No. _____

IN THE

Supreme Court of the United States

FREDERICK R. COTE,

Petitioner,

v.

DEBBIE ASUNCION, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the low threshold for a certificate of appealability ("COA") met on a freestanding claim of actual innocence when a habeas petitioner serving life-without-parole presents a declaration from the admitted real killer and star prosecution witness stating that he falsely implicated petitioner at trial to avoid the death penalty and that another person hired him to kill the victim? Does the presentation of this declaration and supporting declarations entitle a petitioner to a COA on his claim of actual innocence alleged to excuse state procedural defaults and the untimely filing of his federal petition?
2. Does a petitioner meet the low threshold for a COA on a claim that the prosecution presented false evidence when the claim is based on the declaration of the admitted real killer and star prosecution witness stating that he falsely implicated petitioner at trial to avoid the death penalty and that another person hired him to kill the victim?
3. Should a COA issue on a claim that the trial court violated petitioner's constitutional rights by excluding evidence of third-party culpability where the court prevented petitioner from presenting evidence that a prosecution witness who testified that he was friends with the admitted real killer and had contemplated various methods to kill or injure the victim was in fact the person who hired the real killer?
4. Is a petitioner entitled to a COA on his claim that his trial counsel was prejudicially ineffective in failing to investigate and present evidence supporting the defense that a third-party -- not petitioner -- hired the

admitted real killer given the facts described in questions one through three above?

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Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

I. OPINIONS BELOW

Fred Cote petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals. The Ninth Circuit's order denying Cote's motion for a certificate of appealability is unreported. Petitioner's Appendix ("Pet. App.") 1. The district court's judgment and its order accepting the magistrate judge's report and recommendation and dismissing the habeas action against Cote are unreported. Pet. App. 2-4.

The orders by the California Supreme Court denying habeas relief are unreported. Pet. App. 45-48. The California Court of Appeal's opinion affirming the state court judgment on appeal is unreported. Pet. App. 50-73. The California Supreme Court's order denying Cote's petition for review of the Court of Appeal's appellate decision is unreported. Pet. App. 49.

II. JURISDICTION

The Ninth Circuit's order denying Petitioner's motion for a certificate of appealability was filed on January 28, 2019. Pet. App. 1. 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 filed under Supreme Court Rule 13.1.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Sixth Amendment to the United States Constitution

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

Eighth Amendment to the United States Constitution

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the United States Constitution

"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."

28 U.S.C. § 2244(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

IV. STATEMENT OF THE CASE

By December 1990, Fred Cote had been married to his wife Jane for nearly 20 years. They had two children together. They worked many years together at Cote's radio station until Jane took a job at a hotel in 1990. Pet. App. 8. In late December 1990, Jane left Cote and moved in with John Morrell, an employee at the hotel. Pet. App. 9; reporter's transcript of trial ("RT"), volume 3, at pages 364, 367-68.[1]

On February 19, 1991, Morrell was shot to death in his apartment by Joseph Miller, who was also an employee of the radio station. Pet. App. 10-12. Miller admitted the shooting, took a deal for life-without-parole, and became the State's star witness against Cote. Pet. App. 12. Miller testified that Cote paid him $5,000 to kill Morrell. Pet. App. 7. Cote denied any involvement in the killing in his trial testimony and has steadfastly maintained his innocence. 10 RT 1527-28. Cote testified that the payments to Miller were an advance on his salary to pay for car repairs and that he had given other employees similar advances. 10 RT 1497-99, 1527.

[1] Respondent lodged the RT in district court on April 29, 2013. *See* district court docket 46, lodgment 27.

The defense theory of the case was that another radio station employee, Jay Fees, hired Miller to kill Morrell because Fees had become romantically involved with Jane and wanted Morrell out of the way. 3 RT 903-13. At a "402" hearing outside the presence of the jury to consider whether to admit his testimony, Fees testified that he became romantically involved with Jane in the summer of 1991 and that they married in October 1992. 6 RT 839, 850-51. Fees testified that he had met Morrell and knew of Morrell's romantic relationship with Jane. He testified that he told Petitioner that he would be willing to "whoop" Morrell; suggested to Petitioner that he (Fees) loosen the bolts on Morrell's motorcycle; suggested to Petitioner that Morrell be killed; and that he was friendly with Miller, who had showed him the gun used to kill Morrell. 6 RT 860-63, 870, 873, 886. The court denied Cote's request to present Fees' testimony and other evidence to support the defense that Fees, not Cote, hired Miller to kill Morrell. 6 RT 903-13. The California Court of Appeal affirmed the exclusion of this third-party culpability evidence on appeal. Pet. App. 60-62.

