No. ___________

IN THE

Supreme Court of the United States

BENJAMIN ESPINOZA,

Petitioner,

v.

JOSEPH L. MCGRATH, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that depriving a jury of a lesser-included offense instruction creates a substantial risk that the jury will be improperly disposed to convict of a greater offense, even if "in theory" an acquittal is necessary. The Third Circuit, building on this rule, held that a defense counsel's failure to request a lesser-included instruction may constitute prejudicially deficient performance by exposing the defendant to a substantial risk of an improper conviction when the defendant concedes his guilt of the lesser-included offense.

Here, Petitioner Benjamin Espinoza's trial lawyer failed to request a lesser-included enhancement instruction despite pursuing a defense that conceded that the lesser enhancement was true. Presented with a *Strickland* claim based on this omission, the state habeas court declined to adjudicate counsel's performance on the merits, and refused to "relitigate" facts when it dismissed the claim for a lack of prejudice. The Ninth Circuit declined to grant a certificate of appealability (COA).

The questions presented are these:

(1) With the question of counsel's performance reviewed *de novo* and without the constraints of § 2254(d), does the Ninth Circuit's denial of a COA conflict with decisions of this Court and the Third Circuit where the claim is that counsel acted unreasonably by failing to request a lesser-enhancement instruction, thereby exposing Espinoza to the substantial risk that the jury would chose the enhancement when faced with an all-or-nothing choice?

(2) Is it at least debatable that the state court's prejudice analysis is contrary to *Strickland* where it refused to "relitigate determinations of fact?"

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OPINIONS BELOW

The order of the Ninth Circuit Court of Appeals denying a COA was not published; the opinion is attached as Appendix A.[1] The district court's entry of judgment and order adopting the Magistrate Judge's report and recommendation are attached as Appendix B and D. The Magistrate Judge's report and recommendation to dismiss the petition is attached as Appendix C, and the District Court Judge's denial of Espinoza's request for a COA is attached as Appendix B.

The Orange County Superior Court's minute order dismissing the petition is attached as Appendix G. The subsequent summary denials by the California Supreme Court and California Court of Appeal are attached as Appendix E and F, respectively.

JURISDICTION

The Ninth Circuit denied a COA in *Espinoza v. McGrath* on November 29, 2017, Pet. App. A-1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] Cites to the Petitioner's Appendix begin with the document letter followed by the bates number of where in the overall appendix the specific citation can be found.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Cons. Amend. VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Title 28 U.S.C. § 2253(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Title 28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. The Trial

On July 27, 1996, Jesus Zapata, Carlos Tovar, and Espinoza robbed a market. The robbery was carried out with at least one knife and one firearm. Pet. App. H-45-46. During the robbery, the three men took money from a cash box, ordered employees to open the office's safe, forced two victims into a freezer, restrained two others, and then fled the market using a stolen car. *Id.* Espinoza was charged with, inter alia, robbery and assault. 1 CT 212. He was also charged with an enhancement for personally using a firearm, within the meaning of Cal. Pen. Code § 12022.5(a) ("personal-use enhancement"). 1 CT 215.

Espinoza did not dispute his involvement in the robbery. 2 CT 359.[2] The contested issues at trial involved enhancements: whether Espinoza personally used a firearm during the robbery and whether the crimes were in furtherance of gang activity. Regarding the personal-use instruction (the subject of this petition) the prosecution's theory was that Espinoza "personally used the rifle in the robbery of Josephina Ochoa, Jose Ochoa, and Abimael Cuevas." 1 CT 215. However, the victims gave conflicting testimony about which of the perpetrators wielded forearms during the robberies." Pet. App. H-45

B. Jury Instructions and Verdict

The trial court asked if either party had any further jury instructions prior to instructing the jury. 2 RT 456. Defense counsel requested a jury instruction

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[2] "CT" refers to the Clerk's Transcript on Appeal and "RT" refers to the Reporter's Transcript on Appeal.

related to the gang enhancement. Pet. App. 1 CT 283. Counsel did not request a jury instruction regarding a general firearm enhancement. That instruction would have permitted the jury to find Espinoza guilty of the lesser, general-use enhancement "if one or more of the principals is armed with a firearm, whether or not [Espinoza] is personally armed with a firearm." Cal. Pen. Code § 12022(a)(1). That enhancement, if found true, would have resulted in only one additional year added to his sentence.

