No. 18-6330

IN THE SUPREME COURT OF THE UNITED STATES

JOSE ARNALDO RODRGUES,

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

REPLY TO OPPOSITION

John R Grele, Esq.
Law Offices of John R Grele
1000 Brannan St., #400
San Francisco, CA 94103
(415) 655-8776
jgrele@earthlink.net

Attorney for Petitioner
Jose Arnaldo Rodrigues

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REPLY TO RESPONDENT'S OPPOSITION

Respondent engages in a fact-bound discussion of state proceedings to avoid the plain questions presented by Petitioner. In doing so, Respondent does not offer an fair or accurate characterization of the record, and only further demonstrates the unreasonableness of the state court determinations and the erroneous federal review. For the most part, Respondent either concedes Petitioner's contentions or does not dispute them. But, through the factual haze Respondent attempts to cloud this case in, the core contentions remain:

1. A state court cannot reasonably deny competency relief without any hearing when contemporaneous expert opinion was that Petitioner was incompetent and a wealth of habeas investigation and expert review is in accord.

2. Trial counsel's obligations in competency matters are constrained by the competency record and not accorded the wide-ranging defense applied to most defense counsel decisions.

3. Implied bias is available in habeas corpus review when a juror intentionally withholds and is untruthful about core facts relevant to ability to impartially decide guilt.

Respondent's lack of a fair presentation begins with the competency inquiry. He initially declines to rely on the transcript. *See* Opposition Brief, at 1-2 (hereafter, "Opp. Brief"). Instead, it cites to the state supreme court's decision regarding whether the trial court properly declined to *sua sponte* order a

competency hearing, a different, but related claim. *Id,* As demonstrated in the Petition, the state court's rendition is, however, flawed. For instance, it omits trial counsel's description of how he attempted to explain the case and what needed to be done for his defense, and how, after several times, Petitioner was unable to repeat back anything substantive. *Compare* PA 69 with PA 78. Neither Respondent nor the state appellate court even mention co-counsel's caution that the trial court's leading-question colloquy was insufficient to capture the depth of Mr. Rodrigues' incapacity. PA 88-89.

Respondent even omits counsel's stated opinion to the trial court: **"I am of the opinion without psychiatric basis that Mr. Rodrigues is not competent to proceed to preliminary hearing today because he is unable to assist me in making a decision whether to waive time and prepare for preliminary hearing.** PA at 81 (emphasis added). Both Respondent and the state appellate court omit trial counsel's second opinion, that Mr. Rodrigues is unable " **to assist me in communicating rationally about the events giving rise to this complaint."** *Id.* (emphasis added).

These are but a few of the factual inaccuracies offered to deflect from the core questions squarely presented by the Petition., and merely highlight Petitioner's arguments that the state court's determinations were unreasonable.

ARGUMENT

A. The Court Needs to Establish that Review of a State Court's Habeas Determination Under AEDPA Must Also Review and Consider a State Appellate Opinion on a Related Issue that Made Relevant Findings and Legal Analysis

Two claims in habeas proceedings in federal court were that Petitioner was tried while incompetent and that his counsel was ineffective in failing to investigate and present evidence of incompetency. The state supreme court denied these claims without an opinion. Petitioner's initial argument is that under 28 U.S.C. §2254(d) a federal court should look to a state appellate court's reasoned determination of a related claim, failure of the state court to *sua sponte* hold a competency hearing, to determine whether the state court made unreasonable application of Supreme Court precedent and/or unreasonable factual determinations regarding the habeas claims. Respondent disputes this, and in doing so, establishes the *bona fides* of Petitioner's arguments.

