No. _____

IN THE

Supreme Court of the United States

RAYMOND LEQUAN GIBBS,

Petitioner,

v.

NEIL MCDOWELL, WARDEN,

Respondent.

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

PETITION FOR CERTIORARI

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QUESTION PRESENTED

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant a reasonable opportunity to cross-examine the witnesses against him. The breadth of this opportunity is unquestionably at its apex when the witness is an informant. Was Gibbs denied this right when he and his co-defendants were prevented from cross-examining informant Feissa on numerous topics intended to develop his lack of credibility, bias toward the prosecution, and motive to lie when the state court unreasonably viewed these topics as irrelevant?

PARTIES AND LIST OF PRIOR PROCEEDINGS

The parties to this proceeding are Petitioner Raymond Lequan Gibbs and Respondent Neil McDowell, Warden of Ironwood State Prison in Blythe, California.[1] The California Attorney General Represents Respondent.

Gibbs was convicted in Los Angeles County Superior Court following a jury trial in *People v. Dennis Wallace*, case no. YA07570, Judge James R. Brandlin, presiding, in 2011. The case involved three defendants: Raymond Gibbs, Dennis Wallace, and Deyaa Khalill.

The California Court of Appeal affirmed Gibbs's conviction on appeal in *People v. Dennis Wallace*, No. B243535, on January 8, 2014. Petitioner's Appendix H attached hereto ("Pet. App.").

The California Supreme Court denied the petition for review on April 30, 2014. *People v. Dennis Wallace*, Case No. S215954. Pet. App. G.

The United States District Court for the Central District of California, Judge André Birotte Jr., presiding, denied the petition for habeas corpus in *Gibbs v. Montgomery*, case no. 15-0949, and denied a certificate of appealability ("COA") on February 28, 2017. Pet. App. D-F.

The Ninth Circuit Court of Appeals granted a COA on the issue presented herein in *Gibbs v. Covello*, case no. 17-55456, on June 25, 2019. Pet. App. C. Gibbs's appeal was consolidated with Khalill's. Pet. App. B. The Ninth Circuit

[1] The Respondent named in the action below was Patrick Covello, then-Warden of Ironwood State Prison.

subsequently affirmed the judgment of the district court in a published opinion on April 28, 2021. Pet. App. A; *Gibbs v. Covello*, 996 F.3d 596 (9th Cir. 2021).

Khalill presently has a petition for certiorari pending in this Court. Case No. 21-5238.

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TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Raymond Lequan Gibbs ("Gibbs" or "Petitioner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Gibbs v. Covello*, No. 17-55456.

I. OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals in *Gibbs v. Covello*, No. 17-55456, was published on April 28, 2021. Petitioner's Appendix ("Pet. App.") A. The order of the United States District Court denying relief was unreported. Pet. App. E, F. The California Court of Appeal's affirmance on direct appeal, No. B243535 (Jan. 8, 2014) is unpublished. Pet. App. H. The California Supreme Court's denial of the petition for review, No. S215954, on April 30, 2014, is unpublished. Pet. App. G.

II. JURISDICTION

The Ninth Circuit's order affirming the denial of Gibbs's habeas petition was filed and entered on April 28, 2021. Pet. App. A. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.1 and this Court's March 19, 2020 Order extending filing deadlines 150 days during the COVID-19 pandemic.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]

IV. STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

Petitioner is in state custody at Ironwood State Prison in Blythe, California. He filed a habeas corpus petition under 28 U.S.C. § 2254 challenging the constitutionality of his convictions and sentence. The district court denied the petition on the merits with prejudice. Pet. App. D. After the Ninth Circuit granted a COA, it affirmed the district court's denial of the petition. Pet. App. A, C.

B. Facts Material to the Consideration of the Question Presented

1. State Trial Court and Post-Conviction Proceedings

Gibbs was charged with one count of first-degree murder (California Penal Code § 187) in the homicide of Adiel Quezada. Pet. App. H-106. He was also charged with personal use of a firearm (§ 12022.53(d), (e)(1)) and committing the charged conduct for the benefit of a criminal street gang (§ 186.22(b0(1)(C)). *Id.*

Gibbs was tried along with two co-defendants, Dennis Wallace and Deeya Khalill. In addition to the Quezada murder, Wallace and Khalill were also tried for a second murder involving victim Tyronn Bickham. Pet. App. H-106.

