No. 19-_____

In The
Supreme Court of the United States

MICHAEL BARAKA MASON,

Petitioner,

v.

DANIEL PARAMO, 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

I. Whether a habeas petitioner who seeks a *Rhines* stay to exhaust a claim of ineffective assistance of counsel must establish a "reasonable probability of a different outcome" in order to establish that his claim is not "plainly meritless." In particular, whether applying such an exacting merits-based standard runs afoul of this Court's rule that a petitioner need only establish a "colorable claim" in order to justify a *Rhines* stay, as well as the federalism and comity principles underlying it.

II. Whether a certificate of appealability may be a mere "rubber stamp," or whether it should issue where the district court's ruling differs from the opinions of other courts on complex procedural issues that have not been squarely addressed by this Court.

LIST OF PARTIES AND OTHER NAMED PERSONS

Petitioner

Michael Baraka Mason

Respondent

Daniel Paramo, Warden

Other

Kamala Harris, former Attorney General of California

Petitioner Mason named both Warden Paramo and then-Attorney General Harris in his May 11, 2016 *pro se* habeas petition. Ms. Harris is not a proper respondent and has never appeared or participated in this action, except to the extent that the California Office of the Attorney General has served and continues to serve as counsel for Respondent Paramo. California's current attorney general is Xavier Becerra.

STATEMENT OF RELATED CASES

- *People v. Mason*, No. SCD214650, San Diego County Superior Court. Judgment entered April 4, 2013.
- *People v. Mason*, No. D063793, California Court of Appeal, Fourth District, Division One. Judgment entered December 15, 2014.

STATEMENT OF RELATED CASES – Continued

- *People v. Mason*, No. S223830, California Supreme Court. Judgment entered March 11, 2015.
- *Mason v. Paramo et al.*, No. 3:16-cv-01176-JLS-MDD, U.S. District Court for the Southern District of California. Judgment entered May 18, 2018.
- *Mason v. Paramo et al.*, No. 18-55803, United States Court of Appeals for the Ninth Circuit. Judgment entered Feb. 28, 2019.

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JURISDICTION

The Court of Appeals entered its order denying Mr. Mason's request for a certificate of appealability on February 28, 2019. (App. 1a.) Justice Kagan granted

[1] Mr. Mason raises issues only as to the 2017 dismissal of his unexhausted ineffective assistance claim. Because that claim was fully addressed in the first Report and Recommendation, dated February 2, 2017, and dismissed on June 6, 2017, Mr. Mason has omitted the subsequent Report and Recommendation discussing the second claim of his habeas petition.

an application extending the time to file until July 27, 2019. (Sup. Ct. No. 18A1196.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

- **28 U.S.C. § 2253(c) – Appeal**

  (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

  (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

  (B) the final order in a proceeding under section 2255.

  (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

  (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

- **28 U.S.C. § 2254 – State Custody; Remedies in Federal Courts**

  (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

  (b)

  (1) 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 unless it appears that –

  (A) the applicant has exhausted the remedies available in the courts of the State; or

  (B)

  (i) there is an absence of available State corrective process; or

  (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

  (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

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

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

(e)

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

made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

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

(A) the claim relies on –

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

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

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

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall

produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

INTRODUCTION

A murder defendant is simultaneously in need of the most careful and exacting adherence to the rigorous legal standards that safeguard his constitutional rights and among the least likely to receive them. Such is the case of Petitioner Michael Baraka Mason ("Mr. Mason" or "Petitioner"). An African-American man with a troubled past and connections to a violent street gang, he was found guilty of charges that carried the possibility of a death sentence and which resulted in a sentence of life without the possibility of parole. That verdict was allowed to stand even after a juror came forward with serious and specific concerns about the verdict that she only felt comfortable expressing to the Court in private. Not only did the Court refuse her request to speak privately, but utterly failed to conduct an inquiry sufficient to determine whether the juror's concerns related to such matters as bias or extrinsic influence that would have necessitated, at a minimum, an evidentiary hearing.

Mr. Mason had the right to a unanimous verdict rendered by an impartial jury. Juror No. 4's extraordinary interruption of the trial-court proceedings with expressions of concern, coupled with her obvious discomfort at explaining her concerns in open court, raise a strong possibility that he was deprived of that right. Nevertheless, Mr. Mason's trial and appellate counsel failed entirely to address the legal ramifications of the trial court's inadequate inquiry into the juror's disturbing revelation.

