No. 20 - _____

IN THE SUPREME COURT OF THE UNITED STATES

CARL SKIDMORE

Petitioner,

v.

JOE A. LIZARRAGA,
Warden, California State Prison at Mule Creek,

Respondent.

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

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

I. Whether a certificate of appealability should have issued to address the question whether a district court may deny a habeas corpus petition as "speculative" without conducting an evidentiary hearing.

II. Whether a certificate of appealability should have issued to address the question whether *de novo* review of a claim of cumulative error requires *de novo* review of the underlying errors.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### FEDERAL CASES

**STATE CASES**

**FEDERAL STATUTES**

## INDEX OF APPENDICES

Petitioner, Carl Skidmore, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The court of appeals denied a certificate of appealability as to all claims on appeal from the United States District Court for the Northern District of California's denial of petitioner's federal petition for writ of habeas corpus arising from his conviction in California state court.

## OPINION BELOW

The order of the court of appeals denying a certificate of appealability appears as Appendix A to this petition.

The order of the district court denying the petition for writ of habeas corpus appears as Appendix B. The orders and opinions of the state courts denying the various claims raised in the federal petition appear as Appendices C through G.

## JURISDICTION

The court of appeal entered its order on May 7, 2020. Appendix A.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides (in relevant part):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts provides (in relevant part):

> 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.

## STATEMENT OF THE CASE

### A. State Trial

Petitioner was charged with committing felony sex offenses against his two step-daughters—J.D. and A.D.—between Christmas 2004 and March 2005. Clerk's Transcript on Appeal ("CT") 217–224, District Court Docket ("DC-Doc") #42-1 at 228–235.

On January 29, 2008, the jury found petitioner guilty of Counts I, II, III, IV, VI, VII, IX, and X. CT 320–333, DC-Doc #42-1 at 340–353. The jury acquitted petitioner of Count V, an alternate charge. *Id.* The jury acquitted petitioner of Count VIII, but found him guilty of the lesser included offense of committing a lewd act on a child. *Id.*

Petitioner was sentenced to an indeterminate term of 290 years to life in prison, plus a determinate term of 25 years, 4 months—a total sentence of 315 years and 4 months to life. CT 387–399, DC-Doc #4201 at 407–419; Reporter's Transcript on Appeal

("RT") 5705–5708, DC-Doc #42-2 at 836–839. The sentence was reduced by eight years on appeal. DC-Doc #42-3 at 81.

**B. State Appeal**

On March 6, 2009, petitioner filed the opening brief on appeal. *People v. Skidmore*, Cal. App. Case No. A121339, DC-Doc #42-3 at 2–29. On September 1, 2009, the court of appeal issued its opinion. Appendix G, DC-Doc #42-3 at 69–83.

On October 2, 2009, petitioner filed a petition for review with the California Supreme Court. *People v. Skidmore*, Cal. Case No. S176468. On November 10, 2009, the California Supreme Court denied the petition. Appendix F, Petition-Exhibit 18, DC-Doc #35-2 at 14.

**C. State Post-Conviction**

On December 23, 2009, petitioner retained Angelyn Gates to file a petition for writ of habeas corpus on his behalf. Petition-Exhibit 3, DC-Doc #35-1 at 169. As the district court found in granting petitioner equitable tolling in federal court, Ms. Gates "abandon[ed]" petitioner and failed to file a timely petition in state or federal court. *See* Appendix B, DC-Doc #102 at 35.

Following Ms. Gates's abandonment and now without funds to retain counsel, petitioner began preparing *pro se* petitions for writ of habeas corpus. Petition-Exhibit 35, DC-Doc #35-2 at 254–263. On January 7, 2014, petitioner filed a *pro se* petition with the Sonoma Superior Court. *In re Skidmore*, Sonoma County Case No. SCR-458973, Petition-Exhibit 19, DC-Doc #35-2 at 16–33. On January 28, 2014, the superior court denied the petition. Appendix E, Petition-Exhibit 20, DC-Doc #35-2 at 35–41.

On March 13, 2014, petitioner filed a *pro se* petition with the state court of appeal. *In re Skidmore*, Cal. App. Case No. A141261, Petition-Exhibit 21, DC-Doc #35-2 at 43–65. On April 4, 2014, petitioner attached the superior court record. *In re Skidmore*, Cal. App. Case No. A141453, Petition-Exhibit 23, DC-Doc #35-2 at 69–89. On April 9, 2014, the court of appeal summarily denied the petition on the merits. Petition-Exhibit 24, DC-Doc #35-2 at 91.

