No.

IN THE SUPREME COURT OF THE UNITED STATES

EARL DIXIE,

Petitioner

v.

K. HARRINGTON, Warden,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Dixie was convicted of evading pursuing police officers based on an incident where he fled from police during a high speed vehicle chase. At trial, Dixie's counsel argued that Dixie's mental state was impaired during the charged incident because he became intoxicated after learning that his beloved niece had died in childbirth.

Under the clearly established rule in *Strickland v. Washingon*, 466 U.S. 668 (1984), was Dixie's trial counsel prejudicially ineffective when she failed to present evidence that Dixie suffered from paranoid schizophrenia, which would have supported her argument that Dixie did not form the intent to flee from police during the charged incident?

Moreover, under the Eighth Amendment to the United States Constitution, is Dixie's twenty five year to life sentence for the crime of evading the police grossly disproportionate to his crime, when that offense may be charged as a misdemeanor and when no one was harmed as a result of Dixie's conduct?

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PETITION FOR WRIT OF CERTIORARI

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Petitioner, Earl Dixie, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed the district court's denial of habeas relief in an unpublished memorandum decision. App. 1. [1] The order adopting the magistrate judge's findings and recommendations and the judgment of the district court denying Dixie's habeas corpus petition are unreported. App. 8, 9. The magistrate judge's opinion is also unreported. App. 10.

The California Court of Appeal affirmed the conviction and sentence in an unpublished decision. App. 41. The California Supreme Court denied Dixie's petition for a writ of habeas corpus in an unpublished decision. App. 35.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

In pertinent part, the Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall enjoy the right . . ."to have "the assistance of counsel" for his defense.

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[1] "App." refers to the Appendix attached to this petition. "ER" refers to the Appellant's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit simultaneously with the Appellant's Opening Brief on Appeal. "CR" refers to the docket number of the Court of Appeals docket and "DCR" refers to the docket number of the federal district court docket.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law."

The Eighth Amendment to the United States Constitution provides, in pertinent part, that "cruel and unusual punishments" shall not be inflicted

STATEMENT OF THE CASE

A. State Court Proceedings

On June 15, 2006, a Riverside County Superior Court jury convicted Dixie of one felony count of evading a pursuing police officer (Cal. Veh. Code § 2800.2)(CT 126) and three misdemeanors: one count of failing to leave identifying information after causing property damage in a vehicle accident (Cal. Veh. Code § 2002(a))(CT 125), one count of driving under the influence of a mixture of alcohol and drugs (Cal. Veh. Code § 23152(a)) (CT 124)and one count of possession of less than 28.5 grams of marijuana while on a highway (Cal. Veh. Code § 23222(b)). CT 123. Dixie also entered a guilty plea as to one count of driving a motor vehicle with a suspended license, a misdemeanor. I CT 113-114.

The trial court found true the special sentencing allegations that Dixie had suffered three prior "strike" convictions under California Penal Code §§ 667 and 1170.12. CT 189.

On January 29, 2007, the trial court denied Dixie's motion to strike his prior strike allegations. II RT 396-398. The court sentenced him to a prison term of 25 years to life on count one, the conviction for evading a pursuing police officer. It imposed concurrent terms as to the remaining misdemeanor counts. II RT 401.

On March 13, 2008, the California Court of Appeal affirmed the judgment and sentence. I ER 36. On June 11, 2008, the California Supreme Court denied his petition for review. I ER 30.

The Riverside County Superior Court denied Dixie's petition for a writ of habeas corpus on May 1, 2009. I ER 32-33. The California Court of Appeal denied the petition on July 14, 2009. On April 28, 2010, Dixie's final state court petition was denied by the California Supreme Court. I ER 30.

B. Federal Court Proceedings

Dixie timely filed a petition for a writ of habeas corpus in the district court on July 12, 2010. CR 1. On November 28, 2011, the district court denied the petition on the merits. I ER 3, 4.

The Ninth Circuit Court of Appeals issued a certificate of appealbility on March 7, 2013. I ER 1. The Court granted Dixie's motion to stay the proceedings on grounds that there were parallel state court proceedings concerning Dixie's sentence. Docket No. 10. Dixie was eligible for recall and revision of his sentence pursuant to the amendment to California Penal Code section 1170.12. [2]

On January 31, 2013, Dixie filed a petition in the trial court to recall and revise his sentence. The trial court denied the motion on December 13, 2013. On August 5, 2015, the California Court of Appeal affirmed the trial court judgment. *People v. Earl Dixie*, E060217, (Cal. App. 4th, August 5, 2015).

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[2] On November 7, 2012 the California three strikes law was amended by a voter initiative to provide that non-violent, non-serious felony convictions no longer qualify for sentencing under the three strikes law. Because Mr. Dixie was sentenced in this case to a 25 year to life term for a non violent, non serious offense, he qualified for but was not granted discretionary sentencing relief under the revised statute.

On September 15, 2016, the California Supreme Court granted Dixie's petition for review, and deferred briefing pending the outcome of two other pending cases. *People v. Earl Dixie*, S223825 (Cal. Sup. Ct., September 15, 2016). On July 3, 2017, those cases were decided adversely to Dixie. The California Supreme Court dismissed his petition for review on November 29, 2017.

On December 20, 2017, undersigned counsel moved to lift the stay of the Ninth Circuit proceedings. On January 10, 2018, the motion was granted. Docket Nos. 47 and 48. On March 11, 2019, the Ninth Circuit issued a memorandum decision affirming the judgment of the district court. App. 1.

STATEMENT OF FACTS

A. The Charged Incident of Evading Pursuing Police Officers

On June 2, 2002, Riverside Police Officer James Barette saw Dixie sitting in a parked car on Ottawa Avenue, an area where there are frequent incidents of drug dealing and prostitution. Officer Barette also saw two women standing outside Dixie's car and speaking with him through the open window. I RT 69-71.

