No. 20-6199

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

JACOB TOWNLEY HERNANDEZ,

Petitioner,

vs.

SUZANNE M. PEERY, Warden,

Respondent.

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

REPLY TO OPPOSITION

Marc J. Zilversmit (Cal. Bar. No. 132057)
Attorney At Law
28 Boardman Place
San Francisco, CA 94102
(415) 431-3474
marc @ zdefender.com

Counsel of Record for
Petitioner Jacob Townley Hernandez

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Introduction and Summary of Argument

Petitioner in this case only seeks the modest relief of an issuance of a Certificate of Appealability ("COA").

Respondent's opposition does not dispute that the Ninth Circuit's decision here conflicts with holdings of the Fifth and Seventh Circuits on whether a COA should issue when the state courts have been divided on the merits of a constitutional claim. Respondent does not dispute that had this case arose in the Fifth or Seventh Circuit, the court would have been bound by precedent to grant relief where, as here, three Justices of the state appellate court unanimously found that Petitioner's constitutional claim had merit.

Rather, Respondent primarily contends that the Fifth and Seventh Circuits (and the three justices of this Court that cited those cases) are wrong. But, Respondent's argument is wholly contrary to the words of the statute. Respondent contends that a debate among state judges on the merits of the constitutional claim does not demonstrate a reasonable disagreement on whether a petitioner can succeed in meeting the federal habeas deference standard included in 28 U.S.C. § 2254(d)(1) of the Anti-Terrorism Effective Death Penalty Act ("AEDPA"). But 28 U.S.C. § 2253(c)(2) contains no such requirement. Respondent would improperly invent an additional hurdle to obtaining a COA not contained in § 2253(c)(2).

Moreover, Respondent does not dispute that there is a split between the circuits on this issue. Because Respondent also does not dispute that Petitioner's case presents a good vehicle for resolving this split, Respondent cannot dispute that the issue should be resolved by this Court. *See* Supreme Court Rule 10(a).

Nor does Respondent anywhere dispute that the California Supreme Court's decision in this case is the *only published case* to disagree that the holdings of *Geders v. United States*, 425 U.S. 80 (1976) and *Perry v. Leeke*, 488 U.S. 272 (1989) together clearly establish that a lengthy ban on a defendant's absolute right to

consult with counsel about important trial-related matters during trial is structural error. Because a threshold inquiry indicates that the California Supreme Court's decision below conflicts with every other Circuit and state court decision on this issue, the Petition should be granted per Supreme Court Rules 10(b), and (c).

In short, Petitioner has demonstrated a substantial showing of a denial of a constitutional right, and has raised an issue likely to succeed on the merits and that is at least a debatable issue worthy of further consideration. Petitioner would have been granted a COA in the Fifth and Seventh Circuits.

This Court should either grant review and set the case for briefing and argument, or grant review and summarily order that a COA issue.

REASONS FOR GRANTING THE WRIT

Much of the case remains undisputed. Respondent does not dispute that the trial court's order precluded counsel from discussing with the defendant, his investigator or anyone else, the existence or contents of declarations executed by his former codefendants. Opposition ["Opp."] 2-3. Respondent attempts to refer to the declaration as "one document" or one topic. Opp. i, 5. But Respondent does not dispute that the state prosecutor described the declaration as the state's "theory of the case." Nor does Respondent dispute that Flores was a critical witness and an alleged accomplice, or that the declaration contained details not found in other discovery. Respondent does not dispute that Flores's declaration and testimony was the only evidence that identified Petitioner as one of the three attackers of the victim. Nor does Respondent dispute that the eyewitness descriptions of the three attackers were inconsistent with Petitioner's appearance and language. *See* Appendix ["App."] 101, 122 & n.10.

Respondent does not dispute that the unjustified gag order lasted throughout the *entire trial*, covered a host of trial-related matters, and effectively prevented

discussion of the state's theory of the case. Further, Respondent does not dispute the trial court's order "unjustifiably interfered with appellant's access to counsel," as the state appellate courts have found. (Appendix 50, 59 & n.2).

I. This Court Should Grant Certiorari Because Respondent Does not Dispute the Need to Settle a Split Between the Ninth Circuit's Holding Below and that of the Fifth and Seventh Circuits.

