No. 18-5252

In the Supreme Court of the United States

RICKY LEE EARP,

Petitioner,

v.

RON DAVIS, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the district court acted within its discretion in denying petitioner's motion for discovery to support his habeas claim under the circumstances of this case.

2. Whether the district court clearly erred in resolving issues of credibility against respondent's claim, after hearing the competing witnesses testify at an evidentiary hearing and granting petitioner the benefit of an evidentiary inference based on assumed (but unproven) spoliation.

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STATEMENT

1. In 1991, petitioner Earp was convicted of killing 18-month-old Amanda Doshier, who had been left in Earp's care at his house. Pet. 6; Pet. App. 7, 22-23. The jury found that the murder involved three "special circumstances" making it punishable by death: rape, sodomy, and lewd conduct on a child under the age of 14. Pet. App. 23.

The prosecution's guilt-phase evidence showed that Amanda died from multiple blows to the top of her head or severe shaking, and her body showed bruising, blood, and tearing or gaping in the vaginal and rectal areas consistent with sexual assault. Pet. App. 87. It also showed that the child was at home with Earp on the day she sustained her injuries; that he gave false and inconsistent explanations of what happened to her; and that after she was taken to the hospital Earp disappeared, spending the next two days staying with different sets of friends and family before ultimately turning himself in to police in Sacramento, hundreds of miles away. *Id.* at 7, 22-23, 87; *People v. Earp*, 20 Cal. 4th 826, 845-847 (1999) (affirming conviction on direct appeal).

Earp testified in his own defense, denying that he had molested or harmed Amanda. Pet. App. 87. He claimed that a man he had first met in prison, Dennis Morgan, had shown up at the house looking for heroin; that Earp had left Morgan in the house with Amanda while Earp went outside to wash paint brushes; that at one point he saw Morgan spank Amanda; that he later found Amanda unconscious; and that Morgan left while Earp was

calling for help. *Id*. at 7, 22-23, 89-90; *People v. Earp*, 20 Cal. 4th at 849. Morgan also testified, denying that he had visited the house that day (or even knew where Earp was living at the time). Pet. App. 7, 23, 87, 90; *Earp*, at 849.

A jury found Earp guilty and, after a separate penalty proceeding, returned a death verdict. Pet. App. 7, 23. Before sentencing, Earp filed a motion for a new trial in which he alleged, among other things, that an individual named Michael Taylor, who was also an inmate at the jail where Morgan and Earp were housed during the trial, had overheard Morgan admitting that he had been to Earp's house on the day of the murder. *Id*. at 7; *see id*. at 23-24, 90. The prosecution responded that Taylor had recanted this claim after being questioned about it by the prosecutor, Robert Foltz, and a deputy sheriff, Edwin Milkey. *Id.* at 7-8. The trial court denied the new-trial motion without hearing testimony from Taylor or others, considering the allegation "'inherently untrustworthy.'" *Id*. at 5, 8. The court then sentenced Earp to death. *See id*. at 4-5.

2. The California Supreme Court affirmed Earp's conviction and sentence. *See* Pet. App. 5; *People v. Earp*, 20 Cal. 4th at 906. Among other rulings, it concluded that denial of the new-trial motion was within the trial court's discretion. *Id*. at 890.

Earp also filed a petition for a writ of habeas corpus in the California Supreme Court. *See* Pet. App. 23. Among other claims, he alleged that trial

prosecutor Foltz and sheriff's investigator Milkey had improperly threatened Taylor to dissuade him from testifying in support of Earp's new-trial motion. *Id.* at 23-24, 90-91 & n.6. The state court summarily rejected Earp's petition. *Id.* at 23-24, 91, 108.

3. In 2001, Earp filed the federal habeas petition underlying this proceeding. Pet. App. 8, 24, 86. As relevant here, claim IV.B alleged that the prosecution committed misconduct by intimidating Taylor. *See id.* at 23-24, 87. The district court rejected the claim on summary judgment. *Id.* at 8, 24, 91. The court of appeals reversed, instructing the district court to hold an evidentiary hearing. *Id.* at 8, 24, 107.

