No. 20-5764

In the Supreme Court of the United States

RODNEY BERRYMAN, SR.,

Petitioner,

v.

ROBERT K. WONG,

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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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Rodney Berryman presents five questions (Pet. i) that are fairly restated as follows:

1. Whether the court of appeals reasonably denied Berryman's pro se application for an interlocutory appeal in 2002.

2. Whether the court of appeals reasonably declined to consider Berryman's pro se claims of false evidence on appeal from the final judgment.

3. Whether the court of appeals reasonably declined to consider Berryman's new, pro se claims that trial counsel had violated his right to autonomy by allegedly conceding guilt over Berryman's express objection.

DIRECTLY RELATED PROCEEDINGS

Superior Court of the State of California, County of Kern:

People v. Rodney Berryman, No. 34841 (Nov. 28, 1988) (judgment of death).

California Supreme Court:

People v. Rodney Berryman, No. S008182 (Dec. 27, 1993) (on automatic appeal, convictions and death sentence affirmed).

In re Rodney Berryman, No. S034862 (Dec. 27, 1993) (petition for writ of habeas corpus denied).

In re Rodney Berryman, No. S068933 (Apr. 29, 1998) (petition for writ of habeas corpus denied).

In re Rodney Berryman, No. S077805 (Apr. 21, 1999) (petition for writ of habeas corpus denied).

Rodney Berryman v. Davis, No. S226259 (May 4, 2015) (petition for writ of habeas corpus filed).

United States District Court for the Eastern District of California:

Rodney Berryman v. Ayers, No. 1:95-CV-05309-AWI (July 10, 2007) (petition for writ of habeas corpus denied).

United States Court of Appeals for the Ninth Circuit:

Rodney Berryman v. Wong, No. 10-99004 (Mar. 27, 2020) (affirming denial of habeas corpus relief).

Rodney Berryman v. Woodford, No. 02-80106 (Dec. 17, 2002) (denying interlocutory appeal).

Supreme Court of the United States:

Rodney Berryman v. State of California, No. 93-7680 (Jan. 9, 1995) (certiorari denied).

Rodney Berryman, Sr. v. Chappell, Warden. No. 12-9604 (Jun. 3, 2013) (certiorari denied).

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STATEMENT

1. In 1987, police officers were directed to the lifeless body of 17-year-old Florence Hildreth on the side of a dirt road in Delano, California. Pet. App. A5 at 4. Her body was battered and nearly naked. *Id.* An autopsy confirmed that she had been sexually penetrated prior to her death, and that she had died as a result of a knife wound to her neck. *Id.*; *see People v. Berryman*, 6 Cal. 4th 1048, 1064 (1994).

The police soon discovered physical evidence linking Berryman to the crime. Pet. App. A5 at 4-5. As relevant here, the police found at the scene of the crime tire tracks, shoe prints, and a broken piece of jewelry that closely matched corresponding items in Berryman's possession. *Id.* at 5. They also found, to a fairly high degree of certainty, that Hildreth's blood was on one of Berryman's shoes. *Id.*; *see Berryman*, 6 Cal. 4th at 1064.

2. The State charged Berryman with capital murder for killing Hildreth while engaged in a sexual assault. Pet. App. A5 at 4; *see* Cal. Penal Code § 190.2(a)(17). At the guilt phase of trial, defense counsel argued that the physical and forensic evidence mentioned above, along with a host of other circumstantial evidence, was insufficient to establish Berryman's identity as the perpetrator. Pet. App. A5 at 5. Counsel also presented an alternative argument that, even if Berryman had killed Hildreth, there was insufficient evidence that he had done so while engaged in a sexual assault. *Id.* But the jury found Berryman guilty of special-circumstance murder. *Id.* at 4.

Following the presentation of evidence in aggravation and mitigation at the penalty-phase trial, the jury returned a verdict of death. Pet. App. A5 at 8.

The California Supreme Court affirmed Berryman's conviction and sentence on direct appeal. *See Berryman*, 6 Cal. 4th at 1048. It also denied Berryman's state habeas petition. Pet. App. A.5 at 9.

3. In 1998, counsel filed on Berryman's behalf an amended petition under 28 U.S.C. § 2254 in the federal district court. D. Ct. Dkt. 147. Among many other claims, that petition reiterated the theory that the evidence at trial had not been sufficiently substantial to establish Berryman's identity as the perpetrator. *Id*. at 42.

