06-15614

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA RICHTER,

Petitioner and Appellant,

v.

R.Q. HICKMAN, Warden,

Respondent and Appellee.

On Appeal From The Judgment Of The United States District Court For The Eastern District of California
Honorable James K. Singleton, Presiding

PETITION FOR REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION AND STATEMENT OF COUNSEL

On the morning of December 20, 1994, a shooting occurred at 4620 Fair Oaks Boulevard in Sacramento. One person -- Patrick Klein -- was killed while another -- Joshua Johnson -- was injured. When police arrived, they found a large pool of blood in the bedroom doorway. Klein was dead on the living room couch.

The state charged petitioners Joshua Richter and Christian Branscombe with murder and attempted murder. As the panel opinion here noted, the parties "presented different accounts" of the shooting.

According to the state, petitioners went to Fair Oaks Boulevard to commit robbery, they entered the house and shot Klein, and when Johnson awoke to find them committing a robbery, they shot him as well. Three components were essential to the state's theory: (1) Klein was shot in cold blood while sleeping on the couch, (2) the blood pool in the doorway came from Johnson as he waited for police and (3) Johnson did not fire a gun and there was no issue of self defense.

In a detailed opening statement, petitioner's defense counsel outlined the evidence he would present to support the very different defense theory. According to counsel, petitioners went to Fair Oaks Boulevard to return a gun Branscombe borrowed. Richter dropped Branscombe off and, moments later, heard shooting. Rushing into the house, Richter saw Klein on the floor in the bedroom doorway, while Branscombe yelled that Johnson tried to shoot him. Three components were essential to the defense theory: (1) Klein was *not* shot on the couch but during a struggle while in the bedroom doorway, (2) the blood pool in the doorway was *not*

from Johnson, but from Klein before Johnson carried him to the couch and (3) Johnson fired a .380 caliber gun at Branscombe who returned fire in self-defense.

Because the state never collected samples from the blood pool, the source of that pool could not be established by DNA tests and became a critical issue at trial. As the state now concedes, however, defense counsel could have presented undisputed expert testimony that -- in fact -- the blood pool found in the doorway could not have been from Johnson. This *directly* supported the theory defense counsel himself elected to advance in opening statements. Nevertheless, the panel here held although "[c]ounsel highly experienced in trying capital cases involving bloodstain evidence might well have understood the value of such an expert" the "Sixth Amendment does not guarantee defendants a right to highly experienced counsel." *Richter v. Hickman*, __ F.3d. __, 2008 WL 943585 at *6 (9th Cir. 2008). Accordingly, counsel's failure to support the theory he himself elected to present was reasonable.

In the judgment of petitioner's counsel, a rehearing or a rehearing en banc is appropriate. With all due respect, the panel has set the bar for competence of counsel far too low. Defense counsel's entire theory was the blood pool was from Klein, not Johnson. In opening statement, he promised the jury he would prove exactly this. And then he not only failed to consult with (or present) experts that could have established this very point, he presented no evidence at all on the point.

Under the law of the circuit doctrine, the published panel decision here finding counsel's conduct reasonable will bind all future panels of the Ninth Circuit, as well as all district courts in the circuit. While the Sixth Amendment may not require Clarence Darrow, neither should it permit a lawyer who does not even investigate the theory he promised the jury. It would be fundamentally unreasonable to bind the entire circuit to this panel's view of competency. Rehearing or rehearing en banc is proper.

There is a second reason rehearing en banc is proper. As noted, defense counsel's theory was self-defense: Branscombe shot because Johnson fired first with the .380 caliber gun he routinely carried. In closing argument, the prosecutor ridiculed the argument, repeatedly urging the jury to reject it because there was no physical evidence a .380 had been fired that night.

But it is also now undisputed such evidence existed, although neither defense counsel nor the jury knew it. During trial, investigating officer Maloney found a bullet hole in a floorboard of the house, sawed the floorboard in an effort to retrieve it, but lost it below the house. At trial, Maloney testified (1) the hole was not from a .380 and (2) the floorboard could not be retrieved because there was no crawlspace beneath the house. Accepting maloney's word on both point, defense counsel never obtained the floorboard.

