No. 19-

IN THE

Supreme Court of the United States

WILLIAM JOVIAN DAVIS,

Petitioner,

v.

CLARK E. DUCART, Warden,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

AMY KARLIN
Interim Federal Public Defender
MICHAEL T. DRAKE
Counsel of Record
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
(213) 894-5355
michael_drake@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Petitioner William Davis asked the federal district court for an evidentiary hearing to prove that his state-appointed counsel, since disbarred, was constitutionally ineffective at his attempted murder trial because he failed to present a gun expert to prove the underlying shooting accidental. But the district court denied a hearing, faulting Davis—indigent, pro se, and in prison—for failing to support *his* claim with the opinion of an expert. Without analysis, the Ninth Circuit denied a certificate of appealability on whether this was an abuse of discretion—effectively holding that the district court's judgment was "not even debatable." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017).

Did the Ninth Circuit's unreasoned denial so clearly misapply *Buck*'s modest standard as to call for summary reversal?

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PETITION FOR WRIT OF CERTIORARI

"Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Hinton v. Alabama*, 571 U.S. 263, 273 (2014). Other cases will arise in which this Court "ha[s] no difficulty concluding that a COA should have issued." *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). Other cases still will arise when a lower court's rejection of a petitioner's allegations "departs in so stark a manner" from the governing standard as to call for summary reversal. *Erickson v. Pardus*, 551 U.S. 89, 90 (2007).

This case fits all three bills.

Davis's court-appointed trial attorney knew nine months before trial that forensic evidence would be critical to the defense. And he said so during jury selection. But he failed to call an expert, squandering the chance to present powerful forensic evidence that could have effectively rebutted the prosecution's own expert and built a compelling case for Davis's innocence besides.

On a "straightforward application of [this Court's] ineffective-assistance-of-counsel precedents," *Hinton v. Alabama*, 571 U.S. 263, 272 (2014), the omission rendered his attorney's assistance constitutionally ineffective under *Strickland v. Washington*. 466 U.S. 668 (1984). Yet the Ninth Circuit denied even a certificate of appealability ("COA") on whether Davis should have received an evidentiary hearing in district court. In doing so, the panel could only have relied on a "dismissive and strained interpretation of [Davis's] evidence." *Miller-El v. Cockrell*,

537 U.S. 322, 344 (2003). The Court should grant Davis's petition and summarily reverse.

OPINIONS BELOW

A Ninth Circuit panel affirmed in a memorandum disposition reported at 765 F. App'x 312 (9th Cir. 2019), and reproduced at App. 2–3. The remaining orders and opinions entered in the case are unreported, but reproduced beginning at App. 1–81.

JURISDICTION

The Ninth Circuit affirmed on April 5, 2019. (App. 2–3.) It denied Davis's petition for panel rehearing and rehearing en banc on May 30, 2019. Justice Kagan extended Davis's deadline to petition for certiorari, from August 28, 2019 until October 27, 2019, No. 19-A166, making the petition due on October 28, 2019. Sup. Ct. R. 30(1). The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to … have the assistance of counsel for his defense.

The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Subsection (c) of 28 U.S.C. § 2253 provides:

> **(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).

Finally, 28 U.S.C. § 2254 provides in pertinent part:

> **(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.
>
> **…**
>
> **(e)(2)** If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
>
> > **(A)** the claim relies on--
> >
> > > **(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> **(ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> **(B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE[1]

A. The shooting

Davis was outside his uncle's house one evening when across the street he saw Thomas Mason, an acquaintance. Mason agreed to give Davis a ride to another house a couple of blocks away.

Once there, Davis went up to the house while Mason waited in the car at the wheel, engine running. When Davis returned to the car, he shot Mason. Mason would later claim it was intentional, and that after shooting him Davis took $140 from his pants pocket. But Davis would deny the theft and maintain the shooting was an accident—that he'd fumbled a cocked gun given to him by a friend at the house, which went off inside his sweatshirt pocket as he got back in the car. Whether an intended shooting or just a freak accident, the bullet hit Mason in the neck, leaving him permanently paralyzed.

B. The charges

The state charged Davis with robbery and attempted murder. But Davis had been a member of a gang, and was thought still to be one. So the state also alleged that Davis had committed both crimes "for the

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[1] Unless otherwise noted, the facts in this section are as stated in the factual and procedural background recited in the California Court of Appeal's opinion. (App. 54–58.)

benefit of" his gang, "with the specific intent to promote, further or assist in any criminal conduct by gang members," under California's gang enhancement. Cal. Penal Code § 186.22(b).

