether petitioner now claims Beaudreaux's second state habeas corpus petition is procedurally barred as untimely or successive. Pet. Fn 2. If so, Beaudreaux objects because petitioner waived and/or forfeited that claim by conceding the petition was timely and failing to pursue it in federal court.

On September 18, 2017, a Circuit panel majority reversed, in an unpublished opinion. Pet. App. 1a-8a. On November 8, 2017, the Circuit denied the state's petition for rehearing and rehearing en banc. Pet. App. 9a.

REASONS TO DENY CERTIORARI

A. The Circuit's decision will have little, if any, influence on other cases.

Certiorari is unwarranted because the Circuit's decision will have few ramifications, if any, on other cases, due to the highly unusual facts and fact-bound conclusions presented in this case. Pet. App. 1a-7a.

B. The Circuit correctly stated and applied AEDPA deferential review.

Certiorari is also unwarranted because the Circuit decision does not disturb, and in fact affirms and faithfully applies, the stringent review standards required for *Strickland* claims brought pursuant to 28 U.S.C. § 2254(d)(1) ("AEDPA").

A federal court may only grant relief under 28 U.S.C. § 2254 if the state courts' denial of relief, "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," as set forth in 28 U.S.C. § 2254(d)(1). Where, as here, the state courts summarily denied relief, a federal habeas court must "consider all arguments and theories that could support" the state court's denial of federal constitutional relief, and "determine whether fair-minded jurists 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," before it may grant relief. *Harrington v. Richter*, 562 U.S. 86, 101 (2011), *citing Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Federal courts must give "doubly deferential" review to *Strickland* claims under AEDPA in order to afford the state court and defense counsel the benefit of the doubt. *Woods v. Donald,* 575 U.S. 1, 5 (2015). As such, federal habeas courts indulge "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 3. To overcome that presumption, defendant must show counsel failed to act reasonably considering all the circumstances. *Cullen v. Pinholster,* 563 U.S. 170, 189 (2011).

The Circuit here expressly applied the requisite "doubly deferential" standard for AEDPA *Strickland* claims. Pet. App. 6a-7a. The Circuit expressly relied on *Pinholster*, 563 U.S. at 190 and 28 U.S.C. § 2254(d)(1). Pet. App. 6a-7a. In addition, the Circuit decision expressly acknowledged Beaudreaux has a "high burden" and the "requirements of AEDPA" are "stringent." Pet. App. 7a.

C. The Circuit correctly applied AEDPA review for the *Strickland* deficiency prong.

The Sixth Amendment right to effective assistance of counsel is denied when (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland,* 466 U.S. at 687.

To prove counsel's performance deficient, it must be shown "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 at 687-89. The reasonableness of counsel's performance is evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986), *citing Strickland*, 466 U.S. at 689. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland,* 466 U.S. at 688.

Federal habeas courts must be careful when considering a *Strickland* claim, not to confuse "unreasonableness" under *Strickland,* with "unreasonableness" under § 2254(d). *Richter*, 562 U.S. at 105. When 2254(d) applies, the question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland's* deferential standard. *Id.*

The Circuit's decision did not confuse reasonableness under Strickland with reasonableness under AEDPA. The Circuit reviewed the *Strickland* deficiency prong by indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Pet. App. 2a. The Circuit required Beaudreaux "overcome the presumption that, under the circumstances," counsel's failure to move to exclude Esho's identification testimony as the product of impermissibly suggestive procedures, "might be considered sound trial strategy" from the standpoint of objectively reasonable jurists. Pet. App. 2a, citing *Strickland*, 466 U.S. at 689 (internal quotation marks and citation omitted).

The Circuit held "a conclusion by the state court" that counsel was not deficient was "not reasonable" "in light of . . . the lack of any tactical advantage to declining to move to exclude Esho's identification, and defense counsel's declaration that he recalled no strategic motives for failing to move to exclude Esho's identification testimony." Pet. App. 7a, citing *Kimmelman,* 477 U.S. at 385-86.

