

No. 13-56289

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES EDWARD HARDY,
Petitioner-Appellant,

v.

KEVIN CHAPPELL, Warden,
Respondent-Appellee.

D.C. No. 2:11-CV-07310-VAP-PJW

**APPELLANT'S RESPONSE TO APPELLEE'S PETITION FOR
REHEARING AND REHEARING EN BANC**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE VIRGINIA A. PHILLIPS
United States District Judge

HILARY POTASHNER
Federal Public Defender
ELIZABETH RICHARDSON-ROYER
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
(213) 894-5092
(213) 894-0081 fax
elizabeth_richardson-royer@fd.org

Attorneys for Petitioner-Appellant
JAMES EDWARD HARDY

TABLE OF CONTENTS

| | Page |
|---|-------------|
| I. INTRODUCTION | 1 |
| II. ARGUMENT..... | 3 |
| A. Petitioner Does Not Oppose Modifying the Published Opinion to Correctly Reflect the Location of the Morgan Residence, But Panel Rehearing Is Unnecessary. | 3 |
| B. The Court Correctly Concluded that the State Court’s Decision Was Contrary to <i>Strickland</i> | 4 |
| 1. The Court correctly determined that the state court recited the correct prejudice standard but then improperly considered only whether “substantial evidence” still supported Hardy’s conviction notwithstanding counsel’s deficient performance. | 4 |
| 2. The Court’s opinion does not conflict with Circuit or Supreme Court precedent..... | 5 |
| C. The Court Correctly Concluded that the State Court’s Prejudice Determination Was an Unreasonable Application of <i>Strickland</i> | 8 |
| 1. The Court correctly determined that the prosecution did not present the jury with derivative theories of liability..... | 8 |
| 2. The Court correctly found that even if the prosecution <i>had</i> pursued derivative theories of liability, an effective performance by counsel would still have led to a different outcome. | 10 |
| a. There was no compelling evidence against Hardy under any theory. | 10 |
| b. Had counsel presented evidence of Boyd’s culpability and Hardy’s refusal to participate, there is at least a reasonable likelihood that Hardy would not have been convicted..... | 12 |
| III. CONCLUSION..... | 14 |

TABLE OF AUTHORITIES

FEDERAL CASES

| | Page(s) |
|---|----------------|
| <i>Cummings v. Martel</i> , 822 F.3d 1010 (9th Cir. 2016) (mem.) | 3 |
| <i>Mann v. Ryan</i> , 828 F.3d 1143 (9th Cir. 2016) (en banc) | 6, 7 |
| <i>Strickland v. Washington</i> , 466 U.S. 668 (1984)..... | passim |
| <i>Taylor v. Beard</i> , 811 F.3d 326 (9th Cir. 2016) (en banc) | 9 |
| <i>Woodford v. Visciotti</i> , 537 U.S. 19 (2002)..... | 7, 8 |

STATE CASES

| | |
|--|---|
| <i>People v. Perez</i> , 35 Cal. 4th 1219 (2005)..... | 9 |
|--|---|

FEDERAL STATUTES

| | |
|---------------------------|--------|
| 28 U.S.C. § 2254(d) | passim |
|---------------------------|--------|

I. INTRODUCTION

James Hardy was tried and convicted thirty-five years ago as the person who brutally stabbed Nancy and Mitchell Morgan to death. As it later turned out, the killer was actually Calvin Boyd, the prosecution’s key witness at Hardy’s capital trial. Unremarkably, this Court held that evidence of Boyd’s culpability would have been reasonably likely to change the outcome of Hardy’s case, and that the state court’s decision to the contrary was unreasonable. As the Court explained: “Despite the demanding standard set by AEDPA for state inmates, *this case does not present a close question . . .*” (Slip op. at 5 (emphasis added).)

