NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2020 TERM

_____

RODNEY BERRYMAN – Petitioner

vs.

RON DAVIS – Respondent

_____

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

PETITION FOR WRIT OF CERTIORARI

[CAPITAL CASE]

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CAPITAL CASE

QUESTIONS PRESENTED

1. Was the state court's denial of Petitioner's claims in a written opinion and subsequent summary denial of the same claims in a habeas petition, alleging defense counsel's failure to investigate, develop and present available evidence in mitigation at the penalty phase, contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, or an unreasonable determination of the facts, within the meaning of 28 U.S.C. § 2254(d)?

2. Was the state court's denial of Petitioner's claims in a written opinion and subsequent summary denial of the same claims in a habeas petition, alleging defense counsel's failures to obtain neuro-psychiatric testing requested by defense expert witnesses before trial and present that evidence at guilt and penalty including (a) Petitioner's mental illness and (b) other available evidence in mitigation, contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, or an unreasonable determination of the facts, within the meaning of 28 U.S.C. § 2254(d)?

LIST OF PARTIES

All parties appear on the caption of the case on the cover page.

LIST OF PROCEEDINGS

1. Kern County Superior Court -

People v. Rodney Berryman, Case No. 34841-Judgment of death entered December 5, 1988.

2. California Supreme Court -

People v. Rodney Berryman, Case No. S008182, 6 Cal.4th 1048 (1993) Opinion filed on December 27, 1993 affirming judgment and death sentence;

In re Rodney Berryman, Case No. S034862, 1993 Cal. LEXIS 7651 (1993) - Opinion filed December 27, 1993 denying Petition for Writ of Habeas Corpus;

In re Rodney Berryman, Case No. S068933, 1998 Cal. LEXIS 2633 (1998) - Opinion filed April 29, 1998 denying Petition for Writ of Habeas Corpus;

In re Rodney Berryman, Case No. S077805, 1999 Cal. LEXIS 7651 (1999) - Opinion filed April 21, 1999 denying Petition for Writ of Habeas Corpus;

In re Rodney Berryman, Case No. S102102, 2002 Cal. LEXIS 2894 (2002) - Opinion filed May 1, 2002 denying *pro se* Petition for Writ of Habeas Corpus;

In re Rodney Berryman, Case No. S226259 - *Pro se* Petition for Writ of Habeas Corpus filed on May 4, 2015, as of this date, the petition remains

pending.

3. United States District Court for the Eastern District of California -

Rodney Berryman, Sr. v. Robert Wong, Case No. 1:95-cv-05309-AWI - Order issued January 15, 2010 denying petition for writ of habeas corpus (docket no. 414).

4. United States Court of Appeals for the Ninth Circuit -

Rodney Berryman, Sr. v. Jeanne Woodford, Case No. 02-80106 - order issued June 13, 2003, denying *pro se* interlocutory appeal (docket nos. 7, 11);

Rodney Berryman, Sr. v. Robert Wong, Case No. 10-99004, 954 F.3d 1222 (9th Cir. 2020) - Original opinion issued on March 27, 2020 (docket no. 349); Denial of Petition for Rehearing and Rehearing en Banc on August 20, 2020 (docket no. 363). Throughout these proceedings, Mr. Berryman filed numerous *pro se* pleadings, e.g., see DktEntry Nos. 11, 21, 28, 40, 41, 49, 54, 68, 82, 85, 89, 92, 102, 103, 108, 120-126, 129-144, 147-151, 154-155, 162-2, which resulted in petitioner's counsel arguing that Berryman was mentally incompetent and seeking a competency determination, see e.g., Ninth Circuit DktEntry No. 74; the Ninth Circuit stayed proceedings pending this Court's issuing a decision in *Gonzales v. Ryan*, DktEntry No. 78, see *Ryan v. Gonzales*, 133 S. Ct. 696 (2013), after which the Ninth Circuit dissolved the stay and ordered the matter before it to proceed. DktEntry No. 94.

Counsel then argued that Berryman was incompetent to proceed and the matter should be remanded to the District Court for restoration proceedings per *Gonzales v. Ryan, supra,* as an uncertified issue in the opening brief. DktEntry No. 200, argument III.

5. Supreme Court of the United States -

Rodney Berryman, Sr. v. State of California, No. 93-7680 - order issued January 9, 1995, denying petition for writ of certiorari from the direct appeal opinion affirming conviction and sentence;

Rodney Berryman, Sr. v. Chappell, No. 12-9604 - order issued June 3, 2013, denying *pro se* petition for certiorari;

Rodney Berryman, Sr. v. Robert Wong, No. 20-5764 - a *pro se* petition which seeks review of collateral and non-dispositive orders from the underlying Ninth Circuit proceedings including a *pro se* interlocutory appeal from the district court as well as various *pro se* motions and requests made during the appeal proceedings.

INDEX TO APPENDICES[1]

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[1] The appendices are filed concurrently under separate cover.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeal appears at Appendix ("App.") A to this Petition and is reported at 954 F.3d 1222 (9th Cir. 2020). The order denying the Petition for Rehearing and Rehearing En Banc appears at Appendix B and is unpublished. The opinions of the United States District Court appear at Appendix C and are unpublished. The opinion of the Supreme Court of California on direct appeal appears at Appendix D and is reported at 6 Cal.4th 1048 (1993). The opinions of the Supreme Court of California on habeas appear as Appendix E and are unpublished.