On May 13, 2014, petitioner filed a *pro se* petition for writ of habeas corpus with the California Supreme Court. *In re Skidmore*, Cal. Case No. S218498, Petition-Exhibit 25, DC-Doc #35-2 at 93–118. On July 23, 2014, the petition was summarily denied on the merits. Appendix D, Petition-Exhibit 26, DC-Doc #35-2 at 120.

On September 17, 2014, current counsel filed a second petition with the California Supreme Court on petitioner's behalf. *In re Skidmore*, Cal. Case No. S221277, Petition-Exhibit 31, DC-Doc #35-2 at 182–229. The petition raised three claims not previously raised in the state courts, which became federal Claims 4, 5, and 7. On January 14, 2015, the California Supreme Court denied the petition as untimely and successive and not on the merits. Appendix C, Petition-Exhibit 32, DC-Doc #35-2 at 231.

**D. Federal Post-Conviction**

On September 18, 2014, petitioner filed a petition for writ of habeas corpus with the district court. DC-Doc #1. On September 18, 2016, petitioner filed an amended petition. DC-Doc #35. The amended petition is the operative petition.

On April 18, 2018, petitioner requested discovery and an evidentiary hearing. DC-Doc #62. On March 18, 2019, the district court denied the petition in whole, denied an

evidentiary hearing and discovery, and denied a certificate of appealability as to all claims. DC-Docs ##78 (Order), 79 (Judgment).

On January 9, 2020, the district court issued an amended order denying the petition in whole, denying an evidentiary hearing and discovery, and denying a certificate of appealability as to all claims. Appendix B, DC-Doc #102. On January 16, 2020, petitioner timely filed the operative notice of appeal. DC-Doc #103.

On February 19, 2020, petitioner filed a motion for a certificate of appealability as to Claims 1, 2, 3, 4, 5, and 7. Court of Appeals Docket ("Circuit-Doc") #5. On May 7, 2020, the court of appeals summarily denied the motion. Appendix A, Circuit-Doc #6.

**E. Summary of Relevant Claims**

Claim 4 argues that trial counsel was ineffective in failing to investigate factual and legal issues relevant to petitioner's case. Amended Petition, DC-Doc #35 at 111–114. Claim 4 was reviewed *de novo*. Appendix B, Doc #102 at 12.

Antoinette, a friend of J.D.'s and A.D.'s, testified that she thought A.D. "withdrew herself from a lot of things" around "Christmas, 2004." RT 4520, DC-Doc #42-2 at 418. As evidence of the alleged change in A.D.'s behavior, Antoinette explained that A.D.'s grades dropped at that time. *Id.*

The jury expressed an interest not only in whether the drop in A.D.'s grades was substantiated, and also in whether J.D.'s grades had suffered as well. The jury asked: "Will we see the girls[']] school records? Would like to see the fluctuation in grades as well as days attended school 02-05." CT 457, DC-Doc #42-1 at 480.

Despite the clear significance of the grades and the jury's explicit interest in them,

trial counsel made no effort to obtain or review A.D.'s or J.D.'s grades. A simple Google search would have informed counsel that school records "can often be used to show that an alleged child molestation victim did not exhibit the behavior or decline in school performance that is typically expected with a child that has been abused." Brody Law Firm, Obtaining School Records in Child Molestation Cases, https://www.georgia-sex-offense-law.com/obtaining-school-records-in-child-molestation-cases/. Defense counsel have subpoenaed school records for the alleged victim in other California cases. *See, e.g.*, *People v. McLish*, Cal. App. Case No. C076480, 2015 WL 4111699 at *4 (Jul. 8, 2015) (unpublished opinion); *and* 1979 ABA Guideline 4-4.1 (counsel has a duty "to explore all avenues leading to facts relevant to the merits of the case").

Impeaching Antoinette's testimony would have significantly bolstered petitioner's defense. Demonstrating that Antoinette's testimony was unreliable and biased against petitioner would have undercut key corroborating evidence supporting A.D.'s and J.D.'s allegations. *See Amado v. Gonzalez*, 758 F.3d 1119, 1139–1141 (9th Cir. 2014) (discussing materiality of exculpatory evidence withheld by prosecutors).