a. The Preliminary Hearing

The preliminary hearing went forward, despite outstanding discovery on the state's star witness, Samuel Feissa, regarding his involvement in an ongoing

investigation of an unspecified crime. Pet. App. I-173-176. Gibbs requested a continuance for the purpose of obtaining the missing discovery. Pet. App. I-180-181. When the prosecutor insisted she wasn't going to "turn over police reports of a pending investigation to a bunch of gang members," the trial court deemed the discovery request too vague to support a motion to compel. Pet. App. I-182-183. It then denied the motion for continuance because co-defendant Wallace refused to waive time. Pet. App. I-185-186. The discovery motion was renewed the next day, but denied on the reasoning that the defense had no confrontation right at a preliminary hearing. Pet. App. I-189-190.

Feissa testified to being a member of 135 Piru for 2-3 years. Pet. App. I-198. He testified that all three co-defendants were also members of that gang. Pet. App. I-198-201. He testified that Barrio Trece was a rival gang that members of 135 Piru referred to as "Burritos" or "Sarrios." Pet. App. I-198-199.

As Feissa admitted, he had no first-hand knowledge of the Quezada murder and could only testify as to what others had said about it. Pet. App. I-273. According to Feissa, Khalill called Feissa to tell him he saw a Sarrio "slipping." Pet. App. I-209. Feissa interpreted that to mean that a Barrio 13 member had been shot while caught off his guard. Pet. App. I-211. According to Feissa, Khalill specified that he had done the shooting with Gibbs. Pet. App. I-211, 216-217. Feissa had learned a few months earlier that the "Sarrio" Khalill referred to was actually a South Side Player, rather than a member of a rival gang. Pet. App. I-211-213.

Feissa also testified to a conversation he had with Gibbs two months after the murder. Pet. App. I-221. In that conversation, Gibbs allegedly stated that Khalill had done the shooting and that Wallace had stayed across the street as a lookout. Pet. App. I-222-224. Feissa testified that another gang member, Baby Spoke, was present for that conversation and made a statement that he had "trucked it" with "the nine and the .40," which Feissa explained meant he had run fast. Pet. App. I-232-233. Feissa testified that Gibbs informed him of the caliber of weapons used. Pet. App. I-308. Gibbs allegedly made these admissions at a pool party in Compton at the home of a Compton Crip. Feissa admitted that he and Gibbs were not friends, but mere associates, but Feissa explained that he had personally seen gang members inculpate themselves in crimes to people they did not trust. Pet. App. I-275, 314. Feissa testified to seeing many guns at Khalill's residence in 2008, including handguns, a .9mm, a Desert Eagle .40, and a .32 Smith & Wesson. Pet. App. I-238.

Feissa admitted to a prior conviction for felony possession of marijuana, for which he was still on probation. Pet. App. I-201. He also admitted pleading guilty in a second case involving unspecified charges. Pet. App. I-202. He testified that he would not be sentenced on the plea until his testimony was complete in this case as well as a second case in which he was providing information. Pet. App. I-204-205. His understanding was that he could be sentenced to a maximum term of seven years or to time served. Pet. App. I-205.

Feissa also testified to being an informant for Detective Shaw, for which service he received "a couple thousand dollars." Pet. App. I-207. It was established on cross-examination that he received $2,700 in August 2008, and an additional $300 the following January. Pet. App. I-296. He had also been given the use of a Toyota Tercel in 2008. Pet. App. I-319-320. He testified that if police ever pulled him over, he would put Shaw on speaker phone "and let them know to let me go." Pet. App. I-320.

The trial court repeatedly limited cross examination. For instance, as Khalill's attorney was cross-examining Feissa regarding the sentence he expected to serve under his recent plea agreement, the court interposed its own objection:

> THE COURT: Counsel, this is not a trial and there is not a jury here. Let's try to move through this. Maybe you can ask him if he wants to be in any custody any longer than he has to so we can move on from this point.
>
> MR. OLIVE: Well, I'm doing my best, your honor.
>
> THE COURT: Well, it doesn't sound like it, counsel. I mean we don't need to dwell on this, counsel.
>
> MR. OLIVE: I've got a lot of material to go through, your honor. I don't think it's a quick cross examination.
>
> THE COURT: It might not be quick, but this is a preliminary hearing and you might not get to go through everything that you think you want to go through.
>
> MR. OLIVE: Well, I want to go through things that are related to motive and bias regarding this witness.

