No. _____

IN THE

Supreme Court of the United States

CHARLES R. WILLARD,

Petitioner,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, 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

1. Is the low threshold for a certificate of appealability ("COA") met on a claim that trial counsel provided prejudicially deficient performance when counsel failed to impeach the key prosecution witness with his inconsistent testimony?
2. Does a petitioner meet the low threshold for a COA on a claim that trial counsel provided prejudicially deficient performance when counsel failed to adequately emphasize petitioner's history of mental illness to support his requests that the trial court dismiss a prior "strike," so that the instant conviction would not be his "third strike"?

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Petition for a Writ of Certiorari

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I. OPINIONS BELOW

Willard petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals. The Ninth Circuit's order denying Willard's motion for a certificate of appealability is unreported. Petitioner's Appendix ("Pet. App.") 1. The district court's order accepting the magistrate judge's report and recommendation and dismissing the habeas action with prejudice and its order denying the certificate of appealability are unreported. Pet. App. 2-3.

The orders by the California Supreme Court and the California Court of Appeals denying habeas relief are unreported. Pet. App. 5-7. The California Court of Appeal's first opinion reversing Willard's sentence on appeal and remanding for resentencing, and its second opinion affirming the state court judgment on appeal are also both unreported. Pet. App. 8-9.

II. JURISDICTION

The Ninth Circuit's order denying Willard's motion for a certificate of appealability was filed on April 1, 2019. Pet. App. 1. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed under Supreme Court Rule 13.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Sixth Amendment to the United States Constitution

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

Eighth Amendment to the United States Constitution

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the United States Constitution

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28 U.S.C. § 2244(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody

pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

IV. STATEMENT OF THE CASE

A. Prosecution's case in chief.

According to prosecution witnesses, on September 21, 2009, Santos Hernandez ("Hernandez") and his coworker David Ponce ("Ponce") sat in the back of a Metropolitan Transit Authority ("MTA") bus heading home from work. Pet. App. 4 at 5. Willard was approximately four rows in front of Hernandez and Ponce and did not know them. *Id.*

After five minutes, Willard approached Hernandez, touched Hernandez's face and said, "Pinche Mexico" ("Fucking Mexican"). *Id.* Hernandez said, "No problema." *Id.* Willard continued speaking in English, but Hernandez and Ponce did not understand what he was saying. *Id.* Willard returned to his seat and took a knife from his backpack. *Id.*

Willard walked back toward Hernandez and Ponce with the knife unfolded at chest level. *Id.* at 6. Hernandez and Ponce were scared and jumped onto the bus seat. *Id.* Willard swiped the knife at Hernandez's lunch bag, and then swung again

and cut Hernandez's arm. *Id.* Hernandez kicked Willard in the stomach or chest area. *Id.* Video surveillance footage of the incident was obtained from MTA and played for the jury. *Id.*

During the commotion, the bus driver stopped the bus and everyone exited. *Id.* Willard got off the bus after Hernandez and Ponce did. *Id.* Ponce followed Willard into a CVS store while calling 911. *Id.* The police arrived soon thereafter and detained Willard inside the CVS. *Id.* The police found a knife containing a six-inch blade with residue on it that appeared consistent with blood in Willard's backpack. *Id.*

Hernandez identified Willard as the assailant to the police. *Id.* Hernandez testified that he received treatment at a nearby hospital for an inch and a half cut that required five stitches and left a scar. *Id.*

B. Defense case.

Willard testified on his own behalf that he had been on the bus carrying a backpack with razors and electric toothbrushes he wanted to sell. *Id.* at 7. He also had a knife, which he carried for protection because he was injured in 2008 by a "Mexican" and suffered twenty-three stitches. *Id.* Willard was trying to sell some razors when Hernandez looked at him in a "strange way," and shouted, "No, no. I'll take something from you." *Id.* Hernandez's tone was aggressive and Willard perceived that as a threat. *Id.*

Willard saw Hernandez clench his fists, so he returned to his seat, retrieved the knife from his backpack, and went toward Hernandez with the knife at his side. *Id.* Hernandez jumped onto a bus seat and kicked Willard in the chest with steel-

toed boots. *Id.* Willard cut Hernandez's right arm near the elbow with the knife. *Id.* Willard told Hernandez to get off the bus. *Id.* Willard only swung the knife because he was acting in self-defense after Hernandez kicked him. *Id.* Willard exited the bus and went to the CVS store to buy asthma medicine. *Id.*

Willard claimed that the video footage shown to the jury was not the "original copy," which showed a different sequence of events. *Id.* Willard maintained that he was seated in the back of the bus, that the driver would have testified to the same but was excluded, and that he believed he had only nicked Hernandez on the right arm. *Id.* at 8.