Instead, the jury received only an instruction regarding the personal-use of the firearm during the robbery. Pet. App. J-97. The jury was specifically instructed that "[t]he word 'firearm' includes a rifle" and that it could find the personal-use enhancement true if it determined that Espinoza personally used a "rifle." Pet. App. J-96

The jury began deliberating on August 19, 1997. 1 CT 229; 2 RT 536. During deliberations, the jury struggled with coming to an agreement about "one particular count." 1 CT 231. The record does not disclose which count the jury struggled with. On August 20, 1997, the court admonished the jury that if they failed to agree, the court would "have to declare a mistrial as to that count and "[would] need to try [the] case again as to that count." 2 RT 543. That same day, the jury convicted Espinoza of three counts of second degree robbery, four counts of false imprisonment, possession of a firearm in a school zone, assault with a firearm, receiving stolen property, and street terrorism. 2 RT 547-58. The jury also found that Espinoza personally used a firearm (the greater enhancement) during the robbery. 2 RT 547-58.

On September 10, 1997, the trial court sentenced Espinoza to thirty-four years and four months in state prison. 2 RT 581. Twelve to thirteen years of the total thirty-four year sentence came from the § 12022.5 (a) personal-use enhancement applied to the robbery counts.

C. Appellate and post-conviction proceedings

On appeal, Espinoza raised two claims: (1) that particular jury instructions were inadequate, and (2) that trial counsel was ineffective for failing to request a lesser-included enhancement instruction. The second claim is the subject of this Petition. On August 2, 1999, the California Court of Appeal affirmed the judgment in an unpublished opinion. Pet. App. H. The court declined to resolve the ineffective-assistance claim on appeal, but it did find that if "given the option, the jury might have found that defendant was 'armed with a firearm under [the lesser instruction] as opposed to "personally armed with a firearm" under [the greater instruction]." Pet. App. H-45 On October 20, 1999, the California Supreme Court denied Espinoza's petition for review.

Espinoza raised the same ineffective-assistance claim in a habeas petition filed in the Orange County Superior Court, which issued a reasoned decision. Pet. App. G. This was the last reasoned decision addressing that claim. The California Court of Appeal and the California Supreme Court summarily denied Espinoza's petitions. Pet. App. E and F.

On April 5, 2002, Espinoza filed a timely federal habeas corpus petition in the district court. Espinoza requested an evidentiary hearing on the ineffective-assistance claim if the court considered the record insufficient to determine the reasonableness of counsel's decision-making. District Court Dkt. No. 49 at 1 n.1 and Dkt. No. 55 at 2 n.1. On February 12, 2016, the Magistrate Judge issued a report and recommendation dismissing Espinoza's claims and concluding that an evidentiary hearing was unnecessary. District Court Dkt. No. 71. After Espinoza filed Objections to the Report, the case was reassigned to a new Magistrate Judge. District Court Dkt. Nos. 75-77. On February 10, 2017, the newly assigned Magistrate Judge issued a final Report and Recommendation ("Report") that also dismissed Espinoza's claims and denied an evidentiary hearing. Pet. App. C.

On March 28, 2017, the District Court adopted the Magistrate Judge's report; it issued judgment four days later. Pet. App. D. The District Court denied a COA on any claim. Pet. App. B. On May 30, 2017, Espinoza moved the Ninth Circuit Court of Appeal for a COA, and that request was denied on November 29, 2017. Pet. App. A.

