No. 18-6330

In the Supreme Court of the United States

JOSE ARNALDO RODRIGUES,

Petitioner,

v.

RON DAVIS, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to federal habeas relief under 28 U.S.C. § 2254 on his claims of incompetence to stand trial, ineffective assistance of counsel, and juror bias.

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STATEMENT

1. On May 4, 1987, Rodrigues and two accomplices planned and executed a robbery and attack on two drug-dealing brothers, Epifanio Zavala and Juan Barragan, in Menlo Park, California. Pet. App. 62-63. Rodrigues stabbed Barragan in the face, throat, and chest; stabbed Zavala in the leg and foot; and instructed an accomplice to "finish" Zavala. *Id.* at 63-64. When police arrived at the scene they found Barragan lying dead on the floor; Zavala survived. *Id.* at 64-65. Both Zavala and one of the accomplices (who later testified at trial) identified Rodrigues as the man who had killed Barragan. *Id.* at 63-65. Forensic evidence also linked Rodrigues to the murder. *Id.* at 65-66.

2. On June 22, 1987, the date set for a preliminary hearing, defense counsel Edward Thirkell requested an in-camera hearing to explain a "fundamental dispute" over Rodrigues's refusal to agree to a time waiver. Pet. App. 69. He believed Rodrigues's refusal to waive time was not rational, in part because Rodrigues did not give a specific reason for it, and complained that Rodrigues refused to communicate intelligently with counsel. *Id.* Counsel admitted that the sole basis for his concern regarding Rodrigues's rationality was his refusal to waive time for the preliminary hearing. *Id.* Upon questioning by the trial court, Rodrigues said he did not want to waive time because he had been "sitting in here too long," and that he just wanted "to get this over with." *Id.* Rodrigues complained that counsel was not telling him anything, kept challenging him, and treated him like a child. *Id.* The judge

observed of Rodrigues, "talking to him, I think he understands everything I am saying. He seems to be rational." *Id.* at 86. The court told counsel that Rodrigues needed "a little more TLC." *Id.* at 69. Ultimately, after further conversations with counsel, Rodrigues agreed to waive time for the preliminary hearing. *Id*. at 69-70.

On September 11, 1987, counsel again suggested to the court that Rodrigues might be incompetent, citing Rodrigues's refusal to waive time for trial and his refusal to sign release forms for police reports, medical information, and other documents despite counsel's explanation of their need. Pet. App. 70. Counsel complained that Rodrigues was being uncooperative and unreasonable. *Id.* A defense investigator testified that Rodrigues had a childhood history of seizures and migraines. *Id.* Counsel relayed to the court that Dr. Missett, a defense psychiatrist, had informed counsel of his opinion that Rodrigues had brain damage due to two major seizures, and that records of those events were crucial to a psychiatric defense. *Id*. Dr. McKinzey, a second defense psychiatrist, testified that based on records and a conversation with Dr. Missett, he believed Rodrigues suffered from drug dementia that made it difficult for him to understand the proceedings. *Id*.

Addressing Rodrigues, the trial court explained counsel's need for a 60-day trial waiver to investigate competency and a psychiatric defense. Pet. App. 70. Rodrigues continued to refuse to waive time, but agreed to meet with defense doctors. *Id*. He told the court he would decide whether to waive time

and sign releases after meeting with the doctors. *Id.* The court continued the hearing for four days, and suggested that at that time Dr. Missett could testify as to Rodrigues's competence. *Id.*

At the continued hearing, defense counsel reported that Rodrigues had signed releases for several types of records and, although he had not signed a medical release, he had agreed to waive time for trial. Pet. App. 70. Counsel stated that although the competency investigation was ongoing, Rodrigues had met with a defense doctor and had established some rapport with the doctor, and the relationship between Rodrigues and counsel had improved. *Id.* The trial went forward, and counsel never again raised the competency issue. *Id.*

3. A jury convicted Rodrigues of first-degree murder, attempted robbery, and burglary. Pet. App. 13. After a penalty-phase trial, the jury fixed Rodrigues's sentence at death. *Id.* On direct appeal, the California Supreme Court affirmed Rodrigues's judgment and death sentence. *Id.* Rodrigues filed two state habeas petitions directly in the California Supreme Court, in which he raised his claims of incompetence to stand trial, ineffective assistance of counsel, and juror bias, among others. *Id.*