Soon after counsel filed that federal petition, Berryman personally and repeatedly complained that the petition did not include any allegation that certain evidence establishing his identity as the perpetrator was false as opposed to merely insubstantial. *See* D. Ct. Dkt. 462 at 2-4. The district court determined that Berryman's complaints did not warrant the replacement of habeas counsel. *See id*. at 2-3. And the court subsequently declined to entertain a personal request from Berryman for reconsideration. *See* Pet. App. A1.

Berryman then asked the court of appeals for immediate review of the district court's decision not to entertain his personal request for reconsideration. *See* Pet. App. A1. The court of appeals denied his request, explaining in part that he "will be able to raise on appeal from a final judgment

the issue of whether he was prejudiced by the district court's refusal to file his pro se motion." *Id*. at 1.

In 2010, the district court entered a final judgment denying the habeas petition. Pet. App. B at 14. The court issued a certificate of appealability on a single claim of ineffective assistance at the penalty phase. *Id*. at 11-14. Soon thereafter, the court appointed new counsel to represent Berryman on appeal. D. Ct. Dkt. 425. While the appeal was pending, Berryman personally asked the district court to certify additional claims, including his allegations of false evidence. D. Ct. Dkt. 459. The court entertained the request, but then explained at length that none of the issues warranted inclusion in the certificate of appealability. D. Ct. Dkt. 462.

4. In 2014, counsel asked the court of appeals to expand the certificate of appealability to include many additional claims. C.A. Dkt. 200 at 81-136. The claims counsel proposed to add did not include Berryman's desired allegations of false evidence. *Id*. Although Berryman himself personally asked the court of appeals to consider those allegations, C.A. Dkt. 108, the court declined to do so while he was represented by counsel, C.A. Dkt. 110. The court of appeals also declined to entertain Berryman's personal requests to raise a new pro se claim that trial counsel had violated his right to autonomy by allegedly conceding Berryman's guilt. C.A. Dkt. 330, 331. The court of appeals ultimately affirmed the denial of habeas relief, Pet. App. A5, and subsequently denied rehearing, Pet. App. C.

ARGUMENT

1. Berryman claims that the court of appeals erred by denying his request for an immediate appeal in 2002. Pet. 5-7 (first question presented). That claim does not warrant further consideration because it is untimely and, in any event, the court of appeals reasonably applied established rules in denying the request.

Berryman's request for an immediate appeal was based on the fact that the district court did not entertain his personal request for reconsideration of its decision not to replace federal habeas counsel. *See* Pet. App. A1 at 1. In denying the request, the court of appeals explained that "[b]ecause Berryman will be able to raise on appeal from a final judgment the issue of whether he was prejudiced by the district court's refusal to file his pro se motion, immediate appeal is not available under either the collateral order doctrine or 28 U.S.C. § 1292(a)(1)." *Id.* The court also reasoned that there was no room for a difference of opinion under 28 U.S.C. § 1292(b) on the underlying question of "whether a district court is required to accept pro se filings when the petition asserts an irreconcilable conflict with appointed counsel." *Id*. at 2 (footnote omitted). The court similarly determined that mandamus relief was unavailable because "a district court may require a petitioner to communicate with the court through appointed counsel even when the petitioner asserts an irreconcilable conflict with appointed counsel." *Id*. at 2-3 (footnote omitted).

Any suggestion that the court erred by denying the request for an immediate appeal is untimely because the court denied the request nearly two

decades ago, in 2002. Pet. App. A1 at 1. And Berryman does not identify any division of authority that is implicated by the appellate court's determination that a conflict between a habeas petitioner and his appointed counsel may be effectively reviewed on appeal from a final judgment. *See generally Flanagan v. United States*, 465 U.S. 259 (1984) (order disqualifying defense counsel is not immediately appealable).

