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.

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

SUPPLEMENTAL APPELLEE'S BRIEF

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PRELIMINARY STATEMENT

Following denial of the federal petition for writ of habeas corpus, the District Court granted a certificate of appealability on one claim—the constitutionality of lethal injection (AOB Claim II). The opening brief filed by Petitioner-Appellant Armenia Levi Cudjo Jr. (Petitioner) addressed the lethal injection issue, and also included six additional uncertified claims. In an order dated December 5, 2011, this Court directed Respondent-Appellee Warden Kevin Chapelle[1] (Respondent) to brief five of the six uncertified claims, and to address how the Supreme Court's decision in *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011) impacts the analysis. For the reasons that follow, the request for a certificate of appealability on the additional claims should be denied because reasonable courts would agree that each claim was reasonably rejected in state court, and in the District Court as well.

I. THE EFFECT OF *PINHOLSTER*

Under 28 U.S.C. § 2254(d)(1)[2], as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a claim for federal habeas

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[1] Warden Chapelle has succeeded Warden Ayers as Petitioner's custodian at San Quentin State Prison, and should be substituted as the properly named Appellee in this case. Fed. R. App. P. 43(c)(2)

[2] All further statutory references are to Title 28 of the United States Code, unless otherwise specified.

corpus relief must be denied unless the state-court adjudication of the merits of the claim "resulted in a decision that was contrary to, or involved the unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." This is a "threshold" restriction on federal habeas corpus relief. *Renico v. Lett*, 130 S. Ct. 1855, 1862 n.1 (2010). If the state court decision was reasonable, that "ends federal review." *Premo v. Moore*, 131 S. Ct. 733, 745 (2011).

In *Pinholster*, the Supreme Court resolved the question of what evidence should be examined when a federal court is deciding whether the state court's resolution of the merits of the claim was reasonable. Under *Pinholster*, federal review of the § 2254(d)(1) question "is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 1398.

In coming to this conclusion, the Supreme Court observed that, "[i]t would be contrary to [AEDPA's] purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in the federal habeas court . . . ." *Pinholster*, 131 S. Ct. at 1399. "It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court." *Id.* Accordingly, no evidence developed in the federal court can

have any effect on the § 2254(d)(1) analysis. As the Court noted, "evidence adduced in federal court has no bearing on § 2254(d)(1) review[;]" rather, "a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before [the] state court." *Id.* at 1400.

When, as here, the California Supreme Court adjudicated Petitioner's claims on their merits, the initial inquiry in federal court should have been restricted to examining whether the state court's rejection of the merits of Petitioner's claims was unreasonable under § 2254(d)(1). In conducting that examination, the federal court was "precluded from considering" evidence developed in federal court. *Pinholster*, 131 S. Ct. at 1402 n.11. Evidence developed in federal court can only be considered *after* Petitioner meets his burden of demonstrating that the state court rejection of his claim was unreasonable in light of the state court record. *Id.* at 1412 (Breyer, J., concurring in part and dissenting in part); *id*. at 1418 (Sotomayor, J., dissenting). This is a "'difficult'" burden to meet, *id.*, at 1398 (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011)), and there was no finding that Petitioner had met it before the District Court held an evidentiary hearing on some of the claims in issue. Because no evidence developed in federal court can be considered until after Petitioner meets his burden of satisfying the § 2254(d)(1) threshold, and because the District Court never

found that Petitioner had met his burden in that regard, the District Court erred in holding an evidentiary hearing in this case.

In any event, even under what was essentially a de novo standard of review, the District Court denied relief because—even with the benefit of discovery and an evidentiary hearing—Petitioner was unable to prove a violation of his constitutional rights. As is demonstrated below, because the California Supreme Court reasonably denied relief as to every claim raised in this appeal, Petitioner cannot satisfy § 2253(c); accordingly, a certificate of appealability must be denied as to the additional claims. That the District Court found some of the claims without merit even after the improperly held evidentiary hearing bolsters the conclusion that, as to the uncertified claims, Petitioner has not made—and cannot make—a substantial showing of the denial of a constitutional right, particularly under the deferential standard mandated by § 2254(d)(1). Because Petitioner fails to satisfy that standard, the request to certify additional claims for appeal must be denied.

II. STANDARD OF REVIEW

Under § 2253(c), a certificate of appealability may not issue as to any claim unless Petitioner first makes a substantial showing of the denial of a constitutional right as to that claim. Under this standard, if reasonable jurists would agree that the District Court decision was correct, then no certificate

of appealability should issue. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). Petitioner has not met this standard, because he cannot demonstrate that a reasonable court could conclude that he meets the high hurdle imposed by the AEDPA deferential standard of review.

As amended by AEDPA, § 2254(d) "bars relitigation of any claim 'adjudicated on the merits' in state court" unless the claim meets one of the statute's two exceptions. *Richter*, 131 S. Ct. at 784. Under those exceptions, relief may be available if the state court decision was (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 at the State Court proceeding.'" *Id.* at 783-84 (§ 2254(d)).

A state court decision is "contrary to" federal law only if it "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). A state court engages in an "unreasonable application" of federal law if it identifies the correct governing legal

principle from the Supreme Court's decisions but unreasonably applies it to the facts of the prisoner's case. *Id*. at 413.

When there is no "clearly established" Supreme Court law requiring the state court to grant relief on the claim, relief is barred by § 2254(d). *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009) ("[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court."); *Wright v. Van Patten*, 552 U.S. 120, 126 (2008); *Carey v. Musladin*, 549 U.S. 70, 74 (2006). Also, 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 precedents "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002).

Section 2254(d) imposes a "highly deferential standard for evaluating state-court rulings . . . ." *Renico*, 130 S. Ct. at 1862 (internal quotation marks omitted). The federal court cannot grant a writ of habeas corpus unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *Richter*, 131 S. Ct. at 786. This is "'the only question that matters under § 2254(d)(1).'" *Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)).

A state court's summary denial of a claim constitutes a denial on the merits for purposes of § 2254(d). *See Richter*, 131 S. Ct. at 784 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief"). As the Supreme Court recently explained, when a state court has summarily denied a claim, "a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Richter*, 131 S. Ct. at 786.

ARGUMENT

I. CERTIFICATION MUST BE DENIED BECAUSE THE CALIFORNIA SUPREME COURT REASONABLY REJECTED PETITIONER'S CLAIM THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE EXCLUSION OF JOHN CULVER'S TESTIMONY ABOUT GREGORY CUDJO'S INCULPATORY STATEMENT (AOB CLAIM V)

In Claim V of the opening brief (Claim VIII of the Petition), Petitioner alleges that the trial court erroneously excluded the testimony of John Culver that Petitioner's brother, Gregory Cudjo, had confessed to Culver that he, and not Petitioner, had murdered Amelia P. AOB at 44-64. Petitioner first raised this claim on direct appeal, and the California Supreme Court rejected

it. *People v. Cudjo*, 863 P.2d 635, 646-53 (Cal. 1993). Petitioner reasserted the claim in his first state habeas corpus petition, 1SER at 57-58, and that is where it was most recently denied "on the merits." 5SER at 1056. As the claim was summarily denied by the California Supreme Court on the merits, Petitioner's burden to overcome the § 2254(d)(1) bar is substantial. Only when there is "*no possibility* fairminded jurists could disagree" about the correctness of the state court's decision is habeas relief available to the petitioner. *Richter*, 131 S. Ct. at 786 (emphasis added). This is "'the only question that matters under § 2254(d)(1).'" *Id.* (quoting *Andrade*, 538 U.S. at 71).

A. The Denial of Relief in State Court

1. Direct appeal

Petitioner's claim that the trial court erroneously excluded Culver's testimony about the inculpatory statement made by Gregory was the first claim in the opening brief on direct appeal. In addition to the various state law grounds relied upon, Petitioner specifically argued that the exclusion of evidence violated his federal constitutional rights to due process and to present a defense. AOB at 45-49.

The trial court had ruled the evidence inadmissible under California Evidence Code §§ 1230 (statement against penal interest) and 352 (more

prejudicial than probative). In essence, the trial court determined Culver's proposed testimony to be "unreliable and untrustworthy," thus rendering it excludable under state law. *People v. Cudjo*, 863 P.2d at 648.

On appeal, the California Supreme Court held that the trial court had improperly excluded the evidence, but in doing so had only violated state law, and not the federal Constitution. Specifically, the California Supreme Court concluded that the statement satisfied the against-penal-interest exception to state hearsay law, and that Culver's inherent untrustworthiness was not a valid consideration in determining admissibility pursuant to California Evidence Code § 352. *Id*. at 648-51.

The California Supreme Court explained why the federal Constitution was not implicated. Initially, it was established law that the normal—even if erroneous—application of ordinary rules of evidentiary admissibility did not impermissibly infringe on a defendant's right to present a defense. The state court explained

> for the most part, that the mere erroneous exercise of discretion under such "normal" rules does not implicate the federal Constitution. Even in capital cases, we have consistently assumed that when a trial court misapplies Evidence Code section 352 to exclude defense evidence, including third-party-culpability evidence, the applicable standard of prejudice is that for state law error, as set forth in *People v. Watson* (1956) 46 Cal. 2d

> 818, 836, 299 P.2d 243 (error harmless if it does not appear reasonably probable verdict was affected).

Id. at 651 (end citations omitted).

The California Supreme Court went further, and discussed how the United States Supreme Court had never held that a state trial court's exclusion of a defense witness on unreliability grounds commits an error of constitutional magnitude. As the state court explained:

> The 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. However, the high court has never suggested that a trial court commits constitutional error whenever it individually assesses and rejects a material defense witness as incredible. (*See, e.g*., *Michigan v. Lucas* (1991) 500 U.S. 145, 111 S. Ct. 1743, 114 L. Ed. 2d 205 [preclusive effect of statutory notice-of-evidence requirement in rape case]; *Taylor v. Illinois* (1988) 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 [sanction of preclusion for defense violation of discovery rules]; *Rock v. Arkansas* (1987) 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 [exclusion of accused's own testimony under state rule disallowing all hypnotically refreshed evidence]; 612 *Green v. Georgia* (1979) 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 [absolute state failure to recognize hearsay exception for declarations against penal interest]; *Davis v. Alaska* (1974) 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 [denial of cross-examination for bias based on state rule making evidence of juvenile proceedings inadmissible in adult court]; *Chambers v. Mississippi*, [(1973)] 410 U.S. 284,

> 93 S. Ct. 1038 [state rule precluding cross-examination of party's own witness]; *Washington v. Texas* (1967) 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 [state rule precluding accomplice from testifying for defense]; *but cf. Delaware v. Van Arsdall* (1986) 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 [preclusion of cross-examination for bias, based upon individual assessment of probative value against prejudice, violated confrontation clause].)

Id. at 651-52.