Petitioner's defense was that J.D. and A.D. fabricated the allegations so that they would not have to move from California. RT 5366, DC-Doc #42-2 at 796. With the move playing such an important role in the defense, presenting corroborating evidence that the move was imminent and that the timing of the allegations corresponded to the girls learning that the move was imminent was essential. Counsel failed to present available corroborating evidence. Traverse-Exhibit 45, DC-Doc #57-5 at 8–10 (Skidmore

Declaration); Traverse-Exhibit 49, DC-Doc #57-5 at 83 (Hawaii Property Records).

Petitioner's boss, Jason Pavlos could have been called to testify to corroborate the imminent nature of the move. Traverse-Exhibit 45, DC-Doc #57-5 at 8–10. Petitioner asked trial counsel to interview Mr. Pavlos. *Id.* Counsel assured petitioner that he would interview Mr. Pavlos. *Id.* He never did. *Id.* Counsel never investigated or presented available property records from Hawaii showing that petitioner was preparing to move the family there. *Id.*

Counsel's failures constituted ineffective assistance. *In re Branch*, 70 Cal. 2d 200, 210 (1969) ("An attorney who represents a criminal defendant owes to his client a duty to investigate carefully crucial defenses of fact that may be available."). The failure to corroborate the defense with available evidence was ineffective. *See, e.g.*, *Combs v. Coyle*, 205 F.3d 269, 289 (6th Cir. 2000) (where defense was intoxication, trial counsel ineffective for presenting only testimonial evidence when investigation would have revealed corroborating physical evidence in the form of alcohol containers in petitioner's vehicle).

Trial counsel attempted to cross-examine J.D. about the move to Hawaii. She testified that the move had not "become more imminent[,]" meaning "soon in relationship to" the time of the allegations. RT 4272, DC-Doc #42-2 at 231. Evidence showing that J.D. was not candid about the fact that she knew the family's move to Hawaii was imminent would have undermined her credibility.

Petitioner had the right to present "a psychologist's opinion testimony, based upon an interview and professional interpretation of standardized written personality

tests, that defendant displays no signs of 'deviance' or 'abnormality.'" *People v. Stoll*, 39 Cal. 3d 1136, 1140 (1989). A psychologist, Dr. John Podboy, had evaluated petitioner on behalf of the court following petitioner's guilty plea in 1985 to committing a lewd act and found that he "does not . . . pose[] a threat to the community at large, and he appears to be an excellent candidate for probation consideration." Traverse-Exhibit 48, DC-Doc #57-5 at 80. Petitioner asked trial counsel about conducting an evaluation on numerous occasions. Traverse-Exhibit 45, DC-Doc #57-5 at 10. Nevertheless, trial counsel failed to have petitioner evaluated by an expert psychologist and failed to introduce Dr. Podboy's prior finding.

Counsel cannot strategically decide to abandon a potential defense without first investigating whether it might be successful. *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). This is particularly true where, as here, triggering evidence exists to show counsel that such a defense has merit. *Daniels v. Woodford*, 428 F.3d 1181, 1206 (9th Cir. 2005).

The prosecution, without objection from trial counsel, introduced unreliable and unduly prejudicial evidence from an expert witness in Childhood Sexual Abuse Accommodation Syndrom (CSAAS), Dr. Anthony Urquiza. Despite knowing this testimony was coming, trial counsel did not investigate or present evidence to undermine the prosecution's expert testimony regarding the CSAAS.

Petitioner asked trial counsel to retain an expert to challenge the CSAAS evidence. Traverse-Exhibit 45, DC-Doc #57-5 at 11. Trial counsel assured him that such an expert was unnecessary. *Id.* Despite these assurances, counsel did not cross-

examine the state's expert or offer rebuttal evidence.

Trial counsel failed to consult with an expert in fabricated sexual assault allegations. Such an expert could have reviewed the evidence surrounding J.D.'s and A.D.'s initial encounters with their siblings, with law enforcement, and with medical professionals to determine whether they had been pressured into making the allegations. *See generally* National Children's Advocacy Center, Recantation and False Allegations of Child Abuse (2011), https://www.icmec.org/wp-content/uploads/2015/10/Recantations-and-False-Allegations-Bibliography.pdf.

