IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

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United States District Judge

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I. The Effect of *Pinholster* and *Richter* on This Appeal

To obtain habeas relief, a petitioner must show that his constitutional rights were violated under 28 U.S.C. § 2254(a) and that § 2254(d) does not bar relief on any claim adjudicated on the merits in state court. *Frantz v. Hazey*, 533 F.3d 724, 735-36 (9th Cir. 2008) (en banc). *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011), held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Harrington v. Richter*, 131 S. Ct. 770 (2011), held that a summary denial is an adjudication on the merits, and that in assessing such denials under 2254(d), "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." *Id.* at 786.

Three of the claims in this appeal -- the claims of ineffective assistance at guilt and penalty and cumulative error -- were rejected in summary habeas denials. Appellant's Opening Brief ("AOB") at 75, 92, 113-14. *Richter* applies to these claims. "Under California law, the California Supreme Court's summary denial of a habeas petition on the merits reflects that court's determination that 'the claims made in the petition do not state a prima facie case entitling the petitioner to

relief,'" "assum[ing] the allegations in the petition to be true." *Pinholster*, 131 S. Ct. at 1403 n.12. As shown below, the state court denial of these claims violates 2254(d) on the basis of the state court record. *Id*. at 1398.

Three other claims -- Claims 8 (trial court error excluding third-party culpability evidence), 9 (confrontation clause violation), and 12 (prosecutorial misconduct at closing) -- were denied in the direct appeal. AOB at 44, 65, 69-70. Although they were reasserted in state habeas, they were summarily denied there, and the Court "looks through" those denials to the last reasoned decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Hurles v. Ryan*, 650 F.3d 1301, 1311 (9th Cir. 2011). *Richter* does not apply to those claims, and the 2254(d) analysis is "confine[d] . . . to the state court's *actual* decisions and analysis." *Frantz*, 533 F.3d at 737 (original emphasis). Neither *Pinholster* nor *Richter* apply to the lethal injection claim because California is revising its lethal injection protocol, and until it is finalized no court can review it. Respondent asserts that "the District Court erred in holding an evidentiary hearing in this case" because it did so without first finding a violation of 2254(d) based solely on the state record. Suppl. Ans. at 3-4 (original emphasis). But *Pinholster* does not require that a petitioner prove a violation of 2254(d) as a precondition to presenting new facts in federal habeas. 131 S. Ct. at 1411 n.20 ("[W]e need not decide whether § 2254(e)(2) prohibited

the District Court from holding the evidentiary hearing or whether a district court may ever choose to hold an evidentiary hearing before it determines that § 2254(d) has been satisfied."). *See also Wellons v. Hall*, 130 S. Ct. 727, 730 n.3 (2010) (per curiam) (error to require finding of 2254(d) violation before allowing federal fact development); *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

Evidence presented for the first time in federal habeas is relevant to assessing whether Cudjo is ultimately entitled to relief under 2254(a), although it cannot be used in 2254(d)(1) analysis. Once this Court concludes that 2254(d) does not bar relief on a claim, it reviews the claim *de novo*, *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), *Frantz*, 533 F.3d at 735, 737, and it can and should consider evidence developed in federal habeas for the purpose of determining whether to grant relief. *Skipwith v. McNeil*, 2011 WL 1598829 (S.D. Fla. Apr. 28, 2011); *Hearn v. Ryan*, 2011 WL 1526912 (D. Ariz. Apr. 21 2011); *see also Howard v. Clark*, 608 F.3d 563 (9th Cir. 2010) (remanding to district court for evidentiary hearing after finding 2254(d) violation based on state court record). Although the district court did not have the benefit of *Pinholster*'s ruling at the time it rendered its decision, it acted well within its discretion in holding an evidentiary hearing, and the results of that hearing remain relevant to this Court's decision as to whether relief should be granted under 2254(a).

II. This Court Should Certify and Grant Relief on Claim V

Because this claim was presented to the California Supreme Court on direct appeal and resulted in a reasoned decision, this Court must first determine what arguments actually supported that decision, and then determine whether the decision satisfies 2254(d).

A. The Trial Court's Exclusion of John Culver's Testimony On The Sole Ground That It Was Not "Credible" Violated the Fifth and Sixth Amendment; the California Supreme Court's Decision Was Contrary to Clearly Established Federal Law

The right to present a defense arises from the Sixth Amendment's compulsory process clause and the Fifth Amendment's due process clause. *Washington v. Texas*, 388 U.S. 14 (1967). The clauses yield a fundamental right to compel witnesses to appear, and to present their testimony to the jury:

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

Id. at 19. "The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact." *Taylor v. Illinois*, 484 U.S. 400, 409 (1988). Although the Supreme Court has acknowledged that trial courts may, consistent with the Fifth and Sixth Amendment guarantees, exclude evidence that

is "unreliable," it has explicitly rejected the principle that Respondent urges this Court to accept – that a judge has discretion to exclude the testimony of a witness solely because the judge found the witness' testimony not "credible."

1. The Supreme Court Has Explicitly Rejected The Premise That A Trial Court May Exclude Percipient Witness Testimony Solely Because The Judge Does Not Believe It

At common law there were "notorious" examples of defense witnesses prohibited on the ground that, if called, they might be tempted to commit perjury. Defendants and co-defendants were generally disqualified from testifying on the "ground of interest." *Id*. at 20 (citing 2 Wigmore §§ 575-576 (3rd ed. 1940). A party to a civil or criminal case was "not allowed to testify on his own behalf for fear that he might be tempted to lie." Co-defendants in a criminal case were not allowed to testify on behalf of one another out of a concern that "each would try to swear the other out of the charge." *Id*. at 21. These rules "rested on the unstated premise that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by *preventing the jury from hearing any testimony that might be [perjured],* even if it were the only testimony available on a crucial issue." *Id*. (emphasis added).

The Supreme Court rejected that premise in *Washington*, agreeing that "'the truth is more likely to be arrived at by hearing the testimony of all persons of

competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court.[1]" *Id*. at 22. Granting the writ, *Washington* held that "the petitioner . . . was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Id*. at 23.

The trial court here excluded the testimony of John Culver, who was "physically and mentally capable of testifying to events that he had personally observed," and whose testimony was "relevant and material to the defense." *See* ER 255. The only justification offered for the exclusion of Culver's testimony was that he was not "credible." *Id.* Because *Washington* rejected the proposition that a trial court could exclude a critical defense witness on that ground, that decision was contrary to clearly established federal law.

[1] In context, the phrase "by the court" cannot be reasonably interpreted as permitting a trial court to determine witness credibility in the context of a *jury trial*, but rather only in situations in which the judge is the factfinder.

2. The Unjustified Exclusion Of Critical Defense Evidence Violates The Sixth Amendment Regardless of Whether It Is Guided By A Generally Applicable State Rule

Respondent, like the California Supreme Court, tries to distinguish *Washington* and other Supreme Court holdings on the ground that they involved the application of general rules of evidence, whereas this case involved a judge's exclusion of a witness based on an individualized credibility determination. ER 23-35; Suppl. Ans. at 21. This is not a reasonable basis to distinguish *Washington* and its progeny. First, as the California Supreme Court noted in its opinion, the trial court *did* rely on a generally applicable rule of evidence – Cal. Evid. Codes § 1230 and 352. ER 231-34. Second, the distinction makes no sense. The Sixth Amendment applies independently of generally applicable state rules of evidence, and the exclusion of critical defense evidence can violate the constitution even when it is *dictated* by a state rule. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). It is illogical to argue that a trial court's exclusion of a critical defense witness pursuant to a state rule of evidence could offend the Sixth Amendment, but exclusion of the exact same witness, but without any legal authority at all, would not. The fact that the judge's decision was not dictated by a general state rule does not insulate it from constitutional scrutiny. It makes no difference at all.