Concluding that only state law error had occurred, the California Supreme Court applied the state law rule for harmless error and held that "it is not reasonably probable that admission of the testimony would have affected the outcome." *Id*. at 652. The California Supreme Court's analysis was compelling, and bears repeating in full:

> Trapped by a semen sample that included defendant but excluded all other known potential donors, including Gregory, defendant was forced to admit that he was present at the crime scene on the morning of the murder, and that he had sex with the victim. The physical evidence, in particular the shoe prints leading to and from the victim's home, strongly suggested there had been only one visitor during that morning. Just as important, Kevin described only one entry, by the man who robbed his mother.
>
> By contrast, defendant's uncorroborated effort to provide an innocent explanation for his presence in the victim's house was not convincing. Defendant testified he had encountered the victim purchasing cocaine on two prior occasions, and that she traded cocaine for sex on the day of the murder. However, these claims

contravened all other evidence about the victim's lifestyle and values.

The victim's husband testified that she never exhibited signs of drug use during a 13–year marriage, and there was no cocaine in her blood at the time of her death. Moreover, the victim's family was on a tight budget and managed its money carefully; the victim's husband noticed no unusual withdrawals from the family account.

It also seems unlikely that the victim, a housewife and mother, would have engaged in casual sex and drug activity in her living room with a near stranger while her five-year-old son was at home. Defendant's version of events failed to mention or explain Kevin's presence during the alleged sex-for-drugs encounter. The implausibility of defendant's account enhanced the inference that he was involved in the homicide.

Finally, as the trial court surmised, both Culver's testimony and the hearsay confession it recounted had obvious indicia of unreliability. Though he knew the entire Cudjo family, Culver was a particular friend of defendant and thus had a motive to lie. Moreover, 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.

According to Culver, Gregory said that as he was entering the victim's home to burglarize it, the victim came upon him by surprise, whereupon he "tripped" and immediately began beating her with a hammer. As previously noted, however, the crime-scene evidence made clear that the victim was carefully hog-tied in her bedroom before she was beaten and killed. When asked whether Gregory had mentioned anybody else in the house, Culver admitted that Gregory had originally failed to account for this crucial detail. However,

> Culver claimed that in a courthouse conversation just minutes before Culver took the stand, Gregory belatedly mentioned that there "probably was a little boy or somebody...." This claim is suspect. It strains common sense that Gregory willingly provided additional details to Culver at a moment when he must have known Culver was about to give incriminating testimony against him.
>
> In all his other known statements and sworn testimony, Gregory insisted he had no involvement in the homicide. Moreover, after observing Culver's demeanor and hearing his testimony, the trial court concluded that Culver was a patently incredible witness. Under all these circumstances, the chance that a competent jury would have given Culver's testimony substantial weight seems remote. Accordingly, it is not reasonably probable that admission of his testimony would have affected the outcome. No basis for reversal appears.

Id. at 652-54.

2. State habeas corpus

Following direct appeal, Petitioner reasserted this specific claim of error in his first state habeas corpus petition (case number S029707). Claim 2A of that petition asserts a deprivation of federal constitutional rights due to the exclusion of "John Culver's testimony that Petitioner's brother, Gregory Cudjo, had confessed to the murder." 1SER at 65-66. In a summary denial, in addition to imposing various state procedural bars to relief, all claims – including this one – were denied "on the merits." 5SER at 1056.

B. District Court Denial of Relief

The District Court began its discussion by citing to Ninth Circuit and United States Supreme Court authority it believed governed the determination of whether the exclusion of evidence during trial implicates the Constitution. 1ER at 32-33. The lower court employed the balancing test this Court crafted in *Miller v. Stagner*, 757 F.2d 988 (9th Cir. 1985) to resolve the claim, explaining the applicable balance factors as follows:

> (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense.

1ER at 33, quoting *Miller*, 757 F.2d at 994; *accord Chia v. Cambra*, 360 F.3d 997, 1004 (9th Cir. 2004).

The District Court then indicated that, if reliable, Culver's testimony concerning Gregory Cudjo's inculpatory statements would have been central to Petitioner's defense. However, just like the state trial court and the California Supreme Court majority, the District Court determined that Culver's testimony was not reliable, and that the Constitution was not violated. 1ER at 34-37. Specifically, the District Court observed that Culver and Petitioner were long-time friends; Culver and his family had

notorious criminal records; Culver did not tell anyone of Gregory's confession for a long time; and defense counsel was reluctant to use Culver because he was subject to substantial impeachment. 1ER at 35.

The District Court also explained and adopted the reasons relied upon by the state trial court for finding the evidence unreliable. Specifically, Culver's proposed testimony about Gregory's confession was inconsistent with the physical evidence presented at trial. Culver testified that Gregory had confessed to intending to burglarize the home, and that he beat the victim to death as soon as she saw him and started screaming. 1ER at 36. However, as the District Court explained:

> The physical evidence demonstrated that the murder was not a sudden killing that occurred immediately when Amelia started yelling. Instead Amelia was found hog-tied in the bedroom. RT 2705. Kevin testified that his mother was hog-tied before she was killed. He testified that he saw the assailant put a knife to his mothers' neck and then he demanded money. The assailant then walked his mother and Kevin into the bedroom and tied his mother up. RT 2705. Thus, Culver's testimony about Gregory's statement is completely inconsistent with the evidence in the case.

1ER at 36.

Crediting the California Supreme Court with applying "clearly established federal law," The District Court ruled that the state court

reasonably concluded that Culver's testimony was so weak that its exclusion did not violate the Constitution. 1ER at 37.

C. The California Supreme Court Reasonably Denied This Claim

The California Supreme Court reasonably rejected this claim in state court. Accordingly, it may not be relitigated now, and must be denied pursuant to § 2254(d).

1. The applicable law

It is well settled that a criminal defendant has a Sixth Amendment right to present a defense. *Washington v. Texas*, 388 U.S. at 19. However, "the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him 'compulsory process for obtaining witnesses in his favor.'" *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (emphasis in original). Accordingly, a defendant "must at least make a plausible showing of how [the] testimony would have been both material and favorable to his defense." *Id*.

Further, the right to present a defense is not absolute. *Alcala v. Woodford*, 334 F.3d 862, 988 (9th Cir. 2003). A defendant "'does not have an unfettered right to offer [evidence] that is incompetent, privileged, or

otherwise inadmissible.'" *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (quoting *Taylor v. Illinois*, 383 U.S. 400, 410 (1988)). Indeed, "[e]ven relevant and reliable evidence can be excluded when the state interest is strong." *Perry v. Rushen*, 713 F.2d 1447, 1450 (9th Cir. 1983).

The constitutional right to present a defense does not mean that states cannot craft rules to control the admissibility of evidence at state criminal trials. As the Supreme Court has explained:

> "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998); *see also Crane v. Kentucky*, 476 U.S. 683, 689–690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 302–303, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Spencer v. Texas*, 385 U.S. 554, 564, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane, supra*, at 690, 106 S. Ct. 2142 (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); citations omitted). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *Scheffer, supra*, at 308, 118 S.Ct. 1261

> (quoting *Rock v. Arkansas*, 483 U.S. 44, 58, 56, 107 S. Ct. 2704, 97 L. Ed.2 d 37 (1987)).

Holmes v. South Carolina, 547 U.S. 319, 324-25 (2006).

A review of the "right to present a defense" jurisprudence at the core of Petitioner's claim indicates that it is only the exclusion of *credible and reliable* evidence based on the application of an arbitrary or irrational state evidentiary rule that may trigger a constitutional inquiry. *See, e.g. Holmes*, 547 U.S. at 329 (state rule excluding third-party culpability evidence arbitrary because it applied "even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues"); *Washington v. Texas*, 388 U.S. at 22 (state law that barred a charged participant in a crime from testifying as a witness in defense of an alleged co-participant unless the witness had been acquitted unconstitutional because it presumed the witness "unworthy of belief"); *Chambers v. Mississippi*, 410 U.S. at 294-97 (state's voucher rule prohibited impeaching one's own witness and no statement-against-penal-interest hearsay exception); *Crane v. Kentucky*, 476 U.S. at 691 (defendant precluded from presenting evidence on the reliability of a confession based on the circumstances in which it was given; the state court only considered such evidence on the issue of voluntariness); *Rock v.*

Arkansas, 484 U.S. at 56 (state rule mandating wholesale prohibition of hypnotically refreshed testimony unconstitutional as an arbitrary restriction because it applied regardless of the reliability of the testimony).

This Court recently rejected a claim that is substantially similar to the claim Petitioner presents. In *Rhoades v. Henry*, 638 F.3d 1027 (9th Cir. 2011), a pre-AEDPA case, this Court considered a claim that a state court erroneously precluded testimony from a third party, Officer Christian, that another person, Buchholz, had confessed to the murder of which Rhoades was convicted. *Id*. at 1034. Although it was clear that Buchholz had in fact made the confession, this Court found that exclusion of Officer Christian's testimony about the confession did not violate constitutional principles because Buchholz was intoxicated at the time of the time of the confession, and later recanted it. Further, Buchholz had an alibi, and there was no other evidence linking Buchholz to the crime. *Id.* at 1035.

Like Petitioner here, Rhoades argued that the exclusion of the evidence was unconstitutional, citing *Chambers*, *Crane*, and *Holmes*, and arguing that the he should prevail under the test in *Miller v. Stagner.* AOB at 61; compare *Rhoades*, 638 F.3d at 1035-36. This Court in *Rhoades* held that because the evidence was unreliable, its exclusion did not offend the Constitution. *Id.* at 1036. Petitioner's contrary argument accordingly fails,

insofar as there is no basis in reason for this Court to find that the California Supreme Court's rejection of the claim was unreasonable under facts that are essentially similar to those that this Court found failed to state a claim upon which relief could be granted in *Rhoades*.

In light of this Court's holding in *Rhoades*, Petitioner's assertion that there is "clearly established law" that the California Supreme Court contravened fails. *Chambers* specifically limited its holding to "these circumstances" *Chambers*, 410 U.S. at 302; see *Egelhoff*, 518 U.S. at 52 ("*Chambers* was an exercise in highly specific error correction."). And, as this Court explained in *Rhoades*, the other cases upon which Petitioner relies—*Crane*, *Holmes* and *Washington v. Texas*—found error in the exclusion of credible, reliable evidence. *Rhoades*, 638 F.3d at 1038-36. Petitioner presents no case, let alone "clearly established federal law as determined by the Supreme Court," that has held that the exclusion of *unreliable* evidence offends—or even implicates—the Constitution. Rather, the Supreme Court has stated that the opposite is true: "State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules." *United States v. Scheffer*, 523 U.S. 303, 309 (1998).

2. The California Supreme Court reasonably applied Supreme Court Authority in determining that the constitution was not implicated in the state trial court's exclusion of Culver's testimony

In light of the state of federal law, the California Supreme Court's determination—that the federal Constitution was not implicated in the trial court's evidentiary ruling that resulted in the exclusion of Culver's testimony—was a reasonable application of United States Supreme Court authority. As the California Supreme Court expressly and correctly explained on direct review, the United States Supreme Court "has never suggested that a trial court commits constitutional error whenever it individually assesses and rejects a material defense witness as incredible." *People v. Cudjo*, 863 P.2d at 651. As noted, this Court agrees that the Constitution is only offended when *credible* and *reliable* evidence is arbitrarily and mechanistically excluded.