C. At the preliminary hearing, Mason testifies that the gun could not have accidentally gone off in Davis's jacket pocket.

In his preliminary hearing testimony, Mason described the moments immediately leading up to and after the shooting this way: After briefly dropping Davis off at a house a couple of blocks away from Davis's uncle's house, Mason turned the car around. Davis returned, got back in, sat down, closed the door with his right hand, then "immediately" pulled a gun with the same hand, pointed it at Mason's head, and fired. (Reporter's Tr. ("RT") 11, 23.) From Davis's reentry until the shot was a matter of seconds. (RT 25.) After the shot, Davis went through Mason's pockets, took the money, and left. (*Id.*)

Asked by Davis's trial counsel William McKinney whether the shot could have been fired accidentally, from inside the pocket of Davis's sweatshirt, Mason replied, "Never." (RT 911.)

D. Two months later, the LAPD crime lab determines that a shot was fired through Davis's jacket pocket.

But two months after the preliminary hearing, the LAPD had criminalist Carole Acosta examine Davis's jacket. (RT 1523, 1544.) She looked at the gunshot holes in the jacket (RT 1528–33), and tested the jacket for gunshot residue ("GSR")—the residue from the propellant, primer, metal fragments, and lubricant ejected when a gun is fired. (RT 1525.)

Though she said she had no way to tell when it happened (RT 1534–35), she had "absolutely no doubt" that a revolver was fired from inside the jacket pocket (RT 1548).

E. At trial, McKinney stresses the importance of forensic evidence in the case, but calls no defense expert.

At jury selection, McKinney told jurors that the defense would "rely heavily" on scientific evidence in the case—evidence that he expected would be "inconsistent" with Mason's testimony. (RT 91.)

When Mason testified, he provided some more detail about the shooting: The distance between Mason and Davis while seated in the car was less than 18 inches shoulder-to-shoulder. (RT 692, 2475.) Also, while waiting for Davis, Mason had his hands on the wheel and was facing North, but turned to face Davis as he got back in the car. (RT 665.)

The jury also heard from Mason's treating physician, David Allen Duarte. Duarte said Mason presented with two penetrating wounds, one each on either side of his neck. (RT 1803.) Duarte conveyed that the wounds were "almost" level or parallel, both slightly behind the ear. (RT 1809.)

Acosta (the LAPD criminalist) testified about the results of her examination of the jacket, stating as she had in her report that the gun had been fired from inside the sweatshirt right pocket. (RT 1534.) On cross, she testified that if the shot was fired without any barrier from

within two feet, one might expect to see GSR and stippling[2] around the injury. (RT 1574.) She agreed that Mason's gun-fall-and-grab scenario could be consistent with the evidence she examined. (RT 1552.) And she noted that the GSR patterns she found could have been caused by a gun pointed at someone through the jacket. (RT 1554–55.)

McKinney didn't ask Acosta whether GSR testing on the interior of the car or Mason's clothes would have been pertinent. He did not challenge her estimate of a two-foot stippling range. He did not ask her what effect firing a gun through a sweatshirt barrier would have had on GSR dispersal. And he did not ask Acosta or Duarte whether the evidence they'd examined was consistent with the bullet path entailed by Mason's version of events.

Finally, Davis testified in his defense, stating that on the day of the shooting he'd been over at his uncle's watching a basketball game when a friend called him and asked him to help get rid of a gun his parents had found out about. (RT 2180.) When Davis got the gun from the friend (while Mason was waiting back in the car), Davis noticed that the hammer was cocked, but didn't know how to uncock it, so he just put it in his sweatshirt pocket. He realized that this was reckless. (RT 2437.) When he returned and opened the passenger door of Mason's car to get back in, he felt the gun starting to slip. As he fumbled for it, it accidentally went off. After recovering from the momentary shock, he got into the car check Mason's condition. (RT 2125.) Davis

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[2] Stippling marks are small indentations or dot-like patterns around the impact area of the bullet, caused by the unburned and partially burned particles discharged from a gun when it's fired. (RT 1547.)

called out Mason's name and shook him, but Mason didn't respond, and Davis fled in a panic, thinking he'd killed him.

In argument, the prosecutor responded to the uncontested evidence that a gun had been fired through the jacket by arguing that Davis could have fired the gun later, when he thought up an alibi. (RT 2738.)

