

13-56289

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES EDWARD HARDY,

Petitioner-Appellant,

v.

KEVIN CHAPPELL,

Respondent-Appellee.

On Appeal from the United States District Court
for the Central District of California

Case No. CV 11-07310-VAP
The Honorable Virginia A. Phillips, Judge Presiding

**PETITION FOR REHEARING WITH
RECOMMENDATION FOR REHEARING EN BANC**

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INTRODUCTION

In its published opinion, the majority opined that all seven justices of the California Supreme Court failed to “correctly conceptualize and apply” (Slip Op. at 26) the well established and often utilized prejudice standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Although the state supreme court articulated the correct standard for determining prejudice in its unanimous 57-page opinion, a fact which the majority conceded, the majority opined that in practice the court applied an entirely different and incorrect standard, one of substantial evidence. The majority opined that the state supreme court’s inability to understand and correctly apply the *Strickland* prejudice standard rendered its finding of no prejudice contrary to clearly established federal law. The majority further opined that even if the state supreme court understood the correct standard “but simply camouflaged” (Slip Op. at 26) its understanding with different phrasing, its application of the prejudice standard was unreasonable. These two findings enabled the majority to circumvent the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2254, and reweigh the evidence presented at trial. As Judge Callahan noted in her strongly worded dissent, the Supreme Court has repeatedly instructed the Ninth Circuit to refrain from doing so.

Therefore, this case presents two questions of exceptional importance warranting rehearing: (1) whether the California Supreme Court correctly understood and applied the well-known *Strickland* prejudice standard; and (2) assuming the correct standard was applied, whether the California Supreme Court's finding of no prejudice was reasonable in light of the compelling evidence of his guilt as a conspirator and aider and abettor. Moreover, the majority's opinion is in direct conflict with the Supreme Court decision in *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), and this Court's recent en banc decision in *Mann v. Ryan*, ___ F.3d ___ WL 3854234 (9th Cir. 2016) (en banc). Rehearing en banc is necessary to resolve these issues. *See* Fed. R. App. Proc. 35(b)(1)(A), (B). In addition, panel rehearing should be granted to correct or modify the published opinion with regard to both the location of the victims' home and crime scene. *See* Fed. R. App. Proc. 40.

PROCEDURAL HISTORY

On May 21, 1981, Nancy Morgan and her eight-year-old son Mitchell were brutally stabbed to death as they slept in their home. Nancy's husband Clifford Morgan, Petitioner, and Mark Anthony Reilly were subsequently arrested, charged, and tried by a jury for the crimes. Although the prosecution's primary theory was that Petitioner was the actual stabber, it

also presented the jury with derivative liability theories of conspiracy and aiding and abetting. The jury convicted Petitioner of two counts of first degree murder and one count of conspiracy to commit murder to collect life insurance proceeds. Several special circumstances were also found true. Following a penalty phase trial, Petitioner was sentenced to death.¹

On direct appeal, the California Supreme Court struck one of the multiple murder special circumstances. In all other respects the judgment was affirmed.

Petitioner filed a habeas corpus petition in the California Supreme Court, and the court ordered a reference hearing. At the hearing, evidence was presented that a key prosecution witness, Calvin Boyd, was the person who stabbed Nancy and Mitchell to death, not Petitioner. Petitioner filed a second state habeas corpus petition alleging, in part, that defense counsel's failure to investigate and present evidence of Boyd's involvement in the murders amounted to ineffective assistance of counsel.

The California Supreme Court consolidated the petitions. In its opinion, the court agreed that defense counsel's performance was deficient,

¹ Morgan and Reilly were also convicted of capital murder charges, and Reilly was sentenced to death following a penalty phase trial. Morgan's penalty phase trial was severed due to his health. He died of bone cancer before a penalty phase trial was conducted.

and it found that Petitioner suffered prejudice during the guilt phase. The court granted the petition on that issue and vacated the judgment of death. Petitioner was subsequently resentenced to two consecutive sentences of life in prison without the possibility of parole plus a consecutive sentence of twenty-five years to life.

With respect to prejudice during the guilt phase, the court found that ample evidence was presented of Petitioner's involvement in the murders as a conspirator and an aider and abettor. The court found that there was a reasonable probability that Petitioner would still have been convicted of the murders under the derivative liability theories, and therefore he failed to demonstrate that the outcome at trial would have been different had defense counsel investigated and presented evidence regarding Boyd.

Petitioner sought federal habeas corpus relief. The district court found that the state supreme court reasonably rejected Petitioner's claim that he suffered guilt phase prejudice. It denied the petition and dismissed it with prejudice. The district court granted a certificate of appealability limited to the issue of whether the California Supreme Court "reasonably concluded that Petitioner was not prejudiced as a result of his counsel's failure to uncover and expose the fact that a key government witness, Calvin Boyd, was probably the person who committed the murders."

Over a sharp dissent by Judge Callahan, a majority of this Court reversed the district court and held in a published opinion filed on August 11, 2016, that (1) the California Supreme court misunderstood and misapplied the *Strickland* prejudice standard; and (2) even if court correctly understood the standard, but phrased it incorrectly, its application of the standard was unreasonable. A copy of the opinion is attached to this Petition.

ARGUMENT

I. THE PUBLISHED OPINION SHOULD BE CORRECTED OR MODIFIED WITH REGARD TO THE LOCATION OF THE VICTIMS' HOME AND THE CRIME SCENE

In its published opinion, the majority erroneously states that the victims, Nancy and Mitchell Morgan, lived in an apartment complex with defendant Clifford Morgan on Vose Street in Van Nuys, California. The Morgan family actually lived in a single family home on Saticoy Street. (*See* Testimony of Clifford Morgan, 44RT 11323.) Nancy and Mitchell were stabbed to death in this home on May 21, 1981. Although the majority states that its summary of the facts was taken from the district court's order, which in turn relied on the California Supreme Court's opinion in *In re James Edward Hardy*, 41 Cal. 4th 997 (2007), neither the order nor the opinion state that the Morgans resided at the Vose Street apartments at the

time of the murders. Therefore, Respondent respectfully requests that the opinion be corrected or modified to reflect the correct location of the victims' home and the crime scene.

II. REHEARING EN BANC SHOULD BE GRANTED BECAUSE THE MAJORITY INCORRECTLY DETERMINED THAT THE CALIFORNIA SUPREME COURT MISUNDERSTOOD AND MISAPPLIED THE *STRICKLAND* PREJUDICE STANDARD; IT FURTHER INCORRECTLY DETERMINED THAT, IN ANY EVENT, THE CALIFORNIA SUPREME COURT'S APPLICATION OF THE PREJUDICE STANDARD WAS UNREASONABLE

As amended by the AEDPA, 28 U.S.C. § 2254(d) constitutes a “threshold restriction” on federal habeas corpus relief for state prisoners, *Renico v. Lett*, 559 U.S. 766, 773 n.1 (2010), that “bars relitigation of any claim ‘adjudicated on the merits’ in state court” – subject to two narrow exceptions, *Harrington v. Richter*, 562 U.S. 86, 98 (2011). These exceptions require a petitioner to show that the state court’s previous adjudication of the claim either (1) 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) was “‘based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.’” *Harrington v. Richter*, 562 U.S. at 97-98 (quoting § 2254(d)).

In the instant case, the majority incorrectly determined that the California Supreme Court’s application of the *Strickland* prejudice standard was contrary to, and an unreasonable application of, clearly established federal law. This decision enabled the majority to circumvent the restrictions of the AEDPA and reweigh the evidence presented at trial. As Judge Callahan aptly stated in her dissent, “the majority manufactures a legal standard that the state supreme court never utilized and refuses to recognize the reasonableness of the alternative bases of guilt identified by that court.” (Slip. Op. at 33.) As set forth below, the majority’s opinion is based on a gross misinterpretation of the California Supreme Court’s analysis and a complete disregard for the compelling evidence of Petitioner’s guilt as a conspirator and aider and abettor.

A. The California Supreme Court Correctly Applied The Reasonable Probability Standard, And Thus This Case Is Governed By The AEDPA

Under *Strickland*, prejudice requires a showing of a “reasonable probability that, but for counsel’s unprofessional errors, the result of the [trial] would have been different.” *Strickland*, 466 U.S. at 694. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Id.*; see also *Woodford v. Visciotti*, 537 U.S. at 22. “The

likelihood of a different outcome must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693).

In the instant case, the California Supreme Court was tasked with determining whether Petitioner suffered prejudice as a result of defense counsel’s failure to investigate and present evidence at trial that Calvin Boyd was likely the person who murdered the victims. In the very first paragraph of its analysis, the supreme court correctly set forth the *Strickland* prejudice standard, a fact which the majority conceded. *See In re James Edward Hardy*, 41 Cal. 4th at 1018-19; Slip. Op. at 15, 26. It thereafter summarized the evidence presented at the reference hearing. Citing directly to *Strickland*, the supreme court then asked, “After weighing the available evidence, its strength and the strength of the evidence the prosecution presented at trial, can we conclude petitioner has shown prejudice? That is, has he shown a probability of prejudice ‘sufficient to undermine confidence in the outcome’?” *Id.* at 1025.

The supreme court found that Petitioner was prejudiced during the penalty phase and it vacated the judgment of death. In doing so, the supreme court specifically stated that a “more favorable result was *reasonably probable* had this evidence been presented to the jury.” *In re James Edward Hardy*, 41 Cal. 4th at 1036, emphasis added. There can be

no dispute that the supreme court correctly applied the reasonable probability standard when it analyzed whether Petitioner suffered prejudice during the guilt phase. The court clearly articulated and applied the correct standard under *Strickland*.

However, the supreme court found that there was compelling evidence presented at the trial of Petitioner's guilt as a conspirator and an aider and abettor. The court reviewed the evidence presented at the reference hearing regarding Boyd's involvement in the murders and stated as follows:

After weighing the evidence and considering what petitioner's trial would have looked like had he been represented by competent counsel, we conclude that although there is a *reasonable probability* the jury would not have convicted petitioner on the prosecution's proffered theory that he was the actual killer, ample evidence remains that petition was guilt of the murders on the alternative theories that he conspired with, and aided and abetted, Reilly, Morgan and others to commit the murders.

In re James Edward Hardy, 41 Cal. 4th at 1030 (citation omitted, emphasis added). The supreme court went on to conclude as follows:

Because petitioner would have been convicted of two first degree murders on these two theories of derivative liability irrespective of [defense counsel's] unreasonable failure to investigate and present evidence of the Boyd connection, petitioner fails to demonstrate

he would have achieved *a more favorable outcome* at the guilt phase had [defense counsel] competently investigated the Boyd connection. Accordingly we conclude petitioner fails to demonstrate prejudice at the guilt phase flowing from [defense counsel's] deficient representation. (*Strickland, supra*, 466 U.S. at pp. 687-688.)

In re James Edward Hardy, 41 Cal. 4th at 1030 (emphasis added).

Despite the California Supreme Court's correct recitation and application of the reasonable probability standard, the majority found that it actually applied the substantial evidence standard to determine whether Petitioner was prejudiced. This was based on the supreme court's description of the evidence of Petitioner's guilt as a conspirator and aider and abettor as "substantial." *In re James Edward Hardy*, 41 Cal. 4th at 1028-30. The majority's finding is based on a complete misinterpretation of the California Supreme Court's analysis. As Judge Callahan aptly noted in her dissent:

The court used the term "substantial evidence" interchangeably with "ample evidence" or "overwhelming evidence" to underscore the strong evidence of [Petitioner's] guilt as a conspirator and an abettor. Given that the court's opinion "painstakingly describes the *Strickland* standard," its use of the term "substantial" and not another modifier of the majority's choosing "may perhaps be imprecise, but . . . it can no more be considered a repudiation of the standard than can [the Supreme] Court's own occasional indulgence in the same imprecision."