Culver's testimony was not arbitrarily or mechanistically excluded pursuant to any state rule. The California Supreme Court held that trial court incorrectly applied California Evidence Code §§ 1230 (statements against penal interest) and 352 (discretion to exclude evidence that would involve undue consumption of time, be more prejudicial than probative, or confuse the issues or jury), and that the evidence should have been admitted

as a matter of state law. *People v. Cudjo*, 863 P.2d at 648-51. But neither of those evidentiary rules permits for the wholesale, arbitrary exclusion of reliable evidence. Section 1230 governs an exception to the hearsay rule, and § 352 involves a balancing approach to admission of certain types of relevant, but excludable, evidence. Thus, the trial court's erroneous application of the foregoing rules did not violate Petitioner's right to present a defense, within the meaning of the authorities discussed above.

The trial court's basis for excluding Culver's testimony was that it was inherently incredible and unreliable. That finding was not the result of some conclusory, unsupportable assessment. A full hearing was conducted where Culver actually testified—outside the presence of the jury—prior to the trial court's determination that he was an unreliable witness. *See People v. Cudjo*, 863 P.2d at 646-48. The California Supreme Court adopted this finding. *Id.* at 652-53. So did the federal District Court judge below. 1ER at 36.

The only "clearly established" rule that can be extracted from the cases upon which Petitioner relies is that the Sixth Amendment right to present witnesses does not extend to unreliable witnesses. Similarly, the Supreme Court and this Court have clearly held that the right to present a defense, in a due process context, does not include the right to present unreliable

evidence. Accordingly, the California Supreme Court's conclusion that the federal Constitution was not violated by the exclusion of Culver's testimony was not contrary to or an unreasonable application of clearly established United States Supreme Court precedent. Federal relief is accordingly unavailable. § 2254(d)(1).

D. Petitioner Was Not Prejudiced by the Exclusion of Culver's Testimony

In any event, the exclusion of Culver's testimony did not have a substantial and injurious effect or influence in determining the jury's verdict. *See Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) (even if state court does not have occasion to apply the test for assessing prejudice applicable under federal law, the *Brecht* standard applies uniformly in all federal habeas corpus cases under § 2254); *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993); *see also Larson v. Palmateer*, 515 F.3d 1057, 1064 (9th Cir. 2008) (review for harmless error under *Brecht* is "more forgiving" to state court errors than the harmless error standard the Supreme Court applies on its direct review of state court convictions); *Clark v. Brown*, 450 F.3d 898, 916 (9th Cir. 2006) (reviewing under *Brecht* whether there was "a reasonable probability" that the jury would have reached a different result but for the alleged error).

The incredible nature of Culver's proposed testimony was comprehensively addressed by both the California Supreme Court and the District Court. Culver personally had massive credibility problems. As the District Court explained, via reliance on the state court record, Culver and Petitioner were long-time friends. Culver had a prior felony conviction and had been sentenced to prison. Most of Culver's male relatives (approximately forty) had criminal records. 1ER at 35. Petitioner's trial counsel was reluctant to even consider using Culver given his family's reputation in the community and his criminal record. *Id*.

In addition to his inherent personal credibility problems, Culver's proposed testimony also lacked credibility. Although Culver knew Gregory's purported admission was important, he ostensibly waited a very long time to tell anyone—including Petitioner—about it. Further, Gregory's alleged confession, as reported by Culver, was irreconcilable with the physical and eyewitness evidence. Culver testified that Gregory said he went to burglarize the victim's house, and that, as soon as the victim saw him, she confronted him and began screaming, so he immediately beat her into unconsciousness and apparently to death. But the undisputed physical evidence proved beyond any doubt based in reason that the killing did not happen that way. The victim was found hog-tied in her bedroom, and the

victim's young child testified that she was hog-tied *before* she was murdered. 1ER at 36.

The California Supreme Court identified these dramatic reliability deficiencies in Culver's testimony, and other compelling ones as well. For example, Petitioner's semen—not Gregory's—was found on the victim. Petitioner's explanation—that he had traded drugs for consensual sex with the victim—was refuted by all other evidence. Although Petitioner testified that he had seen the victim purchase cocaine on prior occasions, as her husband testified, this was untrue. The victim never showed any signs of drug use, and there was no money missing from their accounts. Further, there was no cocaine in the victim's body at the time of her death. *People v. Cudjo*, 863 P.2d at 652-53.

The state court also noted that the physical and eyewitness evidence supported the presence of only one person in the victim's home that day. Only one set of shoe prints were found leading to and from the victim's home, and the victim's son described only one person entering the home. *People v. Cudjo*, 863 P.2d at 643. In short, there was no evidence that supported the presence of a second person in the home, other than Petitioner's fantastic story of consensual sex for drugs with a woman found hog-tied and beaten to death without any drugs in her system.

The California Supreme Court also noted how unrealistic it would be to conclude that the victim would have engaged "in casual sex and drug activity in her living room with a near stranger while her five-year-old son was at home." *People v. Cudjo*, 863 P.2d at 652. Petitioner's unbelievable story failed to account for the presence of the child known to be in the house with the victim. *Id*.

No rational jury would have disregarded this uncontroverted evidence proving Petitioner was the murderer, and instead concluded that Gregory was the actual killer, if only Culver had been permitted to testify. As every court to consider this issue has found, Culver was personally an unreliable source, and the story he claimed Gregory told him was incredible in light of the uncontroverted physical and eyewitness evidence. Any error in excluding Culver's concocted story did not have a substantial and injurious effect or influence in determining the jury's verdict. *See Fry v. Pliler*, 551 U.S. at 121-22. The claim that the exclusion of Culver's testimony violated the Constitution is without merit, and no certificate of appealability should issue.

II. CERTIFICATION MUST BE DENIED BECAUSE THE CALIFORNIA SUPREME COURT REASONABLY REJECTED PETITIONER'S CLAIM THAT THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY REFERENCING PETITIONER'S RACE IN CLOSING ARGUMENT AS BRIEF, ISOLATED AND NON-PREJUDICIAL (AOB CLAIM VII)

In claim VII of the opening brief (portions of claim XII of the Petition), Petitioner argues that the prosecutor committed prejudicial misconduct by describing Petitioner as "a black man" during the closing argument. AOB at 70-74. This claim fails under § 2254(d)(1) because the California Supreme Court reasonably determined that the remark was brief, isolated and non-prejudicial.

A. State Court Proceedings

One of the key pieces of the prosecution's evidence against Petitioner in this case was that Petitioner's semen was found on and in Amelia P.'s bound and gagged dead body. This finding was never challenged by the defense, and Petitioner took the stand in his own defense to explain that on the morning of the murder of Amelia P., he had consensual sexual intercourse with her on her living room couch in exchange for cocaine.

In response to this testimony, the prosecutor argued to the jury:

> I'm going to ask you to reach back into your own experience. It's been a few weeks, and I've sort of forgotten, but I believe that almost all of you are married, and I think almost all of you have children.

When you're newly, if the – I'm trying to think of just the right word to put it delicately, but when you're newlyweds, if the desire overtakes you and you find yourself in some room other than the bedroom, and it's you and your wife in the house, there may be no particular reason to go to the bedroom. And then when the children arrive, I think for most people that freedom has been lost, and people – people become very wary of expressing their affections in front of their children.

I think it's fair to say that married couples do not have sexual intercourse in front of their children. It may even be fair that married couples, when they have children, don't even go into embraces that are particularly passionate, and, you know, what might have been a hug and some pats and a long kiss when you're alone becomes a peck on the cheek when you have children in the house.

And what 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 living out there where they can have a house they can afford, taking in sewing to help meet the family budget, keeping that kind of house, 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, a single woman in front of her child, let alone a woman who is married and has three kids. You are not going to do it.

First of all, you'd be personally embarrassed to be caught.

> Second of all, I think most of us don't want our children to be exposed to that.
>
> And third of all, you don't want him telling Daddy that a strange man was in the house and they were doing funny things on the couch.
>
> At least under the worst of circumstances I would have expected them to go to the bedroom and lock the door, but he says, 'No, we did it right there on the couch, and after it was over she even offered me a drink,' apparently to keep him around. No way. It does not happen that way in the real world. Maybe in Mr. Cudjo's fantasies.
>
> I don't know what his thoughts are about how other people behave, but it just doesn't work that way, ladies and gentlemen.

9ER at 2249-50.

On direct appeal in the California Supreme Court, Petitioner asserted that the prosecutor's closing argument reference to race constituted misconduct in violation of the Constitution. The California Supreme Court disagreed, finding beyond a reasonable doubt that the racial reference did not affect the verdict:

> Although we do not find compelling justification for the prosecutor's racial reference in this case, neither do we find prejudice to defendant. The reference to race occurred in the course of an argument listing factors that undermined the credibility of defendant's testimony that the victim had consented to sexual intercourse. The racial reference added little to the force of the argument, which relied primarily on the implausibility of the victim engaging in intercourse with a virtual stranger in

> the presence of her five-year-old child. The racial reference was a brief and isolated remark; 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.

People v. Cudjo, 863 P.2d at 661.

In light of this state court record, Petitioner fails to demonstrate that this decision is beyond disagreement among fair-minded jurists. *Bobby v. Dixon*, 132 S.Ct. 26, 27 (2011) (per curiam). The California Supreme Court's conclusion—that the prosecutor's reference to Petitioner's race was brief and isolated and made in the context of larger attack on the implausibility of Petitioner's story that he had consensual sexual intercourse with Amelia P. on her living room couch with her five-year old son present in the house—is well-supported by the record. Petitioner's race is mentioned only once, and only as a parenthetical comment. The California Supreme Court's finding of a lack of prejudice was therefore a reasonable adjudication of this claim under § 2254(d)(1). Indeed, the reasonableness of the court's adjudication is confirmed by the fact that the District Court, exercising de novo review, came to exactly the same conclusion. 1ER 70-71. Accordingly, Petitioner is entitled to neither a certificate of appealability nor relief on claim VII.

III. CERTIFICATION MUST BE DENIED BECAUSE THE CALIFORNIA SUPREME COURT REASONABLY REJECTED PETITIONER'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF GREGORY CUDJO'S PURPORTED SECOND JAILHOUSE ADMISSION OF GUILT (AOB CLAIM VIII)

In Claim VIII in the opening brief (Claim XV(a)(6) in the Petition), Petitioner argues that trial counsel performed in an unconstitutionally ineffective manner by failing to properly investigate and present evidence of Gregory Cudjo's jailhouse admission of guilt. AOB at 75-91. In essence, Petitioner claims that Gregory made a second admission to killing the victim that was overheard by a sheriff's deputy and a few inmates. Pet. at 213-18. This claim was denied "on the merits" by the California Supreme Court in connection with Petitioner's first state habeas corpus petition. 5SER at 1056.[3] Because the denial of relief was reasonable in light of the state court record, federal relief is barred by 28 U.S.C. § 2254(d)(1).

