

20-5151

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

VS.

ORIGINAL

NEIL McDOWELL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Central District Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Antoine Reed G07390
(Your Name)

Ironwood State Prison - A4-108L, P.O. Box 219
(Address)

Blythe, CA 92226
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Did the federal district court commit clear error when it deemed Mr. Reed's properly presented 28 USC section 2254 compulsory process violation claim to be an incognizable state-law challenge simply because the state reviewing court abandoned Mr. Reed's federal compulsory process claim and held that a denial of a material witness only amounted to a state law error?
2. What is the correct rehabilitative standard of review to be applied when, as in Mr. Reed's case, the state reviewing court finds that a denied witness was relevant to the credibility of the complaining witness (her daughter S.) and law enforcement; that S. had, admittedly, lied about key aspects of her version of events; that S. was impeached as having told Detective Montenegro that the police changed her story; and that the record supports the possibility that the mother could give material testimony regarding police manipulation of S.'s testimony, but, rather than reverse under Valenzuela-Bernal, chooses to conditionally reverse and require Mr. Reed to prove, to the liking of the offending trial judge, that the mother would have given material testimony, to be reviewed under the state Watson standard?
3. Did the federal district court commit clear error when it procedurally barred Mr. Reed from challenging trial court's failure to hear his motion to replace appointed counsel, based upon a state rule that was not shown to be consistently and regularly applied?
4. If a trial court has refused to hear Mr. Reed's motion to replace appointed counsel, at a time when Mr. Reed wishes to object to unauthorized sentencing and motion for new trial, what is the correct remedy when Mr. Reed has been diligent in his attempts to develop the record?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Case No. B206326 . California Court of Appeal, March 4, 2009 unpub. opin.
Case No. S171644 . June 10, 2009 California Supreme Court postcard denial
Case No. B221330 . California Court of Appeal, September 22, 2010 unpub. opin.
Case No. B243043 . California Court of Appeal, February 6, 2014 unpub. opin.
Case No. S217179 . April 23, 2014 California Supreme Court postcard denial
Case No. LACV 15-5636 - CAS(LAL). U.S. Central District, February 14, 2019 Judgment.
Case No. 19-55301 . Orders of Ninth Circuit, denying COA on March 6, 2020 and
Motion for Reconsideration on April 17, 2020.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 6, 2020 (Denial of COA).

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 17, 2020, and a copy of the order denying rehearing appears at Appendix D.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was June 10, 2009. A copy of that decision appears at Appendix G.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case

Constitution of the United States

Article I, clause 9:

"The privilege of the Writ of Habeas Corpus, shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Article VI

"All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding."

"The senators and representatives before mentioned, and the members of the several state Legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall

1 ever be required as a qualification to any office or public
2 trust under the United States."

3 4 Amendment V:

5 "No person shall be held to answer for a capital, or other-
6 wise infamous crime, unless on a presentment or indictment of
7 a Grand Jury, except in cases arising in the land or naval for-
8 ces, or in the militia, when in actual service in time of war or
9 public danger; nor shall any person be subject for the same
10 offence to be twice put in jeopardy of life or limb; nor shall he
11 compelled in any criminal case to be a witness against himself,
12 nor be deprived of life, liberty, or property, without due pro-
13 cess of law; nor shall private property be taken for public
14 use, without just compensation."

15 16 Amendment VI:

17 "In all criminal prosecutions, the accused shall enjoy
18 the right to a speedy and public trial, by an impartial jury of
19 the state and district wherein the crime shall have been
20 committed, which district shall have been previously as-
21 certained by law, and to be informed of the nature and
22 cause of the accusation; to be confronted with the wit-
23 nesses against him; to have compulsory process for
24 obtaining witnesses in his favor, and to have the assis-
25 tance of counsel for his defence."

26 27 Amendment XIV, Section 1:

28 "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."

Federal Statutes

28 USC section 2254

"(a) The Supreme Court, a justice thereof, a circuit judge, or a district judge shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b)(1) 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 unless it appears that --

"(A) the applicant has exhausted the remedies available in the courts of the State; or

"(B)(i) there is an absence of available State corrective process; or

"(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

1 "2) An application for a writ of habeas corpus may be
2 denied on the merits notwithstanding the failures of
3 the applicant to exhaust the remedies available in the
4 courts of the State.

5
6 "(3) A State shall not be deemed to have waived the
7 exhaustion requirement or be estopped from re-
8 liance upon the requirement unless the State,
9 through counsel expressly waives the requirement.

10
11 "(c) An applicant shall not be deemed to have exhausted
12 the remedies available in the courts of the State, with-
13 in the meaning of this section, if he has the right un-
14 der the law of the State to raise, by any available pro-
15 cedure, the question presented.