The jurors began deliberating immediately after argument (Clerk's Tr. ("CT") 113), and then had a three-day weekend to think about the case. They'd been unusually active during the eight days of trial, having "asked more questions than all the juries [the judge] ha[d] presided over and … argued in front of [over] forty years." (RT 2478.) Upon returning from the long weekend, deliberating for a little over three hours in the morning and into the afternoon (CT 113, 172), and requesting a read-back of portions of Davis's testimony (CT 112), the jury found him guilty on both counts, and found the gang and gun enhancements true. Four months later, Davis was sentenced to 65 years to life. (RT 4212.)

F. State review proceedings elicit a split decision, but no relief.

On direct appeal, Davis challenged (among other things) the constitutional sufficiency of the evidence to sustain the jury's gang enhancement finding under *Jackson v. Virginia*, 443 U.S. 307 (1979). The California Court of Appeal affirmed in a reasoned opinion. But one justice dissented, stating that the record was "devoid of evidence" to

support the enhancement. (App. 75.) The California Supreme Court denied review on May 16, 2012, though with one justice of the opinion that review should have been granted. (App. 52.)

Davis then pursued additional claims in a full round of state habeas proceedings while pro se. These included a claim under *Strickland v. Washington*, 466 U.S. 668 (1984), that McKinney had been constitutionally ineffective by failing to have the interior of the car tested for GSR and otherwise present a forensic expert to fully develop the defense theory that the gunshot was accidental.

In the last reasoned state court decision on this claim, the Los Angeles County Superior Court denied relief in a single sentence, stating that Davis failed to address "other evidence" that suggested the shooting was intentional.[3] (App. 51.) The court did not say what this other evidence was, or address how it would have fared in the light of the evidence Davis sought to develop. The California Court of Appeal and Supreme Court summarily denied relief as well, the latter on September 18, 2013. (App. 50.)

G. Federal review proceedings

In federal district court, Davis filed a pro se amended habeas petition raising (among other claims) the *Jackson* and *Strickland* claims just mentioned. (App. 82.) Davis separately requested an evidentiary hearing to prove his *Strickland* claim, noting that forensic testing was

[3] Davis's superior court habeas petition was not lodged in district court record.

critical because the only evidence that the gunshot was intentional was Mason's testimony. (ECF No. 43.)[4]

The district court denied a hearing (ECF No. 44), denied relief (App. 8–9), and denied a certificate of appealability ("COA") (App. 10). While noting Davis's *Strickland*-related argument that testing of the car interior could have proven the shooting accidental, the court stated that there could be "no benefit" to testing the car's interior because there was "no dispute" that a gun was fired "in" it. (App. 37.) The court also faulted Davis—then still indigent, pro se, and in prison—for failing to "provide[] the opinion of an expert" to support his claim. (*Id.*)

A Ninth Circuit motions panel granted a COA on Davis's *Jackson* challenge to the gang enhancement, and appointed counsel. In addition to briefing the *Jackson* claim, Davis provided 20 pages of argument that the COA be expanded to include Davis's *Strickland* claim. Ninth Circuit Rule 22-1(e). The Warden did not dispute that in doing so Davis had made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Ten months after the parties completed briefing, the assigned panel affirmed, without oral argument, in a boilerplate memorandum disposition. (App. 2–3.) It likewise denied Davis's request for a COA, again without analysis. (App. 3.)

The panel and the Ninth Circuit en banc denied rehearing. (App. 1.)

This petition follows.

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[4] All ECF citations are to the district court docket.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's denial of a COA so clearly misapprehends the governing standard as to call for summary reversal.

The threshold for a certificate of appealability is very low—as the Court has had to remind lower federal courts from time to time. *See Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003); *Tennard v. Dretke*, 542 U.S. 274, 289 (2004); *Banks v. Dretke*, 540 U.S. 668, 705 (2004); *Buck v. Davis*, 137 S. Ct. 759, 767, 780 (2017); *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (per curiam). *See also McGee v. McFadden*, 139 S. Ct. 2608, 2611 (2019) (Sotomayor, J., dissenting from denial of certiorari), *reh'g denied,* No. 18-7277, 2019 WL 4923611 (U.S. Oct. 7, 2019).

