No. 20-6199

In the Supreme Court of the United States

JACOB TOWNLEY HERNANDEZ,

Petitioner,

v.

SUZANNE M. PEERY, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly denied a certificate of appealability with respect to petitioner's claim that his conviction was invalid because the trial court restricted his lawyer's ability to share one document with him.

RELEVANT PRIOR PROCEEDINGS

United States Supreme Court:

Hernandez v. California, No. 14-8956 (order denying petition for certiorari entered May 4, 2015).

Hernandez v. California, No. 12-273 (order denying petition for certiorari entered October 15, 2012).

United States Court of Appeals for the Ninth Circuit:

Hernandez v. Peery, No. 19-16082 (request for certificate of appealability denied June 11, 2020; reconsideration denied July 13, 2020).

United States District Court, Northern District of California:

Hernandez v. Peery, No. 14-cv-1605 (judgment entered December 18, 2018).

California Supreme Court:

In re Hernandez, No. S222551 (habeas petition denied January 21, 2015).

In re Hernandez, No. S214161 (habeas petition denied November 13, 2013).

People v. Hernandez, No. S213178 (petition for review denied November 13, 2013).

People v. Hernandez, No. S178823 (direct appeal; judgment entered April 19, 2012).

California Court of Appeal, Sixth District:

In re Hernandez, No. H046169 (order to show cause issued February 25, 2019).

In re Hernandez, No. H040027 (habeas petition denied August 30, 2013).

People v. Hernandez, No. H031992 (judgment entered July 29, 2013).

Superior Court of California, Santa Cruz County:

In re Hernandez, No. 17CR03522 (pending habeas petition).

People v. Hernandez, No. F12934 (judgment entered August 24, 2007).

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STATEMENT

1. On February 17, 2006, four young men drove into a neighborhood associated with the Sureño criminal street gang. Pet. App. 48. The driver stayed in the car with the engine running. *Id.* Three other men exited, wearing clothing associated with the Norteño criminal street gang. *Id.* They approached Javier Lazaro, who was wearing a color linked with the rival Sureños gang. *Id.* One of the three shot Lazaro five times. *Id.* The men ran back to the car, jumped in, and sped away. *Id.*

A short time later, police found the car outside of an apartment known to be a gang hangout, where they spoke with several individuals, one of whom was petitioner. Pet. App. 48. Petitioner was driven to the police station for questioning. *Id.* Police learned that a witness had seen petitioner come into the apartment after the shooting; petitioner had told her that he was "looking at 25 to life," had removed a gun from his pocket, had told her that he needed to hide it, and had hidden the gun and a bag of bullets in his shoes. *Id.* at 48, 64, 86; *see also* D. Ct. Dkt. 39-13, at 141-144. An officer searched petitioner and found a .25-caliber handgun and a bag of 20 live cartridges in his shoes. Pet. App. 48. Petitioner's hands and jacket sleeves tested positive for gun residue. *Id.* There were .25-caliber bullet casings found at the scene of the shooting, and a forensic examiner determined that they had been fired from petitioner's gun. *Id.*

Three other people—Jesse Carranco, Reuben Rocha, and Noe Flores—admitted involvement with the shooting and reported that petitioner was the fourth participant. Pet. App. 48-49. All four were charged with premeditated attempted murder and related enhancements. *Id.* at 49.

Flores and Rocha pleaded guilty to assault with a deadly weapon. Pet. App. 49, 65. As part of their plea agreements, Flores and Rocha signed short declarations about the circumstances of the shooting. *Id.* at 49; *see* D. Ct. Dkt. 39. The prosecutor said that Flores would be allowed to serve his sentence out of state because he had been stabbed in the jail and "[t]here are very serious concerns about his physical well-being." Pet. App. 65; *see* D. Ct. Dkt. 39-27 at 15. Concerned that the proceedings would render Flores and Rocha vulnerable to retaliation, the court ordered that the contents of their declarations and the transcripts of the plea proceedings be sealed. Pet. App. 49.