The CSAAS evidence introduced by the prosecution went far beyond its permissible use. Dr. Rahn Minagawa reviewed the CSAAS testimony in petitioner's case and offered his expert opinion regarding that testimony. Traverse-Exhibit 51, DC-Doc #57-5 at 89. Dr. Minagawa determined that "[t]here is no question that the introduction of CSAAS in this matter was inappropriate . . . ." *Id.* at 93. Had trial counsel retained an expert, he could have challenged the CSAAS presentation.

Leaving CSAAS testimony entirely unchallenged without even investigating the subject constitutes deficient performance. *See Gersten v. Senkowski*, 426 F.3d 588, 611 (2d Cir. 2005) ("[E]ven a minimal amount of investigation into the purported 'Child Sexual Abuse Accommodation Syndrome' would have revealed that it lacked any scientific validity for the purpose for which the prosecution utilized it: as a generalized explanation of children's reactions to sexual abuse, including delayed disclosure and blurred memory.") (AEDPA Case).

The prosecution presented a Sexual Assault Response Team ("SART") expert

regarding the sexual assault examinations she performed on J.D. and A.D. RT 4649–4670, DC-Doc #42-2 at 499–520. No evidence was introduced regarding damage to either girls' hymen.

Dr. Michael Knappman examined J.D. He found no signs of physical trauma. Traverse-Exhibit 52 at 708, DC-Doc #57-7 (under seal). Counsel failed to present this fact. Counsel failed to hire an expert to explain the significance of this finding.

Various studies have found the injury prevalence of victims of sexual assault to be 83%, 81%, and 87% when colposcopic examinations are conducted.[1] Had trial counsel presented this fact to the jury he would have seriously undermined J.D.'s allegations. This is particularly true given the scope of J.D.'s testimony regarding sexual contact. RT 4242–4243, DC-Doc #42-2 at 202–203.

Claim 5 argues that trial counsel was ineffective in failing to object to the introduction of scientifically unreliable CSAAS evidence. Amended Petition, DC-Doc #35 at 114–116. Claim 5 was reviewed *de novo*. Appendix B, DC-Doc #102 at 12.

Counsel has a "responsibility to know the law . . . ." 1979 ABA Guideline 4-5.1, Commentary. And a "lawyer's first duty is zealously to represent his or her client." *Sanders*, 21 F.3d at 1456. Given these duties, counsel has an obligation to object to the admission of prejudicial evidence if there is a valid basis to do so.

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[1] Marilyn S. Sommers, *Defining Patterns of Genital Injury from Sexual Assault*, 8 Trauma Violence Abuse 270, 270–280 (2007); C. J. Sachs & L. D. Chu, *Predictors of Genitorectal Injury in Female Victims of Suspected Sexual Assault*, 9 Academic Emergency Medicine 146, 146–151 (2002); L. Slaughter & C. R. Brown, *Colposcopy to Establish Physical Findings in Rape Victims*, 166 American Journal of Obstetrics and Gynecology 83, 83–86 (1992).

Trial counsel should have challenged the admissibility of the CSAAS evidence under *People v. Kelly*, 17 Cal. 3d 24 (1976). "[N]umerous Court of Appeal decisions have held that *Kelly-Frye* . . . precludes an expert from testifying based on the child sexual abuse accommodation syndrome (CSAAS) that a particular victim's report of alleged abuse is credible because the victim manifests certain defined characteristics which are generally exhibited by abused children." *People v. Bowker*, 203 Cal. App. 3d 385, 391 (1988). Any CSAAS evidence must be limited to dispelling misconceptions about how children react to molestation. *Id.* In such cases, the evidence "must be tailored to address the specific myth or misconception suggested by the evidence." *People v. Wells*, 118 Cal. App. 4th 179, 188 (2004).