Both of Maloney's representations were false. As the panel noted, not only was there an easily accessible crawlspace beneath the house, but petitioner retrieved the floorboard in post conviction proceedings and his "firearms evidence

expert . . . determined that the hole was probably caused by a .380 caliber firearm . . . ." *Richter*, 2008 WL 943584 at * 7. The panel recognized this evidence supported the defense theory, contradicted Johnson's testimony and had "exculpatory value." *Id.* at * 7-8.

Nevertheless, the panel held counsel's "decision not to attempt to recover the floorboard was reasonable . . . ." *Id.* at * 8. Although the size of the bullet hole was critical to the defense theory, and properly the subject of expert analysis and testimony, the panel believed counsel reasonably decided not to examine the floorboard because investigating officer Maloney said the hole was *not* from a .380 caliber gun. *Id.* at * 8. The panel rejected petitioner's alternative suppression-of-evidence claim because when Maloney lost the floorboard, he did not know it was exculpatory; the panel refused to consider the exculpatory value of the ballistics tests performed on the floorboard after it was recovered. *Id.* at *8.

In the judgment of petitioner's counsel, rehearing or rehearing en banc is appropriate as to these conclusions as well. In connection with the ineffective assistance of counsel claim, the panel has again set the bar too low. While the Sixth Amendment may not require an experienced lawyer, it should require one who -- while litigating in the confines of an adversary system -- does not simply accept an off-the-cuff conclusion from an investigating officer in connection with a matter which plainly requires expert testimony. And in connection with the suppression-of-evidence claim, both the Supreme Court and this Court have explicitly *rejected* the notion that in assessing the impact of a state's suppression

of evidence, a reviewing court must blind itself to evidence which would certainly have been discovered had the evidence been properly disclosed. Rehearing or rehearing en banc of the published decision in this case is required.

STATEMENT OF FACTS

As the panel noted, the parties presented sharply different accounts of the shooting. Testifying for the state, Johnson said petitioner and Branscombe shot Klein on the couch and then him in the bedroom. ER 150, 151. Although Johnson admitted having a .380 caliber Mac-12 gun that night by his bedside, he testified he did *not* fire it. ER 152, 154.

In stark contrast, petitioner testified he was not even in the house when the shooting occurred. ER 163. When he heard shots and entered the house, Branscombe yelled in a panic that Johnson tried to shoot him. ER 166-167.

This case would be decided by which version of events was supported by the physical evidence. Defense counsel recognized this. He properly recognized the key factual issues he needed to prove in order to support the defense theory. He properly identified those issues to the jury in his opening statement. And then he utterly failed to present readily available evidence to support his case. Thus, according to defense counsel's opening statement, the blood pool found in the living room was *not* from Johnson, it was from Klein. ER 134-135, 142. According to defense counsel opening statement, Klein was *not* killed on the

couch, but in the middle of the room during the gun battle, and Johnson later moved him to the couch. ER 138, 142. According to defense counsel's opening statement, Johnson fired a .380 caliber gun at Branscombe and this was a case of self-defense. ER 141. The defense theory never changed; in his closing argument, defense counsel presented the very same theory. ER 172-173, 174.

But as the prosecutor accurately noted in closing argument, defense counsel did not present any evidence showing the blood pool came from Klein rather than Johnson. Accordingly, the prosecutor argued it was "reasonable" to believe that Johnson bled in the doorway. ER 178, 179.

