No. _____

In the Supreme Court of the United States

Demondray D. Mayo,

Petitioner,

v.

Perry Russell, et al.

Respondent.

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

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether a federal court reviewing a habeas petition incorrectly applies 28 U.S.C. § 2254(d) and *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), when it relies on reasoning given by a state court on a different claim than the one under review in order to rule that the state court's opinion was reasonable under § 2254(d).

LIST OF PARTIES

Demondray D. Mayo is the petitioner. Perry Russell, the warden of Northern Nevada Correctional Center, is the respondent.[1] No party is a corporate entity.

[1] In the Ninth Circuit and federal district court, the respondents were listed as the State of Nevada and the Attorney General for the State of Nevada. Technically, the warden of the facility where Mr. Mayo is incarcerated should be listed.

LIST OF PRIOR PROCEEDINGS

Mr. Mayo was convicted of second-degree murder in *State of Nevada v. Demondray Mayo*, No. C214815 in the Eighth Judicial District. The judgment of conviction was entered on April 24, 2007.

Mr. Mayo filed a motion seeking to correct an illegal sentence and withdraw his guilty plea in *State of Nevada v. Demondray Mayo*, No. C214815 in the Eighth Judicial District. The Nevada Supreme Court entered an order of affirmance on January 30, 2009, in *Demondray Mayo v. State of Nevada*, No. 51040.

Mr. Mayo filed a state post-conviction petition in the Eighth Judicial District in *Demondray Mayo v. State of Nevada*, No. C214815. The parties stipulated that he had shown that he was deprived the right to a direct appeal and was entitled to proceed with a direct appeal with the assistance of counsel. The court granted Mr. Mayo the right to appeal on September 2, 2011.

The Nevada Supreme Court affirmed Mr. Mayo's conviction and sentence on direct appeal on November 13, 2013, in *Demondray Mayo v. State of Nevada*, No. 63512.

Mr. Mayo filed a state post-conviction petition in *State of Nevada v. Demondray Mayo*, No. 05C214815-2 in the Eighth Judicial District. The court denied the petition on December 2, 2014. Mr. Mayo appealed the denial of that petition to the Nevada Supreme Court, which affirmed the denial on December 18, 2015, in *Demondray Mayo v. State of Nevada*, No. 67066.

Mr. Mayo pursued federal habeas relief in the district court *in Demondray*

Mayo v. State of Nevada, et al, No. 3:09-cv-00316-MMD-WGC. The district court denied relief on May 11, 2018. The Ninth Circuit affirmed on appeal on April 1, 2020, in *Demondray Mayo v. State of Nevada; Attorney General for the State of Nevada*, No. 18-16081.

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Petitioner Demondray Mayo respectfully prays that a writ of certiorari issue to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit. (*See* Appendix A.)

OPINIONS BELOW

The Nevada Supreme Court upheld Mr. Mayo's conviction and sentence on November 13, 2013. (Appendix E.) The federal district court denied Mr. Mayo's habeas petition on May 11, 2018. (Appendix D.) The Ninth Circuit issued an unpublished memorandum decision affirming the denial of Mr. Mayo's habeas petition on February 19, 2020. (Appendix C.) After Mr. Mayo filed a petition for panel rehearing and rehearing en banc, the Ninth Circuit filed an amended memorandum on April 1, 2020. (Appendix B.) The Ninth Circuit denied Mr. Mayo's subsequent petition for rehearing on July 9, 2020. (Appendix A.)

JURISDICTION

The court of appeals issued its final decision in this case on April 1, 2020. (Appendix B.) Mr. Mayo filed a timely petition for panel rehearing and rehearing en banc, which was denied on July 9, 2020. (Appendix A.) Mr. Mayo's current petition for a writ of certiorari is timely filed pursuant to the Court's order of March 19, 2020, extending the deadline for filing such a petition to 150 days from the date of the denial of a petition for rehearing in the circuit court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d) provides:

> (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.

STATEMENT OF THE CASE

This is a habeas case challenging under 28 U.S.C. § 2254 a state court conviction for second-degree murder with the use of a deadly weapon. The Ninth Circuit Court of Appeals affirmed the denial of habeas relief. That court had jurisdiction under 28 U.S.C. §§ 1291, 2253.

