No._____

IN THE SUPREME COURT OF THE UNITED STATES

GUY KEVIN ROWLAND,

Petitioner -Appellant,

vs.

KEVIN CHAPPELL, Warden

Respondent-Appellee.

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

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PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. In 1987 petitioner Guy Rowland was convicted of murder and sentenced to death in the State of California. In 1994 he exhausted his state remedies and sought relief in the federal district court of the Northern District of California. At that time the Local Rules 296-8(b) and 8(c) of that court provided that a petitioner's Motion for a Stay of Execution together with a Memorandum of Issues to be Raised, would constitute a federal petition for habeas corpus under 28 U.S.C. § 2254. In good faith reliance on this Rule, Rowland's attorneys filed a motion in federal court for a stay of execution together with a memorandum of partial list of issues to be raised. In accordance with the Rule, the first entry on the federal docket sheet of the case stated that a federal petition for habeas corpus had been filed. After legislation for the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was introduced in Congress, Rowland's attorneys did not accelerate the filing a formal petition believing in good faith that such a filing was not necessary given the Local Rule. On April 24, 1996, the AEDPA became effective. On June 28, 1996, Rowland filed his formal petition which included the issues identified in his memorandum as well as others.

The first question presented is: Does the AEDPA apply where Petitioner's

attorneys relied in good faith on the federal district court's local rules that Petitioner's filings constituted a petition for a writ of habeas corpus, and where the federal district court's docket entry identified his filings as a pending petition for a writ of habeas corpus, though he filed his formal petition after the effective date of the AEDPA?

2. In the guilt phase of this capital case, Rowland was convicted of raping and killing the victim. To prepare for the penalty phase, trial counsel hired psychologist, Dr. Hugh Ridlehuber. As found by the Ninth Circuit, however, trial counsel performed deficiently by hiring Dr. Ridlehuber much too late. Further, as found by the Ninth Circuit, trial counsel performed deficiently by failing to provide Dr. Ridlehuber Rowland's birth records which showed him to have had "jaundice, blood transfusion, convulsions, and an infection" at birth. Because Dr. Ridlehuber did not have the birth records, he testified in the penalty phase that Rowland did not suffer from any organic brain damage or other mental disability except for borderline personality disorder. After two and one-half days of deliberation, the jury sentenced Rowland to death.

In post-conviction proceedings in state court, Dr. Ridlehuber saw the birth records for the first time. After reviewing the records, he declared that had he seen the records, he would have testified in the penalty phase that there was a "very high probability" that Rowland suffered from organic brain damage at the time of his

birth and at the time of the crime as well as from bi-polar disorder. The state court summarily rejected the post-conviction petition. The federal district court denied the federal habeas petition on summary judgment, and the Ninth Circuit Court of Appeals affirmed.

The Ninth Circuit held that trial counsel performed deficiently in hiring Dr. Ridlehuber too late and in failing to provide him Rowland's birth records, and that it was unreasonable for the California courts to have held otherwise. The Ninth Circuit went on to hold, however, that the California Supreme Court could have reasonably concluded that that Rowland was not prejudiced by trial counsel's deficient performance. The Ninth Circuit reasoned that Dr. Ridlehuber' s conclusions reached after seeing the birth records were "mere speculat[ion]." The Ninth Circuit also reasoned that the California Supreme Court, in its post-card denial, could have reasonably determined that the limited value of additional testimony from Dr. Ridlehuber about Rowland's mental diagnoses would not have changed the outcome of the penalty phase when weighed against the aggravating evidence of Rowland's of the rape and murder of the victim and his criminal record of multiple sexual assaults.

The second question presented is: Did trial counsel's deficient performance in the penalty phase prejudice Rowland, where Rowland would have been spared the death penalty if only one juror would have voted for life after

learning that there was a very high probability that Rowland suffered from organic brain damage and bipolar disorder at the time of his birth and at the time of the crime?