Respondent acknowledges that to obtain a COA, a petitioner must show only "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). Satisfying that standard, "does not require a showing that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Respondent's argument, rather, disputes the central premise of the Fifth and Seventh Circuit holdings in *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011) and *Rhoades v. Davis*, 852 F.3d 422, 429 (5th Cir. 2017), that was cited by three members of this Court in *Jordan v. Fisher*, 576 U.S. 1071, 135 S.Ct. 2647, 2651 (2015) (Sotomayor, Ginsburg, & Kagan, JJ., dissenting from denial of certiorari). That is, Respondent disputes that actual disagreement between state court judges on the merits of the constitutional question ordinarily demonstrates that the issue is debatable issue, and that a COA should ordinarily issue. *See Rhoades*, 852 F.3d at 429; *Jones*, 635 F.3d at 1040. Respondent suggests that these Circuits do not sufficiently take into account the requirement that a habeas petition must show that a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1); *see* Opp. 11-18. But even if Respondent were correct (and it is not), the Opposition supports the need for this Court's review to resolve the split between the

Ninth Circuit's rejection of the Fifth and Seventh Circuit holdings. *See* Supreme Court Rule 10(a).

Moreover, Respondent is simply incorrect. First, this claim is contrary to the plain language of § 2253(c)(2). Section 2253, which sets forth the requirements for a COA, limits issuance of a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The statute contains no language requiring or authorizing a federal court to consider whether a petitioner can *additionally* make a substantial showing that the constitutional claim is contrary to, or an unreasonable application of clearly established law per § 2254(d)(1). Section 2253(c)(2) is directed solely to the constitutional issue ("denial of a constitutional right") and makes no reference to AEDPA deference. Respondent has thus improperly *invented* an additional hurdle to the issuance of COA that is not included in the statute. Without this invented additional roadblock, of course, a showing that the state courts were divided on the merits of the constitutional claim ordinarily does demonstrate a substantial showing of the denial of a constitutional right, as held by the Fifth and Seventh Circuits. Thus, plainly, had Petitioner filed his writ in either Circuit, a COA would have issued.

Second, even if Respondent were correct and a COA also required petitioners to make a substantial showing that their constitutional claim is debatable under the deferential standard of § 2254(d)(1), a showing that the state courts reached opposite conclusions on the constitutional claim, nonetheless ordinarily shows that the claim is debatable and deserves a COA. This is particularly true here where three Justices of the appellate court unanimously found that claim was controlled by clear Supreme Court precedents.

As Respondent points out, clearly established federal law, per § 2254(d)(1) refers to the holdings of this Court, rather than dicta. *Carey v. Musladin*, 549 U.S.

70, 74 (2006). But "'clearly established Federal law' under § 2254(d)(1) is the *governing legal principle or principles* set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (emphasis added). In short, § 2254(d)(1) does not require an "'identical factual pattern before a legal rule must be applied.'" *White v. Woodhall*, 572 U.S. 415, 427 (2014), quoting *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). Thus, in *Carey,* the Court held that its prior holdings in two cases had clearly established a legal principle that was not limited to the particular facts of either case. *Id.* at 72, 74; *see id*. at 79 (Stevens, J., concurring).

Similarly here, *Geders* and *Perry* clearly establish governing legal principles. Respondent agrees that in *Geders*, this Court held that an order precluding counsel from discussing anything with the defendant during a 17-hour, overnight recess required reversal without a showing of prejudice. Opp. at 14, citing *Geders*, 425 U.S. at 91. Respondent also agrees that *Perry* held both that the error in *Geders* was structural, and that a prohibition on consultation during a 15-minute recess was not comparable to the *Geders* 17-hour restriction on consultation. Opp. at 15-16, citing *Perry*, 488 U.S. at 274, 280. Further, in *Cronic*, this Court again made clear that this Court's holding in *Geders* and other cases has made *clear* that no showing of prejudice is required "when counsel was ... prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 & n. 25 (1984), citing *Geders*, 425 U.S. 80.

The *Perry* and *Geders* holdings read together, moreover, establish the "governing legal principles" related to restrictions on counsel's right to consult with counsel during trial concern the interrelated *subject matter and timing* of the ban and the *duration*. With respect to subject matter and timing, the *Perry* Court plainly held that a defendant "has no constitutional right to consult with his lawyer

while he is testifying." *Perry*, 488 U.S. at 281. But "*[h]e has an absolute right to such consultation before he begins to testify*." *Id*. (emphasis added). With respect to duration, *Perry* made clear that a short (15-minute) ban on consultation did not violate any constitutional right because the defendant and counsel would not reasonably need to consult on anything except the defendant's testimony during such a short ban. This distinguished the case from the structural error found in *Geders*, which was *unjustified* even if aimed at preventing coaching during testimony. As *Perry* described, any ban that interferes with consultation with counsel about trial related matters, and that lasts at least overnight, would encompass matters ... the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." *Id.* at 284 (emphasis added). As *Perry* further made clear: "It is the *defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters* that is controlling in the context of a long recess." *Id.*, citing *Geders*, 425 U.S. at 88 (emphasis added). All of these points, moreover, were necessary to explaining this Court's holding.

