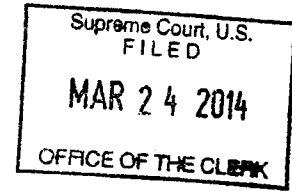


No. 13-677



IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY BEARD, SECRETARY,
CALIFORNIA DEPARTMENT OF CORRECTIONS
AND REHABILITATION,

Petitioner,

v.

GILBERT R. AGUILAR,

Respondent.

BRIEF IN OPPOSITION

Neil Rosenbaum
247 Hartford Street
San Francisco, California 94114
Telephone: (415) 626-4111
FAX no. : (415) 626-5432
Counsel for Respondent

QUESTION PRESENTED

In a case where the prosecution relied on and repeatedly emphasized a dog's alleged scent identification of the defendant to corroborate eyewitness identification evidence the jury found problematic, all the while concealing the dog's history of mistaken identifications, did the Court of Appeals correctly conclude that the state court's rejection of defendant's *Brady* claim resulted in an objectively unreasonable application of clearly established federal law where the state court overlooked, ignored, and misconstrued essential facts in deciding whether the undisclosed evidence was material?

TABLE OF CONTENTS

Opinions and Judgment Below	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	3
Reasons for Denying the Petition	16
The Court of Appeals complied with the deferential standard of section 2254(d)(1) in concluding that the state court's decision was objectively unreasonable	16
A. The essential facts	17
B. Materiality	19
C. The Court of Appeals correctly concluded that the state court's decision was an objectively unreasonable application of <i>Brady</i>	20
D. The Court of Appeals complied with section 2254(d)(1)	25
Conclusion	27

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Aguilar v. Woodford</i> 725 F.3d 979 (9 th Cir. 2013)	1, 20, 24
<i>Brady v. Maryland</i> 373 U.S. 83 (1963)	12, 13, 14, 15, 17, passim.
<i>Brecht v. Abrahamson</i> 507 U.S. 619 (1993)	16
<i>Browning v. Trammell</i> 717 F.3d 1092 (10 th Cir. 2013)	26
<i>Bruton v. United States</i> 391 U.S. 123 (1968)	26
<i>Crawford v. Washington</i> 541 U.S. 36 (2004)	23, 26
<i>Eley v. Erickson</i> 712 F.3d 837 (3d Cir. 2013)	26
<i>Harrington v. Richter</i> 131 S.Ct. 770 (2011)	16, 27
<i>Jackson v. Virginia</i> 443 U.S. 307 (1979)	26
<i>Jones v. Basinger</i> 635 F.3d 1030 (7 th Cir. 2011)	23, 26
<i>Kyles v. Whitley</i> 514 U.S. 419 (1995)	19
<i>Lockyer v. Andrade</i> 538 U.S. 63 (2003)	16

TABLE OF AUTHORITIES (continued)

<u>Cases</u>	<u>Page</u>
<i>O'Laughlin v. O'Brien</i> 568 F.3d 287 (1 st Cir. 2009)	25
<i>People v. White</i> Los Angeles Sup. Ct., no. BA212658 (2002)	6, 12, 13, 14, 18, passim.
<i>Smith v. Cain</i> 132 S. Ct. 627 (2012)	19
<i>United States v. Bagley</i> 473 U.S. 667, 676 (1985)	19
<i>Williams v. Taylor</i> 529 U.S. 362 (2000)	25
 <u>Statutes</u>	
28 U.S.C. § 1254	1
28 U.S.C. § 2254(d)	1, 13, 14, 16, 25, passim.

OPINIONS AND JUDGMENT BELOW

The opinion of the Court of Appeals is reported at 725 F.3d 930 (9th Cir. 2013).

The judgment of the district court and the report and recommendation of the magistrate judge are not reported.

The opinion of the California Court of Appeal affirming the judgment against respondent, Gilbert Aguilar, and denying his state habeas corpus petition are unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 2013.

On September 3, 2013, the Court of Appeals denied the state's petition for rehearing and rehearing en banc.

The state timely filed a petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

In pertinent part, 28 U.S.C. section 2254 provides:

“(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

Trial court record

On July 25, 2001, John Guerrero and four friends were riding in his red Mitsubishi, in the Los Angeles suburb of La Puente. On Amar Road, they saw a group of young Hispanic people standing near a white Volkswagen Beetle. Part of the group ran toward them as they drove past. A few minutes later, Guerrero turned around and drove back along Amar Road. As he passed the group again, they yelled at him and “threw” gang hand-signs. RT 660, 671-680, 709-718.¹

A few blocks away, he stopped at a red light. In a KFC parking lot across the street, someone got out of a white Volkswagen Beetle, approached Guerrero’s car, reached through the passenger window, and fired seven bullets at Guerrero, killing him. None of Guerrero’s friends saw the gunman’s face. RT 681-688, 718-725.

