

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE ARNALDO RODRIGUES,

Petitioner,

v.

RON DAVIS, WARDEN OF CALIFORNIA STATE PRISON AT SAN QUENTIN,

Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal habeas review of a silent state court denial of competency-related habeas claims must consider the state court's appellate opinion on a related competency claim to determine whether the state court reasonably applied Supreme Court precedent, and whether the state court made unreasonable determinations of fact in doing so, when the state has a unitary appeal and habeas review system.
2. Whether a state court can reasonably deny without a hearing both an ineffective assistance of counsel claim for failing to request a competency hearing, and a claim petitioner was incompetent to proceed, when the only contemporaneous expert opinion was that the defendant suffered from a 60 IQ, was neurologically damaged and was incompetent to proceed, and medical records and subsequent mental health reviews are in accord.
3. Whether any state court could be found to have reasonably applied Supreme Court precedent when it denied without an evidentiary hearing a habeas corpus claim that trial counsel was ineffective under the Sixth and Fourteenth Amendments because trial counsel failed to advise the trial court that the defense expert psychologist had conducted testing and determined that the defendant was incompetent to proceed to trial.
4. Whether trial counsel's failure to advise the trial court that the defendant has been found incompetent to proceed to trial by an expert is entitled to deference under *Strickland v. Washington*, when trial counsel himself stated he questioned his client's competency to proceed.
5. Does the Ninth Circuit's rule that it cannot consider on habeas a claim of implied bias from a juror who is untruthful in voir dire on material elements of the case because such a claim is not recognized by this Court comport with this Court's precedent that such claims have long been recognized by the Court. [There is inter and intra-circuit conflict on this question]

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RON DAVIS, WARDEN OF CALIFORNIA STATE PRISON AT SAN QUENTIN,

Respondent.

JOSE ARNALDO RODRIGUES, a California inmate, respectfully petitions for a writ of certiorari to review the final order and judgment of the United States Court of Appeals for the Ninth Circuit, affirming the denial of his petition for writ of habeas corpus by the United States District Court for the Northern District of California.

OPINIONS BELOW

This petition seeks review of the Ninth Circuit unreported memorandum decision in *Rodrigues v. Davis*, case no. 16-17069 (Petitioner's Appendix A)

(hereafter "Pet.'s App." or "PA"). A timely Petition for Rehearing was denied on

July 16, 2018. (Pet.'s App. C).

The United States District Court's order denying his petition for writ of *habeas corpus* in *Rodriguez v. Davis*, Northern District of California case no. 96-cv-01831-CW, is unreported and the relevant portion is appended. (Pet.'s App. B).

The California Supreme Court's denial of relief of claims on appeal is reported at *People v. Rodriguez*, 8 Cal. 4th 1060 (1994). (Pet.'s App. D)(excerpted).

The California Supreme Court's 1996 postcard denial of relief of Petitioner's claims on habeas is unreported. *In re Jose Arnaldo Rodriguez*, number S043207. (Pet.'s App. E).

The California Supreme Court's 2001 postcard denial of relief of Petitioner's second set of claims on habeas is unreported. *In re Jose Arnaldo Rodriguez*, number S068488. (Pet.'s App. F).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). The Ninth Circuit Memorandum opinion and judgment were filed on May 31, 2018. (Pet.'s App. A). A timely Petition for Rehearing was filed on June 14, 2018. That petition was denied on July 16, 2018. (Pet.'s App. C).

STATUTES AND CONSTITUTIONAL PROVISIONS

Articles and Amendments to the United States Constitution

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutes

28 United States Code Sections 2254(d) & (e)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be

Petitioner's defense was one of innocence and, as a result, his trial counsel conducted no mitigation or mental health investigation. The state's evidence was the testimony of the prostitute aider and abettor, a neighbor who identified Petitioner, but who gave an initial description inconsistent with Petitioner, and, a knife wound on Petitioner consistent with a knife that may have been used in the attack, which was found on the route Petitioner took when he left town. He was

Id.

13). Petitioner was tried separately from his co-defendant and charged capitally. robbed two drug dealers, and beat and stabbed one of them to death. (PA 6- Petitioner and a co-defendant, aided by a prostitute who knew the victims,

1. The Crime and Sentence

A. **Factual Background**

STATEMENT OF THE CASE

correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(iii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense

convicted of all charges.

The separate penalty trial resulted in a death judgment that was affirmed on appeal by the California Supreme Court. That court also denied a state petition for writ of habeas corpus. While federal habeas corpus review of the conviction and sentence was pending, the matter was remanded to the California courts for consideration of petitioner's claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), due to Petitioner's evidence that he suffered from an intellectual disability and an IQ of 70. After waiting seven years for the state supreme court to rule, it finally remanded to the trial court where the state stipulated to relief and his sentence was converted to life in prison without parole.

The matter then returned to the United States District Court for habeas corpus review of the guilt and special circumstances verdicts and sentence.

