08-99028

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARMENIA LEVI CUDJO, JR., Petitioner-Appellant, **v.** **ROBERT AYERS, JR.,** Respondent-Appellee.	**CAPITAL CASE**

On Appeal from the United States District Court
for the Central District of California

No. CV 99-08089-JFW
The Honorable John F. Walter, Judge

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

Petitioner-Appellant Armenia Levi Cudjo (Petitioner) was found guilty by a Los Angeles County jury of the special-circumstance murder of Amelia Prokuda, and was sentenced to death. On December 13, 1993, the California Supreme Court affirmed Petitioner's conviction and sentence. *People v. Cudjo*, 863 P.2d 635 (Cal. 1993). (ER 217-257.) The United States Supreme Court denied certiorari on October 3, 1994. *Cudjo v. California*, 513 U.S. 850 (1994).

Petitioner filed a petition for writ of habeas corpus in the California Supreme Court on November 10, 1992 in case number S029707. (SER 1-235.) An Order to Show Cause was issued by the California Supreme Court on October 27, 1993. (SER 236.) In a reference order issued on August 17, 1994 the California Supreme Court presented the following questions to Los Angeles County Superior Court Judge Paul G. Flynn:

> 1. What actions did petitioner's trial attorney William Clark take to investigate the potential culpability of Ubaldo Prokuda for the murder of Amelia Prokuda? What were the results of that investigation? Was that investigation conducted in a manner to be expected of a reasonably competent attorney acting as a diligent advocate? If not, in what respects was it inadequate?
>
> 2. If trial counsel's investigation was inadequate, what additional information would an adequate investigation have disclosed?

> 3. After conducting an adequate investigation of Ubaldo Prokuda's potential culpability, would a reasonably competent attorney acting as a diligent advocate have introduced evidence of his culpability in petitioner's defense at the guilt phase of the trial? If so, what rebuttal evidence would have been reasonably available to the prosecution?

(SER 237-38.) The referee's report was filed on May 7, 1997. (SER 239-76.) On June 7, 1999, the California Supreme Court denied the petition for writ of habeas corpus. *In re Cudjo*, 977 P.2d 66 (Cal. 1999). (ER 198-216.)

Petitioner filed a second petition for writ of habeas corpus in the California Supreme Court on July 25, 2000 in case number S090162. (SER 277-983.)

On July 28, 2000, during the pendency of his second state petition, Petitioner filed the underlying Petition for Writ of Habeas Corpus in this Court. The claims in the Petition are enumerated 1-39. Pet. at 29-437.

On November 25, 2003 Petitioner's second state petition was denied on the merits. (ER 197.)

On October 13, 2004, during the pendency of his federal petition, Petitioner filed a third state petition for writ of habeas corpus, in case number S128474. (SER 984-98.)

On June 25, 2005, during the pendency of underlying federal petition and his third state petition, Petitioner filed a fourth state petition for writ of habeas corpus, in case number S134653. (SER 999-1025.)

The third state petition (case number S128474) was denied on the merits on May 17, 2006. (ER 196.) The fourth state petition (case number S134653) was denied on the merits on March 14, 2007. (ER 195.)

On March 17, 2008, the district court ordered an evidentiary hearing as to claims 15(A)(6) and 20(B) of the Petition. (SER 1026-55.) Following the evidentiary hearing, the district court denied Petitioner relief in a judgment and an order dated October 23, 2008. (ER 1-194.) In its order denying relief, the district court granted Petitioner a certificate of appealability as to claim 38 (ER 191), but denied a certificate of appealability as to the remaining claims (ER 194).

Petitioner filed a notice of appeal on November 18, 2008 (ER 260-61), then another on November 19, 2008 (ER 258-59). Petitioner filed his Appellant's Opening Brief (AOB) on November 20, 2009. In it, he addresses the certified issue claim 38 (AOB at 34-41), as well as several uncertified issues (AOB at 41-122).

STATEMENT OF FACTS

Based upon the evidence adduced at the trial, the California Supreme Court found the following facts:

A. Guilt Phase

1. Prosecution evidence

On March 21, 1986, Los Angeles County sheriff's deputies found the body of Amelia P. in the master bedroom of her home in the desert community of Littlerock, in the County of Los Angeles. The body was face down on the floor, with the hands tied together behind the victim's back, the ankles tied together, and the hands tied to the ankles. These bindings were made with neckties belonging to the victim's husband, Ubaldo P. A piece of cloth was found in the victim's mouth, secured by a necktie tied around the victim's head and upper neck.