The prosecutor asked Dr. Urquiza "hypotheticals" about (1) a child being told that disclosure "will break up the family" or lead to their abuser going to jail; (2) a victim with an abuser who had "financial authority over them in some way;" (3) a victim whose "primary caregiver or parent has a substance abuse problem, is an alcoholic, shall we say;" (4) a victim who testified that during abuse "she would close her eyes and pretend she was at school;" and (5) a victim that "totally unload[ed] their room and move[d] all their furniture out in the hallway and barricade[d] the door and sle[pt] in a bare, empty room." RT 4629, 4630, 4631, 4635 DC-Doc #42-2 at 479, 480, 481, 485. Dr. Urquiza agreed that these hypotheticals, all of which were transparently based on specific facts in petitioner's case, were consistent with CSAAS. *Id.*

The testimony did not dispel misconceptions for the jurors. Instead, the testimony served only the impermissible purpose of asserting "that [the] particular report of

alleged abuse [in petitioner's case] [wa]s credible because the victim manifest[ed] certain defined characteristics which are generally exhibited by abused children." *Bowker*, 203 Cal. App. 3d at 391. The effect of the testimony was "not to help the jury objectively evaluate the prosecution's evidence . . . but to guide the jury to the conclusion that defendant was guilty because [his alleged victim] fit the profile." *People v. Robbie*, 92 Cal. App. 4th 1075, 1087 (2001).

Federal courts have noted the extreme prejudice that arises from the improper use of CSAAS testimony. *See, e.g.*, *Eze v. Senkowski*, 321 F.3d 110, 132 (2d Cir. 2003). The entire case against Mr. Skdimore depended on the credibility of J.D. and A.D. Giving their testimony the false stamp of scientific approval created an unfair and insurmountable hurdle for petitioner's defense. *United States v. Addison,* 498 F.2d 741, 744 (D.C. Cir. 1974).

Despite the extremely prejudicial nature of CSAAS evidence generally, and the particularly inappropriate use of that evidence in petitioner's trial, defense counsel not only left the damaging testimony uncontested by conducting no cross-examination, he bolstered the credibility of the evidence by arguing to the jury that he could not "take issue with a single thing" to which Dr. Urquiza testified. RT 5368, DC-Doc #42-2 at 798; *see also* RT 4639, DC-Doc #42-2 at 489 ("No questions, Your Honor.") (trial counsel following Dr. Urquiza's direct examination). Even assuming counsel was not ineffective in allowing the CSAAS testimony to come in, his subsequent failure to challenge the testimony was deficient and prejudicial.

Claim 7 asserted cumulative error arising from each of the other six claims in the

petition. Amended Petition, DC-Doc #35 at 117–119. Claim 7 was reviewed *de novo*. Appendix B, DC-Doc #102 at 12.

## REASONS FOR GRANTING THE WRIT

### A. Review Should Be Granted to Settle Important Questions Regarding the Scope of Fact-Finding Procedures Available to Petitioners Who Were Denied Post-Conviction Fact-Finding in State Court.

For many federal habeas petitioners, court-directed discovery and/or an evidentiary hearing represent the first opportunity to meaningfully develop evidence in support of their allegations that their convictions and confinement violate the constitution. But these critical fact-finding procedures are frequently closed to habeas petitioners. Such petitioners find their claims perversely denied for a lack of factual development despite never receiving discovery or an evidentiary hearing at any stage.

That is what occurred here when the district court denied Claims 4 and 5 as "speculative" while denying petitioner's requests for discovery and/or an evidentiary hearing. By denying even a certificate of appealability as to the district court's denials, the court of appeals decided an important question regarding the availability of these fact-finding procedures in a manner that is inconsistent with this Court's cases. Sup. Ct. R. 10(c).

Evidentiary hearings are mandatory where: (1) the petition alleges facts that, if proved, entitle the petitioner to relief (*Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)); (2) the fact-based claims survive summary dismissal because their factual allegations are not "'palpably incredible' [or] 'patently frivolous or false'"—the standard for summary dismissal in habeas corpus proceedings (*Blackledge v. Allison*, 431 U.S. 63,

75-76 (1977)); and (3) for reasons beyond petitioner's control, the factual claims were not previously the subject of a full and fair hearing in the state courts. *Earp v. Ornoski*, 431 F.2d 1158, 1167 (9th Cir. 2005).

As the court of appeal explained in *Earp*, "where the petitioner establishes a colorable claim 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." *Earp*, 431 F.3d at 1167 (footnote omitted). "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[.]'" *Id.* (quoting *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004)).