Because Dixie's car registration tags had expired, Officer Barette and his partner approached him in their black and white marked police car. I RT 71-72, 78. Dixie pulled away from the curb and began to drive away as they approached him. The officers then activated the red lights on the top of the patrol vehicle. They did not activate the siren. They followed Dixie down a dead end street, where he turned into a driveway. I RT 74-78. They parked behind his car, and as they got out of their patrol car, Dixie pulled out and drove away very fast. The officers followed him with their patrol car lights on and siren activated. I RT 78-79.

As the officers followed him, Dixie drove without stopping through an intersection marked with a stop sign. He also drove down the wrong side of the street after making a right turn. Officer Barette estimated that Dixie was driving 50 miles per hour through a residential area where many pedestrians were present. I RT 79-81.

Dixie again drove past a stop sign without stopping. The officers noticed that Dixie had turned off his headlights and had increased his speed to approximately 80 mles per hour. I RT 83-85. He then drove past another stop sign and began driving on the far right side of the road, in the bicycle lane. Bicyclists had to move out of the way to avoid him. I RT 87. The officers requested assistance and another patrol vehicle joined the pursuit. I RT 88.

Dixie increased his speed to approximately 100 miles per hour. I RT 86. He drove through a red light signal at an intersection. I RT 89-90. As Dixie approached a dead end that was bounded by a chain link fence and a dirt field, he drove through the fence and struck a palm tree. I RT 92-94. He then attempted to back up and struck another palm tree. Although his car was severely damaged, Dixie continued driving through the field and onto a street, where he began driving slowly on the wrong side of the road, at no more 15-20 miles per hour. I RT 96-99. He proceeded past another red traffic light without stopping and came to a halt. I RT 99-100.

When Dixie was arrested, he had a laceration on his forehead. I RT 101. The officers requested an ambulance. They found a bottle of gin in Dixie's car and a bag of marijuana in his pocket. I RT 102. A sample of Dixie's blood was taken for toxicology testing. I RT 104-105. The officers did not ask him to do field sobriety tests due to his injuries. According to Officer Barette, Dixie's driver's license was revoked and his vehicle registration was expired. I RT 105.

Bruce Harter, a paramedic who attempted to treat Dixie's minor injuries testified that Dixie was "confused" and that he refused to cooperate with treatment. I RT 121-123, 125. According to Harter's notes, Dixie did not respond to questions or was "incomprehensible." I RT 121. However, another paramedic who transported Dixie to a hospital, Manuel Munoz, described Dixie as coherent and said he was not disoriented or dissociated. Dixie was able to provide his name, age, and health history. Dixie told Munoz, that he suffered from, among other things, diabetes, hypertension, and asthma. I RT 199-205.

B. Prosecution Expert Testimony That Dixie Drove While Intoxicated

The prosecutor called an expert to establish that Dixie drove a motor vehicle while intoxicated, which was one of the charged misdemeanor offenses. Maureen Black, a toxicologist, testified that there was alcohol, cocaine, phencyclidine, marijuana, and a prescription medication classed with benzodiazepines (i.e., Valium) in Dixie's blood sample taken after the charged incident. I RT 139-140. However, Dixie's blood alcohol level was too low to cause impaired driving. I RT 141. The amount of cocaine in his blood sample was also low and it may or may not have caused impaired driving. I RT 150.

Black testified that it is difficult to draw predictable conclusions as to how ingestion of phencyclidine (PCP) will impair a person's ability to drive. Based on the amount of phencyclidine in Dixie's blood, his ability to drive was somewhat impaired due to his ingestion of phencyclidine. The marijuana and benzodiazepines in Dixie's blood had sedating effects and they also impaired his ability to drive. I RT 158, 162-163.

Black opined that the combination of drugs and alcohol Dixie had consumed had impaired his ability to drive. Her opinion was based on his drug test results and the reports concerning his behavior before and after his arrest. I RT 162-163.

On cross examination, defense counsel asked Black whether a person with schizophrenia would "increase or decrease" their condition by ingesting PCP. Black replied that she could not give an opinion about that but "it certainly wouldn't help." I RT 175.

C. Dixie's Trial Testimony

In June, 2002, Dixie was living in Riverside with his wife and five children. II ER 139. Dixie testified that at about 4 a.m. on the day of the charged incident, his sister Nickie called to tell him that her daughter, Shantay (who was known by her nickname, "Princess"), Dixie's niece, was in labor. II ER 137-139. Dixie had an unusually close relationship with Princess because he had acted as a father figure for her after her biological father abandoned her. II ER 137. Dixie asked his sister to call when the baby was born. II ER 138; 1 RT 207.

About an hour later, Nickie called, hysterical, and told Dixie that Princess had died during the birth. II ER 138. Dixie and his wife drove from Riverside to Nickie's home in Los Angeles. When they arrived at the house, Dixie's family members were in the front yard grieving and crying. They all went to the hospital at about 6:30 or 7:30 a.m., where Dixie's mother became hysterical and fainted. II ER 139-141. Dixie's father dissuaded him from going to Princess's room to see her body, as he thought that would be too upsetting. After Dixie's mother was treated at the hospital, The group returned home and continued crying and grieving. II ER 141-143.

Dixie's counsel introduced a copy of Princess's death certificate as an exhibit at trial. The certificate indicated that she had died at 5 a.m. on June 2, 2002. II ER 142.

Dixie testified that he had been "clean and sober" for eight years prior to the date of Princess's death. II ER 150. However, the morning that Princess died, an old friend, Randy Springfield, called to offer him emotional support. Springfield asked Dixie if he would like to have a drink. At about 9 a.m., Dixie began drinking gin with Springfield to "calm his nerves." II ER 150-151,171.

