No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD ALLEN BENSON, Petitioner

vs.

KEVIN CHAPPELL, WARDEN, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE NINTH CIRCUIT COURT OF APPEALS

CAPITAL CASE

MARCIA A. MORRISSEY
11400 W. Olympic Blvd., Suite 1500
Los Angeles, California 90064
Telephone: 310-399-3259
Facsimile: 310-392-9029
Email: morrisseyma@aol.com

JOHN R GRELE
1000 Brannan St., Suite 400
San Francisco, California 94103
Telephone: 415-6554-8776
Facsimile: 415-484-7003
Email: jgrele@earthlink.net

Attorneys for Petitioner
RICHARD ALLEN BENSON

CAPITAL CASE – NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. When a federal habeas court examines for reasonableness a silent state court habeas denial pursuant to 28 U.S.C. § 2254(d) (AEDPA) and *Harrington v. Richter,* 562 U.S. 86, 109 (2011), must the federal court undertake that examination using the state law in effect which requires the state court accept as true all facts pled in support of the allegations made by a habeas petitioner to determine if the petitioner has made a prima facie case requiring a hearing, or is the federal court free to disregard state law and instead rely on theories and facts the state court could not have considered, and which are contrary to the state court facts, when positing possible reasons for trial counsel's failure to investigate mitigation evidence in a capital case?

2. Can a federal habeas court determine that a state court summary denial of a capital habeas petition claim of trial counsel ineffective representation without a hearing was reasonable under 28 U.S.C. § 2254(d) (AEDPA) on the grounds that trial counsel in a capital case may have chosen not to investigate severe sexual and physical abuse by his caretakers, organic brain damage, neurological impairments and psychiatric disorders, despite having been advised by his consultants that there was reason to conduct such

investigation and despite trial counsel's post-conviction statement that such mitigation was not inconsistent with his strategy at trial?

3. Can a federal court, reviewing a state court silent determination, rule that, in light of the aggravating circumstances in death penalty case, a state court could reasonably determine that there is no reasonable probability of a different result if counsel had presented evidence of the severe sexual and physical abuse, neurological impairments, and psychiatric impairments, when the state court itself has not adopted the doctrine that no mitigation would result in a life case in certain cases, and such a doctrine violates this Court's Eighth Amendment jurisprudence?

LIST OF PARTIES

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

RELATED CASES

There are no related cases pending in this Court.

INDEX TO APPENDICES[1]

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

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD ALLEN BENSON, Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE

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Petitioner Richard Allen Benson respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on May 1, 2020.

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals, which is reported at 958 F. 3d 801 (9th Cir. 2020), appears as Appendix A to this Petition. (PA 1-41). Relevant portions of the opinion of the United States District Court, which is unpublished, appear in App. C. (PA 43-105). The California Supreme Court opinion

on direct appeal, reported at 52 Cal.3d 754 (2008), is App. D. (PA 106-48). The unpublished state court denial of habeas relief appears at App. E. (PA 148).

JURISDICTION

The Ninth Circuit judgment was entered on May 1, 2020. App. A. A timely petition for rehearing and rehearing en banc was denied on November 20, 2020. App. B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Eighth Amendment

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment Due Process Clauses

"No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented in the State court proceedings."

STATEMENT OF THE CASE

A. Guilt Phase Evidence

Laura Camargo lived in Nipomo, California, with three children, Stephanie and Shawna, age four and three, respectively, and son Sterling, age 23 months.

On Saturday, January 4, 1987, Camargo left her children with a babysitter, and traveled to the apartment of friends in Oceano where she met Petitioner. Petitioner had been drinking that evening and he and his friend split a quarter of an ounce of methamphetamine. At 11:00 p.m., Petitioner and Camargo left and traveled to Camargo's home.

On Monday morning at 8:00 a.m., a neighbor saw smoke coming from the Camargo home and called the fire department.

Police investigators found the Camargo residence charred and heavily damaged by fire. Camargo's body was on an open sofa bed inside the front door and the bodies of Stephanie, Shawna and Sterling were in a connecting room that was heavily damaged by fire. Stephanie was unclothed, on her back with her legs

spread, and the jury was told that there was a wire-ribbed corset next to her body.[2] Shawna's body was also nude and was face down, with her legs slightly spread apart and her buttocks slightly raised.

The State's pathologist testified that Laura Camargo and her two daughters died from multiple blunt-force injuries to the backs of their heads; each of the injuries caused immediate loss of consciousness and death occurred within minutes. Based on the level of decomposition of Laura's body, Dr. Lawrence testified death occurred "several days" before the fire.[3] Sterling Gonzalez died by asphyxiation, strangulation or a combination of both.

Arson investigators determined that the fire was incendiary in nature; it started in the second bedroom, next to the bodies of Stephanie and Shawna, and burned downward into magazines, papers and clothing. Another investigator testified that the burnt debris beneath the bodies included newspapers, magazines and five photo album pages, which contained photos of nude women whose faces had been replaced with those of young girls; nine latent prints on the album pages were identified as Petitioner's.

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[2] This was incorrect. The corset was part of Evidence Item 2, which was found beneath the body of Sterling Gonzalez.

[3] In post-conviction, a pathologist opined that there was "no reasonably reliable objective basis for [Dr. Lawrence's] conclusion that Laura Camargo died 24 hours before the children." On the contrary, the finding of 24% carboxyhemoglobin in her blood indicates she was alive and breathing when the fire started to burn.

William Gordon, M.D., a general practitioner and psychiatrist, conducted a sexual assault examination of the bodies of Stephanie and Shawna. Gordon, who had only recently begun conducting sexual assault examinations, described his training in this area as "learning sort of from the ground up."[4] He told the jury that there was "a high degree of probability that Stephanie had been molested and a real possibility and probability that Shawna had been also", he latter based solely on the position of her body.[5]

Dr. Gordon examined the bodies with an ultraviolet light to detect fluorescence, which is present when there is, *inter alia*, seminal fluid. Camargo showed small evidence of fluorescence; there was minimal fluorescence on Shawna; and there was "considerably more" fluorescence on Stephanie.[6]

Dr. Gordon interviewed Petitioner at the jail. He reported that in the

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[4] Whatever expertise Dr. Gordon had in examining living victims for evidence of sexual assault, it did not extend to deceased victims whose bodies had been exposed to fire. Trial counsel failed to present pathologist testimony that substantial experience in examining burned bodies is essential to an ability to distinguish artifacts of heat and fire from evidence of events prior to death.

[5] The jury did not hear evidence discovered by post-conviction counsel that Gordon's findings may well have been a consequence of death and/or fire alone, and were not a reliable basis for determining whether there had been sexual molestation before death. The jury did not hear that the position in which Shawna's body was found "is of no reliable diagnostic value."

[6] The jury did not hear that specimen swabs from the victims were negative for the presence of semen. PA 32. A qualified pathologist could have testified that "the negative results of the seminal fluid testing shows that the fluorescence observed by Dr. Gordon was caused by a fluorescent material other than semen."

