No. _____

IN THE

Supreme Court of the United States

CHRIS ANTHONY GEORGE,

Petitioner,

v.

RAYMOND MADDEN, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020), this Court held that the Ninth Circuit "departed so drastically from the principle of party presentation" of issues to require reversal because "[i]nstead of adjudicating the case presented by the parties," the court decided a criminal appeal on an issue it raised on its own. Did the Ninth Circuit violate this principle in petitioner's habeas corpus appeal where respondent agreed with petitioner in his briefs that the district court correctly held an evidentiary hearing and properly reviewed petitioner's claim *de novo*, but the Court of Appeals denied relief on the ground that petitioner's *pro se* state court allegations were insufficient, an issue it raised three days before oral argument and decided without briefing?

2. Does a *pro se* habeas petitioner sufficiently plead a claim of ineffective assistance of counsel by alleging and supporting with available documentary evidence that his lawyer advised him to reject a plea offer of three years because he could beat the charges; he would have taken the offer if counsel had advised him to do so; the court would have accepted his plea (it did for his two co-defendants); the sentence under the offer's terms was less severe than the 21-year sentence imposed after conviction at trial; and any strategy for beating the charges was wholly unreasonable?

PARTIES AND LIST OF PRIOR PROCEEDINGS

The parties to this proceeding are Petitioner Chris Anthony George and Respondent Raymond Madden, Warden. The California Attorney General represents Respondent.

On April 12, 2013, George was convicted by jury in the Riverside County Superior Court in *People v. George*, case no. RIF1203066, Judge Michael B. Donner, presiding. Petitioner's Appendix filed concurrently herewith ("Pet. App.") 13, 201; reporter's transcript of trial ("RT"), district court docket 11, lodgment 13, at 408-410.[1] On June 28, 2013, Judge Donner sentenced George and entered judgment against him. Clerk's transcript of trial ("CT"), docket 11, lodgment 12, at 215-216.

The California Court of Appeal, per the Honorable Manuel A. Ramirez, Art W. McKinster, and Douglas P. Miller, affirmed the judgment on appeal in an unpublished opinion filed on November 14, 2014 in *People v. George*, case no. E059313. Pet. App. 200-222. The California Supreme Court denied George's petition for review on January 21, 2015 in case no. S223157. Pet. App. 199.

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[1] Unless otherwise noted, all references to "docket" are to the district court docket in George's habeas corpus case.

On June 23, 2015, Judge David A. Gunn denied George's habeas corpus petition in *In the Matter of the Petition of Chris Anthony George for Writ of Habeas Corpus*, Riverside County Superior Court case no. RIC1507325. Pet. App. 71-73. On September 4, 2015, the California Court of Appeal denied George's habeas petition in *In re Chris Anthony George on Habeas Corpus*, case no. E064220. Pet. App. 69. On January 27, 2016, the California Supreme Court denied George's habeas petition in *Chris Anthony George on Habeas Corpus*, case no. S229888. Pet. App. 68.

On November 27, 2017, United States Magistrate Judge Andrew J. Wistrich filed a report recommending that George's habeas corpus petition be granted in *Chris Anthony George v. Raymond Madden, Warden,* C.D. Cal. case no. ED CV 16-1016-RGK-AJW. Pet. App. 29. On February 9, 2018, United States District Judge R. Gary Klausner denied George's petition and entered judgment against him. Pet. App. 12-13.

On February 21, 2020, the Ninth Circuit, per the Honorable Kim McLane Wardlaw and Carlos T. Bea, Circuit Judges, and the Honorable Danny J. Boggs, Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation, affirmed the judgment in an unpublished opinion in *Chris Anthony George v. Raymond Madden, Warden,* case no. 18-55258. Pet. App. 2-4. On April 30, 2020, the panel denied George's petition for panel rehearing and rehearing en banc. Pet. App. 1.

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

Chris Anthony George petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals affirming the judgment against him in his habeas corpus action.

INTRODUCTION

The Ninth Circuit never answered the question presented by Petitioner and Respondent – whether George was entitled to habeas corpus relief on *de novo* review based on the evidence presented at a federal evidentiary hearing on his claim that he received ineffective assistance of counsel during the plea bargaining process. Instead, the court denied relief on a question it raised *sua sponte* three days before oral argument – whether George's *pro se* allegations and evidence in state habeas satisfied 28 U.S.C. § 2254(d), thereby allowing the district court to hold an evidentiary hearing and assess George's claim *de novo*. The Ninth Circuit thus repeated its error from *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020), where "[i]nstead of adjudicating the case presented by the parties," it raised and resolved a new issue on its own, there against the government.

Here, after the magistrate judge recommended relief based solely on the state court record, Respondent argued that *de novo* review applied and an evidentiary hearing was necessary to resolve George's claim. When the magistrate judge recommended relief again after the hearing in a 29-page report, resolving all key fact and credibility determinations in George's favor, Respondent did not object to the report, effectively conceding the case. After the district court rejected the unopposed recommendation in a three-sentence order, the Ninth Circuit granted a certificate of appealability on the question "whether counsel was ineffective for advising appellant to reject a plea offer that would have resulted in a three-year prison term" but instead took the case to trial, resulting in a 21-year sentence. The parties agreed in their briefs that the magistrate judge properly held an evidentiary hearing and that *de novo* review applied.

The Ninth Circuit never answered the question it certified. Instead, it answered the question it raised against George, holding that in state habeas, George, an incarcerated *pro se* inmate who attended special education classes in school, "did not allege sufficient facts regarding how his attorney 'misadvised' him" "to reject a favorable plea deal." The Ninth Circuit ruled without ordering briefing on whether § 2254(d) was satisfied based on the state court record.

This Court's intervention is required because "the appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion." *Sineneng-Smith*, 140 S. Ct. at 1578. The Court should "vacate the Ninth Circuit's judgment and remand the case for an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel." *Id.* George's position is that the magistrate judge got it right and the district court's three-sentence order rejecting the 29-page report provides no basis to deny relief. He should receive the opportunity to have his argument ruled on by the Ninth Circuit. This case gives the Court the opportunity to make clear that *Sineneng-Smith*'s party presentation principle applies in habeas cases when the State's agreement with the petitioner that a claim is reviewed *de novo* is based on a deliberate litigation decision.