"[D]iscovery is available to habeas petitioners at the discretion of the district court judge for good cause shown, regardless of whether there is to be an evidentiary hearing." *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997) (citing Rules Governing § 2254 Cases Rule 6(a)). Significantly, the "good cause" standard discussed in *Jones* "permits the use of discovery to establish a prima facie case for relief." Habeas Practice and Procedure 1058 §19.4[c]; *accord Bracy v. Gramley*, 520 U.S. 899, 924 (1997) ("It may well be, as the Court of Appeals predicted, that petitioner will be unable to obtain evidence sufficient to support a finding of actual judicial bias in the trial of his case, but we hold that he has made a sufficient showing, as required by Habeas Corpus Rule 6(a), to establish 'good cause' for discovery.").

Under Rule 6, "where 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." Advisory Committee Notes to Rule 6 Governing § 2254 Cases (emphasis added). As such, where evidence might be provided that would entitle the petitioner to relief, a court should grant discovery in advance of determining whether or not to grant an evidentiary hearing.

Here, the district court denied the claims based on speculation about potential factual deficiencies without providing petitioner an opportunity through discovery or an evidentiary hearing to prove his allegations.

For example, the district court denied petitioner's argument that trial counsel was deficient for failing to investigate the imminence of the move to Hawaii because "[i]nvestigation as to what Petitioner's employer and Patricia knew about the timing of the move would not have supported the fabrication theory if J.D. and A.D. did not have the same knowledge." Appendix B, DC-Doc #102 at 25. This conclusion was erroneous, because petitioner had alleged that J.D. and A.D. knew about the imminence of the move, and that allegation was not "palpably incredible [or] patently frivolous or false[.]" *Earp*, 431 F.2d at 1167.

Elsewhere, the district court found that "Petitioner's suggestion that a *Stoll* expert could have been found to testify for him is entirely speculative." Appendix B, DC-Doc #102 at 26. This question too should have been resolved through discovery or at an evidentiary hearing.

The district held that "[c]ounsel reasonably could have concluded that it made more sense to try to show reasonable doubt as to whether Petitioner molested J.D. and

A.D. rather than challenging how CSAAS played into this case." Appendix B, DC-Doc #102 at 26–27. But petitioner alleged that counsel had no strategic basis for failing to object to or rebut the CSAAS evidence. Whether trial counsel made a "strategic decision" is a question of fact. *Wood v. Allen*, 558 U.S. 290, 300–301 (2010). The allegation that counsel did not make a strategic decision was not incredible, frivolous, or false. *Earp*, 431 F.2d at 1167.

The court urged that "it is entirely speculative whether a CSAAS expert would have testified for Petitioner and what such expert would have said." Appendix B, DC-Doc #102 at 27. This issue should have been resolved through discovery or at an evidentiary hearing.

The court again speculated with respect to counsel's failure to present evidence that the absence of physical trauma to J.D. was inconsistent with her testimony: "it appears that Petitioner's counsel may have had good reason not to pursue an investigation regarding the girls' forensic examinations. Appendix B, DC-Doc #102 at 28. The court should not have relied on speculation about what basis counsel may have had for failing to present evidence without providing petitioner an opportunity to question counsel: "A requirement that the defendant receive a full confession of deficiency, in writing, from trial counsel puts the defendant at the mercy of his lawyer. If more information from trial counsel is necessary to resolve particular issues, . . . the court may subpoena him at [an] evidentiary hearing." *Wilson v. Sirmons*, 536 F.3d 1064, 1090 (10th Cir. 2008).

Oddly, the district court further rejected Claim 4 because "[t]he prosecutor did not

rely on the existence of physical trauma to the victims." Appendix B, DC-Doc #102 at 28. This observation supports Claim 4. The prosecution did not rely on the existence of physical trauma because there was none, and the absence of trauma undermined J.D.'s credibility. The absence of trauma was a weakness of the prosecution's case that defense counsel prejudicially failed to expose.

The district court continued: "It is pure speculation that any expert would testify that the lack of trauma to J.D.'s vaginal area was inconsistent with her testimony regarding the years of abuse." Appendix B, DC-Doc #102 at 28. Yet again, casting petitioner's allegations as "speculation" was improper in the absence of discovery or an evidentiary hearing. Particularly where petitioner provided scientific literature supporting his allegations.