Davis is entitled to one if he makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do that, he needs to show that at least one reasonable jurist could "disagree with the district court's resolution of his constitutional claims," or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). In a word, his claim just needs to be "debatable" *id.* at 774—a modest standard he can meet even if "every jurist of reason might agree [he] will not prevail," *id.*

But review of Davis's claim is yet more forgiving because it was aimed not at winning ultimate relief but at securing an evidentiary hearing. He is entitled to one if he (1) adequately "develop[ed] the factual basis of [his] claim in State court," 28 U.S.C. § 2254(e)(2), (2) satisfies one of the conditions that mandate an evidentiary hearing under *Townsend v. Sain,* 372 U.S. 293 (1963), and (3) state a colorable

claim—that is, alleges facts that "if proven, would entitle him to federal habeas relief" under AEDPA's deferential standards. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

That Davis meets these relatively modest requirements is easily debatable. Because the Ninth Circuit panel's contrary, unreasoned denial "departs in so stark a manner" from the modest standards that governed Davis's request, *Erickson v. Pardus*, 551 U.S. 89, 90 (2007), and because the circumstances here further call into question the integrity of the proceedings below, the Court should grant certiorari review and summarily reverse.

A. The Ninth Circuit's COA denial is clearly wrong.

1. Davis adequately developed his claim in state court.

To start, Davis adequately "developed" his claim under § 2254(e)(2) "unless there is lack of diligence, or some greater fault, attributable to [him]." *Williams v. Taylor*, 529 U.S. 420, 432 (2000).

No court below has suggested that. Nor could the suggestion be sustained. Having presented his claim to the California courts, Davis "never reached the stage of the proceedings at which an evidentiary hearing should be requested." *Horton v. Mayle*, 408 F.3d 570, 582 n.6 (9th Cir. 2005) (noting that California habeas courts "determine[] whether an evidentiary hearing is warranted only after the parties file formal pleadings, if they are ordered to do so"). So any failure to adequately develop the facts in state court cannot be attributed to him.

2. It's at least "debatable" that Davis satisfies one of the *Townsend* factors.

Townsend enumerates six circumstances that trigger a mandatory evidentiary hearing.[5] *Townsend v. Sain,* 372 U.S. 293 (1963). The Ninth Circuit has held, however, that after AEDPA, a hearing is required under *Townsend* "where the petitioner establishes a colorable claim for relief" that would satisfy AEDPA's deferential standards but that "has never been afforded a state or federal hearing on this claim." *Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005); *accord Hurles v. Ryan*, 752 F.3d 768, 791 (9th Cir. 2014). The point of law is thus at least debatable.

Since reasonable jurists could likewise debate whether Davis's *Strickland* claim is colorable, *see infra* Part 3, and since he's never been afforded a state or federal hearing on it, it is at least debatable that he satisfies one or more of the *Townsend* factors.

3. It's at least "debatable" that Davis's *Strickland* is colorable.

Davis alleged in district court that despite being on notice months before trial that his theory at trial would be that the gun was accidentally discharged (ECF No. 43 at 3), Davis "failed to investigate and fully develop" facts in support of this defense (App. 83), by failing to

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[5] "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Townsend*, 372 U.S. at 313.

have the interior of Mason's car tested for GSR (App. 83–87; ECF No. 43 at 3), and by failing to put on a defense expert to present relevant findings to the jury (App. 87). Had McKinney done so, he would have been able to prove to the jury that there was no GSR in the interior of the car. (ECF No. 43 at 3.) This would have "rebut[ted] the prosecut[ion] theory" that the gunshot was intentional. (ECF No. 41 at 57.) The results of the expert's analysis thus would have addressed "the crux" of the case: Did Davis "pull a gun out aimed head[-]level" at Mason? (ECF No. 41 at 57.) Or did the gun instead "accidentally discharge in his sweatshirt pocket as he was entering Mason's car"? (*Id.*)

These allegations, if proven, would entitle Davis to relief under *Strickland*.

a. McKinney's failure to consult with an expert was unreasonable because he knew that forensic evidence was pivotal to the defense.

Though McKinney enjoys a strong presumption of competence, that presumption is overcome if he failed "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). And when a state expert's conclusions are at the core of the prosecution's case, effectively rebutting that kind of evidence "require[s] a competent expert on the defense side." *Hinton v. Alabama*, 571 U.S. 263, 273 (2014).

Here, McKinney knew how pivotal gun forensic evidence would be at trial—because he himself told the venire that the defense case would "rely heavily" on it. (RT 91.) And given McKinney's questions to

Mason at the preliminary hearing (RT 24), he knew about the centrality of this evidence nine months before trial. This increased McKinney's duty to consult an expert. *Hinton*, *supra*. But he never did.

McKinney tried to make lemonade out of these lemons by pointing out to the jury that the prosecutor had an opportunity to do GSR tests on the interior of the car and failed to do so. (RT 621.) But that only left Davis vulnerable to the riposte that if such testing would have turned up any favorable evidence, his lawyer surely would have presented it. After all, jurors would expect that it was McKinney's job to investigate the things he thought were important to the defense. And they'd be right.

