No. _____

IN THE

Supreme Court of the United States

FRANCIS HERNANDEZ

Petitioner,

v.

KEVIN CHAPPELL,

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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CAPITAL CASE[1]

QUESTIONS PRESENTED

1. Counsel admitted that he did not know that his chosen defense, diminished capacity, could be based upon mental illness. As a result, counsel never investigated Mr. Hernandez's history of mental illness, head injuries, and child abuse—which multiple habeas experts said could negate intent to commit first degree murder. Was such failure prejudicial in light of the available diminished capacity defense at the time of trial and did the Ninth Circuit Court of Appeals err in failing to appropriately apply California law in conducting the prejudice analysis under *Strickland v. Washington*, 466 U.S. 668 (1984)?

2. Did the Ninth Circuit incorrectly invade the province of the jury when it characterized the unrebutted expert opinions as "weak" when conducting the *Strickland v. Washington* prejudice analysis?

3. Did the Ninth Circuit fail to provide meaningful appellate review when it arbitrarily reversed a grant of guilt phase habeas relief in a capital case after two members of the original panel died?

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[1] On August 16, 2011, the district court granted penalty phase habeas relief on multiple grounds, including ineffective assistance of counsel for failure to investigate and present mitigation evidence. Appendix (hereinafter "App.") 54; *Hernandez v. Chappell*, 878 F.3d 843, 846 (9th Cir. 2017) (App. C at 32). Respondent did not appeal that judgment. *Id.* Although Mr. Hernandez is not currently under the sentence of death, the Los Angeles County District Attorney has not yet determined whether she will seek the death penalty upon retrial.

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

Francis Hernandez ("Petitioner" or "Mr. Hernandez") petitions for a Writ of Certiorari to review the final order of the United States Court of Appeals for the Ninth Circuit in this case denying his appeal, and affirming the judgment of the United States district court denying him relief under 28 U.S.C. § 2254. This is a pre-Anti-Terrorism and Effective Death Penalty Act of 1996 case.

OPINIONS BELOW

On August 16, 2011, the district court granted penalty relief on, among other claims, an ineffective assistance of counsel claim, and denied guilt phase relief in a published opinion. *Hernandez v. Martel*, 824 F.Supp.2d 1025 (C.D. Cal. 2011) (App. D). The initial panel of the Ninth Circuit to review the case reversed the district court's denial of guilt phase relief, finding trial counsel ineffective. *Hernandez v. Chappell*, 878 F.3d 843 (9th Cir. 2017) (App. C). The panel was reconstituted due to the death of two judges and, on rehearing, the subsequent panel vacated the prior panel's grant of guilt phase habeas relief, and affirmed the district court's denial of habeas relief; the opinion was filed on January 14, 2019. *Hernandez v. Chappell*, 913 F.3d 871 (9th Cir. 2019) (App. B). On May 3, 2019, the panel filed an amended opinion denying Mr. Hernandez's petition for panel rehearing and for rehearing en banc and again affirmed the denial of relief. *Hernandez v. Chappell*, 923 F.3d 544, (9th Cir. 2019)(App. A).

JURISDICTION

The district court had jurisdiction over Mr. Hernandez's § 2254 federal habeas petition under 28 U.S.C. §§ 2241 and 2254. Mr. Hernandez filed the operative habeas corpus petition in district court on March 18, 1993 (App. K at 284 (Dkt. 36)), before the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996.[2] *Lindh v. Murphy*, 521 U.S. 320, 327 (1997); App. D at 55. The Ninth Circuit had jurisdiction over the appeal on the guilt phase pursuant to 28 U.S.C. §§ 1291 and 2253. The Ninth Circuit entered judgment on May 3, 2019 and the mandate issued on May 13, 2019. Mr. Hernandez was granted one 60-day extension of time to file his petition. Supreme Court Rule 13.5. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI:

> 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.

28 U.S.C § 46(c):

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat.

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[2] The Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, was signed into law on April 24, 1996, and enacted the present 28 U.S.C. § 2254(d) (1994 ed., Supp.II).

1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

STATEMENT OF THE CASE

A. Procedural History

On April 25, 1983, Francis Hernandez was convicted of two counts of first degree murder, two counts of rape, and two counts of forcible sodomy. The jury also found true the special circumstance allegations of multiple murder and that the murders were committed in the course of a rape and sodomy. App. D at 54-55. Mr. Hernandez was sentenced to death. On direct appeal, the California Supreme Court vacated one of the multiple murder special circumstances but otherwise affirmed the conviction and sentence. App. D at 55. Mr. Hernandez's state petition for habeas corpus was filed November 27, 1989; it was summarily denied on May 31, 1990. App. H at 269.

Mr. Hernandez filed a petition for writ of habeas corpus in the district court on August 28, 1990. App. D at 55. On October 30, 1992, he filed a second petition for writ of habeas corpus in the California Supreme Court to exhaust his federal claims. App. I at 270. That petition was summarily denied as untimely on January 27, 1993. *Id.*

Mr. Hernandez filed an amended petition in the district court on March 18, 1993. App. D at 55. Certain claims were denied on Respondent's motion for summary judgment. *Id.* A bifurcated evidentiary hearing was then conducted on

Mr. Hernandez's remaining claims, considering separately issues of deficient performance and prejudice in assessing his ineffective assistance of counsel claims. *Id.* At the conclusion of the hearing, the district court granted the petition based on ineffective assistance of counsel in the penalty phase, jury misconduct, and cumulative error (App. D at 54), which Respondent did not appeal. *Hernandez*, 878 F.3d at 846 (App C at 29).