C. Jury verdict and sentencing.

On January 18, 2011, the jury found Willard guilty of two counts of assault with a deadly weapon in violation of California Penal Code §245(a). *Id.* at 2. The jury found "not true" the additional allegation that Willard "personally inflicted great bodily injury upon Hernandez within the meaning of Penal Code section 12022.7(a)." Pet. App. 16 at 102-03.

The court found that Willard had suffered two prior convictions and one prior juvenile adjudication for robbery within the meaning of California's Three Strikes Law. Pet. App. 4 at 3. For that reason, the court sentenced Willard to 30-years-to-life in state prison. *Id.*

Willard appealed his conviction to the California Court of Appeal, which reversed his sentence on the ground that the evidence was insufficient to establish that Willard was at least sixteen years old at the time he committed his prior juvenile robbery offense. *Id.* The Court of Appeal remanded for a potential retrial

on the juvenile adjudication, observing that the trial court could exercise its discretion to also dismiss one of the prior strike convictions for robbery in 1987 since they arose from the same incident. *Id.*

On remand, the trial court held a jury trial on the juvenile strike allegation, wherein the state presented evidence of Willard's date of birth (October 1, 1960), and the date the juvenile offense was committed (May 1, 1978). *Id.* The jury found that Willard was at least 16 when he committed the offense. *Id.* On August 7, 2013, the trial court found that the juvenile conviction constituted a "strike," declined to dismiss the other prior strike convictions, and resentenced Willard to a term of 30-years-to-life. *Id.*

Willard's subsequent appeal was denied, and Willard did not appeal to the California Supreme Court. *Id.* at 3-4. Willard, pro se, filed petitions for habeas corpus in California state courts which were denied, concluding with a petition before the California Supreme Court which was denied on July 22, 2015. *Id.* at 4.

Willard timely filed a federal habeas petition pro se in district court on May 31, 2016, and filed a first amended petition ("FAP") pro se on June 29, 2016. *Id.* Present counsel was appointed on July 11, 2016. *Id.* Respondent-Appellee filed a Response to the FAP on October 10, 2016. *Id.* Willard filed a Traverse on August 2, 2017. Pet. App. 10. On May 21, 2108, Magistrate Judge Shashi Kewalramani issued his Report and Recommendation. Pet. App. 4. On July 26, 2018, District Judge Cormac Carney accepted the findings and recommendation, denied the

petition with prejudice, and denied a COA. Pet. App. 2-3. The Ninth Circuit denied Willard's request for a COA on April 1, 2019. Pet. App. 1.

V. REASONS FOR GRANTING THE WRIT

A. COA Standards

A habeas petitioner has no absolute right to appeal a district court's denial of a petition but instead must obtain a COA to pursue an appeal. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Obtaining a COA "'does not require a showing that the appeal will succeed.'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016). To receive a COA, a petitioner "need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* "The COA inquiry asks only if the District Court's decision was debatable." *Id.* at 348. This is a "low" standard. *Frost v. Gilbert*, 835 F.3d 883, 888 (9th Cir. 2016) (en banc). A petitioner need only "prove 'something more than the absence of frivolity.'" *Miller-El*, 537 U.S. at 338 (quotation marks omitted).

A "COA should issue" on procedural issues "when the prisoner shows . . . that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

B. The Court should grant a COA on Willard's first ineffective assistance of counsel claim, because jurists of reason could disagree with the district court's resolution of this claim.

Willard alleges in Ground One of his federal habeas petition that trial counsel was ineffective for failing to object to the false testimony of victim Hernandez. Pet. App. 12 at 5; Pet. App. 10 at 6-11. The relevant state court decision on the claim is the California Supreme Court's unpublished opinion affirming the judgment. Pet. App. 5. Assuming that 28 U.S.C. § 2254(d) applies to this claim, it does not bar relief.