2. Petitioner's Competency and Juror Misconduct

There were three proceedings in the trial court that contained discussion as to Petitioner's competency to proceed. (Pet.'s App. G, H, I). At the first two proceedings (Pet.'s App. G, H), trial counsel stated he believed Petitioner to be incompetent, but needed further time to investigate the matter. The trial court conducted brief colloquy with counsel and Petitioner, and denied counsel's requests for more time.

Prior to the third proceeding, trial counsel's expert, Dr. McKenzie, conducted interviews and testing. (Pet.'s App. J). He came to court ready to

testify that Petitioner was incompetent to proceed. *Id.* By then, however, Petitioner was agreeing to delay proceedings. (Pet.'s App. I). Counsel informed Dr. McKenzie he was not needed. (Pet.'s App. J). He was never called by counsel, nor did counsel advise the trial court of the information. Trial counsel never stated he believed Petitioner to be competent. Instead, he merely told the court he was reviewing the matter further. (Pet.'s App. I).

After trial and conviction, Petitioner's appellate counsel asserted Petitioner was denied his due process right to a competency hearing because the trial court did not *sua sponte* order such a proceeding. (Pet.'s App. D, PA 69-72). The California Supreme Court affirmed, based on the appellate record. *Id.* In the process of doing so, it made several findings regarding the record. *Id.*

In habeas corpus proceedings that were instituted at the same time pursuant to California's unitary review process, Petitioner uncovered and presented the evidence that McKenzie was prepared to opine he was incompetent, but was not called by counsel and counsel never informed the trial court. (Pet.'s App. J). In addition, his counsel conducted the investigation that trial counsel should have undertaken, including examination of Petitioner's cognitive and neurological impairments. All mental health experts to review the records and testing opined that Petitioner was not competent to stand trial. (Pet.'s Apps. K-N). Petitioner claimed he was incompetent during trial, and that his counsel was ineffective for failing to request a hearing and failing to investigate his mental

health relating to competency. (Pet.'s App. B, PA 34-41, 45-50, 57-58).

Petitioner further uncovered evidence that a juror was untruthful in voir dire concerning her brother's criminal histories. (Pet.'s App. B, PA 50-53). These extensive criminal histories included an incident where one brother was dealing drugs and was robbed and killed at a location that was less than a quarter mile from the crime in Petitioner's case. (PA 51). Petitioner claimed the juror was biased as a result.

The California Supreme Court denied relief without a hearing, and provided no explanation for its decision. (Pet.'s App. E, F).

The District Court held that the state decision denying the competency claim was entitled to deference under 18 U.S.C. §2254(d) (AEDPA) because Petitioner bore the burden of proving incompetency by clear and convincing evidence in federal habeas proceedings (PA 35), and he had failed to do so (PA 37-42). It held that trial counsel's actions in not seeking a hearing were entitled to deference as well, and that prejudice could not be established given its ruling on the competency claim. (PA 42-45). Finally, it held that it was bound by Ninth Circuit precedent even if it conflicted with other circuit decisions, and could not consider Petitioner's claim that the facts presented established implied bias of the untruthful juror. (PA 53-56 & fn 5). It also held that the claim was procedurally barred but the second state habeas decision, when the claim was presented and ruled on in the first state habeas decision, without a default having been found.

The Ninth Circuit affirmed. It held that it was reasonable for the state court to deny the competency claim given the trial record of Petitioner's responses to the trial court's questioning about waiving his right to a speedy pre-trial hearing and his being "cooperative." (Pet.'s App. A, PA 2). It further found the state court reasonable to deny the ineffective counsel claims because Petitioner's cooperation during state proceedings (which was uneventful); his interactions with the court; his eventual cooperation with counsel on the issue of waiving speedy pre-trial rights; and, counsel's belief that the competency issue related only to waiving time, and that there was "no additional concerns." (PA 3). This last finding is directly contrary to the record. (PA 136 ["have not concluded our investigation"]). The opinion does not mention McKenzie's incompetency finding, nor does it acknowledge they were made prior to trial. It discounts the McKinze and Missett opinions as having been submitted 7 year after trial, even though they were trial experts and McKinze found incompetency at the time of trial. (PA 3). It discounted McKinze's findings because of the trial record of court interactions with Petitioner and Petitioner's cooperation with counsel. (PA 4). Finally, the Ninth Circuit panel did not address the implied bias of the untruthful juror, nor did it reach the question of whether circuit precedent was incorrect. It ruled that actual bias could not be shown because the juror was now deceased. (PA 4-5). It did not address Petitioner's complaint that the California

habeas process was so dysfunctional that it caused over a decade of delay during which the juror died, and that he should not be prejudiced by such inaction.