Pet. App. I-250; *see also* Pet. App. I-251 ("Counsel, do I need to have all counsel approach so we can figure out a way to get through without the drama?"); Pet. App.

I-254-255 (limiting questioning regarding whether Feissa promised the judge who sentenced him he would do community service he later did not do).

A question on cross-examination regarding whether Feissa had broken his promise to follow the law as a part of his plea agreement garnered further judicial admonishment:

> Q. Did you break that promise?
>
> MS. BARNES: Objection, relevance. The people will stipulate he was on probation when he picked up the new Case. This is --
>
> THE COURT: The objection is sustained.
>
> MR. OLIVE: Well, I haven't got the witness' answer.
>
> THE COURT: We already know the answer, counsel because he --
>
> MR. OLIVE: I don't.
>
> THE COURT: He admitted that he committed offenses after that.
>
> MR. OLIVE: I didn't hear that.
>
> THE COURT: I did hear him admit that. Go ahead, Counsel. The evidence that is in the record.
>
> MR. OLIVE: Well, I'd like the witness to answer the question and then I might have a follow-up or my co-counsel might have a follow-up question.
>
> THE COURT: The objection is sustained.
>
> MR. OLIVE: What questions can I ask the witness if I can't ask questions of credibility?
>
> THE COURT: Counsel, I don't know what questions you can ask. That's what I indicated about three minutes ago.

> I found that you spent ten minutes prior to that on credibility. So I certainly have permitted you to ask questions about credibility, right? It becomes a 352 issue when you just want to spent the first 30 minutes of your cross examination on credibility, on just that one part of credibility.
>
> MR. OLIVE: I asked
>
> THE COURT: I don't think we make the statement that you aren't being permitted to ask questions on credibility.
>
> MR. OLIVE: No.
>
> THE COURT: It's just over kill, counsel.
>
> MR. OLIVE: I think I can ask -- I think the witness can answer the question whether or not he broke a promise and whether or not he committed the offense after.
>
> THE COURT: We've gotten that answer already.
>
> MR. OLIVE: I have not heard him say anything.
>
> THE COURT: Go on to your next question. The last objection is sustained.

Pet. App. I-257-258.

When Feissa testified to having admitting in the past that his past drug use had caused him to be forgetful, the trial court would not permit counsel to cross-examine Feissa regarding what drugs he had taken in the past because of limitations on cross-examination in a preliminary hearing. Pet. App. I-261-262.

After Feissa's testimony was complete, there was still outstanding discovery in regard to him. Pet. App. I-333-349. However, the prosecutor assured defense counsel that Feissa would be available to testify at the trial because safeguards

were being put in place to ensure continuing jurisdiction over his person. Pet. App. I-349-350.

b. Trial Evidence

By the time of trial, Feissa was facing a murder prosecution. Pet. App. M-665-667. Represented by counsel, he invoked his Fifth Amendment privilege against self-incrimination in response to questions by the defense. Pet. App. M-665-673. The trial court sustained Feissa's invocation of the privilege over defense counsel's objection, ultimately concluding that there had been a full opportunity for cross-examination at the preliminary hearing. Pet. App. K-488-490. Defense counsel later objected to allowing Feissa's preliminary hearing testimony to be read to the jury on various grounds. Pet. App. M-654-657. The trial court overruled objection and Feissa's testimony was read to the jury. Pet. App. M-661-662; Pet. App. J.

The prosecution established that Quezada died of multiple gunshot wounds on the night of July 25, 2008 in a parking lot off of Avalon Boulevard. Pet. App. H-111. Both 9mm and .40 caliber expended bullets and shell casings were found at the scene, supporting the conclusion that two weapons were used. *Id.* There were no fingerprints on the rifle casings found at the scene and the casings and bullets were also never tied to a specific weapon. 8 RT 1930, 9 RT 2276-77, 2294, 2296.

Two eyewitnesses testified, but neither was able to identify a perpetrator. Steven Buchanan, a resident of the neighborhood, testified to hearing shots fired and seeing a person in a black hoodie running west from Avalon 3-5 minutes later. Pet. App. H-111. Buchanan further testified that he saw a Chevy truck in the

vicinity at that time, but that he did not see the runner enter the truck, although he had initially reported to police that he did see the runner enter the truck. 10 RT 2459-60, 2530.