REASONS FOR GRANTING THE WRIT

Espinoza is merely seeking the opportunity to appeal the denial of his *Strickland*[3] claim that his trial lawyer performed below professional norms by failing to request a lesser-included enhancement instruction. The lesser-included instruction was consistent with the chosen defense, and the failure to request it exposed Espinoza to a substantial risk—approximately twelve to thirteen years additional imprisonment.

This Court should issue a writ of certiorari because, under the modest standard involved, the Ninth Circuit's refusal to grant a COA on his *Strickland* claim "conflict[s] with the decision of another United States court of appeals." Sup. Ct. R. 10(a) and (c).

A. The COA standard is modest.

To obtain a COA, Espinoza must make "a substantial showing of the denial of a constitutional right." 28 U.S.C § 2253(c)(2). To make this showing, a petitioner must merely "demonstrate that the issues are debatable among jurists of reason, that a court could resolve the issues [in a different manner], or that the questions are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see also Slack v. McDaniel*, 529 U.S. 473 (2000). Espinoza need not show that he should prevail on the merits. To the contrary, "[u]ntil the

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[3] *Strickland v Washington*, 466 U.S. 668 (1984).

petitioner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck v. Davis*, 137 S.Ct. 759, 773 (2017).

B. This Court and the Third Circuit have held that the failure to provide a lesser-included instruction exposes a defendant to a substantial risk that the jury will improperly convict on the greater offense.

It is "beyond dispute that the defendant is entitled to an instruction on a lesser-included offense if the evidence would permit a jury to rationally find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). This Court explained that a defendant is entitled to a lesser-included instruction because absent such an instruction, and "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense," a defendant is "exposed to the substantial risk" that a jury will resolve its doubts in favor of a conviction. *Beck v. Alabama*, 447 U.S. 625, 634 (1980).

Relying on *Kibble* and *Beck*, the Third Circuit held—in a case governed by AEDPA and where 28 U.S.C. § 2254(d)'s impediment to relief applied—that trial counsel is prejudicially deficient for failing to request a lesser-included offense instruction. *Breakiron v. Horn*, 642 F.3d 126 (3d Cir. 2011). In *Breakiron*, the defendant was charged with robbery but trial counsel failed to request an instruction on the lesser-included offense of theft. Breakiron's counsel conceded that a theft had occurred. *Id.* at 129. The Third Circuit found that because trial counsel "conced[ed] theft but [did not request] a theft instruction, Breakiron's counsel exposed him to . . . [the] 'substantial risk'" that the jury would convict of the greater offense if faced with only two choices: conviction of robbery or outright acquittal. *Id.* at 138.[4]

In dismissing Espinoza's *Strickland* claim, the district court refused to consider *Breakiron* or other decisions discussing lesser-included-offense instructions because they involved *offenses* and not, as is the case here, *enhancements*. Pet. App. C-26-27. The import of that distinction is, however, debatable. The greater, personal-use enhancement found true in this case resulted in approximately twelve to thirteen more years of prison time then the lesser, general-use enhancement. While that difference is substantial, the district court found the distinction between enhancements and offenses dispositive based on one California case, *People v. Majors*, 18 Cal. 4th 385, 410-11 (1998). *Majors* was a death-penalty case where the defendant and an accomplice murdered three people during a robbery involving a gun. 18 Cal. 4th 395-401. Majors' defense was that he was innocent of any crime or enhancement altogether. He argued that he was not even at the scene with his accomplice when the murder took place. *Id.* at 402.

Like Espinoza's jury, the jury in *Majors* lacked an instruction on a general-use firearm enhancement. *Id.* Under these facts, the California Supreme Court found that the defendant faced no substantial risk that, absent the general-use enhancement, the jury may have erroneously convicted him of the personal-use enhancement, since the jury—by convicting Majors of the murders—necessarily

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[4] The Fifth Circuit has found counsel deficient on a similar basis. *Richards v. Quarterman*, 566 F.3d 553, 569-70 (5th Cir. 2009) (holding that failure to request a lesser-included-offense instruction consistent with theory of the defense "fell below an objective standard of reasonableness"); *compare Lopez v. Thurmer*, 594 F.3d 584, 588 (7th Cir. 2010) (holding that decision not to request lesser included-offense instruction "appears to have been strategic" where instruction would have been *inconsistent* with defendant's testimony that he "was innocent of any crime")

dismissed his defense and concluded that he was at the scene and actually committed the murders. *Id.* at 410.