3. The Sixth Amendment Guarantees the Right To Have the Credibility of Competent Witnesses Be Assessed By a Jury

Respondent contends that the "right to present a defense" jurisprudence applies only to "*credible and reliable*" evidence. Supp. Br. at 18. But this argument conflates the concept of "reliability," which applies to all types of evidence, with the concept of "credibility," which applies only to testimony.

A trial court has discretion to exclude evidence on the ground that the evidence is unreliable in the sense that it is incompetent, irrelevant, or unduly prejudicial. *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). For example, in *United States v. Scheffer*, 523 U.S. 303, 309-12 (1998), the Supreme Court held that a ban on polygraph evidence in military trials did not violate the defendant's constitutional right to present his defense because the scientific underpinnings of such evidence were so questionable. The Court noted that the rule was justified by legitimate state interests, including "[p]reserving the court members' core function of making credibility determinations in criminal trials." *Id*. at 312-13.

However, the Supreme Court has never equated the concept of "reliability" with the concept of "credibility," as Respondent urges this Court to do. To the contrary, it has held that even potentially *untrustworthy* witness testimony must be permitted when the credibility of that testimony is capable of being evaluated by a jury. For example, in *Rock v. Arkansas*, the trial court precluded the defendant

from testifying because her testimony had been refreshed by hypnosis. 483 U.S. 44, 47-48 (1987). The Supreme Court reversed. The Court acknowledged that hypnosis was a controversial and unproven technique that made witnesses "suggestible" to the point that they might "confabulate." *Id*. at 60. But it held that hypnotically refreshed testimony were not "so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial." *Id*. at 61.

The crucial distinction between the exclusion of "evidence" and the exclusion of "testimony" is that the former only implicates the Fifth Amendment right to due process, whereas the latter *also* implicates the Sixth Amendment right to compel witness testimony and to have that testimony heard and evaluated by a jury. Although a trial court, applying state rules of evidence, is justifiably concerned with "reliability" when determining whether to admit evidence, it has no legitimate role to play in evaluating the "credibility" of witness testimony. As Justice Kennard stated in her dissent in this case, "the Sixth Amendment requires that defense witnesses be permitted to testify to the jury, regardless of the trial court's apparent distrust of the proposed testimony, if the credibility question is one that the jury is reasonably well equipped to deal with." ER 255.

In this case, Culver's testimony was not excluded because it fell within a

class of "evidence" that the trial court could rationally conclude was "unreliable." *See Scheffer*, 523 U.S. at 313. As the California Supreme Court acknowledged, Culver's testimony about Gregory's confession had "substantial probative value," and it was "highly necessary" to the defense because "there was no comparable direct evidence of Gregory's guilt." *See* ER 234. More importantly, it was *live, in-court testimony*, like the testimony that was arbitrarily excluded in *Washington* and *Rock*. As in *Rock*, the testimony was susceptible to evaluation by a jury using "the traditional means" of cross examination. *See Rock*, 483 U.S. at 61. Indeed, the complaints expressed by the District Court and Respondent about Culver's testimony were (1) that he "was a long-time friend" of Armenia's, (2) that he "had a felony conviction," *id*., (3) that Culver waited for a "long time" to tell anyone about the confession because he "didn't want to get involved," and that (4) the confession was "not consistent with the defense evidence." ER 35. These are weaknesses that juries are well suited to evaluate. And when Culver offered his testimony outside the presence of the jury, the district attorney capably addressed each of these issues on cross-examination. ER 2145-47.

4. The Notion that Credibility Determinations Are Exclusively Reserved To Juries Is Clearly Established Federal Law

Respondent contends that there is no clear Supreme Court case holding that a trial court may not exclude a witness' testimony on the basis of an individualized

determination that witness' testimony was not credible. Supp. Ans. at 22. But the notion that credibility determinations are exclusively reserved for the jury is well established. *See*, *e.g., Jackson v. Denno*, 378 U.S. 368, 386 n. 13 (1964) ("Just as questions of admissibility of evidence are traditionally for the court, questions of credibility, whether of a witness or a confession, are for the jury. This is so because trial courts do not direct a verdict against the defendant on issues involving credibility."); *Crane v. Kentucky*, 476 U.S. 683, 688 (1986); *Scheffer*, 523 U.S. at 313 ("A fundamental premise of our criminal trial system is that 'the jury is the lie detector. . . . Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury . . . .").

If there is no Supreme Court case addressing the precise factual scenario in which a trial judge excludes a crucial defense witness solely because the trial judge did not find his testimony credible, it is because the constitutional problem is so obvious. *See Taylor v. Withrow*, 288 F.3d 846, 853 (6th Cir. 2002) ("This is an example of a *rara avis*: a fundamental constitutional rule dictated by precedent but 'so unexceptional that it [has] never been drawn into question in a reported case,' at least a Supreme Court case."). It was not reasonable for the California Supreme Court to ignore the clear holdings of the Supreme Court simply because

they did not address identical facts. *See Panetti*, 551 U.S. at 953 ("AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied."). Section 2254(d)(1) is satisfied if the constitutional principle that the trial court violated was clearly established by Supreme Court precedent. *See Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).

Respondent cites to this Court's recent decision in *Rhoades v. Henry*, 638 F.3d 1027, 1035 (9th Cir. 2011), as evidence that there is no clearly established federal law prohibiting a trial court to exclude a witness based on an individualized credibility determination. Suppl. Ans. 19-20. But *Henry* does not support that proposition. In *Henry*, a man who was extremely drunk confessed to a police officer that he committed the murder for which the defendant was on trial. When he sobered up he recanted. There was no evidence linking him to the crime, and he had an alibi. He refused to testify and the trial court refused to let the defendant call a police officer to recount the confession. This Court affirmed, holding that it did not violate the defendant's due process rights.

As this Court repeatedly pointed out, the ruling in *Henry* depended on the fact that the confession was hearsay. *Id*. at 1036. Because it was hearsay, "the jury would have had no opportunity to evaluate [the declarant's] credibility and demeanor; [the officer's] testimony would have been the only testimony on the

issue." Thus, in ruling on the admissibility of the statement, the trial judge had to apply the state's "declaration against interest" exception to the hearsay rule, which required it to determine whether the out-of-court statement bore "persuasive assurances of trustworthiness." *Id*. at 1035. Applying that test, the trial court was justified in excluding the hearsay statement because the declarant was "intoxicated when he confessed and recanted when he was sober, his alibi checked out, and there was no other evidence linking him to the crime." *Id*. at 1035.

By contrast, in evaluating the "declaration against interest" exception to the hearsay rule in this case, the California Supreme Court held that the *out-of-court* statement was both reliable and admissible. ER 231-32. As the Court pointed out, unlike the confessor in *Henry*, who had a confirmed alibi, "Gregory, who had no alibi, was in custody as a prime suspect." *Id*. And unlike the confessor in *Henry*, who could not be linked to any of the evidence found at the crime scene, "Gregory tended to fit [the eyewitness] description of the assailant, and much of the other evidence, in particular the incriminating shoe prints was as consistent with Gregory's guilt as with [Armenia's]." *Id*.