On April 17, 2012, Cote filed a pro se federal habeas petition alleging the four claims discussed below. District court docket 1 (Petition) at 1, 5-6; district court docket 54 (Traverse) at 18-25. In support of his claims, Cote submitted declarations by Miller, Jason Rott, Ted Gunderson, Richard Martin, Joseph Crawford, William Elledge, John Lego, Frederick Cote, Jr., and Matthew Cote. District court docket 32, lodgment 6; Pet. App. 75-134. Miller declares that he testified falsely at Cote's trial to avoid the death penalty, and that it was Fees, not Cote, who hired him to

kill Morrell and to frame Cote. Pet. App. 16-17, 95-97, 116-118. As discussed further below, the other declarations likewise support Cote's claim and his attempted defense at trial. The magistrate judge denied Cote's request for an evidentiary hearing and recommended denying relief. District court docket 103-104; Pet. App. 43. The magistrate judge did not rule on Respondent's motion to dismiss the petition as untimely but instead denied relief solely on the merits. Pet. App. 6. District Judge S. James Otero adopted the report, entered judgment against Cote, and denied a COA. Pet. App. 2-4. Cote timely appealed. District court docket 111. The Ninth Circuit denied a COA. Pet. App. 1.

V. REASONS FOR GRANTING THE WRIT

A. COA Standards

A habeas petitioner has no absolute right to appeal a district court's denial of a petition but instead must obtain a COA to pursue an appeal. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Obtaining a COA "'does not require a showing that the appeal will succeed.'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016). To receive a COA, a petitioner "need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* "The COA inquiry asks only if the District Court's decision was debatable." *Id.* at 348. This is a "low" standard. *Frost v. Gilbert*, 835 F.3d 883,

888 (9th Cir. 2016) (en banc). A petitioner need only "prove 'something more than the absence of frivolity.'" *Miller-El*, 537 U.S. at 338 (quotation marks omitted).

A "COA should issue" on procedural issues "when the prisoner shows . . . that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

B. The Court Should Grant a COA on the Actual Innocence Claim

Cote alleges in Ground One of his federal habeas petition that newly discovered evidence shows that he is actually innocent. Pet. App. 6-7; Petition at 5; Traverse at 18-21. Because the California Supreme Court denied the claim on procedural grounds without adjudicating the merits, 28 U.S.C. § 2254(d) does not apply, and the Court reviews the claim *de novo*. Pet. App. 7, 46; *Cone v. Bell*, 556 U.S. 449, 472 (2009).

The courts have assumed that a freestanding actual innocence claim is cognizable in non-capital habeas cases and warrants relief without any showing of an additional constitutional violation. *See, e.g.*, *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014). To prevail on such a claim, a petitioner must present reliable new evidence that "'affirmatively prove[s] that he is probably innocent.'" *Id.* at 1246-47. "The federal habeas court 'must consider all the evidence, new and old, incriminating and exculpatory, without regard to whether it would necessarily be admitted under the rules of admissibility that would govern at trial.'" *Id.* at 1247

(quoting *House v. Bell*, 547 U.S. 518, 538 (2006)). "'Based on this total record, the court must make "a probabilistic determination about what reasonable, properly instructed jurors would do."'" *Id.*

Actual innocence also excuses procedural defaults and non-compliance with the federal statute of limitations, thereby enabling a petitioner to have his otherwise procedurally-barred claims considered on the merits. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (describing the actual innocence gateway to federal habeas review). A lesser showing is required in this context. "[W]here post-conviction evidence casts doubt on the conviction by undercutting the reliability of the proof of guilt, but not by affirmatively proving innocence, that can be enough to pass through the *Schlup* gateway to allow consideration of otherwise barred claims.'" *Larsen v. Soto*, 742 F.3d 1083, 1095 (9th Cir. 2013). As shown below and in his filings in District Court and the Ninth Circuit, Cote meets both standards: Based on his actual innocence showing, he is entitled to substantive relief on Ground One and to have Grounds Two through Four considered on the merits regardless of any procedural infirmities.