Mr. Hernandez's claims of ineffective assistance of counsel at the guilt phase were denied (App. D at 264) despite the district court's numerous findings that trial counsel performed deficiently, including by failing to present mental health evidence in support of a diminished capacity defense. Trial counsel admitted that, due to a misunderstanding of the law, he did not know that evidence of mental illness could be presented to support a diminished capacity defense. App. D at 102. The district court concluded both that such a defense was Mr. Hernandez's "best possible defense" and that the evidence was sufficiently persuasive that it "could have caused at least one juror to vote differently." App. D at 135, 183. While these findings should have resulted in the conclusion that Mr. Hernandez was prejudiced by his trial counsel's deficient performance at the guilt phase, the district court instead denied relief under *Strickland v. Washington*, 466 U.S. 668. Mr. Hernandez appealed the guilt phase denial.

On appeal, in a 2-1 decision, the Ninth Circuit Court of Appeals reversed the district court and granted guilt phase relief, finding that Mr. Hernandez was prejudiced by his trial counsel's failure to present mental health evidence in support

of his diminished capacity defense. *Hernandez*, 878 F.3d 843 (App. C). Judge Stephen Reinhardt wrote the opinion for the majority and was joined by Judge Harry Pregerson. Judge Jacqueline H. Nguyen dissented as to whether a prejudice showing had been made. *Hernandez*, 878 F.3d at 859 (App. C at 45). Judge Harry Pregerson passed away on November 25, 2017, one month before the *Hernandez* decision was published. He was replaced on the panel by Judge Kim McLane Wardlaw on February 16, 2018. App. E at 266; App. J at 280 (Dkt. 116). On March 28, 2019, Judge Reinhardt passed away. He was replaced by Judge Milan D. Smith on April 3, 2018. App. F at 267; App. J at 280 (Dkt. 120).

The newly constituted panel granted Respondent's petition for panel rehearing on May 21, 2018. App. G at 268; App. J. at 280 (Dkt. 128). On January 14, 2019, in a unanimous decision authored by Judge Nguyen, the panel issued an opinion vacating the prior panel's grant of habeas relief. *Hernandez*, 913 F.3d 871 (App. B). The panel held that Mr. Hernandez was not prejudiced by his counsel's deficient performance for failing to present mental health evidence in support of a diminished capacity defense. *Id.* Mr. Hernandez's petition for rehearing and for rehearing on banc was denied on May 3, 2019 and the opinion was amended. *Hernandez*, 923 F.3d 544 (App. A).

B. Statement of Facts

1. The Trial

Edna Bristol and Kathy Ryan were raped, sodomized, and assaulted before being suffocated to death. Both women's bodies were subjected to additional, post-mortem injuries. App. C at 33. The identity of their assailant, Francis Hernandez,

is undisputed. The nude bodies of Edna Bristol and Kathy Ryan were found five days apart on the lawns of schools in Long Beach in the winter of 1981. *Id.* The autopsy indicated death by suffocation or strangulation for both women; injuries of the anal and vaginal areas; both women incurred injuries consistent with being struck in the mouth, bitten on the breasts, and suffered burns to the pubic hair. App. C at 33, 46.

Eighteen-year-old Francis Hernandez was arrested on February 4, 1981. After over five hours of interviews, he provided police with a lengthy tape-recorded statement. App. C at 33. Prior to making that taped statement, he was promised psychiatric help. *Id.* Of the nearly six hours Mr. Hernandez spent being interviewed, only forty-three minutes was captured on tape. App. D at 154, 254.

In the taped statement, Mr. Hernandez described meeting Edna Bristol, who he had picked up hitchhiking. He explained, he was drunk, in a crazy mood, and didn't have control over himself. App. C at 33. He stated he became annoyed with Edna Bristol and asked her to get out of the van; when she refused, he hit her and dragged her out. *Id.* After she told him she would "do anything," they had sexual intercourse. He explained, "she was willing . . . I didn't really have her–you know–forcibly. I guess maybe she thought I did. . . ." *Id.* When she kicked him, he "went beserk [sic]" and taped her wrists and legs, sodomized her, and forced her body against the hot engine cowling, causing burns to her breasts. *Id.* Afterward, he put his hand over her face to calm her. Mr. Hernandez explained, "[I] just might have

left it there too long" until she stopped moving. *Id.* He thought she was still alive and left her at the school so that someone would hopefully find her. *Id.*

Kathy Ryan and Francis Hernandez occasionally spent time together as part of a group of teenagers. The evening before Kathy Ryan's body was discovered, she and Francis Hernandez spent time with this group of teens, first at a park and later at a pizza parlor, where some of them played pool. *Id.* Four witnesses testified that Mr. Hernandez was drinking that night, but did not appear drunk. App. C at 33-34. Mr. Hernandez told one witness that he wanted to make a "sandwich" out of Ms. Ryan and "that he'd like to fuck her in the butt until she screams," and "You watch. I'll get some tonight or tomorrow night." App. C at 34.