Two of Dixie's children called to ask where he was and he had to tell them that their cousin had died. II ER 144. Dixie became very emotional and struggled to calm himself. II ER 145. At about 11 a.m., Dixie drove back to Riverside to pick up his children and bring them to his sister's home, where many other relatives had gathered. As he drove his children to Los Angeles, he tried to comfort his children and answer their questions. II ER 145-146.

Dixie went to his niece's room, and was overcome by grief where he saw her pictures and the items that had been purchased in anticipation of the birth of her baby. He then tried to "pull [him]self together" but could not. II ER 147. At about 1:30 p.m., he began driving around L.A. and eventually drove to an area where some old friends lived. They gave him some PCP, marijuana and cocaine. He also stopped at a liquor store and bought a bottle of gin. II ER 148-150.

Then, Dixie went back to his house in Riverside at about 3:30 p.m., where for about two hours, he smoked two or three marijuana cigarettes laced with cocaine. II ER 151-152. He decided to take a shower to try to regain his composure. II ER 153. After crying some more, he received a call from his wife complaining that he had left her in Los Angeles. He promised to get dressed and come out to get her. II ER 153-154.

When he was getting dressed, he found some liquid PCP in a pants pocket. He decided to take it because he thought it would "block out the thoughts." II ER 155. So, he smoked a cigarette dipped in the PCP at around 7 p.m. II ER 155.

Dixie's wife called again and asked him to pick up her sister Tonya, who had been living with them in Riverside, and to bring Tonya to Nickie's home in Los Angeles. Still smoking the PCP laced cigarette, Dixie drove to an area where prostitutes gathered to look for her. II ER 156-157.

Dixie felt very intoxicated from the gin, marijuana, cocaine and PCP that he had consumed. II ER 157-159. He stopped his car on the street and asked two women if they had seen Tonya and gave them a description. II ER 157-158. By then, Dixie had finished the PCP laced cigarette and he began to try to focus on where he was. II ER 158. One of the women asked if he had some PCP and he said he did and began to smoke another cigarette dipped in PCP. At that point, he felt "real high." II ER 159.

Dixie let one of the women smoke part of his PCP laced cigarette. He began to think that he had to get back to his family. He gave the cigarette to the woman he had spoken to and threw the bottle of PCP on the ground. Then, he pulled away from the curb and began driving. II ER 159. He did not recall the rest of the events that night, including the police chase, his arrest, or the trip to the hospital afterward. II ER 159-163. The next event that Dixie could recall was waking up in a hospital bed and realizing that he was handcuffed to the bed. II ER 163. Dixie was very sorry for evading the police and driving recklessly. However, he said he was not in his "right mind" when he was driving. II ER 167-168

When asked to describe his medical conditions, Dixie testified that he suffered from diabetes, asthma, hypertension and paranoid schizophrenia. II ER 164-165. When asked about his medical history when he was at the hospital, he had said he was HIV positive, which was not true. II ER 164. At the time of the charged incident, he had been taking the prescribed anti-psychotic medication Seroquel to control his psychotic symptoms. However, he had not taken his medication on the day he was arrested. II ER 165.

Dixie also admitted that he had been previously convicted of robbery, tampering with a motor vehicle, domestic violence, brandishing a weapon, vandalism and theft. II ER 165-166. He testified that he had committed those crimes when he had been a drug addict. He said "in my normal state of mind . . . I would have never run from the cops." II ER 166.

D. Trial Counsel's Closing Argument

Defense counsel argued that the jury should find Dixie not guilty of the crime of evading pursuing police officers because, due to his voluntary intoxication, he did not form the specific intent to evade the police. II ER 128-129. The trial court also instructed the jury as to the defense of involuntary intoxication. II ER 117-118. However, counsel apparently misunderstood California law concerning the voluntary intoxication defense. She told the jury that under the voluntary intoxication instruction, criminal defendants can't be punished for actions that aren't "voluntary." II ER 130.

Defense counsel argued "the law recognizes that if alcohol interferes with the voluntariness of somebody's actions, then you can't hold them responsible for it." And "That's why we have the voluntary intoxication instruction. The law doesn't want to punish people that aren't responsible for their actions for the reason of being intoxicated." II ER 134.

During closing argument, defense counsel also argued that Dixie's trial testimony was credible because, if he had intended to lie, he could have presented a more convincing mental health defense. She argued:

> You've got evidence that, you know, that he [w]as schizophrenic. That is an unpredictable disease. It is not in front of you, but we could have presented that? And schizophrenia, in combination with drugs, why not blame it on that? Yeah, I remember, but I was paranoid. I didn't know who it was. Any of those things. Why not those things?

II ER 127.

STANDARD OF REVIEW

Under the AEDPA, relief may be granted under 28 U.S.C. 2254(d)(1) if the last reasoned decision, that of the Court of Appeal, unreasonably applied clearly established federal by either (1) correctly identifying the governing rule but then applying it to a new set of facts in a way that is objectively unreasonable, or (2) extending or failing to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." *DeWeaver v. Runnels*, 556 F.3d 995, 997 (9th Cir. 2009).

To prevail under 28 U.S.C. 2254(d)(1), Dixie need not show a case directly on point. He must only demonstrate that the state court unreasonably applied clearly established United States Supreme Court constitutional precedent to the facts of his case. *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000)(state court can be "unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled").

This Court may also grant relief under 28 U.S.C. 2254(d)(2) when the state court opinion contains an objectively unreasonable determination of the facts. *Taylor v. Maddox*, 366 F.3d 992,

1001 (9th Cir. 2004) ("[a state court's] misapprehension [of the record] can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable."

REASONS FOR GRANTING THE PETITION

1. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE OPINIONS BELOW ARE IN CONFLICT WITH THE DECISIONS OF THIS COURT CONCERNING THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND THE RIGHT TO BE FREE OF CRUEL PUNISHMENT

This Court should grant certiorari because the decisions below are in conflict with this Court's precedents concerning the right to effective assistance of counsel at trial and the right to be free of punishment that is cruel.