Despite the serious doubt as to the validity of his conviction and his resulting life sentence, Mr. Mason's efforts to challenge his conviction have been stymied at every turn due to draconian misapplication of the AEDPA standards. When Mr. Mason attempted to raise the issue *pro se* via a habeas claim of ineffective assistance of trial and appellate counsel, the district court dismissed Mr. Mason's claim as unexhausted. The court also denied Mr. Mason's request for a *Rhines*[2] stay to allow Mr. Mason to present his claim to the state courts – despite recognizing that counsel's ineffective assistance is sufficient to establish "good cause" for such a stay – on the ground that his ineffective assistance claim was "plainly meritless." In so ruling, the district court erroneously conflated the low bar of the "plainly meritless" standard with the prejudice standard under *Strickland v. Washington*, 466 U.S. 668 (1984), jumping ahead to decide Mr. Mason's claim without the benefit of a properly developed record or any state court consideration whatsoever.

The Ninth Circuit then ratified the error by refusing to grant a certificate of appealability, cutting off one of Mr. Mason's last procedural avenues for relief. A request for a certificate of appealability is not and should not be a vehicle to rubber stamp a district court's cursory and poorly reasoned decision, but that is exactly what the Ninth Circuit did.

This Court should grant certiorari to clarify that a habeas petitioner seeking a *Rhines* stay need not

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[2] *See Rhines v. Weber*, 544 U.S. 269 (2005).

establish *Strickland* prejudice to demonstrate that his ineffective assistance claim is not plainly meritless, and to reaffirm the role of the circuit Courts of Appeals as separate and independent guardians of the standard articulated in 28 U.S.C. § 2253(c).

STATEMENT OF THE CASE

A. Factual History

In November 2005, several masked men, at least one of whom had a gun, entered Hana Jabbar's house on Velma Terrace in San Diego and demanded money. *People v. Mason*, No. D063793, Slip Op. at 5 (Cal. Ct. App. 4th Dist., Div. 1, December 15, 2014), *partially published at* 232 Cal. App. 4th 355. In the events that ensued, three people were shot and killed. *Mason*, 232 Cal. App. 4th at 360-61.

Mr. Mason was not immediately arrested or implicated in the crime. *See id.* at 360-63; (*see also* Pet. at 7 (Petitioner jailed beginning in 2007)).[3] Indeed, only one eyewitness, Hana Jabbar, was ever able to identify Mr. Mason as one of the perpetrators. *Mason*, 232 Cal. App. 4th at 360. A police informant, Marquis Veal, made a videotaped statement that Terrill Bell had told him that there were at least four men involved in the robbery and shootings: Bell, Morris, Elliott Perry, and Mr. Mason, *see Mason*, D063793, Slip Op. at 18, but later

[3] References to Mr. Mason's *pro se* petition use the pagination generated by the district court's Case Management/Electronic Case Filing system.

repudiated that statement, *see id.* at 8 n.4, 18. The forensic and ballistic evidence was underwhelming and did not conclusively point to Mr. Mason as the shooter, *see Mason*, 232 Cal. App. 4th at 360-64. Bell, Morris, and Perry were longtime and established members of the Lincoln Park gang, which is affiliated with the Bloods.[4] *Id.* at 358. Morris and Mr. Mason were charged with murder and other crimes related to the incident and tried separately; Bell and Perry were not charged in connection with the shooting.

At trial, the prosecution contended Hana Jabbar was "unavailable" as a witness because she had suddenly broken off contact with law enforcement; her preliminary hearing testimony was therefore admitted in lieu of live testimony. *Mason*, No. D063793, Slip Op. at 13. She had similarly conveniently "disappeared" at Morris's earlier trial. *Ibid.* There was also contradictory and unreliable testimony from various members of the Lincoln Park gang about Mr. Mason's activities on the dates in question. *Id.* at 18-22. After deliberating for several days (Pet. at 117-18), the jury returned a guilty verdict on all counts (*id.* at 1-6).

But that was not the end of the story. Between the guilt and penalty phases, Juror No. 4 sent a note to the Court that read as follows:

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[4] Mr. Mason was also a member of Lincoln Park. *Mason*, 232 Cal. App. 4th at 358.