Rhoades does not support the notion that a trial court could exclude an *in-court* witness on the sole ground that the judge did not believe his testimony. In its ruling, this Court analogized case to *Chambers*, which also concerned the

application of a hearsay rule, and it distinguished *Washington* on the ground that it "involved direct (rather than hearsay) testimony . . . ." *Id*. at 1036. Because this case involved the exclusion of a live, in-court witness based solely on a the judge's determination that he was not credible, *Washington* controls.

B. The Exclusion Of Gregory's Confession, The Sole Direct Evidence Of His Guilt, Was Prejudicial

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . . Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139–140 (WHITE, J., dissenting). Because of the uniquely powerful and incriminating nature of a confession, a reviewing court must "exercise extreme caution before determining that the admission of the confession at trial was harmless." *Id*. Although *Fulminante* concerned the erroneous *admission* of a defendant's confession against him, its reasoning applies with equal force to the *exclusion* of an alternate suspect's confession. Just as a defendant's "own confession is probably the most probative and damning evidence against him," the confession of an alternate suspect is the most probative and *exonerating* evidence for a wrongfully accused defendant.

This Court recently reached a similar conclusion in *Lunbery v. Hornbeak*,

605 F.3d 754 (9th Cir. 2010). In that case, a woman was convicted of murdering her husband, based on her own confession. At trial, she was not permitted to introduce evidence that another man had killed her husband as part of a drug deal that had gone bad. *Id*. at 757. A witness told the police that Henry Garza, who was involved in the drug deal approached him at a pizza restaurant and said "That's a bummer. My partners blew away the wrong dude." *Id*.

After the California Supreme Court denied relief in a summary order, this Court granted relief, finding that the ruling resulted in an unreasonable application of the Supreme Court's clearly established cases guaranteeing the right to present evidence of third party culpability, including *Chambers* and *Crane*. *Id*. at 760. The Court concluded that the exclusion of Garza's statement was prejudicial to the defendant because it "stripped her of evidence that someone other than she had probably committed the murder . . . ." *Id*. at 762. Although the defendant was able to present a *theory* of third party culpability to the jury, that was "no substitute for Garza's admission that his partners committed the murder." *Id*.

In this case, as in *Lunbery*, Armenia was able to present some evidence in support of the *theory* that Gregory was responsible for the murder. But that was "no substitute" for the ability to present a direct confession by Gregory. *See Lunbery*, 605 F.3d at 762. The prejudice is even more apparent in this case. The

alternate suspect in *Lunbery* was not the killer, but merely an associate of the killer, and his statement that his "partners blew away the wrong dude" was vague, and not made until three weeks after the murder. By contrast, Gregory was the clear alternate suspect, his confession was based on his own involvement in the murder, and it occurred "within hours after the crime was committed and under circumstances providing substantial assurances that the confession was trustworthy." ER 233. As the California Supreme Court held, "[T]here was no comparable direct evidence of Gregory's guilt." ER 234.

Respondent contends that the exclusion of Culver's testimony was not prejudicial because Culver had a criminal record. But prosecutors routinely call informants with criminal records to testify as to a defendant's confession, and rely on that testimony to prove guilt. *See*, *e.g., Fulminante*, 499 U.S. at 287. Respondent also notes that Culver was a long-time friend of Armenia. But Culver was also a long-time friend of Gregory, *see* ER 2147, and his testimony would have been just as devastating to Gregory as it would have been helpful to Armenia. Culver's close relationship with both brothers also explains Culver's reluctance to report the confession earlier on. His explanation for the delay -- that he "didn't want to get involved" – makes sense. *See* ER 2131.

The fact that Armenia's semen was found at the crime scene was consistent

with the testimony he offered in his defense, which was that was in the victim's house, had sex with her in exchange for drugs, and left prior to the murder. Respondent discounts this testimony as "unrealistic" and "unbelievable" because there was no other evidence that the victim was a drug user. Suppl. Ans. at 25-26. But Armenia testified that he had seen the victim purchase or use drugs on several occasions. *See* ER 228. James Mitchell, whose testimony was not presented to the jury, also witnessed the victim purchase drugs. *See* ER 47. And a detective testified that he found a small plastic baggie in the garage that was consistent with the type used to store drugs. ER 228. Respondent relies on the fact that the victim's husband denied that his wife was a drug user. Suppl. Ans. at 25. But a physician who specialized in drug addiction testified that it is not uncommon for the spouse of a drug addict to be ignorant of their partner's drug use. ER 229.[2]

Respondent argues that the fact that only one set of footprints led from the camper to the victim's house and back contradicts Armenia's defense theory that both he and his brother had visited the house that day. Suppl. Ans. at 25, ER 235. But Armenia testified that he *drove* to the victim's house on a *paved street*, which

[2] The California Supreme Court also discredited Armenia's testimony that the victim was a drug user because the autopsy showed no drugs in her system. ER 236. But Armenia testified that the victim did not use cocaine in his presence, explaining the lack of any cocaine in the her body tissue. *See* ER 2052.

would not have resulted in an additional set of footprints. *See* ER 228; 244. Moreover, a neighbor of the victim's told a state investigator that she saw a car in the victim's driveway on the morning of the murder. SER 1072. Although the car was initially thought to belong to the victim's husband, Ubaldo Prokuda, the witness admitted that "it may have been a car other than Mr. Prokuda's." SER 1072. Thus, the existence of only one set of footprints *corroborated* the defense.

Even if Culver's testimony regarding Gregory's testimony did not precisely track all of the other evidence presented about the murder, it does not follow that the testimony would have be completely discounted by a jury. As the California Supreme Court pointed out, "such discrepancies might be attributable to Gregory's agitation or Culver's misunderstanding of what he was told. They did not negate all possibility that if Gregory claimed to be the murderer, he was telling the truth." ER 232.

At minimum, evidence that the a "prime" suspect who more closely resembled the eyewitness' description of the killer than Armenia, had confessed, would have profoundly shifted the balance of the evidence in Armenia's favor.[3] Its exclusion could only have had a "substantial and injurious" influence on the

[3] At least one juror indicated that "[i]t would have been important evidence . . . that John Culver, who was in County Jail with both brothers, heard Armenia's brother confess to the crime." ER 2804 (Declaration of Laverne Brett at ¶ 2.)

jury's deliberation. *See Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993).

III. This Court Should Certify and Grant Relief on Claim VII

Respondent argues that Cudjo's prosecutorial misconduct claim "fails under § 2254(d)(1) because the remark was brief, isolated and non-prejudicial." Suppl. Ans. at 27. But caselaw makes clear that even isolated racial remarks can prejudice a criminal defendant, especially where the defendant is a black man accused of raping and killing a white woman, and where the race of the defendant is used as a reason to credit the prosecution's theory over the defendant's.

In *Moore v. Morton*, 255 F.3d 95 (3rd Cir. 2001), the Third Circuit granted relief in similar circumstances, concluding that the state court unreasonably applied federal law in denying a claim of prosecutorial misconduct. In his closing at a rape trial where the victim was white, the defendant black, and "[t]he sole issue at trial was the identity of the rapist," 255 F.3d at 109, a prosecutor argued that the fact that the defendant's wife was white showed that he "made a choice to be with a Caucasian woman . . . ." *Id*. at 99. The state court found no prejudice in the remark, and emphasized that "the complained of comments represented a small portion of an extremely lengthy summation" and were "promptly and appropriately dealt with by a forceful curative instruction." *Id*. at 108. The Third Circuit granted habeas relief, holding that "[r]acially or ethnically based prosecutorial

arguments have no place in our system of justice." *Id*. at 113, 116. It held that the argument was prejudicial because it made race relevant to the issue of guilt and "could play to bias against interracial couples." *Id*. at 116.