The body was clothed only in a robe. On the floor near the body were the victim's underwear, socks, and running shoes, as well as a bloodstained hammer and the broken tip of a fireplace poker. The cause of death was multiple blows to the back and sides of the head, fracturing the skull and lacerating the brain. Semen was present on the victim's right inner thigh and genital area, but there were no indications of traumatic sexual assault. Based on the temperature of the liver when the body was found, death was estimated to have occurred between 8:10 a.m. and 12:30 p.m. that day. The victim's blood tested negative for alcohol and an array of illegal drugs, including cocaine.

Kevin P., the youngest of the victim's sons, was five years old on the day of his mother's death, and seven years old when he testified at trial. According to that testimony, a Black man Kevin had never seen before entered the house with a knife in his hand. The man had no facial hair and no tattoos on his arms. It was before lunch, and Kevin was under a table in the living room watching television. The man, who was wearing a sleeveless blue top and dark blue cut-off pants, put the knife to

the victim's neck and demanded money. As Kevin described it, the knife was black with a "little round silver ball around it, and it was a survival knife." At the man's direction, Kevin retrieved the keys to the family van from the kitchen and gave them to the man. The man tried to start the van but was unable to do so. The man then took the victim to the master bedroom, where the man tied up the victim. From the closet in the master bedroom, the man removed two guns belonging to Kevin's father. Kevin went into his own bedroom and stayed there for a long time. Some days later, Kevin attended a lineup but did not identify anyone.

Ubaldo P. testified that he had left the house that morning between midnight and 1 a.m. to go to work 77 miles away in the City of Commerce. When he returned at 5 p.m., the sheriff's deputies were already there. Missing from the house were an M-1 carbine, a 30.06 rifle, and an army duffel bag. The victim's jewelry case, usually kept in the bedroom, was in the family van. The hammer found on the bedroom floor was normally kept in a toolbox in the garage. The fireplace poker was in its usual place, but there were bloodstains on the shaft and the tip had been broken off. The victim was very neat and normally did not leave her clothing on the floor. He had no reason to suspect that she was abusing drugs or alcohol.

Investigating officers found the keys to the van outside the victim's house, about 30 feet from the rear garage door. Nearby, the officers found a single set of shoe prints leading away from the house. It had rained the previous day, making a crusty surface. The officers followed the tracks for about a third of a mile, at intervals observing marks consistent with an object such as a rifle dragging on the ground. The tracks led to a camper, from which the victim's house was easily visible.[1]

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[1] [Footnote 1 in original] The tracks mentioned in the text were not the only ones found in the area. A thorough examination by investigating officers disclosed tracks made by the same or virtually identical shoes on roads to the east and west of the victim's house and Cudjo camper. (The

(continued…)

The officers ordered the occupants to leave the camper. Defendant and his brother Gregory emerged from the camper and were taken into custody.

Inside the camper, the officers found a pair of MacGregor athletic shoes that could have made the shoe prints. The officers found an identical pair of athletic shoes behind the front seat of an automobile belonging to defendant's mother, Maxine Cudjo. Unlike the shoes found in the camper, the shoes found in the automobile were "very wet."

In addition to the shoes, the officers found a black survival knife and a pair of cut-off blue jeans in the Cudjo camper. When shown these articles at trial, Kevin testified that the knife was different from the knife wielded by the man who had assaulted his mother, and that the cut-off pants the assailant had worn were similar to, but shorter than, the ones found in the Cudjo camper. No firearms were found in the camper or in Maxine Cudjo's automobile.

Maxine Cudjo testified that on the day of the murder she was living in the camper. Defendant and Gregory had slept in the camper the previous night, as they occasionally did. She spent most of that morning in the house next door, doing housework for the man who owned the land under the camper. Returning to the camper at 11 a.m., she found defendant and Gregory, both wearing their MacGregor athletic shoes. The three of them went in Maxine's car to the post office and then to the residence of Julia Watson, one of Maxine Cudjo's daughters. Maxine returned to the camper; a little while later, at about 1:30 p.m.,

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(…continued)
camper was north of the victim's house, separated by an expanse of roadless desert.) On the road to the west, there were two sets of tracks, both heading south. On the road to the east, there were two sets of tracks, one heading north and the other south. In addition, two sets of tracks led away from the Cudjo camper, heading east, and a single set of tracks led to the victim's house from the house immediately to the west.

she departed again in her car to visit friends, leaving defendant and Gregory in the camper. On her next return to the camper, at approximately 4 p.m., sheriff's deputies had taken her sons into custody.