1. There is no reasonable basis to conclude counsel's inaction was strategic.

The Circuit considered counsel's sworn declaration, in which he testified he "did not remember considering filing a motion to exclude Esho's identification testimony," and his failure to do so "denied Mr. Beaudreaux the effective assistance

of counsel." Pet. App. 3a. The Circuit acknowledged counsel's statements reasonably support a conclusion his failure to move to exclude Esho's identification testimony, as the product of impermissible suggestive pretrial police procedure was not based on sound trial strategy. Pet App. 2a. The Circuit did not stop there.

Consistent with its responsibility to consider alternative reasonable bases for the state courts' denial of relief, the Circuit considered whether the state courts had a reasonable basis to conclude defense counsel's inaction was reasonably tactical *despite* counsel's testimony his inaction was reasonably tactical. Pet. App. 2a.

The only reasonable conclusion fair-minded jurists can reach is there was a strong tactical benefit to moving to exclude Esho's identification testimony since prevailing on the motion "would have eliminated an identification of central importance to the prosecution's case." Pet. App. 3a. The lack of "countervailing procedural or substantive risk to Beaudreaux," bolsters this conclusion. *Id.*

Other than Crowder and Esho's identifications, there was no evidence connecting Beaudreaux to the crime, i.e., no fingerprint, photograph, surveillance video, DNA, trace blood, weapon, confession, or hearsay admission, evidence to support the identification. *Cf. Foster v. California,* 394 U.S. 440, 442 (1969). Esho's identification was critical to corroborate Crowder's accomplice identification, so the jury could consider it under California Penal Code § 1111.[3] Esho lent necessary

[3]Independent evidence that corroborates portions of an accomplice's testimony, but does not tend to connect the defendant to the crime, is not sufficient corroboration of accomplice testimony for Penal Code § 1111. *People v. Pedroza* (2014) 231 Cal.App.4th 635; *Cf. Foster*, 394 U.S. fn 1.

credibility to the state's case. Crowder, a known (and admitted) liar, had an incentive to name someone else, to, in his own words, avoid "going to prison for the rest" of his life, and plead no contest in exchange for time served, but Esho, had no criminal record and was not induced by a plea agreement. Pet. App. 6a.

The Circuit correctly found no reasonable basis to conclude counsel's failure to move to exclude Esho's identification was excusable as tactically advantageous to Beaudreaux's defense. Pet. App. 2a-3a, relying on *Strickland*, 466 U.S. at 673.

2. The Circuit's decision is not contrary to *Knowles v. Mirzayance*.

Petitioner claims the Circuit's decision impermissibly found counsel was deficient because there was "nothing to lose" by making the motion, contrary to *Knowles v. Mirzayance*, 556 U.S. 111, 121-122 (2009). Pet. 12, fn 3.

In *Knowles,* counsel's performance was not deficient because the claim he failed to pursue "stood almost no chance of success." *Id.* at 122-23.

Here, there was much to gain by moving to exclude Esho's identification testimony since it would eliminate an identification "of central importance to the prosecution's case." Pet. App. 3a. As explained earlier, Esho's identification was needed to corroborate Crowder's identification.

3. There is no reasonable basis to conclude a motion to exclude Esho's identification as the product of suggestion would not succeed.

The Circuit found no reasonable basis for the state courts to conclude a reasonable attorney would have considered a motion to exclude Esho's identification testimony unlikely to succeed. Pet. App. 2a-5a. From the perspective of a

reasonable competent criminal defense attorney, the motion had a "significant chance of success." Pet. App. 3a.

Petitioner claims, "a significant chance of success," stops "well short of any ruling that an objection to the Esho testimony would actually have succeeded as a matter of federal constitutional law." Pet. 12. Petitioner claims counsel "might not have chosen to object" "because the objection was not likely to succeed." Pet. 11.

The record does not support petitioner's claims. The Circuit considered whether it was reasonable to conclude the motion would have failed, but determined there was no reasonable basis to conclude so under the totality of the circumstances on this record and under this Court's well-established authorities. Pet. App. 3a-5a, relying on *Simmons v. United States*, 390 U.S. 377, 383 (1968); *Foster* at 440, 442-43; *Neil v. Biggers,* 409 U.S. 188, 199-200 (1972).