Here, the prosecutor's argument – that a white woman would not have had consensual sex with a black man – likewise made race relevant to the issue of guilt where the identity of the defendant was the main issue and a key part of the defense was that the victim had consensual sex with Armenia. But unlike in *Moore*, no curative instruction was given. In both cases, "[t]he argument gave the jury an illegitimate 'hook' on which to base their decision." *Id*. (footnote omitted); *see also Miller v. North Carolina*, 583 F.2d 701, 704, 707-08 (4th Cir. 1978) (granting habeas relief in rape case where black defendants were charged with raping a white woman and the prosecutor "argued that a defense based on consent was inherently untenable because no white woman would ever consent to having sexual relations with a black"). In light of the allegations in this case, and this nation's pervasive history of racial discrimination in the imposition of the death penalty, particularly in cases involving black men accused of raping and killing white women, *see Furman v. Georgia*, 408 U.S. 238 (1972), *Coker v. Georgia*, 433 U.S. 584 (1977), the California Supreme Court's failure to recognize the prejudice of the prosecutor's use of Armenia's race in order to discredit his

testimony that he had consensual sex with the victim was unreasonable.

IV. This Court Should Certify and Grant Relief on Claim VIII

Even if a jury might have discounted John Culver's testimony about Gregory's first confession, it would have been impossible to discount Culver's testimony if the jury had also heard that Gregory had confessed to the same murder again, but this time to a jailer and a prosecutor. Rather than hear evidence of *both* confessions, as it should have, the jury heard about *neither*.

A. Armenia Alleged Facts That Entitled Him To Relief

Respondent claims that Cudjo's "allegations of attorney [guilt-phase] 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." Supp. Ans. at 35. The argument appears to be that this claim could have been denied on the ground that it allegations were conclusory and failed to state facts with sufficient particularity. *Id.* at 36-37 (*citing People v. Duvall*, 886 P.2d 1252 (1995)). This argument fails.

When California state courts conclude that a petition fails to allege claims with sufficient particularity, they say so by citing *In re Swain*, 209 P.2d 793 (1949) and/or *Duvall*. *Gaston v. Palmer*, 417 F.3d 1030, 1039 (9th Cir. 2005); *Kim v. Villalobos*, 799 F.2d 1317, 1319 (9th Cir. 1986). The California Supreme

Court never cited those cases when denying Cudjo's guilt-phase ineffectiveness claim, or in any way indicated the claim wasn't alleged with sufficient particularity. ER 197. A federal court cannot apply a state procedural bar when the state court failed to do so. *Cone v. Bell*, 129 S. Ct. 1769, 1782 (2009).[4]

In any event, Armenia did state his claim with particularity, and he did identify the witnesses by name. SER 32-37. The allegations state:

(1) that trial counsel knew about, but failed to investigate, the fact that a "Suspect Cudjo," who had to be either Armenia or Gregory, had confessed to the murder, saying "I'm in here for murder, and I did it," SER 33;

(2) the witnesses that trial counsel failed to interview regarding the statement, including (a) Charles Merritt, the jailer, who heard the statement, *see id*., (b) Hans Berg, the prosecutor, who interviewed the person who made the statement, (c) and Bruce Frederickson, Douglas Lewis, and George Mitchell, prisoners who overheard the statement, SER 36-37;

(3) the evidence that an adequate investigation would have revealed, including the fact that the prosecutor interviewed Gregory Cudjo immediately

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[4] If the state court had denied Cudjo's claim on this procedural ground, he would be in a *better* position. His claim would be exhausted, appropriate for federal review, and not subject to 2254(d) because it was not adjudicated on the merits. *Kim*, 799 F.2d at 1319-20; *Cone*, 129 S. Ct. at 1784.

after the statement was made and could have identified him, SER 33; and

(4) the means by which the confession could have been presented to the jury, including (a) by introducing a copy of Merritt's report itself, SER 36, and (b) by calling Merritt, Lewis, and Frederickson to testify. *Id*.

B. The California Supreme Court's Summary Denial of the Claim Was Contrary to Supreme Court Precedent

Respondent contends that trial counsel's investigation into Gregory's second confession was reasonable because Merritt was "unsure whether petitioner or Gregory had made the statement." Supp. Ans at 41-42. But the fact that his investigation revealed that the statement was made, and could only have been made by either Gregory or Armenia, triggered a duty to investigate the circumstances *more*, not less. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003) ("[A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."). Although it can be reasonable for an attorney to decline one avenue of investigation in favor of another, it was not reasonable to do so here. Given that the sole defense in this case was that Gregory had committed the murder, and given that trial counsel knew that he had confessed to the crime on another occasion, there was no justification for trial counsel's failure to investigate Gregory's second confession. The district court's analysis of *Strickland's*

deficient performance prong with respect to this claim is compelling and needs no elaboration here, particularly because Respondent does not challenge it.[5]

The bulk of Respondent's arguments relate to prejudice. Because the prejudice arising from the exclusion of Gregory's second confession is similar to the prejudice that arose from the exclusion of the first one, the analysis set forth with respect to Claim V applies equally here, *see infra* at IIB.

The only additional arguments concern what Respondent claims to be inconsistencies in Armenia's testimony. Suppl. Ans. at 44-47. Respondent contends, for example, that Armenia's testimony was internally inconsistent about what shoes he was wearing at various parts of the day. But a review of the transcript reveals that there is no such inconsistency. ER 1923-2120, 2257-58. Respondent also contends that "no reasonable jury would have believed [Armenia's] story about his preference for jogging in long pants," Suppl. Ans. at

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[5] As Respondent acknowledges, the district court, after holding a hearing, held that trial counsel was ineffective for failing to investigate the circumstances of Gregory's second confession and present it to the jury. Respondent contends that as a result of *Pinholster*, 131 S. Ct. 1388, this Court cannot take into consideration any of the evidence presented at that hearing. Suppl. Ans. 4. But the evidence presented at the federal hearing only confirmed factual allegations and evidence that had already been presented to the state court in the first petition. Therefore, although the district court did rely on evidence presented at the hearing, its analysis would have been no different had it simply evaluated, and accepted as true, the allegations that were before the state court. *See id*. at 1402 n.11.

45, but does not explain why this is so. Respondent claims that it is implausible that Gregory could have been the one who washed his shoes because if that were true, "Gregory would have had to walk from the car into the camper without any shoes." *Id*. But Respondent identifies no reason why Gregory could not have done just that. Finally, Respondent discredits Armenia's testimony that it took him 47 minutes to jog three miles because of an assumption that a man in Armenia's physical condition would have taken less time. *Id*. at 46. But Armenia testified that he engaged in various calisthenic exercises that slowed him down. ER 2087 ("sometimes I would sprint for about a telephone pole and then I would turn around and run backwards, or maybe even a telephone pole, I would hop like a frog on two – you know, two legs for about maybe a telephone pole. Sometimes I would walk to get to the next telephone pole."). Because these alleged inconsistencies concern details that are wholly unrelated to the facts of the murder, they would have little probative value even if they proved to be true. None would cause a jury to completely disregard the fact that Gregory had confessed.