Yet as is now undisputed, the state's theory -- that the blood pool came from Johnson, not Klein, and Klein was shot in cold blood on the couch -- is false. And the explanation is both logical and simple. According to blood spatter expert Ken Moses, a standing person dripping blood (as the state theorized) would create a large number of round splash drops -- known as satellite drops -- surrounding the main pool of blood as blood dropped into the blood pool. ER 82-83. The lack of satellite drops here shows the state's theory -- that the blood pool was deposited by Johnson while standing in the doorway -- was false. ER 82-83. To the contrary, the absence of satellite drops establishes the blood pool was caused *not* by drops falling from an injured person standing in the doorway, but by the

pooling of blood from a source close to or on the floor. ER 82-83.[1]

Because defense counsel did not consult with an appropriate expert, however, the jury deciding whether to believe the defense or the state did not hear uncontradicted expert blood spatter evidence that Johnson could *not* have been the source for the blood pool as the state claimed. Indeed, the district court itself concluded this evidence -- never disputed by the state -- proved "the pool of blood . . . could not have been made by someone standing and dripping blood." ER 11.

The prosecutor also correctly noted no physical evidence supported the self-defense theory defense counsel presented in his opening statement. The prosecutor repeatedly told the jury the absence of any .380 caliber bullet hole required the jury to reject the defense theory:

> [I]t's reasonable with a guy with a Mac-12 semi automatic to get off at least one round if somebody is trying, if he's trying to shoot someone, *and we never ever saw a bullet hole in this room consistent with the Mac-12 being fired at them. There is nothing, nothing over here, nothing* . . . . ER 171, 176.

But the state's theory there was no gun battle is also demonstrably false. Maloney found a bullet hole in the floorboard of Johnson's bedroom. ER 158. He cut a square of the floorboard around the bullet hole, then watched the square fall

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[1] Medical expert Dr. Paul Herrmann confirmed this. Given the nature of Johnson's wounds, and Johnson's description of his activities in the six minutes before police arrived, it is "highly unlikely" Johnson deposited the amount of blood found in the blood pool in the bedroom doorway. ER 71-72. Defense counsel presented none of this readily available expert testimony either.

into the crawlspace beneath the house. ER 159. He testified the crawlspace was inaccessible and the floorboard was lost. ER 160-161. He also testified it was not from a .380 caliber gun. ER 158.

Maloney's testimony was false. The crawlspace was *not* inaccessible. The back of the house had a readily accessible opening to the crawlspace. ER 31-33, 46-48. After trial, petitioner discovered the crawlspace, found the floorboard and provided it to ballistics expert James Aiello. ER 32-33, 63. Aiello obtained a second piece of floorboard from the house to use as a control. ER 63. He test fired five different caliber bullets into the floorboard, including a .380. He then compared the measurements obtained from the control floorboard with measurements from the evidentiary floorboard. ER 64. As the district court noted, Aiello "conclude[d] that the bullet hole was made by a .380 caliber bullet." ER 14. Because defense counsel simply accepted Maloney's off-the-cuff conclusion as to the caliber of the bullet hole, and because Maloney falsely testified the floorboard was lost, neither defense counsel nor the jury ever learned the truth.

ARGUMENT

I. THE PANEL'S HOLDING THAT DEFENSE COUNSEL WAS REASONABLE IN FAILING TO INVESTIGATE THE CASE HE HIMSELF PROMISED TO THE JURY IN OPENING STATEMENT -- AND RELIED ON IN CLOSING ARGUMENTS -- DEPARTS FROM THE RULE FOLLOWED IN THE REST OF THE COUNTRY AND CREATES A SPLIT OF AUTHORITY IN THE CIRCUIT.

When a defendant alleges his counsel provided deficient representation, two elements must be proven: (1) counsel's performance fell below an "objective standard of reasonableness," and (2) but for counsel's errors there is a "reasonable probability" the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688, 693 (1984). Until the published decision here, the law was well-established that where a criminal defense lawyer promised a certain theory in opening statements, the lawyer's failure to present readily available evidence supporting that theory was unreasonable. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (in penalty phase, defense counsel promised jury evidence regarding defendant's difficult life but failed to follow through on this promise; held, *Strickland* violated). Indeed, virtually every circuit in this country -- including this Circuit -- had held counsel's conduct unreasonable where "[h]aving chosen to pursue [a particular] line of defense," counsel does not introduce readily available evidence corroborating that defense. *Hart v. Gomez*, 174 F.3d 1067, 1071 (9th Cir. 1999). *Accord Dugas v. Coplan*, 428 F.3d 317, 328-329 (1st Cir. 2005); *Soffar v. Dretke*, 368 F.3d 441, 473 (5th Cir. 2004); *Pavel*

v. Hollins, 261 F.3d 210, 219 (2nd Cir. 2001); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990); *Anderson v. Butler*, 858 F.2d 16, 17-19 (1st Cir. 1988).

