NO. 20-6822

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

REPLY TO BRIEF IN OPPOSITION

[CAPITAL CASE]

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Petitioner respectfully submits this reply brief addressing new points raised in the brief in opposition ("BIO," *post*), filed April 9, 2021.

In summary, the BIO argues that there is no conflict between the Ninth Circuit's opinion here and decisions of this Court or the court of appeals, that there is no error in the Ninth Circuit's application of settled rules regarding the right to the effective assistance of counsel, and that, therefore, there is no basis for further review. E.g., see BIO at 7.

These contentions are made by ignoring arguments or aspects of arguments presented in the petition, as well as parts of the record and holdings in the underlying state court automatic appeal opinion; the BIO examines numerous individual cases and their holdings, but fails to consider the arguments which the petition presented on many of those same cases, as well as other cases which the petition also cited, and fails to address the overall analysis which the petition offered, effectively ignoring the forest by focusing only on some of the trees.

I. CONTROLLING CASE LAW EXCLUDES FINDING THAT THE STATE COURT'S DENIAL OF CLAIM 65 WAS NOT UNREASONABLE.

The BIO begins by asserting that "[d]efense counsel presented a robust mitigation case at trial," based upon the number of witnesses called and the fact that two of those were experts, Drs. Pierce and Benson, then lists various bits of testimony the defense trial witnesses offered, critiques that essentially as being the same as the habeas evidence, cumulative of the defense trial testimony, and concludes by arguing that *Wiggins v. Smith*,

539 U.S. 510, 535 (2003), is distinguishable. BIO at 9-14.

The BIO thus makes the same or similar analytic failures as did the Ninth Circuit's opinion and the state supreme court's automatic appeal opinion, by variously ignoring or failing to engage the petition's contentions, e.g., that this Court's case law holds that it is not the mere quantity of a trial counsel's penalty phase presentation but instead the quality of that presentation which may provide one measure of prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984) and its progeny, and by ignoring or failing to engage the points listed in the petition's discussion. See Pet. at 9-17, and authorities cited.

One glaring example is that the petition explained that the prosecutor exploited trial counsel's failure to seek to have the neuropsychiatric tests performed which the defense experts requested before trial, when the prosecutor mocked that defense failure in penalty phase closing argument, Pet. at 7-8, 17, after the prosecutor earlier conceded in guilt phase closing 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, RT 3330-3332, 3335-3336, see discussion, Pet. at 19, although there had been no defense expert or mental illness testimony offered at that point. The prosecutor's guilt phase concession regarding the evidence essentially invited the defense to present at the penalty phase the solid mental state evidence it had failed to present at the guilt phase. Yet trial counsel presented experts at the penalty phase who could not back their conclusions by the testing which they had requested trial counsel to have performed before trial. And the prosecutor mocked the defense experts and the defense for that failure to conduct testing

in penalty phase closing argument. RT 3989:4-10. This demonstrates the prejudice from the defense's error - the prosecutor used that error in closing to argue that the defense theory regarding a seizure disorder was baseless and effectively that defense counsel knew it to be so. This contention is not addressed in the BIO's analysis.

Another glaring example is that the BIO at 9 contends that trial counsel "presented a robust mitigation case at trial ... [which] ... included 21 witnesses who testified about Berryman's background and sympathetic character," without acknowledging, let alone addressing, the petition's contention that the same events constituted ineffective assistance of counsel at the penalty phase involving trial counsel's presentation of "a parade of witnesses" who testified about Petitioner's kind and non-violent nature when the jury had just returned a guilty verdict at the guilt phase of a violent rape-murder and the penalty phase defense was a presentation contrary to the principles of *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), *(Terry) Williams v. Taylor,* 529 U.S. 362, 398 (2000), etc. See discussion, Pet. at 17. It is well established in the capital defense field and indeed under the prevailing professional norms, see *Padilla v. Kentucky,* 559 U.S. 356, 366-367 (2010), that capital defense trial counsel must investigate and prepare prior to trial and then present at trial unified guilt and penalty phase defenses, rather than as here present a penalty defense (that petitioner was loved by many women in his life, was kind and gentle with them, suffered some difficulties in life and had specific organic mental illnesses, albeit without support from testing) which contradicted the guilt phase defense (denial of any involvement in the crimes alleged, but arguing alternatively, see Pet. at 19, that if petitioner was present then