Mr. Hernandez stated that Ms. Ryan told him to stop by her house later that night, which he did. He explained that she got into his van. After a while, they started kissing. He acknowledged that at first she was sort of hesitant but she said "okay," she took off her clothes and the two had sex. Mr. Hernandez perceived that Ms. Ryan did not want to go any further sexually because he had a girlfriend. *Id.* When Ms. Ryan turned over, Mr. Hernandez thought she wanted to have anal sex, but then she said it hurt and they stopped. *Id.* Like Ms. Bristol, she started screaming and kicking. Mr. Hernandez put one of his hands over her mouth to "keep her quiet" and he "must have used too much pressure" because she would not wake up and she "stopped struggling." *Id.* He did not know she was dead until he took her body out of the van and left it at the school. He singed her pubic hair and cut her stomach with glass. *Id.*

He explained that, as he was leaving, "it started dawning on [me] what had happened before with the other girl." *Id.* He said, "there was thoughts going through my head like, how the hell can I do these things, and–you know–I was thinking maybe I was doing it on purpose, I didn't know, you know, cause I hadn't been planning anything." *Id.*

Trial counsel pursued a diminished capacity defense in order to establish that Mr. Hernandez lacked the specific intent necessary for first degree murder. *Id.* The defense was based upon voluntary intoxication and he presented some evidence that Mr. Hernandez had been drinking prior to both of the incidents with Ms. Bristol and Ms. Ryan. *Id.* He also presented expert testimony that an alcoholic would not be able to form the specific intent to rape or kill. *Id.* In Mr. Hernandez's mind, the encounters with the women had been consensual and he had only intended to quiet them. *Id.*

2. **Evidence Developed on Federal Habeas Review**

In post-conviction, Mr. Hernandez presented extensive evidence and unrebutted testimony from five experts supporting what the district court acknowledged was his "best possible defense at guilt"—diminished capacity based on mental impairment. App. D. at 183. He presented the testimony of psychologist June Madsen Clausen, psychiatrist Dorothy Otnow Lewis, criminologist Sheila Balkan, clinical psychologist Charles Sanislow, and neuropsychologist Ruben Gur. *See generally*, App. D at 63-99. Respondent presented the testimony of just one expert: clinical psychologist Daniel Martell who the district court discredited. App. D at 82-92.

Dr. Clausen testified in depth regarding Mr. Hernandez's family history and development. App. D at 63-74. She also testified that Mr. Hernandez's genetic predisposition for impaired reality testing and chronic exposure to his adoptive parents' mental illness resulted in a "marked inability to accurately perceive his social environment." App. D at 73. She concluded that he also had a genetic predisposition to dissociative disorder and dissociated at various times throughout his life. Dr. Clausen also opined that Mr. Hernandez's lack of memory of the crime and confession and penalty phase testimony contain evidence that he was dissociated during the crimes. App. D at 74. She also opined that the taped statement reveals that Mr. Hernandez's thought processes were psychotic during the crimes. *Id.*

Dr. Lewis also testified regarding Mr. Hernandez's chaotic upbringing and neuropsychiatric vulnerabilities, including a history of head trauma. App. D at 80. She diagnosed him with pathological dissociation, bipolar mood disorder, the manic phase of schizophrenic disorder or hypomanic. App. D at 80, 86-87. She opined that he suffered the traumatic effects of his physical and sexual abuse as a child. She further opined that Mr. Hernandez's "capacity to premeditate and deliberate [and] his capacity to form the specific intent to rape and kill, was substantially impaired." App. D at 80.

Dr. Balkan provided a social history similar to that provided by Drs. Clausen and Lewis. App. D at 81-82. She concurred with Dr. Lewis' diagnosis that Mr. Hernandez suffered from psychosis, bipolar disorder and dissociation. App. D at 82.

She added that the experts at trial were not given adequate information to form opinions. *Id.*

Dr. Sanislow's testimony was offered in rebuttal to Dr. Martell's now-discredited testimony regarding both his testing methodology and his conclusions. App. D at 93-95.

Dr. Gur also testified in rebuttal to Dr. Martell. He conducted a neuropsychological assessment of Mr. Hernandez and testified that his test results were highly abnormal. App. D at 95. Dr. Gur concluded that Mr. Hernandez suffers from severe brain damage, evidenced in three areas of the brain. *Id.* This caused Mr. Hernandez to be impaired in "interpreting emotional information, controlling and modulating [his] emotional response and could lead to misperceptions or distortions of reality." *Id.* Dr. Gur opined that Mr. Hernandez's brain damage is likely organic, meaning caused by a head injury. App. D at 97. Dr. Gur testified that, due to this brain damage, at the time of the crimes, Mr. Hernandez could not "understand or respond appropriately to his victims' expressions of resistance and fear." *Id.* He stated that this damage also explains why he could not remember significant parts of the crimes. Dr. Gur also concluded that Mr. Hernandez was in a dissociative state when he committed part or all of the crimes. App. D at 98.

The district court found that Mr. Hernandez was genetically vulnerable to schizophrenia, depression, and substance abuse, was exposed to violence, drugs, and alcohol in utero and delivered using forceps, causing neurological damage. App. D

at 109, 112. Mr. Hernandez's birth mother was 14 years old when she had him, and was abused while pregnant. *Id.* There was mental illness on both sides of his family, going back at least three generations. *Id.* Mr. Hernandez's adoptive mother, Naomi, was diagnosed with schizophrenia when Mr. Hernandez was six. App. D at 114. Naomi sat on Mr. Hernandez to calm him when he was a child, engaged in bondage as play, and forcibly administered enemas into his rectum as discipline. *Id.* Naomi suffered from hallucinations and was "in and out of mental hospitals from when petitioner was age six until he was about fifteen." App. D at 114, 117. When not hospitalized, Naomi was medicated with Mellaril, an anti-psychotic drug. App. D at 114. Mr. Hernandez's adoptive father, Frank, left Mr. Hernandez "often on his own starting at age eight." App. D at 115. Frank suffered from paranoia and encouraged Mr. Hernandez to engage in age-inappropriate, risky behaviors. App. D at 118, 185. The district court found that this upbringing affected Mr. Hernandez's emotional and cognitive development, degrading "basic skills in social comprehension and interpersonal communication." App. D at 118. He was raised without "boundaries or structure" and lacked the models for normal social interaction necessary for normal adaptation. App. D at 118-119. The district court viewed the evidence of abuse and neglect by Mr. Hernandez's adoptive parents as "powerful" and "compelling." App. D at 119-120.