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unrecorded interview, Petitioner admitted sexual acts with the two girls, and that it was like being in "a molester's type of heaven." Dr. Gordon testified to his "impressions" that these sexual acts occurred after Camargo and Sterling were killed and that Petitioner last molested the girls shortly before he set the fire and left the residence. Although he said that Petitioner indicated Stephanie may have been alive at the time he set the fire, he admitted that Petitioner also told him that he killed the girls five minutes before starting the fire.

According to Dr. Gordon, pedophilia is not a mental illness, but rather as an integral part of an individual's character and personality that is longstanding, chronic and pervasive. Pedophilia can be a manifestation of other types of personality and character problems; for example, a sociopathic personality may also be a pedophile. These problems are not illnesses, but personality and character patterns. Dr. Gordon said he did not believe that character defects such as pedophilia are beyond the control of an individual, because pedophiles commit their crimes in a secretive, surreptitious fashion. Pedophilia may or may not be medically treatable; an individual whose problem is deep-seated, pervasive and longstanding is much less treatable.[7]

Petitioner was interviewed by detectives and eventually confessed. He stated

[7] The jury did not hear evidence that a court found that Gordon improperly destroyed a tape recording containing an exculpatory statement. PA 33-34. Gordon also failed to comply with a pretrial discovery order in another matter. In May 1987, the directors of the Health and Social Services departments, and the District Attorney, determined that Gordon would not receive further referrals on child molestation examinations.

he and Carmargo fought and he hit her in the head with his ring mandrel three to four times. He admitted sexual acts with Shawna and Stephanie and to strangling Sterling with a braided rope while the girls were sleeping because he coughed and cried. Once daylight arrived on Monday, Petitioner killed the girls, hitting them in rapid succession with the ring mandrel and, after they were on the ground, he hit them with the hammer until they died. He then lit the residence on fire and fled.

Petitioner was re-interviewed the next day and described in more detail the sexual acts with Shawna and Stephanie.

Throughout his interviews, Petitioner told the police that he had been using crank (methamphetamine) at the time of the crimes.

B. Penalty Phase Evidence

1. Prosecution Evidence (PA 109-110)

In aggravation, the state introduced evidence of a kidnaping of Karen Stange shortly after the homicides. Karen Stange offered Petitioner a ride so he could gather his belongings in San Luis Obispo. However, Petitioner suddenly grabbed Stange from behind, put a knife to her throat, and demanded that she drive toward Los Osos. Stange drove Petitioner to a liquor store, where at Petitioner's direction, Stange brought a bottle of whiskey and one copy of every adult magazine in the store.

They eventually drove to an abandoned house. Petitioner left Stange alone in the car and went into the house. Petitioner came out the front door of the house, returned to the car, retrieved his belongings and went back inside. Stange drove

home and called the police, who went to the abandoned house and arrested Petitioner.

The prosecution introduced evidence of Petitioner's four prior convictions and the related facts: the 1971 molestation of nine-year-old Joanna Minor; the second 1975 kidnaping of Lisa Wilhoyte; the 1975 kidnap and molestation of Leslie Hund; and, the 1980 kidnapping of fourteen-year-old Sara Millard.

The jurors listened to fourteen hours of Petitioner's frequently inaudible tape-recorded interrogations and were given a transcript to read that contained over 12,000 inaccuracies.

2. Evidence Presented by the Defense (PA 9-11; PA 110)

At the penalty phase, the defense called three of Petitioner's siblings, Dale Snow, Brad Benson and Sandra Bradley, and an uncle. They are related the same story – that Petitioner and the brothers lived on a farm in Petaluma with Marjorie Buchanan and her son David. His father got custody of the boys when he was ten years old, and they lived with their father and stepmother for about three years, in hotels, a converted chicken coop and a home in Southern California. The longest they stayed in one place was a few months. Their father was an unemployed alcoholic, and the boys worked so he could buy alcohol and cigarettes. Their step-mother mother was a prostitute who was addicted to alcohol and drugs. The State took the children from their father and split them up, then institutionalized several of them, including Petitioner, because suitable foster placement could not be found. All the brothers are alcoholics.

Brad Benson, Petitioner's oldest brother, who claimed he had been sober for ten days prior to testifying, believed that Marjorie Buchanan was the "only woman who ever cared for me," so he returned to her home when he was older.

Mary Pat DeGroodt, a chemical dependency nurse and addiction counselor, testified about her treatment of Dale Snow and the hereditary nature of alcoholism. She testified that Petitioner is a member of a dysfunctional family and a chemically dependent of alcoholic. 5ER 985-1018.

Grace Ehlig O'Brien testified that she knew Petitioner as a student for four months in 1960. 5ER 1033-37. Petitioner had passing grades; felt that no one cared for him and no one believed him when he told the truth; blamed his parents for his problems; and left school because he was sent to juvenile hall. *Id.*

Dr. Gregory Hayner, a pharmacist who ran a detoxification program, spoke to Petitioner for two hours on the night before he testified. 5 ER 1026-32. He testified that Petitioner was suffering from a toxic psychosis due to chronic amphetamine intoxication at the time of the crimes. His further testimony that this is a mental disorder of the psychotic type, paranoia, was stricken for lack of foundation. Hayner admitted he had not reviewed Petitioner's statements, and that it would have been helpful if he had done so. Instead, he relied on statements by Petitioner, his attorneys and his investigator.

Gene G. Abel, M.D., a psychiatrist with a specialty in pedophilia, examined Petitioner and administered a series of tests, which were not described. 5ER 1041. He testified Petitioner has paraphilia, or sexual deviation, of a pedophile, an

individual attracted to children, as well as drug dependency. *Id.*, at 1043. At the time of the offenses, Petitioner was unable to conform his conduct to the requirements of law because of his pedophilic interests. *Id.*, 1054. Petitioner's use of drugs and his pedophilia had a synergistic effect and made it difficult for him to control his conduct. *Id.*,at 1056, 1061-62. Abel described the Camargo offenses as out of character because Petitioner did not have to kill to molest children: he explained "[t]hat's what makes him so dangerous. He doesn't need to kill somebody." *Id.*, 1063-64. Petitioner recognizes he had a problem, *Id.*, at 1048-50. Abel said that drug therapy to eliminate Petitioner's arousal was available, but he did not receive this treatment. *Id.*, at 1048-50. On cross-examination, Abel testified that Petitioner carries out antisocial behavior, a psychiatric disorder. *Id.*, at 1092.

C. Evidence in Post-Conviction Proceedings

Nearly the entirety of the presentation by trial counsel was the result of his failure to investigate Petitioner's childhood and neurological deficits.

