

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLYDE J. RAINEY,
Plaintiff,
v.
MIKE KNOWLES, Warden,
Defendant.

No. C 07-00678 CW
ORDER DENYING
PETITION FOR WRIT OF
HABEAS CORPUS

Petitioner Clyde J. Rainey, a state prisoner incarcerated at Kern Valley State Prison, petitions the Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent Mike Knowles opposes the petition. Having considered all of the papers filed by the parties, the Court DENIES the petition.

BACKGROUND

I. Procedural History

On May 7, 1998, the district attorney filed an information in Contra County superior court charging Petitioner with the murder of twenty-year old Kou pou Saechao. The information alleged that Petitioner personally used a firearm and committed the murder while he was engaged in or was an accomplice in the commission or attempted commission of robbery. On May 4, 1999, after a seven day trial, a jury found Petitioner guilty of first degree murder and found the enhancement allegations to be true. On August 13, 1999, the trial court sentenced Petitioner to a term of life without possibility of parole, plus four years. On February 7, 2001, the California court of appeal, in an unpublished opinion, affirmed the

1 judgment. On May 16, 2001, the California Supreme Court denied
2 without comment a petition for review. In March, 2001, Petitioner
3 sought a writ of habeas corpus in the Contra Costa County superior
4 court. On March 28, 2005, the superior court, in a written
5 opinion, denied the petition. The California appellate court and
6 California Supreme Court denied the petition without comment.

7 On February 1, 2007, Petitioner filed his federal petition for
8 writ of habeas corpus, making the following claims: (1) the trial
9 court's failure to order a competency evaluation violated his right
10 to due process under the Fourteenth Amendment; (2) the admission of
11 his confession violated his right to due process under the
12 Fourteenth Amendment; (3) the failure to suppress his confession
13 violated Miranda v. Arizona because his waiver was not voluntary or
14 knowing and intelligent; (4) the admission of the video tape of his
15 conversation with his mother violated his right to privacy under
16 the Fourth Amendment;¹ and (5) the suppression of exculpatory
17 evidence violated Brady v. Maryland.

18 II. Factual History

19 The following facts were found by the California court of
20 appeal. On October 31, 1996, twenty-year old Kou pou Saechao was
21 shot twice in the back in front of his aunt's apartment building in
22 North Richmond. Saechao came to the door to his aunt's apartment,
23 collapsed in her arms and said a "black guy" shot him. He died

24

25 ¹Citing Stone v. Powell, 428 U.S. 465 (1976), Respondent
26 argues that this claim is not cognizable on federal habeas review.
27 Stone held that where the State has provided an opportunity for
28 full and fair litigation of a Fourth Amendment claim, it is not
cognizable on habeas review. Id. at 494. Petitioner does not
respond to this argument in his traverse. Therefore, the Court
concludes he has conceded it and does not address it further.

1 four days later. On November 6, 1996, the police arrested
2 Petitioner, who is African American and was sixteen years old.
3 Petitioner first denied any involvement in the shooting, then said
4 that he and fourteen-year old Donald C. tried to rob Saechao and
5 that Donald shot Saechao when they found he had nothing for them to
6 steal. After talking with his mother at the police station,
7 Petitioner confessed to the police that he shot Saechao.

8 When being questioned by the police, Petitioner denied being a
9 member of a gang or participating in the shooting as a gang
10 initiation. At trial, Petitioner's defense was that he was only
11 guilty of manslaughter because he shot Saechao as part of a gang
12 initiation, not a robbery, and he suffers from developmental
13 limitations that impede his ability to premeditate.

14 LEGAL STANDARD

15 A federal court may entertain a habeas petition from a state
16 prisoner "only on the ground that he is in custody in violation of
17 the Constitution or laws or treaties of the United States." 28
18 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death
19 Penalty Act (AEDPA), a district court may not grant a petition
20 challenging a state conviction or sentence on the basis of a claim
21 that was reviewed on the merits in state court unless the state
22 court's adjudication of the claim: "(1) resulted in a decision that
23 was contrary to, or involved an unreasonable application of,
24 clearly established federal law, as determined by the Supreme Court
25 of the United States; or (2) resulted in a decision that was based
26 on an unreasonable determination of the facts in light of the
27 evidence presented in the State court proceeding." 28 U.S.C.
28 § 2254(d). A decision is contrary to clearly established federal

1 law if it fails to apply the correct controlling authority, or if
2 it applies the controlling authority to a case involving facts
3 materially indistinguishable from those in a controlling case, but
4 nonetheless reaches a different result. Clark v. Murphy, 331 F.3d
5 1062, 1067 (9th Cir. 2003).

6 An unreasonable determination of the facts occurs where the
7 state court fails to consider and weigh highly probative, relevant
8 evidence, central to the petitioner's claim, that was properly
9 presented and made part of the state court record. Taylor v.
10 Maddox, 366 F.3d 992, 1005 (9th Cir. 2004).

11 Even if the state court's ruling is contrary to or an
12 unreasonable application of Supreme Court precedent, that error
13 justifies habeas relief only if the error resulted in "actual
14 prejudice." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). In
15 other words, habeas relief may be granted only if the
16 constitutional error at issue had a "substantial and injurious
17 effect or influence in determining the jury's verdict." Id. at
18 638.

19 The only definitive source of clearly established federal law
20 under 28 U.S.C. § 2254(d) is the holdings of the Supreme Court as
21 of the time of the relevant state court decision. Williams v.
22 Taylor, 529 U.S. 362, 412 (2000).

23 To determine whether the state court's decision is contrary
24 to, or involved an unreasonable application of, clearly established
25 law, a federal court looks to the decision of the highest state
26 court that addressed the merits of a petitioner's claim in a
27 reasoned decision. LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th
28 Cir. 2000). If the state court only considered state law, the

1 federal court must ask whether state law, as explained by the state
2 court, is "contrary to" clearly established governing federal law.
3 Lockhart v. Terhune, 250 F.3d 1223, 1230 (9th Cir. 2001).

4 DISCUSSION

5 I. Competency Claim

6 Petitioner argues that the trial court violated his due
7 process rights by failing to order a competency hearing because
8 there was substantial evidence that he was not competent to stand
9 trial.

10 A. State Appellate Court Opinion

11 The state appellate court relied upon California law which
12 provides that a mentally incompetent person cannot be tried and
13 defines mental incompetence as the inability to understand the
14 nature of the criminal proceedings or to assist counsel in the
15 conduct of a defense in a rational manner. See California Penal
16 Code § 1367(a); People v. Hayes, 21 Cal. 4th 1211, 1281 (1999).
17 Under California law, when a trial court becomes aware of
18 substantial evidence which generates a doubt about whether the
19 defendant is competent to stand trial, the court must, on its own
20 motion, declare the doubt and suspend proceedings to hold a
21 competency hearing. See People v. Castro, 78 Cal. App. 4th 1402,
22 1415 (2000).

