No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

Ricky Lee Earp,
Petitioner,

v.

Ronald Davis, Warden,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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APPENDIX INDEX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICKY LEE EARP, Petitioner-Appellant, v. RON DAVIS, Warden of California State Prison at San Quentin, Respondent-Appellee.	No. 15-56989 D.C. No. 2:00-cv-06508-MMM Central District of California, Los Angeles ORDER

Before: FARRIS, TALLMAN, and N.R. SMITH, Circuit Judges.

The panel has voted to deny the petition for panel rehearing; Judge N.R. Smith has voted to deny the petition for rehearing en banc and Judges Farris and Tallman so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICKY LEE EARP, *Petitioner-Appellant*, v. RON DAVIS, Warden of California State Prison at San Quentin, *Respondent-Appellee.*	No. 15-56989 D.C. No. 2:00-cv-06508-MMM OPINION

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Argued and Submitted January 12, 2018
Seattle, Washington

Filed February 6, 2018

Before: Jerome Farris, Richard C. Tallman, and N. Randy Smith, Circuit Judges.

Opinion by Judge Tallman

SUMMARY*

Habeas Corpus

The panel affirmed the district court's order on remand denying on the merits California state prisoner Ricky Earp's remaining habeas corpus claims that the state court improperly denied his motion for a new trial based on prosecutorial misconduct.

Earp contended that he should have been allowed to conduct further discovery to explore a possible relationship between those responsible for the California Department of Justice's alleged spoliation of DNA evidence and alleged witness intimidation; and that the district court improperly weighed and did not credit the defense witnesses' testimony, notwithstanding an adverse inference given to Earp for the limited purpose of assessing the witnesses' credibility at the evidentiary hearing.

The panel held that the district court correctly found that any link between spoliated evidence established by the adverse inference (even if true) and the alleged witness intimidation was too attenuated, and did not abuse its discretion in declining to authorize further discovery in light of that finding. The panel held that the district court did not clearly err in weighing the credibility of the evidence in light of the evidence adduced at the hearing.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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OPINION

TALLMAN, Circuit Judge:

California state prisoner Ricky Earp appeals the district court's order denying his 28 U.S.C. § 2254 habeas corpus petition. In his petition, Earp claims that the California state court improperly denied his motion for a new trial based on the State's prosecutorial misconduct. This case comes to us for the third time on appeal.

In 1992, Earp was sentenced to death after a Los Angeles County jury convicted him for the 1988 first-degree murder and rape of an 18-month-old girl. Earp filed a motion for a new trial, arguing that a newly discovered witness, Michael Taylor, would impeach Dennis Morgan's trial testimony that Morgan had never been to the scene on the day of the crime. However, the government presented evidence that Taylor

recanted this impeaching statement. Consequently, the trial court denied Earp's motion for a new trial without conducting an evidentiary hearing. The California Supreme Court affirmed on direct appeal. *People v. Earp*, 978 P.2d 15, 56 (Cal. 1999). Following an unsuccessful state habeas petition, Earp then filed a federal habeas petition. *Earp v. Ornoski*, 431 F.3d 1158, 1169 (9th Cir. 2005) ("*Earp I*"). The district court denied the petition and adopted the state court's factual findings, holding that "Taylor's declarations were 'inherently untrustworthy and not worthy of belief.'" *Id.*

On subsequent appeal, our panel determined that because the state court had made its credibility determination without an evidentiary hearing, the state court had made its decision based on an unreasonable determination of the facts. *Id.* We similarly held that the district court erred when it "reached its credibility determination without taking the opportunity to listen to Taylor, test his story, and gauge his demeanor." *Id.* Determining that Earp may have presented a colorable due process claim, we then remanded the case to the district court for a hearing to determine the credibility of the parties' witnesses concerning the alleged prosecutorial misconduct.[1] *Id.* at 1172.

In 2011, while Earp's federal habeas petition was on remand, Earp moved in state court for DNA testing of napkin and pillow swatches recovered at the crime scene. Earp hoped the testing would produce evidence that Morgan had visited the scene, as Taylor would testify he heard Morgan

[1] We noted that if the prosecutorial misconduct caused Taylor's recantation, Earp would still need to establish prejudice by showing that Taylor's testimony entitled him to a new trial under California law. *Id.* at 1171 n.10.

admit. The state court granted the motion, but the laboratory could not perform the test because it discovered that some of the evidence was missing. On habeas review, Earp then sought further discovery from the federal district court to explore a possible relationship between the disappearance of the evidence and those involved in the alleged prosecutorial misconduct. Instead, the district court assumed without deciding that the State engaged in spoliation, and gave Earp the benefit of an adverse inference for the limited purpose of assessing the credibility of the witnesses at the evidentiary hearing.

Following a thorough evidentiary hearing, the district court held that Earp failed to prove his prosecutorial misconduct claim by a preponderance of the evidence, and therefore, he was not denied his due process rights. The district court also denied Earp's discovery motion. Accordingly, the court denied the only remaining claim from Earp's 2001 federal habeas petition. Earp makes two contentions on appeal: (1) he should have been allowed to conduct further discovery to explore a possible relationship between those responsible for the alleged spoliation and the alleged witness intimidators; and (2) the district court improperly weighed and did not credit the defense witnesses' testimony notwithstanding the adverse inference. We affirm the district court's ruling and hold that it did not abuse its discretion in declining to authorize further discovery; nor did it clearly err in weighing the credibility of the witnesses. As Earp had no remaining viable claims, the district court's denial of his petition for a writ of habeas corpus was proper.

I

The facts and circumstances surrounding Earp's crime are provided in detail in both the California Supreme Court

opinion resulting from Earp's direct appeal, *Earp*, 978 P.2d at 27–31, and our prior opinion in *Earp I*, 431 F.3d at 1165–66. Here, we provide only a brief overview of the basic facts and procedural history, with a more penetrating look at the pertinent record as it relates to the most recent proceedings.

On August 22, 1988, Cindy Doshier left her 18-month-old daughter, Amanda Doshier, with Ricky Earp for a few days at his girlfriend's home in Palmdale, California. *Earp*, 978 P.2d at 27. Earp claimed that Dennis Morgan appeared at the home on August 25 in search of heroin. Earp knew Morgan from their previous time together in state prison. After giving Morgan a spoon (ostensibly to cook the drug) and telling him to leave, Earp claimed he left Amanda inside and went outside to clean paint brushes for approximately 30 minutes. At trial, Earp testified that when he returned, "[h]e discovered Amanda lying motionless at the bottom of the stairs, and made a number of attempts to revive her, including performing CPR, before calling emergency services. Earp further testified that Morgan left as Earp was calling for help." *Earp I*, 431 F.3d at 1168. After a fireman arrived to transport Amanda to the emergency room, Earp fled and was later arrested in Northern California. Morgan swore that he was never at the house on the day of the attack, and that he was not responsible for Amanda's death. *Id.* at 1165. Morgan also said that Earp asked him to testify that another man named "Joe" was there that day. *Id.* Ultimately, the jury credited the State's evidence, and Earp was sentenced to death after the jury convicted him of Amanda's rape and murder. *Earp*, 978 P.2d at 27.

After Earp's trial, but prior to sentencing, Earp filed a motion for a new trial alleging (among other claims) that a jailhouse informant, Michael Taylor, had overheard Morgan admit that he was at the house that day. The prosecution then

presented evidence that Taylor later recanted this claim after being visited by the assistant district attorney and the lead sheriff's detective at the Los Angeles County Jail. Stating that "it would appear that even if this was a declaration by [Taylor] himself, it is inherently untrustworthy, . . . and not worthy of belief," the trial court denied Earp's motion. The California Supreme Court subsequently affirmed Earp's conviction, *id.* at 66, and summarily rejected his state habeas corpus petition.

In 2001, Earp filed a petition for a writ of habeas corpus in the District Court for the Central District of California, alleging 19 separate claims of error. The district court denied Earp's petition as to all claims. As to the witness intimidation claim, the court erroneously relied on the state court's credibility findings concerning Taylor's testimony. On appeal, we affirmed denial of 17 claims but we reversed and remanded for an evidentiary hearing on Earp's prosecutorial misconduct and ineffective assistance of counsel ("IAC") claims. *Earp I*, 431 F.3d at 1165.

On remand in 2007, the district court conducted an evidentiary hearing to explore the testimony of Taylor, the trial prosecutor, Robert Foltz, and the chief investigator for Los Angeles County, Detective Sergeant Edwin Milkey. *Earp v. Cullen*, 623 F.3d 1065, 1069 (9th Cir. 2010) ("*Earp II*"). At that hearing, Taylor claimed Foltz and Milkey intimidated him into recanting his statement that Morgan had admitted to being at Earp's home on the day of the attack. *Id.* Additionally, Earp sought to introduce the testimony of Cindy Doshier, Amanda's mother, who claimed to have been intimidated by Foltz as well. *Id.* Instead, at the hearing Doshier invoked her Fifth Amendment right against self-incrimination on the basis that she might be subject to perjury charges. *Id.* The district judge previously assigned

to this litigation credited the State's witnesses, discredited Earp's, and again dismissed his petition. *Id.* at 1070. On appeal, we again reversed and remanded, holding that the district court erred in permitting Doshier to avoid testifying by invoking the Fifth Amendment as the statute of limitations "had long since expired." *Id.* at 1071. We also held that the district court properly dismissed his IAC claim. *Id.* at 1078.

After we issued *Earp II*, Earp then moved in California superior court for DNA testing of napkin and pillow swatches recovered at the scene of the crime. The superior court granted Earp's motion under California Penal Code § 1405, and the sealed evidence was transported from the Los Angeles County Sheriff's Department crime laboratory to a private laboratory in 2012. Upon its arrival, the private laboratory discovered that some of the evidence was missing from its sealed envelope. The supervising criminalist at the Sheriff's Department crime laboratory, Kenneth Sewell, conducted an investigation into the disappearance, and determined that the evidence had previously been transferred for a single day in 2002 to the California Department of Justice's ("CDOJ") crime laboratory at the request of Sheriff's Department homicide detective Gerry Biehn. Sewell noted that it was the only occasion in his 25 years of service when the Sheriff's Department had released evidence to the CDOJ.

In 2014, now assigned to a different district judge (Hon. Margaret Morrow), the district court heard testimony from Foltz, Milkey, Taylor, and Doshier. Taylor testified that he had overheard Morgan talk about being at Earp's house when Amanda was assaulted, and that Foltz and Milkey had previously intimidated him into recanting that testimony. Doshier testified that Foltz had told her Earp's blood and

semen were found on Amanda's body, that she had testified to that effect at trial, but that she was then intimidated into immediately recanting that testimony when recalled to the stand at trial after Foltz threatened to have her other children taken away. Foltz and Milkey testified that when they interviewed Taylor after he had given his first declaration, without any threats or intimidation, he had admitted in a recorded statement that his claim concerning Morgan was not true and that he made it up at Earp's insistence. Foltz further testified that he had not told Doshier that Earp's blood and semen were found on autopsy, and that he had not intimidated her. Ultimately, the court credited Foltz and Milkey's testimony, discredited Taylor's testimony, and found Doshier's testimony "not particularly credible."

In making its findings, the district court noted that Taylor had a prior conviction for a crime involving dishonesty (providing a false identification card to police), he had admitted to previously using at least 12 different aliases, there were major inconsistencies and implausibility in Taylor's testimony, and that his recorded recantation was "coherent and sounded natural; indeed, he sounded far more like a person telling the truth than someone reciting statements he had been told to make only a few minutes earlier." Weighing Doshier's testimony, the district court considered the fact that "she was consuming heroin multiple times a day during Earp's trial and when Foltz made the alleged threats," she was "emotionally overwrought" during the trial of her daughter's murderer, and it was implausible Foltz would have intimidated her given that her testimony "was not directly relevant to proving Earp's guilt." As to evaluating the assumed spoliation of evidence, the court considered and dismissed its impact: "The mere fact that Morgan lied on the stand does not mitigate any of the problems the court has identified with Taylor's testimony."

Conversely, it found Foltz and Milkey "to be credible witnesses at the evidentiary hearing" based on the coherency of their testimony. Accordingly, the district court held that Earp "failed to prove his prosecutorial misconduct claim by a preponderance of the evidence."

Earp appeals again. Only the prosecutorial misconduct claim is presented here. Thus, Earp's contentions focus solely on two alleged errors during the district court's 2014 evidentiary hearing on that issue. In order for us to remand, Earp must establish that the court clearly erred in finding that the State did not intimidate Taylor, or that further discovery was indispensable to developing the fact of witness intimidation. For if Earp cannot show by a preponderance of the evidence that witness intimidation occurred, he necessarily cannot prove that he was prejudiced and habeas relief warranting a new trial is necessary. *See Towery v. Schriro*, 641 F.3d 300, 307 (9th Cir. 2010).

We have jurisdiction under 28 U.S.C. § 2253(a), and we review *de novo* the denial of a petition for writ of habeas corpus. *Earp II*, 623 F.3d at 1074. The district court's decision to deny discovery is reviewed for abuse of discretion. *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997). "Factual findings and credibility determinations made by the district court in the context of granting or denying [a petition for writ of habeas corpus] are reviewed for clear error." *Larsen v. Soto*, 742 F.3d 1083, 1091–92 (9th Cir. 2013) (quoting *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004)).

II

Earp first asserts the district court erred in denying his request for further discovery into the CDOJ's alleged spoliation of evidence. He contends that further

investigation into how the evidence came to be spoliated could support his witness intimidation claims. The district court, however, assumed for the purposes of the hearing that Earp was entitled to an adverse inference based on the State's spoliation for the limited purpose of assessing the witnesses' credibility, and correctly found that any link between that evidence established by the adverse inference (even if true) and the alleged witness intimidation was too attenuated. We hold that denying further discovery in light of that finding was not an abuse of discretion.[2] *See United States v. Hinkson*, 585 F.3d 1247, 1267 (9th Cir. 2009) (en banc).

Under Rule 7 of the Rules Governing 28 U.S.C. § 2254, a district court may expand the record without holding an evidentiary hearing. *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir. 2005), *overruled on other grounds by Daire v. Lattimore*, 812 F.3d 766 (9th Cir. 2016). A habeas petitioner like Earp, however, "is not entitled to discovery as a matter of ordinary course," *Bracy v. Gramley*, 520 U.S. 899, 904 (1997), and he must demonstrate entitlement to an evidentiary hearing under the federal habeas statute, *Williams v. Taylor*, 529 U.S. 420, 430 (2000). We have previously held "a hearing is required if: '(1) [the petitioner] has alleged facts that, if proven, would entitle him to habeas relief, and (2) he did not receive a full and fair opportunity to develop those facts.'" *Earp I*, 431 F.3d at 1167 (quoting

[2] In his reply brief, Earp asserts that the State has waived its arguments as to the district court's denial of further discovery, and as to the proper weight of the adverse inference against the State witnesses' credibility. *See United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015). Although it did not address Earp's arguments point-by-point, the State did address this issue by arguing that further discovery was unnecessary because the adverse inference was unrelated to the witness intimidation claim.

Williams v. Woodford, 384 F.3d 567, 586 (9th Cir. 2004)). "[A] court's denial of discovery is an abuse of discretion if discovery is indispensable to a fair, rounded, development of the material facts." *Jones*, 114 F.3d at 1009 (quoting *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996) (internal quotation marks omitted)). "Just as bald assertions and conclusory allegations do not afford a sufficient ground for an evidentiary hearing, neither do they provide a basis for imposing upon the state the burden of responding in discovery to every habeas petitioner who wishes to seek such discovery." *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987) (citing *Wacht v. Cardwell*, 604 F.2d 1245, 1246 n.2 (9th Cir. 1979)).

In addition to conducting further discovery, a district court also "has the broad discretionary power to permit a [fact-finder] to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior." *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (citing *Akiona v. United States*, 938 F.2d 158 (9th Cir. 1991)). "[A] 'reasonable' inference is one that is supported by a chain of logic, rather than . . . mere speculation dressed up in the guise of evidence." *Juan H. v. Allen*, 408 F.3d 1262, 1277 (9th Cir. 2005).

Like undisclosed *Brady*[3] evidence, facts established through an adverse inference must still be relevant and material to a defendant's claim to warrant inclusion or further investigation. "Materiality turns on the [evidence]'s potential, viewed as a matter of law to be decided by the trial court, for affecting the course of the inquiry." *United States*

[3] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the prosecution must disclose evidence that is both favorable to the accused and material either to guilt or punishment).

v. Fiorillo, 376 F.2d 180, 184 (2d Cir. 1967) (citing *United States v. Winter*, 348 F.2d 204, 211 (2d Cir. 1965)). *See also* 1 McCormick On Evid. § 185 (7th ed. 2016) ("Materiality . . . looks to the relation between the propositions that the evidence is offered to prove and the issues in the case. If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial."); *United States v. Boshell*, 952 F.2d 1101, 1106 (9th Cir. 1991) (holding that evidence is only material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different") (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

Previously, we have disallowed the introduction of evidence or adverse inferences when they are not relevant to the party's claim. *See United States v. Laurins*, 857 F.2d 529, 538 (9th Cir. 1988) (affirming conviction when the government destroyed criminal evidence because the purported evidence "was not a central issue" to defendant's claim); *Farrow v. United States*, 580 F.2d 1339, 1360 (9th Cir. 1978) (denying further discovery because appellant failed to present more than conclusory allegations).[4] *But see Soo Park v. Thompson*, 851 F.3d 910, 927 (9th Cir. 2017) ("Materiality does not require incontrovertible evidence of

[4] Other circuits have also disallowed irrelevant or immaterial inferences or evidence when not pertinent to the party's claim. *See United States v. Ozuna*, 561 F.3d 728, 738 (7th Cir. 2009) (affirming district court's exclusion of evidence when it was not material to the defense case); *Stanojev v. Ebasco Servs., Inc.*, 643 F.2d 914, 923 (2d Cir. 1981) (reversing the district court when defendant's failure to produce certain evidence "does not establish, or help to establish, a prima facie case because it bears no logical relationship to a finding of age discrimination").

exculpation; to the contrary, evidence that tends to 'cast doubt' on the government's case qualifies as material.").

Here, Earp alleges that further discovery concerning the destruction of DNA evidence would allow him to bolster his claim of prosecutorial misconduct by Foltz and Milkey. He asserts four possible connections to be made. First, "evidence of past acts is admissible to show bias." Second, "[e]vidence regarding Foltz's or Milkey's involvement in the disappearance of material that might have proven Morgan's presence would tend [to] show they were part of an overall effort to suppress evidence of Morgan's involvement." Third, "[d]iscovery as to how and why Sheriff's deputy Biehn came to ask DOJ investigator Shore to obtain the evidence, or as to what Shore did with it and why, could lead, for example, to information indicating that either Foltz or Milkey, or both, were involved in obtaining or disposing of the evidence." And last, "Milkey had another connection with the accessing of the evidence that led to its disappearance: the request to give DOJ investigator Shore access to the napkin came from a fellow Los Angeles County Sheriff's Deputy, homicide detective Gerry Biehn." Weighing the evidence, the district court held that "there is not good cause to permit additional discovery in this case" because Earp received the adverse inference he desired and further discovery into the State's alleged spoliation of evidence would "not affect [the] decision of the remaining [witness intimidation] claim of Earp's habeas petition."

We agree with the district court's rationale. First, Earp received the adverse inference he desired for the purpose of assessing the witnesses' credibility: the district court, sitting as fact-finder, assumed in applying it "that the missing evidence showed Morgan was at the scene of the crime on the day in question." Second, because Earp's remaining

habeas claim concerns alleged witness intimidation, he must make some "plausible showing" that the adverse inference evidence "would have been material and favorable" to his prosecutorial misconduct allegations. *Cf. United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982). He fails to do so. Earp's assertion that further discovery on the CDOJ's alleged spoliation of evidence could show bias, a hidden connection between Foltz, Milkey, and the CDOJ, or an overall scheme to suppress evidence, are too attenuated and too speculative. He simply states that his motion should be granted "[g]iven the reasonable possibility of uncovering evidence that Foltz and Milkey were somehow connected with the napkin's disappearance." This type of bald assertion to fish for evidence that may support the defense theory is not a "reasonable inference" and appears more like "mere speculation dressed up in the guise of evidence." *Juan H.*, 408 F.3d at 1277. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (holding that mere allegations of a vast conspiracy to discriminate were not plausible and did not sufficiently allege a cause of action).

This is exactly the kind of fishing expedition we are admonished not to permit. *Calderon v. U.S. Dist. Court for the N. Dist. of Cal.*, 98 F.3d 1102, 1106 (9th Cir. 1996) ("[C]ourts should not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation."). As the district court properly concluded, there is no reasonable connection between whether Morgan was at the scene of the crime and whether Foltz or Milkey intimidated witnesses. Further discovery on that matter would only unnecessarily burden the State. Earp's meager conjecture suggests that he *might possibly* discover a connection that *might possibly* exist, which *might possibly* change the credibility of the witnesses, if he were only allowed discovery. But that speculation does not change the

fact-finder's ruling on the credibility of the witnesses, overcome the "broad deference" we afford to district courts on supervising discovery, and is not "*indispensable* to a fair, rounded, development of the material facts." *Jones*, 114 F.3d at 1009 (emphasis added). The district court properly denied further discovery.

III

Earp next argues that the district court improperly weighed the credibility of Foltz, Milkey, Taylor, and Doshier, especially in light of the adverse inference drawn against the State. Because we "cannot substitute [our] own judgment of the credibility of a witness for that of the fact-finder," *United States v. Durham*, 464 F.3d 976, 983 n.11 (9th Cir. 2006), and the record shows that the district court carefully and thoughtfully weighed all of the testimony, we hold that the district court did not clearly err in weighing the credibility of the witnesses in light of the evidence adduced at the hearing.

We have repeatedly held that "substantial government interference with a defense witness's free and unhampered choice to testify amounts to a violation of due process." *United States v. Vavages*, 151 F.3d 1185, 1188 (9th Cir. 1998) (quoting *United States v. Little*, 753 F.2d 1420, 1438 (9th Cir. 1984)). In a habeas case, the petitioner must establish the prosecutor's misconduct by a preponderance of the evidence. *United States v. Juan*, 704 F.3d 1137, 1142 (9th Cir. 2013) (citing *Vavages*, 151 F.3d at 1188). In addition to proving that the prosecutor engaged in witness intimidation, a petitioner seeking habeas relief must also prove that he was prejudiced by that intimidation. *Towery*, 641 F.3d at 307 ("A constitutional violation arising from prosecutorial misconduct does not warrant habeas relief if the error is harmless."). *See also Sandoval v. Calderon*,

241 F.3d 765, 778 (9th Cir. 2000) ("Our finding of constitutional error does not end the inquiry, however. To warrant habeas relief, [the petitioner] must show that the prosecutor's improper argument 'had [a] substantial and injurious effect or influence in determining the jury's verdict.'" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993))).

Sitting as fact-finder, the trial court judge is tasked with weighing and making factual findings as to the credibility of witnesses. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985). We review those findings and credibility determinations for clear error, *Larsen*, 742 F.3d at 1091–92, which "does not vest[] us with power to reweigh the evidence presented at trial in an attempt to assess which items should and which should not have been accorded credibility," *Mondaca-Vega v. Lynch*, 808 F.3d 413, 428 (9th Cir. 2015) (quoting *Cataphote Corp. v. De Soto Chem. Coatings, Inc.*, 356 F.2d 24, 26 (9th Cir. 1966)). Under Federal Rule of Civil Procedure 52(a)(6), "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." In weighing the credibility of witnesses, "Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson*, 470 U.S. at 575 (citing *Wainwright v. Witt*, 469 U.S. 412 (1985)). Although credibility determinations are not unreviewable,

> when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a

> coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Id. at 575.

Here, the district court heard live testimony from all four witnesses, and found that the State witnesses were credible and the defense witnesses were not. Earp contends the court clearly erred by: (1) improperly weighing spoliation evidence as to Foltz and Milkey's credibility; (2) failing to consider Taylor a "neutral, disinterested" witness; (3) discounting Doshier's motivation as the victim's mother; and (4) disregarding Foltz and Milkey's alleged motivations and inconsistencies.