(Slip Op. at 42-43, quoting *Woodford v. Visciotti*, 537 U.S. at 23-24; footnote omitted.)

In reaching its ultimate finding, the majority deliberately disregarded both Supreme Court precedent and the precedent of this very Court. In *Woodford v. Visciotti*, the Supreme Court addressed an issue nearly identical to the one in the instant case. There, the California Supreme Court correctly recited the reasonable probability standard in its opinion in connection with the *Strickland* prejudice standard, but thereafter in four instances “used the term ‘probable,’ without the modifier ‘reasonably.’” *Woodford v. Visciotti*, 537 U.S. at 22-23. This Court held that the state supreme court’s decision was, therefore, contrary to *Strickland*. The Supreme Court reversed this Court, stating as follows:

The Court of Appeals made no effort to reconcile the state court’s use of the term “probable” with its use, elsewhere, of *Strickland*’s term “reasonably probable,” nor did it even acknowledge, much less discuss, the California Supreme Court’s proper framing of the question as whether the evidence “undermines confidence” in the outcome of the sentencing proceeding. This readiness to attribute error is inconsistent with the presumption that state courts know and follow the law. It is also incompatible with § 2254(d)’s “highly deferential standard for evaluating state court rulings,” which demands that the state court decisions be given the benefit of doubt.

Id. at 24 (citations omitted).

This Court revisited this issue in the recent en banc case of *Mann v. Ryan*, 2016 WL 3854234. In that case, the defendant argued that the state post-conviction court applied a “more-likely-than-not” standard to evaluate prejudice under *Strickland*, as opposed to the reasonable probability standard. *Id.* at *11. This Court found that the standard the court used was “not clear on the surface of its decision.” *Id.* This Court evaluated the entire opinion and concluded “the more logical inference here is that the standard used by the state post-conviction court was the correct reasonable probability standard.” *Id.* This Court noted that although “the court did not clearly state the standard it applied,” it indicated the claim was controlled by a state supreme court case that “adopted the reasonable probability standard.” *Id.* This Court then explained its role under the AEDPA as follows:

At worst, the state court opinion is ambiguous. But as we have noted in the past, under AEDPA we must do more than find the statement ambiguous. Our analysis starts with a presumption that state courts know and follow the law. Next, we determine what arguments or theories supported or could have supported the state court’s decision. Finally, we ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of th[e Supreme] Court.

Id. (citations and internal quotation marks omitted). This Court held that it was “possible to read the state court’s decision in a way that comports with clearly established federal law,” and concluded, “[u]nder AEDPA, because we can read the decision to comport with clearly established federal law, we *must do so.*” *Id.* (emphasis added).

In the instant case, the majority flatly ignored the holdings in *Woodford v. Visciotti* and *Mann v. Ryan*. As set forth above, the California Supreme Court correctly articulated and applied the reasonable probability standard. Even assuming its use of the term “substantial evidence” was somehow imprecise or ambiguous, the majority refused to even attempt to read the opinion in a way that comports with *Strickland*. Rather, as Judge Callahan cogently pointed out, “[t]he majority assumes the worst of the state supreme court . . . refusing to even attempt to reconcile the state court’s use of the term ‘substantial evidence’ with its proper framing of the *Strickland* prejudice standard.” (Slip Op. at 43, citation omitted.)

In sum, the majority’s finding that the California Supreme Court misunderstood and misapplied the *Strickland* prejudice standard is based on a complete misinterpretation of the court’s opinion, a misinterpretation that allowed the majority to disregard the restrictions set in place by the AEDPA and reweigh the evidence presented at trial. As set forth above, the Supreme

Court has repeatedly instructed this Court to refrain from doing so.

Rehearing en banc should, therefore, be granted to correct the majority's errors.

B. The California Supreme Court's Finding Of No Prejudice Was A Reasonable Application of *Strickland*

The majority also found that even assuming the California Supreme Court correctly understood and applied the reasonable probability standard, its application was unreasonable. As in *Richter*, the majority's "analysis illustrates a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system." *Harrington v. Richter*, 562 U.S. at 104.

A state court engages in an "unreasonable application" of federal law if it identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies it to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 413 (2000). "In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."

Harrington v. Richter, 562 U.S. at 111. Rather, “[t]he likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112.

In the instant case, the California Supreme Court meticulously evaluated the evidence presented at both the trial and reference hearing to determine whether defense counsel’s failure to investigate and present evidence of Boyd’s involvement in the murders was prejudicial. The court found that “[s]ubtracting Boyd’s testimony, the evidence that petitioner was the actual killer was weak and circumstantial.” *In re James Edward Hardy*, 41 Cal. 4th at 1022. The court noted that testimony by Petitioner’s girlfriend, Colette Mitchell, regarding statements Petitioner made about the actual murder were “contradictory and equivocal,” and found that the statements did “not strongly support the prosecutor’s theory that he was the actual killer.” *Id.* at 1024-25.

However, the supreme court correctly noted that “although the prosecutor proceeded primarily on the theory that petitioner was the actual killer, he also presented to the jury two theories of derivative liability: conspiracy, and aiding and abetting.” *In re James Edward Hardy*, 41 Cal. 4th at 1025. As set forth by the court in detail in its opinion, there was ample evidence of Petitioner’s participation “in a conspiracy to kill Nancy and Mitchell Morgan for financial gain.” *Id.* at 1028. As the court noted,

“[the] jury relied, at least in part, on a conspiracy theory to convict petitioner, for is separately convicted him of conspiracy to commit murder for purposes of insurance fraud in violation of section 182.” *Id.* at 1029. For the same reasons, the court correctly concluded there was compelling evidence of Petitioner’s guilt as an aider and abettor. *Id.* at 1030. Based on such evidence, the court correctly found that it was not reasonably probable that the outcome of trial would have been different had defense counsel investigated and presented evidence of Boyd’s involvement in the murders. *Id.* at 1030.

Despite the California Supreme Court’s correct application of the *Strickland* prejudice standard, the majority incorrectly found that the court’s application was unreasonable. To reach this conclusion, the majority flatly ignored the fact that the jury was presented with two alternative theories of guilt – conspiracy and aiding and abetting. As aptly noted by Judge Callahan in her dissent, the majority’s contrary finding “is refuted by the record and the jury’s verdict.” (Slip Op. at 46.) In addition, as Judge Callahan also pointed out, “[t]he majority’s contrary assessment of the evidence and legal arguments in this case turns on two errors of law.” (Slip Op. at 47.) The majority first incorrectly found that “an aid-and-abet theory is wholly distinct from an actual killer theory and the jury could not

simultaneously have found both true.” (Slip Op. at 19.) This finding conflicts with this Court’s recent unanimous en banc decision in *Taylor v. Beard*, 811 F.3d 326, 327, 331 (9th Cir. 2016) (en banc). Second, the majority incorrectly found that Petitioner’s involvement in the overt acts of the conspiracy were too minor to establish guilt. Judge Callahan rightly noted, “[a] conspiracy requires the commission of an overt act but does not distinguish between major and minor acts.” (Slip Op. at 47-48.)

The majority further incorrectly found that “it is reasonably likely the jury would have had a reasonable doubt” of Petitioner’s guilt as a conspirator and aider and abettor if the evidence of Boyd’s involvement in the murders had been presented at trial. This conclusion is incorrect because the Boyd evidence only called into question the evidence presented that Petitioner was the stabber. It had no impact on the ample evidence of Petitioner’s guilt as a conspirator and aider and abettor. The majority disagreed, so it impermissibly re-weighed the evidence and found that the California Supreme Court’s application was unreasonable simply because the majority reached a different conclusion. But, as Judge Callahan noted, even if the supreme court’s “conclusion were erroneous, under AEDPA, we are not authorized to re-weigh the evidence to correct it.” (Slip Op. at 51.) As the Supreme Court has specifically instructed this Court, “even a strong

case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. at 102. Therefore, rehearing en banc should be granted to correct the majority's errors.

C. Conclusion

Here, the majority failed to afford the California Supreme Court's findings the proper deference required by the AEDPA. *See Hurles v. Ryan*, 706 F.3d 1021, 1050 & n.5 (9th Cir. 2013) (Ikuta, J., dissenting) (collecting cases and stating: "The Supreme Court has harshly criticized our non-compliance with AEDPA deference."); *see also Cavazos v. Smith*, 565 U.S. 1, 6-9 (2011) (per curiam) (reinstating California conviction for assault on a child resulting in death); *Premo v. Moore*, 562 U.S. 115, 131-33 (2011) (reinstating Oregon conviction for murder of a kidnap victim); *Felkner v. Jackson*, 562 U.S. 594, 597-98 (2011) (per curiam) (reinstating California conviction for sexual attack on a 72-year-old woman); *Cullen v. Pinholster*, 563 U.S. at 170, 202-03 (2011) (certiorari granted following three-judge dissent from en banc decision granting habeas relief; opinion reversing en banc decision severely limited evidence that may be considered by federal habeas courts); *Knowles v. Mirzayance*, 556 U.S. 111, 114 (2009) (reinstating California first-degree murder conviction); *Rice v. Collins*, 546 U.S. 333, 335 (2006) (reinstating California conviction for cocaine

possession following published dissents of six judges from denial of rehearing en banc of panel decision granting habeas relief for jury selection error); *Kane v. Garcia Espitia*, 546 U.S. 9, 10-11 (2005) (per curiam) (reinstating California conviction for carjacking and other offenses); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam) (reversal following published five-judge dissent from denial of rehearing en banc of panel decision granting habeas relief for ineffective assistance of counsel); *Early v. Packer*, 537 U.S. 3, 10 (2002) (per curiam) (reversal following denial of rehearing en banc of split panel's grant of habeas relief); *Woodford v. Visciotti*, 537 U.S. at 20-21 (reinstating capital sentence for California prisoner convicted of first-degree murder, attempted murder, and armed robbery).

As set forth above, the majority incorrectly found that the California Supreme Court's application of the *Strickland* prejudice standard was

contrary to, and an unreasonably application of, clearly established federal law. Rehearing en banc should be granted so the majority's errors can be corrected.

Dated: September 15, 2016

Respectfully submitted,

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ATTACHMENT

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

<p>JAMES EDWARD HARDY, <i>Petitioner-Appellant,</i></p> <p>v.</p> <p>KEVIN CHAPPELL, <i>Respondent-Appellant.</i></p>	<p>No. 13-56289</p> <p>D.C. No. 2:11-cv-0731-VAP-PJW</p> <p>OPINION</p>
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Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted October 20, 2015
Pasadena, California

Filed August 11, 2016

Before: Harry Pregerson and Consuelo M. Callahan,
Circuit Judges, and Stanley Allen Bastian, District Judge.*

Opinion by Judge Bastian;
Dissent by Judge Callahan

* The Honorable Stanley Allen Bastian, District Judge for the U.S. District Court for the Eastern District of Washington, sitting by designation.

SUMMARY**

Habeas Corpus

The panel reversed the district court's judgment denying California state prisoner James Edward Hardy's habeas corpus petition challenging his convictions for two counts of first degree murder and one count of conspiracy to commit murder to collect life insurance proceeds, in a case in which the California Supreme Court concluded that (1) trial counsel rendered deficient performance under *Strickland v. Washington* by failing to investigate and present evidence that Calvin Boyd, a prosecution witness, was likely the actual killer; and (2) Hardy suffered no prejudice from the deficient performance because there was substantial evidence to convict him under an aid-and-abet or conspiracy theory.