On remand, the district court again rejected claim IV.B after hearing testimony from Taylor, Foltz, and Milkey. Pet. App. 67-68; *see id.* at 8-9, 25-26. It found Foltz and Milkey to be credible, while "expressly rejecting Taylor's testimony as incredible." *Id.* at 68. The court of appeals again reversed, however, because the district court allowed the victim's mother, Cindy Doshier, to assert her privilege against self-incrimination. *Id.* at 68-71. Earp had proffered her to testify that during Earp's trial Foltz had coerced her into recanting testimony, given on cross-examination, that Foltz had falsely told her before the trial that Earp's blood and semen had been found in Amanda's body. *Id.* at 68-71, 83. Because the district court had already made credibility determinations based on the prior hearing, the court

of appeals directed that new evidentiary hearing on remand, including testimony from Doshier, be held before a different district judge. *Id.* at 72.

On the second remand, and a week before the new evidentiary hearing in January 2014, Earp filed a motion to expand the record and conduct discovery under Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts. Pet. App. 21, 27. He related that in 2011 he had obtained a state court order directing DNA testing of swatches from a pillow and a paper napkin, both stained with fluid, that were seized from Earp's house after Amanda's death. *Id.* at 27. According to declarants, in January 2012 a defense investigator received an evidence envelope marked as containing the pillow and napkin swatches from the Los Angeles Sheriff's Department and delivered it to a private testing laboratory; but when the laboratory analyst opened the envelope it contained what appeared to be the pillow swatches but no swatch from the paper napkin. *Id.* at 27-28. A declaration from a supervisor at the sheriff's department laboratory indicated that the envelope marked as containing the pillow and napkin swatches had been released to an agent of the California Department of Justice on May 2, 2002, and returned the same day. *Id.* at 28.

Earp sought to expand the record to include the materials supporting his motion, and further discovery "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[.]" Pet. App. 29. Specifically, he sought to establish the basis for an evidentiary inference that the missing napkin swatch contained Morgan's DNA, which would support his claim that Morgan was at Earp's home on the day Amanda was killed. *Id*. at 38. Ultimately, the district court granted the motion to expand the record, and accepted its factual assertions to the extent of "accept[ing] 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." *Id*. at 42; *see id*. at 43, 56. Having agreed to consider Earp's witness-intimidation claim on that basis, the court saw no need for further discovery on the spoliation allegation for purposes of resolving the issue before it. *Id*. at 40-41. On the contrary, the court noted that "if anything, additional discovery would serve only to develop evidence that could be used to *rebut*" that allegation. *Id*. at 41.

At the remand hearing before the new district judge, the district court heard testimony from Taylor, Foltz, Milkey, and Doshier. Pet. App. 44-55. After carefully "weighing the relative credibility of the individuals involved," the court again concluded that Earp "ha[d] not proved by a preponderance of the evidence that the misconduct described by Taylor—or indeed any misconduct—actually occurred." *Id*. at 56. It found "Taylor's testimony not credible" (*id*. at 57), for reasons it explained in some detail (*id*. at 57-61). In contrast, the court found the recorded portion of Taylor's original interview with Foltz and Milkey, in which Taylor recanted his story about overhearing

Morgan, to be credible—and consistent with the testimony of Milkey and Foltz, "whom the court found to be credible witnesses at the evidentiary hearing." *Id.* at 61. The court "d[id] not find Doshier's testimony particularly credible," or sufficient to overcome Foltz's contrary testimony or to buttress Taylor's credibility. *Id.* at 62; *see id.* at 61-62. And while the court gave Earp the benefit of an inference that DNA testing of the missing napkin swatch would have placed Morgan at Earp's house on the day of Amanda's death, it explained that nothing about that inference "mitigate[d] any of the problems the court ha[d] identified with Taylor's testimony." *Id.* at 62; *see id.* at 62-63. Accordingly, the inference did not alter the court's conclusion with respect Earp's claim that Foltz and Milkey had intimidated Taylor when they met with him in 1992, which was the only claim before the court. *Id.* at 62; *see id.* at 12.