3. In closing argument in the penalty phase, the prosecutor expressed his personal opinion that were he on the jury, he would vote for death. The prosecutor also told the jurors that the voters of California so insisted upon the propriety of the death penalty that they had voted out of office three California Supreme Court justices who had failed to enforce it. The Ninth Circuit disapproved of both these remarks but held the California Supreme Court was not unreasonable in determining that that neither statement violated Rowland's constitutional rights.

The third question presented is: Did the prosecutor's arguments, taken separately or together, violate Rowland's right to due process of law or violate the principle of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Guy Rowland respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit which affirmed the denial of his federal habeas corpus petition that denied relief from his California capital convictions and death sentence.

OPINION BELOW

The opinion of the court of appeals (App. 1-37) is published in the *Federal Reporter*: *Rowland v. Chappell*, 876 F.3d 1174 (9th Cir. 2017).

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2017. The court denied a petition for rehearing and a suggestion for rehearing en banc on

April 4, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, 18 U.S.C. § 3595(a), and 18 U.S.C. § 3742.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The Fifth Amendment to the United States Constitution provides in relevant part that "No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ."

B. the Sixth Amendment to the United States Constitution provides in relevant part that an accused shall be provided with the "Assistance of Counsel" for his defense.

STATEMENT OF THE CASE

A. Procedural History

On February 11, 1987, the State of California charged Rowland with one count of first degree murder, with the special circumstance that the murder took place during the commission of rape, and one count of rape. The information alleged 12 prior felony convictions and Rowland was on parole when he committed the offense. Attorneys Charles Pierpont and James Courshon represented Rowland at trial as appointed counsel. After a jury trial, Rowland was convicted and sentenced to death.

The California Supreme Court affirmed Rowland's conviction and sentence on December 17, 1992, *People v. Rowland*, 4 Cal. 4th 238 (1992), App. 92-116. and summarily, by postcard, denied his petition for a writ of habeas corpus on June 1, 1994. Rowland's petition for habeas corpus was accompanied with supporting declarations including two from Dr. Hugh Ridlehuber, who had testified for Rowland in the penalty phase. App. 117-132. Dr. Ridlehuber declared that he had been hired "too late" by trial counsel to do an adequate examination. App. 117 at ¶ 3. He said that he was not given the medical records compiled by Rowland's mother Stella Rowland when Rowland was ten years old which showed that at his birth Rowland had "jaundice, blood transfusions, convulsions, and an infection." App. 129 at ¶ 12. He declared that "none of the information concerning the traumatic birth circumstances of Mr. Rowland's birth was known to me at the time of evaluation of him." App. 130 at ¶ 14.

Dr. Ridlehuber declared that had he been hired in a timely manner, and been provided with the full medical records, he would have concluded that there was a "very high probability" that Rowland did have organic brain condition, App. 126 at ¶ 9, the possibility of Bipolar Affective Disorder, App. 128 at ¶ 11, and probably "fetal distress syndrome," App. 129 at ¶ 12, and quite possibly Attention Deficit Hyperactivity Disorder, Adult Residual Form. App. 130 at ¶ 15.

On August 26, 1994, Rowland filed a motion in federal court for a stay of

execution pending the preparation and filing of the finalized petition for habeas corpus. App 167. In his motion, he cited Local federal rule 296-8 (b). Under the then prevailing Local Rule of the Northern District of California, this filing was "deemed to be a petition for writ of habeas corpus with leave having been granted to amend the petition upon appointment of counsel." Local Rule 296-8 (b) (1990); App. 154. On June 19, 1995, after counsel were appointed, Rowland filed a further motion for a stay accompanied by a memorandum containing a partial list of the claims he would raise in the finalized petition. App. 169-175. Under Local Rule 296-8 (c), this filing was also "deemed to be a petition for writ of habeas corpus with leave having been granted to amend the petition upon appointment of counsel." App.154.