16
17 "(d) An application for writ of habeas corpus on behalf of a
18 person in custody pursuant to the judgment of a state
19 court shall not be granted with respect to any claim that
20 was adjudicated on the merits in the State court pro-
21 ceedings unless the adjudication of the claim --

22 "(1) resulted in a decision that was contrary to, or in-
23 volved an unreasonable application of, clearly estab-
24 lished Federal law, as determined by the Supreme
25 Court of the United States; or

26
27 "(2) resulted in a decision that was based on an unreas-
28 onable determination of the facts in light of the evi-

1 dence presented in the State court proceeding.
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3 "(e) (1) In a proceeding instituted by an application for a
4 writ of habeas corpus by a person in custody pursuant
5 to the judgment of a State court, a determination of a
6 factual issue made by a State court, shall be presumed
7 to be correct. The applicant shall have the burden of
8 rebutting the presumption of correctness by clear and
9 convincing evidence.
10

11 (2) If the applicant has failed to develop the factual
12 basis of a claim in State court proceedings, the court
13 shall not hold an evidentiary hearing on the claim un-
14 less the applicant shows that --

15 "(A) the claim relies on --
16

17 "(i) a new rule of constitutional law, made retroactive
18 to cases on collateral review by the Supreme
19 Court, that was previously unavailable; or
20

21 "(ii) a factual predicate that could not have been
22 previously discovered through the exercise of due
23 diligence; and
24

25 "(B) the facts underlying the claim would be sufficient
26 to establish by clear and convincing evidence that
27 but for constitutional error, no reasonable fact-
28 finder would have found the applicant guilty of the

underlying offense.

"(f) If the applicant challenges the sufficiency of the evidence introduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determinations.

"(g) A copy of the official records of the State court, duly certified by the clerk of such court to be true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

"(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the

1 court may appoint counsel for an applicant who is or becomes
2 financially unable to afford counsel, except as provided by a
3 rule promulgated by the Supreme Court pursuant to stat-
4 utory authority. Appointment of counsel under this section
5 shall be governed by section 3006A of title 18.
6

7 "(i) The ineffectiveness or incompetence of counsel during
8 Federal or State collateral post-conviction proceedings
9 shall not be a ground for relief in a proceeding arising
10 under section 2254."
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STATEMENT OF THE CASE

Following a jury trial, Reed, who represented himself up until the defense presentation of the case, was convicted of rape (Cal. Pen. Cd. Sect. 261(a)(2)) on count 1 ; oral copulation of a person under 16 (Sect. 288(b)(2) on count 2 ; and two counts of lewd acts on a person of the age of 15 (Sect. 288(c)(1)) on counts 3 and 4 , charged as having all occurred on the same day with the same person. The jury also found true allegations that Reed suffered three prior serious felony convictions and sentenced Reed under the Three Strikes Law pursuant to Sect. 667(b)(1), as well as two serious felony allegations under Sect. 667(a)(1). Reed was sentenced to a total of 110 years to life in state prison, all counts running consecutively. (2009 2CT at 398-406, 446-447.)

According to the complaining witness (S.), Mr. Reed approached 15-year-old S. on the morning of August 2, 2006, as she waited at a public bus stop. S. testified that Mr. Reed told her he was a modeling agent and asked her to walk over to his car. S. said she agreed and, upon arriving at Mr. Reed's car, was shown a modeling agent license, a camera and photographs of young women. S. said she eventually agreed to do a photo shoot at the Botanic Garden in Palos Verdes. S. also testified that she told Mr. Reed that she was 15. (2009 5RT at 1517-1518.)

While at the Botanic Garden, S. testified that Mr. Reed raped her, orally copulated her, and forced her to masturbate her. (2009 5RT at 1543-1556.)

S. also testified that Mr. Reed dropped her off at her high school, where she wrote down Mr. Reed's license plate number. (2009 5RT at 1566-1567.)

1 S. admitted that she initially told police that Mr. Reed had
2 picked her up and threw her into the car, and that she later changed
3 her story by telling police that Mr. Reed threatened to use a knife
4 on her if she did not get into his car. Still later, S. admitted to po-
5 lice that these versions were untrue, admitting that she had will-
6 ingly gotten into the car with Mr. Reed. (2009 6 RT at 1590-
7 1591.)

8 When asked, by Mr. Reed in propria persona, whether she
9 told Det. Montenegro that detectives changed her story, S. de-
10 nied making this statement. (2009 5 RT 1592:1-13.) S. was
11 later impeached when Det. Montenegro clarified that S. did tell her
12 that the police changed her story. Det. Montenegro went on to en-
13 lighten that she had well over 100 hours of special training in inter-
14 viewing sexual assault victims, and it was her opinion that teenagers
15 lie 99-percent of the time. (2009 6 RT 2136-2140.)

17 Mr. Reed testified in his own defense. He stated that S.
18 approached him after overhearing his discussion with a curbside
19 vendor regarding a photoshoot. (2009 7 RT 2436-2437.) Reed fur-
20 ther testified that S. agreed to do a Time For Prints photo shoot
21 with an additional \$20 to be paid for her lunch, after S. informed
22 him she was 19 years of age. (2009 7 RT at 2438-2439.)

23 Mr. Reed testified to taking photos of S. upon arriving at the
24 Botanic Garden. After the session, Mr. Reed testified that he at-
25 tempted to pay S. her \$20 but an argument ensued; S. argued
26 that Mr. Reed agreed to paying her \$200. (2009 7 RT at 2442-2443.)
27 Believing he was being played, and also still believing S. was 19,
28 Reed testified that he eventually told S., "You have to do a

1 little more than that for \$200", and that S. replied, "Let it do
2 what it do." (2009 7 RT at 2443-2444.) Taking that reply as a con-
3 sent to engage in sex as a resolution to the debate, and believing
4 S. to be 19, Mr. Reed admitted that mutual vaginal intercourse oc-
5 curred, and that he ejaculated on S.'s face. (2009 7 RT at 2445.)
6 Mr. Reed denied forcing S. to touch his penis and denied putting
7 his penis in her mouth or putting his mouth on her breath. (2009
8 7 RT at 2442.)