The panel held that to the extent that the California Supreme Court found the *Strickland* prejudice prong was not met because substantial evidence remained to convict Hardy under a different theory, it applied a standard contrary to clearly established law. The panel explained that under *Strickland*, the standard is whether there is a reasonable probability that, absent the errors by counsel, the factfinder would have had a reasonable doubt respecting guilt. Because the state court used the wrong standard, the panel did not need to defer under AEDPA to the state court's decision, and analyzed Hardy's constitutional claim de novo.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that under de novo review, Hardy was clearly prejudiced in the guilt phase by trial counsel's deficient performance. The panel wrote that had counsel properly investigated and presented evidence that Boyd—the state's key witness—actually committed the murders, there is a substantial probability the jury would have come to a different conclusion.

The panel held that assuming that the California Supreme Court did correctly conceptualize and apply the *Strickland* prejudice standard but simply camouflaged that understanding with a different—and incorrect—phrasing of the legal standard, its application of the prejudice prong was objectively unreasonable. The panel wrote that Hardy is entitled to relief based on the severity of trial counsel's deficiency, the vital role Boyd's testimony played in securing Hardy's convictions, the lapses of the prosecution, and the dearth of other evidence inculcating Hardy.

The panel remanded with instructions to grant the petition for a writ of habeas corpus.

Dissenting, Judge Callahan wrote that the majority manufactures a legal standard that the state supreme court never utilized and refuses to recognize the reasonableness of the alternative bases of guilt identified by that court; and that the majority's rationale and conclusion are contrary to AEDPA and to the Supreme Court's opinions interpreting the AEDPA standard of review.

COUNSEL

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OPINION

BASTIAN, District Judge:

During the night of May 20, 1981, someone entered the apartment of Clifford and Nancy Morgan and brutally stabbed Nancy Morgan and their eight-year-old son to death. According to the State of California, that someone was James Edward Hardy. The State argued that theory at trial, obtaining a conviction and death sentence for Hardy. As it turns out, that someone was likely Calvin Boyd, a key prosecution witness at Hardy's trial. Yet Hardy remains imprisoned, serving a life sentence.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") raised the standard of review for petitioners, greatly limiting the success rate of petitions for

writs of habeas corpus.¹ Despite the demanding standard set by AEDPA for state inmates, this case does not present a close question—Hardy is entitled to a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Factual and Procedural History²

Clifford Morgan (hereinafter “Morgan”) lived in an apartment complex on Vose Street in Van Nuys, California, with his wife, Nancy, and their eight-year-old son. Morgan devised a sinister plan to have his wife and son killed so he could collect on their life insurance policies. He enlisted the help of Mark Anthony Reilly. Reilly also lived in the Vose Street apartments. Reilly agreed to Morgan’s plan and sought a partner for the murders. In exchange for this help, Morgan allowed Reilly to live in Morgan’s apartment and promised to allow Reilly to manage a bar that Morgan intended to open with the insurance proceeds.

After failing to recruit a kickboxer named Marc Costello, Reilly turned to another Vose Street resident, Calvin Boyd, and Boyd’s friend Marcus. According to Boyd’s trial testimony, Boyd eventually declined to participate in the murders because Reilly was unable to pay him with either

¹ See, e.g., John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 9 CORNELL L. REV. 259 (2006); Lee Kovarsky, *AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007); Judith L. Ritter, *The Voice of Reason—Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act’s Restrictions on Habeas Corpus are Wrong*, 37 SEATTLE U. L. REV. 55 (2013).

² The factual and procedural summary is taken from the district court’s order. The district court relied on the Supreme Court of California. *In re James Edward Hardy*, 41 Cal. 4th 977, 983–87 (2007) (*Hardy II*).

money or cocaine in advance. According to the State, Reilly then tried to recruit Hardy, telling two friends that Hardy might assist him in the crime.

In May 1981, Morgan moved to Carson City, Nevada, ostensibly for business reasons but likely to establish an alibi. During the night of May 20 or morning of May 21, two people, allegedly Hardy and Reilly, used bolt cutters and a key to enter the Morgan residence. Nancy Morgan and her son were sleeping in a back bedroom. Both were stabbed to death. Experts testified that physical evidence suggested at least two persons were responsible for the slayings, which likely occurred between 3:30 and 5:30 a.m.

Michael Mitchell, Reilly's roommate, testified that he returned to the Vose Street apartments and went to sleep sometime after 11:00 p.m on May 20, 1981. Around midnight, he awoke and saw Hardy, Reilly, Colette Mitchell (no relation to Michael Mitchell), and Steven Rice (another neighbor) in the apartment that he shared with Reilly. Later, he heard male voices and heard the shower being used. The next morning, he observed wet towels in the bathroom, but he saw no evidence of blood.

Shortly after the murders, Reilly admitted his guilt to his then-girlfriend Debbie Sportsman and made incriminating statements to her. He told Sportsman that Nancy Morgan said "[p]lease don't kill me," that more than one perpetrator was involved, that bolt cutters had been used to cut the chain lock on the door, and that a fish knife had been used in the stabbings.

Morgan's recent purchase of an unusually large amount of life insurance raised suspicions, as did two incriminating

statements he made to a neighbor—that his wife was worth more dead than alive, and that he expected she would die before him. Sportsman’s testimony linked Reilly to Morgan and human blood was found on Reilly’s shoes. No physical evidence was found that linked Hardy to the murders. The evidence against Hardy consisted largely of the testimony of Calvin Boyd and Colette Mitchell.

Calvin Boyd was the State’s key witness. He testified that shortly after the murders, Reilly admitted that he and Hardy were the killers. Boyd stated Reilly had showed him recently purchased bolt cutters. Boyd claimed he walked through Rice’s apartment the morning of the murders and saw Reilly and Hardy both sleeping—placing the two men together shortly after the crime. Boyd also saw Rice and Colette Mitchell (hereinafter “Mitchell”) in the apartment.

Mitchell was Hardy’s girlfriend at the time of the murders but not at the time of trial. She gave testimony indirectly linking Hardy to the crime. Her initial statements to law enforcement provided Hardy with an alibi, but she changed her story and admitted to perjury. Mitchell contacted Hardy in jail intending to assist him even after she was granted immunity for her testimony. At trial, Mitchell testified she was working at a restaurant on the night of the murders. Hardy, Reilly, and Rice met at the restaurant shortly after 9:00 p.m. and Mitchell served them drinks. They went to the Vose Street apartments around 10:00 p.m. to “party” and use cocaine. Mitchell admitted to doing several large lines of cocaine and drinking at least three beers via a “beer bong.” Mitchell testified to quarreling with Hardy and leaving Reilly’s apartment to go next door. Sometime between midnight and 2:00 a.m., Rice and Mitchell left the apartments to purchase more beer. After returning, Hardy sought her out

at Rice's apartment and told her not to leave because he needed her that night. Despite having an unusually large amount of cocaine—which often would keep her awake—she passed out in Rice's apartment and did not wake until 11:00 a.m. the next day. When she awoke, Hardy was asleep next to her and Reilly was asleep on a sofa.

Mitchell initially told police she had been with Hardy the entire night. At trial, she claimed she was either asleep or passed out for most of the night and did not know if Hardy left the apartment or not. Mitchell claimed Reilly once told her that he and Hardy had left the apartment while she slept but that another time Reilly told her they had not left. Mitchell testified she and Hardy discussed his alibi “all the time.” Mitchell stated Hardy led her to believe he was going to steal something from someone to enable a third person to collect on an insurance policy. Hardy supposedly told her at least twice that he had been to the victims' home on the night of the murders. Hardy claimed he knew the victims were alive when he was there because he heard them snoring. On another occasion, Hardy told Mitchell the victims had already been killed by the time he entered the apartment. Mitchell testified that Hardy said “we were at the house,” but she also stated that he told her “he didn't do it.” Mitchell testified that Reilly admitted to her that he knew who the killer was and it was not Hardy.

Mitchell claimed Hardy said a chain on a door would be cut to give the crime the appearance of a robbery. According to Mitchell, Hardy was to receive a portion of \$40,000 or \$50,000, but he actually only received \$1,000. Mitchell testified she, or someone else, put the \$1,000 in a cedar box. Mitchell said Hardy made several other statements: Morgan was not worried about the trial because during the delay his

insurance proceeds were earning interest; the less she knew about the crime the better off she would be; Reilly was in charge of the situation; Hardy knew for a fact only one person committed the murders; Hardy took something from Morgan's apartment to make it look like a robbery; and the killers used bolt cutters. According to Mitchell's testimony, Hardy asked her and Hardy's brother to retrieve and dispose of an M1 carbine from Hardy's apartment; a firearm of the same style was reported missing from the crime scene. Mitchell also testified that Hardy asked her to destroy some of his shoes after he learned police found a shoeprint at the scene.

At trial, Hardy's attorney, Michael Demby, gave no opening statement and presented no evidence on Hardy's behalf. The jury was instructed that individuals who directly and actively committed the act constituting the crime, those who aided or abetted the commission of the crime, and those who advised and encouraged its commission were equally guilty. An additional aid-and-abet instruction was also given.

Hardy, Reilly, and Morgan were convicted of two counts of first degree murder and one count of conspiracy to commit murder to collect life insurance proceeds. Six special circumstances were found by the jury. The defendants were not convicted on a burglary charge. A joint penalty phase was held for Hardy and Reilly—both were sentenced to death. Morgan died of cancer before he could be sentenced.

On appeal, the California Supreme Court vacated one of the special circumstances but affirmed the judgment in all other respects. The United States Supreme Court denied a petition for writ of certiorari. *Hardy v. California*, 506 U.S. 987 (1992).

On July 26, 1991, Hardy filed a petition for writ of habeas corpus in the California Supreme Court. That court issued an order to show cause why Hardy was not entitled to penalty phase relief because his trial counsel failed to call available mitigation witnesses. On April 28, 1993, the California Supreme Court ordered the Los Angeles County Superior Court to hold a reference hearing and make findings of fact.

The superior court judge heard evidence over several months in 1996 and 1997, where a very different story than the one presented at trial emerged. According to a number of credible witnesses, Boyd made very incriminating statements after the murders, Boyd's alibi for the night of the murders was a sham, and Hardy had refused to participate in the crimes.³ On September 16, 1999, the superior court entered findings of fact and conclusions finding Demby performed deficiently when he failed to investigate and present evidence that (a) Calvin Boyd, a key prosecution witness, was the actual killer, and (b) the murders occurred at a time when Hardy could not have been present.

On May 3, 2000, Hardy filed his Supplemental Allegation to Conform the Pleadings to the Proof, arguing that evidence from the reference hearing also required guilt phase relief. The California Supreme Court issued an order directing the State to show cause why Hardy was not entitled to reversal of his conviction "because he is innocent of the capital crimes of

³ Specifically, the superior court judge found Boyd had admitted his guilt telling a friend "yes, man, I went in to do the lady in and Marcus and I were stumbling through the house, and I went through one room, I tripped upon the kid and grabbed a pillow and put it over his face and stabbed him." The California Supreme Court explicitly adopted this finding.

which he was convicted, because a third party named Calvin Boyd committed the murders, and because [Hardy's] trial counsel rendered constitutionally ineffective assistance of counsel by failing to present evidence demonstrating [Hardy's] innocence." Both of Hardy's state habeas petitions were consolidated for argument and opinion.