REASONS FOR GRANTING THE WRIT

1. **The Question of AEDPA Review of a State Court Habeas Claim when the Determination was Summary and without Opinion, but when the Contemporaneous Appeal Contained a Related Claim and a Reasoned Opinion**

This Court has struggled with federal AEDPA review of California's silent state

court habeas determinations. As that state refuses to provide hearings or opinions in the vast majority of habeas matters, the federal courts are left with having to review for reasonableness when no reasons are offered. The Court has fashioned a set of rules to accommodate California's process, and required federal courts to consider evidence offered and potential reasons for rejecting it, but also cautioning federal courts not to conduct de novo review, which is a delicate balancing act. See *Cullen v. Pinholster*, 563 U.S. 170, 182-83 (2011); *Harrington v. Richter*, 562 U.S. 86 (2011).

These cases have not considered the relationship between appellate and habeas review in California, and have generally not considered the state appellate court's opinions when evaluating reasonableness of habeas claims. In capital cases, California had a unitary review where the appeal and first habeas

were considered at the same time by the state supreme court. This meant that related claims were being considered by the same court at the same time, one set based on the appellate record, and another considering the habeas evidence offered. This was Petitioner's case.

Here, the appellate opinion addressed a competency claim, whether the trial court had enough evidence to *sua sponte* order a competency hearing. It rejected that claim in a reasoned opinion. (Pet.'s App. D, PA 69-72). In habeas proceedings, it rejected without opinion three competency-related claims: a claim that Petitioner was incompetent at trial and a claim that trial counsel was ineffective for failing to investigate and request a hearing. (Pet.'s App. E).

In the appeal, the state court made several findings and conclusions relating to Petitioner's competency that Petitioner asserted were unreasonable under AEDPA and must be considered when reviewing the habeas denials. These included (1) holding that expert opinions of neurological impairment were insufficient to constitute a mental disease or defect; (2) holding that trial counsel's statement his client was incompetent was insufficient by itself to trigger a hearing; (3) ignoring evidence of oxygen deprivation when it ruled that early on-set seizures were insufficient to suspect neurological impairments; (4) ignoring trial counsel's opinion that the trial court's colloquy with Petitioner was insufficient to capture the nature of Petitioner's impairments and their effect; and (5) mistating that colloquy by ignoring the multiple instances where Petitioner was non-

responsive to questions open-ended questions, and instead focusing on Petitioner's responsiveness to leading questions. (PA 69-72). Items 1-2 are unreasonable applications of this Court's precedent; items 3-5 are unreasonable fact determinations. 18 U.S.C. §2254(d)(1) & (2).

However, the Ninth Circuit declined to examine those when deciding his habeas claims. This was error under *Wilson v. Sellers*, 138 S. Ct. 1188 (2018). Although *Sellers* involved a prior trial court opinion on the same claim, all of the reasons for the "look through" doctrine discussed there apply with equal force here. It is highly likely the same court used the same reasoning to reject the two sets of related claims as it was viewing the same trial court record at the same time. It was bound by its unreasonable fact-finding on the appeal. Indeed, this Court has recognized that in California, the state record includes the habeas petition and "any matter of record pertaining to the case." *Cullen*, 563 U.S. at 188 n. 12. This would certainly include the appellate findings. After all, it was the same record of trial court proceedings that the District and Circuit courts relied on to determine the state court's habeas decision was reasonable. Further, state judicial economy, which is a paramount concern in this Court, is furthered by not repeating the same reasoning on habeas when it was already laid bare on the appeal.

As will be seen below, these unreasonable applications of law and fact were central to the review here.

**2. The Question of AEDPA Deference to State Court Competency
Decisions when no State Hearing was Held, Trial Counsel Expressed a
Doubt as to Competency, the Trial Expert Believed Petitioner was
Incompetent, and all Subsequent Testing and Reviews Concur**

Petitioner's case presents an important question regarding AEDPA deference to state court competency determinations that are made without any hearing having been held, and where the state record, which must be accepted as true, is that he was incompetent. This includes an expert opinion made pretrial. This Court has expressed a strong preference for hearings whenever there is a reason to doubt a defendant's competency, either at trial or in post-conviction. *Drope v. Missouri*, 420 U.S. 162, 174-76 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966); *Rees v. Peyton*, 384 U.S. 312, 313 (1966). Because competency is such a threshold matter upon which nearly every trial right depends, and because the requirement for hearings is a lowered threshold that for many other trial rights, the deference due a state court's silent denial without a hearing when presented with evidence such as here requires an examination of whether it was reasonable to deny the claim without a hearing. The Ninth Circuit erred in not evaluating the claim properly and merely advanced to the merits, and not ordering the hearing the state court should have held under this Court's precedents.

Moreover, because both the state appellate opinion and the District Court and Circuit opinions hinge on the trial record as a reason to reject Petitioner's evidence of incompetence, it is discussed here to demonstrated the

unreasonableness of the state court's denial of this claim without a hearing, and the error by the federal review.

At the first proceeding (Pet.'s App. G), trial counsel announced he felt Petitioner to be incompetent, and sought a stay of proceedings to further investigate:

MR. THIRKEL: I am of the opinion, without psychiatric basis, that Mr. Rodrigues is not competent to proceed to preliminary hearing today because he has been unable to assist me in making a decision as to whether to waive time and prepare for the preliminary hearing. **And, number two, to assist me in communicating rationally about the events giving rise to this complaint.**

COURT: But your declaration that you feel he is incompetent to cooperate with counsel is based on his refusal to waive time in the face of what you feel is overwhelming reasonableness in favor of waiving time?23

MR. THIRKEL: Exactly.