Julia Watson testified that her mother had visited her house that day with defendant and Gregory at approximately 1 or 2 p.m. Defendant was wearing cut-off jeans and work boots; Gregory wore shorts and tennis shoes.

Gregory Cudjo did not testify at trial, but the prosecution introduced evidence of the testimony he had given at defendant's preliminary hearing and statements he had made to investigating officers during a tape-recorded interview the morning of the day after the murder of Amelia P. In these prior statements, Gregory maintained that he had remained in the camper throughout the morning of the murder until his mother returned at approximately 11 a.m. During this time, he alternately slept and listened to a professional baseball game on the radio. He said defendant was gone from the camper for about two hours, leaving at about the time the baseball game started and returning at the same time as Maxine. During the taped interview, Gregory said that later that afternoon defendant had washed off his MacGregor athletic shoes when they were at Julia Watson's house.

Analysis of semen found on the victim's external genital area and right inner thigh revealed that it could have come from defendant but could not have come from Gregory Cudjo or from Ubaldo P.[2]

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[2][Footnote 2 in original] The information did not charge rape or the rape-murder special circumstance, but the jury was instructed on first degree felony murder in the course of rape. According to the prosecutor, the evidence at the preliminary hearing was insufficient to support a charge of rape, and therefore the information did not charge rape expressly. Only after the preliminary hearing did the prosecution complete the laboratory work

(continued…)

2. Defense evidence

Defendant testified in his own behalf. He admitted that he knew Amelia P., that he had been in her house on the morning of her death, and that he had had sexual relations with her, but he denied that he had killed her. He said he had seen Amelia P. on three occasions before the day of her death.

Defendant explained that he and a woman named Iris Thomas had worked together selling cocaine, and that he had derived most of his income from this illicit trade. On two occasions, he had seen Amelia P. purchase cocaine. One of these transactions had occurred in the parking lot of an apartment complex in Quartz Hill. The other transaction had occurred on March 4 or 5, 1986, at a house belonging to Thomas's mother. According to defendant, Amelia P. had announced at the door that she had come "to see Miss Thomas about some coke." Defendant had invited Amelia inside. Amelia had asked Thomas's mother to "front her an eight track of cocaine." (Defendant testified that an "eight track" is one-eighth of an ounce.) After some discussion of arrangements for payment, Thomas's mother had given cocaine to Amelia. On a later date, defendant had seen Amelia P. at a market and they had waved to each other but had not conversed.

On the morning of March 21, defendant was driving his mother's car to a friend's house when he noticed Amelia P. standing in the front yard of her residence. She was wearing a housecoat or robe. It was about 9 a.m. When he blew the horn, she came to the car and asked how he had been and if he knew anybody who had any cocaine. Defendant said he had some. She asked if she could have it on credit as a favor. He said that it would depend on whether she would do him a favor. They agreed to talk about it further.

(…continued)
excluding Gregory and the victim's husband, but not defendant, as the source of the semen found on the victim.

Defendant drove to the camper, retrieved some cocaine, and returned to the victim's residence. Amelia P. invited him into the house. He sold her some cocaine on credit for $50. (Sheriff's officers did not find rock cocaine at the victim's residence, but they did find an empty "baggie" in the garage. Just two and one-half inches square, the baggie was smaller than the ones normally sold in supermarkets; it was a convenient size for $50 worth of rock cocaine. The officers did not take possession of the baggie.)

Defendant smoked some cocaine, then asked Amelia P. when she could pay him. After further conversation, Amelia agreed to have sex with defendant in lieu of cash payment. They engaged in sexual intercourse on the living room couch; defendant left five minutes later. Defendant did not see anyone else in the house. He went back to the camper and told Gregory he had had sex with Amelia P. in exchange for cocaine. Defendant then went jogging. He did not wear the MacGregor shoes, which had cleats, but athletic shoes with smooth soles. When he returned to the camper, Gregory was there and their mother arrived about five minutes later.

Defendant changed to work boots. Gregory and defendant went with their mother to the post office, and then to Julia Watson's house. Defendant sat in the front passenger seat of his mother's automobile during this excursion.