But in making its determination rejecting those contentions, the district court cited considerable bases to discredit both Taylor and Doshier's testimony, dismissed the impact of the assumed adverse inference urged by the defense, listened to the tape recording of Taylor's recantation, and credited Foltz and Milkey's testimony. In light of the extremely deferential standard of review, and the district court's consistent and appropriate credibility findings, which are well supported and articulated in the record, we affirm the district court's dismissal of Earp's prosecutorial misconduct claim. We agree that whether Morgan was at the scene of the crime is minimally probative at best to Earp's allegations of witness intimidation. Earp has not established the nexus. Accordingly, Earp cannot show that his due process rights were violated by the State, or that he was prejudiced and would be entitled to a new trial. *See Towery*, 641 F.3d at 307. The district court's dismissal

of Earp's remaining habeas claim on the merits is **AFFIRMED.**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICKY LEE EARP, Petitioner, vs. KEVIN CHAPPELL, Warden of the California State Prison at San Quentin, Respondent.	CASE NO. CV 00-06508 MMM **DEATH PENALTY CASE** ORDER GRANTING PETITIONER'S MOTION FOR LEAVE TO FILE ADDITIONAL AUTHORITY IN SUPPORT OF PETITIONER'S POST EVIDENTIARY HEARING BRIEF; GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION TO EXPAND RECORD AND CONDUCT ADDITIONAL DISCOVERY; AND DENYING THE REMAINING CLAIM OF PETITIONER'S HABEAS CORPUS PETITION

Ricky Lee Earp was convicted of first degree murder and sentenced to death in 1992. Following denial of *certiorari* by the United States Supreme Court, Earp filed a federal habeas corpus petition on May 24, 2001.[1] Earp's petition was dismissed twice by the district court; both dismissals were reversed in part by the Ninth Circuit. After the second reversal in part, the case was reassigned to this court. On January 16, 2014, Earp filed a motion to expand the record and conduct discovery under Rules 6 and 7 of the Rules Governing Section 2254 Cases in the District Court (the "Habeas Rules").[2] Respondent

[1]Petition for Writ of Habeas Corpus (Petition), Docket No. 17 (May 24, 2001)

[2]Notice of Motion and Motion to Expand the Record ("Motion"), Docket No. 319 (Jan. 1, 2014). See also Reply to Opposition to Motion to Expand the Record ("Reply"), Docket No. 327 (Feb. 28,

Kevin Chappell, warden of the California State Prison at San Quentin, opposed the motion on February 13, 2014.[3] On January 24, 2014, the court held an evidentiary hearing at which it heard the testimony of Robert Foltz, Edwin Milkey, Cindy Dozier, and Michael Taylor.[4] On March 6 and April 8, 2015, petitioner filed motions for leave to file additional authority;[5] respondent has not opposed either of these motions. This order addresses Earp's motion to expand the record and conduct discovery, as well as his motions for leave to file additional authority. The order also adjudicates Earp's remaining habeas claim.

I. BACKGROUND AND PROCEDURAL POSTURE

Earp is currently on death row in San Quentin, California, after being convicted in Los Angeles Superior Court of the 1988 rape and murder of eighteen-month-old Amanda Doshier. *Earp v. Ornoski* ("*Earp I*"), 431 F.3d 1158, 1163 (9th Cir. 2005). The State's case against Earp "was comprised of strong circumstantial evidence – Amanda had been left in [Earp's] care on the day of the crime, and after Amanda was taken to the hospital Earp disappeared and gave false and inconsistent explanations of what had happened to her before he surrendered to the police." *Id*. at 1167. At trial, the defense case turned on the relative credibility of Earp, who asserted that Dennis Morgan had murdered Amanda, and Morgan, who testified that he had never seen Amanda or been to the house where she was fatally injured. *Id*. As summarized by the Ninth Circuit, the trial testimony was as follows:

> "Earp testified that on the day Amanda was attacked, he was at home watching her and working around the house when he was interrupted by Morgan's arrival at his door.

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[3]Opposition to Motion to Expand the Record ("Opposition"), Docket No. 326 (Feb. 13, 2014).

[4]Minutes of Evidentiary Hearing Regarding Petitioner's Remaining Claim, Docket No. 323 (Jan. 24, 2014).

[5]Motion for Leave to File Additional Authority in Support of Petitioner's Post Evidentiary Hearing Brief and Motion to Expand the Record ("First Additional Authority Motion"), Docket No. 350 (Mar. 6, 2015); Motion for Leave to File Additional Authority in Support of Petitioner's Post Evidentiary Hearing Brief and Motion to Expand the Record ("Second Additional Authority Motion"), Docket No. 351 (Apr. 8, 2015).

> Earp claimed that he allowed Morgan into the house, but largely ignored him, hoping that he would leave. Later in the afternoon, Earp said he went outside to clean paintbrushes and, because the backyard was unfinished, Earp left Amanda inside with Morgan and the family dog. Earp testified that after approximately a half-hour, he noticed the dog was agitated and he went inside to investigate. He discovered Amanda lying motionless at the bottom of the stairs, and made a number of attempts to revive her, including performing CPR, before calling emergency services. Earp further testified that Morgan left as Earp was calling for help.
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> Morgan's testimony contradicted this defense. Morgan testified that he had never been in the home and did not even know where it was. He also testified that he had never seen Amanda, and that he had not molested or raped her. Notably, no trial witness other than Earp was able to place Morgan at the house on the day of the crime." *Id*. at 1167-68.

The jury convicted Earp of first-degree murder and found three death-qualifying special circumstances true: rape, sodomy, and lewd and lascivious conduct on a child under the age of fourteen. *Id*. at 1163-64. In a separate penalty phase, the jury recommended that Earp be put to death. The superior court imposed that sentence on February 21, 1992. *Id*. at 1164.

The California Supreme Court affirmed Earp's conviction and death sentence on direct appeal, *People v. Earp*, 20 Cal.4th 826, 906 (1999), and the United States Supreme Court denied certiorari, *Earp v. California*, 529 U.S. 1005 (2000). Thereafter, the California Supreme Court summarily denied Earp's state habeas petition on the merits without holding an evidentiary hearing on any of his claims. *Earp I*, 431 F.3d at 1164. Earp then filed a federal habeas petition in this district, which raised nineteen claims. One of these was a prosecutorial misconduct claim, which he had also raised in his state petition. *Id*. at 1168. The claim alleges that after the trial concluded, a defense investigator located Michael Taylor, a potential jailhouse witness who might have been able to impeach Morgan's testimony. Taylor had been an inmate at the Los Angeles Central Jail during Earp's trial; both Earp and Morgan were housed there as well. In a series of declarations, Taylor asserted that, while Earp's jury was deliberating, he overheard Morgan tell another inmate that Morgan had visited the house where Earp

was watching Amanda on the day in question. He stated that "Morgan referred to Amanda as his 'granddaughter,' and expressed fear that Earp would 'come after him' if he got out of jail because of Morgan's false testimony at trial." *Id*. As summarized by the Ninth Circuit:

> "Taylor declare[d] that he initially told this story in a recorded statement to the defense in late 1991 or early 1992. He assert[ed] that, later the same day, the prosecutor [– Robert Foltz –] and a sheriff's deputy [– Edwin Milkey –] took him to a private room at the jail, verbally abused him, and told him that he would never get out if he stood by his statement. Taylor insist[ed] that although his initial statement was true, he capitulated in the face of the prosecutor's threats and retracted the statement." *Id*.

On the basis of these facts, Earp asserted in his petition that the prosecutor had violated his due process rights by intimidating Taylor and coercing him to withdraw his declaration. He supported his state petition with four declarations by Taylor, the declaration of defense investigator Manuel Alvarez, the declaration of Adrienne Dell, Earp's trial attorney, and a transcript of a portion of the prosecutor's interview with Taylor. *Id*. at 1168-69. As noted, without conducting a hearing, the California Supreme Court issued a silent denial of Earp's prosecutorial misconduct claim. *Id*. at 1169.

Earp next raised the claim in his federal habeas petition. Judge Manuel Real denied all of Earp's claims; as respects the prosecutorial misconduct claim, he found Taylor's testimony incredible on the basis of his declarations. *Id*. See also *Earp v. Cullen* ("*Earp II*"), 623 F.3d 1065, 1069 (9th Cir. 2010). Judge Real did not hold an evidentiary hearing on Earp's prosecutorial misconduct or ineffective assistance of counsel claims.

On appeal, the Ninth Circuit affirmed in part, vacated and remanded in part. *Earp I*, 431 F.3d at 1185. As relevant here, the Ninth Circuit found that Earp was entitled to an evidentiary hearing on the prosecutorial misconduct claim because he alleged facts that, if true, could entitle him to relief. *Id*. The circuit court emphasized that it was important the district court conduct an evidentiary hearing before making the necessary credibility determinations. *Id*. at 1169–72. It also concluded that Earp was entitled to an evidentiary hearing on his ineffective assistance of counsel claim, which was based on trial counsel's purported failure adequately to investigate mitigation evidence. It remanded to Judge Real for further proceedings. *Id*. at 1185.

On remand, Judge Real held an evidentiary hearing concerning the prosecutorial misconduct claim at which Taylor, Foltz, and Milkey testified.[6] *Earp II*, 623 F.3d at 1069. Taylor testified that Foltz and three police officers met with him to discuss his original declaration and coerced him to recant the statements in the declaration. *Id*. He asserted that Foltz had threatened him and directed him how to respond to certain questions. *Id*. Finally, Taylor reaffirmed the statements he had made in his original declaration. *Id*.

Foltz testified that he interviewed Taylor after receiving Taylor's original declaration, which stated that he had heard Dennis Morgan admit he was present in Earp's home on the day of Amanda Doshier's rape and murder. Foltz asserted that Taylor voluntarily recanted the statement after learning that he would have to testify in court. Foltz also maintained that neither he nor Milkey instructed Taylor how to answer questions, *id*., or threatened Taylor in any manner during any part of the interview. Milkey corroborated Foltz's testimony. *Id*. He stated that Taylor became nervous after learning he would have to testify regarding the declaration, and that Taylor was not coached how to answer any of the questions posed during the interview. *Id*.

In an effort to bolster Taylor's credibility, Earp sought to call Cindy Doshier, the victim's mother, as a witness. *Id*. Earp asserted that Doshier was prepared to testify she too had been intimidated by Foltz after she testified at trial. Judge Real allowed Earp to call Doshier as a witness, but appointed separate counsel to advise her of her rights under the Fifth Amendment. *Id*. Doshier subsequently invoked her Fifth Amendment right against self-incrimination on the basis that she might be subject to a perjury prosecution, and Judge Real accepted her blanket invocation of the privilege. *Id*. at 1070. After the hearing, Judge Real denied Earp's prosecutorial misconduct claim a second time, expressly rejecting Taylor's testimony as incredible, and finding that Foltz and Milkey were credible witnesses independent of all other testimony received. *Id*.

Earp appealed the denial, challenging the fact that Judge Real had permitted Doshier to assert

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[6]Judge Real also held an evidentiary hearing on the ineffective assistance of counsel claim, at which other witnesses testified. See *Earp II*, 623 F.3d at 1072-74. He ultimately denied the claim, *id*. at 1074, and the Ninth Circuit affirmed that ruling, *id*. at 1077-78. As the only claim that is presently before this court for adjudication is the prosecutorial misconduct claim, the court discusses in detail only the evidentiary hearing Judge Real held concerning that claim.

her Fifth Amendment privilege on a blanket basis; he argued that he had been denied a full and fair opportunity to prove his claim as a result. *Id.* The Ninth Circuit agreed, stating:

> "The district court permitted Doshier to anticipatorily claim the Fifth Amendment privilege because it believed that she was going to testify untruthfully. Supreme Court and Ninth Circuit precedent clearly preclude pre-emptive invocations of the privilege. The district court erred by accepting Doshier's assertion of the Fifth Amendment." *Id.*

The court noted that its "initial remand . . . [had been] for the purpose of allowing Earp an opportunity to develop facts in support of his claim of prosecutorial misconduct." *Id.* at 1071. By accepting Doshier's blanket invocation, the Ninth Circuit held, Judge Real had denied Earp a full and fair hearing. It thus remanded the prosecutorial misconduct claim for another evidentiary hearing "at which Earp should be afforded a full and fair opportunity to develop the facts supporting his allegations." *Id.* The court stressed that its "decision to remand Earp's prosecutorial misconduct claim [wa]s based solely on the district court's erroneous acceptance of Doshier's invocation of the Fifth Amendment, and [that its] opinion should not be interpreted as a comment on the merits of his claim." *Id.*

Although Earp also appealed Judge Real's denial of his ineffective assistance of counsel claim, the Ninth Circuit affirmed that denial, concluding that Earp had failed to demonstrate deficient performance. *Id.* at 1077-78. It found that reassignment of the case to another judge was warranted in light of the fact that it could not reasonably expect Judge Real to set aside his credibility findings. *Id.* at 1072.

The United States Supreme Court denied certiorari on June 6, 2011, *Earp v. Martel*, 131 S. Ct. 2966 (2011), and the Ninth Circuit issued a formal mandate the same day.[7] On July 6, 2011, the case was reassigned to this court.[8]

On January 24, 2014, the court held an evidentiary hearing as directed by the Ninth Circuit's

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[7]Mandate, Docket No. 301 (June 6, 2011).

[8]Notice of Reassignment of Case, Docket No. 304 (July 6, 2011).

remand order.[9] Just prior to the hearing, on January 16, 2014, Earp filed a motion to expand the record pursuant to Rule 7(b) of the Rules Governing Section 2254 Cases in District Courts. The motion concerned the disappearance of swatches of a fluid-stained paper napkin and pillow that law enforcement had seized from Earp's house following Amanda's death.[10] On May 4, 2011, Earp had filed a motion in Los Angeles Superior Court under California Penal Code § 1405,[11] requesting that the two articles be tested at a private laboratory. Earp argued that a comparison of the DNA extracted from the napkin and pillow with reference samples might show that Morgan was the source of the stains on the pillow, and that, had this been known, it might reasonably have led to a result at trial more favorable to Earp.[12] The superior court granted his request in a minute order dated October 7, 2011.[13]

On January 25, 2012, Alane Mabaquiao, an investigator with the federal public defender's office, transported three evidence envelopes – two containing blood samples from Earp and Amanda, and another marked as containing the swatches of the fluid-stained napkin and pillow – from the Los Angeles Sheriff's Department Laboratory to Serological Research Institute ("SERI"), the private laboratory designated by the parties to perform the testing.[14] Once the envelopes arrived, Thomas Fedor, the SERI serologist, began preparations to test the materials. The first two envelopes contained blood samples, as expected. The third envelope, however, contained three additional envelopes. One was

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[9]Minutes of Evidentiary Hearing, Docket No. 323 (Jan. 24, 2015); Transcript of Hearing Held 1/24/14 ("Transcript"), Docket No. 332 (Mar. 25, 2014).

[10]Motion at 16.

[11]Section 1405 provides that "[a] person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion, pursuant to subdivision (d), before the trial court that entered the judgment of conviction in his or her case, for performance of forensic deoxyribonucleic acid (DNA) testing." CAL. PENAL CODE § 1405(a).

[12]Exhibits in Support of Motion to Expand ("Exhibits"), Docket No. 319-1 (Jan. 16, 2015) at 1-21 (Motion for DNA Testing Pursuant to California Penal Code § 1405).

[13]Exhibits at 43-44 (Minute Order Granting § 1405 Request).

[14]Exhibits at 63-64 (Declaration of Alane Mabaquiao).

labeled "yellow fitted sheet," while a second was labeled "multicolored bed sheet."[15] The third was labeled "pillow" and contained "four portions of textile fabric, blue with tan stripes."[16] Although Kenneth Sewell, a supervising criminalist with the California Scientific Services Bureau, suggests that the third envelope contained the proper pillowcase,[17] Earp appears to question this, noting that the Sheriff's Department records did not indicate the color of the pillow that had been seized, that the pillow swatch in the evidence envelope was blue with tan stripes, and that the accompanying bed sheet, by contrast, was white/blue.[18] The napkin was not in the evidence envelope where it should have been.[19]

Once notified of the missing napkin, Sewell investigated. He first confirmed that the evidence technician had released the proper evidence to FPD investigator Mabaquiao; this included an envelope "described as containing 'stain cuttings from napkin & pillow.'"[20] Sewell stated that as of April 30, 2002, the Scientific Services Bureau had custody of the fluid-stained napkin and pillow. He found documentation, however, indicating that on May 2, 2002, the Bureau had released the envelope containing the pillow and napkin swatches to California Department of Justice ("CDOJ") agent Eddie Shore, at the request of Los Angeles County Sheriff's Department homicide detective Gerry Biehn.[21] The envelope was returned the same day.[22] Sewell states that in his 25 years with the Scientific Services Bureau, this is the only occasion of which he knows on which the Bureau released homicide evidence

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[15]Motion at 15.

[16]*Id.*

[17]Exhibits at 53-54 (Declaration of Kenneth Sewell) ("Tom Fedor[opened] the third envelope that should have contained stain cuttings from the napkin and pillow . . . and found inside the pillow stain cutting, and swatches from a yellow fitted bed sheet and from another sheet. The swatch from the napkin was not in the envelope, as it should have been").

[18]Motion at 19. See also Exhibits at 66-67 (List of Evidence Obtained at Earp's Home).

[19]Exhibits at 54 (Declaration of Kenneth Sewell) ("The swatch from the napkin was not in the envelope, as it should have been").

[20]*Id.* at 55.

[21]*Id.* at 54.

[22]*Id.*

to the CDOJ.[23] The Bureau had "no explanation" as to why the napkin swatch was missing, why the envelope contained cuttings from sheets, or why the envelope was released to the CDOJ.[24]

Earp asks the court to expand the record and to permit discovery, including the deposition of CDOJ investigator Eddie Shore, to determine what happened to the evidence, whether the California Department of Justice should be held responsible for spoliation, and whether an adverse inference should be drawn against it, i.e., a rebuttable presumption that the evidence, had it been preserved, would have been adverse to the CDOJ.

II. DISCUSSION

A. Legal Standard Governing Motions to Expand the Record and to Permit Discovery Under Rules 6 and 7 of the Rules Governing Section 2254 Cases in District Courts

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). The Rules Governing Section 2254 Cases "provide district courts with ample discretionary authority to tailor the proceedings" to fit the circumstances of each case, "preserving more extensive proceedings for those petitions raising serious questions." *Lonchar v. Thomas*, 517 U.S. 314, 325 (1996).

Rule 7 states that "[i]f the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition." RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, RULE 7 ("Habeas Rules"); *United States v. Maxwell*, No. CR 04-732 RSWL, 2014 WL 4162390, *1 (C.D. Cal. Aug. 19, 2014). "The types of materials that may be submitted include, but are not limited to, 'letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge,' and affidavits." *Spencer v. Castro*, No. CV 05-2456-GEB, 2009 WL 2849726, *2 (E.D. Cal. Sept. 2, 2009) (citing Habeas Rule 7(b), Advisory Committee Notes, 1976 Adoption, subdivision (b)). If the court directs record expansion, then "the party against whom the additional materials are offered" must have an

[23] *Id*. at 55.

[24] *Id*. at 54-55.

opportunity to admit or deny their correctness. Habeas Rule 7(c). Because of the nature and purpose of Rule 7, a party seeking to expand the record must demonstrate entitlement to an evidentiary hearing under the federal habeas statute. *Holland v. Jackson*, 542 U.S. 649, 653 (2004); *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir. 2005).

Rule 6 provides that a "judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." Habeas Rule 6; see also *Harris v. Nelson*, 394 U.S. 286, 300 (1969) ("[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry"); *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997) ("Denial of an opportunity for discovery is an abuse of discretion when the discovery is necessary to fully develop the facts of a claim," quoting *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995)). "[A] court's denial of discovery is an abuse of discretion if discovery is indispensable to a fair, rounded, development of the material facts." *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996).

B. Whether Earp Should Be Permitted to Expand the Record and Conduct Discovery

1. Whether Earp Should be Permitted to File Additional Authority in Support of His Request to Expand the Record

On March 6 and April 8, 2015, Earp filed motions for leave to submit additional authority in support of his post-evidentiary hearing brief and motion to expand the record. Both of the new cases he wishes to have the court consider concern the destruction of evidence by the prosecution in situations Earp argues are analogous to his. Respondent does not oppose either motion.

a. *People v. Alvarez*

Earp first requests that the court consider the California Court of Appeal's decision in *People v. Alvarez*, 229 Cal.App.4th 761 (2014). There, the police failed to preserve evidence from two police-controlled cameras in the vicinity of a robbery, despite requests at the scene and during a hearing after defendants' arrest. Alvarez argued that the failure to preserve the evidence violated his due process rights, and required dismissal of the charges against him; the trial court agreed. *Id*. at 761. On appeal,

the court assessed the destruction of the evidence under the United States Supreme Court's decisions in *California v. Trombetta*, 467 U.S. 479 (1984), and *Arizona v. Youngblood*, 488 U.S. 51 (1988). *Trombetta* held that the failure to preserve evidence that "might be expected to play a significant role in the suspect's defense" violates due process. 467 U.S. at 488–89. "To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* Applying this standard, the California appellate court held that it could not "say the evidence, apparently destroyed before it was ever reviewed, me[t] the *Trombetta* standard of possessing 'exculpatory value that was apparent before the evidence was destroyed.'" *Alvarez*, 229 Cal.App.4th at 776.

As relevant here, the California court then turned to *Youngblood*. It explained that where the "the higher standard of apparent exculpatory value [discussed in *Trombetta*] is met, the motion is granted in defendant's favor" whether or now there is a showing of bad faith on the part of the prosecution. *Alvarez*, 229 Cal.App.4th at 773. "But if the best that can be said of the evidence is that it was 'potentially useful,'" *Youngblood* requires that to prove misconduct, the defendant must also "establish bad faith on the part of the police or prosecution." *Id*. The California appellate court concluded that the prosecution was "well aware of the potential usefulness of the video, and did nothing, despite their knowledge that the [police department's] policy at the time was only to preserve video for a short period." *Id*. at 777. Relying on *Youngblood*, the court held that where "'the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant,' and fail to preserve it, that shows bad faith." *Id*. (quoting *Youngblood*, 488 U.S. at 58). The court thus held that Alvarez's due process rights had been violated by destruction of the evidence. Examining the appropriate sanction, the court concluded that it could not identify, and the prosecution had not suggested, any sanction less drastic than dismissal. *Id.* at 778-79. As a result, the court held, the trial court had not abused its discretion in dismissing the charges against Alvarez. *Id*. at 779.

Alvarez is relevant authority. The court thus grants Earp's unopposed motion for leave to supplement his post-hearing brief with this authority.

b. *United States v. Zaragoza-Moreira*

The second case Earp wishes to cite as supplemental authority is *United States v. Zaragoza-Moreira*, 780 F.3d 971 (9th Cir. 2015). There, on December 22, 2011, the defendant entered the pedestrian line for admission into the United States from Mexico at the San Ysidro, California, port of entry. *Id*. at 974. At the primary inspection booth, Zaragoza handed Customs and Border Protection ("CBP") Officer Grant Patterson her United States passport. *Id*. Patterson sent Zaragoza to secondary inspection based on a computer-generated referral. *Id*. at 974-75. CBP Officer Nancy Cervantes, who was conducting secondary inspections, immediately put on gloves to pat defendant down. *Id*. Prior to beginning the pat down, Cervantes asked defendant whether she had any weapons or sharp objects on her body. In response, defendant "blurted [ ] out" that she had packages concealed on her person. *Id*. at 975. Cervantes then removed a package from defendant's lower back containing .34 kilograms of heroin and a package from her abdomen containing .42 kilograms of methamphetamine. *Id*.

Defendant explained that after spending three days in Mexico, she had run out of money and wanted to return home to the United States. Two male companions, who were allegedly connected to the "Antrax of El Mayo" drug cartel, began to pressure her to tape drugs to her body when she crossed the border. She asserted that she had originally resisted, telling the men she "didn't want to do it," but that they and a female friend continued to pressure her. *Id*. Defendant insisted that while in the pedestrian line she "wanted [the authorities] to notice [her], so she tried to attract attention by 'making a lot of noises so [she] could be noticed,' and by making herself 'obvious.'" *Id*. See also *id*. (reporting that defendant stated she "'was making so many things like so they could notice there was something wrong with me'"). The defendant said she had been in the pedestrian line earlier that morning, at approximately 4:00 a.m.; the female and one of the men took her out of the line, however, because she had purposely tried to loosen the packages of drugs attached to her body. *Id*. at 975-76; see also *id*. (reporting that defendant stated she had "wiggled around," "patted her stomach," and "thr[own] her passport on the ground" to draw attention to herself while in line. Finally, defendant explained "that she did not directly alert border inspectors because she 'was scared because [her female friend] was with [her]' in the line." *Id*. at 976.

A criminal complaint charging Zaragoza with importing heroin and methamphetamine into the

United States was filed on December 23, 2011. *Id.* Five days later, on December 28, 2011, defendant's attorney sent a letter to the Assistant United States Attorney assigned to the case requesting the preservation of evidence. *Id.* The letter stated that "defendant specifically requests that any and all videotapes . . . that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and which relate to the arrest or the events leading to the arrest [of defendant] in this case be preserved." *Id.* A grand jury subsequently returned a two count indictment charging Zaragoza with importing heroin and methamphetamine.

On February 23, 2012, Zaragoza's lawyer filed a motion for preservation of evidence, which specifically referenced video recordings at the port of entry. *Id.* Following a hearing on February 27, 2012, the district court ordered the government to preserve the video evidence. *Id.* at 977. U.S. Customs and Border Protection personnel, however, informed the Assistant United States Attorney that video footage from December 22, 2011, had been destroyed on approximately January 21, 2012, due to the fact that new video was automatically recorded over it within thirty to forty-five days of defendant's arrest. *Id.*

Defendant moved to dismiss the indictment due to the government's destruction of the video footage. *Id.* The motion was denied following a hearing, and defendant subsequently entered a conditional plea of guilty, reserving the right to appeal the district court's denial of the motion. *Id.* On appeal, the Ninth Circuit reversed. It noted initially the relevant two-prong standard, which "requires [a] showing of bad faith where the evidence is only potentially useful and not materially exculpatory," and also requires that the missing evidence be "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *United States v. Sivilla*, 714 F.3d 1168, 1172 (9th Cir. 2013). The court held that the evidence that had been destroyed was "potentially useful evidence to support defendant's claim of duress." *Id.* at 978. It also concluded that "the exculpatory value of the video footage . . . [was] readily apparent to [to the government]." Indeed, it noted, "[f]rom the beginning to the end of [the] hour-long interview with [defendant], [she] repeatedly alerted [the interviewing agent] to her duress claim and the potential usefulness of the pedestrian line video footage." *Id.* 979. The court held this constituted bad faith, because "when potentially useful evidence has been destroyed by the government, the bad faith inquiry initially 'turns on the

government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed.'" *Id.* (citing *Sivilla*, 714 F.3d at 1172).