And the record supports the Circuit's conclusion: all reasonable fair-minded jurists must agree, based on Esho's preliminary hearing testimony, the lineups, this Court's decisions in *Simmons, Foster*, and *Biggers*, and the resemblance of the identification procedure here with the "third-time-is-a-charm" procedure this Court rejected in *Foster*, a reasonable competent criminal defense attorney would have moved to exclude the identification because the motion had merit. Pet. App. 3a-5a.

D. The Circuit correctly applied AEDPA review to *Kimmelman*'s requirement that a motion to exclude Esho's identification testimony must have merit to satisfy the *Strickland* deficiency prong, and found the motion had merit.

To prevail on a *Strickland* claim based on counsel's failure to move to exclude evidence, the motion must be meritorious. *Kimmelman,* 477 U.S. at 375.

1. **All fair-minded jurists must agree Esho's identification was the product of impermissible suggestive pretrial police procedures under this Court's well-established authorities or a reasonable extension thereof.**

The Circuit considered whether the state courts could reasonably find Esho's pretrial lineup procedures were not unduly suggestive for purposes of determining whether a motion to exclude Esho's identification had merit, as required by *Kimmelman,* in order to satisfy *Strickland*. Pet. App. 2a-5a, 7a.

The Circuit correctly looked to *Simmons,* 390 U.S. 377, in which this Court pronounced a two-part test for ascertaining whether in-court identification testimony must be excluded as the product of tainted pretrial procedures. Pet. App. 4a. *First*, defendant must show the eyewitness identification was derived through "impermissibly suggestive means." *Id.* at 384. If that burden is met, the trial court must determine whether the identification was otherwise unreliable under the "totality of the circumstances." *Id.* at 383. If there is a substantial likelihood of irreparable misidentification, the evidence must be suppressed. *Id.* at 384. If indicia of reliability outweigh the corrupting effect of the police-arranged suggestive circumstances, the evidence is admissible. *Id.*

The Circuit also looked to *Foster*, 394 U.S. 440. Pet. App. 4a. In *Foster*, a bank robbery accomplice implicated Foster as the man who helped him rob a bank. *Id.* at 441. Police needed independent corroboration for the accomplice's identification pursuant to California Penal Code § 1111. *Id.* at 442, 451, fn 1. Police showed Foster to the bank's night manager twice under suggestive circumstances, but the manager failed to positively identify Foster. *Id.* at 442. The third time the police showed Foster to the manager was a charm: the manager was convinced

Foster was the man. *Id.* at 442-43. The evidence against Foster consisted of (1) the accomplice's testimony, (2) the manager's identification testimony, and (3) Foster's previous conviction for a similar robbery. *Id.* at 442, 444-45. This Court reversed the conviction because the cumulative effect of showing Foster to the manager constituted suggestive pretrial police procedures that led to an unreliable identification. *Id.* at 442-43. This Court held admitting the identification into evidence violated due process, and it should have been excluded as the product of suggestion because, under the totality of the circumstances, the procedure was the equivalent of telling the witness "this is the man." *Id.* at 443. This Court concluded: "The suggestive elements in this identification procedure made it all but inevitable that (the witness) would identify petitioner whether or not he was in fact "the man." *Id.*[4] The same is true for Esho.

The Circuit here carefully considered the state court record: (1) More than seventeen months after the shooting, police showed Esho two successive photographic lineup arrays (in one day) that contained six men; (2) Beaudreaux was the only man depicted in each array; (3) the officer who presented the arrays to Esho testified it was not common practice to show the same individual in successive arrays; (4) Esho did not make a positive identification from either array; (5) when Esho saw the first array, he was "pretty sure" Beaudreaux was "not" the killer; (6) when Esho saw the first array, he stated Beaudreaux's photograph was the "closest"

[4] *Foster* did not consider whether the error was harmless under *Chapman v. California*, 386 U.S. 18 (1967). *Id.* at 444. Per se exclusion was later rejected in *Biggers*, 409 U.S. at 198-99.

but the photograph showed a man whose "face [was] a little wider and his head a little higher;" (6) when Esho saw the second array, he stated Beaudreaux's photograph was "very close," (7) Esho testified he may have unconsciously relied on the first photographic array when he told police Beaudreaux's photograph was "very close" in the second array; (8) Esho still did not positively identify Beaudreaux after he was shown the two arrays; (9) Esho only positively identified Beaudreaux upon seeing him at the preliminary hearing. Pet. App. 4a.