If the Court does not grant certiorari on the foregoing issue, it should on the question decided by the Ninth Circuit: Whether George alleged sufficient facts in state court to render the state courts' summary denial of his claim unreasonable under § 2254(d). As instructed by the form petition he filled out, George specifically stated *what* his lawyer did and said ("I don't want you to mess up your life like both of your co defendants therefore we will not take the deal. I can 'beat the charges.'"); *when* and *where* the misadvice occurred (after a court session on October 17, 2012); *who* was

present when it occurred (George, his lawyer, and his two co-defendants); and *how* it affected his trial (the misadvice "caused Petitioner to proceed to trial rather than to accept an offer of a plea bargain that would have been approved by the court"; "absent ineffective counsel, he would have accepted a plea offer" for a "favorable sentence"). The Ninth Circuit's ruling that these allegations by an incarcerated *pro se* petitioner with a second-grade reading level are insufficient is contrary to habeas pleading standards articulated by this Court and render federal habeas a dead letter. This case gives the Court the opportunity to reaffirm that although the 28 U.S.C. § 2254(d) standard may be difficult to meet, it is not impossible to surmount, and it allows federal fact development and relief in appropriate cases.

OPINIONS BELOW

The Ninth Circuit's order denying George's petition for panel rehearing and rehearing en banc is unreported. Pet. App. 1. The Ninth Circuit's opinion affirming the judgment against George is unreported. Pet. App. 2-4. The district court's judgment and its order denying George's habeas petition are unreported. Pet. App. 12-13.

The opinion by the California Court of Appeal affirming the judgment against George on direct appeal is unreported, as is the order by the California Supreme Court denying George's petition for review. Pet. App. 199-222. The orders by the Riverside County Superior Court, California

Court of Appeal, and the California Supreme Court denying George's habeas corpus petitions are unreported. Pet. App. 68-73.

JURISDICTION

The Ninth Circuit's judgment affirming the judgment against George was filed and entered on February 21, 2020. Pet. App. 2; Ninth Circuit docket 59. The Ninth Circuit's order denying George's timely-filed petition for panel rehearing and rehearing en banc was entered on April 30, 2020. Pet. App. 1; Ninth Circuit docket 65. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.1 and the Court's order of March 19, 2020 extending the filing deadline for certiorari petitions by another 60 days (here, to September 28, 2020) because of Covid-19.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution

"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. § 2254(d)

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

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

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

28 U.S.C. § 2254(e)

"(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

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

(A) the claim relies on--

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

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

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

STATEMENT OF THE CASE

I. Trial

Chris George and two co-defendants, Ural Gamble and Chaz MacFalling, faced over 20 years in prison for having sexual intercourse with an intoxicated, underage girl. Pet. App. 15. At the time of the offense, George was 18 years old and had the reading and language skills of a second grader; he attended special education classes in school. Pet. App. 16, 41, 85-86, 166-175.

The prosecutor offered a three-year sentence with half-time credits, meaning the defendants could be released in 18 months, in exchange for a guilty plea and lifetime registration as a sex offender. Pet. App. 15-18. On the advice of their lawyers, George's two co-defendants took the deal. Pet. App. 15. On the advice of his lawyer, Sean Davitt, George rejected the offer and went to trial. Pet. App. 15-16. On April 12, 2013, George was convicted by a Riverside County, California jury of rape of an intoxicated person (Count 1), lewd acts with a person under the age of 14 (Count 2), and active participation in a criminal street gang (Count 3). Pet. App. 16, 27; RT 408-410. George was sentenced to 18 years, four months in state prison, 10 years resulting from a gang enhancement. Pet. App. 27; CT 215-216.

II. State Appeal and Habeas Actions

On direct appeal, George raised several claims not at issue here. The California Court of Appeal affirmed the judgment with modifications in an unpublished opinion filed on November 14, 2014 and remanded for resentencing. Pet. App. 200-202. George was re-sentenced to 21 years in state prison. Pet. App. 27. The California Supreme Court denied George's petition for review on January 21, 2015. Pet. App. 199.

On June 16, 2015, George raised the ineffective assistance of counsel claim that is the subject of this Petition in a *pro se* habeas corpus petition filed in the Riverside County Superior Court. Pet. App. 74-198. George

alleged that his lawyer provided ineffective assistance by recommending that he reject the plea deal and go to trial, and that but for counsel's advice he would have accepted the offer. Pet. App. 76-86, 179-194. The petition contained school and prison records showing that George was 18 years old at the time of the offense, had the reading and language skills of a first or second grader, functioned in the bottom tenth percentile or in the "low," "deficient," or "extremely low range" in listening and reading comprehension, auditory memory and problem solving, and was diagnosed with auditory processing and sensory motor skills disorders. Pet. App. 160-178 (Exhibit 10). The petition contained a declaration from George's mother, Carol King, stating that she had hired Davitt to represent her son and that Davitt advised George to reject the plea offer and go to trial. Pet. App. 125-127 (Exhibit 6).

The Superior Court denied the petition a week later by checking two boxes on a form. Pet. App. 71. One checkmark denoted that "[t]he petition is denied because the petition fails to state a prima facie factual case supporting the petitioner's release. . . . The petition makes assertions regarding the applicable law that are contrary to established California case decisions." *Id.* The other checkmark indicated that "[t]he petition is denied because the petition fails to state a prima facie factual case supporting the petitioner's release. . . . While the petition states a number of factual conclusions, these

broad conclusions are not backed up with specific details, and/or are not supported by the record in the case." *Id.*

On August 17, 2015, George reasserted his claim in a *pro se* habeas petition filed in the California Court of Appeal. Docket 11, lodgment 5. Respondent acknowledged in his Answer in district court that this "petition is largely identical to the petition previously filed in the superior court." Docket 10-1 at ECF p. 8.[2] The court denied the petition a little over two weeks later in an order stating "[t]he petition for writ of habeas corpus is DENIED." Pet. App. 69.

George reasserted his claim in a *pro se* habeas petition filed in the California Supreme Court on October 13, 2015. Docket 11, lodgment 7. Respondent acknowledged in his Answer in district court that the "petition appears to be identical to the one presented in the court of appeal." Docket 10-1 at ECF pp. 8-9. The California Supreme Court summarily denied the petition January 27, 2016. Pet. App. 68. George never received discovery or an evidentiary hearing in state court.

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[2] "ECF p." refers to the page number stamped at the top of filed documents by the district court's electronic filing system.

