IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARMENIA LEVI CUDJO, JR.,	)
	) CA No. 08-99028
Petitioner-Appellant,	)
v.	) D.C. No. CV-99-08089-JFW
	)
R.K. WONG, Acting Warden,	)
	)
Respondent-Appellee.	)
	)
	)

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE JOHN F. WALTER
United States District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL STATUTES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL STATUTES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL STATUTES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL STATUTES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL STATUTES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL STATUTES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL STATUTES **PAGE(S)**

STATE CASES

FEDERAL STATUTES

TABLE OF AUTHORITIES

STATE STATUTES **PAGE(S)**

STATE STATUTES

MISCELLANEOUS

STATEMENT OF JURISDICTION

This is an appeal from a judgment and order denying Armenia Cudjo's habeas corpus petition and disposing of all parties' claims. (ER 3, 194; ER 1). The district court had subject matter jurisdiction under 28 U.S.C. § 2254. The judgment and order are final. 28 U.S.C. § 1291. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 2253. The judgment and order denying federal habeas relief were entered on October 23, 2008. (ER 3, 1) The order *sua sponte* granted a certificate of appealability ("COA") on Cudjo's lethal injection claim but denied a COA on all other claims. (ER 194). Cudjo timely filed a notice of appeal on November 18, 2008. (Fed. R. App. P. 4(a)(1)(A); ER 26, 258).

STATEMENT OF THE ISSUES

Certified Issue

Lethal Injection

1. The district court did not review Mr. Cudjo's lethal injection claim because California currently has no lethal injection protocol in place. If this Court determines that all of Mr. Cudjo's uncertified claims fail to meet the standard for a Certificate of Appealability ("COA"), should this Court remand the lethal injection claim to the district court for further proceedings?

Uncertified Issues

Exclusion of Evidence of Third Party Culpability

2. The California Supreme Court held that the trial court wrongly excluded John Culver's testimony that Cudjo's brother Gregory admitted that he had killed Amelia Prokuda, the victim in this case. Was the ruling by the state supreme court that Cudjo's constitutional rights were not violated by the exclusion of Culver's testimony reasonable where, according to that court, "[b]y Culver's account, Gregory made his statement spontaneously . . . within hours after a murder for which Gregory, who had no alibi, was in custody as a prime suspect"; "the only eyewitness . . . never identified the assailant and gave a description which more closely resembled Gregory than the defendant"; "much of the other evidence . . . was as consistent with Gregory's guilt as with defendant's"; and "there was no comparable direct evidence of Gregory's guilt?"

Violation of Right to Confront Witnesses

3. Is the California Supreme Court's decision that the admission of Gregory Cudjo's preliminary hearing testimony inculpating Appellant did not violate Appellate's right to confront witnesses reasonable where that testimony was the strongest evidence of Appellant's guilt and Gregory refused to testify at trial and therefore could not be examined by Appellant?

Prosecutorial Misconduct

4. The California Supreme Court held that the prosecutor committed misconduct when he argued in his guilt phase closing that "what [defendant] wants you to believe, and what I believe to be perhaps the most telling thing in this whole case, is that . . . this woman is going to have intercourse with a strange man -- frankly any man -- a black man, on her living room couch with her five year old in the house." Was the state court's decision that Cudjo was not prejudiced by the remark reasonable in a case where the victim was a white woman, the defendant an African-American man, the prosecutor argued that Cudjo raped the victim, and, as the dissent noted, "[t]he prosecution's case was far from compelling"?

Ineffective Assistance of Counsel at the Guilt Phase

5. The district court found that trial counsel performed deficiently by failing to investigate and present evidence that Gregory Cudjo made a second jailhouse confession -- "I'm in here for murder, and I did it" -- but that Appellant was not prejudiced as a result. Is it reasonably probable that at least one juror would have had a reasonable doubt of Cudjo's guilt if the defense had presented evidence of Gregory's admission when the only eyewitness never identified the assailant and gave a description that more closely resembled Gregory than Appellant and much of the other evidence was as consistent with Gregory's guilt

as with Appellant's?

Ineffective Assistance at Penalty

6. The district court found that trial counsel performed deficiently by failing to investigate and present mitigating evidence of Cudjo's life history and evidence of Gregory's confession of guilt to Culver. In a case where at penalty the prosecution presented no aggravating evidence and the defense merely recalled Cudjo to tersely reaffirm his innocence, is it reasonably probable that at least one juror would have voted against death if counsel had presented mitigating evidence of Cudjo's traumatic childhood, exposure to domestic violence, depression, head injuries, seizure disorder, substance abuse, and likely brain damage, and evidence Gregory's confession?

Cumulative Error

7. Does the cumulative impact of errors undermine confidence in the outcome and require relief?

STATEMENT OF THE CASE

A felony complaint filed on March 25, 1986 charged Armenia Cudjo ("Cudjo," "Appellant," or "Armenia") with the first degree murder of Amelia Prokuda while engaged in a robbery and a burglary. (ER 2286). Prokuda had been killed four days earlier in Littlerock, California, near Palmdale, in Los

Angeles County. (ER 225). William Clark represented Cudjo at the preliminary hearing and trial. (ER 2278, 1755-57).

An amended information filed on May 2, 1986 alleged three counts against Cudjo: (1) first degree murder while engaged in a robbery and a burglary, and while using a dangerous weapon (a hammer); (2) robbery; and (3) burglary. (ER 2288-90). Cudjo pled not guilty to all charges. (ER 1758-59).

The defense theory was that Cudjo was innocent and that his brother Gregory killed Prokuda.[1] Cudjo testified for the defense. (ER 1922-2120). Gregory refused to testify, invoking his privilege against self-incrimination. (ER 1865). Gregory's preliminary hearing testimony and statements to the police inculpating Armenia were read into evidence. (ER 1882). The court excluded the testimony of defense witness John Culver that Gregory had admitted to him several hours after the crime that he had killed Prokuda. (ER 2155).

On April 22, 1986, the jury convicted Cudjo on all counts; found true the special circumstances that the murder occurred in the commission of a robbery and burglary; and found true the allegations that Cudjo used deadly weapons in committing the murder (a hammer) and the robbery (a knife). (ER 2291, 2295).

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[1] To distinguish Gregory Cudjo from Appellant, his brother, this brief at times refers to Gregory Cudjo as "Gregory" and to Appellant as "Armenia." *See United States v. Cabaccang*, 481 F.3d 1176, 1179 n.1 (9th Cir. 2007)

The penalty trial began and ended the next court day, Monday, April 25, 1988. (ER 2296). Both sides waived opening statement. (*Id*.). The prosecution presented no aggravating evidence. (ER 2296, 2257). The defense penalty presentation consisted of one substantive question and answer: "Q: Did you kill Amelia Prokuda? A [by Armenia Cudjo]: No, I didn't." (ER 2258). There was no cross examination. (*Id.*). The jury received the case on April 25 and returned a death verdict the next day. (ER 2296-98). On May 31, 1988, the court denied Cudjo's motion for a new trial, sentenced Cudjo to death, and entered judgment. (ER 2299.)

On December 13, 1993, a divided California Supreme Court affirmed the judgment on appeal by a vote of five to two. (ER 217). The majority held that the trial court wrongly sustained the prosecutor's objection to Culver's testimony of Gregory's confession. (ER 229-30). The court noted that Gregory "was the other prime suspect in the case" and "had no alibi" but ruled that the error did not prejudice Cudjo. (ER 231). Justice Kennard, joined by Justice Mosk, dissented, concluding that the exclusion of Culver's testimony "violated defendant's rights under the federal and state Constitutions to present a defense." (ER 253).

While his appeal was pending, Cudjo filed a state habeas corpus petition. (ER 198). The California Supreme Court issued an order to show cause on the

claim that Cudjo's attorney "provided ineffective assistance by not adequately investigating the possibility that Amelia Prokuda's killer was her husband, Ubaldo Prokuda, rather than petitioner." *Id*. A referee concluded after an evidentiary hearing that counsel's performance was not deficient. (ER 202). The California Supreme Court agreed, denied the claim in a written opinion issued on June 7, 1999, and summarily denied the remaining claims without an opinion or a hearing. (ER 202). Justice Mosk dissented, stating that Cudjo "is probably guilty of the offense charged. But only probably. That, I conclude, is not sufficient to justify the ultimate sanction." (ER 216).

Cudjo filed a federal habeas corpus petition in 2000. (ER 4). Cudjo also filed several habeas petitions in state court to exhaust additional claims. (ER 4-5). The last of these petitions was denied on March 14, 2007. (ER 5). On April 10, 2007, Cudjo moved for an evidentiary hearing in district court. (*Id*.). The Honorable John F. Walter granted a hearing on two claims: Claim 15(A)(6), alleging that trial counsel was ineffective for failing to investigate and present evidence of a jailhouse admission by Gregory Cudjo that he killed Prokuda[2]; and Claim 20(B), alleging that counsel unreasonably failed to investigate and present

[2] ER 2303; (Docket no. 10). This admission was separate from the admission to Culver. (*Id*.).

mitigating evidence of Cudjo's background, physical condition and family and social history at the penalty phase. (ER 2303; docket 10; ER 2312). The hearing was held on June 3 and 4, 2008. (ER 262, 534). After receiving briefs on the hearing claims, Judge Walter denied relief on all claims and *sua sponte* granted a COA limited to the lethal injection claim, for which Cudjo had sought but was denied a hearing. (ER 3, 194). Cudjo timely filed a notice of appeal on November 18, 2008. (ER 260).

STATEMENT OF FACTS

I. THE PRELIMINARY HEARING

A preliminary hearing was held on April 16, 1988. Prokuda's five-year old son, Kevin, testified that he saw a Black man hold a knife to his mother's throat and heard him say that he wanted money. (ER 2279-80, 2281-82). The man told him to go to his room, and he did. (ER 2283).

Gregory Cudjo testified that he was Armenia's brother and that the two of them lived together with their mother in a camper on March 21, 1986, the day Prokuda was killed. (ER 1568-69). Gregory gave an account of his and Armenia's whereabouts that day but he denied making some statements to the police inculpating Armenia and said he did not recall making others. Gregory testified that he agreed with some statements made by the police officers "because

they threatened [him] with 25 years" (ER 1584) and that the police "was putting these words in [his] mouth" (ER 1585, *see also* ER 1586).

Gregory agreed that listening to the tape of one of his interviews with the police would refresh his memory, and the prosecutor played part of an interview tape, which, transcribed, lasted about four and a half pages. (ER 1591-96). According to the transcript, Gregory said that on March 21 he saw Armenia take off and wash his tennis shoes (ER 1594), and that when he saw him leave the camper that morning at 9:30 to 10:00 a.m., Armenia wore cut-off Levi's about knee high, a blue sweatshirt and white tennis shoes. (ER 1595-96).

Defense counsel's cross-examination of Gregory lasted less than one page and did not inquire into Gregory's possible involvement in the homicide (ER 1599-1600) although counsel acknowledged at the federal evidentiary hearing that by then the prosecutor had informed him of one of Gregory's confessions. (*See* ER 348, 351).

The prosecution also presented the testimony of Cudjo's mother, Maxine, and his sister, Julia Watson.[3]

The defense presented no evidence. (ER 2284).

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[3] As shown at the federal evidentiary hearing, these witnesses were available to testify to mitigating evidence of Cudjo's life history at his penalty trial but were not asked to do so. (*See* ER 1624-32, 1733-36).

The magistrate found reasonable cause for the charges. (ER 2284-85).

II. PRETRIAL

Cudjo pled not guilty to all the charges in the amended information. (ER 1756).

On January 20, 1988, the court proposed, and counsel agreed, to waive sequestered death penalty *voir dire*. (ER 1758-59).

At a status conference on February 9, 1988, the prosecutor stated that "in compliance with the discovery statute inherent in [Penal Code section] 190," he was informing the defense that the only aggravating evidence he intended to offer at the penalty phase was "defendant's prior conviction for grand theft person," an offense for which both Armenia and Gregory had pled guilty. (ER 1776; *see also* ER 1777-78).

During *voir dire* the prosecutor told a juror that the law did not require a jury to find that Cudjo had the intent to kill in order to find a special circumstance to be true, a misstatement of law in which the court concurred and to which defense counsel did not object. (ER 1792-96).[4]

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[4] Although the trial transcript attributes this statement as coming from defense counsel Clark, when read in context, it appears that prosecutor, Steven Ogden, made the statement. As the California Supreme Court recognized, contrary to the law in effect at the time of the offense and trial, the jury was not instructed that it had to find that Cudjo had the specific intent to kill in order to

On March 2, 1988, outside the presence of the jury, Clark said that "Mr. Cudjo apparently requires Dilantin at 50 milligrams and disatril at 4,000 c.c.'s, I believe that's twice a day," and asked for an order so that Cudjo could receive the medication. (ER 1790). Clark added: "Sounds like a lot, doesn't it." (*Id.*).[5]

The panel and alternates were accepted and sworn on March 9, 1988 and opening statements were given on March 14. (ER 1797-98, 1800).

III. THE GUILT TRIAL

A. Opening Statements

The prosecutor's opening statement emphasized the statements that Gregory Cudjo made to the police inculpating Armenia. (ER 1801-02).

In the defense opening, Clark stated that the jury would have more than a substantial doubt "that Armenia is necessarily the person responsible for the death of Amelia Prokuda" (ER 1803) and that the defense "hope[d] to establish that the one person who spoke the loudest in this case from the very beginning is indeed the person most likely to have killed." (ER 1804). Clark said that "[y]ou will

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find any of the special circumstance allegations true. (ER 247-48).

[5] At the federal habeas hearing, Cudjo presented evidence that he had a seizure disorder and a mild to moderate degree of brain damage at the time of the offense and trial, *see infra* at ER 1716-32 (direct testimony declaration of Dr. Dale Watson), but none of this evidence was presented to his jury.

have, I hope, the opportunity to see Mr. Gregory Cudjo, who is slightly over a year younger than his brother, and approximately the same height, weight, and physical description, and appearance as his brother." (ER 1805-06). Clark acknowledged that he had never visited the crime scene. (ER 1804).

B. The Prosecution Case

Los Angeles County Deputy Sheriff Robert Flores testified that he found the victim dead and bound and followed footprints from the Prokudas' house to the Cudjos' camper. (ER 1807-09). Deputy Sheriff Robert Neilson testified that one set of footprints led into and out of the victim's house and that he also followed footprints from the house to the Cudjos' camper. (ER 1810-14).

A pathologist testified that blows to the head killed Prokuda and that a hammer was likely used to inflict the blows. (ER 1815-16). There were no signs of traumatic sexual assault or of drugs or alcohol in Prokuda's system. (ER 1816-19, 6). Prokuda became unconscious soon after the blows began. (ER 1820).

Several witnesses testified that no identifiable fingerprints were found at the crime scene. (ER 1821-24).

The victim's husband, Ubalda Prokuda, testified that when he returned to his house after his wife had been killed he discovered two rifles and a duffle bag

missing. (ER 1825).[6] He said that he had sex with the victim on the day of the crime. (ER 1826).

Kevin Prokuda testified that he saw a Black man with a knife in his house. (ER 1827-28). The man put a knife to his mother's neck and demanded and received money. (ER 1829). The man took two guns and tried to start the car. (ER 1831-32). He had never seen the intruder before. (ER 1830). The intruder faced Kevin; he was Black with curly hair, had no facial hair or tattoos on his arms, and wore a shirt with no sleeves. (ER 1834-36). Kevin never identified Armenia or anyone else as the perpetrator. (ER 63).

As the district court later noted, "Kevin was unable to testify that the knife recovered from the trailer in which Armenia and Gregory were staying at the time of the murder, was in fact the knife he saw the intruder use to threaten his mother, and both Armenia and Gregory had access to the knife in the trailer." (ER 62). As the district court also noted, at trial Kevin testified the intruder's top was blue and that he wore shoes, but at the preliminary hearing he could not remember what color shirt the man wore and he said he did not see what the man wore on his feet. (ER 63).

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[6] As the district court noted, the police did not find any of the purportedly missing items. (ER 68).

Maxine Cudjo testified that her two sons wore identical tennis shoes. (ER 1841-42, 1847). She added that it had been "a long time" since she had seen defense counsel Clark, a couple of years. (ER 1843). Armenia used to have a tattoo on his arm but Gregory has no tattoos. (ER 1844). She saw Gregory altered on drugs. (ER 1846).

Julia Watson testified that she lived in the Cudjo camper and that on the day of the crime she saw Gregory wearing tennis shoes and Armenia wearing boots. (ER 1857-58).

Criminalist Douglas Ridolfi testified that the footprints leading to the Cudjo camper could have been made by the tennis shoes worn by Armenia or Gregory. (ER 1859). According to Ridolfi, tests of swabs of semen and sperm left on the victim eliminated Gregory and the victim's husband as possible donors, but identified Armenia as being in the one percent of the population that could have been the donor. (ER 1860-64).

When the prosecution called Gregory Cudjo as a witness he invoked his privilege against self-incrimination and refused to testify regarding the crime or anything else. (ER 1865-67). The prosecution did not offer Gregory immunity if he testified. (ER 1867). The court ruled that Gregory was unavailable as a witness. (ER 1867-69).

