No. _____

In the Supreme Court of the United States

JEANNE S. WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, *Petitioner,*

v.

GILBERT R. AGUILAR, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Following respondent's state-court trial for murder, in which multiple eyewitnesses identified him as the shooter, the California Court of Appeal rejected his claim of *Brady* v. *Maryland* error. The state court reasoned that two nondisclosed prior errors in identification by a scent dog used in the case were immaterial because the dog-scent evidence presented at trial had been of only "questionable probity." Although the dog had detected respondent's scent in the car used by the shooter, the prosecution witness who conducted the scent test testified that the evidence did *not* prove respondent was in that car on the day of the shooting, but only at some point *after* the shooting. Under 28 U.S.C. § 2254(d) and *Harrington* v. *Richter*, federal habeas corpus relief for a legal error in applying *Brady* would be prohibited if "it is possible fairminded jurists could disagree" that the state court's ruling was "inconsistent with the holdings in a prior decision" of the Supreme Court. The Ninth Circuit deemed the undisclosed evidence "material" and ordered relief, explaining that "a reasonable state court would have concluded" that the evidence was material the way the Ninth Circuit did.

The question presented is:

Did the Ninth Circuit's grant of habeas relief in this case violate § 2254(d)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

PETITION FOR WRIT OF CERTIORARI

Director Jeanne S. Woodford (the State) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

OPINIONS AND JUDGMENT BELOW

The opinion of the Ninth Circuit is reported at 725 F.3d 970 (9th Cir. 2013). The district court's judgment and the magistrate judge's report recommending that the writ be denied are unreported. The California Court of Appeal's opinion affirming respondent's criminal conviction and denying his state habeas petition is unpublished. All are reproduced in the Appendix to this petition.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on July 29, 2013, and denied a timely petition for rehearing and rehearing en banc on September 3, 2013. The Ninth Circuit stayed issuance of the mandate on September 6, 2013. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), provides in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

The Murder and Investigation

1. John Guerrero was killed when a gunman ran up to his car and shot him as he sat at a red light. Several passersby and the passengers in Guerrero's car witnessed the shooting and gave the police descriptions of the shooter, the clothing he wore, and the white Volkswagen Beetle in which he fled. A police artist created a composite drawing of the shooter based on witnesses' descriptions, and several witnesses identified respondent's photograph from a six-photograph display as depicting the shooter. App. F 105a-08a.

Two weeks after the shooting, police impounded the Volkswagen, which was registered to and being driven by respondent's fellow gang member, Rene Ballesteros. App. F 107a. Over a month after the shooting, respondent was arrested. Scent-samples were collected from his clothing, and a dog detected respondent's scent in the Volkswagen. App. D 90a.

State Trial Court Proceedings

1. At trial, seven eyewitnesses testified for the prosecution.

Victor Jara testified that he had a clear look at respondent's face, and that he had identified him from a six-photograph display soon after the shooting. Jara identified respondent again in court during trial, and said he was "absolutely certain" respondent was the shooter. RT 797-801; App. D 72a-73a n.11, 81a-82a.

Rene Valles testified that she had seen the shooter's face "full on" for "just a second" and "saw more of the profile of his face." RT 1241, 1252. She acknowledged that she had told police she was unable to identify anyone from the pre-trial photographic display because none of the photographs depicted profile views of their subjects. But Valles identified respondent in court as the gunman, explaining that she could do so because she could see his profile. RT 1242-43, 1247; App. D 73a n.11, 80a.

Laura Jara testified that she "got a good look" at the shooter's face and that prior to trial she had identified respondent's photograph as looking "a lot like" the shooter. She confirmed in court that respondent was the person whose photograph she had identified. RT 930-32, 934; App. D 74a n.12, 81a.

Desiree Hoefer testified that she had seen the shooter's face and that she later had viewed about a hundred photographs of possible suspects in two big books and several six-photograph displays. She eventually had selected only one, respondent's, from one of those displays. She acknowledged in her testimony that she had told police she was not one hundred percent certain of her identification because she thought the shooter had a darker complexion.

She, too, confirmed in court that respondent was the person whose photograph she had selected. RT 747-52, 755, 775, 783-84; App. D 75a n.12, 81a-82a.