Respondent argues that a jury would have been skeptical of Gregory's confession to the crime because Gregory's *other* statements and testimony were inconsistent. Suppl. Ans. at 47. But Gregory's only sworn testimony was wholly consistent with Armenia's defense. Gregory testified that he wore MacGregor

"astro turf" cleats on the day of the crime, ER 1887, whereas Armenia was wearing boots and long pants. ER 1892. Gregory denied that he had seen Armenia wash a pair of shoes, ER 1894, and he testified that Armenia did not say anything to him about "being in somebody else's house where he had done something wrong." ER 1895. Although Gregory was impeached with his *unsworn* statements to police, in which he claimed that Armenia had confessed, he explained that the detectives were "putting words in his mouth" and that he agreed to their story only because they were "threatening [him] with 25 years." ER 1903.

If the jury had heard that, in addition to these conflicting statements, Gregory had also *confessed* to the crime, certainly it would have entertained at least a suspicion that he committed it. At a minimum, it would have raised a reasonable doubt about whether Armenia did. The prejudice of the exclusion was magnified in light of the fact that Gregory's other confession, which was even more detailed, and told to a friend, was *also* excluded from the jury. As the Supreme Court stated in *Fulminante*, "the two confessions reinforced and corroborated each other." 499 U.S. at 299. Excluding even one of them was prejudicial to Armenia. Excluding both of them was doubly so.

V. This Court Should Certify and Grant Relief on Claim IX

A. Clearly Established Supreme Court Precedent Made It Clear That Trial Counsel Had An Obligation To Conduct a Thorough Investigation of the Defendant's Background

The notion that Respondent posits -- that a capital trial lawyer practicing at the time of Armenia's trial had no duty to investigate mitigating evidence other than to obtain a "rudimentary knowledge" from "narrow sources," *see* Suppl. Ans. at 61 -- contradicts clearly established Supreme Court precedent. *See Wiggins*, 539 U.S. at 524–25 (holding that trial counsel were deficient because they "abandoned their investigation of [the defendant's] background after having acquired only a *rudimentary knowledge* of his history from a *narrow set of sources*") (emphasis added); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). As this Court recently held in *James v. Schriro*, 659 F.3d 855 (9th Cir. 2011), "[i]t is 'unquestioned' that counsel in a capital case has an obligation to conduct a thorough investigation of the defendant's background." *Id*. at 880 (quoting *Porter v. McCollum*, __ U.S. __, 130 S. Ct. 447, 452 (2009) (per curiam).[6]

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[6] Respondent does not address *Williams*, *Wiggins*, *Rompilla*, or any of the other Supreme Court case decided after 1999, presumably on the ground that they were not decided at the time the California Supreme Court ruled on Armenia's first state petition on June 7, 1999. Suppl. Ans. at 54-60. But as Respondent acknowledges, Armenia's second state petition also presented a claim of ineffective assistance of counsel at penalty, and the California Supreme Court denied it on the merits on November 25, 2003. ER 197. Respondent argues that

It is equally clear that a lawyer's obligation to investigate a defendant's background existed at the time of Armenia's trial in 1988. *Id.* (citing *Hamilton v. Ayers*, 583 F.3d 1100, 1130 (9th Cir.2009) (in 1982, in California, it was "undisputed that counsel was required to obtain the type of available information that a social history report would contain, such as family and social background and mental health"); *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir.2005) (*en banc*) (professional standards in effect in 1982 required trial lawyer "to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction'") (quoting ABA Standards for Criminal Justice 4–4.1 (2d ed.1980)); *id*. at 630 ("[T]he investigation should include inquiries into social background and evidence of family abuse.")); *(Terry) Williams v. Taylor*, 529 U.S. 362, 396 (2000) (failure to investigate evidence of early childhood abuse, mental retardation, and head injuries fell below the standard of care in 1986 trial).

Trial counsel explicitly acknowledged, at trial, the then-existing "tradition"

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this petition was procedurally defaulted, but that argument has no merit. *See infra*. *Williams*, which was decided on April 18, 2000, and *Wiggins*, which was decided on June 26, 2003, were clearly established at the time of the California Supreme Court's decision in that case. In any case, *Strickland* is the clearly established federal law for Armenia's ineffective assistance claims, and it was decided in 1984, well before the events in this case. *Williams, Wiggins, and Rompilla* merely apply *Strickland* and create no new law. *See Wiggins*, 510 U.S. at 522.

of investigating a defendant's background and mental in his "closing argument:"

> Tradition would have me bringing in psychiatrists, psychologists, perhaps even sociologists to talk to you about the death penalty, people who do not know Mr. Cudjo even perhaps as well as you do. . . . I'm not going to go through that . . . .

ER 2268.

Citing *Strickland v. Washington*, 466 U.S. 668 (1984), and *Burger v. Kemp*, 483 U.S. 776 (1986), Respondent contends that the duty to investigate mitigating evidence did not extend beyond an interview with the "client himself." Suppl. Ans. at 55-57, 60. But both the Supreme Court and this Court have rejected that argument. *See Porter*, 130 S. Ct. at 453 (finding deficient performance where trial counsel "had only one short meeting with [the defendant] regarding the penalty phase" and "did not . . . interview any members of [the defendant's] family" or obtain school records); *Summerlin*, 427 F.3d at 631 (finding deficient performance where counsel "conducted no investigation of [the defendant's] family and social history" and "did not speak with [the defendant's] family or friends"). In *Burger*, the main case upon which Respondent's argument relies, trial counsel "did interview all witnesses who had been called to his attention," including the defendant's mother on several occasions, a family friend, and a psychologist. 483

U.S. at 790-91. Likewise, in *Strickland*, in preparation for the penalty phase, trial counsel spoke with the defendant's wife and mother and consulted a psychiatric report. 466 U.S. at 672-73, 676. And in *Pinholster*, trial counsel consulted with the defendant's mother and brother and a psychiatrist, as well as researched epilepsy, in preparation for the penalty phase. 131 S. Ct. at 1405.

In this case, by contrast, Armenia's mother, Maxine, and sister, Julia Watson-Bryant, who both had compelling facts to offer in mitigation, were never interviewed by trial counsel, even though both were in court during Armenia's trial, and both were called as *prosecution* witnesses. *See* ER 1733-36,1624-32, 2815-28. And rather than consult with a psychiatrist or investigate Armenia's "epileptic history," as counsel did in *Pinholster*, trial counsel dismissed the diagnosis out of hand on the basis of his personal opinion that it was "inconsistent" with Armenia's "'jogging' activity." *See* SER 1076.

As Armenia alleged in his state and federal habeas petitions, trial counsel *did no mitigation investigation at all*. SER 77 ("Mr. Clark acknowledged that he failed to even investigate the possibility of any mitigating evidence."); SER 80; 230 ("Mr. Clark told me that he did not conduct any investigation regarding appellant's medical history, psychiatric background or condition, education or employment history."); ER 2691 ("Mr. Clark stated that he did not investigate any

mitigating evidence, interview any witnesses who might have offered mitigating testimony or request a psychiatric examination of Petitioner because such steps would have been inconsistent with the alibi defense he advanced at trial. Mr. Clark stated that he never considered presenting testimony of Petitioner's family members or anyone else at the penalty phase of Petitioner's trial."); ER 1612 (declaration of trial counsel) ("I didn't do any investigation into mitigation evidence in Armenia's case and I didn't instruct Mr. Hill or anyone else to conduct such an investigation."); ER 1643 (declaration of investigator) ("I didn't conduct any investigation in preparation for the penalty phase of Mr. Cudjo's trial. I never talked to Armenia Cudjo or anybody from his family. Mr. Clark never asked me to do that and I was not interested in doing it either."); SER 1076 ("Tactically, presentation of an 'alibi' defense at trial, in my judgment, precluded the presentation of multiple mitigation evidence based upon a lack of education or advantage, alleged contributory health problems or factors . . . ."); *but see* SER 1075 ("The defendant was interviewed on several occasions independently by myself and the investigator to obtain background information from which to possibly 'garner' appropriate potential 'mitigation evidence'").