Now, in support of his petition for rehearing en banc, Respondent seeks to reassert the arguments that failed him below—arguments that were thoroughly considered, and properly rejected, by the Court in its well-reasoned opinion. Simply put, the majority got it right in this case.¹

First, the Court correctly found that the state court’s decision was “contrary to” clearly established federal law because the state court *applied*—and did *not* just articulate—a “substantial evidence” standard rather than the prejudice standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). This “created a much higher bar for Hardy than the law required” (Slip op. at 15), therefore the majority

¹ Judge Bastian authored the opinion of the Court, joined by Judge Pregerson. Judge Callahan dissented.

properly applied de novo review to Hardy's ineffective assistance of counsel claim, and en banc review is unwarranted.

Second, the Court correctly applied the Antiterrorism and Effective Death Penalty Act (AEDPA) in concluding that, even if the state court *did* conceive of *Strickland*'s standard correctly, its prejudice determination was nonetheless an unreasonable application of *Strickland* under 28 U.S.C. § 2254(d)(1). The prosecution's theory of Hardy's liability was *only* that Hardy committed the murders himself—the prosecutor did not present to the jury or argue the theory that Hardy was liable as a mere aider and abettor or conspirator. Given the prosecution's theory, the Court easily concluded, the outcome of Hardy's trial would have been different had his lawyer presented compelling evidence that the prosecution's star witness, not Hardy, was the actual killer.

The Court also properly concluded that even if the prosecutor *had* advanced alternative theories of liability, the “utter dearth” of evidence against Hardy (except for Boyd's false testimony), combined with the harm that Boyd's involvement in the crime would have done to the prosecution's case, meant that no fairminded jurist could help but find a reasonable likelihood of a different result had the Boyd evidence come to light.

In sum, the Court correctly applied AEDPA in finding the state court's decision unreasonable under both the “contrary to” and the “unreasonable application” prongs of 28 U.S.C. § 2254(d)(1). Habeas relief was long overdue in

this case and was properly granted by the Court.² There is no basis for further review.

II. ARGUMENT

A. **Petitioner Does Not Oppose Modifying the Published Opinion to Correctly Reflect the Location of the Morgan Residence, But Panel Rehearing Is Unnecessary.**

Respondent requests that panel rehearing be granted in order to correct the published opinion to accurately reflect that the victims lived in their own home on Saticoy Street, not at the apartments on Vose Street. (PFR at 2, 5-6.) Hardy does not object to this simple modification, but it does not serve as a basis for panel rehearing. *See Cummings v. Martel*, 822 F.3d 1010 (9th Cir. 2016) (order amending opinion to correct factual inaccuracy but denying petition for panel and en banc rehearing). The location of the crime scene made no difference to the panel's decision.

//

//

//

² Although the Court did not have occasion to reach Hardy's prosecutorial misconduct claim, it suggested that that claim might necessitate habeas relief, as well: "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 a key witness against Hardy. The prosecutor's conduct in this case raises substantial concerns about the reliability of Hardy's conviction even apart from [trial counsel]'s inadequate representation." (Slip op. at 14 n.4.)

B. The Court Correctly Concluded that the State Court’s Decision Was Contrary to *Strickland*.

- 1. The Court correctly determined that the state court accurately recited the *Strickland* prejudice standard but then improperly considered only whether “substantial evidence” still supported Hardy’s conviction notwithstanding counsel’s deficient performance.**

Respondent contends that the majority misapplied AEDPA when it concluded that the state court applied an incorrect “substantial evidence” standard to assess whether Hardy was prejudiced by his lawyer’s failure to present evidence that Boyd was the killer. (PFR at 7.) But that is exactly what the state court did.

Citing to several places in the state court opinion where the court stated the correct *Strickland* standard, Respondent attempts to explain away the court’s “substantial evidence” language as merely a part of the court’s analysis, rather than its conclusion. It is undisputed that the state court at points *stated* the correct standard. (Slip op. at 15; ER 99, 104.) However, the state court *applied* the wrong standard when it ultimately asked whether the remaining evidence at trial, discounting Boyd’s trial testimony, remained sufficient to support Hardy’s conviction on a theory of derivative liability. (See ER 107 (“[S]ubstantial evidence supports the theory that petitioner was guilty of first degree murder on a conspiracy theory.”); ER 108 (“We thus conclude substantial evidence supports the theory that petitioner was guilty of first degree murder as an aider and abettor.”).)