Additional impeachment evidence undermining Feissa's credibility was adduced through the testimony of various law enforcement personnel. Detective Valento testified that Feissa had been arrested in July 2009 for possession of a 9 mm firearm, but that it was not the same weapon that had killed Quezada. 10 RT 2505, 2533; 11 RT 2763. He further testified that Feissa was given the use of a Toyota Tercel for two weeks. 10 RT 2509. In March 2009, Feissa was charged with burglary, narcotics sales and gang conspiracy. 10 RT 2518-19. Feissa was relocated. Despite the facts, Valento testified that Feissa was a credible witness. 11 RT 2794-97, 2811. It was stipulated that Feissa was guilty of murdering Daveon Childs on January 3, 2008 in a drive-by shooting and that Feissa was arrested on the charge in July 2011. Pet. App. H-120; Pet. App. L-577-578.

Feissa's informant file was disclosed to the defense mid-trial. Pet. App. L-492. It revealed that between August 2008 and December 2011, Feissa had received $7,250 from the sheriff's department for his work as an informant and that Feissa had been deemed an unreliable informant by law enforcement on March 3, 2009. Pet. App. L-504-507, 601.

There was also some evidence that Feissa was an unlikely person for Khalill and Gibbs to confide their activities to. For instance, Feissa had only been a member of 135 Piru for 2 to 3 years and not originally from the neighborhood. Pet.

App. I-198; Pet. App. L-575. He was previously a 112 Broadway Crip and his membership in the two gangs actually overlapped in 2008 and 2009. Pet. App. L-575; 14 RT 3822. Crips and Bloods are generally viewed as rival gangs. Even within the same gang, evidence was adduced that older members are unlikely to share information about serious crimes with youngsters or newer members, especially if they are originally from outside the neighborhood. 14 RT 3793. There was also testimony regarding the general reliability of informants like Feissa, establishing that such witnesses may have a variety of motives to lie, including monetary gain, avoiding jail time, and wanting to draw law enforcement's attention away from their own crimes. 14 RT 3797-98.

Several wiretapped phone calls involving the defendants were also presented as evidence of their guilt. The first call, between Gibbs and a girlfriend, involved a discussion about the eventuality of their own deaths and whether they might go to hell. Clerk's Transcript (CT") 625; 11 RT 2830, 2833. Gibbs said, "I did some shit . . . God can't take away. On the real. That I can't erase. That I will go to the bank with it. For real." CT 628. He later said, "If I was god, and some of the shit I done did, I probably would reject myself from going to heaven." CT 629. In a separate call with Baby Spoke, Gibbs stated "I'm fucked if they find that whooptie." CT 651; 11 RT 2846-47. The state's gang expert testified that "whooptie" is a generic word that is used to replace a more specific noun. Pet. App. H-116 n.9.

The defense theory was that Feissa himself was the perpetrator of the Quezada murder or that the perpetrator was someone from another gang.

An eyewitness testified to hearing shots while posting mail at a mailbox on 139th and Avalon. 13 RT 3350-52. He saw a black Camry leave the alley contemporaneously with the gunfire, "burning rubber." 13 RT 3363, 3457. Although he saw others on the street at that time, he could not identify them and did not believe they could be the perpetrators. 13 RT 3355-60, 3368-69. He did not see any of the defendants on the street. 13 RT 3399.

Four days after the Quezada murder, Feissa was arrested for possession of an 9 mm handgun. He was found in a black Camry. Pet. App. L-636; 13 RT 1322-26.

Detective Duncan admitted that when interviewing Feissa in 2009, he did not believe he was being honest. Pet. App. L-581-583. It was difficult for Duncan to get Feissa to admit to his own wrongdoing and "[h]e was not being very upfront during the interview." Pet. App. 584. Duncan had acknowledged that he was "unaware of any of these individuals providing 100% truthful information" in prior investigations utilizing informants, though he would not admit that this was also the case with Feissa. Pet. App. L-585. However, he admitted that Feissa denied involvement in the Daveon Childs murder and in fact blamed someone else for the crime. Pet. App. L-603, 619-620. Feissa also denied being involved in drug trafficking between Texas and California. Pet. App. L-603. After the 2009 interview, Duncan and his partner Labbe completed paperwork deeming Feissa an unreliable informant. Pet. App. L-601; 14 RT 3676-79. However, Duncan testified that doing so was prompted by concerns regarding Feissa's safety. Duncan denied that Feissa was being untruthful in the information he provided inculpating

defendants. Pet. App. L-606-607. For purposes of this case, Duncan testified, Feissa was "found to be truthful." Pet. App. L-612-613. He testified he did not catch Feissa lying in regard to the Quezada murder and that the information he provided in a second murder investigation involving a victim named Llanos was corroborated and resulted in a conviction of the charged defendants. Pet. App. L-615. Labbe testified that Feissa was ruled out as a suspect in the Feissa murder because cell phone records placed him 5-6 miles away from the crime scene. 14 RT 3693, 3695.