THE COURT: Nothing else?

MR. THIRKEL: Correct.

THE COURT: It isn't that he has talked to you in an irrational manner or expressed any thoughts, other than refusing to waive time, anything that leads you to support a mental illness?

MR. THIRKEL: I have not seen any evidence of mental defect.

(PA 81)(emphasis added).

Trial counsel's opinion was based on his interactions with Petitioner

concerning waiving time, the issue before the court. (PA 81). It was not based on

Petitioner talking in an irrational manner "or expressed any thoughts." *Id.*

The trial court then engaged in leading questions, each asking Petitioner if

he understood what the court was saying and as to which Petitioner agreed. (PA

82-86, 88). The two or three times the court did not simply make a statement and

ask Petitioner if he understood, Petitioner provided evidence of a lack of

understanding of the process, and non-sequitur responses. Id. He then said he would waive time, then said he would not.

Counsel cautioned the court that the inquiry being conducted was insufficient to understand Petitioner's difficulties:

MR. CARR: Your Honor, if I can interject? I was with him for the 50 minute interview in the jail and I think my initial impression was as yours is, but as the conversation continued for almost an hour, and we went over these things sufficiently enough to gather some response other than the ones that the court is getting right now, there was -- he appeared to me to be not somebody -- I will go a little further, he is not somebody who is just insisting on his rights. He did not articulate a basis or even a response to anything that we would ask him about it other than what he is saying to you. He is saying here basically what he said to us for an hour, and that went on for an hour.... if he could say why he does not agree with us, or what his reasons are, I would be more inclined to agree with the court. but he cannot articulate or even discuss with us the options, period. (PA 88-89)

The proceeding went on to elicit from Petitioner that his only reason for not waiving time was he had been in jail too long; that he was unable to understand what the court was saying at two points and complained that his counsel did not explain it to him; that he can read, but the reports on the case "had a lot of stuff in them"; and that waiving time didn't matter because he had a parole hold that would prevent his release in any event. (PA 92-96) He believed his prior cases didn't involve serious charges (PA 90), which was inaccurate as he was previously charged with murder, rape and arson on separate occasions (PA 67-68). The trial court offered that what Petitioner needed was to be spoken too in short words without a lot of syllables (PA 93), and that he wants "a little more TLC."

(PA 96). It asked if Petitioner understood his lawyers wanted more time, but that he wished to proceed anyway, to which Petitioner assented. (PA 96-97). It then concluded "I think that's the best we can do" and denied counsel's request to continue the hearing. (PA 97). When the matter returned to open court, Petitioner "suddenly changed his mind" and agreed to waive a speedy hearing. (PA 105). At the second proceeding (Pet.'s App. H), counsel had conducted further investigation and again maintained Petitioner was incompetent. The investigation was limited because Petitioner had agreed to meet with one expert (Dr. Missett), but declined to meet with another (Dr. McKinsey). Both concluded Petitioner was impaired and may well be incompetent, but required additional information and testing. Petitioner was declining to sign releases for information because he did not understand them even after counsel explained (PA 105-106), terminates meetings, and did not wish to waive his right to a speedy trial. (PA 105-106). Counsel was requesting a continuance of the trial date to conduct further investigation.

Petitioner began by stating he didn't understand the releases, so wouldn't sign them, despite counsel's explanations. (PA 105-106). The defense had uncovered evidence Petitioner had a seizure at age 2 and turned blue, and was trying to get the records. (PA 107-108). He had suffered oxygen deprivation, which was impacting on competency. (PA 114-115) ("more than meets the eye in terms of his inability to cooperate with us"). Dr. McKinsey, who had reviewed

the records counsel had obtained, suspected a drug dementia based on an extensive drug history (PA 109-110) ("it is going to be difficult for him to understand anything if his brain isn't working very well....A person of this level of drug use is at very high risk for a neurological impairment that would make it very difficult for him to cooperate with his defense.") Dr. Missett reported that he "feels that the defendant has brain damage because of the two major seizures he has heard about", but "he is not sure about his opinion since he's not done a competency evaluation and wanted to get a psychological evaluation on competence before he arrived at an opinion." (PA 110).

Counsel felt he "was at a juncture" about whether to institute competency proceedings under California Penal Code section 1367 and 1368, and expressed concern that if he did so, the prosecutor would can access to discovery of mental condition that could be used against Petitioner at trial. (PA 110-111). This was an error of law.¹ Counsel desired to "waive time" over Petitioner's objection to investigate. (PA 113). This was also incorrect. The statute specifically suspends proceedings when counsel institutes a competency inquiry. Cal. Pen. Code § 1368(a).