Finally, the court noted that the government had "not suggested any reasonably available evidence that would be comparable to the destroyed video footage." *Id*. at 981. Although the government asserted that in lieu of the destroyed video footage the defendant could testify at trial concerning her conduct in the port of entry line, the court found the argument unpersuasive as it ran "afoul of [defendant's] Fifth Amendment right against self-incrimination, by essentially forcing her to testify in her own defense." *Id*. Moreover, the court stated, and "[n]otwithstanding the obvious Fifth Amendment implications triggered by the government's argument, [defendant's] self-serving testimony, especially in light of her substantial cognitive disabilities, would not be comparable to video footage that recorded her actions while in the pedestrian line." Thus, it held that both prongs were met, and defendant's due process rights had been violated. *Id*. at 982. The Ninth Circuit therefore reversed and remanded to the district court with instructions to dismiss the indictment. *Id*.

As with *Alvarez*, the court finds that *Zaragoza-Moreria* is relevant binding authority, and will grant Earp's unopposed motion to supplement his post-hearing brief with the decision.

2. Whether the Court Will Expand the Record and Allow Additional Discovery

Earp contends he should be permitted to expand the record and obtain discovery concerning the disappearance of the fluid-stained napkin swatch and possible disappearance of the pillow swatch. He seeks to add to the record several documents and declarations concerning his successful petition to obtain DNA testing of such evidence, as well as the fact that the evidence was subsequently found to be missing.[25] A "judge may direct the parties to expand the record by submitting additional materials relating to the [habeas] petition." Habeas Rule 7(a). Respondent argues the request should be denied

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[25]Earp seeks to supplement the record with (1) his Penal Code § 1405 motion; (2) the Los Angeles Superior Court's order granting the § 1405 motion; (3) the parties' stipulation regarding DNA testing procedures; (4) the declaration of Kenneth Sewell, supervising criminalist at the Sheriff's Department; (5) the declaration of Alane Mabaquiao, an investigator with the Federal Public Defender's Office, which describes her transport of the evidence bags she received from the Sheriff's Department to the testing laboratory; (6) relevant excerpts from Sheriff's Department investigation reports; and (7) the declaration of Statia Peakheart, an attorney with the Federal Public Defender's Office, which describes her involvement in and awareness of the disappearance of the evidence.

as procedurally improper because Earp has already had three evidentiary hearings, and Rule 7's intended use is to avoid the necessity of an evidentiary hearing. Respondent is correct that the purpose of the rule "is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing." Habeas Rule 7, Advisory Committee Notes, 1976 Adoption; see also *Blackledge v. Allison*, 431 U.S. 63, 81 (1977). The Advisory Committee Notes to Rule 7 *further* state, however, that "[a]n expanded record may also be helpful when an evidentiary hearing is ordered." Habeas Rule 7, Advisory Committee Notes, 1976 Adoption. While avoiding the necessity of an evidentiary hearing may be the primary purpose of the rule, therefore, the plain language of the rule and the comments of the Advisory Committee indicate that it is not so restrictive, and that a district judge has discretion to order an expansion of the record "[i]f the petition is not dismissed summarily. . . ." The Advisory Committee Notes, in fact, suggest that an order expanding the record may *accompany* an evidentiary hearing. In this case, the prosecutorial misconduct claim has not been summarily dismissed, as the Ninth Circuit has ordered that an evidentiary hearing take place. Thus, under Rule 7, the court has discretion to permit expansion of the record. Earp filed his motion for expansion of the record *before* the January 24, 2014 evidentiary hearing, and argued that the evidence he sought to develop would not need to be the subject of examination at a hearing. Thus, while the motion may not have obviated the need for an evidentiary hearing, it was designed in some respects to streamline that hearing and falls within the spirit as well as the letter of Rule 7. Consequently, the court declines to deny the motion on this basis.

As respects Earp's request for discovery, respondent argues that Earp must show good cause under Habeas Rule 6 to obtain discovery and that he has failed to do so. See Habeas Rules 6(a) ("A judge may, for good cause, authorize a party to conduct discovery . . . and may limit the extent of discovery"). Respondent asserts that because Earp discovered that the fluid-stained napkin was missing almost two years before he filed his motion to expand the record and conduct discovery, he cannot show good cause. Under Habeas Rule 6, good cause is evaluated by examining whether discovery concerning the evidence is necessary to a fair and well-rounded presentation of the facts. In *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996), for example, the Eighth Circuit reversed a district court's refusal to permit a habeas petitioner alleging ineffective assistance of counsel to conduct DNA and other tests on physical

evidence because petitioner had consistently maintained his innocence and argued that the test results could exonerate him. Noting that "a court's denial of discovery is an abuse of discretion if discovery is indispensable to a fair, rounded, development of the material facts," *id.*, the court held that discovery was warranted to permit Toney to prove his ineffective assistance of counsel claim. It stated:

> "Given the nature of Toney's allegations, we conclude that Toney has shown good cause for discovery under Rule 6. Toney has claimed throughout his postconviction proceedings that he is innocent of the crime and that his counsel was ineffective for failing to pursue his claim of mistaken identity or to obtain state's evidence so as to conduct scientific examinations. In order to prove the prejudice prong of his ineffective assistance claim, Toney is entitled to have access to this evidence through discovery. The district court abused its discretion in denying his discovery requests." *Id.*

The Ninth Circuit reached an identical result in *Jones*. See 114 F.3d at 1009–10 ("Just as in *Toney*, discovery is essential for Jones to develop fully his ineffective assistance of counsel claim. In particular, the test results may establish the prejudice required to make out such a claim. We reverse the district court's grant of summary judgment on the ineffective assistance of counsel issue and remand to permit Jones to engage in the requested discovery, except for the discovery as to the offered plea agreement").

As discussed *infra*, the court concludes that, unlike the situations in *Toney* and *Jones*, there is not good cause to permit additional discovery in this case. The court does not base this conclusion on respondent's argument that Earp waited too long to seek discovery. Rather, it finds that any probative value information developed through additional discovery might have would not affect the ultimate outcome the court reaches with respect to the adverse inference Earp seeks to have the court draw, and will therefore not affect decision of the remaining claim of Earp's habeas petition; because additional discovery would have no effect on the outcome of the proceedings, discovery is not "essential" to enable Earp "to develop fully his [prosecutorial misconduct] claim." *Jones*, 114 F.3d at 1009; see *Smith v. Wasden*, No. 4:08-cv-00227-EJL, 2012 WL 892325, *8 (D. Idaho Mar. 14, 2012) (denying a motion to conduct additional discovery because "[p]etitioner has not offered a reason to believe that he will be entitled to relief if these discovery requests are granted"); *Franklin v. Walker*, No. CIV S-05-304

FCD,2009 WL 5030660, *16 (E.D. Cal. Dec. 16, 2009) ("While a videotaped recreation may have added to this testimony, petitioner has not made a sufficient showing that its absence had a substantial and injurious effect on the verdict and so has not shown good cause for this request for access to the snowmobile"); *Costella v. Clark*, No. C 08–1010 PJH, 2009 WL 4730856, *2 (N.D. Cal. Dec. 7, 2009) ("Federal discovery does not serve as a fishing expedition to investigate mere speculation. Speculation is exactly what Costella proffers in support of his request to discover the victim's medical records. Costella has made no showing that the medical records are 'essential' to the development of his ineffective assistance of counsel claims, and the court therefore DENIES the motion for discovery"); *Rhyne v. McDaniel*, No. 3:06-CV-00082, 2007 WL 1381775, *4 (D. Nev. May 10, 2007) ("Having reviewed the pertinent claim in Rhyne's habeas petition (Claim One) and the allegations and supporting material submitted with his discovery motion, this court is without reason to believe that the discovery Rhyne seeks will assist him in demonstrating that he is entitled to relief based on an alleged conflict of interest"); see also *Barnabei v. Angelone*, 214 F.3d 463, 474 (4th Cir. 2000) ("The district court did not abuse its discretion in refusing to order the discovery requested here because Barnabei has not met th[e] required 'good cause' standard. In the cases cited by Barnabei [*Jones* and *Toney*], additional discovery would have offered compelling support for a credible alternative theory of the crime for which the petitioner had been convicted. Barnabei can make no such similar 'good cause' showing," abrogated on other grounds by *Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000)); compare *Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir. 2005) (ordering discovery because "[t]he laboratory notes are 'essential' to the full development of Pham's . . . claim within the meaning of *Jones* because they may well contain favorable, material information").

Earp's motion to permit additional discovery does not clearly articulate why the discovery he seeks is essential to a full and fair hearing on his prosecutorial misconduct claim – the only remaining claim in the habeas petition.[26] He argues:

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[26]At times, Earp appears to argue that there is good cause to permit discovery because the evidence developed might tend to prove that Morgan's DNA was present on the missing napkin and purportedly missing pillowcase, which in turn would make it more likely that Earp is innocent of Amanda's murder. (See, e.g., Motion at 24 ("Indeed, it is reasonably likely a favorable result in the DNA testing of this evidence, if it had been available at trial, would have resulted in a more favorable

> "The Sheriff's Laboratory released to the CDOJ Investigator the very evidence Earp had identified as exonerating. The investigator returned the envelopes but when the envelope was next opened, the pertinent evidence was missing. [The] Sheriff's Laboratory has 'no explanation' for why the napkin was missing from the envelope much less why the envelope contained irrelevant swatches. A reasonable inference is that the CDOJ investigator removed the exonerating evidence before he returned the envelope to [the] Sheriff's Laboratory. . . . Crucially, the evidence [surrounding the disappearance of the napkin and pillow] remains relevant to the claim now pending before the court: DNA evidence showing that Morgan was present in the house would give strong support to the credibility of Taylor's evidence, while undercutting that of Folz and Milkey. By removing the possibility of presenting such evidence, Respondent's counsel has insulated its case against a potentially powerful rejoinder."[27]

Earp's argument as to why information developed through discovery would be relevant to the remaining claim has three parts: First, he asserts that given the disappearance of the evidence, the court should draw an adverse inference against respondent and conclude that the missing evidence must have been favorable to Earp, i.e., must have contained Morgan's DNA. Second, he contends that the presence of Morgan's DNA on evidence recovered from the scene of the crime shows that Morgan was at Amanda's home on the day in question. Third, he asserts that this fact corroborates Taylor's testimony and makes it more likely that he overheard Morgan telling another inmate Morgan was present at the house. Earp

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outcome. Had such evidence been available to Earp, it could have, at the very least, created a reasonable doubt in the minds of the jurors as to who committed the crimes, leading to a verdict of not guilty"). Although Earp at one point alleged that he was factually innocent of the crime, he abandoned that theory on appeal. See *Earp I*, 431 F.3d at 1168 n. 6 ("Earp's second use of Taylor's potential testimony was in his state habeas petition to support his claim of factual innocence. The state court summarily denied this claim, but Earp raised it again in his federal petition. Holding that there is no free-standing constitutional claim of factual innocence, the district court rejected this claim, and Earp has abandoned it on appeal"). Thus, discovery cannot be granted solely on the grounds that it might lead to evidence essential to proving Earp's innocence; rather, discovery must lead to evidence that is essential to proving Earp's prosecutorial misconduct claim. See *Russo v. Hulick*, No. 08-3014, 2008 WL 3876087, *15, 21 (C.D. Ill. Aug. 18, 2008) (analyzing separately factual innocence and prosecutorial misconduct claims).

[27]Motion at 22–23, 25.

implicitly argues that this generally bolsters Taylor's credibility by making it more likely he was telling the truth when he stated in declarations and at the hearing that he was intimidated and threatened by prosecutors. Although the chain of logic is somewhat attenuated, this alone is not a ground for denying the motion. See *United States v. Begay*, 673 F.3d 1038, 1045 (9th Cir. 2011) ("Each of the inferences we described is reasonable because it is 'supported by a chain of logic,' which is all that is required to distinguish reasonable inference from speculation"); *Juan H. v. Allen*, 408 F.3d 1262, 1277 (9th Cir. 2005) ("a 'reasonable' inference is one that is supported by a chain of logic, rather than . . . mere speculation"). The court therefore addresses the three "links" in Earp's logic chain to determine whether discovery is essential to permit Earp to develop his prosecutorial misconduct claim.

As noted, the first step in Earp's chain of logic is the drawing of an adverse inference against respondent because pieces of relevant evidence have disappeared. He argues that the court should rebuttably presume from the state's spoilation that the missing evidence was detrimental to the prosecution, and likely contained Morgan's DNA.[28] Earp is correct that "a trier of fact may draw an adverse inference from the destruction of evidence relevant to a case." *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991). "A federal trial court has the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence"; these include "permit[ting] a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior." *Glover v. BIC Corp*., 6 F.3d 1318, 1329 (9th Cir. 1993) (citing *Akiona*, 938 F.2d at 161). In situations such as this, the rule operates as a "common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document." *Akiona*, 938 F.2d at 161. Indeed, "only a 'minimum link of relevance' is required to permit a jury to draw an adverse inference." *Marceau v. Int'l Bhd. of Elec. Workers*, 618 F.Supp.2d 1127, 1174 (D. Ariz. 2009) (citing *Akiona*, 938 F.2d at 161).

Respondent does not dispute that the napkin was relevant. Parties "engage in spoliation of documents as a matter of law[, however,] only if they had some notice that the documents were

[28] *Id*. at 21–22.

potentially relevant to the litigation before they were destroyed." *United States v. Kitsap Physicians Service*, 314 F.3d 995, 1001 (9th Cir. 2002); *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation"). There can be no dispute that respondent knew the fluid-stained napkin was potentially relevant to Earp's habeas claims at the time it was allegedly destroyed or otherwise went missing. Earp has always maintained that Morgan was responsible for Amanda's death, and DNA evidence linking Morgan to the crime scene would have seriously damaged Morgan's credibility. Thus, because the napkin and pillow swatch were checked out of the Sheriff's Department evidence files by the California Department of Justice – which is defending the conviction – and were later found to have disappeared, despite having purportedly been returned by the Department of Justice, it is proper to draw an adverse inference against respondent. As the first step in deciding the discovery motion, then, the court draws the inference that the missing evidence showed Morgan was at the scene of the crime on the day in question. To do so, the court grants Earp's motion to expand the record on which the court will decide his remaining habeas claim to include the documentation and declarations attached thereto, as the court must consider such evidence to draw an adverse inference against respondent. See Habeas Rule 7(a); *Taylor v. Yates*, No. 1:09-cv-01876-OWW, 2011 WL 475185, *2 ("Habeas Rule 7 permits the Court to direct the parties to expand the record by submitting additional materials relating to the petition and to authenticate such materials, which may include letters predating the filing of the petition, documents, exhibits, affidavits, and answers under oath to written interrogatories propounded by the judge").

The court, however, is not persuaded that its drawing of an adverse inference makes additional discovery essential to Earp's ability to have a full and fair hearing on the prosecutorial misconduct claim. Notably, the evidence Earp has already adduced regarding the missing item or items – which, as noted, the court has added to the record – is sufficient to permit the court to draw the adverse inference he seeks, and to conclude that the missing evidence would have shown that Morgan was present at Amanda's home. The party seeking to introduce evidence of spoliation need not establish bad faith on the part of the party who purportedly destroyed or lost the evidence to justify the drawing of an adverse inference. *Glover*, 6 F.3d at 1329 ("[A] finding of 'bad faith' is not a prerequisite to [permit

a jury to draw an adverse inference]"); *Akiona*, 938 F.2d at 161 (same). It is thus unclear exactly what additional discovery would accomplish, since the evidentiary purpose Earp seeks to accomplish by conducting discovery has already been achieved. Stated differently, although the court accepts the second and third steps in Earp's logical argument, it concludes that the ultimate purpose for which Earp wishes to use the adverse inference – to bolster the credibility of Taylor's testimony that he overheard Morgan say he was at Amanda's house by showing that Morgan's DNA was in fact found at that location – has already been accomplished and there is no need for additional discovery.

In his opposition, respondent makes no effort to explain the disappearance of the napkin. This suggests that, if anything, additional discovery would serve only to develop evidence that could be used to *rebut* the inference drawn, e.g., by permitting respondent to adduce facts suggesting an innocent explanation for the disappearance of the napkin and/or pillowcase. See *Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc*., 306 F.3d 806, 824 (9th Cir. 2002) ("[W]hen relevant evidence is lost accidentally or for an innocent reason, an adverse evidentiary inference from the loss may be rejected," citing *Blinzler v. Marriott Int'l, Inc*., 81 F.3d 1148, 1159 (1st Cir. 1996)); see also *Marceau v. Int'l Broth. of Elec. Workers*, 618 F.Supp.2d 1127, 1176–77 (D. Ariz. 2009) (analyzing evidence submitted by defendants to determine whether it successfully rebutted the adverse inference drawn against it). The possibility that discovery might permit respondent to rebut an inference drawn in Earp's favor is not grounds for *Earp* to seek additional discovery. Because Earp has failed to identify any other evidentiary function discovery could accomplish relevant to his remaining habeas claim, he has failed to show good cause for taking additional discovery under Rule 6.

Consequently, while the court grants Earp's motion to expand the record, it denies his motion to conduct additional discovery.

C. Earp's Petition for Writ of Habeas Corpus

1. Legal Standard Governing Habeas Relief

Because Earp's petition for writ of habeas corpus was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the case is governed by that Act. See *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). AEDPA provides in relevant part:

"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 . . . ." 28 U.S.C. § 2254(d).

Under this standard, state court decisions are generally accorded substantial deference. See *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) ("[S]tate court decisions [must] be given the benefit of the doubt"). An exception is made, however, where "a state court adjudication is based on an . . . unreasonable determination of fact." *Maxwell v. Roe*, 628 F.3d 486, 494–95 (9th Cir. 2010). In those cases, the federal court reviews petitioner's claims *de novo*. *Id.*; see also *Jones v. Walker*, 540 F.3d 1277, 1288 (11th Cir. 2008) ("Jones has demonstrated the Georgia Supreme Court unreasonably determined the facts of his case. Under AEDPA, we would ordinarily defer to both the state court's legal and factual determinations. Nevertheless, because this is a rare case in which the petitioner has met the requirement of § 2254(d)(2) by showing the state courts made an unreasonable factual determination, we review Jones' claim de novo, without deference to the Georgia Supreme Court's decision"). Here, the Ninth Circuit determined that the California courts made an unreasonable factual determination regarding Earp's prosecutorial misconduct claim. *Earp I*, 431 F.3d at 1170. It noted that

> "Earp ha[d] never had an opportunity to present Taylor's live testimony so that the trier of fact [could] judge his credibility, and the prosecutor and sheriff's deputy ha[d] never been questioned regarding their side of the story." *Id.* Because the court "conclude[d] that Earp has not had a full and fair opportunity to develop the facts to support his claim," it held "that the state court's decision denying him relief without an evidentiary hearing to resolve the credibility dispute was based on an unreasonable determination of the facts." *Id.*

Consequently, the court will adjudicate Earp's prosecutorial misconduct claim *de novo*, based on the evidentiary hearing it held and the record before the court, including the documents with which

the court supplemented the record. As noted earlier, the court denied Earp's motion to conduct additional discovery because it determined that the documentary evidence Earp had already adduced, and that has now been included in the record, was sufficient to support the drawing of an adverse inference against respondent. The court draws the same adverse inference for purposes of adjudicating Earp's remaining habeas claim as it did in deciding Earp's motion to conduct discovery.

2. Legal Standard Governing Claims of Prosecutorial Misconduct

As noted, Earp's sole remaining habeas claim charges that prosecutors engaged in prejudicial misconduct that violated his due process rights. Specifically, he alleges that following his trial, but before his motion for new trial had been decided, Michael Taylor gave Earp's lawyer a declaration stating that Taylor had overheard Dennis Morgan tell another inmate that Morgan had been at Amanda's home the day she died. This contradicted Morgan's testimony at Earp's trial.[29] Earp attached the declaration to his motion for new trial.[30] Taylor asserts that after Earp's submitted the declaration, Deputy District Attorney Robert Foltz and Investigating Officer Edwin Milkey approached him, threatened him and told him to change his testimony.[31] Taylor contends he recanted the declaration because of these threats.[32]

"To warrant habeas relief, prosecutorial misconduct must 'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process.'" *United States v. Ratigan*, 351 F.3d 957, 964 (9th Cir. 2003) (affirming the denial of a § 2255 motion, and quoting *Davis v. Woodford*, 333 F.3d 982, 996 (9th Cir. 2003)). A defendant's constitutional rights are "implicated where the prosecutor 'employs coercive or intimidating language or tactics that substantially interfere with a defense witness' decision whether to testify.'" *Garcia v. Clark*, No. CIV S–10–0968 GEB DAD P, 2011 WL 6819812, *9 (E.D. Cal. Dec. 28, 2011) (quoting *United States v. Vavages*, 151 F.3d 1185, 1189 (9th Cir. 1998)). "It is well established that 'substantial government interference with a defense witness's free and

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[29]Petitioner's Pre-Hearing Brief, Docket No. 322 (Jan. 17, 2014), at 2–3.

[30]*Id.* at 3.

[31]*Id.*

[32]*Id.*

unhampered choice to testify amounts to a violation of due process.'" *Earp I*, 431 F.3d at 1170 (quoting *Vavages*, 151 F.3d at 1188); see *Williams v. Woodford*, 384 F.3d 567, 601 (9th Cir. 2002) ("Undue prosecutorial interference in a defense witness's decision to testify arises when the prosecution intimidates or harasses the witness to discourage the witness from testifying").

In a habeas case, "[t]o succeed on a witness intimidation claim, the petitioner must establish the prosecutor's misconduct by a preponderance of the evidence." *Moran-Deltoro v. Schribner*, No. CV 06-5423 ODW (FFM), 2011 WL 2183579, *14 (C.D. Cal. May 9, 2011). In addition to proving that the prosecutor engaged in misconduct, a petitioner seeking habeas relief must also prove that he was prejudiced by the misconduct; "[a] constitutional violation arising from prosecutorial misconduct does not warrant habeas relief if the error is harmless." *Towery v. Schriro*, 641 F.3d 300, 307 (9th Cir. 2010); see *Sandoval v. Calderon*, 241 F.3d 765, 778 (9th Cir. 2000) ("Our finding of constitutional error does not end the inquiry, however. To warrant habeas relief, Sandoval must show that the prosecutor's improper argument 'had [a] substantial and injurious effect or influence in determining the jury's verdict,'" quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)).

3. Whether Earp Has Proved His Claim of Prosecutorial Misconduct by a Preponderance of the Evidence

The evidence in the record relevant to Earp's prosecutorial misconduct claim consists of (1) testimony and exhibits introduced at an evidentiary hearing conducted by the court on January 24, 2014; and (2) documents with which Earp has supplemented the record.[33] Four witnesses testified at the hearing: Taylor, Milkey, Foltz, and Doshier.[34]

a. Summary of Taylor's Testimony and Related Evidence

Taylor testified that in October 1991, he was being held at Los Angeles County Jail.[35] He stated

[33]See Petitioner's Post-Hearing Brief ("Earp Post-Hearing Brief"), Docket No. 339 (Apr. 18, 2015), at 13–23.

[34]Transcript at 3.

[35]*Id*. at 13.

that his cell was two cells away from Morgan's, whom he knew.[36] Taylor reported that he overheard Morgan speaking with two other inmates: Kenny Aldridge (nickname "Thumper") and an inmate nicknamed "Joker."[37] Taylor asserted that although he could not see Morgan, he knew Morgan was the speaker because Morgan "[had] a distinctive voice [that] was a male voice trying to sound like a female."[38] Taylor testified that Morgan "was trying to rehearse . . . testimony for a case that Mr. Earp was involved in."[39] He said he overheard Morgan say that Morgan "had to make sure he keep hisself out of that house. He can't slip up on his testimony."[40] Taylor asserted, however, that Morgan "said he was at the house."[41]

Taylor testified that he did not know Earp at the time he overheard this conversation or know anything about him; he had merely seen him in passing.[42] He stated that the night after he heard Morgan's conversation, he told Earp what he had heard. Earp asked Taylor to talk to his lawyer.[43] When asked why he told Earp what he had heard, Taylor responded that he thought Earp "had a right to know."[44] Taylor testified that thereafter, he spoke with a woman from Earp's defense team, whose name he did not remember.[45] He also stated that he signed a declaration in which he described the conversation he overheard ("first declaration").[46]

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[36] *Id.* Taylor testified that he knew Morgan, but that Morgan was not a friend. *Id.*

[37] *Id.* at 13, 15.

[38] *Id.* at 14.

[39] *Id.* at 15.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 16.

[43] *Id.* at 17.

[44] *Id.*

[45] *Id.* at 17–18.

[46] *Id.*

Taylor testified that sometime later he met with a prosecutor and two county sheriff's deputies.[47] He reported that the meeting took place in a small room – which he described as a "little closet" – that had a window and one seat.[48] He stated that he and the prosecutor were both seated, while the two Sheriff's deputies stood.[49] Taylor continued:

> "Well, they pushed me up in a corner in the chair. One grabbed me by the throat and says, you know 'This – this – this guy, he raped and murdered an 18-month-old baby,' uh, and – and this is the only thing – and this – 'Did' – you know, 'He offered you money man, to say this statement?' And they told me what I was going to say, and I said it."[50]

Taylor testified that during the meeting, the prosecutor also said: "You're not going to fuck up my case."[51] Taylor asserted that when the prosecutor said this, he was only a couple of inches away from Taylor and sounded "kind of pissed."[52] Taylor also testified that the prosecutor threatened to put him "in a [Crip] tank" if he did not change his story.[53] He asserted that, following the threats, the officers and prosecutor "turned on a tape recorder after they told [Taylor] what they wanted [him] to say."[54] He stated that he complied and recited what they had instructed him to say.[55]

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[47]Transcript at 20.