1. Jurists could disagree with the district court's conclusion that Claim One was unexhausted.

Jurists of reason could disagree with the district court's finding that Claim One was unexhausted, since Respondent expressly conceded it was exhausted. Pet. App. 11 at 6; Pet. App. 4 at 11; Pet. App. 3 at 1-3.

Under Rule 8(c) of the Federal Rules of Civil Procedure, "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense." Here, the affirmative defense of failure to exhaust was waived when Respondent stated in its Response that "[a]s currently alleged, the claims set forth in the FAP appear to be exhausted." Pet. App. 11 at 6. While this Court has held that "courts have discretion, in 'exceptional cases', to consider a nonexhaustion argument 'inadverten[tly] overlooked by the State in the District Court," *Wood v. Milyard*, 566 U.S. 463, 471 (2012), there is no showing that this case is an "exceptional" one. *See also Granberry v. Greer*, 481 U.S. 129, 131 (1987) ("direct[ing] the courts of appeals to exercise discretion in each case to decide whether the administration of justice

would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith").

In addition, Willard's petition in the California Supreme Court must be broadly construed to include his claim that trial counsel was ineffective in failing to challenge the inconsistent testimony of Hernandez because he was pro se at the time of the filing. *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) ("[I]n general, courts must construe pro se pleadings liberally."). In his California Supreme Court filing, Willard included a lengthy handwritten document entitled "Petition for Writ of Habeas Review: Supplemental Raising Independent Claims for Review in the Supreme Court," where he stated that "defense Counsel[] McGurk . . . committed several incompetent acts," Pet. App. 13 at 17, and later explained via an attached letter from his appellate lawyer that Willard believed his trial attorney failed to rebut key information presented by the prosecution. *Id.* at 57-59. Specifically the letter stated: "One of your main concerns was that you feel your trial attorney, Mr. Kevin McGurk, did not adequately represent you at trial. . . . You . . . felt that he refused to rebut any information presented by the prosecution during your trial." *Id.* at 58. Hernandez's inconsistent testimony was key evidence during trial, and Willard's attorney did not rebut it. *Id.*

Additionally, one of Willard's handwritten exhibits to his California Supreme Court petition included descriptions of Hernandez's inconsistent testimony, which he again alleged in his federal pleadings. Pet. App. 4 at 11 n.6; Pet. App. 13 at 99. Willard cited to the trial transcript and explained that "Mr. Hernandez testified

that he received five stitches at St. Vincent Hospital," but that "St. Vincent Hospital had no record of any such medical treatment of Mr. Hernandez," and that Mr. Hernandez also testified at the preliminary hearing that he only had a "'little scar' from the 'cut' on his arm." Pet. App. 13 at 99. In his pro se FAP, Willard identified the same sections that he contended were inconsistent or false. Pet. App. 12 at 31-36; Pet. App. 10 at 8. For example, he cited line 22 of page 68 of the reporter's transcript ("RT"), where Hernandez testified that he received medical treatment on his arm. Pet. App. 12 at 5; Pet. App. 16 at 13. As explained in Willard's Traverse, this is false testimony because Willard's Trial Exhibit A showed there were no records of Hernandez receiving treatment at the hospital at which he claimed to have received treatment. Pet. App. 16 at 98, 138; Pet. App. 10 at 8.

Accordingly, because Willard's pro se petition before the California Supreme Court must be liberally construed, verified pro se allegations like Willard's are treated as affidavits, Willard's petition and attachments before the California Supreme Court included the information in Claim One of his FAP, and Respondent acknowledged that the claim had been exhausted; thus, jurists of reason could disagree with the district court's decision that Claim One was unexhausted.

2. Jurists could disagree with the district court's narrow interpretation of Claim One.

The magistrate judge, whose findings and recommendation were adopted by the district court, found that Claim One must be denied "because the failure to make a futile argument does not constitute ineffective assistance of counsel." Pet. App. 4 at 13; Pet. App. 3 at 1. Specifically, the court denied the claim because

"[p]etitioner's counsel would have no basis under California law to object on the basis of 'false testimony,' because there is no evidentiary objection under California state law for 'false testimony.'" Pet. App. 4 at 13; Pet. App. 3 at 1.