Apropos of the record, the Circuit noted "[t]he suggestiveness of identification procedures – and the danger of misidentification – increases when, as here, "the police display to the witness . . . the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized." Pet. App. 4a, relying on *Simmons* 390 U.S. at 383, and *Foster*, 394 U.S. at 442-43. Relying on *Foster*, the Circuit noted courtroom procedures might be suggestive in certain circumstances, such as here. Pet. App. 4a, citing *Foster,* 394 at 443.

Based on the record, and this Court's authorities, the Circuit correctly determined "*a conclusion by the state court*" that counsel's representation was not deficient *was* "*not reasonable*" "in light of . . . the merits of the motion to suppress Esho's identification testimony as the product of suggestion." Pet. App. 7a, citing *Kimmelman*, 477 U.S. at 385-86.

Petitioner claims 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." Pet. 13.

This Court's authority and the record are to the contrary.

a. The first lineup procedure was more suggestive than in *Foster*.

In *Foster*, the police first showed Foster to the manager in a three-man lineup two days after the robbery. *Foster,* 394 U.S. at 441. The manager "thought" Foster was one of the robbers, but was unsure. *Id.* The lineup was suggestive because Foster was significantly taller than the other two men. *Id.* The manager likely knew how tall the robbers were, so the lineup conveyed, "choose the closest."

Here, seventeen months (not two days) passed between the crime and when police showed Massey a lineup array that included Beaudreaux and told Massey to choose the "closest." ER 863. Police showed Esho an identical array the same day, but he did not positively identify Beaudreaux. ER 570-72, 637, 784, 925. He said Beaudreaux's photo was the "closest," but it "shows his face a little wider and his head a little higher." ER 571. Police here told Massey to choose the "closest," and Esho chose the "closest." While in *Foster,* the three-man lineup may have implied the manager should choose the closest, the only reasonable conclusion here is the procedure explicitly suggested it. Petitioner claims Esho made a "tentative" identification of Beaudreaux in the first array. Pet. 3, 14, 17. But, Esho testified he was "pretty sure" Beaudreaux was *not* the shooter at that point. ER 1174.

b. The second lineup procedure was more suggestive than in *Foster.*

In *Foster,* the manager viewed Foster a second time in person on the same day he viewed him in the first lineup, but was still unsure. *Foster,* 394 U.S. at 441.

Here, Esho was shown a second array with Beaudreaux's photo six hours after he saw the first one. ER 567-69, 637-38, 784-86, 789-99, 799-801. Esho again failed to positively identify Beaudreaux as the gunman. ER 568, 637-38, 786-87. Instead, he said, "I feel No. 2 [Beaudreaux] is very close, based on my recollection of the events that occurred the night Wayne was killed." ER 568, 625-26, 713.

The procedures here were impermissible suggestive because Esho testified it was obvious Beaudreaux was the suspect because he recognized Beaudreaux from the first array, and he might have "relied" on the first array, to pick Beaudreaux in the second. ER 673. Esho didn't do it "on purpose," "it might just be a thing that happens unconsciously." ER 673. Even the police knew the procedure was not the best practice. Officer Murphy admitted the lineup sequence Detective Sabins employed with Esho "was an unusual thing because they are not trained to go back and try it again if they can get an idea earlier in the day." ER 926-27. And, Detective Sabins admitted it was not common practice to show the same witness two different lineups including the same person at different times. ER 802.

Petitioner claims the police showed Esho a photo of Beaudreaux taken closer to the time of the shooting. Pet. 13-14. But, that does not alter the calculus because recurrence of Beaudreaux in successive lineups suggested he was the gunman and committed Esho to identifying him once he saw him in court. Police knew they needed corroboration for Crowder's identification, and knew Esho would see Beaudreaux at the preliminary hearing and it would be obvious Crowder identified Beaudreaux. Even if the procedure was in good faith, it was unduly suggestive.

c. As in *Foster*: The third time was a charm.