A. Governing Legal Principles

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court noted that it had not previously addressed a claim of "'actual

[3] The claim was reasserted as claim VIII of Petitioner's second state habeas petition, filed in case number S090162, 2SER at 482-506, where it was again denied on the merits, as well as on the grounds that it was untimely and repetitive. 1ER at 197.

ineffectiveness'" and had not formulated the "proper standard" under the Sixth Amendment. *Id*. at 683-84. In what is now the familiar test, the Court held that a defendant must show that counsel's performance was constitutionally deficient and that such performance caused actual prejudice. *Id*. at 687, 692. To show deficient performance, Petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id*. at 668. The performance inquiry "must be whether counsel's assistance was reasonable considering *all* the circumstances" and counsel's conduct must be evaluated from "counsel's perspective at the time." *Id*. at 688 (emphasis added).

As for a duty to investigate, the Supreme Court held that counsel has such a duty or must make reasonable decisions that limit investigation or make it unnecessary. "[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U..S. at 691. "[A] particular decision *not to investigate* must be directly assessed for reasonableness in *all* the circumstances, applying a heavy measure of deference to counsel's judgments." *Id*. (emphasis added).

Counsel may make reasonable and informed decisions about how far to pursue particular lines of investigation. Strategic choices based upon

reasonable investigation are not incompetent simply because the investigation was less than exhaustive. *Burger v. Kemp*, 483 U.S. 776, 788-94 (1987). Further, claims of failure to investigate must show what information would have been obtained with investigation, and whether, if admissible, it would have produced a better result. *See Hamilton v. Vasquez*, 17 F.3d 1149, 21157 (9th Cir. 1994); *Wade v. Calderon*, 29 F.3d 1312, 1316-17 (9th Cir. 1994). Claims of failure to interview or call witnesses are deficient where there is no showing what the interview would have obtained and how it might have changed the outcome. *United States v. Berry*, 814 F.2d 1406, 1409 (9th Cir. 1987). If counsel has stated a reason for not calling a witness, the reason will likely show effectiveness. *Denham v. Deeds*, 954 F.2d 1501, 1505-05 (9th Cir. 1992).

In order to demonstrate actual prejudice, a petitioner 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." *Strickland*, 466 U.S. at 694. Actual prejudice is weighed against the totality of evidence before the trier of fact. *Id*. at 695.

On federal habeas review, "[a] state court must be granted a deference and latitude that are not in operation when the case involves review under

the *Strickland* standard itself." *Richter*, 131 S. Ct. at 785. Judicial review of a *Strickland* claim is "highly deferential," and "doubly deferential when it is conducted through the lens of federal habeas." *Yarborough v. Gentry*, 540 U.S. at 6. "'Surmounting *Strickland*'s high bar is never an easy task[,]'" and "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 131 S. Ct. at 788 (quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010)).

As the Supreme Court recently cautioned: "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 131 S. Ct. at 788.

B. The California Supreme Court Reasonably Rejected This Claim of Error

The California Supreme Court's summary denial of this claim for relief—twice—was neither contrary to nor an unreasonable application of clearly established United States Supreme Court authority. As explained earlier, the Supreme Court has held that when a state court has summarily denied a claim, "a habeas court must determine what arguments or theories

supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Richter*, 131 S. Ct. at 786. Only when there is "*no possibility* fairminded jurists could disagree" about the correctness of the state court's decision is habeas relief available to the petitioner. *Id*. at 786 (emphasis added). This is "'the only question that matters under § 2254(d)(1).'" *Id.* (quoting *Andrade*, 538 U.S. at 71). For the reasons that follow, relitigation of the merits of this claim in federal court is barred by application of 28 U.S.C. § 2254(d).

1. The California Supreme Court reasonably concluded that trial counsel was not ineffective under *Strickland*

Petitioner's allegations of attorney ineffectiveness were deficient in state court so that Petitioner was not entitled to the general presumption of truth afforded to specific factual allegations that comply with required state habeas procedures. Petitioner's failure in this respect warranted summary denial of this claim based on the failure to establish attorney ineffectiveness.

a. Requirements for establishing a prima facie case for relief on habeas under California law

A California inmate has a state constitutional right to petition for a writ of habeas corpus. Cal. Const., art. I, § 11; *People v. Duvall*, 886 P.2d 1252, 1258 (Cal. 1995); *see* Cal. Penal Code § 1474. The petition must establish a prima facie claim for relief in order to trigger an order to show cause. *Duvall*, 886 P.2d at 1258; *People v. Romero*, 883 P.2d 388, 391 (Cal. 1994). "'For purposes of a collateral attack, *all presumptions* favor the *truth, accuracy, and fairness* of the conviction and sentence; *defendant* thus must undertake the burden of overturning them.'" *Duvall*, 886 P.2d at 1258 (quoting *People v. Gonzalez*, 800 P.2d 1159, 1205-06 (Cal. 1990) (first and second emphases added)).

A petitioner's allegations are necessarily viewed against the backdrop of these presumptions. As the California Supreme Court has explained, "because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a *heavy burden* initially to plead sufficient grounds for relief, and then later to prove them." *Duvall*, 886 P.2d at 1258 (emphasis added). In order to satisfy the initial burden of pleading a prima facie case for relief, a petitioner must "state fully and with particularity the facts on which relief is sought" and "include

copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts *and* affidavits or declarations." *Id.* (emphasis added); *People v. Karis*, 758 P.2d 1189, 1216 (Cal. 1988).

"Conclusory allegations made without any explanation of *the basis for the allegations* do not warrant relief." *Duvall*, 886 P.2d at 1258 (emphasis added). This means that a petitioner may not simply allege a conclusion of fact or an ultimate fact; rather, he must allege the specific underlying facts that *show or establish* the ultimate fact itself. Likewise, a declarant must establish a foundation for his or her statements. A petitioner's failure to comply with these requirements justifies summary denial of the petition. *Id.* (a petitioner must allege facts "fully and with particularity" and must reveal *the basis for the allegations*).

In addition, the petition must be verified. *Romero*, 883 P.2d at 391; Cal. Penal Code §1473. A verification based on information and belief is insufficient to sustain the allegations for purposes of the prima facie case analysis. *See People v. McCarthy*, 222 Cal. Rptr. 291, 292 (Cal. App. 1986) (finding no prima facie case for relief where verification was based on information and belief because a petition "based on information and belief is 'hearsay and must be disregarded'"). As the California Court of Appeal has

explained: "Verification, under the statute, manifestly requires that all factual matters relied upon be stated by their declarant, whomever he may be, under oath." *People v. Madaris*, 175 Cal. Rptr. 869, 872-73 (Cal. App. 1981) ("Without such verification the petition, at least ordinarily, will be summarily denied.").

The same principle applies to the factual allegations made in the petition. Indeed, pursuant to California law established as early as 1890, factual allegations must be made in such a form so that, if false, perjury attaches: "'It has long been the rule of California that factual allegations on which a petition for habeas corpus are based must be "in such form that perjury may be assigned upon the allegations if they are false."'" *McCarthy*, 222 Cal. Rptr. at 292-93, quoting *Madaris*, 175 Cal. Rptr. at 873, quoting *Ex parte Walpole*, 24 P. 308 (Cal. 1890). It necessarily follows—as the California courts have repeatedly held—that hearsay allegations do not support a prima facie claim for relief and are "disregarded;" rather, a petitioner must provide a declaration from each proposed witness or declarant to establish a prima facie case.

Applying these principles to ineffective assistance of counsel claims concerning an alleged failure to investigate or call a witness, a petitioner must, at a minimum: support his own statements with a proper verification

or declaration, identify any proposed witnesses by name, proffer a declaration from any such witness based on such witness's personal knowledge and which sets forth the testimony the witness would have offered, explain that the witness would have been available and would have testified at the trial, and allege facts which overcome the presumption that counsel's performance was reasonable or based on trial tactics.

In sum, any fact that would need to be proven in order to demonstrate a federal constitutional violation must be alleged in the petition in the manner and form set forth above.[4] If any link in the chain of necessary elements to establish a claim is missing, a prima facie case for relief has not been stated, and the petition will be summarily denied.

b. The California Supreme Court reasonably rejected Petitioner's claim that counsel performed ineffectively

In the Petition, Petitioner attacked trial counsel for failing "to investigate a jailhouse admission by Gregory Cudjo and witnessed by

[4] If a factual allegation is verifiable by reference to the trial record, such as an allegation that counsel did not call a particular witness to testify, there would be no need to substantiate it with additional evidence. *See Pinholster*, 131 S. Ct. at 1402 n12, quoting *In re Clark*, 855 P.2d 729, 741-42 (Cal. 1993). However, a petitioner is required to point to specific portions of the record to support his claims. *Ex parte Swain*, 209 P.2d 793, 794 (Cal. 1949).

Deputy Sheriff Charles E. Merritt and others." Pet. at 213. Petitioner's allegations in the Petition are essentially indistinguishable from the allegations in both of the state habeas petitions where this claim was previously raised. 1SER at 32-37; 3SER at 683-90. As the allegations failed to comply with state law requirements, the summary merits denials were reasonable, and relitigation of the claim is barred.

Petitioner's specific allegation of error is that "Mr. Clark's *failure to investigate this report* is without question one of the more heinous of his many mistakes in this case." Pet. at 26-27 (italics added). The problem with this allegation is that the record affirmatively establishes that Mr. Clark *did* investigate Deputy Merritt's report. As summarized by the California Supreme Court:

> 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.

In re Cudjo, 977 P.2d 66, 73 (Cal. 1999) (italics added).