Five bystanders saw the incident. Each gave the police a description of the gunman.

Desiree Hoefer was in her car in the KFC lot when the Volkswagen pulled up behind her. She saw “a young [Hispanic] kid, a high school kid” emerge from the passenger side. He had a handgun. After he passed her car she lost sight of him. She heard gunshots. Moments later the kid returned and got back into the Volkswagen. She saw his face for only a one second. RT 737-748, 764, 771. She told the police the kid

¹ “CT” and “RT” refer, respectively, to the clerk’s and reporter’s transcripts of Aguilar’s October 2002 trial in the Los Angeles County Superior Court .

was about 5'4". A month later, she said he was even shorter: 5'2" or 5'3". RT 768, 770.

Victor and Laura Jara were four cars behind Guerrero. After the gunman shot Guerrero, he jogged toward the Jaras, then ran into the KFC lot. Victor told the police the kid was "real young, 15-17," and about 5'5". Laura also said he was "very young," 15-17. RT 793-798, 807-810, 823, 925-930, 941.

Rene Valles heard gunshots as she approached the intersection. The gunman sprinted in front of her car and into the KFC lot. She saw his face for "just a second." "My main concern and focus," she said, "was the gun in his hand." RT 1236-1238, 1241, 1246, 1252.

Kevin Feeney was pumping gas across the street from the KFC when he heard the shots. The gunman was 120 feet away by then, running back to the Volkswagen. Immediately after the shooting, a police officer interviewed Feeney and the Jaras and reported that the gunman was described as 5'5". At trial, 16 months later, Feeney said the gunman was "tall." RT 903-908, 916-918.

With the help of Hoefer and the Jaras, a police artist drew a sketch of the gunman's face. A probation officer thought the sketch resembled Aguilar. The police put his photo in a "six pack" and showed it to the eyewitnesses. RT 1259-1262, 1273-1277, 1305-1306, 1588-1600. Laura Jara thought he looked a lot like the gunman. Victor was sure it was him, even though the gunman was 5'5" or 5'6" and Aguilar is 6'0". RT 803, 811, 932, 990.

Rene Valles did not identify Aguilar in the photo spread, but did at trial, explaining that the photograph didn't show his profile. RT 1241-1243.

Desiree Hoefer picked Aguilar's photo from the spread, but told the police she wasn't sure he was the gunman. She picked his photo because it bore the closest resemblance to the composite sketch. RT 774-775, 779. Although she initially told the police the gunman was 5'4", and then said he was 5'2" or 5'3", at trial she said he was 5'8" or 5'10". RT 756. The court had Aguilar stand in front of her. She told the jury the gunman was shorter than Aguilar. RT 787-788, 791.

Robert Shomer, the defense expert on eyewitness identification, explained why such identifications are often unreliable. An eyewitness's certainty about an identification does not correlate with accuracy. RT 2191-2192. When eyewitnesses fear for their lives – as when a stranger with a gun approaches – their ability to remember details is severely compromised. No matter what they believe, they are more likely to focus on the gun than the gunman's face. RT 1252, 2194-2195, 2226, 2445-2447. Perceptions of height, however, are more accurate. Height estimates may be off by an inch or two, but people know short from tall. It would be "extremely unusual" if the gunman turned out to be much taller than the witnesses' estimates. RT 2196-2197.

Police recovered six Winchester .25 caliber shells from the crime scene, all fired by the murder weapon. RT 1012, 1024-1026. They searched the apartment Aguilar shared with his girlfriend, Mary Saiz, and his father, and found one .25 caliber bullet, a Reming-

ton, in the father's closet. It had been "cycled through" someone's gun, but the markings on it were different from those on the murder weapon shells. That weapon was never found. RT 1036-1040

The police located and impounded the Volkswagen two weeks after the murder. It belonged to Rico Ballesteros, a member of the same Puente street gang Aguilar belonged to. Aguilar was arrested a month later. RT 645, 990, 1258, 1262-1263, 1279.

Dog scent identification.

To corroborate the eyewitness identifications, the state presented evidence that Reilly, a "human scent discrimination" dog, identified Aguilar's scent on the Volkswagen passenger seat. On September 4, 2001, a sheriff's investigator used a Dust-Buster to transfer scent from the car seat to a gauze pad. Someone else prepared four gauze scent pads from Aguilar's clothes and clothes from three unidentified people. RT 1300, 1302. After smelling the car seat pad, Reilly sniffed *three* of the four clothes pads. At the third one, he signaled a match to Aguilar's clothes. RT 1280-1283, 1297-1302. He did not sniff the fourth pad. According to his handler, Joseph D'Allura, once Reilly signaled a match, "you don't give him an opportunity to alert on something else."² Everyone's scent is unique and attaches to everything he or his clothing touches, D'Allura said. The fact

² See Opposition Appendix I, pp. 5-6 [*People v. White*, Reporter's Transcript: March 19, 2002]. This transcript was part of the California Court of Appeal record in Aguilar's case..

that Reilly signaled a match showed that Aguilar had recently sat in the Volkswagen passenger seat. RT 1284-1293. The court told the jurors they could use that evidence in deciding whether the eyewitnesses' identification of Aguilar was correct.