Before trial, petitioner's attorneys were given summaries of police interviews of Rocha and Flores and a copy of Flores's tape-recorded interview. Pet. App. 49. The trial court denied their requests for the declarations. *Id.* The court ordered petitioner's counsel not to disclose the existence or contents of the declarations to their clients or anyone else, but indicated that it would revisit the matter if Rocha or Flores testified. *Id.*[1]

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[1] Carranco's attorney was subject to similar restrictions. Carranco, who was tried separately from petitioner, was convicted and his conviction was affirmed

Rocha did not testify at trial. Pet. App. 49. Flores's testimony was consistent with his statement to police investigators but provided more details. *Id.* Petitioner's counsel was allowed to review the Flores declaration before trial, and was given a copy of it when Flores testified. *Id.*; *see id.* at 12. The court prohibited defense counsel from sharing the declaration with their clients, investigators, or other attorneys. *Id.* at 49. But the court allowed defense counsel to impeach Flores with his declaration, and both defense attorneys did so. *Id.* at 49-50. Petitioner himself also had access to—and could discuss with his attorney—the "police reports investigating Flores and Rocha, which included their statements to the police that had many similarities to the declarations." *Id.* at 14.

The jury found petitioner and Carranco guilty of premeditated attempted murder and related enhancements. Pet. App. 96-97. Petitioner was sentenced to life in prison with the possibility of parole, consecutive to 25 years to life. *Id.* 97.[2]

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on appeal. *See People v. Carranco*, 2013 WL 5310163 (Cal. Ct. App. Sept. 23, 2013).

[2] In a habeas petition that is currently pending in state court, petitioner has sought to set aside the sentencing allegation that the crime was premeditated. He also has asked for a new sentencing hearing in order to place additional facts into the record for use in future applications for early parole as a youthful offender. *See In re Hernandez*, No. 17CR03522 (Santa Cruz Co. Super. Ct.); *see generally* Cal. Penal Code §§ 3051, 4801(c); *People v. Franklin*, 63 Cal.4th 261 (2016).

2. On appeal, one of Hernandez's claims was that by prohibiting his attorney from sharing Flores's declaration with him, the trial court had violated his Sixth Amendment right to consult with his attorney. The California Court of Appeal initially affirmed Hernandez's conviction, holding that the trial court's order did not violate petitioner's right to the assistance of counsel. *See People v. Hernandez*, 2009 WL 2187756, at *4-5 (Cal. Ct. App. July 23, 2009) (unpublished). On rehearing, however, the court reversed. Pet. App. 61-91. The court concluded that the trial court's restrictions had violated *Geders v. United States*, 425 U.S. 80, 91 (1976). Pet. App. 76; *see id.* ("[w]ithout more evidence of good cause for a court order barring defense counsel from discussing the contents of Flores's written declaration with [petitioner], we conclude that this order unjustifiably infringed on [the] right to effective assistance of counsel"). In considering whether the error should result in automatic reversal absent a specific showing of prejudice, the court acknowledged that "[t]he United States Supreme Court has not expressly considered whether *Geders* involved a structural defect or a trial error." *Id.* at 77. But the court viewed this Court's description of *Geders* in later cases as showing that *Geders* error is structural. Pet. App. 76-77 (discussing *Perry v. Leeke*, 488 U.S. 272, 278-279 (1989), and *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984)). Based on that understanding of *Geders*, the court reversed petitioner's conviction under the structural error doctrine, *id.* at 77, although

it acknowledged that *Geders* had not "involved an order preventing an attorney from talking with a defendant about [only] a part of the evidence," *id.* at 69.

3. The State sought review by the California Supreme Court, limited to the question of whether the deprivation of petitioner's right to consult with his attorney about the Flores declaration was structural error. The California Supreme Court reversed the court of appeal and remanded for an inquiry into whether prejudice had in fact occurred. Pet. App. 45-58.