It is, therefore, undeniable that trial counsel "investigated" the statement made at the jail. He questioned the sheriff's deputy who heard it, but did not obtain any useable information, since Deputy Merritt was unable to determine whether it was Petitioner or Gregory who made the statement. Petitioner's allegation that trial counsel "failed to investigate" is contradicted by the record.[5]

Petitioner also alleged—in both his state and federal petitions—that "had [trial counsel] properly investigated Deputy Merritt's report, Mr. Clark would have been able to (1) corroborate the reliability of Mr. Culver's evidence and (2) even if Mr. Culver's testimony had still been excluded, avoid much of the prejudice of the trial court's clearly erroneous ruling, by calling Deputy Merritt, Mr. Lewis and Mr. Frederickson to testify about Gregory's other jailhouse confession." 1SER at 36. This allegation likewise failed to state a prima facie case under California law. Petitioner failed to explain how counsel should have "properly investigated" the report. Counsel asked the deputy what happened, and the deputy could not identify

[5] If Petitioner meant that trial counsel needed to investigate further, then Petitioner was required to say that, to explain what the further investigation should have consisted of, and to allege what useful evidence the further investigation would have produced. *See Hamilton v. Vasquez*, 17 F.3d at 1157; *Wade v. Calderon*, 29 F.3d at 1316-17.

the maker of the statement. Petitioner merely concluded that "calling Deputy Merritt" and the others to testify would have solved all his problems, but there is no allegation as to whether these other witnesses were available to testify, or what they would have said that would have made a difference. Petitioner's pleading deficiencies under California law were monumental, and resulted in the California Supreme Court resolving that Petitioner had failed to state a prima facie case for relief on the ineffectiveness prong of *Strickland*. That reasonable decision ends review.[6]

c. Petitioner failed to allege sufficient facts to establish prejudice, thus resulting in a reasonable denial of relief by the California Supreme Court

Petitioner has likewise failed to demonstrate that a reasonable court would agree that he was prejudiced by counsel's purported deficiencies. Initially, Petitioner's insufficient allegations in state court, along with the

[6] The District Court found that trial counsel was ineffective for failing to conduct a more thorough investigation with respect to the statement overheard by Deputy Merritt and others in the jail. 1ER at 89-91. However, this finding followed an evidentiary hearing where the District Court considered evidence never presented to the state court, and prior to a determination that Petitioner had met his burden of establishing unreasonableness, under § 2254(d). Because this claim was denied on the merits in state court, the District Court should have resolved the reasonableness issues based solely on the state court record; the evidence adduced in federal court plays no part in the §2254(d)(1) analysis. *Pinholster*, 131 S. Ct. at 1398.

absence of documentary evidence, failed to establish that any witness would have testified that it was Gregory, and not Petitioner, who made the statement referred to in Deputy Merritt's report. But even if that evidence existed and could have been presented in admissible form, it would have made no difference with respect to the jury's verdict.

As explained earlier, even if evidence of Gregory's admissions had been admitted, no rational jury would have believed them, because the remaining evidence demonstrates that Gregory's purported admissions were false. Petitioner's semen—not Gregory's—was found on the victim. Eyewitness and physical evidence established that only one intruder had been in the house, which is irreconcilable with the two separate intruders featured in Gregory's story. Petitioner's tale of consensual sex in exchange for drugs was refuted by the absence of drugs in the victim's body, the absence of evidence that she had ever purchased drugs, and the unlikelihood that she would have engaged in casual sex with Petitioner when her young child was in the home. *People v. Cudjo*, 863 P.2d at 652-53.

The District Court, based almost exclusively on the state court record, provided additional reasons why the admission of a Gregory confession to the killing would have made no difference in the verdict. For example, Petitioner testified on direct examination that when he drove up to the victim

on the morning of her death, she was holding a hose. Petitioner's testimony was contradicted by the evidence that it had rained recently, which negated any need for the victim to be watering plants. 1ER at 94 (citing the state court record).

The District Court also discussed Petitioner's internally inconsistent testimony concerning what he wore at different times on the day of the murder. Petitioner testified that when he woke up he put on jeans and tennis shoes, but then changed into jeans and tennis shoes to go for a run after coming back from the victim's home. This was inconsistent with another portion of Petitioner's testimony, in which he asserted that he changed from boots to tennis shoes upon returning from the victim's home. 1ER at 94 (citing the state court record).

The District Court also explained how Petitioner's contention that he jogged in long pants, despite having shorts, made little sense. According to Petitioner, he preferred to run in long jeans—the pants he was arrested in—unless it was very hot. But Petitioner conceded it had been a nice day and that he needed to pull his pants up because he was so sweaty after running. Petitioner had to contend that he went jogging in long pants because other evidence established that the perpetrator had worn shorts. Petitioner's sister testified that he had been wearing shorts on the day of the murder. No

reasonable jury would have believed Petitioner's story about his preference for jogging in long pants. 1ER at 94-95 (citing the state court record).

The District Court also noted an evidentiary discrepancy concerning Petitioner's contention that Gregory had washed his tennis shoes, rather than Petitioner having done so. If Gregory had washed his shoes and left them in his mother's car, where the wet pair was found, Gregory would have been forced to walk from the car into the camper without any shoes. Only Petitioner had an extra pair of shoes, so that he could have washed tennis shoes and still had other shoes to wear. 1ER at 94-95 (citing the state court record).

Also, Petitioner testified that when he returned home from visiting his sister, he changed into a pair of tennis shoes. But when he was arrested, he was wearing work boots. He proffered no explanation as to when or why he changed his shoes in this regard. But the District Court aptly deduced that the jury could have inferred that Petitioner changed into his work boots when he saw officers following footsteps that led from the victim's home to Petitioner's. Petitioner's contention that he had not worn tennis shoes was unbelievable, since the single pair of shoe tracks that led to his home from the victim's were of tennis shoes, and Petitioner was the only person known

to have been in the victim's home that day. 1ER at 96-97 (citing the state court record).

The District Court also observed that there were problems with Petitioner's testimony that he took forty-seven minutes to run three miles. Not only did that seem like a lengthy time for someone with Petitioner's level of conditioning to run that distance, but it would not have been possible for Gregory to do everything attributed to the killer in that time period. As the District Court summarized the prosecutor's argument:

> First, Gregory had to wait until Armenia was no longer in view, and then he had to change into the blue cut-off shorts, pick up his brother's survival knife, walk to Amelia's house as well as to Edward Plummer's residence to leave all the footprints that were later traced back to the camper. Gregory then had to ask Amelia for money, tie her up, attempt to start the van, get the rifles, throw the keys into the backyard, kill Amelia, get rid of the rifles, and then walk back to the camper and appear as if nothing had occurred. RT 2545-46. Moreover, there is no evidence that Gregory even knew Armenia's friend, Edward Plummer, so there is no explanation as to why Gregory would have walked over to Edward Plummer's residence. RT 2546.

1ER at 97-98 (citing the state court record).

The District Court also observed the discrepancy between Petitioner's sex-for-drugs story, and the suggestion that Gregory went to the victim's home to rob her of money. According to Petitioner, the victim needed to

trade sex for drugs because she had no money. Since Gregory had supposedly been so informed, an effort by him to rob the victim of money would have made no sense at all, because he would have known that the victim had no money. 1ER at 98 (citing the state court record).

The District Court next explained how Gregory's own prior statements and testimony would have rendered the jury very skeptical about a confession, given the inconsistency of the earlier statements and testimony. Specifically, in an interview following his arrest, Gregory told police that Petitioner washed his shoes and had admitted to robbing the victim. Gregory tried to backtrack during the preliminary hearing until he was confronted with his original statements to police. The prosecutor's direct examination was so compelling, it prompted the trial court to comment that, "Gregory Cudjo's statements on direct examination were vague, cryptic, inconsistent and sounded like they are the product of intense and incisive cross-examination." 5SER at 1081; *see also* 1ER at 99 (citing the state court record). Gregory initially denied making statements that inculpated his brother, and claimed the police had threatened him and put words in his mouth. However, upon the tape-recording of the interview being played, Gregory confirmed he made the statements and that they were truthful. 1ER at 100-01.

Finally, the District Court powerfully summarized the reasons why evidence that Gregory had admitted to the killing would have had a nominal impact, at best, on the jury's verdict:

> Thus, the transcripts of Gregory's statements to the police on March 22 and March 26, 1986, show that he was completely and thoroughly impeached. Moreover, it was clear that Gregory was Armenia's brother and thus had a motive to lie. In addition, Gregory's purported jailhouse confession that was overheard by Deputy Merritt was completely devoid of any specifics that could have corroborated it, and the confession that was allegedly overheard by John Culver was contradicted by both the physical evidence and all other accounts Gregory had given, including his testimony under oath at the preliminary hearing. [¶] Given these circumstances, there is little likelihood that a competent jury would have given Gregory's alleged confession substantial weight. Accordingly, it is not reasonably probable that admission of his testimony would have affected the outcome, so there is no basis for finding that trial counsel's error in not further investigating the origin of the statement prejudicial. Nor is there any prejudice from trial counsel's failure to interview Gregory, because there is no reason to believe that Gregory would have cooperated with trial counsel. Gregory asserted his Fifth Amendment privilege both at the time of the trial and at the time of the 2008 evidentiary hearing, so there is no reason to believe he would have cooperated with trial counsel's investigation, the goal of which was to incriminate him, at the time of trial.

1ER at 102.

The District Court found no prejudice, within the meaning of *Strickland*, under what appears to be a de novo standard of review. And under AEDPA, the question is only whether the California Supreme Court's rejection of the claim was reasonable, within the meaning of 28 U.S.C. § 2254(d). When viewed through this "doubly deferential" lens, *Yarborough v. Gentry*, 540 U.S. at 6, it cannot reasonably be concluded that the state court's rejection of this claim was unreasonable, particularly in light of the fact that the District Court held that it was not merely reasonable, but correct. Because reasonable courts would agree that relief must be denied on this claim, Petitioner is not entitled to a certificate of appealability.

IV. CERTIFICATION MUST BE DENIED BECAUSE THE CALIFORNIA SUPREME COURT REASONABLY REJECTED PETITIONER'S CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY HIS FAILURE TO PRESENT FAMILY BACKGROUND AND RESIDUAL DOUBT MITIGATING EVIDENCE AT THE PENALTY PHASE (AOB CLAIM IX)

Claim IX of the AOB (claim XX, subclaims B and E of the Petition), generally alleges that trial counsel rendered ineffective assistance of counsel by failing to present social and medical background mitigating evidence, as well as residual doubt mitigating evidence based on the jailhouse testimony of John Culver. AOB at 92-113. These claims fail under § 2254(d)(1)

because the California Supreme Court reasonably rejected these claims on direct appeal and in a summary denial on habeas corpus.

A. The Denial of Relief in State Court

The state court record in this case reveals that this penalty phase mitigation claim was raised three times in the California Supreme Court. On direct appeal, Petitioner alleged that trial counsel rendered ineffective assistance of counsel in failing to renew his efforts to admit the jailhouse testimony of John Culver at the penalty phase. The California Supreme Court denied this claim on prejudice grounds, based on its earlier ruling on the admissibility of Culver's testimony. *People v. Cudjo,* 863 P.2d at 667. Thereafter, Petitioner combined with this claim an ineffective assistance of counsel claim based on the failure to present social and medical background mitigation evidence as claims III(B) and III(F) in Petitioner's first state habeas corpus petition. 1SER at 81-85, 89-90. The California Supreme Court summarily denied these claims "on the merits." 5SER at 1056. The second time these claims appear together is in Petitioner's second state habeas corpus petition as claims XXI(B) and XXI(E). 3SER at 810-35, 839-44. The California Supreme Court denied the claims as untimely, and alternatively, as repetitive, and "on the merits." 1ER at 197.

As to the background mitigation claim, Petitioner conceded in state court that the mitigation evidence he had put forth in his first state habeas corpus petition was only "the most rudimentary" in content. 1SER at 81. The entire recitation of social-medical background mitigation evidence that Petitioner claimed his trial attorney should have presented consists of only eight paragraphs in the Petition covering approximately two and one-half pages of text. 1SER at 83-84.