> I . . . (Juror No. 4) would like to address the Court regarding reasonable doubt. Thank you.

(Pet. at 99.)

After much confused discussion among the Court and counsel, Juror No. 4 was called into the courtroom in the presence of counsel, court officers, the court reporter, and the judge. (Pet. at 103.) The Court thanked her for her note and indicated that it "want[ed] to honor [her] request that [she] be allowed to address the Court regarding reasonable doubt." (Pet. at 103.) The first words out of her mouth were, "Yeah, I actually wanted to speak with you [i.e. the judge] in private." (*Ibid*.) The Court flatly refused. (*Id.* at 103-04.) The Court then asked her, "What do you want to address me about concerning reasonable doubt?" (*Id.* at 104.)

Juror No. 4 hesitated, stuttered, stammered, and avoided identifying whatever it was that was bothering her. (*See ibid.* ("I guess I just --- I wanted to address, um, the reasonable doubt that I had on certain counts."); *id.* at 105 (in response to Court's question why she hadn't brought up her doubt when the jury was polled, stating, "Yeah, you know, I --- I, ah, should have said it then" and "I --- I didn't. I went with --- we were --- had been deliberating and --- and, um, I thought that I could just --- I thought that I had, um, basically overcome the doubt that I had")). She denied doing independent research and affirmed that she understood the definition of reasonable doubt. (*Id.* at 105.) She again expressed her wish to speak privately

with the Court in more detail, but the Court ignored her and later told her that would not be "appropriate." (*Id.* at 106-07.)

The Court, perhaps frustrated at her vague non-answers, inquired whether her concerns related to "specific charges" or "specific allegations" and Juror No. 4 responded, "Yeah. I mean totally specific. Very specific." (*Ibid*.) The Court did not ask why she apparently could not be specific outside of a private setting. It excused her for a few minutes to discuss with counsel whether she could be objective enough in the penalty phase to continue serving as a juror; counsel, evidently also befuddled at what all acknowledged was an unprecedented situation, responded with "overwhelming silence." (*Id.* at 107.) Counsel turned their attention to whether Juror No. 4 might have shared her doubts with other jurors and the Court called her back in to ask her that. (*Id.* at 119.) She responded:

> No. No. Well *if* I can't speak with you [i.e. the judge] in private and discuss at length what the issue is, *then* I will stay with my verdict.

(*Ibid.* (emphases supplied).)

Counsel and the Court later held further extended discussions as to whether Juror No. 4 was sufficiently unbiased to continue to serve during the penalty phase. In that discussion, the Court observed that Juror No. 4 had been "a little more emotional" and "teary eyed" during the reading of the verdict, and her body language was different from the other jurors.' (Pet. at 131.) Yet the Court determined that she had nothing

more than a case of "buyer's remorse" and there was no reason to suspect jury tampering or even make further inquiry of her (*see id.* at 107-10, 117, 170). That decision was at least initially supported by defense counsel, who at one point specifically cautioned *against* "tinkering" with her even more in an effort to determine the reasons behind her expressions of doubt and her emphatic need to discuss them privately with the Court. (*Id.* at 134.)

Although defense counsel eventually sought to have the jury redeliberate on the guilt issue and, when that was denied, moved for a mistrial, which was also denied (*see* Pet. at 133-69), he evidently did not make further inquiry of Juror No. 4, even after discharge. The penalty phase went on as planned and Mr. Mason was sentenced to life without the possibility of parole. *Mason*, 232 Cal. App. 4th at 357. No one ever tried to find out what had caused Juror No. 4 to take the drastic and unusual step of interrupting the entire proceeding – the first instance of such behavior to ever occur in California (*see* Pet. at 168) – to attempt to speak with the judge privately about reasonable doubts she had.

B. Procedural History

Mr. Mason timely appealed his conviction and sentence based on the prosecution's failure to secure Hana Jabbar's live testimony, the admission of Marquis Veal's videotaped statements over a hearsay

objection,[5] and other grounds not relevant here. *See People v. Mason*, No. D063793 (Cal. Ct. App. 4th Dist., Div. 1, December 15, 2014), *partially published at* 232 Cal. App. 4th 355. The appellate court struck portions of his sentence but affirmed in all other respects. *Id.* Mr. Mason filed a petition for review in the state supreme court raising only the issue of Hana Jabbar's testimony (Pet. at 51-79 [copy of petition for review]); the petition was summarily denied on March 15, 2015 (*id.* at 17 [summary denial]).