Information in the state court record showed that there were significant reasons to question whether Demondray Mayo pled guilty knowingly and intelligently. At the age of sixteen, Mr. Mayo was charged with murder with the use of a deadly weapon. (EOR 319–22.[2]) In the course of pre-trial proceedings, the trial court ordered Mr. Mayo to see a psychologist on fourteen occasions. (EOR 208–41.) Mr. Mayo's full-scale IQ was only 66 or 67, which is "in the range of mild mental retardation" and meets the definition of borderline intellectual functioning. (EOR 37,

[2] Mr. Mayo cites to the Excerpts of Record and Supplemental Excerpts of Record filed in the Ninth Circuit. *See* Ninth Cir. ECF Nos. 9 & 19.

58, 61.) He received social security benefits starting at the age of ten for borderline intellectual functioning. (*See* EOR 393, 475, 762.) At the age of seven, he had processing deficits in visual memory and visual perception. (EOR 33.) And at the age of fifteen—only one year before he was charged with murder—testing revealed he suffered from possible neurological impairment. (EOR 59, 61.)

Mr. Mayo had been in special education classes starting when he was seven years old and in the first grade. (*See* EOR 31–34.) By the age of seventeen, he read at only the fourth-grade level and could do math at the second-grade level. (EOR 337–38.) In order to accommodate his learning disabilities, Mr. Mayo received double time on assignments (EOR 54, 424) and had directions read and reread aloud (EOR 54). When reading, Mr. Mayo had "difficulty identify[ing] the main idea, details, and drawing conclusions from longer passages." (EOR 337.) He could "decode single and some multisyllabic words . . . [and had] difficulty with higher level vocabulary. In addition, the lengthier the passage, the more difficult it is to decode and comprehend the material." (EOR 418.)

Moreover, while in jail for the instant offense, Mr. Mayo was prescribed Seroquel, an antipsychotic, which caused him to suffer from blackouts. (EOR 475; SEOR 1.)

While still a juvenile, Mr. Mayo pled guilty to second-degree murder with the use of a deadly weapon. (EOR 376–83.) The plea canvas was shockingly brief. The entire hearing lasted only seven minutes. (*See* EOR 385, 391.) And the canvass spans just over four pages of transcript. (*See* EOR 385–90.) Inexplicably, the court did not

ask any questions about the court-ordered psychological treatment. Nor did the court inquire about Mr. Mayo's educational background, even though he was just seventeen years old at the time and the court had been alerted to his mental limitations. (*See, e.g.*, EOR 208–41 (ordering psychological treatment); EOR 353 (moving to suppress statement to police, arguing "Demondray is neither intelligent enough nor mature enough to have made a knowing and voluntary waiver of his sixth amendment rights given the totality of the circumstances. He was sixteen (16) years old at the time, had a very limited education, has a cocaine addiction, has been prescribed Prozac for a mental disability, and had only been in trouble in juvenile court."); EOR 934–35 (discussing Mr. Mayo's motion to dismiss counsel based on failure to obtain medical records and have him evaluated).) Further, there was no question about whether Mr. Mayo was on medication. Because of the court's failure to ask this basic question, no record was made that Mr. Mayo had been blacking out from his medication. Instead of probing whether Mr. Mayo in fact understood his guilty plea, the trial court asked nothing but yes or no questions of this juvenile with mental limitations. (*See* EOR 384–91.)

A month later, Mr. Mayo, with the help of his cellmate, moved to withdraw his guilty plea. (EOR 397–402, 408.) In the motion, Mr. Mayo informed the court that he "has been mentally disabled and is use[d] to his 'mom making decisions'" and "suffers from a mental handicap." (EOR 399.) Mr. Mayo was then appointed counsel, who argued that Mr. Mayo had significant intellectual deficiencies and "would be considered 'mentally retarded.'" (EOR 446; *see also* EOR 440–56.) Despite the

significant evidence in the record of Mr. Mayo's mental limitations and the court's failure to pursue these matters at the colloquy, the trial court denied the motion (EOR 332), and sentenced Mr. Mayo to twenty years to life (EOR 692; *see also* EOR 29–30).