23 The state court analyzed Petitioner's claim as follows:

24 At trial, defense counsel never claimed that appellant
25 was incompetent. Appellant argues on appeal that trial
26 evidence of his developmental limitations, which was
27 offered to refute allegations of premeditation,
28 necessitated a competency hearing. Appellant goes so far
as to argue that evidence of a developmental disability,
standing alone, constitutes substantial evidence of
incompetency to stand trial. Appellant offers his poor
academic performance and low IQ test score of 75 as

1 substantial evidence of incompetency. But evidence of
2 possible developmental disability is not necessarily
3 evidence of incompetency. The relevant question is
4 whether "as a result of . . . developmental disability,
5 the defendant is unable to understand the nature of the
6 criminal proceedings or to assist counsel in the conduct
7 of a defense in a rational manner." (§ 1367, subd. (a)).

8 Nothing in the record suggests the appellant was unable
9 to understand the nature of the proceedings or to assist
10 counsel. Appellant's police station meeting with his
11 mother demonstrates the contrary. Appellant
12 spontaneously told his mother that he was going to go to
13 prison because he shot a man, and that he would "probably
14 do 25 years." Appellant explained to his mother that he
15 lied to the police in telling them that 'his partner' was
16 the gunman, and tried to pass a lie detector test by
17 being "cool and calm" and putting the shooting out of his
18 mind. Appellant formulated a defense in speaking to his
19 mother. Appellant said: "I'm going to say I'm
20 handicapped when I go to court and stuff. I'm going to
21 tell my lawyer I'm handicapped."

22 . . .

23 [N]othing triggered the need for a competency hearing.
24 Defense counsel never expressed a doubt as to appellant's
25 competence, and nothing in appellant's speech or behavior
26 suggested that he was incompetent. Indeed, as described
27 above, appellant's pretrial statements show an
28 understanding of the proceedings and an ability to assist
in his defense. Nor did the medical testimony suggest
that appellant did not understand the proceedings or
could not assist in his defense. While a clinical
neuropsychologist testified that appellant has low
intelligence, she also testified that appellant is not
mentally retarded, "can think," "can get through life,"
knows right from wrong, and can work and live on his own.
The trial court was not required to initiate competency
proceedings.

Pet.'s Ex. A, People v. Rainey, A088153 (2001) at 3-4.

B. Applicable Federal Law

A criminal defendant may not be tried unless he is competent.
Godinez v. Moran, 509 U.S. 389, 396 (1993). The conviction of a
defendant while legally incompetent violates due process.
Cacoperdo v. Demosthenes, 37 F.3d 504, 510 (9th Cir. 1994). The
test for competence to stand trial is whether the defendant "has

1 sufficient present ability to consult with his lawyer with a
2 reasonable degree of rational understanding -- whether he has a
3 rational as well as factual understanding of the proceedings
4 against him." Dusky v. United States, 362 U.S. 402, 402 (1960).

5 Due process requires a trial court to order a competency
6 hearing if the court has a good faith doubt concerning the
7 defendant's competence. Cacoperdo, 37 F.3d at 510. A good faith
8 doubt about a defendant's competence arises only if there is
9 substantial evidence of incompetence. Id. This standard is
10 "clearly established Federal law, as determined by the Supreme
11 Court" within the meaning of 28 U.S.C. § 2254(d)(1). Torres v.
12 Prunty, 223 F.3d 1103, 1107 (9th Cir. 2000) (citing Pate v.
13 Robinson, 383 U.S. 375, 385 (1966)).

14 The state law applied by the court of appeal is not
15 inconsistent with federal law.

16 C. Analysis

17 Petitioner argues that the appellate court's decision was an
18 unreasonable application of established federal authority and was
19 based on an unreasonable determination of the facts because the
20 record contains substantial evidence of his incompetency.
21 Petitioner relies on the trial testimony of Dr. Nell Riley, a
22 neuropsychologist who performed a neuropsychological assessment of
23 Petitioner in 1998, when he was eighteen years old. Dr. Riley
24 concluded that Petitioner suffered from very significant
25 neuropsychological impairments based on the fact that his IQ was
26 75, he was reading at the level of an average six-year old child,
27 had the vocabulary and math skills of a nine-year old child, and
28 had problems processing information. Reporter's Transcript (RT) at

1 668-70. Dr. Riley testified that a brain scan showed that an area
2 of Petitioner's brain was not functioning normally and that these
3 impairments may have been caused by complications at birth. RT at
4 687-88. However, Dr. Riley also testified that the tests showed
5 that Petitioner could think, knew right from wrong, could work and
6 live on his own. RT at 690-91. She also testified that
7 Petitioner's visual memory was above average, his delayed memory,
8 the ability to keep the information in his brain over time, was
9 good, RT at 700, and he had the ability to understand that certain
10 actions have reactions, RT at 723-24.

11 There was no evidence at trial that Petitioner could not
12 understand or assist in his defense. In fact, as noted by the
13 appellate court, there was evidence to the contrary in Petitioner's
14 conversation with his mother and in Dr. Riley's testimony.

15 Therefore, the appellate court's decision was not an
16 unreasonable application of Supreme Court authority or an
17 unreasonable determination of the facts in light of the evidence in
18 the record. Habeas relief is denied on this claim.

19 II. Claims Regarding Admission of Confession

20 Petitioner asserts that the admission of his confession at
21 trial violated his Fifth Amendment right to remain silent because
22 his Miranda waiver was ineffective and violated his Due Process
23 right to a fair trial because his confession was not voluntary.

24 A. State Appellate Court Opinion

25 The relevant portions of the state appellate court opinion are
26 as follows:

27 In a pretrial motion, appellant claimed that his waiver
28 of the right to remain silent was ineffective and that
his confession was coerced. The trial court denied the

1 motion after reviewing the videotaped police interview, a
2 psychological evaluation of appellant, and police
3 testimony. Appellant renews his challenge to the
4 confession on appeal.

5 1. The interrogation and confession.

6 Evidence at the suppression hearing established that
7 appellant was arrested at his home at 7 a.m. on November
8 6, 1996, after his friend Donald identified him to police
9 as the gunman. The police interview began at 10 a.m.,
10 after the police conducted a probation search of
11 appellant's home and transported him to a police facility
12 with videotape capabilities. The police did not ask
13 appellant any questions about the shooting while in
14 transport. At the police station, appellant was placed
15 in a small interview room with a table and three chairs.
16 On videotape, Sergeant Celestre asked appellant if he had
17 been arrested before and advised him of his rights.
18 Appellant said he had been advised of his rights
19 "[p]robably twice" on earlier occasions. The officer
20 stated and explained appellant's Miranda rights, and
21 appellant said "I understand." In response to the
22 officer's question if appellant wanted to talk about the
23 allegations against him, appellant said "yeah," and "I'll
24 talk."

25 Sergeant Celestre, sometimes joined by Sergeant Daley,
26 interviewed appellant. Appellant sat at the table in a
27 relaxed pose. Sergeant Celestre told appellant that
28 someone identified him as the person responsible for the
killing of an Asian man during an attempted robbery.
Initially, appellant denied any involvement in the
shooting. Sometime before 11 a.m., the officer asked
appellant if he wanted to take a lie detector test and
appellant said yes. Appellant asked if he could first
have something to eat, and the police gave appellant
lunch. As appellant waited alone for lunch, he sang rap
songs.