On June 28, 1996, Rowland filed his finalized federal habeas petition challenging his conviction and sentence. Docket No. 46, App. 181. On November 19, 2007, Rowland filed the third amended petition with 28 claims. Docket No. 214; App. 183. The state moved for summary judgment on all claims in the petition. On October 2, 2012, the district court granted the state's motion and denied a COA on all claims in a written order. App 39-91. The district court's order was predicated on its holding that the AEDPA applied to this case. App. 46 at n.3.

On October 11, 2012, Rowland filed a notice of appeal to the Ninth Circuit Court of Appeals. That Court issued a Certificate of Appealability on the issue whether the AEDPA applies to this case and also on various other claims. On December 6, 2017, the Ninth Circuit affirmed the district court's decision, App. 1-37, and later denied a petition for rehearing and suggestion for rehearing en banc. App. 38.

B. Essential fact at trial from the opinions of the state and federal courts.

1. The killing of Marion Richardson.

On March 16, 1986, Marion Geraldine ("Geri") Richardson went to the "Wild Idle" bar in Byron, Contra Costa County, California. Rowland Guy Rowland was also at the bar. He socialized with Geri for a while. According to an off duty bartender, Rowland was "coming on" to Richardson, but she did not respond positively. Before 10 p.m., Rowland left the bar. Sometime later, Geri told her friend, Jeanne Weems, that she had a headache and needed to go home to get some sleep before she had to work early the next morning. Geri left the bar alone, apparently driving away in her car. Her vehicle was later seen parked, empty and unlocked, at an odd angle about half a block from the bar.

The state presented evidence that in the hours that followed, Rowland beat Geri about the head, face, and elsewhere. He also had intercourse with her. According to expert testimony, Geri had a bruise on her inner thigh that could have

been caused by someone using a knee to force the knees apart. Before her death, Geri had ingested a potentially lethal dose of methamphetamine.

Rowland hauled Richardson's body in his truck to the vicinity of Half Moon Bay, dragged it across the ground, and dumped it in the ocean. The next day Rowland arrived at the house of his lover, Susan Lanet, in Livermore. He appeared disturbed and said he wanted to leave the state. Rowland and Lanet shared some methamphetamine. He admitted to Lanet that he had killed Geri. He told Lanet that he became angry with Richardson because she made an offensive remark about ex-convicts and because they were quarrelling over the methamphetamine. Rowland offered her $20 to clean his truck and remove "blood and every strand of hair." Lanet pretended to accept, but then called the police. Rowland was arrested as he attempted to flee. At around 9:45 AM, Geri's body was found at the base of a cliff by Moss Beach near Half Moon Bay. Blood and other evidence in Rowland's vehicle tied him to the killing.

Trial counsel initially retained several mental health experts to evaluate Rowland for mental defenses. In February, 1988, one month before the start of the guilt phase, defense counsel retained Dr. Hugh Ridlehuber to evaluate Rowland for ADHD. Rowland's primary defense at the guilt phase was that the evidence did not establish that the killing was first-degree murder that followed a rape, but instead was the result of a quarrel over dugs.

At the guilt phase of the trial, Rowland presented no evidence, called no witnesses, and Rowland himself did not take the stand. On May 13, 1987, the jury convicted Rowland of first-degree murder and rape and also found true the special circumstance allegation of felony murder in the course of rape.

2. The Penalty Phase

During the penalty phase, the prosecution offered in aggravation: (1) the circumstances of the offenses, (2) other criminal activity perpetrated by Rowland, and (3) his prior felony convictions. As to other violent criminal activity, the prosecution presented evidence of the following conduct in the penalty phase:

- On April 4, 1978, Rowland assaulted and injured Harriet Larson.
- On October 4, 1980, Rowland met Tereza V. in a bar in Pleasanton, offered to share cocaine with her, and raped her in a park.
- On November 7, 1980, together with a male partner, Rowland kidnapped two 13-year old girls, Lisa V. and Caren F., and sexually assaulted one of them.
- On March 11, 1986, Rowland assaulted his stepsister with a knife.
- On March 11, 1986, Rowland assaulted Patricia G. and threatened to kill her.