Given all of these circumstances, Mr. Mayo's guilty plea was not knowing and intelligent. *See Henderson v. Morgan*, 426 U.S. 637 (1976); *Boykin v. Alabama*, 395 U.S. 238 (1969). And the trial court did not fulfill its constitutional obligation to ensure on the record that Mr. Mayo actually understood the plea and its consequences. *See Brady v. United States*, 397 U.S. 742, 747 n.4 (1970); *Boykin*, 395 U.S. at 244.

On direct appeal, Mr. Mayo challenged his plea as not knowing and intelligent as well as the trial court's failure to hold a competency hearing. (EOR 1188–1211.) The Nevada Supreme Court denied relief. (Appendix E.) Mr. Mayo then filed a post-conviction petition, arguing, among other things, that his plea was not knowing and intelligent. (EOR 1333–54.) On December 8, 2015, the Nevada Supreme Court affirmed the denial of post-conviction relief. (EOR 19–21.) Mr. Mayo then unsuccessfully sought relief under 28 U.S.C. § 2254 in the federal district court. (*See* Appendix D.)

On appeal, a panel of the Ninth Circuit ruled that the Nevada Supreme Court had reasonably denied Mr. Mayo's claim that his guilty plea was not knowing and intelligent. (Appendix B.) Mr. Mayo filed a petition for panel rehearing and rehearing en banc, arguing that the opinion was based on a misstatement of the contents of the Nevada Supreme Court's decision, the panel's reliance on reasoning not put forth by

the Nevada Supreme Court conflicted with precedent from the Ninth Circuit and this Court, the new justification for the state court's opinion was also in conflict with this Court's precedent, and the panel's opinion overlooked several facts relevant to the question of if, under the totality of the circumstances, Mr. Mayo's guilty plea was knowing and intelligent. (Ninth Cir. ECF No. 47.) The Ninth Circuit filed an amended memorandum. The court again found that the Nevada Supreme Court reasonably rejected Mr. Mayo's claim. (*See* Appendix A.) Mr. Mayo argued in a second petition for rehearing that the panel's amended decision still rested on a misstatement of key facts and was in conflict with precedent from this Court. (Ninth Cir. ECF No. 49.) The Ninth Circuit ordered a response (Ninth Cir. ECF No. 50) and permitted Mr. Mayo to file a reply (Ninth Cir. ECF Nos. 55, 55). The Ninth Circuit denied the petition for rehearing. (Appendix A.)

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's decision conflated rulings by the Nevada Supreme Court on two distinct claims and so joined a minority of circuits in misapplying 28 U.S.C. § 2254(d) and *Wilson v. Sellers*, 138 S. Ct. 1188 (2018).

A. The Ninth Circuit misapplied this Court's precedent in Mr. Mayo's case.

The Nevada Supreme Court addressed two related claims on Mr. Mayo's direct appeal. First, it ruled that the state district court did not abuse its discretion by denying Mr. Mayo's motion to withdraw his guilty plea because the plea was not knowing and intelligent. (Appendix E at App.36-37.) Second, the Nevada Supreme Court ruled that the district court did not abuse its discretion by not holding a

competency hearing. (Appendix E at App.37-38.) The reasoning for denying the two claims was distinct. As concerns the first claim, the Nevada court determined:

> After reviewing the pleadings and the "entire record," the district court denied appellant's motion [to withdraw his plea] on the grounds that there was no showing that his guilty plea was unknowing or involuntary as he "has been involved and directing several of the important decisions in his case of his own volition" and that appellant's "regret or change of heart" is insufficient to withdraw the plea. . . . Based on the record, we conclude that appellant has not demonstrated that the district court abused its discretion by denying his motion to withdraw his guilty plea.

(Appendix E at App. 37.) Then, when addressing the second claim about competence, the court reasoned, in part, that "the district court had the opportunity to observe appellant's demeanor during the plea canvass." (Appendix E at App. 38.)