On July 26, 2007, the California Supreme Court decided the consolidated petitions. Although that court recognized that the disturbing revelations about Boyd "presented a more difficult decision for the jury and may well have created in the minds of the jurors a reasonable doubt as to petitioner's guilt," it found Hardy could not meet the very difficult burden of an actual innocence claim. *Hardy II*, 41 Cal 4th at 1017–18. As to ineffective assistance of counsel, the California Supreme Court granted Hardy's claim that Demby's performance was deficient at both the penalty and guilt phases of the trial. The court reversed Hardy's death sentence but found Demby's inadequate representation at the guilt phase did not prejudice Hardy because there was "substantial evidence" to convict him under an aid-and-abet or conspiracy theory. *Id.* at 1029–30 ("We conclude substantial evidence supports the theory that petitioner was guilty of first degree murder on a conspiracy theory."). The court also rejected Hardy's actual innocence claim.

The California Supreme Court order specifically adopted several factual findings from the reference hearing, including: (1) Raynell Burney, Rickey Ginsburg, James Moss, Sandra Moss, Michael Small, and Steven Rice testified credibly regarding various incriminating statements and actions made by Boyd; (2) Boyd was not a credible witness; (3) Boyd habitually carried a knife similar to the murder weapon; (4) Boyd had previously committed several assaults with a

knife; (5) Boyd had cuts on his hands after the killings; (6) Boyd's alibi was false; (7) Boyd had motive to commit murder; (8) Boyd testified falsely when he stated at trial that the prosecutor had not promised him anything in connection with his testimony when he was actually granted immunity; and (9) Boyd likely had a role in the murders, very possibly a primary one.

After the State chose not to retry the penalty phase, Hardy was resentenced to consecutive terms of life in prison without the possibility of parole. He was resentenced to twenty-five years to life on the conspiracy charge.

On September 6, 2011, Hardy timely filed a pro se petition for writ of habeas corpus in the United States District Court for the Central District of California. A magistrate judge ordered responsive briefing but denied Hardy's request for appointment of counsel. On May 7, 2013, the magistrate issued a report and recommendation denying all claims. On June 24, 2013, the district court accepted the report and entered judgment denying the petition. The district court issued a certificate of appealability as to "[w]hether the state supreme court reasonably concluded that Hardy was not prejudiced as a result of his counsel's failure to uncover and expose the fact that a key government witness, Calvin Boyd, was probably the person who committed the murders." This appeal was timely filed.

Standards of Review

A district court's decision to grant or deny a habeas corpus petition under 28 U.S.C. § 2254 is reviewed de novo. *Brown v. Ornoski*, 503 F.3d 1006, 1010 (9th Cir. 2007); *Shumway v. Payne*, 223 F.3d 982, 984 (9th Cir. 2000). Facts

found by the district court are reviewed for clear error. *Tapia v. Roe*, 189 F.3d 1052, 1055 (9th Cir. 1999).

AEDPA applies because the petition was filed after the passage of that law. *Jeffries v. Wood*, 103 F.3d 827, 827 (9th Cir. 1996). Under AEDPA, relief may only be granted if the state court decision in question was either “contrary to, or involved an unreasonable application of, clearly established Federal law” or was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” § 2254(d)(1)–(2).

Analysis

The question now is whether the California Supreme Court decision was contrary to, or involved an unreasonable application of, clearly established federal law. The answer is yes; the California Supreme Court decision was contrary to established federal law. Alternatively, we also conclude that the California Supreme Court decision was an unreasonable application of clearly established federal law.

I.

The “clearly established federal law” for an ineffective assistance of counsel claim under the Sixth Amendment derives from *Strickland v. Washington*. 466 U.S. 668 (1984); see *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (“There is no dispute” that *Strickland* is clearly established federal law). *Strickland* established a two-part test: the defendant must show (1) counsel’s performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

The first prong of *Strickland* is not contested here. The California Supreme Court concluded that Demby rendered deficient performance by failing to investigate and present evidence that Boyd was likely the actual killer.⁴ Because neither party questions this conclusion, this Court need only review the findings under the second prong of *Strickland*, which the parties contest.

Under § 2254(d)(1), “contrary to” means “substantially different from the relevant precedent” of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). As an example, the Supreme Court explained that if a state court denied an ineffective assistance of counsel claim for failure to show prejudice by a preponderance of the evidence standard rather than by a reasonable probability of a different result standard, the state court’s ruling would be “contrary to” the clearly established federal law in *Strickland* because the state court would be applying a stricter standard. *Id.* 405–06. This case presents a nearly identical set of circumstances.

The California Supreme Court held that Hardy did not demonstrate the level of prejudice required under *Strickland*. The court concluded that even without Boyd’s testimony, and even if Demby had proven to the jury that Boyd was the actual murderer, substantial evidence remained to permit a jury to find Hardy guilty of murder under an aid-and-abet or conspirator theory.

⁴ The State, with its more abundant resources, should also have discovered Boyd’s role in the crime. Instead, the State concealed the existence of an immunity agreement with Boyd granted Boyd immunity and used him as its key witness against Hardy. The prosecutor’s conduct in this case raises substantial concerns regarding the reliability of Hardy’s conviction even apart from the Demby’s inadequate representation.

Although the California Supreme Court recited the *Strickland* standard, it concluded that because there was “substantial evidence” against Hardy he suffered no prejudice from Demby’s deficient performance. This was not the correct standard, and consequently, the relevant question regarding prejudice at the guilt phase was never properly addressed.

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁵ *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). By applying this standard, the state court created a much higher bar for Hardy than the law required. Under *Strickland*, the court must ask “whether there is a reasonable probability that, absent the errors [by counsel], the factfinder would have had a reasonable doubt respecting guilt.” 466 U.S. at 695. A reasonable probability is “sufficient to undermine confidence in the outcome” and must be substantial, not just conceivable. *Id.* at 693–94. This standard does not mean a petitioner must demonstrate “that counsel’s actions more likely than not altered the outcome.” *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693) (internal quotation marks omitted). Requiring a habeas petitioner to demonstrate that had counsel performed adequately there would not have been sufficient evidence for a jury to convict is more akin to a Fed. R. Crim.

⁵ Substantial evidence is also the standard California courts use in reviewing factual and credibility determinations made by a referee during a reference hearing. *In re Cox*, 30 Cal. 4th 974, 998 (2003). Here, the California Supreme Court properly applied the standard in that portion of its opinion concerning the reference hearing. Whether counsel’s deficient performance prejudiced Hardy, however, is not subject to the substantial evidence standard and is independently reviewed.

P. 29 motion for a judgment of acquittal and has no place in the *Strickland* test. To the extent that the California Supreme Court found the *Strickland* prejudice prong was not met because substantial evidence remained to convict Hardy under a different theory, it applied a standard contrary to clearly established federal law.

This case differs substantially from *Mann v. Ryan*. No. 09-99017, — F.3d —, 2016 WL 3854234 (9th Cir. July 15, 2016) (en banc). In *Mann*, this Court found that the state court’s opinion was ambiguous as to whether it was employing the proper *Strickland* standard. *Id.* at *11. The most logical inference in *Mann*, however, was that the state court judge—who was also the original sentencing judge—applied the proper standard but recited the standard incorrectly. Hardy’s case presents the inverse. Here, the state court correctly recited the *Strickland* standard but then, in its application, abandoned it—replacing it with a substantial evidence standard. As the Supreme Court has made clear, it is the application, not the recitation of a standard that matters for § 2254(d) purposes. *See Sears v. Upton*, 561 U.S. 945, 952 (2010) (per curiam) (“Although the Court appears to have stated the proper [*Strickland*] prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case.”) (footnote omitted). It is apparent on the surface of the California Supreme Court’s decision that it applied an incorrect standard and no inferences need be, nor can be drawn, that could result in finding the state court applied the proper standard. *See Mann*, 2016 WL 3854234 at *11.

Hardy’s petition satisfies the “contrary to” clause of § 2254(d)(1) because the California Supreme Court employed a standard of review which was significantly harsher than the

clearly established test from *Strickland. Id.* (“Had the state post-conviction court applied [a stricter standard] to analyze [Petitioner’s] ineffective assistance of counsel claims, its opinion would have been contrary to clearly established federal law under AEDPA.”). Because the state court used the wrong standard, we need not defer to that decision. *See Panetti v. Quarterman*, 551 U.S. 930, 948 (2007) (explaining that when § 2254(d)(1) is satisfied, a court may review a petition “unencumbered by the deference AEDPA normally requires”). In other words, this Court may analyze Hardy’s constitutional claim de novo pursuant to § 2254(a). *Frantz v. Hazy*, 533 F.3d 724, 735–37 (9th Cir. 2008) (explaining the two step process under AEDPA).

II.

Under de novo review, Hardy was clearly prejudiced in the guilt phase by Demby’s deficient performance. Had Demby properly investigated and presented evidence that Boyd—the state’s key witness—actually committed the murders, there is a substantial probability the jury would have come to a different conclusion. Hardy is entitled to habeas relief because the California Supreme Court applied a standard contrary to clearly established law and because his attorney’s deficient performance was prejudicial at the guilt phase.

At trial, the State’s theory of the case centered on the existence of an “elaborate scheme or plan or design by Mr. Morgan[,] coupled with Mr. Reilly as the middleman[, which] culminated in the hiring of Mr. Hardy or the agreement by Mr. Hardy to go with Mr. Reilly to do the killing.” That is, Morgan hired Reilly to kill his family, Reilly then recruited Hardy, and the two entered Morgan’s apartment where Hardy

killed Morgan’s wife and son. The State argued that Boyd and his friend Marcus had originally been enlisted to burglarize the Morgan residence but had ultimately withdrawn from the scheme.

According to the California Supreme Court, Boyd provided “two critical pieces of evidence” at trial: (1) Boyd testified that Reilly told Boyd that Hardy was the killer, and (2) Boyd saw Hardy and Reilly together just a few hours after the murder at Rice’s apartment.

Most of the other evidence presented against Hardy at trial came from Mitchell. Sportsman also testified that Hardy and Reilly spent a lot of time drinking and doing drugs together during the weeks surrounding the murders.

We note that the California Supreme Court actually did address the prejudicial effect of Demby’s performance but only in relation to Hardy’s actual innocence claim—not as to his ineffective assistance claim. The California Supreme Court found the weight and breadth of the evidence regarding Boyd’s likely participation in the murder “would have presented a more difficult decision for the jury and may well have created in the minds of the jurors a reasonable doubt as to [Hardy’s] guilt.” The evidence regarding Boyd’s likely participation—which included evidence Boyd made incriminating statements before and after the murder, had a false alibi, carried a knife similar to the murder weapon, and had previously committed assaults—is precisely the same evidence that Hardy argues Demby should have investigated and presented at trial. The fact that the California Supreme Court acknowledged, in relation to Hardy’s innocence claim, how such evidence would have created a reasonable doubt as

to Hardy's guilt is equally applicable to Hardy's ineffective assistance of counsel claim.

Nonetheless, the California Supreme Court held Hardy was not entitled to relief on the ineffective assistance of counsel claim because substantial evidence supported a theory Hardy was guilty of first degree murder on a conspiracy theory and on an aid-and-abet theory. Because Hardy was found guilty on a conspiracy charge, and because an aid-and-abet jury instruction was given along with the murder charge, the California Supreme Court concluded no prejudice occurred. Under de novo review, the California Supreme Court clearly erred.

First, as noted, the State's entire theory of the case hinged on Hardy being the actual killer. Under no reasonable reading of the record could it be concluded the jury actually found Hardy guilty under an aid-or-abet theory. When the prosecutor addressed the aid-and-abet theory in his closing argument, he described only Morgan's and Reilly's involvement—*not* Hardy's. Although the jury instruction regarding the murder charge included an aid-and-abet instruction and the jury found Hardy guilty of the murder charge, an aid-and-abet theory is wholly distinct⁶ from an actual killer theory and the jury could not simultaneously have found both true.⁷ Had Demby presented evidence that

⁶ We do not suggest that a prosecutor can never present factually inconsistent theories. Rather, we emphasize that here the prosecutor presented just one theory to the jury: Hardy was the actual killer.