Most of the evidence adduced at trial was insufficient, in and of itself, to establish Cote's guilt. *Cf.* California Criminal Jury Instruction 224 ("If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence"); 13 RT 2176 (jury instruction). Only when this circumstantial evidence was considered in the context of Joseph Miller and

Mara Ann Rearick's testimony did the circumstantial evidence imply Petitioner's guilt. Petitioner's newly discovered evidence not only casts doubt on the circumstantial evidence adduced at trial, but affirmatively shows its false and incomplete conclusions. In light of the new evidence, it is more likely than not that no reasonable juror would have found Cote guilty beyond a reasonable doubt, and therefore Cote is entitled to relief. *House*, 547 U.S. at 536-537.

The trial evidence included a note containing Morrell's identifying information at the radio station, the presence of a newspaper clipping about the murder at Petitioner's house, a rendering of the murder suspect found in Petitioner's possession, paperwork related to a car rented by Petitioner, checks made out to Miller from Petitioner, the circumstances surrounding Petitioner's flight, and Petitioner's prior conduct vis-a-vis Peter Vanderbogart. Each of these facts can be reasonably explained in an innocent fashion. For example, a person may adopt a false name and leave the jurisdiction—not because of guilt—but out of a fear of wrongful conviction. *Larsen*, 742 F.3d at 1098 ("[e]ven if [petitioner's] use of a pseudonym suggests consciousness of guilt in some general sense, it cannot independently support a finding of guilt beyond a reasonable doubt"). Petitioner's prior conduct vis-à-vis Peter Vanderbogart was just that—prior conduct that even the California Court of Appeal thought improper to admit. Pet. App. 62-65. Even when Petitioner's flight and prior conduct are considered in light of the note, the checks, and the rental car, there was still insufficient evidence to prove guilt beyond a reasonable doubt. Further, the fact that Cote had a rendering of the suspect and

a newspaper article about a crime in which he was implicated does very little to advance the government's theory of guilt. As a result, the prosecution looked to Miller and Rearick in hopes that their testimony might sure up its circumstantial case with direct evidence that linked Petitioner to the murder.

At trial, Miller directly implicated Cote in the murder-for-hire scheme and purported to explain the checks, the rental car, and the note. But Miller's post-conviction declaration exculpates Cote and does so in a way that reasonably explains the circumstantial evidence adduced at trial. Miller's declaration that he and Fees conspired to murder Morrell explains the presence of the note at the radio station. Pet. App. 94-106, 114-125. The note belonged to Fees and Miller—both of whom were employees at the radio station and had access to the location where the note was found. Pet. App. 101-102 (Miller admits he stole Cote's office key and would use Cote as a scapegoat if "there was a problem."); 6RT 848 (Fees' testimony that Jane also had a key to Petitioner's office).[2] The note was not Cote's.[3]

[2] The radio station's former chief engineer, William R. Elledge, testified by deposition on February 25, 1993, and provided three reasonable scenarios which would explain how Fees and Miller would get a copy of the station master key. *See* district court docket 32, lodgment 6, Ex. B-213 at 12. Additionally, Jay Fees substantiated Petitioner's trial testimony in an interview with a defense investigator. *Id.*, Ex. B-203 (Fees recalling a conversation where Petitioner informed Fees that Miller had a master key).

[3] We know that Fees had access to Morrell's personal information because he admitted as much at the 402 hearing. 6 RT 858 (Fees testifies that he followed Morrell home one evening after learning where Morrell lived and what vehicle Morrell drove).