The trial court continued counsel's error. It began by informing Petitioner

¹ It was also factually inaccurate. Counsel never conducted any mental health investigation into issues surrounding guilt or penalty (PA 69), so there was no concern about the state using mental health evidence in response.

"obviously, this court isn't in a position, in light of the present record, to say your Petitioner was willing to waive time in order to determine competency. (PA 115-16).

In the colloquy that followed, Petitioner was non-responsive to every non-leading question. (PA 116). When asked what a waiver means, Petitioner responded he didn't want to waive time. (PA 116). When asked about waiving time, Petitioner asked if he was going to get a lineup, about which counsel advised the court he had tried to explain to Petitioner was not in his best interests. (PA 117-18). The court asked whether Petitioner had had a jury trial before, which Petitioner denied, and stated it assumed he had entered into plea agreements in prior cases or had them dismissed, to which Petitioner responded in the affirmative. (PA 119). When asked whether he was familiar with what had happened in those cases, Petitioner could only say he had been to court twice. (PA 120). When asked whether he understood the difficulty trial counsel was having preparing the case, Petitioner explicitly stated he did not. (PA 120). He knew he was facing the death penalty. *Id.* After the trial court said it was as serious as a case gets, and that counsel says they needed more information, Petitioner said he would talk to the doctors first. *Id.* When asked if he would consider waiving time after that, Petitioner responded that his next court date was on the 15th. (PA 121).

From this, the court found that Petitioner was unwilling to give counsel additional time until he saw the doctors, and denied counsel's motion to continue over Petitioner's objection. It then concluded that:

You know, I'm obviously not making a determination as to his competence or lack of competence either. At this stage he is perfectly competent to answer my questions. He's aware of the processes. So it's going to require more than you presently have, and I am not prepared to give more time at this time. I am not foreclosing that for something additional on Tuesday. (PA 123).

As trial counsel continued with his request, the court stated he needed to confer with the doctors to see whether they felt Petitioner was incompetent and come back to court with that information. It held "based upon the record I have at the moment, all I am going to do is say I take Mr. Rodriguez's word that he will talk to the doctors." (PA 126-27).

At the hearing four days later (Pet.'s App. I), counsel reported that Petitioner had met with the doctors and signed releases, and had agreed to waive his right to a speedy trial. (PA 134). No questioning of Petitioner was conducted except to asked if he agreed to waive time, and he still had some difficulty. (PA 135) ("what do you mean by waving time"). The court assumed competency was no longer an issue, and counsel advised the defense was still investigating. (PA 136). It was never addressed again.

Unbeknownst to the trial court, counsel did obtain that information from Dr. McKinsey, who had interviewed Petitioner and conducted testing. (Pet.'s App. J).

It was unequivocal that Petitioner was severely impaired, with a 60 IQ, and neurologically compromised, and that he was incompetent to proceed. Dr. Frick had also tested Petitioner's IQ and found a score of 70, which was not reported to the court. (Pet.'s App. L). In evaluating this information, and additional information obtained during post-trial investigation, all experts agree that Petitioner was and is significantly impaired in cognitive and neurological functions, and was incompetent at trial. (Pet.'s App. K, M, N).

Trial of an incompetent person violates the Fourteenth Amendment right to Due Process. To be competent to proceed to trial a defendant must be able to consult with counsel, "with a reasonable degree of rational understanding" and possess a "rational as well as factual" understanding of the ensuing trial process, *Dusky v. United States*, 362 U.S. 402, 402 (1960), be able to assist in the preparation of his or her defense, and be able to understand the nature and object of the proceedings, *Drope v. Missouri*, 420 U.S. 162, 171 (1975). A "rational understanding" of the proceedings includes the capacity to make a "reasoned choice" in a variety of contexts, including "strategic choices" about whether to waive or invoke testimonial, jury trial, and confrontation rights and "whether (and how) to put on a defense and whether to raise one or more affirmative defenses." *Godinez v. Moran*, 509 U.S. 389, 397-98 (1993). A defendant is said to be incompetent such that a hearing is required if suffering from a "mental disease, disorder or defect which may substantially affect his capacity." *Rees v. Peyton*,

Drope recognized the question of competency does not require irrational behavior or ill demeanor at trial, and that contemporaneous medical opinion can be sufficient. 420 U.S. at 180. And, it offered that the question is "often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Id.* Thus, long-gone are the days when courts could simply examine outward behaviors and obviously troubled statements, which are associated with commonly understood ailments such as schizophrenia, bipolar disorder and dementia. As this Court noted in *Atkins*, intellectual disabilities such as those suffered by Petitioner, are equally debilitating. 536 U.S. at 318 ("diminished capacities to understand and process information, to communicate...to engage in logical reasoning."); *Id.*, at 320-21 ("less able to give meaningful assistance to their counsel."). And, courts and commentators have recognized the special relationship between the subtleties of this impairment and its evaluation of competency. *United States v. Preston*, 751 F.3d 1008, 1022 (9th Cir.2014) (en banc) (detailing intellectual disability and its effects: likely to agree with authority figures; attempt to hide impairments by doing so; etc.). See also Morgan Cloud, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U.CHI. L. REV. 495, 511-13 (2002) (intellectually disabled do not understand their limitations and "feel compelled to answer a question, even if the question exceeds [their] ability to answer"). As researchers have found, the