1. Information Trial Counsel Possessed that Triggered a Duty to Investigate Mitigation Mr. Benson's Early Childhood

Although the Circuit majority concludes that trial counsel's strategy was to "humanize" Petitioner by showing he had a normal childhood, then "deprivation" under his father's care (PA 25), this is not supported. There is no statement by counsel to this effect, and no reasonable inference to be made that this was counsel's strategy to the exclusion of other potential strategies. Instead, trial counsel presented what he had – that Petitioner had suffered deprivation after he left the

farm and assumed that his life on the farm was pleasant based on incomplete information. When confronted with information this was inaccurate, trial counsel ignored it rather than investigate further *as was recommended by the mitigation investigator and consulting expert.*

Prior to the start of trial, mitigation investigator Dorothy Ballew noted that Petitioner's recollections of his childhood were "inaccurate and incomplete" and there were "large gaps." ER 665-66. Petitioner's brother Brad had informed her he was repeatedly sodomized by David Buchanan, and that Buchanan had been in prison. Ballew reported to counsel that Petitioner's incomplete memory of his early childhood could be because he was suppressing past trauma as well. 4ER 665-66, ¶11. She reported to counsel that she strongly suspected all the boys had been sexually abused and that investigating such efforts are "difficult and time-consuming" because sexual abuse victims fee shame and guilt. Trial counsel did not respond to her request to continue proceedings to conduct this investigation. ER 671, ¶26.

Terry Kellogg, a consulting family systems therapist, with extensive experience in sexually traumatized persons (3ER567-68), informed counsel that he was "quite certain that Mr. Benson had suffered significant physical and/or sexual abuse in his formative years and advised him that further investigation of Mr. Benson's childhood was necessary." 3ER 568-69,¶5. Kellogg also told trial counsel that a sex offender is likely to have been physically or sexually abused during his developmental years; that he strongly suspected that Benson had been abused as a

child; that it is common that survivors of abuse are unable to recollect such events and that the reports of Petitioner were consistent with this; and that further investigation was required. *Id.*, 569-70, ¶6. Kellogg advised trial counsel to look for symptoms of severe physical and sexual abuse, serious head injuries, eyewitness reports, and any other indicators of neurological, physiological or emotional damage, especially during the period before adolescence. *Id.*, 570-71,¶8. Kellogg observed indicators of abuse during an interview of Dale Snow (*id.*, 569-70, ¶6) and asked to interview Benson, but was not allowed to do so (4ER 672, ¶29).

Trial counsel did nothing with this information. Counsel later acknowledged that evidence Petitioner was severely abused on the Buchanan Farm "would have been consistent with the mitigation evidence he had presented." 4ER674, ¶7.

2. The Evidence a Reasonable Investigation Would Have Uncovered (PA 38-40; SER 1-69)

Petitioner and his siblings suffered horrific early childhood abuse at Marjorie Buchanan's farm, when he was a young child. Marjorie enjoyed beating the boys; she beat at least one of them every day, and sometimes all three. 3ER 522, ¶¶8-10. She punished Petitioner by holding his hand on a hot stove and by filling his mouth with cayenne pepper. 3ER 523, ¶¶ 12-13, 536-37, ¶¶11-12. She hit him in the head with a shovel when he was six years old. 3ER 523, ¶11; ER 536, ¶10.

Marjorie held the boys' heads under water. ER 525, ¶24. When Petitioner was about seven, she held his head under water in the bathtub until he turned blue and lost consciousness. 3ER 525, ¶25; ER 538,¶22. That same year, Petitioner got

caught under water in a creek; ten minutes later, when they got him out, he was limp, unconscious and blue. Marjorie revived him, then beat him with a willow switch. 3ER 525,¶ 26; ER 538-39,¶23.

Marjorie "often" gave the boys enemas of hot, soapy water. If they cried or yelled, they would get a second enema. 3ER 525-26, ¶¶ 27-28; ER 539, ¶25.

When Petitioner was seven or eight years old, Marjorie suspected that he left a gate open. She tied him to the gate spread eagle, by his wrists and ankles, and beat him on the testicles with a rubber hose and a ping pong paddle. 3ER 526, ¶30; ER 539-40, ¶27.

Marjorie was not the only abuser on the farm. Her husband, Jack, beat Benson with a rubber hose, a ping pong paddle and the brass buckle end of a large belt. 3ER 523, ¶16; ER 537, ¶14. When Benson went down during a beating, Jack would kick him in the head and ribs, leaving him bruised and bleeding. 3ER 523, ¶16. Jack once used the brass buckled belt to beat Benson on the back and legs so hard and so long that Bill Benson thought he would die. 3ER 523-24, ¶17. Jack's beatings left Benson's face swollen, bloody and bruised; at times he was beaten so badly he could not walk. 3ER 524, ¶¶19-20.

Although Benson received worse beatings than his brothers, he never cried: he would "just go inside of himself." 3ER 524, ¶18; ER 525, ¶24; ER 438, ¶20. He ate dirt, live bugs and beetles, and banged his head against the wall; Brad Benson said he "banged his head against the wall a lot." 3ER 538, ¶20.

Marjorie's son, David Buchanan, also abused Benson. He forced the boys to

help him castrate sheep by biting off their testicles; Benson initially refused, but complied when David hit him across the back with a two-by-four. 3ER 527-28, ¶39; ER 540-41, ¶32. David sexually molested the brothers. Bill Benson said that sexual abuse "happened so much that we all thought it was normal." 3ER 528, ¶41. David molested them in the bathtub, when they were swimming, and in a tree house; he orally copulated them and digitally penetrate their anuses. 3ER 528, ¶41; ER 541, ¶36. David sodomized Brad Benson from the age of eight to ten years, and would also put objects up his rectum, such as a flashlight and an electric cattle prod, called a "hot shot." 3ER 541, ¶¶34-35. David, a Boy Scout leader, taught the Benson boys about knots by tying them to a tree or a chair and then molesting them. 3ER 529, ¶45; 542, ¶38. David forced the boys to engage in unnatural acts with animals; they had to put their penises in the mouths of cats and pigs and have the animals suck them. 3ER 529, ¶46, ER 642, ¶40. David made the boys watch him torture animals with an electric cattle prod. He stuck the cattle prod down a cow's throat and turned it on; he taught them to milk a cow by shocking its utters with the prod; he would touch the prod to a bull's testicles; and jam the cattle prod into pigs' rectums. 3ER, 529-30, ¶¶48-52; ER 542-43, ¶¶43-45. David also used the cattle prod to threaten the Benson boys. 3ER 530, ¶53.

When Benson was about seven years old, Bill hit him in the head with a hatchet; he passed out and was bleeding heavily; Bill thought he had killed him. 3ER., 530, ¶57; ER 539, ¶24.

Benson's body evidences the physical abuse he suffered as a child. There is a

one-inch scar above the hairline that is consistent with Bill's hitting him in the head with a hatchet. 3ER 575, ¶12. There are many scars on his back and left flank, the backs of both thighs, and a horizontal scar across the back of his right thigh just below the buttocks. *Ibid.* There are scars on his right forearm near his wrist and a horizontal scar across the left wrist. *Ibid.* His left foot and ankle bear scars that appear to have been made by bonds. *Ibid.*

Petitioner then presented a wealth of expert testimony in post-conviction as to the life-long effects of such abuse, including from Dr. Abel, who testified at trial and was unaware of this information. *See e.g.* 3ER 572-90; ER 558-556; 4ER 593-636; SER 1-69.

