

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_

CHRISTOPHER BRIAN ROGERS, *Petitioner*

v.

TAMMATHA SOSS, Acting Warden, *Respondent*.

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

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Under Appointment by the Criminal  
Justice Act

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## QUESTION PRESENTED

Mr. Rogers was charged with first-degree murder in state court. The jury in Mr. Rogers' first trial was deadlocked and could not reach a verdict. There was a mistrial and Mr. Rogers was retried.

After the second trial, during closing arguments, the prosecutor told the jury that Mr. Rogers had the burden of proving his innocence during his criminal trial: "And lastly, what did they prove? What did the defense prove to you in this case?" (ER 537.)<sup>1</sup>

The prosecutor continued:

And what did they do to prove to you and or to challenge any of the evidence that we presented to show you that you shouldn't trust any of the evidence we have presented? Nothing, right?" (ER 538.)<sup>2</sup>

The jury then convicted Mr. Rogers of first-degree murder. (1 CT 13.) Mr. Rogers was sentenced to a term of 50 years to life imprisonment. (ER 8.)

Mr. Rogers argued on direct appeal prosecutorial misconduct based on the prejudicial statements made by the prosecutor that Mr. Rogers was required to present proof of his innocence. The state court

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<sup>1</sup> "ER" refers to the Excerpts of Record filed in the Ninth Circuit.

<sup>2</sup> During oral argument in this case, one of the judges noted that the prosecutor's statements were a "blatant misstatement of the burden of proof" and counted 16 times the prosecutor made such remarks. (Recording of oral argument at about the 7:00 mark, 05/15/2019.)

found that Mr. Rogers forfeited this claim because his attorney failed to object. (ER 25.)

Mr. Rogers filed a petition in federal court and argued that the prosecutor's comments during closing argument shifting the burden of proof to Mr. Rogers constituted prejudicial misconduct pursuant to Darden v. Wainwright, 477 U.S. 168 (1986).

Mr. Rogers argued that Martinez v. Ryan, 566 U.S. 1 (2012) expressly supports Mr. Rogers' argument that the procedural default (failing to object) should be excused because the state failed to appoint counsel at the first opportunity Mr. Rogers was allowed by law to bring forth an ineffective assistance claim for failure to object to the prosecutor's statements. Mr. Rogers argued that procedural default does not apply "if the petitioner establishes cause for the waiver and shows actual prejudice resulting from the alleged violation". Reed v. Farley, 512 U.S. 339, 354 (1994). The Ninth Circuit adopted the mistaken assertion that the cause and prejudice exception is unavailable to Mr. Rogers because Mr. Rogers did not make an independent claim of ineffective assistance of counsel in state court. (Appendix A, p. 2.)

However, this Court held in Martinez v. Ryan, 566 U.S. 1 (2012) that

a federal court may excuse a procedural default when the claim was not properly presented in state court due to an attorney's errors in collateral proceedings. The ultimate holding in Martinez is:

“Where, under state law, ineffective-assistance-of –trial-counsel claims must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing those claims if, in the initial-review collateral proceeding, there was *no* counsel or counsel in that proceeding was ineffective.” (Emphasis added.) Martinez v. Ryan, *supra*, 566 U.S. at 18.

The panel mistakenly found that Martinez v. Ryan 566 U.S. 1 (2012) did not apply to Mr. Rogers because he did not bring an independent constitutional claim based on ineffective assistance of counsel. (Appendix “A”, p. 2.)

The question presented in this case is:

Is federal habeas review barred under Martinez v. Ryan, 566 U.S. 1 (2012) and a claim procedurally defaulted when a petitioner fails to bring an independent constitutional claim based on ineffective assistance of counsel when the state failed to appoint counsel in an initial-review state collateral proceeding?

