No. 20-6822

In the Supreme Court of the United States

RODNEY BERRYMAN, Sr.,

Petitioner,

v.

RON DAVIS,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

Whether a reasonable jurist could conclude that Berryman was not prejudiced by (i) the absence of additional evidence regarding his family and social background at the penalty phase of his trial; (ii) the absence of a mens rea defense at the guilt phase of his trial; and (iii) the absence of neurological testing at the penalty phase.

DIRECTLY RELATED PROCEEDINGS

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

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

California Supreme Court:

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

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

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

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

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

United States District Court for the Eastern District of California:

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

United States Court of Appeals for the Ninth Circuit:

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

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

Supreme Court of the United States:

Rodney Berryman v. Wong, No. 20-5764 (Feb. 22, 2021) (certiorari denied)

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

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

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STATEMENT

1. In 1987, police officers were directed to the lifeless body of 17-year-old Florence Hildreth on the side of a dirt road in Delano, California. Pet. App. A at 4. Her body was battered and nearly naked. *Id.* An autopsy confirmed that she had been sexually penetrated prior to her death, and that she had died as a result of a knife wound to her neck. *Id.*; *see* Pet. App. C at 100. The police soon discovered physical evidence linking Berryman to the crime. Pet. App. A at 4.

2. The State charged Berryman with capital murder for killing Hildreth while engaged in a sexual assault. Pet. App. C at 118; *see* Cal. Penal Code § 190.2(a)(17). At the guilt phase of the trial, defense counsel argued that physical and forensic evidence, along with a host of other circumstantial evidence, was insufficient to establish Berryman's identity as the perpetrator. Pet. App. A at 4. Counsel also presented an alternative argument that, even if Berryman had killed Hildreth, there was insufficient evidence that he had done so while engaged in a sexual assault. *Id.* The jury found Berryman guilty of special-circumstance murder. Pet. App. C at 9.

3. At the penalty phase, the State introduced aggravation evidence of other violent criminal activity in which Berryman had engaged and his prior felony convictions. In particular, the jury learned that Berryman had been convicted of three counts of transportation of marijuana and one count of grand theft. Pet. App. C at 18. The jury also heard evidence that Berryman was

involved in two prior acts of violence. *Id.* at 18-19. The first involved a traffic altercation that resulted in Berryman striking a man with a tire iron. *Id.* The second involved an altercation in which Berryman struck his father-in-law on the nose. *Id.*

In mitigation, Berryman's lawyers introduced evidence relating to his background and character. The defense called a total of twenty-one witnesses, many of whom were friends and relatives, including Berryman's wife, siblings, and mother. Pet. App. A at 4. In the opinion of family members and friends, defendant was "warm," "caring," and "nice"; he had been, and remained, close to those who loved him and whom he loved; and he was not violent, either generally or specifically in his dealings with women. *Id.* His wife continued to "love him very much." Pet. App. D at 4; *see People v. Berryman*, 6 Cal. 4th 1048, 1067 (1993).

Mitigation witnesses described Berryman as having a troubled childhood and adolescence. Pet. App. C at 86, 88, 98. His parents had a stormy marriage that included physical violence by his father against his mother. Pet. App. A at 4; Pet. App. C at 20, 22, 86-88. After a number of separations, his parents divorced. Pet. App. C at 20. Berryman moved back and forth among his father, his mother, and others in various locations. Pet. App. A at 4, 7; Pet. App. C at 88-89. He was not given adequate attention and affection and did poorly in school. Pet. App. at 4; Pet. App. C at 90. During his teenage years, Berryman began to abuse alcohol, run away, and get in trouble with the law. Pet. App.

D; *Berryman*, 6 Cal. 4th at 1066. His father died during this period. Pet. App. C at 21. Berryman began to experience recurrent disabling headaches due in part to a work-related head injury. Pet. App. A at 4.

Berryman married in 1986 and things began to improve. Pet. App. A at 5. He and his wife had a son, Rodney, Jr., and they participated in church activities. *Id.* Before long, however, Berryman began experiencing trouble in his personal life, marriage, and employment. Pet. App. C at 23. His heavy use of alcohol led to "a precipitous downward spiral." Pet. App. A at 5. Soon, he and his wife separated. *Id.*

Two expert witnesses testified about Berryman's mental health and development. Pet. App. A at 5. William Pierce, Ph.D., a clinical psychologist, testified that Berryman suffered from an alcohol-induced seizure disorder. Pet. App. C at 22. Dr. Pierce discovered certain indications of brain damage, but could not confirm its presence because he was unable to obtain specialized neurological testing. Pet. App. A at 5. He also testified that Berryman suffered from a personality disorder "with dependent narcissistic and depressive features." Pet. App. D; *Berryman*, 6 Cal. 4th at 1067.