9 Mr. Reed testified that, after engaging in sex he asked S.
10 where she wanted to be dropped off. S. said her school. Upon fur-
11 ther inquiry, Mr. Reed learned that S. was actually 15. In a
12 state of panic, Mr. Reed testified that he smashed the two film
13 cannisters with a rock. (Appx. B, p. 4) It should be noted that S.
14 testified to the smashing of a film cannister, but maintained it was to
15 get S. to trust Mr. Reed. (2009 5 RT 1562-1563.)

16
17 In regards to the issues at hand, Reed sought to introduce the
18 testimony of S.'s mother, for the purpose of providing a witness who
19 would give testimony of what police said and did to manipulate S.'s
20 testimony. This issue was addressed, on timely appeal, as well as
21 prosecutorial misconduct, denial of Faretti motion, and refusal to
22 hear Marsden motion. (See Appx. B.) The California Court of Ap-
23 peal found that the trial court abused its discretion in denying
24 the mother's testimony and remanded to superior court. Under
25 this conditional reversal, Mr. Reed was to be allowed the opportu-
26 nity to examine the mother, so as to allow the offending trial
27 judge to determine whether it is reasonably probable that her
28 testimony would have resulted in a more favorable outcome for

1 Mr. Reed. (Appx. B, p. 17.) All other issues were denied. (Ibid at pp.
2 6, 14, and 15.)

3 Mr. Reed filed a Petition for Review in the California Supreme Court,
4 contending that the Compulsory Process claim should have been reversed
5 outright under Chapman standards. The issues regarding the denial of
6 Fareta motion and failure to hear Marsden motion were also pre-
7 served and denied without comment. (Dist. Ct. Lodged Documents 2 and
8 3, Case No. S171644.)

9 On remand, the mother was examined by Mr. Reed, in propria per-
10 sona, and Ms. Dieringer, the prosecutor. A new trial was denied by
11 trial court and Mr. Reed was reinstated the sentence of 110-years- to
12 life. Mr. Reed challenged this ruling on appeal. (Lodged Documents
13 51-53.) Again, the case was conditionally reversed due to trial
14 court's prevention of Mr. Reed's examination of mother on relevant
15 matters. (Lodged Document 4, at 2, 5-9, Case No. B221330.)

16 On remand II, Mr. Reed, again in propria persona, reexamined the
17 mother, as well as six additional impeachment witnesses (in-
18 cluding two witnesses (Dr. Vince Carbino, Principal and Offi-
19 cer Perez, L.A. School Police) who Mr. Reed was also denied the op-
20 portunity to examine at trial). Again, Mr. Reed was denied a new
21 trial and the 110-years- to-life sentence was reinstated. Mr. Reed
22 appealed and appeal was denied. (Lodged Documents 45, 54-56, and 5.)

23 Mr. Reed, again, filed a Petition for Review to the California Su-
24 preme Court, readdressing his federal compulsory process violation
25 claim. Mr. Reed was denied without comment. (Lodged Documents 6
26 and 7, Case No. S217179.)

27 Mr. Reed filed his 28 USC 2254 habeas on July 24, 2015 and,
28 concurrently, a request to stay proceedings so as to allow for

1 the completion of state remedies. A stay was granted, albeit under
2 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), which requires a petitioner
3 to subsequently prove that additional claims relate back to originally
4 filed claims. (District Court Docket Nos. 1, 3, 12.) Mr. Reed withdrew
5 his habeas claims pending exhaustion of state remedies. (Dkt. No. 19.)

6 On April 15, 2016 Mr. Reed filed the FAP on the grounds at issue
7 herein, and on May 2, 2016 Respondent moved to dismiss on the
8 grounds that Ground 5 was untimely and unexhausted (namely that it
9 did not "relate back.") On September 29, 2016 Mr. Reed filed his oppo-
10 sition, arguing that the exhausted claims related back to his Ground
11 4 claim of trial court's refusal to hear his Marsden motion. Mr.
12 Reed contended that the additional Ground 5 served as the pre-
13 judice prong of the incorporated ineffective assistance of coun-
14 sel. In other words, Mr. Reed intended to demonstrate what he
15 would have said had he been afforded the opportunity to speak
16 at his Marsden attempt. On February 2, 2017, the Magistrate Court
17 issued its Report and Recommendation, granting the motion to
18 dismiss and affording Mr. Reed the option of dropping Ground 5
19 upon order of dismissal, which would allow consideration of
20 grounds 1-4. The District Court ordered dismissal of all claims.
21 (Dkt. Nos. 24-27, 32, 38, 42, 51, 53, and 54.)

22 On May 3, 2017 Mr. Reed filed a Motion for Reconsideration. Mr.
23 Reed contended that, despite his filing of a motion to drop Ground
24 5, as instructed in the R and R, all claims were erroneously de-
25 nied. On June 5, 2017, Mr. Reed's Motion for Reconsideration
26 was granted and Respondent was ordered to file an answer to
27 the FAP. (Dkts. 60 and 65.)

28 On October 19, 2017 Respondent filed an Answer, and on

February 21, 2018 Mr. Reed filed a Reply. On December 17, 2019 the Magistrate Court issued its R and R recommending a denial of all claims and dismissal of the action with prejudice. On January 16, 2019 Mr. Reed filed his Objections to the R and R, which included a request for a Certificate of Appealability. On February 14, 2019 the District Court judge accepted the Magistrate's R and R, and denied a COA "for the reasons stated in the Report and Recommendation." However, the R and R gave no reasons, or mention, of an R and R. (Dkts. 79-85.) Note: District Court made no mention of the Objections.