Here, in contrast, Espinoza conceded that he actively participated in a robbery, and that the robbery involved a firearm. Whereas the defense theory in *Majors* was that the defendant was innocent of all enhancements because he did not participate, here, Espinoza's defense conceded his guilt of the general-use enhancement by acknowledging his participation in an armed robbery. Thus, Espinoza's conviction for armed robbery left open the possibility that the jury would conclude that he did not personally use a firearm during the robbery. Indeed, this is the only point Espinoza challenged in his defense. Absent the lesser-included instruction, there was a substantial risk that Espinoza's jury—hearing from Espinoza himself that he participated in an armed robbery—would "diverge from theory" and convict him of the only firearm enhancement available to it, the personal-use enhancement. *Beck*, 447 U.S. at 634. This risk simply was not present in *Majors* because the jury's verdict there showed that it rejected Majors' defense to the enhancement.

C. The denial of a COA on Espinoza's ineffective-assistance claim conflicts with *Kibble*, *Beck*, and *Breakiron* by ignoring the substantial risk placed upon Espinoza by the failure to request a lesser-included instruction.

By denying a COA on Espinoza's ineffective-assistance claim, the Ninth Circuit concluded that it is not even debatable that counsel's failure to request a lesser-included enhancement instruction was objectively unreasonable, or that the failure to do so undermines confidence in the jury's verdict. This conclusion conflicts with *Kibble*'s, *Beck*'s, and *Breakiron*'s holding that such a failure exposes a defendant to a substantial risk of an improper conviction.

1. The law and standard of review governing Espinoza's ineffective-assistance claim

Strickland v. Washington sets forth the standard for determining whether a person's Sixth Amendment right to counsel has been violated based on ineffective assistance. 466 U.S. 668 (1984). The case sets forth a two-pronged test: "First, the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. The second prong requires defendant to show that the deficiency was prejudicial. *Id.* To prove deficient performance, Espinoza must show that his trial "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Even alleged tactical decisions are evaluated through this objective standard of reasonableness. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). To show prejudice "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermined confidence in the outcome." *Id.* at 694.

Espinoza filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and therefore his petition is governed by the AEDPA and its constraints on the grant of habeas relief. *Woodford v. Garceau*, 538 U.S. 202 (2003). 28 U.S.C. § 2254(d)'s constrain on relief, however, does not apply to elements of a claim that were not adjudicated on the merits by the state court. *Porter v. McCollum*, 558 U.S. 30, 39 (2009) ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*). Here, the last reasoned opinion of the state court dismissed Espinoza's claim by concluding that he could not show prejudice. Pet. App. G-42. Accordingly, the federal courts review the element of deficient performance *de novo*.

2. Counsel's failure to request a general-use instruction is debatably unreasonable given the substantial risk to Espinoza that the omission created.

There are only two reasons for why counsel failed to request a general-use instruction. Either he made a deliberate tactical choice to forego the request or the failure was a mere oversight. If the latter, counsel was deficient. *Rompilla v. Beard*, 545 U.S. 345, 395-96 (2005) (counsel's omission fell below "constitutionally required standards" where it "was the result of inattention, not reasoned strategic judgment") (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

The district court dismissed Espinoza's claim, however, by concluding that his failure to request the instruction was "presumptively reasonable" because Espinoza presented "no affirmative evidence" that counsel was uninformed, and counsel had diligently challenged other enhancements. Pet. App. C-30-31. Reasonable jurists could disagree with either basis. First, Espinoza has never been permitted an evidentiary hearing to prove the allegation that his counsel lacked a strategic reason for failing to request the instruction. The district court denied Espinoza's requests for an evidentiary hearing, concluding that one was unnecessary. Pet. App. C-23.[5] Espinoza cannot, therefore, be faulted for failing to produce "affirmative evidence" of counsel's strategy, *vel non*. *See also Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (Petitioner's allegations should be accepted as true prior to an evidentiary hearing).