[48]*Id*.

[49]*Id*. at 20–21.

[50]*Id*. at 21. Taylor testified that these statements were made by "one of the sheriffs." *Id*.

[51]*Id*.

[52]*Id*.

[53]*Id*. at 22. A "Crip tank" is an area of the jail populated by members of the Crips gang. Taylor testified that the area was "mainly African[-]Americans," and that it would have been "dangerous" for him to be placed there. *Id*.

[54]*Id*. at 21–22.

[55]*Id*. at 22.

The recorded portion of the interview was introduced as an exhibit at the hearing.[56] In the recording, Milkey can be heard asking questions of Taylor. Milkey acknowledged that the interview had begun approximately thirty minutes before the recorder was turned on, and asked Taylor to "go back to the beginning."[57] Taylor said that during the penalty phase of Earp's trial, Earp had continually approached Taylor – about once a day – to discuss Earp's trial.[58] Earp attempted to convince Taylor that he was innocent, and that Morgan had murdered Amanda and lied about it on the stand.[59] Taylor told Milkey and Foltz that Earp had offered him $20 to "place Dennis Morgan at the house for him."[60] Earp also wanted Taylor to give him the names of other inmates, so that Earp and his lawyers could contact them.[61] When Milkey asked how Taylor was supposed to "place Morgan at the house," Taylor said that he was supposed "to overhear Dennis [Morgan] talking about the trial and everything, you know . . . to place Dennis, 'cause Dennis was not supposed to be at the house and definitely wanted me to place Dennis there at the time."[62] Taylor said Earp told him that once he made a statement about having overheard Morgan, he would not have to testify, because "it would just go to the appellate court."[63] Taylor also said that he agreed to state falsely that he had overheard Morgan because he was convinced Earp was innocent.[64] He believed this because Earp "had all this paperwork . . . and everything . . . I guess from his lawyer," and because Earp had told him there was no physical evidence incriminating

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[56]Recording of 02/17/92 Interview ("Interview"), Exh. 537. All references to the interview are based on this recording, which was admitted at the hearing.

[57]Interview at 00:43.

[58]*Id.* at 02:02–02:30

[59]*Id.*

[60]*Id.* at 04:38.

[61]*Id.* at 04:48–04:52.

[62]*Id.* at 05:40–05:52.

[63]*Id.* at 06:49–06:58.

[64]*Id.* at 07:12.

him, and the jury had convicted him strictly on the basis of circumstantial evidence.[65] He also stated, however, that had he known he would be required to testify concerning the conversation he had purportedly overheard, he would not have agreed to participate.[66] He said he believed his involvement would be limited to "merely sign[ing] a piece of paper."[67]

In the recorded interview, Taylor also stated that he had met with "an older lady," apparently someone involved in Earp's defense.[68] Taylor told Milkey and Foltz that he lied to the woman and said that he had overheard Morgan's statements.[69] He stated that when he met the woman a second time, she brought a declaration for him to sign.[70] He read the declaration and signed it, although he admitted at the interview that the statements contained in it were untrue.[71] Taylor said the woman did not explain that the document he was signing was a declaration or that he was signing it under penalty of perjury.[72]

At the conclusion of the interview, Milkey asked Taylor whether either he or Foltz had threatened Taylor or asked him to tell them "anything other than . . . the truth."[73] Taylor responded "no" to both questions.[74]

At the evidentiary hearing, Taylor testified that the statements he made after the recorder was turned on were false, and that he made the statements because he "was pretty much in fear for [his] life"

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[65] *Id.* at 07:16–09:10.

[66] *Id.* at 13:31–13:40.

[67] *Id.* at 13:41.

[68] *Id.* at 10:05.

[69] *Id.* at 10:25–10:49.

[70] *Id.* at 10:59–11:10.

[71] *Id.* at 11:13.

[72] *Id.* at 11:31–11:41.

[73] *Id.* at 14:07, 15:08.

[74] *Id.* at 14:09, 15:09.

due to the threat that he would be placed in the Crip tank.[75] He also testified that at some point he communicated to the prosecutor and investigating officer that he wanted to be moved to a different facility; he was apparently moved to the Hall of Justice the next day.[76]

Taylor stated that after his meeting with Foltz and Milkey, he was approached by the woman on Earp's defense team;[77] he said that because of what had happened, he told her to leave him alone.[78]

In 1996, Taylor was approached by a different member of Earp's defense team – "an older gentleman."[79] At this point, Taylor testified, he was willing to discuss what had happened, primarily because "they couldn't put [him] in the [Crip] tank at the time."[80]

b. Summary of Milkey's Testimony

Milkey testified that in 1992, he was employed as a homicide investigator for the Los Angeles County Sheriff's Department.[81] He had begun working at the department in 1972, and had been a sergeant since 1986.[82] He stated that he was one of the homicide investigators who had been assigned to investigate the death of Amanda Doshier.[83]

Milkey testified that he had interviewed Taylor at the county jail in 1992.[84] He stated that deputy district attorney Robert Foltz had called him, and asked Milkey to meet him at the jail because "some

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[75]Transcript at 23.

[76]*Id.*

[77]*Id.* at 24.

[78]*Id.*

[79]*Id.*

[80]*Id.*

[81]*Id.* at 36.

[82]*Id.*

[83]*Id.* at 37.

[84]*Id.*

information had been developed."[85] Specifically, Foltz told Milkey that Taylor had had a conversation with Earp concerning the fact that he had overheard some statements made by Morgan, and that Taylor had signed a declaration concerning the statements.[86] Milkey was not sure whether he had read the declaration prior to the interview, but he did know its contents.[87] Milkey testified that Taylor was interviewed in the "watch commander sergeant's office" located at the jail.[88]

He reported that when Taylor was brought into the office, he was not handcuffed.[89] He also stated that the only people present during the interview in addition to him were Foltz and Taylor.[90] Milkey testified that he did not begin recording the interview immediately; he said he "wanted to know what [Taylor's] story was, and [so he] didn't start recording until after [he and Taylor] had gone through the story the first time."[91] The unrecorded portion of the interview lasted at most thirty minutes.[92] Milkey reported that after Taylor went through the story, he told Taylor he was going to have to testify in court.[93] This, he asserted, "changed [Taylor's] attitude immediately," and Taylor began to recant the story.[94] Milkey testified that Taylor "got upset" when Milkey said he would have to testify.[95] He said Taylor responded that he would not testify, that all he had to do was sign the "piece of paper" –

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[85] *Id*. at 37–38.

[86] *Id*. at 38. Later testimony indicates that the exact date of the interview was February 17, 1992. (See, e.g. *id*. at 126).

[87] *Id*. at 38.

[88] *Id*.

[89] *Id*. at 39–40.

[90] *Id*. at 40.

[91] *Id*. at 41.

[92] *Id*. at 42.

[93] *Id*. at 41.

[94] *Id*.

[95] *Id*. at 44.

presumably the declaration – and that "that would take care of the matter."[96] Milkey stated that Taylor said he was "not going to testify because it's not true."[97] When Milkey asked him to explain what was not true, Taylor simply responded "the statement," and repeated that he was not going to testify.[98] At this point, Milkey stated, he turned on the tape recorder.[99] Milkey asserted that during the entire interview – both the recorded and unrecorded portions – he never verbally abused Taylor, directed intimidating gestures at him, swore at him, called him names, threatened him with transfer or extended jail time, offered him benefits if he changed his story, asserted that "nobody [was] going to fuck with [the] case," or coached Taylor on how he should change his story.[100] Milkey said that Taylor did not appear to be scared of him or of Foltz. He stated that following the interview, he took no steps to alter Taylor's inmate status in any way, and did not direct anyone else to do so.[101]

c. Summary of Doshier's Testimony

Doshier is the mother of the victim, Amanda Doshier.[102] She testified that prior to Earp's trial, she spoke with Foltz several times and told him she did not believe that Earp killed Amanda because "he loved Amanda very much and . . . Amanda loved him very much."[103] Doshier testified that in response to such statements, Foltz said Earp was guilty because they found "sperm in [Amanda's] vagina and blood around her body . . . [and] that the sperm and the blood was that of Ricky Lee Earp[ ]."[104] Doshier stated that this changed her opinion of Earp's guilt. She reported that at Earp's trial, she

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[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 44–48.

[101] *Id.* at 52.

[102] *Id.* at 171.

[103] *Id.* at 177.

[104] *Id.* at 178.

testified to this conversation with Foltz in response to questions by the defense on cross-examination.[105]

Doshier said that following her testimony at Earp's trial, Foltz and several of his colleagues approached her in the hallway.[106] At their behest, she accompanied Foltz and approximately three other individuals to a "small room."[107] Doshier stated that at the meeting that followed,

> "Robert Foltz was very, very angry with me and told me that if I didn't get back up on the stand and take back my testimony that he would have my child that was in the stroller taken from me and my child that was in my stomach because he knew that I was using heroin and that people on heroin do not make – cannot make good parents and that you should not use drugs during pregnancy."

Doshier believed that Foltz was angry because "his voice was deep and loud," and he was approximately two-and-a-half to three feet from her when he made these statements.[108] She said she was scared by Foltz's comments because she believed he could do the things he threatened.[109]

Doshier testified that thereafter, she was recalled as a witness.[110] On the witness stand, she recanted her earlier testimony that Foltz had told her Earp's sperm and blood were found on Amanda's body.[111] She told the Earp jury she had "made up" the fact that Foltz said those things.[112] At the evidentiary hearing, Doshier testified that her testimony upon being recalled as a witness was false and that she offered it only because she was afraid her children would be taken from her.[113]

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[105] *Id.*

[106] *Id.* at 179.

[107] *Id.*

[108] *Id.* at 180–81.

[109] *Id.* at 181.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 182.

[113] *Id.*

d. Summary of Foltz's Testimony

Foltz testified that he was a deputy district attorney in the Los Angeles County District Attorney's Office in 1992.[114] His testimony was in most respects similar to Milkey's. Foltz testified that Milkey took the lead in interviewing Taylor, but that he occasionally interjected questions.[115] He stated that all three men were seated during the interview.[116]

Like Milkey, Foltz reported that Taylor originally said he had overheard Morgan state that Morgan had been present at Amanda's home on the day in question. Foltz testified that either he or Milkey then said: "[Y]ou d[o] understand that if you made a declaration, it was made under penalty of perjury."[117] Foltz reported that Taylor's demeanor changed slightly after that comment, but he did not say anything.[118] Foltz described the change, stating that prior to the comment, Taylor had looked "relaxed," but that following the comment, he looked "a little bit flummoxed."[119] More specifically, Foltz said, Taylor looked like "a person who [had] suddenly [been] informed of some bad news and now [was] concerned about it."[120] Foltz testified that as he and Milkey were leaving the room, Milkey said he would see Taylor in court.[121] At that point, Taylor called the men back into the room, and said he wanted to talk.[122] Foltz testified that neither he nor Milkey verbally abused Taylor, used intimidating gestures, swore at Taylor, called him names, threatened him with transfer or extended jail time, offered

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[114] *Id.* at 96.

[115] *Id.* at 97.

[116] *Id.* at 100.

[117] *Id.* at 101.

[118] *Id.*

[119] *Id.* at 102.

[120] *Id.*

[121] *Id.* at 101.

[122] *Id.*

him benefits if he changed his story, or coached Taylor concerning what he should say.[123]

Foltz also addressed the allegations leveled by Doshier. He testified that following a side-bar conference and voir dire questioning during Earp's trial, Doshier was permitted to testify about the purported conversation she had had with Foltz regarding evidence of Earp's guilt.[124] He reported she told the jury he had falsely stated that Earp's semen and blood were found on Amanda's body.[125] Foltz testified at the hearing that Doshier's trial testimony had been false, as he had never made these statements to her.[126] Foltz was then asked about his cross-examination of Doshier following her initial testimony at trial. Foltz testified at the hearing that he questioned Doshier about being "unavailable" during the investigation of her daughter's rape and murder, and commented that he had "scold[ed]" Doshier for not making herself more available to the prosecution team.[127] When Earp's counsel asked what he meant by "scolding," Foltz responded:

> "I mean speak to her and say, '[w]hy would you, as the mother of the victim of this – of this crime, not make yourself available at all times, any time you are requested to, to assist in determining what actually happened to your child?' . . . In other words, in not kind – not done in a kind way. I would scold her and tell her, '[t]his is a bad thing. You're the mother of this child. . . . Why aren't you doing everything in your power to help find what happened to your child?'"[128]

Foltz also stated that he "scolded" Doshier for using methamphetamine while pregnant.[129] The

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[123] *Id*. at 102–08.

[124] *Id*. at 153.

[125] *Id*.

[126] *Id*. at 158.

[127] *Id*. at 154.

[128] *Id*. at 154–55.

[129] *Id*. at 156.

conversations in which he scolded Doshier occurred prior to the commencement of Earp's trial.[130]

Foltz testified at the hearing that following Doshier's initial trial testimony, he had a conversation with her.[131] Foltz said that Doshier contacted him, and told him she wanted to discuss her prior trial testimony; Foltz assesrted he had no interest in discussing the testimony.[132] Specifically, Foltz testified that Doshier "was concerned that she had misstated . . . reality when she testified in court and she wanted to make the record correct."[133] Foltz stated that Doshier telephoned him to communicate this.[134] Foltz testified that he did not recall speaking with Doshier in a hallway or room of the courthouse;[135] he noted, however, that a conversation "may well have occurred" in an attorney room immediately before Doshier testified a second time.[136] He said at the hearing that at no point did he scold, harass, or threaten Doshier regarding her allegedly false initial testimony. When asked about that allegation at the hearing, he stated:

> "I certainly wouldn't have scolded her for that because she's the one that initiated the desire to return to the stand to clear up what she had previously testified to. And there's no reason to scold her. She came back. She said, '[l]ook, I was mistaken. I learned [the incorrect allegations regarding Earp's sperm and blood] from my husband, not from you, and I want the Court to know I wasn't lying, that I was just mistaken.'"[137]

Foltz explicitly testified that he never threatened to take away Doshier's children or bring felony child endangerment charges if she did not recant her testimony, and never threatened if she did not

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[130] *Id*. at 162.

[131] *Id*. at 157.

[132] *Id*. at 157–58.

[133] *Id*. at 158.

[134] See *id*. at 159 (Q: "[W]here were you when she made this phone call to you?").

[135] *Id*. at 160.

[136] *Id*. at 161.

[137] *Id*. at 162.

recant.[138]

e. Earp's Expansion of the Record

As noted, the court has expanded the record to include evidence that officials discovered that certain items of relevant physical evidence were missing after they had been in the custody of the California Department of Justice. The court has drawn an adverse inference based on the disappearance of the evidence, and will assume for purposes of deciding Earp's remaining habeas claim that the missing evidence would have been favorable to Earp in that it would have shown that Morgan was at the Doshier home on the day of Amanda's death.

f. Whether Earp Has Proved Prosecutorial Misconduct by a Preponderance of the Evidence

Were it to find that Taylor's testimony concerning Milkey's and Foltz's conduct was true, the court would almost certainly find that such conduct deprived Earp of due process of law. *United States v. Little*, 753 F.2d 1420, 1438 (9th Cir. 2004) ("[S]ubstantial government interference with a defense witness's free and unhampered choice to testify amounts to a violation of due process"). Had Milkey and Foltz physically intimidated Taylor and threatened that, unless Taylor recanted his statements, they would see that he was transferred to a part of the jail where he would be in danger, their conduct would have "effectively dr[iven] [Taylor] off the stand, and thus deprived Earp of due process of law under the Fourteenth Amendment." *Webb v. Texas*, 409 U.S. 95, 97 (1972).

The court, however, concludes that Earp has not proved by a preponderance of the evidence that the misconduct described by Taylor – or indeed any misconduct – actually occurred. The only direct evidence of Milkey's and Foltz's threats is Taylor's testimony. His testimony was directly contradicted by that of Milkey and Foltz. As the Ninth Circuit noted when it required that an evidentiary hearing be held, resolution of the factual dispute as to what occurred during the February 17, 1992 interview requires weighing the relative credibility of the individuals involved. See *Earp I*, 431 F.3d at 1170 ("Because the veracity of the witnesses who signed the affidavits on which Earp based his claim was at issue, the claim could not be adjudicated without an evidentiary hearing on this disputed issue of

[138] *Id.* at 162–63, 168–69.

material fact. . . . Earp has never had an opportunity to present Taylor's live testimony so that the trier of fact can judge his credibility, and the prosecutor and sheriff's deputy have never been questioned regarding their side of the story").

For a variety of reasons, the court finds Taylor's testimony not credible. First, although the court does not rely heavily on it, there is the fact that Taylor was convicted in 2004 of providing a false identification card to a police officer;[139] this is a crime that involves dishonesty, and therefore impeaches or undermines his credibility. See FED.R.EVID. 609(a)(1)(B) ("[F]or any crime regardless of punishment, . . . evidence [of a conviction] must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement"). Taylor also testified that he had used at least twelve different aliases, raising further questions about his trustworthiness and credibility.[140]

More importantly, there were inconsistencies in Taylor's testimony, and certain portions of the testimony were implausible. First, Taylor testified on direct examination that Morgan was in Morgan's cell when Taylor overheard the statements he allegedly made;[141] on cross- examination, however, he stated Morgan was in Aldridge's cell.[142] Second, Taylor testified that the room in which the interview took place had "one seat," but then testified that both he and Foltz were seated during the interview.[143] Although these inconsistencies are relatively minor and concern somewhat collateral issues, they contribute to the court's ultimate conclusion concerning Taylor's credibility. Additionally, and more troubling, is the fact that Taylor testified at the evidentiary hearing that he overheard Morgan at a time when he was "rehears[ing] . . . testimony for a case that Mr. Earp was involved in."[144] He said that

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[139]Transcript at 25.

[140]*Id.* at 25–26.

[141]*Id.* at 14.

[142]*Id.* at 28.

[143]*Id.* at 20–21.

[144]*Id.* at 15.

Morgan stated he "had to make sure [that] he ke[pt] hi[m]self out of that house," and that he could not "slip up on his testimony."[145] Taylor admitted at the hearing, however, that in his first declaration, he stated that the conversation he allegedly overheard occurred *after* Morgan had testified; the first declaration asserted that "[a]t some point in time *during deliberations* in the Rick Earp trial, I overheard a conversation"[146] This is a significant detail, and one about which Taylor should have been able to testify consistently, if in fact he overheard the conversation he asserts Morgan had with other inmates.[147]

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[145] *Id*.

[146] *Id*. at 33 (emphasis added).

[147] Respondent noted this inconsistency in his post-hearing brief. Earp objected that respondent was attempting to "impeach[ ] the credibility of Michael Taylor's testimony at the hearing on the basis of discrepancies between that testimony and prior inconsistent statements made by Taylor," but Taylor was not confronted with the inconsistency at the hearing. (Objection to Respondent's Post-Evidentiary Hearing Brief, Docket No. 342 (Apr. 28, 2014).) As a result, Earp contends, the argument violates Rule 613(b) of the Federal Rules of Evidence. See FED.R.EVID. 613(b) ("Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires"). Respondent counters that Taylor was given an opportunity to deny or explain the inconsistent statement in his first declaration because he was shown the declaration, directed to paragraph 3 of the declaration where the inconsistent statement appears, and asked whether or not the first declaration contained the statement. (See Response to Petitioner's Objection to Respondent's Post-Evidentiary Hearing Brief, Docket No. 348 (Aug. 8, 2014); see also Transcript at 33:13-21.) Following respondent's examination of Taylor, Earp's lawyer questioned him on redirect. Although she had an opportunity to elicit an explanation from Taylor concerning the inconsistency, she did not do so. Because Taylor was given an opportunity to deny the statement and request the opportunity to explain it, and because Earp's counsel had an opportunity to examine Taylor about the statement, Rule 613(b)'s requirements were satisfied. See *United States v. McLaughlin*, 663 F.2d 949 (9th Cir. 1981) (quoting the Advisory Committee Notes to Rule 613(b), which state that "[t]he traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposing party an opportunity to examine on the statement, with no specification of any particular time or sequence," and holding that "[o]n cross-examination, Weitz denied making the statement in question at the 1977 meeting. On direct examination McLaughlin should have been permitted to testify as to his version of the meeting. The government would have been free to re-call Weitz as a witness and give him an additional 'opportunity to explain or deny' the statement attributed to him. Rule 613(b) requires no more"); see also *United States v. Whitmore*, 35 Fed. Appx. 307, 329 (9th Cir. Feb. 11, 2002) (Unpub. Disp.) ("The foundational prerequisites of Rule 613(b) require only that the witness be given an opportunity, at some point, to explain or deny the prior inconsistent statement and that the opposing party be given the opportunity to examine the statement").

Moreover, it is unclear whether, under the particular circumstances of this case, Rule 613(b) even applies. The first declaration – the extrinsic evidence containing Taylor's inconsistent statement – was

Certain facts to which Taylor testified also appear implausible and unrealistic. Taylor asserts – and Earp's habeas petition alleges – that Morgan spoke audibly about his decision to lie in Earp's case. Taylor contends Morgan was speaking in a somewhat loud voice, as Taylor was able to hear the statements from nine to fifteen feet away.[148] Given the potential consequences if his alleged perjury were to be discovered (e.g., a perjury charge and the fact that Morgan would potentially be implicated in Amanda's death), it is difficult to believe that Morgan would so indiscreetly discuss his alleged perjury. Far more likely, in the court's opinion, is the scenario described by Taylor in his recorded interview, i.e., that the Morgan conversation never took place and that the statements Taylor made in his first declaration were part of a scheme conceived by Earp to secure a reversal of his conviction.

The court finds even more implausible Taylor's purported response to the statements he allegedly overheard. Taylor testified repeatedly that he had never met Earp before he spoke to him

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not admitted at the hearing. (See Transcript at 19:2-5.) Rather, evidence of the inconsistent statement came in the form of a question and answer during Taylor's cross-examination. Respondent's counsel asked: "Now, at paragraph 3 of [Exhibit 523], you state, 'At some point in time during deliberations in the Rick Earp trial, I overheard a conversation.' That was in your declaration, [wasn't] it?" (*Id.* at 33:16-20.) Taylor responded: "Yes, ma'am." (*Id.* at 33:21.) Earp's attorney did not object either to the form of the question or to the admissibility of Taylor's answer on any other grounds. Earp therefore waived any objection he might otherwise have had to the evidence. See *Good v. United States*, 378 F.2d 934, 936 (9th Cir. 1967) ("Further, no objection was made to the introduction of these statements at the time of trial. Unless good cause is shown for such failure, there is a waiver"); see also *New Market Inv. Corp. v. Fireman's Fund Ins. Co.*, 774 F.Supp. 909, 917-18 (E.D. Pa. 1991) ("In its post-trial motion, Frupac contends that the testimony of the expert for Fireman's Fund was 'unfounded' and therefore cannot amount to the minimum quantity of evidence necessary to support the jury's verdict. However, it is well-settled under the caselaw and clear under Rule 103(a)(1) of the Federal Rules of Evidence that the failure to timely object to the admission of evidence constitutes a 'waiver' of such objection for purposes of post-trial review").

[148]There was some discrepancy at the hearing respecting the distance between Taylor's and Morgan's locations at the time of the alleged conversation. Taylor initially testified that he was approximately nine feet from Morgan when he overheard Morgan's statements. (Transcript at 28). Taylor was shown a transcript of his earlier deposition, however, in which he testified that Morgan was fifteen feet away. (*Id.* at 29). When confronted with this inconsistency, Taylor appeared to concede that his deposition testimony was inaccurate. (*Id.* ("Okay. Well, no, ma'am. It's a single-man cell, so it can't be 15 feet")).

about Morgan's statements; indeed, he said he did not even know of Earp before then.[149] The following colloquy is representative:

> "Q: [W]hen did you first meet Ricky Earp?
>
> A: Oh, I was working high power.[150]
>
> Q: Do you remember the month?
>
> A: . . . Oh, I don't remember the month, no ma'am. I – I only met the guy one time. That's when I told him what I heard, uh, Mr. Morgan said.
>
> Q: But you knew of him?
>
> A: No, ma'am. . . . But I heard this guy talking about this guy's case, and I thought he should know about it and I told him.
>
> Q: How did you know where to find him?
>
> A: Because he was in high power.
>
> Q: So you knew he was in high power. You knew who he was?
>
> A: No, I had to ask – I asked the guy in the first cell who he was.

Given that Taylor did not know Earp, and did not know anything about Earp's case or Morgan's involvement in it, it is questionable that Taylor would have understood the significance of Morgan's purported comments. Taylor testified that he heard Morgan say he "had to make sure he ke[pt] hi[m]self out of that house. He can't slip up on his testimony."[151] Had Taylor had some familiarity with Earp's defense, he might have been able to glean from Morgan's somewhat opaque statement that Morgan intended to commit perjury to deprive Earp of the ability to argue that he was the one who had committed the crime. With no knowledge of the background facts of Earp's trial, however, it is highly unlikely that he would have understood the import or significance of testimony by Morgan that he was not at the house on the day in question.

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[149] *Id*. at 16 (Q: "Now at that time [when you heard Morgan's statements] did you know Mr. Rick Earp?" Taylor: "No, ma'am").

[150] High Power is an area of the jail.

[151] Transcript at 15.