Contrary to Respondent’s contention, these conclusions about the “substantial evidence” supporting Hardy’s convictions were not just part of the

state court’s prejudice analysis—they *constituted* it. The statements were not buried amidst the state court’s discussion; they were the state court’s ultimate *legal conclusion*—the court’s very last words on the subject of prejudice. Once the court described the intact evidence against Hardy and concluded that the evidence was sufficient to support the theories of derivative liability, its inquiry came abruptly to an end. (*See id.*) There is no legitimate argument that the court did *not* ultimately apply a “substantial evidence” test to the question of prejudice.

As the majority correctly explained, “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.” (Slip op. at 15 (noting that the state court’s “substantial evidence” analysis “created a much higher bar for Hardy than the law required”).) The majority correctly applied AEDPA in finding the state court’s decision “contrary to” *Strickland*, and en banc review is unwarranted.

2. The Court’s opinion does not conflict with Circuit or Supreme Court precedent.

Respondent contends that the majority’s opinion conflicts with this Court’s recent opinion in *Mann v. Ryan*, 828 F.3d 1143 (9th Cir. 2016) (en banc), in which the Court found that although the state court had applied an ambiguous standard to

the question of IAC prejudice, it was not clearly “contrary to” *Strickland*. But Respondent does not acknowledge, much less rebut, the majority’s convincing explanation of why this case is distinguishable from *Mann* such that *Mann* does not compel a different result:

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.

(Slip. op. at 16.) As the majority found, the state court’s decision in this case was *not* ambiguous. Rather, the state court clearly analyzed whether substantial evidence supported Hardy’s conviction on derivative theories and, finding that it

did, immediately denied relief on that basis. The Court's opinion does not conflict with *Mann*.

Nor does the majority's "contrary to" determination conflict with the Supreme Court's decision in *Woodford v. Visciotti*, 537 U.S. 19 (2002), as Respondent suggests (PFR at 13). In that case, as here, the state court recited the correct *Strickland* standard. But in *Visciotti*, the only basis for this Court's "contrary to" finding was the state court's "shorthand reference" to *Strickland*'s standard "by the use of the term 'probable' without the modifier" of "reasonably" preceding it. *Id.* at 23-24. The Supreme Court, in reversing this Court's decision, held only that the state court's mere use of a shorthand term did not show that it applied the wrong standard. *Id.* at 24.

Here, unlike in *Visciotti*, the state court did not merely *state* the wrong standard of "substantial evidence"—it actually *applied* it. Thus while the problem in *Visciotti* was one of terminology alone, the problem in Hardy's case lay with the state court's *analysis*. The majority correctly determined that the state court's analysis stopped once it determined that substantial evidence remained, even without Boyd's testimony, to support Hardy's conviction on a derivative theory. This case is easily distinguishable from, and entirely consistent with, *Visciotti*. En banc review is unwarranted.

C. The Court Correctly Concluded that the State Court’s Prejudice Determination Was an Unreasonable Application of *Strickland*.