JURISDICTION

The district court had jurisdiction of Petitioner's habeas corpus petition under 28 U.S.C. § 2254. The district court denied the petition and granted a Certificate of Appealability as to one issue. The Ninth Circuit expanded the Certificate of Appealability and had jurisdiction under 28 U.S.C. § 2253(c)(1). The Ninth Circuit judgment was entered on March 27, 2020. App A. A timely petition for rehearing and rehearing en banc was denied on August 20, 2020. App B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Though Mr. Berryman filed a *pro se* Petition for Writ of Certiorari on September

9, 2020 (Rodney Berryman, Sr. v. Robert K. Wong, Case No. 20-5764), that petition addressed collateral and non-dispositive orders regarding the treatment of his *pro se* pleadings filed in district court and in the 9th Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."

The Fourteenth Amendment provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On October 18, 1988, the state trial court imposed a judgment of conviction and on October 28, 1988 sentenced Petitioner to death for crimes that occurred on September 6, 1987.

On December 27, 1993, the state court affirmed the death judgment on automatic direct appeal. App. D. Petitioner's state court petition for writ of habeas corpus was denied the same day. App. E.

On November 4, 1996, Petitioner filed his original federal habeas corpus petition in district court. Petitioner returned to state court to exhaust the claims in his federal petition. His First Amended Petition for Writ of Habeas Corpus ("AP") was filed on November 6, 1998. After a second return from state court where he exhausted claims in the AP, on July 10, 2007, the District Court issued an opinion denying an evidentiary

hearing and denying the merits of all claims but Claim 18. As to Claim 18, the Court allowed for further investigation and factual development and deferred ruling pending the submission of additional evidence. On January 15, 2010, the District Court denied Claim 18 on the merits and issued a Certificate of Appealability ("COA") as to Claim 65 and issued its judgment denying the AP. On January 28, 2010, Petitioner filed an *Ex Parte* Request for Termination of Appointed Attorneys which the District Court granted.

On February 3, 2010, Petitioner timely filed a Notice of Appeal. On February 23, 2010, present counsel were appointed to represent Petitioner on appeal.

The certified claim 65, as well as Claim 15-16, 63-64, were presented simultaneously in both the state court automatic appeal and initial state habeas corpus proceeding; both those cases were fully briefed before the automatic appeal's oral argument. The automatic appeal opinion and one-sentence, summary denial of the habeas petition issued the same day. Apps. D and E. The former held Petitioner failed to establish prejudice on the issue, but ignored the fact that the court had earlier denied petitioner's two confidential, *ex parte* requests for related investigatory funds. In the petition for rehearing, Petitioner argued that the court could not deny funds to conduct any related habeas investigation on the habeas issue and then reject the very same issue in the automatic appeal on the ground of failure to demonstrate prejudice. The state court denied rehearing.

The district court denied claim 65 without affording an evidentiary hearing on it but granted a COA as to Claim 65 alone.

On appeal to the Ninth Circuit, Petitioner raised that certified claim along with several uncertified claims, and argued that the Circuit Court should "look through" the state court habeas summary denial to the reasoning of the state court's automatic appeal opinion as the last reasoned opinion (LRO), per *Wilson v. Sellers*, 584 U.S. ___, 138 S. Ct. 1188 (2018), affirming *Ylst v. Nunnemaker,* 501 U.S. 797, 803-804 (1991).

On March 27, 2020, the Ninth Circuit's panel issued a per curiam opinion denying the appeal, in which it expanded the COA to include four other Claims. App. A. The Ninth Circuit panel opinion examined the state appeal opinion's reasoning and held that petitioner "cannot prevail on any of his claims," finding a lack of prejudice as to each claim asserted. Id.

The Petition for Rehearing and Rehearing en Banc was denied on August 20, 2020. App. B.

STATEMENT OF FACTS[1]

A Kern County, California jury sentenced Petitioner to death for the 1987 murder of Florence Hildreth ("Hildreth"). The California Supreme Court affirmed his conviction and sentence on direct appeal, see *People v. Berryman*, 6 Cal.4th 1048, 864 P.2d 40 (Cal. 1993), and summarily denied his state habeas petition.

A. Guilt Phase

Petitioner was convicted of murder with special circumstances:

[1] This statement of facts is taken from the Ninth Circuit memorandum opinion, which in turn was based upon the state supreme court's underlying opinion. No concessions are intended from repeating this part of the record.

felony-murder-rape with the use of a dangerous weapon. The jury heard that Hildreth, the victim, was a 17-year-old high school student. She and Petitioner were acquaintances. Around 10:45 p.m. on the night of her death, Hildreth left one aunt's house to walk to another's. She never reached her destination, and her body was found the next morning sprawled on a nearby dirt road. Prosecution witnesses testified that: her clothes had been pulled partly off, and forensic evidence suggested that she had been sexually assaulted; her death was caused by a shallow stab wound in her neck, which had nicked her carotid artery; a mark on her right cheek had evidently been left by the sole of a shoe, pressing down on her head for several minutes as she died; shoe prints in the dirt at the crime scene were similar to those of Petitioner's shoes, and nearby tire tracks were similar to the tracks left by the tires of Petitioner's truck; a blood stain on his shoe was consistent with Hildreth's blood but not his own and would have matched only 1 in 1,470 people who, like Hildreth, were African-American; small golden chain links found at the scene were consistent with a broken necklace found in Petitioner's truck.

Other prosecution witnesses testified that Petitioner told the police that: Hildreth had never been in his truck, but her thumb print was found inside the passenger-door window; he also said that he had not been on a nearby road the night of her death, but a witness saw his truck in that location. Evidence was introduced which the prosecution contended established that Petitioner appeared to know that Hildreth had been stabbed before that information was made public.

Petitioner's lawyer, Charles Soria (Soria), argued that the government's timeline did not add up and that Petitioner could not possibly have been present to commit the crime. Although he primarily argued that the prosecution had charged the wrong person, Soria also alternatively argued that Petitioner might have lost his temper after consensual sex and was guilty only of voluntary manslaughter.