The Ninth Circuit in its amended memorandum conflated these two distinct rulings from the Nevada Supreme Court and relied on both the reasoning that Mr. Mayo had directed decisions in the case and that the trial court had observed his demeanor. (Appendix B at App. 5.) But the Nevada Supreme Court did not rely on Mr. Mayo's demeanor when deciding the claim about his guilty plea.

The Ninth Circuit's reliance on reasoning not advanced by the Nevada Supreme Court as to the particular claim at issue when conducting its analysis under 28 U.S.C. § 2254(d) is in conflict with this Court's precedent on the proper evaluation of a state court opinion under the Antiterrorism and Effective Death Penalty Act. When conducting analysis under § 2254(d) when a state court has adjudicated the

merits of a claim in a reasoned decision, federal courts must look to the actual reasons provided by the state court. In *Wilson v. Sellers*, the Court explained:

> Deciding whether a state court's decision "involved" an unreasonable application of federal law or "was based on" an unreasonable determination of fact requires the federal habeas court to "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims" . . . This is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion. In that case, a federal habeas court simply reviews the *specific reasons* given by the state court and defers to those reasons if they are reasonable.

138 S. Ct. 1188, 1191–92 (2018) (internal citations omitted and emphasis added). If the state court's actual reasoning is defective under § 2254(d), then the court's decision does not warrant deference even if the state court could have used other reasoning that would have commanded deference. The Court noted that it has "affirmed this approach time and again." *Id.* at 1192.

As *Wilson* makes clear, the panel here could not find under § 2254(d) that the Nevada Supreme Court reasonably applied United States Supreme Court precedent based on a reason not put forth by the state court for the specific claim at issue. The error of conflating reasoning on distinct claims here is particularly problematic because this Court has made clear that the question of a defendant's competence to plead is distinct from whether a plea was knowing and intelligent. *Godinez v. Moran*, 509 U.S. 389, 400–01 & n.12 (1993); *see also United States v. Christensen*, 18 F.3d 822, 826 (9th Cir. 1994) (discussing distinction).

B. There is a circuit split on the proper application of 28 U.S.C. § 2254(d) and *Wilson v. Sellers*.

The majority of circuit courts have faithfully followed *Wilson*. *See Thompson v. Skipper*, __ F.3d __, 2020 WL 6938150 at *2 (6th Cir. Nov. 25, 2020); *Gish v. Hepp*, 955 F.3d 597, 603 (7th Cir. 2020); *Scrimo v. Lee*, 935 F.3d 103, 111-12 (2d Cir. 2019); *Tyler v. Hooks*, 945 F.3d 159, 167 (4th Cir. 2019); *see also Gibbs v. Admin. New Jersey State Prison*, 814 Fed. Appx. 686, 689 n.6 (3d Cir. 2020) (unpublished); *Dyer v. Farris*, 787 Fed. Appx. 485, 493 (10th Cir. 2019) (unpublished). By relying on reasoning not advanced by the Nevada Supreme Court to deny Mr. Mayo's claim under § 2254(d), the Ninth Circuit joined a minority of circuits in misapplying § 2254(d) and *Wilson*. Now, the Fifth, Eleventh, and Ninth Circuits make up the incorrect minority.

Prior to the ruling in *Wilson*, the law of the Fifth Circuit was that under § 2254(d) it reviewed "the ultimate legal conclusion that the state court reached and not [] whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc). Therefore, the Fifth Circuit evaluated "not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it could have relied upon." *Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017).