Additionally, Cote's explanation for the checks and the rental car are reasonable in light of Miller's inconsistent trial testimony and the newly discovered evidence.[4] Both Lego and Elledge indicate in their declarations that Cote regularly advanced money to radio station employees. Pet. App. 79, 91-92. The existence of Miller's 1991 brake repair order further supports Petitioner's testimony that the checks were intended for Miller's car, not for a murder weapon. When these facts are read in the context of the newly discovered evidence and the California Court of Appeal's conclusion that Fees had motive and opportunity to hire Miller to kill Morrell, the case against Fees is strong and Petitioner's innocence is clear.[5]

In addition to the declarations of Lego and Elledge, Petitioner has also proffered the declarations of Rott, Gunderson, Martin, and Crawford in support of his actual innocence claim. Pet. App. 75-77, 85-88, 93, 107-113, 134. Rott's declaration is integral to undermining the prosecution's narrative regarding the murder weapon. By severing the link between the checks Petitioner wrote to Miller and the need to purchase a murder weapon, Rott's declaration impeaches the credibility of Miller's plea-bargain induced story. Rott's declaration also corroborates Gunderson's investigation, which found that Miller did in fact have

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[4] Miller provided conflicting statements at trial regarding when he owned the murder weapon and how much Cote allegedly paid him for the weapon. 7 RT 958-59, 965-67; 9 RT 1319.

[5] Miller's declaration is also consistent with Fees' testimony at the 402 hearing that Fees spoke with his roommate, James Ritter, about committing the murder and that Petitioner instructed Fees to tell Ritter not to do anything at all, as it would implicate Petitioner. 6 RT 867. Additionally, Miller's declaration confirms that Fees developed various ways to kill Morrell. 6 RT 862-63.

mechanical work performed on his car approximately one month before the murder. Pet. App. 86-87, 107-108; district court docket 32, lodgment 6, Ex. D-407-409. [6] Combine Gunderson's investigation with the declarations of Lego and Elledge—both of whom declare that Petitioner regularly gave advances to his employees—and Petitioner's version of events is much more probable than the prosecution's circumstantially tenuous theory. Even more damaging are Lego's statements that Fees and Jane had a romantic relationship prior to Jane seeing Morrell and that Fees moved into Petitioner's home immediately after Petitioner was charged with murder. Pet. App. 89. Not only does Lego's declaration establish Fees' motive, it also impeaches Fees' 402 hearing testimony that he did not have a romantic relationship with Jane before or during the relevant time period.

Finally, the declarations of Martin and Crawford – which describe Miller's confession that Fees hired him to kill Morrell – impeach Miller's trial testimony and call into question Fees' testimony at the 402 hearing. Pet. App. 76-77, 93, 134. Looking at the evidence adduced at trial in light of the newly discovered evidence proffered by Cote, it is clear that Cote has met his burden to show his innocence, i.e., that it is more likely than not that any reasonable juror would have reasonable doubt. *House*, 547 U.S. at 538.[7]

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[6] Gunderson is a private investigator and former FBI agent. Pet. App. 85.

[7] Unlike the petitioner in *Herrera v. Collins*, 506 U.S. 390 (1993) (cited in the report at 4, Pet. App. 8), where the state district court denied Herrera's second petition because "no evidence at trial remotely suggest[ed] that anyone other than [Herrera] committed the offense," the Court of Appeal in Petitioner's case acknowledged that Fees had a motive and the opportunity to kill Morrell. *Compare*

Petitioner's additional declarations and investigatory interviews support his claim that he rented a car because his personal vehicle was being repaired. Petitioner identified Simon Beltran as the mechanic who fixed his car on the day of Morrell's murder. At trial, Beltran corroborated the entirety of Petitioner's version of events (i.e., bringing the car to repair the air conditioning, taking his sons to get food while waiting for the repairs, etc.), but could not recall the exact date.[8] 13 RT 2010-2030. As it stood, Beltran's testimony was far from inculpatory; it was inconclusive at worst and exculpatory at best. But this evidence should have been buttressed with the statements of Bob Roberts, owner of Bob's Auto Body and Beltran's landlord.[9] District court docket 32, lodgment 6, Ex. D-411. Although Roberts could not remember the exact date Petitioner brought his car in for repairs, he remembered that Petitioner did in fact bring his car in for repairs and that Petitioner and his kids got stood up at the repair shop by Miller. *Id.*, ¶¶ 4-5. Even though Roberts could not remember the date, the fact that he remembers Cote being stood up by Miller substantiates Cote's version of events and the date on which they occurred.