B. Penalty Phase

The prosecution's penalty phase aggravating evidence included the following. Petitioner had previously been convicted of marijuana transportation and grand theft. One witness testified he had been in a fight with Petitioner in which he alleged that Petitioner struck him with a tire iron. The other witness, Petitioner's father-in-law, recounted a scuffle during which Petitioner hit him on the nose.

Petitioner's lawyers called twenty-one witnesses, many of whom were friends and relatives, including Petitioner's wife, siblings, and mother. Family and friends testified that Petitioner was warm and loving and always peaceful with women. The jury heard that Petitioner's parents had a bad marriage and that his father was violent with his mother. The witnesses testified that Petitioner was not given enough attention and affection as a child. The family moved often, and Petitioner struggled in school. As a teenager, he began to abuse alcohol and, after a work- related injury to the head, he began experiencing disabling headaches.

After Petitioner got married in 1986, his life improved. He and his wife had a son, and Petitioner was an active participant in his father-in-law's church. But after he lost

his job, he began drinking heavily again, leading to "a precipitous downward spiral." He and his wife separated shortly before Hildreth's murder.

Two expert witnesses testified about Petitioner's mental health and development. Dr. William Pierce, a clinical psychologist, diagnosed Petitioner with an "alcohol induced organic disorder." On psychological tests, he saw "consistent signs of organicity"—a term then used to describe psychological disorders with apparent physical origins, such as brain damage. Based on his observations, Dr. Pierce opined that further neurological testing was required to "confirm or disconfirm the presence of an organic mental syndrome." But he explained that he had been unable to administer the necessary tests because the Kern County hospitals would not grant him permission.

Dr. Samuel Benson, a psychiatrist, agreed that Petitioner exhibited signs of "organicity." He opined that Petitioner "does, in fact, suffer from an organic mental syndrome, that it's probably alcohol induced, but [that] other factors in addition to his consumption of alcohol" also contribute, among them "head trauma." He testified that Petitioner had sustained head trauma on other occasions, including a work-related fall from a crane or forklift, and once when he was hit with a pipe. Dr. Benson agreed with Dr. Pierce that additional testing was necessary, in particular, an electroencephalogram (EEG), which would measure Petitioner's brain activity to determine whether he was suffering from seizures. Drs. Benson and Pierce testified that these seizures could have caused Petitioner to become violent and disoriented and experience blackouts.

Dr. Benson would also have administered an alcohol-induced EEG, which looks for

seizures specifically brought on by alcohol. He, too, testified that local hospitals refused to allow the tests.

On cross-examination, Dr. Benson agreed that he had no information that Petitioner had ever experienced a blackout or a seizure or that Petitioner had ever become lost or disoriented. He explained that because he was unable to perform the EEG tests, he did not know whether Petitioner had a seizure disorder. He also conceded that, while an individual might be violent during a seizure episode, it would not be possible for him to commit rape.

During penalty phase closing arguments, the prosecutor criticized the defense for failing to have the EEG tests performed. He offered one possible explanation for that failure: "Because as it stands, they have something to talk about. . . . They don't want that test to be performed because it will rule out [brain damage] and then they wouldn't have anything to talk about." The prosecutor argued that even if there had been tests showing brain damage, they would not have made a difference. The experts' hypothesis, he argued, did not fit the rape- murder facts of the case.

The jury returned a sentence of death.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE LOWER COURTS FAILED TO APPLY CONTROLLING CASE LAW OF THIS COURT AND THE NINTH AND OTHER CIRCUIT DECISIONS REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF A CAPITAL TRIAL

A. Controlling Case Law Excludes Finding That The State Court's Denial Of Claim 65 Was Not Unreasonable

Petitioner respectfully submits that this capital case deserves this Court's consideration because, the underlying decisions that the state court was not unreasonable in denying this condemned petitioner's ineffective assistance of counsel claim conflict with this Court's foundational decision in *Strickland v. Washington,* 466 U.S. 668 (1984) and its progeny, as set forth, below.

In Claim 65, petitioner argued penalty phase ineffective assistance of counsel for failure to investigate and present additional mitigating evidence of family history and background. The Ninth Circuit panel held fairminded jurists could conclude the state court's application of *Strickland v. Washington, supra*, was correct because petitioner failed to show prejudice in that nearly all the evidence petitioner argued to be new was not new, and the rest would not have been sufficient to make a different result reasonably probable.

The state court automatic appeal opinion (the last reasoned opinion)'s pertinent passage addresses penalty phase ineffective assistance of counsel briefly, identifying the defendant's asserted right as based in the Sixth Amendment and related state constitution provision, then states that defense counsel called "more than a score" of

witnesses "presenting . . . evidence about defendant's background and character from the mouths of family members and friends and also from a psychologist and a psychiatrist. . . . . ," notes petitioner's argument includes ". . . numerous cited acts and omissions . . ." resulting in prejudice. App. D, 6 Cal.4th at 1108. The state court opinion continues:

> We have carefully considered each in its proper context. In few if any instances does he show professionally unreasonable conduct. In none does he show a reasonable probability of an adverse effect on the outcome.
>
> For example, defendant does not establish ineffective assistance in defense counsel's asserted failure to pursue neurological testing to determine whether and to what extent he suffered from an organic mental syndrome or disorder. He does not demonstrate that such testing would have yielded favorable results. Hence, he cannot demonstrate that its omission adversely affected the outcome within a reasonable probability.
>
> Neither does defendant establish ineffective assistance in defense counsel's asserted failure to further investigate his background and character and then to introduce additional evidence thereon. *He does not demonstrate that such further investigatory efforts would have yielded favorable results. Hence, he cannot demonstrate that their omission adversely affected the outcome within a reasonable probability.*