Petitioner has all the indicia of brain damage. 3ER 575-77, ¶¶13-16. Neuropsychological testing confirms Petitioner's diagnosis of organic brain damage. 3ER 547-57. He exhibited attention deficits, a common manifestation of prenatal exposure to alcohol, and significant impairment in the ability to encode and recall verbal information. *Id*, ¶¶20-21. He performed poorly on tests of non-verbal reasoning and cognitive flexibility; such test results are often associated with frontal lobe injury. *Id.,* ¶25.

Psychiatrist David Vernon Foster, M.D., reports that Petitioner was likely genetically predisposed to mental illness. His father was a delusional, paranoid, alcoholic manic-depressive with organic affective illness. 4ER 595-96, ¶7, ER 598, ¶12. His mother was an alcoholic, drug-abusing prostitute. *Id.*, 595-96, ¶7; ER 598, ¶13. His grandfather, who was arrested for child molesting, lived in an isolated

shack in the hills. *Id.,* 595-96, ¶7. Petitioner was exposed to toxins during gestation as a result of his mother's heavy drinking; this is a known cause of brain and behavior disorders, including those that affect cognitive ability, attention, impulsivity, judgment, planning and organizational skills. *Ibid.*

After the infant Benson arrived at the Buchanan farm, he experienced torture, physical assault, sexual abuse and chronic trauma, multiple insults to the brain, including head injuries, prolonged instances of anoxia and exposure to toxins. 4ER, 600-01, ¶¶16-20. Descriptions of his reaction to this abuse - withdrawal, head banging, eating dirt and live bugs - indicate that he experienced dissociation and psychic numbing at an early age; this defense mechanism is often seen in victims of severe abuse. *Id.*, 601-02, ¶21. Benson's lack of memory of this abuse is common in adult survivors of trauma, and could be based on neurological damage, organic brain damage or the psychiatric disorders he suffers. *Id.*, ¶21.

D. The Ninth Circuit Decision

In a 2-1 decision, the Circuit Court upheld the District Court's denial of relief without a hearing. The majority held the state court's decision was reasonable because trial counsel's possible reasons for failing to investigate mitigation were reasonable. PA 26-27. It the posited a series of theories as to why it would possibly be reasonable to deny relief, and held it was required to do so by this Court's directive in *Richter*. However, those theories were not supported by, and were contrary to the record. A number of its theories run directly against established Sixth and Eighth Amendment jurisprudence, such as (1) the notion that childhood

abuse can negate jury consideration of future reform while incarcerated; (2) the notion that trial counsel, advised of the need to investigate abuse, can ignore this advice because no one told him that the accused was in fact abused; (3) and the notion that the nature of the crime and aggravation can be such that no prejudice flows from counsel's failure to investigate and present mitigation.

By contrast, the dissent rejected these assumptions and errors, and would have held that trial counsel's failure to investigate and present abuse and brain while the crimes were highly aggravating, the mitigation evidence not presented as overwhelming, rendering the state court determination that not even a single juror would have had a doubt as to penalty unreasonable. PA 40-41.

The majority first held it would be reasonable for a state court to conclude counsel was not on notice of the need to investigate, because no one told trial counsel that Petitioner himself had been molested, that Dr. Gordon testified Petition informed him that life on the farm was the nicest time he knew, and that Brad Benson viewed Marjorie Buchanan as the "only woman who had cared for him, without addressing the abuse by her husband and son. PA 26. It further inaccurately held that the only mistreatment counsel knew of was that Marjorie Buchanan had disciplined the boys with red pepper and a rubber hose. *Id*. This ignores Ballew's advice to trial counsel that Brad Benson had been sexually abused, and that Petitioner's incomplete, inaccurate childhood memories were consistent with abuse, which was supported by Kellogg. ER 665-66, 671; 3 ER 567-68.

The majority then held that without direct proof that Petitioner suffered

trauma, it was reasonable not to investigate potential trauma, even though both the mitigation investigator and consulting expert had informed him of such potential trauma. PA 26. The majority substituted its opinion for what a "reasonable excuse" would be for pedophilia and announced the deprivation of Petitioner's life with an alcoholic father was reasonably adopted by trial counsel as a penalty phase theme. PA 27. This ignores the fact that this was not a choice based on an informed decision, but on a failure to investigate. And there is no evidence that deprivation in the care of an alcoholic parent is in any way tied to pedophilia; in fact, consulting expert Kellogg informed trial counsel that pedophilia is a most likely a function of prior abuse. 3 ER 567-68.

The majority then discussed possible reasons trial counsel could have chosen not to investigate childhood trauma mitigation, positing possible choices that counsel made not to do so. PA 27-28. Throughout, this analysis, the majority ignored that trial counsel stated that childhood abuse was *not inconsistent with his strategy at trial.* ER 674, ¶7. The majority's citation of potential reasons why trial counsel did not present abuse is speculative and unsupported by the record.

The majority held that the presentation of the defense of an idyllic childhood was a "reasonable strategy" because it was "*perhaps*" more likely to pull on the jury's "heart strings" as a presentation that he was abused as a child. PA 27. According to the majority, this was because it allowed for the "possibility he could change" and "that he could reform." *Id.* This was also contrary to the record; Dr. Abel testified that without hormone suppression treatment, there was no likelihood

Petitioner would change. 5ER 1043-54. It was also irrelevant to the question before the jury because conduct while incarcerated was not an issue – the question was whether Petitioner would spend his remaining years incarcerated or put to death. There was no evidence of misconduct while incarcerated. "Reform" or "possibility of change" was not an issue.

Trial counsel never argued potential "reform" or "possibility of change." All counsel asked was for the jury to think about Petitioner's early life, the "darling little boy in photograph", and where he is today. 5ER 1122-23. Counsel stated he could not answer the question of "why," but urged the jury to consider Petitioner's "disrupted family," his placement in multiple foster homes and the lack of any moral or religious training or upbringing. *Id.* Thus, there was no "choice" made by counsel. And early childhood abuse would have answered counsel's question powerfully.

The majority asserted that early abuse was "slightly inconsistent" with expert testimony that Petitioner did not need to kill to conform his behavior. PA 27. That was not the expert testimony; it was that Petitioner had a compulsion to molest and did not need to kill in order to molest. 5ER 1063-64. Moreover, molesting young children is not an issue when serving life in prison without parole.

In discussing prejudice, the majority stated that post-conviction evidence was "cumulative", so it was reasonable for a state court to conclude that there was no prejudice from counsel's failure to investigate childhood mitigation. PA 30-31. The

dissent characterized this as "severe error." PA 41.