The prosecutor asked to read portions of Gregory's preliminary hearing testimony into the record. (ER 1867, 1869). Defense counsel objected, arguing that his "motivation in terms of cross-examining at [the] time of the preliminary hearing . . . was substantially different than it would have been at trial." (ER 1870). The court held that the defense had an opportunity for meaningful cross-examination at the preliminary hearing and that Gregory's testimony from that proceeding was admissible. (ER 1871-72). Defense counsel added that he believed Gregory was under the influence of drugs when he testified at the preliminary hearing, and that it "was very apparent that he was operating in an aberrated condition [sic]." (ER 1873). The court replied that "that should have been brought to the attention of the magistrate judge," who then could have granted a continuance. (*Id.*). Counsel again objected that the ruling would violate Cudjo's right to confront the witnesses against him and moved for a mistrial, which was denied. (ER 1874, 1876). The court ruled that the defense could present evidence of a prior felony conviction to impeach Gregory's testimony, and the jury was informed of the conviction. (ER 1875).

Deputy District Attorney Myron Jenkins read portions of Gregory's preliminary hearing testimony. (ER 1882, *see* ER 1568-1600). Jenkins read portions where Gregory denied telling the police (a) that he saw Armenia leave the

camper at 10:00 a.m. on the day of crime and that Armenia was wearing a long-sleeved sweat shirt with a hood and cut-off Levi's (ER 1897); (b) that Armenia told him "that is the house that I burglarized, dammit she didn't have any money either" (ER 1902); (c) that Armenia told him that he had taken two guns from the house (ER 1905); and (d) that Armenia told him that he had hogtied the lady in the house using neckties from the closet. (ER 1909.)

C. The Defense Case

Armenia testified that on the morning of March 21, 1986 he sold crack to Amelia Prokuda and had consensual sex with her in exchange for the crack (she was short of money). (ER 1945-48). He did not kill Prokuda. (ER 1923). After he left her house, he returned to the camper, told Gregory, who was "doing dope," what had happened, and went running. (ER 1950-54, 1933-36).

Armenia testified that he smoked crack before having sex with Prokuda (ER 1982) but that she never smoked crack in his presence. (ER 1955, 2052). He described the many tattoos he had on his arms the day Prokuda was killed. (ER 1956-57, 1961-62). He admitted being convicted of grand theft person in 1985 (ER 1967, 1972) and explained he served less than one year in jail as a result. (ER 2062-63).

Detective William Patterson testified that he found an empty baggie at the

crime scene. (ER 2120.1, 2120.2).

Defense counsel played tapes of Gregory's March 22, and March 26, 1986 statements to the police. (ER 2120.3-2120.17, 827-36). In his statements, Gregory said that he and Armenia had identical tennis shoes. (ER 2120.8, 829). Gregory denied ever being in Prokuda's house. (ER 827). During the second statement, prosecutor Berg informed Gregory that he had been cleared of the murder charge. (ER 827).

David Murphy, a specialist in chemical dependency, testified that it is common for people not to know that their spouse is using cocaine. (ER 2120.21-2120.23).

Outside the presence of the jury, the court held a Penal Code 402 hearing to consider the prosecutor's request to exclude the testimony of proposed defense witness John Culver. (ER 2121). Culver testified that he had known Armenia for 15 to 20 years and had known his relatives. (ER 2123-24). He testified that when he and Gregory shared a jail cell in March 1986 Gregory told him that "'they got me in here for a murder'" and he "'went over to rob, burglarize this lady's house and she seen [him] and that's when all the stuff went down and that's what happened.' He had done it." (ER 2126-27.) Gregory told him the victim started screaming and "he just went off on the lady" and knocked her out. (ER 2135).

The prosecutor argued that Culver's testimony was incredible and should be excluded under California Penal Code section 352. (ER 2152). The defense argued that Gregory's inculpatory statements were admissible as a declaration against interest. (ER 2153). The court ruled that Culver's testimony was inadmissible because it lacked sufficient indicia of reliability. (ER 2155; *see also* ER 2156).

D. Instructions

When discussing proposed jury instructions, the court stated that the evidence "shows one person committed the murder, the evidence indicating it's either Mr. Armenia Cudjo or Mr. Gregory Cudjo." (ER 2156.1). The prosecutor stated: "I really think this case is going to resolve itself as this is either a flat out, cold felony murder committed by Armenia or it is a premeditated murder committed by Gregory." (ER 2156.6). Defense counsel said "it's simply an all or nothing type of case as well as a defense" and he did not request instructions on second degree murder or manslaughter or on an intoxication defense. (ER 2156.2-2156.5).

E. The Prosecutor's Closing Argument

The prosecutor argued that Cudjo was guilty of felony murder because the killing occurred in the course of a robbery, burglary and rape. (ER 2160-61). He

argued that because Prokuda did not have much money, "perhaps this man . . . to make the best of the situation he goes back there to rape her. [¶] It seems to me that the issue as to whether he entered to commit rape is kind of -- is not well established. I don't know." (ER 2165).

As to the identity of the perpetrator, "[w]e have narrowed it down to two people." (ER 2174). He emphasized Gregory's statements to the police implicating Armenia. (ER 2175-77). He argued:

> Even without Gregory Cudjo's testimony that you heard in this courtroom, both in terms of his preliminary hearing and in terms of the tape, there is enough to prove Armenia Cudjo guilty beyond a reasonable doubt. But, with that testimony, if you believe it, and you're jurors, you're the ones who decide who you're going to believe . . . . [W]ith it, we have iced the cake.

(ER 2179-80).

F. Defense Counsel's Closing Argument

Clark began by noting that although the trial was initially estimated to last about two months, "we've worked only half days" and "tried this case in what is the equivalent of possibly about eleven days, including jury selection, which I find remarkable." (ER 2187).

He argued that "what the defense contends in this case . . . is that there's an utter failure of evidence to convict." (ER 2194). He discussed Gregory's

statements and said that "he gives us absolutely exquisite detail of things in the victim's house," suggesting that Gregory had been in the house. (ER 2201, 2205).

G. Prosecution's Rebuttal

In rebuttal, the prosecutor argued:

> [W]hat Mr. Cudjo wants you to believe, and what I believe to be perhaps the most telling thing in this whole case, is that this woman who, from all appearances is a happily married mother of three trying to make ends meet . . . that this woman is going to have intercourse with a strange man, frankly any man -- a Black man, on her living room couch with her five year old in the house.
>
> I'm telling you -- not telling you -- I would suggest to you that no single woman of the slightest degree of respectability is going to do that . . . .

(ER 2249-50).

H. Deliberations and Verdicts

After deliberating for about ten hours, the jury found Cudjo guilty of first degree murder and the special circumstances of burglary and robbery to be true. (ER 2256.1-2256.2).

IV. THE PENALTY TRIAL

As the district court noted, "[t]his case is somewhat unique." (ER 137). "The entire penalty phase took slightly more than one hour, and that included the

time that was spent discussing the jury instructions . . . outside the presence of the jury, and the time spent instructing the jury." (*Id*.).

A. Opening Statements

Neither side gave an opening statement. (ER 137).

B. The Prosecution Case

The prosecution presented no evidence. (ER 9).

C. The Defense Case

The defense case consisted solely of three words of testimony: Asked whether he killed Prokuda, Cudjo replied, "No, I didn't." (ER 9, 138). There was no cross examination. (ER 138).

D. The Prosecutor's Closing Argument

The prosecutor argued that the circumstances of the crime warranted death when weighed against the evidence presented by the defense. (ER 2266). He said that "Mr. Cudjo comes to us as a kind of unknown quantity"; "we don't know what he did with the first 26 years of his life"; and "his background is unknown to us until January 6th, 1985," when he was arrested for grand theft person. (ER 2260, 2263-64).

He recited the portion of the penalty instruction allowing evidence of "any other circumstance which extenuates the gravity of the crime, even though not

legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense . . . ." (ER 2266). He added: "I didn't see anything like that offered in this case, ladies and gentlemen, other than his recitation that he wasn't guilty." (*Id*.).

E. Defense Counsel's Closing Argument

Defense counsel's closing consumes a little over eight transcript pages. (ER 2266-75). Counsel argued that a verdict of life without parole "leaves open the possibility" of Cudjo later receiving a pardon or obtaining judicial relief through new evidence of his innocence. (ER 2267, 2273-74). He said: "I think my impression of your verdict is that you are sure." (*Id.*). Like the prosecutor, defense counsel argued that many of the penalty factors in the jury instruction did not apply. (ER 2270-72; *see also* RT 2677-83) (penalty instructions). He said that "the standard of proof now is less than it was before, so if you simply want to balance the ledger you could flip a coin. It would be inappropriate, but you could determine it that way . . . ." (ER 2273).

F. The Verdict and Sentencing

The jury deliberated for about five hours and forty minutes before returning a death verdict. (ER 2296, 2298; ER 139). The court sentenced Cudjo to death on

May 27, 1988. (ER 2299).

VI. THE STATE APPEAL

On December 13, 1993, a divided California Supreme Court affirmed the judgment on appeal by a vote of five to two. (ER 217-57). Relevant portions of the opinion are summarized below in the discussion of legal claims.

VII. THE STATE HABEAS ACTIONS

The California Supreme Court issued an order to show cause on the claim in Cudjo's initial state habeas petition that defense counsel did not adequately investigating the possibility that the victim was killed by her husband. (ER 198-216). After an evidentiary hearing, the California Supreme Court denied the claim in a written opinion and summarily denied the remaining claims without an opinion or a hearing. (*Id.*). Cudjo filed three additional state habeas petitions to exhaust claims, and each was summarily denied. (ER 3-5, 195-97).

VIII. THE PROCEEDING BELOW

Cudjo filed a federal habeas corpus petition in 2000. (ER 4). After the state supreme court denied his final exhaustion petition, Cudjo moved for an evidentiary hearing. (*Id.*). The court granted a hearing on Claim 15(A)(6), alleging ineffective assistance for failing to investigate and present evidence of the confession by Gregory reflected in a report by Deputy Sheriff Charles Merritt

(a separate confession from the one to Culver), and on Claim 20(B), alleging ineffective assistance for failing to investigate and present mitigating evidence.

At the hearing, defense counsel Clark testified that his "best defense" at trial "was to alibi Armenia based on . . . information [he] had in terms of Armenia's ability to account for his time" and to suggest that Gregory Cudjo was the real killer. (ER 298; *see also* 345-46). It was "central" to his strategy "to try to convince the jury that petitioner was not the perpetrator." (ER 304).

Merritt's March 26, 1986 report was admitted into evidence. (ER 825). The report contains a statement that Merritt overheard by a "suspect Cudjo" in the Antelope Valley jail to another inmate that "I'm in here for murder, and I did it." (*Id.*). The report notes that Bruce Frederickson, George Mitchell and Douglas Lewis were also present when the statement was made. (*Id*.) At the time, both Armenia and Gregory Cudjo were incarcerated at the jail (but in separate cells) and both were suspects in the Prokuda homicide. (ER 825; 333-34).

The Merritt report states that deputy district attorney Hans Berg was informed of the statement. (ER 826). Berg testified that he interviewed Gregory on March 26, 1986, that he never interviewed Armenia, and that it was his standard procedure to disclose reports such as Merritt's to the defense before trial. (ER 368, 361).

Cudjo's federal habeas investigator Ellen Turlington testified that in 2008 she discussed the Merritt report with Gregory and that he admitted to her that he was the Cudjo who said "I'm in here for murder, and I did it." (ER 556.) Frederickson, Lewis and Mitchell testified that they would have spoken to the defense before trial about what they heard. (ER 1648-51). Sheriff's Department Sergeant Brian Jones testified that in 2000, Gregory told him that he was at fault in a homicide that his brother was convicted of committing. (ER 400-01; 1646). Shontae Franklin testified that in 1994 or 1995, Gregory confessed to him that "my big brother is in jail now for the white girl that I (Gregory) killed," and that he confessed to him again at least one other time. (ER 1640). Steven Davidson testified that 1991 or 1992, Gregory told him that he was the one who did the crime that his brother, Armenia, was in prison for. Davison deck, para. 4.

Clark testified that before the preliminary hearing, he was aware that Gregory had confessed to the murder and that Berg had interviewed Gregory about it. (ER 292-93, 335-37, 348, 351). Clark testified that before trial Merritt told him about the statement and that he also received a copy of Merritt's report. (ER 292, 320-22, 1611).

Clark admitted that he never tried to contact Gregory to interview him, or had his investigator interview him. (ER 307, 348; *see also* 1642 (trial investigator

confirms he never interviewed Gregory)). Clark only spoke to Gregory when he examined him at the preliminary hearing. (ER 307, 348).

In response to the court's question, Clark had no explanation for why he did not "investigate or ask Gregory Cudjo as to whether he had made that statement." (ER 351). He said it never occurred to him to call Berg (who was no longer the prosecutor on the case by the time of trial) to testify to Gregory's confession. (ER 356).

Clark testified that his theory at penalty was "lingering doubt," i.e., to continue to maintain that Cudjo was innocent. (ER 305). He admitted that he "didn't do any investigation into mitigation evidence in [Cudjo's] case and [he] didn't instruct [trial investigator] Hill or anyone else to conduct such an investigation." (ER 1612). Hill confirmed that he "didn't conduct any investigation in preparation for the penalty phase." (ER 1643). Hill explained: "I never talked to Armenia Cudjo or anybody from his family. Mr. Clark never asked me to do that and I wasn't interested in doing it either." (*Id*.) Clark did not recall receiving negative information about Cudjo (e.g., that "he was a bad guy") before trial, and he indicated that Cudjo was a cooperative client. (ER 290, 306).

Clark testified that "presenting a laundry list of feigned mitigating evidence would detract from one good theory which was consistent with the evidence

presented at trial, and might prompt the jury to re-evaluate their determination of guilt at trial." (ER 1612). He testified: "If I am dealing with an alibi or a straight denial type of a case, I don't think mitigation is appropriate." (ER 340).[7] Referring to presenting mitigating evidence after contending that a defendant is not guilty, Clark testified: "[P]ersonally, it's not my mode. I can't do it." (ER 311). By "mitigation," Clark affirmed that he meant evidence that attempts to give some context to the defendant's life and portray the defendant sympathetically. (ER 340).

Clark testified that he did not seek to introduce at the penalty phase Culver's testimony of Gregory's confession because he thought the judge would probably "be most consistent" in ruling on the testimony, which he had precluded at guilt. (ER 339). Although he was aware of Cudjo's prior Arizona robbery conviction, he did not investigate the facts of the conviction by obtaining court documents or police reports. (ER 343). He believed that the prosecutor may not have been aware of the conviction. (ER 342). He said that the existence of the prior conviction was not the primary reason he did not present mitigation. (ER 341). Given that he had already decided not to present mitigation but instead just argue

[7] At the hearing, Clark repeatedly called his theory of defense as an "alibi theory," (ER 296, 298) , but at trial he presented no other witnesses to corroborate Cudjo's testimony of his whereabouts on the day Prokuda was killed.

lingering doubt, the existence of the prior conviction was not a reason for foregoing a mitigation presentation. (*Id*.)

At the hearing, Cudjo presented evidence of the mitigation case that could have been presented at trial but wasn't. Numerous lay witnesses, including five of Cudjo's relatives, and social historian and psychologist Kumea Shorter-Gooden testified to Cujdo's difficulties and traumatic experiences as a child, adolescent and young adult. (ER 1614-37; 1633-36; 1194-1205). They testified to Cudjo's inadequate and indifferent caregivers when he was child; the impoverished circumstances of his family life and the community in which Cudjo was raised; the trauma he experienced in the wake of his father's death when Cudjo was 11 and essentially became "the man of the family"; the domestic violence he was exposed to as a child and teenager, particularly when his mother began a relationship with a violent alcoholic; and his substance abuse from an early age, including sniffing gasoline as a teenager after his father died. (*Id.*). All of the lay witnesses were willing and able to testify at trial; indeed, two were called as prosecution witnesses at the preliminary hearing and trial. (*See* ER 1841-58).

Neuropsychologist Dale Watson testified that before the Prokuda homicide, Cudjo had suffered two serious head injuries, including a skull fracture, and that at the time of the crime he had a seizure disorder and suffered from a mild to

moderate degree of brain dysfunction indicating a high likelihood of brain impairment. (ER 506, 1720-25, 875-77, 1329-1407). Cudjo's head injuries and family history of seizure disorder were noted in records available before trial (ER 875-77, 1055-1138, 1141-73, 1329-1407), and Cudjo's seizure disorder was noted during the trial[8] and was also reflected in trial counsel's notes. (ER 863 (trial file notes contain the word "Dilantin," a medication for seizures)).

Respondent's expert John Dunn disagreed that Cudjo had appreciable brain damage at the time of the crime or trial, but he acknowledged that San Quentin State Prison has treated Cudjo for seizure disorder since his arrival there after his conviction, (ER 515), and Watson explained that a seizure disorder is prima facie evidence of a problem with the brain. (ER 507).

Gregory Cudjo invoked his privilege against self-incrimination and refused to testify at the hearing. (ER 279).

After receiving briefing on the hearing claims the district court denied the entire petition. The order concluded:

> Given the Court's familiarity with the issues and the straightforward nature of the requirements of 28 U.S.C. § 2253(c)(2) for the issuance of a certificate of appealability, the Court finds no additional briefing is

[8] As noted above, during trial defense counsel asked that Cudjo receive medication for his disorder. (ER 1790).

> necessary. The Court hereby finds that the only issue that meets the standard set forth in 28 U.S.C. § 2253(c)(2) is claim 38, in which Cudjo alleges that the use of lethal injection is cruel and unusual.

(*Id*. at 192). Relevant portions of the appeal opinion are summarized below in the discussion of legal claims.