Id. (emphasis supplied). Nowhere in the state opinion is the clearly established federal law, *Strickland*, cited, nor is its standard discussed, as to guilt, death eligibility, or penalty phase ineffective assistance of counsel or any weighing of the unpresented evidence in mitigation against the evidence in aggravation. As to the latter, it is well established that the reviewing court's prejudice analysis must consider all the mitigating evidence in state habeas, including factors present here, e.g., being the victim of childhood abuse, having a mental illness history including such associated with head

injuries and the defense's failure to present readily available evidence of mental illness, including neuropsychiatric evidence requested before trial by the defense's chosen experts, particularly when it would have supported state statutory factors in mitigation.[2] See, e.g., *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000), *Wiggins v. Smith*, 539 U.S. 510, 535 (2003), *Rompilla v. Beard*, 545 U.S. 374,390-392 (2005), 545 U.S. at 390-92, *Porter v. McCollum*, 558 U.S. 30 (2009), *Sears v. Upton,* 561 U.S. 945, 954, 959 (2010), *Brumfield v. Cain*, 135 S.Ct. 2269 (2015), *Nunes v. Mueller*, 350 F.3d 1045 (9th Cir. 2003), *Cannedy v. Adams,* 706 F.3d 1148, 1163 (9th Cir. 2013), *cert. den*. 134 S.Ct. 1001 (2014).

The Ninth Circuit panel opinion identifies four themes of Petitioner's proffered habeas evidence, and finds that the jury heard other details relating to each theme. The panel agrees the jury did not hear habeas evidence of premature birth, Petitioner's father's womanizing and abuse of his mother, or Petitioner's low IQ score. The panel holds this evidence would not have significantly altered the character of evidence supporting mitigation. App. A at 11-13.

First, the panel's reasoning is contrary to *(Cary) Williams v. Filson*, 908 F.3d 546, 569-570 (9th Cir. 2018), citing *inter alia Wiggins, supra*, 539 U.S. at 535, *Sears v. Upton*, 561 U.S. 945, 951 (2010); and *(Terry) Williams v. Taylor,* 529 U.S. 362, 398 (2000).

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[2] Here, the evidence described would have constituted evidence in mitigation per Cal. Pen. Code §§ 190.3, subd. (d), (h), and (k); compare, *Porter v. McCollum, supra* (state court objectively unreasonable to find no reasonable probability of different penalty for defendant, where counsel similarly failed to present evidence in mitigation).

(Cary) Williams held a district court erred relying on identical reasoning as here, 908 F.3d at 569-570, explaining that the state sentencing court had not heard the "full extent of ... Williams['s] .. experiences ... and why he might therefore be deserving of mercy." *Id.;* see Olive, *Narrative Works,* 77 U.M.K.C. L.Rev. 989, 1002 (2009) (effectiveness of mitigation is in details and presenting an encompassing narrative, tying mitigation evidence together), quoting the Magistrate Judge's decision affirmed in *Walbey v. Quarterman,* 309 Fed. Appx. 795, 803 (5th Cir. 2009); *id., Commonwealth v. Housman,* 226 A.3d 1249, 1273-1280 (Pa. Supreme Ct., Mar. 26, 2020), *Chatman v. Walker,* 773 S.E.2d 192, 203-205 (Ga. Supreme Ct., 2015). As in *(Terry) Williams*, "there was 'really ... n[o] ... dispute' that available mitigation evidence was not presented at trial," 529 U.S. at 398. *Id., Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002).

The 1980 ABA Standards upon which the Supreme Court relied in *Williams,* 529 U.S. at 396, provide that "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to the facts relevant to the merits of the case and the penalty in the event of conviction. . . The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." 1ABA Standards for Criminal Justice 4-4.1 (2d ed. 1980). The Commentary to Standard 4-4.1 states:

> The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the

> lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions. Such information may lead the prosecutor to defer or abandon prosecution and will be relevant at trial and at sentencing.
>
> [. . .]
>
> The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate's role. Failure to make adequate pretrial investigation and preparation may be grounds for finding ineffective assistance of counsel.

1ABA Standards for Criminal Justice 4-4.1, commentary (2d ed. 1980).

Wiggins, 539 U.S. at 521, repeated *Strickland, supra,* 466 U.S. at 690-691, in holding that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id., Sears, supra,* 561 U.S. at 954; see also *Williams, supra,* 529 U.S. at 396. Thus, the constitutional right to effective counsel guarantees petitioner the right to have counsel, at a minimum, conduct such a reasonable investigation as to enable him or her to make an informed decision as to how to proceed. *Sanders v. Ratelle*, 21 F.3d 1446, 1456-1457 (9th Cir. 1994); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (Souter, J.) [citing ABA Standards for Criminal Justice Investigation from 1982 and 1993]; *id.*, at 395 (O'Connor, J., conc.) [trial performance unreasonable in part because "attorneys' decision not to obtain Rompilla's prior conviction file was not the result of an informed tactical decision about how the lawyers' time would best be spent"]. Failing to conduct a reasonable

investigation means that counsel cannot make a reasonable strategic decision. See, e.g., *Bemore v. Chappell*, 788 F.3d 1151, 1174 (9th Cir. 2015).