As to prior felony convictions, the prosecution presented evidence that on June 8, 1981, Rowland was convicted of the following offenses arising out of the

Lisa V./Caren F. incident: two counts of sodomy, one count of lewd and lascivious conduct with a child under fourteen years of age, and one count of oral copulation.

In mitigation, Rowland offered evidence that he was born into a middle class family in 1961. He had a brother and two sisters and was at least of average intelligence. His parents had a violent, alcoholic marriage. His mother, especially, neglected and abused him. She twice attempted to drown him in the bathtub when he was a baby. As a toddler, he experienced night terrors and convulsions. He commenced psychotherapy and drug therapy at a young age. In school, he experienced learning disabilities and behavioral problems. In time, he started to abuse alcohol and drugs. He went on to spend time in correctional facilities. At various points in life, Rowland was diagnosed with various mental conditions, including hyperactivity. At the time of trial, when he was 26, Rowland was diagnosed with borderline personality disorder.

Rowland also offered the background of members of his family. His parents each came from violent, alcoholic backgrounds. His mother had been sexually molested by her father. His father, at age eleven, was given gifts in exchange for sexual favors by a neighborhood man. Rowland's mother once put his infant sister's head in the oven and turned the gas on. His father later sexually molested that same sister. His father abused his mother while under the influence of alcohol.

3. *Dr. Ridlehuber's testimony*.

Just two days before the beginning of the penalty phase, trial counsel recontacted Dr. Ridlehuber to again examine Rowland generally (not for ADHD specifically) and to testify in the penalty phase to any mental-state mitigating testimony he could diagnose... The examination was done "while the penalty phase was already in progress." Dr. Ridlehuber concluded that Rowland suffered a borderline personality disorder, "a major psychiatric disorder [that] can be just as disruptive as schizophrenia." But he also testified that he found no evidence of organic brain dysfunction or schizophrenia.

Dr. Ridlehuber testified that by virtue of his abusive and traumatic childhood Rowland was very vulnerable to rejection and his ability to handle interpersonal relationships is severely impaired. In Ridlehuber' s opinion it was very stressful for Rowland that he could not fix his family problems when he got out of prison and that situation coupled with his crippled emotional state made Rowland lose cognitive control and ultimately lose control of his behavior.

4. *The prosecutor's closing argument in the penalty phase*.

Dr. Ridlehuber was effectively cross-examined by the prosecutor who argued in closing that his conclusions should be given no weight because his report had been "rushed together" at the last minute. App. 161-162.

The prosecutor also argued that were he on the jury he would vote for death:

> And I feel for you. But we're all part of it: I am, you are. And I've made a long practice in my life *never to ask others to do what I would not feel is right, and what I would not do myself.*
>
> I believe strongly in the sanctity of human life, *and I would not ask you to do something that I would not do*. And I believe in human life. But I also believe that society has the right, in fact the duty, to protect itself and to see that justice is done in the appropriate case…..

App. 165: 16-25 (emphasis added). Trial counsel objected to the prosecutor's expression of personal opinion, but the trial court overruled the objection.

Furthermore, the prosecutor reminded the jury, in the context of these arguments, that "several" California Supreme Court justices who did not enforce the death penalty "are gone now." Specifically, the prosecutor argued in pertinent part as follows:

> We had a recent election in which several of our Supreme Court justices were perceived by the voters not to be applying this law. They are gone now. There's no question that it is the policy expressed by the will of the populace that there be a death penalty in California, and that it be carried out in appropriate cases.
>
> * * *

App. 160: 2-7.

The prosecutor also repeatedly argued that the people of California had overwhelmingly insisted upon the propriety of the death penalty.

Following two and one-half days of deliberations, the jury returned a verdict of death.

REASONS FOR GRANTING THE WRIT

A. The Court should grant the writ on the first question because, contrary to the decision of the Ninth Circuit, Rowland's petition for habeas corpus is not governed by AEDPA.