SUMMARY OF ARGUMENT

This appeal implicates major concerns the courts have had with the death penalty: the execution of someone who may be innocent; the principle that punishment should be directly related to the personal culpability of the criminal defendant, and therefore a capital sentencing jury must be able to consider evidence of the defendant's background and character before deciding whether to give the ultimate sanction; and that racial bias and inadequate defense lawyering may lead to unreliable and unfair death verdicts.

Armenia Cudjo is an African-American man who was convicted of killing a white woman in Palmdale, California. The prosecution proceeded on a felony murder theory that the killing occurred during a robbery, burglary and rape, although rape was not charged as a separate offense or special circumstance and prosecution witnesses testified there was no evidence of traumatic sexual assault.

Cudjo's trial was unusual and irregular. Defense counsel noted in his

closing that the entire case was tried in the equivalent of just eleven full days, including jury selection.

The prime alternate suspect, Cudjo's brother Gregory, inculpated Cudjo in statements to the police, testified at the preliminary hearing that the police had put words in his mouth and threatened him, and then under further questioning generally affirmed the inculpatory statements. Although defense counsel was aware at the time of the preliminary hearing that Gregory had admitted that he had killed the victim, and counsel's theory was that Cudjo was innocent and Gregory was the real killer, he did not question Gregory at the preliminary hearing about his possible involvement in the homicide. At trial, Gregory invoked his privilege against self-incrimination and refused to testify, and his preliminary hearing testimony inculpating Cudjo was read to the jury.

The entire penalty trial took slightly more than one hour, including the time spent discussing jury instructions outside the presence of the jury and time spent instructing the jury. The prosecution presented no aggravating evidence. The defense case consisted of Cudjo taking the stand and giving a three-word synopsis of his guilt phase testimony ("Q: Did you kill Amelia Prokuda? A: "No, I didn't.") Defense counsel presented no evidence of Cudjo's life history; as the prosecutor noted in his penalty closing, "Mr. Cudjo comes to us as a kind of

unknown quantity."

The California Supreme Court and the district court found numerous errors at the guilt trial: defense counsel failed to investigate and present evidence of Gregory's jailhouse confession that was witnessed by a deputy sheriff and investigated (and disclosed) by the prosecutor; the judge wrongly excluded testimony of a separate jailhouse confession by Gregory to defense witness Culver; the prosecutor committed misconduct by arguing to the jurors that to accept the defense they would have to believe the victim would have consensual sex with a Black man, and defense counsel failed to object to the misconduct; the court failed to instruct that intent to kill was an element of the felony murder special circumstances, and defense counsel failed to object and seek a proper instruction.

Because of the errors, on the one hand Cudjo could not confront the prime alternate suspect whose statements were, in the words of the dissenting California Supreme Court justices, "perhaps the strongest evidence of defendant's guilt presented by the prosecution." On the other hand, Cudjo was prevented from presenting, through the court's and his counsel's errors, evidence of two confessions by the alternate suspect, in a case where the only eyewitness never identified the assailant and gave a description that more closely resembled

Gregory than Armenia, and where much of the other evidence was as consistent with Gregory's guilt as with Armenia's. Remarkably, however, both the state supreme court, albeit in a split decision, and the district court found that Cudjo was not prejudiced by the errors.

With regard to the penalty trial, the district court found that counsel was ineffective in failing to investigate and present evidence of Cudjo's life history and in failing to seek to admit Culver's testimony of Gregory's confession under the more relaxed evidentiary standards that exist at penalty. Again, the court concluded that Cudjo was not prejudiced by the errors. The court failed to even grant a COA on any of Cudjo's claims aside from lethal injection.

The district court's decision is outside the mainstream of this Court's and the Supreme Court's jurisprudence and must be reversed. The gulf between the guilt phase case the jury heard -- unconfronted statements by the alternate suspect implicating Cudjo – and the case it should have heard -- evidence of two confessions by that suspect that would have corroborated Cudjo's trial testimony and defense theory -- is too wide for the Court to have confidence in the outcome. And in a penalty case where the prosecution presented no aggravating evidence and the defense merely called Cudjo to tersely reaffirm his innocence, it is reasonably probable that at least one juror would have voted against death if

counsel had presented mitigating evidence of Cudjo's traumatic childhood, exposure to domestic violence, head injuries, seizure disorder, substance abuse and brain damage, and evidence of the confession of alternative suspect Gregory Cudjo. A combination of an effective lingering doubt and third party culpability presentation and life history mitigation evidence would have outweighed the aggravating evidence of the circumstances of the offense.

ARGUMENT

Certified Issues

I. STANDARDS OF REVIEW

A. Review of the District Court's Rulings

This Court reviews the district court's denial of Cudjo's habeas petition *de novo*. *Powell v. Galaza*, 328 F.3d 558, 562 (9th Cir. 2003). The Court reviews *de novo* questions of law and mixed questions of fact and law (including claims of ineffective assistance of counsel). *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001) (*en banc*).

"To the extent it is necessary to review findings of fact made in the district court, the clearly erroneous standard applies." *Silva v. Woodford*, 279 F. 3d 825, 835 (9th Cir. 2002).

B. Review of the State Court's Decision under AEDPA

Cudjo filed his federal habeas corpus petition after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and therefore his petition is governed by AEDPA. *Woodford v. Garceau*, 538 U.S. 202, 204 (2003).

Under AEDPA, a habeas petition challenging a state court judgment:

> 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.

28 U.S.C. § 2254(d). 28 U.S.C. § 2254(e)(1) states that "a determination of a factual issue made by a State court shall be presumed to be correct" and that the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

"'Clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). "That the [applicable federal] standard is stated in general terms does not mean the application was reasonable. AEDPA does not 'require state and federal courts to

wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti v. Quarterman*, 127 S. Ct. 2842, 2858 (2007). "[C]ircuit law may be 'persuasive authority' for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law. . . ." *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

Federal habeas courts typically "look through" a summary denial of a claim to examine the "last reasoned decision" on the claim in the state court system. *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). However, when there is no reasoned state decision on the claim at all, but only a summary denial, this Court "must conduct an independent review of the record" to determine if the state court decision was objectively unreasonable. *Reynoso v. Giurbino*, 462 F.3d 1099, 1119 (9th Cir. 2006).

Because the state courts made no findings of fact and did not hold a hearing on the summarily-denied claims discussed below, there are no factual determinations for this Court to defer to, or for § 2254(e)(1)'s presumption of correctness to apply to, on these claims. *Taylor v. Maddox*, 366 F.3d 992, 1014 (9th Cir. 2004).

When a federal habeas court concludes that the state court decision is contrary to or an unreasonable application of federal law, or is based on an

unreasonable determination of the facts (28 U.S.C. § 2254(d)), it reviews the claim *de novo* in assessing whether the petitioner's constitutional rights were violated. *Panetti v. Quarterman*, 127 S. Ct. 2842; *Wiggins v. Smith,* 539 U.S. 510, 528-29 (2003); *Frantz v. Hazey*, 533 F.3d 724, 733-39 (9th Cir. 2008) (en banc).

II. THE COURT SHOULD GRANT RELIEF ON THE UNCERTIFIED CLAIMS; ALTERNATIVELY, IT SHOULD REMAND SO THAT THE DISTRICT COURT CAN CONSIDER THE MERITS OF THE LETHAL INJECTION CLAIM ONCE CALIFORNIA HAS A NEW LETHAL INJECTION PROTOCOL IN PLACE

The district court both denied and *sua sponte* issued a COA on Cudjo's claim that the use of lethal injection -- the method by which the State of California plans to execute him -- violates the Eighth Amendment's prohibition against cruel and unusual punishment. (ER 191, 194). Because California currently has no lethal injection protocol in place, this claim is not yet ripe, and the district court prematurely denied relief. Cudjo has briefed several uncertified issues that have merit; accordingly, this Court can and should grant relief on Cudjo's uncertified issues and need not resolve Cudjo's lethal-injection claim. Alternatively, this Court should remand the matter to the district court for further proceedings once California adopts and implements a protocol for performing lethal injections.

A. <u>The Lethal Injection Claim Should Be Considered Once It Is Ripe</u>

Although Cudjo's lethal-injection claim is prematurely before this Court,

neither Ninth Circuit nor Supreme Court precedent forecloses relief on Cudjo's claim. In *Baze v. Rees*, 128 S. Ct. 1520 (2008), the United States Supreme Court addressed a challenge to the constitutionality of Kentucky's lethal-injection protocol, holding that, in order to prevail in an Eighth Amendment challenge, a prisoner "must show that the risk [of severe pain] is substantial when compared to the known and available alternatives." *Id*. at 1537. The Court went on to find that a state "with a lethal injection protocol substantially similar to [Kentucky's] protocol would not create a risk that meets this standard."

Baze did not address the constitutionality of California's method of lethal injection, and, in fact, three of the justices in the plurality expressed a belief that further litigation would necessarily follow the Supreme Court's ruling. *Id.* at 1546, 1562.

Historically, the lethal injection protocol in California has lacked both reliability and transparency, creating an undue and unnecessary risk that an individual executed under California's protocol would suffer excessive pain during execution, in violation of the Eighth Amendment. In the past, California's protocol has created a demonstrated risk of severe pain. The risk is substantial when compared to known and available alternatives. In *Morales v. Tilton*, the Honorable Jeremy Fogel, District Judge of the Northern District of California,

held that California's then-current protocol in place raised substantial questions as to whether an individual executed in California would suffer excessive pain during the execution. 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006); *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006).

In response to the district court's decision in *Morales*, the California Department of Corrections and Rehabilitation ("CDCR") revamped Operational Procedure No. 0-770 ("OP 0-770"), which governed California's lethal-injection protocol. The California Court of Appeal then issued a decision holding that the CDCR had violated California's Administrative Procedures Act (Govt. Code § 11340, *et seq*.) when it adopted OP 0-770 without opening it up to public commentary. *Morales v. CDCR*, 168 Cal. App. 4th 729 (Cal. Ct. App. 2008). The State chose not to appeal that ruling to the California Supreme Court. Consequently, California does not currently have a valid lethal-injection protocol in place.

This Court has expressed concerns about California's protocol prior to *Morales* (*see Beardslee v. Woodford*, 395 F.3d 1064, 1074-75 (9th Cir. 2005)); moreover, Cudjo's claim is unlike previous lethal-injection challenges this Court has rejected. In *Poland v. Stewart*, 117 F.3d 1094 (9th Cir. 1997), this Court held that Poland had failed to demonstrate that lethal injection violated his

constitutional rights because none of the "botched" executions he cited had taken place in Arizona, the state where he was to be executed, and because none of the botched executions were tied to the protocol used in Arizona. *Id*. at 1105. The lethal injection challenge in *LaGrand v. Stewart*, 133 F.3d 1253, 1265 (9th Cir. 1998), similar to the challenge in *Poland*, "[was] not to the execution protocol, did not involve the California procedure at issue here, and [was] mostly founded on evidentiary deficiencies." *Beardslee*, 395 F.3d at 1072 n.7.

This Court addressed another Eighth Amendment challenge to lethal injection in *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004). Cooper alleged a number of deficiencies in California's protocol. *Cooper*, 379 F.3d at 1032. The *Cooper* court deferred to factual findings by the district court in that case to deny Cooper's lethal injection challenge; in Cudjo's case, there have been no district court fact findings to which to defer. Instead, the district court denied Cudjo's lethal injection claim with only a brief reference to the unfinished proceedings in *Morales*. Further, while Judge Fogel has not yet concluded his inquiry into lethal-injection in California, it is already evident from his findings to date that the possibility of unnecessary pain and suffering is not purely speculative, as this Court had determined it to be in *Cooper*, 379 F.3d at 1033.

What is clear is that the Supreme Court's decision in *Baze v. Rees* by no

means decided the issue of the constitutionality of California's lethal injection protocol. More than a year before the Supreme Court resolved this issue for states substantially similar to Kentucky, the district court in *Morale*s noted that, "[w]hile there have been numerous legal challenges to lethal-injection protocols across the country, it is by no means clear that every jurisdiction has problems similar in either nature or extent to California's." *Morales*, 465 F. Supp. 2d at 982 n.12. Indeed, the *Morales* court found that "implementation of California's lethal-injection protocol lacks both reliability and transparency. In light of the substantial questions raised by the records of previous executions, Defendant's actions and failures to act have resulted in an undue and unnecessary risk of an Eighth Amendment violation." *Morales*, 465 F. Supp. 2d at 981.

For these reasons, and in the absence of a current and valid lethal injection protocol in California, this Court should either address the merits of Cudjo's uncertified claims, briefed herein, and grant relief accordingly, or remand the lethal-injection claim for further proceedings in the district court, once a final decision is reached in *Morales*.

Uncertified Issues

III. STANDARDS OF REVIEW

The rules discussed in section I above govern the claims for which Cudjo

seeks a COA.

IV. COA STANDARDS

A federal habeas petitioner has no absolute right to appeal a district court's denial of his petition but instead must seek and obtain a COA in order to be able to pursue an appeal. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 335-36 (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); *Miller-El*, 537 U.S. at 327. "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id*. at 327.

A "COA ruling is not the occasion for a ruling on the merit of petitioner's claim." *Miller-El*, 537 U.S. at 331. Rather, "[t]he COA determination . . . requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id*. at 336. "The COA inquiry asks only if the District Court's decision was debatable." *Id*. at 348. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id*. at 336. "When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a

COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id*. at 336-37; *see also Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) ("At this preliminary stage, we must be careful to avoid conflating the standard for gaining permission to appeal with the standard for obtaining a writ of habeas corpus.").

The COA standard is "modest"; "'the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor.'" *Lambright*, 220 F.3d at 1024-25 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). "A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Miller-El*, 537 U.S. at 338 (quoting *Barefoot*, 436 U.S. at 893).

The nature of the penalty is a proper consideration in determining whether to issue a COA, and the courts "resolve any doubt regarding whether to issue a COA in favor of" the capital habeas petitioner. *Mayfield*, 270 F.3d at 922; *Lambright*, 220 F.3d at 1025; *Valerio v. Crawford*, 306 F.3d 742, 767 (9th Cir. 2002) (*en banc*) ("Because this is a capital case, we resolve in Valerio's favor any doubt about whether he has met the standard for a COA.").

V. THE COURT SHOULD GRANT A COA AND RELIEF ON CUDJO'S CLAIM THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE EXCLUSION OF CULVER'S TESTIMONY OF GREGORY CUDJO'S CONFESSION

A. Summary of Claim

Claim 8 alleges that Cudjo's constitutional rights were violated by the trial court's ruling excluding the testimony of John Culver that Gregory Cudjo confessed to him just hours after the homicide that he had killed Prokuda. Cudjo raised this claim in his direct state appeal; it was not the subject of the federal evidentiary hearing.

B. Standards of Review and AEDPA Standards

The relevant state court decision for purposes of federal habeas review is the California Supreme Court's appellate opinion. (ER 229-38). This Court may grant habeas relief if it concludes that the state court decision is objectively unreasonable. This Court reviews the district court's ruling on the claim *de novo*. Findings of fact are reviewed for clear error. *See supra* at Section I B.

C. The California Supreme Court Opinion

At the prosecutor's urging, the trial court held a hearing outside the presence of the jury to determine whether to permit Culver's testimony of Gregory's confession to the murder of Amelia Prokuda. After hearing Culver's

testimony describing the confession, the trial court precluded trial counsel from calling Culver as a witness on the ground that Culver's testimony was "unreliable." (ER 231). The California Supreme Court held that the trial court's ruling was erroneous. (ER 233-34). The court stated that it had previously "warned trial courts to avoid hasty conclusions that third-party culpability evidence is 'incredible'; this determination . . . 'is properly the province of the jury.'" (ER 232). The court then found Culver's testimony to have substantial probative value. The court explained:

> By Culver's account, Gregory made his statement spontaneously, while alone with an acquaintance, within hours after a murder for which Gregory, who had no alibi, was in custody as a prime suspect. Gregory tended to fit Kevin P.'s description of the assailant, and much of the other evidence, in particular the incriminating shoe prints, was as consistent with Gregory's guilt as with defendant's.

(ER 232).

The court added:

> Here, Culver would testify that Gregory, the other prime suspect in the case, had confessed to the murder within hours after the crime was committed and under circumstances providing substantial assurances that the confession was trustworthy. The issue of Gregory's guilt was highly material: given Kevin P.'s testimony describing a single intruder, and given also the single set of shoe prints leading away from the victim's residence,

> proof of Gregory's guilt would exonerate defendant. Thus, Culver's testimony raised the requisite reasonable doubt of defendant's guilt.

(ER 233-34).

The court also found that "the evidence was highly necessary:

> [A]lthough there was other evidence tending to cast suspicion on Gregory, there was no comparable direct evidence of Gregory's guilt. Gregory's invocation of his Fifth Amendment privilege prevented the defense from calling him as a witness.

(ER 234).

The court noted that "nothing in the record indicates that Culver's testimony was motivated by threats or bribery or expectation of personal advantage." (ER 234).

The court nevertheless concluded that the exclusion of Culver's testimony was not prejudicial because "the inference that defendant, not Gregory, was the murderer was extremely strong." (ER 235). The court noted that the physical evidence suggested that "there had been only one visitor [to the Prokuda residence] during that morning," and that Appellant admitted that "he was present at the crime scene on the morning of the murder, and that he had sex with the victim." (ER 235). According to the court, "defendant's uncorroborated effort to provide an innocent explanation for his presence in the victim's house was not

convincing." (ER 236). According to the court, "Gregory's purported jailhouse confession contravened both the physical evidence and all other accounts Gregory had given, including his testimony under oath at the preliminary hearing," and that "[i]n all his other known statements and sworn testimony, Gregory insisted he had no involvement in the crime." (*Id.*). The court also noted that "after observing Culver's demeanor and hearing his testimony, the trial court concluded that Culver was a patently incredible witness." (ER 236).