In terms of actual factual content alleged with specificity, the Petition averred that Petitioner was born in Phoenix Arizona in 1957, the first-born of five children. An unidentified sister of Petitioner's contracted spinal meningitis as an infant, which resulted in her having a malformed spine. This sister suffered from epilepsy, but it was undiagnosed until she became a teenager. Petitioner maintained or "dropped" to "unsatisfactory" grades in first and second grade, and in high school obtained 15 failing grades over an unspecified period. Petitioner's father died when Petitioner was twelve years old, and Petitioner was "traumatized" in some unidentified manner by the report that his father had been beaten to death by police who mistook him for a vagrant. Thereafter, Petitioner became "the 'Man' of the house" while his mother eventually married Ernest Freeney, "a violent and abusive man." Finally, the petition alleged that Petitioner had an unspecified

"history of blackouts" and in August 1983, he was struck with a pipe while asleep and suffered a depressed skull fracture that caused him headaches, nausea, vomiting, and left-upper-extremity weakness and numbness. The petition further averred that Petitioner, while incarcerated in the Los Angeles County Jail, was a trustee with no disciplinary violations. 1SER at 82-84.

In response to this claim, the State produced a nineteen-page declaration from trial counsel that addressed, among other things, his approach to mitigation evidence at Petitioner's trial. This declaration was later accepted via stipulation of the parties as counsel's testimony at the state-court reference hearing. 5SER at 1057-78. According to trial counsel, both he and his investigator interviewed Petitioner several times to obtain background information for possible pursuit of an appropriate mitigation case for the penalty phase. As the case developed, however, the essential defense became alibi, thereby causing background information about Petitioner's childhood, education and various other common mitigation factors to become of minimal consequence. Counsel found Petitioner's prior record, of which the prosecutor was not fully aware, to be "particularly aggravating" and detrimental to a lingering doubt defense at the penalty phase, if disclosed.

Counsel did not want to delve into background information that risked the prosecutor both learning of and presenting aggravating evidence of a prior Arizona robbery for which Petitioner was paroled just months before he murdered Amelia P. Counsel further explained that Petitioner's claimed history of epilepsy could not be verified or connected to the operative facts of this case. It was also, in counsel's opinion, inconsistent with Petitioner's claimed training he had been doing as part of his "boxing career." Counsel further believed that pursuit of mental state mitigation evidence that conceded commission of the murder would have undermined his residual doubt strategy. 5SER at 1074-77.

The California Supreme Court summarily denied this claim "on the merits." 5SER at 1056. The Culver ineffective assistance of counsel claim raised in the first state habeas petition renewed the claim raised on appeal (1SER at 88-89), and was also summarily denied "on the merits." 5SER at 1056.

B. District Court Denial of Relief

The claims as alleged in the second state habeas corpus petition were refiled in the District Court in an amended petition as claims XX(B) and XX(E). The District Court reviewed the claims de novo and received evidence that was not before the California Supreme Court during both the

first state habeas proceeding, and to a lesser extent, during the second state habeas proceeding. Employing a de novo standard of review, the District Court denied Petitioner relief on these claims, finding that trial counsel's decision not to present mitigation evidence was objectively unreasonable, but not prejudicial. 1ER at 158-61. The District Court similarly denied the ineffective assistance of counsel claim centered on the failure to renew efforts at the penalty phase to admit the testimony of John Culver on prejudice grounds. 1ER at 162-63.

C. The California Supreme Court Reasonably Denied These Claims

The California Supreme Court's denial of these claims in Petitioner's first state habeas corpus petition was a reasonable adjudication of the merits under § 2254(d)(1).

1. The applicable law

In 1999 when the California Supreme Court summarily denied Petitioner's ineffective assistance of counsel claim centering on counsel's alleged failure to present background mitigation evidence, the clearly established Supreme Court authority begins with *Strickland* itself. *Strickland* was a death penalty case in which counsel conducted a limited investigation. Counsel spoke with the defendant about his background and

spoke to the defendant's wife and mother on the phone, but did not follow up on a single unsuccessful effort to meet with them. "He did not otherwise weed out character witnesses for [the defendant]." *Strickland*, 466 U.S. at 672-73. "Nor did [counsel] request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems." *Id*. at 673. "Counsel decided not to present and hence not to look further for evidence concerning [the defendant's] character and emotional state." *Id*. In mitigation, counsel argued that Strickland had no history of any criminal activity, he committed the crimes under extreme mental or emotional stress, and that his life should be spared because he surrendered and confessed. *Id*. at 673-74. The aggravating evidence included that "all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain." *Id*.

In a state post-conviction proceeding, Strickland claimed that counsel provided ineffective assistance by failing to move to continue the sentencing hearing, failing to investigate and present character witnesses, failing to seek a presentence investigation report, and failing to request a psychiatric report. *Strickland*, 446 U.S. at 674. In support of his claim, Strickland produced the

declarations of fourteen friends, neighbors and family members who would have testified on his behalf. In addition, he provided a psychiatric report and a psychological report stating that Strickland was suffering from depression at the time of his crimes. The state trial court rejected the claim without holding a hearing. On federal habeas review, the district court concluded that counsel erred in failing to further investigate mitigating evidence, but the error was harmless. *Id*. at 675-79.

The Supreme Court reversed regarding counsel's performance. The Court explained that counsel's conduct must be judged by a standard of reasonableness and "[m]ore specific guidelines are not appropriate" because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant[.]" *Strickland*, 466 U.S. at 688-69. Indeed, reviewing the claim under a *de novo* standard, the high court found that its decision was "not difficult" and that it was "clear" that counsel's performance at and during the capital sentencing hearing was reasonable. *Id*. at 698-99; *id*. at 699 ("The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with [the defendant] that character and psychological evidence would be of little help. . . . On these

facts, there can be little question, *even without application of the presumption of adequate performance*, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment") (italics added).

In *Burger v. Kemp*, a pre-AEDPA death penalty case, Burger was convicted of murder and was sentenced to death. Burger and Stevens were United States Army soldiers stationed at Fort Stewart, Georgia. They called a cab after agreeing to pick up a third soldier from the airport and bring him back to the base. Honeycutt, a soldier working part-time as a cab driver, picked them up. On the way to the airport, Burger and Stevens robbed Honeycutt at knifepoint. While Burger drove, Stevens forced Honeycutt to undress, blindfolded him and tied his hands behind his back. Stevens climbed into the backseat with Honeycutt, forced Honeycutt to commit oral sodomy, and anally sodomized him. They stopped the car and placed Honeycutt, nude and blindfolded, into the trunk and drove to a pond. Burger opened the trunk and asked whether Honeycutt was okay. When he responded affirmatively, Burger closed the trunk, started the cab, placed it into gear and exited before it entered the water. Honeycutt drowned. *Burger*, 483 U.S. at 778.

In a habeas proceeding, Burger claimed that his attorney failed to adequately investigate the mitigating circumstances of his offense. *Burger*, at 483 U.S. 777-78. The evidence showed that Stevens was "primarily responsible for the plan to kidnap the cabdriver, the physical abuse of the victim, and the decision to kill him." *Id*. at 779. In addition, Burger was only seventeen years old at the time of the offense and "functioned at the level of a 12-year-old child." *Id*. Stevens was twenty. *Id*. Counsel also could have presented evidence that "petitioner had an exceptionally unhappy and unstable childhood." *Id*. at 789. Burger's parents married at a very young age, sixteen and fourteen. His mother remarried twice, and neither of Burger's stepfathers wanted him in the home. One of them beat her in his presence when he was 11, and the other got him involved in drugs. *Id*. at 790. Later, Burger was placed in a juvenile detention center. *Id*. Burger's counsel did not present any of this evidence at either of two sentencing hearings. *Id*. at 788-90. "Except for one incident of shoplifting, being absent from school without permission, and being held in juvenile detention – none of which was brought to the jury's attention, petitioner apparently had no criminal record before entering the Army." *Id*.

The Supreme Court described the mitigating evidence as including a "'neglectful, sometimes even violent, family background' and testimony that

his 'mental and emotional development were at a level several years below his chronological age[.]'" *Burger*, 483 U.S. at 790 n.7. Yet, counsel decided not to present any of this evidence, even though counsel had some family history evidence before the trial, in order to keep evidence that Burger had committed a prior petty theft away from the jury. *Id*. at 790-92. Counsel also decided not to present the testimony of a psychologist because, given Burger's lack of remorse and attitude about the crimes, "he would be subjected to cross-examination that might be literally fatal." *Id*. at 791. In addition, while other family members could have testified on Burger's behalf, their declarations also referenced Burger's prior contacts with law enforcement and were "at odds with the defense's strategy of portraying petitioner's actions on the night of the murder as the result of Stevens's strong influence upon his will." *Id*. at 793.

Despite counsel's "failure" to present any evidence at the sentencing hearing, the Supreme Court concluded that counsel's performance satisfied the constitutional standard: "The record at the habeas corpus hearing does suggest that [counsel] could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger*, 483 U.S. at 794 (citation omitted). As

the high court explained, "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment. It appears that he did interview all potential witnesses who had been called to his attention and that there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty." *Id*. at 794-95.

Based on this Supreme Court legal landscape, the California Supreme Court could reasonably conclude that trial counsel's investigation into various mitigation themes and decision to forego further investigation and presentation in favor of a lingering doubt defense was objectively reasonable and did not fall below prevailing professional norms. In neither *Strickland* nor *Burger* did the Supreme Court mandate any sort of bright-line minimum level of penalty phase investigation that must take place before a trial attorney could reasonably conclude that further investigation was unnecessary. In particular, neither case holds that a defense attorney's mitigation investigation into his client's background must go beyond interviews of the client himself. Indeed, as noted above, in *Strickland* the Court had no difficulty finding adequate investigation based only on an interview of the defendant about his background and phone conversations

with the defendant's wife and mother without further follow-up. And in *Burger* the Court specifically acknowledged that trial counsel could well have conducted a more thorough investigation, but instructed that constitutional minima did not dictate what was "prudent or appropriate." *Id*. at 794-95.

The District Court in the instant case found otherwise, 1ER at 153-57, but in its analysis, the District Court erred in a number of fundamental respects. First, the District Court conducted a de novo evaluation of counsel's performance based evidence that went beyond the record of the first state habeas corpus proceeding. This analysis contravenes the Supreme Court's recent mandate in *Pinholster*. *Pinholster*, 131 S. Ct. at 1401. Second, the District Court erred in going beyond the clearly established Supreme Court law as it existed in 1999. Indeed, the District Court relied upon Supreme Court cases, as well as Ninth Circuit authority, to set forth a constitutional duty to investigate a defendant's background for the penalty phase that goes beyond rudimentary knowledge from narrow sources. However, the Supreme Court has instructed that it is error to attribute such "strict rules to this Court's recent case law." *Id*. at 1407.