Nor is there any reason to review the appellate court's determination that Berryman was unlikely to succeed on the merits. The court explained that "a district court may require a petitioner to communicate with the court through appointed counsel even when the petitioner asserts an irreconcilable conflict." Pet. App. A1 at 2-3. That explanation was consistent with this Court's precedent. *See McKaskle v. Wiggins*, 465 U.S. 168, 182-186 (1984).[1]

2. The balance of Berryman's certiorari petition complains that the court of appeals did not entertain certain claims that he had tried to raise on appeal from the final judgment. For example, he complains that the court of appeals did not entertain his pro se request to certify claims that the prosecution team had planted or otherwise falsified evidence establishing his identity as the perpetrator. Pet. 8-12 (second question presented); *see* C.A. Dkt. 108 at 14-15,

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[1] It is also consistent with lower-court precedent. *See*, *e.g.*, *Abdullah v. United States*, 240 F.3d 683, 686 (8th Cir. 2001) ("A district court has no obligation to entertain pro se motions filed by a represented party."); *Cross v. United States*, 893 F.2d 1287, 1291-1292 (11th Cir. 1990) (there is no right to "hybrid representation" partly by counsel and partly by defendant); *United States v. Daniels*, 572 F.2d 535, 540 (5th Cir. 1978) (noting that hybrid representation, partly pro se and partly counseled, is not allowed).

17, 21-22, 27-33 (request). He similarly complains that the court of appeals did not entertain his pro se request to develop an uncertified claim of false evidence through DNA testing. Pet. 13, 16, 37 (third question presented); *see* C.A. Dkt. 330 at 9 (request). And he argues that, by not entertaining his pro se claims of false evidence, the court of appeals did not allow him to demonstrate that he had been "prejudiced by the district court's refusal to file his pro se motion" as contemplated by its earlier order denying his request for an immediate appeal. Pet. 19-21 (fifth question presented) (quoting Pet. App. A1 at 1).

Berryman's complaints do not warrant review because the court of appeals reasonably applied established rules in declining to entertain pro se claims from Berryman while he was represented by appellate counsel. And the strategic decision of appellate counsel not to seek certification of Berryman's desired claims was entirely reasonable—especially in light of the district court's detailed and compelling explanation for omitting the claims from the certificate of appealability.

The district court first considered Berryman's claims of false evidence when deciding whether to replace counsel for not raising the claims in the federal habeas petition. *See* D. Ct. Dkt. 317 (sealed). The court agreed with the assessment of federal habeas counsel that the claims were "implausible." D. Ct. Dkt. 462 at 3-4. It explained that

> evidence of malfeasance on the part of Kern County law enforcement officials (including investigators for the District

> Attorney's Office) in manipulating evidence *cannot be developed due to nonexistence*. The Court has studiously considered Berryman's pro se claims, as presented in his pro se state habeas petition and reiterated in his pro se communications received by the Court. The contentions he advances simply cannot be sustained. The evidence presented at Mr. Berryman's trial does not appear to have been, in any way, planted.

C.A. Dkt. 40-2 at 108-109 (emphasis in original); *see also* D. Ct. Dkt. 317 (sealed).

The district court did, however, appoint independent counsel to investigate the relationship between Berryman and habeas counsel as well as Berryman's claims of malfeasance by police investigators. D. Ct. Dkt. 390 (sealed). After concluding that investigation, independent counsel found no wrongdoing, telling the court that:

> [a]t this point, counsel has pursued many investigative leads, without discovering evidence adequate to support removing habeas counsel because of an incompetent decision to assert that the events surrounding Ms. Hildreth's death do not constitute capital murder, and not the claims Mr. Berryman has asserted in his pro se documents regarding his complete non-involvement in the crimes.

C.A. Dkt. 40-2 at 121. Thereafter, the district court stated that the report did not change its "previously expressed views." D. Ct. Dkt. 462 at 4.

Counsel subsequently asked the court of appeals to expand the certificate of appealability to include several additional claims. C.A. Dkt. 200 at 81-136. But the proposed claims did not include any allegation of false evidence. *Id.* And the court of appeals did not entertain Berryman's personal requests to expand the certificate and develop his allegations through DNA testing. C.A.

Dkt. 110 (order regarding expansion of certificate); C.A. Dkt. 211 (order regarding DNA testing). The court of appeals explained that "[b]ecause appellant is represented by counsel, only counsel may submit filings, and this court therefore declines to entertain the submissions." C.A. Dkt. 211.