The district court found that Mr. Hernandez developed depression and anxiety in his early school years. App. D at 118. He exhibited psychotic behavior in preschool, attacking peers without provocation, misperceiving reality, and

misreading social cues. App. D at 119. Mr. Hernandez began using drugs and alcohol in fifth grade. App. D at 118-119. The district court concluded that Mr. Hernandez suffered from bipolar mood disorder, dissociation, impaired reality testing, and brain damage. App. D at 135-137.

The district court found that Mr. Hernandez suffered "many incidents of head trauma as a child, adolescent and teen." App. D at 134. His congenital brain damage was complicated by his upbringing, affecting "various regions of petitioner's brain" and causing him "to struggle with verbal memory impairment and interpreting emotional information, both of which are exacerbated by extreme emotion or stress." *Id.* This damage existed at the time of the crimes and "prevented petitioner from understanding or responding appropriately to his victims' expressions of resistance and fear." *Id.* The district court concluded:

> Petitioner harbors a skewed picture of reality. He suffers from a profound impairment in his ability to perceive emotions accurately . . . . Petitioner has suffered from this problem as early as preschool, and it is heightened when he is experiencing extreme emotion or stress. Petitioner attempts to cope with his inability to perceive emotions accurately by using other cues, but this coping mechanism is quite limited due to the mental illness of petitioner's adoptive parents.

App. D at 136. The district court also agreed with the experts' opinion that the sexual abuse Mr. Hernandez suffered at the hands of his adoptive mother "bore a strong relationship to the crimes." App. D at 188.

The district court found that the "clinical data suggest that petitioner actually cannot recall significant parts of the crime, not that he is being evasive or feigning forgetfulness." App. D at 137. The district court credited Dr. Clausen's

conclusion that Mr. Hernandez was "unequipped to understand his social world, negotiate interpersonal relationships, appropriately manage strong emotions, and seek help." App. D at 139.

Finally, the district court found that, at the time of the crimes, Mr. Hernandez was homeless, drug addicted, and bereft of family or institutional support. App. D at 181. Mr. Hernandez, "who already suffered from emotional instability, felt unable to cope with the intense abandonment he felt and was stressed to his breaking point." App. D at 181-182.

On appeal, the original Ninth Circuit panel also credited the expert testimony presented to the district court, summarizing Mr. Hernandez's genetic vulnerabilities to severe mental illness, the significant parallels between the crimes and abuse that Mr. Hernandez suffered, and his substantial impaired reality testing and history of dissociation. *Hernandez*, 878 F.3d at 854-855 (App. C at 40-41). The panel found that all experts had been found credible by the district court except for Dr. Martell, Respondent's expert. *Id.* at 855 (App. C at 41). The panel recognized that Mr. Hernandez's experts concluded that he lacked the capacity to form the specific intent necessary to support a first degree murder conviction. *Id.*

The newly constituted panel, without any explanation of how the prior panel had erred, reversed the original panel decision. *Hernandez*, 923 F.3d 544 (App. A).

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari because the Ninth Circuit has decided an ineffective assistance of counsel issue under *Strickland v. Washington*, 466 U.S. 668, in a way that conflicts with decisions by the California Supreme Court

that must inform the prejudice analysis. Supreme Court Rule 10(a). The Ninth Circuit has also decided an important federal question in a way that conflicts with *Strickland v. Washington*. Supreme Court Rule 10(c). Finally, this Court should use its supervisory powers to correct the Ninth Circuit's arbitrary review and decision-making in this case, which created a defect akin to an intra-circuit split of authority. Supreme Court Rule 10(a).

A. The Ninth Circuit did not Correctly Consider California Supreme Court Law in Analyzing the Strickland Prejudice Prong With Respect to a Diminished Capacity Defense

At the guilt phase of a capital case, trial counsel presented a diminished capacity defense based primarily upon alcohol intoxication, but presented no evidence of Mr. Hernandez's mental illness, incorrectly believing that he could not do so. App. D at 102; *Hernandez*, 923 F.3d at 550 (App. A at 7). Both the district court and the appellate court concluded that trial counsel's "ignorance of the law that was central to a diminished capacity defense, which the district court characterized as Mr. Hernandez's 'best possible defense'," constituted deficient performance. *Id.* But the second Ninth Circuit panel continued in trial counsel's vein, laboring under a misunderstanding of California's diminished capacity law when it found that the failure to present such a defense based upon mental illness did not result in prejudice to Mr. Hernandez. App. A at 14.

In determining whether a federal constitutional violation occurs during a state criminal trial, and whether prejudice results from an error, this Court and lower federal courts have tailored their analyses by considering the relevant state law in effect at the time of the defendant's trial. *Zant v. Stephens*, 462 U.S. 862,

870 (1983) (concluding "that an exposition of the state-law premises . . . would assist in framing the precise federal constitutional issues presented"); *California v. Ramos*, 463 U.S. 992, 1011-1012 (1983) (jury instruction claim where this Court looked to "state law at the time of respondent Ramos' trial" which "precluded the giving of the 'other half' of the commutation instruction); *Garth v. Davis*, 470 F.3d 702, 709-710 (7th Cir. 2006) (looking at Indiana law regarding specific intent to kill as an element of aiding an attempted murder when reviewing jury instruction due process claim and underlying ineffective assistance of counsel claim).