The majority also held the state court could have concluded trial counsel was not on notice of Petitioner's brain injury, and therefore, not required to investigate it, because psychiatrist Abel interviewed Petitioner, conducted unknown tests, and did not advise counsel of any brain injury. PA 29. However, Dr. Abel, in post-conviction, stated that he was not provided with the records and evidence supporting brain injuries, including school records; that if he had been, he would have requested such testing; and, that the testing conducted in post-conviction reveals brain impairments. 3ER 559-62. More significantly, the majority did acknowledge that counsel's consulting expert advised investigation of possible head injuries. PA 29. He also advised counsel to look for evidence of neurological damage during childhood, which the majority does not mention. 3ER 570.

REASONS FOR GRANTING THE WRIT

This case is deserving of this Court's consideration because this Court needs to address the confines of its doctrine announced *Harrington v. Richter,* 562 U.S. 86, 109 (2011) ("*Richter*"), that a federal habeas court can posit potential reasons to deny relief when faced with a state court decision that denies relief in a single sentence and without any proceedings in state court. The Court should address what it cautioned against in *Richter*, 562 U.S at 109, i.e., engaging in "'post hoc rationalization' for counsel's decision making"). Whatever the outer confines of this doctrine, it should begin with determining what the state court processes are for rendering such decisions and abide by those processes when examining whether the

state court's determination was reasonable under AEDPA. The Ninth Circuit did not undertake the correct analysis when examining the state court habeas denial, but instead substituted its own analysis in the place of what the state court procedure required it do. This is a plain incorrect application of the law, which requires a remand so the circuit court can apply and abide by state law when fashioning potential bases to deny relief under *Richter*.

This case is the first instance in which the Ninth Circuit has expanded upon *Richter*, by holding that trial counsel could possibly have reasonably failed to investigate the horrific child sexual and physical abuse a capital petitioner suffered, despite advice from trial counsel's consultants that there was reason to conduct such an inquiry. In doing so, the court goes further and jettisons decades of capital jurisprudence as to the obligation to investigate evidence in mitigation by holding that presentation of evidence of horrific child sexual and physical abuse reduces a capitally-charged defendant's ability to argue rehabilitation, a false-choice without any support in case law, scholarship or the facts of this case, and contrary to trial counsel's post-conviction statement that such evidence was not inconsistent with his penalty strategy. 4 ER 674, ¶7.

The Ninth Circuit's decision has expanded *Richter* into the realm of speculation and conjecture, untethered to the record or long-standing doctrines regarding trial counsel's obligations in capital cases. It conflicts with the Court's holdings as to the analysis required under *Strickland v. Washington,* 466 U.S. 668 (1984). *See, e.g., Williams v. Taylor,* 529 U.S. 362 (2000); *Wiggins v. Smith,* 539

U.S. 510 (2000); *Rompilla v. Beard,* 545 U.S. 374 (2005), and *Porter v. McCollum*, 558 U.S. 30 (2009). It is a significant case to capital habeas petitioners because the Ninth Circuit has equated "deference" to state court decisions under the Antiterrorism and Effective Death Penalty Act with "abandonment or abdication of judicial review," contrary to *Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003).

The decision of the Ninth Circuit conflicts with Supreme Court authority that a strong case in aggravation does not preclude a finding that the state court denial of habeas relief was unreasonable. *Williams v. Taylor,* 529 U.S. at 369. It also conflicts with precedent regarding the weight to be afforded substantial explanatory mitigation and mitigating evidence of sexual and physical abuse and mental disorder. *Wiggins,* 539 U.S. at 535 (failure to present evidence of defendant's severe childhood abuse and privation, physical and sexual abuse in foster care, periods of homelessness and "diminished mental capacities" rendered the death verdict unreliable).

I. The Majority Opinion Incorrectly Applies AEDPA Review of California's *Prima Facie* Holding in Silent Denials of Habeas Corpus Petitions

The Ninth Circuit majority applied an incorrect legal framework in determining whether the silent state habeas denial was reasonable. In California, the state court is required to issue an order to show cause when a petitioner makes out a prima facie claim for habeas relief. *See Cullen v. Pinholster,* 563 U.S. 170, 188 n.12 (2011) ("*Pinholster*"). A prima facie case is where the claim is "sufficient on its face," such that, assuming the factual allegations in the petition to be true,

the claim "states facts that . . . entitle the petitioner to relief." *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). Thus, when the state court denies relief without issuing an order to show cause, review of the state court's determination is whether any fair-minded jurist would disagree that Petitioner *presented a prima facie showing* of a reasonable probability that at least one juror would have voted against the death penalty sufficient to issue an order to show cause. It must accept the allegations as pled to be true.

The majority loses sight of this legal framework. For instance, it fails to credit trial counsel's statement that evidence of early sexual abuse was not inconsistent with the presentation he made in penalty (4 ER 674, ¶7), a fact the state court was bound to accept as true. The majority instead posited that (1) trial counsel opted for an approach that would be rehabilitive and (2) that a rehabilative approach was inconsistent with evidence of abuse as a basis for counsel's having reasonably rejected abuse investigation. However, that is not a construct the state court could employ and, therefore, not one the federal court was permitted to make.

The majority also failed to recognize that the state court was bound to fully credit evidence that trial counsel's investigator and his consulting expert advised that abuse and neurological injury should be investigated. Instead, the majority quibbled about the expert's qualifications (PA 29 n. 23), while failing to credit the extensive post-conviction expert presentations explaining that sexual abuse victims may not be able to recall abuse (4ER 623-24) and evidence that counsel so advised by his consultants (3 ER 567-68; 4ER 665-66, 671). However, these facts were not

something the state court could ignore in finding that counsel was unaware of the need to investigate Petitioner's abuse. Because the state court under state law was bound to the facts and allegations, the federal court was as well when examining the reasonableness of the state court's determination.

The entire analysis employed by the majority flows from this initial improper legal framework. The remedy is for this Court to remand so the circuit court may properly examine the applicable state law and undertake its analysis of state court reasonableness using those principles, instead of its own.

II. The Ninth Circuit Majority Opinion Improperly Speculates that Counsel Reasonably Chose to Forgo Investigation of Abuse, Contrary to the Record and Established Sixth Amendment Jurisprudence

A decision to not investigate must itself be reasonable. *Strickland v. Washington,* 466 U.S. 668, 690-91 (1984) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances.") At the time of Petitioner's trial, the standard of care was for counsel to investigate allegations of physical and sexual abuse of which he was, *or should have been*, on notice. *Bean v. Calderon,* 163 F. 3d 1073, 1080 (9th Cir. 1998); *Doe v. Ayers,* 583 F. 3d 1100, 1122 (9th Cir. 2009).

Because the state court denial was unexplained, the federal court can explore potential reasons for counsel's decision not to investigate under *Richter* and *Pinholster*. *See Richter,* 562 U.S. at 101-02 ("what arguments or theories . . . could

have supported the state court's decision"). This "fill-in-the-gaps" approach was easy in *Richter* and *Pinholster* because in both cases counsels' decisions could have been reasonably based on the desire to preclude potentially harmful rebuttal evidence that could have been presented. This has been a consistent position by the Court. *See e.g. Wong v. Belmontes*, 558 U.S. 15, 24 (2009). However, this is not an issue in Petitioner's case; there is no contention that harmful rebuttal evidence factored into counsel's decision making.