But McKinney's failure to consult an expert showed in other ways too. For example, while the LAPD's criminalist Carol Acosta provided some potentially helpful information about the GSR inside Davis's jacket, she also made other statements that weren't helpful—or accurate. Had McKinney consulted an expert, he could have effectively rebutted these statements. *See infra* Part 3.b. Worse, his failure to consult with an expert led him to overlook several other lines of attack on the prosecution's theory that could have been developed. *See id*. His failure to push back on Acosta and rely wholly on the evidence she happened to have on offer "demonstrated his lack of expertise." *Duncan*, 528 F.3d 1222, 1235 (9th Cir. 2008) (saying same of attorney's ignorance of serology); *accord Sims v. Livesay*, 970 F.2d 1575, 1580 (6th Cir. 1992) (holding that defense counsel's failure to have own expert

examine quilt that FBI suggested had been intermediate object between gun and victim, contrary to prosecution's theory, "cannot be characterized as a reasonable").

His omissions were therefore unreasonable—and were to have catastrophic results.

b. McKinney's unreasonable omission prejudiced Davis's defense by squandering decisive lines of scientific evidence to prove the defense theory.

A suitable expert would have been able to present relevant, compelling evidence in at least three main areas.

The first is the one Davis himself anticipated in his pro se pleadings: GSR testing. As he pointed out, GSR testing on the interior of the car could have determined that there was less of it on the interior than would be expected had the gun been fired inside the car without the jacket blocking it.

For one thing, a shot from outside the car with the door open would result in less GSR inside the car, since more of the particulate matter would have been dispersed into the open air. For another, it's likely that Davis's jacket would have "trap[ped] virtually all the flake powder[,] soot[,] carbon[—]everything" that would have otherwise been expelled from the gun. *Sims v. Livesay*, 970 F.2d 1575, 1580–81 (6th Cir. 1992) (capitalization modified) (describing expert testimony relied upon in granting relief for *Strickland* violation). An expert could have confirmed that this difference in expected GSR was significant.

Much the same goes for GSR testing on the exterior of Mason's clothing, naturally.[6] But GSR testing inside his pants pockets could have provided additional, critical evidence: If Davis had shot Mason and then gone through "all" of his pockets (RT 668), any GSR deposited on his hand from the gunshot should have been transferred to the inside of the pockets. *See United States v. Stafford*, 721 F.3d 380, 395 (6th Cir. 2013) (noting reliability of prosecution expert's testimony that there can be inadvertent transfer of GSR to suspect's hands). If none had been detected, that could have been significant evidence that Davis did not reach into them with his hands.

The second type of evidence that a gun expert might have been able to develop relates to the lack of stippling. Defense counsel elicited from Acosta that stippling would be expected when a gun is fired from within two feet of the impact area. (RT 1547.) But an independent defense expert could have established that Acosta's estimate was too conservative—that stippling can occur when a gun is fired from as far as three feet. *Williams v. Holley*, 764 F.3d 976, 980 (8th Cir. 2014) (describing prosecution evidence). That established, it would have been much harder for a juror to believe that Davis managed to shoot Mason while the two sat within 18 inches of him (RT 690, 2475) without a hint of stippling.

[6] There was no testimony about whether any such testing had been done.

The third and final type of evidence would have created still other problems for the prosecution's theory: an analysis of the bullet's *trajectory*. There are clear indications in the record that such an analysis would have been devastating to the prosecution's theory.

To begin with, trial testimony established that the entrance and exit wounds on either side of Mason's neck were "almost" level or parallel. (RT 1809.) Assuming that's correct, the actual bullet path would have been roughly perpendicular to Mason's line of sight and level with the ground.

That fact alone almost certainly rules out Mason's testimony that he was looking to the right when Davis shot him (RT 666)—because with Davis seated in the passenger seat holding the gun in his right hand, there is just no plausible way for the shot fired to have traveled along the actual bullet path. *See* **Figure 1**, left.