4. The court of appeals affirmed. Pet. App. 2-20. First, it held that the district court did not abuse its discretion in denying discovery on Earp's spoliation allegation. *Id.* at 6, 11-17. On the contrary, it agreed with the district court's reasoning that, once the court had assumed the truth of the spoliation allegation (*id.* at 6, 12) and giving Earp the benefit of an inference that the missing evidence would have put Morgan at Earp's house on the day of the crime (*id.* at 15), any argument for further discovery concerning the alleged spoliation was "too attenuated and too speculative" (*id.* at 16), especially when the only claim actually at issue involved whether Foltz and

Milkey had intimidated Taylor. Certainly it was insufficient to "overcome the 'broad deference' [the appellate court] afford[s] to district courts on supervising discovery[.]" *Id.* at 17.

The court of appeals also rejected Earp's argument that the district court clearly erred in weighing the credibility of the witnesses who appeared before it, taking into account the adverse inference relating to Morgan. Pet. App. 17-20. As the district court had observed, Taylor was a generally untrustworthy witness; and there were "major inconsistencies and implausibility" in his testimony, while "his recorded recantation was 'coherent and sounded natural[.]'" *Id.* at 10. Conversely, the district court listened to and credited Foltz and Milkey. *Id.* at 10, 11, 19. As to the adverse inference, the court of appeals agreed that "whether Morgan was at the scene of the crime is minimally probative at best to Earp's allegations of witness intimidation." *Id.* at 19; *see id.* at 5-6, 10-11, 12. Ultimately, the court explained, trial courts are "tasked with weighing and making factual findings as to the credibility of witnesses." *Id.* at 18. The court of appeals declined to disturb the district court's "consistent and appropriate credibility findings, which are well supported and articulated in the record." *Id.* at 19.

ARGUMENT

Earp first asks this Court to revisit the court of appeals' conclusion that the district court did not abuse its discretion in denying a request for discovery. Pet. 18-20. He argues that he should have been allowed to inquire further into alleged spoliation by a California Department of Justice agent in

2002, to support his claim of witness intimidation by a local prosecutor and sheriff's department investigator in 1991-1992. *Id.* He also asks the Court to grant review and hold that the courts below should have weighed alleged spoliation by a Department agent (working in connection with this federal habeas proceeding) more heavily against the credibility of the local trial prosecutor and sheriff's investigator (testifying about alleged witness intimidation just after trial), on the ground that all of them are part of one "state prosecutorial team." Pet. 21; *see* Pet. 21-23. Neither issue warrants review in this case.

Earp has been pursuing his underlying witness-intimidation claim in federal court since 2001. *See* Pet. App. 8. The court of appeals has twice remanded his case to the district court for further proceedings on that claim—first to hold an evidentiary hearing with live testimony so the court could evaluate the credibility of the relevant witnesses, and then for another hearing before a different judge and with an additional witness. *Id.* at 5, 67, 71-72, 83. That treatment of Earp's claim cannot be fairly described as "cavalier" (Pet. 18).

In the latest round of evidentiary proceedings, the district court carefully considered Earp's allegations of spoliation and his request for discovery. Pet. App. 34-41. It concluded that, for purposes of resolving the witness-intimidation claim before it, it could address the spoliation allegation by assuming that spoliation had occurred and giving Earp the benefit of the

evidentiary inference he requested, that DNA testing of a napkin swatch from the crime scene would have placed Dennis Morgan there on the day of the crime. *Id.* at 40-41. The court then reviewed the testimony of the witnesses who appeared before it (*id.* at 44-56) and thoughtfully evaluated their credibility (*id.* at 56-62). It also gave Earp the benefit of the adverse inference. *Id.* at 43, 56, 62-63. In the end, however, it found that, even with the inference, Taylor's testimony at the hearing was not credible, his recorded recantation was credible, and Milkey's and Foltz's denials of intimidation were likewise credible. *Id.* at 61; *see id.* at 56-63. It thus concluded that, in light of the testimony and despite the inference, "Earp ha[d] not proved by a preponderance of the evidence that the misconduct described by [Michael] Taylor—or, indeed, any misconduct—actually occurred." *Id.* at 56.