Samuel Benson, M.D., a psychiatrist, testified consistent with Dr. Pierce. Dr. Benson "confirmed" the "soft signs of organicity" found by Dr. Pierce. Pet. App. D; *Berryman*, 6 Cal. 4th at 1067. He opined that Berryman "does, in fact, suffer from an organic mental syndrome, that it's probably alcohol induced, but there is [sic] some other factors in addition to his consumption of alcohol that's

[led] to it," including "head trauma." Pet. App. A at 5. Dr. Benson recommended additional testing, in particular an electroencephalogram (EEG) and an alcohol-included EEG. *Id.* The purpose of these tests was to determine whether Berryman had a seizure disorder and whether the seizures were induced by his consumption of alcohol. *Id.* According to Drs. Benson and Pierce, these seizures could have caused Berryman to become violent and disoriented and experience blackouts. *Id.* Dr. Benson testified that he was unable to obtain the permission of any local hospitals to conduct these EEG tests. *Id.* On cross examination, however, Dr. Benson conceded that no one whom he interviewed had informed him that Berryman had ever suffered a blackout, disorientation, or the inability to identify people. Pet. App. A at 5. Dr. Pierce also conceded that, because no EEG tests had been conducted, he could not confirm that Berryman had a seizure disorder. *Id.* Finally, he conceded that an individual could not commit a rape while having a seizure. *Id.*

The jury returned a sentence of death. Pet. App. A at 5.

4. On both direct appeal and state collateral review, Berryman claimed among many other things that trial counsel had been ineffective for not ensuring that he received the neurological testing that Drs. Pierce and Benson had mentioned to the jury. He also claimed that counsel had been ineffective for not uncovering and presenting additional evidence of his social history.

In support of those claims, Berryman proffered a declaration from trial counsel explaining that counsel did not seek permission from the trial court for out-of-county testing because he "believed at the time the court would not issue such an order." Pet. App. A at 6. But in a case two years following Berryman's, Soria was able to obtain a transfer order from the same judge to get an out-of-county EEG and PET scan for a different defendant. *Id.* Berryman also submitted additional mitigating evidence about his formative years. Pet. App. A at 5. That evidence included declarations from Berryman's mother and sister, who both provided more details about Berryman's childhood. *Id.*

The California Supreme Court denied his claims on the merits. Pet. App. D. The court explained in its opinion on direct appeal that Berryman did not show that the alleged errors "adversely affected the outcome within a reasonable probability." *Id.* Specifically, he failed to show that neurological testing and additional social history evidence "would have yielded favorable results" as to either guilt or punishment. *Id.* The same day that the court affirmed the judgment on direct appeal, it denied his state habeas petition without comment other than to confirm that the denial was "on the merits." Pet. App. E.

5. Berryman then filed a habeas corpus petition in the district court. Pet. App. C. During the federal habeas proceedings, and over the State's objection, Berryman received a PET scan of his brain. C.A. Dkt. 278 (SER 4-5). The Medical Director at the facility that conducted that test, Dr. Peter Vaulk, who

was not retained by either party, read the results as indicative of normal brain function. *Id.*

The parties' experts disagreed over the results. The State's expert, Dr. Alan Waxman, agreed with Dr. Vaulk that the PET scan results were normal. Pet. App. C at 94-95; C.A. Dkt. 278 (SER 7). But Berryman's expert, Dr. Joseph Wu opined that the PET scan was abnormal. Pet. App. C at 86.

Dr. Raul Guisado, a neurologist, was retained by Berryman to conduct both a regular and an alcohol-induced EEG. Pet. App. C. at 86. Dr. Guisado opined that the results of the alcohol-induced EEG were abnormal. *Id.* But the State's expert, Dr. Marc Nuwer, concluded that the alcohol-induced EEG results were perfectly normal. C.A. Dkt. 278 (SER 6).