## **OPINION BELOW**

On August 23, 2019, the United States Court of Appeals for the Ninth Circuit filed an unpublished opinion in Christopher Brian Rogers v. Tammatha Soss, Acting Warden, No. 16-16414, affirming the district court's denial of his petition for writ of habeas corpus. A copy of the opinion is attached hereto as Appendix "A". On October 1, 2019, the Ninth Circuit denied Mr. Rogers' petition for rehearing. A copy of the order is attached hereto as Appendix "B".

## **JURISDICTION**

On August 23, 2019, the United States Court of Appeals for the Ninth Circuit affirmed the district court's denial the petition for writ of habeas corpus. On October 1, 2019, the Ninth Circuit denied Mr. Rogers' petition for rehearing. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

## **STATEMENT OF THE CASE**

Mr. Christopher Rogers was convicted of first-degree murder. During closing argument, the prosecutor told the jury that Mr. Rogers had the burden of proof to prove his innocence in his criminal case. (ER 497, 537, 538.)



On direct appeal in the California state court, Mr. Rogers argued prosecutorial misconduct based on the prejudicial statements made by the prosecutor that Mr. Rogers was required to present proof of his innocence. The state court found that Mr. Rogers forfeited this claim because his attorney failed to object. (ER 25.) On direct appeal, Mr. Rogers' conviction was affirmed on March 11, 2013. Mr. Rogers filed a petition for review in the California Supreme Court, which was denied without comment on June 12, 2013. (ER 8.) Mr. Rogers filed a pro se petition for habeas relief in the superior court, the Court of Appeal, and the California Supreme Court. (ER 9.) The state courts denied Mr. Rogers' petitions. (ER 8-9.)

Mr. Rogers then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. section 2254 and argued that the prosecutor's comments during closing argument shifting the burden of proof to Mr. Rogers constituted prejudicial misconduct pursuant to Darden v. Wainwright, 477 U.S. 168 (1986). The district court denied Mr. Rogers' petition.

Mr. Rogers appealed to the Ninth Circuit. On August 23, 2019 the United States Court of Appeals for the Ninth Circuit affirmed the district court's denial the petition for writ of habeas corpus. On October 1, 2019, the Ninth Circuit denied Mr. Rogers' petition for rehearing. (App. A, App.

B)

### **STATEMENT OF FACTS**

Mr. Rogers was charged with the first-degree murder of Juanita Johnson. (ER 5.) The body was found outside of a house on Thanksgiving Day in 2004. The autopsy showed she died from a gunshot wound to her face. (ER 6.)

Rogers proceeded to a jury trial. The jury was hopelessly deadlocked, and the trial court declared a mistrial on June 28, 2010. (ER 8.)

A second trial began on September 27, 2010. (ER 8.) This time, the prosecutor told the jury that Mr. Rogers had the burden of proving himself innocent and pointed out that Mr. Rogers did not present evidence and did not prove anything. (ER 497, 537, 538.) After hearing the prosecutor's statements, the jury found Mr. Rogers guilty of first-degree murder. The trial court sentenced Mr. Rogers to a term of 50 years to life imprisonment. (ER 8.)

## **REASONS FOR GRANTING THE WRIT**

Mr. Rogers was charged with first-degree murder in state court. The jury in Mr. Rogers' first trial was deadlocked and could not reach a verdict. There was a mistrial and Mr. Rogers was retried.

After the second trial, during closing arguments, the prosecutor told the jury that Mr. Rogers had the burden of proving his innocence during his criminal trial: "And lastly, what did they prove? What did the defense prove to you in this case?" (ER 537.)

The prosecutor continued:

And what did they do to prove to you and or to challenge any of the evidence that we presented to show you that you shouldn't trust any of the evidence we have presented? Nothing, right?" (ER 538.)

The jury then convicted Mr. Rogers of first-degree murder. Mr. Rogers was sentenced to a term of 50 years to life imprisonment. (ER 8.)

Mr. Rogers argued on direct appeal in state court prosecutorial misconduct based on the prejudicial statements made by the prosecutor that Mr. Rogers was required to present proof of his innocence. The state court found that Mr. Rogers forfeited this claim because his attorney failed to object. (ER 25.)