Rather than construe the claim narrowly, however, a jurist of reason could have interpreted Willard's Claim One to mean, as was explained in the Traverse, that "[d]efense counsel did not confront or impeach Hernandez with [his inconsistent testimony] on cross, and did not mention [his inconsistent testimony] in his closing argument." Pet. App. 10 at 11. Willard was pro se at the time he filed the FAP, as well as being mentally ill and without legal training. Thus, his phrasing could have been more precise—for example, by using the word "inconsistent" rather than "false." Pet. App. 12 at 5 ("Trial counsel McGurk was ineffective for failing to object and argued the facts necessary that constitute false testimony by the alleged victims Hernandez . . . . ").) Pro se pleadings must be liberally construed. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). And it was clear from the phrasing Willard used as well as the lines of the transcripts he cited that what Willard objected to was his trial counsel's failure to impeach Hernandez through his inconsistent testimony and his failure to make this argument in closing. Pet. App. 10 at 8-11.

Moreover, a jurist of reason could consider the claim to be raised in the Traverse. "[A] district court 'has discretion, but is not required' to consider evidence and claims raised for the first time" in a traverse. *Breverman v. Terhune*, 153 Fed. Appx. 413, 414 (9th Cir. 2005) (reversing and remanding for the district court to

consider an ineffective assistance of counsel claim that the district court had refused to consider "because it was first raised in the traverse") (quoting *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000)). Accordingly, even had the claim not been raised in the FAP, the district court had discretion to consider it as it was clearly raised in the Traverse; thus, jurists of reason could have construed Claim One more broadly and considered its merits.

3. Jurists could disagree with the district court's resolution of Claim One.

Defense counsel performed deficiently by failing to impeach Hernandez with his inconsistent testimony during cross-examination and failing to highlight the discrepancies in closing. Witness Hernandez's inconsistencies that trial counsel failed to exploit included:[1] (a) at the preliminary hearing, Hernandez twice stated that he did not recognize anyone on the bus who was in the courtroom, whereas at trial Hernandez immediately identified Willard as the person on the bus with the knife, *see* Pet. App. 14 at 7; Pet. App. 16 at 7; (b) at the preliminary hearing, Hernandez testified that Willard approached him twice, and that "the second time [he] climbed up on the seat, and [he] stopped him by kicking him, whereas at trial Hernandez testified that Willard approached him on the bus three times, and that after "the third time he did that," he kicked Willard in the stomach, *see* Pet. App. 14

[1] The only inconsistencies counsel did emphasize were: (1) no hospital treatment records existed for Hernandez's arm, and (2) at the preliminary hearing Hernandez testified that he missed a week of work, whereas at trial Hernandez testified that he only missed three workdays, *see* Pet. App. 16 at 14, 39; Pet. App. 14 at 14.

at 19-21; Pet. App. 16 at 10-11; (c) at the preliminary hearing, Hernandez testified that he bled "a little" when he received medical treatment, while at trial Hernandez testified that when Willard stabbed him, he was "very injured and there was "a lot of blood", *see* Pet. App. 14 at 13-14; Pet. App. 16 at 13; (d) at the preliminary hearing, Hernandez testified that he "wouldn't know" how many people were on the bus, whereas at trial he testified that there were 15-20 people on the bus, *see* Pet. App. 14 at 18; Pet. App. 16 at 6; (e) at trial Hernandez initially testified that Willard made an upward swinging or slashing motion, waving the knife from side to side, but he later testified that Willard did not wave the knife that way, *see* Pet. App. 16 at 10-11, 48; Pet. App. 10 at 8-11.

Criminal defendants have a Sixth Amendment right to the effective assistance of counsel, *Strickland v. Washington*, 466 U.S 668 (1984), which under AEDPA is "clearly established Federal law, as determined by the Supreme Court . . . . " *Williams v. Taylor*, 529 U.S. 362, 391 (2000); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). To prevail, the petitioner must show that (1) counsel's errors or omissions fell below an "objective standard of reasonableness" as defined by the prevailing professional norms for "a reasonably competent attorney," and (2) there was "a reasonable probability" that the result of the proceeding would have been different had the deficient performance not occurred, meaning it "undermine[d] confidence in the outcome," not that it rendered a different outcome more likely than not. *Strickland*, 466 U.S. at 687, 694.

a. Trial counsel performed deficiently when he failed to impeach Hernandez with his inconsistent statements or emphasize them in closing.