Other than the testimony and exhibits introduced at the hearing and the documents surrounding the missing physical evidence, the only evidence that is directly probative of the relative credibility of Taylor, on the one hand, and Foltz and Milkey, on the other, is the recorded portion of the interview with Taylor. During the recorded portion of the interview, Taylor made statements that directly contradict the testimony he offered at the evidentiary hearing. He stated that the conversation he allegedly overheard never occurred, and that Earp had urged him to fabricate the story to show that Morgan lied during his trial testimony. Having considered all the evidence, the court concludes that Taylor was telling the truth during this portion of the interview. His responses were coherent and sounded natural; indeed, he sounded far more like a person telling the truth than someone reciting statements he had been told to make only a few minutes earlier. Taylor's statements during the interview, moreover, are consistent with Milkey's and Foltz's, whom the court found to be credible witnesses at the evidentiary hearing.

This conclusion is not altered when the court considers Doshier's testimony and the disappearance of relevant physical evidence. Doshier testified that Foltz threatened her after she took the stand at Earp's trial, and that his threats led her to recant her earlier testimony when she was recalled. Earp asserts that the court should infer from Doshier's testimony a "plan" or "motive" on Foltz's part to threaten any witness whose testimony increased the likelihood of acquittal. See FED.R.EVID. 404(b); see also *United States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002) ("Rule 404(b) permits evidence of prior wrongs or acts to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). Doshier's testimony does not strongly undercut Foltz's credibility or indicate that he had a plan or pattern of bullying witnesses involved in Earp's trial. First, during the evidentiary hearing, Doshier admitted she was consuming heroin multiple times a day during Earp's trial and when Foltz made the alleged threats.[152] It was also likely difficult for Doshier to participate in a trial concerning the death of her daughter, a fact that caused her to be emotionally overwrought. Both circumstances increase the potential for inaccuracies in Doshier's recollection of events. Second, the court finds it unlikely that Foltz would have threatened Doshier to

[152] *Id.* at 183.

get her to recant her testimony. Her original trial testimony – that Foltz told her Earp's blood and semen were found in or around Amanda's body when they were not – was not directly relevant to proving Earp's guilt. Notably, Doshier's testimony did not concern whether or not Earp's blood and semen *were in fact* found on Amanda's body; clearly, they were not. The testimony concerned only whether Foltz had told Doshier falsely that this was the case. If anything, it appears the testimony was solicited to suggest to the jury that Foltz was biased. While this may have had a slight impact on the jury's determination of guilt, the court finds it implausible that Foltz would have threatened one of his own witnesses to get her to recant such minimally-probative testimony. Although Foltz may have wanted Doshier to recant for self-interested reasons, e.g., to avoid being professionally disciplined for lying to a potential witness to influence her testimony, the court finds credible Foltz's testimony that he recalled Doshier primarily because Doshier wanted to correct the record.[153] For all of these reasons, the court does not find Doshier's testimony particularly credible, and does not find that her testimony buttresses Taylor's testimony or makes it significantly more credible.

Finally, as noted, the court has read and considered the evidence Earp has proffered concerning the loss of the fluid-soaked napkin and possibly of the stained pillowcase, and has drawn the adverse inference Earp sought. Specifically, the court accepts as true for purposes of Earp's petition that the napkin would have shown Morgan was present at Amanda's home on the day of her death. This fact, however, does not alter the court's conclusion respecting Earp's *prosecutorial misconduct* claim, which is the only claim that remains to be adjudicated. Earp argues that "physical proof that Morgan was at Earp's house would corroborate Taylor's testimony that he overheard Morgan admit that he was there on the day Amanda suffered her injuries."[154] The court does not agree. The mere fact that Morgan lied on the stand does not mitigate any of the problems the court has identified with Taylor's testimony. Even if the court accepts the fact that Morgan lied on the stand, this does not make it plausible that he would have admitted to fellow inmates in a relatively loud voice that he did so; this is particularly true as such conduct ran the risk of implicating him in the murder. Nor, perhaps more importantly, does it

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[153] *Id.* at 158.

[154] Petitioner's Post-Hearing Brief at 23

make it in the least plausible that Taylor – who did not know Earp and did not know the specifics of his case or Morgan's involvement in it – would have sought Earp out to communicate what he purportedly overheard Morgan say. Finally, because the inference is that the California Department of Justice destroyed the evidence or allowed it to be lost – *not* Foltz or Milkey, neither of whom is affiliated with that organization – it does not significantly undermine their credibility concerning what transpired during the interview with Taylor. Thus, even when the adverse inference Earp sought is considered in combination with all the other evidence, Earp has not shown by a preponderance of the evidence that Milkey and Foltz threatened or otherwise bullied Taylor to recant the statements in his original declaration, or to dissuade him from testifying. Because this alleged misconduct is the sole basis for Earp's remaining habeas claim, the court dismisses the claim with prejudice.

III. CONCLUSION

For the reasons stated, the court grants Earp's unopposed motions for leave to file additional authority. It grants Earp's motion to expand the record to include documentation concerning the disappearance of the fluid-soaked napkin and possibly the stained pillowcase. It denies his motion to conduct discovery concerning the disappearance of these items.

Having addressed these matters, the court has considered the record evidence in support of and opposition to Earp's claim that prosecutorial misconduct violated his due process rights, and concludes that he has failed to prove his prosecutorial misconduct claim by a preponderance of the evidence. The court thus dismisses Earp's remaining claim and his petition for habeas corpus with prejudice.

DATED: December 14, 2015

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICKY LEE EARP, *Petitioner-Appellant,* v. VINCENT CULLEN,* Warden of California State Prison at San Quentin, *Respondent-Appellee.*	No. 08-99005 D.C. No. 2:00-CV-06508-R OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
March 22, 2010—San Francisco, California

Filed October 19, 2010

Before: Jerome Farris, Dorothy W. Nelson, and Richard C. Tallman, Circuit Judges.

Opinion by Judge Tallman

*Vincent Cullen is substituted for his predecessor, Robert L. Ayers, Jr., as Warden of California State Prison at San Quentin. Fed. R. App. P. 43(c)(2).

COUNSEL

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James W. Bilderback, II (argued), Supervising Deputy Attorney General; Keith H. Borjon, Supervising Deputy Attorney General; Pamela C. Hamanaka, Senior Assistant Attorney General; Dane R. Gillette, Chief Assistant Attorney General; Edmund G. Brown, Jr., Attorney General of California, Los Angeles, California, for respondent-appellee Vincent Cullen.

OPINION

TALLMAN, Circuit Judge:

Petitioner-Appellant Ricky Lee Earp was sentenced to death after a jury convicted him of first-degree murder for the rape and murder of eighteen-month-old Amanda Doshier.[1] We affirmed in part but remanded in part Earp's first appeal of the denial of his petition for a writ of habeas corpus and instructed the district court to conduct an evidentiary hearing addressing two specific issues: (1) Earp's allegations of prosecutorial misconduct relating to the testimony of witness Michael Taylor; and (2) Earp's claim of ineffective assistance of counsel arising from a failure to sufficiently investigate mitigation evidence. *Earp v. Ornoski*, 431 F.3d 1158, 1164 (9th Cir. 2005). After conducting numerous hearings, the district court again denied the petition, but granted a certificate of appealability on both claims. We affirm the denial of Earp's claim of ineffective assistance of counsel and reverse and remand the denial of the prosecutorial misconduct claim.

I

A

In his petition for a writ of habeas corpus, Earp alleged that the deputy district attorney, Robert Foltz, engaged in misconduct by intimidating Michael Taylor, a witness who was going to testify in support of Earp's motion for a new trial. Taylor initially averred that he overheard fellow inmate Dennis Morgan admit, while the two were incarcerated in Los Angeles, to being at Earp's home the day Amanda was

[1]The facts and circumstances surrounding the crime are detailed in both the California Supreme Court opinion resulting from Earp's direct appeal, *People v. Earp*, 978 P.2d 15 (Cal. 1999), and our opinion in Earp's prior appeal, *Earp v. Ornoski*, 431 F.3d 1158, 1165-66 (9th Cir. 2005). We recite the facts again only as necessary to understand our opinion.

attacked. Taylor later recanted his original statement by claiming that it was a lie, and that Earp offered to pay Taylor if he would say that Morgan admitted to being present the day the crime occurred. However, Taylor again changed his story. This time, Taylor claimed that prosecutor Foltz and Edwin Milkey, the investigating sheriff's homicide detective, coerced him into recanting his original statement, and he affirmed his earlier statement about Morgan's admission.

The district court originally found Taylor incredible on the basis of his multiple declarations and denied Earp's claim of prosecutorial misconduct without conducting an evidentiary hearing. We reversed the district court after concluding that a question that turns on the "veracity of the witnesses . . . could not be adjudicated without an evidentiary hearing." *Earp*, 431 F.3d at 1170. In analyzing both whether Earp had a full and fair opportunity to develop his claim and whether he presented a colorable claim, we emphasized the importance of conducting an evidentiary hearing before making the requisite credibility determinations. *Id.* at 1169-72. We remanded to allow Earp "an opportunity to prove the facts supporting his claim." *Id.* at 1172.

On remand, Taylor, Foltz, and Milkey testified. Taylor testified that Foltz and three police officers met with him to discuss his original declaration and coerced him into recanting. Taylor claimed that Foltz threatened him and that Foltz directed Taylor on how to respond to certain questions. Finally, Taylor reaffirmed the statements he made in his original declaration. Foltz stated that he conducted an interview with Taylor after receiving Taylor's original statement claiming he overheard Dennis Morgan admit to being present at Earp's home. Foltz testified that Taylor voluntarily recanted his statement after learning that he would have to testify in court. Foltz maintained that neither he nor Milkey instructed Taylor on how to answer questions. They also did not threaten Taylor in any manner during any part of the interview. Milkey corroborated Foltz's testimony. He testified that Taylor

became nervous after learning that he would have to testify regarding his statement, and that Taylor was not coached on how to answer questions posed during the interview. Milkey denied all allegations that he or Foltz threatened or intimidated Taylor.

In an effort to bolster the credibility of Taylor, Earp sought to introduce the testimony of Cindy Doshier, the victim's mother, at the evidentiary hearing. According to Earp, Doshier was prepared to testify that she too was intimidated by Foltz after she testified in support of the defense at trial. The district court allowed Earp to call Doshier as a witness, but then appointed separate counsel to advise Doshier of her rights under the Fifth Amendment. Doshier subsequently invoked her Fifth Amendment right against self-incrimination, and the district court accepted her invocation on a blanket basis.

In its order denying Earp's petition, the district court expressly rejected Taylor's testimony as incredible, and found Foltz and Milkey to be credible witnesses independent of all other testimony received. Consequently, the district court denied Earp's allegation of prosecutorial misconduct. Earp now challenges the exclusion of Doshier's testimony, asserting that he was deprived of a full and fair opportunity to prove his claim due to the district court's improper acceptance of Doshier's invocation of her rights under the Fifth Amendment.

B

[1] We conduct de novo review of challenges to the invocation of the Fifth Amendment. *United States v. Antelope*, 395 F.3d 1128, 1133 (9th Cir. 2005). The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In order to properly claim the protections against self-incrimination, a witness must show that his testimony would

"support a conviction under a federal criminal statute . . . [or] would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). A witness justifiably claims the privilege if he is "confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination." *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980) (internal quotation marks and citations omitted).

[2] While the Fifth Amendment protects witnesses from incriminating themselves on the basis of past conduct, it "provides no protection for the commission of perjury." *Id.* at 127; *Glickstein v. United States*, 222 U.S. 139, 142 (1911) ("[I]t is also true that the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury."). There is "no doctrine of 'anticipatory perjury,' " and a "future intention to commit perjury" does not create a sufficient hazard of self-incrimination to implicate the Fifth Amendment privilege. *Apfelbaum*, 445 U.S. at 131.

[3] We applied this principle in *United States v. Vavages*, 151 F.3d 1185, 1192 (9th Cir. 1998), and held that the district court erred in recognizing a witness's invocation of the Fifth Amendment when the basis for the invocation was the witness's fear that the testimony about to be given "would subject her to a perjury prosecution." When a witness has not yet testified, "[t]he shield against self-incrimination . . . is to testify truthfully, not to refuse to testify on the basis that the witness may be prosecuted for a lie not yet told." *Id.* (quoting *United States v. Whittington*, 783 F.2d 1210, 1218 (5th Cir. 1986)). A blanket invocation of the Fifth Amendment in such circumstances is not acceptable because there is no "valid basis" for the assertion. *Id.*

[4] This case is indistinguishable from *Vavages*. The district court permitted Doshier to anticipatorily claim the Fifth Amendment privilege because it believed that she was going

to testify untruthfully. Supreme Court and Ninth Circuit precedent clearly preclude pre-emptive invocations of the privilege. The district court erred by accepting Doshier's assertion of the Fifth Amendment.

[5] Nonetheless, the State contends that Doshier properly asserted her Fifth Amendment privilege because she faced a substantial and real hazard of incrimination. According to the State, the testimony Doshier planned to give at the evidentiary hearing could have established that a declaration she completed in 1997 was perjurious. "Fear of a perjury prosecution can typically form a valid basis for invoking the Fifth Amendment . . . where the risk of prosecution is for perjury in the witness' *past* testimony." *Vavages*, 151 F.3d at 1192 n.3. This argument is not persuasive, however, because the district court did not rely on Doshier's past testimony as the basis for her Fifth Amendment privilege. It is the district court's duty to determine the basis for a witness's assertion of the Fifth Amendment privilege. *Hoffman*, 341 U.S. at 486 ("It is for the court to say whether [a witness's] silence is justified, and to require him to answer if 'it clearly appears to the court that he is mistaken.' " (citations omitted)). The district court allowed Doshier to invoke the Fifth Amendment because her *proposed* testimony would expose her to the possibility of prosecution; it believed she would commit perjury if allowed to testify. The district court did not focus on Doshier's potential liability for statements made in her earlier declaration. Because a witness cannot validly assert her Fifth Amendment rights upon a fear that she is about to commit perjury, there was no viable basis for the district court's acceptance of Doshier's invocation.

Moreover, there was no substantial risk that Doshier would be prosecuted for perjury on the basis of her 1997 declaration due to the federal and state statutes of limitation. Under federal law, a person may not be prosecuted for perjury more than five years after the offense. 18 U.S.C. § 3282(a). California law imposes a limitation of three years. Cal. Penal Code

§§ 126, 801, 803. Doshier's trial testimony occurred sixteen years before the evidentiary hearing, and she completed her declaration ten years prior to the hearing. The relevant statutes of limitation had long since expired.

[6] Our initial remand of this case was for the purpose of allowing Earp an opportunity to develop facts in support of his claim of prosecutorial misconduct. The district court deprived Earp of a full and fair hearing because it erroneously accepted Doshier's invocation of the Fifth Amendment. Thus, we remand this claim for another evidentiary hearing at which Earp should be afforded a full and fair opportunity to develop the facts supporting his allegations. At the evidentiary hearing, the district court is free to control the admission or exclusion of evidence by exercising its discretion under the Federal Rules of Evidence, specifically Rules 404(b) and 608. Our decision to remand Earp's prosecutorial misconduct claim is based solely on the district court's erroneous acceptance of Doshier's invocation of the Fifth Amendment, and this opinion should not be interpreted as a comment on the merits of his claim.

C

[7] In his opening brief, Earp requested that, upon remand, we reassign the case to a different judge. In the absence of personal bias, we assign a case to a new judge on remand only in "unusual circumstances." *United States v. Sears, Roebuck & Co., Inc.*, 785 F.2d 777, 780 (9th Cir. 1986). To make a determination that unusual circumstances exist, we consider whether: (1) "the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected"; (2) "reassignment is advisable to preserve the appearance of justice"; and (3) "reassignment would entail waste and duplication out of proportion to any gain in pre-

serving the appearance of fairness." *Id.* (quoting *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979)).

[8] We regrettably conclude that the circumstances of this case warrant reassignment. In its order, the district judge made explicit credibility findings—it found Taylor incredible and Foltz and Milkey credible. On remand, we cannot reasonably expect the district judge to set aside these credibility findings and reassess the viability of Earp's claim of prosecutorial misconduct in light of Doshier's testimony. Additionally, during the pendency of the original proceedings on remand, we had to intervene and enter an emergency stay in response to the district judge's refusal to continue the evidentiary hearing in order to allow Earp and the California Department of Corrections time to locate and transport inmate Taylor to Los Angeles to testify. At the next hearing, the district judge was very critical of the request for a stay, notwithstanding the importance our remand order placed on assessing Taylor's accusation. Under these circumstances, reassignment is necessary to uphold the appearance of justice.

A finding of only one of the first two factors identified in *Arnett* supports reassignment on remand. *Sears*, 785 F.2d at 780. Not only do the first two factors weigh in favor of reassignment, but doing so would not result in an undue waste of judicial resources. To this point, the district judge has facilitated the whittling of Earp's federal habeas claims from nineteen to two. It will not take a different district judge much time to become acquainted with the facts underlying Earp's claim of prosecutorial misconduct—the only issue that will need to be addressed on remand. We express no opinion on the ultimate credibility determination. The district court is free to conduct such proceedings and rule however the credible evidence warrants.

II

A

[9] In his petition for a writ of habeas corpus, Earp also asserted a claim of ineffective assistance of counsel. Specifically, he alleged that trial counsel neglected to conduct sufficient investigation into potential mitigating evidence. Had sufficient investigation occurred, Earp argued that trial counsel would have uncovered school records indicating emotional and psychological problems, additional information about Earp's familial background—including a history of substance abuse and mental health problems—and significant mental health evaluations evincing organic brain damage. *Earp*, 431 F.3d at 1172.

[10] At an evidentiary hearing held by the district court, Earp presented numerous witnesses in support of his claim of ineffective assistance of counsel. Adrienne Dell, Earp's counsel for the penalty phase of trial and later his wife, testified on direct examination that she did minimal investigation and did not personally interview the witnesses presented at the penalty phase. She claimed that she did not inquire into Earp's history of drug abuse, nor did she investigate his mental health or request a neuropsychological exam. However, on cross-examination, she equivocated when confronted with her own billing records indicating several conferences with her co-counsel, investigator, and others regarding penalty phase matters, and she admitted that Earp had been evaluated by two psychologists. In fact, she acknowledged receiving one psychologist's conclusion that Earp "fit the profile of being a child molester." She also acknowledged that "several" investigators were retained to assist with both the guilt phase and the penalty phase of Earp's trial. Dell identified notes she received prior to Earp's trial stating that there were no indicators of organic brain damage, and admitted that she probably would have presented evidence of organic brain damage if the evidence had indicated Earp had any such damage.

Earp also elicited the testimony of a social worker for the California Youth Authority ("CYA") who had compiled a report on Earp containing psychiatric and psychological evaluations, medical and dental reports, a social history, and evaluations of Earp's interactions within his CYA living unit. He presented three childhood acquaintances, who all testified about Earp's drug and alcohol abuse during his teenage years. Earp's brother and sister testified about Earp's childhood and his relationships with his father, mother, and stepfather.

[11] During the evidentiary hearing, Earp sought to introduce the testimony of Dr. Inez Monguio, a neuropsychologist who evaluated Earp in 2002 to determine whether he had organic brain damage. She testified that had she examined Earp in 1991, she would have reached the same conclusions as she did in 2002, and that the tests she utilized during her evaluation were either available in 1991 or had comparable counterparts at that time. On cross-examination, Dr. Monguio stated that she did not confer with any of the mental health professionals who had evaluated Earp at the time of his trial. She also admitted that she could not reliably opine on Earp's mental state at the time of the crime. After that admission, the State moved to strike Dr. Monguio's testimony. The district court granted the motion to strike, concluding that Dr. Monguio's testimony was not helpful because, in 2002, she could not determine whether Earp had organic brain damage at the time of his trial in 1991.

[12] Earp's final witness at the evidentiary hearing was Ezekiel Perlo, an experienced capital case attorney licensed to practice in California. The State objected to Perlo's testimony on the basis that the purpose of the testimony was to opine regarding the effectiveness of Earp's trial counsel—a legal conclusion to be made by the district court. The district court allowed Perlo to testify regarding what trial counsel should have done, but excluded his ultimate legal opinion pertaining to the adequacy of Earp's trial counsel's performance. Accordingly, Perlo testified about the applicable standards of

attorney competence in 1991. Specifically, he stated that trial counsel should develop evidence if there is an indication of drug abuse or mental health problems, but he also acknowledged that there is an end to the duty to investigate.

In response, the State presented the testimony of investigator Sheryl Duvall, a member of Earp's defense team who had been responsible for discovering mitigation evidence, and two attorneys assigned to Earp's case before Dell was appointed. The defense investigator reported that the extensive pre-trial inquiry she conducted produced psychological and psychiatric reports, probation records, and prison records. Duvall also met with Earp, his mother, his sister, his brother, his stepfather, his aunt, and his cousin. Duvall spoke with Earp's former teachers, former partners, and employees at the CYA.

Louis Bernstein, lead defense counsel during the guilt phase of Earp's trial, testified that Earp's lack of candor impeded attempts to uncover additional mitigation evidence. He stated that he and Dell worked together and offered advice and assistance to one another. Marcia Morrissey, the attorney originally assigned to the penalty phase of Earp's trial, verified that she obtained pre-trial psychological reports from Earp's childhood, and she identified records of meetings she held with two mental health experts regarding potential mitigating evidence. Morrissey testified that she transferred everything to Dell at the time she ceased working on the case, and recalled telling Dell that more investigation needed to be done to obtain a "coherent picture" of Earp.

After receiving all of this evidence, the district court found that Earp did not satisfy his burden of proof "as to either deficient performance or resulting prejudice." It discredited the testimony of Adrienne Dell because her testimony was "vague, inconsistent, and subject to lapses of memory in significant areas." Additionally, Dell's testimony contradicted her own contemporaneous records and notes and was inconsistent with other testimony. The district court also rejected

the testimony of the social worker, Earp's childhood friends, and his family as being cumulative, unpersuasive, and biased. The court discussed Dr. Monguio's testimony, and reaffirmed its decision to strike it. Finally, the district court stated that Perlo's testimony was not "particularly illuminative or useful."

[13] Earp now challenges the district court's limitation of Perlo's testimony and its decision to strike Dr. Monguio's testimony. Similar to his argument regarding the prosecutorial misconduct allegation, Earp claims that the district court's evidentiary rulings deprived him of a full and fair opportunity to present his claim of ineffective assistance of counsel. Earp also contends that the district court erred in denying his ineffective assistance of counsel claim on the merits.

B

We review de novo a district court's decision to deny or grant habeas relief. *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004). The Anti-Terrorism and Effective Death Penalty Act governs our review of Earp's petition because it was filed after April 24, 1996. *Woodford v. Garceau*, 538 U.S. 202, 210 (2003). Because there is no reasoned state court decision addressing the merits of Earp's ineffective assistance of counsel claim, we conduct an independent review of the record and determine whether the state court's decision was objectively unreasonable. *Richter v. Hickman*, 578 F.3d 944, 951 (9th Cir. 2009) (en banc).

Ineffective assistance of counsel claims are governed by the two-prong analysis pronounced in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a claimant must "show that counsel's performance was deficient." *Id.* at 687. Counsel renders deficient performance when representation falls "below an objective standard of reasonableness." *Id.* at 688. We conduct a "highly deferential" review of counsel's conduct because "it is all too easy for a court, examining counsel's defense after

it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

If a claimant establishes that counsel's performance was deficient, he must then show that the deficiencies were prejudicial—"that they actually had an adverse effect on the defense." *Id.* at 692-93. Prejudice occurs when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *Rhoades v. Henry*, 611 F.3d 1133, 1141 (9th Cir. 2010).

Earp premises his claim of ineffective assistance of counsel on two deficiencies: (1) inadequate investigation of organic brain damage; and (2) inadequate investigation of Earp's background. The district court denied Earp's claim, finding that he failed to show that either allegation constituted deficient performance or that either alleged deficiency caused prejudice. Specifically, the district court found that "counsel made adequate investigation into [Earp's] background and family history and that counsel did not curtail required investigation into possible emotional, psychological or neurological problems stemming from early childhood, any possible organic brain damage, or the mitigating possibility of youthful drug abuse." Furthermore, it concluded that there was nothing in the record that indicated that Earp was "prejudiced by any purported deficiency of counsel." We need not address whether Earp was prejudiced by trial counsel's performance because we conclude that trial counsel's performance was not deficient. *See Hein v. Sullivan*, 601 F.3d 897, 918 (9th Cir. 2010) ("[W]e may dispose of [the ineffective assistance of counsel] claim if [the claimant] fails to satisfy either prong of the two-part test.").

1

Before reaching the merits of Earp's claim of ineffective assistance of counsel, we address his challenge to the district court's decision to limit the testimony of Perlo. We review a district court's decision to admit or exclude expert testimony for an abuse of discretion. *United States v. W.R. Grace*, 504 F.3d 745, 759 (9th Cir. 2007). At the evidentiary hearing, the district court precluded Perlo from opining on Earp's trial counsel's performance and repeatedly admonished Earp that such questions were improper. The district court did, however, permit Earp to question Perlo regarding what competent trial counsel in a death penalty case should have done in 1991.

Expert testimony is not necessary to determine claims of ineffective assistance of counsel. *Hovey v. Ayers*, 458 F.3d 892, 910 (9th Cir. 2006). When determining whether to admit expert testimony, the district court must consider the probative value of the testimony—a consideration that hinges on the court's ability to "assess the issues." *Id.* at 911. Because a district court is "qualified to understand the legal analysis required by *Strickland*," it does not abuse its discretion in excluding expert testimony relating to that analysis. *Id.*

[14] The aspects of Perlo's testimony that were excluded by the district court in this case impacted only the determination of whether Earp's trial counsel satisfied the appropriate standard of care. It was not an abuse of discretion for the district court to prevent Perlo from testifying regarding this ultimate legal conclusion because it was a determination the district court was qualified to make.