Mr. Reed's request for a COA in the Ninth Circuit Court was denied on March 6, 2020 under 2253(c)(2) and Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (Ninth Circuit Dkt. Nos. 2 and 3.)

Mr. Reed filed a motion for extension of time to file a motion for reconsideration, which was granted. The subsequent motion was filed on April 13, 2020. Mr. Reed's Motion for Reconsideration En Banc was denied on April 17, 2020

This Petition for Certiorari to the United States Central District Court, filed in this United States Supreme Court within the 90-day limit.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT'S MISINTERPRETATION AND MISAPPLICATION OF THIS COURT'S HOLDINGS IN VALENZUELA-BERNAL, AND ITS INTERRELATIONS WITH CHAPMAN AND BRECHT, HAVE ALLOWED FOR STATE COURTS TO TREAT A COMPULSORY PROCESS VIOLATION AS THOUGH IT WERE A STATE ERROR, THEREBY PROMPTING THE DISTRICT COURT TO ACQUIESCE THAT REED'S FEDERAL CLAIM IS INCOGNIZABLE UNDER 28 USC SECTION 2254

At trial the State superior court judge denied Reed the opportunity to examine the mother of the complaining witness in this case. On appeal, the California Court of Appeal recounted the exchange between Reed, in propria persona, and the trial court:

The Court: What would [the mother] be able to testify to that she would have direct knowledge of?

The Defendant: She had an inclination to not allow Detective Montenegro to talk to her daughter because she felt like they were manipulating her daughter. So I'm wondering what brought her to that point where she felt like they were manipulating her daughter.

1 The Court: Under [Section] 352, I don't find that par-
2 ticularly probative, and that's the conclusion of this
3 person, maybe. But I don't think that it's relevant
4 as it relates to the facts before the jury. Her feel-
5 ings about law enforcement or their investigation
6 aren't relevant.

7
8 The Defendant: What if she actually knew what
9 they actually said or did with her daughter?

10
11 The Court: What's your offer of proof?

12
13 The Defendant: That was it. I don't know the
14 whole reason why she didn't want Montenegro
15 to talk to her daughter alone.

16
17 The Court: This isn't time for depositions. I'm
18 not going to allow you to call the witness on
19 the hopes that she's going to provide infor-
20 mation to make it relevant. What else do you
21 have? Who else do you want?

22
23 (Appx. B at pp. 15-16.)

24
25 The California Court of Appeal responded that,

26
27 Reed made it sufficiently clear that he was not
28 merely seeking evidence of S.'s mother's feel-

ings' about the police interrogations of her daughter but what the police 'actually said or did to her daughter' in terms of directing her testimony and that he proposed to prove what the police said and did through the testimony of S.'s mother, a percipient witness to at least one law enforcement interview of S."

(Appx. B at pp.18-19.)

The California Court, after dissecting various California statutes and caselaw, went on to rule that, "the court abused its discretion in prohibiting Reed from examining S.'s mother[...]" (Appx. B at pp.17; also see p.18 ("abused its discretion in excluding S.'s mother's testimony."))

However, the State reviewing court went on to address Reed's Federal claim presented on State appeal; namely, the State court addressed Reed's claim of a Sixth Amendment violation of the Compulsory Process Clause. At this juncture the appellate court reiterated that,

that the Supreme Court recognized in *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 873, when the defendant has not had the opportunity for a pretrial interview with the witness to determine 'precisely what favorable evidence' the witness possesses 'the defendant cannot be expected to render a detailed description of [the] lost testimony.' In those cases, the

1 court held, to establish error in excluding the ev-
2 idence the defendant need only 'make some show-
3 ing of materiality.' (Ibid.) The defendant may
4 make such a showing on the basis of undisputed
5 facts already in the record or on those facts
6 plus additional facts. (Ibid.)

7
8 (Appx. B at p.19.)

9
10 In addition to Reed's trial proffer, already found to be
11 sufficient, the California Court of Appeal, itself, went on to
12 solidify the materiality showing of Valenzuela-Bernal, add-
13 ing that,

14
15 (The record supports the possibility that mother
16 could give material testimony about police manip-
17 ulation of S.'s testimony. At the time the issue
18 of mother's testimony arose, Montenegro had
19 already testified that S.'s mother was present
20 during at least one of Montenegro's interroga-
21 tions of S. Testimony also showed that S. had
22 changed at least two aspects of her narrative
23 of the incident prior to trial. S. first told the
24 police that Reed had 'thrown' her into his car.
25 Later she said Reed forced her into his car
26 by threatening her with a knife. At trial she ad-
27 mitted that she went with Reed voluntarily.
28 Montenegro testified that when she asked S.

1 why she changed her story S. replied 'she
2 didn't change her story, that they [Los Angeles
3 Police], had changed her story.' S. also changed
4 her statement about Reed's use of a condom. She
5 told the nurse who examined her after the in-
6 cident that Reed did not use a condom. At trial
7 she testified that he did use one.

8
9 (Appx. B at pp. 19-20.)
10

11 It is important to note other findings made by this State
12 court. For instance, the court confirmed that, "as the prose-
13 cutor told the court, mother had refused to speak to Reed's
14 investigator and refused to be questioned by Reed except on
15 the witness stand." (Appx. B at p. 19.)