Herrera, 506 U.S. at 396 *with* Pet. App. 62. Furthermore, the newly discovered evidence in this case is internally consistent, is not rife with hearsay statements, provides a convincing account of the offense, and is offered by a petitioner who has always professed his innocence. *Contra Herrera*.

[8] Beltran's memory failed him at trial when he testified due to the intervening two years between the repair and the trial.

[9] Beltran rented a spot adjacent to Roberts' shop where Beltran operated an air conditioning repair business.

Roberts' statement also corroborates Miller's declaration that he and Fees used Cote's rental car as an opportunity to frame Cote. In light of this evidence, Cote's version of events supports his claim of actual innocence.

Finally, the prosecution wanted Rearick to testify that Cote made several phone calls to Morrell at Beverly Manor in the time leading up to his death. 3 RT 424-32, 452. However, her testimony was far from conclusive. First, Rearick's testimony that someone called Morrell at work is also consistent with Miller's declaration that Fees pretended to be Cote when calling and threatening Morrell. Second, Rearick's original statement to police was that a person with a "very raspy threatening voice" called Morrell at work on the day of the murder and threatened him. District court docket 32, lodgment 6, Ex. B-209. At trial, when the prosecutor questioned Rearick about the calls she received as a receptionist at Beverly Manor, Rearick answered that she recognized Cote's voice from a phone call he allegedly made to Morrell at Beverly Manor. 3 RT 448. But Rearick never testified, nor did the prosecutor ever establish, that the call from someone with a "very raspy threatening voice" on the day of the murder was from Cote or from someone who "sound[ed]. . . similar" to him.[10] Since Rearick did not know the actual identity of the caller and could not place Cote as the person who called on the day of the murder, it is reasonable to suspect—and consistent with Miller's declaration—that

[10] Rather, Rearick could only testify that a man who "sound[ed]. . . similar" to Petitioner had called Beverly Manor on a couple of occasions. 3 RT 448-49. In fact, Rearick was still unsure in her identification even after the prosecutor tried to rehabilitate her during the lunch recess. 3 RT 442, 446-49.

Fees pretended to be Cote, phoned Morrell at work, and threatened him. Rearick's speculative testimony is not strong enough to disprove Cote's showing of innocence.[11]

Because Cote meets the standard for relief on his actual innocence claim, he necessarily satisfies the lower standard to excuse any procedural bars. The district court erred in denying his actual innocence claim, and also abused its discretion in denying his claim without affording him an evidentiary hearing to further prove his claim. *See* cases cited *infra* at 16.

The cases cited in the magistrate judge's report do not compel a different conclusion. For example, the report cites *Jones*, 763 F.3d at 1248, for the point that "[r]ecantations such as Miller's are generally insufficient to affirmatively prove innocence" and have "inherent problems." Pet. App. 20-21. But the recantations in *Jones* were "insufficient to prove Jones's innocence" because they were "all from Jones's family members, which reduces their weight and reliability." 763 F.3d at 1249. Further, two of the recanting witnesses did not see the sexual abuse that was the subject of the charges and conviction. *Id.* Miller's recantation suffers from none of these infirmities: He is unrelated to Cote, is the admitted actual killer, and has personal knowledge of who hired him to kill Morrell.

The recantation in *Allen v. Woodford*, 395 F.3d 979, 994 (9th Cir. 2005) (Pet. App. 16), was "unreliable because [the recanting witness's] trial testimony

[11] It is also notable that Rearick had been to Cote's house after the alleged call, met with him and Jane, and never mentioned Cote's alleged call to either of them. 3 RT 428.

implicating Allen is consistent with the other evidence, while his recantation is not," and the recantation was inconsistent with petitioner's trial testimony. That is not the case here; Miller's recantation is consistent with Cote's trial testimony and with the defense theory of the case at trial.

In *Graves v. Cockrell*, 351 F.3d 143 (5th Cir. 2003), cited in page 17 of the Report (Pet. App. 21), on rehearing the Fifth Circuit granted a COA on the claim of actual innocence to excuse a procedural default. *Graves v. Cockrell,* 351 F.3d 156, 158 (5th Cir. 2003). The court did so even though the state court had found the recanting witness's "statements to be incredible and unreliable" and denied the innocence claim on the merits, 351 F.3d at 151, state court adjudications and fact findings that are absent in Cote's case.