The decision of the court of appeals not to entertain Berryman's desired claims of false evidence was entirely reasonable. As previously discussed, a court is not obliged to consider pro se claims from a party who is represented by counsel. *See, e.g.*, *United States v. Cohen*, 888 F.3d 667, 682 (4th Cir. 2018) ("an appellant who is represented by counsel has no right to file pro se briefs or raise additional substantive issues in an appeal"); *McMeans v. Bigano*, 228 F.3d 674, 684 (6th Cir. 2000) (similar). To be sure, the court of appeals had previously observed in 2002 that Berryman would be able to raise his claims of prejudice on appeal from the final judgment. Pet. App. A1 at 1. But that observation did not mean that Berryman would be able to raise those claims in pro se while being represented by an attorney who chose not to advance the claims. As a result, the decision of the court of appeals not to entertain Berryman's pro se claims while he was represented by counsel does not warrant further consideration.

It was also reasonable for counsel not to raise Berryman's desired claims of false evidence on appeal from the final judgment. As this Court has explained, an indigent defendant does not have "a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client,

if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id.* at 751-752. Here, none of Berryman's claims of false evidence is meritorious:

Jewelry evidence. Berryman's first claim of false evidence involves expert testimony from criminalist Gregory Laskowski that a small horseshoe-shaped link of jewelry found at the crime scene could have come from a broken chain that law enforcement officers seized from Berryman's pickup truck. Pet. 8; *see People v. Berryman*, 6 Cal. 4th at 1064, 1083. Berryman alleges that officers had actually discovered a different round-shaped clasp at the crime scene, replaced it with the horseshoe-shaped link, and then submitted the replacement to Laskowski for analysis.

The district court considered Berryman's claim and determined that it did not warrant inclusion in the certificate of appealability. D. Ct. Dkt. 462 at 13-14, 18. The court explained that the jury had access to a photograph depicting the shape of the item found at the crime scene. *Id.* at 14. In any event, "the presence of a round clasp at the crime scene that had similarities to the broken chain links and necklaces found in Berryman's pickup truck would be just as inculpatory as the presence of a horseshoe shaped link . . . ."

Id. In other words, "the presence of a gold-colored clasp at the crime scene is no less incriminating than a gold-colored horseshoe link." *Id.* at 18.

Counsel chose not to press the claim of false evidence regarding the jewelry in the court of appeals. *See* C.A. Dkt. 200 at 81-136. That choice was entirely reasonable, particularly in light of the district court's explanation for omitting the claim from the certificate of appealability. Indeed, Berryman's claim is little more than a request to reconsider the inferences that the jury drew from testimony and photographic evidence admitted at trial. And counsel could have reasonably understood that the ability to draw different inferences from an item of evidence does not establish that the evidence is false.

Tire track evidence. Berryman's second claim of false evidence involves expert testimony regarding tires that law enforcement officers seized from his truck and a limited service spare tire that they seized from a residence where he had been staying. Pet. 9. Criminalist Laskowski made impressions of the tires and opined that they were consistent with tracks at the scene of the crime. D. Ct. Dkt. 351 at 10; *see id.* at 134. Berryman appears to argue that the evidence was false because (i) there was not enough time for him to kill Hildreth and then replace the spare tire; (ii) there were inconsistent accounts of where the spare tire had been installed on his truck; and (iii) there was inconsistent evidence about which of the rear tires matched the crime scene. *See* Pet. 9; D. Ct. Dkt. 462 at 6-7, 20.

The district court considered this claim and determined that it did not warrant inclusion in the certificate of appealability. D. Ct. Dkt. 462 at 20-21; *see id.* at 6-8. The court explained that "[w]hile the timeline for Berryman to have committed rape and murder, then remove and replace the limited spare tire within less than two hours would have been strained, the Court does not agree it would have been impossible." *Id.* at 7. It also reasoned that, although Laskowski might have made a prior inconsistent statement about which of the rear tires matched the crime scene, the inconsistency "is far from enough to vacate Berryman's conviction." *Id.* at 20. Laskowski "was confident the limited spare tire had been mounted on the vehicle present at the crime scene" and his "testimonial error about whether the second tire which matched impressions at the crime scene was the left rear tire or the right rear tire is not significant." *Id.* at 21. The district court had also noted previously that, although an eyewitness saw a spare tire on the left-rear side of Berryman's truck rather than on the right-rear side, as Laskowski had opined, the witness had made that observation "earlier in the week" of the murder. D. Ct. Dkt. 351 at 20 n.16. The timing of that observation gave Berryman ample opportunity to move the spare sometime before killing Hildreth.