On May 11, 2016, Mr. Mason filed *pro se* a habeas petition in the U.S. District Court for the Southern District of California, raising two claims: the Hana Jabbar claim raised in state court (Claim One), and ineffective assistance of trial and appellate counsel in failing to investigate and raise the potential lack of a unanimous verdict by an impartial panel in light of Juror No. 4's post-verdict concerns about reasonable doubt (Claim Two). (*See* Pet. at 12-13.) On October 25, 2016, Respondent Paramo moved to dismiss the Petition as mixed because Claim Two was unexhausted. (*See* App. 45a.) Mr. Mason, now proceeding through counsel, opposed the motion and sought a *Rhines* stay to return to state court to exhaust Claim Two.[6] (*See* App. 45a,

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[5] Bizarrely, appellate counsel brought up the issue of Juror No. 4's statements in support of the contention that Veal's testimony had been improperly admitted. *See Mason*, No. D063793, Slip Op. at 18 n.10. The state court of appeal rejected this argument. *Ibid.*

[6] Petitioner also or alternatively sought a stay under *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002), *overruled in part on other grounds by Robbins v. Carey*, 481 F.3d 1143, 1148 (9th Cir. 2007),

51a-60a.) On February 2, 2017, the magistrate judge issued a Report and Recommendation recommending that Mr. Mason's stay request be denied and Claim Two dismissed as unexhausted because Petitioner lacked good cause under *Rhines* and in any event his claim was plainly meritless. (App. 51a-59a.) The district judge adopted the R. & R. on June 6, 2017, but analyzed Mr. Mason's *Rhines* stay request differently, finding that he had good cause but his claim was plainly meritless. (App. 25a-40a.)

Claim Two was dismissed and the proceedings continued on Claim One only. (App. 5a.) On May 18, 2018, the district court adopted the magistrate judge's second Report and Recommendation, which dealt solely with Claim One, and denied the Petition. (App. 2a, 3a-19a.)

Mr. Mason sought a certificate of appealability from the Ninth Circuit Court of Appeals on both claims. (Req. Cert. Appealability, *Mason v. Paramo et al*., No. 18-55803, 9th Cir. filed July 2, 2018). His request was summarily denied on February 28, 2019. (App. 1a.)

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which the district court denied. (*See* App. 22a-23a.) That denial is not at issue here.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD CLARIFY THAT A PETITIONER SEEKING A *RHINES* STAY NEED NOT SATISFY HIS HEAVY BURDEN UNDER THE *STRICKLAND* STANDARD MERELY TO DEMONSTRATE THAT HIS INEFFECTIVE ASSISTANCE CLAIM IS NOT "PLAINLY MERITLESS"

A. The Competing Legal Standards of *Rhines* and *Strickland* Have Caused Disparate Decisions Among Federal Courts Analyzing Stay Requests Based on Ineffective Assistance of Counsel

To obtain a stay under *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005), a habeas petitioner must demonstrate that he has good cause for his failure to exhaust, that he has not been engaging in abusive or intentionally dilatory litigation tactics, and most saliently here, that his claim is not "plainly meritless." *Id.* at 278. This Court has never specifically defined "plainly meritless" in the context of *Rhines* for ineffective assistance claims but has previously indicated that a claim meets this standard when "it is perfectly clear that the [petitioner] does not raise even a colorable federal claim." *Granberry v. Greer*, 481 U.S. 129, 135 (1987); *see also Jones v. Morton*, 195 F.3d 153, 156 n.2 (3d Cir. 1999) (same); *Mercadel v. Cain*, 179 F.3d 271, 276 n.4 (5th Cir. 1999) (same). In other words, a claim is plainly meritless when it is "perfectly clear that the petitioner has no hope of prevailing." *Cassett v. Stewart*, 406 F.3d 614, 623 (9th Cir. 2005).

By contrast, the *Strickland* standard for *prevailing* on an ineffective assistance claim is far more demanding; the defendant or petitioner must show that

> there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694.