In concluding that there was no prejudice, the court stated that it:

> recognize[d] that Gregory was the other prime suspect in the murder, and he disclosed accurate crime-scene details, which he told the police defendant had revealed to him. Moreover, Kevin P., the only eyewitness, never identified the assailant and gave a description which more closely resembled Gregory than defendant. Some other evidence was consistent with Gregory's guilt as well as defendant's.

(ER 235).

Justice Kennard, joined by Justice Mosk, dissented. Justice Kennard concluded that "the trial court violated defendant's rights under the federal and state Constitutions to present a defense" and that federal law "compel[led] reversal of the judgment as to both guilt and penalty." (ER 253). "By erroneously excluding evidence that Gregory had confessed to the killing, the trial court's

ruling eviscerated [Cudjo's] defense." (ER 256).

Justice Kennard explained that:

> [t]he prosecution's case was far from compelling. The murder victim's young son, Kevin, could not identify defendant, nor did he recognize the survival knife or the cut-off jeans found in the Cudjo camper. Defendant's fingerprints were not found at the victim's home, and no bloodstains were detected on any of defendant's clothing, on any articles seized from the Cudjo camper, or on the shoes seized from defendant's mother's automobile. No articles taken from the victim's residence were found in defendant's possession, nor did any witness testify to such possession.

(ER 256).

Justice Kennard emphasized that "Gregory's previous statements to sheriff's investigators . . . were perhaps the strongest evidence of defendant's guilt presented by the prosecution, yet this evidence too was equally if not more consistent with Gregory's guilt." (ER 256-57). Yet, "[b]ecause Gregory did not testify at trial, the jury was never given an opportunity to judge his credibility by observing his demeanor under oath." (*Id.*).

Justice Kennard further explained that:

> [b]ecause the trial court excluded Culver's testimony, defendant's testimony was essentially uncorroborated. Evidence that Gregory had confessed to the murder would have filled a major gap in the defense case, and would have greatly increased the likelihood of the jury's

> entertaining a reasonable doubt of defendant's guilt.

(ER 257).

D. The District Court Opinion

The district court ruled on this claim without requesting or allowing briefing from the parties. Thus, the parties only addressed the claim in their pleadings.

At the hearing on Cudjo's motion for an evidentiary hearing, the district court said that it agreed with the California Supreme Court that the exclusion of Culver's testimony was error. The district court also agreed with the dissenting state justices that the error was prejudicial. (ER 1740). However, in its final order denying the claim, the district court reversed course without acknowledging its prior contrary position and ruled that there was no error at all. The ruling concludes:

> This Court adopts the trial court's reasoning, particularly the fact that Culver's testimony about Gregory's confession was inconsistent with the physical evidence in the case. Accordingly, this Court concludes that Culver's testimony would not have substantially bolstered Armenia's defense theory that Gregory committed the murder.

(ER 36).

Rejecting the state supreme court's admonition that it was properly the role of the jury to assess the credibility of Culver's testimony, the district court stated

that "[w]hile Culver's testimony, it could be believed, would have assisted the defense, there were ample grounds for the trial court to exclude the testimony in its entirety." (ER 34). The court noted that Culver was a long-time friend of Cudjo; that "Culver had about fifty adult male relatives in the Littlerock area, and about forty of them had criminal records and had been in jail in the last five years"; and that "irrespective of his friendship with Armenia, he did not even tell Armenia that Gregory admitted to committing the murder" but instead "waited a long time to come forward." (ER 35).

The order acknowledged that "[i]t is clearly established federal law, as determined by the Supreme Court, that when a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that testimony may rise to the level of a due process violation." (ER 32 (citations omitted)). The order also noted that "[t]he Supreme Court has made clear that the erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair and the Sixth Amendment right to present a defense." (*Id*.). However, the court denied the claim under a five-part test articulated by this Court in *Miller v. Stagner*, 757 F.2d 988, 994 (9th Cir. 1985). The order did not mention *Holmes v. South Carolina*, 547 U.S. 319 (2006), a leading Supreme Court case addressing the exclusion of evidence of third-party

culpability that had been decided two years previously, in its order.

E. The Trial Court's Exclusion of the Testimony of John Culver Regarding Gregory Cudjo's Confession to the Murder Was Unreasonable and Contrary to Clearly Established Federal Law

The trial court violated Cudjo's Due Process right to present evidence in support of a defense, his Sixth Amendment right to the use of Compulsory Process to compel the testimony of witnesses in his favor, and his Sixth Amendment right to a jury trial when it excluded the testimony of John Culver. The California Supreme Court's decision that the exclusion of this critical defense witness was not an error of constitutional magnitude was objectively wrong. As two dissenting justices noted, the California Supreme Court unreasonably failed to apply clearly established Federal Law when it analyzed the claim.

1. The Right To Present Critical Evidence of Third-Party Culpability Was Clearly Established At the Time of Trial

The United States Constitution guarantees every criminal defendant the fundamental right to "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Crane v. Kentucky*, 476 U.S. 683, 687 (1986); *DePetris v. Kuykendall*, 239 F.3d 1057, 1062-1063 (9th Cir. 2001). The right to present a defense is a "fundamental element of due process" guaranteed by the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 19

(1967). The right of the accused to present witness testimony in support of his defense is also guaranteed by the Sixth Amendment's Compulsory Process Clause. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (noting that the Sixth Amendment guarantees the "right to have the witness' testimony heard by the trier of fact."). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

Although states may promulgate evidentiary rules that ensure the efficient presentation of evidence and exclude evidence that is misleading, irrelevant, cumulative, or unduly prejudicial, *see Moses v. Payne*, 555 F.3d 742, 757 (9th Cir. 2009), *see also United States v. Scheffer*, 523 U.S. 303, 308 (1998), the Supreme Court has held that the application of state evidentiary or procedural rules that preclude the presentation of evidence of third-party guilt without a rational justification is unconstitutional. *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). The Court has consistently rejected state evidentiary rules that exclude a defense witness' testimony on the ground that a particular class of witness or type of witness testimony is not believed to be credible. *See, e.g., Rock v. Arkansas*, 483 U.S. 44, 56 (1987) (exclusion of all hypnotically-refreshed testimony violated defendant's Due Process and Sixth Amendment rights to testify on his own behalf); *Washington*, 388 U.S. at 22 (ban against testimony of a witness who

stands accused of the same crime charged against the defendant violated defendant's Sixth Amendment right to call witnesses in his favor); *Crane*, 476 U.S. at 690-91 (holding that misapplication of state procedural rule resulting in exclusion of critical defense evidence necessary to explain defendant's false confession lacked rational justification, and therefore violated defendant's right to a "meaningful opportunity to present a complete defense.") (citation omitted).

In *Holmes*, the prosecution had forensic evidence that strongly suggested the defendant was guilty of rape and murder, including a palm print and DNA evidence which matched the defendant. The defendant sought to present four witnesses at trial who would testify that they had heard another man confess to having committed the rape and murder. 547 U.S. at 323. The trial court excluded the evidence pursuant to a state rule which precluded the introduction of third-party guilt by the defendant in cases where the forensic evidence persuasively proved the defendant's guilt. The Supreme Court reversed the conviction, holding that the state rule violated the defendant's right "to a "meaningful opportunity to present a complete defense." 547 U.S. at 324 (citations omitted). The Court found that the state's rule regarding the admission of evidence of third-party culpability was so fundamentally flawed as to be irrational because the strength of the government's case could not be meaningfully evaluated or tested unless it were

viewed in light of the potentially exculpatory evidence. *Id.* at 331. The Court acknowledged that trial courts can apply rules to "exclude evidence that is 'repetitive . . ., only marginally relevant' or poses an undue risk of 'harassment, prejudice, confusion of the issues." *Id.* at 327. But the Constitution "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." *Id.* at 327.

This Court has traditionally employed a five-part balancing test to determine whether the exclusion of evidence pursuant to an otherwise valid procedural or evidentiary rule violated a defendant's constitutional rights, *see Miller*, 757 F.2d at 994. Pursuant to *Miller*, when evaluating the constitutional effect of the exclusion of defense evidence, this Court has weighed the probative value of the defense evidence on the central issue at trial, the reliability of the defense evidence, whether it is capable of evaluation by the trier of fact, whether it is the sole evidence on the issue or merely cumulative, and whether it constitutes a major part of the attempted defense. *Id.*; *see also Chia v. Cambra*, 360 F.3d 997, 1003 (9th Cir. 2004) (holding that exclusion of four hearsay statements offered by the defense to support his third party culpability theory violated his right to due process under *Chambers*).

The district court relied on the *Miller* test in its order denying relief. But

this Court has since repudiated the balancing test announced in *Miller*. In *Moses*, 555 F.3d at 759, this Court considered a petitioner's claim that the exclusion of an expert witness on the ground that his testimony would not assist the trier of fact pursuant to the state-law analogue of Fed. R. Evid. 702 violated his constitutional right to present "a complete defense." *Id.* at 757. The Court held that the that the *Miller* test was not the appropriate means by which to evaluate the claim under AEDPA because it was not the product of a "Supreme Court holding." *Id.* at 759. After evaluating the Supreme Court's decisions in *Washington*, *Crane*, *Chambers*, *Rock*, and *Holmes*, this Court concluded that those decisions and others by the Supreme Court, rather than *Miller* and the Ninth Circuit cases which interpreted them, provided the only guidance for this Court in evaluating a habeas petitioner's claim that the trial courts' exclusion of critical defense evidence violated his constitutional rights. *Id.* at 760.

2. The State Had No Legitimate Interest in Excluding Culver's Testimony; the Judge's Exclusion of Culver's Testimony On the Sole Ground That the Judge Believed that Culver Was Not Credible Violated Clearly Established Federal Law

The California Supreme Court unreasonably applied clearly established Supreme Court precedent, including *Crane*, *Rock*, *Washington*, and *Chambers,* in evaluating the impact of the trial court's exclusion Culver's testimony. In

particular, the California Supreme Court acted unreasonably in failing to apply *Chambers*, a case whose facts are remarkably similar to the facts of this case.

In *Chambers*, there was circumstantial evidence that the defendant had shot a police officer. But the defendant maintained his innocence and contended that another man, Gable McDonald, was the shooter. One witness testified that he saw McDonald do the shooting. The other testified that he saw McDonald shortly after the shooting with a pistol in his hand. *Id.* at 291. McDonald ultimately admitted that he shot the officer in a sworn, written statement, but he subsequently repudiated his statement. *Id.* The defendant called McDonald as a witness at trial for the purpose of introducing his sworn statement into evidence. *Id.* at 291. On cross-examination, however, McDonald recanted the statement. The defense attempted to cross- examine him, but the court refused to allow it because he had been called by the defense. *Id*. The defense also sought to call three witnesses to testify that McDonald confessed to the murder. *Id.* at 292. The trial court excluded the witnesses on the ground that the confessions were hearsay. *Id.*

The Supreme Court held that the trial court's refusal to allow the admission of McDonald's confessions and to allow the defense to cross examine McDonald violated due process. The Court noted that the statements of the three witnesses relating McDonald's confessions bore "persuasive assurances of trustworthiness"

and were thus "well within the basic rationale of the exception for declarations against interest." *Id*. at at 302. The Court relied on the fact that there were multiple confessions, and that the confessions were made spontaneously to multiple witnesses. *Id.* at 300. The Court noted that the confessions were clearly incriminating, in that McDonald "stood to benefit nothing by disclosing his role in the shooting." *Id.* at 301. Finally, the Court relied on the fact that the confessions were consistent with the other evidence presented by the defense. *Id.* at 300. The Court held that "the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process." *Id*.

As in *Chambers*, the trial court excluded all of the spontaneous confessions of the sole alternate suspect, Gregory. And as in *Chambers*, the circumstances under which the Gregory's confessions were made were trustworthy. (ER 233-34). They were made soon after the murder, and they were so contrary to Gregory's penal interest that they should have been admitted as declarations against penal interest. (ER 229-30). And as was the case in *Chambers*, Gregory made multiple confessions, and to different people: his first confession was made to his cellmate, John Culver, and his second confession was made to Deputy Merritt, his jailer. (ER 89, 229-30). Finally, just as *Chambers* was deprived of the

opportunity to cross-examine McDonald, even though McDonald's testimony was admitted against him, Armenia was deprived of the opportunity to cross-examine Gregory at trial, but Gregory's preliminary hearing testimony was nonetheless used against Armenia. (ER 227-28).

The California Supreme Court noted that "[t]he United States Supreme Court has held that the constitutional right to present and confront material witnesses may be infringed by *general rules* of evidence or procedure which preclude material testimony or pertinent cross-examination for arbitrary reasons, such as unwarranted and overbroad assumptions of untrustworthiness." (ER 235 (citing, *inter alia*, *Rock*, 483 U.S. 44, *Green v. Georgia*, 442 U.S. 95 (1979), *Chambers*, 410 U.S. 284, and *Washington*, 388 U.S. 14)). But it failed to identify any legitimate interest that justified the exclusion the testimony of John Culver. As the Court acknowledged, neither California's hearsay rules nor its rules precluding unduly prejudicial or cumulative evidence gave the trial court the authority to exclude the testimony of a defense witness simply because the court did not believe him. (ER 231-32). Culver's testimony was admissible under the "declaration against interest" exception to California's hearsay rules and it should have been presented to the jury. (ER 234). The court's ruling on the admissibility of Culver's testimony was not challenged in the district court. It is binding on this

Court and should have been binding below. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam).

Thus, this is not a case in which the trial court's *valid* exercise of discretion under an otherwise state rule of evidence or procedure burdened the defendant's right to present a defense. *See Moses*, 555 F.3d at 758-59. Because the state has offered no valid justification for the exclusion of Culver's testimony in this case, this case is more analogous to *Crane*, *Rock, Chambers, and Holmes*, in which the lack of a valid justification for the exclusion of critical defense evidence, standing on its own, rendered the exclusion of the evidence unconstitutional. *See Crane*, 476 U.S. at 691-92 (holding that without "valid state justification," the exclusion of exculpatory evidence at trial "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing") (internal punctuation omitted); *Wood v. Alaska*, 957 F.2d 1544, 1549-50 (9th Cir. 1992). *Crane* analyzed precisely the issue presented in this case. It was clearly established at the time the California Supreme Court decided this appeal. The California Supreme Court's failure to apply the reasoning in *Crane* to the analogous factual and legal scenario in this case was unreasonable.

Insofar as the California Supreme Court assumed that the state had a legitimate interest in preventing Culver from testifying based solely on the trial

judge's belief that Culver was not credible, (ER 235 ("Absent clearer guidance from above, we will not lightly assume that a trial court invites federal constitutional scrutiny each and every time it decides, on the basis of the particular circumstances, to exclude a defense witness as unworthy of credit.")), that assumption was clearly wrong. The United States Supreme Court has repeatedly affirmed the principle that a defendant has a constitutional right to have the credibility of his witnesses determined by a jury, not a judge. *United States v. Bailey*, 444 U.S. 394, 414-15 (1980) ("The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses."); *see also Sandstrom v. Montana*, 442 U.S. 510, 523 (1979).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies . . . . [A]n accused has the right to . . . present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19; *see also Padilla v. Terhune*, 309 F.3d 614, 620 (9th Cir. 2002) (holding that in evaluating the trustworthiness of an out-of-court statement for the purpose of determining its admissibility as a declaration against

interest, "[t]he credibility of the [in-court] witness remains an issue for the trier of fact . . . ."); *Alcala v. Woodford*, 334 F.3d 862, 884 (9th Cir. 2003) (trial court's exclusion of defense witness based in part on the judge's assessment that the witness lacked credibility because he had been forcefully impeached in a prior trial violated the defendant's due process right to a fair trial); *id.* at 885 (noting that the credibility of the witness and the weight to afford their testimony were "issues to be weighed by the jury, not the judge.") (citing *Scheffer*, 523 U.S. at 312-13).

The district court's summary decision denying relief is flawed, both legally and factually. First, like the California Supreme Court, the district court ignored or misapplied clearly established Supreme Court decisions on the precise issue presented, including *Chambers*, *Crane,* and *Holmes,*[9] and relied instead on the since-repudiated five-part balancing test set forth by this Court in *Miller*. (*See* ER 33-34 0(citing *Chia*, 360 F.3d at 1003; *Miller*, 757 F.2d at 994)).

Second, the district court erred in the same way that the California Supreme Court did, by assuming that the state had a legitimate interest in excluding the testimony of the in-court witness, Culver, solely because the trial judge did not believe him, notwithstanding clear federal law assigning credibility determinations

[9] Although *Holmes* was decided more than two years before the district court's decision, the district court failed to acknowledge *Holmes* in its analysis.

to the jury. (*See* ER 35 (declining to evaluate the credibility of the out-of-court declarant, Gregory, and instead "look[ing] at the testimony that was excluded, which is Culver's testimony about his discussion with Gregory.")).