Thus, according to *Perry* and *Geders*, this Court has clearly established that a defendant has the "absolute right" "to unrestricted access to his lawyer for advice on a variety of trial-related matters" during trial. Further, although a defendant may have no right to consult with counsel during his testimony, a court's prohibition on consultation during his testimony is also structural error if it lasts at least overnight, because it would interfere with normal consultation on trial-related matters.

All of these points, moreover, were necessary to the Court's result and thus constitute holdings, not dicta. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). *No court* (except the California Supreme Court in this case) has found those

principles to be unclear, at least when applied to a ban on consultation with counsel about important trial-related subjects which last longer than an overnight recess.

Respondent does not dispute that the trial court's ban on consultation about anything included in the Flores declaration–the state's theory of the case–prevented the defendant from obtaining "access to his lawyer for advice on a variety of trial-related matters." *Perry*, 488 U.S. at 284. Further, Respondent does not dispute that because it lasted *throughout the entire trial*, the trial court's ban on consultation was *far longer* than *Perry* or *Geders*. Moreover, as Respondent concedes, the ban, like that in *Geders* was *unjustified*.

Respondent remarkably contends that no reasonable court could view either *Perry* or *Geders* as holding that "limited topical" restrictions on discussion with counsel that last throughout the trial are clearly included in the *Geders* rule. Opp. 15. But, here, the California Court of Appeal made *just such a holding*. App. 67-78. The California appellate court examined *Perry* and *Geders*, and particularly *Perry's* statement that "'[a]ctual or constructive denial of the assistance of counsel altogether' [citation], is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." App. 76. The appellate court found this to be a "*clear holding*" (*id.* [emphasis added]) and noted that Respondent has cited no authority suggesting that this Court has retreated from that holding. App. 77. The appellate court rejected Respondent's attempt to minimize the ban on consultation as limited to "one topic," which did not "alter our conclusion that on this topic—the written declaration of an accomplice who was a significant witness at trial" fit within the clear holdings of *Perry* and *Geders* and required reversal without a showing of prejudice. App. 77-78.

The unanimous decision of the three Justices of the California Court of

Appeal thus objectively disproves Respondent's assertion that no reasonable jurist could make such a decision. Indeed, that is the point of the Fifth and Seventh Circuit *Jones* and *Rhoads* holdings, and the dissenters in *Jordan*. Ordinarily when state court judges have in fact disagreed on the merits of a constitutional claim, their disagreement demonstrates that the issue is debatable among reasonable jurists and constitutes a substantial showing of a denial of a constitutional right; thus, the issuance of a COA should ordinarily be routine. *Rhoades*, 852 F.3d at 429; *Jones*, 635 F.3d at 1040; *see Jordan*, 135 S.Ct. at 2651 (Sotomayor, Ginsburg, & Kagan, JJ., dissenting from denial of certiorari). Respondent does not dispute that courts in the Fifth and Seventh Circuits would have been bound by these precedents to grant him a COA.

Moreover, as seen in the petition, in addition to the three appellate judges here, dozens of other reasonable jurors, including Justice Scalia (when sitting on the D.C. Circuit) have agreed that a court's similar limited topical ban on discussion of important trial-related matters falls within the holdings of *Geders* and *Perry* where it lasts at least overnight:

> ... the District Court's order prohibiting defendant from discussing his testimony with his attorney during a weekend recess was not significantly less invasive of sixth amendment rights than the order prohibiting all contact between a defendant and his attorney during an overnight recess in *Geders*[.] I therefore join in the majority's holdings that a prohibition on attorney-defendant discussion during substantial recesses, even if limited to discussion of testimony, violates the sixth amendment and that, like the similar violation at issue in *Geders*, it constitutes per se reversible error.

Mudd v. United States, 798 F.2d 1509, 1515 (D.C. Cir. 1986) (Scalia, J., concurring); *see id.* at 1512. As cited in the Petition, numerous other courts agree. *See* Petition for Certiorari 16-17, citing cases; *see also Commonwealth v. Diaz*, 226 A.3d 995, 1008-11 (Pa. Supreme Court 2020) [failure to secure interpreter for defendant until the second day of trial required reversal per se].) By contrast, Respondent cites *no cases* that agree with the California Supreme Court's novel approach finding *Geders*

and *Perry* insufficiently clear.

The trial court's gag order here cannot be reasonably swept under the rug as a minimal or trivial restriction on discussion. Respondent does not dispute that in this case, the trial court's ban on discussion of anything included in the Flores declaration prevented discussion of the state's theory of the case, and the testimony of the only witness identifying Petitioner as one of the attackers. Even assuming that a ban on consultation about a trivial or unimportant document or subject might fall outside the purview of *Geders*, banning discussion of the state's theory of the case throughout the trial presents no such close question. Indeed, if forced to choose between an absolute ban on communication lasting for one evening recess, or a ban on discussing the state's theory of the case and the testimony of the key witness *throughout trial*, one need not speculate to conclude that counsel and defendants would choose the shorter restriction held to be structural error in *Geders*. Clearly, the constitutional violation here was on par with, or worse than that in *Geders*.