16 Additionally, the State reviewing court announced that,
17 "evidence that Montenegro or any other law enforcement offi-
18 cer persuaded S. to change her version of events would be
19 relevant to both S.'s credibility and the credibility of the
20 officer." (Appx. B at p. 18.)
21

22 However, despite recognizing that, on State appeal,
23 Reed contended "that the court's refusal to allow him to
24 call mother as a witness requires reversal whether eval-
25 uated under [...] Chapman [...] or "Watson", the
26 California Court of Appeal countered that,

27
28 [w]e cannot evaluate the error under either

1 standard, however, because we are in the same
2 position that Reed occupied in the trial court;
3 we do not know, and have no way of determining
4 from the record, what S.'s mother would have
5 testified to had she been called as a witness.
6 A remedy exists nonetheless.

7
8 (Appx. B at p. 20.)

9
10 It is at this crossroad that a number of this Supreme
11 Court's precedents were violated and intentionally aban-
12 doned. First, there can be no argument that,

13
14 the right of the accused to have compulsory process
15 for obtaining witnesses in his favor, guaranteed in fed-
16 eral trials by the Sixth Amendment is so fundamental
17 and essential to a fair trial that it is incorporated in
18 the Due Process Clause of the Fourteenth Amend-
19 ment.

20
21 Washington v. Texas, 388 U.S. 14, 17 (1967).

22
23 The State court's rationalization, as to why it could not
24 analyze Reed's constitutional compulsory process error under
25 Chapman v. California, 386 U.S. 18 (1967) is in opposition to this
26 Supreme Court's long-standing rule that, upon the occurrence of
27 a violation of a defendant's United States constitutional right,
28 at the State level, the State must prove beyond a reasonable

1 doubt that the constitutional error "did not contribute to the
2 verdict obtained." Chapman at p. 24. In this case, at the time
3 of the State court's ruling, the State had not even made an
4 attempt at satisfying its Chapman burden.

5 However, the California Court of Appeal substituted this
6 Court's principles, set in Valenzuela - Bernal, with its own unique
7 standard based on a curiosity that goes directly against the very
8 purpose of this Supreme Court's Valenzuela - Bernal precedent.
9 The State court's "curiosity" was founded upon, not what the
10 witness could say, or whether there was "a reasonable likeli-
11 hood that the testimony could have affected the judgment of
12 the trier of fact;" (United States v. Valenzuela - Bernal, 458 U.S.
13 at pp. 873 - 874), but rather, a declared "evidentiary question", as
14 to, "does S.'s mother have material testimony to offer[?]"
15 (Appx. B at p. 20.) In resolving this "evidentiary" matter,
16 the California Court of Appeal pronounced its Opinion as follows:

17
18 We conclude that the court abused its discretion in
19 prohibiting Reed from examining S.'s mother and
20 that the remedy for this error is to conditionally
21 reverse the judgment to all counts and remand the
22 cause to permit defendant an opportunity to pre-
23 sent mother's testimony for the trial court's de-
24 termination whether it is reasonably probable
25 that admission of her testimony would have re-
26 sulted in a more favorable outcome for Reed.

27
28 (Appx. B at p. 17.)

1 Reed filed a Petition for Review in the California Supreme
2 Court, challenging the California Court of Appeal's condition-
3 al reversal, as opposed to "outright reversal," while read-
4 vancing his Federal compulsory process claim. See "Pro-
5 cedural History" in Magistrate's Report and Recommendation
6 (hereafter RandR) (Appendix A at p. 2). This was denied.

8 Reed's timely filed 28 USC section 2254 habeas pe-
9 tition, Ground One claim read: "State court identified, then
10 misapplied, the controlling Federal case on Compulsory Pro-
11 cess leading to decision contrary to Federal law (Appx. E).
12

14 Despite multiple clarifications the DISTRICT COURT has steadfastly
15 assured that Reed's Ground One claim will not receive a full and fair re-
16 view. Such denials are in violation of, not only 28 USC 2254, but a clos-
17 er look reveals a classic case of a "judicial effectualness prin-
18 ciple" infringement. (I.e., see *Marbury v. Madison*, 5 U.S. (1
19 Cranch.) 137 (1803) (The notion that federal courts may decline to
20 disturb judgments that they know are wrong, to deny all relief and
21 leave in effect state court decisions that the Article III court's
22 independent interpretation reveals to be in conflict with the Con-
23 stitution, collides head-on with the principle of judicial effectu-
24 alness.)

25 In this case, Reed's properly presented Federal compulsory
26 process presentation has been relegated to a state claim
27 on grounds contrary to this Supreme Court's mandates and
28 principles. Consider the following:

1. Reed has asserted that the state reviewing court misapplied Valenzuela-Bernal, *supra*, after quoting from its text. The Central District courts, without a hint of parallelism in its cited references to the record, have explained the State court's use of the Valenzuela-Bernal text in this way:

Although the California Court of Appeal cited Valenzuela-Bernal in its decision, it did so to articulate the burden imposed upon a defendant in proffering the relevancy of proposed witness testimony, a burden the appellate was considering within the context of the trial court's decision to exclude the proposed testimony under California Evidence Code section 352. (Lodgment 1 at 19.) To this end, the California Court of Appeal's ultimate finding of trial court error was not premised on a violation of the federal constitutional right to compulsory process, as articulated in Valenzuela-Bernal. In fact, the state court never reached the federal constitutional issue. Instead, the appellate court premised its decision on a finding that the trial court abused its discretion under California Evidence Code section 352 by holding Petitioner to too high a burden with respect to proffering the relevancy of the proposed testimony. (Lodgment 1 at 17-20.) (Appx. A at 14.)