The defense claimed the person who shot Guerrero was Richard "Gangster" Osuna, another Puente gang member who resembled Aguilar, but was four years younger, and much shorter.

The jury heard recordings of conversations Aguilar had with his girlfriend Mary Saiz while he was in jail. Aguilar told her he was in jail for a crime he didn't commit. She told him that Gangster's brother had been shot in a "drive-by" and was still in the hospital the day before Guerrero was killed. "Why wouldn't he want to shoot?" she said. CT 85-86; RT 1325-1327, 1335, 1367.³

Saiz told Aguilar she was prepared "to rat" on the person who killed Guerrero. RT 1340. She knew the names and addresses of the eyewitnesses, and had a copies of their police statements. Should she show the statements to people? No, Aguilar said, "there's no reason to show 'em. . . . they're gonna go do something and get me in trouble I ain't even done." RT 1340, 1365-1366.

³ Richard's brother Reyman said he didn't know who shot him. RT 1541. Reyman was discharged from the hospital a few hours before Guerrero was murdered. RT 2451-2452. The prosecution's gang investigator testified that retaliatory shootings were common in La Puente when someone in a gang member's family was believed to have been shot by a rival gang. Targeting only one of five people in a car, the investigator said, is consistent with a retaliatory shooting. RT 1277-1278.

At trial, Saiz testified that on the day of the murder she was standing with Aguilar, Ballesteros, Richard Osuna, and other people on Amar Road outside her house. A red car drove by. Osuna seemed to recognize the occupants: "There goes those 'vatos' that shot my brother," he said. "I'm going to get those fools." He and Ballesteros got into the Volkswagen and pursued them. Saiz and Aguilar went home. A few minutes later, Aguilar left the apartment to visit a friend. RT 1644-1651.

Alfred DeAnda did not belong to a gang. He and Aguilar had been schoolmates. He, too, saw "Gangster" get into Ballesteros's Volkswagen as it drove off. Aguilar did *not* go with them, DeAnda said; Aguilar stayed on the street with Saiz and their baby. RT 1559, 1565, 1574, 1584.

Saiz told the jury that Osuna came to her apartment that evening. DeAnda confirmed this. Osuna told Saiz he had just shot someone and needed to take a shower to get the gunpowder off him. RT 1571-1572, 1690, 1699.

Saiz told the public defender who initially represented Aguilar that she and Aguilar were together the entire evening on July 25th. She admitted that was not true, because at one point Aguilar left to visit a friend. Fearing he might expose her as a snitch and endanger her and her baby, she also didn't tell the public defender about Gangster. RT 1674-1679, 1715-1716.

Aguilar had never been in Ballesteros's Volkswagen, Saiz said. The prosecutor pressed her about the dog scent identification: if Aguilar "*never left in that vehicle with*

[Ballesteros],” how could his scent get on the passenger seat? Saiz explained that *she* had ridden in the Volkswagen, and that she sometimes wore Aguilar’s clothes, so his scent could have got onto the seat that way. When was the last time you sat in that car? the prosecutor asked. In March or April 2001, four months before Guerrero was shot, she said. RT 1848-1852.

Months before trial, Aguilar’s lawyer told the police that Richard Osuna’s brother had been shot by a rival gang, and said there was reason to believe Osuna shot Guerrero in retaliation. He asked the police to investigate. Osuna was already in custody for a crime he committed after Guerrero was killed, but the police never interviewed him or did anything to determine whether he was the gunman who shot Guerrero. RT 1353-1355.

Fingerprints were lifted from the Volkswagen. They were not Aguilar’s prints. The police never compared them to Osuna’s prints. ER 431. Nor did they interview Mary Saiz. RT 1375. Although the eyewitnesses all said the gunman was a short, high school age kid and the police knew that Osuna matched that description perfectly while Aguilar didn’t, they dismissed those facts. Indeed, even after learning about Osuna’s brother, they dismissed the possibility of a link between the attack on Reyman and Saiz’s statement that “Richard” may have retaliated by shooting Guerrero. RT 1378-1385, 1409-1410.