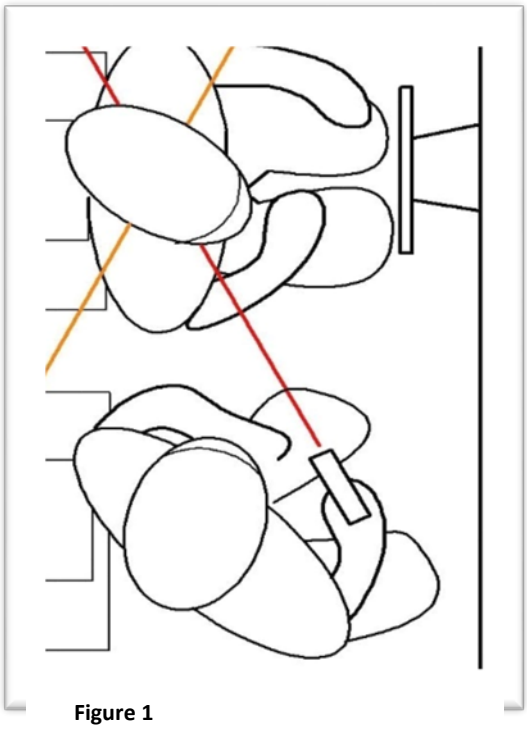

Figure 1

But even if Mason was looking straight ahead, his story would still have insurmountable problems. Again, with Davis firing from his right side as Mason testified, the actual and hypothetical bullet paths still won't line up. *See* **Figure 2**, right.

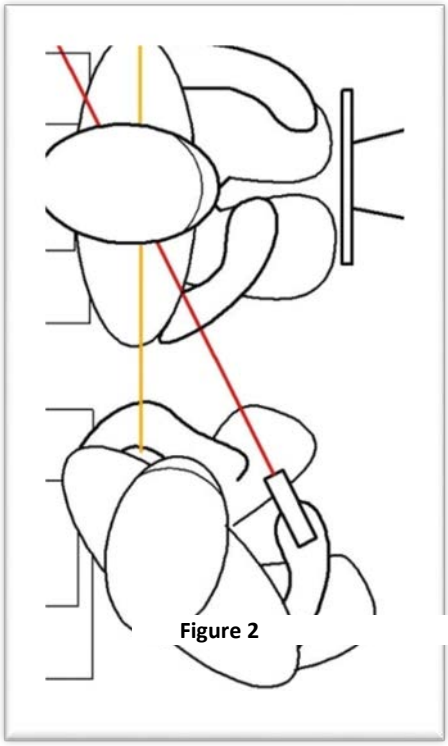

Figure 2

The only way they'd line up on the prosecution's theory is if Davis had raised the gun up and around toward his left, holding it sideways or upside down, with his wrist bent back. But not only is that position awkward and unlikely; it would mean that the muzzle would have been inches from Mason's neck when the gun went off, *see* **Figure 3,** left. —well within the range likely to have caused stippling on Acosta's own, conservative assumptions. (RT 1547.)

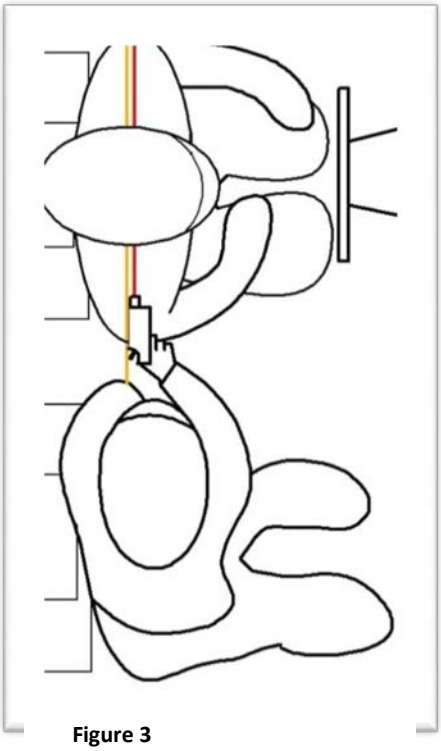

Figure 3

By contrast, once it's assumed that Davis was *outside* the car, fumbling with the gun at roughly hip level, these discrepancies are resolved. The