That is exactly what occurred here. In opening statements defense counsel offered the jury a very specific theory: Klein was *not* shot in cold-blood on the couch, but during a gun battle initiated by Johnson. Counsel explained Klein was actually shot in the bedroom doorway where he left a pool of blood. Although this was the centerpiece of the defense, counsel neither consulted with an expert nor presented what is now undisputed expert blood spatter testimony to confirm Klein was indeed the source of the blood pool. And this remained counsel's theory in closing arguments as well. ER 172-174. Under these circumstances, and pursuant to case law from around the country and this Court, counsel's failure to investigate the defense he himself elected to present was unreasonable.

The panel here disagreed. The panel reasoned defense counsel was surprised when the state presented its own blood spatter expert mid-trial, and did not have time to present a rebuttal expert. *Richter*, 2008 WL 943584 at * 6. Accordingly, defense counsel's failure to consult an expert in support of his own case was reasonable. *Id.* With all due respect, the panel has not only set the bar for effective assistance of counsel too low, but it has set the bar below any other circuit in the country.

The bottom line here is simple. The state's case depended on the jury believing Klein was shot on the couch in cold-blood. The defense case depended on the jury believing Klein was shot in the bedroom doorway during a gun battle

and later carried to the couch. In both his opening statement and closing argument, defense counsel relied on the theory Klein was shot in the bedroom doorway. ER 134-135, 138, 141-142, 172-174.

Contrary to the panel's decision, it should not take a lawyer "highly experienced in trying capital cases" to realize the value of investigating the theory he promised to the jury. As the Supreme Court, this Court and virtually every other circuit have already recognized, it simply takes a competent one. The panel's published decision here not only ignores this well-established precedent, but binds the Ninth Circuit to a level of competency lower than any other court in the country. Rehearing or rehearing en banc is appropriate.

II. DEFENSE COUNSEL'S FAILURE TO SUBMIT EXCULPATORY EVIDENCE TO HIS OWN EXPERT BECAUSE THE STATE'S INVESTIGATING OFFICER TOLD HIM THE EVIDENCE WOULD NOT BE HELPFUL WAS UNREASONABLE; THE PANEL'S CONTRARY RULING REQUIRES REHEARING OR REHEARING EN BANC.

As noted above, the critical components of the defense case were (1) Klein was shot in the bedroom doorway (and the blood pool found there was from him not Johnson) and (2) Johnson fired a .380 caliber gun at Branscombe that night. These two components related directly to (and reinforced) each other; the reason Klein was shot in the bedroom doorway was that he was hit in the crossfire of a gun battle. ER 141, 172-173, 174.

During closing arguments, the prosecutor skewered the defense for failing to present any physical evidence supporting its theory Johnson fired the .380 caliber gun that night. ER 171, 176. The prosecutor was not subtle:

> [I]t's reasonable with a guy with a Mac-12 semi automatic to get off at least one round if somebody is trying, if he's trying to shoot someone, *and we never ever saw a bullet hole in this room consistent with the Mac-12 being fired at them. There is nothing, nothing over here, nothing* . . . . ER 176. *See* ER 171 ["[t]here is no bullet hole that can be found"].

As also discussed above, we now know this was false. In fact, a floorboard in the house contained a bullet hole. Officer Maloney cut out the floorboard, dropped it into the crawlspace beneath the house, and then testified (1) he did not think the bullet hole was from a .380 caliber bullet and (2) the floorboard was lost

because there was no access to the crawlspace. ER 158, 159-161.[2]

As petitioner would discover much later, however, the crawlspace was *not* inaccessible, but readily accessible through an opening in the back of the house near the kitchen door. ER 31-32, 46-48. And after obtaining the floorboard, petitioner's "firearms evidence expert . . . determined that the hole was probably caused by a .380 caliber firearm . . . ." *Richter*, 2008 WL 943584 at * 7. *Accord* ER 14. To assess the bullet hole's caliber, petitioner's expert (1) obtained a second piece of floorboard from the house as a control, (2) test fired five different caliber bullets into the floorboard, including a .380, (3) took measurements of the test-firings and (4) compared these measurements with measurements from the evidentiary floorboard. ER 63-64.