"tendency to mask their disabilities," combined with the widespread ignorance of mental retardation, "make it difficult for police and others to properly interpret the responses of mentally retarded persons." Eugene R. Millhizer, *Confessions After Connelly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 15 (2008). The same is true for neurological impairments, as noted by the Ninth Circuit in other cases. *Odle v. Woodford*, 238 F.3d 1084, 1088-89 (9th Cir. 2001) (neurologically impaired defendant calm and agreeable, masking inability to understand and assist).

The state court's determination, as evidenced by its appellate opinion on a related claim, and as elucidated by the District and Circuit courts, reflects common but archaic misunderstandings of competency, ones that require this Court's attention. They both misunderstood the nature of Petitioner's impaired functioning, and how the record supports it. Yes, he was cooperative eventually, and was not disruptive. But, that is consistent with his impairments. He will agree to leading questions, again consistent with his impairments. When asked any form of open-ended question reflecting any understanding, he is confused and tangential. It was an is unreasonable to rely on this record with these forms of impairment.

Thus, the state court's determination was unreasonable and not entitled to deference, particularly the determination not to grant a hearing in post-conviction. The resulting findings were both an unreasonable application of this

Court's precedents under section 2254(d)(1), and an unreasonable determination of fact under section 2254(d)(2).

The state court did not recognize neurological impairments as mental disease or disability, and therefore rejected the notion that they could form the basis for incompetency. This is an unreasonable application of *Drope*. It failed to credit trial counsel's repeated contention that he believed Petitioner incompetent, one which he never rescinded. Trial counsel's statement that she believes a defendant to be incompetent carries great weight in establishing a bona fide doubt, and is nearly dispositive. *Medina v. California*, 505 U.S. 437, 450 (1992); *Drope*, 420 U.S. at 176-77.

The state appellate court's resolution of the competency question failed to acknowledge important facts, rendering its determination an unreasonable finding of fact under 2254(d)(2). It discounted the effects of Petitioner's early seizure(s) by not acknowledging trial counsel's presentation that the seizures resulted in oxygen deprivation. Likewise, it relied on the trial court's colloquy with Petitioner to rebut trial counsel's concerns about competency, but never mentioned trial counsel's warning that its colloquy was insufficient to determine competency because Petitioner's impairments were subtle. It highlighted and relied on exchanges with Petitioner that were in the form of leading questions by the trial court, and never addressed the tangential responses to open-ended questions or addressed responses that reflected obvious difficulties understanding

the process.² And, counsel advised that seizures with oxygen deprivation, Petitioner's conduct and history leads them to believe it's more than obdurate that is the source of "inability" to cooperate with counsel.³ This form of "cherry-picking" facts to support a determination, and never considering contrary facts that supported Petitioner's contentions, is plainly unreasonable under 2254(d)(2).

The federal courts engaged in the exact same analysis as the state court – weighing Petitioner's evidence against a trial record that is devoid of any inquiry into competency.⁴ More problematic, like the state court, they failed to acknowledge or appreciate the impairments Petitioner suffered from and how the record evidences those impairments and his resulting incompetency. The Ninth Circuit and District Court were incorrect in characterizing counsel's difficulties as relating only to time waivers. While Petitioner's difficulties

² The state court described Missett as "unsure" of brain damage. This was inaccurate. Missett was clear as to defect, but unsure of competency without that evaluation.

³ The state court omitted "oxygen deprivation" from their descriptions so as to rule that the seizure evidence was unconnected to any lasting damage. ⁴ Any rudimentary inquiry asks a defendant to describe the role of the judge, counsel and the prosecutor. See Rogers and Johansson-Love, *Evaluating Competency to Stand Trial with Evidence-Based Practice*, Journal of the American Academy of Psychiatry and the Law Online (December 2009, 37 (4) 450-460) (all standardized assessments require defendant to express understanding of courtroom personnel and their roles and relationship to the case).

became apparent in that context, and that was what counsel desired most, counsel also described how Petitioner could not repeat counsel's instructions as to what they thought of the case and the strategy involved, despite multiple attempts. The state appellate court also omitted this description by counsel. Indeed, throughout the very brief trial court proceedings, there is no attention paid to this critical inquiry at all. This failure goes to the core inquiry of the ability to assist counsel. *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

The state court and the federal courts never discussed Petitioner's difficulty whenever he expressed more than a rote response to leading questions. Dr.

McKinze, who was present for much of this, opined that rather than supporting competence, the proceedings demonstrated Petitioner was in fact incompetent. At no time does either court inquire into whether Petitioner possessed a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him," *Dusky v. United States*, 362 U.S. 402 (1960). In fact, the trial court specifically stated in both proceedings that it wasn't making any such inquiry.