In *Christian v. Frank*, 595 F.3d 1076, 1084 n.11 (9th Cir. 2010), the recantation was rejected only after an evidentiary hearing where the recanting witness testified. Despite his requests, Cote has never received such a hearing.

In sum, Cote's new evidence calls into question the central proof connecting him to the crime and constitutes "substantial evidence pointing to a different suspect." *House*, 547 U.S. at 554. "[H]ad the jury heard all the conflicting testimony[,] it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." *Id.* Cote should at least receive an evidentiary hearing on his claim. *Schlup*, 513 U.S. at 331-32; *Clark v. Cate*, 581 Fed. Appx. 654, at *2 (9th Cir. June 27, 2014); *Lisker v. Knowles*, 463 F. Supp. 2d 1008, 1042 (C.D. Cal. 2006). Cote meets the "low" threshold for a COA.

C. The Court Should Grant a COA on the False Evidence Claim

Ground Two of the Petition alleges that the prosecution knowingly presented false evidence when it presented Miller's testimony. Pet. App. 6, 33; Petition at 5; Traverse at 21-22. As noted by Respondent in his Answer, Cote exhausted this claim by presenting it to the California Supreme Court in a habeas petition in 2011. Answer (district court docket 45 at 2). The state supreme court denied the petition on procedural grounds and did not address the merits of the claim. *Id.*; Pet. App. 33, 46. Consequently, § 2254(d) does not apply and the Court reviews the claim *de novo*. Supra at 7.

The State violates a criminal defendant's Fourteenth Amendment right to due process when it presents false or misleading evidence and the prosecutor knew or should have known of the false or misleading nature of the evidence. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). Even if the prosecutor does not knowingly solicit false evidence, he or she must correct it "when it appears." *Napue*, 360 U.S. at 269.

As shown in the preceding section, the prosecution's star witness, Miller, testified falsely, and the prosecutor knew or should have known of the false testimony and corrected it "when it appear[ed]." Relief is required because there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.*; *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008).

The report rejected Cote's claim on the ground that "[t]he version to which Miller testified to at trial is consistent with other evidence pointing to petitioner's

guilt and is equally likely to be true as the version given in Miller's recantation." Pet. App. 34. But the prosecutor's duty is to see "that justice shall be done" and "to refrain from improper methods calculated to produce a wrongful conviction," *Berger v. United States*, 295 U.S. 78, 88 (1935), not to present testimony that has a 50-50 chance of being true. If there is a question whether the prosecutor knew or should have known that Miller's testimony was false or misleading, the district court should have granted Cote a hearing to further prove this point rather than deny relief on a cold record. Cote is entitled to a COA on this claim.

D. The Court Should Grant a COA on the Claim of Wrongful Exclusion of Third Party Culpability Evidence

Cote alleges in Ground Three of his Petition that the trial court denied his rights to a complete defense, to confront the evidence against him, and to due process by excluding evidence of third-party culpability, namely, evidence that Fees, not Cote, hired Miller to kill Morrell. Pet. App. 6, 35; Petition at 6. The trial judge repeatedly denied Cote's efforts to present third-party culpability evidence. *See*, *e.g.*, 3 RT 346-53; 4 RT 478-80; 6 RT 903-13. The relevant state court decision on the claim is the California Court of Appeal's unpublished opinion affirming the judgment. Pet. App. 35, 60-62. Assuming that § 2254(d) applies to this claim, it does not bar relief.

"In *Chambers v. Mississippi*, 410 U.S. 284 . . . (1973), the United States Supreme Court clearly established that the exclusion of trustworthy and necessary exculpatory testimony violates a defendant's due process right to present a defense."

Cudjo v. Ayers, 698 F.3d 752, 754 (9th Cir. 2012). "Supreme Court precedent [also] makes clear that questions of credibility are for the jury to decide." *Id.* at 763.