This approach is no longer valid after *Wilson*. This Court made clear that when the state court has provided a reasoned opinion denying a claim, the state court's actual reasoning has to be evaluated. *Wilson*, 138 S. Ct. at 1191–92. However, the Fifth Circuit has not disavowed its pre-*Wilson* precedent in light of this Court's decision. The court was presented with the opportunity to do so but declined to take

it. *See Sheppard v. Davis*, 967 F.3d 458, 467 (5th Cir. 2020). And district courts in the circuit are still applying the no-longer-valid precedent even after *Wilson*. *See, e.g.*, *Bess v. Davis*, 2020 WL 2066732, No. 3:16-CV-1150-S (N.D. Tex. Apr. 28, 2020) ("Petitioner asserts that the Court committed manifest error by failing to apply the standard for habeas relief articulated in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018). Petitioner is mistaken. It is binding Fifth Circuit law that the Antiterrorism and Effective Death Penalty Act ("AEDPA") authorizes a federal habeas court to review only a state court's decision and not the written opinion explaining that decision." *See Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2003) (en banc) (citing 28 U.S.C. § 2254(d))."). The Fifth Circuit therefore has not corrected its practice and continues in conflict with this Court's clear directive in *Wilson* of how § 2254(d) is to be applied. *See Langley v. Prince*, 926 F.3d 145, 174 (5th Cir. 2019) (Higginson, J., dissenting) (discussing majority decision's misapplication of *Wilson*).

The Eleventh Circuit likewise has flouted this Court's precedent. In *Whatley v. Warden*, 927 F.3d 1150 (11th Cir. 2019), the Eleventh Circuit conducted a similar analysis as the Fifth Circuit. As the dissent from the denial of en banc review argued, the panel opinion's articulation of the appropriate standard of review ignored *Wilson*. *See Whatley v. Warden*, 955 F.3d 924, 925 (11th Cir. 2020) (Martin, J., dissenting from denial of rehearing en banc). The panel stated that under § 2254(d), "we're most concerned with reviewing the [state] court's ultimate conclusion, not the quality of its written opinion." *Whatley*, 927 F.3d at 1177 (internal quotation marks omitted). The court further explained that "we are not limited to the reasons the [state] Court gave

and instead focus on its 'ultimate conclusion.' . . . Under 28 U.S.C. § 2254(d), we 'must determine what arguments or theories *could* have supported the state court's decision.'" *Id.* at 1182 (original alterations omitted and alterations added) (emphasis in original). The court relied on *Harrington v. Richter*, 562 U.S. 86, 102 (2011), for this articulation of the standard.

This use of *Richter*—which applies to unreasoned state court decisions, *see id.* at 98—is misplaced because the state court decision in *Whatley* included reasoning. Indeed, in *Wilson*, this Court rejected an argument that *Richter* should apply to an unreasoned state court opinion when there was a reasoned lower court opinion; instead there is a presumption a federal court should look through the unreasoned opinion to the reasoning of the lower court. *See Wilson*, 138 S. Ct. at 1195. *Wilson* thus makes clear that *Richter* certainly does not apply to a reasoned opinion by the state's supreme court. The Eleventh Circuit's reliance on *Richter* and further articulation of the appropriate standard of review under § 2254(d) make clear that it too is acting against the dictates of *Wilson*.

Like the Fifth and Eleventh Circuits, the decision of the Ninth Circuit in Mr. Mayo's case misapplies precedent of this Court. Under *Wilson*, when a state court has articulated its reasons for denying a claim, a federal court reviewing the claim under § 2254(d) must look at whether those specific reasons are unreasonable. The federal court should not create its own justification. The Ninth Circuit has therefore joined the minority side of a circuit split in misapplying § 2254(d) and this Court's precedent.

II. Mr. Mayo's case is a good vehicle to resolve the circuit split.

Mr. Mayo's case presents this Court with a clear opportunity to resolve this growing circuit split. The issue is cleanly presented. First, there is no dispute that Mr. Mayo raised two claims on direct appeal—one challenging his guilty plea as unknowing and unintelligent and the second challenging the trial court's failure to hold a competency hearing. (Ninth Cir. ECF No. 52 at 3 ("Relevant to Mayo's appeal and this petition for rehearing Mayo asserted two closely related challenges in his state court proceedings: that the state district court abused its discretion when it denied his motion to withdraw his plea, and when it did not conduct a competency hearing before accepting his plea.").) Nor can there be any dispute that the Nevada Supreme Court gave distinct reasoning when denying the two claims. (*See* Ninth Cir. ECF No. 52 at 4 (discussing Nevada Supreme Court's reasoning on each claim in warden's opposition to petition for rehearing).)