III. Federal Habeas Action

A. The Magistrate Judge Recommends Relief in a 29-Page Report Issued After an Evidentiary Hearing

On May 17, 2016, George filed a *pro se* habeas petition in district court raising his ineffective assistance claim. Docket 1. The claim is raised in grounds 1-3 of the petition. Pet. App. 28. Respondent admitted in his Answer that the petition "appears to raise the same claims, employ the same points and authorities, and rely on the same ten exhibits that George presented in the state courts." Docket 10-1 at ECF p. 9. Respondent conceded that George's petition was timely and that his claims were exhausted and not procedurally defaulted. Docket 10 at ECF p. 1. Respondent argued that because the state court reasonably denied the claims on the merits, relief was unavailable under 28 U.S.C. § 2254(d). *Id.* Respondent claimed that George failed to overcome the presumption that his trial lawyer performed competently because, among other things, "he has neither provided nor, it appears, sought explanation from counsel." Docket 10-1 at ECF p. 15. Respondent said George was not entitled to an evidentiary hearing. Docket 10 at ECF p. 2.

On February 28, 2017, United States Magistrate Judge Andrew J. Wistrich recommended that relief be granted on the basis of the state court record in a 30-page report that canvassed the law, the record, and George's

allegations and supporting evidence. Docket 14. He explained that George's allegations were made under penalty of perjury, are presumed to be true, and were supported by the record. *Id.* at 12-13.[3] The report concluded that "[i]t was unreasonable for the state court to conclude that advising petitioner to reject an extremely favorable plea offer was within the range of reasonable professional assistance," and that "to the extent that the state court rejected petitioner's claim" for lack of prejudice, "its determination was an unreasonable application of clearly established federal law." *Id.* at 27, 29-30. Accordingly, 28 U.S.C. § 2254(d) did not bar relief and relief was proper on the existing record. *Id.* at 9-11.[4]

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[3]The magistrate judge correctly concluded that George's *pro se* allegations in his petition, made under penalty of perjury, are to be considered as an affidavit. *Id.*; *Laws v. Lamarque*, 351 F.3d 919, 924 (9th Cir. 2003).

[4] Numerous federal habeas courts have granted relief on an ineffective assistance claim without holding an evidentiary hearing. *See, e.g., James v. Ryan*, 679 F.3d 780, 799-801, 820-821 (9th Cir. 2012) (collecting cases); *see also Bemore v. Chappell*, 788 F.3d 1151, 1155, 1160, 1176-1177 (9th Cir. 2015); *Coleman v. Mitchell*, 268 F.3d 417, 432-434, 452-454 (6th Cir. 2001); *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 266 n.10 (1978). This Court vacated the grant of relief in *James* and remanded for the Ninth Circuit to consider *Johnson v. Williams*, 568 U.S. 289 (2013). *Ryan v. James*, 568 U.S. 1224 (2013) (Mem.). On remand, the Ninth Circuit concluded that *Johnson v. Williams* did not change the result and reaffirmed its decision to grant relief on the ineffective assistance claim without remanding for an evidentiary hearing. *James v. Ryan*, 733 F.3d 911, 912, 916 (9th Cir. 2013).

Respondent objected to the report. Pet. App. 55-67. Respondent argued that while the presumption that "the factual assertions in the Petition are correct" "may be sufficient to overcome the relitigation bar applicable to petitions filed by state prisoners," "it is not sufficient to support a grant of relief." Pet. App. 55. According to Respondent, the report's conclusion "that the rejections by the California courts of George's IAC [ineffective assistance of counsel] claim were unreasonable" "merely lifts the application of AEDPA's deferential standard, leaving this Court to determine, under de novo review, whether George is entitled to relief." Pet. App. 56. According to Respondent, that determination could only be made after an evidentiary hearing, since no court has ever provided "defense counsel an opportunity to be heard." *Id.*

Respondent submitted a declaration from trial counsel Davitt stating that he had reviewed the report and that "it appears that the main issue is whether I insisted Mr. George go to trial rather than take the plea deal of 3 years." Pet. App. 65. Davitt claimed that "[a]t no time did [George] express a willingness to take the 3-year deal, without condition. He maintained that he would accept a plea on the condition that the Deputy District Attorney remove the requirement of life-time registration as a sex offender," which the prosecutor refused to do. *Id.* Davitt did not deny advising George to reject the deal; he did not describe any advice he gave George on whether to take the deal. Pet. App. 64-66.

In his reply to Respondent's objections, George submitted a letter from him to Davitt dated October 23, 2014, while George's direct appeal was still pending. George said in the letter that Davitt advised him not to take the three-year offer. Docket 17 at ECF p. 6. The letter concluded by "asking that you please provide [a] declaration in hopes that I may obtain a new trial." *Id.* George sent a second request to Davitt for a declaration in April 2015. Davitt did not respond to either request. Pet. App. 19.

On April 25, 2017, the magistrate judge ordered an evidentiary hearing and appointed counsel for George. Pet. App. 51-54. The court noted that "[i]n his objections to the report, respondent for the first time disputes petitioner's allegations. Respondent argues that in light of the now-present factual dispute, the Court must conduct an evidentiary hearing before granting relief." Pet. App. 52. The court noted that "Respondent obviously was on notice of petitioner's sworn allegations as well as the fact that nothing in the record suggested that his allegations were untrue" yet "failed to dispute petitioner's version of events or otherwise alert the Court that a factual dispute existed" until after the court issued its report. Pet. App. 52-53. The court noted that it had the discretion to decline to consider new arguments and allegations raised in an objection to a report, but that in the interest of justice, it was ordering an evidentiary hearing. Pet. App. 53.

At the hearing, the court heard testimony from George, his mother, his sister, his co-defendant Gamble, the trial lawyer for co-defendant MacFalling, Graham Donath, and Davitt, and received numerous exhibits, including Davitt's case files. Pet. App. 19, 30-31; dockets 30-32, 36, 38-39, 57.

George testified that Davitt advised him to reject the plea offer, he would have taken the deal if counsel had recommended it, but he turned down the offer based on counsel's advice. Docket 32.