When a defendant alleges ineffective assistance of counsel, two elements must be proved: (1) counsel's performance was objectively unreasonable and (2) but for counsel's errors there is a "reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

In this case, trial counsel was prejudicially ineffective because she failed to investigate and present evidence at trial that, at the time of the charged offense, Dixie was suffering from chronic paranoid schizophrenia. Because trial counsel failed to do a reasonable investigation of the facts and the potential witnesses, her failure to present a defense that Dixie did not form the specific intent to evade the police due to his psychotic illness could not have been a reasonable trial strategy. Moreover, counsel's failure to present evidence and arguments concerning Dixie's mental health prejudiced his defense, because counsel's argument that Dixie did not form the requisite intent due to intoxication would have been bolstered by testimony and evidence concerning his chronic mental illness. The Ninth Circuit's memorandum decision conflicts with

this Court's decisions in *Strickland v. Washington,* 466 U.S. 668 (1984) and .*Wiggins v. Smith*, 539 U.S. 510 (2003), which hold that trial counsel must make a reasonable investigation prior to preparing a defense in a criminal case.

Because evidence concerning Dixie's diagnosis of paranoid schizophrenia would have corroborated his testimony that he did not recall evading the police and did not intend to do so, there is a reasonable probability that at least one juror would not have convicted him of the felony evading offense that led to his 25 year to life sentence. Accordingly, this Court should grant certiorari, reverse the decision of the Ninth Circuit and issue a conditional writ of habeas corpus providing that Dixie should receive a new trial.

In the alternative, this Court should hold that Dixie's 25 year to life sentence for evading pursuing police vehicles is invalid because it violates the prohibition on cruel and unusual punishment. The crime of evading pursuing police vehicles is a "wobbler" or alternate felony/misdemeanor offense that is generally punishable by either a one year county jail term or up to three years in prison. The Ninth Circuit's memorandum decision failed to give sufficient weight to the facts concerning his offense, where no one but Dixie was injured. Moreover, the Court failed to adequately weigh Dixie's mental health condition and the tragic death of his niece, which triggered the drug and drinking binge that led to his arrest. Finally, Dixie's offense could not have resulted in a prison term or recidivist sentence in the majority of states, including, now California, which has abolished three strikes sentences for cases such as this where the current offense is non-violent. The Ninth Circuit's decision is contrary to this Court's decisions in *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and *Solem v. Helm*, 463 U.S. 277(1983), which hold that a criminal sentence may not be grossly

disproportionate to the charged offense. For all of these reasons, Dixie's sentence is grossly disproportionate and this Court should grant certiorari and grant the writ.

ARGUMENT

I. Dixie Should Receive a New Trial Because His Trial Counsel Was Prejudicially Ineffective When She Failed to Present Evidence and Argument That He Did Not Form The Specific Intent to Evade The Police Because He Suffered From Paranoid Schizophrenia At The Time of the Charged Incident

A. Dixie's Mental Health History

Dixie filed his claim that his trial counsel was prejudicially ineffective for failing to present evidence concerning his paranoid schizophrenia in a *pro se* petition for a writ of habeas corpus filed in the state courts. The petition alleges that Dixie had requested (1) appointment of an expert to evaluate his mental health in order to present evidence that he suffered from a mental disorder at the time of the crime and (2) to present evidence that he did not form specific intent to evade the police due to a combination of his mental health symptoms and his voluntary intoxication at the time of the offense. II ER 86.

Dixie also asserted that his trial counsel, Ms. O'Rane, knew that he had a history of mental illness and also knew that he was taking prescribed psychotropic medications while he was incarcerated in the county jail. II ER86-87. Dixie asserted that his counsel did not attempt to have him examined by a mental health expert and did not present evidence of his mental health diagnosis or his medications. II ER 86-87. Dixie stated in his petition that his counsel seemed to be unaware that evidence of mental illness combined with voluntary intoxication can be presented in support of an argument that a defendant did not form the specific intent necessary for a charged offense. II ER 86-87.

Dixie attached as exhibits to the petition prison medical records in support of his claim including:

1. A "Psychiatric Evaluation Chrono" indicating that, on November 16, 2007, he was prescribed the medications Ablify and Benadryl and referred for further evaluation. II ER 90.

2. A "Mental Health Placement Chrono" which is difficult to read but apparently indicates that on November 20, 2007, Dixie was placed in the Clinical Case Management System. He was also referred for further evaluation after a mental health screening. II ER 91.

3. A "Mental Health Placement Chrono" dated February 20, 2008, which indicates that Dixie was diagnosed with a qualifying mental disorder and placed in the Clinical Case Management System. II ER 92.

4. A Mental Health Treatment Plan dated April 4, 2009, which indicates that Dixie has suffered from anxiety and hallucinations. However, his mental status exam did not indicate any current delusions or issues with his mental functioning. The indicated diagnosis is schizoaffective disorder not otherwise specified. II ER 93.

5. Two pages of "Mental Health Progress Notes" from Kern Valley State Prison dated November 16, 2007 and April 6, 2009. The 2007 notes are difficult to read but include references to complaints of auditory and visual hallucinations, and current prescriptions for Thorazine and Haldol. II ER 98-99. The 2009 notes indicate that Dixie's hallucinations decreased when he was taking Haldol. His diagnosis was schizoaffective disorder. II ER 98-99.

B. The Last Reasoned State Court Decision

The last reasoned state court decision was that of the Riverside County Superior Court, which held, without further elaboration, that Dixie had failed to state a prima facie case

supporting his release, because he had failed to demonstrate that his counsel's conduct was deficient or that he was prejudiced. I ER 32-33.