Applying *Richter* to fill the gaps of the state court's silent denial, the majority found that "[r]easonable minds could conclude that Petitioner's trial counsel's decision not to investigate Petitioner's life on the farm further was reasonable." The majority extends *Richter* and *Pinholster* by ascribing decisions and motives to counsel that are contrary to counsel's own statements and the record is in error. This Court cautioned against such an approach. *Richter*, 562 U.S at 109 (court should not engage in "'post hoc rationalization' for counsel's decision making").

A. The Reasonableness of Counsel's Failure to Investigate Childhood Abuse in a Capital Case is not Determined by what was Presented, and in Petitioner's Case, such a Conclusion is Contrary to the Record and Established Sixth Amendment Jurisprudence

Trial counsel conducted *no* investigation into Petitioner's abuse on the farm, despite being advised of the need to do so. The majority's analysis is based on a faulty construct of an imaginary "decision" not to present evidence that counsel never investigated that is then used to justify the failure to investigate itself. That is not the proper legal framework for a failure to investigate allegation – the

presentation was not the issue; the lack of investigation was. *Wiggins v. Smith,* 539 U.S. at 523 (focus is not what counsel decided to present; it was on whether the decision was based on reasonable investigation); *Id.,* 539 U.S. at 528 (strategic choices made after less than complete investigation are reasonable to the extent that reasonable professional judgment supports the limitation on investigation). Here, as in *Wiggins,* counsel's penalty phase presentation was the product of "inattention, not reasoned strategic judgment." *Id.,* at 526.

Second, the majority inappropriately cites Petitioner's inability to recall the abuse on the farm as supporting its conclusion that the state court could reasonably determine that counsel reasonably chose not to investigate. Putting aside that the record does not support this theory and that trial counsel knew Petitioner's inability to recall was a potential symptom of abuse, discussed above, this Court has recognized that a capital defendant's failure to affirmatively volunteer information about his past does not relieve counsel of the independent duty to investigate it. *See Porter v. McCollum,* 558 U.S. 30, 40 (2009) (per curiam) (a "fatalistic or uncooperative" client "does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation") (emphasis added); *Rompilla v. Beard,* 545 U.S. 374, 381 (2005) (granting penalty phase relief where the client was described as "uninterested in helping" and "even actively obstructing" mitigation investigation). The majority's determination is also contrary to the scientific understanding of trauma, as explained extensively in the post-conviction expert declarations. Victims of such abuse repress such memories. This is not a new theory – it is exactly what

counsel's consultants were advising him at the time of trial.

The majority's statement that counsel only knew about discipline with a rubber hose and red pepper is factually incorrect. Further, the majority incorrectly finds that there was no evidence trial counsel was told of the abuse at the farm. Counsel knew that Brad reported that he was routinely sodomized by David Buchanan from the age of nine to twelve. Mitigation specialist Dorothy Ballew reported that Benson's incomplete memory of his early childhood could because he was suppressing past trauma. Terry Kellogg, a consulting family systems therapist with extensive experience in sexually traumatized persons, informed counsel that he was "quite certain that Mr. Benson had suffered significant physical and/or sexual abuse in his formative years and advised him that further investigation of Mr. Benson's childhood was necessary if the jury was to be provided with an accurate picture of Mr. Benson's mental state at the time of the crimes." Kellogg also advised trial counsel to look for symptoms of severe physical and sexual abuse, serious head injuries, eyewitness reports and any other indicators of neurological, physiological or emotional damage, especially during the period before adolescence. Kellogg observed indicators of abuse during an interview of Dale Snow and asked to interview Petitioner but was not allowed to do so.

As the dissent noted, discipline with red pepper and a rubber hose are unusual and extraordinarily harsh methods of correcting a child's behavior that was a clear "red flag." Moreover, the question is not, as the majority assumes, whether these disciplinary methods constituted "torture," but whether it, combined with

what the consultants were saying - Brad's sexual assaults, Petitioner likely a victim as well - warranted additional investigation. According to the majority, unless counsel is actually aware of sexual abuse, he has no constitutional obligation to investigate it, even if the likelihood of such abuse is brought to his attention by his mitigation investigator and an expert who has an extensive background in the subject. That is not the law.[8] And the majority offers no good reason why trial counsel, aware that sex abuse occurred and that David Buchanan was incarcerated, did not seek records that showed David was a convicted pedophile.

The majority confuses the decision not to investigate with the decision to present evidence, and, working backwards, holds that the latter justifies the former. The fact that a penalty phase defense was presented does not end the inquiry. This Court has "never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears v. Upton,* 561 U.S. at 955 (emphasis in original).

[8] Given the well-known cycle of abuse for young victims/older perpetrators, and the repressed memory associated with such abuse, it would be a very rare capital counsel representing a pedophile who could justify not investigating sexual abuse. In this case, trial counsel was advised of this phenomena. Thus, trial counsel was aware that Petitioner's silence was a symptom of trauma, not a reason to ignore it.

B. The Majority's Holding that Evidence of Abuse Negates the Notion of Reform while Incarcerated is Contrary to Eighth Amendment Principles and Untethered to the Facts of this Case, Which Did Not Involve Prison Misconduct or Future Danger in Prison Allegations

Perhaps most problematic, the majority substitutes counsel's failure to investigate traumatic history with speculation that counsel's limited presentation of Petitioner's life after he left the Buchanan farm was reasonable because it "*seems* just as *likely, perhaps more likely*" to provide the jury with a more effective mitigation presentation. It then posits that counsel's presentation was a reasonable explanation for the crimes and "allowed for the possibility that [Petitioner] could change, that he could reform," whereas the truth - that his acts "emanated from sexual and physical abuse throughout the entirety of his childhood" - "*might* . . . make it less likely that Benson could change." "Might," "seem" and "perhaps" are conjecture: there is *zero* evidence that counsel made any such calculations, or that such calculations were acceptable at the time. Counsel's own statement is to the contrary. 4 ER 674, ¶7.