One facet of an adequate penalty phase investigation and preparation that has been consistently recognized by the Ninth Circuit is the need for informed mental health experts. When trial counsel "'is on notice that his client may be mentally impaired,' yet fails 'to investigate his client's mental condition as a mitigating factor in a penalty phase hearing . . . .' ," the danger of ineffective assistance is heightened. *Caro*, 280 F.3d at 1254, quoting *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995). Had trial counsel undertaken a rudimentary investigation, he would have discovered school records showing that Petitioner scored in the borderline intellectually disabled range with a Full Scale Intelligence Quotient (FSIQ) score of 75. Had trial counsel properly investigated Petitioner's social history, he would have discovered that both Petitioner and his sister were subjected to serial sexual molestation by his uncles as young children. Trial counsel would also have learned of the beatings and violence that Petitioner witnessed by his parents throughout his young life. Had this information been provided to the mental health experts and had trial counsel requested funds from the Court to conduct the prescribed mental health testing, a different picture could have been provided to the jury. Tragically, this mitigation information was never presented, preventing the jury from getting a necessary snapshot of Petitioner's nightmarish family history.

In *Wiggins*, 539 U.S. 510, this Court reversed a death sentence for failure of the

trial attorneys to present and uncover voluminous mitigating evidence of the defendant's life history and background. *Wiggins* involved a 1988 crime that was tried in 1989. Relying on the 1984 decision in *Strickland*, 466 U.S. 668, the Court noted that the mitigating evidence counsel failed to discover and present was powerful:

> Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability.

Wiggins, 539 U.S. at 535.

In emphasizing the importance of presenting mitigating evidence of a defendant's background and character, *Wiggins* relied on two cases decided many years before Petitioner's 1988 trial: *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), which invalidated an Ohio law that did not permit consideration of aspects of a defendant's background to attenuate the penalty; and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), which vacated a death sentence because the trial judge failed to consider the mitigating factors of the defendant's turbulent family history and serious emotional disturbance. The Court held that consideration of the offender's life history is "part of the process of inflicting the penalty of death." *Eddings*, at 112.

Like the petitioner in *Wiggins*, Petitioner suffered privation and abuse. On habeas, psychologist Gretchen White provided a social history, which documented Petitioner's various life-history factors associated with mental illness and associated

premature birth, low IQ and poor school achievement as suggesting the possibility of compromised brain functioning, along with Petitioner's early life deprivation of emotional nurturance associated with neurobiological abnormalities, absence of resources, frequent moves and disruption of life, genetic predisposition to and family history of substance abuse, experience of childhood rejection and neglect, vulnerability to depression, and cumulative trauma.

In *Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998), the Ninth Circuit held that the responsibility to perform a proper investigation was "as crucial in 1980 as it is today in order to assure individualized sentencing and the defendant's right to a fair and reliable capital penalty proceeding." *Bean*, 163 F.3d at 877. At Bean's original penalty phase trial two mental health experts had testified to Bean's organic personality disorder, but a number of neuropsychological tests recommended by one of the mental health experts had not been completed. Just as *Bean* resulted in reversal for presenting an "unfocused snapshot," *Bean*, 163 F.3d at 1081, of the defendant, Petitioner's case should also be reversed for presenting a partial and unfocused snapshot.

Both this Court and the Ninth Circuit "have consistently held that counsel's failure to present readily available evidence of childhood abuse, mental illness, and drug addiction is sufficient to undermine confidence in the result of a sentencing proceeding, and thereby to render counsel's performance prejudicial. See, e.g., *Rompilla* [*v. Beard*, 545 U.S. 374,390-391] (2005); *Ainsworth [v. Woodford]*, 268 F.3d 868, 878 (9th Cir. 2001); *Smith v. Stewart*, 140 F.3d [1263,] 1271 [(9th Cir. 1998)]." *Lambright v. Schriro*, 490

F.3d 1103, 1122 (9th Cir. 2007).

Here, the mitigation case consisted of a parade of witnesses who testified about Petitioner's kind and non-violent nature despite the fact that the jury had just convicted him of a rape-murder; mental health experts who testified about diagnoses they could not back up with testing data because trial counsel failed to request the funds for the testing; and a witness who testified about prison conditions in maximum security. This weak presentation did not comport with the 1980 ABA standards nor with obligations recognized in *Lockett*. When this meager offering is compared to the vast amount of readily available documentary evidence of Petitioner's chaotic and abusive childhood and intellectual disability, there can be no question that Petitioner was denied his constitutionally guaranteed right to the effective assistance of counsel when his trial lawyer failed to investigate and to present any mitigating evidence any of this available mitigating evidence to the sentencing jury. See, e.g., *Mayfield v. Woodford,* 270 F.3d 915 (9th Cir. 2001), citing *Williams*, 529 U.S. at 393.

As in *(Terry) Williams*, the unpresented mitigation evidence "might well have influenced the jury's appraisal of his moral culpability." 529 U.S. at 398. Additionally, presenting the neuropsychiatric tests at penalty - discussed further in the next issue - might also have done the same, and in any event, would have eliminated the prosecutor's argument that the failure to obtain those tests was intentional.

II. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE LOWER COURTS FAILED TO APPLY CONTROLLING CASE LAW OF THIS COURT AND THE NINTH AND OTHER CIRCUIT DECISIONS REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF A CAPITAL TRIAL

A. Controlling Case Law Excludes Finding That The State Court's Denial Of Claims 15, 16, 63 And 64 Was Not Unreasonable

The federal habeas petition's closely related claims 15, 16, 63 and 64, alleged trial counsel's ineffective assistance in failing to properly investigate, develop and present mental state evidence at the guilt phase which was later presented at the penalty phase, or additional related evidence, addressing premeditation, deliberation, intentional killing, and rape or attempted rape. Included within these claims was trial counsel's failure to request, obtain and present neuro-psychiatric testing which the defense experts told defense counsel Soria was required to support their opinions that Petitioner was mentally impaired at the time of the underlying events, and that such testing evidence would form the basis for guilt phase mental state defenses and penalty phase evidence in mitigation.