Although the report correctly notes that Miller's declaration was not in front of the trial or appellate court on this claim, Pet. App. 38, Fees' testimony at the 402 hearing was. The evidence proffered during the 402 hearing circumstantially and directly linked Fees to the murder-for-hire scheme. Fees testified that he spoke with his roommate, James Ritter, about the potential murder of Morrell. 6 RT 864. When combined with Fees' testimony that he was friends with Miller, knew where Morrell lived, had followed Morrell home, had contemplated various methods by which to injure or kill Morrell, and Elledge's testimony that Fees had access to the office master key, Pet. App. 83, there existed ample direct and circumstantial evidence that Fees solicited someone to kill Miller. The state court's determination otherwise was based on an unreasonable determination of facts under § 2254(d)(2). *Maxwell v. Roe*, 606 F.3d 561, 568, 576 (9th Cir. 2010).

The Court of Appeal's ruling is also contrary to and an unreasonable application of clearly established federal law under § 2254(d)(1). Fees testified that he had developed various methods by which to injure or kill Morrell and that he had a friendship with Miller. He further testified that he knew of Morrell's schedule, his whereabouts, etc. As a result, the Court of Appeal concluded that Fees had both motive and opportunity to commit or solicit Morrell's murder. Yet Cote was prevented from presenting trustworthy, material, exculpatory evidence in the form of Fees' testimony and a third-party culpability defense (i.e., the opportunity to also

cross-examine Miller on Fees' involvement). The Court of Appeal's arrival at a different result than pronounced in *Chambers*, 410 U.S. 284, was contrary to clearly established federal law.[12] *See Cudjo*, 698 F.3d at 762. The report errs in concurring with the state court's decision. Here, as in *Chambers*, the "exclusion of . . . critical evidence, coupled with the State's refusal to permit [the defendant] to cross-examine [another key witness], denied" due process. 410 U.S. at 302; *see also Cudjo*, 698 F.3d at 765-66. Cote meets the low threshold for a COA on this claim.

E. The Court Should Grant a COA on the Ineffective Assistance Claim

Ground Four of the Petition alleges that Cote's trial lawyers provided prejudicially deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), by failing to investigate Miller's purchase of the gun, introduce evidence of repair receipts for Miller's car, call witnesses to corroborate Cote's testimony that he sometimes gave his employees cash advances, and present evidence that Miller stole a master key and had access to the victim's apartment and car. Pet. App. 6, 40-41; Petition at 5-6. Cote presented this claim in the habeas petition he filed in the California Supreme Court in 2011. Pet. App. 41. The court summarily denied the claim on procedural grounds and did not adjudicate the merits of the claim. Pet.

[12] The report also notes that Miller's declaration is contradicted by Fees' testimony at the 402 hearing. However, there is nothing inconsistent between the two statements. Fees suggests killing Morrell. Fees knew where Morrell lived. Petitioner told Fees not to do anything to Morrell because it would implicate Petitioner. Fees told Petitioner to go to Mexico, thereby making Petitioner look like he was fleeing authorities. Each of these facts is consistent with Fees' guilt and with Petitioner's role as a patsy.

App. 46. Accordingly, 28 U.S.C. § 2254(d) does not apply and the Court reviews the claim *de novo*.

The report underestimates the prejudice from counsel's failures. Testimony by Rott that Miller bought the murder weapon before receiving checks from Cote would have undermined Miller's testimony about how much money Cote allegedly gave him to buy the gun and would have bolstered Cote's testimony and defense. Testimony by defense investigator Gunderson that Miller's car was in a repair shop at or near the time of the murder would have corroborated Cote's testimony that he wrote the checks to Miller as an advance to pay for the repairs. This is particularly so given the Lego and Elledge declarations stating that Cote regularly gave employees advances. This omitted evidence would have raised a reasonable doubt of Cote's guilt in the mind of at least one juror, and therefore was prejudicial. *See Strickland*, 466 U.S. at 695; *Weeden v. Johnson*, 854 F.3d 1063, 1071 (9th Cir. 2017). The Court should grant a COA on this claim.

VI. CONCLUSION

For the foregoing reasons, the Court should grant Cote's petition, reverse the judgment of the Ninth Circuit, and grant a COA on each of Petitioner's claims.

Respectfully submitted,

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