In fact, such calculations were not acceptable. *Williams v. Taylor,* 529 U.S. 362, 396 (2000) (potential downside irrelevant to failure to investigate in the first instance); *Richter,* 562 U.S. at 109 (court should not engage in "'*post hoc* rationalization' for counsel's decision making"). The majority's analysis upends decades of capital jurisprudence that finds sexual and physical trauma uniquely mitigating such that it warrants investigation. *See, e.g., Eddings v. Oklahoma,* 455 U.S. 104, 115 (1982) ("youth is more than a chronological fact. It is a time and

condition of life" that indelibly shapes a person); *Porter v. McCollum,* 558 U.S. 30, 41 (2009) (trial counsel failed to present Porter's "troubled history," including his childhood history of physical abuse and brain abnormality). It also misapprehends the nature of the penalty phase decision, where the choice is between execution and life in prison without possibility of parole. Both options meant that Petitioner would never again have access to children, and would never again molest a child. The prospect of "change" was not part of the calculus of this sentencing proceeding - "change" was irrelevant. There was no argument by defense counsel that they jury should spare Petitioner's life because he "could change." This notion was also contrary to the testimony of the defense expert, Dr. Abel, who opined that Petitioner was an anti-social pedophile (i.e., unable to change), who re-offends whenever drugs and children are present. And, the majority's characterizations of testimony regarding life on the farm as idyllic stretches both the testimony at trial and any reasonable inference from it. No counsel could credibly argue or jury conclude that because Petitioner had a normal life until he was nine, he was capable of redemption or change when the entirety of the case in aggravation and mitigation was exactly the opposite. Fundamentally, there is nothing inconsistent with counsel's strategy, chosen due to lack of investigation, that Petitioner's life deteriorated when he went to live with his father, and the presentation of evidence that life was miserable at the ranch. Both could easily be true and trial counsel has acknowledged this.

Under the majority's theory, every trial counsel would be justified in not

pursuing abuse evidence because of some imaginary notion that trial counsel might reasonably conclude such abuse negates themes of reform, or other affirmative gains while incarcerated. It is a dangerous theory and one that have not been accepted by this Court. Trial counsel himself rejected this false choice. And, approving a strategy that abuse negates reform made at the investigative stage, before the nature and degree of abuse is known, is improper under Sixth and Eighth Amendment principles.

Admittedly, there may be some circumstances where such an analysis is appropriate after the nature of the abuse is known. This Court has noted that in some cases mental impairments may show a lack of redemption, which is a much different construct. *See Pinholster*, 563 at 201 (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), where it was noted that mental retardation (intellectual disability) may give the false impression that such defendants are more susceptible to future dangerousness). But, when, as here, future dangerousness is not an issue and intellectual disability is not alleged, the *Atkins* concern is not present. In fact, the evidence was that Petitioner did well in prison throughout his life, which included multiple incarcerations, because he was no longer a danger to young children.

C. Failure to Investigate Organic Brain Damage

The majority concluded the state court could reasonably conclude trial counsel was not required to investigate brain damage because Kellogg's advice to

look for a history of head injuries[9] was not sufficient notice of brain injury and because the defense psychiatrist, Dr. Abel, "did not diagnose Benson with having experienced severe head trauma." PA 29. However, aside from the fact that childhood head injuries are a clear "red flag", Kellogg advised counsel to look for evidence of neurological injury as well, and Dr. Abel subsequently found that such evidence was present in Petitioner's school records and other materials provided in post-conviction. 3 ER 559-62. The majority's analysis wrongly assumes that counsel's investigation of Petitioner's background was reasonable in the first place, something no reasonable state court could entertain.

Instead, Dr. Abel's post-conviction declaration demonstrates prejudice from the failure to investigate Petitioner's background. Because trial counsel did not investigate Petitioner's early childhood, Dr. Abel did not know about Benson's head trauma, anoxia and exposure to toxins Petitioner at the Buchanan ranch. Without this information, he had no reason to recommend neurologic and neuropsychological tests for organic brain damage. Dr. Abel opines that the evidence and records show that Petitioner suffers from organic brain damage. But for counsels' failure to investigate the formative years of Petitioner's life and report the results of that investigation to Dr. Abel, the jury would have heard powerful mitigating evidence of the brain damage with which he was born and its exacerbation by severe trauma at the Buchanan's.

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[9] The majority questions Kellogg's qualifications, but the state court was bound to accept he was qualified to render the opinions he did.

The majority does not address the findings of Dr. Riley (3ER 547-57) or Dr. David Vernon Foster (4ER 593-636). It focuses on Dr. Pincus' declaration which states in full that Benson's neurological damage in combination with the extreme abuse to which he was daily subjected daily at the Buchanan's caused his bizarre sexual impulses; that because of his damaged brain his ability to control these impulses is severely compromised; that his marginal behavioral controls would be even further impaired by his ingesting alcohol or amphetamines; and that his ability to control his impulses and think rationally and logically under stress, to weigh and consider his actions and their consequences must be viewed in light of his prenatal exposure to alcohol, his chronic abuse, his numerous head injuries, and his family history of mental illness. 3ER 572-90. The majority distills this information into a simplistic statement that Dr. Pincus opined that Benson had "problems with 'impulse control" and concludes that such problems did not advance the case in mitigation. PA 31. But Dr. Pincus does not say that Benson is incapable of planning; rather, he states that Benson's neurological damage and the extreme abuse on the farm were the cause of his sexual impulses and that his ability to control those impulses is severely compromised.

D. This Court has Never Accepted the Notion that Partial Investigation of Mitigation is Sufficient to Justify A Full Investigation

To the extent that the majority asserts the state court believed that counsel's investigation was sufficient to stop further efforts, it is clearly unreasonable in light of what was easily ascertainable with a modicum of investigation. In *Wiggins v.*

Smith, 539 U.S. at 524, "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." The same is true here - counsel knew only Petitioner's history after leaving the farm and willfully failed to heed recommendations that investigation into his early years at the ranch would likely reveal sexual and physical abuse. *Porter v. McCollum*, 558 U.S. at 39-40, closely mirrors this case; there, counsel presented mitigation themes of intoxication and good family relationships but was nevertheless prejudicially ineffective because he failed to present evidence of defendant's abusive childhood, heroic military service, and "brain damage that could manifest in impulsive, violent behavior." Here, counsel had clear indications that investigation into Petitioner's years at the farm was necessary but failed to investigate that time of his life. *See Sears v. Upton*, 561 U.S. 945, 948-50 (2009) (counsel presented some mitigation evidence, but was prejudicially ineffective in failing to present evidence of an abusive childhood and evidence that the defendant had "significant frontal lobe brain damage" and a "'profound personality disorder'"); *Terry Williams v. Taylor,* 529 U.S. 362, 395-96 (2000) (counsel prejudicially ineffective in failing to investigate defendant's harsh childhood or obtain records showing his abuse and neglect).

III. The Panel's Prejudice Analysis Conflicts with This Court's Jurisprudence and is Contrary to the Facts Presented to the State Court

The prejudice inquiry requires evaluating "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the

habeas proceeding—in reweighing it against the evidence in aggravation." *Terry Williams*, 529 U.S., at 397–398. The question is whether, taking into account all the mitigating and aggravating evidence, "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S., at 537.

The majority concludes that "counsel's performance, even if deficient, did not prejudice Petitioner," because "much of the proffered evidence offered in the post-conviction petition was cumulative" and "trial counsel presented the jury with evidence that Benson's aberrant behavior had been brought on by his horrendous childhood." PA 30. Both statements are profoundly incorrect, and could not be the bases for a reasonable state court determination. PA 41 (dissent: "severe error").