In support of his juror bias claim, Rodrigues alleged that a juror named Langston had lied during voir dire, evidencing bias that required that she be excused for cause. Pet. App. 50. In a declaration executed 11 years after the trial, Langston stated that she had brothers who had abused drugs, one of whom was killed in a dispute close to where the murder in this case had

occurred, and that she herself had been the victim of a burglary in 1964. *Id.* at 51. Langston had not disclosed any of this information during voir dire. *Id.*

The California Supreme Court denied all of Rodrigues's habeas claims on the merits, and denied some claims alternatively on state procedural grounds as well. Pet. App. 13, 73-74.

In 1999, Rodrigues sought federal habeas relief. Pet. App. 13. The district court stayed the federal proceedings for state court proceedings on Rodrigues's claim of relief under *Atkins v. Virginia*, 536 U.S. 304 (2002). Pet. App. 13-14. In 2010, the parties stipulated in state court to *Atkins* relief, though the State did not concede that Rodrigues's *Atkins* claim was meritorious. *Id.* at 14. Pursuant to that stipulation, Rodrigues's death sentence was vacated, and he was resentenced to life without the possibility of parole. *Id.* Upon return to federal court, the district court denied on the merits all non-penalty claims remaining in the petition, but granted a certificate of appealability on claims relating to competency and juror bias. *Id.* at 28-60. The court of appeals affirmed in an unpublished memorandum disposition. *Id.* at 1-5.

ARGUMENT

The courts below correctly applied settled law in rejecting Rodrigues's competency and ineffective assistance claims. His juror bias claim likewise lacks merit, and does not implicate any conflict or legal uncertainty that may exist concerning such claims. There is no reason for further review.

1. The courts below correctly denied relief on Rodrigues's competency claim.

a. Rodrigues argues first that review is warranted to clarify "federal AEDPA review of California's silent state court habeas determinations." Pet. 9. Citing this Court's recent opinion in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), he contends the court of appeals should have "looked through" the California Supreme Court's summary denial of his state habeas petition to that court's reasoned decision on his direct appeal. Pet. 9-11. As an initial matter, Rodrigues did not make this argument below. He cannot raise it for the first time in this Court. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). In any event, this Court has repeatedly explained how to review summary denials of habeas petitions filed directly in the California Supreme Court: "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98 (2011); *accord Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (per curiam); *Cullen v. Pinholster*, 563 U.S. 170, 188 (2011). That is the standard the court of appeals applied in this case. Pet. App. 2. Rodrigues cites no decision following any other approach.

Rodrigues's reliance on *Wilson* is misplaced. As he acknowledges, that case "involved a prior trial court opinion on the same claim." Pet. 11. Here, Rodrigues raised his substantive competency claim for the first time in his

habeas petition in the California Supreme Court. *Id.*; Pet. App. 13. *Wilson* itself distinguished *Richter* on exactly this basis, noting that in *Richter* "there was no lower court opinion to look to," because the claims at issue (as in this case) were raised for the first time on habeas petition in the California Supreme Court. *Wilson*, 138 S. Ct. at 1195. In *Wilson*, which arose out of Georgia, there was a lower court opinion. *Id.* at 1192-1193.

Rodrigues argues that "[i]t is highly likely the [California Supreme Court] used the same reasoning to reject" his habeas claims as it did to reject his "related claims" on direct appeal, so the federal habeas court should have looked through to the opinion in that appeal. Pet. 11. That argument is speculative; but in any event, both *Richter* and *Pinholster* also involved claims rejected on state habeas that were related to claims rejected on direct appeal. *See Richter*, 562 U.S. at 95-96; *Pinholster*, 563 U.S. at 177-179; *People v. Branscombe*, 72 Cal. Rptr. 2d 773, 775 (Ct. App. 1998) (direct appeal in *Richter*; opinion ordered depublished by California Supreme Court); *People v. Pinholster*, 1 Cal. 4th 865, 964 (1992). Yet there was no suggestion in either case that the federal habeas court should have "looked through" to the rulings on direct appeal on any issue. Here, the courts below correctly applied the standard from *Richter* and *Pinholster*, rather than *Wilson*.

b. Rodrigues also contends that the court of appeals erred in determining that the state court reasonably rejected his competency claim. Pet. 12-26. That

is incorrect, and in any event that factbound question does not warrant this Court's review.