The manager in *Foster* became convinced Foster was one of the robbers when he saw Foster a third time. *Foster,* 394 U.S. at 441-42.

Esho identified Beaudreaux when he saw him a third time during the preliminary hearing, but with one important difference: Esho saw Beaudreaux in court as a defendant alongside his old friend, Crowder, who had obviously identified Beaudreaux as the gunman. ER 639, 645-49, 1147, 1180-82. This was far more suggestive than the situation in *Foster*.[5] It was "obvious" Beaudreaux was arrested as the gunman and Esho "figured he [Beaudreaux] was the man." ER 1181-82. Like the manager in *Foster*, Esho identified Beaudreaux upon seeing him a third time, after he was conditioned to do so by previous viewings. Pet. App. 4a.

Petitioner contends the Circuit erroneously relied on its own authority, contrary to *Parker v. Matthews*, 567 U.S. 37, 48-49 (2012) (per curiam). Pet. 14. In *Parker,* the Circuit decision repetitively relied on its own circuit precedent "rather than" this Court's well-established authorities. *Id.* at 49. This Court held, "circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court," and "cannot form the basis for habeas relief under AEDPA." *Id.* at 48-49. It was error for the Circuit there to consult its own precedents "rather than"

[5] "It is deeply ingrained in human nature to agree with the expressed opinions of others particularly others who should be more knowledgeable when making a difficult decision." *Manson v. Brathwaite,* 432 U.S. 98, 134 (1977) (Marshall, J., Brennan, J.) (dissenting) (citing e. g., *United States v. Wade* 388 U.S. 218, 228-229 (1967) [other citations omitted].).

those of this Court for purposes of AEDPA. *Id.* at 48. This Circuit's decision did not rely on its own authorities "rather than" this Court's well-established authorities. Pet. 1a-7a.

Petitioner claims the Circuit relied on *Johnson v. Sublett*, 63 F.3d 926 (9th Cir. 1995), but the Circuit relied on *Simmons and Foster*. Pet. App. 4a, citing *Foster*, 394 U.S. at 442-43. *Sublett* merely illustrated the obvious: Courtroom procedures can be suggestive, such as here, although not in *Sublett*. Pet. App. 4a.

2. Fair-minded jurists must agree Esho's identification was not independently reliable.

Under *Biggers*, when considering the second part of the *Simmons* test and determining whether identification evidence is sufficiently reliable to go to the jury despite pretrial suggestive procedures under the "totality of the circumstances," a court considers: (1) the witness's opportunity to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness's prior description, (4) the level of certainty demonstrated at confrontation, and (5) the time between the crime and confrontation. Pet. App. 5a, relying on *Biggers*, 409 U.S. at 199-200.

The Circuit here correctly considered whether the state courts could reasonably find Esho's identification sufficiently reliable despite the suggestive procedures, such that a motion to exclude Esho's identification lacked merit, as *Kimmelman* requires to satisfy the *Strickland* deficiency prong. Pet. App. 5a, relying on *Biggers,* 409 U.S. 188.

a. Two years passed between the shooting and the identification.

In *Foster,* the night manager saw Foster twice in one day only two days after the robbery, and a third time a week to ten days later. *Foster,* 394 U.S. 440-41. Here, Esho never saw the gunman before 1:30 a.m. the night of the incident. Seventeen months later, he saw two photos of Beaudreaux, but failed to positively identify him as the gunman. More than three years after the shooting, and after having seen his face twice, he identified Beaudreaux at the preliminary hearing. The Circuit correctly found the only reasonable conclusion is the third *Biggers* factor favors an unreliable identification. Pet. App. 5a.

b. Esho's initial description did not match Beaudreaux.