C. The District Court Decision

The district court held that Dixie had failed to establish that his counsel was ineffective under the two prong standard in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the district court held that counsel made a strategic decision to rely on a voluntary intoxication defense rather than a mental health defense. I ER 16. However, the district court conceded that there was no evidence that defense counsel had ever investigated the mental health defense. For example, there was no evidence that a mental health expert was ever consulted or that Dixie had received a mental health evaluation prior to trial. I ER 16.

Nevertheless, the district court held that the claim should be denied on grounds that Dixie had not shown prejudice. The district court reasoned that even if defense counsel's conduct was deficient, there was no evidence that Dixie was under the influence of auditory or visual hallucinations at the time of the charged incident. Moreover, the district court reasoned that any evidence that schizophrenia causes memory loss would not have established that Dixie lacked the specific intent to evade the police. I ER 17.

Finally, the district court reasoned that the evidence supporting a finding of specific intent was substantial. The district court pointed to evidence that the police officers were driving marked vehicle and had activated their overhead lights. Moreover, Dixie drove away at high speed after he stopped and officers approached him on foot. Dixie had also turned off his lights, presumably to avoid detection, and continued to try to drive away even after striking a palm tree twice and seriously damaging his car. Finally, a paramedic who rode in the ambulance with Dixie

said he had “no problems” responding to questions and that he did not appear to be disoriented. I ER.

D. Trial Counsel’s Preparation And Presentation of Dixie’s Defense Was Professionally Unreasonable Because She Failed to Investigate And Present Mental Health Evidence That Would Have Bolstered His Trial Testimony And His Intoxication Defense

1. California Law Concerning the Admissibility of Mental Health Evidence

Under California law, the prosecutor is required to prove that a defendant had the specific intent to evade the police in order to convict him of evading a pursuing police vehicle under California Vehicle Code § 2800.2. *People v. Howard*, 34 Cal.4th 1129, 104 P.3d 307, 311-312 (2005).

Moreover, California permits the introduction of evidence of mental illness to support a defendant’s argument that he did not in fact form the requisite specific intent. Cal. Penal Code §§ 25, subd. (a), 28, subd. (a). An expert may testify concerning the defendant's mental condition, but may not testify regarding the ultimate issue whether the defendant had actually formed the required intent at the time he acted. § 29; *People v. Nunn* 50 Cal.App.4th 1357, 1364 (1996). When there is evidence of both a mental disease and voluntary intoxication admitted as to the issue of specific intent, the jury should be instructed that they may consider each type of evidence when determining whether there was a reasonable doubt that the defendant formed the requisite mens rea. *See People v. Musselwhite*, 17 Cal.4th 1216, 1247 (1996).

2. The Clearly Established Right to Effective Assistance of Counsel

A claim of ineffective assistance of trial counsel requires proof that : (1) counsel's performance was objectively unreasonable and (2) but for counsel's errors there is a “reasonable

probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

When, as in this case, counsel has failed to present defense evidence, the Court must "focus on whether the investigation supporting counsel's decision not to introduce [exculpatory evidence] was itself reasonable." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). An attorney who fails to introduce evidence "that would have raised a reasonable doubt at trial renders deficient performance."' *Lord v. Wood*, 184 F.3d 1083, 1092 (9th Cir. 1999).

Strickland instructs:

> . . . [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 690-91.

The duty to investigate derives from counsel's basic function, which is "to make the adversarial testing process work in the particular case." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (quoting *Strickland*, 466 U.S. at 690); 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1203 1982 Supp.) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case....").

A purportedly strategic decision is not objectively reasonable "when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir.1991).Thus, the question is whether "reasonable professional

judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691; *Seidel v. Merkle*, 146 F.3d 750, 756 (9th Cir.1998).

In order to provide constitutionally adequate representation to a criminal defendant who may suffer from a mental defect, counsel must conduct a reasonable investigation into potential mental defenses. *See, e.g., Raley v. Ylst*, 470 F.3d 792, 800–01 (9th Cir.2006). Counsel's investigation must be sufficient to permit informed decisions about how best to represent the client. *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir.1994). Accordingly, a defense attorney's failure to investigate a client's mental health defense, even when counsel has chosen an alternative defense, is deficient performance. *Bemore v. Chappell*, 788 F.3d 1151, 1165 (9th Cir. 2015).

The *Bemore* court emphasized that even if counsel had chosen a conflicting defense, which was not the case here, she was not absolved from her duty to conduct a reasonable investigation where her client's mental illness could give rise to a viable defense. *Id* ("Even if presenting mental health evidence would have conflicted with or diluted an alibi defense in this instance, that fact does not absolve counsel of a duty to investigate . . . That way, [counsel] could decide in an informed manner which defense was preferable . . .").

Therefore, the correct inquiry is not whether Dixie's counsel made a decision to pursue another defense, it is whether counsel had a duty to investigate his mental health in order to decide on a trial strategy, considering "all of the circumstances. *Strickland*, 466 U.S. at p. 691.

3. Counsel's Failure to Investigate Dixie's Mental Health Was Professionally Unreasonable

Dixie's petition states that his trial lawyer knew that he was mentally ill and that he was taking anti-psychotic medication prior to trial. II ER 86. Because defense counsel knew or

should have known about Dixie's schizophrenia diagnosis prior to trial, her failure to obtain an expert evaluation and to present evidence concerning Dixie's mental illness was professionally unreasonable. *See Seidel.* at 755-56 (counsel ineffective because, despite "abundant signs in the record that Seidel suffered from mental illness," petitioner's counsel "failed to conduct any investigation at all into his client's psychological history and therefore neglected to pursue a potentially successful defense").

The district court's conclusion that trial counsel reasonably declined to present mental health evidence without investigating Dixie's mental health is contrary to Supreme Court precedent. The Supreme Court has squarely rejected attempts to "justify [a] limited investigation as reflecting a tactical judgment." *Wiggins*, 539 U.S. at 521.