At about 11 a.m., following lunch, appellant took a
polygraph test at the District Attorney's office.
Investigator Sjostrand explained the test to appellant
and interviewed him before examining appellant with the
polygraph. The investigator reviewed the test results
and, with Sergeant Celestre present, told appellant that
it was clear that appellant shot Saechao. Sergeant
Celestre told appellant that appellant failed the test
"all across the board" and said that he had someone
willing to testify that appellant shot Saechao.
Appellant changed his story, and said that he was
involved in an attempted robbery and shooting but that
Donald was the gunman.

The officer and appellant returned to the police station

1 around 2:45 p.m. Appellant continued to deny being the
2 gunman. Sergeant Celestre took a break around 3:30 p.m.
3 and Sergeant Daley continued the interview. Appellant's
4 mother had telephoned Sergeant Celestre, and the officer
5 returned her call. Sergeant Celestre told her that
6 appellant was going to be booked and asked her if she
7 wanted to see her son. Appellant's mother said yes. The
8 police moved appellant to a larger interview room
9 furnished with a sofa and chairs at 4:10 p.m.
10 Appellant's mother arrived at police headquarters around
11 4:50 p.m. and was taken to appellant.

12 The police surreptitiously videotaped and monitored
13 appellant's meeting with his mother. Almost immediately
14 after his mother entered the room, appellant confessed to
15 her that he shot Saechao. His mother asked appellant:
16 "Are you sure you did it? Don't be lying for nobody.
17 Don't be trying to lie for nobody." Appellant replied:
18 "I did it." Appellant explained to his mother that he
19 lied to the police in telling them that "his partner" was
20 the gunman, and tried to pass the lie detector test by
21 being "cool and calm" and putting the shooting out of his
22 mind. Appellant told her that he was "going to say I'm
23 handicapped when I go to court and stuff. I'm going to
24 tell my lawyer I'm handicapped."

25 Sergeants Celestre and Daley entered the room. Sergeant
26 Celestre did not tell appellant that the police had been
27 listening to appellant's conversation with his mother.
28 Without referring to the surreptitiously recorded
confession, the officer asked appellant: "Clyde, is there
anything different you want to tell me now?" Appellant
said "I did it." Appellant confessed to the police
officers that he shot Saechao during an attempted
robbery. Appellant explained that everything he had
described earlier about the robbery was true but that he,
not Donald, "pulled the trigger."

2. Appellant knowingly waived his Miranda rights.

. . . .

Appellant knowingly waived his constitutional rights,
judged under the totality of the circumstances. Sergeant
Celestre explained appellant's rights one-by-one, each
time eliciting appellant's unhesitant statement that he
understood what he was told. The officer then asked
appellant if he wanted to talk and appellant said "yeah"
and "I'll talk." Appellant had experience with the
police. He had been arrested at least twice earlier and
advised of his rights on those occasions. Nothing in the
record, either at the time of the waiver or at other
points in the interrogation, suggests that appellant did
not understand the nature of the rights he waived and the
consequences of his waiver.

1 3. Appellant's confession was not coerced.

2

3
4 We agree with the trial court that appellant's confession
5 was voluntary. The videotapes of the interrogation show
6 no signs of police aggression in conduct or voice.
7 Sergeant Celestre sat at the interview room table with a
8 coffee mug and a pad of paper on which he wrote notes.
9 The officer asked a question, waited for appellant's
10 response, then asked another question. Appellant showed
11 no signs of fear, confusion or fatigue. Appellant sat
12 calmly in his chair, sometimes leaning back and sometimes
13 listening to questions with his hand propped under his
14 chin. At one point, when alone in the room, appellant
15 sang rap songs. Late in the day, Sergeant Celestre asked
16 appellant "Have I treated you right? Have I shown you
17 respect?," and appellant said yes. Appellant later told
18 Sergeant Daly: "You all are cool."

19 Appellant's will was not overborne. Appellant long
20 denied participation in the shooting, and admitted
21 limited complicity only after failing the polygraph test
22 in an apparent effort to better fit his story to the test
23 results. Appellant even bragged to his mother that he
24 had lied to the police, but that he wanted to tell her
25 the truth. After telling his mother that he shot
26 Saechao, appellant confessed to the police without the
27 police ever mentioning their surveillance of the meeting.
28 Appellant claims that the police coercively used the
polygraph test and the meeting with this mother to induce
a confession, and that the police lied and falsely
promised leniency.

A polygraph test is not inherently coercive, as appellant
concedes. (People v. Brown (1981) 199 Cal. App. 3d 116,
127.) Nor was its use here coercive. Appellant
willingly agreed to take the test, and it was conducted
in a professional manner over a reasonable length of
time. Appellant's chief complaint seems to be
Investigator Sjostrand's statement to appellant that a
polygraph machine can detect a lie, and did detect lies
in appellant's denial of involvement in the shooting. A
polygraph examiner's stated opinion that the test
revealed that the suspect lied is not necessarily
coercive. (See Id. at p. 127.) No coercive effect upon
appellant is apparent. The polygraph test and the
examiner's statements did not produce an immediate
confession. Appellant changed his story to admit being
present at the shooting, but he continued to deny being
the gunman until a couple hours later, after speaking
with his mother. Appellant denied the accuracy of the
polygraph test results, telling the examiner and Sergeant
Celestre that the results were skewed by his nervousness.

1 Appellant also told his mother that he tried to pass the
2 lie detector test by being "cool and calm" and putting
3 the shooting out of his mind. The record simply does not
support appellant's claim that the polygraph test broke
his will.

4 Nor did the police use appellant's mother as a coercive
5 "instrument for confession extraction," as appellant
6 claims. The record is undisputed that appellant's mother
7 initiated contact with the police, and then freely
8 accepted Sergeant Celestre's offer to let her speak with
9 her son before he was booked. The police did not
10 instruct the mother how to act or converse with
11 appellant; they simply gave her the option of seeing her
12 son. We recognize that the police hoped that appellant
13 would confess to his mother, and monitored their
14 conversation for that purpose. But this plan falls far
15 short of the coercive use of a suspect's friends and
16 family condemned by the courts.

11 . . .

12 Finally, the record does not support appellant's claim
13 that his confession was induced by police deception and
14 false promises of leniency. Appellant asserts that
15 Sergeant Celestre lied in telling him that the officer
16 had "somebody that is willing to testify that you shot
17 that man." However, Sergeant Celestre did have someone
18 who was willing - and did - identify appellant as the
19 shooter. Donald told the police that appellant shot
20 Saechao. Any deception was limited to the officer's
21 averment of the witness's willingness to testify, but the
22 officer said he believed that Donald could be brought to
23 court as a witness, if necessary. The officer's
24 overstatement of his case was slight, and there is no
25 evidence that the embellishment induced appellant's
26 confession.

20 . . .