The other three eyewitnesses who testified at trial did not see or identify the shooter's face, but were able to describe his estimated height, build, clothing, and car. Respondent was 20 years old and about 5'11" at the time of the shooting. App. D 75a & n.12, 78a-82a; App. F 106a-07a. RT 680, 685, 696, 703-04, 720-22, 727, 908, 912, 915-16, 920, 923. Two witnesses (Soltero, a passenger in the victim's car, and Valles), in their testimony, estimated the shooter's age as 18 to 20 (the estimate Soltero acknowledged having given to police) and 16 to 21 (Valles's estimate at trial); two others (the Jaras) estimated his age as 15-17; and one (Hoefer) gave two age ranges, 15 to 17 and 16 to 20. RT 703-04, 771, 807, 941, 1245. Three witnesses (Carrillo, also a passenger in the victim's car, Valles, and Soltero) estimated his height as 5'9" to 5'10" tall. One (Victor Jara) said he was 5'5" or 5'6". Another (Hoefer) gave various estimates: 5'2" or 5'3," 5'4," taller than the 5'6" defense counsel, and shorter than respondent. And another (Feeney) described him as "tall and slender." App. D 72a-75a & nn.11-12, 77a n.13, 78a, 80a.

In addition to the eyewitness testimony, the prosecution also presented evidence that the police had impounded the Volkswagen, with Ballesteros driving it, about two weeks after the murder, and that, over a month after the murder, respondent's scent had been detected in the car by Reilly, a dog trained in scent identification. Reilly's handler, Joe D'Allura, testified that a person's scent would remain in the car only for about five days. He explained that it could remain longer if no one else used or cleaned the car. Because, as the prosecution evidence showed,

the Volkswagen was being used by Ballesteros when it was impounded two weeks after the shooting on July 25 and had been used by others during that month—and because it also had been washed before it was impounded—the dog handler acknowledged that he could not say that the scent test proved that respondent had been in the car on the day of the murder. He testified only that respondent's scent was in the car and that respondent had been in the front passenger seat of that car at some point. RT 1287-88, 1294; App. D 89a-92a; App. F 112a.

The prosecution, further, produced evidence of tape-recordings of respondent's conversations in jail with his girlfriend, Mary Saiz. In their conversations, respondent said, at one point, that he was in jail for something he did not do. Saiz, however, acknowledged in her conversation with respondent that she had lied to respondent's first attorney by telling him respondent had been with her at the time of the shooting. She said she was "ready to rat," showed respondent what appeared to be a police report she had somehow obtained from his attorney that contained witness names and statements, and strategized with respondent about how to find out the last name of someone named Richard, whose brother was in the hospital. RT 1323-26; App. F 110a.

2. The defense presented expert testimony challenging the reliability of eyewitness identifications. App. F 113a-14a; App. D 58a.

With regard to the dog-scent evidence, Saiz testified that respondent had never been in the Volkswagen. Claiming that she had been in it many times, she speculated that her scent might have been on respondent's clothes, from which his scent sample had been taken. RT 1848-55; App. D 56a; App. F 112a.

The defense also sought to implicate a third party, Richard Osuna, as the culprit. App. D 54a-57a; RT 2452-55, 2462. Saiz and another witness, Alfred Deanda, testified that they had seen Osuna get into a Volkswagen to chase after Guerrero's car because Osuna thought its occupants were responsible for shooting his brother. Saiz also testified that Osuna later went to her apartment and told her he had just shot someone. App. D 55a-56a; App. F 111a; RT 1578-79. Saiz acknowledged, however, that she had not told anyone about Osuna coming to her apartment until over a year after the shooting and just a couple of days before she testified. RT 1877.

Osuna was 5'7" and 16 years old around the time of the shooting. His photographs were displayed for the jury. RT 1387-88; App. D 54a; App. F 110a.

3. The prosecution presented rebuttal evidence that Osuna had an alibi. Osuna's father testified that, on the date of the murder, he and Osuna had picked up Osuna's brother from the hospital and took him home, where they all remained together for the rest of the day. RT 2452-55, 2461-62. Paperwork from the hospital, presented at trial, confirmed the discharge date. RT 2454.

4. After a brief opening summation by the prosecutor, in which the dog-scent evidence was not discussed, defense counsel argued to the jury that the dog scent evidence merely placed respondent in the Volkswagen on some date *after* the shooting and closer to the date the car was impounded. App. D 98a. He also argued that Osuna more closely matched some of the eyewitnesses' descriptions of the shooter. RT 2545-46, 2553.

In response, the prosecutor argued that the eyewitness identification evidence was strong despite the expert testimony attacking its reliability.

He also argued that the dog scent evidence refuted Saiz's testimony that respondent had never been in the car, and that it connected respondent to the car in a general way, giving the jury further reason to discount the possibility that Osuna was the shooter. App. H.