2. In addressing the question as to whether the State court was required, in this case, to analyze the compulsory

1 process violation under the Federal definition for materiality, the
2 Central District Court explained its decision this way:

3
4 Petitioner is mistaken. As explained, the compulsory
5 process precedent applies a 'reasonable probability'
6 standard of materiality. This is the materiality
7 standard the state court's applied in addressing
8 Petitioner's claim under state law, although the trial
9 court suggested Petitioner's claim still failed un-
10 der an alternate standard. (Lodgment 5 at 8; Lodg-
11 ment 41 at 54-55; Lodgment 44 at 72-74; Lodgment
12 46 at 3902, 4202.) (Appx. 1 at p. 21: 2-8.)

13
14 3. Despite Valenzuela-Bernal's requirement that a petitioner
15 need only show that there is a "reasonable likelihood that the
16 testimony could have affected the judgment of the trier of fact,"
17 the Central District Court disagreed, finding that:

18
19 [T]he evidence before the appellate court was insuf-
20 ficient to determine the materiality of the proposed
21 testimony, thereby preventing an ultimate finding on the
22 issue of compulsory process under the authority of
23 Valenzuela-Bernal. (See Lodgment 1 at 19-20 (not-
24 ing 'the record supports the possibility that moth-
25 er could give material testimony' but remanding
26 to take the witness's testimony because 'we do
27 not know, and have no way of determining from the
28 record what [the witness] would have testified

1 to had she been called' at trial) [emphasis in
2 Magistrate's Rand R]. (Appx. 1 at 14:4-10.)

3
4 It may be interesting to note how, on the one hand, the Cen-
5 District Court finds that the State court cited Valenzuela - Bernal
6 only for the purpose of making a state-law determination of
7 error, while, on the other hand, the Central District Court finds
8 that the State Court of Appeal remanded the case because
9 the evidence was insufficient to determine materiality, un-
10 der Valenzuela - Bernal, beyond a "possibility."

11
12 4. Despite Reed's detailed examination of the inter-circuit
13 case of Cudjo v. Ayers, 698 F3d 752 (9th Cir. 2012) (i.e. see Reed's
14 Reply to Respondent's Answer, Appx. F, p. 7), the District Court
15 elected not to mention Cudjo. Cudjo also involved the denial of
16 a witness. Likewise, the State Court called the violation a state error,
17 as opposed to a federal violation. The court in Cudjo found that the
18 denial of the witness was a federal violation under Chambers v. Missis-
19 sippi, 410 U.S. 284 (1973), and that the State courts review under the
20 "lower threshold of harmless error test" (the "reasonably probable"
21 test of Watson), was in direct contradiction with the holdings in Chap-
22 man v. California, 386 U.S. 18 (1967). The Ninth Circuit Court further
23 held that no deference should be given to the State court's subse-
24 quent findings under the State court's "reasonably probable" standard,
25 citing Inthavang v. Lamarque, 420 F3d 1055, 1059 (9th Cir. 2005). Further,
26 the Cudjo court went on to decide that a de novo hearing was in order,
27 in accordance with Brecht v. Abrahamson, 507 U.S. 619 (1993), in light
28 of this Supreme Court's holdings in Fry v. Pliler, 551 U.S. 112 (2007).

1 This is the epitome of Reed's Compulsory Process Clause violation
2 claim. Yet, this claim has yet to be met straight-forward. For example,
3 a professed de novo review, in light of factual findings made by re-
4 viving courts, and in violation of Reed's right to have a jury make such
5 determinations after a full trial, is not the harmless-error review
6 insisted upon in Valenzuela-Bernal, and is contrary to federal law.

7
8 5. The Central District Court's agreeance with the State courts
9 standard of review of a compulsory process claim is in opposition to, not
10 only the United States Supreme Court's precedent, but also holdings with-
11 in its own Central district and Ninth Circuit jurisdiction. In the case of
12 Diaz v. SATF-SP, 2014 U.S. Dist. LEXIS 83522 (Central Dist.), a non-alien case
13 where a witness was available for a post-trial examination, the court adhered
14 to the "plausible scenerio" requirement of Valenzuela-Bernal.

15 In the case of Ingram v. Cate, 2014 U.S. Dist. LEXIS 100575, also a
16 non-alien Central District case, the court also applied the "plausible scener-
17 io" requirement of Valenzuela-Bernal, regarding the denial of an available psy-
18 chiatrist expert.

19 In Williams v. Sherman, 2014 U.S. District LEXIS 171878, a case in
20 which the defendant was denied the testimony of his 'available friend,' the
21 Central District Court reminded us that, "[t]o establish a violation, Petition-
22 er must 'at least make some plausible showing of how [the absent] test-
23 imony would have been both material and favorable to his defense. U.S. v.
24 Valenzuela-Bernal, 458 U.S. 858, 867 (1982)."

25 The Court in United States v. Chibeast, 605 Fed. Appx. 638, 640
26 (2015), a Ninth Circuit decision, the court reconfirmed that, "the question
27 on remand is not whether the newly discovered evidence shows Chibeast
28 'would probably be acquitted in a new trial,' Berry, 624 F3d at 1042, but

1 rather whether there is 'reasonable likelihood that the [missing evi-
2 dence] could have affected the judgment of the trier of fact.' Valen-
3 zuela-Bernal, 458 U.S. at 874."