21 Lastly, appellant's claim of false promises of leniency
22 is unsupported by the record. Sergeant Celestre simply
23 told appellant that, if appellant was the gunman, he
24 should say so now because it would be "worse" for the
25 fact to be revealed later. The officer said: "And I'll
26 tell you straight up, you know, I ain't going to sit here
27 [sic] bullshit you and tell you I'm going to wave some
28 magic wand and make all your problems disappear. But if
you're the one who pulled the trigger on dude, let's get
it out on the table now. [¶] . . . [¶] Because if it --
if it comes out tomorrow or the day after that or next
week, it's just going to make it that much worse."
Sergeant Celestre did not promise leniency; he exhorted
honesty. Police statements that "it would be better for
the accused to tell the truth" do not render a subsequent

1 confession involuntary. (People v. Boyde (1988) 46 Cal.
2 3d 212, 238.) Appellant clearly did not confess with any
3 expectation of leniency. Appellant told his mother that
4 he would "probably do 25 years," and never suggested that
5 he was expecting that his confession would bring a
6 lighter sentence.

7 Pet.'s Ex. A at 4-11.

8 B. Applicable Federal Law

9 1. Miranda

10 In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court
11 held that certain warnings must be given if a suspect's statement
12 made during custodial interrogation is to be admitted in evidence.
13 Once properly advised of his rights, an accused may waive them
14 voluntarily, knowingly and intelligently. Id. at 475.

15 Voluntary means that the waiver was the product of free and
16 deliberate choice rather than intimidation, coercion or deception.
17 Colorado v. Spring, 479 U.S. 564, 573 (1987). Knowing and
18 intelligent means that the defendant was aware of "the nature of
19 the right being abandoned and the consequences of the decision to
20 abandon it." Id.; Moran v. Burbine, 475 U.S. 412, 421 (1986).

21 A valid waiver of Miranda rights depends upon the totality of
22 the circumstances, including the background, experience and conduct
23 of the defendant. United States v. Bernard S., 795 F.2d 749, 751
24 (9th Cir. 1986). In the case of juveniles, this includes
25 evaluation of the juvenile's age, experience, education, background
26 and intelligence, and whether the juvenile has the capacity to
27 understand the warnings given him, the nature of his Fifth
28 Amendment rights and the consequences of waiving those rights.
Fare v. Michael C., 442 U.S. 707, 725 (1979).

Where a Miranda waiver is concerned, the voluntariness prong

1 and the knowing-and-intelligent prong are two separate inquiries; a
2 state court's finding that a Miranda waiver was knowing and
3 intelligent is a question of fact. Derrick v. Peterson, 924 F.2d
4 813, 820-24 (9th Cir. 1990), cert. denied, 502 U.S. 853 (1991).
5 Whether a waiver was made voluntarily presents a mixed question of
6 law and fact. Id. at 821-22; Miller v. Fenton, 474 U.S. at 116.

7 2. Due Process

8 Involuntary confessions in state criminal cases are
9 inadmissible under the Fourteenth Amendment. Blackburn v. Alabama,
10 361 U.S. 199, 207 (1960). The voluntariness of a confession is
11 evaluated by reviewing both the police conduct in extracting the
12 statements and the effect of that conduct on the suspect. Miller
13 v. Fenton, 474 U.S. 104, 116 (1985); Colorado v. Connelly, 479 U.S.
14 157, 167 (1986) (coercive police activity is a necessary predicate
15 to the finding that a confession is not voluntary).

16 "The test is whether, considering the totality of the
17 circumstances, the government obtained the statement by physical or
18 psychological coercion or by improper inducement so that the
19 suspect's will was overborne." Schneckloth v. Bustamonte, 412
20 U.S. 218, 226-27 (1973); see e.g., Cunningham v. Perez, 345 F.3d
21 802, 810-11 (9th Cir. 2003) (officer did not undermine plaintiff's
22 free will where interrogation lasted for eight hours and officer
23 did not refuse to give break for food and water, officer suggested
24 cooperation could lead to treatment rather than prison, officer
25 made statement he had put people in prison for similar conduct,
26 officer denied plaintiff's request to call therapist, and plaintiff
27 diagnosed with mental disorder and taking bi-polar medication);
28 Clark v. Murphy, 331 F.3d 1062, 1073 (9th Cir.), cert. denied, 540

1 U.S. 968 (2003) (holding that state court's determination that
2 interrogation was non-coercive, where suspect was interrogated over
3 five-hour period in six by eight foot room without water or toilet,
4 was objectively reasonable application of Schneckloth).

5 The suspect's age may be taken into account in determining
6 whether a confession was voluntary. Taylor v. Maddox, 366 F.3d
7 992, 1015-16 (9th Cir. 2004) (finding confession involuntary where
8 petitioner, a sixteen-year-old, was interrogated for three hours in
9 the middle of the night without an attorney or parent, given no
10 food, offered no rest break, may or may not have been given water,
11 threatened by officer's jabbing ring in his face and drawing
12 diagram of a grim future if he did not confess, and denied access
13 to telephone to contact attorney). However, it is not enough, even
14 in the case of a juvenile, that the police indicate that a
15 cooperative attitude would be to the benefit of an accused unless
16 such remarks rise to the level of being threatening or coercive.
17 Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005) (quoting
18 Fare, 442 U.S. at 727).

19 C. Analysis

20 1. Miranda Claim

21 Petitioner claims his Miranda waiver was not voluntary,
22 intelligent or knowing because he was sixteen years old at the time
23 of the interrogation, is borderline retarded, has severe learning
24 problems, and suffers severe deficits in basic skills which cause
25 him to function on the level of an eight to ten year old child.

26 The record is devoid of any evidence that the police used
27 coercive, intimidating or deceptive tactics to motivate Petitioner
28 to waive his Miranda rights. Petitioner's arguments focus on his

1 mental and intellectual deficiencies and resulting alleged
2 inability to understand the significance of the waiver, not on any
3 improper police tactics. The Court concludes that the state
4 court's decision was not contrary to or an unreasonable application
5 of established federal law.

6 In analyzing the intelligent-and-knowing prong of the Miranda
7 claim, the state court considered Miranda v. Arizona and Fare v.
8 Michael C., the two Supreme Court cases directly on point.
9 Therefore, the state court opinion was not contrary to established
10 federal law.

11 Fare held that the same totality-of-circumstances approach
12 applies whether the suspect is a juvenile or adult. 442 U.S. at
13 725-26. Addressing the interrogation of a sixteen-year old, the
14 Court noted:

15 The transcript of the interrogation reveals that the
16 police officers conducting the interrogation took care to
17 ensure that respondent understood his rights. They fully
18 explained to respondent that he was being questioned in
19 connection with a murder. They then informed him of all
20 the rights delineated in Miranda, and ascertained that
21 respondent understood those rights. There is no
22 indication in the record that respondent failed to
23 understand what the officers told him. . . . [¶] Further,
24 no special factors indicate that respondent was unable to
25 understand the nature of his actions. He was a 16 1/2-
26 year-old juvenile with considerable experience with the
27 police. He had a record of several arrests. He had
28 served time in a youth camp, and he had been on probation
for several years. . . . There is no indication that he
was of insufficient intelligence to understand the rights
he was waiving, or what the consequences of that waiver
would be. He was not worn down by improper interrogation
tactics or lengthy questioning or by trickery or deceit.