George's mother testified that Davitt recommended taking the case to trial; he "said there was no witness and something about DNA evidence." Docket 31 at ECF p. 3.[5]

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[5] As described by the state appellate court, the prosecution presented evidence that a condom found in a toilet in the abandoned house contained "DNA which matched a buccal swab taken from [George], as well as DNA from Ural Gamble." Pet. App. 204. "The interior and exterior of the other condom taken from the toilet tank had female DNA matching Jane Doe's, and male DNA matching" George. *Id.* Before trial, Davitt moved to suppress the condoms containing George's DNA. He argued that the search was invalid because the officers had not obtained a warrant and that George had standing to raise a Fourth Amendment claim because the abandoned house had belonged to his friend's neighbor and he and the friend had used the building as a "'crash pad and party house'" after the neighbor had been evicted. Pet. App. 21. The court denied the motion, ruling that George had no expectation of privacy in the house: George did not live there, was not a guest of anyone with a possessory interest in the house, and the house was vacant, unfurnished, unlocked, and abandoned with a notice posted out front "informing persons to call a bank or real estate company with questions concerning the property." Pet. App. 21-22.

George's sister testified that Davitt told her to encourage George to reject the deal "because of the DNA being contaminated." Docket 31 at ECF p. 6; docket 36 at 23.

Gamble testified that he overheard Davitt pump up George about going to trial but that he, Gamble, took the deal on his lawyer's advice. Docket 31 at ECF p. 8.

Donath testified that he recommended that his client, MacFalling, take the deal because he did not see a viable defense to the charges, and that "'[t]he gang [sentencing] enhancements alone made it an extremely big risk to go to trial.'" Docket 31 at ECF pp. 9-10.

Davitt denied advising George to reject the plea deal. Docket 36 at 121-122. He also testified that before the deal was offered, he had concluded that "a lot of evidence was pointing in th[e] direction" that George was "good for the charge" (*id.* at 100); that the plea offer was "an amazing deal," "incredible" (*id.* at 131); but that he nevertheless (1) never gave George his independent judgment on whether he thought the plea deal was worth accepting or rejecting; (2) never told George directly that he thought he should take the deal; and (3) never recommended to George that he take or not take the deal. Pet. App. 94, 122, 131. Davitt testified that although he believed that he should retain a DNA expert, "[w]e did not hire or consult with a DNA expert to assist in Mr. George's defense," even though the

argument that the DNA evidence was contaminated was his only theory for acquittal. Docket 31 at ECF p. 13. Counsel's other hope for acquittal was that the victim would not appear for trial. *Id.* at ECF pp. 12-13. She did. Pet. App. 31-32, 202.

Respondent argued in his post-hearing brief that the court should deny relief. Pet. App. 46. But Respondent also acknowledged that George "had pleaded a prima facie case for relief" in state court; an evidentiary hearing was "warranted," "required," "completely proper," and "correctly conducted"; and "[t]he court properly has proceeded to determine the issues de novo." Pet. App. 46-50.

On November 27, 2017, the magistrate judge recommended relief in a thorough 29-page report canvassing the law, independently reviewing the state court record, and making factual and credibility determinations in George's favor. Pet. App. 15-43. He found that Davitt advised George to reject the offer and that this was deficient performance in light of the strength of the prosecution's case, the lack of any viable defense, and the fact that the offer was "extremely favorable." Pet. App. 19, 30-33. The magistrate judge also ruled that George established deficient performance even if the court credited Davitt's testimony. "[E]ven if the testimony of petitioner and his family was rejected, and Davitt's testimony was accepted, Davitt's lack of advice regarding the risks and benefits of the offer fell outside the range of

reasonable professional assistance and deprived petitioner of the ability to make an informed choice." Pet. App. 38.

Respondent did not object to the report and thereby consented to the court's proposed fact findings and waived any objections thereto. Pet. App. 14; *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998).

B. The District Court Rejects the Unopposed Recommendation and Denies Relief in a Three-Sentence Order

On February 9, 2018, without taking any new evidence, District Judge R. Gary Klausner rejected the unopposed recommendation and denied relief in a three-sentence order that did not mention the standard of review or say that the magistrate judge clearly erred in any fact finding. The order states:

> Petitioner seeks a writ of habeas corpus on the ground of ineffective assistance of counsel. Upon review of the parties' arguments, the Court DENIES the Petition for the following reasons: (1) the facts and evidence indicate that Petitioner made the decision to go to trial on his own volition; (2) Petitioner has failed to provide evidence showing that Attorney Davitt's advice was ungrounded or otherwise unreasonable; (3) Petitioner has failed to show that Attorney Davitt provided false, misleading, or otherwise inaccurate information to him. While in hindsight, Attorney Davitt's advice led to a negative outcome for Petitioner, this alone does not constitute adequate grounds for prevailing on a claim for ineffective assistance of counsel.

Pet. App. 13. The district court denied a COA, saying an "appeal will be futile." Pet. App. 10.

C. The Ninth Circuit Affirms the Denial of Relief on a Ground Not Raised by Either Party or the District Court

On August 30, 2018, the Ninth Circuit granted a COA on the question "whether counsel was ineffective for advising appellant to reject a plea offer that would have resulted in a three-year prison term." Pet. App. 9.

In their Ninth Circuit briefs, the parties agreed that 28 U.S.C. § 2254(d) had been satisfied based on the state court record and argued over whether George was entitled to relief on *de novo* review based on the evidence presented at the federal hearing. Respondent stated in his Appellee's Brief that "the correct standard for this Court to apply in reviewing the district court's denial of George's habeas petition is the de novo standard with a review of the facts, including those developed in the district court, for clear error"; "the deferential standard of review under § 2254(d) and the limitation to the state court record does not apply here." Pet. App. 8.

Three days before oral argument, the panel issued an order stating that "[a]t oral argument, the parties should be prepared to address the standard of review applicable to this case. *See* 28 U.S.C. § 2254(d)(1); *Amado v. Gonzalez*, 758 F.3d 1119, 1133 n. 9 (9th Cir. 2014)." Pet. App. 5. *Amado* states that federal habeas courts "have the obligation to apply the correct standard, for the issue is non-waivable." 758 F.3d at 1133 n.9.

At argument, the panel's questions for George focused on his allegations in state habeas. Ninth Circuit docket 58. The panel did not call for any briefing on the question whether § 2254(d) was satisfied based on the state court record. The panel affirmed the judgment against George on the ground that in state habeas he "did not allege sufficient facts regarding how his attorney 'misadvised' him" "to reject a favorable plea deal" and "that the state court's holding that George failed to state a prima facie case for habeas relief is not unreasonable" under 28 U.S.C. § 2254(d). Pet. App. 3-4.