5. Respondent was convicted as charged and sentenced to state prison for fifty years to life. App. F 105a.

State Appellate Court Proceedings

1. In a state habeas petition presented to the California Court of Appeal concurrently with the direct appeal from his conviction, respondent alleged that the prosecution had violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose material exculpatory evidence before or during respondent's October 2002 trial. The allegedly withheld evidence was that Reilly had made two identification mistakes in the past.

In support of this claim (and a related ineffective-counsel claim based on the failure to challenge the admissibility of the dog-scent evidence), respondent presented transcripts from an evidentiary hearing on the admissibility of dog-scent identification evidence in an unrelated prosecution, *People* v. *Stephon White, Jr.* There, the parties had stipulated that Reilly had made mistakes in two identification tests—one in 1997 and one in April 2001—conducted prior to respondent's September 2001 trial.[1] Respondent also alleged that, in March

[1] According to the evidence presented in *White*, Reilly in 1997 "alerted" to two scent samples in a test, and in April 2001 identified the scent of a person who could not have been the culprit because he was incarcerated at the time of the crime. (continued…)

2002, the Los Angeles County Public Defender sent a letter to the Los Angeles County District Attorney, notifying him of Reilly's two prior mistakes. App. D 94a-95a.

2. In its response to the habeas petition, the State argued that Reilly's undisclosed errors were not "material" within the meaning of *Brady*. The State argued that the scent identification evidence had not been a particularly probative part of the prosecution's case because it did not prove that respondent was in the Volkswagen on the day of the murder, but only that he had been in the car at some point. Opp. to Pet. at 15. The State also cited and discussed *People* v. *Mitchell*, 110 Cal. App. 4th 772, 2 Cal. Rptr. 3d 49, (2003), to put the issue of Reilly's two errors into context. Opp. to Pet. at 9. As reported in *Mitchell,* Reilly and the same dog handler involved in respondent's case here had conducted a scent identification test in that case. The court of appeal's decision explained that, during the *Mitchell* trial, sworn testimony had been presented that Reilly had begun to work in scent discrimination in 1997, was trained for hundreds of hours, and was certified for scent identification work in 1999. That testimony further reflected that, as of the February 2001 *Mitchell* trial, Reilly had performed over 200 training lineups and over 100 lineups involving actual

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(…continued)
(State Hab. Petn., Ex. B at p. 213.) The *White* court ruled the dog-scent-identification evidence inadmissible for multiple reasons. The evidence was excluded, not specifically because of the dog's prior mistakes, but because, in general, the court found it inadmissible under California Evidence Code sections 801 and 352, and because, on the record in that case, it failed to meet the standard for admissibility of novel scientific techniques. *Id*. at 225-27, discussing *People* v. *Kelly*, 17 Cal. 3d 24 (1976); *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923).

suspects, and that, since his certification, he had made no mistakes in any training lineup and there was no indication that he had made any mistakes in an actual lineup. *Id*. at 779-80. In other words, in light of Reilly's history as discussed in *Mitchell*, Reilly still had a post-certification success rate of over 99 percent, even taking into account the April 2001 mistake identified in *White*.

3. The California Court of Appeal denied respondent's state habeas petition in conjunction with affirming his criminal conviction on direct appeal. The state court found that the dog scent evidence in this case was of only "questionable probity" because, as defense counsel had made clear to the jury, it showed only that appellant probably had been in the car after the shooting and shortly before the car was impounded. Therefore, the state court held, the evidence was not "material" under *Brady* because it was not reasonably probable that the result of the trial would have been different had the jury been told of Reilly's past mistakes. App. F 116a-18a.

The California Supreme Court denied discretionary review. App. E.

Federal Court Proceedings

1. Respondent then filed a petition for writ of habeas corpus in the federal district court, where he reasserted his *Brady* claim and the related ineffective-counsel claim. The State again argued that Reilly's undisclosed errors were not material, and also discussed Reilly's background as set forth in *People* v. *Mitchell*.

The district court rejected respondent's claims in a fifty-four-page decision. The court noted, in ruling on the ineffective-counsel claim, that the state

court had "correctly determined that the Dog Scent Evidence was of 'questionable probity.'" App. D 89a. On the *Brady* claim, the district court agreed with the state court that "the purported [dog-scent] identification" of respondent was insufficient to place him in the Volkswagen at the time of the shooting because the scent collected from the car must have been left there within a week of its collection and long after the shooting, as defense counsel had pointed out to the jury. App. D 98a; RT 2574. The district court found reasonable the state court's determination that the failure to disclose information about Reilly's two mistakes did not constitute a *Brady* violation; indeed, the federal court ruled that there was no reasonable probability that the evidence, if disclosed, would have produced a different verdict. It explained:

> Even if the jurors had been presented with evidence that [the dog] had made mistaken identifications in the past, this would have had no effect on their assessment of the eyewitness testimony; at best, such evidence could have served as a basis for disbelieving an irrelevant fact, *i.e.*, that [respondent] was in the VW *after* the shooting.