Steven Strong, a California Justice Department expert on street gangs and former L.A.P.D. gang detective, criticized the police for not interviewing Saiz and for refusing to investigate Osuna. If Strong had information that the crime was committed by a particu-

lar gang member who looked like the accused and who had a motive for retaliation, he would certainly have investigated it. When he was in the police department, he said, we always" investigated leads relating to possible third party guilt. RT 2115-2118.⁴

Strong corroborated Saiz's testimony about the dangers of "ratting" on a gang member. She was taking a great risk by doing that; it's "not done. . . . *You don't rat.*" RT 2104-2107, 2130, 2166.

The state called two rebuttal witnesses: the public defender who initially represented Aguilar; and Richard Osuna's father.

The public defender said Saiz told him she was with Aguilar at the time Guerrero was shot. She said she believed the killer was a juvenile who resembled Aguilar, but she wouldn't identify him by name. That was not surprising, the public defender said: witnesses in gang cases are usually afraid to rat. RT 2415, 2439.

Osuna's father said Richard was with him all afternoon on July 25, 2001. At about 4:00 p.m., they drove Richard's brother Reyman home from the hospital. RT 2452.

Guerrero was not shot until 7:00 p.m. or a little later. RT 793, 903, 925, 950.

The prosecutor said almost nothing about the evidence in his opening argument to the jury; he waited until his rebuttal argument before addressing it. RT 2514-2530, 2705-

⁴ The jury expressed concern about the state's failure to investigate Osuna. They asked the court whether "the fact that the D.A.'s office did not pursue the 'Richard Osuna' lead" was "something we should deliberate about?" The court replied that "except as it relates to a bias, interest or other motive to fabricate evidence," the investigator's or prosecutor's state of mind was not relevant to whether Aguilar was guilty. CT 137, 140; RT 3307, 3310.

In view of the dog scent identification, defense counsel found it necessary to concede to the jury that Aguilar sat in the Volkswagen, but argued that it was not on the day Guerrero was shot. RT 2574. In rebuttal, the prosecutor repeatedly emphasized the strength of the scent identification as corroboration of the eyewitnesses:

Dr. Shomer could not explain the presence of Aguilar's scent in "the vehicle that was responsible for following the victims to the murder location;"

If Richard Osuna killed Guerrero, what "an incredible coincidence" it was that "Aguilar's scent was in the passenger side of that Volkswagen;"

If Mary Saiz put Aguilar's scent on the car seat when she rode in the Volkswagen wearing Aguilar's clothes at least three months before July 25, 2001, the day Guerrero was shot, then to believe Richard Osuna was the gunman the jury had to believe that Aguilar's scent managed to overtake Osuna's "*on July 25th*" — or else believe that "these twins," Osuna and Aguilar, "not only look alike, but they *smell* alike." RT 2713, 2718-2719.

It took six days to present the evidence and arguments in the case. The jury deliberated for four days before returning a "guilty" verdict. During that time, they asked to rehear nearly all the testimony of eyewitnesses Hoefer, Feeney, and Valles, as well as the description of the gunman Victor Jara gave the police. They also asked whether to

⁵ The court overruled defense counsel's objection that by waiting until rebuttal before addressing the evidence the prosecutor was sandbagging him. RT 2530-2531.

consider the state's decision not to "pursue the Richard Osuna lead."

Aguilar was sentenced to prison for 50 years to life.

State appeal and habeas corpus petition

Aguilar filed a direct appeal and a habeas petition in the California Court of Appeal. The habeas petition alleged a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), based on the state's failure to disclose material exculpatory evidence that Reilly, the dog that allegedly identified his scent on the car seat, had made mistaken identifications in other cases. A few months before Aguilar's trial, the state stipulated to that fact at an evidentiary hearing in *People v. White, supra*, at the conclusion of which the court ruled Reilly's scent identification inadmissible, because of the dog's history of mistaken identifications and because of the many serious defects in the scent identification procedures employed by the Los Angeles Police and Sheriff's Departments. Opposition Appendix I, pp. 4-20.

Immediately after the ruling in *White*, the Los Angeles Public Defender wrote to the Los Angeles District Attorney and asked that the information about Reilly's mistaken identifications and other matters that led the *White* court to rule the scent identification evidence inadmissible be disclosed in all cases involving Reilly. It was not disclosed in Aguilar's case. Opposition Appendix J.

The state appellate court denied Aguilar's habeas petition on the sole ground that, since it did not prove that Aguilar sat in the Volkswagen on the day Guerrero was

murdered, the scent identification was “of questionable probity,” so the evidence of Reilly’s erroneous identifications in other cases was not material for *Brady* purposes.⁶ The court also denied Aguilar’s direct appeal. Petition Appendix F.

The California Supreme Court denied discretionary review. Petition Appendix E.