Because the state courts were divided on the merits of the constitutional question, the Ninth Circuit should have issued a COA, and its refusal to do so created a split with the Fifth and Seventh Circuits on this question. Petitioner plainly would have received a COA had this case arisen in the Fifth and Seventh Circuits based upon *Jones* and *Rhoads*. The Court should grant review to resolve this split.

Respondent's contention that *Jones* and *Rhoads* are inapposite and wrongly decided does not resolve the split. Moreover, Respondent's argument improperly invents a new barrier to the issuance of a COA that does not appear in § 2253(c)(2). Respondent argues that *Jones* is not on point because it involved a Confrontation Clause violation where the standard is purportedly clearer. Opp. 17. But, as seen

above, numerous courts (including the California Court of Appeal) have concluded that the *Geders* and *Perry* cases are sufficiently clear as to require automatic reversal where a court imposes an unjustified ban on consultation with counsel that lasts overnight or longer, even when the ban is limited to one important subject. Respondent's attempt to distinguish *Rhoads*, moreover, is even less convincing. Respondent contends only that the disagreement in the state court was about the merits of the constitutional issue without the additional burden to federal habeas relief set forth in § 2254(d)(1). Opp. 17-18. Respondent also contends that the *Jones* and *Rhoads* standard conflicts with *Miller-El's* statement that the COA requirement is intended to provide differential treatment between appeals deserving attention and those that do not. Opp. at 18, citing *Miller-El*, 537 U.S. at 337. But, rather, as shown above, it is Respondent's interpretation of the COA requirement that plainly conflicts with the language of § 2253(c)(2), and *invents* an additional hurdle to issuance of COA that is not included in the statute. In any case, a division and debate among the state courts on a petitioner's constitutional claim is nonetheless a good indication that the federal habeas appeal raises at least a debatable issue under clearly established law, and thus deserves attention.

Moreover, Respondent's contentions do not resolve the split among the Circuits on this point. Further, Respondent makes no claim that Petitioner's case is a bad vehicle for resolving this split. Respondent does not dispute that Petitioner's case would merit a COA under the holdings in *Jones* and *Rhoads*. Thus, this Court should grant certiorari per Rule 10(a).

In sum, the state court of appeal in Petitioner's case and numerous Circuit and lower court cases have found that *Geders* and *Perry* clearly establish that a trial court's lengthy ban on consultation with counsel about trial related matters require reversal without a showing of prejudice–at least when the ban concerns

important subject matter. Petitioner has shown that the issue is at least debatable among reasonable jurists. A COA would issue under *Jones* and *Rhoads* in the Fifth and Seventh Circuits, and should issue for Petitioner here.

This Court should either grant certiorari and set the case for briefing and argument, or vacate the Ninth Circuit's order denying a COA and remand with directions to issue a COA.

II. This Court Should Grant Certiorari where a Threshold Inquiry Demonstrates that the California Supreme Court's Decision is not Only Debatable, but *Contrary to Every Other Court Decision* Applying *Perry* to Trial Court Orders Imposing Lengthy Limits on Discussion Between Counsel and the Defendant During Trial.

Petitioner's second contention is that an appropriate threshold inquiry into the merits which is required for a COA inquiry (*see Buck v. Davis*, — U.S. —, 137 S. Ct. 759, 773 (2017)) indicates that the California Supreme Court's decision is contrary to every other court decision applying *Geders* and *Perry* to a trial court's ban on attorney consultation with a defendant.

Respondent notes that only two of the cases cited by appellant were federal habeas cases where the court had to consider whether the state court's ruling was an unreasonable application of clearly established federal law. But Respondent does not dispute that the California Supreme Court's decision here *conflicts with every other case on this point.*

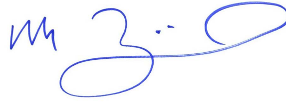
The fact that *all* authority agrees on this point with Petitioner, and that *no authority* supports the California Supreme Court's decision, indicates that Petitioner has raised at least a debatable issue that the California Supreme Court's decision is an unreasonable application of, or contrary to, clearly established federal law. Moreover, as shown above, Respondent's interpretation improperly invents an additional roadblock to issuing a COA that is not contained in § 2253(c)(2).

This Court should grant certiorari, vacate the Ninth Circuit's order denying a

COA, and remand with directions to issue a COA, or set the case for briefing and argument to settle these important questions.

Dated: March 22, 2021

Respectfully submitted,



MARC J. ZILVERSMIT

Counsel of Record for
Petitioner Jacob Townley Hernandez