This holds true in the *Strickland* context. In order to determine whether there is a reasonable probability of a different result under *Strickland*, a federal habeas court looks to the state law that the jury would have been instructed on had trial counsel not performed deficiently. *Bell v. Cone*, 535 U.S. 685, 690-691 (2002) (considering then-applicable Tennessee law regarding how the jury was to weigh statutory and mitigating circumstances); *Daniels v. Woodford*, 428 F.3d 1181, 1207-08 (9th Cir. 2005) (citing California cases on the state's diminished capacity defense and imperfect self-defense to analyze *Strickland* prejudice prong).

Federal habeas courts also look to state law to establish the scope of evidence that could have been presented at trial, as well as the weight it would have been accorded. In *Wiggins v. Smith*, 539 U.S. 510 (2003) this Court relied on Maryland state law in evaluating whether petitioner was prejudiced by counsel's failure to try to admit a social history report at Wiggins' sentencing. This Court held that the report may well have been "admissible under Maryland law" and "it was reasonably

probable that a competent attorney . . . would have introduced it in an admissible form." *Id.* at 535-536; *see also Cannedy v. Adams*, 706 F.3d 1148, 1163-64 (9th Cir. 2013) (noting that a competent lawyer likely would have been able to introduce the omitted evidence under the California Evidence Code).

The Ninth Circuit failed to correctly consider—or consider at all—a series of California Supreme Court cases spanning back to 1959 that would have informed the correct prejudice analysis under *Strickland*. In particular, California law was clear that a diminished capacity defense could negate the prosecution's mental state showing, and did not require the jury to weigh the evidence of intent against the weight of the diminished capacity defense. The Ninth Circuit engaged in this exact kind of weighing, and by doing so, erroneously ignored California Supreme Court law regarding the "best possible defense" Mr. Hernandez had at trial.[3]

California's diminished capacity defense recognized that the mens rea elements of first-degree murder "could be rebutted by a showing that the defendant's mental capacity was reduced by mental illness, mental defect or intoxication." *People v. Swain*, 12 Cal. 4th 593, 606 (1996); *see also People v. Williams*, 44 Cal. 3d 883, 908 (1988) (acknowledging that evidence of mental defect or deficiency could "negate" the prosecution's mental state evidence in a felony

[3] A "defendant who, because of diminished capacity, does not entertain the specific intent required for a particular crime is entitled to be acquitted of that crime." *People v. Wetmore*, 22 Cal. 3d 318, 321 (1978). Mr. Hernandez was tried under two theories of first degree murder: deliberate and premeditated murder and felony murder. *Hernandez*, 923 F.3d at 551 (App. A at 8). Both theories required a finding of specific intent, which could be negated by a successful diminished capacity defense. If negated, he could not be found guilty of first degree murder.

murder robbery prosecution). "In short, in any situation where malice aforethought or any other specific mental state must be established in order to find a charged or included offense, evidence of diminished capacity may be used to negate its existence." *People v. Poddar*, 10 Cal. 3d 750, 758 (1974). To be clear, when the doctrine of diminished capacity applies, evidence of intoxication or mental illness does not weigh against a finding of intent, it rebuts that conclusion. *People v. Flannel*, 25 Cal. 3d 668, 672 (1979) ("[C]ases . . . applying the doctrine of diminished capacity[] hold that evidence of intoxication, mental defect, or disease can rebut malice."); *People v. Mosher*, 1 Cal. 3d 379, 385-86 (1969) (holding that "the trial court erred in failing to instruct the jury that defendant's diminished capacity might rebut each of the specific kinds of intent necessary to a finding of a killing in the perpetration of or an attempt to commit rape, burglary, or robbery, and hence, might rebut the prosecution's felony-murder theory of first degree murder"); *People v. Bassett*, 69 Cal. 2d 122, 128 (1968) (evidence of diminished capacity negated the substantial evidence of mens rea implied from the circumstances of the offense).

In *People v. Goedecke*, 65 Cal. 2d 850, 854 (1967), the defendant testified to killing his parents by wrapping a towel around an iron bar and striking them both multiple times. He further testified that after striking the blows, he washed up and then returned to his parents' bedroom to find his father crawling on the floor. The defendant testified that he smoked a cigarette while he watched his father struggle. He noticed a hunting knife in the room and thought, "Maybe this will finish him off." *Id.* He then stabbed his father repeatedly. *Id.* Despite this evidence, the

California Supreme Court concluded, in light of Goedecke's diminished capacity, that "the evidence fails to support the finding that the murder was of the first degree." *Id.* at 856-58.

Instead of following the controlling California Supreme Court law that a diminished capacity defense could negate the prosecution's mental state showing, the Ninth Circuit balanced the weight of the intent evidence against the weight of the diminished capacity evidence. *Hernandez*, 923 F.3d at 554 (contrasting the "strength" of the intent evidence with the "weakness" of the diminished capacity evidence) (App. A at 11). Moreover, the Ninth Circuit improperly engaged in an analysis of Mr. Hernandez's actual intent, applying a more onerous standard—diminished actuality—than the one in effect at the time of Mr. Hernandez's trial.[4] *Id.* at 551 (App. A at 8) ("Ample evidence of Hernandez's specific intent to rape and kill both [Ms.] Bristol and [Ms.] Ryan supported the jury's verdict."). This is a serious error. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994) ("The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation.").