Federal habeas proceedings

Aguilar petitioned the federal district court for habeas corpus relief. 28 U.S.C. § 2254. The magistrate judge recommended the petition be denied. Petition Appendix D. The district court adopted the magistrate judge’s report and recommendation, and denied the petition. Petition Appendix C.

The Ninth Circuit Court of Appeals issued a certificate of appealability on Aguilar’s *Brady* claim and another issue.⁷ Without reaching the other issue, the Court of Appeals reversed the district court’s judgment and granted Aguilar’s petition on the *Brady* claim on the ground that the state court’s decision involved an unreasonable

⁶ The state says there was no indication that Reilly made any mistakes in an actual lineup after he was certified. Petition, p. 9. That is not true. The state admitted that Reilly made an erroneous identification in April 2001, a few months before he allegedly identified Aguilar’s scent. And the fact that the parties in *White* stipulated only to two false identification cases is hardly proof that Reilly was correct in every other scent lineup. In his letter to the District Attorney about the ruling in *White* that Reilly’s scent identification was inadmissible, the L.A. Public Defender explained that his office could not obtain enough information to investigate more than a few of Reilly’s cases. He asked the District Attorney to “order an investigation into all cases in which Reilly has participated in scent lineups” to determine whether Reilly “has made other mistakes.” Opposition Appendix J.

⁷ I.e., whether the denial of Aguilar’s new trial motion based on newly discovered evidence violated his right to present a complete defense.

application of *Brady*. The Court of Appeals noted that the identity of the gunman was the only issue at trial, and that Aguilar's defense was that the gunman was Richard Osuna. Substantial evidence supported that defense, the court said, including the facts that the eyewitness descriptions matched Osuna more closely than Aguilar, that Osuna had a motive and Aguilar did not, that two witnesses saw Osuna in the getaway car as it set off after the victim, and that one witness (Saiz) testified that shortly after the murder Osuna told her he had just shot someone. At trial, some of the eyewitnesses identified Aguilar as the shooter, but their testimony was questionable. The description of the shooter they gave the police did not match Aguilar; at trial, they changed the description to match him. To corroborate the eyewitness identification of Aguilar, the state relied on evidence that Reilly identified Aguilar's scent in the Volkswagen getaway car. The state never disclosed the evidence that Reilly had made erroneous scent identifications in other cases, even though the state stipulated to that fact in another case, *People v. White*, a few months earlier, and in that case the court ruled that Reilly's scent identification was inadmissible and excluded it. As noted, based entirely on its view that the scent identification was "of questionable probity" in this case, the state appellate court decided that the undisclosed evidence was not material, so the failure to disclose that evidence was not a *Brady* violation. After carefully reviewing the state court record, and applying the "highly deferential standard" required by section 2254(d), the Court of Appeals concluded that the state court had overlooked, ignored, or misconstrued facts that were essential to a

reasonable determination of materiality under *Brady*, and its decision involved an objectively unreasonable application of clearly established federal law. Contrary to the state's claim, the Court of Appeals did not review the case de novo and replace the state court's decision with its own.

REASONS FOR DENYING THE PETITION

THE COURT OF APPEALS COMPLIED WITH THE DEFERENTIAL STANDARD OF SECTION 2254(d)(1) IN CONCLUDING THAT THE STATE COURT'S DECISION WAS OBJECTIVELY UNREASONABLE

The state claims that the Court of Appeals, though well aware of AEDPA's highly deferential standard of review, Petition Appendix A, p. 6a, ignored the law, and treated the question as a test of its own confidence in the result it would reach under de novo review.

That is not true. The Court of Appeals's opinion shows it clearly understood that "the only question that matters under section 2254(d)(1)" is whether a state court decision is contrary to or involved an objectively unreasonable application of clearly established federal law. 725 F.3d at 972, citing *Lockyer v. Andrade*, 538 U.S. 63, 71, 75 (2003). See also *Harrington v. Richter*, 131 S.Ct. 770, 785 (2011) ["The pivotal question" under section 2254(d)(1) is whether the state court's application of clearly established federal law was unreasonable.] The Court of Appeals also understood that habeas relief may not be granted unless the constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." 725 F.3d at 972, citing *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993).

The Court of Appeals carefully reviewed the entire state court record in this case, examined the sole ground on which the state court based its decision that the undisclosed evidence was not material, and concluded that that decision was an objectively unreason-

able application of *Brady*, because the state court overlooked, ignored, or misconstrued facts that were essential in evaluating Aguilar's claim. There is no merit to the state's contention that the Court of Appeals disregarded AEDPA's deferential standard.