the crimes may have occurred either as an accident or during "an explosion of emotions," RT 3404, 3417-3418. See discussion, Pet, at 29-30, citing Goodpaster, *The Trial For Life: Effective Assistance Of Counsel In Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 324-325, 330-334, 338 (1983). Trial counsel must construct and present the guilt phase as a foundation for the penalty phase case, should it be necessary. *Ibid.* In effect, the defense's own guilt phase presentation heightened the prejudice from the penalty phase failures. Pet., at 27-28. The BIO fails to address any of this.

Another glaring example is that the BIO's attempted distinction of *Wiggins*, BIO at 12-14, and fails to engage any aspect of the petition's analysis of the application of *Wiggins* and related case law there. See Pet. at 10-17.

The BIO at 12-14 also presents a piecemeal analysis of its characterization of selected details, while ignoring others raised in the petition here and below. See Pet., at 9-17.

And finally, the BIO's piecemeal analysis ignores the fact that the prejudice of *Strickland* error is measured collectively with each alleged instance considered as part of a whole and the totality of the available mitigation evidence - both that adduced at trial and the evidence adduced in the habeas proceeding - taken together in reweighing it against the evidence in aggravation. *Strickland*, 466 U.S. at 695-6; *Wiggins v. Smith*, 539 U.S. 510, 536 (2003); *Williams v. Taylor*, 529 U.S. 362, 397 (2000). The state supreme court failed to conduct such an analysis here. See discussion, Pet., at 9-10, quoting the state court's opinion, App. D, 6 Cal.4th at 1108.

II. CONTROLLING CASE LAW EXCLUDES FINDING THAT THE STATE COURT'S DENIAL OF CLAIMS 15, 16, 63 AND 64 WAS NOT UNREASONABLE

The BIO essentially argues that the ineffective assistance of counsel alleged in claims 15 and 16 regarding the defense's failures to present mental illness expert testimony at the guilt phase along with a mental state defense were groundless because "presenting this evidence during the guilt phase would have required admitting to the jury that Berryman killed Hildreth," BIO at 15. This ignores the fact that defense counsel Soria presented just that as an alternative in guilt phase closing argument, see discussion, Pet. at 19; Soria did argue in the alternative that if the homicide was committed by Berryman, the evidence suggested there was no rape - the absence of vaginal trauma and the victim's shoe being off established there was no rape, ER 20, RT 3415-3416, 3417, 3433 - and that as to the fatal "wound, three-quarters of an inch deep denotes an accident," RT 3402, 3415, 3417:13-14, occurring during an "explosion of emotions," RT 3404, 3417-3418, but so argued without supporting neurological evidence such as testing would have provided to establish a mental state defense or lay the groundwork for presenting such as evidence in mitigation in the penalty phase. Thus, counsel chose to make the very argument which the BIO finds too difficult, and counsel chose to do so without support from the testing the experts requested take place. Trial counsel also told the jury in guilt phase closing that if petitioner was present then the crimes may have occurred either as an accident or during "an explosion of emotions," RT 3404, 3417-3418.

Similarly, the BIO argues that because defense expert Dr. Benson testified (later at the penalty phase) that sexual relations during a seizure were impossible, if Benson's

testimony had been presented at the guilt phase, defense counsel would have had to argue that Berryman and Hildreth engaged in consensual sex and that he had a seizure only afterwards. BIO at 16. The BIO thus ignores the fact that defense counsel Soria did argue exactly that at the guilt phase, telling the jury that Berryman and Hildreth had consensual sex, after which the crimes may have occurred either as an accident or during "an explosion of emotions," RT 3404, 3417-3418; see discussion, Pet. at 19.