The district court denied relief on all claims. Pet. App. A at 4.

6. The court of appeals affirmed the district court's decision to deny the petition. With regard to claim 65, the court held that reasonable jurists could conclude that admission of the additional family history and social background evidence would not have led to a reasonable probability of a different result. Pet. App. A at 7. For claims 15 and 16, the court held that "[t]he California Supreme Court reasonably concluded that a mens rea defense theory would not have been reasonably probable to persuade the jury to acquit." *Id.* at 9. And for claims 63 and 64, the court held that the state court's determination that "the tests lacked the capacity to produce results that might have moved a juror to acquit (or to vote for life in prison) was reasonable." *Id.* The court of

appeals denied Berryman's petition for rehearing and rehearing en banc. Pet. App. B.

ARGUMENT

Berryman contends that the opinion below conflicts with the decisions of this Court and prior decisions of the court of appeals. Pet. at 9. But no such conflict appears. Nor does any error appear in the appellate court's routine application of settled rules regarding the right to the effective assistance of counsel. There is no basis for further review.

1. The legal principles governing Berryman's claims of ineffective assistance are well established. When a defendant raises a claim of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), the defendant must show not only that "counsel's performance was deficient" but also that "the deficient performance prejudiced the defense." *Id.* at 687. In order to overturn a conviction, the defendant must show "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. In the context of a jury's decision to impose a capital sentence, the defendant must show a reasonable probability that the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* This Court has applied these rules in

several cases where defense counsel was found or assumed to have conducted a deficient investigation.[1]

2. The application of the forgoing principles to the facts of this particular case does not warrant further consideration.

a. Berryman argues that he was denied his Sixth Amendment right to counsel at the penalty phase because his lawyers failed to present additional evidence of his family history and social background. Pet. 9. The California Supreme Court denied that claim (claim 65) on the merits. Pet. App. E. And the court of appeals correctly held that a reasonable jurist could conclude that Berryman's claim is unmeritorious, particularly in light of the restrictions in 28 U.S.C. § 2254(d).

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[1] *Rompilla v. Beard*, 545 U.S. 374, 391-392 (2005) (counsel failed to present evidence showing that during Rompilla's childhood he was beaten by his father with fists, straps, belts, and sticks; that his father locked him and his brother in a dog pen filled with excrement; and that he grew up in a home with no indoor plumbing and was not given proper clothing by his parents); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (trial counsel failed to present evidence that Wiggins suffered consistent abuse during the first six years of his life, was the victim of "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care," was homeless for portions of his life, and was deemed to have diminished mental capacities); *Williams v. Taylor*, 529 U.S. 362, 370-71, 395 (2000) (sentencing counsel failed to present extensive records graphically describing Williams's nightmarish childhood, that Williams had been committed at age eleven, that he suffered dramatic mistreatment and abuse during his early childhood, was "borderline mentally retarded," had suffered numerous head injuries, and might have mental impairments organic in origin).

Defense counsel presented a robust mitigation case at trial. The evidence included 21 witnesses, among them 16 friends and relatives who testified about Berryman's background and sympathetic character. Pet. App. A at 4. Defense counsel also called two mental health experts. One of them was Dr. Pierce, a psychologist, who diagnosed Berryman with an "alcohol induced organic disorder." Pet. App. C at 22. On psychological tests, Dr. Pierce saw "consistent signs of organicity," which meant Berryman suffered from psychological disorders with apparent physical origins, such as brain damage. The other expert was Dr. Benson, a psychiatrist, who agreed with Dr. Pierce that Berryman exhibited signs of "organicity." Pet. App. A at 5. Indeed, Dr. Benson opined that Berryman "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." *Id.*

Notwithstanding this evidence, Berryman contends that he is entitled to relief due to shortcomings in the defense presentation. For example, he argues that trial counsel should have presented evidence that there was "open violent conflict between the parents with frequent arguments," and that "[t]he children witnessed their father beating their mother on many occasions." C.A. Dkt. 200 at 60; *see* Pet. at 14, 16-17; Pet. App. A at 7. But that evidence *was* presented to the jury. Bonty testified that there was "overt, open conflict" between herself and Berryman's father "[f]or at least three and a half years," and that there was "physical violence demonstrated" by Berryman's father

toward Bonty during this time. RT 3628-3629; *see also* RT 3857 (testimony of Dr. Pierce that there was "some chaos in the marriage between the mother and father").