Here, trial counsel's failure to investigate Dixie's chronic paranoid schizophrenia could not have been a reasonable tactical decision. Counsel could not have a made a reasoned choice to by-pass the opportunity to present mental health evidence because counsel did not obtain the assistance of an expert to evaluate Dixie and to provide an opinion as to whether his mental illness, combined with drug and alcohol intoxication, could have prevented him from forming the specific intent to evade the police at the time of the charged offense. *Weeden v. Johnson*, 854 F.3d 1063, 1070 (9th Cir. 2017)(trial counsel's failure to investigate client's mental health could not be excused "simply by invoking strategy")*Weeden*, *supra*, at p. 1070.

The district court's conclusion that counsel made a tactical decision to rely on voluntary intoxication rather than a mental health defense is also unreasonable because those defenses are entirely consistent. The evidence concerning Dixie's mental illness supported and corroborated counsel's argument that Dixie did not know that he was evading the police at the time of the

charged incident. Paranoid schizophrenia can cause visual and auditory delusions that could have been the trigger for Dixie's decision to flee the police. See II ER 90-99 (prison medical records with notes concerning Dixie's history of visual and auditory hallucinations).

The defense of voluntary intoxication and that of failure to form specific intent due to mental illness can be raised in combination when there is, as in this case, evidence that the defendant suffered from schizophrenia and that he was also under the influence of intoxicants. *People v. Musselwhite*, 17 Cal.4th 1216, 1248 (1998). Schizophrenia is a psychotic disorder that leads to visual and auditory hallucinations and interferes with the ability to think and reason. *See People v. Elmore*, 59 Cal.4th 121, 148 (2014). No reasonable defense attorney under the circumstances would have argued, as defense counsel did, that the trial jury should simply not consider the evidence that her client suffered from schizophrenia. II ER 127. Counsel's argument that the jury should ignore her client's psychotic illness is particularly inexplicable because the defense that she selected and argued to the jury was that Dixie did not know what he was doing when he drove away from the police. Accordingly, defense counsel's decision to forego presenting mental health evidence was professionally unreasonable.

In addition, trial counsel elected to rely only on voluntary intoxication as a defense when she did not understand the law. Trial counsel's comments to the jury that it could not hold Dixie responsible for his actions if they occurred when he was intoxicated were incorrect because, under California law, a person's actions are not less criminal simply because they occur while the defendant is intoxicated. *People v. Mendoza*,18 Cal. 4th 1114, 1124-1126 (1998).

Defense counsel apparently did not recognize that the fact that a defendant was intoxicated at the time of a charged incident is not sufficient, in and of itself, to support an

acquittal. She argued that voluntary intoxication excuses criminal conduct when California law is specifically to the contrary. *Id*. Moreover, counsel failed to recognize that schizophrenia combined with intoxication was a stronger defense than intoxication alone. Because trial counsel's arguments and strategy were based on a misapprehension of the law, this Court should accord no deference to her tactical decisions. *Crace v. Herzog*, 798 F.3d 840, 852 (9th Cir. 2015).

In summary, the only contested issue at trial was whether Dixie had formed the specific intent to evade the police at the time of the police chase. Defense counsel sought to persuade the jurors that he did not form the specific intent due to his ingestion of PCP, cocaine, gin and marijuana and declined to offer any expert testimony explaining to the jury that Dixie's chronic paranoid schizophrenia, alone or in combination with the intoxicants he consumed, could have caused his black out and his failure to form the intent to flee from the police. There could not have been a valid tactical reason for counsel's omission, because her failure to investigate was itself unreasonable and prevented her from making reasoned tactical judgements as to whether to present the evidence at trial. *Wiggins, supra,* 539 U.S. at 523. Because there was no conceivable downside to presenting the evidence of Dixie's mental illness, defense counsel's conduct was professionally unreasonable.

4. Dixie's Defense Was Prejudiced Because Expert Testimony Concerning His Mental Illness Would Have Bolstered His Mental State Defense And The Credibility of His Trial Testimony That He Did Not Recall The Charged Events

Under *Strickland*, a petitioner is entitled to a new trial if there was a "reasonable probability" that counsel's failures affected the verdict. *Strickland*, *supra* at p. 694. Moreover, *Strickland* instructs that "a verdict or conclusion only weakly supported by the record is more

likely to have been affected by errors than one with overwhelming record support." *Strickland*, *supra*, 466 U.S. at 696.

Without the context of Dixie's history of paranoid schizophrenia and delusions, his testimony that he did not recall the police chase at all must have struck the jury as implausible. If an expert witness had explained to the jurors that people with schizophrenia are prone to delusions and blackouts, particularly in combination with the use of alcohol and illegal drugs, there is a reasonable likelihood that at least one juror would have harbored a reasonable doubt as to whether Dixie had the specific intent to evade the police.

Moreover, Dixie's mental state at the time of the police chase was his only defense. Because he had a documented history of a pertinent mental health condition, a serious delusional disorder, it was objectively unreasonable for the state court to conclude that counsel's performance did not affect or otherwise undermine confidence in the outcome of the trial. *Woods v. Sinclair*, 764 F.3d 1109, 1133 (9th Cir.2014). Accordingly, the state court's conclusion that Dixie did not establish prejudice"unreasonably applied clearly established Federal law" under 28 U.S.C. § 2254(d)(1). *Id.*

The district court held that Dixie was not prejudiced because there was no evidence that Dixie's schizophrenia was disturbing his sensory perceptions or thought processes at the time of the charged incident. However, defense expert testimony could have supplied that missing information and could have explained his lack of memory of the charged incident. Although a lack of memory would not have established a lack of specific intent, expert testimony on that point would have bolstered Dixie's credibility.

The prosecutor argued in closing that Dixie's testimony that he could not remember fleeing from the police was not credible. I RT 312-314. Expert testimony concerning Dixie's schizophrenia diagnosis would have allowed defense counsel to rebut that argument.