Finally, it is clear that the Ninth Circuit relied on the state court's reasoning for two separate claims. In response to Mr. Mayo's second petition for rehearing in the Ninth Circuit, the warden argued that the Ninth Circuit acted appropriately because it "in no way relied on reasoning that was not advanced by the Nevada Supreme Court; rather this Court expressly relied on and appropriately deferred to the state court's findings in a single order of affirmance." (Ninth Cir. ECF No. 52 at 5.) But the fact that the Ninth Circuit pulled reasoning from a single order is no answer to the error of relying on the state court's reasons for denying a claim not challenged by Mr. Mayo in the Ninth Circuit. The question of whether the Ninth

Circuit, when evaluating a claim under § 2254(d), could have appropriately relied on a state court's reasoning for a distinct claim is thus cleanly before the court.

Mr. Mayo's case also presents a good vehicle to resolve this issue because Mayo was clearly entitled to relief under § 2254(d). The Nevada Supreme Court's actual reasons for denying Mr. Mayo's claim were unreasonable. The Nevada Supreme Court's bases for denying Mr. Mayo's claim that his plea was not knowing and intelligent were that the state district court had reviewed the entire record before making its determination and that Mr. Mayo had directed decisions in the case. (Appendix E at App. 37.) But clearly established law required the state court to look to the totality of the circumstances to determine whether the defendant actually understood the "significance and consequences" of the plea. *See Godinez*, 509 U.S. at 401 n.12; *Henderson*, 426 U.S. at 644; *Little v. Crawford*, 449 F.3d 1075, 1080 (9th Cir. 2006). Under this standard, the state court acted unreasonably.

First, the entire record supporting Mr. Mayo's motion to withdraw included ample evidence that the plea was not knowing and intelligent. It included fourteen court-signed transportation orders for Mr. Mayo to meet with a psychologist. (EOR 208–41.) It also revealed that Mr. Mayo had intellectual deficits, including that he had an IQ score of 67 (EOR 337) and had been receiving social security benefits for a mental disability since the age of ten (EOR 393; EOR 475). Mr. Mayo's difficulties in school were before the court: he had been designated as learning disabled from a young age (EOR 336–37); he could read at only the fourth grade level at the time he plead guilty (EOR 337); he shut down when a task was too difficult for him instead of

asking for help (EOR 337); and he had trouble identifying "the main idea, details, and drawing conclusions from longer passages" (EOR 337). Finally, the court knew that Mr. Mayo had been prescribed Seroquel, which caused blackouts. (EOR 475.) It is unsupportable that the state district court reviewed this record and still reasonably found Mr. Mayo's guilty plea knowing and intelligent. At the very least, it is clear that such a perfunctory plea canvass as the court conducted here was insufficient to establish that Mr. Mayo actually understood the plea. *See Boykin*, 395 U.S. at 244.

The Nevada Supreme Court's second reason for denying Mr. Mayo's claim—that he had directed decisions in his case—is also unreasonable under § 2254(d). The Nevada Supreme Court did not specify what decisions Mr. Mayo had made but relied on the district court's decision. (Appendix E at App. 37.) The district court in turn relied on the State's opposition to Mr. Mayo's motion to withdraw his guilty plea. (*See* EOR 332.) There, the State argued that Mr. Mayo had provided information relayed in the sentencing memorandum and had wavered on whether to plead guilty. (EOR 462.) Neither reason supports the Nevada Supreme Court's decision.

That Mr. Mayo could provide information about his life and childhood for a sentencing memorandum does not speak to whether he understood the plea. As explained above, Mr. Mayo had borderline intellectual functioning and was learning disabled. (*See, e.g.*, EOR 33, 37, 58, 61, 762.) When he pled guilty in this case, he could read at only the fourth-grade level. (EOR 337–38.) In a school setting, his learning disability was accommodated by, among other things, double time on assignments and instructions being read aloud to him, multiple times if needed. (EOR 54.)

Mr. Mayo's deficits directly impacted his ability to read and understand a plea agreement and understand questions posed by the court involving complicated legal concepts. His deficits did not similarly impede his ability to recite his prior, lived experiences. *Cf. Atkins v. Virginia*, 536 U.S. 304, 307 (2002) (explaining that Atkins, who is intellectually disabled, described the events of the crime).