2

Earp alleges that he received ineffective assistance of counsel at the penalty phase of his trial due to his counsel's failure to investigate whether he suffered from organic brain damage. In support of his claim, Earp elicited the testimony of his pen-

alty phase counsel, Dell. She stated that she neither investigated Earp's mental state nor requested a neuropsychological evaluation. However, she did acknowledge that two psychologists and a psychiatrist evaluated Earp. Dell also confirmed that she reviewed notes from Marcia Morrissey, the attorney originally assigned to the penalty phase of Earp's trial, which stated that there were no indications of organic brain damage. Finally, Dell admitted that she wrote a letter during preparation for Earp's trial explicitly stating that the medical records contained no information suggesting that Earp had organic brain damage.

Earp also relied on the testimony of neuropsychologist Dr. Inez Monguio.[2] In her report and deposition testimony, Dr. Monguio concluded that Earp had deficits in processing speed and working memory that were consistent with organic brain damage. The testing also revealed that Earp experienced difficulty with verbal and visual functions, which indicated problems in the anterior areas of both the left and right hemispheres of the brain. Dr. Monguio summarized her findings as "consistent with organic damaged [sic] by traumatic brain injury."

[15] Notwithstanding Dr. Monguio's conclusions that Earp had organic brain damage that was diagnosable in 1991 and Dell's statements that she did not investigate the possibility of organic brain damage, we conclude that Earp has not established that his trial counsel was deficient for failing to investigate this potential mitigating evidence. Earp contends that because Dr. Monguio's 2002 report clearly establishes that he had organic brain damage at the time of his trial in 1991, his

[2]Earp argues that the district court abused its discretion when it struck Dr. Monguio's testimony. For purposes of resolving Earp's appeal, we assume that Dr. Monguio was qualified to testify as an expert and that the district court improperly excluded her testimony. Therefore, we accept the conclusions outlined in her comprehensive report and deposition testimony.

trial counsel was ineffective for failing to discover and present this mitigating evidence. The record belies Earp's allegations of insufficient investigation of organic brain damage.

[16] When there is no "objective indication" that a defendant has a mental illness or brain damage, we cannot label counsel "ineffective for failing to pursue this avenue of mitigation." *Gonzales v. Knowles*, 515 F.3d 1006, 1015 (9th Cir. 2008). Dell's testimony, in combination with the records created at the time of the penalty phase of Earp's trial, establish that Earp's defense counsel was pursuing the possibility of organic brain damage—there was just no evidence to support that theory. Rather, one psychologist concluded that Earp was a sociopath and that he had a higher probability than the average person to be a child molester. We cannot fault trial counsel for failing to further investigate potential mitigating evidence of organic brain damage when the thorough defense investigation, that explicitly pursued the possibility of organic brain damage, uncovered no helpful information.

[17] Furthermore, Dr. Monguio's contradictory diagnosis of organic brain damage, received eleven years after Earp's trial, is insufficient to overcome the contemporaneous documentation that indicated that Earp did not have organic brain damage. *See Boyde v. Brown*, 404 F.3d 1159, 1166-67 (9th Cir. 2005) (rejecting a retrospective competency determination in favor of contemporaneous evidence that showed the defendant was competent to stand trial); *id.* at 1167 (holding that defendant could not establish that his trial counsel was ineffective for failing to request a competency hearing when all of the contemporaneous evidence supported the conclusion that the defendant was competent). The fact that Earp can now present a neuropsychologist who is willing to opine that he had organic brain damage at the time of his trial does not impact the ultimate determination of whether Earp's trial counsel insufficiently investigated that possibility.

The pertinent question is whether Earp's counsel pursued the possibility that Earp had organic brain damage—it indis-

putably did, but to no avail. Even if the mental health professionals who evaluated Earp at the time of his trial incorrectly concluded that Earp did not have organic brain damage, Earp's claim fails. An expert's failure to diagnose a mental condition does not constitute ineffective assistance of *counsel*, and Earp has no constitutional guarantee of effective assistance of experts.

[18] We agree with the district court's finding that "the possibility of brain damage was carefully considered before being excluded." We reject Earp's claim of ineffective assistance of counsel for failing to investigate organic brain damage due to his inability to show that his trial counsel rendered deficient performance.

3

Earp next contends that trial counsel violated professional norms by failing to adequately investigate Earp's familial background, childhood, and social history. Specifically, Earp argues that trial counsel should have contacted three childhood friends and a CYA social worker. At the evidentiary hearing, Earp's childhood friends testified that Earp began using drugs in seventh or eighth grade. Earp asserts that the evidence of his extensive drug use as a teenager would have "humanized" him and reinforced any references to the possibility of organic brain damage. He claims further that had trial counsel contacted the CYA social worker, her report would have led to additional mitigation evidence and could have revealed another strategy for conducting the penalty phase of Earp's trial.

[19] The fact that Earp now presents additional witnesses who were not contacted prior to the penalty phase of Earp's trial does not compel a finding that trial counsel rendered ineffective assistance. The Supreme Court recently reaffirmed the proposition that we cannot fault trial counsel for failing to find more mitigating evidence if trial counsel reasonably

believed that further investigation would produce only cumulative evidence. *Bobby v. Van Hook*, 130 S. Ct. 13, 19 (2009). Indeed, requiring additional research in such instances could have potentially negative implications because it would distract trial counsel from performing more important responsibilities. *See id.*

[20] Although Earp presented four witnesses not contacted before the penalty phase of his trial, we cannot agree that trial counsel inadequately investigated his familial background, childhood, and social history. The defense investigator hired by Earp's trial counsel conducted extensive research and field work. She interviewed Earp numerous times, met with his childhood friend, David Callenchini, interviewed his immediate and extended family, and spoke with his former teachers and juvenile probation officers. Additionally, she obtained records from Earp's prior psychiatric hospitalization, previous psychological examinations, medical examinations, and a psychological evaluation conducted after Earp's father died. She even pursued Earp's father's mental health records. The investigator also acquired Earp's school and juvenile probation records. It is evident that Earp's defense team was vigilant in its investigation of his past notwithstanding the difficulties caused by Earp's lack of honesty with his lawyers.

[21] "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Trial counsel's failure to contact the four witnesses Earp now presents does not violate objective standards. "This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, or would have been apparent from documents any reasonable attorney would have obtained." *Bobby*, 130 S. Ct. at 19 (internal citations omitted). In fact, there is no evidence in the record that trial counsel knew, or should have known, of Earp's relationship with these four witnesses. Consistent with Perlo's testimony regarding what competent capital counsel should

investigate, Earp's trial counsel obtained school records, prison records, CYA records, and doctors' records, in addition to speaking with Earp's family and his former teachers. Earp's penalty phase counsel conducted sufficient investigation into Earp's social history in an effort to uncover potential mitigating evidence.

III

The district court erred when it allowed Cindy Doshier to invoke her Fifth Amendment right against self-incrimination. This error deprived Earp of a full and fair opportunity to present his claim of prosecutorial misconduct. Therefore, we REVERSE the district court's denial of this claim, REMAND for a full and fair evidentiary hearing on only the prosecutorial misconduct claim, and instruct that this case be reassigned to another district judge on remand. We further hold that Earp has not shown in any respect that his trial counsel's performance was deficient. We thus AFFIRM the district court's denial of Earp's claim of ineffective assistance of counsel.

AFFIRMED in part; REVERSED and REMANDED in part. Each party shall bear its own costs.

431 F.3d 1158, 2005 Daily Journal D.A.R. 14,503
(Cite as: 431 F.3d 1158)

United States Court of Appeals,
Ninth Circuit.
Ricky Lee EARP, Petitioner-Appellant,
v.
S.W. ORNOSKI, Warden, of California State Prison at San Quentin,[FN*] Respondent-Appellee.

FN* Pursuant to Fed. R.App. P. 43(c)(2), S.W. Ornoski, the current custodian, is substituted for John Stokes as Warden of California State Prison at San Quentin.

No. 03-99005.

Argued and Submitted July 14, 2005.
Filed Sept. 8, 2005.
Amended Dec. 16, 2005.

Background: Petitioner sought federal habeas corpus relief after his first-degree murder conviction and death sentence were upheld on direct appeal, 20 Cal.4th 826, 85 Cal.Rptr.2d 857, 978 P.2d 15. The United States District Court for the Central District of California, Manuel L. Real, J., denied petition. Petitioner appealed.

Holdings: The Court of Appeals, Tallman, Circuit Judge, held that:
(1) petitioner was entitled to evidentiary hearing on prosecutorial misconduct claim;
(2) denial of petitioner's motion for evidentiary hearing on claim of ineffective assistance of counsel was abuse of discretion; and
(3) state court finding that petitioner's intimate relationship with trial counsel did not create conflict of interest supporting claim of ineffective assistance of counsel did not warrant habeas relief.

Affirmed in part, reversed in part, and remanded.

Opinion, 423 F.3d 1024, amended and superseded on denial of rehearing.

West Headnotes

[1] Habeas Corpus 197 842

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 k. Review De Novo. Most Cited Cases
Court of Appeals reviews de novo denial of a petition for a writ of habeas corpus.

[2] Habeas Corpus 197 846

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k846 k. Clear Error. Most Cited Cases
Factual findings and credibility determinations made by the district court in the context of granting or denying habeas petition are reviewed for clear error.

[3] Habeas Corpus 197 842

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 k. Review De Novo. Most Cited Cases
District court's application of the Antiterrorism and Effective Death Penalty Act (AEDPA), as well as its conclusion that the standards set forth in AEDPA are satisfied, raises mixed question of law and fact reviewed de novo. 28 U.S.C.A. § 2254(d).

[4] Habeas Corpus 197 842

[35] Criminal Law 110 ⚿1789

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)6 Conflict of Interest
110k1789 k. Presumptions and Burden of Proof. Most Cited Cases
(Formerly 110k641.5(.5))
To establish a Sixth Amendment violation on grounds that defense counsel actively represented conflicting interests, defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. U.S.C.A. Const.Amend. 6.

[36] Criminal Law 110 ⚿1781

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)6 Conflict of Interest
110k1781 k. Prejudice and Harm in General. Most Cited Cases
(Formerly 110k641.5(.5))
For Sixth Amendment purposes, an "actual conflict of interest" is not something separate and apart from adverse effect, but rather is a conflict of interest that adversely affects counsel's performance. U.S.C.A. Const.Amend. 6.

[37] Habeas Corpus 197 ⚿452

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or Constitutional Questions. Most Cited Cases
Following enactment of Antiterrorism and Effective Death Penalty Act (AEDPA), only holdings of United States Supreme Court are binding on state courts on federal habeas review. 28 U.S.C.A. § 2254(d)(1).

***1163** Robert S. Gerstein, Santa Monica, CA, for the petitioner-appellant.

Dean R. Gits, Office of the Federal Public Defender, Los Angeles, CA, for the petitioner-appellant.

James William Bilderback II, Deputy Attorney General, Los Angeles, CA, for the respondent-appellee.

Appeal from the United States District Court for the Central District of California; Manuel L. Real, District Judge, Presiding. D.C. No. CV-00-06508-R.

Before FARRIS, D.W. NELSON, and TALLMAN, Circuit Judges.

ORDER AMENDING OPINION AND DENYING PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC AND AMENDED OPINION.

ORDER

The opinion filed September 8, 2005, slip opinion at 12700 and published at 423 F.3d 1024 (9th Cir.2005), is amended by the opinion filed concurrently with this order. With these amendments, the panel has voted to deny the petition for rehearing and the petition for rehearing en banc filed by the Appellant and the petition for rehearing and the petition for rehearing en banc filed by the Appellee.

The full court has been advised of the petitions for rehearing en banc filed by the Appellant and the Appellee and no judge of the court has requested a vote on either.

The Appellant's petition for rehearing and petition for rehearing en banc is DENIED and the Appellee's petition for rehearing and petition for rehearing en banc is DENIED. No further petitions for rehearing or rehearing en banc may be filed.

OPINION

TALLMAN, Circuit Judge:

Ricky Lee Earp is on death row in San Quentin, California, after being convicted in Los Angeles County of the 1988 rape and murder of eighteen-month-old Amanda Doshier. The jury convicted Earp of first-degree murder and found three death-qualifying special circumstances to ***1164** be true: rape, sodomy, and lewd and lascivious conduct on a child under the age of fourteen. In the separate penalty phase, the jury recommended that Earp be put to death for his crimes. The California Superior Court ("trial court") imposed that sentence on February 21, 1992.

All reviewing courts thus far have upheld Earp's conviction and sentence. The California Supreme Court ("state court") affirmed Earp's conviction and death sentence on direct appeal, and summarily denied his state habeas corpus petition on the merits without affording him an evidentiary hearing on any of his claims. *People v. Earp*, 20 Cal.4th 826, 85 Cal.Rptr.2d 857, 978 P.2d 15 (1999). The United States Supreme Court denied certiorari. *Earp v. California*, 529 U.S. 1005, 120 S.Ct. 1272, 146 L.Ed.2d 221 (2000). Earp then filed a federal habeas corpus petition in the United States District Court for the Central District of California, raising nineteen constitutional claims. The district court denied Earp's habeas petition on all of them. Earp now brings this appeal.

We affirm the district court on seven of the claims Earp raises in this appeal, and vacate and remand for an evidentiary hearing on the two remaining claims.[FN1] This Opinion addresses Earp's claims of prosecutorial misconduct, ineffective assistance of counsel, and conflict of interest.[FN2] The district court conducted a limited evidentiary hearing on his conflict claim and denied his motion for an evidentiary hearing on his prosecutorial misconduct and ineffective assistance of counsel claims. Ultimately, all of these claims were denied on summary judgment.

FN1. In a separately filed companion Memorandum Disposition we affirm the district court on six of Earp's claims. Earp made four prosecutorial misconduct claims in addition to the one discussed in this Opinion: (1) that the prosecutor committed prejudicial error under *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), by commenting on Earp's failure to name Dennis Morgan prior to trial; (2) that the prosecutor's closing statement shifted the burden of proof; (3) that the prosecutor impermissibly stated his own opinion of Earp's guilt; and (4) that the cumulative effect of these errors deprived Earp of his right to due process. We affirm the district court's summary judgment order in favor of the Warden because we agree that the state court's resolution denying these claims was neither contrary to, nor an unreasonable application of, controlling federal precedent. Furthermore, we affirm in the Memorandum Disposition the district court's decision to deny Earp an evidentiary hearing on his claims that his counsel provided ineffective assistance by not presenting his third-party defense in the opening statement and by eliciting testimony from a defense investigator. Because the record demonstrates that these were strategic choices, we hold in the Memorandum Disposition that the district court did not abuse its discretion by denying an evidentiary hearing on these claims.

FN2. For the remainder of this Opinion, we use the term "prosecutorial misconduct" to refer to Earp's claim that the prosecutor intimidated and threatened Michael Taylor to dissuade him from testifying, and the term "ineffective assistance of counsel" to refer to Earp's claim that his counsel provided ineffective assistance by failing to conduct adequate investigation into mitigating evidence for use in the penalty

phase.

Here we decide whether: (1) Earp alleges facts warranting an evidentiary hearing on his claim that the prosecutor committed prejudicial misconduct by dissuading Michael Taylor from testifying; (2) Earp alleges facts warranting an evidentiary hearing on his claim of ineffective assistance of counsel for failure to sufficiently investigate mitigation evidence; and (3) Earp's counsel suffered from a conflict of interest stemming from her intimate relationship with Earp during his trial and sentencing. We hold that Earp has alleged facts which, if proven true, may entitle him to relief on ***1165** his prosecutorial misconduct and ineffective assistance of counsel claims. Because Earp has never been afforded an evidentiary hearing on these claims, we remand to the district court for an evidentiary hearing on his prosecutorial misconduct and ineffective assistance of counsel claims. As to Earp's conflict claim, we hold that the state court determination that counsel was not laboring under a conflict of interest was neither contrary to, nor an unreasonable application of, established federal law because the Supreme Court has expressly limited its conflict jurisprudence to cases involving multiple, concurrent representation. We therefore affirm the summary judgment in part, reverse in part, and remand for the necessary evidentiary proceedings.

I

We recount the facts and circumstances leading to and surrounding the crime and Earp's trial as necessary to understand our opinion.[FN3] In August 1988, Earp was living in Palmdale, California, with his girlfriend, Virginia MacNair. On August 22, Cindy Doshier left her daughter, Amanda Doshier, with Earp and MacNair for a few days, as she had done several times before. On Thursday, August 25, MacNair left for work around 7:00 a m., leaving Amanda with Earp. Around 3:00 p m., a firefighter responded to an emergency call from a man reporting that a baby had fallen down some stairs. A preliminary assessment of her injuries led the first responder to conclude that Amanda needed more medical attention than he could give, so the firefighter took her to the hospital.

> FN3. We extract much of the facts and procedural history from the California Supreme Court opinion disposing of Earp's direct appeal, *Earp*, 85 Cal.Rptr.2d 857, 978 P.2d at 27-31, confirmed by our own independent review of the record.

After the firefighter left with Amanda, Earp disappeared and spent the next two days with different sets of friends and family elsewhere in California before ultimately turning himself in to the police in Sacramento after learning that he was being sought in connection with Amanda's death. During the intervening time, Earp gave inquiring friends and neighbors a host of contradictory explanations for Amanda's injuries and his absence.

At 10:30 a.m. on Saturday, August 27, 1988, Amanda died. Medical examinations of Amanda revealed that she had severe bruising, blood, and tears in the rectal area and blood and gaping in the vaginal area consistent with sexual assault. However, no semen, sperm, or seminal fluid was found. The medical examiner determined that Amanda's death was caused either by multiple sharp blows to the top of the head or severe shaking.

At trial, Earp denied sexually molesting or otherwise harming Amanda. He blamed Dennis Morgan, Amanda's grandmother's boyfriend whom Earp had met while the two served time together in prison. Dennis Morgan testified that he met Earp while they were both inmates at the Susanville prison and had helped Earp get a job after his release. He also admitted that he was a heroin addict with nineteen different aliases, but refuted Earp's assertion that he was present at MacNair's house on August 25, denied knowing where Earp was living at the time, and claimed that he did not rape or molest Amanda. He also accused Earp of asking him to testify that there was a man named Joe at the house with them, and alleged that Paul Ford, a defense investigator,

told him that Earp "needed someone who could place somebody else at the house."

At the penalty phase, Adrienne Dell, Earp's attorney, presented the following evidence in mitigation: Earp's mother and aunt testified generally about Earp's family***1166** background and legal troubles as a juvenile; MacNair testified as to her and her son's visits to Earp in jail; a cook from the California Youth Authority ("CYA") testified about Earp during his juvenile confinement; and a former associate warden at San Quentin testified that Earp would pose no danger in a high-security facility and that Earp could adjust to life in prison.

II

[1][2][3] We review de novo the district court's denial of a petition for a writ of habeas corpus, *Lambert v. Blodgett,* 393 F.3d 943, 964 (9th Cir.2004), and the district court's grant of summary judgment, *Davis v. Woodford,* 384 F.3d 628, 638 (9th Cir.2004). "Factual findings and credibility determinations made by the district court in the context of granting or denying the petition are reviewed for clear error." *Lambert,* 393 F.3d at 964. The district court's application of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), as well as its conclusion that the standards set forth in AEDPA are satisfied, is a mixed question of law and fact which we also review de novo. *Id.* at 965.

Because Earp's petition was filed after April 24, 1996, federal review is circumscribed by AEDPA. *Lockyer v. Andrade,* 538 U.S. 63, 70, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003); *see also Lambert,* 393 F.3d at 965 (citing *Woodford v. Garceau,* 538 U.S. 202, 210, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003)). AEDPA mandates a highly deferential standard for reviewing state court determinations. Under AEDPA, a writ of habeas corpus:

> 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.

28 U.S.C. § 2254(d).

[4][5] We review de novo the district court's interpretation of AEDPA standards governing the grant or denial of an evidentiary hearing, *Baja v. Ducharme,* 187 F.3d 1075, 1077 (9th Cir.1999), and we review for abuse of discretion the district court's ultimate denial of an evidentiary hearing based on these AEDPA standards, *Davis,* 384 F.3d at 638. In determining whether a petitioner is entitled to an evidentiary hearing under AEDPA, the district court:

> must determine whether a factual basis exists in the record to support the petitioner's claim. If it does not, and an evidentiary hearing might be appropriate, the court's first task in determining whether to grant an evidentiary hearing is to ascertain whether the petitioner has 'failed to develop the factual basis of a claim in State court.'.... If [ ] the applicant has not 'failed to develop' the facts in state court, the district court may proceed to consider whether a hearing is appropriate or required under *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)[*overruled on other grounds in Keeney v. Tamayo-Reyes,* 504 U.S. 1, 5, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992)].

Insyxiengmay v. Morgan, 403 F.3d 657, 669-70 (9th Cir.2005) (quoting *Baja,* 187 F.3d at 1078).

[6][7] Because a federal court may not independently review the merits of a state court decision without first applying the AEDPA standards, a fed-

eral court may not grant an evidentiary hearing without first determining whether the state court's ***1167** decision was an unreasonable determination of the facts. *See Lockyer*, 538 U.S. at 71, 123 S.Ct. 1166 (rejecting a line of Ninth Circuit cases requiring "federal habeas courts to review the state court decision de novo before applying the AEDPA standard of review"). *Townsend* establishes that a defendant is entitled to an evidentiary hearing if he can show that:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

Townsend, 372 U.S. at 313, 83 S.Ct. 745. If the defendant can establish any one of those circumstances, then the state court's decision was based on an unreasonable determination of the facts and the federal court can independently review the merits of that decision by conducting an evidentiary hearing. *See Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir.2004) ("If, for example, a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an 'unreasonable determination' of the facts.").

[8][9] Accordingly, where the petitioner establishes a colorable claim [FN4] for relief and has never been afforded a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing. *Insyxiengmay*, 403 F.3d at 670; *Stankewitz v. Woodford*, 365 F.3d 706, 708 (9th Cir. 2004); *Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir.2001). In other words, a hearing is required if: "(1) [the defendant] has alleged facts that, if proven, would entitle him to habeas relief, and (2) he did not receive a full and fair opportunity to develop those facts [.]" *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir.2004).

> FN4. In showing a colorable claim, a petitioner is "required to allege specific facts which, if true, would entitle him to relief." *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir.1998) (internal quotation marks and citation omitted).

III

In his state habeas petition and again in his federal petition, Earp argues that the prosecutor committed misconduct by intimidating a post-trial witness named Michael Taylor to prevent him from testifying in support of a new trial motion. We hold that the district court's decision to reject this claim without holding an evidentiary hearing was an abuse of discretion. *See Davis*, 384 F.3d at 638.

A

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The case against Earp was comprised of strong circumstantial evidence-Amanda had been left in his care on the day of the crime, and after Amanda was taken to the hospital Earp disappeared and gave false and inconsistent explanations of what had happened to her before he surrendered to the police. At trial, the defense case hinged on a credibility battle between Earp, who claimed that Dennis Morgan had murdered Amanda, and Morgan, who testified that he had never seen Amanda or been to the house where she was fatally injured.

Earp testified that on the day Amanda was attacked, he was at home watching her and working around the house when ***1168** he was interrupted by Morgan's arrival at his door. Earp claimed that he allowed Morgan into the house, but largely ignored him, hoping that he would leave. Later in the after-

noon, Earp said he went outside to clean paintbrushes and, because the backyard was unfinished, Earp left Amanda inside with Morgan and the family dog. Earp testified that after approximately a half-hour, he noticed the dog was agitated and he went inside to investigate. He discovered Amanda lying motionless at the bottom of the stairs, and made a number of attempts to revive her, including performing CPR, before calling emergency services. Earp further testified that Morgan left as Earp was calling for help.

Morgan's testimony contradicted this defense. Morgan testified that he had never been in the home and did not even know where it was. He also testified that he had never seen Amanda, and that he had not molested or raped her. Notably, no trial witness other than Earp was able to place Morgan at the house on the day of the crime.

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After the trial was over, a defense investigator located a potential jailhouse witness who might have impeached Morgan's testimony: Michael Taylor. Taylor was also an inmate at the Los Angeles County Central Jail at the time of Earp's trial, where both Earp and Morgan were being held.[FN5] In a series of declarations, Taylor claims that, while Earp's jury was deliberating, he overheard Morgan tell another inmate that Morgan had visited the house where Earp was watching Amanda on the day in question. Taylor insists that Morgan referred to Amanda as his "granddaughter," and expressed fear that Earp would "come after him" if he got out of jail because of Morgan's false testimony at trial.

FN5. Morgan was jailed on unrelated charges.

Taylor declares that he initially told this story in a recorded statement to the defense in late 1991 or early 1992. He asserts that, later the same day, the prosecutor and a sheriff's deputy took him to a private room at the jail, verbally abused him, and told him that he would never get out if he stood by his statement. Taylor insists that although his initial statement was true, he capitulated in the face of the prosecutor's threats and retracted the statement.

B

Earp first raised his claim that these events constituted prosecutorial misconduct in his state habeas petition.[FN6] He argued in his petition that the prosecutor violated Earp's due process rights by intimidating Taylor into withdrawing his declaration. He supported his state petition with four signed declarations from Taylor, a signed declaration from defense ***1169** investigator Manuel Alvarez, a declaration from Adrienne Dell, Earp's trial attorney, and a transcript of part of the prosecutor's interview with Taylor. Through these submissions to the state court, Earp proffered the factual foundation for his alleged prosecutorial misconduct claim. *See id.* at 669-70.