At that time, defendant had tattoos on both biceps, on his right shoulder, and on his lower left arm. Defendant denied owning the cut-offs found in the camper and denied knowing to whom they belonged to, although he admitted he had seen them in the camper. Defendant admitted owning the survival knife found in the camper. Gregory is two years younger than defendant and had no facial hair on the day of the murder. (Apparently, a photograph in evidence, taken on the day of the murder after defendant's arrest, showed that defendant had a goatee and/or a mustache.)

To establish Gregory's knowledge of the details of the murder, the defense introduced the complete tape recordings of

Gregory's two interviews with investigating officers. During these interviews, Gregory said that when defendant saw the officers following the tracks to the camper, he admitted to Gregory that it appeared the officers were following his (i.e., defendant's tracks.)

According to Gregory, defendant gave this description of what he had done: Defendant had hidden and the woman had walked up with a basket of clothes. The woman was wearing a housecoat, which came open. Defendant rushed up, grabbed her, put a knife to her throat, and said he wanted only money. The woman had no money and no jewelry, but defendant took a couple of shotguns, one of which looked like a rifle. The woman started to make a lot of noise, so defendant put a sock in her mouth. There was a little boy, and there was a boa constrictor in an aquarium. (Kevin kept a pet snake in his bedroom.) The little boy had shown defendant where to find the keys to a van. Defendant had started the van but was unable to drive it out of the garage because the garage door was padlocked on the outside. Defendant had "hogtied" the woman with some neckties that were in the closet "next to a . . . jacket with all kinds of medals on it-something like a Ranger jacket or something." (Ubaldo P. testified he had been an Airborne Ranger in the United States Army, and his green full-dress uniform had been hanging in the closet.) Defendant became "real nervous" because the woman had said her husband would come home at noon and it was then 11:25 a.m. He had tied her up to give himself enough time to get away. He did not rape the woman. According to Gregory, defendant said nothing about hitting the woman.

By stipulation, the defense established, first, that Kevin had told investigating officers on the day of the murder that he had been watching a certain television program when the intruder entered his house; second, that this program had been broadcast that day from 10:30 to 11:00 a.m.; and, third, that the professional baseball game that was broadcast that morning began at 10:30 a.m.

> An expert in drug dependency testified that it is frequently impossible to determine from an individual's appearance and behavior whether that individual has been using cocaine. He also testified that it is not uncommon for the spouse of a cocaine addict to profess ignorance of the addict's use of cocaine. This may indicate genuine ignorance or the psychological state of denial.
>
> A defense investigator testified that he had driven the route that defendant said in his testimony that he had jogged on the morning of the murder and that the distance was three miles.
>
> 3. Rebuttal
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> On rebuttal, Deputy Sheriff Robert Flores testified that on March 21, 1986, the time from the landing of the sheriff's helicopter at the victim's residence to the officers' arrival at the Cudjo camper was at least one hour and thirty minutes.
>
> B. Penalty Phase
>
> The prosecution presented no evidence at the penalty phase. The only defense evidence was the testimony of defendant. Asked but a single question, defendant again denied killing Amelia P. There was no cross-examination.

People v. Cudjo, 863 P.2d at 598-603.

Based upon the evidence adduced at the state-court reference hearing, the California Supreme Court further found the following facts:

> After being appointed to represent petitioner at trial, William Clark received a packet of discovery materials from the prosecution. This packet contained reports of two witness statements suggesting the possibility that Ubaldo Prokuda had murdered Amelia Prokuda.
>
> At 8:00 p.m. on the day of the murder, a sheriff's investigator had interviewed Alander Wilson, a self-employed construction contractor, who said he had been working on the residence

across the street from the one in which Amelia Prokuda was murdered. He had returned from lunch around 1:30 p.m.; thereafter, a boy he knew as Kevin approached him and "told him that his daddy had just killed his mom" and that "his mom had bought his daddy two new guns and that his daddy had put them in the garage."

Investigators also interviewed Lora Johnson, who lived near Amelia Prokuda and described herself as a "close friend" of Amelia Prokuda. According to the investigators' report, Johnson said that when she left her own residence "around noon" she had "noticed that the victim's husband's car was in the driveway of the location." At that time, "the drapes in the living room [of Amelia Prokuda's house] were open, as were the drapes in the back, allowing her to see through the house to the rear yard," but "she did not see any people moving about the property." Johnson told investigators that when she returned home around 1:05 p.m., "she noticed that the car that was previously in the driveway of the location was gone and the drapes were closed." Johnson said this was "unusual because the victim never closed her drapes during the day." She also said, however, that there were "no obvious marital problems involving the victim's family."