None of the post-conviction evidence was presented in post-conviction was offered at trial – there was *no evidence of sexual or physical abuse and no evidence of brain impairment.* The testimony about Petitioner on the farm was minimal – mere passing references to his having been there. The post-farm evidence was limited to a two-year period, which is described as a difficult time with an alcoholic father who moved around a lot.[10] Moreover, trial counsel did not present evidence or argue that Petitioner's crimes were brought on by his suffering in childhood, or for any reason other than he was a pedophile on methamphetamine. The single reference to childhood was when counsel stated Petitioner "was a normal, nice little

[10] The majority asserts that trial evidence was that Petitioner's life before age 9 was "horrible," (PA 30), but that is untrue as he was on the farm, which the majority says was portrayed as "idyllic." There was no testimony as to after 11.

boy," and "wonder[ed] how did he get there to where we are today?" Trial counsel *never answered this question.* There was no evidence explaining why Petitioner came to sit in the Santa Barbara courtroom and no evidence explaining why he became a pedophile, a "very dangerous person" in the words of Dr. Abel.[11] By contrast, the new evidence would have "destroyed the [relatively] benign conception of [Petitioner's] upbringing." *Rompilla*, 545 U.S., at 391. There is no question that the evidence of abuse and impairment presented in mitigation is simply beyond anything presented at trial – rape and torture are qualitatively different from idyllic youth and living with an alcoholic father for 2 years, and to try and say otherwise is simply and profoundly unreasonable.

The majority's prejudice analysis also misapplies this Court's precedent. It first posits that mitigation "*might* have made [Benson] *seem* less likely to be rehabilitated and "*tends* to suggest that [Petitioner] may not be able to control" his pedophilia. PA 31. (emphases added). There is no citation to any authority for this conjecture, nor reference to the record. None exists, because "rehabilitation" or controlling pedophilia was not a defense theme in this case; on the contrary, Dr. Gordon's and Dr. Abel's testimony was that he could not be rehabilitated or controlled, except maybe with anti-hormone therapy. Moreover, the jury was not concerned with rehabilitation or controlling pedophilia because there was no chance

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[11] The majority offers that Benson's pedophilia *might* have been genetic or related to trauma in utero. This may be accurate - although less so than it was the result of his own victimization on the farm - but it was not presented at trial.

of future release or future danger to young children if Petitioner was sentenced to life imprisonment without the possibility of parole, which was the only alternative to death under California law.

Further, as discussed above, the type of impairments alleged in post-conviction here, and the lack of any allegation of future dangerousness in prison, negates any potential application of the notion that traditional mitigation is counter to rehabilitation while serving a life without parole sentence. *Cf Pinholster,* 563 at 201 (mitigation there *may not be entirely mitigating* as it *might* preclude redemption) (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (mental retardation/ intellectual disability may give the false impression that such defendants are more susceptible to future dangerousness, when such an allegation is made by the state as a reason not to permit death judgments)).[12] There is no citation to state court authority for this principle. Once again, the majority has not grounded its determination of reasonableness of the state decision on state law. And, application of this principle to Petitioner's post-conviction mitigation evidence would be unreasonable, because there is no issue of future danger.[13]

Finally, this Court has discounted this notion even in cases where a downside to presenting mitigating evidence is established by the record. *See, e.g., Williams,*

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[12] The majority does not rest on the principle of redemption, only rehabilitation.

[13] The majority's notion that mitigation of a difficult childhood could defeat rehabilitation would apply to all such mitigation, including that presented by trial counsel in this case. It cannot have it both ways – holding that the evidence is cumulative and holding that such evidence is counter-productive.

529 U.S. at 396. And, as a legal principle, the notion that childhood abuse mitigation conflicts with rehabilitation is contrary to the "long held" precept that disadvantaged background evidence that is tied to the crime is mitigating. *Eddings v. Oklahoma,* 455 U.S. 104, 112 (1982) ("consideration of the defendant's life history" is a "constitutionally indispensable part of the process of inflicting the penalty of death."). A jury's consideration of abuse and disadvantage suffered during early childhood is especially critical, given our society's "long held" belief that "defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse." *Boyde v. California*, 494 U.S. 370, 382 (1990) (emphasis omitted) (internal quotation marks omitted). Though mitigating life history evidence does not excuse heinous crimes, it places a defendant's crimes in context, allowing jurors to impose a sentence reflecting a "reasoned moral response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (internal quotation marks omitted), abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002). The District Court and Circuit Court determination that mitigation makes one less worthy of sympathy is antithetical to that long-standing capital jurisprudence and unsupportable. Finally, the majority also relies on the discredited, and untrue in this case, principle that the mitigation did not explain or justify the crimes. This Court has "never countenanced and . . . ha[s] unequivocally rejected" such a nexus test. *Smith v. Texas*, 543 U.S. 37, 45 (2004).

The majority fails to recognize the significance of the explanatory nature of

the mitigating evidence the jury did not hear. *See Porter v. McCollum*, 558 U.S. at 43 ("It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with Williams."); *Wiggins v. Smith*, 539 U.S. at 534-35 (evidence that counsel failed to present of "repeated rape during [defendant's] . . . years in foster care" was "powerful" mitigating evidence); *Andrews v. Davis,* 944 F.3d at 1117 ("Evidence of abuse inflicted as a child is especially mitigating, and its omission is thus particularly prejudicial."); *Boyde v. Brown,* 404 F. 3d 1159, 1176 (9th Cir. 2005) ("the family history of sexual abuse [petitioner] had known growing up [] is the sort of evidence that could persuade a jury to be lenient"). Benson's severe sexual abuse at the Buchanan ranch "could have engendered sympathy" from the jury. *Boyde,* 404 F. 3d at 1180.

More important, here, Petitioner's mitigation is directly related to the crime. His neurological impairments - from his mother's use of alcohol while pregnant, head injuries, anoxia and exposure to toxins - in combination with the extreme physical and sexual abuse he suffered as a child caused his impulses to molest children and because he was so damaged his ability to control those impulses is severely compromised. There is a causal nexus between the mitigation trial counsel failed to present and the crimes. The evidence presented by post-conviction counsel would have offered the jurors an understanding of Benson's crimes as the product of his repeated brutalization as a child.

Petitioner's sexual abuse undeniably cast his crimes in a different light. He

endured abuse on the Buchanan farm committed with impunity. Without information about the severely damaging effect of his physical and sexual abuse at the ranch, and the relationship of that abuse to the crimes, the jurors could not impose a sentence "on a case-by-case basis according to an individualized assessment of the defendant's characteristics and the circumstances of the crime." *Zant v. Stephens,* 462 U.S. 862, 879 (1983).

CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the decision of the Ninth Circuit Court of Appeals.

Dated: April 16, 2021

Respectfully submitted,

/s/ Marcia A. Morrissey
MARCIA A. MORRISSEY

/s/ John R Grele
JOHN R GRELE

Attorneys for Petitioner-Appellant
RICHARD ALLEN BENSON