Mr. Rogers filed a petition for a writ of habeas corpus in federal

district court pursuant to 28 U.S.C. § 2254 and argued that the prosecutor's comments during closing argument shifting the burden of proof to Mr. Rogers constituted prejudicial misconduct pursuant to Darden v. Wainwright, 477 U.S. 168 (1986). The United States Supreme Court has long held that a prosecutor holds the burden of proof. In re Winship, 397 U.S. 358, 364 (1970). The prosecutor's comments during his initial argument to the jury shifted the burden of proof to the defendant in violation of the Due Process clause of the Fifth Amendment of the United States Constitution.

Mr. Rogers argued in the Ninth Circuit that the procedural default of failing to object in the state court should be excused because he established cause and prejudice for the procedural default that he forfeited this claim due to his attorney's failure to object. Mr. Rogers relied on Martinez v. Ryan, 566 U.S. 1 (2012) to demonstrate he established cause for the default when the state failed to appoint counsel in his initial state collateral proceedings to raise the issue that trial counsel was ineffective for failing to object to the prosecutor's prejudicial statements. Ineffective assistance of counsel constitutes cause sufficient to excuse a procedural default.

The Ninth Circuit found that “Rogers’ reliance on Martinez v. Ryan, 566 U.S. 1 (2012) is inapposite because Rogers does not bring an independent constitutional claim based on ineffective assistance of counsel”. (App. A, p. 2.) Mr. Rogers files this petition for writ of certiorari because the Ninth Circuit’s decision is contrary to this Court’s decision in Martinez v. Ryan, 566 U.S. 1 (2012).

This Court held in Martinez v. Ryan, 566 U.S. 1 that a federal court may excuse a procedural default when the claim was not properly presented in state court due to an attorney’s errors in collateral proceedings. The ultimate holding in Martinez is:

“Where, under state law, ineffective-assistance-of –trial-counsel claims must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing those claims if, in the initial-review collateral proceeding, there was *no* counsel or counsel in that proceeding was ineffective.” (Emphasis added.) Martinez v. Ryan, supra, 566 U.S. at 18.

A federal habeas court is not precluded from hearing ineffective assistance of counsel claims that have not been raised and exhausted in state court when there was no counsel or counsel was ineffective. Martinez v. Ryan, supra, 566 U.S. at 18. Here, there was no counsel appointed to represent Mr. Rogers in a state post-conviction habeas proceeding. See the State’s Lodged

Documents 8, 10, and 15. The state lodged documents can be assessed by logging into Appellate ECF and then choosing Reports > PACER Report.

Mr. Rogers' reliance on Martinez supports his argument that the procedural default should be excused and that an appellate court may decide his claim on the merits. The Ninth Circuit decision directly conflicts with this Court's decision in Martinez v. Ryan, 566 U.S. 1 (2012) Appellate court decisions should conform to Supreme Court law.

Pursuant to Martinez v. Ryan, 566 U.S. 1 (2012), an appellate court may consider Mr. Rogers' claim of state prosecutorial misconduct raised in his 28 U.S.C. § 2254 petition because the procedural default should be excused. The procedural default should be excused because Mr. Rogers has established "cause" for the procedural default when the state failed to appoint counsel in his initial state collateral proceedings in order to raise the claim that trial counsel was ineffective for failing to object to the prosecutor's numerous prejudicial statements during closing argument that Mr. Rogers had the burden of proof to prove his innocence. In addition, Mr. Rogers has established prejudice because the prosecutor's false statements to the jury were improper and allowed the jury to consider the fact that Mr. Rogers failed to put on a defense. Darden v. Wainwright, 477 U.S. 168 (1986).

The panel mistakenly found that Martinez v. Ryan 566 U.S. 1 (2012) did not apply to Mr. Rogers because he did not bring an independent constitutional claim based on ineffective assistance of counsel. (Appendix “A”, p. 2.) The rule in Martinez v. Ryan is that a procedural default will not bar federal review in cases if in the initial review collateral proceeding, there was *no* counsel or counsel in that proceeding was ineffective. Martinez v. Ryan, *supra*, 566 U.S. at 18. (Emphasis added.)

