No. 18-5039

IN THE SUPREME COURT OF THE UNITED STATES

GUY KEVIN ROWLAND,

Petitioner

vs.

KEVIN CHAPPELL, Warden

Respondent

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

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PETITIONER'S REPLY BRIEF

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A. Rowland's petition for habeas corpus is not governed by AEDPA.

In his petition Rowland argues that his attorneys relied in good faith on Local Rule 296-8 (1994) of the Northern District of California that treated his pleadings as a petition for a writ of habeas corpus. The State and the Court of Appeals assert that this reliance was unjustified because AEDPA was enacted six years later. Both the State and Court of Appeals misapprehend the argument. Even if the local rule had nothing to do with AEDPA, as the State argues, in light of its plain language and the entry in the docket, Rowland had every right to assume that his motion for a stay, 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 just as the docket entry designated. This is so because "[l]itigants 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).

In its opposition, the State correctly argues that in *Woodford v. Garceau*, 538 U.S. 202 (2003), the Court held that a motion for a stay even when accompanied by a statement of non-frivolous issues was not a habeas corpus petition because the pleading does not actually present issues to the federal court for adjudication. *Garceau*, however, does not control because it does not concern itself with the

petitioner's attorney's good faith reliance on a local rule that deems the filing a habeas corpus petition.

After the AEDPA legislation was introduced in Congress, Rowland's attorneys did not accelerate the filing of a formal petition believing in good faith, given the local rule, that such a filing was not necessary. Had they believed otherwise, they would have simply restyled or refiled their pleading as a petition for habeas corpus. They would have slightly modified the pleading making clear that its list of non-frivolous issues was being presented to the federal court for adjudication.

This Court has made clear that "habeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). *See also Martinez v. Ryan*, 566 U.S. 1, 13 (2012) (noting that the procedural default rules reflect equitable principles); *Holland v. Florida*, 560 U.S. 631, 646 (2010) (noting that "equitable principles have traditionally governed the substantive law of habeas corpus"); *Holland*, 560 U.S. at 649 (equitable tolling applies to AEDPA's statute of limitations because the Court was hesitant to interpret AEDPA's statutory silence as indicating a congressional intent to close courthouse doors "that a strong equitable claim would ordinarily keep open"). Saying that Rowland's attorneys' good faith reliance on the local rule does not matter is not equitable, and is fundamentally unfair. This Court should grant certiorari on this issue.

B. Trial counsel's deficient performance in the penalty phase in not giving Dr. Ridlehuber Rowland's birth records, which established a very high probability of organic brain damage about which the jury never learned, substantially prejudiced Rowland.

In his petition, Rowland argued that because of the deficient performance of Rowland's trial counsel in failing to provide Dr. Ridlehuber with Rowland's birth records, the penalty phase jury never learned that at birth Rowland had "jaundice, blood transfusions, convulsions, and an infection." The jury never learned that upon reviewing these records, Dr. Ridlehuber concluded 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 his crimes. Ridlehuber would have so testified to the jury had he had the birth records. Tellingly, in its opposition, the State does not address trial counsel's failure to provide the birth records. .

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). But here, the penalty phase jury was presented with a distorted and entirely inaccurate picture of Rowland's mental state at his birth and at the time of the crime. This Court's insistence on the "acute need for reliable decision making" was undermined and circumvented by trial counsel's deficient performance.

In the petition Rowland argued that his traumatic birth and his ensuing very probable organic brain damage is precisely the kind of evidence that might well cause a single juror to vote for life instead of death. This is especially true that the penalty phase jury deliberated more than two and one-half days even without the evidence. The State's brief in opposition is equally silent on this point. The Court should grant certiorari on this issue.

C. Rowland was denied due process in the penalty phase when the prosecutor expressed his personal opinion that were he on the jury, he would vote for death and when he told the jurors that the voters had tossed out of office three California Supreme Court justices who did not enforce the death penalty.

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 prosecutor misconduct "*especially, assertions of personal knowledge* [which] are apt to carry much weight against the accused when they should properly carry none") (emphasis added). The prosecutor here argued in effect that if he were on the jury he would vote for death. 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 the other circuits cited in the petition.

The prosecutor compounded this constitutional violation by also making the inflammatory argument in the penalty phase that the sentence of death was appropriate because the voters in California demanded its imposition 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.

Furthermore, 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 so insisted that it be imposed that they had thrown out of office three justices for refusing to enforce it. This argument implies 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 Court should grant certiorari on this issue.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the Court should grant certiorari on each of the issues presented in the petition.

Respectfully Submitted:

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Michael R. Levine

/s/ *Joel Levine*
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