!. This Issue was Presented Below

Respondent initially claims that Petitioner's argument was not presented below. (Opp. Brief at 5). That, however, is incorrect. Petitioner expressly stated that the state court habeas determination was an unreasonable application of Supreme Court precedent and an unreasonable determination of the facts because it was based on the flawed state court appellate opinion. (Appellant's Opening Brief on Appeal, at 39 [competency claim]; 43-46 [trial counsel

ineffectiveness claim – District Court erred in relying on state appellate court's unreasonable determination of law and facts]). After Respondent relied extensively on the state appellate court's opinion, Petitioner painstakingly traversed the factual record and both Respondent's and the state appellate court's deficient factual recitations. (Reply to Opposition Brief on Appeal, at 2-8). Petitioner expressly noted that such factual errors and omissions on material factual considerations was an unreasonable determination of the fact as it relates to the habeas claims as well, and are what the federal court needs to examine when determining reasonableness. (Reply, at 8, 14). Petitioner was equally adamant that the state court appellate opinion also reflected an unreasonable application of Supreme Court precedent. (Reply, at 8, 14).

2. Petitioner's Argument is not Speculative and was one that Respondent Made in the District Court.

After merely repeating the case law surrounding silent state court habeas denials, Respondent concludes that relying on state court reasoning as to related claims which are not the subject of reasoned analysis is "speculative." Opp. Brief at 6. Notably, Respondent does not offer any defense of the state appellate opinion. Nor does he offer a single reason rooted in state law or jurisprudence why Petitioner's construct is speculation, or any argument to demonstrate the same state court conducting unitary review did not employ the same faulty factual and legal reasoning in reviewing the related claims. In fact, Respondent's position before the District Court was that the appellate

findings were entitled to a presumption of correctness as to the habeas claims and that they should and could be used to deny the habeas claims. PA 36.

3. This Court's Jurisprudence does not Contradict Petitioner's Argument

Respondent 's main argument is that this Court's determinations in *Cullen v. Pinholster*, 563 U.S. 170 (2011), and *Harrington v. Richter*, 562 U.S. 86 (2011), did not examine state court's appellate reasoning on "related claims" in those cases, so the Court must have eschewed such an analysis. (Opp. Brief, at 6). But, even Respondent must acknowledge this question was not squarely addressed in those case. *Id*. And, Respondent plainly mis-states the relatedness in both cases. *Richter* here involved a claim that trial counsel was ineffective for failing to investigate and present forensic evidence as to the manner of death to support a third-party self-defense claim. *Richter*, 562 U.S. at 94-96 (2011). In the state appeal, there was no related claim. *People v. Branscombe*, 72 Cal. Rptr. 2d 773, 775-81 (Ct. App. 1998) (ineffectiveness for failing to suppress statements; failure to object to prosecutorial argument; failure to object to evidence of gun possession by girlfriend; failure to strike character testimony; failure to object to response to jury question). Likewise, in *Pinholster*, this Court addressed a claim of deficient penalty phase mitigation evidence. *Pinholster*, 563 U.S. at 177-78 (2011). The state appellate opinion contains no discussion of any such claims. *People v. Pinholster*, 1 Cal. 4th 865, 964 (1992) (citation by Respondent to claims involving prosecutorial misconduct in guilt phase; no trial counsel ineffectiveness issues addressed).

B. Petitioner's Core Contention that he was Incompetent and the State Court's Determinations Were Unreasonable are not Credibly Disputed

Respondent does not address the core issue for this Court – whether a state court denial of relief without a hearing can be reasonable when contemporaneous expert opinion, communicated to trial counsel, was that Petitioner was severely impaired and incompetent to proceed, and when all contemporary and subsequent findings are in accord. Instead, Respondent offers a recitation of facts largely cribbed from the state court's flawed appellate opinion, with various inaccuracies and glaring omissions, so as to argue the dispute is largely a factual one. (Opp. Brief, at 7-8). And, yet, Respondent does not address the state appellate court's decision, nor contest Petitioner's argument that it was severely flawed. That is plainly a concession to Petitioner's extensive presentation that the state appellate determination is riddled with material factual errors and omissions, and incorrect legal principles, relevant to the competency inquiry. Finally, Respondent does not dispute that the trial court's inquiry was insufficient under any standards to determine competency. To rely on such an incomplete and flawed trial record to argue the denial of a comprehensive presentation on habeas that Petitioner was incompetent is simply unreasonable. *Dusky v. United States*, 362 U.S. 402 (1960) (inquiry is whether the accused 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").