REASONS FOR GRANTING THE WRIT

I. AEDPA Standards

George filed his federal habeas petition after AEDPA's effective date; therefore, his petition is governed by AEDPA. *Woodford v. Garceau*, 538 U.S. 202, 205, 210 (2003). To obtain relief under AEDPA, a petitioner must show that his constitutional rights were violated under 28 U.S.C. § 2254(a) and that § 2254(d) does not bar relief on any claim adjudicated on the merits in state court. *Frantz v. Hazey*, 533 F.3d 724, 735-737 (9th Cir. 2008) (en banc).

Under § 2254(d), a habeas petition challenging a state court judgment:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted

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

The relevant state court decision for purposes of federal review is the last reasoned decision that resolves the claim at issue. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

When a federal court concludes that the state court decision is contrary to or an unreasonable application of federal law, or is based on an unreasonable factual determination, it reviews the claim *de novo* in assessing whether the petitioner's constitutional rights were violated. *Panetti v. Quarterman*, 551 U.S. 930, 953-954 (2007); *Frantz*, 533 F.3d at 735; *Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010).

II. The Ninth Circuit Never Adjudicated the Case Presented by the Parties But Instead Decided George's Appeal on a Question It Raised on Its Own Three Days Before Oral Argument and Without Briefing on the Issue

The Ninth Circuit never answered the question presented by Petitioner and Respondent – whether George was entitled to habeas corpus relief on *de novo* review based on the evidence presented at a federal evidentiary hearing on his claim that he received ineffective assistance of counsel during the plea bargaining process. Instead, the court denied relief on a question it raised *sua sponte* three days before oral argument – whether George's *pro se* allegations and evidence in state habeas satisfied 28 U.S.C. § 2254(d),

thereby allowing the district court to hold an evidentiary hearing and assess George's claim *de novo*.

In his answer to George's federal petition, Respondent did not dispute George's factual allegations but instead argued that § 2254(d) barred relief accepting the truth of George's claims. After the magistrate judge issued a report recommending that relief be granted based solely on the state court record, Respondent changed his position and argued that while George's allegations "may be sufficient to overcome the relegation bar applicable to petitions filed by state prisoners," they were "not sufficient to support a grant of relief," but instead "merely lift[ed] the application of AEDPA's deferential standard, leaving this Court to determine, under de novo review, whether George is entitled to relief." Respondent argued that an evidentiary hearing was required to allow trial counsel to tell his side of the story (counsel never responded to the incarcerated George's requests for a declaration while his case was in state court).

The magistrate judge accepted Respondent's argument, ordered an evidentiary hearing, and appointed counsel for George. In his post-hearing brief, Respondent reaffirmed his position that the court correctly held a hearing and "properly . . . proceeded to determine the issues de novo." The magistrate judge recommended relief in a report to the district judge, making all key factual and credibility determinations in George's favor. Respondent

did not object to the report, essentially conceding the case. The district judge rejected the unopposed recommendation in a three-sentence order that did not mention the standard of review or say the magistrate judge clearly erred in any fact finding.

In his brief in the Ninth Circuit, Respondent reaffirmed his position that "the correct standard for th[e] Court to apply in reviewing the district court's denial of George's habeas petition is the de novo standard"; "the deferential standard of review under § 2254(d) and the limitation to the state court record does not apply here." George agreed.

Nevertheless, three days before oral argument the Ninth Circuit instructed the parties to be prepared to discuss the applicable standard of review, and its questions for George at argument focused on his allegations in state habeas. The panel did not order any briefing on whether § 2254(d) was satisfied based on the state court record but answered the question it raised against George, holding that George, an incarcerated *pro se* inmate with a second-grade reading level who attended special education classes, "did not allege sufficient facts regarding how his attorney 'misadvised' him" "to reject a favorable plea deal."

The Ninth Circuit's treatment of George's case repeats its error in *Sineneng-Smith*, 140 S. Ct. 1575, 1578, a federal criminal appeal where "[i]nstead of adjudicating the case presented by the parties," the Ninth

Circuit raised a new issue on its own and decided it against the government. Respondent's position that § 2254(d) did not apply and the standard of review was *de novo* was not a mistaken statement made in a single brief or under the pressure of oral argument, but instead reflected a conscious change in position to try to achieve his own litigation goals that he articulated in briefs in district court and the court of appeals.[6] The "appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion," and the Court should "vacate the Ninth Circuit's judgment and remand the case for an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel." *Sineneng-Smith*, 140 S. Ct. at 1578.

This is no idle issue to George, who would be released from prison for time served if he wins habeas relief, since the remedy is to make the

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[6] George's case is thus distinguishable from the case cited by the panel, *Amado*, 758 F.3d at 1133 n.9, where "neither party addressed the issue of the proper standard by which [the court was] to review Amado's habeas claim" and the court concluded it had "the obligation to apply the correct standard, for the issue is non-waivable." Likewise, in *Hernandez v. Holland*, 750 F.3d 843, 855-857 (9th Cir. 2014), Respondent failed to brief whether 28 U.S.C. § 2254(d) applied to two claims. Here, by contrast, Respondent addressed whether § 2254(d) applied in briefs in district court and the Ninth Circuit and argued that a federal evidentiary hearing was required and that George's claim should be reviewed *de novo*. *See Day v. McDonough*, 547 U.S. 198, 202 (2006) (cited in *Sineneng-Smith*, 140 S. Ct. at 1579) ("we would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense"); *Reynoso v. Giurbino*, 462 F.3d 1099, 1110 & n.9 (9th Cir. 2006).

prosecutor re-offer the original three-year plea deal. *Lafler v. Cooper*, 566 U.S. 156, 171, 174 (2012). It is an important issue for other petitioners as well, given the danger that the overzealous application of AEDPA poses to the vitality of the writ of habeas corpus. *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.").

III. George Adequately Pleaded an Ineffective Assistance of Counsel Claim in State Habeas and 28 U.S.C. § 2254(d) Does Not Bar a Federal Evidentiary Hearing or Relief

If the Court does not grant certiorari on George's first question, it should on his second: Whether George adequately pleaded an ineffective assistance of counsel claim in state habeas.