An inmate, Elvie Porter, testified that Feissa had threatened to inform against him while in jail. 15 RT 3963-64. According to Porter, Feissa admitted testifying falsely against other defendants after reading the murder books in their cases. 15 RT 3964.

c. **Conviction and Sentencing**

The trial was longer than expected. 14 RT 3601-06. The defense was denied the opportunity to call the detective who originally made Feissa an informant and provided him with most if not all of his monetary compensation in part because allowing the trial to go on any longer would not give jurors enough time to deliberate. Pet. App. M-730-33. Both the court and certain jurors had vacation schedules that interfered with the trial going longer. 16 RT 4206-10. Juror 6 was excused so that s/he could leave for an already delayed flight. Pet. App. M-735-739. The jury began its deliberations on a Tuesday afternoon. Pet. App. M-742. On Wednesday, the jury requested readback of Feissa's testimony, as well as the testimony of the two eyewitnesses, Gordon and Buchanan. Pet. App. M-753-756.

The court requested the jury to narrow its request in light of the consumption of time. The jury thereafter narrowed its request to the Feissa testimony. *Id.* The jury reached its verdicts to convict on all charges after the Feissa readback the following day. *Id.*; Pet. App. M-774, 758; 16 RT 4801-13.

Gibbs was sentenced to two twenty–five-years-to-life sentences totaling 50 years to life. Pet. App. H-106.

d. State Post-Conviction Proceedings

On appeal, the California Court of Appeal affirmed the judgment with a single modification, reducing that Gibbs' minimum parole eligibility to 15 years. Pet. App. H-168. On April 30, 2014, the California Supreme Court denied Gibbs' petition for review. Pet. App. G.

2. Federal Court Proceedings

On February 5, 2015, Gibbs filed a pro se petition for habeas corpus raising the claim at issue here. The Final Report and Recommendation of Magistrate Judge Douglas F. McCormick issued on December 5, 2016, recommending the petition be denied. Pet. App. F. The district court adopted the report on February 28, 2017, denied the petition with prejudice, denied a certificate of appealability, and entered judgment. Pet. App. D-E.

The Ninth Circuit granted a certificate of appealability with respect to the issue presented in this appeal on June 25, 2018. Pet. App. C. After the case had been briefed, the court ordered supplemental briefing on "whether, and to what extent, any information that the State disclosed after the preliminary hearing related to Samuel Feissa's credibility—and which was introduced at trial—bears on

either the alleged violation of the Confrontation Clause or the harmless error analysis." Pet. App. B.

Following oral argument, the Ninth Circuit affirmed the denial of the claim in a published opinion, noting that "[o]n the merits, the Confrontation Clause question is a close one." Pet. App. A. It acknowledged that "the magistrate repeatedly cut off lines of inquiry that defense counsel attempted to pursue," often doing so "by pointing out that the proceeding was only a preliminary hearing, not a trial." Pet. App. A-14. The Ninth Circuit further found that "Feissa was a remarkably evasive witness" and "[a]rguably, the magistrate should have allowed counsel greater freedom to try to pin him down." Pet. App. A-15. However, under AEDPA, it concluded that the California Court of Appeal was not unreasonable in denying the claim on the theory that further questioning "would not have given the jury 'a significantly different impression of [Feissa's] credibility.'" Pet. App. A-16-17 (quoting *Van Arsdall*, 475 U.S. at 680).

As to the issue of whether the later-disclosed discovery implicated Gibbs's confrontation right, the Ninth Circuit found it did not in the absence of clearly established law in support of that proposition. Pet. App. A-16. It also found that Gibbs failed to show how the discovery would have been "a fruitful avenue for cross-examination." Pet. App. A-17.