On August 23, 2019, the panel filed a memorandum affirming the district court’s decision:

“The California Court of Appeal held that Rogers forfeited his prosecutorial misconduct claims by failing to make a contemporaneous objection at trial, and California’s contemporaneous objection rule is an adequate and independent state ground that precludes federal habeas review”, citing to Paulino v. Castro, *supra*, 371 F. 3d at 1093 and Coleman v. Thompson, 501 U.S. 722, 729-30 (1991).

The panel “rejected Mr. Roger’s argument that his procedural default should be excused due to ineffective assistance of counsel because Rogers has not shown that he was prejudiced by his attorney’s performance. See Vansickel v. White, *supra*, 166 F. 3d at 958. Rogers reliance on Martinez v. Ryan, 566 U.S. 1 (2012), is inapposite because Rogers does not bring an independent constitutional claim based on ineffective assistance of counsel.”

This petition for writ of certiorari should be granted because Martinez v. Ryan, *supra*, expressly supports Mr. Rogers’ argument that the procedural

default should be excused because the state failed to appoint counsel at the first opportunity Mr. Rogers was allowed by law to bring forth an ineffective assistance claim for failure to object to the prosecutor's statements. Mr. Rogers argued that procedural default does not apply "if the petitioner establishes cause for the waiver and shows actual prejudice resulting from the alleged violation". Reed v. Farley, 512 U.S. 339, 354 (1994). The Ninth Circuit adopted the assertion that the cause and prejudice exception is unavailable to Mr. Rogers because Mr. Rogers did not make an independent claim of ineffective assistance of counsel in state court. (Appendix A, p. 2.)

The Ninth Circuit has applied the California contemporaneous objection rule in affirming denial of a federal habeas petition on grounds of procedural default where there was a complete failure to object at trial. Paulino v. Castro, 371 F. 3d 1083, 1092-1093 (9<sup>th</sup> Cir. 2004). Procedural default does not apply "if the petitioner establishes cause for the waiver and shows actual prejudice resulting from the alleged violation". Reed v. Farley, 512 U.S. 339, 354 (1994).

The Supreme Court has "not given the term 'cause' precise content." Reed v. Ross, 468 U.S. 1, 13 (1984). However, ineffective assistance of



counsel constitutes cause sufficient to excuse a procedural default. Martinez v. Ryan, supra, 566 U.S. at 17. The right to the effective assistance of counsel is a cornerstone of our criminal justice system. It has been accorded “not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.” Mickens v. Taylor, 535 U.S. 162, 166 (2002).

To excuse procedural default, an appellant must show “counsel’s performance was deficient” and “the deficient performance prejudiced the defense.” Strickland v. Washington, 466 U.S. 668, 687 (1984).

In California, a claim of ineffective assistance of trial counsel is to be raised in a post-conviction setting, that is, a petition for writ of habeas corpus. People v. Pope, 23 Cal. 3d 412, 425 (Cal. 1979). In this case, Mr. Rogers’ ineffective assistance claim of trial counsel for failing to object to the prosecutor’s prejudicial statements at closing argument had to be raised not in the direct appeal, but in a petition for writ of habeas corpus in state collateral proceedings. The record shows that this claim was not raised in Mr. Rogers’ habeas petitions and no counsel was appointed. See the State’s Lodged Documents 8, 10, and 15.

In Martinez v. Ryan, Martinez sought relief in federal court. Martinez

“acknowledged the state courts denied his claims by relying on a well-established state procedural rule, which, under the doctrine of procedural default, would prohibit a federal court from reaching the merits of his claims.” Martinez v. Ryan, supra, 566 U.S. at 7. Martinez could overcome this hurdle to federal review, he argued, because he had cause for the default: His first postconviction counsel was ineffective for failing to raise the claims in the first postconviction proceedings. Martinez v. Ryan, supra, 566 U.S. at 7.