FN6. Michael Taylor's potential testimony arose in two other ways in the state habeas litigation, but Earp does not pursue those arguments in this appeal. First, Earp partially based his Motion for a New Trial on the argument that Taylor's potential testimony was newly discovered evidence. The trial court denied Earp's motion for a new trial, and the denial was affirmed on direct appeal. Earp dropped this argument after direct appeal; he did not protest the new trial decision in his state or federal habeas petitions. Earp's second use of Taylor's potential testimony was in his state habeas petition to support his claim of factual innocence. The state court summarily denied this claim, but Earp raised it again in his federal petition. Holding that there is no free-standing constitutional claim of factual innocence, the district court rejected this claim, and Earp has abandoned it on appeal. It is only his third use of Taylor's proffered testimony-to support his claim

that the prosecutor committed misconduct-that Earp continues to pursue in this appeal.

Without conducting a hearing, the state court denied Earp's prosecutorial misconduct claim without opinion. Earp continued to pursue his prosecutorial misconduct claim in his federal petition. He was unsuccessful before the district court as well; the federal court adopted the Warden's proposed order granting summary judgment against Earp on his prosecutorial misconduct claim. Earp appeals the district court's order.

C

[10] Because the factual basis for Earp's claim was adequately proffered to the state court, he is entitled to an evidentiary hearing if he has not previously received a full and fair opportunity to develop the facts of his claim and he presents a "colorable claim" for relief. *Insyxiengmay*, 403 F.3d at 669-70; *see also Williams*, 384 F.3d at 586.

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[11] It is evident from the record that Earp has never received an opportunity to develop his claim of prosecutorial misconduct. The issue was not presented to the trial court, but it was raised on habeas, and neither the state court nor the district court allowed him an evidentiary hearing. Because we find that such a hearing was necessary to make the credibility determination upon which rejection of Earp's claim depends, we conclude that he has not had a "full and fair" opportunity to develop the facts supporting his claim, *see Townsend*, 372 U.S. at 313, 83 S.Ct. 745, and, consequently, the state court decision summarily denying him habeas relief was based on an unreasonable determination of the facts, 28 U.S.C. § 2254(d)(2); *Taylor*, 366 F.3d at 1001.

The district court resolved Earp's claim on the basis of Taylor's credibility, concluding that Taylor's declarations were "inherently untrustworthy and not worthy of belief." FN7 The district court reached its credibility determination without taking the opportunity to listen to Taylor, test his story, and gauge his demeanor.FN8 *See Blackledge v. Allison*, 431 U.S. 63, 82 n. 25, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) ("When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive....") (internal quotation marks and citation omitted).

FN7. The district court also found that Taylor's statements would not have impacted Earp's conviction and thus "did not concern material evidence" because the trial court would not have accepted them. This is also a credibility determination, because the district court reasoned that the trial court would have found the declarations untrustworthy and would have refused to consider them.

FN8. The district court gave no explanation as to how it resolved the credibility contest between Taylor and the law enforcement officers in favor of the officers. One could speculate that the district court found Taylor untrustworthy because he was an inmate, but, in the absence of an evidentiary hearing to determine who was telling the truth, it remains unclear why an inmate testifying for the defense would be inherently incredible. Alternatively, one could speculate that the district court found Taylor untrustworthy because he changed his initial story, and then returned to it. But Earp's allegation is that Taylor changed his story because the prosecutor essentially threatened him, so this speculation would support Earp's allegation if the evidence Earp proffers is found to be credible.

[12] In rare instances, credibility may be determined without an evidentiary ***1170** hearing where it is possible to "conclusively" decide the credibility question based on "documentary testimony and

evidence in the record." *Watts v. United States,* 841 F.2d 275, 277 (9th Cir.1988) (finding an evidentiary hearing unnecessary in a § 2255 case). However, such a determination is not possible here because the documentary testimony in the record is consistent with Taylor's story and Earp's claim. Otherwise, there is no evidentiary basis for the district court's judgment of Taylor's incredibility because Taylor's story is completely outside the record. *See Frazer v. United States,* 18 F.3d 778, 784 (9th Cir.1994) ("Because all of these factual allegations were outside the record, this claim on its face should have signalled the need for an evidentiary hearing.").

[13] Because the veracity of the witnesses who signed the affidavits on which Earp based his claim was at issue, the claim could not be adjudicated without an evidentiary hearing on this disputed issue of material fact. Summary judgment is an inappropriate vehicle for resolving claims that depend on credibility determinations. *See Williams v. Calderon,* 48 F.Supp.2d 979, 989 (C.D.Cal.1998) (noting in the context of a habeas claim "[t]he Court is not to determine issues of credibility on a motion for summary judgment; instead, the truth of each party's affidavits is assumed"), *aff'd Williams,* 384 F.3d at 628; *see also United States v. Two Tracts of Land in Cascade County, Mont.,* 5 F.3d 1360, 1362 (9th Cir.1993) (reversing and remanding summary judgment for live testimony where the district court concluded on the basis of affidavits that the affiants were not credible); *Kreisner v. San Diego,* 988 F.2d 883, 900 n. 1 ("Determinations of credibility are inappropriate for summary judgment."), *amended by* 1 F.3d 775 (9th Cir.1993); *SEC v. Koracorp Indus., Inc.,* 575 F.2d 692, 699 (9th Cir.1978) ("[S]ummary judgment is singularly inappropriate when credibility is at issue.").

Earp has never had an opportunity to present Taylor's live testimony so that the trier of fact can judge his credibility, and the prosecutor and sheriff's deputy have never been questioned regarding their side of the story. Thus, because we conclude that Earp has not had a full and fair opportunity to develop the facts to support his claim we hold that the state court's decision denying him relief without an evidentiary hearing to resolve the credibility dispute was based on an unreasonable determination of the facts.

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[14][15] We next consider whether Earp has alleged facts which, if demonstrated to be true, would present a colorable claim for relief. *See Insyxiengmay,* 403 F.3d at 669-70; *Williams,* 384 F.3d at 586. At this stage, Earp does not need to prove that the prosecutor committed misconduct or that his due process rights were violated; he only needs to allege a *colorable* claim for relief. *See Phillips,* 267 F.3d at 973. This is a low bar, and Earp has surmounted it.

[16][17] If the facts that Earp alleges are proven true at an evidentiary hearing, the district court might well determine that he had established that the prosecutor threatened and verbally abused Taylor, fed him an untrue story, forced him to recant the impeaching statement by Morgan on tape, and punished Taylor for assisting Earp by having Taylor removed from his job as a trustee and transferred to a significantly less desirable jail facility. It is well established that "substantial government interference with a defense witness's free and unhampered choice to testify amounts to a violation of due process." *United States v. Vavages,* 151 F.3d 1185, 1188 (9th Cir.1998) (quoting *United States v. Little,* 753 F.2d 1420, 1438 (9th Cir.1984)). Moreover, coercive or threatening behavior towards ***1171** a potential witness may justify reversal of a defendant's conviction. *See Webb v. Texas,* 409 U.S. 95, 98, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); *Williams,* 384 F.3d at 601-02 ("Undue prosecutorial interference in a defense witness's decision to testify arises when the prosecution intimidates or harasses the witness to discourage the witness from testifying...."). If Earp could prove his factual claims at an evidentiary hearing, he may well estab-

lish that the prosecutor committed misconduct.[FN9] We note that we are not opining on what the resolution of this issue should be; we are only explaining why Earp is entitled to a hearing on his claim.

> FN9. We have considered and rejected the possibility that hearsay objections to Taylor's testimony would preclude Earp's claim. Hearsay testimony should not be necessary in the district court because in order to establish Earp's claim, Taylor would need to testify as to how the prosecutor treated him and how he reacted (by withdrawing his statement); the actual content of Taylor's statement would not be particularly relevant to this inquiry. If Earp is granted relief on this claim and the case against him is ultimately retried, Taylor's testimony would likely be admissible under California evidence rules as an inconsistent statement, *see* Cal. Evid.Code §§ 770, 1235, as impeachment evidence, *see* Cal. Evid.Code §§ 780(h), 785, or possibly also as a statement against penal interest, *see* Cal. Evid.Code § 1230. We thus conclude that hearsay concerns do not preclude a finding that Earp has alleged facts which, if proven, would entitle him to relief.

[18][19] Earp has also made out at least a colorable claim that he was prejudiced by the prosecutor's misconduct. If the facts Earp alleges are true, he may well have demonstrated that the prosecutor's misconduct precluded him from presenting a witness in support of his Motion for a New Trial.[FN10] *See Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). Furthermore, because Earp's defense strategy at trial so clearly pitted Earp's credibility against Morgan's, evidence that Morgan was lying could have created a reasonable doubt with the jury that would have made the difference for Earp. *See Silva v. Brown,* 416 F.3d 980, 987(9th Cir.2005) ("Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case."). If Earp can demonstrate that prosecutorial misconduct prevented Taylor from impeaching Morgan, he may be able to establish that he was deprived of his right to present Taylor as a witness on his behalf, that he should have been granted a new trial to prove his defense, and that this deprivation may well have affected the outcome.

> FN10. Although this evidence did not come to light until after the trial had concluded, Earp sought a new trial based on newly discovered evidence, including Taylor's statement impeaching Morgan's testimony. Because this is a state conviction the California standard for granting a new trial must guide our prejudice analysis. *Horton v. Mayle,* 408 F.3d 570, 576 (9th Cir.2005). Under California law, a new trial will be granted if: (1) the evidence is newly discovered; (2) the evidence is not cumulative; (3) the evidence is "such as to render a different result probable on a retrial of the cause;" (4) "the party could not with reasonable diligence have discovered and produced it at the trial;" and (5) that the "facts be shown by the best evidence of which the case admits." *People v. Martinez,* 36 Cal.3d 816, 205 Cal.Rptr. 852, 685 P.2d 1203, 1205 (1984). In looking to California law, we are not addressing the merits of Earp's Motion for a New Trial. The only question before us is whether Earp has presented a colorable claim of constitutional harm; in other words, whether these facts, if proven true, may have entitled him to a new trial.

The district court's conclusion that Earp has not demonstrated any potential prejudice hinges on the credibility determination that we have already concluded cannot be made on summary judgment. The

district***1172** court says that it assumed the credibility of Taylor's declarations, but concluded that even if the prosecutor committed misconduct, Earp was not prejudiced because the trial court would not have accepted Taylor's testimony had it been offered because the court would not have found it credible. FN11 Had the trial court actually heard Taylor testify and determined that he was not credible, we would probably defer to the trial court's credibility judgment as an established fact and would likely conclude that Earp had not raised a colorable claim of prejudice. *See Torres v. Prunty*, 223 F.3d 1103, 1109 (9th Cir.2000). However, because no court has properly considered Taylor's credibility, we have no basis upon which we may hold that the facts Earp alleges do not establish a colorable claim of prejudice by prosecutorial misconduct.

> FN11. The district court reached this conclusion by adopting the trial court's conclusion that Taylor was untrustworthy. Just as we could not accept the district court's credibility judgment based only on Taylor's written statements, we cannot accept its reliance upon a trial court credibility judgment that suffered from the same deficiency in resolving a credibility dispute without a hearing. The trial court never received a declaration from Taylor. Rather the defense submitted a declaration from its defense investigator, allegedly because the prosecutor's misconduct forced Taylor to withdraw his declaration. Although the trial court held that it would have denied relief "even if this was a declaration by[Taylor] himself" because any such declaration "would appear" to be "inherently untrustworthy," that does not change our analysis. The documentary testimony in the record is consistent with Taylor's story and Earp's claim, and Taylor's testimony is completely outside the record. *Cf. People v. Jefferson*, 47 Cal.2d 438, 303 P.2d 1024, 1028-29 (1957) (upholding trial court's credibility determination after the trial court weighed conflicting affidavits and defense counsel had an opportunity to elicit testimony from the affiants during trial). Consequently, the trial court had no basis to judge Taylor's credibility without conducting an evidentiary hearing.

Instead, we hold that Earp has established entitlement to an evidentiary hearing because the facts he alleged may show that the prosecutor committed a constitutional due process violation by prejudicially dissuading Michael Taylor from testifying. We remand for an evidentiary hearing so that Earp will have an opportunity to prove the facts supporting his claim.

IV

Earp argues that he was denied effective assistance because his counsel's investigation was insufficient, resulting in a "large body of relevant mitigating material" being kept from the jury in the penalty phase. Specifically, Earp argues that defense counsel's failure to properly investigate and follow up on leads unearthed by the defense investigator resulted in the failure to uncover and present the following mitigating evidence: (1) extensive records of Earp's schooling, documenting a history of emotional problems and possible psychological or neurological problems; (2) further information about Earp's family background, his history of substance abuse and mental problems, especially in light of his family history of alcoholism, depression, and suicide; and (3) neurological and psychiatric evaluations evincing organic brain damage resulting from head trauma that he suffered at age eight or nine. In this appeal, Earp seeks not the grant of his petition for relief, but remand for an evidentiary hearing on this claim. FN12

> FN12. Earp also raised this claim in his state petition for habeas relief. In support of his claims at the state level Earp included the following items in his exhibits:

the declaration of Lori Thomson, Earp's sister; Earp's CYA records; Earp's juvenile arrest/detention record; Earp's Santa Clara Valley Medical Center records; Earp's school records including progress reports, psychological reports, and testing results; Earp's Probation Officer's Social Study Report; birth, school, and medical records of Earp's extended and immediate family members; and various reports about the conditions of CYA confinement.

***1173** Although he presented his claim to the state court, Earp never received an evidentiary hearing. The district court denied Earp's motion for an evidentiary hearing and granted summary judgment in favor of the Warden on this claim, concluding that Earp failed to establish that counsel's performance was deficient and that he suffered prejudice thereby, because the evidence in aggravation was insurmountable.[FN13] Earp has alleged facts that, if proven true, may entitle him to relief. Because an evidentiary hearing is needed in order to resolve these factual allegations we hold that the state court's decision was based on an unreasonable determination of the facts. For those reasons, Earp is entitled to an evidentiary hearing in federal court and we remand for that purpose.

FN13. The district court had before it all of the evidence contained in the state record, along with the following: the declaration of Barbara Nusbaum, Earp's aunt; the declaration of Helen Perusse, Earp's mother; the declaration of Curtis Earp, Earp's brother; Background Factors and Social History (prepared by defense investigator Sheryl Duvall for the trial court on January 23, 1992); the declaration of Douglas Dorman (re: teenage drug use, family background, time in detention); the declaration of Donald Robbins (re: family background, alcoholism, abuse, teenage drug use, time in detention); the declaration of Kelly Williams (re: teenage drug use, family background); the supplemental declaration of Barbara Nusbaum (re: alcohol abuse, family background, teenage drug use); the supplemental declaration of Curtis Earp (re: family background, father's abuse of Earp, father's suicide); the declaration of Abbey Drew (re: experience as Earp's Juvenile Hall counselor, Earp's behavior, impressions of Earp as a teenager); the declaration of Dean R. Gits (re: contents of the deposition of Sue Brown); the Expert Report of Ines Monguio, Ph.D. (re: whether Earp's psychosocial history and neuropsychological functioning prior to and during the crime for which he was convicted may have presented a viable defense at the time because Earp's test results and records were "consistent with organic damage[ ] by traumatic brain injury"); and the Expert Report of Ezekiel P. Perlo (re: expert opinion as to ineffective assistance, mostly addressing the conflict claim).

A

[20] In order to establish entitlement to an evidentiary hearing, Earp is not required to conclusively establish in this appeal that counsel was prejudicially deficient. Rather, Earp must demonstrate by his evidence the potential of a *colorable claim* that, if proven true at the hearing, would show that his former counsel's failure to investigate amounted to ineffective assistance of counsel, and that, but for such deficient representation, there is a reasonable probability that the outcome of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 688, 693-94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

B

[21] A defendant in a criminal proceeding is entitled to effective assistance of counsel in order "to protect the fundamental right to a fair trial." *Id.* at

684, 104 S.Ct. 2052. *Strickland* sets forth two prongs that the defendant must satisfy in order to establish a Sixth Amendment right to counsel violation: (1) "the defendant must show that counsel's performance was deficient"; and (2) "the defendant must show that the deficient performance prejudiced the defense.... Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 104 S.Ct. 2052.

In order to satisfy the first prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" under "prevailing professional norms," *id.* at 688, 104 S.Ct. 2052, by identifying the acts or omissions "that ***1174** are alleged not to have been the result of reasonable professional judgment[,]" *id.* at 690, 104 S.Ct. 2052. Our review of counsel's performance for constitutional deficiency "must be highly deferential" and should include every effort "to eliminate the distorting effects of hindsight[.]" *Id.* at 689, 104 S.Ct. 2052.

It is not enough to show that counsel was deficient; rather, reversal is only proper if the error had a prejudicial effect on the outcome of the trial. *Id.* at 692, 104 S.Ct. 2052. Thus, in order to establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

C

1

Two recent Supreme Court cases inform our analysis of Earp's claim. First, in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), where the defendant faced death because the jury found a probability of future dangerousness, the Supreme Court considered whether counsel's failure to discover, investigate, and present certain mitigating evidence fell "below the range expected of reasonable, professional competent assistance of counsel." *Id.* at 371, 120 S.Ct. 1495 (internal quotation marks and citation omitted). At sentencing, counsel presented testimony from Williams's mother and two neighbors, and a taped excerpt from a psychiatrist. *Id.* at 369, 120 S.Ct. 1495. The witnesses testified generally that Williams was a "nice boy," and a non-violent person by nature. *Id.* The psychiatrist's taped excerpt related statements made by Williams that, in a prior unrelated robbery, Williams had removed the bullets from his gun in order to ensure that he did not hurt anyone. *Id.*

Reversing the Fourth Circuit's denial of habeas relief, the Supreme Court held that, notwithstanding the presentation of some mitigation evidence, "trial counsel did not fulfill their obligation to conduct a thorough investigation of[Williams's] background." *Id.* at 396, 120 S.Ct. 1495 (citation omitted). Specifically, the Court noted that, despite being put on notice of Williams's cooperation in a prison sting, counsel requested neither prison records nor testimony from prison officials regarding Williams's non-violent disposition. *Id.* Counsel also failed to return a phone call from a witness who offered to testify on Williams's behalf. *Id.*

[9] *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), is also particularly instructive in the instant appeal. There, the Supreme Court further refined and emboldened the ineffective assistance inquiry in the context of a claimed failure to investigate mitigation evidence. The Court held that, in determining whether counsel exercised "reasonable professional judgment[,]" *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052, the focus is "on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable* [,]" not "whether counsel should have presented"

mitigation evidence, *Wiggins,* 539 U.S. at 522-23, 123 S.Ct. 2527.

The Court ultimately granted Wiggins's "claim stem[ming] from counsel's decision to limit the scope of their investigation into potential mitigating evidence." *Id.* at 521, 123 S.Ct. 2527. Defense counsel's mitigation investigation had been limited to two items: (1) a written presentence investigation ("PSI") report containing a one-page account of Wiggins's personal history noting "misery as a youth"; and (2) Baltimore ***1175** Department of Social Services ("DSS") records documenting Wiggins's placements in the foster care system. *Id.* at 523-24, 123 S.Ct. 2527. The Court concluded that "[c]ounsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989" because "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 524, 123 S.Ct. 2527. The Court noted that "[c]ounsel's conduct [ ] fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which [the Court] long [has] referred as guides to determining what is reasonable." *Id.* (internal quotation marks and citations omitted). The relevant ABA guidelines state that counsel in capital cases should consider the following information about a petitioner: medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. *Id.* (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.8.6, p. 133).

In addition to finding that the investigation should have been more expansive and probing as a general matter, the *Wiggins* Court further found that the investigation was "unreasonable in light of what counsel actually discovered" in the course of their limited investigation. *Id.* at 525, 123 S.Ct. 2527; *see also Stankewitz,* 365 F.3d at 722. Specifically, the Court found that the DSS report should have tipped off counsel and triggered more robust investigation because it mentioned that Wiggins's mother was an alcoholic, that Wiggins and his siblings went without food, that Wiggins suffered emotional trouble, and that Wiggins experienced trouble in school. *Wiggins,* 539 U.S. at 524, 123 S.Ct. 2527. In light of this information, the Court found that counsel uncovered no evidence in the course of the investigation that would indicate that "further investigation would have been fruitless." *Id.*

[22] The Supreme Court has conveyed a clear, and repeated, message about counsel's sacrosanct duty to conduct a full and complete mitigation investigation before making tactical decisions, even in cases involving similarly egregious circumstances. Based on this mandate, we hold that the district court abused its discretion in denying Earp's request for an evidentiary hearing and remand for such a hearing. At the proceeding, the Warden will have the opportunity to challenge Earp's allegations and the evidence rallied to support his claim. Earp will also have the opportunity to further substantiate his allegations. In other words, Earp must be given a full and fair hearing on his ineffective assistance of counsel claim.

[23][24] Although counsel clearly has a duty to conduct a full and complete mitigation investigation, we find it difficult to know where a habeas court may draw the line in deciding how far defense counsel must go in conducting the mitigation investigation for the penalty phase of a capital case. We think the jurisprudential principle to be gleaned from *Wiggins* is that, although counsel is not required "to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing[,]" *id.* at 533, 123 S.Ct. 2527, they are in no position to decide, as a tactical matter, not to present mitigating evidence or not to investigate further just because they have *some* information about their client's background, *id.* at 527, 123 S.Ct. 2527. Moreover, *Wiggins* also establishes that the

presence of certain elements in a capital defendant's background, such as a family history of alcoholism, abuse, and ***1176** emotional problems, triggers a duty to conduct further inquiry before choosing to cease investigating. *Id.* at 525, 123 S.Ct. 2527. How far they must go is obviously heavily fact-dependent and cannot be ascertained here without developing a more complete evidentiary record on remand.

2

Earp's claim invokes the essential issue in *Wiggins:* whether counsel's decision, based on a limited amount of information, to cease further investigation into mitigating evidence deprived Earp of his constitutional right to effective assistance of counsel. As stated in *Wiggins,* the issue in Earp's case is not whether Dell should have presented certain mitigation evidence during the penalty phase, but whether she should have investigated further before deciding to cease investigating. "[W]e focus on whether the investigation supporting counsel's decision ... *was itself reasonable.*" *Id.* at 523, 123 S.Ct. 2527. We conclude that an evidentiary hearing is required because Earp's allegations are sufficient to trigger the need for a hearing on whether Dell's investigation was unreasonable in light of the evidence she uncovered.

During the penalty phase, attorney Dell's mitigation presentation consisted of testimony from five witnesses. Earp's aunt and mother testified about his family background and childhood: his father's alcoholism, physical abuse of Earp's mother, and emotional abuse of Earp and his siblings; his stepfather's alcoholism, violence, and abuse of Earp, his mother, and his siblings; Earp's father's suicide and its effect on Earp; and Earp's juvenile history, including time spent in juvenile detention. *Earp,* 85 Cal.Rptr.2d 857, 978 P.2d at 30-31. Gloria Hall, a juvenile facility cook from Earp's time in CYA detention, opined that Earp committed crimes as a juvenile because of his family situation, and stated that Earp "was awarded honor status" at the facility. *Id.* at 30. Virginia MacNair testified that she and Earp's son visited him in jail, and that Earp sent them letters and pictures. *Id.* James Park, the former associate warden at San Quentin, testified that he thought Earp "would pose no danger in a high security prison" and that he would adjust well to confinement. *Id.* Although Dell presented this mitigation evidence, Earp contends that her investigation was still insufficient in light of the evidence she uncovered.

Earp claims that his penalty phase presentation would have "materially benefitted" from evidence and testimony about his violent family and social background, substance abuse, mental illness, history of emotional problems, and brain injury. *See Stankewitz,* 365 F.3d at 721-22 (finding that petitioner's penalty phase representation would have benefitted from information about the petitioner's background, history of mental illness, and substance abuse problems). In his motion for an evidentiary hearing on this claim, Earp stated that he would present: (1) testimony of counsel as to her failure to obtain and present family and personal background; (2) evidence as to family and personal history obtained by habeas counsel, including records of emotional problems and possible psychological and neurological problems stemming from early childhood, medical evaluations evincing organic brain damage which may have exacerbated Earp's behavioral problems, as well as testimony from family and friends regarding Earp's ongoing substance abuse; and (3) expert testimony regarding prejudice.

In support of his claim, Earp presented the district court with: declarations from family members providing additional details about his background; declarations from family members, associates, and a CYA counselor discussing his history of substance abuse; declarations regarding ***1177** Earp's time spent in CYA custody; an expert report finding that Earp's psychosocial history and neuropsychological functioning prior to, during, and after commission of the crime may have presented a vi-

able defense because Earp's test results and records were "consistent with organic damage[ ] [caused] by traumatic brain injury"; and an expert report as to counsel's failure to render effective representation.