Third, the district court failed to give appropriate deference to the California Supreme Court's findings of fact about the reliability and importance of Culver's testimony in its analysis. The California Supreme Court found that "[t]he evidence [of Gregory's confession] had substantial probative value" and that there were "substantial assurances that the confession was trustworthy." (ER 233). The California Supreme Court's findings of fact must be accepted as true by the district court unless rebutted by clear and convincing evidence. *See Summer v. Mata*, 449 U.S. 539, 545 (1981); 28 U.S. C. § 2254 (e) (2); *Moses*, 555 F.3d at 746. Nonetheless, the district court repeatedly stated that the factual findings to which it deferred were those of the *trial court*. In particular, the district court relied on the *trial court's* finding that John Culver's testimony was "untrustworthy and unreliable" because it "did not correlate closely with the defense evidence in the case." (*See* ER 35 (citing RT 2704); *see also* ER 36 ("[t]his Court adopts the *trial court's* reasoning, particularly the fact that Culver's testimony about Gregory's confession was inconsistent with the physical evidence in the case.") (emphasis added)). The district court's deference to the trial court's factual findings, in light

of contrary findings by the California Supreme Court, constitutes clear error. *See Lambert v. Blodgett*, 393 F.3d 943, 973 (9th Cir. 2004). The District Court's analysis fails for that reason alone. *See id.*

3. The Exclusion of John Culver's Testimony Had a Substantial and Injurious Effect On the Verdict And Requires Habeas Relief

The California Supreme Court's holding that the error in excluding the evidence was "harmless" was objectively unreasonable. First, the California Supreme Court arrived at its conclusion after applying *People v. Watson*, 46 Cal. 2d 818, 836, 299 P. 2d 243 (1956), "the applicable standard of prejudice . . . for state law error . . . ." (ER 234). Under *Watson*, Cudjo would have had to establish that it was "reasonably probable that the admission of the testimony would have affected the outcome." (*Id*. (*citing Watson*, 46 Cal. 2d at 836)). The *constitutional* error in precluding Culver's testimony is subject to a different standard. Cudjo is entitled to relief if the constitutional error in this case had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). Under *Brecht*, Cudjo did not have the burden to show that it was "reasonably probable" that the error affected the outcome. Having proven that a constitutional error occurred, Cudjo was only required to establish that the error had a "substantial and injurious *effect"* in

determining the jury's verdict, or that it had a substantial and injurious "*influence"* in determining the jury's verdict." *Id.* at 638 (emphasis added).

The California Supreme Court's factual findings with respect to the probative value of Culver's testimony and the impact that it would have had at trial compel the conclusion that the erroneous exclusion of the testimony had, at minimum, a substantial and injurious influence in determining the jury's verdict. As the California Supreme Court acknowledged, Culver's testimony was (1) trustworthy, (2) "highly material," in that it "raised the requisite reasonable doubt of [Armenia's] guilt," and (3) "highly necessary," in that there was no "comparable evidence" that established Gregory as an alternate suspect: (ER 233-34). On the other hand, as Justice Kennard emphasized in her dissent, the wrongful exclusion of Culver's testimony left Armenia's defense essentially uncorroborated and eviscerated the defense. (ER 257 (finding that evidence of Gregory's confession "would have greatly increased the likelihood of the jury's entertaining a reasonable doubt of defendant's guilt.")).

"The exclusion of this critical evidence, coupled with the State's refusal to permit [Armenia] to cross-examine [Gregory] denied him a trial in accord with traditional and fundamental standards of due process." *Chambers*, 410 U.S. at 302. At a minimum, Cudjo is entitled to a COA on this claim.

VI. THE COURT SHOULD GRANT A COA AND RELIEF ON CUDJO'S CLAIM THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE COURT ADMITTED ALTERNATE SUSPECT CUDJO'S PRELIMINARY HEARING TESTIMONY INCULPATING CUDJO

A. Summary of Claim

Claim 9 alleges that Cudjo's rights to confront witnesses and to present a defense were violated when the trial court ruled that his brother Gregory, the prime alternate suspect, was unavailable as a witness and allowed the prosecution to read into evidence Gregory's preliminary hearing testimony inculpating Cudjo. (Docket no. 10).

B. Standards of Review and AEDPA Standards

The relevant state court decision for purposes of federal habeas review is the California Supreme Court's appeal opinion. (ER 229-39). This Court may grant habeas relief if it concludes that the state court decision is objectively unreasonable. This Court reviews the district court's ruling on the claim *de novo*. "[W]hen deciding whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause." *Lilly v. Virginia*, 527 U.S. 116, 123-24 (1999); *Padilla v. Terhune*, 309 F.3d at 618 ("Trustworthiness is a mixed question of fact and law which we

review *de novo*."). The district court did not take evidence on this claim at the evidentiary hearing, and it made no findings of fact that are subject to clear error review.

C. The California Supreme Court Decisions

The California Supreme Court ruled that Cudjo's confrontation right was not violated because "the record before [the court] did not support defendant's contention" that "he did not have a fair opportunity to cross-examine because Gregory's ability to think and respond coherently had been impaired by the ingestion of some drug or drugs." (ER 239). The court stated that "Gregory's testimony . . . was lucid and responsive," albeit "internally inconsistent." (ER 240).

D. The District Court's Decision

The district court denied the claim on essentially the same grounds as the state supreme court. (ER 42-43).

E. The Admission of Gregory's Preliminary Hearing Testimony Prejudicially Violated Cudjo's Rights to Confront Witnesses and Present a Defense

The Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "'The central concern of the Confrontation Clause is to

ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" *Lilly*, 527 U.S. at 123-24.

Supreme Court "cases construing the confrontation clause hold that a primary interest secured by it is the right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Id*. at 316. Cross-examination can "reveal[] possible biases, prejudices, or ulterior motives." *Id*.

Crawford v. Washington, 541 U.S. 36 (2004), was decided after Cudjo's judgment became final and therefore the analytical framework set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), applies here. *Whorton v. Bockting*, 549 U.S. 406, 409 (2007); *Padilla*, 309 F.3d at 618. Under that framework, "[w]hen the government seeks to offer a declarant's out-of-court statements against the accused, and . . . the declarant is unavailable, courts must decide whether the Clause permits the government to deny the accused his usual right to force the declarant 'to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth."'" *Lilly*, 527 U.S. at 124. "[T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such

statements against an accused when (1) 'the evidence falls within a firmly rooted hearsay exception' or (2) it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." *Id*. at 124-25.

Gregory's preliminary hearing testimony lacked the requisite guarantees of trustworthiness because when he testified and made his statements to the police he was the prime alternate suspect with an incentive to falsely accuse Armenia and because, as defense counsel noted at trial, he appeared to be impaired by drugs at the preliminary hearing. Defense counsel also did not have the same interest in examining Gregory at the preliminary hearing as he did later at trial.

As the Supreme Court explained in *Barber v. Page*, 390 U.S. 719, 725 (1968), "[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." By contrast, "[a] preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Id*. *Barber* granted a habeas petitioner's Confrontation Clause claim where a witness did not appear at trial, his preliminary hearing testimony incriminating petitioner was admitted into evidence at trial, and

petitioner's counsel did not cross-examine the witness at the preliminary hearing despite having the chance to do so (the witness was crossed by a co-defendant's attorney). *Id*. at 720. The Court stated that it would have "reach[ed] the same conclusion on the facts of th[e] case had petitioner's counsel actually cross-examined [the witness] at the preliminary hearing." *Id*. at 725.

The district court noted the prejudice to Armenia from the admission of Gregory's preliminary hearing testimony when it said:

> Gregory's testimony about his actions and those of his brother on the morning of the murder were key to Armenia's defense because his testimony contained the most damaging evidence against Armenia, and he was perhaps the only other person, who consistent with Armenia's testimony and the physical evidence, could have committed the murder.

(ER 44). Further, the prosecutor emphasized Gregory's testimony in his guilt phase closing. (ER 2179-80; *Stallings v. Bobby*, 464 F.3d 576, 582 (6th Cir. 2006) (granting relief on Confrontation Clause claim; explaining that in assessing prejudice, "courts must consider such factors as 'the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution's case.'"); *Whelchel v. Washington*, 232 F.3d 1197, 1208 (9th Cir.

2000) (granting habeas relief on Confrontation Clause claim where prosecutor's closing argument emphasized out of court statements of co-defendants implicating petitioner in murder; prejudice found even where physical evidence (the victim's purse linked petitioner to the murder and seven prosecution witnesses testified to petitioner's admissions that he committed the murder or had planned to do so)). The state court decision that the erroneous admission of Gregory's preliminary hearing testimony did not violate Cudjo's constitutional rights was objectively unreasonable. Cudjo is entitled to relief on this claim. At the very least, Cudjo has met the standard for obtaining a COA on this claim.

VII. THE COURT SHOULD GRANT A COA AND RELIEF ON CUDJO'S CLAIM THAT THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY HIGHLIGHTING CUDJO'S RACE IN HIS GUILT PHASE CLOSING ARGUMENT

A. Summary of Claim

Claim Twelve alleges that the prosecutor committed misconduct when he said in his closing argument at guilt that "what [defendant] wants you to believe, and what I believe to be perhaps the most telling thing in this whole case, is that . . . this woman is going to have intercourse with a strange man -- frankly any man -- a black man, on her living room couch with her five year old in the house." (Docket no. 10).

B. Standards of Review and AEDPA Standards

The relevant state court decision for purposes of federal habeas review is the California Supreme Court's appeal opinion. (ER 229-39). This Court may grant habeas relief if it concludes that the state court decision is objectively unreasonable. This Court reviews the district court's ruling on the claim *de novo*. The district court did not take evidence on this claim at the hearing and it made no findings of fact that are subject to clear error review.

C. The California Supreme Court Decision

The state supreme court held that the prosecutor's statement was misconduct but that it did not prejudice Cudjo. (ER 245). The court explained that "[p]rosecutorial argument that includes racial references appealing to or likely to incite racial prejudice violates the due process and equal protection guarantees of the Fourteenth Amendment to the federal Constitution." (ER 244). "[E]ven neutral, nonderogatory references to race are improper absent compelling justification." (ER 245).

Although the court found no compelling justification for the racial reference, it concluded that Cudjo was not prejudiced by the remark. (ER 245). The court stated that "[t]he racial reference added little to the force of the [prosecutor's] argument on the alleged implausibility of Cudjo's account; that the

"racial reference was a brief and isolated remark"; and that there was "no continued effort by the prosecutor to call attention to defendant's race or to prejudice the jury against him on account of race." (*Id.*).

D. The District Court Decision

The district court's rationale for denying Claim 12 largely mirrors those of that of the state supreme court. (ER 69-71). Like the state court, the district court held that the prosecutor's statement was misconduct but not prejudicial. (ER 71). The court stated that:

> "[i]t was not solely because of Armenia's race that the prosecutor found his story incredible, but because of all of the other circumstances, i.e., she was happily married, kept a clean house and was in the house with her son. Thus, when the argument is put its proper context, its prejudicial effect is minimized."

(ER 70-71).

E. The Prosecutor's Racial Remark Prejudiced Cudjo and Requires Relief

The state supreme court and district court recognized the correct legal principle that "[t]he Constitution prohibits racially biased prosecutorial arguments." *McCleskey v. Kemp*, 481 U.S. 279, 310 n.30 (1987). This principle is clearly established federal law" under AEDPA. *Bains v. Cambra*, 204 F.3d 964, 974 (9th Cir. 2000); *see also United States v. Cabrera*, 222 F.3d 590, 594 (9th Cir.

2000) ("Appeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's . . . right to a fair trial.").

The state supreme court unreasonably applied the law because it failed to adequately take into account the consequences of the remark in the particular circumstances of this case. The situation presented here -- an African-American man accused of raping and killing a white woman –[10] strikes at the heart of the Supreme Court's concerns about the improper injection of race into capital trials. The Court's "modern capital punishment case law" has been "suffused with concern about race bias in the administration of the death penalty," most particularly in cases where Black men are accused of raping white women. *Graham v. Collins*, 506 U.S. 461, 479 (1993) (Thomas, J., concurring); *id*. at 482.

In *United States v. Grey*, 422 F.2d 1043, 1044-45 (6th Cir. 1970), the Sixth Circuit vacated a bank robbery conviction where the prosecutor asked a defense character witness "whether he knew that Grey, a Negro, and a married man, was 'running around with a white go-go dancer.'" In language applicable here, the court reasoned that "[a]t best, the entire question was a magnificent irrelevance in a prosecution for bank robbery." *Id*. at 1045. "At worst, the gratuitous reference

[10] Although Cudjo was not charged with a separate count of rape or with a rape special circumstance, rape was one of the theories of felony murder presented and argued to the jury. *See supra* at Section III E.

to the race of the go-go dancer may be read as a deliberate attempt to employ racial prejudice to strengthen the hand of the" prosecution. *Id*.

The prejudice here is stronger, given that the prosecutor argued that Cudjo raped and killed a white woman. *See Bates v. Bell*, 402 F.3d 635, 641-42 (6th Cir. 2005) (stating that it is "'the cardinal rule that a prosecutor cannot make statements "calculated to incite the passions and prejudices of the jurors"'" and granting penalty phase relief under AEDPA because of the prosecutor's improper argument).

That the remark was "isolated" and there was "no continued effort by the prosecutor to . . . prejudice the jury against him on the account of race" misses the point where the prosecutor explicitly cited Cudjo's race to discount his defense. The district court's statement that "[i]t was not solely because of Armenia's race that the prosecutor found his story incredible" (ER 70) requires a greater quantum of proof to establish prejudice than the law requires. *See Bates*, 402 F.3d at 649 (granting relief under AEDPA because "the improper argument clearly operated towards prejudicing" petitioner and noting that "[i]f a habeas court is in 'grave doubt' as to the harmlessness of an error, the habeas petitioner must prevail") (citing *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). At the very least, Cudjo has met the standard for obtaining a COA on his claim.

VIII. THE COURT SHOULD GRANT A COA AND RELIEF ON CUDJO'S CLAIM THAT HIS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF GREGORY CUDJO'S SECOND JAILHOUSE ADMISSION OF GUILT

A. Summary of Claim

Claim 15A.6. alleges that defense counsel was prejudicially ineffective by failing to investigate and present evidence of Gregory Cudjo's admissions that he had killed Amelia Prokuda. (Docket no. 10).

B. Standards of Review and AEDPA Standards

Cudjo raised this claim in his exhaustion petition, which the California Supreme Court summarily denied without an opinion or a hearing. This Court may grant habeas relief if it concludes that the state court decision is objectively unreasonable. *Supra* at Section I B. Where, as here, the state court summarily denied the claim, the Court conducts an independent review of the record to assess objective reasonableness.

The district court denied the claim after an evidentiary hearing. This Court reviews the district court's ruling on the claim *de novo*, and its findings of fact for clear error. *Supra* at Section I B.

C. The California Supreme Court Decision

The court summarily denied the claim without an opinion or citation to

authority. (ER 197).

D. The District Court Decision

The district court found that trial counsel performed deficiently (1) when he failed to investigate and present evidence of Gregory Cudjo's jailhouse admission reported by Deputy Merritt that, "I'm in here for murder, and I did it" and (2) when he failed to interview Gregory regarding the admission. (ER 91, 102). Resolving a factual dispute between the parties, the court found that Gregory, not Armenia, was the "suspect Cudjo" referred to in Deputy Merritt's report who said on March 26, 1986 that "I'm in here for murder, and I did it." (ER 899)..

"Due to the extent to which the defense was relying upon the theory that Gregory was guilty of the murder," the court ruled, "trial counsel should have closely investigated the possibility that Gregory made an admission while in jail, particularly since trial counsel believed that Gregory had confessed to John Culver." (ER 90). The district court also found that had trial counsel properly investigated the confession, he could have presented evidence of it to the jury: First, trial counsel could have put Deputy Merritt on the stand to show that a statement was made. Second, he could have shown that Gregory was moved on the day the incriminating statement was made, and that the two brothers were never moved or housed together. Third, he could have called Hans Berg, the

prosecutor, to testify that he questioned only one "suspect Cudjo" about the statement and the person he interviewed was Gregory, so by implication, Gregory was the "suspect Cudjo" who made the statement.[11] (ER 90-91).

Trial counsel testified at the federal hearing that although he had received a copy of the Merritt report before trial, and although Hans Berg also told him about the statement in Deputy Merritt's report prior to trial, it never occurred to him to put Berg on the stand to have him testify about Gregory's confession. (ER 91; *see also* ER 130-31, 292, 356, 371 (testimony of Hans Berg that it was his custom to disclose such exculpatory evidence to the defense)).

The court found that evidence of Gregory's second confession would have "bolstered the testimony that the defense offered through witness John Culver" of Gregory's similar, but distinct, previous confession while in jail. (ER 91).

The court concluded, however, that counsel's deficient performance in investigating the statement in the Merritt report did not prejudice Cudjo because "there was extremely strong evidence that the murder was committed by Armenia." (ER 91). That evidence, according to the court, was that Armenia admitted being in the victim's house on the morning of the homicide and that he

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[11] Calling Berg as a witness at trial would not have been problematic or impractical because Berg did not prosecute the case at trial. (ER 364).

had sex with the victim then; there was only one intruder at the victim's house the day of the crime; a prosecution toxicology report showed no drugs in the victim's body but Armenia testified that she took one hit of crack the morning she was killed; someone in training like Cudjo would not have taken 47 minutes to run three miles, as he had testified; "any testimony about Gregory's alleged confession would have been viewed skeptically by the jury, in light of how thoroughly Gregory had been impeached with all of his prior statements; and "it was clear that Gregory was Armenia's brother and thus had a motive to lie." (ER 91-102).