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[4] Diminished capacity was abolished in California when the Penal Code was amended to provide that "evidence of mental illness 'shall not be admitted to show or negate the capacity to form any mental state,' but is 'admissible solely on the issue of whether or not the accused *actually* formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.'" *People v. Saille*, 54 Cal. 3d 1103, 1111–12 (1991) (quoting revised Penal Code section 28) (emphasis added). Diminished actuality is a strict mens rea defense in which experts cannot testify about their opinions regarding the ultimate intent issue and the test only considers whether the defendant *actually* had the necessary intent as opposed to the capacity to form the intent. *See People v. Elmore*, 59 Cal. 4th 121, 139 (2014). Given that the offense was committed prior to the change in law, Mr. Hernandez was entitled to the benefit of the diminished capacity defense.

The Ninth Circuit parses the unrebutted expert opinions offered by Dr. Gur, Dr. Lewis, Dr. Clausen, Dr. Balkan, and Dr. Sanislaw, criticizing their opinions for inconclusive diagnoses and a failure to adequately account for Mr. Hernandez's custodial statement and other circumstances of the crime. *Hernandez*, 923 F.3d at 554-557 (App. A at 11-14). However, in *Goedecke*, the California Supreme Court deemed the diminished capacity evidence sufficient to prove the defense, despite competing expert testimony offered by the prosecution that Goedecke had the capacity to formulate the necessary men rea. *Goedecke*, 65 Cal. 2d at 856-57. As the California Supreme Court explained, the prosecution's rebuttal was insufficient because "there was no psychiatric testimony as to the extent to which defendant could maturely and meaningfully reflect upon the gravity of his contemplated act." *Id.* at 857 (App. A at 14). Here, the prosecution did not offer expert testimony at trial, and the only expert testimony presented by Respondent on habeas, that of psychologist Dr. Daniel Martell, was discredited by the district court. App. D at 84-92. Thus, Respondent offered no credible psychiatric testimony that Mr. Hernandez could formulate intent. Its absence signals that Mr. Hernandez's diminished capacity evidence is sufficient under California law. *Id.*; *see also People v. Nicolaus*, 65 Cal. 2d 866, 873-75, 878 (1967) (finding diminished capacity evidence sufficient despite conflicting testimony and reducing the conviction to second-degree murder).

The Ninth Circuit also failed to give adequate consideration to California law regarding nondiagnostic evidence. In California, diminished capacity was established not only by medical and psychiatric diagnoses, but also by life history,

relative youth, intoxication, and evidence of contemporaneous stressors. *Bassett*, 69 Cal. 2d at 132-35 (detailing life history evidence relevant to defendant's diminished capacity); *People v. McDowell*, 69 Cal. 2d 737, 741-42 (1968) (same); *Goedecke*, 65 Cal. 2d at 852, 856 (modifying murder conviction from first-degree to second-degree because Goedecke, 18 at the time of the crime, "was not and is not a fully normal or mature, mentally well person"); *In re Saunders*, 2 Cal. 3d 1033, 1036-37 (1970) (considering youth, history of head injuries and organic brain damage); *People v. Conley*, 64 Cal. 2d 310, 315 (1966) (considering evidence of dissociation heightened by intoxication, as well as personality fragmentation); *Nicolaus*, 65 Cal. 2d at 866 (contemporaneous stressors). Each of these cases demonstrates that Mr. Hernandez's post-conviction evidence was sufficient to prove a diminished capacity defense. See, above, Statement of the Case, B.2.

Nor would Mr. Hernandez's confession necessarily have deprived him of a successful diminished capacity defense, as the Ninth Circuit suggests. *See, e.g.*, *Goedecke*, 65 Cal. 2d at 854, 858 (finding evidence of mental state insufficient to sustain first-degree murder conviction despite detailed confession). Mr. Hernandez marshaled the testimony of four experts to put the confession in context and explain why it did not rebut their opinion that Mr. Hernandez was dissociating at the time of the crimes. App. D at 74 (Dr. Clausen), 79 (Dr. Lewis), 82 (Dr. Balkan), 98 (Dr. Gur). Moreover, in addition to dissociation, Mr. Hernandez suffered from psychosis, hypomania, and extensive brain damage at the time of the offenses that must also be taken into account. App. D at 74, 80, 82, 86-87, 95-98.

Finally, the Ninth Circuit overlooked the fact that California's diminished capacity defense at the time allowed the jury to hear the experts' opinions on the "ultimate issue." *Goedecke*, 65 Cal. 2d at 856-57 (setting forth expert testimony, including ultimate issue opinions); *Bassett*, 69 Cal. 2d at 135 (considering ultimate issue testimony); *People v. Gorshen*, 51 Cal. 2d 716, 723 (1959). By ignoring the ultimate opinion testimony offered here, *see* 824 F.Supp.2d at 1053 ("petitioner's 'capacity to premeditate and deliberate [and] his capacity to form the specific intent to rape and kill, was substantially impaired'"), the Ninth Circuit deprived Mr. Hernandez of the full force of the diminished capacity defense.