V. REASONS FOR GRANTING THE WRIT

A. Certiorari Review Is Necessary Because the Ninth Circuit's Published Decision Ignores the Unreasonable Fact-Finding of the State Court and Employs a Speculative Outcome-Determinative Analysis to Find No Violation of Gibbs's Confrontation Rights

1. Legal Principles

It is clearly established federal law that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (internal quotation marks omitted). In particular, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* at 316-17. A criminal defendant's Confrontation Clause rights are "violated when he is 'prohibited from engaging in otherwise appropriate cross-examination . . . 'from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' " *Slovik v. Yates*, 556 F.3d 747, 752 (9th Cir. 2009) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (quoting *Davis*, 415 U.S. at 318))). The "denial or significant diminution" of the right to cross-examination requires that "competing interests be closely examined." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *see Rhodes v. Dittman*, 903 F.3d 646, 656, 659 (7th Cir. 2018) (holding it is clearly established federal law that "ordinary rules of evidence must give way when they prevent a defendant from presenting evidence central to the defense"); *Holley v. Yarborough*, 568 F.3d 1091, 1098 (9th Cir. 2009) (holding it is clearly established federal law that "[r]estrictions on a criminal defendant's rights to confront adverse witnesses. . . 'may not be arbitrary or disproportionate to the

purposes they are designed to serve.'" (quoting *Michigan v. Lucas*, 500 U.S. 145, 151 (1991)). The burden of establishing the violation is met when the defendant can show "that '[a] reasonable jury might have received a significantly different impression of [a witness'] credibility had . . . counsel been permitted to pursue his proposed line of cross-examination.'" *Slovik*, 556 F.3d at 753 (quoting Davis, 415 U.S. at 318).

Preliminary hearing testimony is unquestionably testimonial. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). "That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the [Confrontation] Clause's demands most urgent. *Id.* at 68.

Finally, it is clearly established that "informant testimony . . . . poses serious credibility questions." *Banks v. Dretke*, 540 U.S. 668, 701 (2004). To the extent "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility . . . . a defendant is entitled to broad latitude to probe credibility by cross-examination." *On Lee v. United States*, 343 U.S. 747, 757 (1952); *see Banks*, 540 U.S. at 701-02.

2. The admission of Feissa's preliminary hearing testimony violated the Confrontation Clause because the limitations imposed in cross-examination prevented exposure of a crucial witness's lack of credibility, prosecution bias, and motive to lie

The defense was prevented from asking about numerous topics aimed at testing Feissa's bias, motive to lie, and general credibility:

- questions exploring Feissa's minimization of his motive to avoid prison, on grounds of time-wasting (Pet. App. I-250-251; Pet. App. H-133 & nn.14-15);

- questions surrounding his failure to comply with a community service requirement of a past plea deal, on grounds of relevance (Pet. App. I-254-255, 258);
- the reason he had an upcoming probation violation hearing (Pet. App. I-259-260);
- the basis for his admitted memory problems, on the ground the question was argumentative and assuming facts not in evidence (Pet. App. I-261);
- the timing of drug use that may have impacted his memory of events, on grounds of relevance (Pet. App. I-262-263; Pet. App. H-134 n.16 ("The trial court did not allow questions about which drugs he had used and the length of drug use.")));
- other murder investigations for which Feissa provided information, on grounds of relevance and being outside the scope of the direct examination (Pet. App. I-267);
- the value of the money Feissa earned as an informant compared to what he earned in everyday life, on grounds of relevance (Pet. App. I-296);
- his knowledge of whether he was under investigation for other crimes, on grounds of speculation (Pet. App. I-316);
- his receipt of relocation assistance, on the prosecutor's objection to such questioning in open court (Pet. App. I-318-319).

Moreover, counsel was unable to confront Feissa with information obtained from his informant file, which was not produced to counsel until midway through trial. Pet. App. L-492. Thus, while counsel confronted Feissa about some $3,000 he

had received as an informant between August 2008 and January 2009 (Pet. App. I-269, 295-297, 309), it could not confront him about the fact that he actually received over twice that amount, or $7,250. Pet. App. L-507. It also could not confront him on the reasons law enforcement classified him as an unreliable informant in March 2009, well over a year before Feissa testified at the preliminary hearing. Pet. App. L-601.