Given trial counsel's declaration, which was introduced at the state reference hearing, the California Supreme Court could reasonably

summarily deny this claim on the merits. In light of the state-court record, the California Supreme Court could reasonably conclude that Petitioner had failed to overcome the strong presumption that counsel rendered adequate assistance of counsel and made all significant decisions in the exercise of reasonable professional judgment. *Pinholster*, 131 S. Ct. at 1403.

First, the California Supreme Court could reasonably have credited as reasonable trial counsel's concern that presentation of background evidence risked bringing before the jury aggravating evidence of Petitioner's Arizona robbery conviction, imprisonment, and parole just prior to the murder of Amelia P. At the guilt phase of trial, Petitioner testified without contradiction that he lived in California for 12 1/2 to 13 years prior to April, 1988. 8ER at 1925. However, the proffered mitigation evidence that Petitioner had earned a high school equivalency certificate in 1982 in Arizona, as well as having suffered an alleged head injury in 1983, carried with it the risk that the jury would have learned that both events happened while Petitioner was incarcerated in Arizona from 1980 to 1985 for robbery. This discovery would have confirmed the jury's conclusion at the guilt phase that Petitioner was an untrustworthy person. It also would have further tarnished Petitioner as a career criminal, with a greater propensity for violence, and a motive to kill to avoid going back to prison.

Similarly, the California Supreme Court could reasonably have credited as reasonable trial counsel's concern that Petitioner's claimed epilepsy based on a purported "history of blackouts" could not be verified or connected to the operative facts of this case. Nowhere in connection with this claim was it ever alleged that trial counsel was made aware that Petitioner had a documented medical history of epilepsy, that epilepsy played any role in the murder of Amelia P., or that epilepsy affected Petitioner's conduct on the day of the crime. The California Supreme Court could reasonably credit counsel's concern that pursuit of mental state mitigation evidence that conceded commission of the murder would have undermined his residual doubt strategy.

As for the remaining elements of the proposed mitigation strategy—Petitioner's poor school performance; a sister's childhood meningitis, deformed spine, and undiagnosed childhood epilepsy; the beating death of Petitioner's father; his mother's subsequent marriage to a "violent and abusive man;" and Petitioner's good conduct in county jail—the California Supreme Court could reasonably credit trial counsel's judgment that such mitigation themes were "miscellaneous alternative theories of responsibility for the murder that were patently not operative" and "of minimal consequence[.]" 5SER at 1075-76. Based on this record, the California

Supreme Court could reasonably credit counsel's judgment that "presenting a 'laundry list' of feigned mitigation evidence would detract from one good theory which was consistent with evidence presented at trial[.]" 5SER at 1076. For all of these reasons, the California Supreme Court could have reasonably concluded that Petitioner failed to overcome the strong presumption that counsel rendered competent representation.

When the claim of ineffective assistance of counsel involves counsel's alleged failure to present mitigating evidence at the penalty phase of trial, a petitioner generally must "establish 'a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing,' and 'that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned a different sentence." *Wong v. Belmontes*, 130 S. Ct. 383, 386 (2010) (quoting *Wiggins v. Smith*, 539 U.S. at 535); accord *Williams v. Taylor*, 529 U.S. at 397.

"In evaluating that question, it is necessary to consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path – not just the mitigating evidence [counsel] could have presented, but also the [aggravating evidence] that almost certainly would have come in with it." *Belmontes*, 130 S. Ct. at 386 (emphasis in original)

(citing *Strickland*, 466 U.S. at 386). Thus, a petitioner "must show a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence [] against the entire body of aggravating evidence []." *Id*.

It is readily apparent why the California Supreme Court rejected this aspect of the ineffective assistance of counsel mitigation claim on prejudice grounds. The new mitigation evidence offered in support of the claim in the California Supreme Court was far from overwhelming and would have been problematic for the defense. Evidence of Petitioner's Arizona school records, particularly his 1982 high school equivalency certificate, as well as Petitioner's head injury in 1983, opened the door for the prosecution to present evidence of Petitioner's conviction and incarceration for robbery from 1980 to 1985. Indeed, such revelations would have opened the door to a strong prosecution argument in aggravation that Petitioner murdered Amelia P. in order to avoid going back to prison.

Freestanding claims of epilepsy without any connection to the operative crime facts or Petitioner's criminal history would have been of little value, and if connected to the facts of the murder, the evidence would have greatly diminished, if not extinguished, any residual doubt mitigation theory. Such evidence also would have opened the door to rebuttal by the State through

expert testimony or other types of evidence. And evidence that Petitioner's family exposed him to "violent and abusive" people was "by no means clearly mitigating" and risked having the jury conclude that Petitioner "was simply beyond rehabilitation." *Pinholster*, 131 S. Ct. at 1410.

The remaining material in the state habeas record is "sparse" and reveals "just a few new details" about Petitioner's childhood. *Id*. Petitioner's sister suffered spinal meningitis as an infant, resulting in a malformed spine. She also suffered from epilepsy that was undiagnosed until she was a teenager. Petitioner's father was reportedly beaten to death by police officers when he was mistaken for a vagrant. This "traumatized" Petitioner and forced him to become the man of the house, while his mother entered into a series of relationships with other men. Petitioner was also a trustee in the Los Angeles County Jail with no disciplinary violations. The new mitigating evidence in this record was "not so significant" that even assuming trial counsel performed deficiently in putting together a mitigation defense, "it was necessarily unreasonable" for the California Supreme Court to conclude that Petitioner had failed to demonstrate a reasonable probability of a different sentence had the new mitigation evidence been presented. *Id*.

Litigation of this claim in state court did not end with the California Supreme Court's summary denial of the claim on the merits. As previously

noted, the claim reappeared in Petitioner's second state habeas as claim XXI(B). 3SER at 810-35, 839-43.) The California Supreme Court denied the claim as untimely, as repetitive, and "on the merits." 1ER at 197. This iteration of the claim was amplified by allegations and exhibits that did not appear in the first state habeas corpus application. Primarily, the new allegations came from the declarations of a social historian and a psychologist.

The social historian provided details that were not provided in the first state habeas corpus petition that Petitioner claimed his trial attorney should have developed. These details traced Petitioner's family back to the early 1800s, where the Black Seminoles lived in Florida. This history traced Petitioner's family through the Civil War, providing details of the lives of Petitioner's great-great grandfather, great grandfather, grandfather, and father. The allegations further documented Petitioner's father's early adult life and marriage to Petitioner's mother. It described Petitioner's father's employment as a minister and a day laborer supporting five children, his drinking, and medical problems. The allegations described in greater detail Petitioner's poor performance in school through elementary and high school. The bolstered claim again identified the death of Petitioner's father as a major event in his life, but noted that family members could not agree on

how he had died, with stories ranging from him getting into a fight with another man, to being beaten by police, to just "collapsing." The allegations likewise amplified the assertion that Petitioner was "devastated" by his father's death, alleging that Petitioner "careened through his adolescence" by acting out, challenging authority, skipping school, and withdrawing from family and friends. The allegations gave more detail of Petitioner's mother's ensuing relationships with men, particularly her relationship with Ernest Freeney, who drank, fought with, and beat Petitioner's mother. All this was witnessed by the Cudjo family children. 3SER at 810-26.

For the first time, the second state habeas petition alleged that Petitioner had engaged in substance abuse, and provided details of the onset of Petitioner's epilepsy. It also provided details of Petitioner's head injuries he suffered while in prison for burglary in 1983, conceding that the incident happened in prison, and supported allegations of brain damage with a 1992 neuropsychological summary that "suggest[ed] a degree of brain dysfunction and impairments generally within the mild to moderate range, with greater left hemisphere dysfunction consistent with Petitioner's 1983 skull fracture." The allegations repeated the assertions in the first petition that Petitioner was a trustee in the Los Angeles County Jail with no disciplinary violations. 3SER at 826-31.

The California Supreme Court denied the claim as untimely, and alternatively, as repetitive, and "on the merits." 1ER at 197. In support of its timeliness bar, the California Supreme Court cited *In re Robbins*, 959 P.2d 311, 317-18 (Cal. 1998) and *In re Clark*, 855 P.2d at 737-62. 1ER at 197. Because of the imposition of this timeliness bar, none of the additional allegations or exhibits supporting this claim can be considered on federal habeas review. The bar constitutes an adequate and independent state ground for the California Supreme Court resolution of this claim in the second state habeas corpus proceeding.

A federal court may not review a claim if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support it. *Beard v. Kindler*, 130 S. Ct. 612, 614 (2009) (citing *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). In other words, in all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. at 750; *Poland v. Stewart*, 169 F.3d 573, 577 (9th Cir. 1998); *Bonin v.*

Calderon, 59 F.3d 815, 842-43 (9th Cir. 1995). A habeas petitioner who has failed to meet the state's procedural requirements for presenting federal claims has deprived the state courts of an opportunity to address those claims in the first instance, just like a petitioner who has failed to exhaust state remedies. *Coleman v. Thompson*, 501 U.S. at 732; *see also Harris v. Reed*, 489 U.S. 255, 265-66 (1989) (state court must, however, clearly and expressly invoke the default by providing a "plain statement" of default).

In *In re Robbins*, the California Supreme Court discussed its policies concerning the timely presentation of habeas corpus petitions. Where a petition is filed after a long delay, the court noted, the petitioner has the burden of establishing absence of substantial delay, good cause for the delay, or that the claim falls within an exception to the bar of untimeliness. *In re Robbins*, 959 P.2d at 18. This is the same timeliness bar identified in *In re Clark*, 855 P.2d at 737-62.

In its recent decision in *Walker v. Martin*, 131 S. Ct. 1120 (2011), the United States Supreme Court expressly held that California's requirement that habeas corpus petitions be filed in state court without substantial delay is an "adequate" procedural ground, as it is "firmly established and regularly followed." *Id*. at 1127-31. Although the rule is discretionary under California law, the Supreme Court noted, a state procedural rule can

adequately bar federal habeas review even if the state exercises its discretion at times to disregard the rule and decide a habeas claim on its merits. *Id*. at 1128 (citing *Beard v. Kindler*, 130 S. Ct. at 618).

Thus, the ineffective assistance of counsel claim as set forth in Claim XXI(B) of the second state habeas petition, 3SER at 810-35, and repeated verbatim in the amended federal habeas corpus petition as Claim XX(B), is procedurally barred. *See Walker v. Martin*, 131 S. Ct. at 1127-31; *see also La Crosse v. Kernan*, 244 F.3d 702, 705 (9th Cir. 2001) ("[T]he California Supreme Court was applying the untimeliness bar because [petitioner] delayed nearly twelve years between his direct appeal and his state petition for habeas corpus")

As Petitioner has failed to show cause and prejudice with respect to his delay in seeking relief, the amplified version of this claim is barred. *See generally Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir. 1996); *see also McCleskey v. Zant*, 499 U.S. at 497 (cause is external impediment such as government interference or reasonable unavailability of claim's factual basis); *see Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003). In this regard, it is significant that Petitioner offered as the principal explanation for the delayed presentation of this amplified claim in the second state habeas petition that

the California Supreme Court had denied him "sufficient funds" for the development of mitigation evidence on habeas corpus. 2SER at 401-05. However, Petitioner provided no authority—and Respondent is aware of none—that would excuse a Petitioner from fully developing his claim because the state courts would not pay him to do so. Respondent disputes Petitioner's assertion that unless the State facilitates a Petitioner's investigation by fully funding it in the way Petitioner later claims it should have been funded, the State is "interfering" with the investigation. In any event, Petitioner was wrong on the facts. The California Supreme Court granted Petitioner $8,000 specifically for the purposes of investigating potential mitigating evidence that could have been presented at the penalty phase, and the order specifically permitted Petitioner to renew the request for additional funds in the future. 5SER at 1079. Petitioner therefore did not establish any legally cognizable cause for his failure to develop this claim in the first state habeas corpus petition, and the "cause" he alleged was based upon demonstrably false allegations of fact.