The court also ruled that there was no prejudice "from trial counsel's failure to interview Gregory, because there is no reason to believe that Gregory would have cooperated with trial counsel" given the fact that Gregory invoked his privilege against self-incrimination both at trial and at the federal hearing. *Id*.

E. The Failure To Present Evidence of Gregory Cudjo's Confession, Individually and in Combination with the Trial Court's Exclusion of Gregory's Separate Confession to Culver, Prejudiced Cudjo And Resulted In Unfair Trial And An Unreliable Verdict

As the district court correctly found, given the extent to which the defense was relying upon the theory that Gregory was guilty, trial counsel had a duty to investigate the circumstances of Gregory's confession to the murder and present witnesses to the confession at trial. Had trial counsel investigated the confession,

he would have discovered multiple means by which to present evidence of the confession to the jury.[12] Trial counsel compounded the trial court's error in excluding the testimony of John Culver about Gregory's first confession when he failed to present evidence, through the testimony of Deputy Merritt and Hans Berg, of Gregory's second confession. There was no informed or strategic reason for counsel's failure to present evidence of Gregory's confession. (ER 337-39).

The district court erred by focusing solely on the outcome of the trial, rather than the effect of the deficient performance on the fairness of the proceedings, in determining that trial counsel's failure to present evidence of Gregory's second confession was not prejudicial. (ER 91). "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined

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[12] In addition to the means identified by the district court, there were also other means by which trial counsel could have presented evidence that Gregory had confessed to the murder. Trial counsel could have interviewed Gregory himself or sent an investigator to interview him. Had an investigator interviewed Gregory, it is reasonably likely that he would have obtained a statement from Cudjo which he could have then recounted at Petitioner's trial, as habeas investigator Turlington did at the evidentiary hearing below. *See Luna v. Cambra*, 306 F.3d 954 (9th Cir. 2002). Likewise, an investigator could have obtained a written or taped statement by Gregory corroborating the confession, which would have provided powerful evidence of Armenia's innocence and could have been introduced as a declaration against interest at trial, even though Gregory decided to invoke the Fifth Amendment and refused to testify. *See* Cal. Evid. Code § 1230 (West 1988).

the outcome." *Strickland v. Washington,* 466 U.S. 668, 694 (1984). Thus, a petitioner need not establish that his trial counsel's ineffectiveness changed the outcome. *See Brown v. Myers*, 137 F.3d 1154, 1157 (9th Cir. 1998). A habeas petitioner need only show that, as a result of the ineffective representation, the process by which the outcome was determined at trial was fundamentally unfair. *Strickland*, 466 U.S. at 696 ("the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged); *id*. at 698 ("noting that an "ineffectiveness claim . . . is an attack on the fundamental fairness of the proceeding whose result is challenged."). Although would be sufficient to establish a reasonable probability that at least one juror would have had a reasonable doubt respecting Armenia's guilt, *see id.* at 695, the fundamental unfairness of the *process* is what undermines confidence in the outcome.

As several courts in this Circuit and others have noted under similar circumstances, evidence of a third party culpability would have dramatically altered the weight that the jury gave to the prosecution evidence. For example, in *Brown*, the habeas petitioner was convicted of attempted murder. 137 F.3d at 1157. The prosecutor presented eyewitness testimony that the petitioner got in a fight with the victim and threatened to come back and kill the victim, saying "you're dead." *Id*. at 1155. Twenty minutes later, someone who matched a

description of the petitioner and was wearing the same clothing that petitioner had worn during the fight, shot the victim. The petitioner was seen by at least two witnesses running away from the site of the shooting holding a firearm. At trial, petitioner testified that he fought the victim but did not shoot him. He testified that he was with several friends, watching television, at the time the shooting took place. Trial counsel did not interview any of the petitioner's friends or call any of them to testify at trial. Respondent conceded, and this Court held, that trial counsel's failure to interview any of the witnesses who would have supported the petitioner's alibi "failed to meet the professional standard required for effective assistance of counsel under the Sixth Amendment." *Id*. at 1156-57.

This Court held that counsel's ineffective assistance prejudiced the petitioner. Although the prosecution case consisted of some direct eyewitness testimony that supported its case, the impact of that testimony would have been lessened had the jury considered the alibi witnesses testimony because "the jury would have had to balance more evenly divided evidence to reach its verdict." *Id*. at 1157. Thus, the "missing testimony of the alibi witnesses would have altered significantly the evidentiary posture of the case." Moreover, had trial counsel presented available evidence to support the defendant's account of the events, this Court held, the prosecution could not have argued, as he did at trial, that the

petitioner's testimony was fanciful or uncorroborated. This Court emphasized that a jury may not have believed petitioner's witnesses, many of whom were his relatives, and the outcome may not have been different had the petitioner's witnesses testified. But "focusing . . . 'on the fundamental fairness of the proceeding . . .," the Court held that the witnesses would have made enough of a difference that trial counsel's failure to call them "undermine[d] confidence in the outcome of the trial." *Id*. at 1158 (quoting *Strickland*, 466 U.S. at 696).

Similarly, in this case, the defense theory was that Armenia was in the victim's house on the day of the murder, but he was not the person who killed her. Although there was circumstantial evidence of Armenia's guilt, the California Supreme Court noted that much of the evidence presented at trial "was as consistent with Gregory's guilt as with [Armenia's]." (ER 232). But because trial counsel failed to present any evidence of Gregory's confession to the jury, the prosecution was able to argue that Armenia's theory that Gregory was the one that committed the murder was farfetched and improbable. (*See* ER 2233-35). Even if the jury might have harbored some suspicion about John Culver's testimony regarding Gregory's first confession, given Culver's relationship with Armenia, no such suspicion would have arisen from the testimony of Merritt and Berg. Had the jury heard that Gregory had actually confessed to the murder, twice, the

prosecution would not have been able to so cavalierly discount the defense theory, and the jury would have "had to balance more evenly divided evidence to reach its verdict." *Brown,* 137 F.3d 1157.

A similar scenario was presented in *Luna v. Cambra*, 306 F.3d 954 (9th Cir. 2002). In that case, the petitioner was convicted of attempted murder after the victim identified him in a photo lineup as the man who stabbed him. The petitioner testified at trial that he was at home sleeping when the crime occurred, and two family members would have corroborated his alibi. But his lawyer presented no evidence or witness testimony to corroborate his testimony. Moreover, Richard Lopez, the man who actually stabbed the victim, confessed to the crime to a defense investigator prior to the federal evidentiary hearing and submitted a declaration indicating that he would have been available to testify at trial. Trial counsel never interviewed either the two alibi witnesses or Lopez. *Id.* at 957. The district court held that trial counsel's performance was deficient but that it did not prejudice the petitioner because the jury may not have believed the alibi witnesses. It refused to consider the declaration submitted by Lopez.

This Court held that the trial lawyer's failure to interview the witnesses prejudiced the petitioner. Although the Court acknowledged that a jury could have reservations about the testimony of the petitioner's family members, it

nonetheless found that the testimony would have had a significant impact "particularly given that [petitioner's] only defense was that he was home asleep at the time of the crime, and his bare testimony the only proof." *Id*. at 962. Trial counsel's failure to present the alibi witness' testimony undermined this Court's confidence in the outcome of the petitioner's trial because the witness' testimony "would have created more equilibrium in the evidence presented to the jury." *Id*. This Court also found that the district court erred in refusing to consider Lopez' declaration because evidence of Lopez' confession could have been presented to the jury under California's Declaration Against Interest exception to the hearsay rule. *Id*. at 962-63 (citing Cal. Evid. Code 1230, *People v. Cudjo*, 6 Cal.4th 585 (1994)). Had"Lopez' declaration had been considered below," the Court held, "it would have provided substantial evidence that trial counsel's failure to interview Lopez was prejudicial." *Id*. at 964; *see also Riley v. Payne*, 352 F.3d 1313, 1320 (9th Cir. 2003) (failure to call defense witness was prejudicial because corroborating witness would have made defendant's account that he drew his gun in self-defense after victim drew his gun more credible); *Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999) (failure to interview three witnesses who had material evidence as to the petitioner's innocence was prejudicial).

In this case, the district court did consider the confession of the alternate

suspect – Gregory – at the federal evidentiary hearing.[13] And as in *Luna*, the district court held, correctly, that the failure to present evidence of that confession to the jury violated Armenia's right to effective assistance of counsel. But like the district court in *Luna*, the district court erred in failing to give Gregory's confession appropriate weight in the prejudice analysis. Just as this Court held that the declaration of Lopez provided "substantial evidence" that the failure to call him as a witness was prejudicial in *Luna*, the district court's well-supported finding that Gregory confessed to the murder prior to trial, and that confession could have been presented to the jury but was not, compels the conclusion that the error was prejudicial. As in *Luna*, where the failure to present available defense witnesses left the petitioner with a wholly uncorroborated defense, trial counsel's failure to present evidence of Gregory's confession to the murder left him in a position of having to argue that Gregory was responsible for the murder without the benefit of the most persuasive evidence that would have supported it.

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[13] The district court also received evidence of Gregory's multiple confessions to the murder subsequent to trial (*See* ER 1638-39 (stating that Gregory Cudjo told him "I'm the one that did the crime that Armenia is in prison for"); ER 1640(stating that Gregory Cudjo said "my big brother is in jail now for the white girl that I (Gregory) killed."); ER 1646 (stating that Gregory Cudjo had confessed to him that "someone else was in jail for a homicide that the person didn't commit" and that "he (Malik Cudjo) was involved in the homicide."); ER 861).

The facts of this case are even more compelling than *Luna* because the alternate suspect in *Luna* approached only the defense, and then only after the petitioner's trial had ended, whereas Gregory confessed to the murder well before Armenia's trial and in front of a Sheriff's Deputy and a Prosecutor. *See Luna*, 306 F.3d at 964; *see also Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994) (finding trial counsel's failure to obtain statement from the defendant's brother, who had confessed to the crime, was prejudicial because the brother "might very well have" obtained a statement consistent with his later-produced declaration). Whereas this Court's decisions in *Luna* and *Sanders* rested on its speculation that the evidence of an alternate suspect's confessions *might* have been available to the defense the time of trial, *see Luna*, at 962-63 (noting that Lopez' willingness to confess to a defense investigator prior to the federal evidentiary hearing "provided substantial evidence that trial counsel would have obtained inculpatory statements from Lopez . . . ."); *Sanders*, 21 F.3d at 1457, the district court in this case found that clear evidence of Gregory's confession existed prior to Armenia's trial and that it could definitely have been presented to the jury. (ER 90-91).

The district court's ruling that there was no prejudice depended heavily on the Court's assessment that the evidence against Armenia was "strong." But the California Supreme Court, whose factual findings are entitled to deference under

28 U.S.C. § 2254(e) recognized that the prosecution's case against Armenia Cudjo was relatively weak. (*See* ER 256). Unlike *Luna*, *Avila*, and *Brown*, there was no eyewitness identification. The only visual description of the assailant came from Kevin P., a seven-year-old boy. In that identification he described the assailant in terms that matched Gregory Cudjo, not Armenia. Kevin P. testified that the assailant was wearing cut-off shorts, and a sleeveless blue top, the same clothes that Gregory was wearing on the day of the murder. When asked to identify the assailant in a lineup, Kevin P. could not. (ER 226). Nor could he identify Mr. Cudjo in court. (ER 256). The absence of a reliable eyewitness identification was a significant hole in the government's case. *See Strickland*, 466 U.S. at 696 ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"); *Luna*, 306 F.3d at 966 (noting that victim's "questionable identification standing alone made for a relatively weak case."). The fact that the description of the assailant given by Kevin P. on the date of the murder matched the alternate suspect, Gregory, more closely than it matched Armenia, was a particularly *helpful* fact to the defense.

The physical evidence was likewise equivocal and pointed just as strongly to Gregory as it did to Armenia. As the California Supreme Court observed in addressing the trial court's refusal to allow Culver to testify to a separate

admission by Gregory, Gregory's statement was made spontaneously, soon "after a murder for which Gregory, who had no alibi, was in custody as a prime suspect. Gregory tended to fit Kevin P.'s description of the assailant, and much of the other evidence, in particular the incriminating shoe prints, was as consistent with Gregory's guilt as with defendant's." (ER 232, 235 (Gregory "disclosed accurate crime-scene details" and "Kevin P., the only eyewitness, never identified the assailant and gave a description which more closely resembled Gregory than defendant")). Although there was blood type evidence tending to show that Armenia had had sex with the victim on the day of the murder, a fact that Armenia admitted in his trial testimony, there was no physical evidence that Armenia committed the murder. There were no fingerprints or other witnesses. Gregory had no alibi. Armenia's mere admission that he was in the victim's house on the morning that the murder occurred and that he had had sex with her was far from compelling taking into account the utter lack of physical evidence that he killed her. *See Brown*, 137 F. 3d at 1157.

Perhaps the strongest evidence against Armenia Cudjo was the self-serving accusation of his brother, Gregory. Although Gregory did not testify, his preliminary hearing testimony, as well as previously recorded hearsay statements

played *to* Gregory at the preliminary hearing, were presented to the jury.[14] According to Gregory, Armenia returned to the camper where they slept, described a robbery of the victim, but denied raping or killing her. But the vivid detail with which Gregory described the scene of the crime, raised the distinct possibility that Gregory had been in the house himself. (*See* ER 257, Kennard, J., dissenting ("this evidence too was equally if not more consistent with Gregory's guilt). Had the jury considered this possibility, along with Gregory's multiple confessions to the murder, both to his cellmate and in the presence of a Sheriff's Deputy, it would likely have accorded Armenia's defense theory that Gregory was responsible for the murder more weight.

The district court reasoned that Gregory's confession might have been disbelieved given the extent to which his testimony had been impeached at the evidentiary hearing. (ER 99). But the fact that Gregory's testimony could have been impeached does not mean the absolute preclusion of his testimony was not prejudicial. *See Luna*, 306 F. 3d. at 962. And the jury would have been no more likely to disregard Gregory's confession to the crime than it would his *denial* of

[14] The admission of Gregory's preliminary hearing testimony, and the hearsay statements played to impeach Gregory at the preliminary hearing, which were also presented to the trial jury, violated Mr. Cudjo's Sixth Amendment Right to confront the witnesses against him. *See infra* at Section VI.

the crime, as part of his preliminary hearing testimony. Finally, Gregory's un-cross-examined testimony, which *was* presented to the jury, was crucial to the prosecution's case. If the jury did not believe that Gregory's confession to the murder was sincere, then it would also have been more likely to disbelieve his preliminary hearing testimony regarding Armenia's alleged confession of the crime to Gregory. If the jury had discounted all of Gregory's testimony, it would have been left with little evidence to prove Armenia's guilt.

The district court's prejudice analysis relies heavily on "unexplained discrepancies" in Armenia's own testimony regarding his contact with the victim on the morning of the crime. (*See* ER 92). But Armenia's testimony was not internally inconsistent. At worst, it was inconsistent with some of the physical evidence, and some of the prosecution's assumptions about what the physical evidence showed. In any case, any perceived discrepancies in Armenia's testimony were no more significant than the discrepancies that permeated Gregory's testimony, and none of them would have been significant enough to eliminate all reasonable doubt as to whether Armenia committed the crime. Moreover, but for (1) the Court's constitutional error in excluding John Culver's testimony regarding Gregory's confession, and (2) counsel's ineffective assistance in failing to present evidence of Gregory's second confession to the jury, Armenia

might not have been forced to testify in his own defense in the first place.

The testimony of Deputy Merritt and Deputy District Attorney Hans Berg regarding Gregory's second confession to the murder, on the other hand, would have raised at least a reasonable doubt as to Petitioner's guilt, taking into account the equivocal witness identification in the case and other evidence that pointed equally to Gregory as it did to Armenia. *See Strickland*, 466 U.S. at 692. But Armenia is not required to prove that much. *See Brown*, 137 F. 3d 1154 (9th Cir. 1998). He was required only to show that the failure to present evidence that Gregory had confessed to the murder for which he was then on trial undermines this Court's confidence in the process that led to his conviction. *See Strickland*, 466 U.S. at 694. Ironically, the prosecution convicted Armenia based almost entirely on Gregory's un-cross-examined statements that Armenia had confessed to the crime. And yet, the jury never learned that Gregory himself had confessed, twice, to the same murder. Failure to present evidence of the confession distorted the fact finding process and deprived Armenia of a fair trial. Had evidence of Gregory's confessions been presented, it is reasonably probable that at least one juror would have had a reasonable doubt about Armenia's guilt. *See id.* at 695. At the very least, Cudjo is entitled to a COA on this claim.

IX. THE COURT SHOULD GRANT A COA AND RELIEF ON CUDJO'S CLAIM OF INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE

A. Summary of Claim

Claim 20(B) alleges that Cudjo's trial counsel was ineffective by failing to investigate and present mitigating evidence of Cudjo's background, physical condition, and family and social history. (Docket no. 10). Claim 20(E) alleges that counsel was ineffective for not seeking at the penalty phase to admit Culver's testimony of Gregory's confession, given the more lenient evidentiary standards that apply at that stage. (Docket no. 10).

B. Standards of Review and AEDPA Standards

Cudjo raised these claims in his exhaustion petition, which the California Supreme Court summarily denied without an opinion or a hearing. (ER 197). This Court may grant habeas relief if it concludes that the state court decision is objectively unreasonable. Where, as here, the state court summarily denied the claim, the Court conducts an independent review of the record to assess whether the state decision was reasonable. *Supra* at Section I B..