Defense counsel raised concerns about Rodrigues's competence during two pretrial proceedings. These concerns centered entirely on his refusal to waive his speedy trial rights or to sign releases allowing counsel access to an assortment of his personal records, which counsel sought in large part to use in penalty-phase proceedings. Pet. App. 69-70, 81-82, 104, 124-125. Once Rodrigues agreed to waive time and sign the desired releases, trial counsel did not again raise competency, nor did he identify any other reason to believe Rodrigues was incompetent. That is significant, because "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." *Medina v. California*, 505 U.S. 437, 450 (1992). And Rodrigues points to no further contemporaneous evidence of incompetence to support his claim.

On the contrary, transcripts from the three relevant pretrial conferences show that Rodrigues was able to interact coherently and rationally with the trial court—such as recalling the dates of his next proceedings (Pet. App. 117, 121), explaining that he reasonably would not sign waivers he did not understand (*id.* at 105-106), and saying he did not want to waive time because he wanted to move ahead with his trial sooner (*id.* at 91, 95). After interacting with Rodrigues, the judge observed, "talking to him, I think he understands everything I am saying. He seems to be rational." *Id.* at 86. These transcripts

all but foreclose any argument that the trial court was unreasonable in proceeding with trial without further inquiry into Rodrigues's competence. *Cf. Godinez v. Moran*, 509 U.S. 389, 396 (1993) (defendant with "rational as well as factual understanding of the proceedings against him" and the ability "to consult with his lawyer with a reasonable degree of rational understanding" is competent to stand trial).[1]

Nor does the record of the pretrial hearings contain any persuasive expert evidence of incompetence. One doctor, Dr. Missett, was unable to make a definitive conclusion on competence, Pet. App. 110, and the other, Dr. McKinzey, was unable to personally examine Rodrigues before forming any opinion, *id.* at 109. Based on personal interactions with Rodrigues and the other information presented, two separate state judges each noted that he was able to understand and follow proceedings and did not find any doubt as to his competence to stand trial. *Id.* at 86, 123. Given this contemporaneous evidence, it was reasonable for the California Supreme Court to deny habeas relief on this claim.

The post-conviction evidence Rodrigues cites (Pet. 18-19) does not alter that conclusion. Most of the declarations he presented in support of his state habeas petition provide only anecdotal information, not an expert opinion on competency. Pet. App. 37. The four declarations that do offer expert opinions

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[1] Under California law, a competency hearing may be held if either the trial court or defense counsel declares a doubt as to the defendant's competence. Cal. Penal Code § 1368(a)-(b).

do not negate the contemporaneous evidence indicating that Rodrigues was competent. Dr. Fricke's declaration was based entirely on testing and evaluations performed by others. *Id.* at 38. Drs. Woods and Riley based their opinion largely on evaluations and interactions with Rodrigues several years after trial. C.A. E.R. 390-391, 425-428, 674-676, 684-697. The state court could reasonably have given them little weight. *See Amadeo v. Zant*, 486 U.S. 214, 228 (1988) (trial court "might well have considered" contemporaneous evidence "more persuasive than after-the-fact assessments of … other witnesses"). And while Drs. Missett and McKinzey interacted with Rodrigues around the time of trial, they did not actually opine that he was incompetent to stand trial until several years afterward, and their assessments did not account for the evidence of competence that the trial court observed and related on the record. Pet. App. 38-40. The state court reasonably could have determined that these opinions, too, were insufficient to overcome the contemporaneous evidence of competence.[2]

Finally, Rodrigues argues that the federal habeas court should have conducted an evidentiary hearing. Pet. 26. But both the district court and the

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[2] Rodrigues properly does not argue that the 2010 stipulation to vacate his death sentence to resolve an *Atkins* claim, *see* Pet. App. 13-14, is relevant to his competency claim. The *Atkins* stipulation occurred more than 22 years after Rodrigues's trial; the State never conceded that Rodrigues's *Atkins* claim was meritorious; and the legal standards for an *Atkins* claim and a competency claim are entirely different. *See Atkins*, 536 U.S. at 318 ("Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial.").

court of appeals correctly determined that he was not entitled to such a hearing. Pet. App. 4, 36. Here, as in general, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 180-181. When a habeas petitioner is not entitled to relief based on that record, "a district court is 'not required to hold an evidentiary hearing.'" *Id.* at 183; *accord Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate.").