Despite the yawning chasm between "not even colorable" and "a reasonable probability," federal courts have not always recognized the distinction, instead partly or completely conflating the two standards and creating inconsistent decisions across the country. *Compare, e.g.*, *Dixon v. Baker*, 847 F.3d 714, 722-23 (9th Cir. 2017) (flatly rejecting contention that petitioner need show *Strickland* prejudice to obtain *Rhines* stay but acknowledging such would be required on remand), *and Cowan v. Stovall*, 645 F.3d 815, 820 (6th Cir. 2011) (holding that ineffective assistance claim based on failure to interview witnesses was not plainly meritless, recognizing that whether the claim is actually meritorious is for the state courts to decide in the first instance), *with Woodard v. Chappius*, 631 F. App'x 65, 66 (2d Cir. 2016) (upholding denial of stay to exhaust ineffective assistance claim because petitioner had not shown *Strickland* prejudice).

The problem created by the lack of guidance on the dueling standards is nowhere more apparent than in Mr. Mason's case. The magistrate judge, in

recommending that his stay request be denied, performed what purported to be a "good cause" analysis that in fact provided his view of the merits of the jury tampering claim that Mr. Mason had not made. (*See* App. 55a-58a (noting that "Petitioner has made a sufficient showing that his attorney may have acted unreasonably" in failing to exhaust the issue as to Juror No. 4 but finding, based solely on the existing record, that nothing untoward occurred with her and thus Mr. Mason could not show prejudice).) The district judge – in contravention of the Ninth Circuit's own recent opinion in *Dixon*, 847 F.3d at 722-23 – proceeded to deny the stay request, ostensibly on the "plainly meritless" prong of *Rhines* but actually based on the standard articulated in *Strickland*. (*See* App. 40a *and more generally* App. 31a-40a.)

This Court should grant certiorari to resolve these disparities and clarify the circumstances under which an unexhausted ineffective assistance claim is plainly meritless for purposes of *Rhines*. The lower courts that have recognized the distinction between the *Rhines* "plainly meritless" standard and the *Strickland* "reasonable probability" standard have recognized the fundamental purpose behind the *Rhines* stay, which is to preserve comity between federal and state courts. As the Ninth Circuit explained in *Dixon*:

> In determining whether a claim is "plainly meritless," principles of comity and federalism demand that the federal court refrain from ruling on the merits of the claim unless "it is perfectly clear that the petitioner has no

> hope of prevailing." *Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005). "A contrary rule would deprive state courts of the opportunity to address a colorable federal claim in the first instance and grant relief if they believe it is warranted." *Id.* (citing *Rose v. Lundy*, 455 U.S. 509, 515, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)).

Dixon, 847 F.3d at 722. The Sixth Circuit has further explained that federal courts should not dismiss an unexhausted claim where the record is not fully developed – precisely *because* of the lack of exhaustion – and the state courts have not been given the opportunity to decide the merits of the claim in the first instance. *Cowan*, 645 F.3d at 820.

The purposes of the exhaustion requirement and the *Rhines* stay are frustrated when, as here, federal courts simply proceed to decide the merits of a habeas petitioner's claim under the guise of a "plainly meritless" analysis. Without guidance from this Court, the *Rhines* stay standard – so carefully crafted to provide deference to state courts while also preserving state petitioners' rights – will continue to be misunderstood and misused by federal courts to interfere in the state courts' decision-making process and to deprive state petitioners of their rights to have their claims heard on the merits.

B. Requiring a Showing of *Strickland* Prejudice Is Particularly Inappropriate When the Ineffective Assistance Claim Arises From a Failure to Develop the Record

Even assuming some showing of potential prejudice is required for petitioners with unexhausted ineffective assistance claims to overcome *Rhines*'s "plainly meritless" prong, *Strickland* prejudice cannot be the correct test because many such unexhausted claims, like those of the petitioners in *Dixon* and *Cowan*, arise from a failure to adequately and properly develop the record. To require petitioners in such circumstances to show a "reasonable probability" that the outcome would have been different when the crux of their claim is that they lack such evidence *because of* failings by the trial court in the first instance and appellate counsel after that, compounded by procedural bars at every step of the way, makes nonsense of the "colorable" standard articulated in *Granberry*, 481 U.S. at 135, and adopted by the district courts.