Respondent argues that there was no need to investigate clues that Armenia suffered from epilepsy and a history of blackouts because those facts "could not be

verified or connected to the operative facts of the case." Supp. Ans. at 63. But this argument is circular: the only way that trial counsel could have verified Armenia's conditions would have been to investigate them. Trial counsel's assumption that mitigation evidence was only relevant insofar as it "connected to the operative facts of the case," was plainly wrong. *See Tennard v. Dretke*, 542 U.S. 274, 283 (2004) (rejecting the argument that for mitigating evidence to be "constitutionally relevant" at the penalty phase, it must show that the criminal act was attributable to a severe and permanent disabling condition); Cal. Pen. Code § 190.3(k) (permitting jury to consider "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant").

Respondent contends that trial counsel acted reasonably in pursuing a "lingering doubt" theory *instead* of presenting mitigation. Suppl. Ans. at 60. This argument has several flaws. First, the Supreme Court has rejected the notion that "lingering doubt" and "mitigation" are mutually exclusive concepts. *Wiggins*, 539 U.S. at 535. Second, while an attorney may theoretically make a reasonable decision to rely solely on "lingering doubt" at the penalty phase, the Supreme Court has reiterated that an attorney cannot reasonably make that choice without the benefit of investigating mitigation first, and weighing the risks and benefits of presenting it against the alternative of not doing so. *See id.; Goodwin v. Johnson*,

632 F.3d 301 (6th Cir. 2011) (finding that trial counsel' performance was deficient at penalty phase where he "chose to rely on residual doubt without conducting an adequate investigation of [the Petitioner's] background."). A choice cannot be "strategic," and it therefore cannot be reasonable, unless it is informed by an adequate investigation. *See Correll v. Ryan*, 539 F.3d 938, 948 (9th Cir. 2008).

Third, even if trial counsel could have been considered reasonable in choosing this strategy, he was not reasonable in carrying it out. Trial counsel put on no additional evidence at the penalty phase to support his supposed "lingering doubt" theory, even though there was, available to him, compelling evidence that the alternate suspect, Gregory, had confessed to the crime. *See infra*, at II, IV. Trial counsel's failure to, at minimum, re-offer John Culver's testimony about Gregory's confession at the penalty phase, was unreasonable. And in his closing argument, trial counsel made it clear that *even he* did not believe that the jury would be willing to choose life over death on the basis of "lingering doubt." *See* ER 2267 ("[M]y impression of your verdict is that you are sure.").[7]

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[7] The California Supreme Court dismissed the claim that trial counsel was deficient for failing to re-offer Culver's testimony at the penalty phase based on its incorrect statement of law that "the same evidentiary rules govern admissibility of evidence at the guilty and penalty phases." ER 251. This holding was contrary to clearly established federal law holding that even otherwise valid state evidentiary rules cannot be invoked to exclude important penalty phase evidence. *See Green v. Georgia*, 442 U.S. 95, 97 (1979); *Sears v. Upton*, 130 S. Ct. 3259, 3263 (2010).

Finally, Respondent contends that trial counsel could have reasonably decided not to introduce mitigating evidence at the penalty phase out of a concern that doing so would cause the prosecution to present aggravating evidence, including Armenia's prior robbery conviction from Arizona. But the state court record shows that the prosecutor did not know about Armenia's Arizona robbery conviction. ER 2323. And although the prosecutor was aware that Armenia had been convicted of "grand theft person," the prosecutor indicated at trial that he did not intend to introduce it at the penalty phase because he believed that "only crimes of violence may be used," and he did not believe that the crime involved violence. ER 2324 ("I do not intend to offer rebuttal. Well – let's say this. I am 94 percent sure at this point that I will not offer rebuttal, your honor.").

Particularly in light of the fact that trial counsel had already decided that his strategy of relying on "lingering doubt" *precluded* the use of mitigation, and that as a result of that choice he had not even *investigated* mitigation, it is not reasonable to now argue that his failure to present it was out of a concern that doing so might trigger rebuttal aggravating evidence. "When viewed in this light, the 'strategic decision'" claimed by Respondent "resembles more a *post hoc* rationalization of counsel's conduct" than an accurate description of his deliberations prior to sentencing. *Wiggins*, 539 U.S. at 526-27. Accordingly, the

district court found, correctly, that trial counsel's decision not to present mitigation had little to do with a concern about the robbery conviction. ER 146.

B. The California Supreme Court Could Not Have Reasonably Determined That Armenia Was Not Prejudiced By Trial Counsel's Failure To Present Any Evidence About Armenia's Impoverished Childhood, His Father's Traumatic Death, The Domestic Violence He Endured, and His Substance Abuse

A measure of prejudice is "the magnitude of the discrepancy between what counsel did investigate and present and what counsel could have investigated and presented." *Hovey v. Ayers*, 458 F.3d 892, 929 (9th Cir.2006). Where *no evidence at all* was presented to the jury in the penalty phase, it is more likely that the presentation of *some evidence* would have had an influence in the sentencing decision. *See Porter*, 130 S. Ct. at 454 (finding prejudice because the "judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability.").

Respondent does not respond meaningfully to the vast and detailed mitigating evidence that was available to trial counsel, but not presented to the jury, *see, e.g.,* AOB at 28, ER 1614-19, 1624-32, 1633-37, 1733-36.

Instead, Respondent argues that the California Supreme Court could have determined that presenting that evidence would have been "problematic." The only example he provides is that presenting Armenia's 1982 high school

equivalency certificate and evidence of his 1983 head injury would have "opened the door" for the prosecution to present evidence of his 1985 robbery conviction. Suppl. Ans. at 65. This argument is unpersuasive. First, it would have made no difference whether the door was "opened" because the prosecutor did not know about the conviction. *See infra*. Second, even if there was a risk of "opening the door," trial counsel could have easily omitted those two facts from his mitigation presentation in order to avoid that risk. And third, even if presenting mitigation evidence would have caused the prosecutor to counter with evidence of Armenia's prior conviction, that would not have so overpowered the mitigating evidence about the rest of Armenia's life as to render it meaningless to the jury. *Compare Pinholster*, 131 S. Ct. at 1396 (finding no prejudice where "[t]he prosecution produced eight witnesses, who testified about Pinholster's history of threatening and violent behavior, including resisting arrest and assaulting police officers, involvement with juvenile gangs, and a substantial prison disciplinary record").