In Martinez, the Court discussed Coleman v. Thompson, 501 U.S. 722, 755 (1991): Coleman left open “whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. These proceedings can be called for the purposes of this opinion, “initial review collateral proceedings.” Martinez v. Ryan, supra, 566 U.S. at 9.

“Coleman had suggested, though without holding, that the Constitution may require States to provide counsel in initial-review collateral proceedings because ‘in [these] cases...state collateral review is the first place a prisoner can present a challenge to his conviction. As Coleman noted, this makes the initial-review collateral proceeding a

prisoner's 'one and only appeal' as to an ineffective-assistance claim....and this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings.” Martinez v. Ryan, supra, 566 U.S. at 8-9.

In the present case, just as in the Martinez case, “the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner’s direct appeal as to the ineffective-assistance claim”. Martinez v. Ryan, supra, 566 U.S. at 11. “By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process where counsel is constitutionally guaranteed, the State significantly diminishes prisoners’ ability to file such claims. It is within the context of this state procedural framework that counsel’s ineffectiveness in an initial-review collateral proceedings qualifies as cause for procedural default.”

Martinez v. Ryan, supra, 566 U.S. at 13. The Court ruled:

“Where, under state law, ineffective-assistance-of –trial-counsel claims must be raised in an initial- review collateral proceeding, a procedural default will not bar a federal habeas court from hearing those claims if, in the initial-review collateral proceeding, there was *no* counsel or counsel in that proceeding was ineffective.” Martinez v. Ryan, supra, 566 U.S. at 18. (Emphasis added.)

In the present case, since Mr. Rogers had “no” counsel appointed during his state post-conviction habeas proceedings, a claim of ineffective of assistance of counsel can be raised in a federal habeas petition which satisfies the “cause” prong of the cause and prejudice test which bars procedural default. The absence of counsel in the state habeas proceedings and the subsequent failure to raise the issue that trial counsel was ineffective for failing to object to the prosecutor’s prejudicial statements during closing argument shows cause to excuse the procedural default. Martinez v. Ryan, supra, 566 U.S. at 18. “A state court’s invocation of a procedural rule to deny a prisoner’s claims precludes federal review of the claim if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed. Martinez v. Ryan, supra, 566 U.S. at 10. Here, the California court found that Mr. Rogers forfeited the prosecutorial misconduct claim by failing to object at the trial. (ER 25.) However, Mr. Roger may obtain federal review of a defaulted claim by showing “cause” for the default and “prejudice” from a violation of federal law. Martinez v. Ryan, supra, 566 U.S. at 10.

In addition to “cause”, Mr. Rogers has established actual “prejudice”

resulting from counsel's failure to object to the prosecutor's statements during closing argument. Reed v. Farley, supra, 512 U.S. at 354.

Procedural default does not apply if Mr. Rogers establishes cause for the waiver (failure to object) and shows actual prejudice resulting from the failure to object. Reed v. Farley, supra, 512 U.S. at 354. Here, the claims of prosecutorial misconduct warrant reversal, then trial counsel's failure to object satisfies the cause prong of the cause and prejudice test and the claim is not procedurally barred.

Mr. Rogers establishes prejudice because the prosecutorial misconduct claim warrants reversal. Darden v. Wainwright, 477 U.S. 168 (1986). "The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Tak Sun Tan v. Runnels, 413 F. 3d 1101, 1112 (9<sup>th</sup> Cir. 2005), citing to Darden v. Wainwright, supra. Here, the prosecutor's statements during closing argument were in error because the statements shifted the burden of proof in this criminal case to Mr. Rogers and this constituted prejudicial misconduct pursuant to Darden v. Wainwright, 477 U.S. 168 (1986). The United States Supreme Court has long held that a prosecutor holds the burden of proof. The burden of proof is on the state to

prove every element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). Conversely, absent an affirmative defense, a defendant bears no burden of proof in the context of a criminal trial. Here, Mr. Rogers was prejudiced because the prosecutor told the jury that the defense had a burden to disprove aspects of the prosecution's case in order to be entitled to an acquittal. The prosecutor argued to the jury that Mr. Rogers had a burden of persuading the jury of his innocence. (ER 537-538.)