1. Local Rule 296-8 (c) deemed Rowland's filing a federal petition for habeas corpus.

Pursuant to the unambiguous wording of the then-applicable Local Rule of the Northern District of California, Rowland's Motion for a Stay of Execution and the accompanying Memorandum of Issues to be Raised, which were filed prior to AEDPA's effective date, were "deemed a petition for a writ of habeas corpus." Indeed, the very first filing on the federal docket is so denominated. The good faith reliance of Rowland' attorneys on the Local rule render *Woodford v. Garceau*, 538 U.S. 202, 208−210 (2003) inapposite, because that case did not address this issue.

AEDPA became effective on April 24, 1996. However, almost two years earlier, on August 26, 1994, Rowland filed a motion in federal court for a stay of execution and the appointment of counsel to prepare a finalized petition. The then-prevailing local rules for the Northern District of California, provided that such a motion "shall be deemed to be a petition for writ of habeas corpus with leave having been granted to amend the petition." N. D. Cal. R. 296-8(b) (1990). Furthermore, on June 19, 1995, Rowland's counsel filed a motion in for a stay of execution pending the preparation and filing of the formal petition for habeas

corpus. Along with the motion, Rowland submitted a memorandum containing a partial list of the claims that he asserted justified granting of the writ and that he would raise in the formal petition. App. 171-175. These issues included, among others, ineffective assistance of trial counsel in the penalty phase, now raised in Question 2 in this petition. Once again the local rule provided such a filing would also "be deemed to be a petition for writ of habeas corpus with leave having been granted to amend the petition." App. 174.

In accordance with the local rule, the very first docket entry in this case, Docket #1, on August 6, 1994, states a "PETITION FOR WRIT OF HABEAS CORPUS" was filed and so designated by "Court Staff." App. 177. Rowland's attorneys justifiably relied on the district court rule that his filing would be deemed a petition for habeas corpus.

It is true that Rowland did not file his "finalized" petition for habeas corpus until June 28, 1996. It is also true that in *Woodford v. Garceau*, 538 U.S. 202, 208−10 (2003), this Court held that an application for a stay of execution, even when accompanied by a statement of issues to be raised, was insufficient to constitute a pending petition for habeas corpus. However, the facts of this case remove it from the ambit of *Garceau* in light of the local rule that was in effect in 1994 that assured Rowland his filings would be "deemed to be a petition for [a] writ of habeas corpus with leave having been granted to amend the petition." No such

local rule was at issue or even mentioned in *Garceau*. Further, *Garceau* did not present a case in which the very first docket entry in the district court is denominated as a filing of a "PETITION FOR WRIT OF HABEAS CORPUS" as designated by "Court Staff."

Because Rowland's writ of habeas corpus was pending at the time AEDPA went into effect, AEDPA is not applicable. *See Lindh v. Murphy*, 521 U.S. 320 (1997) (AEDPA was effective on April 24, 1996, and does not apply to habeas corpus petitions pending as of that date). In sum, the district court's granting of summary judgment and the Court of Appeal's affirmance of that judgment were erroneously predicated on the applicability of AEDPA. The Court should grant certiorari on this important issue and reverse the decision of the Ninth Circuit.

2. *Rowland's attorneys relied in good faith on the district court's local rule that treated Rowland' s motion as a petition for a writ of habeas corpus.*

Rowland's attorneys relied in good faith on the district court's local rule that treated his motion as a petition for a writ of habeas corpus. In light of the local rule, the entry in the docket, and the weight of pertinent authority, Rowland had every right to assume that his motion for a stay, filed by appointed counsel, together with his specification of non-frivolous issues, would be "deemed a petition for [a] writ of habeas corpus," just as the rule mandated and the docket entry designated.