The court began by noting that *Geders* had reversed a conviction where a trial court barred a defendant from discussing his case with his attorney during a 17-hour recess partway through the defendant's testimony. Pet. App. 50. But *Geders* had emphasized "the length of the sequestration and the complete ban on attorney-client communications," and did not agree that its principles would necessarily apply "'to the analysis of *any* order barring communication between a defendant and his attorney.'" *Id.* at 51; *see also id.* (*Geders* "did not discuss whether reversal without inquiry into resulting prejudice is appropriate in all cases of unwarranted interference with the right to counsel."). The court noted this Court's later statements that the Sixth Amendment right to counsel exists to guarantee a fair trial, and that "'[a]bsent some effect of the challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.'" *Id.* at 52 (quoting *Cronic*, 466 U.S. at 658). This Court had identified some "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case

is unjustified,'" such as "'the complete denial of counsel.'" *Id.* (quoting *Cronic*, 466 U.S. at 658); *see id.* (noting that *Cronic* included *Geders* in a list of cases where "'counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding'"). "'Apart from circumstances of that magnitude,'" the court noted, *Cronic* stated that "'there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.'" *Id.*

Here, the court reasoned, petitioner had been provided counsel for all stages of the proceeding. Pet. App. 53-54. He therefore had the burden of establishing prejudice "unless the circumstances are comparable in magnitude to those presented in *Geders*" and "render[ed] the adversarial process presumptively unreliable." *Id.* at 54. That exception would apply "where an accused is denied counsel at a critical stage of trial, or counsel entirely fails or is unable to subject the prosecution's case to meaningful adversarial testing." *Id.* But unlike the defendant in *Geders*, petitioner "was at all times free to consult with his attorney generally about trial tactics and defense strategy, and although he was not fully informed about Flores's probable testimony before Flores took the stand, he was not prevented from discussing how to respond." *Id.* Nor did the nature of the trial court's imposition on the right to counsel make it "difficult to assess its effect" on trial. *Id.* at 55; *see id.* at 55, 59 n.5 (reasoning that the primary value of the sealed materials "was their

usefulness as tools of impeachment during cross-examination," and "the prejudicial effect of the trial court's order" could be assessed by identifying details in the declaration that could have led to greater impeachment without the restriction). Moreover, the court reasoned, it would be illogical to presume prejudice when impeaching evidence is withheld only from a defendant, but to require a showing of prejudice before reversal when material is withheld from a defendant *and* his attorney. *Id.* at 56, 58; *see Kyles v. Whitley*, 514 U.S. 419, 433 (1995). The court reversed the court of appeal's judgment and remanded so that Hernandez could attempt to demonstrate actual prejudice. Pet. App. 58. This Court denied certiorari. *Hernandez v. California*, 568 U.S. 964 (2012) (No. 12-273).

4. On remand, the California Court of Appeal examined the record and determined that the error was not prejudicial. Pet. App. 101-102; *see id.* at 101 (noting that any alleged inconsistencies between Flores's declaration and other evidence "were brought to light at trial"); *id.* (noting that Flores was cross-examined about the key discrepancy petitioner pointed to, concerning who was wearing a particular shirt); *id.* at 102 (stating that "[petitioner's] attorney, having examined the declaration and plea transcript, was already aware of the discrepancies between the witness's declaration and his direct testimony . . . and Flores was cross-examined accordingly"). Petitioner's conviction was affirmed, *id.* at 120, and the state courts denied petitioner's requests for further review and habeas relief. *Id.* at 8.

5. Petitioner filed a federal habeas petition in the U.S. District Court for the Northern District of California.[3] One of petitioner's claims was again that he had been denied the effective assistance of counsel because of the trial court's restriction on his lawyer's ability to discuss Flores's declaration with petitioner.