As shown below, the Ninth Circuit opinion is flatly wrong that George failed to "allege sufficient facts regarding how his attorney 'misadvised' him" "to reject a favorable plea deal," and that the state court reasonably denied his claim accepting his allegations as true, as required under state law. *Cullen v. Pinholster*, 563 U.S. 170, 188 n.12 (2011). The panel's heightened pleading requirement, applied against a *pro se* petitioner with a second-grade reading level whose request for a corroborating declaration from trial counsel was ignored, is contrary to this Court's law and effectively renders federal habeas a dead letter. *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004)

(§ 2254(d) "standard is not impossible to meet"); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief."); *Doody v. Ryan*, 649 F.3d 986, 1003 (9th Cir. 2011) (en banc) ("[I]f we succumb to the temptation to abdicate our responsibility on habeas review, we might as well get ourselves a big, fat rubber stamp, pucker up, and kiss The Great Writ good-bye."). This case gives the Court the opportunity to clarify its habeas pleading jurisprudence and affirm that allegations like those presented here are sufficient to state a constitutional claim in state habeas and to enable federal courts to hold an evidentiary hearing and grant relief when state courts deny relief without fact development.

A. Habeas Pleading Law

George asserted his ineffective assistance claim in habeas petitions filed *pro se* in the Riverside County Superior Court, the California Court of Appeal, the California Supreme Court, and federal district court. Federal courts liberally construe *pro se* California state habeas petitions. *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008); *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (allegations by *pro se* state inmates held "to less stringent standards than formal pleadings drafted by lawyers").

California and federal habeas pleading standards are similar in many respects. Under California law, a habeas petitioner bears the "burden initially to *plead* sufficient grounds for relief, and then later to *prove* them" if and when the court issues an order to show cause ("OSC"). *People v. Duvall*, 886 P.2d 1252, 1258 (Cal. 1995) (original emphasis). The petition "'must . . . specify the facts on which the petitioner bases his or her claim.'" *People v. Romero*, 883 P.2d 388, 391 (Cal. 1994); *see also* Rule 2(c) of the Habeas Rules Governing Section 2254 Cases in the United States District Courts ("The petition must: . . . state the facts supporting each ground" for relief).

"The petition should both (i) state fully and with particularity the facts on which relief is sought" "as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." *Duvall*, 886 P.2d at 1258; *see also Mayle v. Felix*, 545 U.S. 644, 655 (2005) ("[n]otice pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error") (quotation marks omitted).

"Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." *Duvall*, 886 P.2d at 1258; *see also Blackledge v. Allison*, 431 U.S. 63, 75 (1977) (vague or conclusory allegations warrant dismissal). However, "where the Superior Court determines that the habeas corpus petition has pleading

defects and believes that correction of the defects is necessary to ensure a full and fair hearing and a determination of the cause, the superior court has the discretion to give notice of the defect and grant leave to amend or supplement the petition." *Jackson v. Superior Court*, 118 Cal. Rptr. 3d 81, 90 (Cal. Ct. App. 2010); *Duvall*, 886 P.2d at 1264 (courts should not construe habeas pleadings in a parsimonious manner; "technical and inadvertent pleading errors" should "not lead to premature dismissals that would frustrate the ends of justice"); *see also Ross v. Williams*, 950 F.3d 1160, 1172-73 (9th Cir. 2020) (en banc), *cert. pet. filed sub nom. Hutchings v. Ross*, July 23, 2020 (Supreme Court case no. 20-86).

On an ineffective assistance of counsel claim, "where access to critical information is limited or denied to one party, where it is unreasonable to expect a party to obtain information at the pleading stage, or where the proper resolution of a case hinges on the credibility of witnesses, the general rule requiring the pleading of facts should not be enforced in such a draconian fashion so as to defeat the ends of justice." *Duvall*, 886 P.2d at 1266 (holding that the Court of Appeal erred by failing to order an evidentiary hearing to determine the truth of petitioner's allegations on his ineffective assistance claim where trial counsel had died).

California requires *pro se* petitioners to use habeas corpus form MC-275. Cal. R. Ct. 4.551(a)(1). George used this form for all three of his state

petitions. The form instructs petitioners to "[t]ell your story briefly without citing cases or law." Pet. App. 76. It states: "You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial." *Id.* The form further explains: "A rule of thumb to follow is, *who* did exactly *what* to violate your rights at what time (*when*) or place (*where*). (*If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.*)." *Id.* (original emphasis).

"When presented with a petition for a writ of habeas corpus, a [California] court must first determine whether the petition states a prima facie case for relief -- that is, whether it states facts that, if true, entitle the petitioner to relief -- and also whether the stated claims are for any reason procedurally barred." *Romero*, 883 P.2d at 391; *Duvall*, 886 P.2d at 1258; *In re Rosenkrantz*, 59 P.3d 174, 217 (Cal. 2002) ("We presume that the trial court accepted as true petitioner's undisputed factual allegations, including any undisputed matters contained in the exhibits incorporated by reference into his pleadings.").

"If no prima facie case for relief is stated, the court will summarily deny the petition." *Duvall*, 886 P.2d at 1258; *Romero*, 883 P.2d at 391. "If, however, the court finds the factual allegations, taken as true, establish a

prima facie case for relief, the court will issue an OSC." *Duvall*, 886 P.2d at 1258. After receiving pleadings, the court may rule on the papers if there are no disputed factual questions, or order an evidentiary hearing if there are. *Id.* at 1261.

B. George's State Court Allegations and Evidence

As Respondent acknowledges, George's three state habeas petitions are "identical" or "largely identical" to one another. *Supra* at 10. Because the Superior Court's denial of relief is the last reasoned decision for purposes of federal review,[7] and George's petition in that court was the focus of the Ninth Circuit's questions at oral argument, George submits that petition in the accompanying appendix and quotes from it below. He also provides parallel cites below to the habeas petitions he later filed in the California Court of Appeal and California Supreme Court.

In his state petitions, George alleged that "Petitioner contends that ineffective representation at the pretrial stage of his criminal proceeding caused him to proceed to trial rather than to accept an offer of a plea bargain that would have been approved by the court. Petitioner has been deprived of the effective assistance of counsel guaranteed by U.S. Const., 6th Amend.,

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[7] The Court "looks through" the unreasoned denials by the Court of Appeal and Supreme Court to the Superior Court's denial. *Supra* at 9-10, 21.