Federal habeas courts must carefully apply the state law in effect at the time of the defendant's trial in order to adequately evaluate whether a constitutional error is prejudicial. *Zant*, 462 U.S. at 870; *Ramos*, 463 U.S. at 1011-1012. Although California law was clear that a diminished capacity defense could negate the prosecution's mental state showing, the Ninth Circuit ignored that law when it engaged in an analysis that weighed the evidence of intent against the evidence of diminished capacity, which Mr. Hernandez's jury had not been instructed to do. It is reasonably probable that, had trial counsel presented evidence of mental illness and social history evidence to support a diminished capacity defense at the guilt phase, the jury would have found that such evidence negated the intent requirement, and would not have found Mr. Hernandez guilty beyond a reasonable doubt of first degree murder.

B. The Ninth Circuit Improperly Applied the Strickland Prejudice Prong When it Independently Weighed Unrebutted Expert Evidence

The Ninth Circuit invaded the province of the jury when it characterized the unrebutted expert opinions as "weak," *Hernandez*, 923 F.3d at 554 (App. A at 11), contrary to this Court's and other circuits' binding precedent that "determining the weight and credibility of [a witness's] testimony belongs to the jury." *Nimely v. City of New York*, 414 F.3d 381, 397-398 (2d Cir. 2005); *Taylor v. Illinois*, 484 U.S. 400, 428 n.3 (1988). The Ninth Circuit's decision on this important federal question deviates from this Court's precedent. Supreme Court Rule 10(c). As this Court has held: "The jury were the judges of the credibility of the witnesses . . . and in weighing their testimony had the right to determine how much dependence was to be placed upon it." *Sartor v. Arkansas Nat. Gas Corp.*, 321 U.S. 620, 628 (1944).

This principle must also be followed in the federal habeas context when conducting the *Strickland* analysis. *Avery v. Prelesnik*, 548 F.3d 434, 439 (6th Cir. 2008) (in analyzing *Strickland* prejudice, holding, "We do not denigrate the role of the factfinder in judging credibility when we review a record in hindsight, but evaluation of the credibility of . . . witnesses is 'exactly the task to be performed by a rational jury'"); *Miller v. Mullin*, 354 F.3d 1288, 1298 (10th Cir. 2004) ("we agree with the district court's statement that challenges to the conclusions drawn by [the witness] regarding her examination of exhibits and methodology goes to her credibility and is properly left to the jury to determine what weight, if any, to give to her testimony"); *Pirtle v. Morgan*, 313 F.3d 1160, 1174 (9th Cir. 2002) ("weighing of evidence and credibility determination is for the jury"); see *Vega v. Ryan*, 757

F.3d 960, 973 (9th Cir. 2014) (recognizing that it is not the court's role in a *Strickland* prejudice analysis to resolve issues of evidentiary weight and credibility).

In *Weeden v. Johnson*, 854 F.3d 1063 (9th Cir. 2017), the Ninth Circuit held that "speculat[ion] that the jury would have assigned little weight to [expert testimony]" did not undermine the reasonable probability of a different result where the testimony is "uncontradicted" and "directly probative of a critical element in the case." *Weeden*, 854 F.3d at 1072. The Ninth Circuit in Mr. Hernandez's case engaged in this exact erroneous speculation regarding unrebutted expert testimony to conduct the *Strickland* prejudice analysis. *Hernandez*, 923 F.3d at 554-557 (App. A at 11-14). The unrebutted expert opinions presented in post-conviction were critical and noncumulative. Without them, Mr. Hernandez was left "without any effective defense." *Riley*, 352 F.3d at 1320. Mr. Hernandez is entitled to have a jury assess the expert testimony and determine whether it raises a reasonable doubt as to Mr. Hernandez's mens rea. Had these unrebutted expert opinions been presented to the jury, it is reasonably probable that the jury would have reached a different result, a conviction less that first degree murder, which is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

C. The Reversal of Guilt Phase Relief by a Newly Constituted Panel Provided Mr. Hernandez Inadequate, Arbitrary and Capricious Appellate Review and Created a Defect Akin to an Intra-Circuit Split of Authority

The Supreme Court, in the exercise of its general power to supervise administration of justice in federal courts, has the responsibility of defining fundamental requirements to be observed by the Courts of Appeals with respect to

power vested in it regarding hearings and rehearings en banc, and to insure their observance by the respective courts. *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 259-260 (1953). This Court should apply its general supervisory power over the lower federal courts to correct a defective appellate process that resulted in an arbitrary and capricious final decision in Mr. Hernandez's capital case when two different panels came to different conclusions regarding whether habeas relief was merited. The dramatic difference in result between these two panel opinions with respect to the same case constitutes an error akin to an intra-circuit split that the Ninth Circuit did not correct or acknowledge through en banc review. *See Inyo County, Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 709 n.5 (2003) (certiorari granted to address question on which Ninth Circuit "expressed divergent views"); *see also* Supreme Court Rule 10(a). Furthermore, this Court has indicated that there should be heightened procedural integrity at the trial level and heightened scrutiny at the appellate level with regard to capital cases. *Ramos*, 463 U.S. at 998-999. In this case, the Ninth Circuit did not afford such integrity or scrutiny.

On December 29, 2017, the panel reviewing Mr. Hernandez's case issued a decision granting habeas relief on an ineffective assistance of counsel claim at issue in this certiorari petition. The majority opinion was authored by Judge Stephen Reinhardt and joined by Judge Harry Pregerson. Judge Jacqueline H. Nguyen dissented regarding the prejudice prong of the ineffective assistance of counsel

claim. Judge Pregerson died on November 25, 2017.[5] On February 16, 2018, the Ninth Circuit replaced him with Judge Kim McLane Wardlaw. App. E at 266; App. J at 280 (Dkt. 116). On March 28, 2019, Judge Reinhardt passed away. He was replaced by Judge Milan D. Smith on April 3, 2018. App. F at 267; App. J at 280 (Dkt. 120).