2. Rodrigues next argues that his trial counsel was ineffective. Pet. 26-29. That claim likewise does not warrant further review.

On habeas review of an ineffective assistance of counsel claim, federal courts ask "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105; *see Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (internal quotation marks and citations omitted).

The courts below correctly applied this standard. To prevail on his ineffective assistance claim, Rodrigues would have had to demonstrate both "that his counsel provided deficient assistance and that there was prejudice as a result." *Richter*, 562 U.S. at 104. As to deficient performance, the record

refutes any argument that Rodrigues has overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Contrary to Rodrigues's assertion (Pet. 26-27), trial counsel *did* undertake an investigation of his competence: Counsel contacted and retained two doctors to evaluate Rodrigues, obtained releases from him for a variety of relevant records, and sought additional time to allow further investigation. Pet. App. 105, 107-108, 134-136. As noted above, *see supra* at 6-9, much of this evidence indicated that Rodrigues was competent to stand trial, as did the trial court's interactions with him at the two hearings the court held on the matter when counsel brought the issue to the court's attention. It was well within the bounds of professional judgment for Rodrigues's trial counsel not to pursue the issue further.

For similar reasons, Rodrigues could not establish prejudice. Even if his trial counsel had formally moved for a determination that he was incompetent to stand trial, and a competency hearing had been held where Rodrigues presented Drs. Missett's and McKinzey's opinions, it is not reasonably likely that the trial court would have disregarded its own observations and assessment of Rodrigues's competence and found him incompetent to stand trial. *Supra* at 7-8; Pet. App. 47, 70; *see Drope v. Missouri*, 420 U.S. 162, 180-181 (1975) (trial court may be able to gauge from defendant's demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings).

3. Finally, Rodrigues claims that a juror was biased against him in light of inconsistencies between her answers during voir dire and a post-trial declaration she submitted. Pet. 30-32. The court of appeals properly rejected that claim on the merits, and it does not warrant this Court's review.

a. Rodrigues argues that the Ninth Circuit, ostensibly unlike some other circuits, does not recognize implied juror bias claims in the context of federal habeas review. Pet. 31. But this case does not implicate any circuit conflict, for two reasons.

First, Rodrigues's claim is not an implied bias claim. The Ninth Circuit recognizes "'three forms of juror bias: (1) actual; (2) implied; and (3) *McDonough*, which turns on the truthfulness of a juror's responses on voir dire.'" Pet. App. 4 (alterations omitted) (quoting *United States v. Olsen*, 704 F.3d 1172, 1189 (9th Cir. 2013) and citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984)). The gravamen of Rodrigues's claim is what the Ninth Circuit terms *McDonough* bias: He argues that "a juror lied about her family's extensive involvement in drugs, crime, and murder," and that truthful responses would have kept her off the jury. Pet. 30. Such a claim is available on federal habeas review in the Ninth Circuit, and the court reviewed and rejected Rodrigues's *McDonough* bias claim on the merits here. Pet. App. 4-5. It held that Rodrigues had "fail[ed] to establish *McDonough* bias because he did not sufficiently develop his claim that the juror's responses to an

arguably ambiguous jury questionnaire 'would have provided a valid basis for a challenge for cause.'" *Id.* at 5.