The Ninth Circuit has observed that "to preserve the integrity of the judicial

system . . . the explicit assurances that a judge makes—no less than the decisions the judge issues—must be consistent and worthy of reliance . . . . Litigants and the public must be able to trust the word of a judge if our justice system is to function properly." *Perry v. Brown*, 667 F.3d 1078, 1087–88 (9th Cir. 2012). Thus, "if our justice system is to function properly," Rowland was entitled to "trust the word" of the Local Rule in this case.

To be sure, a district court cannot authorize a defendant to file a notice of appeal beyond the dates set forth in the rules of criminal procedure or by act of Congress, because such a date is a mandatory, jurisdictional directive. *See Gonzalez v. Thaler*, 132 S.Ct. 641, 650 (2012) (noting the "century's worth of precedent' for treating statutory time limits on appeals as jurisdictional"); *Bowles v. Russell*, 551 U.S. 205, 210, 214 (2007) (defendant cannot rely on judge's statement as to when an appeal was due when the date was beyond that provided in the rules of criminal procedure because the date for filing an appeal is mandatory and jurisdictional in that "a time limitation is set forth in a statute").

The case at bar, however, does not involve a mandatory jurisdictional deadline set by Congress. Furthermore, this Court has held that to be jurisdictional, the restriction on a court's authority not only must be specified by Congress—it must also express a clear Congressional intent to be jurisdictional. *Gonzalez*, 132 S.Ct. at 648-649. No such intent is manifested in the AEDPA. *Cf. Sibelius v.*

Auburn Regional Medical Center, 133 S.Ct. 817, 825 (2013) (Provision of Medicare statute setting a 180-day limit for health care providers to file appeals from the fiscal intermediary to the Provider Reimbursement Review Board (PRRB) was not jurisdictional.)

Saying that Rowland's reliance on the local rule was fatal to his claims is fundamentally unfair and a violation of due process. Analogy to the principle of entrapment by estoppel demonstrates this conclusion. The seminal decision is *Raley v. Ohio*, 360 U.S. 423 (1959). There, four individuals were ordered to appear before an Ohio legislative commission to answer questions. After the commission's chairman had informed the individuals that they could claim the privilege against self-incrimination, they invoked the privilege and refused to answer many questions posed to them. They were thereafter prosecuted and convicted of contempt for at least some of their refusals, and the Ohio Supreme Court upheld the convictions on the ground that the privilege did not actually apply at the hearing in question. This Court reversed, holding that the convictions violated the Due Process Clause of the Fourteenth Amendment. *Id*. at 437. The Court held that to allow such convictions "would be to sanction the most indefensible sort of entrapment by the State" — convicting a citizen for doing something the state had clearly told him he could do. *Id*. at 438; S*ee also Cox v. Louisiana*, 379 U.S. 559, 571 (1959) (reversing conviction for picketing near courthouse where city officials had told defendant to

confine himself to the west sidewalk and he had done so; "[t]he Due Process Clause does not permit convictions to be obtained under such circumstances"].) The Due Process violation set forth in *Raley* and *Cox* apply by analogy to the present case. Rowland and his attorneys relied on the explicit guarantee of the Local Rule and on the confirming docket entry that his filings were deemed to be a petition for habeas corpus. The district court and the Ninth Circuit's refusal to honor that promise and assurance denied Rowland fundamental fairness and due process. This Court should grant certiorari to address this important issue of federal law that has not been, but should be, settled by this Court.

B. The Court should grant the writ on the second issue to correct a manifest injustice arising from trial counsel's ineffective assistance in the penalty phase.

Due to the deficient performance of Rowland's trial counsel, the penalty phase jury never learned there was a very high probability that Rowland suffered from organic brain damage at the time of his birth and at the time of his crimes. The jury never learned that at the time of his birth Rowland had "jaundice, blood transfusions, convulsions, and an infection." Thus, the penalty phase jury was presented with a distorted and entirely inaccurate picture of Rowland' mental state at his birth and at the time of the crime.