The district court denied the petition and denied petitioner's request for a certificate of appealability (COA). Pet. App. 6-43. The court reasoned that under 28 U.S.C. § 2254(d)(1), the state court's resolution of petitioner's structural error claim could be set aside in federal habeas only if its ruling violated "'clearly established federal law, as determined by the Supreme Court of the United States.'" *Id.* at 13. That required a violation of "'the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision.'" *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). The court noted that "[t]he list of Supreme Court cases in which structural error analysis has been found to apply is short, and does not include the error caused by the trial court's order." *Id.* (citation omitted). Although "[a] complete denial of access to counsel violates a defendant's Sixth Amendment right and is not subject to a showing of prejudice," the Supreme Court had "found no structural violation of the right to counsel" in cases

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[3] The federal habeas case was initially stayed for petitioner to exhaust another claim in state court. Pet. App. 8. The California Supreme Court denied habeas relief, Pet. App. 8-9, and this Court denied certiorari, *Hernandez v. California*, 135 S. Ct. 2061 (2015) (No. 14-8956).

featuring more "limited" denials of access. *Id.* Here, "a limited prohibition on attorney-client communication was imposed . . . not a complete one, insofar as only a small number of discrete documents were off-limits for discussion between [p]etitioner and his attorney." *Id.*; *see also id.* at 13-14 (discussing the many ways in which petitioner and his counsel could still discuss trial strategy and Flores's testimony); *id.* at 17 (noting that the trial court order did not prevent petitioner from telling his counsel if Flores testified to something that petitioner knew to be false). Habeas relief was therefore unavailable: Because "[t]he Supreme Court has never held that a limited restriction . . . on the matters that defense counsel could discuss with his client amounts to structural error," the state courts "did not contravene or unreasonably apply clearly established federal law . . . in finding no structural error." *Id.* at 14. And because this was not a case "in which 'reasonable jurists would find [that] assessment of the constitutional claims debatable or wrong,'" a COA would be inappropriate as well. *Id.* at 43 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

6. The court of appeals denied petitioner's request for a COA, stating that petitioner had not "made a 'substantial showing of the denial of a constitutional right.'" Pet. App. 2 (citing 28 U.S.C. § 2253(c)(2), and *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). The court of appeals also denied petitioner's motion for reconsideration. *Id.* at 4.

ARGUMENT

Petitioner argues that the court of appeals should have granted him a certificate of appealability to allow him to appeal the district court's denial of habeas relief. But the denial of a COA was correct and did not conflict with this Court's precedents or the decisions of other courts. No further review is warranted.

1. In order to appeal a district court's denial of federal habeas relief, a petitioner must have a COA. 28 U.S.C. § 2253(c)(1); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That does not require the petitioner to show that the district court's resolution of his case was wrong; instead, the petitioner must show only that the district court's application of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to his constitutional claims "was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.[4] Petitioner does not dispute that his claim was "adjudicated on the merits in State court proceedings," and that relief under AEDPA was available only if the state court's decision "was contrary to, or involved an unreasonable application of,

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[4] *See also Miller-El*, 537 U.S. at 349 (Scalia, J., concurring) (noting that under *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), "a habeas petitioner seeking to appeal a district court's denial of habeas relief on procedural grounds must not only make a substantial showing of the denial of a constitutional right but *also* must demonstrate that jurists of reason would find it debatable whether the district court was correct in its procedural ruling").

clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); *see* Pet. 2-3, 7. Under these standards, the denial of a COA here was correct.

"[C]learly established law" under section 2254(d)(1) requires Supreme Court precedent that "squarely addresses the issue" before the state court. *Wright v. Van Patten*, 552 U.S. 120, 125-126 (2008) (per curiam); *see Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). If the circumstances of a case are only "similar to" Supreme Court precedents, then the state court's decision is not "contrary to" their holdings. *Woods v. Donald*, 575 U.S. 312, 317 (2015) (per curiam). And "'[i]f a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White v. Woodall*, 572 U.S. 415, 426 (2014) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)).