A. The essential facts

- Five eyewitnesses saw the person who shot Guerrero. Immediately after the shooting, they described the gunman as a young kid, 15-17 years old, and short, between 5'4" and 5'6". Two weeks later, one eyewitness said the gunman looked even shorter than 5'4".
- Richard Osuna was 16 years old and 5'6". Aguilar was nearly 21 and 6'0" tall.
- The gunman specifically targeted Guerrero. He didn't fire at any of the other four people in the car.
- The state offered no clear motive why Aguilar would shoot Guerrero; he and Guerrero had no connection to each other. There was evidence that Richard Osuna did have a motive: a few days earlier Osuna's brother was seriously wounded in a drive-by shooting.
- The police and district attorney were asked to investigate information that Osuna killed Guerrero, including reports that witnesses saw Osuna in the Volkswagen when it pursued Guerrero, and a report that Osuna had admitted shooting someone. The police and district attorney did nothing to investigate Osuna.
- Aguilar consistently denied shooting Guerrero. He didn't incriminate himself in any way, and there was no physical evidence linking him to the murder. The fingerprints lifted from the Volkswagen were someone else's.
- At trial, the eyewitnesses changed their descriptions of the gunman and said he was substantially taller than they had reported to the police a year and half earlier.
- None of the eyewitnesses was ever shown a photograph of Osuna.

- The *jurors* were shown Osuna's photograph. They were also shown the sketch a police artist drew based on the eyewitnesses' descriptions of the gunman. After comparing Osuna's photo to the sketch, the jury expressed concern about the state's failure to investigate Osuna.
- The only evidence presented to corroborate the eyewitness identification of Aguilar was testimony that police dog Reilly identified his scent on the Volkswagen passenger seat. The state relied heavily on the scent identification to prove that Aguilar was the person who killed Guerrero. The prosecutor argued that the scent identification made the case against Aguilar "*miraculously strong*."
- The trial court specifically instructed the jury that the purpose of the scent identification was to show that Aguilar was the murderer.
- Apart from the scent identification, there was no evidence that Aguilar had ever been in the Volkswagen.
- The scent identification effectively forced defense counsel to make a strategic concession that Aguilar sat in the Volkswagen at some time.
- Neither defense counsel nor the trial court knew about Reilly's mistaken identifications in other cases. The prosecution unlawfully concealed that fact, even though it had stipulated to it in the *White* case only a few months before Aguilar's trial. Following that stipulation, the *White* court ruled Reilly's scent identification inadmissible.
- On any fairminded view, this was a close case. Evidence and arguments took only six days, yet it took the jurors four days to reach a verdict, and during that time they asked to rehear most of the eyewitness testimony and voiced concern about the state's failure to investigate Osuna. Even accounting for replacement of jurors by alternates, it seems clear the jury had difficulty reaching a verdict.

No fairminded jurist could possibly have ignored these facts in deciding whether the undisclosed evidence of Reilly's mistaken identifications was material under *Brady*.

The California Court of Appeal ignored them.

B. Materiality

Evidence is material under *Brady* if it creates a reasonable probability of a different result. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). A reasonable probability does not mean the defendant must show it is more likely than not he would have been acquitted had the evidence been disclosed; it means only that the likelihood of a different result is sufficient to undermine confidence in the outcome of the trial. *Ibid.* [*Brady* violation occurs when the undisclosed evidence “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict”]; *Smith v. Cain*, 132 S. Ct. 627, 630 (2012). Undisclosed exculpatory evidence is not material only when the case against the defendant was so strong that there is no reasonable probability the verdict would have been different even if that evidence had come to light. And for these purposes there is no distinction between exculpatory evidence and impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

The state court decided the undisclosed evidence was not material in Aguilar’s case. It based that decision on only one ground: that the only inference Reilly’s scent identification truly supported was that Aguilar was a passenger in the Volkswagen at some time, though not necessarily the day of the murder, so the scent identification had little probative value and was of little importance to the prosecution case. The state court saw no reasonable probability that the verdict would have been different even if the prosecution had disclosed the facts that led the *White* court to rule Reilly’s scent

identification inadmissible and Aguilar's counsel moved to exclude Reilly's scent identification in this case for the same reasons.

C. The Court of Appeals correctly concluded that the state court's decision was an objectively unreasonable application of *Brady*

An application of clearly established federal law is objectively unreasonable when the state court overlooks or ignores facts that must be considered in resolving the defendant's constitutional claim. It is also objectively unreasonable when it is based on mistakes of law or fact. Here, the state court's application of *Brady* was objectively unreasonable for both reasons.