1. The Court correctly determined that the prosecution did not present the jury with derivative theories of liability.

Respondent argues that, while the prosecutor’s “primary theory” was that Hardy was the actual killer, he also advanced alternative theories in which Hardy was liable as an aider and abettor or a conspirator. (PFR at 2-3, 15.) The record contradicts this contention. First, although the prosecutor argued that codefendants *Morgan and Reilly* aided and abetted the murders, those arguments did not apply to Hardy. (*See* RT 12916.) With respect to Hardy, the prosecutor argued *only* that he was the actual killer. (*See, e.g.*, RT 4948, 4950, 4955, 4961, 12838 (“How does [Hardy] know for a fact it was one [killer]? He knows for a fact it’s one if he’s the one.”), 12869 (arguing that Reilly “personally assisted the killer, James Hardy” until Reilly got sick and then “the rest of that was accomplished by one individual”), 12973, 13064-65; ER 1067 (“Mr. Hardy had the knife in his hand and plunged the knife into the bodies of those two people in excess of 65 times.”).) Thus, as the majority correctly found, “[u]nder no reasonable reading of the record could it be concluded the jury actually found Hardy guilty under an aid-or-abet theory.” (*Id.*)³

³ As the majority correctly noted, the two theories of liability—actual killer versus mere aider and abettor—are mutually exclusive under California law. (Slip op. at 19.) *See also* *People v. Perez*, 35 Cal. 4th 1219, 1225 (2005). Respondent complains that this conclusion conflicts with *Taylor v. Beard*, 811 F.3d 326 (9th

Likewise, although the prosecutor argued that Hardy was part of the murder conspiracy, he repeatedly emphasized that Hardy's role in that conspiracy was *committing* the murders. (ER 1071 (arguing that conspiracy "culminated" in the "agreement by Mr. Hardy to go with Reilly to do the killing"); ER 1073 (arguing that Hardy was "going to do the killings . . . in furtherance of a conspiracy.")) The prosecutor never advanced a theory of the case in which Hardy participated in the conspiracy but did not commit the killings. Thus the majority correctly found that "although Hardy was found guilty by the jury of conspiracy to commit murder for insurance proceeds, his conviction rested on being the actual killer." (Slip op. at 20.)

While Respondent complains that the majority "ignored" the alternative theories of liability (PFR at 16), Respondent is wrong. The majority in fact carefully considered, and properly rejected, the idea that Hardy was actually tried under either stand-alone derivative theory of liability. (Slip op. at 19-21.) Because Hardy was tried *only* as the actual killer, the mountain of compelling evidence that Boyd stabbed the victims to death was at least "reasonably likely"—to put it

Cir. 2016) (en banc). (PFR at 17.) But *Taylor* never held that a jury could find both theories true at the same time. All *Taylor* did held was that it did not violate the petitioner's *right to a jury trial* to resentence him as an aider and abettor after he proved only that he had not been the shooter. 811 F.3d at 334-35. The prosecutor had argued both theories at Taylor's trial and the jury had not needed to agree on a single theory to convict. *Id.* at 333-34. The majority in this case considered *Taylor* and properly found that it did not control. (Slip op. at 19 n.7.)

mildly—to change the outcome of trial.⁴ The state court’s decision to the contrary was an unreasonable application of *Strickland*, as the majority correctly found.

2. The Court correctly found that even if the prosecution had pursued derivative theories of liability, an effective performance by counsel would still have led to a different outcome.

a. There was no compelling evidence against Hardy under any theory.

According to Respondent, the state court’s prejudice ruling was reasonable because there was “compelling” evidence of Hardy’s guilt on a derivative theory. (PFR at 7.) But the majority considered and correctly rejected this argument, even assuming that the derivative theories had been advanced: “This is not a case where counsel’s deficient performance had no bearing on the outcome due to otherwise strong or overwhelming evidence of guilt.” (Slip op. at 25-26.) In fact, there was little evidence against Hardy at all. The evidence that remained absent Boyd’s false testimony was certainly not so overwhelming that the revelation that the star prosecution witness was the actual killer would have had no effect.