In Claims 15 and 16, petitioner argued ineffective assistance in trial counsel's: failing to investigate and present at least the same mental health and mental state defense evidence at the guilt phase as they did at penalty; and failing to investigate and present more such available evidence at the guilt phase than they actually did at the penalty phase, including social history evidence and related expert testimony bearing upon brain disease and mental state.

Claim 63 alleged that counsel were ineffective in failing to obtain and present

evidence resulting from a Positron Emission Tomography (PET)-Scan, electroencephalogram (EEG) and an alcohol-induced-EEG in the guilt phase. Claim 64 alleged that the defense investigators failed to make arrangements for those tests, all despite the defense experts' pre-trial request for such testing.

As with claim 65, addressed in the preceding argument, *ante,* all the claims addressed in this argument were raised both on direct appeal and in the initial state habeas petition, then briefly addressed and rejected in the state court appeal opinion (the last reasoned opinion). The Ninth Circuit panel opinion looks through the summary denial of the state habeas and examines the state court appeal opinion.

1. Underlying Events, Mental Health Evidence And Holdings

a. Defense Mental Health Evidence At Trial

The defense presented no guilt phase mental health expert testimony. Nonetheless, during guilt phase closing, the prosecutor conceded that there was a "coherent theory of the state of the evidence that would justify a finding" of second degree murder or manslaughter, or no intent to kill, or heat of passion. Defense counsel Charles Soria's closing argued insufficiency of the evidence, but also contended the homicide "could have started" as self-defense, "the person over-reacted," the shallow stab-wound "denotes an accident" and if Petitioner "was out there" there "was an explosion of emotions." The victim's shoe being off indicated consent, not rape.

At penalty phase, defense experts William Pierce, clinical psychologist, and Samuel Benson, psychiatrist, testified and agreed Petitioner suffered organic brain

damage, middle brain dysfunction, an alcohol-induced organic disorder and alcohol intoxication. App. A, *Berryman v. Wong*, 954 F.3d 1222, 1225 (9th Cir. 2020).

As to possible organic brain syndrome, both experts believed Petitioner had some brain damage at an early age, possibly at birth, manifested by learning difficulties in school, exacerbated by two later head injuries - in 1983, he was rendered unconscious by falling from a crane and later, hit on the head with a metal pipe. Drs. Pierce and Benson advised Soria that Petitioner had to undergo neurological testing to confirm brain damage, including an EEG, an alcohol-induced EEG, and PET-scan. They advised that Petitioner's supporting factual history of organic brain damage included: early age learning disabilities at school, special education placement beginning third grade, and demonstrated intellectual deficiencies (like his brother); later head injuries, one rendering him unconscious; ringing in the ears; sudden onset, recurrent, intense and disabling headaches accompanied by facial distortions, lasting 15-20 minutes; written tests indicating difficulty performing perceptual motor tasks; additional soft signs, e.g., perceiving aura of odors (smelling non-existant oil, gas or petroleum products) prior to headaches, which always precedes an abnormal EEG pattern or seizure disorder, and ringing in the ears. Numerous people described Petitioner's alcoholism, beginning at age 14 and a pattern of deterioration during 1987, when he lost a job, increased alcohol consumption especially May-August, separated from his wife and left Los Angeles. Dr. Pierce opined Petitioner's headaches appeared to be like "grand mal seizures," consistent with soft signs of organic dysfunction, and he exhibited related difficulties on

Dr. Pierce's written neurological tests, including immediate recall.

Dr. Pierce testified Petitioner's non-violent history and patterns of reacting to problems, frustration and anger did not "fit" "what happened in September of 1987," which was "uncharacteristic of this person which suggests that there has to be something else involved to make behavior become that bizarre and out of control and that's what the diagnosis reflects." Further neurological testing was required to determine the level of possible interruption in central nervous system functioning, which can be adversely affected by alcohol, and the effect of alcohol intoxication on an already existing syndrome. Dr. Pierce therefore consulted Dr. Benson, who confirmed existence of "soft signs" of brain damage and diagnosed "organic mental syndrome . . . alcohol-induced," "middle brain dysfunction." Dr. Benson believed diagnosis confirmation required additional neurological testing, such as an alcohol-induced-EEG, to see if Petitioner suffered from "grand-mal epilepsy" or "petit-mal epilepsy", a lesser form of seizure associated with brain tissue damage.

The two available hospitals in Kern County either refused to test Petitioner (as an inmate facing a murder charge), or did not have technicians qualified to perform the testing; no such tests were performed on Petitioner. The experts' diagnoses and penalty phase testimony therefore seemed equivocal and tentative, and lacked the kind of definitive support that would have convinced the jury that the diagnoses were correct.

The prosecutor capitalized on the omission by emphasizing the absence of the EEG or PET-scan, arguing in closing that: testing was deliberately not done in order to

preserve the argument of possible brain damage; if tests were performed and ruled out organic brain damage, the defense would not have anything to talk about; if the defense really wanted these tests performed, it would have asked the judge for an order transporting Petitioner under guard somewhere for testing, but did not.

The trial court also alluded to the absence of such evidence at sentencing, concluding Petitioner failed to substantiate California statutory mitigating factors (d) and (h). While Pierce, according to the court, opined Petitioner may have some disorder "and wanted to rule out some organic mental syndrome not otherwise specified," this was the very evidence defense counsel failed to obtain and present to the jury. Confirmation of brain damage could also have been statutory factor (k) mitigation.

b. State Habeas Evidence

The 1993 state habeas presented relevant declarations from Drs. Pierce and Benson and Soria, and some school and medical records. Soria admitted that:

- Soria consulted with Drs. Pierce and Benson before the guilt phase began, both found "'soft signs' leading to suspicion of brain damage" and organic brain disease, due to head traumas and chronic alcohol use, but Dr. Benson could not positively testify Petitioner "suffered from brain damage without further testing;" specifically, "Benson wanted [Petitioner] . . . tested with an alcohol-induced EEG" to "determine . . . brain tissue damage," and that it required technical expertise not available at all hospitals.
- Soria knew Dr. Pierce's conclusion meant that "further neurological testing was required to rule out any organic mental syndrome such as brain damage. I also

understood this was especially important because [Petitioner] had a history" of head trauma.