Esho never met or saw the gunman until moments before the struggle over the gun in the dark, and had no independent memory of the gunman upon which to base his description or identification. ER 565. His initial description of the gunman does not match Beaudreaux. ER 658. He told police the gunman was his own height (6' 1"), but admitted Beaudreaux is significantly shorter. ER 564-66, 655-59; Trial Exhibit 18. He initially described the gunman as having a darker complexion than his own, but backed away from that at trial, saying Beaudreaux's complexion was "medium." ER 656-57. The Circuit determined the only reasonable conclusion is the fourth *Biggers* factor favored unreliability. Pet. App. 5a.

c. Esho was uncertain until after repeated exposure to Beaudreaux's face and until he saw Beaudreaux in court alongside his friend, Crowder, who had obviously identified Beaudreaux as the gunman.

Esho's level of certainty was similar to the night manager in *Foster*. In each case, neither of them was certain the defendant was the man during the first or

second viewings. The third time, however, each became certain the defendant was the man. *Foster* threw out the night manager's identification because it was unreliable under these circumstances. *Foster,* 394 U.S. 442-43.

Here, Esho never met or saw the gunman until moments before the struggle over the gun in the dark, so he had no independent memory of the gunman. ER 565. His description on the day of the shooting, when he said his memory was best, does not match Beaudreaux. ER 658, 661. He saw two lineup arrays seventeen months after the shooting, but did not say Beaudreaux was probably the gunman. ER 567-72. He merely said his photo was the "closest" of six, and "very close." ER 567-72. He did not independently recall Beaudreaux as the gunman. ER 569-72. The third time he saw Beaudreaux, it was obvious Beaudreaux was charged as the gunman. ER 672-73, 1181-82. It was also obvious to Esho that his friend, the accomplice Crowder, had identified Beaudreaux. ER 672-73, 1181-82.

The only reasonable conclusion is Esho's confidence was the product of the suggestive police procedures rather than his independent recollection. As the Circuit found, "Esho's initial identifications evinced considerable uncertainty; only after repeated exposure to Beaudreaux's photograph did Esho positively identify him at the preliminary hearing, itself a suggestive situation." Pet. App. 5a.

Petitioner claims Esho was certain because he testified he recognized "sort of the way that he walked." Pet. 15; ER 284-85, 649. But, Esho did not testify he recognized Beaudreaux's walk when he identified Beaudreaux at the preliminary hearing. ER 1146. Esho mentioned the walk three years after the shooting during

trial. At the preliminary hearing, he failed to identify anything distinctive or unusual about Beaudreaux's walk and testified there was nothing unusual or distinctive about the gunman. ER 285, 1166-67. His testimony on this point also lacks foundation: (1) He never saw the gunman before the night of the crime, (2) He testified the gunman was behind Crowder when he first saw Crowder tap the man, (3) the gunman was behind him when they went around the corner from Blake's, and (4) he was behind the gunman when he and the gunman followed Drummond. ER 565, 601-03, 617-18, 625, 899-901, 1149-50, 1153, 1176, 1179.

In sum, the Circuit correctly held, "a conclusion by the state court" that counsel's "representation was not deficient was not reasonable," "in light of the merits of the motion to suppress, the importance of the evidence subject to suppression, the lack of any apparent tactical advantage in declining to raise the issue," and counsel's "declaration that he recalled no strategic motives," for failing to object or move to exclude Esho's identification testimony as the product of impermissibly suggestive photographic identification procedures under the totality of the circumstances. Pet. App. 2a-5a, 7a.

d. The Circuit deferred to the state courts when it found Esho had a good opportunity to view the gunman.

Beaudreaux contends it is unreasonable to find Esho had a good opportunity to see the gunman because he (1) had never seen the gunman before the night of the crime, (2) did not "focus" on the gunman, (3) was behind the gunman when Drummond ran away until he came up alongside him and told him to leave them alone, (4) the gunman was behind Crowder when Esho first notice him, and (5) the

gunman was behind Esho when Crowder and Drummond went around the corner to fight. ER 565, 601-03, 617-18, 625, 899-901, 1149-50, 1153, 1176, 1179. The Circuit, however, deferred to the state courts finding it reasonable to conclude Esho had a good opportunity to view the gunman the night of the shooting. Pet. App. 5a.

e. The Circuit deferred to the state courts when it found Esho paid close attention.