Respondent, like the District Court and the Court of Appeals, simply cannot acknowledge the essential truth: (1) that Dr. McKinzey examined Petitioner prior to trial; (2) that he told trial counsel that Petitioner was incompetent; (3) that trial counsel failed to advise the trial court and instead stated he was investigating further; (4) that trial counsel harbored a false understanding of competency law that caused him to hesitate when declaring a doubt and requesting a hearing; and (5) trial counsel never investigated further once he had obtained a waiver of speedy trial. The reason for this silence is obvious – it renders any state court competency determination unreasonable.

Further, Respondent goes so far as to say the McKinzey opinion was in a declaration filed a few years after trial and, therefore, wasn't given at the time of trial. (Opp. Brief at 9). But that is incorrect. The declaration is plain that this was an opinion Dr. McKinzey arrived at prior to trial and one counsel ignored, *and no evidence was presented to contradict this*. *See* Pet.'s App 141, par. 10; *Id*, at 139-142; *Cullen v. Pinholster*, 563 U.S. at 182-83 (federal court must, like the state court, accept facts presented by Petitioner as true unless contrary to the record). The reason McKinzey's opinion wasn't in the trial record was because trial counsel buried it. It was certainly an opinion arrived at contemporaneous to trial, and rendered at that time. It is exactly the uncontested contemporaneous medical opinion that is nearly dispositive.

Likewise, Respondent obscures the record concerning Mr. Rodrigues' state court proceedings under *Atkins v. Virginia*, 536 U.S. 304 (2002), instituted during the course of District Court review and presented to the federal court. Opp. Brief, 9 fn 2. There, the state court issued an order to show cause why relief should not be granted; the state's expert admitted intellectual disability; the prosecutor declined to contest the order to show cause; and, pursuant to stipulation, the trial court made a finding of fact that Mr. Rodrigues met the criteria of *Atkins*. CA ER 288-91.

Respondent incorrectly asserts that all of counsel's concerns about competency, raised in two proceeding, were only concerns about Petitioner waiving speedy trial rights. Opp. Brief, at 7. The first trial court asked if the basis for asserting incompetency (which trial counsel did) was in the context of the decision not to waive time, and counsel agreed. PA 81. But, while that may have been the immediate procedural question for the court, whether to waive time over a defendant's objections, the limitations on participation extended to understanding the charges, the evidence against him, being able to understand potential defenses, and being able to contribute to them. Petition, at 13-18; PA 88-89.

It is correct that once trial counsel obtained the speedy trial waivers he desired, he no longer pursued competency with the trial court. Opp. Brief, at 7. However, Respondent does not offer a fair characterization. In response to the court's inquiry as to whether further proceedings were needed on the question

of competency, trial counsel represented he was still investigating the matter. PA 136. Counsel did not say he believed Mr. Rodrigues to be competent. We now know that by then, counsel already had expert opinion that Mr. Rodrigues was incompetent, with Dr. McKinzey sitting in the hall outside the court room ready to so testify. PA 139-41.

Nor is it correct that the trial proceedings demonstrated Petitioner was able to "interact coherently and rationally." Opp. Brief, at 7. Respondent does not dispute that Petitioner was unable to adequately respond to anything but leading questions requiring a yes or no response, and merely assented to nearly all of them. Petition, 13-18. Nor does Respondent contest that this is typical of those with such impairments. Petition, at 20-22. And Respondent ignores the fact that Dr. McKinzey sat in the court room and observed these interactions at the second proceeding and found them to demonstrate severe impairments and a lack of ability to participate. PA 140-41. The reason it is unreasonable to rely on such a record is that it doesn't come close to approximating a competency inquiry, a point Respondent does not contest.