Counsel again chose not to press the claim of false evidence in the court of appeals. *See* C.A. Dkt. 200 at 81-136. That choice was entirely reasonable, particularly in light of the district court's explanation for omitting the claim from the certificate of appealability. Indeed, the jurors were well aware of the

tightness in the prosecution's timeline, as defense counsel had pressed the issue at trial. *See Berryman*, 6 Cal. 4th at 1065, 1081-1082. Moreover, even to the extent that there was inconsistent evidence about the rear tires, the probability that one of those tires matched the crime scene was immaterial in light of the ample other evidence establishing Berryman's identity as the perpetrator. *See* D. Ct. Dkt. 351 at 143-146. As a result, the decision not to entertain Berryman's claim of false evidence regarding the tire tracks does not warrant further consideration.

Shoe print evidence. The final claim of false evidence that Berryman discusses in his certiorari petition involves expert testimony from criminalist Laskowski linking Berryman's shoes to the scene of the crime. Pet. 8. Berryman does not appear to dispute that, when law enforcement officers confronted him, he was wearing Brooks brand shoes like the ones that left distinctive prints at the scene. *See* D. Ct. Dkt. 351 at 20. Instead, he claims that officers used a second pair of Brooks shoes to fabricate the prints and then submitted that second pair to Laskowski for analysis. And he speculates that DNA testing might somehow establish that the shoes admitted into evidence did not belong to him. Pet. 16, 37.

The district court determined that the claim was "implausible" and "unsubstantiated." D. Ct. Dkt. 462 at 9-10, 14-15, 18, 20. The court explained that Laskowski had relied on crime scene photographs taken prior to Berryman's arrest. *Id.* at 3-4. Likewise, there was "no indication from the

facts alleged that shoe impression photographs were taken after Berryman was arrested . . . ." *Id.* at 20. In other words, the officers could not have used a particular type of shoe to fabricate distinctive prints at the scene, because they had already photographed the prints before discovering whether Berryman wore the same type of shoes.

Counsel chose not to press the claim of false shoe evidence in the court of appeals. *See* C.A. Dkt. 200 at 81-136. And it appears that counsel chose not to develop the claim through DNA testing despite its potential availability under state law. *See* Cal. Penal Code § 1405. Again, those choices were entirely reasonable, particularly in light of the district court's detailed explanation for omitting the claim from the certificate of appealability. Berryman's claim amounts to a request for further consideration of the application of settled law to the particular facts of his case.

3. Finally, Berryman claims that the court of appeals erred by not entertaining his new, pro se claim that trial counsel violated his right to autonomy under *McCoy v. Louisiana*, 584 U.S. ___ (2018), by allegedly conceding guilt over his express objection. Pet. 13-15 (third question presented); *see* C.A. Dkt. 330 (motion). Similarly, he claims that the court of appeals erred by not entertaining the pro se claim in which he elaborated that trial counsel violated *McCoy* as applied by the state court in *People v. Eddy*, 33 Cal. App. 5th 472 (2019). Pet. 17-18 (fourth question presented); *see* C.A. Dkt. 348 (motion).

The court of appeals properly declined to entertain the claims because Berryman was represented by counsel. The court explained that "[b]ecause Appellant is represented by counsel, only counsel may submit filings, and this Court therefore declines to entertain the submissions." C.A. Dkt. 331. As the court of appeals reminded Berryman, counsel is vested with the authority to determine which issues to pursue. *See Barnes*, 463 U.S. at 751-753. It is not only reasonable for appellate counsel to winnow out weaker arguments and focus on a few key issues, it is effective lawyering. *Id.* at 751-752. And it is not the function of the appellate court to direct counsel regarding what strategy to take and what issues to raise.

Moreover, the premise that trial counsel conceded Berryman's guilt is simply incorrect. During the guilt phase of trial, counsel "introduced evidence to undermine the probativeness of the People's evidence, in an effort to show that they had not carried their burden. He played on various uncertainties, including uncertainties related to time." *Berryman*, 6 Cal. 4th at 1065. In particular, trial counsel suggested it would have been impossible for Berryman to have raped and killed Hildreth and then remove the limited service spare tire from a wheel on his truck within the brief window of time between Hildreth's last appearance and Berryman's return to his friend's house. D. Ct. Dkt. 351 at 23. Counsel argued that all the evidence of Berryman's guilt was circumstantial and there were no eyewitnesses. *Id.* Counsel further argued that from the initial interviews given by members of Hildreth's family to the

testimony given at trial, some of the time estimates had changed in order to incriminate Berryman out of animosity. *Id.* The trial record does not reflect any concession of guilt by defense counsel.