A criminal defendant has the constitutional right to an impartial jury. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017); *see also United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1997) ("If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel."). Although in general a juror may not impeach a verdict through testimony about her own mental processes during deliberations or statements made among jurors during

deliberations, *see Pena-Rodriguez*, 137 S. Ct. at 865-66 (collecting authority and discussing rationale), there are many valid bases upon which a verdict may be impeached, including by evidence of racial bias, coercion, intimidation, unauthorized communication, or other recognized forms of jury tampering that cast doubt on the validity of the verdict, *see*, *e.g.*, *Pena-Rodriguez*, 137 S. Ct. at 870 (racial bias); *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (coercion); *Remmer v. United States*, 347 U.S. 227, 229 (1954) ("private communication, contact, or tampering" with juror during trial about matter pending before jury); *see also Tarango v. McDaniel*, 837 F.3d 936, 951 (9th Cir. 2016) (fear of retaliation); *United States v. Elias*, 269 F.3d 1003, 1020 (9th Cir. 2001) (as amended) (improper contact with third parties, including offer of bribe), *opinion supplemented by* 27 F. App'x 750 (9th Cir. 2003).

Indeed, the recognized grounds for impeaching a verdict listed above are *presumptively prejudicial* and, if raised, require the trial court to hold an evidentiary hearing on the matter. *See Pena-Rodriguez*, 137 S. Ct. at 869; *Remmer*, 327 U.S. at 229. This Court has recognized that when there is a failure to develop the record in the face of a colorable claim of juror misconduct or jury tampering, the petitioner is not to be left in a "procedural morass" based on the catch-22 created by a slim or nonexistent record. *See Wellons v. Hall*, 558 U.S. 220, 221, 226 (2010) (per curiam) (granting GVR for evidentiary hearing when habeas petitioner had learned of inappropriate post-verdict contact among jurors, trial judge, and bailiff, and had "repeatedly

tried, in both state and federal court, to find out what occurred").

Mr. Mason is in the same situation as the petitioner in *Wellons*, and he should similarly be rescued from the procedural morass into which he has been thrust. He has identified a colorable claim and, to the extent he needed to, made a colorable showing of potential prejudice. Yet he has been repeatedly prevented from developing the record and having his claim heard on the merits, by the compounded errors of the trial court, trial and appellate counsel, the federal district court, and the Ninth Circuit, leaving him in precisely the "procedural morass" recognized in *Wellons*, 558 U.S. at 221.

No one knows why Juror No. 4 wanted to speak with the judge privately about reasonable doubt because the trial court never bothered to ask her what her "very specific" concerns were or even what their general basis was. Even if her request to speak privately could not be honored, the trial court needed to at least inquire whether the concerns resulted from some extrinsic source or the juror's own thought processes. The court did not do so. It simply *assumed* that Juror No. 4 wanted to talk about her thoughts on particular pieces of evidence presented during trial (Pet. at 101-02, 108-09) when *she never said any such thing.* The trial court also assumed that she had developed her doubts after the verdict – in a case of "buyer's remorse" – when her statements on the record reflect just the opposite: that she *had* doubts on certain charges or allegations at the time of the verdict and – for reasons

that are also unknown – had not spoken up, even though she later acknowledged that she should have (*id.* at 103-04). The trial court's conclusion that there had been no coercion or jury tampering (*see id.* at 107-10, 136-39, 169-70) was not supported by what little Juror No. 4 actually said in response to the Court's perfunctory inquiry.

Furthermore, Juror No. 4's testimony and the circumstances surrounding it and Mr. Mason's case in general support an inference that her "guilty" vote may have been the result of threats, coercion, or fear of retaliation. She hesitated and stammered and spoke in vague generalities that gave no indication of what her concerns were about reasonable doubt. She repeatedly asked to speak with the judge privately, "at length" on "very specific" issues (*id.* at 106, 119), and only after that request had been refused several times did she conditionally indicate that she would "stay with [her] verdict." Whatever it was that was bothering her, she clearly did not want it on the record in open court, suggesting that it was more than just a mundane issue with some individual piece of evidence or the abstract concept of reasonable doubt.