- After two Kern County hospitals were found unusable for the EEG, Dr. Benson suggested an out-of-county facility where tests could be performed, but Soria never requested an order from the trial court for Petitioner's transfer for testing because Soria then believed the court would not issue such an order. Soria admitted that in early 1990, in *People v. Holt*, Soria sought and obtained Kern County orders for that capital defendant's transfer to UC-Irvine Medical Center where a PET-scan occurred and to a San Jose facility where an EEG was administered confirming organic brain damage. The *Holt* orders were signed by the same judge who had presided in *Berryman*. Soria claimed he realized these removal orders were possible only after reading about procedures in another capital case.

- "There is no reason why a similar order would not have issued in [Petitioner]'s case if I had sought one."

- Therefore the EEG was never performed and jurors could not be told by Drs. Pierce and Benson that Petitioner actually suffered from organic brain damage, their expert opinions remained speculative and unconfirmed by testing "they had recommended." Had such testing been done and shown brain damage, Soria believed it would have been additional significant and material evidence, making these experts' testimony more probative.

- "[T]his omission undermined the value of the expert opinions offered on behalf of

petitioner at the penalty trial."

Dr. Benson confirmed his trial testimony and Soria's account generally, while adding that:

- Dr. Benson had suggested tests could be performed outside Kern County, including UC-Irvine. Soria responded "the court would not grant an order to allow these expensive tests to be done, particularly if they had to be done outside Kern County," so Dr. Benson could not confirm his diagnosis, which would have allowed Dr. Benson to testify to a more positive opinion that "Berryman suffered from brain damage that may have affected his conduct at the time of the incident resulting in his conviction and sentence of death."
- Before the guilt phase began (August 11, 1988), Dr. Benson told Soria of his findings and advised that if confirmed by EEG and PET-scan they could be helpful to guilt phase defenses establishing mental disease, illness or condition, but Soria did not call Dr. Benson to testify at the guilt phase.

Dr. Pierce confirmed his trial testimony and Soria's account generally, while adding that:

- Dr. Pierce's April, 1988, evaluation (four months before guilt phase began) included interviewing Petitioner, relatives, administering specific written tests; Dr. Pierce suggested to Soria that the neurological tests including an EEG and alcohol-induced EEG be run and "this information should be used in the guilt phase . . ." if confirmed brain damage, in addition to penalty; Dr. Pierce consulted Dr. Benson who

agreed on diagnosis and "that further neurological testing was required. . . [but] never done."

School records documented that in 1977, 11-year-old Rodney Berryman's full scale IQ (FSIQ) was 75. Medical records documented Petitioner's 1984 work-related fall resulting in unconsciousness.

The 1993 state habeas requested the state supreme court grant "sufficient funds to obtain investigators and expert assistance as necessary to prove the facts alleged in this petition" and grant orders and funds for Petitioner ". . . to undergo the recommended neurological testing to determine whether he suffers from brain damage or disease, or other relevant mental condition . . ." That court denied the petition without even calling for an informal response on December 27, 1993, failed to authorize investigatory fees and failed to afford any evidentiary proceedings. The state court summarily denied the state petition.

As summarized by the District Court, App. C at 104-105, there was evidence Petitioner and the victim knew one another prior to the underlying events, which was supportive of them having engaged in voluntary intercourse on the night in question.

c. Related Court Holdings Below

As to the guilt phase arguments, the state court opinion rejected the whole category of guilt phase ineffective assistance of counsel claims, without bothering to itemize them except failure to investigate mental state at the time of the crime, etc., this way:

> Defendant claims that defense counsel performed deficiently with regard to numerous cited acts and omissions and thereby subjected him to prejudice. In large part, he simply recasts arguments for reversal that we have expressly or impliedly disposed of in the course of the preceding analysis. He is indeed forceful in presenting his complaints. We have carefully considered each in its proper context. In few, if any, instances does he show professionally unreasonable conduct. In none does he show a reasonable probability of an adverse effect on the outcome.
>
> [. . . ¶ . . .] Neither does defendant establish ineffective assistance in defense counsel's asserted failure to investigate his mental state at the time of the crime or to introduce evidence thereon. Here as well, he does not demonstrate that the investigation would have yielded favorable results and hence cannot demonstrate that its omission adversely affected the outcome within a reasonable probability.

App. D, *People v. Berryman,* 6 Cal.4th at 1082.

This above passage identifies the defendant's asserted right as based in the Sixth Amendment and related state constitution provision. Nowhere in the state opinion is the clearly established federal law, *Strickland*, cited, nor is its standard discussed, regarding guilt phase ineffective assistance of counsel.

