No. 19-6429

In the Supreme Court of the United States

WILLIAM JOVIAN DAVIS,

Petitioner,

v.

CLARK E. DUCART, WARDEN,

Respondent.

ON PETITION FOR A 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 should have granted a certificate of appealability to review the district court's denial of an evidentiary hearing on petitioner's claim of ineffective assistance of counsel.

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Davis v. Ducart, No. 16-56662, judgment entered Apr. 5, 2019 (this case below).

United States District Court for the Central District of California:

Davis v. Madden, No. CV 13-8179-GW (LAL), judgment entered Oct. 17, 2016 (this case below).

California Supreme Court:

In re Davis, No. S217201, judgment entered May 14, 2014 (state collateral review).

In re Davis, No. S211759, judgment entered Sep. 18, 2013 (state collateral review).

People v. Davis, No. S200913, review denied May 16, 2012 (direct appeal).

California Court of Appeal, Second Appellate District:

In re Davis, No. B254522, judgment entered Mar. 6, 2014 (state collateral review).

In re Davis, No. B248206, judgment entered May 6, 2013 (state collateral review).

People v. Davis, No. B227566, judgment entered Feb. 9, 2012 (direct appeal).

California Superior Court, County of Los Angeles:

In re Davis, No. BA354723, judgment entered Feb. 5, 2014 (state collateral review).

In re Davis, No. BA354723, judgment entered Mar. 29, 2013 (state collateral review).

People v. Davis, No. BA354723, judgment entered Sep. 20, 2010 (trial).

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STATEMENT

1. On March 12, 2009, petitioner William Davis asked Thomas Mason for a ride to his girlfriend's house in Los Angeles. Pet. App. A055. Mason was a promoter with celebrity clients and often carried large amounts of cash. *Id.* Mason gave Davis a ride and waited for him in the car while Davis went into the house. *Id.* When Davis returned, he got into the front passenger seat and fired a single gunshot shot into Mason's neck, immediately paralyzing him. *Id.* Mason remained conscious, however, and watched as Davis went through his pockets, took his money, and ran away. *Id.* Mason survived and identified Davis as the shooter. *Id.* at A055-A056. During their investigation, the police found a sweatshirt in Davis's car with Mason's blood on it. *Id.* at A056.

2. Davis was charged with attempted first degree murder and second degree robbery, with firearm and gang enhancements. Pet. App. A054. He testified in his own defense at trial and told the jury that he had agreed to help a friend dispose of a gun, which was loaded and cocked. *Id.* at A057. He said he did not know how to uncock it, so he put it in his sweatshirt pocket in the cocked position. *Id.* Davis testified that when he was re-entering Mason's car, the gun accidentally discharged and struck Mason. *Id.* Panicked, Davis fled the scene and threw the gun away; when police soon arrested him a few blocks away, he falsely told them he had nothing to do with the shooting. *Id.* Davis testified that he had not taken any money out of Mason's pockets. *Id.* at A058.

The prosecution's firearms expert testified that there was a hole in the right front pocket of the sweatshirt found in Davis's car. C.A. ER 242.[1] She performed gunshot residue testing on the sweatshirt and determined that a firearm was fired from inside the pocket. *Id.* at 246. The prosecutor's theory—presented to the jury during closing argument—was that Davis probably fired the gun at Mason while it was concealed in his jacket pocket. *Id.* at 397.

The jury convicted Davis as charged, and the trial court sentenced him to 78 years to life in prison. Pet. App. A054 n.1. The California Court of Appeal affirmed Davis's conviction, but reduced his sentence to 40 years to life on state-law grounds not at issue here. *Id.* at A070-A071. The California Supreme Court denied review. *Id.* at A052.

3. Davis filed a pro se habeas corpus petition in the state trial court, arguing that trial counsel was ineffective for not having the interior of the car tested for gunshot residue and not presenting testimony from a firearms expert that the shooting was accidental. Pet. App. A051. The court denied that petition, reasoning that Davis failed to address other evidence indicating that the shooting was an intentional act and not an accident. *Id.* Davis later filed pro se habeas corpus petitions in the California Court of Appeal and the California Supreme Court, which were summarily denied. Pet. App. A050; C.A. ER 44.