The state court concluded that the defense was limited from engaging in "redundant questioning" or questioning on "irrelevant or minor topics." Pet. App. H-139. This characterization gives short shrift to what defense counsel was actually addressing with its excluded lines of examination: Feissa's credibility, prosecution bias, and motive to lie. "[I]nformant testimony . . . . poses serious credibility questions." *Banks*, 540 U.S. at 701. To the extent "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility . . . . a defendant is entitled to broad latitude to probe credibility by cross-examination." *On Lee*, 343 U.S. at 757, *quoted in Banks*, 540 U.S. at 701-02. It was unreasonable for the court of appeal to conclude that lines of cross-examination directed at the credibility and bias of a central informant witness were either "irrelevant" or "redundant." *Holley*, 568 F.3d at 1099 (holding that state court's conclusion that questions aimed at discrediting witness were "of questionable, if any relevance" an unreasonable application of clearly established federal law); *Nappi v. Yelich*, 793 F.3d 246, 251-52 (2d Cir. 2015) (holding that state court's conclusion that cross-examination

regarding witness' motive for testifying was a "collateral matter" was contrary to clearly established federal law).

Although trial courts are empowered to impose "reasonable limits" on cross-examination, state laws protecting other interests may be "outweighed by [the criminal defendant's] right to probe into the influence of possible bias in the testimony of a crucial identification witness." *Van Arsdall*, 475 U.S. at 679; *Davis*, 415 U.S. at 319 (holding that a judicial rule and state statute protecting the anonymity of juvenile offenders in Alaska did not license the trial court to limit cross-examination of a prosecution witness in regard to his experience with the criminal justice system). In particular, the invocation of the procedural rule that evidence may be excluded if its probative value is outweighed by the danger of prejudice, confusion, or undue consumption of time has been found to violate the Confrontation Clause in numerous instances. *E.g., Van Arsdall*, 475 U.S. at 676 & n.2; *Slovik*, 556 F.3d at 755 (holding that the California appeal court decision the trial court's discretion to apply California Code of Evidence section 352 to limit cross-examination without any examination of the right to confrontation was objectively unreasonable under AEDPA); *Fowler v. Sacramento County Sheriff's Dept.*, 421 F.3d 1027, 1038-41 (9th Cir. 2005) (concluding that the trial court's application of California Code of Evidence section 352 to limit cross-examination was an unreasonable application of Davis). Considering "the very broad standard of relevance embodied in [California] Evidence Code section 210," *People v. Scheid*, 16 Cal. 4th 1, 16 (1997), the same analysis applies with even greater force here.

Although the California Court of Appeal acknowledged a laundry list of areas defense counsel was unable to cross-examine on (Pet. App. H-139-140), it failed to acknowledge that the cross-examination the trial court precluded was aimed at uncovering Feissa's lack of credibility, prosecution bias, and motive to lie. It failed to acknowledge that Feissa was either a crucial witness or an informant. Its decision, based upon unreasonable factfinding, was therefore contrary to and an unreasonable application of *Davis*, *Van Arsdall*, and *Banks*. *Vasquez v. Jones*, 496 F.3d 564, 569-71 (6th Cir. 2007) (holding that state court unreasonably applied Davis in admitting preliminary hearing testimony in which the opportunity for cross-examination was not reasonable).

The court of appeal's conclusion that the numerous sustained objections and sua sponte rulings were only "minor limitations" that "did not unduly restrict appellants' ability to fully cross-examine him" (Pet. App. H-140), "cannot be squared with the trial court record" and is an therefore an unreasonable factual finding under § 2254(d)(2). *Rhodes*, 903 F.3d at 662; *see Sharp v. Rohling*, 793 F.3d 1216, 1230 (10th Cir. 2015) (holding that state court's determination that witness was not promised leniency was an unreasonable determination of the facts because it was "not a plausible reading" of the relevant record); *Castellanos v. Small*, 766 F.3d 1137, 1150 (9th Cir. 2014) (holding that when state court record reveals "significant evidence" of a fact, a state court's decision not to find the fact is unreasonable within the meaning of § 2254(d)(2)).