Berryman further complains that trial counsel should have presented evidence that the death of his father had a profound impact on him; that he would not accept the fact that his father was dead; that he wanted to go on an expedition to find his father; and that, to this day, he continues to believe that his father is alive and has abandoned him. Pet. 16; *see* C.A. Dkt. 200 at 61. But that evidence is redundant of trial testimony the jury considered. For instance, the jury heard from numerous witnesses regarding the death of Berryman's father. RT 3587, 3589, 3617-3618, 3632-3633, 3645, 3664, 3821. More importantly, Dr. Pierce testified about the effect that the death had on Berryman. Dr. Pierce explained that "around this time . . . there was a significant behavior change in him" such that his behavior became "more difficult to control." RT 3860. And "[h]e still . . . has a tremendous difficulty in believing that his father is dead." *Id*.

Berryman next complains that trial counsel should have presented evidence that his father was not a good role model and that Berryman received "intermittent attention from a succession of step-fathers." C.A. Dkt. 200 at 61; Pet. 16. But the jury heard evidence that Berryman's father physically abused his mother during the course of a three and one-half year period. RT 3628-3629. The jury also heard evidence that Berryman's father was an alcoholic.

RT 3909. From this a reasonable juror would have concluded that Berryman's father was not a good role model.

Berryman also contends that counsel failed to discover that Berryman "scored in the borderline intellectually disabled range with a Full Scale Intelligence Quotient (FSIQ) score of 75." Pet. at 14. As the court of appeals recognized, however, "the jury heard repeatedly during trial that Berryman had a learning disability and intellectual deficiencies, and that he did poorly in school and was placed in specialized classes." Pet. App. A at 7. Dr. Pierce told the jury that Berryman attended at least seven or eight different schools and was identified as a slow learner in the third grade. Pet C at 22. Berryman also had difficulty reading and writing. *Id.*

Berryman faults counsel for failing to discover "that both Petitioner and his sister were subjected to serial sexual molestation by his uncles as young children." Pet. at 14. But the court of appeals correctly recognized that this evidence constituted inadmissible hearsay and was not considered on that basis. Pet. App. A at 7 n.1. Moreover, the district court specifically rejected the notion that Berryman's mental or emotional problems were attributable to sexual abuse:

> The proffered evidence of Berryman's molestation, that is, declarations of Berryman's mother and sister about what Berryman told them when they visited him in the Kern County Jail for the present offense, even setting aside hearsay considerations, see Federal Rules of Evidence, 802, 803 and 804, is not reliable. Neither Berryman's mother nor his sister are independently competent to testify about what happened to

> Berryman as a little boy, because they were not percipient witnesses and only learned about the alleged sexual abuse years later. Moreover, Berryman never told any of his examiners, the social historian, or even counsel about his sexual abuse. The Court concludes that Berryman's proffered expert opinion of mental impairment, to the extent it is said to be due to sexual molestation, is not "based on sufficient facts or data" required under Federal Rule of Evidence 702.

Pet. App. C at 99.

Finally, Berryman maintains that trial counsel should have presented evidence that he was born two months premature, weighed only four and one-half pounds, and spent the first month of his life in an incubator. C.A. Dkt. 200 at 60; *see* Pet. 15-16. But the court of appeals properly recognized that "even if this evidence had been presented to the jury, it would not have significantly altered the character of the evidence supporting mitigation." Pet. App. A at 7.

Berryman nonetheless claims that the court of appeals erred in its application of Section 2254(d) because the state court's decision is supposedly "contrary to" *Wiggins*, 539 U.S. at 510. Pet. at 15. But *Wiggins* is distinguishable. There, the prejudice to Wiggins resulting from trial counsel's ineffectiveness was plain. Evidence presented at Wiggins's post-conviction hearing showed that he and his siblings often had to beg for food or eat paint chips and garbage when their alcoholic mother left them home alone for days; his mother had sex with men while the children slept in the same bed; his mother beat him for breaking into the kitchen, which she kept locked; his mother once forced Wiggins's hand against a hot stove burner, burning him so

badly he had to be hospitalized; after he was placed in foster care, at age six, his first and second foster mothers physically abused him, and he was repeatedly raped and molested by the father in the second foster home; in a later foster home setting he was "gang-raped . . . on more than one occasion"; and when he entered the Job Corps program, he was sexually abused by his supervisor. *Wiggins*, 539 U.S. at 517.