Thus, trial counsel presented both of the above arguments here, but did so without any supporting expert testimony; the viability of such arguments is attested by the prosecutor's volunteering during his own guilt phase closing that there was a "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, RT 3330-3332, 3335-3336, i.e., the trial prosecutor conceded that the prosecution's crime scene circumstantial evidence and related prosecution testimony was not only vulnerable to but consistent with a mental state defense of one sort or another. *Ibid.*

The BIO then argues, at 16-17, that if defense counsel had presented such an argument they would have lost the ability to argue the "more straightforward theory" of factual innocence. This is an unreasonable argument embraced earlier in the Ninth Circuit's opinion. See discussion, Pet, at 27. Additionally, presenting a guilt phase defense of alibi and denial of guilt, followed by a penalty phase defense case of mental illness as mitigation, as defense counsel did here, has long been viewed as contrary to prevailing professional norms of practice for capital defense counsel. See Goodpaster, *The Trial For Life:*

Effective Assistance Of Counsel In Death Penalty Cases, 58 N.Y.U. L. Rev. at, e.g., 324-325,330-334, 338. Finally, it is also an argument rejected by the state court's underlying automatic appeal opinion, as discussed in the petition, at 27-28. 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.

Next, the BIO at 17-22 presents various arguments regarding the ineffective assistance of counsel alleged in claims 63 and 64 for trial counsel's failing to ask the trial court for failing to obtain the trial court's transport order and funding authorization for the EEG tests and PET scan which the defense experts had requested.

The BIO at 17 contends that a seizure disorder "could not have played a role in the commission of the crime." This is incorrect. The panel similarly erred in reasoning that petitioner failed to show that he had a seizure at the time of the underlying events.

First, a showing of causality was not required under California law at the time of trial here. Counsel merely needed to present evidence going to reasonable doubt.[1] Contrary to the District Court's asserted reliance upon *Hensley v. Crist*, 67 F.3d 181 (9th Cir. 1995),

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[1] At the guilt phase, the due process clause required the prosecution prove beyond a reasonable doubt each element of the offense charged. In re Winship, 397 U.S. 358, 361-364 (1970). By contrast, Berryman had no burden to prove that a seizure occurred and could simply argue reasonable doubt; additionally, at the guilt phase, the defense's mere presentation of "substantial evidence of unconsciousness" would have required the trial court "to instruct on its effect as a complete defense." People v. Halvorsen, 42 Cal.4th 379, 417 (2007). Drs. Benson and Pierce's testimony would have met that standard if offered at the guilt phase, even without further testing, but the EEG/PET-scan results would have strengthened their testimony even further.

Berryman did not have a burden of proving he had a seizure at the event. *Hensley* holds that a petitioner does not show prejudice when she fails to offer any expert opinion that mental defect was linked to commission of crime, unlike here where Pierce and Benson's opinions more than provided that linking testimony, later reinforced by the EEG/PET-scan results. Additionally, as to penalty phase and claim 65., discussed *ante*, mitigation evidence does not have to be causally connected to the crime. *Tennard v. Dretke*, 542 U.S. 274, 286 (2004).

Second, Benson and Pierce's declarations and potential testimony went beyond whether Berryman merely had a seizure disorder and extended to whether that seizure disorder was medically characterized by behavior consistent with the events of the underlying homicide but inconsistent with Berryman's known behavior previously[2], yet they needed the neuropsychiatric test results to reach conclusive opinions. Their testimony was not presented at the guilt phase, when it could have formed the basis for a guilt defense, as they told Soria before trial. The district court here held that:

> A finding of such resultant seizure activity would have challenged the jury finding that Berryman intentionally killed [Ms. Hildreth], a finding that was required under then existing California law. See *Carlos v. Superior Court*, 35 Cal. 3d 131, 142

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[2] Both Dr. Pierce, RT 3869, 3870, 3874, and Dr. Benson, RT 3894-3900, 3906-3910, provided related testimony, reiterated and detailed in post-conviction declarations and strengthened by the EEG/PET-scan results, Ninth Cir. Docket ER 17 at 139-141 (Pierce), 136-137 (Benson), ER 12, District Court CR 283 at 28-34 (Pierce), 35-39 (Benson), that the underlying event - the homicide - involved violent "bizarre" acts very uncharacteristic of Berryman, but medically characteristic of certain organic brain disorder seizure behaviors generally - and in light of Berryman's described history of head trauma, low IQ, increasing and heavy alcohol consumption beginning at an early age and the EEG/PET-scan results documenting Berryman was afflicted by exactly the alcohol-induced seizures these experts believed Berryman had, each expressed the belief the underlying event was consistent with the diagnoses including organic brain disorder and increasingly violent seizure behavior.