⁷ In *Taylor v. Beard*, this court rejected a petitioner's argument that because the jury found him guilty of being the actual shooter, it could not find him guilty of aiding and abetting. 811 F.3d 326, 327 (9th Cir. 2016) (en banc) (petition for cert. filed). Hardy's case is distinguishable from

Boyd was the killer it would have completely undermined the prosecution's theory of the case. As a result, there is a significant likelihood the jury would not have found that Hardy was guilty of murder beyond a reasonable doubt.

Further, the California Supreme Court found that "[e]vidence of Boyd's incriminating admissions, coupled with other evidence, could have convinced a reasonable jury to entertain some doubt as to the extent of [Hardy's] participation in the murders." The California Supreme Court also stated that had Boyd's participation been revealed at trial it would have "throw[n] some doubt on the scope of [Hardy's] role—said by the prosecutor at trial to be a primary one—in the crimes." These statements indicate the state court believed a jury would have seriously questioned what role, if any, Hardy had in the murders, including under an aid-and-abet theory, had Demby not performed deficiently as Hardy's attorney.

Second, although Hardy was found guilty by the jury of conspiracy to commit murder for insurance proceeds, his conviction rested on being the actual killer. The California

Taylor because Taylor was making a "freestanding innocence" claim and the additional evidence he presented tended to inculcate him further. *Id.* at 333–34. Hardy's *Strickland* claim, however, has a much more yielding standard. Additionally, Taylor was tried alone, a jury agreed on every element of the crime that Taylor essentially admitted to committing, and his jury did not need to agree unanimously on the theory presented. *Id.* at 332 (citing *Schad v. Arizona*, 501 U.S. 624, 631–32 (1991)). In contrast, Hardy was tried with two other co-defendants who were alleged to be the aiders-and-abettors and Hardy was tried as the actual killer. Because of the critical differences in the standards that apply to an actual innocence claim versus the *Strickland* claim in this case and the dissimilar trial procedures used in these two cases, *Taylor* does not control this case.

Supreme Court found the jury relied—at least in part—on a conspiracy theory in convicting Hardy and that sufficient evidence supported the theory. This theory fails for the same reasons the aid-and-abet theory fails. The prosecution argued Hardy was a member of the conspiracy because he agreed to, *and actually did*, commit the murders.⁸ Any remaining evidence linking Hardy to other minor acts involved in the conspiracy does little to rebut that the prosecution’s theory at trial would have been eviscerated had Demby not been deficient.

Additionally, there was at least some evidence adopted by the California Supreme Court that, even if Hardy was involved in the conspiracy at one point, he may have withdrawn from the conspiracy before the commission of the crimes. Hardy may have backed out before the crime was committed because, according to Boyd, Hardy was too “chicken shit to go along.” Whether this withdrawal would have occurred before any overt acts were taken—and therefore been effective—is unclear but it is additional evidence adopted by the state court that would cause a jury to view the conspiracy charge differently. Again, whether the jury could have or even likely would have convicted Hardy under this theory of conspiracy is irrelevant; what matters is the substantial likelihood the jury may not have convicted Hardy had Demby investigated and presented evidence about Boyd’s participation in the crime.

⁸ In his opening statement, the prosecutor stated that “there is no doubt in anyone’s mind or ought to be that Mr. Hardy had the knife in his hand and plunged that knife into the bodies of those two people in excess of 65 times.”

Third, even if the aid-or-abet and conspiracy theories of guilt could supplant what the jury found at trial—that Hardy was the actual killer—it is reasonably likely the jury would have had a reasonable doubt under those theories based on the evidence that should have been presented at trial. The California Supreme Court’s contrary conclusion was incorrect and is unsupported by the record. According to the state court, the substantial evidence that remained to convict Hardy under derivative theories consists almost entirely of Mitchell’s testimony and a few circumstantial statements made by Sportsman.

In support of its finding, the California Supreme Court cites Sportsman’s testimony linking Reilly to the murders. Sportsman testified that the day after the murders she saw Reilly and Hardy laughing and drinking. Sportsman also testified that Reilly encouraged her to speak to Hardy and Mitchell to coordinate alibis. According to Sportsman, Hardy and Reilly started drinking and doing drugs together ten days before the murders.

Beyond Sportsman’s testimony, the California Supreme Court relied solely on Mitchell to provide the “substantial evidence” that Hardy is guilty under a derivative theory. Mitchell testified that Hardy discussed his alibi frequently and that Hardy knew several details about the crimes. Most incriminatingly—according to the California Supreme Court—was that Hardy possessed \$1,000 in \$100 bills after the murders and that he instructed Mitchell to dispose of his shoes and an M1 carbine. The state court, however, recognized the weakness of Mitchell’s testimony—discounting most of it point-by-point. The court noted Mitchell “did not know where the money came from, could not remember who informed her of the money’s origin, and

could not remember the first time she saw the money.” The California Supreme Court added “[t]he persuasive power of [Mitchell’s] testimony was further undermined by the fact she was subject to impeachment due to her drug and alcohol use and that she admitted lying for [Hardy] at his preliminary hearing.”

The California Supreme Court found that Sportsman’s and Mitchell’s testimony *could* support a finding that Hardy was guilty under a derivative theory assuming the jury found the testimony credible and persuasive. As previously explained, however, this is not the correct standard. The question is whether, if Demby had not performed deficiently, it is reasonably likely the jury would have reached a different outcome. Although the federal district court concluded that the jury specifically found Mitchell credible and relied on her testimony, this conclusion was purely speculative and not supported by the record. *See Strickland*, 466 U.S. at 695 (“[E]vidence about the actual process of decision, if not part of the record of the proceeding under review . . . should not be considered in the prejudice determination.”). At least one juror stated that the jury specifically discussed Mitchell’s testimony and determined she was not credible. Further, Mitchell’s testimony would have been discounted by the jury had Demby presented evidence that Boyd’s testimony, which corroborated much of Mitchell’s testimony, was false.

The California Supreme Court described Boyd’s crucial role in Hardy’s trial calling it “extremely damaging to [Hardy’s] case” and stating that he provided evidence “on which the prosecution relied to convict [Hardy].” Removing Boyd’s extremely damaging testimony and its corroborating effect on Mitchell’s testimony would have significantly changed the case as presented to the jury. Despite some

evidence remaining that Hardy may have somehow been involved in the murders under a derivative theory, had Demby not performed deficiently, there is a substantial likelihood the jury would have had a reasonable doubt concerning Hardy's guilt.

Last, *Strickland*'s prejudice prong requires analyzing the evidence that would have been presented had counsel not performed deficiently. *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995). *Strickland* held:

a court hearing an ineffectiveness claim must consider the totality of the evidence before the . . . jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by the errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

466 U.S. at 695–96. *Strickland* does not permit the court to reimagine the entire trial. We must leave undisturbed the prosecution’s case. We only envision what Demby should have presented in Hardy’s defense and determine how that would have altered the trial. In doing so, we may not invent arguments the prosecution could have made if it had known its theory of the case would be disproved.

Here, this means the State would have called Boyd to the stand to testify that Hardy was the actual killer. Then Demby would have cross-examined Boyd, revealing compelling evidence that Boyd, not Hardy, was the actual killer. Though we might assume the State would attempt to rehabilitate Boyd as a witness, we cannot simply presume it would have been successful in doing so. Nor can we presume the State would have altered the entire theory of its case in response or been successful doing so. If the State had changed horses midstream, that alone would have created a substantial probability the jury would come to a different result. Demby’s failure to investigate Boyd’s role in this case altered the entire evidentiary picture. Viewing the trial in this manner, the California Supreme Court and the federal district court erred in finding there was no reasonable probability that the outcome would have been different but-for the deficient performance of counsel under any theory of conviction.⁹

This is not a case where counsel’s deficient performance had no bearing on the outcome due to otherwise strong or

⁹ The *Strickland* test is clear, and it is not a sufficiency of the evidence standard nor is it a substantial evidence standard. The dissent incorrectly suggests otherwise and fails to address or analyze how the deficient performance by attorney Demby fundamentally prejudiced Hardy on all theories of criminal liability.

overwhelming evidence of guilt. *See, e.g., United States v. O'Neal*, 937 F.2d 1369, 1376 (9th Cir. 1990) (no prejudice where there was strong evidence of guilt), *abrogated on other grounds by United States v. Garcia-Cruz*, 40 F.3d 986, 989 (1994); *United States v. Harden*, 846 F.2d 1229, 1232 (9th Cir. 1988) (no prejudice where there was overwhelming evidence of guilt). Instead, the verdict was only weakly supported by the evidence. No witness except Boyd placed Hardy at the scene of the crime, no witness reported seeing Hardy leaving the apartment complex the night of the crime, and no blood, fingerprint, footprint, hair, or other forensic evidence linked Hardy to the crime. No murder weapon was found and no evidence was presented that linked Hardy to any knife similar to the one used by the killers. Indeed, no physical evidence whatsoever linked Hardy to the crime. Hardy was convicted of being the actual killer primarily on the strength of Boyd's now discredited testimony. It cannot be reasonably argued that strong or overwhelming evidence of guilt under any theory exists without Boyd's testimony. Thus, there is a substantial likelihood that the jury would not have convicted Hardy had Demby performed effectively.

III.

Even though the California Supreme Court *recited* the proper *Strickland* prejudice standard, it failed to *apply* the proper standard, and thus the decision is not protected from review for 28 U.S.C. § 2254(d) purposes. *See Sears*, 561 U.S. at 952 (2010). Assuming, however, that the California Supreme Court did correctly conceptualize and apply the *Strickland* prejudice standard but simply camouflaged that understanding with a different—and incorrect—phrasing of the legal standard, we still conclude that its application was unreasonable.

Prior to the passage of AEDPA, federal courts reviewed state court convictions for habeas consideration using a standard akin to de novo review. *See Brown v. Allen*, 344 U.S. 443, 500–03 (1953). AEDPA revised the standard of review limiting a federal court’s review of state court decisions which are “contrary to, or involved an unreasonable application of, clearly established Federal law.” § 2254(d).

Three distinct terminologies have emerged to describe the “unreasonable application” portion of § 2254(d). The Supreme Court has described this standard as objective unreasonableness, double deference, and the fairminded jurist test. Although this may appear as simply a “matter of phrasing,” its discussion is necessary because “phrasing mirrors thought, and it is important that the phrasing not obscure the true issue” before the Court. *Wright v. West*, 505 U.S. 277, 304–05 (1992) (O’Connor, J., concurring) (quoting *Brown*, 344 U.S. at 501). Regardless of which conception of “unreasonable application” is applied, the result is the same in this case—the California Supreme Court applied the *Strickland* prejudice test in an unreasonable fashion.

In *Williams*, the Supreme Court explained that “unreasonable” is a common term in the legal world and is to be measured objectively in the AEDPA context. *Williams*, 529 U.S. at 409–10. Although the term “unreasonable” may be difficult to define in some scenarios, we know it means more than being merely erroneous or incorrect. *Id.* at 410–11.