Petitioner also cannot establish prejudice for his failure to develop this version of the claim because the California Supreme Court also alternatively rejected the claim on the merits, and Petitioner cannot overcome the high hurdle imposed by § 2254(d)(1). The additional allegations merely added

more details to the same claim already rejected in the first state habeas corpus petition, and the court could reasonably conclude that the newer version of the claim did not significantly strengthen the claim so as to warrant relief.

As previously discussed, trial counsel and his investigator interviewed Petitioner about his background with the express purpose of evaluating potential family background, medical, and mental state mitigation themes, but concluded that those themes were by no means clearly mitigating and endangered the more prudent mitigation strategy of residual doubt. By the same token, the California Supreme Court could reasonably conclude that the addition of two experts did not significantly bolster the claim on the prejudice prong.

The mitigation expert, whose function was to synthesize family background evidence so as "humanize" Petitioner, added little value to the presentation. Penalty phase juries do not need expert testimony to understand the value of "humanizing" evidence. All that is needed is common sense or a sense of mercy. *Belmontes*, 130 S. Ct. at 388. Furthermore, an expert who would have testified that Petitioner suffered from mild brain damage, largely from an injury suffered just a number of years earlier in prison would have been countered by a State expert and

added little, if anything, to a case in mitigation. *Pinholster*, 131 S. Ct. at 1410.

Indeed, proof of the reasonableness of the California Supreme Court's rejection of this amplified version of this claim is evidenced by the District Court's de novo rejection of yet another iteration of this the claim on prejudice grounds. If the District Court could reasonably conclude that the jury's knowledge that Petitioner had experienced a traumatic childhood, was exposed to domestic violence, lost his father at age twelve, was depressed, abused alcohol and drugs, experienced two head injuries, seizures, and had possible brain damage would not have overcome the "'brutal and revolting circumstances of this premeditated, deliberate, cold-blooded and totally unjustified murder,'" 1ER at 158, then it cannot be said that "it was necessarily unreasonable for the California Supreme Court to conclude that [Petitioner] had failed to show a 'substantial' likelihood of a different sentence." *Pinholster*, 131 S. Ct. at 1410.

As to Petitioner's ineffective assistance of counsel claim regarding trial counsel's failure to renew his efforts to admit Culver's testimony, Petitioner again cannot overcome the relitigation bar of § 2254(d)(1). As explained by the California Supreme Court on direct appeal,

> We have previously concluded that Culver's testimony was erroneously excluded at the guilt phase, but that the error was not prejudicial. Because the same evidentiary rules govern admissibility of evidence at the guilt and penalty phases, we question whether defense counsel demonstrates incompetence by failing to press at the penalty phase for admission of evidence excluded at the guilt phase. But we need not decide whether reasonably competent counsel would have again sought admission of Culver's testimony. For the reasons already stated, we are persuaded that Culver's testimony was lacking in credibility and could not have affected the outcome at either the guilt or penalty phases of the trial.

People v. Cudjo, 863 P.2d at 667.

The California Supreme Court's conclusion that the admission of Culver's testimony at the penalty phase could not have affected the outcome of the penalty phase is not outside the realm of a fair-minded jurists, and hence must be deferred to under § 2254(d)(1). As previously noted with respect to Claim V on appeal here, the incredible nature of Culver's proposed testimony was comprehensively addressed by both the California Supreme Court and the District Court. Culver personally had massive credibility problems. As the District Court explained, via reliance on the state court record, Culver and Petitioner were long-time friends. Culver had a prior felony conviction and had been sentenced to prison. The overwhelming majority of Culver's male relatives (approximately forty) had

criminal records. 1ER at 35. Petitioner's trial counsel was reluctant to even consider using Culver given his family's reputation in the community and his criminal record. *Id*.

In addition to his inherent personal credibility problems, Culver's proposed testimony also lacked credibility. Although Culver knew Gregory's purported admission was important, he ostensibly waited a very long time to tell anyone—including Petitioner—about it. Further, Gregory's alleged confession, as reported by Culver, was irreconcilable with the physical and eyewitness evidence. Culver testified that Gregory said he went to burglarize the victim's house, and that, as soon as the victim saw him, she confronted him and began screaming, so he immediately beat her into unconsciousness and apparently to death. But the undisputed physical evidence proved beyond any doubt based in reason that the killing did not happen that way. The victim was found hog-tied in her bedroom, and the victim's young child testified that she was hog-tied *before* she was murdered. 1ER at 36.

The California Supreme Court identified these dramatic reliability deficiencies in Culver's testimony, and other compelling ones as well. For example, Petitioner's semen—not Gregory's—was found on the victim. Petitioner's explanation—that he had traded drugs for consensual sex with

the victim—was refuted by all other evidence. Although Petitioner testified that he had seen the victim purchase cocaine on prior occasions, as her husband testified, this was untrue. The victim never showed any signs of drug use, and there was no money missing from their accounts. Further, there was no cocaine in the victim's body at the time of her death. *People v. Cudjo*, 863 P.2d at 652-53.

The state court also noted that the physical and eyewitness evidence supported the presence of only one person in the victim's home that day. Only one set of shoe prints were found leading to and from the victim's home, and the victim's son described only one person entering the home. *People v. Cudjo*, 863 P.2d at 643. In short, there was no evidence that supported the presence of a second person in the home, other than Petitioner's fantastic story of consensual sex for drugs with a woman found hog-tied and beaten to death without any drugs in her system. *Id*.

The California Supreme Court also noted how unrealistic it would be to conclude that the victim would have engaged "in casual sex and drug activity in her living room with a near stranger while her five-year-old son was at home." *People v. Cudjo*, 863 P.2d at 652. Petitioner's unbelievable story failed to account for the presence of the child known to be in the house with the victim. *Id*.

No rational jury would have disregarded this uncontroverted evidence proving Petitioner was the murderer, and concluded that Gregory was the actual killer, if only Culver had been permitted to testify. As every court to consider this issue has found, Culver was personally an unreliable source, and the story he claimed Gregory told him was incredible in light of the uncontroverted physical and eyewitness evidence. Any error in excluding Culver's concocted story did not have a substantial and injurious effect or influence in determining the jury's verdict.

As noted above, this claim was denied a second time on the merits in Petitioner's first state habeas petition. Presented with an opportunity to bolster this claim, Petitioner failed in this regard because trial counsel's declaration confirmed that he was well aware of the credibility problems Culver presented, including Culver's longtime friendship with Petitioner, Culver's family's well-known contacts with law enforcement in the area, and the lateness of Culver's offer to testify (which detracted from his credibility based on the publicity generated by the case), Culver's own longtime relationship with trial counsel, and his prior contacts with counsel that did not produce the proffered admissions. In addition, trial counsel was acutely aware of the trial court's prior ruling and major inconsistencies in Culver's testimony and the physical and other evidence in the case. 5SER at

1067-68. Based on trial counsel's declaration, the California Supreme Court could reasonably concluded that Petitioner had failed to overcome the strong presumption of competence of counsel and counsel could reasonably refrain from renewing efforts to admit the Culver testimony based on credibility concerns and doubts that the trial court would change its ruling. In similar fashion, the court could find renewed confidence in its conclusion that Culver's testimony could not have affected the verdict in the case. For all of the above-stated reasons, Petitioner is entitled to neither a certificate of appealability nor relief on Claim IX.

V. CERTIFICATION MUST BE DENIED BECAUSE THE CALIFORNIA SUPREME COURT REASONABLY REJECTED PETITIONER'S CLAIM OF CUMULATIVE ERROR (AOB CLAIM X)

In Claim X of the AOB (Claims XIX, XXX and XXXI of the Petition), Petitioner argues that, even if none of the errors he identifies are sufficiently prejudicial to warrant relief when considered individually, he is entitled to relief based upon the cumulative effect of the errors at the guilt and penalty phases. AOB at 113-22.

The California Supreme Court reasonably rejected these claims. Although Petitioner presents a laundry list of purported errors, AOB at 114-16, he does not discuss how those errors purportedly cumulatively prejudiced him. AOB 119-21. As to most of the allegedly accumulating

errors, Petitioner states without elaboration that he was "additionally prejudiced . . . by the other errors." AOB at 120. How "the other errors" "accumulated" to cause additional prejudice beyond that contemplated by the analysis of their individual effect is not discussed. Because, as discussed in the preceding sections, most of the allegations Petitioner identifies fail to present a meritorious claim of error, the accumulation of these non-errors did not render the trial fundamentally unfair. *Payton v. Cullen*, 658 F.3d 890, 896-97 (9th Cir. 2011).

The one area of "accumulation" that Petitioner discusses with specificity is the alleged synergy between the allegedly erroneous admission of Gregory's preliminary hearing testimony and the erroneous exclusion of Gregory's inculpatory statements. However, the District Court held that the admission of the preliminary hearing testimony was not error; accordingly, there was no "prejudice" from this evidence to accumulate. 1ER at 37-46. And this Court found that the preliminary hearing testimony claim was so lacking in substance that it denied a certificate of appealability as to this issue. See 12/5/2011 Order re Supplemental Briefing.

Thus, the relevant portion of Petitioner's "cumulative" error claim is simply a recapitulation of his complaints about the prejudice that purportedly flowed from the wrongful exclusion of Gregory's inculpatory

statements. This is not so much a claim of cumulative error as a restatement of his claim of prejudice from this one alleged claim of error. Because the prejudice component of that claim is adequately addressed in the context of Respondent's discussion of the claim itself, see pp. 23-26, *supra*, it does not bear repeating here. And, insofar as the California Supreme Court—and the District Court—reasonably concluded that the claim raised no constitutionally cognizable error, and was in any event harmless, *People v. Cudjo*, 863 P.2d at 648-54; *accord* 1ER 30-37, federal habeas corpus relief is unavailable. § 2254(d)(1).

CONCLUSION

Accordingly, Respondent requests that the decision of the District Court denying and dismissing the Petition with prejudice be affirmed.

Dated: January 6, 2012

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: January 6, 2012

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

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

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1/6/12

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 January 6, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

SUPPLEMENTAL 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 January 6, 2012, at Los Angeles, California.

L. Luna	s/ L. Luna
Declarant	Signature

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