Second, counsel's diligent performance with respect to other enhancements just as likely indicates that the failure to request a general-use enhancement instruction was an oversight as it indicates counsel was making a strategic decision.

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[5] Because the issue of counsel's performance is reviewed *de novo* by the federal courts, AEDPA does not preclude an evidentiary hearing to develop facts in support of this element of Espinoza's *Strickland* claim.

That he performed competently in other areas says nothing about his failure to request the instruction. Even "a single, serious error may support a claim of ineffective assistance of counsel[.]" *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986).

Even if counsel's failure to request a general-use instruction was deliberate, it was, debatably, unreasonable. The record exposes that counsel's strategy was to concede Espinoza's guilt of guilt of robbery involving a firearm (i.e. the applicability of a general-use enhancement). Thus, counsel could not have been pursuing an "all or nothing" defense to the enhancements, since he conceded that the general-use enhancement applied to Espinoza. Hoping that the jury would acquit Espinoza of any firearm enhancement, despite Espinoza's testimony admitting his conduct, is unreasonable when counsel had no argument that Espinoza was innocent of all applicable firearm enhancements. *See Breakiron*, 642 F.3d at 138.

3. Jurists of reason could conclude that this Court's and the Third Circuit's decisions about the substantial risk indicate counsel's failure to request a lesser-included instruction was prejudicial.

Under *Strickland*, the prejudice-prong of Espinoza's IAC claim is met if there is a reasonable probability that, had counsel sought that instruction, the jury would have acquitted Espinoza of the personal-use enhancement and convicted him of only the general-use enhancement. The district court concluded that Espinoza failed to show prejudice. Pet. App. C-29. This conclusion is debatable among jurists of reason and conflicts with this Court's and the Third Circuit's decisions discussing the substantial risk involved in failing to give a lesser-included instruction.

At the outset, the district court's conclusion on prejudice is debatable because the California Court of Appeal found that Espinoza's "jury *might* have found defendant was 'armed with a firearm' under section 12022 [general-use] as opposed to 'personally armed with a firearm' under 12022.5, subdivision (a)." Pet. App. H-48 (emphasis added). This finding necessarily means that the state court on appeal—comprised of reasonable jurists—lacked confidence in the outcome of the jury's verdict. *See Wiggins*, 539 U.S. at 538 (finding prejudice for counsel's failure to present evidence where that evidence "*might* well have influenced the jury's appraisal of [the petitioner's] culpability.") (emphasis added).

Putting aside the state court's conclusion that the jury might have reached a different verdict had counsel requested the general-use instruction, prejudice is also, at least, debatable given the substantial risk involved. "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Keeble*, 412 U.S. 205. Espinoza and his counsel admitted at trial that a rifle was used during the robbery, making Espinoza "plainly guilty" of the general-use enhancement (i.e. participating in an armed robbery). As a matter of law, there is a substantial risk—*i.e.* at least a reasonable probability—that the jury convicted Espinoza of the only *available* firearm enhancement because that was its only option. With a general-use instruction, however, the jury could have still appropriately punished Espinoza by convicting him of a crime related to the gun, *to wit*, the one-year general-use enhancement.