The district court also held that Dixie was not prejudiced because there was substantial evidence to support the element of specific intent. I ER 17-18. The district court's analysis is faulty, because under *Strickland* the court cannot reject a claim of ineffective assistance of counsel based on the notion that there were factual inconsistencies at trial or that some evidence supported the conviction. *Crace v. Hertzog*, *supra*, at p. 847.

Here, the district court reasoned that Dixie drove at high speed away from police in marked vehicles who had lights and sirens activated. The court also pointed to evidence that Dixie drove through a fence, twice hit a palm tree and had shut off his lights, presumably to avoid detection. However, all of those actions are equally consistent with a disorganized state of mind. I ER 17-18.

The district court also reasoned that a paramedic testified that Dixie had no problems responding to his questions. I ER 18. However, when Dixie responded to questions about his medical history, he apparently also said he was HIV positive which was not true. At trial, Dixie could not explain why he said that. II ER 164. Moreover, another paramedic who was the first person to treat Dixie at the scene said that Dixie was "confused." I RT 125.

The district court decision also reasons that Dixie was not prejudiced because defense counsel presented Dixie's testimony and a toxicologist testified about the effects of the drugs and alcohol he consumed. I ER 19. However, the toxicologist who testified at trial was a prosecution expert, who was called to give an opinion that Dixie's ability to drive was impaired

by alcohol or drugs. I RT 139-175. Defense counsel presented no expert testimony at all concerning the effects of drugs and alcohol or Dixie's mental illness in relation to the element of specific intent for the felony charge of evading the police. When Dixie's counsel asked the state's toxicologist if schizophrenia combined with intoxicants would impair a person's thinking the expert relied that she did not know, but that [the mental illness] "wouldn't help." I RT 175. Moreover, Dixie's uncorroborated lay testimony about his own mental health diagnosis could not have carried much weight with the jury.

For all of these reasons, trial counsel's failure to present evidence of Dixie's mental health at trial was prejudicially ineffective. The state court's denial of Dixie's claim unreasonably applied *Strickland* and *Wiggins*, which require that counsel make a reasonable investigation prior to preparing a defense. For all of these reasons, this Court should grant the writ and Dixie should receive a new trial.

5. This Court Should Not Defer To The Decision of the Riverside County Superior Court, Because It Unreasonably Applied *Strickland* and Unreasonably Determined the Facts When It Failed to Acknowledge Dixie's Evidence That His Trial Counsel Had Failed to Investigate a Mental Health Defense

28 U.S.C. 2254(d)(2) allows federal courts to grant habeas relief in cases where the state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Taylor v. Maddox*, 366 F.3d 992, 1007-08 (9th Cir.2004). A state court unreasonably determined the facts if it (1) failed to make a factual finding when it should have done so; (2) employed a fact finding process that was inadequate; (3) ignored important evidence or (4) failed to acknowledge substantial portions of the record that contradict its findings. *Taylor*, *supra* at p. 1000-02. Fact finding is a "dynamic, holistic

process that presupposes for its legitimacy that the trier of fact will take into account the entire record before it." *Taylor, supra* 366 F.3d at 1077.

Here, the last reasoned decision was that of the Riverside County Superior Court, which the Court must review pursuant to *Ylst v. Nunnemaker*, 501 U.S. 797 (1991). For the reasons set forth above, the Superior Court decision unreasonably applied *Strickland* when it held, without elaboration, that Dixie had failed to raise a prima facie claim of ineffective assistance of counsel. I ER 32-33. The decision also unreasonably determined the facts because it ignores the exhibits demonstrating that Dixie suffers from schizophrenia and fails to acknowledge that defense counsel failed to investigate his potential mental defense. Accordingly, this Court should not defer to the state court ruling under 28 U.S.C. § 2254 (d)(1) and (2).

II. Dixie's Sentence of Twenty Five Years to Life Based on a Conviction For Fleeing From Pursuing Police Officers Violates the Prohibition on Cruel and Unusual Punishment

A. Dixie's Motion to Strike His Prior Strike Offenses Pursuant to *People v. Romero*

Dixie received a 25 year to life sentence for the felony offense of evading the police, under Cal. Veh. Code § 2800.2. II RT 382-383, 400-401. The offense is a "wobbler" under California law, chargeable as either a misdemeanor or a felony. Cal. Veh. Code §§ 666, 2800.2. As a misdemeanor, the crime was punishable by no more than one year in the county jail. As a felony, absent any enhancements, the sentence would have been 16 months, two or three years. *Id*. The district attorney had initially charged the evading offense as a misdemeanor, and several months later amended the charge to a felony, triggering the application of the three strikes law. 1 RT 18-23.

The trial court found true the allegations that Dixie had suffered three prior "strike" offenses, which consisted of two counts of robbery and one count of attempted robbery. I CT 104, 222-223; II RT 382-383. Both of the robbery convictions arose out of a single incident that occurred in 1990. Dixie had shoplifted some merchandise and was detained by two store security guards. During the struggle, he jabbed one of the guards in the leg with a screwdriver and bit the other on his arm. I CT 226.

The summary of Dixie's criminal history as described in the probation officer's report included juvenile petitions sustained for theft, receiving stolen property, burglary and robbery. As an adult, he had been convicted of two counts of robbery in 1990, attempted robbery in 1992, and misdemeanor offenses including tampering with a vehicle, vandalism, failure to appear, brandishing a weapon, domestic violence, and petty theft with a prior conviction. There were also felony domestic violence and assault charges pending at the time the probation report was prepared. CT 221-223.

Dixie's counsel made a motion to strike the prior offenses in the interests of justice, which would have allowed the trial court to impose a term of 7 years. . The trial court denied the motion and imposed a term of 25 years to life. II RT 396-401.