Ironically, the district court itself engaged in speculation: "Even if an expert had testified on the subject, the jury may well have attributed the lack of trauma to the passage of time between Petitioner's last intercourse with J.D. and the examination." Appendix B, DC-Doc #102 at 28. The district court was in no position to make such a determination without providing petitioner an opportunity to develop his allegation regarding the absence of physical trauma.

In sum, the district court repeatedly rejected non-frivolous factual allegations without providing petitioner an opportunity to develop those allegations. The court of appeals should have granted a certificate of appealability to address the district court's error.

"The standard for granting a certificate of appealability is low." *Frost v. Gilbert*,

835 F.3d 883, 888 (9th Cir. 2016). A prisoner seeking a certificate of appealability ("COA") must demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to make such a showing, a petitioner need only demonstrate that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (internal quotation marks omitted); *accord Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Recently, this Court reiterated that the COA determination is a "threshold" inquiry and "is not coextensive with a merits analysis." *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759, 773 (2017). Courts undertaking a COA inquiry should "ask only if the District Court's decision was debatable." *Id.* at 774 (quoting *Miller-El,* 537 U.S. at 348). The bar is very low: "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* (quoting *Miller-El*, 537 U.S. at 338)).

The threshold nature of the COA inquiry "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail." *Miller-El*, 537 U.S. at 337. Because the COA standard entails merely a threshold inquiry, it "does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id.* at 336. When an appellate court "sidesteps this process by first determining the merits of an appeal, and then justifying its denial of a COA based on its adjudication of

the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* at 336–337.

Reasonable jurists could at least *debate* whether the district court properly denied Claims 4 and 5 while denying discovery and/or an evidentiary hearing.

Although the district court also denied Claims 4 and 5 for lack of prejudice, that finding does not overcome the need for a COA. The court's prejudice determination was colored by its repeated and improper findings that petitioner would not have been able to present evidence supporting his factual allegations. Furthermore, the CSAAS issues alone warrant a COA in light of the extreme prejudice that can arise from the improper use of such evidence. *Eze*, 321 F.3d at 132.

Numerous jurisdictions have found CSAAS evidence scientifically wanting and dangerous in *any* context. *Steward*, 652 N.E.2d at 499; *Frenzel v. State*, 849 P.2d 741, 747 (Wyo. 1993); *People v. Beckley*, 456 N.W.2d 391, 405–406 (Mich. 1990); *State v. Foret*, 628 So.2d 1116, 1125 (La. 1993); *Hadden v. State*, 690 So.2d 573, 581 (Fla. 1997); *Miller v. State*, 77 S.W.3d 566, 572 (Kent. 2002).

In light of these opinions in other jurisdictions, jurists of reason could at least *debate* whether the CSAAS evidence here—exacerbated as it was by trial counsel's failure to rebut it—was prejudicial. *See, e.g.*, *Amaya v. Frauenheim*, N.D. Cal. Case No. 16-cv-05069-PJH, 2018 WL 2865222 at *14 (June 8, 2018) ("Here, the court finds that the third claim regarding the CSAAS evidence . . . meet the above standard and accordingly

GRANTS the COA . . . .").[2]

### B. Review Should Be Granted to Settle the Important Question Whether *de Novo* Review of a Claim of Cumulative Error Requires *de Novo* Review of the Underlying Claims.

Claim 7, alleging cumulative error, was reviewed *de novo*. Three of the claims underlying Claim 7 were reviewed under AEDPA's deferential standard. Petitioner argued that, although the freestanding claims were subject to deference, *de novo* review of his cumulative error claim required *de novo* review of each constituent claim for the purposes of reviewing Claim 7. The district court acknowledged that the issue was a matter of first impression and held that *de novo* review of the cumulative error claim did not require *de novo* review of its constituent claims. Appendix B, DC-Doc #102 at 36–37. By declining to review the district court's holding, the court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c).

It is illogical to assess the cumulative prejudice from numerous errors *de novo* while applying deference to many of those underlying errors. "De novo review means that the reviewing court 'do[es] not defer to the lower court's ruling but freely consider[s] the matter anew, as if no decision had been rendered below.'" *Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009) (quoting *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988)). Yet applying AEDPA to the claims underlying Claim 7 required extensive deference to the state court's decisions.

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[2] *Amaya* was an AEDPA case, subject to a higher standard of review than Claims 4 and 5, which were reviewed *de novo* here.