Given that Mr. Rogers suffered prejudice due to counsel's failure to object to these instances of prosecutorial misconduct at trial, Mr. Rogers has satisfied the cause and prejudice standard. Procedural default does not apply if the petitioner establishes cause for the waiver and shows actual prejudice resulting from the alleged violation. "A finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would be procedurally defaulted." Martinez v. Ryan, *supra*, 566 U.S. at 17. Therefore, this petition for writ of certiorari should be granted so that federal appellate courts decisions will conform to the rule in Martinez v. Ryan, *supra*, 566 U.S. 1 that procedural default will not bar federal review in cases if in the

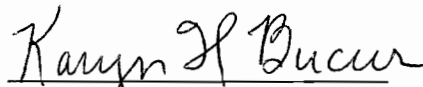
initial review collateral proceedings, there was no counsel or counsel in that proceeding was ineffective.

### CONCLUSION

For the foregoing reasons, Mr. Christopher Brian Rogers respectfully submits that the petition for writ of certiorari should be granted.

Dated: December 9, 2019

Respectfully Submitted,

A handwritten signature in cursive script, reading "Karyn H. Bucur", written over a horizontal line.

Karyn H. Bucur  
Attorney for Petitioner

FILED

AUG 23 2019

NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

CHRISTOPHER BRIAN ROGERS,

Petitioner-Appellant,

v.

TAMMATHA SOSS, Acting Warden,

Respondent-Appellee.

No. 16-16414

D.C. No. 2:15-cv-01805-JKS

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
James K. Singleton, District Judge, Presiding

Argued and Submitted May 15, 2019  
San Francisco, California

Before: WALLACE, IKUTA, and CHRISTEN, Circuit Judges.

Christopher Rogers appeals from the district court's denial of his petition for a writ of habeas corpus. We have jurisdiction under 28 U.S.C. § 2253.

The California Court of Appeal did not unreasonably apply *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), in concluding that, taking the facts in the light

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

App A



most favorable to the prosecution, there was sufficient evidence of premeditation and deliberation, *see People v. Rogers*, 2013 WL 870617, at \*3–4 (Cal. Ct. App. Mar. 11, 2013). The court reasonably concluded that the jury could have reasonably found that Rogers engaged in planning because Rogers knew the victim, armed himself with a gun, and committed the crime in a secluded area, and that Rogers acted deliberately because he shot the victim from a close range. *See id.*

The California Court of Appeal held that Rogers forfeited his prosecutorial misconduct claims by failing to make a contemporaneous objection at trial, *see id.* at \*4, and California's contemporaneous objection rule is an adequate and independent state ground that precludes federal habeas review, *see Paulino v. Castro*, 371 F.3d 1083, 1093 (9th Cir. 2004); *see also Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991). We reject Rogers's argument that his procedural default should be excused due to ineffective assistance of counsel because Rogers has not shown that he was prejudiced by his attorney's performance. *See Vansickel v. White*, 166 F.3d 953, 958 (9th Cir. 1999). Rogers's reliance on *Martinez v. Ryan*, 566 U.S. 1 (2012), is inapposite because Rogers does not bring an independent constitutional claim based on ineffective assistance of counsel.

**AFFIRMED.**

FILED

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

OCT 1 2019

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

CHRISTOPHER BRIAN ROGERS,

Petitioner-Appellant,

v.

TAMMATHA SOSS, Acting Warden,

Respondent-Appellee.

No. 16-16414

D.C. No. 2:15-cv-01805-JKS  
Eastern District of California,  
Sacramento

ORDER

Before: WALLACE, IKUTA, and CHRISTEN, Circuit Judges

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Ikuta and Judge Christen voted to deny the petition for rehearing en banc and Judge Wallace recommended denial of the petition for rehearing en banc. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are  
DENIED.

App B