The packet of discovery materials also contained considerable evidence casting doubt on the hypothesis that Ubaldo Prokuda was the killer.

When interviewed by investigators at 2:25 a.m. on the day after the murder, petitioner's brother, Gregory, gave the statements that the defense introduced in evidence at petitioner's trial, in which he recounted petitioner's admissions that he had entered Amelia Prokuda's house, tied her with her husband's neckties, and taken two guns that he buried in the desert.

When interviewed by investigators, Kevin apparently said nothing about his father having killed his mother. Instead, his statement was generally consistent with the testimony he gave at trial. He said his mother had been seized by a knife-wielding intruder when she opened a door leading from the house to the

garage. The intruder demanded money. Kevin mentioned guns to the investigators, saying that "they were normally kept in the closet in the victim's bedroom" and that "he had seen the guns on the floor of the victim's bedroom next to the victim." Kevin said he saw the intruder tie up his mother. The intruder then sent Kevin to his room. "Later, when he came out of his room, [Kevin] saw that his mother was still tied up and that she had red stuff all over her head."

Kevin told the investigators that he had been watching I Dream of Jeannie on television when the intruder appeared. This television show aired between 10:30 a.m. and 11:00 a.m. Based on the victim's liver temperature, the coroner's investigator estimated that she had died between 10:00 a.m. and 11:00 a.m., approximately. (See fn. 1, ante.)[3]

The packet of discovery materials also contained reports describing how the sheriff's investigators had found the shoe tracks leading from Amelia Prokuda's residence to the camper where petitioner and Gregory were found and detained.

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[3] Clarifying the trial testimony that liver temperature evidence set the time of death as between 8:10 a.m. and 12:30 p.m., footnote 1 the state habeas opinion stated:

> This estimate of the time of death differs somewhat from the estimate given during the initial investigation and contained in police reports furnished to petitioner's trial attorney, William Clark. The initial estimate put the time of death between 10:00 a.m. and 11:00 a.m. The two estimates concur in fixing 10:30 a.m. as the most likely time of death. The initial estimate, using a one-hour time period, appears to identify the *probable* time of death. The more cautious trial estimate, using a period exceeding four hours, appears to identify the *possible* time of death.

(977 P.2d at 70 n.1.)

Regarding Ubaldo Prokuda's potential culpability for his wife's murder, the packet included a number of significant reports. When interviewed by investigators at 10:45 p.m., Ubaldo Prokuda said he had left his house for work around 1:40 a.m. He left work around 11:00 a.m. On the way home, he stopped at a bank in the City of Commerce or Bell Gardens, bought gasoline and oil at a service station near the bank, and bought stamps at a post office in Bell Gardens. Around noon he visited a bar in Bell Gardens called Mary's Place, where he had two drinks and spoke with a barmaid known to him as "Buttons." He then stopped at a nursery to discuss trees and plants for his yard. His final stop was at the Sandpiper Bar where he had one more drink and spoke with a barmaid named Bobbie. He arrived home around 3:30 p.m. to find the police already there. He denied killing his wife and affirmed that he owned two rifles that were normally kept in the master bedroom closet but were then missing.

Other reports documented sheriff's investigators' efforts to verify Ubaldo Prokuda's statements. Ubaldo Prokuda's supervisor told an investigator that Ubaldo had "clocked out at 1048 hours." Nancy Austen, who worked with Ubaldo Prokuda, said she had spoken to him at the office around 11 a.m. She also said that the employee parking lot was 10 minutes from the office. At a bar called Marie's in Bell Gardens, Neva Marvich said Ubaldo Prokuda had been there between 11:00 a.m. and 1:00 p.m. and had consumed two drinks and "played some pool."

The discovery materials also included a report of a jail incident on March 26, 1986, five days after the murder. While a jailer, Deputy Merritt, was in the process of sending prisoners to a holding cell to go to court, a prisoner named Lewis complained about being in jail for a crime he had not committed. In response, "suspect Cudjo" said "I'm in here for murder, and I did it." To determine the identity of "suspect Cudjo," petitioner's trial counsel, William Clark, questioned Deputy Merritt about this incident, but Merritt was unsure whether petitioner or Gregory had made the statement.