There were at least three longtime members of a violent criminal street gang who had a vested interest in Mr. Mason being found guilty: Morris, who had already been convicted but could reasonably have believed that Mr. Mason's conviction might undermine his own; Perry, who had not been charged; and Bell, who also had not been charged and who, according to one version of events given by Veal, was the sole or

main perpetrator of the Velma Terrace crimes. *See Mason*, No. D063793, Slip Op. at 18 n.8. Under these circumstances, the possibility of jury tampering or extrinsic influence could not simply be swatted away with the back of the trial court's hand.

Nor could the possibility of racial bias be dismissed so easily. Mr. Mason was African-American and a member of a street gang and easily could have been the target of racial animus, into which the trial court should have inquired. *See Pena-Rodriguez*, 137 S. Ct. at 869. In short, the trial court left unanswered important questions bearing on Mr. Mason's right to a unanimous and impartial jury.

Trial counsel then compounded the error by failing to challenge the adequacy of the trial court's inquiry (much less perform any investigation), and appellate counsel failed entirely to raise the issue on appeal when it was clearly a viable appellate issue under the authorities listed above. Appellate counsel raised other issues regarding the fairness of his trial, and his failure to make the argument that the trial court erred in failing to question Juror No. 4 adequately, hold an evidentiary hearing, or declare a mistrial, cannot have been strategic and amounts to ineffective assistance.

Precisely because the trial court conducted an inadequate inquiry and trial and appellate counsel did not challenge it, the current record is not sufficient to say with certainty why Juror No. 4 acted the way she did. But there is certainly enough to raise a colorable claim that Mr. Mason was deprived of unanimity and

impartiality and his counsel was ineffective in failing to raise this issue properly in the state courts. Requiring a full showing of *Strickland* prejudice at this stage is unjust and contrary to the precedent established in *Rhines*.

This Court should grant certiorari in order to clarify that requests for a *Rhines* stay on ineffective assistance claims cannot be denied based on the *Strickland* "reasonable probability" standard where the ineffective assistance itself has caused the record to be underdeveloped.

II. THIS COURT SHOULD MAKE CLEAR THAT A REQUEST FOR A CERTIFICATE OF APPEALABILITY MUST PROVIDE A MEANINGFUL OPPORTUNITY FOR REVIEW UNDER THE "REASONABLE JURISTS MAY DISAGREE" STANDARD

Under 28 U.S.C. § 2253(c), a certificate of appealability may issue upon the "substantial showing of the denial of a constitutional right." The petitioner must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

The petitioner need not show that he should prevail on the merits; he need only show that the issue is not frivolous and should be given an "opportunity to persuade [the appellate court] through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000). This is a "modest standard" and "any doubts about whether the petitioner has met [this standard] must be resolved in his favor." *Silva v. Woodford*, 279 F.3d 825, 833 (9th Cir. 2002) (emphasis added).

"When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

As this Court has periodically had to remind the circuit courts, the high volume of habeas petitions filed each year should not turn the COA analysis into a mere "rubber stamp" on the district court's decision. *McGee v. McFadden*, 139 S. Ct. 2608, 2610 (June 28, 2019) (Mem.) (Sotomayor, J., dissenting from denial of certiorari); *see also Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (per curiam) (granting petition for certiorari, vacating COA denial, and remanding for further consideration of whether COA should issue).

As discussed above, Mr. Mason's ineffective assistance claim is not plainly meritless and thus amply meets the "modest" standard articulated in *Silva*, 279 F.3d at 833. Further, and as also discussed above, the magistrate judge's *Rhines* analysis differed significantly from that of the district judge, which strongly suggests that reasonable jurists could disagree as to how to consider Mr. Mason's claims. Most significantly, the district judge appears to have ignored or incorrectly applied the Ninth Circuit's own decision in *Dixon*, 847 F.3d at 722-23, in denying a *Rhines* stay based on failure to satisfy the *Strickland* standard. (*See* App. 39a-40a.) The Ninth Circuit nevertheless denied Mr. Mason's request for a COA, in what can only be described as an example of the "rubber stamp[ing]" that Justice Sotomayor recently decried.

This Court should grant certiorari in order to make a clear and precedential statement that such rubber-stamping is impermissible. Alternatively, Mr. Mason requests that the Court issue a "grant, vacate, and remand" order directing the Ninth Circuit to reconsider its denial of a certificate of appealability, applying the proper standard.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Mason's petition for a writ of certiorari.

Respectfully submitted,

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