The mitigating evidence introduced at Wiggins's post-conviction proceeding was far more compelling than the scant evidence Berryman faults his counsel for not presenting. Here, counsel presented evidence that Berryman's mother was largely absent and failed to nurture Berryman during his formative years, that Berryman's father drank heavily, that Berryman had problems with alcoholism, and that Berryman witnessed his parents' violent relationship. There was no showing that any additional family history or social background evidence would have significantly altered the character of the evidence supporting mitigation so that there would be a reasonable probability of a different sentence.

Moreover, in *Wiggins* no state court had decided whether the defendant was prejudiced by his counsel's failures; the federal court therefore decided the issue without the constraint of Section 2254(d) deference. 539 U.S. at 534. Here, in contrast, the federal district court was "circumscribed by a state court conclusion with respect to prejudice." *Id.* The district court could grant relief only if it concluded that no fairminded jurist could agree with the California

Supreme Court's conclusion that Berryman was not prejudiced by counsel's failure to introduce additional mitigation evidence. *Harrington v. Richter*, 562 U.S. 86, 101 (2011). As the court of appeals correctly held, Berryman failed to make this showing. Pet. App. A at 7.

In short, Berryman simply failed to demonstrate that his "counsel made errors so serious that [they were] not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 700. Nor did he establish a reasonable probability that, absent the purported errors, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. The record establishes that nearly all of Berryman's additional mitigation evidence is both cumulative of what was presented at trial and is not severe enough to earn a jury's sympathies. More importantly, Berryman failed to meet his burden on "the only question that matters under § 2254(d)(1)," *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)—whether a reasonable jurist could agree with the California Supreme Court that counsel was not so incompetent that they "undermined the proper functioning of the adversarial process [such] that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.[2]

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[2] Petitioner complains that "[n]owhere in the state opinion" does the California Supreme Court discuss the *Strickland* standard. (Pet. at 10.) In fact, the California Supreme Court recited the correct standard for ineffectiveness of counsel. Pet. App. D; *Berryman*, 6 Cal. 4th at 1081 ("To succeed under the Sixth Amendment . . . , a defendant must show (1) deficient performance under

b. In claim 15, Berryman alleged that his trial lawyers were ineffective in failing to present psychological and psychiatric testimony at the guilt phase to support his argument that the killing was not premeditated or intentional. And in claim 16, he alleged that his trial lawyers were ineffective for failing to seek out and develop social history evidence and additional expert testimony to establish Berryman's brain disease and mental state for use at the guilt phase. Pet. 18. But presenting this evidence during the guilt phase would have required admitting to the jury that Berryman killed Hildreth. And Berryman does not claim that he would have taken the stand to testify that that is what happened. Indeed, Berryman insisted that he never saw Hildreth that night, Pet. App. D; *Berryman*, 6 Cal. 4th at 1065, and continues to this day to profess his innocence, *see* Pet. for Writ of Cert., *Berryman v. Wong*, No. 20-5764 (Sept. 9, 2020).

What is more, because Dr. Benson testified that it would have been impossible for Berryman to have had sex during a seizure, his attorneys would have been forced to argue that Berryman and Hildreth engaged in consensual

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an objective standard of professional reasonableness and (2) prejudice under a test of reasonable probability of an adverse effect on the outcome.").) In any event, a state court adjudication is not "contrary to" clearly established federal law merely because it does not cite this Court's precedents. Indeed, "it does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam); accord *Bell v. Cone*, 543 U.S. 477, 455 (2005) ("Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.").

sex and that he had the seizure only afterward. As the court of appeals pointed out, "[i]t is reasonable to assume that this argument would likely have been greeted with extreme skepticism." Pet. App. A at 8. Indeed, "[t]he fact that Hildreth was found left on a dirt road with her clothes in disarray and a shoe imprint on her face would have made it seem frivolous to argue that her killing had occurred during a seizure, or was otherwise the product on unintentional conduct." *Id.*