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[1] The excerpts of record filed in the court of appeals are available on that court's electronic docket. *See* No. 16-56662, Dkt. 17 (Apr. 3, 2018).

4. Davis filed a pro se habeas corpus petition in federal district court in which he raised a variety of claims, including sufficiency of the evidence as to the gang enhancement and ineffective assistance of trial counsel. Pet. App. A021, A035. As relevant here, he argued that his trial counsel was ineffective for failing to have Mason's car tested for gunshot residue and for failing to present testimony from a forensic expert. *Id.* at A035.

Applying the deferential standard prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the district court rejected Davis's claim of ineffective assistance. Pet. App. A037. The court determined that Davis could not show prejudice resulting from trial counsel's alleged errors "because he cannot show that further investigation would have led to helpful evidence." *Id.* Davis apparently believed that forensic testing would have shown an absence of gunshot residue in the car, which in turn would have helped prove his "improbable claim that he accidentally fired the gun from the pocket of his sweatshirt." *Id.* But, the court reasoned, Davis had offered no reason to believe "that the existence or absence of gunshot residue in the victim's car would have supported" a theory of accidental rather than deliberate discharge of the gun. *Id.* Similarly, Davis "merely speculate[d] that a forensic expert would have offered testimony helpful to the defense," and failed to point to any specific evidence or testimony that an expert witness would have presented to produce a different outcome at trial. *Id.* The district

court also rejected Davis's request for an evidentiary hearing, C.A. ER 537-542, and denied a certificate of appealability, Pet. App. A010.

The court of appeals granted a certificate of appealability limited to the issue of whether sufficient evidence supported the gang enhancement. C.A. ER 546-547. Davis briefed the uncertified issue of ineffective assistance of counsel, seeking to raise the theory that the district court had rejected (and as to which it had denied a certificate of appealability). He also advanced several new theories of ineffective assistance that he had not previously presented in the state courts or the federal district court: that trial counsel was ineffective for not presenting testimony from a firearms expert about lack of gunshot residue inside of Mason's pockets, lack of "stippling," and the trajectory of the bullet. C.A. AOB 33-54.[2] The court of appeals affirmed the denial of habeas relief on the sufficiency-of-the-evidence claim, and "construe[d] Davis's additional argument" regarding ineffective assistance "as a motion to expand the certificate of appealability," which the court denied. Pet. App. A003. The court denied Davis's petitions for panel rehearing and rehearing en banc. *Id.* at A001.

ARGUMENT

Davis contends that the court of appeals erred by not granting him a certificate of appealability regarding whether he was entitled to an evidentiary

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[2] "Stippling" refers to marks caused by gunpowder near a gunshot wound, generally indicating that the wound resulted from a shot at close range. *See, e.g.*, *United States v. Jamison*, 509 F.3d 623, 626 n.2 (4th Cir. 2007).

hearing on his claim that trial counsel was ineffective for not presenting testimony from a firearms expert. But there was no basis for an evidentiary hearing because, as the district court held, the state court reasonably rejected that claim on the ground that Davis failed to establish prejudice resulting from his trial counsel's asserted error. Davis was not entitled to a certificate of appealability because no jurist of reason could debate the district court's ruling. And the new arguments Davis raised for the first time before the Ninth Circuit did not present a proper ground for granting a certificate of appealability and, in any event, are meritless.

1. To obtain a certificate of appealability, Davis was obligated to make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), by demonstrating that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). Where AEDPA's deferential review standard applies, the question is "whether the District Court's application of AEDPA deference . . . was debatable amongst jurists of reason." *Miller-el v. Cockrell*, 537 U.S. 322, 341 (2003).