If true, the facts alleged may well paint a materially different picture of Earp's background and culpability, the very things considered relevant and vital to a competent mitigation presentation. *See, e.g., Douglas v. Woodford,* 316 F.3d 1079, 1090 (9th Cir.2003). First, the declarations set forth a more detailed view of Earp's family background. For instance, the declarations allege details of Earp's father's (Don Earp) alcoholic binges, sometimes leading to police dispatches and often resulting in serious beatings of Earp's mother.[FN14] They also outline Don Earp's slide from alcoholism into suicide after being severely beaten himself, discussing how his violence toward the family and "uncontrollable rages" intensified. The declarations also set forth an account of Ricky Earp's life after his father's suicide spent in the company of a similarly abusive and alcoholic stepfather in a house where "finances, and indeed even food and shelter were inconsistent." The declarations detail the trauma that his father's suicide caused Earp. *See id.* at 1087-89 (finding deficient counsel due, in part, to failure to investigate and present additional evidence of petitioner's family background and "difficult childhood"); *see also Wiggins,* 539 U.S. at 525, 123 S.Ct. 2527 (finding ineffective assistance for failure to investigate petitioner's background involving abuse, alcoholism, neglect, and emotional trouble).

> FN14. Some of the declarations state that Earp and his siblings were occasionally beaten during these binges as well.

Second, the declarations from friends and family outline a history of substance abuse that the state court did not address and that the district court found to be unimportant. The declarations state that Earp's drug abuse began with smoking marijuana when he was twelve or thirteen years old, and that he later used other illegal drugs on a regular basis, including methamphetamine, cannabinol, LSD, and other hallucinogenics. The declarants also note that Earp consumed large quantities of alcohol during his teen years, sometimes selling marijuana to adults in exchange for the purchase of alcohol. *See Lambright v. Stewart,* 241 F.3d 1201, 1207 (9th Cir.2001) (determining that counsel's failure to obtain a psychiatric evaluation of the petitioner where he had a history of "extensive drug abuse," among other things, constituted deficient performance and warranted remand for an evidentiary hearing).

Finally, the declarations, records, and reports regarding Earp's emotional and neurological history allege additional mitigation grounds. Earp's school records, including progress reports, psychological evaluations, and testing results, contain details that should have caused counsel to investigate further. Specifically, a psychological report conducted after repeated behavioral problems stated that Earp "should be considered for at least partial Educationally Handicapped placement" and that "[s]uch placement would be on an emotional disturbance basis." The report goes on to note that "[a]lternate ways to deal with disturbing behavior and emotionally charged feelings should be explored, as well as the desirability of outside agency counseling." The report also discusses Earp's test results and observations, finding that Earp was "very troubled," suffered***1178** from "a great deal of anxiety," and was "having trouble coping emotionally."

The testing and observations also revealed a "lack of adequate control." A later report, documenting a psychiatrist-parent conference regarding Earp's "obvious emotional disturbance," also dealt with Earp's trauma resulting from his father's suicide.[FN15] Earp alleges that these problems continued, as evidenced by a CYA intake report noting that Earp "has experienced psychosocial turmoil" and "witnessed alcoholism, physical brutality, domination, inconsistent discipline, and marital discord followed by divorce and a broken home." *See Ainsworth v. Woodford,* 268 F.3d 868, 875-76 (9th Cir.2001) (finding ineffective assistance where

counsel failed to investigate and present mitigation evidence regarding, *inter alia*, petitioner's history of emotional problems dating back to childhood).

> FN15. A follow-up psychiatrist-parent conference report noted that "the situation has not improved" and had, in fact, possibly worsened.

Earp asserts that the emotional problems that he alleges to have suffered throughout his youth and into adulthood were exacerbated and augmented by a head injury that he suffered in a motorcycle accident at age eight or nine, resulting in organic brain damage. Expert Dr. Ines Monguio conducted neuropsychological testing of Earp, finding that his functioning is "consistent with the presence of organic damage." Monguio also determined that discrepancies in Earp's verbal functions were consistent with brain damage. The expert concluded that Earp displayed the "consequences of the brain trauma " suffered in the motorcycle accident, as well as "generalized damage probably incurred through consistent and extreme" substance abuse. Monguio concluded that the testing results and background data were "consistent with organic damage[ ] [caused] by traumatic brain injury[,]" and noted that a "person diagnosed with this type of damage display[s], among other symptoms, impulsive behavior, problems with self-monitoring (regulating behavior), and poor judgment." *See Douglas,* 316 F.3d at 1086 (finding ineffective assistance of counsel for failure to investigate and present mitigation evidence where petitioner suffered from "possible organic impairment" and test results revealed "some level of preexisting neurological deficit") (internal quotation marks omitted).

3

We hold that under *Williams* and *Wiggins* Earp has met his burden of showing a colorable claim sufficient to trigger entitlement to an evidentiary hearing. He has adequately alleged that counsel unreasonably curtailed investigation into mitigating evidence, even after being presented with information warranting and triggering a duty to look further. In her declaration, attorney Dell stated the following: that she did not present any evidence that "was not entirely consistent with [Earp's] claim of innocence"; that her main penalty phase theme was "lingering doubt"; that she was solely responsible for the investigation and preparation of Earp's penalty phase presentation; that she obtained the services of, and relied on completely, defense investigator Sheryl Duvall; that she did not direct Duvall's investigation or instruct her to investigate specific areas; that the defense investigator obtained Earp's school and medical records; that Dell did not collect, or instruct to be collected, evidence concerning the conditions of confinement in the CYA at the time of Earp's detention; and finally, that she knew of Earp's head injury and history of ***1179** substance abuse, but did not seek a neurological or mental health evaluation.[FN16]

> FN16. Whether her proffered evidence will withstand the crucible of an adversary proceeding and cross-examination for possible bias remains to be seen.

[25] The district court determined, and the Warden now argues, that counsel's mitigation case represented a tactical decision entitled to deference. However, deference is only owed to strategic decisions reached after "thorough investigation of law and facts relevant to plausible options [.]" *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. We do not see how such a conclusion may be made on this record without a factual hearing. Earp alleges that his counsel failed to obtain a mental health, neurological, or psychological evaluation of Earp, despite being alerted to the following evidence about Earp's background: (1) that he had both a personal and a family history of substance abuse; (2) that his family had a history of alcoholism, mental illness, suicide, and physical and emotional abuse; (3) that Earp's father and stepfather were abusive; (4) that Earp's mother was physically abused; (5) that Earp had a history of emotional problems; and (6) that

Earp had suffered a head injury.

If proven to be true during future evidentiary hearings, this alleged history of substance abuse, emotional problems, and organic brain damage is the very sort of mitigating evidence that "might well have influenced the jury's appraisal of [Earp's] moral culpability." *Williams*, 529 U.S. at 398, 120 S.Ct. 1495; *see also Douglas*, 316 F.3d at 1090 ("Evidence regarding social background and mental health is significant, as there is a 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional or mental problems, may be less culpable than defendants who have no such excuse.' ") (quoting *Boyde v. California*, 494 U.S. 370, 382, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)); *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir.2005) ("Defense counsel's use of mitigation evidence to complete, deepen, or contextualize the picture of the defendant presented by the prosecution can be crucial to persuading jurors that the life of a capital defendant is worth saving.") (citations omitted).

If proven, Earp's allegations could establish a colorable claim that counsel's failure to investigate mitigating evidence, "despite tantalizing indications in the record, as in *Wiggins*, that would lead a reasonable attorney to investigate further," deprived Earp of his constitutionally guaranteed right to effective representation. *Stankewitz*, 365 F.3d at 720 (internal quotation marks and citation omitted). We emphasize that the ultimate determination must be made in the first instance by the fact-finder at the hearing. We offer no opinion on the merits of Earp's claim here.

4

[26] But even if Earp has established a colorable claim of ineffective assistance for failure to conduct a competent mitigation investigation, he must also present a colorable claim that counsel's deficient performance prejudiced him. *Wiggins*, 539 U.S. at 521, 123 S.Ct. 2527; *see also Stankewitz*, 365 F.3d at 722-23. "In assessing prejudice, [the court] reweigh[s] the evidence in aggravation against the *totality of available* mitigating evidence." *Stankewitz*, 365 F.3d at 723 (emphasis added) (quoting *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527). The totality of the available evidence includes "both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*" *Wiggins*, 539 U.S. at 536, 123 S.Ct. 2527 (quoting *Williams*, 529 U.S. at 397-98, 120 S.Ct. 1495).

***1180** Earp has alleged that the testimony presented at the penalty phase did not fully encompass the degree of violence, abuse, and alcoholism that he claims to have suffered during his formative years. It appears that the jury in this case was not presented with the evidence that Earp alleges regarding his history of substance abuse beginning at age twelve, his organic brain damage and its attendant effects resulting from his childhood head injury at age eight or nine, or his history of emotional problems. While Earp's life history is not as "excruciating" as that of defendants in other cases, it may well be that, after conducting the hearing on remand, the habeas court could conclude that, "[h]ad the jury been able to place [Earp's] life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527 (noting, further, that Wiggins did "not have a record of violent conduct" that the prosecution could have introduced to offset the omitted mitigating evidence).

During the prosecution's penalty phase of the trial, the aggravation presentation consisted of Earp's prior felony conviction for burglary. *Earp*, 85 Cal.Rptr.2d 857, 978 P.2d at 30; *see also Mayfield v. Woodford*, 270 F.3d 915, 933 (Gould, J., concurring) (noting that, for purposes of prejudice, it is relevant to consider that the defendant did not have "an extensive history involving major crimes or violence"). In finding no prejudice, the district court determined that any omitted mitigation evidence

would not have made a difference to even a single reasonable juror because the nature of Earp's crime was so egregious.

The aggravating circumstances of this case are indeed heinous. However, as we have previously noted, "the Supreme Court has made clear that counsel's failure to present mitigating evidence can be prejudicial even when the defendant's actions are egregious." *Stankewitz*, 365 F.3d at 723-24 (discussing *Williams*, 529 U.S. at 368, 398-99, 120 S.Ct. 1495 (noting that, among his other crimes, Williams confessed to "brutally assault[ing] an elderly woman leaving her in a vegetative state" in her home, yet still finding that the mitigating evidence that counsel failed to investigate could have tipped the balance for at least one juror) (internal quotation marks omitted)); *see also Mak v. Blodgett*, 970 F.2d 614, 620-22 (9th Cir.1992) (finding prejudice despite the presence of exceedingly horrific circumstances of the crime in which the defendant slaughtered thirteen people in the course of one night to eliminate all witnesses to an armed robbery).

Given that the circumstances of Earp's crime constituted the vast majority of the aggravation case, prejudice is "especially likely." *Lambright*, 241 F.3d at 1208 (noting that "[p]rejudice is especially likely where, as here, this is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances") (internal quotation marks and citation omitted); *cf. Allen*, 395 F.3d at 1009 (finding no prejudice, despite ineffective assistance, because of the overwhelming evidence in aggravation consisting, in part, of a "long history of orchestrating and committing violent robberies and burglaries" and plotting the murder of multiple individuals who testified against the defendant on an earlier murder charge). Accordingly, we hold that Earp's allegations are sufficient to require an evidentiary hearing because, if true, they could establish that he suffered prejudice from counsel's deficient mitigation investigation and presentation.

V

Earp's second Sixth Amendment claim is that he was deprived of effective assistance of counsel because his intimate relationship***1181** with Dell created a conflict of interest between Dell's duties as counsel and her personal interests in the relationship. We affirm the denial of habeas relief on this claim because the state court finding of no conflict was neither contrary to, nor an unreasonable application of, clearly established federal law.

A

On April 23, 1991, Adrienne Dell was appointed as Earp's second counsel. Dell met frequently with Earp, giving him her home phone number and speaking with him regularly in order to build trust and rapport. During the course of her representation, Dell developed romantic feelings for Earp.

The conversations between Earp and Dell reflected this sentiment and started to broach more personal matters, although only after discussing necessary case-related issues. Dell sent Earp pictures of herself and dressed provocatively for her visits to Earp. She also disrobed for him and engaged in "intimate relations" with Earp during their visits. In addition, Dell gave him a religious medallion "to signify her feelings for him," picking this type of item because she knew that the rules of confinement would allow for him to keep it, given its religious nature. During the trial itself, Earp and Dell passed personal notes and winked to each other.

After the return of the guilty verdict, Dell confessed her love to Earp in the holding cell and he reciprocated. From then on, Dell and Earp shared a "strong emotional attachment," which culminated in their marriage after Earp was transferred to death row. Dell and Earp were married from October 7, 1993, until December 27, 2000.

This issue was first raised in Earp's state petition for writ of habeas corpus and was summarily denied on the merits. Earp reiterated this claim in

his federal habeas petition. The defense argued that, because of the relationship between Dell and Earp, Dell: (1) failed to present any shaken baby syndrome evidence; (2) gave Earp too much control over his defense; and (3) failed to present substantial mitigation evidence of which she was aware. The district court held an evidentiary hearing on the conflict claim and bifurcated the inquiry, instructing counsel to only present evidence of "actual conflict," and barring the defense from presenting any evidence relating to whether the representation was adversely affected by the alleged conflict.[FN17]

> FN17. Earp also argues that the district court's bifurcation of the evidentiary hearing was improper because actual conflict cannot be determined without analyzing whether there was an adverse effect on representation. While the Supreme Court in *Mickens v. Taylor*, 535 U.S. 162, 171-73, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002), makes clear that the question of actual conflict is not properly analyzed as two separate inquiries, we affirm the district court's denial of the claim on summary judgment because, even assuming the facts alleged to be true, the state court decision did not contravene Supreme Court precedent. *See* supra, § V.C; *see also Lambert*, 393 F.3d at 965 (noting that this court can affirm the district court decision on any ground supported by the record).

At the close of the evidentiary hearing, the district court propounded that "[b]eing in love is not a conflict," and concluded that Dell felt she was acting in Earp's best interest. In its order denying relief on the conflict claim, the district court compared Dell's situation to every lawyer's conflict between maintaining a personal life and a professional life: "such balancing is done by every lawyer who works past the time their spouse goes home or school lets out." The district court ultimately concluded that, because there was no actual conflict, it was unnecessary to examine whether there was any adverse impact due to purported conflict.

***1182** On appeal, Earp argues that Dell labored under an actual conflict, relying primarily on our circuit's case law addressing situations where a lawyer's personal interests conflict with the defendant's interest,[FN18] as well as various state supreme court disciplinary proceedings stemming from unethical lawyer-client sexual relationships.[FN19] Most of these cases involve pre-AEDPA petitions, many of which do not involve habeas proceedings, and all of which were decided before the Supreme Court issued *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). For the reasons explained below, we hold that Earp's claim fails, and that the district court properly denied this claim for relief.

> FN18. *E.g.*, *United States v. Hearst*, 638 F.2d 1190 (9th Cir.1980); *United States v. Baker*, 256 F.3d 855 (9th Cir.2001).
>
> FN19. *E.g.*, *In re Gore*, 752 So.2d 853 (La.2000); *In re Grimm*, 674 N.E.2d 551 (Ind.1996); *People v. Boyer*, 934 P.2d 1361 (Colo.1997).

B

[27][28][29][30] Whether counsel and client had conflicting interests is a mixed question of law and fact which we review de novo. *Williams*, 384 F.3d at 586; *see also Bragg v. Galaza*, 242 F.3d 1082, 1086, *amended by* 253 F.3d 1150 (9th Cir.2001). We also review de novo the district court's summary judgment decision. *Davis*, 384 F.3d at 638. Section 2254(d)(1) of U.S.C. Title 28 applies to questions of law and mixed questions of law and fact. *Id.* at 637. A decision is "contrary to" federal law when the state court applies a rule of law different from that set forth in the holdings of Supreme Court precedent or when the state court makes a contrary determination on "materially indistinguishable" facts. *Williams*, 529 U.S. at 405-06, 120 S.Ct. 1495. An "unreasonable applica-

tion" of federal law occurs when a state court's application of Supreme Court precedent to the facts of a petitioner's case is "objectively unreasonable." *Id.* at 409, 120 S.Ct. 1495. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411, 120 S.Ct. 1495.

[31][32] Clearly established federal law "as determined by the Supreme Court," § 2254(d)(1), " 'refers to the holdings, as opposed to the dicta of [the Supreme Court's] decisions as of the time of the relevant state-court decision.' " *Lambert*, 393 F.3d at 974 (quoting *Lockyer*, 538 U.S. at 71-72, 123 S.Ct. 1166). Circuit court precedent is relevant only to the extent that it clarifies what constitutes clearly established law. *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir.2004); *see also Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir.2003), *cert. denied*, 540 U.S. 968, 124 S.Ct. 446, 157 L.Ed.2d 313 (2003); *Duhaime v. Ducharme*, 200 F.3d 597, 602-03 (9th Cir.2000) (Ninth Circuit precedent derived from an extension of a Supreme Court decision is not "clearly established federal law as determined by the Supreme Court").

C

[33][34][35][36] While ineffective assistance of counsel claims generally require the petitioner to show deficient representation and prejudice, we "forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict" in instances "where assistance of counsel has been denied entirely or during a critical stage of the proceeding." *Mickens*, 535 U.S. at 166, 122 S.Ct. 1237. Circumstances of such magnitude may "arise when the defendant's attorney actively ***1183** represented conflicting interests." *Id.* at 166, 122 S.Ct. 1237; *see also Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). In order to establish a Sixth Amendment violation under the *Sullivan* exception, the defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348, 100 S.Ct. 1708. As clarified in *Mickens*, an actual conflict is not "something separate and apart from adverse effect." 535 U.S. at 172 n. 5, 122 S.Ct. 1237. Rather, "[a]n 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Id.*

The Supreme Court's recent decision in *Mickens* proves determinative in the instant appeal. In *Mickens*, the Supreme Court dealt with a habeas claim in a capital case alleging ineffective assistance where counsel for the defendant also represented the victim, who was a defendant in an unrelated juvenile case. *Id.* at 164-65, 122 S.Ct. 1237. After being informed that the victim was deceased, the trial judge dismissed the juvenile charges against him. *Id.* The same trial judge appointed counsel in the defendant's case. *Id.* at 165, 122 S.Ct. 1237. The precise issue facing the Court was "what a defendant must show in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known." *Id.* at 164, 122 S.Ct. 1237.

In answering this query, the *Mickens* Court clarified its conflict precedent and restated the parameters of its application. First, the Court discussed three seminal Supreme Court conflict cases: *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); [FN20] *Sullivan*, 446 U.S. at 346-49, 100 S.Ct. 1708; [FN21] and *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). [FN22]

> FN20. In *Holloway*, defense counsel representing three codefendants with diverging and potentially conflicting interests moved for the appointment of separate counsel. 435 U.S. at 478-80, 98 S.Ct. 1173. The Supreme Court noted that counsel in this situation is effectively gagged from properly representing any one of the defendants, and that it is inherently difficult

to measure the degree of harm caused by such conflicts. *Id.* at 489-90, 98 S.Ct. 1173. The Court found that this type of conflict undermines the fairness and efficacy of the adversarial process, and that automatic reversal was necessary where defense counsel's objection was denied by the trial court, unless the trial court concludes that there is no conflict. *Id.* at 488, 98 S.Ct. 1173.

FN21. In *Sullivan,* the Supreme Court addressed the issue of multiple representation where the trial court does not and reasonably should not know of the conflict. 446 U.S. at 345-50, 100 S.Ct. 1708. The *Sullivan* Court noted that *Holloway* recognized that "a lawyer forced to represent codefendants whose interests conflict cannot provide the adequate legal assistance required by the Sixth Amendment." *Id.* at 345, 100 S.Ct. 1708 (citing *Holloway,* 435 U.S. at 481-82, 98 S.Ct. 1173). The *Sullivan* Court further developed the joint representation conflict standard, stating that, "[i]n order to establish a violation of the Sixth Amendment, a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance" and that a defendant who makes such a showing is not required to show prejudice in order to obtain relief. *Id.* at 348, 349-50, 100 S.Ct. 1708.

FN22. In *Wood,* the Court remanded for proceedings to determine whether there was an actual conflict where the defendants' lawyer was being paid by the defendants' employer. 450 U.S. at 269-72, 101 S.Ct. 1097 (employer owned a business purveying obscene material, and the defendants had been convicted in connection with the business). The defendants' employer had been paying the defendants' fines, imposed after their conviction for distributing obscenity. *Id.* at 276, 101 S.Ct. 1097. The Court determined that remand was necessary because "petitioners were represented by their employer's lawyer, who may not have pursued their interests single-mindedly." *Id.* at 271-72, 101 S.Ct. 1097.

***1184** [37] After surveying precedent, the *Mickens* Court added an entire section to address the limited scope of its holding, and to explicitly cabin its conflict jurisprudence despite its expansive application by lower courts. 535 U.S. at 174-76, 122 S.Ct. 1237. The Court noted that circuit courts "have applied *Sullivan* 'unblinkingly' to 'all kinds of alleged attorney ethical conflicts,' " invoking it in cases involving interests of former clients, interests implicating counsel's personal or financial interest, interests inherent in romantic relationships with opposing counsel, and interests implicated by counsel's future or present employment with opposing counsel. *Id.* at 174, 122 S.Ct. 1237 (citation omitted).[FN23] While acknowledging this expansion, the Court cautioned that its own conflict jurisprudence had not yet reached beyond joint representation: "the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application.... Both *Sullivan* itself [ ] and *Holloway* [ ] stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice. Not all attorney conflicts present comparable difficulties." *Id.* at 175, 122 S.Ct. 1237 (internal citations omitted). The Court propounded that the conflict inquiry does not, and should not, entail weighing of professional ethical duties, and that the *Sullivan* exception is not intended to enforce and encourage compliance with codes of conduct:

FN23. Earp argues that, despite *Mickens,* circuit courts have long applied the *Sullivan* conflict framework to a wide variety of conflicts in addition to the traditional concurrent representation application. *See,*

e.g., *Mannhalt v. Reed*, 847 F.2d 576, 580-81 (1988) (pre-AEDPA habeas case finding that *Sullivan* applies when an attorney is accused of similar crimes for which his client is being prosecuted); *Garcia v. Bunnell*, 33 F.3d 1193, 1196-98 (9th Cir.1994) (pre-AEDPA habeas case finding that, although the "vast bulk of the caselaw in the attorney conflict area involves alleged conflicts arising out of representation of multiple defendants by a single attorney who may not be able simultaneously to serve optimally the interests of each," *Sullivan* also applies "to conflicts between a defendant's and the attorney's own personal interests"); *see also Winkler v. Keane*, 7 F.3d 304, 307 (2d Cir.1993) (citing other sister circuit cases expanding application of the *Sullivan* standard). This line of argument, however, is futile post-AEDPA; only Supreme Court holdings are binding on state courts. *See Lambert*, 393 F.3d at 974 ("only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied") (quoting *Clark v. Murphy*, 331 F.3d 1062, 1069 (2003)).

> This is not to suggest that one ethical duty is more or less important than another. The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland*, however, is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel.

Id. at 176, 122 S.Ct. 1237.

The *Mickens* Court specifically and explicitly concluded that *Sullivan* was limited to joint representation, and that any extension of *Sullivan* outside of the joint representation context remained, "as far as the jurisprudence of [the Supreme Court was] concerned, an open question." *Id.*

D

The Supreme Court has never held that the *Sullivan* exception applies to conflicts stemming from intimate relations with clients. *See Lambert*, 393 F.3d at 986 (noting that Supreme Court precedent is limited to conflicts involving joint representation);***1185** *see also Smith v. Hofbauer*, 312 F.3d 809, 815-17 (6th Cir.2002) (finding that the *Sullivan* line of Supreme Court precedent only apply, for AEDPA purposes, to cases involving joint representation; noting that "[b]ecause the question of whether the *Sullivan's* lessened standard of proof for a claim of ineffective assistance of counsel based upon an attorney's conflict of interest for anything other than joint representation remains an 'open question' in the jurisprudence of the Supreme Court, and in fact was an open question at the time Petitioner's case was heard, Petitioner's claim fails because it is not based upon clearly established Supreme Court precedent as mandated by AEDPA") (internal citation omitted).

E

While our circuit's precedent has expanded the scope of the *Sullivan* exception to apply in other contexts, and while we strongly disapprove of Adrienne Dell's unprofessional behavior as reflected in her conduct at bar, the advent of AEDPA forecloses the option of reversing a state court determination simply because it conflicts with established circuit law. Although we would perhaps reach a different conclusion if addressing this claim on direct review, the Supreme Court has not spoken to this issue and has expressly limited its constitutional conflicts jurisprudence. Accordingly, we hold that the state court's determination that the intimate relationship between Earp and his counsel during the trial and sentencing did not constitute a conflict of interest was neither contrary to, nor an unreasonable application of, established federal law.

VI

Earp is entitled to an evidentiary hearing on his prosecutorial misconduct claim involving Michael Taylor because he has alleged facts which, if proven true, may entitle him to relief on this claim. Earp is also entitled to an evidentiary hearing on his ineffective assistance of counsel claim because he has demonstrated a colorable claim that counsel's mitigation investigation was deficient in light of the evidence uncovered, and that he suffered prejudice thereby. We therefore vacate the district court's summary judgment on these claims and remand for an evidentiary hearing. The district court's decision to deny Earp's conflict of interest claim was neither contrary to, nor an unreasonable application of, clearly established federal law, so we affirm that part of the district court's summary judgment.

AFFIRMED in part, REVERSED in part, and REMANDED for an evidentiary hearing.

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S060715

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

IN RE RICKY LEE EARP ON HABEAS CORPUS

The petition for writ of habeas corpus is denied on the merits.

The following subclaims are also denied under *In re Dixon* (1953) 41 Cal.2d 756, 759, in that they were not, but could have been, raised on appeal:

II.C1, C4, C5, C6, and C7.

The following subclaims are also denied under *In re Waltreus* (1965) 62 Cal.2d 218, 225, as raised and rejected on appeal:

II. C2, E, F, and G.

Mosk, J., is of the opinion an order to show cause should issue

Brown, J., would deny the petition solely on the merits.

George
Chief Justice