Second, any disagreement among the circuits would have no bearing on the proper result in this case, because no court of appeals would grant habeas relief in the circumstances present here. Rodrigues argues that the Ninth Circuit's decision in this case conflicts with published decisions from the Fourth and Fifth Circuits. *See* Pet. 31 (citing *Conaway v. Polk*, 453 F.3d 567, 586-588 (4th Cir. 2006); *Brooks v. Dretke*, 444 F.3d 328, 329-332 & n.5 (5th Cir. 2006)). But those cases are readily distinguishable. In *Conaway*, the Fourth Circuit held that a habeas petitioner had stated a viable claim for *McDonough*-type bias where a juror had lied about a "familial relationship" with the habeas petitioner's co-defendant, since if the juror "had responded candidly" about the relationship, it would have provided the petitioner "with a valid basis for a challenge for cause." 453 F.3d at 586. Here, as noted, the Ninth Circuit held that Rodrigues's *McDonough* bias claim failed on the merits because Rodrigues could not show that the facts supported it. Pet. App. 5. In *Brooks*, the Fifth Circuit held that a petitioner was entitled to habeas relief on an implied bias theory when a juror faced a pending felony charge and the same prosecutor who would decide whether to bring a case against him was also prosecuting the petitioner's capital case, on which the juror sat. 444 F.3d at 332. Here, there was no such conflict of interest. Nothing in *Conaway* or *Brooks* suggests

that either the Fourth or the Fifth Circuit would have granted relief on the facts of this case.

b. The Ninth Circuit correctly rejected Rodrigues's juror bias claim. To establish *McDonough*-type juror bias, a claimant must show that a juror gave intentionally dishonest answers for "reasons that affect a juror's impartiality," rather than providing a "mistaken, though honest response," and that "a correct response would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 555-556. The California Supreme Court had more than sufficient grounds for concluding that Rodrigues failed to satisfy this test. Among other things, he did not show that juror Langston had intentionally lied for reasons that would affect her impartiality—as opposed to, for instance, a good-faith though misguided desire not to share sensitive family information in court.

Nor did Rodrigues establish that an honest answer would have resulted in Langston being dismissed from the jury for cause. Langston's declaration stated that her brothers had been involved with drugs and one had been killed ten years earlier in a location close to the scene of the murder Rodrigues committed, and that she herself had been the victim of a burglary more than 20 years before the trial. Pet. App. 51. None of those facts would necessarily have resulted in her being excused for cause. *See*, *e.g.*, *Fields v. Brown*, 503 F.3d 755, 774-775 (9th Cir. 2007) (en banc) (rejecting bias claim where juror in rape and murder trial was the spouse of a rape victim); *Johnson v. Luoma*, 425

F.3d 318, 323, 326-327 (6th Cir. 2005) (rejecting bias claim as to juror who was the victim of past assaults and domestic violence in domestic violence trial); *Jones v. Cooper*, 311 F.3d 306, 312 (4th Cir. 2002) (rejecting bias claim as to juror whose relatives had a history of arrests and jury trials); *United States v. Powell*, 226 F.3d 1181, 1189 (10th Cir. 2000) (rejecting bias claim as to juror in rape trial whose daughter was a rape victim ten years prior). And five other sitting jurors had friends or relatives involved in drugs or accused of crimes, *see* C.A. E.R. 709-710, 714, 718, 723, yet Rodrigues did not challenge those jurors for cause. The California Supreme Court reasonably could have concluded that Langston would have remained on the jury even if she had answered accurately. At a minimum, as the courts below held, Rodrigues's failure to develop facts showing otherwise is fatal to his claim. Pet. App. 5, 55.

Moreover, this Court has never suggested—let alone issued an opinion clearly establishing—that jurors who are crime victims or relatives of crime victims or criminals should be automatically disqualified as impliedly biased. None of the cases Rodrigues cites, Pet. 31, comes close to standing for that proposition. *United States v. Wood*, 299 U.S. 123, 150-151 (1936), involved a claim that government employees were, as a class, impliedly biased—an argument this Court rejected. *Turner v. Louisiana*, 379 U.S. 466, 474 (1965), involved jurors who fraternized with "two key prosecution witnesses" during trial. Rodrigues also cites Justice O'Connor's concurrence in *Smith v. Phillips*, 455 U.S. 209 (1982). Pet. 31. Putting aside that concurring opinions (except

in rare circumstances not present here) do not amount to clearly established law of this Court, *see Panetti v. Quarterman*, 551 U.S. 930, 949 (2007), Justice O'Connor merely gave three examples of jurors who might be impliedly biased: "an actual employee of the prosecuting agency," "a close relative of one of the participants in the trial," or "a witness or [someone] somehow involved in the criminal transaction," *Smith*, 455 U.S at 222 (concurring opinion). None of those examples is remotely applicable here, and Rodrigues's bias claim does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 14, 2018