Davis does not contest that his federal petition was governed by AEDPA. *See* Pet. 22. Under AEDPA, evidentiary hearings are generally not authorized for claims adjudicated on the merits in state court. That is because "review

under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Only if a federal habeas petitioner can overcome the limitation of 28 U.S.C. § 2254(d)(1) may an evidentiary hearing even be considered. *Id*. at 185; *see id.* at 183 ("when the state-court record precludes habeas relief under the limitations of § 2254(d), a district court is not required to hold an evidentiary hearing") (internal quotation marks and citation omitted). Thus, Davis was required to show that the state court's rejection of his ineffective assistance claim was contrary to, or an unreasonable application, of this Court's precedents. 28 U.S.C. § 2254(d)(1). He cannot meet that standard.

2. This Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), governs claims of ineffective assistance of counsel and requires proof of both deficient performance and prejudice. *See, e.g.*, *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018). In this case, the last reasoned state court decision rejected Davis's claim on the ground that he had failed to establish prejudice. *See* Pet. App. A051. The district court correctly held that the state court's decision was neither contrary to, nor an unreasonable application of, this Court's precedent.

Davis argues that had his trial counsel tested the interior of Mason's car for gunshot residue, such testing might "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." Pet. 16. In Davis's view, this might have

cast doubt on Mason's testimony, which had suggested (albeit equivocally) that Davis had fired the gun from outside his jacket pocket. *See* Pet. 20-21. As the district court determined, however, the state court reasonably concluded that this theory failed to establish prejudice for *Strickland* purposes. Pet. App. A037. Davis never explained why a lack of gunshot residue in the car would help establish that the shooting was accidental, as opposed to (as the prosecutor argued) a deliberate attack with the gun concealed in his jacket pocket. *See* C.A. ER 242, 246.

Davis also fails to grapple with compelling evidence, which the jury apparently credited, indicating that the shooting was intentional. Mason testified that Davis went through Mason's pockets after Davis shot him, took his money, and fled. Pet. App. A014. This evidence was consistent with Davis shooting Mason in order to steal his money, not an accident. Davis also lied to the police by telling them he had nothing to do with the shooting, *id.* at A016, which the jury reasonably could have viewed as consciousness of guilt. Under those circumstances, it was reasonable for the state court to hold that Davis had not satisfied the prejudice prong of *Strickland*. *See Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (*Strickland* places the burden on the defendant to show prejudice); *Strickland*, 466 U.S. at 693 (it is not enough for a defendant to show that his attorney's deficient conduct "had some conceivable effect on the outcome of the proceeding"; instead, he must show that it "actually had an adverse effect on the defense").

Davis argues that the last reasoned state court decision addressing his claim—the denial of the claim by the California Superior Court—constitutes an unreasonable application of *Strickland* because it "disposed of the . . . claim in a single sentence." Pet. 22-23. The state court explained that Davis "fails to address other evidence which indicated an intentional act and not an accident." Pet. App. A051. While succinct, that sentence sets forth a basis for denying Davis's *Strickland* claim on no-prejudice grounds that is reasonable under 28 U.S.C. § 2254(d). *Cf. Harrington v. Richter*, 562 U.S. 86, 98 (2011) ("determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning").

Davis also argues (Pet. 14-16) that he satisfied the deficient performance prong of *Strickland*. Because the state court reasonably rejected Davis's claim on prejudice grounds, these arguments do not provide a basis for federal habeas relief (or an evidentiary hearing). They are also without merit. There is an obvious reason why Davis's trial counsel may have chosen not to conduct forensic testing to establish that there was less gunshot residue inside the car "than would be expected had the gun been fired inside the car without the jacket blocking it" (Pet. 16): the prosecution's own firearms expert testified that the gun was discharged inside Davis's jacket pocket. Pet. App. A029 n.50; C.A. ER 242, 246. The prosecutor emphasized that evidence to the jury at closing argument, suggesting that Davis likely concealed the gun in his pocket

and fired it at Mason. C.A. ER 397. In other words, the prosecution itself acknowledged that to the extent Mason's testimony suggested that Davis had fired the gun from outside the jacket, that account was wrong. Davis's trial counsel was not ineffective for failing to try to prove a point already established by the prosecution's evidence. *See generally Richter*, 562 U.S. at 104 (court considering claim of ineffective assistance "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance").[3]