Berryman focuses on a remark by defense counsel during closing argument regarding the gold-colored chain links: "We're not saying what Mr. Laskowski [the prosecution's expert] is saying he saw is incorrect." Pet. 25 (quoting Reporter's Transcript (RT) at 3408). Berryman takes this as a concession that the prosecution's expert was correct in opining that the jewelry link found at the murder scene matched the chain found in Berryman's pickup truck. But that is not an accurate characterization of counsel's statement. At trial, a defense expert testified that photographs of the necklace were of very little analytical value because they were out of focus and lacked detail. RT 3049-3053. Defense counsel's remark to the jury merely noted that, although the prosecution expert might have subjectively believed that the gold links matched, there was no way to confirm this conclusion because the photographs of the gold links were out of focus.[2]

Berryman also argues that defense counsel conceded guilt when he stated in closing argument: "We don't disagree that that could probably be from the chain, but when he tries to show you his work, that was a waste of time. [¶]

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[2] That meaning is confirmed by what defense counsel stated immediately thereafter: "But what he's trying to show you he saw you can't see because the photograph is out of focus. Why even bother to show these photographs if they're out of focus. You can't show anything. You can't judge what he says he has seen." RT 3408.

They're out of focus." 26 RT 3409. Again, this was not a concession that the chain links in Berryman's truck were from the same chain as the link found at the crime scene. Defense counsel was merely stating (perhaps inartfully) that the photographs relied on by the prosecution's expert were of the chain found in Berryman's truck or the crime scene, not that the links all came from the *same* chain.

Berryman further complains that, although his trial lawyer "argued at length that the prosecution had charged the wrong person, [he] briefly argued in the alternative that Berryman might have lost his temper after consensual sex and was guilty only of voluntary manslaughter." Pet. App. A5 at 5; *see also* 26 RT 3418. But this was far from an admission of guilt. As the record demonstrates, defense counsel's argument focused on the contention that Berryman was not the perpetrator. 25 RT 3370-3443. Counsel rigorously challenged the prosecution's evidence that Berryman had committed the murder and rape. The fact that counsel briefly offered a fallback theory that, even if the prosecution could prove that Berryman was the perpetrator, it still could not prove that he was guilty of capital murder rather than of manslaughter, did not amount to a concession that Berryman actually was the perpetrator.

Berryman also appears to complain that federal appellate counsel did not renew the claim of insufficient evidence regarding his identity as the perpetrator. Pet. at 14. As the district court explained, however, there was

ample evidence of guilt. D. Ct. Dkt. 351 at 143-146. It was entirely reasonable for appellate counsel to raise issues challenging the judgment of guilt on grounds other that the supposed insufficiency of the evidence. *See* C.A. Dkt. 200 at 86-121.

Berryman nonetheless highlights a footnote in the Opening Brief on the Merits. Pet. at 14-15. In that footnote, counsel stated:

> There may be exhausted claims under, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. Illinois*, 360 U.S. 264, 269 (1959), regarding prosecutorial failure to disclose material impeaching evidence and false testimony, or additional ineffective assistance of counsel, or any number of other claims. The matter is simply unknowable because Berryman is unable to communicate or cooperate rationally. If competent, Berryman might be able to communicate rationally on any of these unknown matters, but also might be able to communicate on claims raised here, e.g., various forms of ineffective assistance of counsel, incompetency at trial, mental state at the time of the underlying events, knowledge regarding the underlying events, etc.

Pet. at 15; C.A. Dkt. 200 at 132 n.28. Berryman contends that the court of appeals erred by failing to order counsel to investigate these "Maybe Unexhausted Violation Claims." Pet. at 15. But there is no reason to believe that any unexhausted claims of this nature exist. Counsel was merely pointing out that, due to Berryman's alleged failure to cooperate, it was impossible to rule out the possibility of additional claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: December 22, 2020

Respectfully submitted,

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