4
5 6. Despite the excerpts of inter-circuit and inter-district cases
6 that oppose the unique handling of Reed's properly-presented compul-
7 sory process claim, Reed's Application for Certificate of Appeal-
8 bility (COA) (Appx. C), it was denied under Miller-El v. Cockrell, 537
9 U.S. 322 (2003). This was a clear error as a matter of law. In ac-
10 cordance with this Supreme Court's ruling in Miller-El, the low-
11 threshold requirement is only "that a prisoner seeking a COA dem-
12 onstrate that jurists of reason could disagree with the district
13 court's resolution of his constitutional claims r...t." (At 327.)
14 Not only "could" jurists of reason disagree with the District Court's
15 resolution of Reed's claims, but the abovelisted inter-district and
16 inter-circuit cases do disagree with the District Court's res-
17 olution of Reed's constitutional claims, as well as this United
18 States Supreme Court. To date Reed is unaware of any case,
19 nor has the State or District Courts presented any, where
20 a State court is permitted to relabel a compulsory process
21 violation as a state one, thereby rendering his claim in-
22 cognizable under 28 USC 2254(a). Nor has such a case
23 been offered to substantiate a District Court's failure to
24 confront the most crucial questions to be answered in a
25 compulsory process claim. I.e.:

26 If jurors, after hearing the testimony of the mother,
27 had believed that the police manipulated S.'s testimony against Reed,
28 is it reasonably likely that this would have had an effect on their

1 verdict at the original trial?

2 The Ninth Circuit's denial of Reed's motion for a COA (Appx. D)
3 is in need of the enactment of this Supreme Court's supervisory power
4 to intervene, so as to bring clarity within the Ninth Circuit's District
5 and Circuit courts, as well as to maintain adherence to the judicial
6 effectualness principle that assures petitioners the fair opportunity
7 to have their fairly presented constitutional claims heard as pre-
8 sented, rather than as State courts would like for them to have
9 been presented.

10
11 Finally, as it pertains to Reed's compulsory process claim,
12 there remains the question of whether, upon satisfying the materiality
13 prong of a compulsory process test, prejudice is built in forgoing
14 the need for a Brecht examination. This would seem to be the case,
15 considering, the Supreme Court in *Valenzuela-Bernal* likened its ma-
16 teriality test as requiring "at least the same" as those cases in-
17 volving "the Due Process Clause of the Fifth Amendment". (At p. 872.)
18 As also discussed in *Valenzuela-Bernal*, this genre of cases include
19 *Brady v. Maryland*, 373 U.S. 83 (1963) violations. (At pp. 867-868.) As
20 held in the case of *Kyles v. Whitley*, 514 U.S. 419, 435 (1995), such type
21 cases are not required to satisfy Brecht harmless error review.
22 (Also raised in Reed's Objections to R and R, Appendix H, pp. 17-20.)

23
24 **II. THE FEDERAL DISTRICT COURT FAILED TO APPLY THE**
25 **PRINCIPLES OF *CONE V. BELL*, 556 U.S. 449 (2009) and**
26 ***TOWNSEND V. SAIN*, 372 U.S. 293 (1963) WHEN IT ADOPT-**
27 **ED THE STATE COURT'S REASONING FOR APPLYING AN**
28 **INADEQUATE PROCEDURAL BAR TO REVIEWING REED'S**

1 CONSTITUTIONAL CLAIM, THAT HE WAS DENIED
2 EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE
3 TRIAL COURT REFUSED TO HEAR HIS "MARSDEN"
4 MOTION. THE DISTRICT COURT FURTHER EXTENDED
5 THIS CLEAR ERROR WHEN IT ASSUMED FACTS,
6 NOT IN THE RECORD BEFORE THE STATE COURT,
7 THAT ARE IN DISPUTE REGARDING WHAT REED
8 WOULD HAVE SAID, AT THE SENTENCING PROCEEDINGS,
9 HAD HE BEEN GIVEN THE OPPORTUNITY TO SPEAK.

10
11 As recognized by the California Court of Appeal,

12
13 [After the court pronounced sentence it advised Reed
14 of his appeal rights and then addressed his counsel, asking:
15 'Mr. Kim, will you be filing a notice of appeal on [Reed's]
16 behalf?' Counsel responded: 'Your Honor, I will. But--
17 I've just been told by Mr. Reed that he wants to re-
18 quest a Marsden hearing.' The court responded: 'It's
19 a little untimely at this point. The request for a Mars-
20 den hearing is denied.' (Appx. B, p. 15.)

21
22 In response to Reed's State appointed appellate counsel's sug-
23 gestion "that substituted counsel could have moved for a new trial,"
24 the California Court of Appeal replied, "Not so. A motion for new trial
25 must be made and determined before judgment." ([California Penal
26 Code] section 1182." The State goes on to make a statement that
27 is not supported by the case listed: "Our Supreme Court has inter-
28 preted this requirement as meaning that the motion must be made

1 and determined before sentencing. (People v. Braxton (2004) 34 Cal. 4th
2 798, 810.)" (Appx. B, p. 15.) Hence, the constitutional merits of
3 Reed's ineffective assistance of counsel claim and his right to be
4 heard were never addressed on the grounds of a declared State
5 procedural bar.

6 Reed contended, in his 28 USC. section 2254 Reply to Re-
7 spondent's Answer (Appx. F, p. 27), that "such a procedural bar did
8 not constitute a 'firmly established and regularly followed rule.'"
9 Reed further noted that, "it is the question whether a state pro-
10 cedural ruling is adequate is itself a question of Federal law. Lee
11 v. Kimna, 534 U.S. 362, 375 (2002). We have framed the adequacy
12 inquiry by asking whether the state rule in question was firmly
13 established and regularly followed." Id. at 376 (quoting James v.
14 Kentucky, 466 U.S. 341, 348 (1984))."