Counsel's performance was deficient for failing to impeach Hernandez with his inconsistence statements or emphasize them in closing because this case turned on a "he said, he said" credibility battle between Hernandez and Willard. Hernandez testified that Willard approached him at random and attacked him. Pet. App. 16 at 42. By contrast, Willard testified that he acted in self-defense and stabbed Hernandez only after Hernandez threatened him and kicked him in the chest with a steel-toed boot. *Id.* at 68-69. The jury was instructed that the prosecution had the burden of proving beyond a reasonable doubt that Willard did not act in self-defense. *Id.* at 127, 129. The jury was also instructed that in evaluating a witness's testimony, it may consider whether the witness "made a statement in the past that is . . . inconsistent with his or her testimony." *Id.* at 133-35.) The jurors were further instructed that "[i]f you decided that a witness deliberately lied about something significant in the case, you should consider not believing anything that witness says." *Id.* at 135.

In this credibility battle between Hernandez and Willard, however, defense counsel unreasonably failed to confront Hernandez with most of his inconsistent statements during cross-examination or emphasize them in closing to argue that the jury should discredit Hernandez in assessing whether the prosecution proved beyond a reasonable doubt that Willard did not act in self-defense. *See id.* at 136-42. Impeaching Hernandez with his inconsistent testimony would have been

consistent with the defense trial counsel presented that Hernandez was not credible. *See Reynoso v. Giurbino*, 462 F.3d 1099, 1107-08 (9th Cir. 2006) (affirming grant of relief on ineffective assistance claim in AEDPA case where the challenged omission—failing to cross two prosecution witnesses about their knowledge of a reward before identifying the defendant as the shooter in a murder case—was consistent with the defense actually presented). For example, when Hernandez testified that he missed three days of work because of his injury, defense counsel impeached him with his contrary preliminary hearing testimony that he missed an entire week of work. Pet. App. 16 at 39. Counsel simply, and unreasonably, failed to impeach the prosecution's key witness on the other inconsistencies in his testimony and failed to highlight these discrepancies in closing. *Reynoso*, 462 F.3d at 1115.

The magistrate judge emphasized in his decision that "there were several instances where counsel did cross-examine Hernandez on his inconsistent testimony . . . ." Pet. App. 4 at 13. In fact, the record shows that trial counsel did cross-examine Hernandez on some of his inconsistent testimony, as described above. Instead of demonstrating that counsel's failures were reasonable, however, the fact that counsel did cross-examine Hernandez on a few of his inconsistencies clearly indicates that more fully cross-examining Hernandez would have been consistent with the defense, and also that counsel had much unused ammunition. In other words, it shows that counsel had absolutely no reason not to continue to fully impeach Hernandez with his additional inconsistent statements. *See Driscoll v.*

Delo, 71 F.3d 701, 710 (8th Cir. 1995) (no objectively reasonable justification existed for trial counsel's failure to impeach a state's eyewitness whose testimony "took on such remarkable detail and clarity over time."); *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001) (trial counsel had no reasonable justification for not introducing witness's recantations into evidence, because "there was absolutely no risk in doing so."). If counsel had shown the jury the full extent of Hernandez's inconsistencies, at least one juror would have believed Willard over Hernandez.

Accordingly, the evidence demonstrated that counsel's performance fell outside the range of reasonable professional assistance.

b. Trial counsel's deficient performance prejudiced Willard.

The state court record shows that Willard was prejudiced by counsel's deficient performance, since the additional impeachment and emphasis on the inconsistencies in closing would have tipped the balance in favor of Willard's version of what happened over Hernandez's version. For example, during deliberations, the jury sent a note asking the court to clarify the definition of "significant or substantial physical injury." Pet. App. 16 at 100. This note on its own shows that the jury was not inclined to believe everything Hernandez testified about. *Mayfield v. Woodford*, 270 F.3d 915, 932 (9th Cir. 2001) (en banc) (holding that jury notes indicate prejudice from constitutional violations). And indeed, the jury found the allegation that Willard inflected great bodily injury on Hernandez not true, thus discrediting Hernandez's testimony. Pet. App. 16 at 103.