Later, in explaining how § 2254(d) interacts with the *Strickland* test, the Supreme Court introduced the concept of “double deference.” Double deference refers to the layering of the reasonableness test from § 2254(d) on top of another

reasonableness test, such as the deficiency prong of *Strickland*'s two part standard. Because only the prejudice prong is at issue here, double deference does not apply.¹⁰

More recently, the Supreme Court expressed the AEDPA standard slightly differently. In *Harrington v. Richter*, the Court phrased the application of *Strickland* under § 2254(d)(1) as “whether it is possible fairminded jurists could disagree” that theories or arguments the state court could have relied on were inconsistent with a prior Supreme Court decision. 562 U.S. 86, 101–02 (2011). This “fairminded jurist” phrasing has oft been repeated since *Richter* in the AEDPA/*Strickland* context. *See, e.g., Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015); *Pinholster*, 563 U.S. at 188; *Andrews v. Davis*, 798 F.3d 759, 774 (9th Cir. 2015).

In *Williams*, the Supreme Court explained that the “reasonable jurist” standard is an objective standard and is

¹⁰ Double deference applies when a federal court is reviewing a state court’s application of a general rule. *Knowles v. Mirzayance*, 556 U.S. 111 (2009) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The more specific a legal rule is, the more narrow a range of reasonable application exists for that rule. *Yarborough*, 541 U.S. at 664. *Strickland*’s deficiency prong presents a general rule because “[j]udicial scrutiny of counsel’s performance must be highly deferential” and there is “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” 466 U.S. at 687–88. Because “[t]here are countless ways to provide effective assistance in any given case,” courts must be hesitant in performing a post-hoc review of trial counsel’s strategic choices. *Id.* at 689. Thus, the federal court asks whether it was reasonable for the state court to find whether trial counsel’s performance fell within the range of reasonable professional assistance. Because the prejudice prong of *Strickland* presents only a more specific legal rule, a case considering only that prong is not subject to double deference as described in *Mirzayance*.

not the proper standard for determining what amounts to an “unreasonable application” under § 2254(d)(1). 529 U.S. at 409 (“The placement of this additional overlay on the ‘unreasonable application’ clause was erroneous.”). Because *Richter* cited *Williams* approvingly, and because no Supreme Court decision has overruled *Williams*, it is clear that the “fairminded jurist” language in *Richter* is just an alternative way to describe the objective unreasonableness standard elucidated in *Williams* and not a new subjective standard.¹¹

Applying an objective fairminded jurist standard does not mean that because any state judge found otherwise, the federal court is obliged to turn away a petitioner. *Cf. Wright v. West*, 505 U.S. 277, 304 (1992) (O’Connor, J., concurring). Indeed, to do so would wholly negate § 2254 and function as a suspension of the writ of habeas corpus for state prisoners. It would mean that even were a state prisoner granted a writ by a state trial court, the government could appeal all throughout the state process and lose each step of the way but so long as one jurist on either the state appellate court or state supreme court dissented, any federal petition would be doomed to failure. Courts are to read laws in order to give them meaning, not to render them fully impotent. *See Williams*, 529 U.S. at 404.

Under any reading of § 2254(d), we conclude that Hardy is entitled to relief. We must determine whether the

¹¹ The dissent clings to a subjective interpretation of the Supreme Court’s “fairminded jurist” language, insisting § 2254(d) cannot be met because the California Supreme Court and the federal district court came to a different conclusion. Under this interpretation, there would be no reason for a federal appellate court to ever hear § 2254(d) appeals.

California Supreme Court applied the prejudice prong of *Strickland* in an unreasonable manner. It did.

The relevant inquiry under *Strickland*'s prejudice prong is “whether it is reasonably likely the result would have been different” had counsel not performed deficiently. *Cannedy v. Adams*, 706 F.3d 1148, 1162 (9th Cir. 2013) (quoting *Harrington*, 562 U.S. at 111–12). A court must “compare the evidence that actually was presented to the jury with that which could have been presented had counsel acted appropriately.” *Thomas v. Chappell*, 678 F.3d 1086, 1102 (9th Cir. 2012) (quoting *Karis v. Calderon*, 283 F.3d 1117, 1133 (9th Cir. 2002)). As described in detail in part II, if Demby had provided effective assistance of counsel, the State’s theory of the case that Hardy was the actual killer would have been eviscerated. If Demby had investigated Boyd and then presented evidence that he made incriminating statements before and after the murder, and that his alibi was false, the jury would have been torn between two conflicting theories on the identity of the second killer. This would have created a reasonable doubt as to Hardy’s guilt. To the extent the California Supreme Court concluded there was not a substantial likelihood of a different result, it did not simply arrive at an incorrect conclusion about prejudice but it applied the *Strickland* prejudice prong in an objectively unreasonable manner.

Hardy is entitled to relief based on the severity of Demby’s deficiency, the vital role Boyd’s testimony played in securing Hardy’s convictions, the lapses of the prosecution, and the utter dearth of other evidence inculcating Hardy.

Conclusion

Hardy was deprived of effective assistance of counsel at his trial and has demonstrated *Strickland* prejudice therefrom. Hardy's attorney failed him, and the State of California failed Hardy by putting a man on the stand that it should have known committed the crime. We are not in a position to determine if, or to what extent, Hardy may have been involved in these heinous murders. But we can, and do, find that when the California Supreme Court failed to find ineffective assistance of counsel, its denial of Hardy's claim was both contrary to and objectively unreasonable under *Strickland*. Accordingly, Hardy is entitled relief under AEDPA. We **REVERSE** the district court's judgement and **REMAND** the case to the district court with instructions to grant the petition for a writ of habeas corpus.

REVERSED and REMANDED.

CALLAHAN, Circuit Judge, dissenting:

This is a standard habeas case governed by AEDPA that requires us to evaluate the reasonableness of the state court's determination that an error—here, an error made by defense counsel—was not prejudicial. In a unanimous 57-page opinion, the California Supreme Court found that under *Strickland v. Washington*, 466 U.S. 668 (1984), James Edward Hardy did not receive competent representation from his trial lawyer, who failed to discover evidence tending to show that Hardy was *not* the person who stabbed the mother and child to death. *In re Hardy*, 41 Cal. 4th 977, 1019–21 (2007). Accordingly, the California Supreme Court vacated

his death penalty. Applying *Strickland*'s prejudice test, however, the court affirmed his conviction as a conspirator and an aider and abettor, because the overwhelming evidence of Hardy's participation in the crime was not undermined by the post-conviction evidence suggesting that another person did the actual stabbing. *Id.* at 1021–30.

The only issue certified by the district court for appeal is the California Supreme Court's determination that Hardy has failed to show that his conviction as a conspirator and abettor was undermined by his trial attorney's failure to uncover evidence that another person butchered the victims. Under AEDPA, we may not grant relief unless Hardy shows that the California Supreme Court's decision applied *Strickland* in an "objectively unreasonable" manner. *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015).

As recently reaffirmed in our en banc opinion, where "it is possible to read the state court's decision in a way that comports with clearly established federal law . . . we must do so." *Mann v. Ryan*, —F.3d—, 2016 WL 3854234, at *11 (9th Cir. 2016) (en banc). This reflects the Supreme Court's admonishments in *Ayala* that:

under AEDPA, "a federal court may not award habeas relief under § 2254 unless the *harmlessness determination itself* was unreasonable." And a state-court decision is not unreasonable if "'fairminded jurists could disagree' on [its] correctness." [A petitioner] therefore must show that the state court's decision to reject his claim "was so lacking in justification that there was an error well understood and comprehended in existing law

beyond any possibility for fairminded disagreement.”

135 S. Ct. at 2199 (internal citations omitted) (second emphasis added).

Rather than follow the Supreme Court’s directions, the majority manufactures a legal standard that the state supreme court never utilized and refuses to recognize the reasonableness of the alternative bases of guilt identified by that court. Because the majority’s rationale and conclusion are contrary to AEDPA and to the Supreme Court’s opinions interpreting the AEDPA standard of review, I dissent.

I. Background

Thirty-seven years ago, at the behest of Clifford Morgan, Mark Anthony Reilly and Hardy plotted to murder Morgan’s wife, Nancy, and their eight-year-old son, Mitchell. In exchange for their hard work, Morgan promised to reward the two handsomely, with money from the insurance proceeds he intended to collect from the deaths. The morning after Morgan gave final approval to proceed with the murders, a neighbor found Nancy’s and Mitchell’s bloody, lifeless bodies in the bedroom of the Morgan’s Van Nuys home. The two had been knifed to death—Morgan’s wife had been stabbed 45 times and their son 21 times.

Morgan, Reilly and Hardy were arrested for the killings and charged with first degree murder and conspiracy to commit murder to collect life insurance proceeds. Cal. Penal Code §§ 182, 187. The amended information listed 24 overt acts committed by the men in furtherance of the conspiracy. The acts involving Hardy include: taking an M–1 rifle from

the Morgan home on May 20 or 21 to make the murders appear to have been committed in the course of a robbery/burglary; participating in the arrangements the trio made to ensure that Morgan would be out of town when the murders took place; receiving instruction from Reilly as to how to commit the murders; meeting Reilly on May 20 to formulate their alibi with Colette Mitchell; and accompanying Reilly to burglarize the Morgan home, which Reilly accomplished by using a key supplied by Morgan to gain entry, and bolt cutters to disguise the purpose of the killings. Because the conspiracy continued after the murders took place, the information also listed several acts committed by Hardy while in pre-trial custody: he assisted Reilly in fabricating an alibi and/or a confession or testimony to enable Morgan to collect insurance proceeds, and a defense that would pin the murders on someone else; he communicated with Reilly over 60 times and joined him in conveying to other co-conspirators testimony given at the preliminary hearing, and in “formulat[ing]” their hearing testimony; and he arranged to have his brother dispose of the M-1 rifle taken from the Morgan home.

Hardy, Reilly and Morgan were tried together in Los Angeles County Superior Court. At trial, Debbie Sportsman, Reilly’s girlfriend, and Colette Mitchell, Hardy’s girlfriend, provided key testimony linking Hardy to the murders. Sportsman testified that Hardy kept company with Reilly in the days before and after the murders. She also recounted that Hardy was present in Reilly’s apartment during Reilly’s telephone conversation with Morgan several hours before the killings. Colette testified that she was with Hardy the night before the murders and that, although she was not sure whether Hardy left the apartment between 2 a.m. and 11 a.m. the following day, he told her on two occasions that he had

been to the victims' home on the night of the murders. Hardy frequently discussed his alibi with her in the days following the murders and told her that bolt cutters had been used to enter the victims' house. He also told her that Reilly was in charge, that insurance proceeds were the reason for the killing, and that Morgan was not worried about the delay caused by the trial because his insurance proceeds were earning 12 $\frac{3}{4}$ percent interest. Colette further recalled that Hardy received \$1,000 in \$100 bills after the murders. Finally, Colette testified that as a pre-trial detainee, Hardy instructed her to destroy a pair of shoes that he feared would match a footprint discovered at the crime scene, and to help him dispose of an M-1 carbine rifle allegedly stolen from Morgan's home.

At the State's urging, the trial court permitted the jury to consider whether Hardy conspired to commit murder, or aided and abetted the killings. Regarding conspiratorial liability, the court explained that a conspirator includes a person "who, whether present or not at the commission or attempted commission of a crime, advise[s] and encourage[s] in its commission or attempted commission." *Hardy*, 41 Cal. 4th at 1026. Such a person is "regarded by the law as [a] principal[] in the crime . . . and equally as guilty." *Id.* In defining a conspiracy, the court instructed that it is "an agreement" to commit a crime "followed by an overt act committed in this state by one of more persons of the parties for the purpose of accomplishing the object of the agreement." *Id.* at 1027. The jury received a copy of the amended information listing the alleged overt acts. *Id.* at 1026. In turn, the prosecutor argued that "based upon the facts of this case, . . . if one conspires to commit a murder for the purposes of collecting insurance, what is it other than premeditation and deliberation [justifying a verdict of first

degree murder]?” *Id.* at 1027. The prosecutor further argued: “We submit to you that Mr. Hardy joined that conspiracy, and when he joins the conspiracy, he adopts those acts [committed by Reilly and Morgan].” *Id.* at 1027–28.