On these facts, we think it clear that respondent
voluntarily and knowingly waived his Fifth Amendment
rights.

Id. at 726-27.

Here, the state appellate court looked at the totality of the

1 circumstances regarding Petitioner's Miranda waiver and concluded
2 that nothing at the time of the waiver or during the interrogation
3 suggested that Petitioner did not understand the nature of the
4 rights he waived or the consequences of the waiver. The court's
5 analysis shows that it took into consideration Petitioner's age and
6 experience with the police in making its determination. Petitioner
7 is correct that the court did not mention the fact that he had a
8 low IQ and learning disabilities. However, the record shows that,
9 even though Petitioner was far below his age level in reading and
10 writing, his memory and ability to understand cause and effect were
11 good. See RT at 700, 724. It was reasonable to conclude that the
12 skills Petitioner possessed allowed him to understand the nature of
13 the rights he was waiving and the consequences of his waiver.
14 Thus, the appellate court's denial of this claim was not an
15 unreasonable application of federal law nor an unreasonable finding
16 of facts based upon the evidence in the record. Habeas relief
17 based on the Miranda claim is denied.

18 2. Due Process Claim

19 Petitioner claims that, based upon his particular
20 characteristics and the details of the interrogation, his
21 confession was involuntary and thus, his due process rights to a
22 fair trial were violated by its admission into evidence at trial.

23 a. Petitioner's Characteristics

24 Citing Haley v. Ohio, 332 U.S. 596, 599-600 (1948), Petitioner
25 claims his youth was a significant factor in evaluating whether his
26 confession was voluntary. In Haley, the police took a fifteen-year
27 old boy from his home to police headquarters at midnight to
28 question him about his involvement in a murder. Id. at 598. He

1 was questioned for five hours by at least five police officers who
2 interrogated him in relays of two or more at a time. Id. Only
3 after the suspect confessed at about 5 a.m. did the police inform
4 him that he had the right to remain silent and the right to an
5 attorney. Id. The Supreme Court concluded that the suspect's due
6 process rights had been violated. Id. at 600. But, in addition to
7 the suspect's age, the Court based its conclusion on the facts that
8 he was not advised of his Fifth Amendment rights before the
9 interrogation began, and that he was questioned in the middle of
10 the night, non-stop, by a combination of five different officers.
11 Id. Noting that the police prevented the suspect from seeing his
12 attorney for three days and his mother for five days after his
13 confession, it found that the "callous attitude of the police
14 towards the safeguards which respect for ordinary standards of
15 human relationships compels that we take with a grain of salt their
16 present apologia that the five-hour grilling of this boy was
17 conducted in a fair and dispassionate manner." Id.

18 Although Petitioner was sixteen at the time of the police
19 interrogation, other circumstances the Court relied on in Haley
20 were absent here. Most importantly, Petitioner was given his
21 Miranda warning before the interrogation began and he had
22 experience with the police and police interrogations. Unlike the
23 interrogation in Haley, Petitioner's interrogation was videotaped
24 and, thus, the actions of the officers were visible to judicial
25 scrutiny. Finally, Petitioner was not kept isolated from his
26 mother for days after the interrogation. Therefore, the appellate
27 court did not unreasonably apply Supreme Court authority by
28 arriving at a different result than the Haley Court.

1 Citing four Supreme Court cases, Petitioner argues that his
2 lack of intelligence and education were important factors that the
3 appellate court did not consider. As noted above, Petitioner is
4 correct that the appellate court did not specifically mention his
5 mental ability in its opinion. However, although the cases cited
6 by Petitioner involved suspects who were mentally deficient, they
7 also involved other circumstances which established police
8 coercion. In Fikes v. Alabama, 352 U.S. 191, 193, 196 (1957), the
9 suspect was uneducated and of low mentality, but also mentally ill
10 and highly suggestible. He was kept in isolation for one week,
11 except for sessions of questioning. Id. at 197. His father and
12 lawyer were barred in attempts to see him. Id. He was not taken
13 before a magistrate after his arrest as is required by Alabama law.
14 Id. at 194.

15 In Payne v. Arkansas, 356 U.S. 560, 567 (1958), in addition to
16 being mentally slow, the petitioner was arrested without a warrant,
17 was denied a State-required hearing before a magistrate at which he
18 would have been advised of his right to remain silent and his right
19 to counsel, was not advised of his right to remain silent or his
20 right to counsel, was held incommunicado for three days while
21 members of his family were turned away, was refused permission to
22 make even one telephone call, was denied food for long periods, and
23 was put in fear for his life by the chief of police who told him
24 that there would be thirty to forty people at the police station
25 who wanted to get him. The Court concluded that the fact that the
26 petitioner confessed after being exposed to the threat of mob
27 violence established that the confession was coerced. Id.

28 In Spano v. New York, 360 U.S. 315, 322 (1959), the petitioner

1 was a foreign-born, twenty-five year old man with only one-half
2 year of high school education and a history of emotional
3 instability. He was subjected to questioning by at least fourteen
4 law enforcement officials for eight hours during the night before
5 he confessed. Id. His repeated requests for his attorney, whom he
6 had retained, were ignored. Id. 322-23. Finally, the police
7 instructed Bruno, a fledgling police officer and the petitioner's
8 childhood friend, to tell the petitioner untruthfully that, because
9 the petitioner had called Bruno before he had turned himself over
10 to the police, Bruno might lose his job, which would be disastrous
11 for his pregnant wife, three children and unborn child. Id. at
12 319. The petitioner confessed after the fourth time Bruno told him
13 this untruth. Id. The Court concluded that the petitioner's will
14 was overborne by "official pressure, fatigue and sympathy falsely
15 aroused" by Bruno's story. Id. at 323.

16 In Columbe v. Connecticut, 367 U.S. 568, 620 (1961), the
17 petitioner had an IQ of sixty-four and as a result was classified
18 as a "high moron." He was suggestible and could be easily
19 intimidated. Id. at 621. In addition, he was in police custody
20 for approximately five days before he confessed; he was never
21 advised of his Fifth Amendment rights; he was confronted by his
22 wife, whom police had coached to ask him to tell the truth; his
23 thirteen-year old daughter was called upon in his presence to
24 recount incriminating circumstances; his requests for a lawyer were
25 ignored; and, instead of promptly being brought in front of a
26 magistrate as required by Connecticut law, he was taken to a police
27 court on a "palpable ruse of a breach-of-the-peace charge concocted
28 to give the police time to pursue their investigation." Id. at

1 627-31.

2 In each case, although the petitioner was mentally impaired,
3 there were many other circumstances establishing police coercion.
4 Therefore, the Court addresses whether the record here demonstrates
5 such coercion by the police.

6 b. Coercive Police Activity

7 1. Physical Circumstances of Interrogation

8 Citing Spano, 360 U.S. at 322 and Ashcraft v. Tennessee, 322
9 U.S. 143, 153, (1944), Petitioner contends that the length,
10 continuity, location and circumstances of his interrogation help to
11 establish that his confession was coerced. These cases are
12 distinguishable.