Although the defense theory was Johnson fired a .380 caliber gun that night, defense counsel never obtained the floorboard to have it tested by an expert. He failed to do this even though this would have been the single strongest physical evidence supporting the self-defense theory. The panel held counsel's performance was reasonable because he relied on Maloney's statement that the bullet hole was not from a .380 caliber, but a .22 caliber.

Once again, however, the published panel opinion has set the bar too low. Maloney was the state's investigating officer working to ensure petitioner's

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[2] In fact, Maloney said he thought the bullet was from a .22 caliber. ER 158. The defense theory was Johnson fired the .380 caliber gun he admitted was on his bedside table. ER 152. Maloney's testimony about the size of the bullet, if believed by the jury, completely undercut the defense.

conviction. He was a state witness. He had not tested the floorboard or the Mac-12. Competent counsel in a special-circumstances murder case cannot forbear from having his own expert test exculpatory physical evidence simply because the state's investigating officer -- who is not an expert -- opines the evidence will not be helpful. *See Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003) (unreasonable for criminal defense lawyer to forego investigation based on "the investigative work of the State"). The panel has set the competency bar so low, the adversary system is unrecognizable. Rehearing or rehearing en banc is required.

III. THE PANEL'S HOLDING THAT THE OBLIGATION TO DISCLOSE EXCULPATORY EVIDENCE IS NOT VIOLATED WHEN THE STATE DOES NOT KNOW THE EVIDENCE IS EXCULPATORY CREATES A SPLIT OF AUTHORITY IN THE CIRCUIT ON THIS EXACT QUESTION.

Even if defense counsel reasonably hinged his use of experts on the views of the state's investigating officer, rehearing is required for another reason. Maloney's testimony the floorboard was lost, relied upon by defense counsel, was false. In fact, the floorboard was easily obtained after trial. *Richter*, 2008 WL 943584 at * 7.

Due Process requires the prosecution in a criminal case to disclose all substantial material evidence favorable to an accused. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Where a defendant is convicted at a trial in which such evidence has been suppressed, Due Process is violated and relief is required. *Kyles v. Whitley*, 514 U.S. 419, 435-436 (1995). Once it is determined material evidence was suppressed, no further harmless error analysis is necessary. *Kyles*, 514 U.S. at 435-436. This is because the determination certain evidence was "material" -- and could not properly be suppressed -- embraces a conclusion defendant has been prejudiced. *Kyles*, 514 U.S. at 435-436.

Here, the defense theory was Branscombe fired in self-defense, after Johnson fired at him. ER 141, 172-173, 174. The panel correctly noted physical evidence of a .380 caliber bullet hole supported this defense, contradicted Johnson's testimony, and had "exculpatory value." *Richter*, 2008 WL 943584 at *

7-8. This is especially true here, where the prosecutor placed so much reliance on the absence of such evidence. ER 171, 176.

In nevertheless rejecting petitioner's position, the panel held it had "not yet specifically addressed" the "unusual factual situation" where "the police did not believe evidence to have exculpatory value when it was lost or misplaced, even if the evidence is later recovered and determined to be exculpatory." *Richter v. Hickman*, 2008 WL 943585 at * 8. The panel refused to consider the exculpatory value of the tests which were performed on the floorboard after its recovery. *Id.* Instead, the panel rejected petitioner's *Brady* claim because maloney did not know the floorboard was exculpatory when he lost it, and so there was no bad faith. *Id.*

The panel's conclusion that this case presented an unusual situation "not yet specifically addressed" ignores binding Ninth Circuit precedent. In fact, this Court has *directly* addressed this exact situation.