Finally, Respondent contests the claim that an evidentiary hearing on competency was improperly denied. Opp. Brief, at 9-10. He ignores this Court's strong commitment to such proceedings when competency is in question. And, he relies on the requirement that all supporting facts must be presented to the state court initially, established in *Pinholster v. Cullen*. Opp. Brief, at 10. However, there is no allegation that Petitioner is relying on any facts other than those

presented to the state court.[1] Nor is the Respondent's alleged proscription again hearings when unreasonableness is not established (a questionable proposition) applicable here. *Id.* This is because in order to deny relief, the District Court (like Respondent here) had to question the relevance and evidentiary value of the materials submitted by Petitioner: his expert and lay declarations demonstrating his severe impairments, their effects on his functioning, including competency to stand trial. And, they creates a dispute over whether the McKinzey opinion was contemporaneous to trial. As Petitioner has pointed out, that is improper under *Pinholster*, which requires all uncontested facts be accepted as true. But, if such an analysis is going to be the lynchpin for denying relief, then a hearing is necessary in order to do so.

C. Trial Counsel's Actions were Unreasonable, Professionally Deficient and Prejudicial

Only by mis-characterizing the record in exactly the same manner as the state appellate court did can Respondent argue that certiorari should not be granted. Opp. Brief, at 10-11. Respondent also ignores Petitioner's main argument for the need for review – that trial counsel's obligations with regard to competency are more constrained than the wide-range of deference given to other decisions because the presumptions underlying this Court's counsel ineffectiveness jurisprudence all assume a competent defendant. This question

---

[1] Petitioner presented his intellectual disability in several expert declarations in the state habeas proceedings. Subsequently, the state agreed and penalty phase relief was granted. Thus, all the facts and opinions are in the record for the purposes of habeas review.

will only squarely arise in habeas proceedings because it concerns what evidence counsel had and did not present that will necessarily be in a habeas record.

In this case, because trial counsel had expert opinion of incompetency, and no contrary expert opinion, he was professionally required to present it to the trial court. Even if counsel had some reason to doubt this opinion, which does not appear in the record, it was incumbent upon him to alert the trial court. Counsel is not a mental health expert, particularly as to the effects of intellectual and neurological impairments, and cannot, as Respondent argues, rely on "his own observations and assessment." Opp. Brief, at 11. Counsel offered factual evidence that Petitioner counsel not understand the proceedings, counsel's role, the evidence against him, or potential defenses. He offered that the leading question inquiry the trial court undertook was deficient. He twice argued that further investigation was needed and hired experts to do this. Thus, he could not have and in fact did not rely on some heretofore undisclosed assessment and observations.

Respondent is only half correct that trial counsel investigated competency. Opp. Brief, at 11. As demonstrated in the Petition and uncontested by Respondent, counsel conducted an initial investigation based on his stated belief that Petitioner was incompetent, and obtained expert opinion to that effect. PA 139-43. However, counsel harbored an incorrect view of the law that if he requested a competency hearing, he would be exposing

Mr. Rodrigues to potential harmful mental state evidence that would be used at trial, which Respondent does not dispute. Petition, at 16. Counsel was also not entirely forthright with the trial court – he never intended to present a mental health defense or mental health mitigation evidence at trial, nor did he ever conduct any such investigation. And, at the next proceeding, rather than informing the trial court that he had obtained an opinion as to incompetency, trial counsel stated the matter was under investigation (PA 134-36) yet conducted no further investigation (PA 143). This is hardly an adequate investigation of competency, which counsel himself twice stated was in doubt.

Respondent next asserts that "much of the evidence" trial counsel uncovered in his truncated investigation, "indicated Mr. Rodrigues was competent to stand trial." Opp. Brief, at 11. But, Respondent cannot point to a single piece of such "evidence." The record is to the contrary. In fact, trial counsel did present what he knew at the time of the second proceeding as evidence supporting his contention that competency was sufficiently in question to warrant suspending proceedings. Petition, 13-18. Then, when he obtained expert examination and opinion that Petitioner was incompetent, he never disclosed it or pursued it further. PA 139-43.