Indeed, the same "substantial risk" was the basis for a prejudice finding by the Third Circuit in *Breakiron*. There, under § 2254(d) review, the Third Circuit held that confidence in the verdict is undermined where Breakiron's counsel "conced[ed] theft but [did not request] a theft instruction, [and, thus,] Breakiron's counsel exposed him to . . . [the] 'substantial risk'" of an erroneous conviction[.]" *Id.* Here too, Espinoza's lawyer conceded Espinoza's guilt of participating in a robbery that involved a firearm but he did not request a general-use firearm enhancement, thus exposing Espinoza to the substantial risk of an erroneous conviction of the only firearm enhancement the jury had before it. The Ninth Circuit's failure to grant a COA squarely conflicts with *Breakiron*.

D. It is at least debatable that the state court's resolution of Espinoza's claim on the basis of prejudice conflicts with and is contrary to *Strickland*.

The last-reasoned state-court decision addressing the prejudice prong of Espionza's *Strickland* claim states, in full, that:

> [P]etitioner does not establish that a more favorable outcome was reasonably probable but for trial counsel's alleged failure to request a jury instruction on the lesser enhancement of being 'armed' with a firearm as defined by Penal Code § 12022(a)(1). At trial, there was conflicting evidence as to which of the three perpetrators had wielded the firearm during the commission of the offense. In view of such evidence, there is no basis by which to conclude that a jury would have probably found petitioner guilty of the lesser enhancement. Habeas corpus is not available to relitigate determinations of fact made upon conflicting evidence after a fair trial. (See In re Dixon (1953) 41 Cal. 2d 756, 760.)

Pet. App. G-42.

This analysis of the prejudice-prong Espinoza's claim conflicts with *Strickland* by failing—and instead holding that "habeas corpus is not available"— to reweigh or "relitigate" facts. Pet. App. G-42. Contrary to the state court's application, a prejudice analysis under *Strickland* requires a reviewing court to independently reweigh the evidence to determine whether there is a reasonable probability of a different result. *Wiggins*, 539 U.S. 510, 512 (2003) ("This Court assesses prejudice by reweighing" the evidence "adduced both at trial and in the habeas proceeding"). The state court's explicit refusal to engage in reweighing—shown by its statement that "the reweighing of conflicting evidence" had no place in a habeas proceeding—contradicts *Strickland* and *Wiggins*.[6] Accordingly, it is at least debatable that the state court's prejudice analysis was contrary to *Strickland* and the district court below should have analyzed this prong de novo.

CONCLUSION

The decisions of this Court and the Third Circuit have made clear that the failure to provide a lesser-included instruction exposes a defendant to a substantial risk. The risk is that—absent an option to convict the defendant of what he admitted doing—the jury will erroneously convict so long as he is plainly guilty of something. Here, Espinoza conceded that he was guilty of participating in a robbery that involved a firearm. His lawyer failed to request a general-use enhancement instruction that would have effectuated that defense, and allowed the jury to convict him for his involvement in an *armed* robbery. As a result, the jury convicted Espinoza of the only firearm enhancement put before it, for personally

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[6] The state court's citation to *In re Dixon*, 41 Cal. 2d 756 (1953) further demonstrates its contrary analysis. The California Supreme Court in *Dixon* held that a petitioner may not use habeas proceedings "instead of an appeal to review determinations of fact" made by trial court concerning the petitioner's claims of a "forced confession and unlawful search and seizure." *Dixon*, 41 Cal. 2d at 760. *Dixon*'s discussion on this point did not have to do with an IAC claim, where the prejudice inquiry does allow (indeed, requires) a habeas court to assess the evidence in light of counsel's deficient performance to determine if a different outcome was reasonably probable. Rather, *Dixon* was discussing record-based claims that cannot be raised in habeas proceedings. The procedural bar announced in *Dixon*—that a habeas court will not consider claims that could have been raised on appeal—has a well-established exception for IAC claims. *See People v. Mendoza Tello,* 15 Cal. 4th 264, 267 (1997).

using a firearm. It is at least debatable that counsel's failure to give the jury a lesser option undermines confidence in the jury's verdict. This Court should, accordingly, grant the Petition and direct the Ninth Circuit to issue a COA on Espinoza's *Strickland* claim.

Respectfully submitted,

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DATED: 2/23/18

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