The Ninth Circuit panel held that this holding amounted to a finding that Petitioner was not prejudiced by counsel's such failure, and that this holding was reasonable. App. A at 14. The panel further held that had counsel developed such evidence for the guilt phase, it would have required arguing that Petitioner and the victim engaged in consensual sex, after which Petitioner had a seizure and then killed the victim unintentionally, which the panel holds a "far-fetched theory." App. A at 15-16. However, the panel also concedes that Soria presented just such as an alternative guilt

phase argument. App. A at 15, n.2.[3]

The panel also reasons that "circumstantial evidence tying Berryman to the scene was not insurmountable," identifying blood on the shoe and the victim's fingerprint, for which the panel holds the defense had rejoinders, such that "[t]he straightforward innocence argument that Berryman's lawyers pursued was not a lost cause," App. A at 16, the implication being that counsel made a reasoned tactical decision not to investigate or obtain available mental health evidence, as identified. Respectfully, this ignores the available mental health evidence, and counsel's duty to develop and present unified themes and evidence at guilt and penalty, and construct and present the guilt phase as a foundation for the penalty phase case, should it be necessary. Goodpaster, *The Trial For Life: Effective Assistance Of Counsel In Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 338 (1983). Presenting a guilt phase defense of alibi and denial of guilt, followed by a penalty phase case of mental illness as mitigation, as defense counsel did here, has long been viewed as contrary to existing norms of practice. See *id.,* at 324-325,330-334.

The state court's reasoning is to the contrary. See discussion, post.

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[3] Of course, Soria so argued with no supporting guilt phase evidence and did so following the prosecutor's closing, where the prosecutor conceded that there was a "coherent theory of the state of the evidence that would justify a finding ..." of second degree murder or manslaughter, or no intent to kill, or heat of passion; that prosecution concession was without presentation of any defense mental state evidence. Soria's failure occurred despite being told by his experts there was a basis for such a related guilt phase defense and asked by them to obtain evidence through available supporting scientific tests, as well as being told by those experts that the same tests were not just for guilt phase defenses, but also were necessary to support their testimony for penalty phase mitigation evidence.

The panel then holds that either "the California Supreme Court reasonably concluded that a mens rea defense theory would not have been reasonably probable to persuade the jury to acquit. . . . ," or that, if counsel did render deficient performance, it was reasonable for the state court to conclude that Petitioner failed to show the omission of guilt phase mental state evidence adversely affected the outcome, "as counsel was more likely to succeed in arguing that Berryman had not killed Hildreth at all." App. A at 16-17. The panel's reasoning is contrary to the state court's reasoning. The state court held that there was ample evidence of guilt, itemizing numerous other items of evidence which it characterizes as "substantial" for the defense to overcome on identity. App. D, *Berryman,* 6 Cal.4th at 1083.

2. *Strickland* and Progeny Exclude The Panel's Holding That The State Court's Opinion Was Reasonable.

The clearly established federal law on point, *Strickland* and progeny, also exclude the panel's holding that the state court opinion was reasonable. The pertinent caselaw is set forth in the preceding argument regarding Claim 65. In essence, trial counsel has a duty to conduct a reasonable investigation before making tactical decisions, contrary to the panel's conclusion here that the state court was reasonable in concluding that trial counsel made a decision to pursue a factual innocence defense in lieu of pursuing his own experts' requests that neuropsychiatric testing be conducted to support potential defenses for both guilt and penalty phases.

As discussed *ante,* in *Wiggins,* 539 U.S. at 521, this Court cited and repeated the holding from *Strickland, supra,* 466 U.S. at 690-691, that "counsel has a duty to make

reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id., Sears, supra,* 561 U.S. at 954; see also *Williams, supra,* 529 U.S. at 396. Thus, the constitutional right to effective counsel guarantees petitioner the right to have counsel, at a minimum, conduct such a reasonable investigation as to enable him or her to make an informed decision as to how to proceed. *Sanders, supra*, 21 F.3d at 1456-1457; *Rompilla, supra*, 545 U.S. at 387. When counsel failed to take any action on Drs. Pierce and Benson's request that testing be obtained, counsel failed to conduct a reasonable investigation and as a result was unable to make an informed decision as to how to proceed strategically at guilt or penalty.

Additionally, as described *ante*, counsel here was on notice from his experts that they believed Petitioner suffered from mental disabilities amounting to defenses at guilt and penalty, but that the experts needed testing to confirm their diagnoses. Trial counsel's subsequent failure to investigate Petitioner's related "'mental[...] impair[ments]," heightened "the danger of ineffective assistance . . ." *Caro*, *supra*, 280 F.3d at 1254, quoting *Hendricks, supra*, 70 F.3d at 1043.

The prejudice from trial counsel's failure manifested in various ways. First, instead of pursuing pre-trial scientific testing before deciding guilt phase strategy (and its implications for penalty phase strategy and trial strategy as a whole), trial counsel chose instead at the guilt phase primarily to deny any involvement by Petitioner in the homicide at all during the guilt phase (while also arguing without expert support in guilt phase closing that after engaging in consensual sex with the victim, Petitioner had a

seizure and committed the homicide, as discussed *ante*, which the panel concedes counsel did, see App. A at 15, n.2), and then presented a mental illness defense at penalty phase, for which the experts admittedly lacked the support which testing might have provided. The penalty phase defense thus contradicted the guilt phase defense, contrary to well established capital defense norms. See Goodpaster, *The Trial For Life: Effective Assistance Of Counsel In Death Penalty Cases*, *supra,* 58 N.Y.U. L. Rev. at 338.

Second, defense counsel presented a greatly watered down and parenthetical version of the argument in guilt phase closing, without any supporting expert testimony or even lay witness testimony at all, which could only have confused the jury.

Third, the prosecutor pounced on these errors in his own penalty phase closing, emphasizing the absence of neuropsychiatric testing to the jury and arguing that this omission was intentional and tactical on the part of the defense. The prejudice from trial counsel's blunder was direct and directly lead to the death verdict imposed here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: December 31, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to United States Supreme Court Rules, Rule 33.1(h)2, the attached Petition for Writ of Certiorari is proportionately spaced with a Century 725 BT typeface of 12 points, contains 7764 words according to my word processing program.

DATED: December 31, 2020

Respectfully submitted,

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