The district court denied the claims after an evidentiary hearing. In a federal habeas action, a claim of ineffective assistance of counsel presents a mixed question of fact and law. This Court reviews the district court's ruling on the

claims *de novo* and its relevant findings of fact for clear error. *Supra* at Section I B.

C. The California Supreme Court Decision

The court summarily denied Claim 20(B) in the habeas case without an opinion or citation to authority. (ER 197).[15]

D. The District Court Decision

On Claim 20(B), the district court found that "trial counsel made a strategic decision to present a lingering doubt theory at the penalty phase, and decided that the presentation of mitigation evidence would be inconsistent and detract from that theory." (ER 156-57). "However, while the decision was strategic, the court [found] that it was not reasonable because trial counsel did not conduct an adequate investigation before making his decision." (ER 157).

The court rejected the Respondent's claim that counsel reasonably decided not to present mitigating evidence out of a concern that such a presentation would result in the prosecution discovering and presenting evidence of Cudjo's prior Arizona robbery conviction. The court explained that "the primary reason that

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[15] Cudjo also asserted in his direct appeal that counsel failed to effectively present a lingering doubt defense and failed to present other mitigating evidence, but the state court ruled that "[a]ny assertion that counsel was inadequate in this regard must be raised on habeas corpus." (ER 251).

trial counsel did not present mitigating evidence was that it would be inconsistent with the theory of lingering doubt, not to try to keep the Arizona robbery conviction from being discovered by the prosecution." (ER 146). "[W]hile the existence of the Arizona prior conviction was a consideration, it was not the main reason that trial counsel strategically decided not to present a separate case in mitigation . . . ." (*Id.*).

The court concluded regarding counsel's performance that:

> Trial counsel's decision to conduct a cursory investigation due to his strategy focusing on lingering doubt demonstrates that trial counsel failed to adequately recognize how evidence of an individual's background could be utilized to ask for [a] life sentence without the possibility of parole. Moreover, trial counsel did not present any evidence to support the theory of lingering doubt, aside from Armenia's own denial of guilt, which he made in three words, without any cross-examination.

(ER 157).

However, the court concluded that counsel's deficient performance did not prejudice Cudjo. The discussion of prejudice at the penalty phase takes up less than three of the 192 pages in the order denying habeas relief. (ER 157-59). The court phrased the issue as follows:

> The question before this Court is whether knowledge that Armenia had experienced a traumatic childhood, been exposed to domestic violence, lost his father at age

> twelve, suffered from depression, self-medicated himself by abusing drugs and alcohol, suffered two head injuries, had a history of seizures and might have had minimal brain damage, would have been enough that even one juror would have weighed it more heavily than the evidence that Armenia bound up Amelia and beat her to death with her young son present in the house.

(ER 158). The court answered its question in the negative.

E. Counsel's Deficient Performance Prejudiced Cudjo

1. Ineffective Assistance Standards

To prove his claim, Cudjo must show that his counsel's performance was deficient and that he was prejudiced as a result. To establish deficient performance, Cudjo must show that trial counsel's "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To establish prejudice, Cudjo "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Wiggins*, 539 U.S. at 534 (quoting *Strickland*, 466 U.S. at 694). "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case . . . . The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined

the outcome." *Strickland*, 466 U.S. at 693-94.

2. Clark's Deficient Performance at the Penalty Phase

The district court correctly found that Clark's decision not to present any mitigating evidence was unreasonable and that his performance was deficient. (ER 157). Clark admitted at the federal evidentiary hearing that he "didn't do any investigation into mitigation evidence in [Cudjo's] case and [he] didn't instruct Mr. Hill or anyone else to conduct such an investigation." His trial investigator testified similarly. (*See* ER 1643 ("I didn't conduct any investigation in preparation for the penalty phase of Mr. Cudjo's trial. I never talked to Armenia Cudjo or anybody from his family. Mr. Clark never asked me to do that and I was not interested in doing it either.")).

Clark testified that he did no mitigation investigation because he pursued a theory of defense that Cudjo was innocent of the murder. On more than one occasion, Clark called his theory of defense an "alibi" theory. (*See, e.g.*, ER 1612 ("As the case began to take on dimension and substance, and it became apparent that the essential defense would be 'alibi' in nature, the background information on the defendant, his childhood, education, and various other factors commonly used in mitigation became of minimal consequence. Therefore, I didn't do any investigation into mitigating evidence in Armenia's case[.]"); ER 296)). However,

Clark introduced no evidence of an alibi at trial, except for Cudjo's testimony that he went jogging alone on the morning of the crime, after he returned from a consensual sexual encounter with the victim. (ER 1951-53).

Clark's stated rationale for not investigating or presenting mitigation was that "presenting a 'laundry list' of feigned mitigating evidence would detract from one good theory which was consistent with the evidence presented at trial, and might prompt the jury to re-evaluate their determination of guilt at trial." (ER 1612). Clark added, "If I am dealing with an alibi or a straight denial type of a case, I don't think mitigation is appropriate." (ER 340). Clark also testified -- referring to mitigation -- that "[p]ersonally, it's not my mode. I can't do it." (ER 311).

In light of this evidence, the district court was correct to find that Clark's decision not to investigate and present mitigating evidence was not a reasonable decision. Clark's decision was unreasonable because it was misinformed, contrary to his constitutional duties, and based on an inadequate investigation. Clark's belief that a defense lawyer does not have a duty to investigate mitigating evidence when the defense theory at the guilt phase is to challenge the defendant's culpability for the crime is contrary to United States Supreme Court law. *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins*, 539 U.S. at 524-26; *Terry Williams*

v. Taylor, 529 U.S. 362, 396 (2000) (holding that defense counsel in a capital case has an "obligation to conduct a thorough investigation of the defendant's background").

Clark also failed to present at the penalty phase any of the evidence of Gregory Cudjo's culpability that he had unsuccessfully sought to introduce at the guilt phase -- most notably, the testimony of John Culver. At the federal hearing, Clark testified that he did not seek to introduce Culver's testimony at the penalty phase -- where the evidentiary standards are more relaxed -- because he thought the judge would "be most consistent" in ruling on the testimony, which he had precluded at guilt. (ER 339). But in fact, had Clark sought to introduce Culver's testimony at the penalty phase, the judge would have had to consider the relaxed standards governing the admissibility of evidence at the penalty phase of a capital trial (*see Green v. Georgia*, 442 U.S. 95, 97 (1979) (holding that exclusion of relevant evidence at sentencing hearing constitutes denial of due process), where "mechanical application" of the hearsay rule is disfavored. *Chambers*, 410 U.S. at 302 (holding that where a statement substantially implicates the declarant's penal interest, "the hearsay rule may not be applied mechanistically to defeat the ends of justice"). And, separate from any federal constitutional mandate, as a practical matter, the evidence was admissible under California's statutory scheme. *See* Cal.

Pen. Code § 190.3 (a) and (k). Clark's failure to pursue mitigation in favor of a "lingering doubt" theory he felt was more consistent with his guilt-phase defense must be viewed in light of his failure (due largely to his inadequate investigation, exacerbated by the trial court's rulings) to introduce powerful evidence of Gregory Cudjo's culpability at either phase.

Further, as the district court correctly found, Clark's decision not to present mitigating evidence based on Cudjo's life history was also unreasonable because it was not based on adequate investigation. (ER 157). "A decision by counsel not to present mitigating evidence cannot be excused as a strategic decision unless it is supported by reasonable investigations." *Correll v. Ryan*, 539 F.3d 938, 948 (9th Cir. 2008) (as amended); *see also id*. at 949 ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all.").

The record in Cudjo's case is clear: no investigation informed Clark's decision to rely solely on the theory of "lingering doubt" at the penalty phase. Clark excused himself from this responsibility because he had contested his client's guilt at trial, based on a theory of reasonable doubt that was poorly developed due to Clark's failure to investigate and present evidence of Gregory Cudjo's confession. In *Strickland*, the Supreme Court referenced the American Bar Association's Standards for Criminal Justice as "guides to determining what is

reasonable." 466 U.S. at 688-89. In *Wiggins*, the Court reiterated that it had "long referred" to the Guidelines in assessing reasonableness under *Strickland*. *(Terry) Williams* and *Wiggins* both emphasize a particular standard -- Standard 4-4.1: the Duty to Investigate. *Williams*, 529 U.S. at 396 (citing Standard 4-4.1 for the proposition that counsel had "obligation to conduct a thorough investigation of the defendant's background"); *Wiggins*, 510 U.S. at 522. The American Bar Association stressed, in its 1980 commentary to Standard 4-4.1, that "[t]he defense lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing . . . . Investigating is essential to the fulfillment of these functions."" 1 ABA Standards for Criminal Justice 4-.41, commentary, pp. 4-5 (2d ed. 1980).

Had Clark investigated Cudjo's life and social history, his family history of epilepsy and seizure disorder, his history of seizures, and his brain impairments, a decision not to present any of the evidence would still have been unreasonable, because social history evidence and the third-party culpability theory Clark pursued at trial are not mutually exclusive. *See Wiggins*, 539 U.S. at 535; *Correll*, 539 F.3d at 943, 950 (stating that penalty phase investigations should include "inquiries into social background, including investigation of any family abuse, mental impairment, physical health history and substance abuse history" and

recognizing this type of evidence as "powerful.")

Clark's strategy, like defense counsel's in *Correll*, was not a strategy at all: instead of presenting an affirmative defense of "lingering doubt" at penalty, Clark did nothing more than reiterate Cudjo's statement that he did not commit the crime and then argue, weakly, to the jury for mercy. Clark called Cudjo as a penalty-phase witness to deny guilt (in testimony consisting of three-words: "No, I didn't." (ER2258), but Cudjo had done that at length during the guilt phase and the jury was unpersuaded by it. Clark's closing argument did not reflect his stated strategy to argue lingering doubt; instead, he told the jury -- for no apparent reason -- that the decision they made regarding life or death could be overturned on appeal, or that Cudjo could be granted a pardon or a commutation of his sentence by the governor. (ER 2267).

3. Prejudice

The district court wrongly concluded that Cudjo was not prejudiced by his counsel's failings. The United States Supreme Court has established that, in reviewing ineffective assistance of counsel claims, courts must "evaluate the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding -- in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-98. A review of the totality of the

evidence sufficiently undermines confidence in the outcome of Cudjo's trial and establishes prejudice.

The prejudice is apparent once the mitigating evidence Clark could have uncovered is considered in contrast to the dearth of aggravation. This is especially true because the case for aggravation was not particularly strong. At penalty, the prosecution relied on the evidence introduced at the guilt phase and did not introduce any additional evidence in aggravation. In his closing, the prosecutor asked the jury to return a death sentence because of the circumstances of the crime itself. Had Cudjo's jury been able to place Cudjo's troubled life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance between life and death.

Dr. Kumea Shorter-Gooden, a psychologist, described Cudjo's troubled life history at the federal evidentiary hearing. Dr. Shorter-Gooden, or another social history expert with similar background and credentials, could have told Cudjo's jury the facts she testified to at the hearing. California Penal Code § 190.3 (k) gives capital defendants broad leeway to introduce any relevant mitigating evidence, and the sentencer in a capital case must be allowed to consider in mitigation, "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant." *Hitchcock v. Dugger*, 481

U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986); (*see* ER 2277). This principle of broad admissibility of mitigating evidence extends to hearsay when it is highly relevant and there are substantial reasons to consider it reliable. *Green*, 442 U.S. 95. The Supreme Court in *Wiggins* relied on a social history report prepared by a social worker to find that Wiggins' counsel had been constitutionally ineffective for failing to investigate and present mitigating evidence at the penalty phase of Wiggins' capital trial and rejected arguments that the social history report would have been inadmissible hearsay under Maryland law, citing to Maryland's "relaxed standard' governing the admissibility of reliable hearsay at the penalty phases of capital trials. *Wiggins*, 539 U.S. at 536.

An expert could also have placed the facts of Cudjo's troubled history in context, drawing conclusions about the impact of Cudjo's difficulties and traumatic experiences as a child, adolescent, and young adult on his development and his life trajectory. An expert could have testified about the limitations of Cudjo's inadequate and indifferent caregivers (*see*, *e.g.*, ER 452-53, 1654-73); the impoverished circumstances of Cudjo's family life and the community in which he was raised (*see, e.g.*, ER 1665-69, 464-65); the trauma Cudjo experienced in the wake of his father's death, when Cudjo was only 11 years old (*see*, *e.g.*, ER 444, 1671-74); the domestic violence Cudjo was exposed to as a child and a teenager,

particularly when his mother began a relationship with a violent alcoholic (*see*, *e.g.*, ER 452, 1674-77);and Cudjo's substance abuse, most notably when, as a teenager, he began sniffing gasoline (*see*, *e.g.*, ER 1677-78, 1681).

Cudjo's relatives, including his half-sister, Julia Watson-Bryant, his sisters, Helen Cudjo-Woods and Brauni Cudjo, his brother, Martin Luther Cudjo, and his mother, Maxine Cudjo -- also could have told the jury about many of the difficult experiences that shaped Cudjo's development. (*See, e.g.*, ER 1614-19, 1622-37, 1733-36). These witnesses would have corroborated the experts' explanations of Cudjo's childhood and adolescent development. While the testimony of Maxine Cudjo and her children about these difficult circumstances would have been powerful in its own right, the expert testimony would have placed the narrative details of Cudjo's life in a broader context that the jury could understand and sympathize with.

Clark could have discovered extensive mitigating evidence by interviewing Cudjo, by contacting and interviewing the relatives, neighbors, friends, extended family and other witnesses who knew Cudjo throughout his life, and by gathering the relevant school, medical, psychiatric, criminal, and other social history records about Cudjo and his family. All of the relatives whose direct testimony was admitted during these proceedings were willing to talk to Cudjo's trial counsel or

investigator in 1988 and to testify at Cudjo's trial, and several were called as prosecution witnesses at the preliminary hearing and trial. Other witnesses, who were available at the time of trial but no longer available by the time the federal evidentiary hearing took place, including Cudjo's sister, Boni Cudjo (now deceased, (*see* ER 1140), also could have testified on Cudjo's behalf.

Clark also could have presented at the penalty phase expert testimony such as that of Dale Watson, Ph.D., regarding Cudjo's seizure disorder and brain dysfunction. Clark was on notice, at the time of Cudjo's trial, that Cudjo was medicated for seizures. (ER 863 (note from Clark's trial file containing the word "Dilantin" -- a medication for seizures)). Clark observed that Cudjo "was probably pretty slow, intellectually." (ER 1609). Clark also could have discovered, by obtaining medical records, that Cudjo had had two serious head injuries, including a skull fracture. (*See* ER 875-77 (medical records from 1972 bicycle accident); ER 1329-1407 (medical records from 1983 skull fracture).) With the help of mental health experts such as Dr. Watson, Clark could have presented evidence that Cudjo had a family history of seizure disorder (ER 504, 1055-1138, 1141-73), evidence that Cudjo suffers from a seizure disorder (ER 503, 515, 885-1054, 1307-08), and evidence that Cudjo suffered from brain dysfunction that impaired his judgment at the time of the crime. (ER 1720-25,

875-77, 1329-1407).

The district court's conclusion that Cudjo was not prejudiced by Clark's failures to investigate and present mitigating evidence at his trial is contrary to Supreme Court and this Court's precedent. The district court wrongly concluded that the mitigating evidence presented at the federal evidentiary hearing -- evidence that Armenia had "experienced a traumatic childhood, been exposed to domestic violence, lost his father at the age of twelve, suffered from depression, self-medicated himself by abusing drugs and alcohol, suffered two head injuries, had a history of seizures and might have had minimal brain damage" (ER 158) -- was insufficient to outweigh the circumstances of the crime (the only factor argued in aggravation at his trial). The district court wrongly concluded that this mitigating evidence was insufficient because it was not "exculpatory" and because it did not "'portray a person whose moral sense was warped by abuse, drugs, or mental incapacity, or who acted out of passion, anger or other motive unlikely to reoccur." (ER 158, quoting *Allen v. Woodford*, 395 F.3d. 979, 1107 (9th Cir. 2005)).

The district court analogized Cudjo's case to the United States Supreme Court's per curiam opinion in *Woodford v. Visciotti*, 537 U.S. 19 (2002), reversing this Court's grant of penalty-phase relief on an ineffective assistance of counsel

claim, and to this Court's opinion in *Allen v. Woodford*, 395 F.3d 979 (9th Cir. 2005). *Allen* and *Visciotti* are distinguishable because they both involve aggravating circumstances that far exceed the nature and extent of the aggravation in Cudjo's case. They are also distinguishable because they are not cases where trial counsel had a plausible theory of lingering doubt to argue to the jury at the penalty phase, as Clark did here -- although he failed to capitalize on it.

In *Allen*, the petitioner had been convicted of triple murder and conspiracy to murder seven people had a long history of orchestrating and committing violent robberies and burglaries (including eight armed robberies) and had plotted murders from prison. 395 F.3d at 984. This Court also observed that the United States Supreme Court has "deem[ed] defendants who have committed murder while serving a life term in prison to be "unique among capital defendants" and concluded that "the aggravating circumstances of Allen's triple-murder and conspiracy are those for which the United States Supreme Court envisions the harshest penalty." 395 F.3d at 1009.