Finally, as the court of appeals recognized, "[b]y adopting this far-fetched theory, Berryman's lawyers would have lost the ability to argue the more straightforward theory that the police had arrested the wrong person." Pet. App. A at 9. Although there was evidence pointing to Berryman's guilt, it was all subject to challenge by Berryman's attorneys. In other words, "[t]he straightforward innocence argument that Berryman's lawyers pursued was not a lost cause." *Id.* The primary defense theory at trial was that the prosecution failed to meet its burden of proving that Berryman was the perpetrator, playing off of various uncertainties, including uncertainties related to time. That was eminently reasonable. The prosecutor's case was entirely circumstantial and lacked eyewitness or DNA evidence to link Berryman to the crimes. Indeed, in responding to Berryman's argument that the evidence was insufficient to identify him as the perpetrator, the California Supreme Court observed that "the inculpatory evidence is not without

weaknesses in certain particulars, including the matter of time." Pet. App. D; *Berryman*, 6 Cal. 4th at 1083.[3]

c. In claims 63 and 64, Berryman contends that his trial counsel was ineffective for not asking the trial court for permission to conduct neurological testing. Pet. at 18-19. Berryman argues that, without such testing, the mitigating evidence from Drs. Pierce and Benson carried little weight. But the court of appeals correctly applied settled authority when it determined that a fairminded jurist could have reasonably concluded that the results of the testing were unlikely to have affected the jury's verdict.

Berryman does not appear to dispute that his "best-case scenario" was for the testing to have "confirmed that he had a seizure disorder." Pet. App. A at 9. As discussed *supra* p. 16, however, such a disorder could not have played a role in the commission of the crime. Such a disorder was unlikely to engender sympathy "without further evidence of actual manifestations or identifiable impact on Berryman's life." *Id.* There was little such evidence presented at trial or proffered on collateral review. Indeed, "[t]he fact remains that neither Berryman nor anyone else reported that he had ever suffered a seizure, a blackout, or disorientation." *Id.* The jury heard instead that, despite his assumed disorder, he had "married, held jobs, and had a year-long period of

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[3] Defense counsel did, in fact, present the fallback theory that even if Berryman killed Hildreth, it did not constitute murder. Pet. App. C at 16. Under the circumstances, however, the jury would have known that the defense was not viable in light of the absence of supporting evidence.

stability in which he functioned as a good father, good husband, and dedicated member of his church." *Id*.

In addition, as the court of appeals recognized, it was "unclear whether the test results would have been admissible under the then-prevailing standard for scientific evidence." Pet. App. A at 10. As the court of appeals added:

> In its opposition to the request for this testing in the district court, the government strenuously argued that the tests were not generally accepted in the scientific community for the purposes that Berryman's experts advocated. The government argued the tests should not be performed for that reason. In its order denying Berryman's habeas petition, the district court acknowledged the controversy regarding the admissibility of the tests and did not decide whether the test results would have met the standard for admissibility.

Id.

And even if the newly-developed evidence were considered, it would not provide a proper basis for relief. Although the parties' experts disagreed over the interpretation of the PET scan and alcohol-induced EEG results, it is unnecessary to resolve which set of experts is correct. A reasonable jurist could conclude that the jury would not have found Berryman's seizure argument persuasive even if the disputed results were presented at trial. Pet. App. 4 at 10.

First, a reasonable jurist could conclude that Berryman failed to demonstrate that the alleged disorder played a role in the killing. Accepting Berryman's theory, one would expect to find numerous declarations from

family, friends, romantic partners, and others attesting to this fact. After all, Berryman drank frequently—often excessively—in the presence of others. C.A. Dkt. 201-2 (ER at 187) ("His mother recalls that he seemed to never be without an open bottle, even when driving."); C.A. Dkt. 201-2 (ER 12 at 228) ("drinking almost daily"). And as Dr. Nuwer explained, "people around the patient would generally be very much aware of convulsions or partial seizures. Someone who has such events should have a record of having these in the presence of others who would report them." C.A. Dkt. 278 (SER 6 at 216). But no one, including those who witnessed Berryman severely intoxicated, reported seeing him exhibit behavior consistent with having a seizure. And this despite the fact that habeas counsel obtained twenty-four declarations from close family members and friends, C.A. Dkt. 201-1 (ER 4 at 228), and interviewed at least six others, C.A. Dkt. 201-2 (ER 12 at 165), many of whom knew Berryman well and actually saw him intoxicated, sometimes severely, C.A. Dkt. 201-2 (ER 12 at 228, 237, 244, 249, 263, 279).