App. D 98a-99a. The district court therefore denied relief.

2. The Ninth Circuit, however, reversed, in a published opinion by Judge Fletcher, joined by Judge Pregerson and District Judge Bennett. The panel's opinion commenced with its assertion that the dog-scent evidence was "the only evidence" connecting respondent to the Volkswagen, that the rest of the prosecution's case was "weak," and that the evidence implicating Osuna rather than respondent was

"substantial." The panel then noted that its review was circumscribed by 28 U.S.C. § 2254(d), so that relief would be allowable only if the state court decision amounted to an "unreasonable application" of *Brady*.

After a lengthy discussion of the Osuna evidence, the panel also discussed, at equal length, the prosecution's eyewitness testimony, concluding with its assertions that the eyewitness's descriptions fit Osuna more closely than respondent and that several eyewitnesses had testified in ways that varied from their earlier statements to the police.

Following further lengthy discussions of the dog-scent evidence and the course of jury deliberations, and an account of the prior state- and federal-court proceedings, the panel turned to its *Brady* analysis. The panel opined that, if the undisclosed evidence of Reilly's two mistakes had been presented to the trial court, "it is virtually certain," and "we are confident," that the court would have excluded the evidence. App. A 29a, 30a.[2] It then decided that, if the evidence of the dog's two mistakes had been admitted into evidence, "*a reasonable state court would have concluded* that the *Brady* evidence provided powerful impeachment material." App. A 31a (emphasis added). The panel

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[2] As both the state court and the federal district court recognized, however, the trial court deferred a ruling on defense counsel's motion to strike the dog handler's testimony on the grounds of lack of foundation as to how scent pads used in the test were prepared. The trial court agreed that the foundation was lacking, but assumed that the person who prepared the scent pads would testify, and remarked that, absent such testimony, it would expect that the prosecutor himself would strike the testimony. As the trial court predicted, the very next witness provided the requisite foundation. (App. D 53a, App. F 109a; RT 1295, 1297-1304.)

thus further determined that "*[a] reasonable state court would have concluded* that there was a reasonable probability that the jury would have reached a different verdict if [the] dog scent identification had not been presented to the jury, or had been impeached by the evidence of [the dog's] earlier misidentifications . . . ." App. A 31a (emphasis added).

In support of these views, the panel declared that the eyewitness identifications of respondent were "shaky" and "strikingly weak"; that defense counsel had been forced to concede, in his argument to the jury; that respondent had sat in the car at some point; and that the prosecutor had relied on the dog-scent evidence to bolster his case. App. A 34a. The panel's explanation contained no reference to whether fairminded jurists could disagree with the state court's *Brady* ruling or how that ruling was not merely incorrect, but was objectively unreasonable. (App. A 29a-34a.) The panel then concluded that the prosecution's failure to disclose the dog's two mistaken identifications violated *Brady*, and added that the state court's decision to the contrary was an unreasonable application of this Court's precedent. App. A 34a.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S VERSION OF THE HABEAS CORPUS DEFERENCE STANDARD AND ITS APPLICATION OF IT TO THIS CASE CONFLICT WITH 28 U.S.C. § 2254(D) AND THIS COURT'S PRECEDENTS ENFORCING IT

In a mode of § 2254(d) analysis that this Court has repeatedly condemned, the Ninth Circuit here made passing reference to the standard of deference

applicable to state court decisions on habeas corpus, but then expressly reformulated and applied the test in a way that is irreconcilable with AEDPA's concept of deference.

The Ninth Circuit did not ask, as it was required to do before discarding the state court merits adjudication, whether there was at least a "possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011). Instead, the court determined only what it thought "a reasonable state court would have concluded." App. A at 30. That reformulated standard wrongly amounted to no more than "a test of its confidence in the result it would reach under de novo review[.]" *Richter*, 131 S. Ct. at 786.

As this Court has recognized in analogous contexts, there may well be a range of different, reasonable views of what the law requires, see*, e.g.*, *Lambrix* v. *Singletary*, 520 U.S. 518, 536, 538 (1997) see also *Strickland* v. *Washington*, 466 U.S. 668, 688-89 (1984), including many different, reasonable views of how *Brady* v. *Maryland* should be applied in a given instance. To say that it would be reasonable for a state court to adopt one view of *Brady*'s demands does not necessarily mean that a different view is objectively unreasonable. But the Ninth Circuit's explanation for its ruling in this case confirms that it failed to acknowledge the possibility of multiple reasonable applications of *Brady*, including the one taken by the state court. Instead, it reviewed the case in a way that is functionally indistinguishable from intrusive de novo review. That is, "[b]ecause the Court of Appeals had little doubt that [respondent's *Brady* claim] had merit, the Court of Appeals concluded the state court must have

been unreasonable in rejecting it." *Richter*, 131 S. Ct. at 786.