13 As discussed above, in Spano, the suspect was questioned for
14 many hours by relays of officers while he was held incommunicado
15 and the police enlisted the cooperation of the suspect's friend who
16 persuaded him to confess.

17 In Ashcraft, relays of officers, experienced investigators,
18 and highly trained lawyers questioned the suspect for thirty-six
19 hours during which time he was held incommunicado and was not
20 allowed to sleep or rest. 322 U.S. at 153. In both Ashcraft and
21 Spano, the interrogations were not videotaped. Id. at 149; Spano,
22 360 U.S. at 325 (dissent).

23 In contrast, Petitioner was questioned by only three law
24 enforcement officials and the interrogation was videotaped and
25 viewed by the trial court and the appellate court. The courts
26 found no signs of police aggression and no signs that Petitioner
27 was afraid, confused or fatigued during the course of the
28 interrogation. Therefore, the circumstances of Petitioner's

1 interrogation did not create the coercive atmosphere that the Court
2 found objectionable in Spano and Ashcraft.

3 2. Psychological Coercion

4 Petitioner contends that the police used psychological
5 techniques that were condemned in Miranda. Although Petitioner is
6 correct that Miranda cited several interrogation techniques that
7 were developed for the purpose of obtaining a confession from a
8 suspect, it did not suggest that use of these techniques
9 constituted a violation of due process; it listed these techniques
10 to explain why, before a custodial interrogation began, it was
11 necessary for a suspect to be advised of his Fifth Amendment rights
12 to be silent and to be represented by an attorney. Miranda, 384
13 U.S. at 449-456. Petitioner cites no federal authority for the
14 proposition that the psychological techniques used by the police
15 during his interrogation are unconstitutional. Therefore, this
16 claim is without merit.

17 3. Polygraph Test

18 As noted above, Petitioner contends that the officers' use of
19 the polygraph test was coercive because the operator told him that
20 the test could detect lies and that Petitioner had failed.
21 Petitioner relies on a federal case from the District of New Jersey
22 and a state case from New York. These do not meet the AEDPA
23 requirement for establishing an unreasonable application of Supreme
24 Court authority.

25 Petitioner faults the officers for explaining to him how the
26 test operated and for showing him how the test indicated he was
27 being untruthful, but doesn't explain how this was coercive. The
28 appellate court's conclusion that the polygraph test was not

1 coercive was not contrary to or an unreasonable application of
2 federal law.

3 4. Use of Petitioner's Mother

4 Petitioner claims that the police used his mother as an
5 unwitting agent for coercing a confession from him. The cases
6 Petitioner cites for this argument, Spano 360 U.S. at 323 and
7 Culombe, 367 U.S. at 630 are distinguishable. As noted above, in
8 Spano, the police asked the suspect's childhood friend to extract a
9 confession from him by lying to him. Spano, 360 U.S. at 323. In
10 Culombe, the suspect's wife was asked to tell her husband to
11 confess and his thirteen-year old daughter was called upon in his
12 presence to recount incriminating circumstances. Culombe, 367 U.S.
13 at 630.

14 Here, the police did not instruct the mother in what to say.
15 Petitioner confessed to his mother almost immediately after she
16 entered the room. Under these circumstances, the fact that the
17 police allowed Petitioner to see his mother cannot be construed as
18 using the mother to coerce a confession from Petitioner.

19 5. Police Deception, Threats and Promises
20 of Leniency

21 Again citing Spano, 360 U.S. at 321-24, Petitioner claims that
22 the officers' lies, threats and promises of leniency rendered his
23 confession involuntary. However, even the evidence Petitioner
24 cites shows that Officer Celestre was urging Petitioner to tell the
25 truth, not offering him leniency or making threats.

26 In sum, the appellate court's decision that Petitioner's
27 confession was not coerced was not contrary to or an unreasonable
28 application of established federal authority and habeas relief is

1 denied on this ground.

2 III. Brady Claim

3 Petitioner claims that, prior to trial, the prosecution failed
4 to disclose to the defense exculpatory and material evidence of a
5 statement by Phillip Kendrick to San Pablo Police Department
6 Detective Mark Harrison that Petitioner did not shoot Saechao, but
7 that other individuals were responsible.

8 A. Superior Court Habeas Opinion

9 The superior court judge who had presided over Petitioner's
10 trial considered his habeas petition. He held an evidentiary
11 hearing on the Brady claim and concluded that Kendrick's statements
12 to the police constituted favorable exculpatory evidence that
13 should have been disclosed to the defense. However, the court
14 denied the Brady claim on the ground that there was not a
15 reasonable probability that, had the statements been disclosed, the
16 result of the proceeding would have been different. Petitioner's
17 Ex. C, In re Clyde James Rainey, on Habeas Corpus, No. 01442-2,
18 March 23, 2005 at 12, 14.

19 1. State Court's Finding of Facts

20 The habeas court noted that the defense theory at trial had
21 been that, although Petitioner did shoot Saechao, it was not a
22 special circumstances robbery-murder because Saechao's wallet had
23 not been taken. Instead, the defense argued that the killing was
24 part of a gang initiation of a young man who wanted the respect and
25 status of membership. The jury did not believe Petitioner's
26 defense and convicted him of the special circumstance murder during
27 the course of a robbery. Ex. C. at 11.

28 The court found that Detective Harrison was a qualified expert

1 in the area of gang identification and criminal street activity,
2 particularly in the area of North Richmond where the shooting of
3 Saechao occurred. Detective Harrison testified that the dominant
4 street gangs in this area were the Project Trojans (PJT) and their
5 subset, Trojans in Training (TIT). Both gangs engaged in street
6 level sales of drugs and witnesses who testified against them had
7 been murdered. If the gangs were unable to murder the alleged
8 snitch, they chose a close relative. Detective Harrison knew many
9 of the individuals in these gangs, including those individuals
10 mentioned to him by Kendrick. At the time of his interview with
11 Kendrick, Detective Harrison knew that Petitioner and Donald Clark
12 were suspects in the shooting of Saechao. Ex. C at 3.

13 On July 21, 1997, Detective Harrison conducted a lengthy
14 interview with Kendrick regarding three murders he was suspected of
15 committing. Kendrick was in the core group of PJTs. Detective
16 Harrison asked Kendrick about Petitioner, who was not a gang
17 member. Kendrick stated that he knew Petitioner and that he was
18 present on the night that Saechao was murdered. He stated that an
19 Asian man tried to buy marijuana from an individual named Butter.
20 When the man paid for the marijuana, other people nearby saw that
21 he had a great deal of cash on him and tried to rob him. The
22 following colloquy took place between Detective Harrison and
23 Kendrick:

24 H: Now does Clyde do it or did Brian?

25 K: Brian D. and Donald shot him 'cause Brian D. shot him
26 one time in the back and from the back now, from the back
27 . . . I seen Brian D. shoot one time from the back and I
28 seen Donald shoot one time from the side.

H: Now you're talking about Clyde?

1 K: Yeah, but I call him Donald though, and I seen them
2 set him over, 'cause when they shot, all the blood flew
in Butter face and shit.