Nor does the fact that Mr. Mayo did not initially plead guilty mean that he later understood the plea agreement. Instead, the entire timeline of the case shows that Mr. Mayo did not understand the plea. As the State noted in opposition to Mr. Mayo's motion to withdraw his plea, he rejected an earlier plea offer. (EOR 461–62.) The record does not reveal the extent of counsel's explanation of this offer to Mr. Mayo. Then, Mr. Mayo later accepted the same plea offer. (*See* EOR 462.)

The canvass itself shows that Mr. Mayo did not understand what he was pleading to and the consequences of his plea. The canvass lasted only a few minutes and spans just over four pages of transcript. Mr. Mayo spoke a total of thirty words, comprised of "yes," "no," and "guilty." (*See* EOR 384–91.) Mr. Mayo did not say anything substantive, and nothing in his answers shows that he understood what he was agreeing to or the import of the questions and his answers. *See Miles v. Stainer*, 108 F.3d 1109, 1112 (9th Cir. 1997) ("The state-court plea colloquy consisted almost entirely of yes or no questions which shed little light on complex reasoning ability.").

Strikingly, Mr. Mayo agreed he was pleading to the elements of first-degree murder when he was in fact pleading to second-degree murder. The trial court asked: "Are you in fact entering a guilty plea today, sir, to second degree murder with use of

a deadly weapon because . . . you did . . . willfully, feloniously, and without authority of law, kill Jesus Escoto-Gonzales." (EOR 389.) Mr. Mayo responded simply, "Yes." (*Id.*) In Nevada, first-degree murder is any murder "[p]erpetrated by . . . any . . . kind of willful, deliberate and premeditated killing. Nev. Rev. Stat. § 200.030(1)(a). Second-degree murder, on the other hand, "is all other kinds of murder." *Id.* § 200.030(2). In other words, the trial court provided the factual basis for first-degree murder—a willful killing—not second-degree murder, which is not willful. And Mr. Mayo did not correct the error because he did not understand the distinction.

A month after the plea, Mr. Mayo, with the help of his cellmate, moved to withdraw his guilty plea. (EOR 397–402, 408.) He explained that his counsel had failed to communicate with him "in a meaningful manner" given his "educational and mental defic[i]encies." (EOR 400.) New counsel was appointed to represent Mr. Mayo on his motion to withdraw. This attorney explained that he had several discussions with Mr. Mayo about the plea and that after these discussions, Mr. Mayo wished to withdraw his plea. (EOR 442.)

Mr. Mayo therefore maintained that he did not want to plead guilty when the same plea offer was initially presented and again after he had pled guilty and when new counsel had several discussions with him about the plea. There was only one time when Mr. Mayo waivered in his steadfast position that he did not want to plead guilty, and it was when counsel and the court failed to adequately explain the plea to him. Instead of suggesting that Mr. Mayo understood the plea and simply changed his mind about whether to accept it, this timeline shows that Mr. Mayo did not

understand the plea at the time he accepted it. Mr. Mayo had maintained that he did not want to plead guilty throughout the proceedings. The Nevada Supreme Court's reliance on Mr. Mayo's so-called direction of decisions was therefore unreasonable.

When evaluating just the reasons advanced by the Nevada Supreme Court on the relevant claim, the state court decision is unreasonable under § 2254(d) and not entitled to the deference the Ninth Circuit gave it. The Ninth Circuit's reliance on a demeanor determination made by the state court for another claim, which is much harder to overcome under § 2254(d), thus allowed it to bolster the state court's reasoning and afford deference where none was due. The court's error therefore prevented it from rectifying a serious constitutional violation and the unconstitutional conviction of an intellectually disabled juvenile.

CONCLUSION

The Court should issue a writ of certiorari to reaffirm the proper analysis of a state court decision under 28 U.S.C. § 2254(d) and *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), resolving a circuit split on the issue.

Dated December 4, 2020

Respectfully submitted,

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