In *Allen*, this Court made a point of clarifying that "we do not hold that humanizing, non-exculpatory evidence can *never* be enough to establish prejudice," but rather that "the quality and quantity of the particular evidence offered by Allen, in light of the heinous nature of his crimes, does not establish

prejudice." 395 F.3d at 1010. As the Supreme Court observed in (*Terry*) *Williams*, "[M]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." 529 U.S. at 398. Given the qualitative and quantitative differences between the aggravating circumstances in Cudjo's case, as compared to Allen's, the district court's reliance on *Allen* to support its conclusion that Cudjo suffered no prejudice by his trial counsel's ineffectiveness is misplaced.

The other cases the district court cited in support of its conclusion that Cudjo was not prejudiced are also cases in which the aggravation was far more extensive than the aggravation in Cudjo's case. In *Campbell*, the habeas petitioner had been convicted of three counts of aggravated murder and sentenced to death, and trial counsel made a reasoned strategic choice not to use the mitigating evidence he had uncovered through his investigation because he feared "opening the door" to possible damaging rebuttal evidence by the State. The possible rebuttal evidence included the forcible rape of an ex-wife, repeated rape and intimidation of other inmates, drug- and alcohol-induced violence, and the report of a psychologist that Campbell was "imminently harmful to all who directly or indirectly capture his attention or interest," "reportings of sexually abhorrent conduct with animals, stranglings of animals, [and] alleged child abuse."

This Court found that Campbell suffered no prejudice even if his counsel had performed deficiently, because he had failed to "suggest any potential mitigating evidence that could have been uncovered through a more thorough investigation." 829 F.2d 1453, 1463 (9th Cir. 1987). By contrast, Cudjo has presented extensive mitigation that his trial counsel could have uncovered through adequate investigation and presented at Cudjo's trial.

The district court also cited *Gerlaugh v. Stewart,* which this Court characterized as "an example of the most extreme factual situations with virtually no mitigation." 129 F.3d 1027, 1042 (9th Cir. 1997). The same cannot be said of Cudjo.

The district court relies on a small number of exceptional cases (*Allen*, *Campbell, Gerlaugh*) where the aggravating circumstances were especially numerous and chilling, including prior convictions for rape, murder and violence orchestrated from behind bars. The district court fails to reconcile the difference between such cases and Cudjo's case, where the State presented no additional evidence in aggravation at the penalty phase and argued for the death penalty based on the circumstances of the crime itself. Additionally, the district court found that the one piece of damaging evidence the State pointed to as possible rebuttal -- Cudjo's prior Arizona conviction for burglary and robbery -- was not

was not the primary reason that trial counsel decided not to present mitigating evidence during the penalty phase of trial.

In its prejudice analysis, the district court did not cite the numerous cases from this and other circuits finding prejudice where counsel had failed to investigate and present mitigating evidence. *See, e.g.* :

-- *Douglas v. Woodford*, 316 F.3d 1079, 1099 (9th Cir. 2003) (failure to present evidence of capital defendant's childhood abuse and neglect, mental impairments, and prison gang-rape prejudicial; "[t]he available mitigating evidence that could have been introduced in Douglas's trial was precisely the type of evidence that we have found critical for a jury to consider when deciding whether to impose a death sentence");

-- *Ainsworth v. Woodford*, 268 F.3d 868, 875 (9th Cir. 2001) (similar; also finding prejudice because omitted evidence of defendant's drug and alcohol use "would have been extremely important to the jury in its effort to decide whether to impose the death penalty").

-- *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001) (reversing death judgment because counsel failed to present additional evidence of defendant's drug and alcohol use and failed to present expert testimony on the subject; prejudice found even though "[t]he mitigation evidence presented at trial through the

testimony of [an expert psychologist] was substantial");

-- *Jackson v. Calderon*, 211 F.3d 1148, 1163 (9th Cir. 2000) (failure to present evidence of repeated childhood beatings, upbringing characterized by neglect and instability, and mental impairments prejudicial).

Contrary to the district court's conclusion, Cudjo's is not a case where the aggravating evidence was overwhelming and the presentation of mitigating evidence would not have mattered. Cudjo is entitled to relief on Claim 20(B) under clearly established Supreme Court precedent. *See, e.g., Rompilla*, 545 U.S. 374, *Wiggins*, 539 U.S. 510, and *Williams*, 529 U.S. 420. The district court's denial of Cudjo's claim of prejudice erroneously focused instead on inapposite cases from this Circuit where not prejudice was found due to overwhelming circumstances in aggravation, in addition to the crime facts. The Supreme Court has made clear that habeas petitioners can show prejudice, even where the circumstances of the crime were aggravating -- indeed, even where aggravating evidence was presented in addition to the circumstances of the crime. *See, e.g., Williams*, 529 U.S. at 368 (granting relief despite evidence at trial of the petitioner's prior convictions for armed robbery, burglary, and grand larceny; two auto thefts; two separate violent assaults on elderly victims; an arson; a robbery; another "brutal[] assault[]" on an elderly woman, resulting in the victim being in a

vegetative state; and an arson in jail while awaiting trial).

This Court has also explained that aggravating crime facts do not render counsel's errors harmless. *See Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009) (reversing the district court and granting relief under AEDPA due to penalty-phase ineffectiveness, where petitioner killed three people); *Lambright v. Stewart*, 241 F.3d 1201, 1208 (9th Cir. 2001) ("Evidence of mental disabilities or a tragic childhood can affect a sentencing determination even in the most savage case"); *Smith v. Stewart*, 189 F.3d 1004, 1013 (9th Cir. 1999) ("The horrific nature of the crimes involved here does not cause us to find an absence of prejudice. In *Hendricks v. Calderon*, 70 F.3d 1032, 1044 (9th Cir. 1995), we rejected the argument that heinous crimes make mitigating evidence irrelevant, noting that the fact finder in California has broad latitude to weigh the worth of the defendant's life"); *Silva v. Woodford*, 279 F.3d 825, 828, 847-50 (9th Cir. 2002) (finding prejudice where defendant kidnaped and robbed two college students; the male student was chained to a tree while the female student was repeatedly sexually assaulted; and defendant shot and killed the male and ordered his accomplice to dismember him with an axe); *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992) (finding prejudice where defendant was convicted of murdering 13 people).

Here, in light of the record as a whole, "the failure of [defense counsel] to

present mitigating evidence rendered the sentencing hearing neither fair nor reliable." *Hendricks*, 70 F.3d at 1044; *Douglas*, 316 F.3d at 1090. This Court cannot conclude with confidence that the jury unanimously would have sentenced Cudjo to death if counsel had presented and explained all of the available mitigating evidence. *Mayfield*, 270 F.3d at 929. Cudjo is entitled to relief on this claim. At a minimum, he is entitled to a COA. *Id*. at 926-27.

X. THE COURT SHOULD GRANT A COA AND RELIEF ON CUDJO'S CUMULATIVE ERROR CLAIMS

A. Summary of Claims

Claim 19 alleges that the cumulative errors at the guilt phase require relief. (Docket no. 10). Claim 31 alleges that the cumulative effect of the errors at guilt caused an unconstitutional penalty trial and require penalty relief. (*Id.*). Claim 30 alleges that the cumulative effect of the errors at guilt and penalty require relief. (*Id*.).

B. Standards of Review and AEDPA Standards

Cudjo raised these claims in his exhaustion petition, which the California Supreme Court summarily denied without an opinion or a hearing.[16] This Court

[16] Cudjo also raised claims of cumulative error at guilt phase and at guilt and penalty in his direct appeal (ER 247-48, 252), but these claims were based solely on the appellate record. The cumulative error claims reasserted in the exhaustion petition were based on extra-record evidence that was also presented in the federal

may grant habeas relief if it concludes that the state court decision is objectively unreasonable based on its independent review.

Some evidence on these claims was taken at the federal evidentiary hearing on Claims 15(A)(6) and 20(B). This Court reviews the district court's ruling on the claims *de novo* and relevant findings of fact for clear error.

C. The California Supreme Court Decision

The court summarily denied the claims without an opinion.

D. The District Court Decision

The court found numerous errors at the guilt phase:

--the prosecutor improperly referred to Cudjo's "race as a reason for discounting the defense" (Claim 12);

--trial counsel failed to investigate Gregory's jailhouse admission witnessed by Deputy Sheriff Merritt and others (Claim 15(A)(6));

--trial counsel failed to adequately investigate the testimony of prosecution witness Douglas Ridolfi and the introduction of blood test results associating Cudjo with the semen sample found on the victim and excluding Gregory and the victim's husband as donors (Claim 15(B)(5)):

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habeas action, and the California Supreme Court's summary denials of those claims are the relevant state court decisions for purposes of federal habeas review.

--trial counsel failed to object to the prosecutor's racially inflammatory remarks in closing argument (Claims 15(E) and (F));

--trial counsel failed to object to the references to rape (which was never charged) in the jury instructions on felony murder (Claim 15(G));

--trial counsel failed to object to the trial court's exclusion of Culver's testimony regarding Gregory's confession (Claim 15(I));

--trial counsel's ineffective closing argument trivialized the prosecution's burden of proof (Claim 17)[17]; and

--the trial court failed to instruct that intent to kill was an element of the felony murder special circumstances and defense counsel failed to object and seek a proper instruction (Claim 18). (ER 136).

The court concluded, however, that "[b]alancing any errors that were committed at trial against the strength of the state's case . . . any cumulative error was harmless error at best . . . ." (ER 137).

In considering Claims 30 and 31, the court found the following errors at the penalty phase:

--trial counsel failed to investigate and present evidence of Cudjo's

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[17] This is actually a penalty phase claim. The court thus appears to have mistakenly considered it as part of its guilt phase analysis and failed to consider it when assessing errors affecting solely the penalty phase.

background, physical condition, and family and social history (Claim 20(B));

--counsel failed to move to have Culver's testimony, which was held inadmissible at the guilt phase, admitted during the penalty phase (Claim 20(E)); and

--counsel failed to file briefs or otherwise argue in support of modifying the death sentence (Claim 21). (ER 174).

However, the court concluded that these errors did not warrant penalty relief, and that these errors, considered along with the guilt errors identified above, did not warrant relief. (ER 194).

E. The Cumulative Effect of Errors Rendered Cudjo's Defense Far Less Persuasive Than It Otherwise Would Have Been and Requires Guilt and Penalty Relief

Habeas relief is required when the combined prejudice of multiple constitutional errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone . . . cumulatively produce a trial setting that is fundamentally unfair." *Alcala*, 334 F.3d at 883.

The errors forming the basis of relief can be solely trial court errors. *See*, *e.g., Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007)), or a combination of trial court errors and errors resulting from the ineffective assistance of counsel, *see, e.g.*, *Mak*, 970 F.2d at 622. "*Strickland* requires [courts] to assess the aggregate

impact of counsel's deficient actions when evaluating whether such failures are prejudicial." *Richter v. Hickman*, 578 F.3d 944, 967 (9th Cir. 2009) (*en banc*).

Chambers, 410 U.S. 284, is "the seminal cumulative error case" and constitutes clearly established federal law under AEDPA for the cumulative error doctrine. *Parle*, 505 F.3d at 927 & n.5, 934. "The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle*, 505 F.3d at 927. "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Id*. "Furthermore, the cumulative nature of the challenged evidence does not necessarily render its inclusion (or exclusion) harmless." *Id*. at 928.

Cumulative errors require relief "where the errors have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id*. at 927. "Such 'infection' occurs where the combined effect of the errors had a 'substantial and injurious effect or influence on the jury's verdict.'" *Id*. (quoting *Brecht*, 507 U.S. at 637). "In simpler terms, where the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might otherwise have been,' the resulting conviction violates due process." *Id*.

"[I]n determining whether the combined effect of multiple errors rendered a criminal defense 'far less persuasive' and had a 'substantial and injurious effect or influence' on the jury's verdict, the overall strength of the prosecution's case must be considered because 'a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" *Id*. at 928. Supreme Court and Ninth Circuit precedent require relief on this claim.

1. Cudjo Is Entitled to Guilt Relief

Here, as in *Chambers*, the evidence at trial pointed to there being a single person responsible for a killing, and the main issue was the identity of the perpetrator. 410 U.S. at 297. Here, as in *Chambers*, the defendant "endeavored to develop two grounds of defense": that he did not kill the victim but that an identifiable other person did. *Id*. at 288-89. In both cases, the alternate suspect had previously confessed to the crime; the defense was prevented from cross-examining the alternate suspect at trial; and the defendant was prevented from presenting witnesses to testify to the alternate suspect's confessions. *Id*. at 289-94. The Court found a due process violation because "Chambers' defense was far less persuasive than it might have been had he been given an opportunity to subject [the alternate suspect's] statements to cross-examination or had the other

confessions been admitted." *Id*. at 294.

Cudjo was even more "frustrat[ed in] his efforts to develop an exculpatory defense," *id*. at 290 n.3., and more prejudiced as a result, than the defendant in *Chambers*. In *Chambers*, the alternate suspect's written confession was admitted into evidence but the defense was presented from examining him about his repudiation of the confession. *Id*. at 291. Cudjo was prevented from presenting any evidence of Gregory's confessions and from examining Gregory at trial at all.

The Court found prejudice in *Chambers* despite the presence of stronger evidence of the defendant's guilt than is present here: "One of the deputy sheriffs testified at trial that he was standing several feet from [the police officer who was shot] and that he saw Chambers shoot him." *Id*. at 286. "Another deputy sheriff stated that, although he could not see whether Chambers had a gun in his hand, he did see Chambers 'break his arm down' shortly before the shots were fired." *Id*. Here, by contrast, there was no such clear evidence of Cudjo's guilt, and the eyewitness testimony points more toward Gregory than to Armenia.

The Court also found prejudice even though the defendant was able to present a greater portion of his case than Cudjo was. In *Chambers*, the defense was allowed to present one witness who testified to seeing the alternate suspect shoot the victim and another who said he saw the suspect immediately after the

shooting with a gun in his hand. *Id*. at 289.

Cudjo was additionally prejudiced by the prosecutor's racial remark in closing, and by the other errors found by the district court. If the defendant in *Chambers* was prejudiced by the cumulative impact of errors, then *a fortiorari*, Cudjo was, too.

This Court's decision in *Parle* also supports Cudjo's claim. *Parle* granted relief on a cumulative error claim under AEDPA where the defendant was convicted of the first-degree murder of his wife and at trial he "contest[ed] only his state of mind at the time of the killing," arguing that he was guilty at most of second-degree murder or manslaughter. 505 F.3d at 925. This Court granted relief because "the wrongful admission of Dr. Acenas's testimony [of defendant's thoughts of hurting his wife] and the erroneous exclusion of Dr. Jackman's testimony ["about the effects of a manic episode on one's general state of mind and ability to premeditate"] left the jury with only half the picture." *Id*. at 930-32. "Like the evidence excluded in *Chambers*, this wrongfully admitted and excluded evidence went to the heart of the central issue in the case" and "rendered [the] defense 'far less persuasive than might have been.'" *Id*. at 932-33.

The same is true here regarding the wrongful admission of Gregory's preliminary hearing testimony implicating Armenia and the wrongful exclusion --

through trial court error and defense counsel's ineffectiveness -- of evidence of Gregory's confessions. *See also Alcala*, 334 F.3d at 894 (granting guilt relief on cumulative error claim in capital habeas case because "the combined testimony of [wrongly excluded] witnesses would have challenged [the main prosecution witness's] version of events and presented a colorable third-party culpability theory for the jury to assess")[18]; *Thomas v. Hubbard*, 273 F.3d 1164, 1180 (9th Cir. 2002) (granting cumulative error claim in case governed by AEDPA because errors "adversely affected [defendant's] ability to undermine the credibility of the prosecution's principal witness" and "offer his own defense," where the strongest evidence against him "was the uncorroborated testimony of a person who himself had both a motive and an opportunity to commit the crime"), *overruled in part by Payton v. Woodford*, 346 F. 3d 1204 (9th Cir. 2003).

2. At a Minimum, Cudjo Is Entitled to Penalty Relief

The errors at guilt thwarting an effective third-party culpability presentation prejudiced Cudjo's chances at penalty of receiving life without parole on a lingering doubt theory. The prejudice at penalty was exacerbated by counsel's failures to introduce Culver's testimony of Gregory's confession and to

[18] In granting relief, the Court also considered the prejudice of defense counsel's failure to present an alibi witness. *Id*. at 888-89, 894.

present any life history mitigation evidence, and by his ineffective closing.

In *Mak*, 970 F.2d at 617, 622, this Court granted penalty relief on a cumulative error claim because of "the refusal of the trial court to admit at the penalty phase circumstantial evidence from which it might be inferred that [the capital habeas petitioner's] co-defendant . . . and a third party . . . rather than Mak, may have planned the massacre" and because "[d]efense counsel failed to present any mitigating evidence regarding Mak's background."[19] The Court found the errors prejudicial even though Mak had been convicted of killing 13 people. *Id*. at 616. The case against Cudjo was weaker at guilt and less aggravating at penalty than the evidence against Mak.

[19] The Court also considered the impact of a faulty jury instruction. *Mak*, 970 F.2d at 625.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, Petitioner respectfully requests that this Court reverse this judgment of the district court and grant his petition for a writ of habeas corpus.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: November 20, 2009

By /S/
JOHN L. LITTRELL
Deputy Federal Public Defender

STATEMENT OF RELATED CASES

Counsel for appellant certifies that he is unaware of any pending case presenting an issue related to those raised in this brief.

DATED: November 20, 2009

/S/ John L. Littrell
John L. Littrell

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 27, 259 words.

DATED: November 20, 2009

/S/ John L. Littrell
John L. Littrell

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepared, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Diana Elliott
Diana Elliott