In stating that Dr. Ridlehuber merely speculated that the birth records showed that Rowland "possibly" had organic brain damage, the Ninth Circuit misconstrued

the record. In his declaration, Dr. Ridlehuber did not state that Rowland "possibly" had organic brain damage. To the contrary, he stated that there was a "very high probability" that he had such damage

That Rowland suffered brain damage from birth is powerful mitigation evidence which was never presented to the jury. Organic brain injury and damage is precisely the kind of evidence that might well cause a juror to vote for life instead of death. *See Wiggins v. Smith*, 539 U.S. 510 (2003). Similarly had the jury known that Rowland, through no fault of his own, had a traumatic birth, which affected his entire life, at least one juror may well have voted for life instead of death. Contrary to the decision of the Ninth Circuit, the Supreme Court of California wrongly held that any error was harmless because had the penalty phase jury heard such evidence, "there is a reasonable probability that at least one juror would have struck a different balance" and voted for life. *Id*. The Court should grant *certiorari* on this issue because the Supreme Court of California and the Ninth Circuit Court of appeals have decided an important federal question in a way that conflicts with relevant decisions of this Court.

C. The Court should grant certiorari on the third issue because Rowland was denied due process in the penalty phase when the prosecutor expressed his personal opinion in closing argument that were he on the jury, he would vote for death, because the prosecutor reminded the jurors that the voters had tossed out of office three California Supreme Court justices who did not enforce the death penalty, and because the prosecutor violated *Caldwell*.

This Court has admonished that a prosecutor "must refrain from interjecting personal beliefs into the presentation of his case," *United States v. Young*, 470 U.S. 1, 8–9 (1985). This is so because the opinion "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id*. at 18–19; *See also Berger v. United States*, 295 U.S. 78, 88 (1935) (citing as an example of prosecutors misconduct "*especially, assertions of personal knowledge* [which] are apt to carry much weight against the accused when they should properly carry none") (emphasis added

. Especially in a capital case "statements about the prosecutor's personal belief in the death penalty are inappropriate and contrary to a reasoned opinion by the jury." *Weaver v. Bowersox*, 438 F.3d 832, 840–41 (8th Cir. 2006). By suggesting to the jury that the prosecutor himself would vote for death were he on the jury, the prosecutor short-circuited the process of deliberation to which Rowland was constitutionally entitled, because his argument "encourage[d] the jury to defer to the prosecutor's judgment." *Id.* at 841.

The Court should grant certiorari because the Ninth Circuit's opinion conflicts with the decisions of this Court in *Berger* and *Young* and with those of other circuits. *See Weaver*, 438 F.3d at 840*; Bates v. Bell*, 402 F.3d 635, 644 (6th Cir. 2005) ("In the capital sentencing context, prosecutors are prohibited from expressing their personal opinion as to . . . the appropriateness of the death penalty. Jurors . . . are apt to afford undue respect to the prosecutor's personal assessment.").

The prosecutor compounded this constitutional violation by also arguing in the penalty phase that the sentence of death was appropriate because the voters in California demanded its imposition in appropriate cases and had in the past voted three Supreme Court Justices out of office for their purported failure to uphold the death penalty. As the prosecutor argued, "we had a recent election in which several of our Supreme Court justices were perceived by the voters not to be applying this law. They are gone now. There's no question that it is the policy expressed by the will of the populace that there be a death penalty in California, and that it be carried out in appropriate cases." App. 160: 2-7.

Although the Ninth Circuit disapproved of the prosecutor's arguments, the court it held that under AEDPA's deferential procedures, the California Supreme Court could reasonably conclude that the argument failed to prejudice Rowland.

The prosecutor's arguments about the will of the voters violated *Caldwell v Mississippi*, 472 U.S. 320 (1985), where this Court held that a death sentence may

not be upheld if the jury was asked to rest its decision on something which absolved it of its responsibility to be the final arbiter. Here, the jury was told that the death sentence was appropriate because the voters of California wanted it imposed. The prosecutor's remarks suggested that imposing the death penalty upon Rowland would not be the fault or responsibility of the jurors; rather, it would be the responsibility of the people of California because it was *they* who had mandated the imposition of the penalty. The prosecutor's argument served to relieve the jurors of their individual responsibility for imposing the death sentence, violating *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and the Eighth Amendment.

