No. 19-6125

In the Supreme Court of the United States

FRANCIS G. HERNANDEZ,

Petitioner,

v.

RONALD DAVIS, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED*

Whether the court of appeals correctly determined that petitioner is not entitled to federal habeas relief under *Strickland v. Washington*, 466 U.S. 668 (1984), because he was not prejudiced by counsel's failure to present a diminished capacity defense based on mental illness.

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* Respondent omits the notation "capital case" because, as discussed more fully below, the district court vacated petitioner's death sentence on grounds not at issue here, and California did not appeal that judgment. *See* Pet. App. A-6. Petitioner is thus not under any "death sentence that may be affected by the disposition of the petition." S. Ct. Rule 14.1(a).

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Hernandez v. Chappell, No. 11-99013, judgment entered May 3, 2019 (this case below).

United States District Court for the Central District of California:

Hernandez v. Martel, No. CV 90-4638 RSWL, judgment entered Aug. 16, 2011 (this case below).

California Supreme Court:

In re Hernandez, No. S153858, judgment entered June 11, 2008 (state collateral review).

In re Hernandez, No. S029520, judgment entered Jan. 27, 1993 (state collateral review).

In re Hernandez, No. S013027, judgment entered May 31, 1990 (state collateral review).

People v. Hernandez, No. S004559, judgment entered Nov. 28, 1988 (direct appeal).

Los Angeles County Superior Court:

People v. Hernandez, No. A022813, judgment entered July, 12, 1983.

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STATEMENT

1. In January 1981, petitioner raped, sodomized, and killed Edna Bristol and Kathy Ryan. He committed the crimes five days apart, leaving their nude bodies near schools in Long Beach, California. According to a pathologist, Bristol and Ryan both died of asphyxiation due to strangulation or suffocation, and their bodies sustained "extremely similar and extremely rare" trauma to the vaginal and anal areas, suggesting a large object, consistent with a baseball bat, had been inserted. In February 1981, petitioner was arrested for the crimes. After his arrest, petitioner gave a detailed, taped confession. *See* Pet. App. A-3–A-4.

2. The State charged petitioner with two counts each of first-degree murder, forcible rape, and forcible sodomy, with special circumstances. *See* Pet. App. A-3, A-5. During the guilt phase of the trial, petitioner's counsel presented a diminished capacity defense based on voluntary intoxication. Counsel argued that petitioner's heavy drinking prevented him from forming the specific intent necessary for first degree murder, that petitioner's intoxication caused him to believe the encounters with Bristol and Ryan were consensual, and that he did not intend to kill them. *Id.* at A-5. In 1983, a jury convicted petitioner as charged and sentenced him to death. *Id.* at A-3, A-5.

3. In 1988, on direct appeal, the California Supreme Court vacated one special circumstance but otherwise affirmed the judgment. In 1989, petitioner filed a habeas petition in the California Supreme Court, raising claims of ineffective assistance of counsel, which the court summarily denied. Petitioner

then filed a federal habeas petition and returned to state court to exhaust his claims. The California Supreme Court summarily denied the second habeas petition as untimely and on the merits. Pet. App. A-5.

4. In 2011, a federal district court vacated petitioner's death sentence, partly because counsel had presented virtually no mitigating evidence at the penalty phase. The court reasoned that, had counsel investigated, he would have discovered that petitioner suffered from a deeply troubled childhood and certain mental deficiencies. Pet. App. D-136–D-140. The State did not appeal the grant of penalty-phase relief. *Id.* at A-6.

The district court denied relief as to the guilt phase. It found that counsel was ineffective for failing to present mental health evidence in support of the diminished capacity defense, but that petitioner was not prejudiced. Pet. App. D-103. The court reasoned that "other circumstances" at trial "would have undermined a diminished capacity defense," including "the level of detail in petitioner's confession" and the evidence "that some amount of preparation or deliberation was involved in the crimes." *Id.*

5. In December 2017, a divided Ninth Circuit panel issued an opinion reversing the district court's denial of guilt-phase relief. Pet. App. C. The majority (consisting of Judges Pregerson and Reinhardt) vacated petitioner's murder convictions, concluding that he was prejudiced by counsel's failure to present a diminished capacity defense based on mental impairment. *Id.* at C-44. Although Judge Pregerson passed away before the opinion was released,

the opinion stated that "[p]rior to his death, Judge Pregerson fully participated in this case and formally concurred in this opinion after deliberations were complete." *Id.* at C-31. Judge Nguyen dissented. *Id.* at C-45. In her view, it was "not even a close call" whether petitioner was entitled to habeas relief, because there was "no reasonable possibility of a different outcome" at trial had petitioner's counsel presented the defense at issue. *Id.*

In February 2018, the State filed a petition for a rehearing. Pet. App. J-279 (Dkt. No. 112). The court of appeals subsequently replaced Judge Pregerson with Judge Wardlaw. Pet. App. E. In April 2018, following Judge Reinhardt's death, the court replaced him with Judge Milan Smith. Pet. App. F. In May 2018, the newly constituted panel granted rehearing, Pet. App. G, and in September 2018, the case was re-argued, Pet. App. J-281 (Dkt. No. 133).

In January 2019, the court of appeals withdrew its prior opinion and filed a new opinion, unanimously affirming the district court's denial of guilt-phase relief. Pet. App. B; *see also* Pet. App. A (opinion modified on denial of rehearing). The court reasoned that "[b]ecause the evidence of [petitioner's] specific intent to rape *and* kill both victims was overwhelming when compared to the relatively weak diminished capacity evidence that counsel could have presented, but failed to present, there was no reasonable probability of a different outcome in this case." *Id.* at A-4 (italics in original); *see id.* at A-14.