B. The California Court of Appeal Decision

The last reasoned state court decision as to Dixie's claim that his 25 year to life sentence violates the Eighth Amendment was that of the California Court of Appeal. The Court of Appeal compared Dixie's case to *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004), where this Court granted habeas corpus relief on grounds that a 25 year to life sentence for a shoplifting offense was grossly disproportionate. The Court of Appeal reasoned that Dixie's case was

distinguishable because his current and prior offenses included serious felony conduct and a disregard for the safety of others. The Court of Appeal acknowledged the tragic circumstances that preceded Dixie's conduct in this case as well as the trial court's comments that it had no doubt that Dixie had been grieving due to the loss of his niece prior to the charged offense. I ER 44-46. Nevertheless, the Court of Appeal found that those circumstances did not excuse Dixie's conduct and it affirmed Dixie's sentence. Id.

C. Dixie's Sentence of 25 Years to Life for Evading the Police is Grossly Disproportionate

Under the Eighth Amendment to the United States Constitution, a criminal sentence must be proportionate to the crime the defendant committed. (See, e.g., *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Solem v. Helm*, 463 U.S. 277(1983); *Gardner v. Florida*, 430 U.S. 349 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976).) A sentence that is grossly disproportionate to the offense committed violates the Eighth Amendment. *Id*.

To analyze proportionality, a court must determine whether a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality. *Harmelin v. Michigan*, 501 U.S. 957, 986 (1991) (Kennedy, J., conc.); *Norris v. Morgan,* 622 F.3d 1276, 1289 (9th Cir. 2010)("The threshold determination in the Eighth amendment proportionality analysis is whether [the] sentence was one of the rare cases in which a ... comparison of the crime committed and the sentence imposed leads to a inference of gross disproportionality.").

In doing so, the Court must compare the harshness of the sentence with the gravity of the defendant's triggering offense and his criminal history. The analysis may include consideration of the justifications for the state sentencing scheme, the offender's mental state and for

committing the crime, and the actual harm to the victim or society due to his conduct. *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 2028, 2037 (2010)[opinion of Roberts, C.J.].

Once an inference of disproportionality has been raised, a court may compare a defendant's sentence with sentences imposed for other crimes in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions. *Harmelin, supra*, 501 U.S. at 1005. "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Solem, supra*, 463 U.S. at 291.

This Court has addressed the Eighth Amendment prohibition against cruel and unusual punishment in the context of California's Three Strikes law. In *Gonzalez v. Duncan*, 551 F.3d 875 (9th Cir. 2008), the petitioner claimed that his sentence of 28-years to life for failing to update his annual registration as a sex offender violated the Eighth Amendment. *Id*. at 876.

This Court found that, although Gonzalez's criminal history was extensive, including narcotics violations, attempted rape of a minor, robbery and spousal abuse, his sentence was grossly disproportionate to his current offense. *Id*., at 889.

In *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004), this Court held that a sentence of 25 years to life based upon a petty theft conviction violated the Eighth Amendment. Ramirez had two prior convictions for commercial burglary based on two shoplifting offense. *Id*., at 757. Five years later, he was convicted of shoplifting a VCR worth less than $200 and was sentenced to 25 years to life. Id. at 758. This Court affirmed the district court order vacating Ramirez's sentence on Eighth Amendment grounds because it "was grossly disproportionate" to the offenses he committed. *Id*., at 775.

Here, if Dixie's conviction is affirmed, this Court should strike his twenty five year to life sentence as grossly disproportionate to the charged offense. The Court of Appeal decision that Dixie's sentence did not violate the Eighth Amendment relies on its opinion that his current offense and criminal history were serious and posed a great risk to the public. I ER 44-46.

However, the Court of Appeal failed to give sufficient weight to the evidence of Dixie's mental state at the time of the offense. It was not contested at trial that Dixie became distraught after he received the devastating news that his niece had died in childbirth. He began drinking gin and using drugs to attempt to escape from his grief. He was also suffered from a disabling mental illness, paranoid schizophrenia.

Moreover, the offense Dixie committed was evading the police, a "wobbler" offense that could have been and was initially charged as a misdemeanor in this case. I CT 18. While Dixie's conduct was arguably reckless, it was not violent.

Likewise, the Court of Appeal failed to give any weight to the fact that the only person harmed during the current offense was Dixie. Although his conduct presented a risk to others, there was no actual harm. A sentence of 25 years to life based on such conduct is grossly disproportionate.

Moreover, Dixie's criminal history does not support a sentence of 25 years to life. He had sustained three prior "strike" convictions, for two counts of robbery and one count of attempted robbery. II RT 382-383; I CT 226.

Dixie testified that he had been "clean and sober" for eight years before the current offense. He had successfully completed a grant of probation, married, and was caring for five children with his wife. I CT 221.

Dixie's sentence is also disproportionate when compared with the punishments in other states for the crime of evading a police officer. In the majority of states, Dixie's conduct would have been charged as a misdemeanor with a maximum term of one year. II ER 110 (compilation of state statutes prohibiting evading a pursuing police officer compiled by Dixie's appellate counsel and included in his opening brief on appeal).

There are only three states, Arizona, Minnesota, and Missouri, where Dixie's conduct could have been charged as a felony. II ER 112. Moreover, in most states, including, now, California, the recidivist sentencing statutes would not apply to Dixie because they require the third conviction to be a violent felony. II ER 113-114. The version of the California three strikes law under which Dixie was sentenced has been amended so that, if sentenced today, the maximum term for his felony evading conviction would be three years in prison. [3]

For all of these reasons, Dixie's sentence is grossly disproportionate and this Court should grant the writ.

CONCLUSION

For the reasons stated above, this Court should grant certiorari and grant the writ.

Dated: May 20, 2019.

Respectfully submitted,

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Earl Dixie

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[3] On November 7, 2012 the California three strikes law was amended by a voter initiative to provide that non-violent, non-serious felony convictions no longer qualify for sentencing under the three strikes law. Cal. Penal Code § 1170.12 (c)(2).