(1983).

July 10, 2007, District Court Memorandum Decision and Order Denying Petitioner's Request for Evidentiary Hearing and Denying Petition on the Merits District Court Doc. 201-1, at 123:1-6.

After Drs. Pierce and Benson testified at the penalty phase, the prosecutor dramatically exploited Soria's failure to seek the testing his experts requested, during penalty phase summation, mocking the failure to conduct such testing. RT 3986:3 - 3989:10. Petitioner argued below that the Ninth Circuit should remand the matter for related evidentiary hearings. Ninth Cir. Dkt. 200, at 105-108.

Per *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985), a consulting psychiatrist's request that counsel obtain certain tests supported by a reasonable showing constitutes part of an "appropriate examination," *id.*, at 83, and is one of the "raw materials integral to the building of an effective defense" the State must provide the defendant. *Id.*, at 77. "[T]o provide adequate representation of a criminal defendant who may suffer from a mental defect, counsel must conduct a reasonable investigation into such a defense. . . . ," *Raley v. Ylst*, 470 F.3d 792, 800 (9th Cir. 2006), at both guilt and penalty phase. *Jennings v. Woodford*, 290 F.3d 1006, 1013 (9th Cir. 2002). "In general, an attorney is entitled to rely on the opinions of mental health experts in deciding whether to pursue an insanity or diminished capacity defense." *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995)

At the guilt phase, when the defense expert requests relevant information which is readily available and counsel inexplicably does not even attempt to provide it, counsel's performance is deficient. *Bloom v. Calderon*, 132 F.3d 1267, 1279 (9th Cir. 1997). Counsel's

performance is also deficient when counsel possesses information that would have put a reasonable attorney on notice that he needed to investigate guilt phase mental health and drug - here, alcohol - issues that might have raised reasonable doubt about defendant's ability to form requisite intent to justify first-degree murder conviction, but counsel settled on a weak alibi defense without making an informed, strategic choice regarding possible mental health defenses. *See Jennings, supra,* 290 F.3d at 1013 -1014.

Next the BIO at 17-21, argues that Berryman failed to present evidence of any seizure behavior prior to the crimes here, that the neuropsychiatric tests would not have been admissible, and that the fatal wound was a shallow cut, inconsistent with "thrashing" movements during a seizure.

To the contrary, the cut was consistent with an accidental, RT 3417:14, or random injury occurring during a seizure, per Mr. Soria's guilt phase closing, as were the victim's other injuries. Random or "thrashing" movements could as easily inflict a shallow wound as a deep one. Absence of documented prior seizures was not fatal to the argument[3], nor was the testing's admissibility, as the district court failed to determine whether it was

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[3] E.g., in a recent study of a cohort of 200 patients experiencing a new-onset (first) seizure, 34.5 % were 21-40 years of age, Ranganathan, et al., *New Onset Seizures--a Clinical, Aetiological and Radiological Profile, Journal of Evolution of Medical and Dental Sciences* (Nov. 26 2018), https://www.thefreelibrary.com/NEW+ONSET+SEIZURES--A+CLINICAL%2c+AETIOLOGICAL+AND+RADIOLOGICAL+PROFILE.-a0569113334 (last viewed June 30, 2020). Mr. Berryman arrived in Delano, California, at age 21, Berryman, 6 Cal. 4th at 1063, and was 22 at the time of the crime.
Https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-list-secure-request/ (last viewed April 26, 2021).

admissible or not. Absence of prior seizures is also consistent with Dr. Benson's testimony, describing emerging causation and symptoms; Benson testified Berryman suffered from organic brain disease, due to chronic alcoholism at young age and head trauma, RT 3909; the aggression began to come out just before Berryman "ran away," RT 3907-3908, from Los Angeles to Delano where he arrived shortly before the homicide, at age twenty-one. *Berryman,* 6 Cal. 4th at 1063.

CONCLUSION

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

DATED: April 27, 2021

Respectfully submitted,

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