3 Ex. C. at 3-4.

4 At the evidentiary hearing before the state habeas court,
5 Kendrick testified that on October 31, 1996, he was hanging out on
6 Sixth and Grove in North Richmond. Also present were Donald Clark,
7 Brian Williams (also known as Brian D.), Hassan Williams (also
8 known as Dust) and Petitioner. Donald Clark was waving a gun.
9 Butter was not there. A car drove up, and an Asian man got out who
10 wanted to buy marijuana. Donald Clark was about to sell him some,
11 when Dust, Kendrick and Petitioner walked away. Kendrick turned
12 around and saw Donald Clark, holding his gun in his hand, standing
13 over the Asian man. The Asian man was lying in the street and
14 Kendrick observed Donald Clark shoot him a second time. He never
15 saw Brian Williams shoot the Asian man; Brian Williams was just
16 standing next to Donald Clark.

17 Kendrick continued that, on June 21, 1997, he had turned
18 himself in to the Richmond police on other matters. He was
19 interviewed by Detective Harrison. Kendrick recalled that
20 Detective Harrison asked him about Petitioner's involvement in a
21 shooting and that Kendrick had told him that Brian D. and Donald
22 Clark did the shooting. Kendrick also testified that he had talked
23 to defense counsel's investigator in January, 2001 and had said
24 that the shooting occurred on Fifth Street and that the Asian man
25 drove up in a cab. Kendrick testified that he had been wrong about
26 the shooting occurring on Fifth Street and about the Asian man
27 driving up in a cab.

28 On cross-examination by the prosecutor, Kendrick was asked why

1 he had told Detective Harrison in the June 21, 1997 interview that
2 Brian D. as well as Donald Clark shot Saechao. Kendrick replied:
3 "When Donald shot him, Brian D. was standing next to him, so I was
4 trying to say, you know what I'm saying, that Brian D. was right
5 next to him . . ." Kendrick also said that Detective Harrison was
6 asking him many questions and it had been going on for hours, so
7 that he was telling Detective Harrison what he wanted to hear.
8 Kendrick admitted that he did not know where the first shot hit
9 Saechao and that his statement that blood flew in Butter's face was
10 untrue. Kendrick admitted that parts of his statement to Detective
11 Harrison were made up.

12 With respect to the question, "You mean Clyde?" and his
13 answer, "Yeah, but I call him Donald though," Kendrick testified,
14 "I was trying to tell him that I said Donald, the one who did the
15 shooting, not Clyde, and it came out the wrong way."

16 Kendrick also admitted that he had lied about several things
17 he told the defense investigator on January 17, 2001 and that he
18 was "mixing the truth with the false" because he did not trust the
19 investigator. Ex. C at 6-8.

20 At the evidentiary hearing, Elizabeth Harrigan, Petitioner's
21 trial attorney, testified that she did not receive a copy of
22 Detective Harrison's interview with Kendrick until years after
23 Petitioner's trial. Harrigan testified that if she had this
24 evidence, her defense would have been that Donald Clark was the
25 shooter and that Petitioner's confession was false, made to protect
26 himself from retaliation by the gang or out of loyalty to the gang.
27 Harrigan surmised that if Petitioner testified against the PJT gang
28 and was labeled a snitch, not only would his life be in danger, but

1 his whole family would potentially be in danger. Harrigan thought
2 that because Petitioner was young, inexperienced and not too
3 intelligent, he would "take one for the gang." Harrigan did not
4 find the inconsistencies in Kendrick's statements to be
5 insurmountable. Harrigan also testified that she would have used
6 Kendrick as a witness at trial even though he was a convicted
7 felon, a murderer and gave different versions of what happened,
8 including admitted lies.
9 Ex. C. at 8-10.

10 2. State Court's Analysis

11 As noted above, the court concluded that Kendrick's statement
12 was exculpatory, that it was suppressed by the prosecution, but
13 that it was not material under Brady. The court emphasized that
14 Kendrick had given three different versions of the shooting to law
15 enforcement officials. First, he had told Detective Harrison that
16 Butter sold marijuana to Saecho and that Brian D and Donald Clark
17 shot Saechao. In a January, 2001 declaration attached to the
18 habeas petition, Kendrick testified that Donald Clark fired one
19 shot at the victim and that Kendrick did not know who fired the
20 second shot. At the evidentiary hearing, Kendrick testified that
21 he saw Donald Clark shoot the victim twice.

22 The court stated:

23 Kendrick's veracity . . . troubles the court . . .
24 Kendrick admitted at the OSC hearing² that Butter was not
25 at the scene and that he made up that story. At the OSC
26 hearing he admitted he lied to Harrison and told Harrison
27 what Harrison wanted to hear. He lied about the cab
incident; he lied to counsel's investigator. He
purposefully mixed "the truth with the false." The
pattern is consistent, whether it be Harrison or

28 ²The evidentiary hearing.

1 counsel's investigator; Kendrick in his own words was
2 "mixing some of the truth with the false."

3 Kendrick's attempts to extricate himself from his lies
4 are completely unconvincing. For example saying he calls
5 Clyde "Donald" when he later testified that no one,
6 including himself, calls Clyde "Donald." Then there is
7 the example of saying Brian D shot the victim when he
8 meant to say Brian D was standing next to the victim.
9 His testimony just does not stack up.

10 The results of Kendrick's handiwork are the inconsistent
11 Statements set forth above. The court knows of no method
12 by which the various Statements can be reconciled and the
13 ultimate true version of the facts gleaned therefrom. It
14 is for this reason, inter alia, that the court now finds
15 that all the Kendrick Statements, including the
16 Stipulation, set forth above are not trustworthy and
17 completely lack any indicia of reliability. The court
18 accepts petitioner's version of the facts as set forth in
19 his confession. Moreover, the court had an opportunity
20 to observe Kendrick's demeanor at the OSC hearing and now
21 finds his testimony to be wholly wanting.

22 The court appreciates that defense counsel would have
23 executed a different trial strategy if she had the 1997
24 Kendrick statement. That strategy would have included
25 using Kendrick as a witness. And that's the rub: how
26 many versions of the shooting would he have concocted by
27 the time he testified. The court cannot say. But if he
28 mixed the truth with the false, as is his custom and
habit, the jury, following cross-examination of him,
would have found that they had to face the same question
the court just faced, namely what value, if any, to place
in Kendrick's testimony knowing that he was a liar.

The jury's answer to that question, however, is not a
difficult one. The jury would have placed no value at
all in his testimony. Jurors take their jobs very
seriously and when they turn their intellects
individually and collectively to Kendrick's testimony,
they will see it for what it is, to wit, some strange
contrived ramblings of a convicted gangster. Moreover,
that jury would have petitioner's straightforward and
plausible confession as a counterweight to Kendrick's
concoctions. Admittedly trial counsel would attempt to
prove the confession was a false confession, but that
strategy would be unavailing because petitioner was
neither in the PJTs nor the TITs and therefore, had no
reason to take one for the gang. In short, it would be
extremely unlikely a jury would have been convinced of
the claim that the confession was a false confession when
they had petitioner's voluntary confession to his mother
and the videotaped confession to Lt. Celestre.