Respondent's view of prejudice is that it is constricted to the opinions of Dr. McKinzey and Dr. Missett and is balanced against counsel's own assessment. Opp. Brief, at 11. First, that is not the proper prejudice inquiry as the federal court must consider and weigh all the state habeas evidence, which includes

extensive expert testing, observations, reviews and opinions, as well as numerous medical, school and lay observations. All of this must be credited as true. Second, trial counsel's stated observation was that he doubted competency, twice, and that he was investigating it further, but that he believed state law cautioned against such an inquiry. His unreasonableness cannot be used as a shield against a habeas record that establishes incompetency.

D. The Ninth Circuit Incorrectly Precludes Implied Juror Bias Claims on Habeas

Petitioner presented evidence a juror lied on voir dire about material facts and argued this reflected undisclosed bias. Respondent would have this Court believe there is no such claim in the case, and that there is no implied bias here. Opp. Brief, at 12-14.

Respondent confuses the types of juror claims to argue that Petitioner is not claiming implied bias. Opp. Brief. at 12-13. Respondent believes the Petition seeks to establish that the lies themselves were sufficient to establish a for cause challenge had the juror been truthful. Opp. Brief, at 12 ("*McDonough*-type bias")[2]. It mis-cites the Petition for this as there is no such claim therein. There was such a claim below, but that was only because Circuit law precludes implied bias (and Circuit rules preclude a panel from over-ruling another panel). Respondent concedes as much.

Respondent also concedes a Circuit conflict, but merely argues Petitioner cannot meet the implied bias standard. Opp. Brief, at 12. For this, Respondent

[2] *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984)

relies on the Ninth Circuit's *McDonough* bias rule, which the Circuit itself distinguishes from an implied bias analysis. Other circuits don't see it this way, as Respondent notes. Opp. Brief, at 13. Rather than examine the claim on its merits to determine whether implied bias is shown by the nature of the untruths here, Respondent blithely asserts the other circuits would not have granted relief on these facts, without indicating anything in those opinions that would reflect this other than they presented different facts. Opp. Brief, at 13-14.

In the context of addressing the Circuit's *McDonough* bias ruling, Respondent posits the juror's responses may have been a misguided desire to conceal sensitive information, rather than an intentional lie reflecting impartiality. Opp. Brief, at 14. But, the federal courts in Petitioner's case have not addressed whether this is sufficient to reasonably deny an implied bias claim because they can't under mistaken Circuit law. And, this is hard to square with the record: each potential juror was given the opportunity to privately disclose sensitive information, and many did so; there were at least four questions answered untruthfully; she even failed to disclose that she had brothers, which is not something withheld due to it being sensitive information; and, the most salient undisclosed fact, her brother's death under similar circumstances in the same location, is so obviously relevant and responsive that it negates any such conjecture about her "good-faith." All of this needs to be evaluated in the first instance by the District Court.

Respondent argues a lack of actual bias sufficient to excuse for case, which is not the question here. Opp. Brief, at 15. It cites to two cases, none of which rise to the level of non-disclosure here. *Id*. And, it cites to other jurors with family members and their criminal pasts that did not result in excusals. *Id.* Tellingly, Respondent does not mention the facts underlying those disclosed pasts – all were extremely minor transgressions, and unrelated to the circumstances of Petitioner's case. C.A. ER 7-9-710; 714; 718; 723.

Finally, Respondent addresses implied bias and distinguishes this Court's cases that establish it has a basis for relief. Opp. Brief, at 15-16. It distinguishes those cases based on their facts, not on any principles of law or standards for review that have not been met by Petitioner. *Id.* The facts here, though, reflect a strong implied bias: it is a drug-related murder in the very same location.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: December 28, 2018

Respectfully submitted,

JOHN R GRELE

Law Offices of John R Grele
Attorney for Petitioner