Had the Ninth Circuit adhered to the correct standard, it is plain that § 2254(d) would have precluded relief. As both the state court and the district court found, the dog-scent evidence in this case was minimally probative, because even the prosecution witness who had conducted the test testified it did not prove respondent was in the car used in the shooting on the day of the murder, but only that he was in the car at some later point. Moreover, contrary to the Ninth Circuit's view of the case, the prosecutor did not argue to the jury that the dog-scent evidence identified respondent as the shooter. And, even had Reilly's past mistakes come to light, all it would have shown was that he had a success rate of more than 99 percent. Instead, the state court reasonably concluded that nondisclosure of the evidence allegedly impeaching the dog's reliability did not violate *Brady*, because that evidence was not "material."

This Court should grant certiorari, and would be justified in summarily reversing, because the Ninth Circuit's decision conflicts with this Court's precedents enforcing the deferential standard that federal courts must apply under § 2254(d).

A. The Ninth Circuit's Redefinition of the § 2254(d) Standard Eviscerated Its "Objective-Unreasonableness" Requirement

The only determination the Ninth Circuit was required to make in this case at the threshold was whether fairminded jurists could disagree that the state-court decision denying respondent's *Brady* claim was correct. *Richter*, 131 S. Ct. at 786. Under 28 U.S.C. § 2254(d), federal-court relitigation of the

claim was permitted only if no such possibility existed. *Id.* The Ninth Circuit did not make that determination. It did not even ask the pertinent and determinative question.

Instead, it expressly and incorrectly reformulated the applicable standard of review into a determination of *what a reasonable state court would have concluded*. App. A at 31a. The Ninth Circuit then, in essence, reviewed the state court decision de novo. As made clear by this Court's jurisprudence, the Ninth Circuit's grant of federal habeas corpus relief in derogation of § 2254(d) warrants a grant of certiorari and should be reversed.[3]

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[3] See, e.g., *Marshall* v. *Rodgers*, 133 S. Ct. 1446 (2013) (Ninth Circuit erred in deeming unreasonable California's view of the scope of right to counsel based on mere circuit-court precedent); *Johnson* v. *Williams*, 133 S. Ct. 1088 (2013) (Ninth Circuit reversed for declining to apply deferential standard of review); *Cavazos* v. *Smith*, 132 S. Ct. 2 (2011) (*per curiam*) ("Ninth Circuit plainly erred in concluding that the jury's verdict was irrational, let alone that it was unreasonable for the California Court of Appeal to think otherwise"); *Premo* v. *Moore*, 131 S. Ct. 733 (2011); *Felkner* v. *Jackson*, 131 S. Ct. 1305 (2011) (reversing Ninth Circuit for failing to give state court decision the benefit of the doubt); *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011) (Ninth Circuit improperly found state court denial of relief unreasonable based on its de novo review of evidence); *Waddington* v. *Sarausad*, 555 U.S. 179 (2009) (finding nothing objectively unreasonable about state court decision and reversing Ninth Circuit's grant of habeas relief); *Richter*, 131 S. Ct. 770 (reversing Ninth Circuit's grant of habeas relief for reviewing unexplained state court decision de novo); *Uttecht* v. *Brown*, 551 U.S. 1 (2007) (reversing Ninth Circuit for failing to give required deference to state court decision); *Knowles* v. *Mirzayance*, 556 U.S. 111 (2009) (reversing Ninth Circuit's grant of habeas relief where it was not unreasonable for state court to conclude defense counsel's performance was not deficient); *Rice* v. *Collins*, 546 U.S. 333, 337-38 (2006) ("Though it recited the proper standard of review, the panel majority

(continued…)

1. The Ninth Circuit's reformulation of the applicable standard of review, and its ensuing analysis, is irreconcilable with AEDPA's "demand[] that state-court decisions be given the benefit of the doubt." *Felkner* v. *Jackson*, 131 S. Ct. at 1307, quoting *Renico* v. *Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks omitted). Under AEDPA, a "federal habeas court cannot issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly." *Yarborough* v. *Alvarado*, 541 U.S. at 665, quoting *Woodford* v. *Visciotti*, 537 U.S. at 24-25. "For purposes of § 2254(d)(1), 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Richter*, 131 S. Ct. at 786, quoting *Williams* v. *Taylor*, 529 U.S. 362, 410 (2000).