Without Boyd’s testimony, evidence of Hardy’s guilt under *any* theory was essentially limited to the following, as the Court found: (1) Debbie Sportsman’s testimony that Hardy and Reilly spent time together in the days before the murders

⁴ Even the state court conceded that the Boyd evidence would have made a difference if Hardy had been “convicted solely on the theory that he was the actual killer.” (ER 104.)

and that Reilly told Sportsman, after the fact, that she should coordinate an alibi with Hardy even though Hardy had not been involved; and (2) the disjointed, inconsistent, and unbelievable testimony of Colette Mitchell that Hardy knew certain details about the crimes, discussed his alibi frequently, possessed \$1000 in cash after the crimes, and helped dispose of certain items of evidence after the fact. But as the Court noted, “The state court . . . recognized the weakness of [Colette’s] testimony—discounting most of it point by point.” (Slip op. at 23.) The state court also conceded that “[t]he persuasive power of Colette’s testimony was further undermined by the fact that she was subject to impeachment due to her drug and alcohol use and that she admitted lying for [Hardy] at his preliminary hearing.” (ER 104; *see also* Slip op. at 23.) Furthermore, as the Court noted, “[Colette] Mitchell’s testimony would have been discounted by the jury had [trial counsel] presented evidence that Boyd’s testimony, which corroborated much of Mitchell’s testimony, was false.” (Slip op. at 23.)

In light of the credibility problems Colette faced and the “utter dearth of other evidence inculcating Hardy,” (Slip op. at 30), there is a “substantial likelihood the jury would have had a reasonable doubt concerning Hardy’s guilt” had Boyd not been allowed to provide damning false testimony against him. (Slip op. at 24). The state court’s decision to the contrary was, as the majority of the panel concluded, an unreasonable application of *Strickland*.

- b. Had counsel presented evidence of Boyd’s culpability and Hardy’s refusal to participate, there is at least a reasonable likelihood that Hardy would not have been convicted.**

The majority also correctly found that the state court’s analysis was an unreasonable application of *Strickland* on the basis that the state court asked only what evidence other than Boyd’s testimony still implicated Hardy, rather than asking what effect an adequate performance by trial counsel would have had on the trial. The majority explained:

Strickland does not permit the court to reimagine the entire trial. We must leave undisturbed the prosecution’s case. . . . 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. . . . Demby’s failure to investigate Boyd’s role in this case altered the entire evidentiary picture.

(Slip op. at 25.) The state court’s failure to acknowledge the devastating effect the Boyd evidence would have had on the prosecution’s entire case-in-chief was yet another reason that its decision was unreasonable.

Furthermore, although Respondent argues that the new evidence regarding Boyd’s involvement showed only that Hardy himself did not stab the victims (PFR at 17), it actually strongly suggested that he refused to participate at all. As the majority explained:

There is 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.

(Slip op. at 21.) The evidence that trial counsel should have presented cast a doubt even on Hardy’s involvement on derivative theories. Thus “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 on the evidence that should have been presented at trial.” (Slip op. at 22.) The state court’s decision to the contrary was unreasonable under 28 U.S.C. § 2254(d)(1).⁵

//

//

//

//

⁵ There was another very strong basis for de novo review under AEDPA: that the state court’s decision involved unreasonable determinations of fact under 28 U.S.C. § 2254(d)(2). Because the majority found § 2254(d)(1) satisfied on both the “contrary to” and the “unreasonable application” prongs, it did not have to reach the question of whether the state court’s decision was also unreasonable under § 2254(d)(2). But de novo review was indeed appropriate on that basis, as well. (Appellant’s Opening Brief at 47-50; Appellant’s Reply Br. at 22-26.)

III. CONCLUSION

The petition for panel rehearing and rehearing en banc should be denied.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: October 11, 2016

By: s/ Elizabeth Richardson-Royer
ELIZABETH RICHARDSON-ROYER
Deputy Federal Public Defender

Attorney for Petitioner-Appellant
JAMES EDWARD HARDY

CERTIFICATE OF COMPLIANCE

I certify that this supplemental reply brief is proportionally spaced, has a typeface of 14 points, and contains approximately 3,282 words. It also complies with the 15-page size limitation.

DATED: October 11, 2016

s/ Elizabeth Richardson-Royer
ELIZABETH RICHARDSON-ROYER