The same is true with regard to the extensive social history prepared by Gretchen White, Ph.D. Dr. White reviewed Berryman's school, medical, and juvenile records, as well as numerous declarations and investigative reports of family members. C.A. Dkt. 201-2 (ER 12 at 165). Yet her report is devoid of any witness accounts of Berryman exhibiting seizure-like behavior when intoxicated. *Id.* Likewise, Berryman's medical, school (from third grade through high school), and juvenile records do not indicate that he ever reported

having symptoms consistent with experiencing a seizure. C.A. Dkt. 201-2 (ER 4 at 221-223).

Also telling is the fact that Berryman never told his numerous doctors or medical experts, including Drs. Benson, Pierce, Guisado, or Wu, that he had experienced symptoms associated with having a seizure while intoxicated. And while Berryman was aware that his trial attorneys were seeking to show that he suffered from alcohol-induced seizures, and both Drs. Benson and Pierce interviewed him at length numerous times, there is no evidence that he ever told his attorneys that he had experienced symptoms that could be attributed to a seizure. Reporter's Transcript 3920 (trial testimony of Dr. Benson admitting that no one had told him, and he had not read any report indicating, that Berryman ever had a blackout or became lost or disoriented, symptoms consistent with having had a seizure).

Second, a reasonable jurist could conclude there is not a reasonable probability that Berryman was severely intoxicated at the time he raped and murdered Hildreth. *Richter*, 562 U.S. at 101. Berryman failed to present any evidence, direct or circumstantial, to support that theory. Indeed, the record demonstrates just the opposite. Witnesses reported that Berryman was able to function normally in the hours surrounding the rape and murder. C.A. Dkt. 278 (SER 2 at pp. 40, 64, 69, 81, 82); Pet. App. C at 100 n.110. The record also demonstrates that Berryman was able to safely drive himself back to Armendariz's house after murdering and raping Hildreth, and then, sometime

before 8:00 the next morning, switch the tires on his truck. Pet. App. D; *Berryman*, 6 Cal. 4th at 1063-1064. This conduct is completely at odds with the contention that Berryman was severely intoxicated at the time of the rape and murder.

Third, a reasonable jurist could conclude that Berryman failed to demonstrate that he experienced a seizure contemporaneous with the rape and murder of Hildreth. *Richter*, 562 U.S. at 101. The only "evidence" Berryman points to in support of his theory that he suffered a seizure during Hildreth's rape and murder is the testimony of Dr. Pierce that the "alcohol-organic mental syndrome interaction could have produced a seizure in Mr. Berryman, resulting in an altered state of consciousness . . . ." C.A. Dkt. 201-1 (ER 4 at 139). But Dr. Pierce offered no opinion concerning the likelihood of this possibility. And Dr. Benson, Berryman's own expert, conceded that Berryman could not have raped Hildreth while experiencing a seizure. C.A. Dkt. 278 (SER 4 at 104). So did Dr. Nuwer. C.A. Dkt. 278 (SER 6 at p. 216).

Finally, this newly proffered defense theory would have depended on convincing the jury that Berryman first engaged in sex with Hildreth and then had a seizure that caused him to lose control and kill her. But the evidence showed that Hildreth was killed by a relatively shallow cut, not by "thrashing out" or other especially violent activity that Dr. Benson described as possible during the course of a seizure. Pet. App. A at 10. As the district court went to great lengths to explain, the circumstances surrounding Berryman's crimes

were wholly inconsistent with the theory that Hildreth was raped and murdered by someone in the throes of a seizure. Pet. App. C at 99-100. The court of appeals correctly concluded that "Berryman's lawyers would likely have had great difficulty persuading the jury to accept this version of events, no matter what the test results showed." Pet. App. A at 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: April 9, 2021

Respectfully submitted,

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No. 20-6822

In the Supreme Court of the United States

RODNEY BERRYMAN, SR., *Petitioner,*

v.

ROBERT WONG, ET AL., *Respondent.*

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Brief in Opposition contains 5,598 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 9, 2021

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CERTIFICATE OF SERVICE BY MAIL

I, Brian R. Means, Deputy Attorney General, a member of the Bar of this Court hereby certify that on **April 9, 2021**, a copy of the **BRIEF IN OPPOSITION** in the above-entitled case were mailed, first class postage prepaid to:

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I further certify that all parties required to be served have been served.

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