(…continued)
improperly substituted its evaluation of the record for that of the state trial court."); *Carey* v. *Musladin*, 549 U.S. 70 (2006) (Ninth Circuit improperly found state court decision was contrary to or an unreasonable application of federal law); *Brown* v. *Payton*, 544 U.S. 133 (2005) (same); *Kane* v. *Garcia Espitia*, 546 U.S. 9 (2005) (same); *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004) (where facts in record supported alternative conclusions that defendant was, and was not, in custody at time of interview, fairminded jurists could disagree, so Ninth Circuit erred in granting relief); *Middleton* v. *McNeil*, 541 U.S. 433 (2004) (reversing Ninth Circuit grant of habeas relief for failing to defer to state court); *Yarborough* v. *Gentry*, 540 U.S. 1 (2003) (*per curiam*) (reversing Ninth Circuit's habeas grant because it gave too little deference to state court); *Lockyer* v. *Andrade*, 538 U.S. 63 (2003) (same); *Early* v. *Packer*, 537 U.S. 3 (2002) (*per curiam*) (reversing grant of habeas relief where Ninth Circuit mistakenly determined state court decision was contrary to clearly established federal law); *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (*per curiam*) (Ninth Circuit grant of habeas relief erroneous because state court decision was not objectively unreasonable).

Under § 2254(d), "a habeas court must determine what arguments or theories supported . . . the state court's decision," and then it must ask "whether fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court," *Richter*, 131 S. Ct. at 786. This is "the only question that matters." *Lockyer* v. *Andrade*, 538 U.S. at 71. If there is support in the state court record for divergent conclusions about how a legal claim should be resolved, fairminded jurists could disagree, and as long as the "state court's application of our law fits within the matrix of [this Court's] prior decisions," federal habeas relief cannot be granted under AEDPA by conducting an independent inquiry into whether the state court was correct as a de novo matter. *Yarborough* v. *Alvarado*, 541 U.S. at 664-66; see also *Richter*, 131 S. Ct. at 786. In other words, so long as disagreement *can* exist, habeas relief must be denied even if the federal habeas court disagrees with the state court decision and considers it to be incorrect. *Richter*, 131 S. Ct. at 786.

The § 2254(d) standard logically presupposes multiple reasonable views of how clearly established Federal law can be applied. A federal habeas court must, accordingly, determine not just whether a state court's application of clearly established Federal law was *a* reasonable, or even *the most* reasonable, one, but rather, whether it was one as to which fairminded jurists could disagree. *Richter*, 131 S. Ct. at 786; see *Lambrix* v. *Singletary*, 520 U.S. at 536, 538. Under the objective-reasonableness standard of § 2254(d), habeas relief may be granted only when there is *no* possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Richter*, 131 S. Ct. at 786.

"Though it recited the proper standard of review" under § 2254(d) early in its opinion, App. A 5a-7a, the Ninth Circuit erroneously set aside the state court's reasonable conclusion about the probative value of the dog-scent evidence, which was factually supported by the dog-handler's testimony, in favor of its own view of the evidence. See *Rice* v. *Collins*, 546 U.S. at 335, 342. As it made clear, it endeavored to make a different determination: "what a reasonable state court would have decided" in this case. App. A 31a.[4] But asking merely "what a reasonable state court would have" done, as the panel did in this case, fails to address the essential § 2254(d) question: whether there was *any* possibility fairminded jurists could disagree that the state court decision here reasonably applied *Brady*.

2. And, indeed, its ensuing review was devoid of deference to the state court decision. First, nothing in the panel's analysis of the evidence reflected, in explicit words or in substance, any mention or mindfulness of the pertinent question: whether fairminded jurists might reasonably differ in their assessment of *Brady* materiality. To the contrary, at the beginning of its opinion—and before any mention of § 2254(d) or deference—the panel had expressed its own view that "the evidence against [respondent] was weak" and that "evidence suggesting Osuna was the killer was substantial." App. A 4a, 5a. The panel's tendentious and one-sided discussion of the

[4] A similarly incorrect formulation was articulated recently in another published Ninth Circuit decision, in which the court explained that "[w]hen we reverse a state court's habeas decision, we are surely not saying that all the state court justices whom we are reversing are not fairminded jurists, but rather that objectively the answer is one that a fairminded jurist should reach." *Dow* v. *Virga*, 729 F.3d 1041, ____, n.8 (9th Cir. 2013).

evidence was underscored by the oddity that it launched its recitation of the facts of the case with a detailed description of the defense theory that Osuna was the shooter. App. A 8a-13a. But in its detailed discussion, the panel omitted *any* reference to evidence that Osuna had an alibi, misstated important evidence relating to that alibi, and failed to address significant facts undermining the defense witnesses' credibility. App. A 8a-13a; RT 2452-55, 2461-62; see page 6, *supra*.