Even if reasonable jurists might disagree as to whether the factual scenario presented here should be covered under the structural error doctrine, they could not disagree as to whether this Court's existing precedent clearly established such a rule. As the district court recognized, instances of structural error are "rare," and "[t]he list of Supreme Court cases in which structural error analysis has been found to apply is short." Pet. App. 13. A "complete denial of counsel" makes a trial presumptively unreliable. *United States v. Cronic*, 466 U.S. 648, 659 (1984). This Court has "found constitutional error without any showing of prejudice," in cases such as *Geders v. United*

States, 425 U.S. 80, 91 (1976), "when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding," *id.* at 659 n.25; *see id.* at 659 (noting that no specific showing of prejudice is needed "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"). "Apart from circumstances of that magnitude, however," reversal on the basis of a violation of the right to counsel generally requires a specific showing of prejudice. *Id.* at 659 n.26; *see* Pet. App. 13 (Supreme Court has not found the structural error doctrine to apply with respect to "limited" denials of access).

As this Court's decisions on structural error under AEDPA make clear, habeas relief was not available to petitioner, given the gap between the limited deprivation at issue here and this Court's precedent on complete deprivations of counsel or entire failures of adversarial testing. In *Glebe v. Frost*, 574 U.S. 21 (2014) (per curiam), the Washington Supreme Court had held that a trial court's limitation on the defense counsel's closing argument by forcing him to choose one theory of his case was harmless error. *Id.* at 22-23. The Ninth Circuit held that habeas relief was available under section 2254(d)(1) because the state court decision contravened a decision of this Court that had reversed a conviction where a defendant was completely denied the opportunity for closing argument. *Id.* at 23-24. This Court reversed. *Id.* at 25. Habeas relief was unavailable under AEDPA because even if this Court's prior decision had "established that *complete denial* of summation amounts to structural error, it

did not clearly establish that the *restriction* of summation also amounts to structural error." *Id.* at 24. "A court could reasonably conclude, after all, that prohibiting all argument differs from prohibiting argument in the alternative. That is all the more true because our structural-error cases ha[ve] not been characterized by [an] in for a penny, in for a pound approach." *Id.* (internal quotation marks omitted).

This Court reasoned similarly in *Woods*, 575 U.S. at 317-319. Counsel for one defendant in a multi-defendant trial was absent during brief testimony that did not relate to him. *Id.* at 314. In judging that defendant's habeas petition, the Sixth Circuit ruled that the lawyer's absence was per se ineffective assistance of counsel, with no showing of prejudice required. *Id.* at 314-315. This Court held that ruling to be error under AEDPA: Since none of this Court's cases confronted whether counsel's short absence during testimony about other defendants in a joint trial constituted structural error, the state court's decision could not be "contrary to" or "an unreasonable application of" any of the holdings in those cases. *Id.* at 317-318. Here, as in *Woods,* "the state court's decision could not be 'contrary to' any holding from this Court" because there is no Supreme Court case concerning "'the specific question presented by'" the habeas petitioner. *Id.* at 317. As a result, the district court's "application of AEDPA to petitioner's constitutional claims" was not "debatable amongst jurists of reason," and the COA was properly denied. *Miller El*, 537 U.S. at 337.

2. Petitioner argues that jurists of reason could debate whether AEDPA relief was available based on *Geders*, *supra*, and *Perry v. Leeke*, 488 U.S. 272 (1989). Pet. 3, 5, 13-16. But neither case can reasonably be read as holding that the structural error doctrine applies to limited topical restrictions on discussions with counsel. In *Geders*, the trial court issued a blanket order prohibiting the defendant from consulting his attorney about anything during the 17-hour overnight recess between his direct examination and cross-examination. 425 U.S. at 91. This Court reversed the conviction without discussing whether the restriction had prejudiced the defendant. But the Court's decision expressly disclaimed any ruling on lesser or different types of restrictions. *Id.* ("We need not reach, and we do not deal with limitations imposed in other circumstances.").

Perry considered whether a defendant's right to the assistance of counsel was violated by a trial court's order prohibiting him from talking to anyone—including his attorney—during a 15-minute break between his direct testimony and his cross-examination. 488 U.S. at 274. The court reasoned that the order did not resemble that in *Geders*, because it had the effect mainly of preventing the defendant from discussing one thing—his ongoing testimony—rather than preventing consultation on the entire "variety of trial-related matters" that might be discussed "in the context of a long recess." *Id.* at 284. Unlike the order in *Geders*, the order at issue in *Perry* therefore did not violate the defendant's Sixth Amendment rights at all. *Id.* Although the

question of prejudice was therefore not at issue, *Perry* stated that a citation to *Geders* in *Strickland v. Washington*, 466 U.S. 668, 692 (1984), "was intended," in "context," "to make clear that '[a]ctual or constructive denial of the assistance of counsel altogether' is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." 488 U.S. at 280.