In finding that "Petitioner cannot establish that he suffered any prejudice" from counsel's errors, the magistrate judge found that "[i]t is too speculative to find that Hernandez's inconsistent testimony would have had any impact on the jury's decision-making had they been more fully explored and argued by trial counsel," since "the video from the MTA bus camera was played for the jury and showed the entire incident," and "Petitioner was followed by Ponce into a CVS and was arrested in the same clothing just minutes after the assault." Pet. App. 4 at 13; Pet. App. 3 at 3-4 ("As described in the R&R, the entire incident was recorded on the MTA bus camera and played for the jury.").)

Yet, it is clear that the MTA video was not sufficient on its own to show that Willard was guilty, as the prosecution still required both Hernandez and Ponce to testify. Had the video evidence been sufficient, there would have been no need for this cumulative testimony. Moreover, even after viewing the video, the jurors found the allegation that Willard inflicted great bodily injury on Hernandez not true as previously described. Pet. App. 16 at 103. This finding indicates that the MTA video cannot have been wholly corroborating of Hernandez's testimony, as the jury was willing to discredit Hernandez's testimony even after viewing it.

Finally, the fact that Ponce followed Willard into a CVS and he was arrested in the same clothing soon after the assault does not support the district court's finding of no prejudice. Willard's defense was that he acted in self-defense, not that he was incorrectly identified. Thus, evidence showing that they correctly identified Willard does not show that the jury would have been more likely to believe

Hernandez over Willard. In fact, it bolsters Willard's self-defense argument by demonstrating that Ponce was not afraid of Willard; Ponce would not likely have followed Willard for fear of being stabbed, had the assault happened the way Hernandez described. Therefore, Willard was prejudiced by counsel's deficient performance. Willard meets the "low" threshold for a COA.

C. Jurists could disagree with the district court's resolution of Willard's Claim Two.

Willard also claims that his trial counsel provided ineffective assistance by failing to object to the admission of evidence of Petitioner's 1987 robbery conviction and by failing to argue his mental illness, impairments, and history of addiction as a challenge to his third "strike" in support of the *Romero* motion.[2] Pet. App. 12 at 5-6; Pet. App. 10 at 15. The relevant state court decision on the claim is the California Supreme Court's unpublished opinion affirming the judgment. Pet. App. 5. Assuming that 28 U.S.C. § 2254(d) applies to this claim, it does not bar relief.

1. Jurists could disagree with the district court's narrow reading of Claim Two.

Jurists of reason could disagree with the district court's narrow reading of Claim Two, wherein the court found that the "FAP should not be read to include [an argument relating to counsel's failure to argue mental illness and addiction]." Pet. App. 4 at 14; Pet. App. 3 at 4.

As previously explained, however, Willard's pro se claims must be liberally construed. In the section of the FAP entitled "Ground Two," Willard stated that

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[2] *People v. Superior Court* (*Romero*), 917 P.2d 628 (Cal. 1996).

"trial counsel McGurk did not object or challenge the evid[ence] on the 1987 adult prior." Pet. App. 12 at 5. In the "Supporting Facts" section of "Ground Two," Willard noted that the court should look to the "attached sheets [for the] supporting facts." *Id.* at 6. The "attached sheets" included around 140 additional pages, within which Willard noted that "the Trial Court did not address . . . petitioner's mental illness in the motion under Romero." *Id.* at 27. Willard also included pages from the Romero motion hearing transcript, wherein counsel made little argument about Willard's mental illness. *Id.* at 57-64. Additionally, Willard included pages from trial counsel's "Supplemental Motion to Dismiss," which only include a short one paragraph mental health argument. *Id.* at 70. Finally, Willard attached a mental health evaluation which included facts that counsel should have heavily emphasized, including that Willard suffers from a "chronic psychotic mental illness," that he has had "an extensive prior psychiatric history beginning at the age of twelve," including "two psychiatric hospitalizations," one for a period of "two years," and that he received "psychiatric treatment and medications at the jail." *Id.* at 81-82.

By submitting these pages as his "supporting facts" to "Ground Two", Willard alleged that counsel failed to properly raise his mental illness as a challenge to the "strike" for his 1987 adult prior in his Romero motion. *Id.*; Pet. App. 10 at 15-17.