As in *Porter*, "[t]his is not a case in which the new evidence "would barely have altered the sentencing profile presented to the sentencing judge." 130 S. Ct. at 454. The mitigation in Armenia's case, including childhood abuse and neglect and the loss of a parent, is precisely the type of evidence that the Supreme Court has found to support a finding of prejudice. *See, e.g., id*. at 449; *Rompilla*, 545

U.S. at 391–92. Had the jury learned about Armenia's difficult and impoverished childhood, his head injuries and the seizures that they caused, and particularly, the violent and traumatic death of his father when he was only twelve years old, it is reasonably probable that at least one juror would have been persuaded to spare his life.[8]

C. Armenia Presented All Of The Essential Facts Underlying His Ineffective Assistance Claim To the California Supreme Court

Relying on *Walker v. Martin*, 1315 S. Ct. 1120 (2011), Respondent contends that the facts in Armenia's second state habeas petition should not be considered on federal review because that petition was denied as untimely. This argument overstates the impact of *Walker*. But even if it didn't, the salient facts underlying Armenia's ineffective assistance claim were already presented to the

[8] Several jurors have stated that learning about the circumstances of Armenia's life prior to the crime would have influenced their deliberation. *See* ER 2889 (Declaration of Thomas Gaskill) ("[H]ad I been provided evidence at the time of trial that Armenia Cudjo lost his father as a young man and that the death of his father had a profound effect on him, and had I known that Armenia had a long history of drug abuse, that he had brain damage, suffered physical abuse during childhood, and came from a poor family and an impoverished environment, I would not have voted for death in this case."); ER 2889 (Declaration of Laverne Brett) ("In reaching a decision about which sentence was appropriate in this case, it would have made a difference to me to known that [Armenia] suffered physical abuse during his childhood. We did not learn anything about his life."). *See Silva v. Woodford*, 279 F.3d 825, 850 (9th Cir. 2002) (finding prejudice where juror declarations revealed that "at least some of the jurors were initially leaning towards a verdict of life without parole").

California Supreme Court, and denied on the merits, in his first petition.

1. The California Supreme Court's Decision Denying The First State Petition Was Contrary to Clearly Established Federal Law

The allegations in the first state petition and informal reply, and the exhibits attached thereto, more than adequately presented this claim. As set forth above, the first state habeas petition alleged with specificity that trial counsel did absolutely no investigation into mitigation evidence, and it supported that allegation with multiple sworn declarations. *See infra*. Although Respondent countered with a declaration in which trial counsel claimed that he interviewed the defendant "to obtain background information from which to possibly 'garner' appropriate potential 'mitigation evidence,'" *see* SER 1075, that allegation, at most, created a dispute of fact which the California Supreme Court would have had to hold a hearing to resolve. *Cf. Wiley v. Epps*, 625 F.3d 199 (5th Cir. 2010) ("when a petitioner makes a prima facie showing of mental retardation, a state court's failure to provide him with an opportunity to develop his claim deprives the state court decision of the deference ordinarily due under the AEDPA.").

Respondent argues that Armenia failed to set forth the facts demonstrating prejudice in the first state petition, but this argument also fails. In his first petition Armenia described his family history of epilepsy, the fact that in screening placement tests Armenia tested in the 0.4 percentile in terms of reading readiness,

and as a result he did poorly in school, earning mostly "F" grades. SER 81-83. The petition alleged that Armenia's father was beaten to death by police officers when he was only 12 years old, and that event traumatized him, SER 83. The petition documented Armenia's subsequent suffering at the hand of Ernest Freeney, his step-father, who was violent and abusive to him. SER 83. The petition also described Armenia's history of blackouts, and an incident in which his skull was crushed by a pipe, requiring neurosurgery and causing recurring symptoms. SER at 84. Finally, it noted that notwithstanding these events, Armenia was a model prisoner with no disciplinary violations. *Id*.

The allegations were further supplemented in the Informal Reply to the first state petition, which Respondent ignores. The Informal Reply confirmed Armenia's history of epilepsy. It discussed in more detail the devastating impact of Armenia's father's death. ER 2649. It included even more detailed information about Armenia's abusive step-father, Ernest Freeney. *Id*.; ER 2678-81. In sum, the allegations in the first state habeas petition set forth the most important mitigating facts that could have been, but were not, presented to the jury.

As Respondent concedes, the second state habeas petition "merely added more details to the same claim already rejected in the first state habeas corpus petition." Suppl. Ans. at 72-73. The second state petition also augmented the

record with additional proof of those facts, including a detailed declaration of a social historian synthesizing scores of interviews with family members. ER 810. The second petition also described in more detail the extreme poverty, violence, neglect, and substance abuse that characterized Armenia's childhood. For example, the petition notes that soon after the death of his father, Armenia began to habitually sniff gasoline through a hose to the point of passing out, and that his step-father responded to this behavior by tying Armenia to a chair with a gasoline soaked rag tied across his face, and leaving him to suffocate. SER 827. And the second petition includes a psychiatric evaluation, which revealed mild to moderate brain damage. SER 830. The second state petition and its exhibits is substantially similar to the petition filed in federal court and the exhibits presented at the federal hearing. Thus, the federal court did not consider a significant amount of information that had not already been considered by the state court.[9]

[9] If this Court disagrees, and holds that any of the facts upon which habeas relief depends in this case were not first presented to the state court, *see Pinholster*, 131 S. Ct. at 1398, Armenia respectfully requests that this Court remand the case to the district court with a stay pursuant to *Rhines v. Weber*, 544 U.S. 269, 278 (2005), so that he can present those facts to the state court. *See Gonzalez v. Wong*, __ F.3d __, 2011 WL 6061514 (9th Cir. Dec. 7, 2011), at *8.

2. Respondent's Procedural Default Argument Is Meritless

Respondent contends that none of the allegations and exhibits in Armenia's second state habeas petition can be considered because the California Supreme Court deemed the claim untimely and the state bar "constitutes an adequate and independent state ground" barring federal merits review. Suppl. Ans. at 69 (citing *In re Robbins*, 18 Cal. 4th 770, 780-81, and *In re Clark*, 5 Cal. 4th 750, 763-99 (1993)). But Respondent does not even acknowledge the district court's ruling denying his procedural bar defense, much less argue that it was error.

The district court ruled correctly. Respondent's belated effort to revive his claim fails because (1) as a matter of Circuit precedent, California's timeliness bar was neither adequate nor independent at the time of the alleged default; and (2) even if Respondent was not foreclosed by that authority from establishing his defense, he failed to meet his burden of proving the adequacy of the bar under the burden-shifting procedure set forth in *Bennett v. Mueller*, 322 F.3d 573, 585 (9th Cir. 2003). *Walker*, 131 S. Ct. at 1120, doesn't change the result.

The procedural default doctrine "'is a specific application of the general adequate and independent state grounds doctrine.'" *Fields v. Calderon*, 125 F.3d 757, 76-62 (9th Cir. 1997). "Under the adequate and independent state grounds doctrine, federal courts 'will not review a question of federal law decided by a

state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Id*. at 725. A procedural rule is independent only if its basis is separate and distinct from the federal question. *Bennet*, 322 F.3d at 581. A rule is adequate only if it is "clear, consistently applied, and well-established at the time of the petitioner's purported default.'" *Fields*, 125 F.3d at 762.

The adequacy of state procedural bars is examined at the time of the alleged default, i.e., "the time the claim should have been raised." *Calderon v. District Court (Hayes)*, 103 F.3d 72, 75 (9th Cir. 1996) (per curiam); *id.* ("the critical time to judge Hayes' default [was] 1987, when he filed his first state habeas petition and failed to raise all of his claims," not "1994, when he filed his second state petition"); *Calderon v. District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) ("The issue before us is whether California's timeliness requirements were firmly established and regularly followed at the time of Bean's purported procedural default."); *Morales v. Calderon*, 85 F.3d 1387, 1393 (9th Cir. 1996) (examining whether timeliness bar was adequate and independent "at any time after Morales's convictions were affirmed and before he filed his first state habeas petition"). Here, the time of the alleged default is November 10, 1992, 90 days from the final due date for Cudjo's reply brief in his appeal, when a habeas petition would have

been considered presumptively-timely under then-existing Supreme Court rules. California Supreme Court Policies Regarding Cases Arising from Judgments of Death, eff. June 6, 1988, mod. eff. Dec. 21, 1992, Policy 3, Std. 1.1.