The court and trial counsel made a fundamental error of law. It held, and counsel asserted, that Petitioner must waive time to trial so as to permit investigation of competency. But see Cal. Pen. Code §1368(a) (proceedings suspended); *Pate v. Robinson*, 383 U.S. 375, 384 (1966) (waivers inappropriate

when incompetency suspected). Thus, not only was counsel deficient, but the trial court violated clear state law and Supreme Court precedent. Thus, reliance on the trial record for any competency findings is contrary to this Court's precedent, and an unreasonable determination of fact. In order to diminish its significance, the District and Circuit courts analyzed the affirmative proof of incompetency in a manner contrary to this Court's holdings. In California, neither can quibble about the facts presented on habeas – they must be accepted as true as no contrary facts were before the state court. *Cullen*, 563 U.S. at 188 fn 12; see also Cal. Rules of Court, rule 4.551(c)(1): *In re Serrano*, 10 Cal.4th 447, 455 (1995) (court cannot reject facts on credibility grounds). Thus, it is error to decline to accept the credibility of Petitioner's showing when assessing reasonableness of the state court habeas denial. However, both courts dismissed any opinions are made in post-conviction, a position never endorsed by this Court, and one that is profoundly unfair. The Ninth Circuit has also adopted what amounts to a *per se* exclusion of the consideration of post-conviction declarations when determining competency. (Pet.'s App., A, at PA 3; Pet's App., B, at PA 37). This is error. While such retrospective examination is difficult, it is not impossible as *Drope* noted. What is required is an examination of whether the post-conviction declarations are supported with adequate facts, and, importantly, consistent with the trial expert opinions. About this, there can be no doubt.

Given the uncontested evidence and the lack of a hearing, the state

court determination as to competency cannot be reasonable. In fact, we know from the appellate opinion that it wasn't. The Circuit erred in according it any

deference under 2254(d).

Under these circumstances, it was error not to accord Petitioner a hearing

in federal court. The District and Circuit courts both believed that because

Petitioner cannot satisfy 2254(d), there is no reason to grant a hearing under

2254(e). But, the hearing provision is discretionary and such hearings are

strongly preferred whenever there is a doubt. And, it is the absence of a

hearing that renders the state court's determination unreasonable.

3. Trial Counsel Ineffectiveness When he Fails to Disclose to the Trial Court Expert Opinion of Incompetency, and Fails to Investigate Further

It violates the Sixth Amendment right to counsel for trial counsel not to seek

a competency hearing when he possesses a doubt as to competency. To do so

is to deprive an accused of all the protections of counsel, as his client cannot

understand what is happening or contribute to his defense.

There is little question that counsel rendered deficient performance. His expert was saying Petitioner was incompetent (Pet.'s App. J), and he several times stated he believed it. Counsel's hesitation in requesting competency hearing was a belief that evidence from competency proceedings could be used against

Petitioner at trial, an error of law. See *People v. Arcega*, 32 Cal.3d 504, 522-523 (1982)(evidence cannot be used at trial); *People v. Harris*, 192 Cal.App.3d 943 (1987) (same). No matter how much deference is accorded counsel, it is unreasonable for any state court to find this was anything but deficient performance. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The speckle of an expert waiting in the hallway to testify a defendant is incompetent based on interviews and testing, and counsel neither informing the court nor fully investigating it further because he has secured a time waiver, and counsel's misapprehension of the law as reason to fail to declare a doubt, are simply too much for the Sixth Amendment to bear.

Further, trial counsel's range of strategic choices are severely constrained regarding competency, a feature of counsel's obligations that the District and Circuit courts erroneously ignored when finding the state court determination was reasonable. As the Court has noted, trial counsel is in a unique position to evaluate competency. *Medina v. California*, 505 U.S. 437, 450, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992). Here, counsel twice stated he believed Petitioner incompetent, yet did nothing. He knew his expert had a strong opinion of incompetency, yet remained silent. Further, additional Due Process considerations inherent in competency determinations limit the normal deference accorded counsel's actions – it is not possible to defer to counsel's actions by assuming he has conferred with his client and incorporated his client's

input into the decisions regarding the case. *Pate v. Robinson*, 383 U.S. 375, 385, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966)(incompetency deprives a defendant of the ability to confer). For that reason, counsel has an independent obligation as an officer of the court to declare a doubt and request a competency hearing under such circumstances. See *United States v. Boigegrain*, 155 F.3d 1181, 1187 (10th Cir. 1998) ("the defendant's lawyer has a professional duty to [raise incompetency] when appropriate"); ABA Standards for Criminal Justice, 7-4.2(c)(counsel must move for a hearing if she has good faith basis to doubt competence).