The court's most serious error was its utter failure to consider – or its complete misunderstanding of – the role the scent identification evidence actually played in this case. The court dismissed the evidence as having only “questionable probity,” but that certainly was not the prosecution's view. The Court of Appeals accurately noted that the prosecution “emphasized the importance of the dog scent identification throughout trial.” 735 F.3d at 984. The prosecutor repeatedly exhorted the jury to see that evidence as proof that the eyewitnesses who identified Aguilar as the Volkswagen passenger, i.e., the murderer, were correct. He emphasized that point over and over in questioning witnesses and in closing argument:

Prosecutor to Mary Saiz: “Can you explain any reason why we were able to obtain Mr. Aguilar's scent from the passenger side of Rico [Ballesteros]'s vehicle *if Mr. Aguilar never left in that vehicle with Rico?*” RT 1848.

Prosecutor to defense investigator Steven Strong: "A scent sample obtained from [Aguilar's] clothing was compared to a scent sample taken from the vehicle *from which the gunman arose moments prior to the shooting. The same vehicle that the gunman reentered after the shooting in order to escape the scene. That same seat that the shooter sat in matched the scent from Mr. Aguilar's clothing coupled with four independent eyewitnesses that he is, in fact, the shooter. In your opinion, doesn't that case become miraculously strong?*" RT 2141.

Prosecutor to defense expert Robert Shomer: "Mr. Aguilar was allegedly identified as being the front passenger of this Volkswagen coming right out of the passenger side to do the shooting. *It just so happens that the scent that was collected from the front passenger seat of this Volkswagen happened to be connected to scent evidence collected from Mr. Aguilar's clothing. . . .* Now, the fact that the suspect vehicle, the Volkswagen which was seen by Ms. Hoefer behind her vehicle – *the front passenger seat from which the gunman exited – contained the same scent, tying Mr. Aguilar to being inside that passenger seat at some point in time. Doesn't that evidence in and of itself support the accuracy of the eyewitness identification evidence that each of these four independent witnesses are claiming to be accurate?*" RT 2255-2256.

Prosecutor's closing argument:

"Mr. Shomer cannot explain why *Gilbert Aguilar's scent was in the same particular vehicle that was responsible for following the victim to the murder location.*"

Petition Appendix H, p. 133a

"What is an incredible coincidence in this case? *If we were again to assume the defense case as being true, that Mr. Osuna is, in fact, the shooter in this case? Well, we would be accepting an incredible coincidence that Mr. Aguilar's scent was in the passenger side of that Volkswagen.*

“How did it get there if Mr. Aguilar, according to Mary Saiz, never rode in that vehicle before? Of course, she came up with an excuse – or an explanation, let’s say, that Mr. – that she was wearing Mr. Aguilar’s clothes on some prior occasion and, therefore, any scent that was on those clothes she accidentally transferred to this Volkswagen.

“Well, the bottom line is, if we were to accept that as being gospel, if we were to accept that as being truthful, then we’re accepting *another incredible coincidence*. That the actual shooter, *Richard Osuna*, the person responsible for this crime – *his scent just so happened to have evaporated from that [seat] because of what Mary did. Wearing Aguilar’s clothing on some prior occasion before the murder ever occurred.*⁸

“So how that scent managed to overtake Richard Osuna’s scent *on July 25th* remains a mystery. But, nonetheless, *that’s the bill of goods that you’re being asked to accept.*

“The other explanation, I guess, is it a reasonable interpretation? Probably not. *The other explanation is that these two twins also not only look alike, but they smell alike. So we not only have a look-alike guy, we have a smell-alike guy as well – that being Richard Osuna and Gilbert Aguilar.*”

Petition Appendix H, p. 139a-141a

“And just remember, if you do acquit Mr. Aguilar, what version of the facts you’re really accepting. *You’re accepting all the coincidences that his identical twin and smell-alike person is the one who is really responsible.*”

Petition Appendix H, p. 159a

The trial judge understood exactly how the scent identification evidence was used and why it was so important to the prosecution case. He instructed the jury that

⁸ Saiz said the last time she sat in the Volkswagen was four months before the murder. RT 1851-1852.

“Evidence of dog tracking has been received for the purpose of showing, if it does, *that the defendant is a perpetrator of the crime of murder.*” RT 2495.⁹ The scent identification served no other conceivable purpose. The state appellate court simply overlooked or ignored the crucial importance of the scent identification in this case as corroboration of the eyewitnesses.

The Court of Appeals concluded that overlooking or ignoring that fact made the state court’s decision unreasonable. The Seventh Circuit reached the same conclusion in *Jones v. Basinger*, 635 F.3d 1030 (7th Cir. 2011), where the trial court let the jury use an informer’s hearsay statements as substantive evidence of the defendant’s guilt, even though the statements were supposedly not admitted for their truth. Because the state appellate court failed to consider how the evidence was actually used, its decision affirming the defendant’s conviction involved an objectively unreasonable application of *Crawford v. Washington*, 541 U.S. 36 (2004).