To determine whether Ubaldo Prokuda could have killed Amelia Prokuda, a licensed private investigator and former deputy sheriff, acting at Clark's direction, "made timed car trips between [Ubaldo Prokuda's place of employment and the residence where Amelia Prokuda was murdered] and he concluded that [Ubaldo Prokuda] could not have been present at his residence until nearly three or more hours after the time the Coroner's Office indicated the murder had occurred."

In a declaration, Clark explained that when he first interviewed petitioner, petitioner "denied any contact with murder victim [Amelia Prokuda] and denied ever having been at her residence for any reason." Petitioner told Clark that Gregory "must have committed the murder." Petitioner did not alter these statements until "the eve of trial," after test results had revealed that semen found on Amelia Prokuda could have come from petitioner but not from either Gregory or Ubaldo Prokuda. Petitioner then admitted having intercourse with Amelia Prokuda, giving Clark an account consistent with petitioner's trial testimony.

Clark decided not to attempt at trial to establish that Ubaldo Prokuda had murdered Amelia Prokuda because, in Clark's words, "there was no credible evidence that [Ubaldo Prokuda] could have been present at the time of the murder," and because "a theory that [Ubaldo Prokuda] had killed his wife would have detracted from the defense which was presented at the trial."

Clark declared that he had wanted to interview Alander Wilson but had been unable to locate him, despite searching in DMV (Department of Motor Vehicles) and CII (Bureau of Criminal Investigation and Identification) records and by informal inquiries.

Edward Rucker, an attorney in private practice and a former deputy public defender, testified as an expert witness for the defense. He had represented 25 to 30 defendants who had faced capital charges at some stage of the proceedings, and had represented 7 or 8 defendants at jury trials in which the prosecution was seeking the death penalty. He had reviewed

> the trial file of petitioner's trial attorney, William Clark, the transcripts of petitioner's trial, and the stipulations entered at the reference hearing. Based on this review, he testified to these opinions: Clark's investigation of the potential culpability of Ubaldo Prokuda was inadequate because a reasonably competent attorney acting as a diligent advocate would have interviewed Alander Wilson and Amelia Prokuda's neighbors, at least attempted to interview Kevin, and promptly and thoroughly investigated Ubaldo Prokuda's alibi; an adequate investigation would have yielded evidence supportive of the defense that Ubaldo Prokuda was the killer; and a reasonably competent attorney would have presented that evidence and argued that defense at petitioner's trial.

In re Cudjo, 977 P.2d at 72-74. The facts found by the California Supreme Court, both in the context of the appeal and in the context of the post-conviction collateral review, are supported by substantial evidence, and are therefore presumptively correct. 28 U.S.C. § 2254(e)(1).

SUMMARY OF ARGUMENT

Petitioner has been granted a Certificate of Appealability (COA) as to Claim 38 from the Petition. That claim alleges that the use of lethal injection as a method of execution constitutes cruel and unusual punishment under the Eighth Amendment. (Pet. at 421-29.) This claim fails. This Court has already considered and rejected this claim in another case; in any event, no United States Supreme Court case has ever invalidated any state's method of execution under the Eighth Amendment. Further the United States Supreme Court has recently approved a method that is substantially

similar to California's. Accordingly, Petitioner has not met and cannot meet his burden of demonstrating that the California Supreme Court decision rejecting his Eighth Amendment claim was contrary to or involved the unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States.

As to the claims not contained in the COA, Respondent declines to address them until directed to do so by this Court. Further, Respondent urges this Court to reject Petitioner's excessive request to greatly expand the scope of this appeal.

ARGUMENT

I. STANDARD OF REVIEW

On habeas corpus, this Court must defer to the California Supreme Court's decisions denying Petitioner relief. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") bars federal habeas corpus relief on a claim adjudicated by the state court unless the adjudication was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "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); *Price v. Vincent*, 538 U.S. 634, 638-39 (2003); *Miller-el v. Cockrell*, 537

U.S. 322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners.").