In *Gantt v. Roe*, 389 F.3d 908 (9th Cir. 2004), the prosecutor failed to disclose evidence which was only later determined to be exculpatory. This Court held that "*Brady* has no good faith or inadvertence defense." *Id.* at 912. Instead, *Brady* applies even if the prosecution "fails to grasp the significance" of the evidence at the time of its suppression. *Id.* The Supreme Court too has repeatedly held *Brady* has no good faith exception. *Brady*, 373 U.S. at 87. *See Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 280 (1999). Contrary to the panel's holding here, "[i]f the suppression of evidence result in a constitutional error, it is because of the character of the evidence, not the character

of the [police]." *United States v. Agurs*, 427 U.S. 97, 110 (1976).

Moreover, the Supreme Court has also held in determining the materiality of undisclosed evidence a reviewing court must consider not just the evidence suppressed itself, but "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." *United States v. Bagley*, 473 U.S. 667, 683 (1985). Following *Bagley*, this Court has held a court must consider not only the evidence suppressed, but "information the defendant reasonably could acquire after the prosecution's disclosure of the materials." *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1988); *Coleman v. Calderon*, 150 F.3d 1105, 1116-1117 (9th Cir. 1998), *reversed on other grounds, Calderon v. Coleman*, 535 U.S. 141 (1998)(suppressed evidence is material where it "lead[s] to admissible evidence."). Other circuits agree. *See Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991); *Sellers v. Estelle*, 651 F.2d 1074, 1077 n.1 (5th Cir. 1981).

Pursuant to *Gantt*, it was entirely irrelevant Maloney did not know the floorboard was exculpatory when he lost it. And pursuant to *Bagley* and *Kennedy*, the panel should have considered the evidence which would have been obtained absent the suppression -- expert testimony the bullet hole was from a .380 caliber. The panel's insertion of a good faith defense in *Brady* cases, and its refusal to consider the ballistics test, ignored binding precedent and created a split of authority on both issues in the Circuit. Rehearing or rehearing en banc is proper.

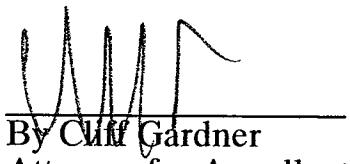
CONCLUSION

The published decision here creates a split of authority on whether (1) defense counsel has an obligation to investigate the defense theory promised in opening statements and relied on in closing, (2) there is a good faith exception to *Brady*, and (3) in assessing *Brady* claims, courts may consider evidence which would have been discovered absent the suppression. It also permits defense counsel to abdicate his duty to investigate based on opinions of the investigating officers. Rehearing or rehearing en banc is required.

DATED: 4/24/08

Respectfully submitted,

CLIFF GARDNER
EDWARD SWANSON



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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e), I certify that the accompanying brief is double spaced, that a 14 point proportional font was used, and that there are 4,199 words in the brief.

Dated: 4/24/08.

Cliff Gardner

06-15614

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FOR THE NINTH CIRCUIT

JOSHUA RICHTER,

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Honorable James K. Singleton, Judge

OPPOSITION TO PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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06-15614

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In a published opinion issued on April 9, 2008, a panel of this Court unanimously affirmed the district court's denial of Appellant Joshua Richter's petition for writ of habeas corpus. *Richter v. Hickman*, 521 F.3d 1222 (9th Cir. 2008). On or about April 24, 2008, Richter filed a petition for rehearing and rehearing en banc. The petition alleges that the panel erred in its resolution of some aspects of his claim of ineffective assistance of trial counsel and erred in the resolution of his claim of error under *Brady v. Maryland*, 373 U.S. 83 (1963). On

May 22, 2008, this Court ordered Appellee (hereinafter "the State") to file a response. For the reasons stated below, the State submits that rehearing is inappropriate and unnecessary in this matter.