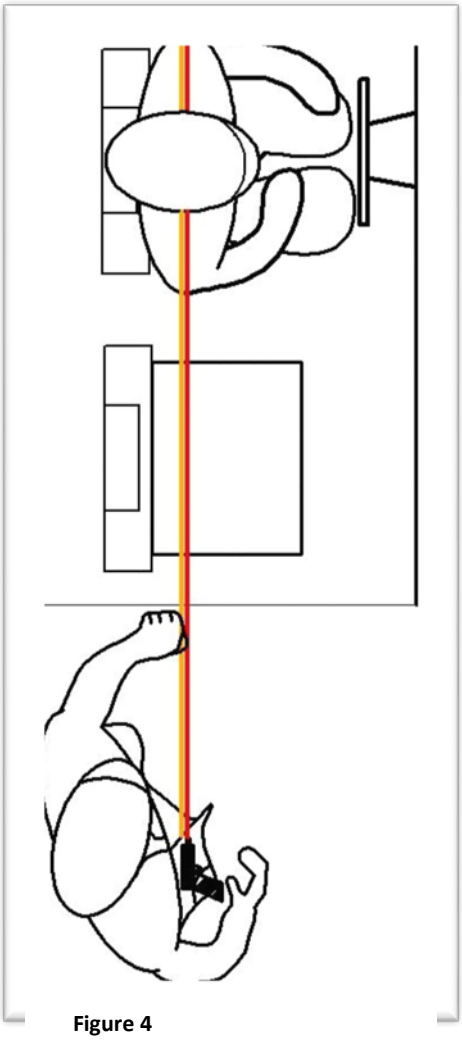

Figure 4

gun is in a natural position. The bullet path would result in the symmetrical wound described in the record. And the distance and sweatshirt barrier would explain the absence of stippling *See* **Figure 4**, left.

In sum, a defense expert could have explained to jurors why Davis's version of events is the "only reasonable and non-speculative interpretation" of the forensic evidence. *Duncan*, 528 F.3d 1222, 1242. More than just eliciting reasonable doubts, then, this demonstration would have added up to a compelling demonstration of Davis's factual innocence.

This in turn would have contradicted Mason's version of events—for which there was already ample room for doubt: his erroneous testimony that the gun was an automatic (RT 691); the lack of any evidence that his pockets had been turned inside-out; and his failure to mention the robbery when first asked why the shooting occurred.

Even his supposed certainty about even seeing a gun at all was a product of the prosecutor's leading questions:

Q Did you see [Davis] pull out a gun … ?

A Yeah, I saw a gun come out with a fast—it was a fast motion.

Q Do you remember seeing a gun, or do you remember seeing a flash? Or do you remember both?

A Probably—probably both. But to my knowledge, it was mostly … a very bright flash.

Q And … did you see the gun in his hand? …

A I just remember from the right, it was from the right side, where I saw the bright flash.

…

Q And then do you actually see a gun, or do you just see a bright flash?

A Seen like a bright flash.

Q And could you actually see the gun?

A I think I—I'm almost positive I did.

Q And when you say you're almost positive, what do you mean?

A It's positive that what I saw was a gun with a bright flash.

(RT 666–67.)

While it's easy to see why jurors would have overlooked these inconsistencies in the testimony of a young man trying to make sense of a profoundly traumatic event in his life, jurors' faith in his version of events would have dissipated, and the prosecution's case with it, if test results and expert testimony had shown that events could not have transpired the way Mason recalled.

Taking Davis's allegations as proven, then, *Schriro*, 550 U.S. at 474, there is at least a reasonable probability that given the new evidence, "at least one juror would have harbored a reasonable doubt" about an essential fact. *Buck*, 137 S. Ct. at 776.

c. AEDPA does not bar relief.

"Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." *Schriro*, 550 U.S. at 474. Under AEDPA, Davis cannot obtain habeas relief unless the state court's adjudication of his claim on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the [Court]," § 2254(d)(1), or the relevant state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). In reviewing Davis's claim under AEDPA, the Court "look[s] through" the state supreme court's silent denial to the last reasoned decision, *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)—here, the superior court's order denying relief.

In that decision the state court disposed of the Davis's *Strickland* claim in a single sentence: "[Davis] fails to address other evidence which indicated an intentional act and not an accident." (App. 51.)

Because this analysis does not "reach" *Strickland*'s first prong, review of it is de novo. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

The analysis contravenes or unreasonably applies *Strickland*'s second prong, first by treating *Strickland* prejudice standard as if it were a sufficiency-of-the-evidence test, *cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995), and second by ignoring the reasonably probable effect of Davis's allegations on the unspecified evidence that the court said he'd "fail[ed] to address" (App. 51).

The state court also either unreasonably applied *Strickland* or unreasonably determined the facts relevant to it in two other ways. First, far from "fail[ing] to address" the other evidence (App. 51), Davis specifically noted Mason's testimony in the last bit of space remaining on the habeas petition form (App. 90)—the obvious import in context being that new evidence, if developed by an expert, would tend to disprove that testimony (*see id.*). Second, the state court's denial of relief without giving Davis access to an expert so that he could adequately develop the facts of his claim rendered the court's fact-finding defective, so that "any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004).