A state court decision is "contrary to" federal law if it either "applies a rule that contradicts the governing law" as set forth in Supreme Court opinions, or reaches a different decision from a Supreme Court opinion when confronted with materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); accord *Bell v. Cone*, 535 U.S. 685, 694 (2002); *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). A state court makes an "unreasonable application" of federal law if it identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Williams v. Taylor*, 529 U.S. at 413; *Bell v. Cone*, 535 U.S. at 694; *accord Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) ("AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1) -- whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law"). Habeas corpus relief is not available simply because a federal court independently concludes "that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that

application must also be unreasonable." *Williams v. Taylor*, 529 U.S. at 411; *accord Lockyer v. Andrade*, 538 U.S. at 75-76; *Early v. Packer*, 537 U.S. 3, 11 (2002); *Bell v. Cone*, 535 U.S. at 694; *Hernandez v. Small*, 282 F.3d 1132, 1140 (9th Cir. 2002). Moreover, decisions of the Supreme Court are the only ones that can form the basis justifying habeas relief; lower federal courts cannot establish such a principle to satisfy the AEDPA bar. *Clark v. Murphy*, 331 F.3d at 1069; *Hernandez v. Small*, 282 F.3d at 1140 (any principle on which a petitioner seeks to rely must be found in the holdings, as opposed to dicta, of the Supreme Court decisions).

Further, a state court's failure to cite any federal law in its opinion does not run afoul of AEDPA. In fact, a state court need not even be aware of applicable Supreme Court precedent "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. at 8.

If there is no Supreme Court precedent that controls a legal issue raised by a petitioner in state court, the state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law. *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008); *Carey v. Musladin*, 549 U.S. 70, 77 (2006). Decisions of the Supreme Court are the only ones that can form the basis justifying habeas relief; lower federal

courts cannot themselves establish such a principle to satisfy the AEDPA bar. *Clark v. Murphy*, 331 F.3d at 1069; *Hernandez v. Small*, 282 F.3d 1132, 1140 (9th Cir. 2002) (any principle on which a petitioner seeks to rely must be found in the holdings, as opposed to dicta, of the Supreme Court decisions). Under AEDPA, "clearly established federal law" 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. at 71; *see also Williams v. Taylor*, 529 U.S. at 412.

II. THE CALIFORNIA SUPREME COURT REASONABLY REJECTED PETITIONER'S CLAIM THAT LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT

In claim 38 of the Petition, Petitioner alleged that lethal injection generally, and California's lethal injection procedures specifically, violate the Eight Amendment ban on cruel and unusual punishment. (Pet. at 421-29.) This claim fails.

Petitioner presented essentially the same Eighth Amendment claim to the California Supreme Court. (SER 956-67.) The California Supreme Court reasonably rejected the claim.

This Court has already considered and rejected a substantially identical claim. In *Brown v. Ornoski*, 503 F.3d 1006, 1016-17 (9th Cir. 2007), this Court held,

> There is no Supreme Court precedent holding lethal injection to be unconstitutional, and there certainly was none in existence at the time of the California Supreme Court's denial of Brown's claim in 1999. Because on this record Brown cannot demonstrate that the California Supreme Court's denial was an objectively unreasonable application of clearly established Supreme Court precedent, we affirm the district court's denial of the writ on this claim.

Subsequently, the United States Supreme Court confirmed the central point informing this Court's decision in *Brown*, holding, albeit even more broadly: "This Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." *Baze v. Rees*, 553 U.S. 35, 48-49 (2008), *see id.* at 62 ("Throughout our history, whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge.") Further, the Kentucky protocol considered by the Supreme Court in *Baze* uses the same three drugs that California uses. *Id.* at 45, 52-61 (the Kentucky protocol begins with the administration of sodium thiopental, followed by pancuronium bromide and potassium chloride); *see Morales v. Tilton*, 465 F. Supp. 2d 972, 975 (the California protocol, "like

those used by the federal government and most other states," begins with the administration of sodium thiopental, followed by pancuronium bromide and potassium chloride).

Petitioner provides no reasoned basis for the necessary conclusion under 28 U.S.C. § 2254(d)(1) that the California Supreme Court's rejection of his claim was based upon the unreasonable application of, or was somehow contrary to, some United States Supreme Court case. Indeed, as demonstrated, the opposite is true: the California Supreme Court's decision is completely consistent with, and would be compelled by, now-extant United States Supreme Court authority.