3. Davis also advances arguments that trial counsel was ineffective for not presenting testimony from a firearms expert about lack of gunshot residue inside of Mason's pockets, lack of stippling on Mason's body, and the trajectory of the bullet. Pet. 17-20. But Davis failed to raise these theories before the district court, and the court of appeals could have properly denied a certificate of appealability on that basis. *See Wood v. Milyard*, 566 U.S. 463, 473 (2012) ("[A]ppellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance."); *Gonzalez v. Thaler*,

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[3] Davis notes that counsel told the jurors during jury selection that the defense would rely heavily on forensic evidence. Pet. 1, 6, 14. It appears that counsel was referring to the scientific findings made by the prosecution's own experts in the government's crime lab. Counsel told the jurors, "I anticipate that the defense will rely heavily on scientific evidence in this case. If in fact the defense instead of the prosecution calls witnesses from the crime lab, would you be able to listen to that testimony as though the D.A. had called them?" C.A. ER 78. During the defense's cross-examination of Mason, trial counsel explored the inconsistency between the finding by the prosecution's expert that the gun discharged in Davis's jacket pocket and Mason's testimony that Davis fired the gun directly at his head. *Id.* at 152-153, 168-169.

565 U.S. 134, 145 (2012) ("The COA process screens out issues unworthy of judicial time and attention[.]").

In any event, Davis's new arguments lack merit. Davis contends that trial counsel should have performed gunshot-residue testing on the inside of Mason's pockets, on the theory that it might have helped establish that Davis did not reach into Mason's pockets to steal his money. Pet. 17. Davis's assertion that there would have been no gunshot residue inside of Mason's pockets is speculative; but, even if true, that would not have been compelling evidence for the defense. Davis might have reached into Mason's pockets with his other hand, or his hand simply might not have left any residue there.

Davis next argues that trial counsel should have presented testimony from a gun expert to establish that Davis could not have shot Mason at close range without causing stippling. Pet. 17. But the record did not establish that there was no stippling on Mason's body. And even if it had, the absence of stippling presumably would be explained by the discharge of the firearm inside of Davis's jacket pocket, which may well have prevented gunpowder from reaching Mason's body.

Finally, Davis maintains that trial counsel should have presented expert testimony regarding the bullet's trajectory. Pet. 18-21. The evidence showed that the bullet entered the right side of Mason's neck and exited the left side of his neck, with the entry and exit holes at approximately the same level. C.A. ER 273-74, 278-79. Davis suggests that a gun expert could have testified that

this trajectory was incompatible with Mason's account that Davis sat down in the car before shooting him. Pet. 18-21; *see* Pet. 5. Even if an expert had offered such testimony, however, that would not have been compelling defense evidence. The prosecution could have argued in response that even if it were proven that Davis shot Mason while standing outside the car, Mason was simply mistaken about that detail, and the shooting was still intentional in light of the considerable "evidence which indicated an intentional act and not an accident." Pet. App. A051. Ultimately, the jury simply declined to credit Davis's implausible account that he agreed to dispose of a loaded and cocked handgun for his friend; that he put the gun, still cocked, in his jacket pocket (because he supposedly did not know how to uncock it); and that it accidentally went off, striking Mason in the neck. Pet. App. A057. The evidence Davis claims his trial counsel should have introduced would not have made that story more credible to the jury.[4]

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[4] Without providing any supporting documentation, Davis asserts that his trial counsel has since been disbarred. Pet. i. Davis's trial counsel was William Lawrence McKinney. Reporter's Transcript on Appeal, Cal. Ct. App. No. B227566, Vol. 1, at 2. According to the California State Bar's public online database (http://members.calbar.ca.gov/fal/LicenseeSearch/QuickSearch), an attorney named William Lawrence McKinney is deceased. An attorney with a similar name—William Brian McKinney—faced disciplinary charges in 1996 and was later suspended from the practice of law based on failure to pay bar fees and MCLE noncompliance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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Dated: February 7, 2020