AEDPA thus poses no bar to relief.

On de novo review, because nothing about Davis's *Strickland* claim was "insubstantial." *Schriro*, 550 U.S. at 475; because nothing in the record refuted his factual allegations, *id.* at 474; and because nothing at all suggests that Davis "could not develop a factual record that would entitle him to habeas relief," *id.* at 475, this Court should have "no difficulty concluding that a COA should have issued." *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). That the Ninth Circuit refused one "is as inexplicable as it is unexplained." *Felkner v. Jackson*, 562 U.S. 594, 598 (2011). For this reason alone, the Court should summarily reverse. *Id.*

B. Minimal review here can avert a fundamental injustice and check the integrity of the proceedings below.

Indeed, this Court "has not shied away" from summarily deciding even "fact-intensive cases" where, as here, lower courts have "egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing cases) (summarily reversing upon holding that prosecution suppressed evidence in violation of due process).

While the misapplication here is just as egregious, the intensity of review is far more "limited," given the COA context. *Buck v. Davis*, 137 S. Ct. 759, 774 (2017); *accord Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Even a cursory review of just the district court's brief analysis, the points in this petition, and any response the Warden may provide, should make it manifest that the district court's decision is at least "debatable." Merits review of the claim can then be left to the lower court.

The minimal effort would be worth it, not just to avert the fundamental injustice of perpetuating the life sentence of a possibly innocent young man, but also to check the integrity of the proceedings below.

"[A] number of judges have suggested that unpublished opinions are breeding grounds for abuse." David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 Wash. & Lee L. Rev. 1667, 1684 (2005). These include Justice Thomas, who in his *Plumley v. Austin* dissent noted the "disturbing" prospect that a circuit panel had opted not to publish 39-page opinion written over dissent in order to "avoid creating binding law." 135 S. Ct. 828, 831 (2015).

The panel decision here presents a similarly disturbing prospect. To start, the unusual seriousness of Davis's certified *Jackson* claim could not have escaped the panel's notice: The issue had elicited a dissent in the court of appeal explaining why the record was "devoid of [supporting] evidence" on the gang enhancement. (App. 75.) A justice of the state supreme court also called for review. (App. 52.) And Davis highlighted both facts in his briefing.

But then there was also the fact that after briefing was complete, the Ninth Circuit issued a decision that should have been controlling on the issue. *Maquiz v. Hedgpeth*, 907 F.3d 1212 (9th Cir. 2018) (holding that California court had unreasonable rejected *Jackson* challenge to gang enhancement, where finding was based on gang officer's theory that robberies in general "benefit" gang by making people fear it).

Yet despite these factors, the panel opted to dispose of the case in an unpublished disposition, without argument, and without a word of substantive analysis. This leaves it difficult to rule out that the panel succumbed to the incentives Justice Thomas identified, and "intentionally cho[se] to duck some inconvenient issues." 62 Wash. & Lee L. Rev. at 1689.

There is no reason to think the panel's approach in denying Davis's COA request was any different. This is particularly troubling in a case that involves a potentially catastrophic misuse of forensic evidence at trial. As the Court noted in *Hinton*, "[s]erious deficiencies have been found in the forensic evidence used in criminal trials," with invalid forensic testimony contributing to convictions in 60% of exoneration

cases analyzed in one study. *Hinton*, 571 U.S. at 276. "This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses." *Id*. But it was maximized here, because McKinney didn't just fail to realize he could get a better expert, *cf*. *id*.; he failed to get any expert at all.

Unless the Court at least imposes a spot check in circumstances like these, the incentives to "engage in ad hoc decision-making and avoid accountability for so doing" will persist. 62 Wash. & Lee L. Rev. at 1680. The cost will be dwindling confidence in the fairness of the courts, an erosion of judicial accountability, the degradation of the COA process itself, and the perpetuation of wrongful convictions.

CONCLUSION

If the word "debatable" fits any case, it "surely fits" this one. *Banks v. Dretke*, 540 U.S. 668, 705 (2004). That the Ninth Circuit denied a COA would have been bad enough if Davis were facing only a few years in prison. That he faces life makes it intolerable. This Court should grant Davis's petition, reverse, and remand with instructions to assign a new panel to consider his claim afresh.

Respectfully submitted,

AMY KARLIN
Interim Federal Public Defender

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/s/ Michael T. Drake

MICHAEL T. DRAKE
Counsel of Record
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
(213) 894-5355
michael_drake@fd.org

Counsel for Petitioner