I

RICHTER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Richter first challenges some of this Court's observations regarding his claim of ineffective assistance of trial counsel. Specifically, he alleges that the Court improperly resolved his claims regarding trial counsel's (1) failure to consult with and present an expert who might have testified that the pool of blood discovered in the bedroom of the crime scene was deposited by victim Patrick Klein and (2) failure to conduct independent investigation that might have yielded evidence that a .380 caliber bullet had been filed into a floorboard in the house at some point. Neither claim reveals error warranting rehearing.

In support of both claims, Richter points to some circuit cases finding unreasonable performance where counsel failed to investigate readily available evidence corroborating a chosen defense. (Pet, pp. 9-10, 14.) The general principle underlying this authority does not advance Richter's cause because, of course, this case is governed by the AEDPA, which allows for relief only where

the state-court adjudication "involved an unreasonable application" of clearly established United State Supreme Court precedent. 28 U.S.C. § 2254(d)(1).

To sustain a claim of ineffective assistance, a federal habeas petitioner must show that the state courts "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone,* 535 U.S.685, 698-99 (2002). Accordingly, the scope of federal habeas review of ineffective assistance claims under AEDPA is limited (*Dows v. Wood*, 211 F.3d 480, 484 (9th Cir. 2000)) and is "very forgiving." *Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000). And, as enunciated by the Supreme Court, where the claim at issue involves a broad and general rule, such as that announced in *Strickland*, state courts must be afforded substantial "leeway ... in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Richter's proffered circuit authority is, therefore, unavailing because, as the Supreme Court recently emphasized, habeas relief is available only if the state court's decision is contrary to or involved an unreasonable application of the *Supreme Court's* own holdings. *Carey v. Musladin*, --- U.S. ----, 127 S.Ct. 649, 653-654 (2006). Petitioner provides no clearly established United States Supreme Court authority that would require a finding of unreasonable performance under

the facts of this case. The panel, therefore, properly found that Richter had failed to sustain his burden under AEDPA.

More importantly, rehearing is unwarranted because, as Richter fails to acknowledge, the panel's determination of Richter's ineffective assistance claim did not turn on any finding regarding the reasonableness of counsel's performance. As the panel expressly held:

> We need not decide whether appellants' trial counsel acted unreasonably in failing to consult and present experts in firearms evidence, serology and pathology. Even assuming that trial counsels' failure to consult and present such experts was unreasonable, appellants do not show that such failure prejudiced their case.

Richter, 521 F.3d at 1230. Understandably, Richter presents nothing to challenge the panel's holding regarding lack of prejudice. The claim simply presents nothing warranting rehearing.

II

RICHTER'S CLAIM OF *BRADY* ERROR

Richter also insists that rehearing is necessary with respect to his claim regarding the portion of the house's floorboard that was initially lost during the police investigation but later recovered after trial. He claims that the panel's analysis of this claim is flawed because it takes no account of the potential

exculpatory value of such evidence for purposes of determining materiality under of *Brady*.

As the panel correctly observed, however, this case does not involve withheld or suppressed evidence; in this case, the floorboard evidence was inadvertently lost under the house in an area the investigating officers believed to be inaccessible, and the exculpatory value of the evidence was not apparent at the time. Accordingly, the panel properly determined that this matter was not governed by *Brady* but rather by *California v. Trombetta*, 467 U.S. 479 (1984), and *Arizona v. Youngblood*, 488 U.S. 51 (1988). Under that authority, the exculpatory value of the evidence must have been apparent *before* it was lost or destroyed, *Trombetta*, at 489, or the police must have acted in bad faith in failing to preserve the evidence, *Youngblood*, 488 U.S. at 56 n. *. And as the panel properly observed, neither of those conditions were present in this case. *Richter*, 521 F.3d 1234. Again, rehearing is unwarranted and unnecessary because the panel's resolution of this claim was correct.

CONCLUSION

For the reasons stated herein, the State respectfully requests that the panel deny Richter's petition for rehearing and that the full Court deny Richter's petition for rehearing en banc.

Dated: June 11, 2008

Respectfully submitted,

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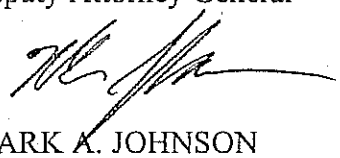

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