In stark contrast was its close scrutiny of the evidence of respondent's guilt. There, the panel baldly stated that the dog-scent identification evidence was the "only evidence" tying respondent to the Volkswagen. App. A 4a. Had it reviewed the record to determine how a fairminded jurist *could* have construed the facts, however, the panel would have had to account for the evidence that the car belonged to respondent's fellow gang member, that respondent's girlfriend had ridden in it many times, and that at least one witness, Hoefer, had seen a man she later identified from a photograph as respondent get out of the Volkswagen with a gun at the time of the shooting. App. D 49a, 56a, 75a n.12.

Similarly, the panel gave credence to the testimony of witnesses who provided police with height estimates of 5'6" or less, while dismissing that of one witness whose 5'9" to 5'10" estimate was described as "several inches shorter" than respondent, and minimizing the testimony of witnesses who, during trial, described the shooter as tall or estimated his height as 5'9" to 5'10. *Id.*; App. D 74a-75a & n.12, 78a-81a; App. F 106a-08a.

The panel's non-deferential "de novo" approach extended to its account of the prosecutor's closing argument. The court of appeals asserted that the state courts could not reasonably have concluded that

any *Brady* violation was harmless because the prosecutor had relied on the scent evidence in his summation. (App. A 32a-33a.) In fact, the prosecutor did not even mention the scent evidence in his initial summation.

After the defense presented its argument that the prosecution had pursued the wrong suspect, and that the scent evidence did not prove that respondent was in the Volkswagen on the day of the murder, the prosecutor responded by attacking the credibility of the main defense witnesses (Saiz and a defense expert on misidentification) and by emphasizing the common-sense credibility of the four eyewitnesses in the case. He argued that the eyewitnesses' testimony was corroborated by the number of independent witnesses; by the implausibility of the defense's contrary contentions; by the correlation between the beginning of the incident and the location of respondent's apartment—and, to be sure, by the scent evidence connecting respondent and the car used in the crime. App. H. But, contrary to the Ninth Circuit's view, the prosecutor did not emphasize the dog-scent evidence in the manner portrayed by the panel.

The prosecutor's summation provided no compelling reason to reject, as unreasonable, the state court's (and district court's) conclusions that the undisclosed evidence was immaterial under *Brady*. This is especially so in view of the facts that the dog-scent evidence did not prove respondent was in the car on the date of the murder, and that, even had Reilly's past mistakes come to light, all they would have shown was that he had a success rate of more than 99 percent.

The panel's de novo view of the record, undertaken in an earlier part of its opinion, apparently served as the basis for, and thus infected,

its later answer to its irrelevant inquiry into how a reasonable court "would have" resolved the *Brady* claim. In fact, the Ninth Circuit never addressed the state-court and district-court conclusions that the dog-scent identification evidence was immaterial under *Brady* because it established, at best, only an "irrelevant fact" that respondent had been in the Volkswagen sometime after the shooting. See App. D 98a. Nowhere in its discussion did the court evaluate whether the state court's finding that the undisclosed evidence was not material under *Brady* was a reasonable finding, or explain why it might not be. The panel did not advert to the possibility that there was *any* reasonable way to analyze the *Brady* claim other than its own. Instead, it in effect concluded merely that its own view of the case was reasonable and that a state court therefore *would have* reached the same conclusion it did. That is, it did not even discuss, much less decide, whether fairminded jurists could disagree about whether the state court ruling was correct. The panel simply and "improperly substituted its evaluation of the record for that of the state [] court." *Collins*, 546 U.S. at 337-38.

B. Proper Deferential Review under § 2254(d) Precludes Relief in this Case.

Had the Ninth Circuit adhered to AEDPA's deferential standard of review, it could not have granted relief.