Earp argues that the district court should have allowed discovery into the circumstances of the alleged spoliation, rather than simply assuming that it occurred and giving him the benefit of the resulting inference. Pet. 19-20. He speculates (*id.*) that factual development might not only substantiate the allegation (rather than showing it, instead, to be unfounded, *see* Pet. App. 41) but also reveal complicity on the part of the different individuals involved in his claim of witness intimidation. As this Court has recognized, however, a district court will allow discovery in a federal habeas proceeding only if it finds "good cause" to do so, "in the exercise of [its] discretion." *Bracy v. Gramley,* 520 U.S. 899, 904 (1997); *see also, e.g.*, *Pollock v. Marshall*, 845 F.2d

656, 657 (6th Cir. 1988); *Nixon v. Freeman*, 670 F.2d 346, 363 (D.C. Cir. 1982); *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982). The district court's exercise of that discretion will be disturbed on appeal only based on a clear showing of abuse. *See, e.g.*, Pet. App. 12-13; *Danny B. ex rel. Elliott v. Raimondo*, 784 F.3d 825, 834 (1st Cir. 2015); *In re Missouri Dep't of Nat. Res.*, 105 F.3d 434, 435 (8th Cir. 1997).

Here, the district court saw no need for discovery in light of the court's willingness to assume that spoliation actually occurred, draw the inference Earp requested, and use that inference "to bolster the credibility of Taylor's testimony." Pet. App. 41; *see id.* at 40-41. The court of appeals, which twice previously remanded for further proceedings to ensure a fair evaluation of Earp's intimidation claim, this time reviewed the district court's reasoning and agreed with its rationale. *Id.* at 15-17. It considered Earp's contentions that discovery about the spoliation allegation "could show bias, a hidden connection between Foltz, Milkey, and the [state Department of Justice agent whom Earp accuses of spoliation], or an overall scheme to suppress evidence," but it rejected them as "too attenuated and too speculative" to require discovery in a proceeding focused on alleged intimidation in 1991-1992, not alleged spoliation in 2002. *Id.* at 16. Certainly it saw nothing that would "overcome the 'broad deference' [appellate courts] afford to district courts on supervising discovery." *Id.* at 17. That conclusion does not warrant further review by this Court.

Nor is there any reason for the Court to take this case to consider whether spoliation by one member of a prosecution team should ever weigh against the credibility of one or more other members of the team. As Earp notes, the district court recognized that under appropriate circumstances it could. Pet. 22 (citing Pet. App. 62-63). Here, however, the district court found on the facts before it that alleged carelessness or misconduct with respect to preserved evidence by a state agent during the federal habeas proceedings in 2002, without more, did not "significantly undermine" the credibility of a trial prosecutor and investigator testifying about their own interactions with a potential new witness immediately after trial ten years before. Pet. App. 63. The court reached that conclusion in part based on the lack of credibility of Michael Taylor and his in-court testimony, compared with the greater credibility of his previous recorded recantation. *Id.* at 62-63.[1] Those factors are independent of the credibility of Milkey and Foltz—

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[1] The court discounted Taylor's testimony for many reasons. Pet. App. 57-61. He had used aliases and had been convicted of providing false identification. *Id.* at 57. More importantly, his testimony was inconsistent and sometimes implausible. *Id.* In his declaration supporting Earp's new-trial motion, Taylor swore that he overheard Morgan's jailhouse conversation while the jury was deliberating; but at the hearing below he claimed that he overheard Morgan practicing his testimony for Earp's trial. *Id.* at 57-58. The court found it "implausible and unrealistic" that Morgan would have loudly discussed perjuring himself in a capital case, so that Taylor could hear the statements from 9-15 feet away. *Id.* at 59. And it was "even more implausible" that Taylor would have understood the alleged significance to Earp's defense of Morgan's "somewhat opaque" purported comments, given Taylor's claim that at the time he "did not know Earp, and did not know anything about Earp's case or Morgan's involvement in it." *Id.* at 59-60. In (continued…)