Beaudreaux contends it is also unreasonable to conclude Esho paid close attention to the gunman because he was focused on the fight and the gun, and did not focus on the gunman's face. ER 677. He never saw the gunman before, and he concentrated on separating Drummond and Crowder. ER 565, 1159-61. He was more drunk than sober that night, the gunman's appearance came as a complete surprise to him, and he "froze" when he saw the gun (commonly known as "weapon focus") so much so that he says he saw the man's finger pull the trigger. ER 614, 676-77, 1151. At the preliminary hearing, he did not remember his description of the gunman from the night of the shooting. ER 1166. And, he admitted his description did not match Beaudreaux. The Circuit, however, gave deference to the state courts by concluding Esho paid close attention to the gunman. Pet. App. 5a.

E. The Circuit correctly applied AEDPA review to the *Strickland* prejudice prong.

Petitioner claims Beaudreaux must show a reasonable probability of acquittal. Pet. 16. Not so. A defendant making a *Strickland* claim must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Pet. App. 5a, citing *Strickland*, 466 U.S. at 694 (a reasonable probability is a probability sufficient to undermine confidence in

the outcome). Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Reviewing courts must "consider the totality of the evidence," including the strength of the evidence supporting the verdict. *Id.* at 694. A *Strickland* claim under AEDPA, requires a substantial, not just conceivable, likelihood of a different result. *Pinholster,* 563 U.S. at 189 (citing *Richter,* 562 U.S. at 112) (citing *Strickland,* 466 U.S. at 694).

The Circuit applied AEDPA review to the *Strickland* prejudice prong and determined, "the 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." Pet. App. 7a, citing *Strickland*, 466 U.S. at 696 and 28 U.S.C. § 2254(d)(1).

1. Esho's identification was critical to the state's case.

Like the conviction in *Foster*, Beaudreaux's conviction rested on three evidentiary components: (1) Crowder's accomplice testimony; (2) Esho's eyewitness testimony, and (3) a largely inaudible and unintelligible recording attributed to Beaudreaux that does not contain a confession. *Foster,* 394 U.S. at 444.

The Circuit considered prejudice based on the credibility of Crowder versus Esho, and found the only reasonable conclusion the state courts could draw on this record is Beaudreaux was prejudiced by counsel's failure to move to exclude Esho's identification testimony given that Esho enjoyed greater credibility than did Crowder. Pet. App. 5a-7a. Crowder "was likely not regarded as a credible witness" since the record demonstrates he "lied to police over the course of several interrogations regarding the crime at issue," "cooperated only after he had been

arrested and charged with a separate crime," "was himself charged with Drummond's murder," and "testified against Beaudreaux pursuant to a plea agreement in which he pled no contest to the lesser offense of voluntary manslaughter and received a sentence of probation, with no prison term." Pet. App. 6a. Esho, "[i]n contrast to Crowder, a known liar and criminal offender with a strong incentive to identify Beaudreaux as the killer," "had no criminal record, and his testimony was not induced by any deal with the government." Pet. App. 6a.

The Circuit correctly concluded, "[t]he only reasonable conclusion given the weakness of the state's case and the critical importance of Esho's identification, is a more favorable verdict was 'reasonably likely' absent the ineffective representation. Pet. App. 7a, relying on *Strickland*, 466 U.S. at 696 and 28 U.S.C.§ 2254(d)(1).

Additionally, as in *Foster*, Beaudreaux's jury had to determine if Crowder was an accomplice and if so, his identification had to be disregarded under California Penal Code §1111 unless there was independent corroborating evidence of the identification. ER 578 562. Had Esho's identification been excluded, as it should have been, it is conceivable the jury would have determined Crowder was an accomplice without requisite corroboration and disregarded his identification.

2. Massey did not corroborate the identification of Beaudreaux.

Petitioner complains the Circuit failed to consider Massey's testimony, which it characterizes as a "probable identification." Pet. 17. It is not objectively reasonable to conclude Massey made a probable identification. Massey initially told police he would not be able to identify the gunman. ER 862-63. Seventeen months

later, he failed to identify Beaudreaux in a lineup array, and told police he "never really focused on the person who shot Wayne." ER 787-788, 802-806, 852-53, 922-23, 1121-22. Two days later, seeing a second photo of Beaudreaux, he said the photo had "similar characteristics." ER 788-90, 840-44, 853- 55. At trial, Massey testified he did "not know" whether Beaudreaux was the gunman or not:

> Q: Are you saying he may have been the person, he may not have; *you just don't know*?
>
> A: Yes.