Cal. Const., Art. I, § 15." Pet. App. 77; district court docket 11-5 at ECF p. 4; district court docket 11-7 at ECF p. 7.

George alleged that while he was waiting for his attorney Sean Davitt to appear in court on October 17, 2012, he heard a conversation between his co-defendant MacFalling and MacFalling's attorney, Graham Donath. George asked Donath about the three-year plea offer that he was explaining to MacFalling. Donath told George to talk to his lawyer about the deal. Pet. App. 79-80; docket 11-5 at ECF pp. 6-7; docket 11-7 at ECF pp. 9-10.

George alleged that when Davitt appeared in court a short time later, he asked Davitt about the offer. Davitt replied that there was no three-year offer. George told Davitt he had learned from Donath that in fact a three-year offer was on the table. George's co-defendants MacFalling and Gamble were present during this conversation. George asked Davitt to check with his co-defendants' attorneys whether a three-year deal had been offered. Davitt said he would look into it, walked away, and returned and said there was a three-year deal available. Davitt then told George: "I don't want you to mess up your life like both of your co defendants therefore we will not take the deal. I can 'beat the charges.'" Pet. App. 80-81; docket 11-5 at ECF pp. 7-8; docket 11-7 at ECF pp. 10-11.

George alleged that "[a]fter the court session on October 17, 2012 Petitioner explained to Mr. Davitt that he thinks he should take the 3 year

deal because his two co-defendants MacFalling and Gamble are going to take the deal which will be the best thing to do. Mr. Davitt explained to Petitioner 'Your family hired me to look out for your best interest so stop listening to jail house lawyers.' Mr. Davitt explained that they will talk about it later before the next court date (10-24-12)." Pet. App. 81; docket 11-5 at ECF p. 8; docket 11-7 at ECF p. 11.

George alleged that on October 24, 2012, while he went to Department 31 for a preliminary hearing, co-defendants Gamble and MacFalling took the three-year plea deal on the advice of their attorneys Graham Donath and John Dorr in Department 63 before Judge Helios J. Hernandez. George reiterated that "Petitioner was advised by attorney Sean Davitt on 10-17-12 not to take the 3 year deal." Pet. App. 82; docket 11-5 at ECF p. 9; docket 11-7 at ECF p. 12.

George continued: "Petitioner contends that after talking to his family it was discovered that the lawyer Mr. Sean Davitt misadvised Petitioner when Mr. Davitt advised Petitioner on 10-17-12 (after Petitioner told Mr. Davitt there was a 3 yr deal) not to accept the deal because he could 'beat the charges.' The misadvice given to Petitioner on 10-17-12 was solely for attorney Sean Davitt monetary gain [sic] by taking Petitioner to the preliminary hearing and to trial. If Petitioner would have accepted the 3 year deal attorney Sean Davitt would not have received the large sum of

money from Petitioner's family. Petitioner explained this to the Probation Dept. *See* Exhibit 5 pg 11 line 19 through 31." George alleged that "the notarize[d] declaration of Carol A. King (Petitioner's mother) . . . explains the agreement to represent Petitioner by Sean A. Davitt. Now marked as Exhibit 6." Pet. App. 83 (original emphasis); docket 11-5 at ECF p. 10; docket 11-7 at ECF p. 13.

George also alleged that "his level of comprehension and communication disabled Petitioner mentally" and cited test scores and special education reports from the attached Exhibit 10. Pet. App. 85-86; docket 11-5 at ECF pp. 12-13; docket 11-7 at ECF p. 15-16. He alleged that "in light of Petitioner's mental disabilities Petitioner's attorney was ineffective to advise Petitioner to reject [] plea offer of 3 years." Pet. App. 86; docket 11-5 at ECF p. 13; docket 11-7 at ECF p. 16. He concluded his allegations by stating: "See Exhibits 1-through-10 attached behind this page." *Id.*

Exhibits 3 and 4 are abstracts of judgment showing that on October 24, 2012, George's co-defendants MacFalling and Gamble entered guilty pleas for a three-year sentence. Pet. App. 93, 96; docket 11-5 at ECF pp. 45, 48; docket 11-7 at ECF pp. 39, 42.

Exhibit 5 is a pre-sentence probation report containing George's statement that "he was offered a deal prior to the trial and he did not accept it, because his lawyer advised he could 'beat the charges' if he went through a

trial. His family wasted money on his attorney, because he did not do anything for him." Pet. App. 110; docket 11-5 at ECF p. 63; docket 11-7 at ECF p. 58.

Exhibit 6 is a declaration by George's mother, Carol King, explaining that she hired Davitt to represent George; Davitt explained that his fee of $6,300 would cover his services through the preliminary hearing; that his fee was an additional $10,000 for trial; and that she paid Davitt $4,600 before the preliminary hearing and $8,300 afterwards, owing a balance of $5,400. She said that she explained to Davitt that George's co-defendants had told him that the 3-year deal was offered to him. She said that "Davitt insisted that Chris George go to trial because Mr. Davitt did not want him to mess his life up. Mr. Sean Davitt also stated that Chris Anthony George will have a better chance at trial due to the fact that the co-defendants were taking the plea deal and Chris George would be tried separate from Mr. Gamble and Mr. MacFalling." King told Davitt that she and her family were in agreement that "it would be best if Chris takes the same deal of his co-defendants [sic.]. He insisted once again that he has a good chance of fighting the case. Never once was I told if he's found guilty Chris Anthony George will be facing 23 years in prison." She was disturbed that Davitt advised her son not to take the deal when her son's co-defendants took the deal on the advice of their

lawyers. She said she believes Davitt took the case to trial to obtain more legal fees. Pet. App. 126; docket 11-5 at ECF p. 79; docket 11-7 at ECF p. 74.

Exhibit 10 contains school and prison records reflecting George's second-grade reading level, attention and learning problems, and special education history. Pet. App. 166-175; docket 11-5 at ECF pp. 119-128; docket 11-7 at ECF pp. 111-120.