On February 2, 2018, Respondent filed a Petition for Rehearing. App. J at 279 (Dkt. 112). Panel rehearing was granted and the case was reargued. App. G at 268; App. J. at 280 (Dkt. 128). On January 14, 2019, the newly constituted panel withdrew the original opinion and filed a new opinion, reversing the original panel's grant of habeas relief on the ineffective assistance of counsel claim. App. B.

Such an arbitrary result calls for the exercise of this Court's supervisory power. Especially in capital cases, the appellate process should not work in such a fundamentally arbitrary manner. *Ramos*, 463 U.S. at 998.[6] Mr. Hernandez's guilt

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[5] The original panel decision in *Hernandez* was issued on December 29, 2017, one month after Judge Pregerson's death. The *Hernandez* opinion noted that "[p]rior to his death, Judge Pregerson fully participated in this case and formally concurred in this opinion after deliberations were complete." *Hernandez*, 878 F.3d at 845 (App. C at 31). On February 25, 2019, this Court decided *Yovino v. Rizo*, __ U.S. __, 139 S. Ct. 706, 709 (2019), which held that, under 28 U.S.C. § 46(c), a deceased judge is without power to participate in decisions. This law had not yet been settled on December 29, 2017 when the original panel decision in *Hernandez* was issued.

[6] Although *Ramos* speaks to the heightened reliability required at the sentencing phase of a capital case, the underlying case here was also charged as a capital case. Upon a penalty phase retrial, the circumstances of the crime will be brought as an aggravating factor in the penalty phase. Cal. Penal Code § 190.3(a). Therefore, it is equally important that the guilt phase be subject to the same heightened reliability standard.

phase relief was reversed merely because two of the original panel members died, both long after the case had been argued and submitted. Had Judge Nguyen been the one to be replaced instead of the other two judges, the result would not have changed. The different result can only be attributed to the difference in the members of the panel, not because it was clear that the first panel's opinion was the result of a mistake or error.[7] The new panel's opinion did not even attempt to address why the previous decision was erroneous.

This substantial concern was highlighted in *Carver v. Lehman*, 558 F.3d 869 (9th Cir. 2009), which was in an identical posture: after the 2-1 decision, but prior to a decision on rehearing, Judge Ferguson died and was replaced. As here, the result was essentially reversed by the replacement judge and the previous judge who had dissented. As the concurrence in *Carver* correctly points out:

> To those who question whether the results in constitutional and other cases depend on the membership of the panel, or whether the replacement of even a single Supreme Court justice can change the fundamental nature of the rights of all Americans with respect to matters as basic as affirmative action, a woman's right of choice, and the nature of religious liberty, the result in the case currently before our panel is merely a minor illustration of how the judicial system currently operates. Solely because of fortuity, I am compelled to write in strong disagreement with the majority's constitutional analysis instead of simply reaffirming an opinion vindicating the constitutional rights of the petitioner and his fellow prisoners in the state of Washington.

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[7] In fact, the original panel's decision made objective sense given that the district court had already granted relief on the penalty ineffective assistance of counsel claim based upon the same mental illness, background, and brain damage evidence that the district court relied on in its prejudice analysis to grant such relief. *Hernandez*, 878 F.3d at 846 (App. C at 32). Moreover, Respondent did not contest that trial counsel afforded Mr. Hernandez prejudicial ineffective assistance at the penalty phase and never appealed that judgment. *Id.*

Carver, 558 F.3d at 880 (Reinhardt, J. concurring). Just as in *Carver*, such an arbitrary reversal of habeas relief in this case, based upon the change in panel members, does not inspire confidence in the ultimate result and calls into question the fairness of the federal appellate review afforded to Mr. Hernandez's case by the Ninth Circuit Court of Appeals. Justice should not be based upon a lottery and appellate review should cover basic due process guidelines of procedural fairness. Judge Reinhardt had a remedy to safeguard against such unfairness:

> Under these circumstances, the more important consideration, in my view, is maintaining the stability and legitimacy of the court's decisions. We have a procedure for correcting decisions that a majority of the court believes warrant reconsideration. That process is known as a en banc rehearing . . . Relying on this process would, in my view, be in the better interests of the court and the judicial system; increasing the extent to which judicial decisions depend on chance and subjectivity is not a wise alternative.

Carver, 558 F.3d at 880-881 (Reinhardt, J. concurring).

The fact that two different panels reached the opposite conclusion in a capital case supports Mr. Hernandez's argument that this Court should carefully consider the merits of the ineffective assistance of counsel claim, as pled in sections A and B above, and grant certiorari. The different panel conclusions is analogous to a serious intra-circuit split on a fundamental issue of importance in a capital case. Supreme Court Rule 10(a). At the very least, this Court should follow Judge Reinhardt's solution in *Carver* and assert its supervisory powers to remand the case to the Ninth Circuit for en banc review given the arbitrary results of these diverse panels' rulings on the same case. *See Western Pac. R. Corp*, 345 U.S. at 259-260

(the enactment of 28 U.S.C § 46(c) establishing en banc procedures does not mark the end of the Supreme Court's general power over the federal courts to supervise and ensure the use of the en banc procedure in appropriate cases). Such divergent outcomes require heightened scrutiny by this Court to avoid an unreliable result in a capital case.

CONCLUSION

For all of the foregoing reasons, this Court should grant Mr. Hernandez's Petition for Writ of Certiorari.

Respectfully submitted,

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