Strickland and prejudice normally requires an examination of "whether it is reasonably likely the result would have been different." *Harrington v. Richter*, 562 U.S. 86, 111 (2011). The Ninth Circuit did not examine the standard in competency matters in Petitioner's case, but it has elsewhere applied the Third Circuit standard: if "there is a reasonable probability that the defendant would have been found incompetent to stand trial had the issue been raised and fully considered." *Jermyn v. Horn*, 266 F.3d 257, 283 (3rd Cir.2001); accord *Stanley v. Cullen*, 633 F.3d 852, 862 (9th Cir. 2011); *Burt v. Uchitman*, 422 F.3d 557, 567 (7th Cir. 2005); *Felde v. Butler*, 817 F.2d 281, 282 (5th Cir. 1987). The difficulty arises, however, when applying AEP A deference, and Petitioner's case is a perfect example.

In California, all habeas allegations by a petitioner are accepted as true unless controverted by the record. *Cullen v. Pinholster*, 563 U.S. 170, 188 fn 12, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). Thus, the federal court must accept Dr.

McKenzie's rendition of the facts at trial, and those of the subsequent experts, even the ones in post-conviction as the state court does not and cannot dismiss them at the petitioning stage in the manner the Ninth Circuit does.

Nor could the state court reasonably rely on the trial record. As was shown above, it was unreasonable to rely on the state trial record as anything other than evidencing Petitioner's impaired functioning and counsel's deficient conduct. Cooperation, demeanor and assent to leading inquiry are exactly what was wrong – those with these types of impairments do exactly as Petitioner did in these circumstances. We know the state court ignored important facts and mischaracterized others in an unreasonable manner under 2254(d)(2). Thus, the lens through which the federal court examines the state determination is clouded by error.

It is simply error to state this trial record is contrary to the expert opinions. The experts explain why, in their opinions, it is consistent. Those opinions are well-supported. McKinze was actually present for the second proceeding.

Further, the prejudice inquiry is not a but-for one. It must factor in this Court's strong preference for hearings when there is a doubt as to competency. Here, there was no hearing due to counsel's unreasonable conduct. In the unreasonable absence of a state hearing, it is unreasonable to find that there is no doubt about the outcome of such a proceeding.

4. The Question of Implied Juror Bias When a Juror is Untruthful in a Significant Manner

There is no question that a juror lied about her family's extensive involvement in drugs, crime and murder. (PA 51; Pet's App. O-Q).

The District Court applied a procedural bar to this claim, but then addressed the merits. (PA 50). That bar was in error in several ways: the cases is relied on post-dated the default, so cannot be the basis for such a default. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). Further, the claim was presented twice, the second time with additional evidence to support it. The first claim was not defaulted. The claim, is, therefore, reviewable in federal court. Finally, the second state court ruling is some unclear as to what bars are being applied as to be meaningless. For instance, it applies a successor bar, which means it was presented already. That is not a bar in federal court. The Ninth Circuit, therefore, only addressed the merits. (PA 4-5).

The case presents the question of whether a federal habeas court can examine untruthfulness for implied bias. Implied bias is "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Fields v. Brown*, 503 F.3d at 767, quoting *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000). See also *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998). It was applied to a habeas matter in the *Dyer* case.

However, in *Hedlund v. Ryan*, 815 F.3d 1233, 1248-49 (9th Cir. 2016), the Ninth Circuit ruled it was not recognized by this Court so as to be applied in habeas cases. Thus, neither the District Court nor the Circuit examined the issue in Petitioner's case.

The Ninth Circuit is in error on this question. Implied juror bias has long been recognized by the Supreme Court. See *United States v. Wood*, 299 U.S. 123, 133-34 (1936) ("the bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law."); *Turner v. Louisiana*, 379 U.S. 466, 474 (1965). *Smith v. Phillips*, 455 U.S. 209, 217-81 (1982), held that once hearing is held, relief was not available because no actual bias shown. See also, *id.*, at 221-24 (O'Connor, J., conc.) (opinion does not preclude implied bias in certain cases). Five justices held that implied bias remained a basis for relief in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556-57 (1984) (Blackmun, Stevens, and O'Connor, JJ., concurring); *id.* at 558 (Brennan and Marshall, JJ., concurring).

Other Circuits disagree with the Ninth Circuit. See *Conaway v. Polk*,

453 F.3d 567, 586-88 (4th Cir. 2006) (concluding in post-AEDPA opinion that the "doctrine of implied bias remains," while heavily quoting *Dyer*; *Brooks v. Dretke*, 444 F.3d 328, 329-32 & n.5 (5th Cir. 2006) (concluding that implied bias is clearly established federal law under AEDPA, citing *Dyer*). This Circuit split needs to be addressed.

Petitioner's case presents a strong showing of implied bias, such that it was unreasonable for the state court to deny it. He brothers had long criminal and state prison histories, which she concealed. Her brother was killed in very similar circumstances in the same area, which she concealed. There is no reason for this other than a bias against Petitioner for having done the very same thing that was done to her brother.

CONCLUSION

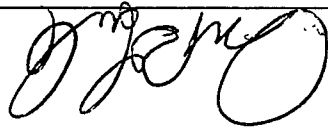
For the reasons stated above, this petition is well taken and the writ should

be granted.

DATED: October 12, 2018

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