although the court also heard from them in person and expressly found them credible. *Id.* at 61. The court of appeals reviewed the record, recognized that the district court had "carefully and thoughtfully weighed all of the testimony" (*id.* at 17), and rejected Earp's contention that the district court's findings were clearly erroneous (*id.* at 17-19). That fact-found determination, concurred in by both courts below, again does not warrant further review. *See, e.g.*, *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

Finally, Earp overreaches in asserting that the district court "found that spoliation took place." Pet. 19; *see id.* ("found the [state Department of Justice] . . . guilty of spoliation"); *id.* at 20 (arguing for discovery "whenever a state prosecutorial agency is found guilty of spoliating"). As the court of appeals recognized, the district court here only "assumed without deciding that the State engaged in spoliation." Pet. App. 6. Indeed, the district court expressly noted the possibility that "additional discovery would serve only to develop evidence that could be used to *rebut*" the allegation of spoliation. *Id.* at 41. In other proceedings, for example, the Department of Justice has

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(…continued)

contrast, the court found that in the recorded statement to Foltz and Milkey recanting the Morgan story (and indicating that Earp had urged him to fabricate it), Taylor's "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 [by the prosecutor or sheriff's investigator] only a few minutes earlier." *Id.* at 61.

pointed out that the assertedly unprecedented release of homicide evidence to its investigator on one day in 2002 (*see* Pet. 14) can be explained by the fact that federal habeas counsel at the Department had agreed, as a courtesy to Earp's counsel in connection with proceedings then pending in the district court, that the state Department would check with the Los Angeles Sheriff's Department to see whether pillow and napkin swatches used at the original trial still existed and appeared to have sufficient material to permit DNA testing. *See* C.A. Dkt. No. 12-4, ECF pp. 7-9 (RJN 99-101).[2]

It is also noteworthy that, while Earp's investigator did not locate a napkin swatch in the materials that were delivered to him for testing in 2011 (*see* Pet. 12-13), he did test a pillow swatch that was present. C.A. Dkt. No. 12-6, ECF p. 11 (RJN 237). That test indicated that DNA recovered from the pillow is a mixture from at least three persons, with no single contributor being unambiguously discernible. *Id*. at ECF p. 16 (RJN 242). Earp and the victim, Amanda Doshier, "are possible contributors to the mixture, and approximately one person in 99 million would be similarly considered." *Id*. And Morgan's sister—whose reference sample was used in the absence of any

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[2] The materials cited in this paragraph and the next are attached to a motion for judicial notice filed by Earp in the court of appeals, C.A. Dkt. No. 12-1. That court denied the motion, and the materials therefore are not part of the record on appeal. *See* C.A. Dkt. No. 13. They are, however, readily available on PACER should the Court wish to review them.

DNA sample or record from Morgan himself—is "excluded as [a] possible contributor[] to the mixture." *Id.*[3]

As the courts below concluded, this case is not the proper vehicle for pursuing any of these issues. We note, however, that in September 2017 Earp filed a petition for a writ of habeas corpus in state court directly raising his claims of spoliation. *See Earp v. Davis*, No. A747945 (petition filed Sep. 6, 2017). If further factual development is warranted, it can be pursued more appropriately in that proceeding.[4]

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[3] Of the individuals other than Earp and Amanda discussed in the test results, Ricky Anthony Earp is Earp's brother. Eileen Vaughn is Morgan's sister. Serena Stone is the victim's sister. Cindy Doshier is the victim's mother.

[4] For example, we understand from the Los Angeles District Attorney's Office (which is handling the habeas matter in the state superior court) that an item has been located which appears to be the napkin found at the crime scene, from which the apparently missing swatch was taken. We further understand that the parties are in the process of negotiating a stipulation for the testing of that item.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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