The jury heard similar instructions and argument regarding aiding and abetting liability. The court defined an aider and abettor as someone who “aids, promotes, encourages or instigates by act or advice the commission” of a crime and explained that such person is “liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged.” *Id.* at 1029. The prosecutor argued this theory of guilt to the jury: “[i]f you find that this is a first degree murder and if you find that each one of these individuals [Hardy, Morgan and Reilly] participated in that, either by aiding, abetting, by personally becoming involved, by encouraging, by soliciting, by aiding and abetting, each one of them individually [is guilty of first degree murder].” *Id.* at 1029–30 (second brackets by state court).

The jury convicted Hardy, Morgan and Reilly of two counts of first degree murder, one for Nancy and one for Mitchell. Moreover, convinced that the three participated in a scheme to murder the victims and thus were jointly culpable for the deaths regardless of who performed the actual killings, the jury separately convicted each defendant of one count of conspiracy to commit murder to collect life insurance proceeds. Hardy and Reilly were sentenced to death.¹ The

¹ The jury did not get the opportunity to consider Morgan’s sentence. The trial court severed his penalty phase trial from the other defendants when it was discovered that his health was failing due to cancer. *Hardy*, 41 Cal. 4th at 987; *People v. Hardy*, 2 Cal. 4th 86, 128, 197 (1992),

convictions were affirmed on direct appeal to the California Supreme Court. *Hardy*, 2 Cal. 4th at 216.

II. State and Federal Habeas Proceedings

A. State Habeas Decision

In 2007, the California Supreme Court affirmed Hardy's conviction in state habeas proceedings. Hardy claimed, among other things, that defense counsel unreasonably and prejudicially failed to investigate and present significant evidence indicating that he was innocent of murder and that Calvin Boyd was probably the person who killed Nancy and Mitchell Morgan. An evidentiary hearing revealed incriminating evidence against Boyd. The court found that this evidence, while failing to demonstrate Hardy's innocence, created substantial doubt that he personally stabbed the victims, thus undermining confidence in the sentence. The court vacated Hardy's death sentence on this basis.²

The court upheld the guilty verdict, however, because counsel's failure to discover and present the Boyd evidence did not undermine confidence in the jury's determination that Hardy was guilty of murder as a co-conspirator. *Hardy*, 41 Cal. 4th at 1021–30, 1036. Recognizing *Strickland's* requirement that a defendant establish the prejudice he has allegedly suffered because of counsel's deficient

modified on denial of reh'g (May 14, 1992). Morgan died before the penalty phase of his separate trial could be held. *Id.*

² In 2010, Hardy was re-sentenced to two consecutive life terms without the possibility of parole plus a consecutive prison term of 25 years to life.

representation, the court required Hardy to show that “there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the [trial] would have been different.’” *Id.* at 1018 (quoting *In re Avena*, 12 Cal. 4th 694, 721 (1996)).³ Based on Supreme Court precedent, the court defined “reasonable probability” as “a probability sufficient to undermine confidence in the outcome.” *Id.*

Guided by these principles, the California Supreme Court considered whether post-conviction evidence that Boyd stabbed the victims undermined confidence in the guilty verdict. The court did so by “weighing [the] evidence and considering what petitioner’s trial would have looked like had he been represented by competent counsel.” *Id.* at 1030. The court recognized that “although the prosecutor proceeded primarily on the theory that petitioner was the actual killer, he also presented to the jury two theories of derivative liability: conspiracy, and aiding and abetting.” *Id.* at 1025. Citing the accusatory instrument, the jury instructions and the prosecutor’s closing arguments, the court found that the prosecution had adequately presented both alternative theories for the jury’s consideration. The court then determined that Debbie Sportsman’s and Colette Mitchell’s testimony “strongly” demonstrated that “[Hardy] conspired with, and aided and abetted, Reilly, Morgan and others” to kill Nancy and Mitchell Morgan for financial gain. *Id.* at 1028–30. The court concluded that Hardy failed to meet *Strickland*’s prejudice prong as to his guilt as a conspirator and an abettor.

³ The standard quoted in *Avena* is excerpted from *Strickland*. *Avena*, 12 Cal. 4th at 721 (quoting *Strickland*, 466 U.S. at 694).

B. Federal Habeas Decision

Hardy challenged the California Supreme Court's 2007 decision in habeas proceedings in federal court. The district court denied his petition but certified one issue for appellate review: whether the California Supreme Court reasonably concluded that Hardy was not prejudiced as a result of counsel's failure to uncover and expose the fact that Boyd was the likely killer. This is the narrow question we must answer on appeal.

III. Standard of Review

We review the district court's decision de novo, but apply AEDPA's "highly deferential standards" to the underlying state court decision. *Ayala*, 135 S. Ct. at 2198; *Mann*, 2016 WL 3854234, at *7. Under AEDPA, a claim that is adjudicated on the merits in state court may be reviewed by a federal court only to determine whether its adjudication 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) was "based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding." 28 U.S.C. § 2254(d); *Ayala*, 135 S. Ct. at 2198. The Supreme Court continues to require that we rigorously apply AEDPA's deferential mandate. *Ayala*, 135 S. Ct. at 2198–99; *Harrington v. Richter*, 562 U.S. 86, 100–04 (2011). As part of that mandate, we must "presum[e] that state courts know and follow the law," we must give state courts "the benefit of the doubt," and we must make an "effort to reconcile" state courts' reasoning with clearly established law. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam).

IV. Deference to the California Supreme Court Is Required

A. The California Supreme Court's Correct Application of *Strickland*'s "Reasonable Probability" Standard

Under AEDPA's "contrary to" clause, we examine whether "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court on a set of materially indistinguishable facts." *Mann*, 2016 WL 3854234, at *7 (quoting *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000)).

Here, the state court began its prejudice analysis by reciting the *Strickland* standard verbatim, setting forth the "reasonable probability" test. It then proceeded to conduct three critical inquiries derived from the Supreme Court's decision in *Rompilla v. Beard*, 545 U.S. 374 (2005). In *Rompilla*, the Supreme Court found *Strickland* prejudice where counsel failed to discover mitigating evidence about the petitioner's disadvantaged background. 545 U.S. at 390–93. Had counsel investigated his client's imprisonment record, the Court held, he would have discovered critical information that would likely have influenced the jury not to sentence him to death. *Id.*

Based on *Rompilla*, the California Supreme Court assessed Hardy's prejudice claim by asking: "What evidence was available that counsel failed reasonably to discover? How strong was that evidence? How strong was the evidence of guilt produced at trial?" *Hardy*, 41 Cal. 4th at 1021–22

(citing *In re Thomas*, 37 Cal. 4th 1249, 1265 (2006)).⁴ The court answered each of these questions, beginning with a recap of the new evidence implicating Boyd in the murders. The court then analyzed the trial evidence purporting to show that Hardy personally stabbed the victims and determined that the evidence was “weak and circumstantial.” *Id.* at 1022. Finally, the court considered what trial evidence linked Hardy to the murder conspiracy and determined that the testimony from Hardy’s and Reilly’s girlfriends supported not only that theory, but also the State’s aiding and abetting theory of guilt. The California Supreme Court’s measured approach led to the principled decision to affirm Hardy’s conviction. *Hardy*, 41 Cal. 4th at 1036.

The majority cannot bring itself to defer to the California Supreme Court’s conclusion or methodology, however. To circumvent AEDPA, the majority fragments the state court opinion in a way that distorts the court’s prejudice formulation, making it appear as if the court embraced a test that was “contrary to” *Strickland*. In so doing, the majority defies Supreme Court precedent and our recently reaffirmed mandate that we *must* “read the [state court] decision to comport with clearly established federal” where it is possible to do so. *Mann*, 2016 WL 3854234, at *11; see *Visciotti*, 537 U.S. at 24.

In *Mann*, we applied this principle to a state court decision where “the court did not clearly state the [prejudice] standard it applied.” *Mann*, 2016 WL 3854234, at *11. We “[r]ead[] the opinion as a whole” and made the “logical

⁴ Although the California Supreme Court cites to its decision in *Thomas*, *Thomas* expressly relies on *Rompilla*’s prejudice approach. *Thomas*, 27 Cal. 4th at 1265.

inference” that the state court applied the correct “reasonable probability” standard and not, as the petitioner contended, the “more-likely-than-not” standard. *Id.* We based our conclusion on various factual findings relevant to the petitioner’s mitigation profile and the state court’s reference to a “controll[ing]” Arizona Supreme Court decision adopting the “reasonable probability” standard. *Id.*

Much like the petitioner in *Mann*, the majority argues that the state court employed a prejudice test that was “significantly harsher than the clearly established test from *Strickland*,” “creat[ing] a much higher bar for Hardy than the law require[s].” Maj. Op. 15, 16–17. The majority opines that the state decision applied a “substantial evidence” test—relevant to a sufficiency-of-the-evidence challenge—that impermissibly burdened Hardy with “demonstrat[ing] that had counsel performed adequately there would not have been sufficient evidence for a jury to convict” him. Maj. Op. 15.

The California Supreme Court made no such blunder. The court used the term “substantial evidence” interchangeably with “ample evidence” or “overwhelming evidence” to underscore the strong evidence of Hardy’s guilt as a conspirator and an abettor.⁵ Given that the court’s

⁵ See *Hardy*, 41 Cal. 4th at 1029 (“there is ample evidence showing [Hardy] participated in the plan to kill the victims as part of a wider conspiracy”); *id.* at 1030 (“For much the same reasons we found substantial evidence supported a conspiracy theory of liability for first degree murder, we also find substantial evidence supports an aiding and abetting theory of liability. To recap: Overwhelming evidence tied Reilly to the conspiracy and the murders . . .”); *id.* (“[W]e conclude that although there is a reasonable probability the jury would not have convicted [Hardy] on the prosecution’s proffered theory that he was the actual killer, ample evidence remains that [he] was guilty of the murders on the

opinion “painstakingly describes the *Strickland* standard,” its use of the term “substantial” and not another modifier of the majority’s choosing “may perhaps be imprecise, but . . . it can no more be considered a repudiation of the standard than can [the Supreme] Court’s own occasional indulgence in the same imprecision.” *Visciotti*, 537 U.S. at 23–24. The California Supreme Court found that Hardy failed the “reasonable probability” test because the evidence that counsel failed to discover was of minimal weight as to Hardy’s participation in the murders, and was overwhelmed by other evidence of his role as a conspirator and as an aider and abettor.⁶

The majority assumes the worst of the state supreme court, however, refusing to even attempt to reconcile the state court’s use of the term “substantial evidence” with its proper framing of the *Strickland* prejudice standard. *See id.* at 24. “This readiness to attribute error is inconsistent with the presumption that state courts know and follow the law.”⁷

alternative theories[.]”); *id.* at 1036 (“there being ample evidence [Hardy] was a coconspirator in the scheme to kill the victims”).

⁶ The missing evidence did, however, carry weight with respect to the sentence, as it tended to show Hardy might not have played the lead role in the murder conspiracy. Accordingly, the state court remanded for resentencing.