Those cases provide no basis for a COA here. Petitioner's contention that *Geders* itself involved structural error is insufficient as an initial matter because no reasonable jurist could view *Perry*'s dicta characterizing *Geders* as clearly established law for purposes of section 2254(d). *See Woods*, 575 U.S. at 316 ("'clearly established Federal law' for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions.'").

But even if *Perry* might be seen as establishing that violations of *Geders* are structural error, the district court correctly recognized that petitioner faced another, insurmountable problem: No reasonable jurist could view either case as holding that limited topical restrictions on discussions with counsel are included in the *Geders* rule. *Geders* explicitly limited its analysis to the lengthy and complete restriction that that case concerned. *See supra* p. 14. And *Perry* held that a different and lesser restriction was not covered by *Geders* at all. *See id*. Unlike the defendant in *Geders*, petitioner was able to confer with his attorney about nearly everything in the trial. And with respect to Flores in particular, petitioner had access to Flores's entire interview with the police and

could discuss Flores's testimony with his lawyer as it happened. The only thing petitioner's lawyer could not share was a single five-page declaration. Pet. App. 65; D. Ct. Dkt. 39 at 2-6; D. Ct. Dkt. 39-8 at 175. Given the limited nature of the restriction here, neither *Geders* nor any other decision by this Court could be read as squarely foreclosing a case-specific inquiry into prejudice. Indeed, when the state court of appeals eventually compared Flores's unsealed declaration, *see* Pet. App. 121 n.6, with the other documents petitioner had and the cross-examination petitioners' counsel conducted, that court was able to conclude that no prejudice occurred. *See id.* at 120.[5]

3. Petitioner argues that the contrast between the California Supreme Court's decision denying him relief, and the earlier intermediate state appellate court's grant of relief establishes by itself that he was entitled to a COA. Pet. 3-5. But a state court that decides a direct appeal is answering a different question than federal courts must answer under AEDPA. State courts may resolve an issue based on dicta from this Court, extensions of this Court's precedent, or the reasoning of other lower courts, as the intermediate state appellate court did here. *See* Pet. App. 77 (acknowledging that "[t]he

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[5] Petitioner erroneously implies that the State sought to prohibit his appellate counsel from sharing the declaration with him while the case was on remand to the state court of appeals. Pet. 8. As the district court opinion explains, the State simply argued that it was not necessary to vacate the trial court's prior orders because when the documents were unsealed they became available to anyone and no limits were imposed upon who could view them or discuss them. Pet. App. 12.

United States Supreme Court has not expressly considered whether *Geders* involved a structural defect or a trial error,*"* and relying on *Perry*'s dicta instead); *id.* at 69 (acknowledging that *Geders* did not "involve[] an order preventing an attorney from talking with a defendant about a part of the evidence"). Such reasoning would not, however, allow a reasonable jurist to conclude that federal habeas relief is available under section 2254(d). *See supra* pp. 11, 15. Nor can it show that the district court's "application of AEDPA to petitioner's constitutional claims" was debatable for purposes of the COA inquiry, without a holding from this Court that at least arguably constitutes clearly established law.