George also submitted a memorandum that cited *Lafler*, 566 U.S. 156, and the ineffective assistance test of *Strickland v. Washington*, 466 U.S. 668 (1984); alleged that "[a] claim of deficient performance depends on whether the advice and other communications regarding the offered plea bargain were within the range of competence demanded of attorneys in criminal cases"; alleged that "[c]ounsel should inform the defendant of the prosecution and defense evidence and assess its value at trial"; and alleged that Davitt did not adhere to the standards required of defense counsel, which made his performance deficient. Pet. App. 179-192; docket 11-5 at ECF pp. 14-27; docket 11-7 at ECF pp. 17-30. He said Davitt advised him to reject the deal because he didn't want him to mess up his life like his co-defendants and he could beat the charges. Pet. App. 185; docket 11-5 at ECF p. 20; docket 11-7 at ECF p. 21. He alleged that "absent ineffective counsel, he would have accepted a plea offer" for a "favorable sentence," as his co-defendants did. Pet. App. 190; docket 11-5 at ECF p. 25; docket 11-7 at ECF p. 28.

One week after the petition was filed, the Superior Court denied it for failure to state a prima facie case. This is the last reasoned decision on George's claim and the relevant decision for federal review. The Attorney General was never ordered to respond to any of George's state petitions.

C. George Adequately Pleaded His Claim and the State Court's Summary Denial Is Unreasonable Under § 2254(d)

The Ninth Circuit is just plain wrong that George failed to allege sufficient facts regarding how Davitt misadvised him and caused him to reject the plea deal. George's allegations and exhibits presented his "claim with more than sufficient particularity," *Dye*, 546 U.S. at 4, and "point[ed] to a real possibility of constitutional error." *Mayle*, 545 U.S. at 655.

As instructed by the form petition, George specifically stated *what* his lawyer did and said ("I don't want you to mess up your life like both of your co defendants therefore we will not take the deal. I can 'beat the charges.'"); *when* and *where* the misadvice occurred (after a court session on October 17, 2012); *who* was present when it occurred (George, Davitt, and co-defendants MacFalling and Gamble); and *how* it affected his trial (the misadvice "caused Petitioner to proceed to trial rather than to accept an offer of a plea bargain that would have been approved by the court"; "absent ineffective counsel, he would have accepted a plea offer" for a "favorable sentence").

George also submitted "copies of reasonably available documentary evidence," including the probation report recounting counsel's misadvice; his mother's declaration reporting Davitt's statement that George would have a better chance at trial because he would be tried separately given his co-defendants' pleas; and the abstracts of judgment showing that the court approved the three-year deals accepted by his similarly-situated co-defendants, resulting in sentences one-seventh of what George received after trial.

Although George did not submit his appellate opinion or all of his trial transcripts, they are part of the state court record in habeas, *Pinholster*, 563 U.S. at 188 n.12, *In re Reno*, 283 P.3d 1181, 1250 (Cal. 2012), and they further show the strength of the prosecution's case and that reasonable counsel would have recommended the deal given the lack of a viable defense. Although he did not submit a declaration from Davitt, the federal record shows that he asked Davitt for one before he filed his first state petition but Davitt did not respond to his request. The lack of a declaration from trial counsel was a reason to order an evidentiary hearing, not to summarily deny relief without one. *Duvall*, 886 P.2d at 1266; *see also Reeves v. Alabama*, 138 S. Ct. 22, 26 (2017) (Sotomayor, J., dis. from denial of cert.).

George thus adequately pleaded a prima facie case of ineffective assistance under *Strickland* and *Lafler* by alleging specific facts to support

each element of his claim, i.e., that counsel's advice to reject the plea deal and proceed to trial was objectively unreasonable under prevailing professional norms[8] and that but for counsel's ineffective advice, there is a reasonable probability George would have taken the deal, the court would have accepted it (it did for his similarly-situated co-defendants), and George would have received a less severe sentence (three years rather than 21). *Lafler*, 566 U.S. at 162-164, 174; *Ross*, 950 F.3d at 1168 (ineffective assistance claim adequately pleaded when it alleged that "trial counsel was ineffective for failing to object when the State failed to 'provide any notice that it intended to present expert testimony' from the State's witness about what 'distract thefts' were"); *Dorsey v. Kelly*, 112 F.3d 50, 52-53 (2d Cir. 1997) (similar).

Accepting George's allegations and unrebutted evidence as true, the state court could not reasonably deny relief for failure to state a prima facie case under § 2254(d)(1) or (d)(2). *See, e.g.*, *Lafler*, 566 U.S. at 162-164; *Brumfield v. Cain*, 135 S. Ct. 2269, 2277-2282 (2015) (state court's denial of capital habeas petitioner's intellectual disability claim without an evidentiary hearing unreasonable under § 2254(d)(2) where petitioner was not obligated to prove his claim at pleading stage); *Earp v. Ornoski*, 431 F.3d 1158, 1172-

[8] The allegation that counsel advised against the deal to earn more fees by going to trial in and of itself states a claim of deficient performance. *Strickland*, 466 U.S. at 686, 688, 692. George alleged much more than that.

1173 (9th Cir. 2005) (California Supreme Court's summary denial of ineffective assistance claim unreasonable under § 2254(d)(2); remanding for evidentiary hearing); *Nunes v. Mueller*, 350 F.3d 1045, 1054-1056 (9th Cir. 2003) (California court's summary denial of ineffective assistance-plea bargaining claim for failure to state prima facie case unreasonable under § 2254(d)(1) and (2)).

Moreover, with § 2254(d) satisfied based on the state court record, the federal court properly held an evidentiary hearing (as Respondent acknowledged): George (1) presented at least a colorable claim for relief; (2) was never afforded a hearing in state court; and (3) diligently presented the factual basis of his claim in state court. *Brumfield*, 135 S. Ct. at 2275-2276; *Earp*, 431 F.3d at 1166-1167; *Schriro v. Landrigan*, 550 U.S. 465, 468, 474, 481 (2007). And like the petitioners in *Brumfield* and *Nunes*, once George received the chance to prove his claim at a hearing, he did so.

Accordingly, the Court should grant certiorari, hold that 28 U.S.C. § 2254(d) is satisfied based on the state court record, and remand for the Ninth Circuit to consider George's claim on *de novo* review, as argued by the parties and as the magistrate judge and district court had done. The onerous pleading standard applied by the Ninth Circuit is contrary to federal and California law, and should not be permitted to preclude a federal evidentiary hearing or relief.

CONCLUSION

For the foregoing reasons, the Court should grant George's petition, reverse the judgment of the Ninth Circuit, and remand for the Ninth Circuit to determine whether George is entitled to relief on *de novo* review based on the evidence presented at his federal evidentiary hearing.

Respectfully submitted,

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DATED: September 23, 2020

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