These allegations were also present in Willard's petition before the California Supreme Court. Pet. App. 13 at 25-27. In that filing, Willard included a document entitled "Petition for Writ of Habeas Review: Supplemental Raising Independent

Claims for Review in the Supreme Court," where he stated that "defense Counsel[] McGurk . . . committed several incompetent acts," *Id.* at 17, and later referenced the fact that the "trial court did not give due consideration to petitioner's mental health problems." *Id.* at 33; Pet. App. 10 at 15-17. Accordingly, jurists of reason could disagree with the district court's narrow reading of Claim Two.

2. Jurists could conclude that the issues in Claim Two are adequate to deserve encouragement to proceed further.

Although the district court did not review Claim Two on the merits, jurists of reason could conclude that the issues presented are adequate to deserve encouragement to proceed further.

a. Trial counsel performed deficiently when he failed to adequately argue that the court should dismiss prior "strikes" based on Willard's mental illness.

At sentencing, defense counsel presented some evidence of Willard's mental illness and substance abuse in support of the defense request that the court dismiss prior strikes under *People v. Superior Court* (*Romero*), 917 P.2d 628 (Cal. 1996); Pet. App. 15 at 2-23. Counsel argued that Willard was under the influence of cocaine and alcohol at the time of the dispute on the bus and that he had suffered from mental illness since childhood. Pet. App. 15 at 10. Counsel argued that Willard's "poor choices can be directly linked to his mental illness and his extreme alcohol and drug addiction." *Id.* However, the only evidence counsel presented of Willard's mental illness and substance addiction consisted of an interview of Willard by

counsel's paralegal and a 1987 report noting Willard's "chronic psychotic mental illness" and drug abuse. *Id.* at 12-23.

Reasonable counsel also would have presented more contemporary evidence by the State's own prison doctors further explaining Willard's serious mental illness and substance addiction. Attached to the Traverse as Exhibit 1 were copies of documents from Willard's prison records that were readily available before the time of the trial. Pet. App. 10 at 18-31. Dr. Dickerman's 1993 report shows that Willard sustained significant trauma in a motor vehicle accident in 1978, well before both the 1987 robbery and the 2009 bus incident. Dr. Dickerman reports that as a result of the accident, Willard sustained head injuries and "may have remained in a coma like state for about two weeks." *Id.* at 21. Other prison records note Petitioner's attempted suicide in 1985, *id.* at 20; his PCP use and organic brain syndrome, *id.* at 19; his major depression, *id.* at 25-26; his possible mood disorder, *id.* at 26; his possible thought disorder, *id.* at 25-27; and his paranoia, including complaints that people were putting blood in his food, *id.* at 28-30. Presenting this evidence from the State's own witnesses would have been consistent with counsel's strategy at sentencing, and reasonable counsel would have presented it. *See Reynoso*, 462 F.3d at 1107-08, 1115.

b. Willard was prejudiced by counsel's deficient performance at sentencing.

Willard was prejudiced by counsel's deficient performance at sentencing. As the court noted, both prior felony convictions were "fairly old strikes." Pet. App. 16 at 108. But the court held that "nothing has been submitted to the court to show

that there is a -- something redeeming in his background why he should fall outside the spirit of the Three Strikes Law." *Id.* at 111. The omitted records from the State's own doctors would have filled in the blanks. Defense counsel conceded that the only doctor's report he submitted—from 1987—was "a little bit dated." *Id.* at 113. The prison records from the 1990s and 2000s would have cured this deficiency and carried the imprimatur of the State to boot. They also would have shown that Willard's mental illness and paranoia contributed to his behavior on the bus, further explaining and mitigating his conduct. But for counsel's deficient performance, there is a reasonable probability that Willard would have received a lesser sentence. *Reynoso*, 462 F.3d at 1116-18. Counsel noted before sentencing that Willard's sentence would be 13 years if the defense motion to strike was granted in its entirety. Pet. App. 15 at 9. Instead, Willard was sentenced to 30-years-to-life. Pet. App. 16 at 121-122. Willard meets the "low" bar to receive a COA.

VI. CONCLUSION

For the foregoing reasons, the Court should grant Willard's petition, reverse the judgment of the Ninth Circuit, and grant a COA on Willard's Claims One and Two.

Respectfully submitted,

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