1 For all these reasons, the court now finds that there is
2 not a reasonable probability that, had the evidence been
disclosed to the defense, the result of the proceeding
would have been different.

3 Ex. C at 12-14.

4 B. Applicable Federal Law

5 In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court
6 held that "the suppression by the prosecution of evidence favorable
7 to an accused upon request violates due process where the evidence
8 is material either to guilt or to punishment, irrespective of the
9 good faith or bad faith of the prosecution." Id. at 87. Evidence
10 is material "if there is a reasonable probability that, had the
11 evidence been disclosed to the defense, the result of the
12 proceeding would have been different. A 'reasonable probability'
13 is a probability sufficient to undermine confidence in the
14 outcome." United States v. Bagley, 473 U.S. 667, 682 (1985).
15 The Bagley standard of materiality "does not require demonstration
16 by a preponderance that disclosure of the suppressed evidence would
17 have resulted in the defendant's acquittal." Kyles v. Whitley, 514
18 U.S. 419, 434 (1995). "A reasonable probability of a different
19 result is shown when the government's evidentiary suppression
20 'undermines confidence in the outcome of the trial.'" Id. (citing
21 Bagley, 473 U.S. at 678); United States v. Golb, 69 F.3d 1417, 1430
22 (9th Cir. 1995) (ultimate question is whether there is reasonable
23 probability that, had evidence been disclosed, result of proceeding
24 would have been different such that confidence in outcome is
25 undermined).

26 A finding that the undisclosed evidence is material under
27 Bagley "necessarily entails the conclusion that the suppression
28

1 must have had 'substantial and injurious effect or influence in
2 determining the jury's verdict'" under Brecht. Kyles, 514 U.S. at
3 435.

4 C. Analysis

5 Petitioner argues that the state habeas court's conclusion
6 that Kendrick's testimony was not material was contrary to Supreme
7 Court authority because the court stated that there was "not a
8 reasonable probability that, had the evidence been disclosed to the
9 defense, the result of the proceeding would have been different."

10 Petitioner argues,

11 The U.S. Supreme Court has repeatedly stated: To prove
12 materiality, a defendant need not demonstrate that it is
13 more likely than not that he would have received a
14 different verdict with the evidence; rather, "[a]
15 'reasonable probability' of a different result is
16 . . . shown when the government's evidentiary suppression
17 'undermines confidence in the outcome of the trial.'" Kyles v. Whitley, 514 U.S. 419, 434 (1995), quoting
18 United States v. Bagley, 473 U.S. 667, 678 (1985).

16 Traverse at 33-34.

17 The state court used the standard in Bagley and Kyles did not
18 overturn or disapprove Bagley. Rather, in Kyles, the Supreme Court
19 was providing further guidance for the "reasonable probability of a
20 different result" standard set forth in Bagley by distinguishing it
21 from a preponderance of the evidence standard. Kyles, 514 U.S. at
22 434. The Court further explained that the Bagley standard was met
23 when the government's suppression "undermines confidence in the
24 outcome of the trial." Id. (citing Bagley, 473 U.S. at 678).
25 Therefore, the state court's opinion was not contrary to
26 established Supreme Court authority.

27 Petitioner argues that, with Kendrick as a witness, Harrigan
28 would have used the defense that Donald Clark, not Petitioner, was

1 the shooter, and that Petitioner falsely confessed to protect his
2 mother from gang retaliation. Petitioner argues that, without
3 Kendrick's testimony, Harrigan's only choice was to present the
4 weak defense that there were no special circumstances because
5 Petitioner did not shoot the victim in the course of a robbery, but
6 as a gang initiation. Petitioner argues that, because he was
7 denied the opportunity to present the stronger defense, he did not
8 receive a fair trial. However, Petitioner did not need Kendrick's
9 testimony to use the defense that his own confession was false and
10 that Petitioner did not shoot Saecho.

11 Further, there are flaws in Petitioner's argument that the
12 jury would have believed that he confessed falsely to protect his
13 mother. First, the jury would have had to find that Kendrick was a
14 credible witness, which the habeas court reasonably found was not
15 probable. The habeas court found, based on its own observations of
16 Kendrick's demeanor during his testimony, that he was totally
17 unreliable as a witness. Had Kendrick testified at the trial, the
18 jury would have observed the same demeanor that the court did.
19 Furthermore, Kendrick's reason for lying, that he told Detective
20 Harrison what "he wanted to hear," does not withstand scrutiny
21 because there was no indication that the detective wanted to hear
22 the version Kendrick told him. Furthermore, there does not seem to
23 be good reason for Kendrick's lies to the defense investigator, and
24 Petitioner proffers no reason why Kendrick would have told
25 Detective Harrison one story and the investigator another; the
26 court's conclusion that Kendrick's custom and habit was to "mix the
27 truth with the false" is the most plausible.

28 Second, the false confession explanation is implausible

1 because Petitioner could have maintained his original story that he
2 wasn't at the scene of the crime and didn't know what happened.
3 This version did not incriminate a gang member and thus would not
4 have drawn retaliation. Third, his statement to the police that
5 gang member Donald Clark was the shooter contradicts the theory
6 that he was afraid of gang retaliation.

7 Petitioner argues that the state court unreasonably relied on
8 the fact that he "was neither in the PJTs nor the TITs and
9 therefore had no reason to take one for the gang" by falsely
10 confessing. Petitioner points out that expert testimony at the
11 evidentiary hearing and at trial demonstrates that whether an
12 individual was a member of a gang was not relevant to whether that
13 individual would falsely confess because a cooperating witness
14 would have reason to fear a gang might harm a member of his family.
15 However, as discussed above, the court relied on other findings to
16 conclude that it was not reasonably probable that the jury would
17 have found his confession to be false.

18 Petitioner also argues that, with Kendrick's testimony in
19 evidence, Harrigan would have used Dr. Riley's testimony to show
20 that Petitioner was very susceptible to fear and intimidation from
21 the PJTs and that he could easily have been swayed to confess
22 falsely to protect his mother, to whom he was very close. However,
23 Dr. Riley also testified that the personality tests she gave to
24 Petitioner indicated that he scored a little above average in the
25 category of independence as opposed to accommodating, that he
26 scored a little above average in the category of dominance, that he
27 scored at the top of the average range in the category of vigilance
28 as opposed to trusting, that he scored just over the average range

1 for self-controlled as opposed to unrestrained, and he scored a
2 little above average in the category of rule-conscious as opposed
3 to expedient. RT at 715-718. With these personality
4 characteristics, it would not have been evident that Petitioner was
5 particularly susceptible to fear and intimidation.

6 Based on the above, the state court was reasonable in finding
7 that Kendrick's statement to the police was not material. Thus,
8 the court's decision was not contrary to or an unreasonable
9 application of established federal authority nor was it based on an
10 unreasonable determination of the facts in light of the evidence in
11 the record.

12 CONCLUSION

13 Based on the foregoing, the petition for writ of habeas corpus
14 is DENIED.

15
16 IT IS SO ORDERED.



17
18 Dated: 9/2/08

19 _____
20 CLAUDIA WILKEN
21 United States District Judge
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