ARGUMENT

The court of appeals correctly applied the well-established *Strickland* standard in concluding that petitioner was not entitled to habeas relief because

he could not show that his counsel's alleged deficient performance had caused him prejudice. There is no reason for further review.

1. Petitioner first argues that the court of appeals "did not correctly consider California Supreme Court law in analyzing the *Strickland* prejudice prong with respect to a diminished capacity defense." Pet. 14 (capitalization and emphasis omitted).[1] Petitioner faults the court of appeals for supposedly overlooking California law "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." *Id.* at 16.

That argument is meritless. The court of appeals recognized that California law at the time of petitioner's crimes allowed him to seek to establish "that his mental condition rendered him incapable of forming the requisite intent." Pet. App. A-11.[2] The court carefully reviewed the evidence of petitioner's alleged diminished capacity, pronouncing it "relatively weak" and insufficient "to undermine the evidence that Hernandez was capable of forming, and in fact formed, the intent to rape and kill" his victims. *Id.* at A-11–A-13. Petitioner suggests that California law required that analysis to be

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[1] Because petitioner filed his federal habeas petition before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the standards of review set forth in that statute do not apply here. Pet. App. A-6.

[2] California abolished the diminished capacity defense in 1982, after petitioner's crimes. *Daniels v. Woodford*, 428 F.3d 1181, 1208 n.29 (9th Cir. 2005).

conducted in a vacuum, without regard for any direct evidence of intent reflected in the nature of his crimes. *See* Pet. 16-18. But the cases petitioner cites (*see id.*) do not establish that counterintuitive proposition; they hold only that evidence of intent "could be rebutted" by a showing of diminished capacity, not that a jury may not consider all evidence regarding intent in making that determination. *People v. Swain*, 12 Cal. 4th 593, 606 (1996). The court of appeals reasonably concluded that the "overwhelming evidence that Hernandez had the specific intent" to rape and murder both Bristol and Ryan would have defeated any diminished capacity defense based on his mental condition. Pet. App. A-11. That is especially true in light of the jury's rejection of a separate diminished capacity defense based on petitioner's alleged voluntary intoxication. *Id.* at A-5.

Moreover, the California Supreme Court rejected petitioner's ineffective assistance claim in state habeas proceedings, finding no merit in his arguments regarding California law on the diminished capacity defense. *See* Pet. App. A-5. It is implausible for petitioner to suggest that the court of appeals misapplied California law in simply following the lead of the state supreme court. And even if that were not so, certiorari would still not be warranted to review whether the court of appeals correctly applied a state law defense that has long been abolished in California.

2. Petitioner next argues that the court of appeals "improperly applied the *Strickland* prejudice prong when it independently weighed unrebutted

expert evidence." Pet. 22 (capitalization and bold omitted). But the testimony of petitioner's post-conviction experts *was* rebutted by petitioner's own statements. The court of appeals observed that "[petitioner's] own statements – even those made to Dr. Gur himself during their evaluation – belie the notion that [petitioner] could not perceive the emotions of his victims." Pet. App. A-12 (footnote omitted). Further, "the suggestion by Dr. Clausen that [petitioner] was in a dissociative state and 'had no subsequent actual recollection' of his crimes is totally contradicted by his detailed confession[.]" *Id.* Petitioner also had the presence of mind to cut a tic-tac-toe pattern in Ryan's abdomen "'to make the two bodies look different from one another so that the police could not link the cases together.'" *See id.* at A-4–A-5.

In conducting this analysis, the Ninth Circuit followed this Court's well established guidance regarding *Strickland*'s prejudice prong. A court must determine whether there is a "reasonable probability that the additional evidence" petitioner argues should have been presented to the jury "would have changed the jury's verdict." *Cullen v. Pinholster*, 563 U.S. 170, 200 (2011); *accord, e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 19-20 (2009) (per curiam). "In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it," *Belmontes*, 558 U.S. at 20, not just petitioner's expert testimony in a vacuum. The court of appeals reasonably did so, finding the opinions of petitioner's experts "grossly inadequate to

undermine the evidence that [petitioner] was capable of forming, and in fact formed, the intent to rape and kill Bristol and Ryan." Pet. App. A-12–A-13.

3. Finally, petitioner contends that "the reversal of guilt phase relief by a newly constituted panel provided [him] inadequate, arbitrary and capricious appellate review and created a defect akin to an intra-circuit split of authority." Pet. 23 (capitalization and bold omitted). That argument is plainly meritless. Judge Pregerson's death prior to the issuance of the original panel's opinion rendered that opinion a one-to-one decision, and thus a nullity. *See Yovino v. Rizo*, 139 S. Ct. 706, 707-10 (2019) (per curiam) (a federal court may not count the vote of a judge who dies before the decision is issued); *id.* at 709 (two judges are able to decide an appeal, provided that they agree). And Judge Reinhardt was likewise replaced on the panel after his death. *See* Pet. 5. The replacement judges, Judges Wardlaw and Milan Smith, later joined Judge Nguyen in denying petitioner's claim for guilt-phase relief. *Id.* Petitioner suggests that a judge newly added to a panel to replace a recently deceased or otherwise recused judge is somehow bound to follow the tentative views of the earlier judge, but he cites no authority for that proposition.

Petitioner also complains that "[t]he new panel's opinion did not even attempt to address why the previous decision was erroneous." Pet. 26. But the court of appeals was under no obligation to do so, given that the previous decision was void. *See Yovino*, 139 S. Ct. at 710. In any event, both Judge Nguyen's dissent from the initial (void) panel opinion, as well as her later

majority opinion, explained in detail why the putative conclusion of the initial panel was incorrect. *See* Pet. App. C-45–C-53; *id.* at A-8–A-14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: November 22, 2019