The court of appeal made another unreasonable factual finding when it completely overlooked the questions defense counsel was unable to ask regarding discovery it had not yet received: that Feissa was paid twice as much as he admitted at the preliminary hearing and had, by that time, been deemed an unreliable informant by law enforcement. Overlooking this important aspect of the record was an unreasonable finding of fact that resulted in an unreasonable application of Davis. *Vasquez*, 496 F.3d at 569-71 (holding that state court unreasonably applied Davis in admitting the preliminary hearing testimony of an unavailable witness when the defendant had no opportunity to cross-examine him regarding his prior convictions not known at the time of the preliminary hearing); *see Milke v. Ryan*, 711 F.3d 998, 1007 (9th Cir. 2013) ("[W]e can't accord AEDPA deference when the state court 'has before it, yet apparently ignores,' evidence that is 'highly probative and central to petitioner's claim.'" (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984, 999-1000 (9th Cir. 2014))); *Norton v. Spencer*, 351 F.3d 1, 7 (1st Cir. 2003) (holding that state court's conclusion that evidence was cumulative was an unreasonable finding of fact because "evidence cannot be cumulative when it goes to an issue that was not known at the time of trial").

The state court further reasoned that the cross-examination was not unduly restricted because the trial court allowed the defense to attack Feissa's credibility through other witnesses. Pet. App. H-140-141. This is, in itself, an unreasonable application of clearly established confrontation law: "The Constitution prescribes a

procedure for determining the reliability of testimony in criminal trials"—cross-examination—"and we, no less than the state courts, lack authority to replace it with one of our own devising." *Crawford*, 541 U.S. at 67; *see Rhodes*, 903 F.3d at 662 (holding that the state court's reasoning that limitations on cross-examination were acceptable because "the defendant could admit similar evidence through other means" was an unreasonable application of clearly established federal law).

Even on subjects the defense was able to engage in some cross-examination, it was only a "conclusory, bobtailed version" of the cross-examination counsel sought. *Rhodes*, 903 F.3d at 662. The state court's decision that the cross-examination was "extensive" (Pet. App. H-141) was unreasonable because the defense was stopped short from asking all the questions "'from which the jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.'" *Rhodes*, 903 F.3d at 662 (quoting *Davis*, 415 U.S. at 318). Feissa was hostile to the defense, engaging in such a pattern of nonresponsiveness that at one point, the trial court had to admonish him to "just answer the question." Pet. App. I-252, 260-261. Nevertheless, the trial court repeatedly precluded counsel from exploring areas of credibility, prosecution bias, and motive to lie when follow-up questions were necessary to make the examination effective. The Confrontation Clause is intended to prevent such limitations. The court of appeal unreasonably applied clearly established federal law in approving them.

3. The Ninth Circuit's Published Opinion Conflicts with the Holding of This Court That Speculation as to What the Witnesses' Testimony Would Have Been Has No Place in the Confrontation Analysis

This Court has held that "[a]n assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." *Coy v. Iowa*, 487 U.S. 1012, 1021–22 (1988); *see also Coleman v. Vannoy*, 963 F.3d 429, 434 (5th Cir.) ("Confrontation has no inherent trial-outcome prejudice component."), *cert. denied*, 141 S. Ct. 824 (2020); *Miller v. Genovese*, 994 F.3d 734, 743–44 (6th Cir. 2021).

By denying Gibb's claim on the reasoning that Gibbs failed to show how cross-examination on the basis of later-disclosed discovery "would have been a fruitful avenue for cross-examination," Pet. App. A-17, the Ninth Circuit put petitioner to an unreasonable burden of proof that could not be met in the absence of an evidentiary hearing. And, in fact, Gibbs did put forth evidence tending to show that Feissa testified under an undisclosed deal with the prosecution that resulted in his favorable placement in a minimum security camp, despite his first-degree murder conviction. Ninth Cir. Docket No. 62. And currently, Feissa is a Male Community Reentry program in Los Angeles designed for inmates who have less than a year of their sentence remaining to serve, suggesting that not only his

placement was favorable, but also his sentence.[2] *See* *https://inmatelocator.cdcr.ca.*gov/ (reporting placement for Samuel Asrat Feissa, inmate no. AL5717); Cal. Penal Code § 190(a) (providing that the minimum sentence for first-degree murder is 25 years to life).

A miscarriage of justice occurred in this case that allowed the unreliable and largely unconfronted testimony of an police informant to substitute for proof beyond a reasonable doubt. The Petition should be granted.

VI. CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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DATED: September 24, 2021

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[2] This information is subject to judicial notice under Federal Rule of Evidence 201. *United States v. Garcia*, 855 F.3d 615, 622 (4th Cir. 2017) ("The district court acted well within its discretion when it took judicial notice of the facts contained on the government website.").