1. The clearly established federal law for AEDPA purposes in this case is that of *Brady* v. *Maryland*, 373 U.S. 83. Under *Brady*, due process is violated where evidence favorable to the accused is suppressed by the State, and there is a "reasonable probability" that the suppression affected the result. *Strickler* v. *Greene*, 527 U.S. 263, 281-82 (1999). A

reasonable *possibility* of a different result is not enough; a defendant's burden is to establish a reasonable *probability* of a different result, by showing that the undisclosed evidence undermined confidence in the outcome of the trial. *Id.* at 291; *Kyles* v. *Whitely*, 514 U.S. 419, 434 (1995). Thus, no *Brady* violation occurs "unless the suppressed evidence was "material," i.e., unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.*

The dispositive question properly addressed by the state court to resolve respondent's *Brady* claim was whether the allegedly undisclosed evidence—that Reilly had previously made two mistakes—was "material" in the special *Brady* sense of the term. App. D 97a-98a: App. F 118a. In the federal habeas court, the determinative question was different. As already explained, the state court's resolution of that issue was entitled to "deference and latitude" and could not be set aside "so long as 'fairminded jurists could disagree on the correctness of the state court's decision.'" *Richter*, 131 S. Ct. at 785-86 (quoting *Yarborough* v. *Alvarado*, 541 U.S. at 664). Moreover, evaluating the reasonableness of the state court's application of a rule also depends on the rule's specificity: "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* at 786. As *Brady* is a rule of general application, see *United States* v. *Bagley*, 473 U.S. 667, 682-83 (1985), "a wide range of reasonable applications exist" *Cobb* v. *Thaler*, 682 F.3d 364, 381 (5th Cir. 2012).

2. Especially under such a general standard, ample grounds support the conclusion that the state court's ruling was not "objectively unreasonable." To begin with, the dog-scent issue was a relatively minor

one in the trial. As the state court found and the federal district court affirmed, the probative value of the dog-scent evidence in this case was "highly dubious." It was relevant only to prove a tangential issue: that respondent had been in the white Volkswagen at some point *after* the murder. Had the dog scent evidence not been presented at all, or had it been impeached with evidence of the dog's errors, the jury would have had grounds to question only this tangential fact. In any event—despite the panel's assertion to the contrary—the scent evidence was hardly the only evidence connecting respondent to the Volkswagen.[5] For these reasons, the state court reasonably could find, as it did, that the failure to disclose the dog's two mistakes did not undermine confidence in the result of the trial. App. D 97a-99a; App. F 117a-18a.

In addition, it would not have been unreasonable for the state court to minimize the potential effect of the non-disclosed evidence, that Reilly had made two mistakes in the past, because of a lack of any context in which to gauge how seriously the mistakes might have affected the dog's reliability in the eyes of the jury. Respondent sought to support his *Brady* claim by citing two isolated mistakes by Reilly. But the background related in *People* v. *Mitchell*, 110 Cal. App. 4th 772, and made known to the state court in respondent's case, called into serious question the significance of any such

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[5] The owner of the car, Ballesteros, was Respondent's fellow gang member and was obviously acquainted with Respondent's girlfriend, as she had been in his car many times. RT 644, 648, 1263, 1265, 1279, 1708. App. D 5, 11. And at least one eyewitness, Hoefer, identified his photograph as the person she saw emerge from the Volkswagen with a gun. App. D at 29 n.12.

mistakes in a vacuum. The *Mitchell* decision disclosed evidence that Reilly had made no mistakes in more than 100 post-certification lineups. Thus, even the existence of the one post-certification mistake identified by respondent still would not have detracted from the conclusion that Reilly had a post-certification success rate higher than 99 percent. The state court's conclusion that the dog-scent mistakes were not "material" under *Brady* in respondent's case was therefore at least reasonable because, as *Mitchell* illustrated, they were insufficient *in isolation* to show that the defense could have appreciably undermined Reilly's reliability.

Finally, multiple witnesses saw respondent at the scene of the murder. Four witnesses identified him, either from a photograph or in court, or both. One of those four was absolutely certain of his identification. And at least three other witnesses gave descriptions of the shooter that were, in whole or in part, consistent with respondent's appearance.

In light of all this evidence, the state court's rejection of respondent's *Brady* claim cannot be condemned as "objectively unreasonable." The state court easily could have determined that respondent had failed to show a reasonable "probability," and not just a "possibility," of a different result. See *Strickler* v. *Greene*, 527 U.S. at 291.

3. As articulated by one recent dissenting Ninth Circuit Judge, "Were the full feast of direct review spread before us, we would be free to gnaw away at the trial court's *Brady* ruling. [Citation.] However, the Supreme Court has told this Circuit specifically, emphatically, and in no uncertain terms, to curb our appetite when it comes to habeas review." *Amado v. Gonzalez*, No. 11-56420, 2013 U.S. App. LEXIS 22088, at *51, (9th Cir. Oct. 30, 2013)

(Rawlinson, J. dissenting), citing *Richter*, 131 S. Ct. at 785-86. Having failed to curb its appetite in this case, the Ninth Circuit's decision granting habeas relief should be reversed.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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