Petitioner argues that the denial of a COA here results in "at least an implicit split in Circuit authority." Pet. 5. In support, petitioner cites decisions by the Fifth and Seventh Circuits. Neither decision, however, supports his argument. The first case, *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011), stated that "[w]hen a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine." But *Jones* made that statement in the context of discussing a Confrontation Clause claim for which the governing Supreme Court test was established. *See id.* at 1044. The lower court judges' disagreement about how to apply that test to the facts of the case was a strong indication that reasonable judges could differ as to whether the state court's application was in fact unreasonable. *See generally id.* The Fifth Circuit cited

Jones approvingly in *Rhoades v. Davis,* 852 F.3d 422, 429 (5th Cir. 2017). But that case did not purport to require a certificate of appealability where the state-court jurists' disagreement as to the ultimate constitutional issue was based on reasoning that is not available to a federal habeas courts under AEDPA. Nor would such a principle be compatible with this Court's recognition that the COA requirement is intended to provide "differential treatment for those appeals deserving of attention from those that plainly do not." *Miller-El*, 537 U.S. at 337.[6]

4. Petitioner also asserts (Pet. 16-17) that the California Supreme Court's decision about how to analyze prejudice conflicts with various other lower courts' decisions. But those decisions do not constitute clearly

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[6] The circumstances of this case are not comparable to those that led three members of this Court to conclude that a COA should have been issued in *Jordan v. Fischer*, 135 S. Ct. 2647, 2648 (2015) (Sotomayor, J., dissenting from denial of certiorari). In *Jordan*, judicial disagreement about the claims at issue was not limited to state-court judges' differing views about how to resolve the case on direct appeal; a Fifth Circuit judge applying AEDPA's clearly established law requirement had also stated that the claims were debatable in his dissent from the denial of the COA. *Id.* at 2650, 2651; *see id.* at 2651 (comparing the Fifth Circuit's disposition of the case to the Third Circuit rule granting COA if any judge on the panel believes the standard is met). Here, in contrast, no federal judge has indicated that petitioner's claim is even debatable under AEDPA. More fundamentally, the state and federal judges' disagreement with the denial of relief in *Jordan* was based on differing views of how this Court's clearly established law on the prosecutorial vindictiveness question at issue applied to the particular case. *See id.* at 2649, 2651 (citing *Blackledge v. Perry*, 417 U.S. 21 (1974)). Here, this Court has not clearly established a rule to govern limited topical restrictions on discussions with counsel; the lower court's disagreement is about how to extend this Court's reasoning and dicta. *See supra* pp. 15-16.

established Supreme Court authority for purposes of section 2254(d). *Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017) (per curiam). Nor do they imply that those jurists would have found this case debatable: Petitioner's cited cases are overwhelmingly state-court decisions or federal-court decisions on direct appeal, which would not have required the examination of clearly established Supreme Court precedent that AEDPA requires here.[7]

The two federal habeas cases that petitioner cites likewise do not show that jurists of reason might debate whether the AEDPA standard could provide relief for the sort of limited topical restriction on communication at issue in petitioner's case. In *Jones v. Vacco*, 126 F.3d 408 (2d Cir. 1997), the Second Circuit granted habeas relief where a defendant was forbidden to consult his attorney about "*anything*" over an overnight recess during his cross-examination. *Id.* at 411 (emphasis added). The restriction was thus all-encompassing, like the one in *Geders*. *Id.* at 416. And in *Moore v. Purkett*, 275 F.3d 685 (8th Cir. 2001), the Eighth Circuit held that there was structural error from a complete denial of counsel where the trial court prohibited a defendant from quietly speaking with his attorney during the entire trial. *Id.* at 687. The defendant was told to consult in writing but could not write well

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[7] Petitioner is also incorrect to state that his cited precedents held that "per se reversible error" occurs whenever the trial court prohibits "discussion of a trial-related subject." Pet. 16. The cases petitioner cites all concerned prohibitions on the defendant's discussion of *his own testimony*, or blanket prohibitions on discussing the case at all. *Id.* at 16-17. They say nothing about restrictions on discussion of a single subject that is not the defendant's own testimony.

enough to do so. *Id.* at 687, 689. The restriction in *Moore* thus effectively prevented counsel and the defendant from effectively communicating as to any topic during the proceedings. The circuit court decisions in *Moore* and *Jones*—like this Court's decisions in *Geders*—concerned restrictions vastly different from the one in petitioner's case. They provided no basis for a COA below and provide no basis for certiorari now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: March 8, 2021

Respectfully submitted,

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