ER 844 (emphasis added).

3. The recording provides no objectively reasonable basis to infer consciousness of guilt.

The Circuit's decision gave deference to the state courts about the recording by acknowledging the "largely inaudible" recording of statements attributed to Beaudreaux in a police van transporting him and Crowder to prison, "is certainly persuasive evidence that Beaudreaux was extremely angry at Crowder." Pet. App. 6a-7a. But, as the Circuit correctly concluded, "there was no statement in the recording revealing whether Beaudreaux was livid because he had committed the murder or because he had not and was being falsely identified." Pet. App. 6a.

The Circuit's conclusion is supported by the recording itself. The recording (Trial Exhibit 23) was admitted as evidence, but not the transcript (Trial Exhibit 23A), which was only briefly permitted as an aid to the jury. ER 679, 700-01, 704-05, 915-16. The recording is largely inaudible. The words attributed to Beaudreaux are missing context in many places, i.e., there a few words and nothing intelligible, followed by some words, followed by something unintelligible. Trial Exhibit 23.

There are not enough audible, intelligible, complete sentences in the recording to draw any conclusions about why Beaudreaux was angry. The isolated words attributed to Beaudreaux fail to provide a basis upon which objectively reasonably fair-minded jurists can infer Beaudreaux identified himself as the gunman.

Petitioner claims if this is a close call, the state courts are entitled to the benefit of the doubt. Pet. 17. But, this is not a close call. Listening to the recording in the light most favorable to the prosecution, there are no complete audible and intelligible spoken sentences that provide any objectively reasonable basis to infer Beaudreaux acknowledged he was the shooter or exhibited consciousness of guilt.

Petitioner claims Crowder's testimony "was corroborated by other evidence that the state court reasonably could deem significant," claiming it "reasonably could have construed" the comments in the prison van recording as "strong evidence that Beaudreaux had committed the murder. . ." Pet. 17. But, if fair-minded jurists listen to the recording, they must all agree the recording provides no objectively reasonable basis to conclude the recording identifies Beaudreaux as the shooter or articulates consciousness of guilt. As the Circuit stated, the only reasonable conclusion to be drawn from the recording is, "[i]f the jury was not convinced by Crowder's testimony identifying Beaudreaux, there is a reasonable probability that it would have regarded the recorded conversation as insufficient to conclude beyond a reasonable doubt that Beaudreaux was the murderer." Pet. App. 6a. The only *reasonable* conclusion fair-minded jurist can reach is the recording "was not enough" "to dissipate the prejudice related to Esho's identification." *Id.*

F. Summary disposition is inappropriate.

Petitioner suggests this Court "may wish to consider summary reversal." Pet. 10. Summary disposition is inappropriate. The Circuit accurately stated and faithfully applied the limitations on its authority under AEDPA and thoroughly considered the state court record in detail in light of this Court's relevant well-established authorities before drawing its conclusions. Pet. App. 1a-7a. Moreover, the cases petitioner relies on for summary reversal are materially distinguishable. Pet. 10. Unlike *Felkner v. Jackson*, 562 U.S. 594 (2011)(per curiam), the Circuit here used the appropriate AEDPA standards for review and carefully discussed the facts. Pet. App. 1a-7a. Unlike *Cavazos v. Smith*, 565 U.S. 1 (2011) (per curiam), the Circuit here relied on this Court's well-established authorities rather than its own precedent and gave AEDPA deference to counsel and the state courts. Unlike *McDaniel v. Brown*, 558 U.S. 120 (2010) (per curiam), the Circuit based its conclusion on the state court record. Unlike in *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam), counsel here negligently and prejudicially failed to move to exclude unreliable identification testimony.

CONCLUSION

This court should deny certiorari.

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Respectfully submitted,

_____

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