Errors can be prejudicial even if they are not errors so plainly recognized by Supreme Court law that no reasonable jurist could find otherwise. "Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–103 (2011) (quotation and citation omitted). An error can cause prejudice without amounting to an extreme malfunction in the state system. *Holley v. Yarborough*, 568 F.3d 1091, 1101 n.2 (9th Cir. 2009) ("[I]n spite of the lack of Supreme Court precedent on the issue, the trial court's admission of the pornographic materials resulted in a trial that was fundamentally unfair and would warrant issuance of the writ under this court's precedent.").

Errors can be prejudicial even if they depend on evidence that was not presented in state court. *See, e.g.*, *Ridgeway v. Zon*, 424 Fed.Appx. 58, 60 (2d Cir. 2011) ("[A]dditional information proffered before the District Court appears to lend some credence to Ridgeway's claims. As in other cases, we might have remanded the cause to give Ridgeway's counsel an opportunity to explain behavior that does not appear to have been the product of appropriate strategic considerations. However, the Supreme Court has now apparently foreclosed that avenue for us here.") (quotations and citations omitted).

Under the district court's form of review, a petitioner who was, in fact, prejudiced by the cumulative effect of these kinds of errors[3] would not be entitled to relief. As such,

[3] Errors that were not so unreasonable as to satisfy AEDPA or which were not apparent from the state court record.

the district court's reasoning would deny relief to a petitioner who was prejudiced by cumulative error under *de novo* review of a claim that he was prejudiced by cumulative error. That facially contradictory conclusion is surely debatable by jurists of reason.

The district court explicitly denied Claims 1, 2, and 3 by relying on AEDPA deference. Appendix B, DC-Doc #102 at 17 ("This Court cannot consider materials that were not part of the state court record in [evaluating Claim 1.]"), 19 ("Neither Petitioner's declaration nor the CPS Guide may be considered with respect to Claim 2 because those documents were not part of the state court record."), 22 ("[The court's] task is not to determine whether the prior offense was properly admitted, but whether the California Supreme Court reasonably could have concluded that counsel was not deficient in raising the specified objections to admission of the prior offense, or that counsel's failure to raise those objections was not prejudicial.").

A reasonable jurist that properly evaluated petitioner's cumulative prejudice claim *de novo* by assessing the underlying prejudice arising from each claim *de novo* could debate whether petitioner was entitled to relief. The errors in petitioner's case were numerous, and the prejudice high.

The prosecution relied on testimony that petitioner's saliva was conclusively found on J.D. and A.D. RT 5345, 5379, DC-Doc #42-2 at 775, 809. The prosecutor was only able to make this argument because of defense counsel's failure to investigate and counter the DNA evidence. *See* Traverse, DC-Doc #57-4 at 24–26. Defense counsel failed to investigate and present evidence from a C.P.S. worker that J.D. had denied being molested by petitioner. *Id.* at 35–42. Counsel did not fully and effectively object to the

admission of petitioner's prior offense on all available grounds. *Id.* at 42–49.

Defense counsel failed to investigate the girl's school records, even after their materiality became clear early in the trial; failed to corroborate the main defense with available documentary and testimonial evidence; did not investigate whether a *Stoll* expert could provide helpful testimony even after promising to do so; stood idly by as the prosecution presented extremely damaging CSAAS testimony well beyond the permissible limits of California law; and failed to present available evidence that the absence of physical trauma to J.D. undermined her testimony.

With a proper investigation, the defense could have undermined the credibility of petitioner's accusers. Had the jury doubted their credibility, the DNA evidence would have been explicable. Reasonable jurists could at least debate the possibility that the verdict might have been different if counsel had provided effective assistance.

## CONCLUSION

Review of the decision below is necessary to resolve important questions regarding the propriety of a COA, the scope of fact-finding that must be afforded to petitioners before their claims can be dismissed as speculative, and regarding the appropriate review of cumulative error claims. Accordingly, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

DATED: August 4, 2020

Respectfully submitted,

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CARL SKIDMORE
Counsel of Record

**CERTIFICATE OF COMPLIANCE**

**PURSUANT TO Sup. Ct. R. 33.2(b)**

Case No. 20 - _____

I certify that the foregoing petition for writ of certiorari is proportionally spaced, has a typeface of 12 points, is in Century font, is double-spaced, and is 23 pages long.

JAMES S. THOMSON