This Court held in *Morales*, 85 F.3d at 1391, that California's timeliness rule was not adequate to bar federal relief before the issuance of *Clark* on July 29, 1993. *See also Hayes*, 103 F.3d at 74-75; *King*, 464 F.3d at 966 ("In *Morales*, we indicated that California's timeliness rule was too uncertain, pre-*Clark*, to be a procedural bar for capital cases."); *La Crosse v. Kernan*, 244 F.3d 702, 705 (9th Cir. 2001); *Fields*, 125 F.3d at 759; *Bean*, 96 F.3d at 1131. Indeed, "[i]n *Clark*, the California Supreme Court acknowledged that 'no clear guidelines regarding departure from the habeas corpus rules have emerged in our past cases.'" *Bean*, 96 F.3d at 1129-30. Likewise, the California Supreme Court acknowledged in *Robbins*, decided August 3, 1998, that up until then California courts reviewing habeas petitions on timeliness grounds had considered the federal constitutional merits of claims in determining whether the petitions qualified for an exception to the time bar. *Bennett*, 322 F.3d at 581. Accordingly, the timeliness rule was not independent of federal law before *Robbins*. *Id*.; *La Cross*, 244 F.3d at 706-07. Thus, under controlling Circuit authority, at the time of the alleged default of the penalty-phase ineffectiveness claim in November 1992, neither *Clark* nor *Robbins*

had issued, and California's time bar was neither adequate nor independent.

Respondent tries to avoid this Court's binding caselaw by citing *Walker*, 131 S. Ct. 1120. *Walker* does not help Respondent. In *Walker*, the *noncapital* petitioner timely filed a habeas petition in 1998, but omitted claims that were later found untimely when filed in a second petition in 2002. 131 S. Ct. at 1126. Thus, the time of the default alleged in *Walker* was 1998. The petitioner did not "dispute that the time limitation is an 'independent' state ground." *Id*. at 1127. But as noted herein, the California Supreme Court has acknowledged, and this Court has held, that the timeliness bar was not independent of federal law up to the time *Robbins* was issued in 1998. *Walker* does not overrule this Court's precedent evaluating claims of procedural defaults that occurred *before* 1998, like the one in this case.

Even if Circuit law did not explicitly foreclose Respondent's contention, Respondent would have the burden of proving the adequacy of California's time bar as of the alleged default in 1992. Procedural default is an affirmative defense. *Gray v. Netherland*, 518 U.S. 152, 165 (1996). "[T]he state must plead, and it follows, prove the default." *Bennett*, 322 F.3d at 585. Respondent made no effort to prove the adequacy and independence of the time bar in the district court, and the district court properly ruled against him. SER 1039-40 (Order Granting in Part and Denying in Part Petitioner's Motion for Evidentiary Hearing at 14-15) ("[T]he

untimeliness rule is not an adequate rule such that federal habeas review is precluded because the Warden failed to bear his burden under *Bennett* . . . .”). Respondent makes no effort to meet his burden of proof on appeal either.[10]

VI. This Court Should Certify and Grant Relief on Claim X

Respondent discounts the importance of the numerous errors in this case by claiming that they weren't “errors” at all, and even if they were, they did not really “accumulate” to prejudice Armenia. Suppl. Ans. at 79-80. Respondent fails to appreciate the way in which each of the serious constitutional errors in this case built on one another to limit Armenia's defense at each stage of the trial.

Errors during the prosecution's case made it impossible for Armenia to challenge the state's most important evidence against him: the blood type evidence linking him to the crime scene, which the district court correctly held was not adequately investigated, *see* AOB at 88, and the un-confronted hearsay testimony

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[10] If this Court were inclined to reverse the district court's ruling and hold that the second state petition is procedurally defaulted, the Court should remand to the district court to allow Armenia to show cause and prejudice for the default or that the actual innocence exception applies. *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991) (ineffective assistance of counsel can constitute cause for a default); *Jenkins v. Anderson*, 447 U.S. 231, 234-35 n.1 (1980) (“application of the ‘cause’-and-‘prejudice’ standard may turn on factual findings that should be made by a district court”); *House v. Bell*, 547 U.S. 518, 522 (2006) (“In certain exceptional cases involving a compelling claim of actual innocence . . . the state procedural default rule is not a bar to a federal habeas corpus petition.”).

of Gregory in which he claimed that Armenia confessed the crime to him.

Armenia's only hope to rebut the prosecution's case was to present his own defense evidence that Gregory had himself confessed to the crime, *twice*. In fact, trial counsel had evidence that one of Gregory's confessions was made to both a jailer and a prosecutor, witnesses that a jury would have been much more likely to believe than Gregory himself. *See* AOB at 76. The trial court's erroneous decision to exclude Culver's testimony about Gregory's first confession hobbled the defense by keeping from it the most powerful defense evidence available. Trial counsel's constitutionally deficient failure to investigate the circumstances of Gregory's second confession completely crippled it. *See* AOB at 79. The lack of any evidence related to Gregory's two confessions "left the jury with only half the picture." *See Parle v. Runnels*, 505 F.3d at 930-32 (9th Cir. 2007).

Stripped of the most powerful independent evidence he could have offered in his defense, Armenia was left with one option: to testify. But the prosecutor undercut his testimony by telling the jury it was not believable because of Armenia's race. Every court has agreed that the prosecutor's exploitation of Armenia's race was misconduct that clearly violated Armenia's constitutional rights. ER 2249-50. Trial counsel made no objection to the racial remark, another serious constitutional error about which there is no dispute. ER 2250.

Having been convicted based on a lopsided presentation of evidence, and having had the credibility of his testimony attacked before the jury on account of his race, Armenia appeared before the same jury, only days later, as an "unknown quantity." ER 2260. As the prosecutor said in closing, "all of the things that I will relate to you at this time were things that were revealed in the evidence, because I really know nothing about him beyond what was revealed in the evidence." *Id*. Due to trial counsel's failure to present any evidence in support of his lingering doubt theory, AOB 99, the jury learned nothing new about the circumstances of the crime that might have caused it to reevaluate its guilt verdict. AOB 101. And due to trial counsel's complete refusal to investigate mitigation, it learned nothing about Armenia's horrific childhood, his head injuries and blackouts, or his meaningful relationships with family members who loved him. AOB 93. In his closing argument, trial counsel did nothing to humanize Armenia, but instead *ruled out*, one by one, the mitigating factors that the jury might have considered, leaving the jury with no reason to spare him the death penalty. ER 2266-75.

These errors were devastating at both the guilt and penalty phases. Several of the errors were prejudicial, even considered in isolation. Combined with one another, they were even more so. Given the grave and pervasive nature of the errors in this case, this Court cannot have confidence in the verdict.

Respectfully submitted,

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DATED: January 26, 2012

By */s/ John L. Littrell*
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and (C) and Circuit Rule 32-1, I certify that Appellant's Supplemental Reply Brief has been prepared in a proportionately spaced typeface using WordPerfect X3, 14 point, Times New Roman and contains 11,678 words.

Dated: January 26, 2012

/s/ John L. Littrell
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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

By */s/ John L. Littrell*
JOHN L. LITTRELL
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