Here, the state court also disregarded the judge’s instruction that, in determining the weight to give Reilly’s scent identification, the jury should consider his “training, proficiency, experience, and proven ability.” RT 2495. In light of that instruction, no fairminded jurist could possibly disagree with the Court of Appeals that Reilly’s history of mistaken identifications, and the other matters that led the *White* court to exclude his scent identification, were “powerful impeachment material,” and were therefore essential

⁹ Although the instruction referred to “tracking,” the jury certainly would have construed it to mean “scent identification” in this case.

to consider in deciding whether the undisclosed evidence was material. See 735 F.3d at 984.

While overlooking the true purpose and importance of the scent identification in this case, the state court also made the eyewitness evidence seem stronger than it actually was. See 735 F.3d at 984. The court said that Kevin Feeney told the police the gunman was tall. He did not. The state court misread the record. Only at trial did he describe the gunman as tall. After the police interviewed Feeney on the day of the shooting, the officer reported that the gunman was described as 5'5".

Finally, and importantly, the state court paid no attention to any of the clear signs that the eyewitness identification evidence gave the jurors pause and made them hesitant to rely on it. As the Court of Appeals observed, they deliberated for four days, asked to rehear the testimony of three eyewitnesses (Hoefer, Valles, and Feeney), asked to rehear Victor Jara's description of the gunman (Jara told the police the gunman was 5'5" and 15-17 years old), and were plainly concerned about whether to consider "the fact that the D.A.'s office did not pursue the 'Richard Osuna' lead." 735 F.3d at 980. Precisely because the scent identification was the *only* evidence that Aguilar sat in the Volkswagen, and thus the only evidence to corroborate the eyewitness identification, there is more than a reasonable probability that the scent identification is what ultimately tipped the scales against Aguilar.

If the prosecution had disclosed the *Brady* evidence, the alleged scent identification would have been excluded, or at the very least thoroughly discredited, and there would have been *no* corroboration of the eyewitness identification of Aguilar. The undisclosed evidence could therefore “reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict” *Kyles v. Whitley, supra*, 514 U.S. 419, 435.

Given the record in this case, no fairminded jurist could possibly disagree with the Court of Appeals that it was objectively unreasonable of the state court to overlook or ignore so many essential facts in deciding whether the *Brady* evidence was material in this case.

D. The Court of Appeals complied with section 2254(d)(1)

This Court has directed federal habeas courts making a section 2254(d)(1) inquiry to “ask whether the state court’s application of clearly established federal law was objectively unreasonable.” *Williams v. Taylor*, 529 U.S. 362, 409-10 (2000). The Court of Appeals did exactly that. It did what federal habeas courts throughout the country do in making that inquiry: it examined the state court’s decision in light of the entire trial record to determine whether the state court considered and understood the relevance of all the facts that had to be considered for the court to apply clearly established federal law in an objectively reasonable way. See, e.g., *O’Laughlin v. O’Brien*, 568 F.3d 287 (1st Cir. 2009) [determination that evidence was sufficient to prove defendant guilty resulted in

objectively unreasonable application of *Jackson v. Virginia* because state court gave undue weight to circumstantial evidence]; *Eley v. Erickson*, 712 F.3d 837 (3d Cir. 2013) [believing that co-defendant's confession had been adequately redacted to eliminate prejudice to defendant, state court found no *Bruton* error; decision was objectively unreasonable because state court was factually mistaken: confession was insufficiently redacted to eliminate prejudice to defendant]; *Jones v. Basinger*, *supra*, 635 F.3d 1030 (7th Cir. 2011) [objectively unreasonable application of *Crawford* because state court failed to consider how the evidence in question was actually used at trial]; *Browning v. Trammell*, 717 F.3d 1092 (10th Cir. 2013) [in determining materiality of undisclosed impeachment evidence concerning eyewitness's psychiatric condition, failure of state court to consider crucial role the witness played in prosecution case and the relevance of mental illness to her credibility resulted in objectively unreasonable application of *Brady*].

The Court of Appeals correctly concluded that the state court's disregard and misunderstanding of the essential facts of this case resulted in an objectively unreasonable application of *Brady*.

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CONCLUSION

The state would reduce the analysis required by section 2254(d) to a formulaic recitation of words this Court used in *Richter* to illustrate the meaning of an objectively unreasonable application of clearly established federal law. It would have this Court elevate form over substance and ignore the fact that the state court decision in this case overlooked or misconstrued so many essential facts in determining materiality that the result was an objectively unreasonable application of *Brady*.

There is no basis for granting certiorari in this case. The petition should be denied.

Dated: March 24, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Neil Rosenbaum", with a stylized flourish at the end.

Neil Rosenbaum
Counsel for Respondent
Gilbert Aguilar