Petitioner argues that because "neither Ninth Circuit nor Supreme Court precedent forecloses relief on [Petitioner's] claim," federal collateral relief under 28 U.S.C. § 2254 should be available. (AOB 37-38.) This position fundamentally misapprehends the nature of federal collateral review in the wake of the AEDPA amendments to federal habeas corpus law. Under 28 U.S.C. § 2254(d)(1), federal collateral relief is available if, *and only if*, Petitioner can point to a United States Supreme Court case that was *both* 1) in existence at the time the California Supreme Court was asked to rule on the claim and 2) compels relief. Thus, contrary to Petitioner's position, the rule is that unless it is the *denial* of relief that is foreclosed by United States

Supreme Court precedent, relief must be denied. In any event, as demonstrated above, here denial of relief is not only "not foreclosed" by relevant authority, it is compelled.

Finally, Petitioner suggests that this Court should remand the matter for further consideration because the California death penalty protocol is currently being revised. (AOB 41.) This request is apparently premised on the same mistaken belief about the ambit of federal collateral review as his underlying argument. The threshold inquiry under AEDPA is the reasonableness of the state court decision. 28 U.S.C. § 2254(d)(1). This Court's authority compels the conclusion that the state court decision was reasonable in light of the facts alleged to the California Supreme Court and the law in place at the time the California Supreme Court ruled. Nothing that happened since the California Supreme Court ruled, or that might happen in the future, can alter the reasonableness of the state court decision.[4]

[4] To the extent that Petitioner did not intend the instant claim to be a collateral attack on his conviction and sentence, but rather intended it to be an as-applied challenge to California's death penalty protocol, such a challenge should be brought in an action arising under 42 U.S.C. § 1983, rather than in the instant habeas corpus action arising under 28 U.S.C. § 2241 et seq. See *Brown v. Ornoski*, 503 F.3d at 1017 n.5, citing *Hill v. McDonough*, 547 U.S. 573 (2006).

Accordingly, the district court properly rejected Petitioner's request for federal collateral relief as to this claim.

III. THIS COURT SHOULD DECLINE TO INDULGE PETITIONER'S WISH TO GREATLY EXPAND THE CERTIFICATE OF APPEALABILITY

Petitioner asks this court to expand the COA to include several claims that were not certified by the district court. (AOB 41-122.) Petitioner's request is excessive, and should be denied. In any event, pursuant to Circuit Rule 22-1(f), Respondent declines to address any uncertified issue unless and until this court first concludes that an appeal of that issue is appropriate.

Although Ninth Circuit Rule 22-1(e) sets forth a protocol for briefing uncertified issues in capital federal habeas corpus appeals, the Circuit Advisory Committee Note to Rule 22-1 begins, "The court strongly encourages petitioner to brief *only* certified issues." Further, Rule 22-1(e) concludes by warning, "Except, in the extraordinary case, the court will *not* extend the length of the brief to accommodate uncertified issues."

Here, although Petitioner received permission from this Court to file a brief that was in excess of the 21,000-word length limit set by Ninth Circuit Rule 32-4, conspicuously absent from Petitioner's request to exceed the word limit was any presentation of the principal reason why Petitioner found it necessary to exceed it: to present uncertified issues to this Court. As

filed, the Appellant's Opening Brief in this case is 123 pages long. Of the 89 pages of argument in the brief, less than ten percent--under 8 pages--discusses material within the COA. The other ninety-plus percent of the argument section is devoted to uncertified issues.

Respondent urges this Court to hew to the letter and the spirit of Circuit Rule 22-1(e), and the sound advice of the Advisory Committee Note, and decline to permit Petitioner to expand his appeal tenfold to include multiple uncertified issues.

CONCLUSION

Petitioner's claim for relief under the Eighth Amendment fails.

Petitioner's request to expand this appeal is excessive, and should be denied.

The judgment of the district court should be affirmed.

Dated: June 24, 2010

Respectfully submitted,

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08-99028

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARMENIA LEVI CUDJO, JR.,

Petitioner-Appellant,

v.

ROBERT AYERS, JR.,

Respondent-Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: June 24, 2010

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 08-99028

I certify that: (check (x) appropriate option(s))

[ ] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

[ ] This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

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[X] 3. Briefs in **Capital Cases**.
This Appellee's Brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 6,761 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

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☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

☐ Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

June 24, 2010
Dated

s/ James William Bilderback II
James William Bilderback II
Supervising Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **ARMENIA LEVI CUDJO, JR. v. ROBERT AYERS, JR.** No. **08-99028**

I hereby certify that on June 24, 2010, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLEE'S BRIEF

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 24, 2010, at Los Angeles, California.

Bernard M. Santos	s/ Bernard M. Santos
Declarant	Signature

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