⁷ This presumption is especially compelling here, where the state court knew when to examine the record for substantial evidence—i.e., when reviewing the factual and credibility determinations of the reference hearing referee. *Hardy*, 41 Cal. 4th at 993 (“[W]e give great weight to those of the referee’s findings that are supported by substantial evidence. This is especially true for findings involving credibility determinations. . . . [Hardy] is entitled to challenge the referee’s findings, both on the ground that they are not supported by substantial evidence and

Mann, 2016 WL 3854234, at *11 (quoting *Visciotti*, 537 U.S. at 24). “Taken in context,” the California Supreme Court’s prejudice discussion demonstrates the great care the court took in weighing the evidence to determine whether the jury would have acquitted Hardy of murder under *all* theories of guilt had his attorney performed adequately. *Id.*; see *Williams*, 529 U.S. at 398–99 (upholding the state trial judge’s “[*Strickland* prejudice] conclusion that the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised ‘a reasonable probability that the result of the sentencing proceeding would have been different’ if competent counsel had presented and explained the significance of all the available evidence”).

“If [the *Strickland*] standard is difficult to meet, that is because it was meant to be.” *Richter*, 562 U.S. at 102. The Supreme Court has explained that a petitioner’s “reasonable probability” showing must be “substantial, not just conceivable.” *Id.* at 111–12 (citing *Strickland*, 466 U.S. at 693). The majority acknowledges this requirement but somehow construes it to lighten a petitioner’s *Strickland* burden. Maj. Op. 15. It is the quantity and quality of trial evidence, as impacted by counsel’s errors, that determines whether the probability of reasonable doubt is “substantial” or, as here, “just conceivable.” See *Williams*, 529 U.S. at 397–99.

The majority’s misinterpretation of the California Supreme Court’s opinion reflects its failure to appreciate the issues raised in this appeal. The majority’s opinion “ignore[s] ‘the only question that matters’” in this case:

for accuracy[.]”); Maj. Op. 15 n.5 (acknowledging proper application of “substantial evidence” standard to referee findings).

“whether the state court’s application of the *Strickland* standard was unreasonable.” *Richter*, 562 U.S. at 102 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)). The proper inquiry would force the majority to consider “what arguments or theories”—here, for example, key testimony from Debbie Sportsman and Colette Mitchell—“supported . . . or could have supported” the state supreme court’s determination that the jury verdict would not have changed had the missing evidence been presented. *Id.*

B. Reasonableness of the California Supreme Court’s Prejudice Determination

In determining the reasonableness of a state court decision, the Supreme Court requires that we not only consider the reasons offered by the state court, but also “what arguments or theories supported or . . . *could* have supported, the state court’s decision.” *Id.* (emphasis added). We are directed to then “ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.” *Id.* Applying these principles, the Supreme Court has held that “[a] state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Id.* at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

The California Supreme Court’s decision reflects its masterful grasp of the State’s multi-faceted case and why, in light of these nuances, *Strickland* precludes relief. In assessing the integrity of the jury verdict, the court examined the State’s approach to the defendants’ prosecution from arraignment to verdict. At the outset, it observed that the

amended information charged Hardy with conspiracy and alleged a series of overt acts committed by Hardy in furtherance of the conspiracy. It then pointed to all the evidence—including the testimony of Debbie Sportsman and Colette Mitchell—that bore out these allegations. The damning evidence is worth repeating: Hardy and Reilly began associating with each other in the days leading up to the murders; Hardy was with Reilly in Reilly’s apartment when Morgan gave final approval to proceed with the murders; Hardy rehearsed his alibi with Colette frequently in the days following the murders; Hardy knew critical details about the crimes, including that life insurance proceeds were the reason underlying and payment for the murders; Reilly played a leadership role in the planning efforts; Hardy received \$1,000 cash after the murders; and Hardy instructed Colette regarding the disposal of potentially incriminating evidence. *Hardy*, 41 Cal. 4th at 1028–30. Based on all the evidence, the prosecutor during summation called the jurors’ attention to the conspiracy and aiding and abetting instructions provided by the trial court and urged them to convict the three defendants as co-conspirators and as aiders and abettors to murder. The jury agreed, returning verdicts of first degree murder *and* conspiracy to commit murder.

The majority nonetheless chastises the California Supreme Court for accepting the way in which the State prosecuted its case. It myopically insists that the prosecution’s entire case rose and fell on the theory that Hardy was the actual killer, but this is refuted by the record and the jury’s verdict. Even if there were less evidentiary support for the California Supreme Court’s decision, the majority would still be bound by the Supreme Court’s clear instruction to consider “what arguments or theories supported or . . . could have supported, the state court’s decision.”

Richter, 562 U.S. at 102; see *Visciotti*, 537 U.S. at 27 (“[U]nder § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. The federal habeas scheme leaves primary responsibility with the state courts for these judgments.”).

The majority’s contrary assessment of the evidence and legal arguments in this case turns on two errors of law. First, the majority asserts that “an aid-and-abet theory is wholly distinct from an actual killer theory and the jury could not simultaneously have found both true.” Maj. Op. 19. But as we have recognized, the law permits the State to present factually inconsistent theories of guilt, within constitutional limits of course. See *Taylor v. Beard*, 811 F.3d 326, 327, 331 (9th Cir. 2016) (en banc) (state argued principal and aiding-and-abetting theories in the alternative). The majority’s logic begs the question: having charged Hardy with first degree murder, what leverage would the prosecution have gained by a conspiracy count, or an aiding-and-abetting instruction, premised on Hardy’s culpability as the actual killer? Nothing at all, since Hardy would be acting as a principal under all three theories of guilt.

Second, contrary to principles of conspiratorial liability, the majority contends that the acts Hardy committed in furtherance of the conspiracy are too “minor” to render him culpable for murder. Maj. Op. 21. A conspiracy requires the commission of an overt act but does not distinguish between

major and minor acts.⁸ As the California Supreme Court held on direct appeal, the conspiracy in this case was primarily one to defraud insurance companies. *Hardy*, 2 Cal. 4th at 143–44. The conspiracy continued until the co-conspirators received the insurance proceeds, or until Morgan was convicted of murder. *Id.* at 144. Because the proceeds had not yet been paid at the time of trial, *any* of Hardy’s overt acts committed between the agreement to defraud and the trial—however minor that act may be in the eyes of the majority—was a cognizable basis for convicting him of conspiracy to commit murder to collect life insurance.

The majority’s fixation on the fact that *part* of the State’s case hinged on an actual killer theory undoubtedly clouds its judgment on habeas review. It deliberately ignores the other theories of culpability advanced by the prosecution and points

⁸ As recited by the California Supreme Court:

A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit a public offense and with the further specific intent to commit such offense, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement.

In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one of the overt acts alleged in the information. It is not necessary to the guilt of any particular defendant that he himself committed the overt act, if he was one of the conspirators when such an act was committed.

Hardy, 41 Cal. 4th at 1027 (quoting jury instructions).

only to the evidentiary shortcomings undermining the prosecution's assertion that Hardy did the actual stabbing. But the California Supreme Court did not hide the ball with respect to these weaknesses. It recognized that no one reported seeing Hardy leave Reilly's apartment the night of the murders; no witnesses placed Hardy at the crime scene; no blood, fingerprint, footprint, hair or other forensic evidence linked him to the crimes; and no murder weapon was recovered. Such evidence could have shored up the prosecution's actual killer theory. But the shortcomings of the State's principal liability theory did not necessarily undercut its alternative case for conspiracy. So long as the State proved that Hardy intentionally participated in the murder plot, its case against all three defendants remained strong.

The majority's dismissive attitude towards the state court's careful treatment of the jury verdict is contrary to the Supreme Court's repeated instruction "not . . . to substitute its own opinion for the [state court's] determination." *Ayala*, 135 S. Ct. at 2202. At this point, the Supreme Court's AEDPA instructions to the Ninth Circuit might sound like a broken record. *See Visciotti*, 537 U.S. at 22–27; *Deck v. Jenkins*, 814 F.3d 954, 986–87 & n.1 (9th Cir. 2016) (en banc) (M. Smith, J., dissenting) (citing Supreme Court cases reversing Ninth Circuit's grant of AEDPA relief). The majority blithely marches forward to the beat of its own drum, however, substituting its judgment for that of the state supreme court. It discounts Debbie Sportsman's "few circumstantial statements" regarding Hardy's role in the murders. Maj. Op. 22. It also discredits Colette Mitchell's testimony, cherry-picking statements from the state court opinion that acknowledge weaknesses in her testimony. Maj. Op. 22–23. But the California Supreme Court made those

acknowledgments only for purposes of assessing Hardy’s guilt as the actual killer and plainly accepted Colette’s testimony as supporting the jury’s conspiracy verdict.⁹ *See Hardy*, 41 Cal. 4th at 1023–25, 1028–30. Only by substituting its evaluation of the evidence for that of the jury—the very process forbidden by the Supreme Court—can the majority conclude that the California Supreme Court’s decision was unreasonable.

V. Conclusion

The California Supreme Court’s meticulous opinion comports with *Strickland*. The court recited *Strickland*’s “reasonable probability” standard and faithfully applied it, inquiring whether counsel’s inadequate performance would have undermined confidence in the guilty verdict. The court concluded that the representation undermined the theory that Hardy actually stabbed the victims, thus prejudicing the death penalty verdict and justifying its vacatur. The court found no additional prejudice to the conviction, however, because critical post-conviction evidence did not blot out the substantial trial evidence establishing that Hardy conspired to

⁹ The majority asserts that the observations the state supreme court made in rejecting Hardy’s claim of innocence are “equally applicable” to his ineffective assistance of counsel claim. Maj. Op. 18–19. The rationale is flawed, however, because actual innocence claims and ineffective assistance of counsel claims are governed by separate and distinct legal standards. *Compare Hardy*, 41 Cal. 4th at 1016, 1018 (rejecting actual innocence claim where “the allegations . . . fail to undermine the prosecution’s entire case against [Hardy] or point unerringly to his innocence or reduced culpability”), *with id.* at 1036 (rejecting ineffective assistance of counsel claim where the “new evidence does not undermine our confidence that the jury would nevertheless have convicted [Hardy] of murder by relying on a conspiracy theory”).

commit, and aided and abetted, the murders. This was not an objectively unreasonable conclusion given the overwhelming evidence connecting Hardy to the conspiracy. And even if the conclusion were erroneous, under AEDPA, we are not authorized to re-weigh the evidence to correct it.

This is not the first time that we have gotten the “unreasonableness question” wrong. In *Richter*, the Supreme Court reprimanded us for

treat[ing] the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review: Because the Court of Appeals had little doubt that Richter’s *Strickland* claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it. This analysis overlooks arguments that would otherwise justify the state court’s result and ignores further limitations of § 2254(d), including its requirement that the state court’s decision be evaluated according to the precedents of this Court. It bears repeating that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.

562 U.S. at 102 (internal citation omitted). The majority in this case commits the very same error. *See, e.g., Ayala*, 135 S. Ct. 2187; *Visciotti*, 537 U.S. 19; *Williams*, 529 U.S. 362. I agree with the justices of the California Supreme Court, the United States magistrate judge and the United States district judge that Hardy’s request for habeas relief should be denied.

Somehow the Supreme Court's instructions, as plain as they are, seem to have fallen on deaf ears. My hearing is not so dull. Because the majority has turned a blind eye to AEDPA and the Court's interpretation of it, I dissent.

**CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1
FOR 13-56289**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check (x) applicable option)

Proportionately spaced, has a typeface of 14 points or more and contains 4,007 words (petitions and answers must not exceed 4,200 words).

or

In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

September 15, 2016

Dated

s/ Coleen M. Tiedemann

Colleen M. Tiedemann
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: *James Edward Hardy v. Kevin Chappell* No. 13-56289

I hereby certify that on September 15, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PETITION FOR REHEARING WITH RECOMMENDATION FOR REHEARING EN BANC

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 15, 2016, at Los Angeles, California.

C. Esparza
Declarant

s/ C. Esparza
Signature