15
16 The District Court did not directly address the question, as
17 to whether the "Braxton Rule" was "firmly established and reg-
18 ularly followed." Nor did the District Court reach the merits of
19 Reed's ineffective assistance of counsel component of the
20 claim. As will be revealed shortly, Reed contended that the
21 long-standing California rule in People v. McAllister, 15 Cal
22 2d 519 (1940) was the stare decisis on the matter of timeliness
23 to file a motion for new trial in California Courts.

24
25 As explained in Reed's Reply (Appx. F, p. 26), his concerns
26 not only included appointed counsel's perfunctory representa-
27 tion guided by a misrecollection of Opening Remarks made
28 while Reed was representing himself, but also counsel's fail-

ures to object to unauthorized sentencing (i.e. a strike, where none existed, due to the conviction being reversed (see Reed v. Roe, 100 F3d 964 (1996)), *inter alia*. Under California law,

reviewing courts have required parties to raise certain issues at the time of sentencing. In such cases, lack of a timely and meaningful objection forfeits or waives the claim.

People v. Scott, 9 Cal. 4th 331, 353 (1994).

The California Supreme Court, in Scott, went on to state the obvious, that "of course, there must be a meaningful opportunity to object to the kinds of claims otherwise deemed waived by today's decision." (Scott, at p. 356.)

Considering that, in this case, the trial court gave no pause after imposing sentence, rather, immediately advancing to appeal rights vernacular, it must be said that the District Court's finding, that Reed was procedurally barred from being heard on his Marsden motion because, "no purpose would have been served," (Appx. A, p. 26) is incorrect. Reed has repeatedly filed, and exhausted, his erroneous and unauthorized sentencing in State court. As documented in the District Court's B and R (Appx. A, pp. 3-5 (Procedural History: Colateral Review)), Reed was summarily denied each sentencing claim due to untimeliness. Had Reed's Marsden motion been inquired upon, by the trial judge, untimeliness would not have been a factor.

1 As to appointed counsel's perfunctory defense and ineffec-
2 tiveness warranting a motion for new trial, Reed explained, in
3 depth, how there exists no such "Braxton Rule" that is firmly es-
4 tablished and regularly followed.

5 A thorough review of the case of People v. Braxton, 34 Cal. 4th 798
6 (2004) will reveal that the court, in Braxton, never announced any rule
7 that a motion for new trial must be made prior to trial. The Dis-
8 trict Court's pinpointing of page 810 reveals nothing more than the
9 statutory recitation that an "application for a new trial must be
10 made and determined before judgment [...]" (California Penal
11 Code section 1182). Braxton does not set out to define, or re-
12 define, this terminology. In fact, the Braxton case con-
13 cerns itself, moreso, with a defendant's right to an auto-
14 matic retrial when a trial judge fails to address a motion
15 for new trial, under California Penal Code section 1202.

16 More to point, as explicated in Reed's Answer (Appx. F,
17 pp. 25-28), the ruling and defining California case, on the
18 timeliness of motions for new trials, is People v. McAllister,
19 15 Cal. 2d 519 (1940). The court in McAllister promulgated that,
20 "if the sentence pronounced has not been entered by the clerk
21 in [his or her] minutes and no legal restraint has been imposed
22 upon the defendant [...], then it is proper for the court to change
23 the sentence originally pronounced." (At pp. 526-527.)

24 The "McAllister" rule was reiterated in California v. Thomas,
25 334 P.2d 227, 229 (1959), where it was determined that "judgment"
26 occurred once defendant left the courtroom.

27 Directly on point was the case of People v. Jaramillo,
28 208 Cal. App. 2d 620, 627 (1962). As did Reed, Jaramillo made

1 a motion for new trial after the pronouncement of sentence.
2 Implementing McAllister, the Jaramillo court ruled that, "the
3 fact that judgment has been pronounced orally was not a bar
4 because judgment would not be effective until entered by the
5 clerk."

6 The District Court did not mention the McAllister case. Nor has
7 the District Court demonstrated that the State has applied an ade-
8 quate procedural bar to addressing Reed's Marsden motion and the
9 attached federal constitutional claims of ineffectiveness of counsel.

10 This United States Supreme Court, in Cone v. Bell, 556 U.S.
11 449, (2009) has reiterated that the question of whether a
12 state rule is "adequate" is a question of federal law that must be
13 answered.

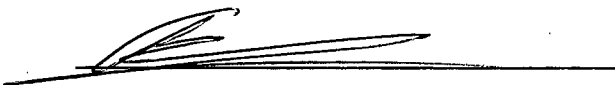
14
15 Reed also impressed the need for an evidentiary hearing, so
16 as to allow for the development of the record, so as to allow
17 Reed to demonstrate prejudice via a showing of what he
18 would have said and shown had he been allowed to fully express
19 his Marsden motion, object to sentencing errors, and request
20 counsel for motion for new trial.

21 In this case, Reed has diligently attempted to develop the
22 record, collaterally, at every state level (Appx. A, pp. 2-5). After
23 his State exhaustions, Reed attempted to add a Claim 5, to demon-
24 strate the prejudice in denying his State claims but was rejected.
25 (Appx. A, pp. 1-2.) Such diligence, this Supreme Court has found,
26 entitles Reed to an evidentiary hearing in accordance with
27 this Court's ruling in Townsend v. Sain, 372 U.S. 293, 313
28 (1963). Reed has not been afforded a full and fair hearing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in dark ink, consisting of several overlapping, sweeping strokes, positioned above a horizontal line.

Date: June 24, 2020