The prosecutor also improperly argued that if he were on the jury he would vote death. The dangers of vouching identified by *Berger*, *Young*, and their progeny are compounded in a capital case, where the jury is literally faced with a life and death decision. "Statements about the prosecutor's personal belief in the death penalty are inappropriate and contrary to a reasoned opinion by the jury." *Weaver*, 438 F.3d at 840–41. Situations such as this are the very reason the law condemns a prosecutor's expression of personal opinion as to the guilt of the defendant or the appropriateness of the death penalty. *See Bates*, 402 F.3d at 644 ("In the capital sentencing context, prosecutors are prohibited from expressing their personal opinion as to . . . the appropriateness of the death penalty. Jurors . . . are apt to afford undue respect to the prosecutor's personal assessment.").

Prejudice from such personal expression is manifest. In *United States v. Modica*, the Second Circuit noted the necessity for the prohibition on a prosecutor injecting his personal opinions into an argument before the jury:

> The policies underlying the proscription *go to the heart of a fair trial*. The prosecutor is cloaked with the authority of the United States Government; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, but rather of a federal official duty-bound to see that justice is done. The jury knows that he has prepared and presented the case and that he has complete access to the facts uncovered in the government's investigation. Thus, when a prosecutor conveys to the jurors his personal view . . . it may be difficult for them to ignore his views, however biased and baseless they may in fact be.

663 F.2d 1173, 1178–79 (2d Cir. 1980) (citing *Berger*, 295 U.S. at 88) (emphasis added).

The concerns are even greater here, in a capital case, when the prosecutor tells the jury that he personally would vote for death if he were in their shoes. The prosecutor is the community's representative—no juror could be expected to dismiss such a statement from a governmental official in this position. "Jurors . . . are apt to afford undue respect to the prosecutor's personal assessment." *Bates*, 402 F.3d at 644. The argument here "encourage[d] the jury to defer to the prosecutor's judgment." *Weaver*, 438 F.3d at 841. Because just a single juror might have been swayed to vote for the death penalty due to the prosecutor's expression of his personal opinion in this case, the decision below should be reversed.

The California Supreme Court held that the prosecutor's remarks here were proper because his belief that death was warranted was "based solely on the facts of record." *Rowland*, 4 Cal. 4th at 280–81. In so holding, the Court ignored the principles established by this Court beginning with *Berger*, that a prosecutor's personal opinion is improper *irrespective of its basis* because it carries the imprimatur of the state and may well cause the jury to trust the government's view of the appropriate sentence as opposed to the jury's own determination based on the facts of the case. The misconduct is in the statement itself, not in its evidentiary support or lack thereof. Accordingly, the California Supreme Court's opinion was both contrary to and an unreasonable application of federal law as established by this and was "based on an unreasonable determination of the facts" in light of the record before the state court. 28 U.S.C. § 2254(d) (1) (2).

This Court "has stressed the *acute need* for reliable decision making when the death penalty is at issue." *Deck v. Missouri*, 544 U.S. 622, 632 (2005) (citations omitted, emphasis added); *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (noting the Eighth Amendment's heightened "need for reliability in the determination that death is the appropriate punishment in a specific case").

The prosecutor's improper arguments here rendered the death verdict entirely unreliable. The decision of the Supreme Court of California was an unreasonable application of *Caldwell*, *Berger* and *Young*. The Court should grant certiorari to

review the contrary decision of the Ninth Circuit because that court decided an important federal question in a way that conflicts with these decisions of this Court.

. **CONCLUSION**

For the foregoing reasons, the Court should grant certiorari on each of the issues set forth above.

Respectfully Submitted:

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/s/ *Joel Levine*
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CERTIFICATE OF COMPLIANCE

I certify that the brief contains about 7, 054 words in “14” print.

/s/ Michael R. Levine