

No. _____

IN THE
Supreme Court of the United States

JOHN ATLAS, JR.,

Petitioner,

v.

PATRICK COVELLO, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CUAUHTEMOC ORTEGA
Federal Public Defender
DEVON L. HEIN*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2936
Facsimile: (213) 894-0081
Devon_Hein@fd.org

Attorneys for Petitioner
JOHN ATLAS, JR.
**Counsel of Record*

QUESTION PRESENTED

Whether Petitioner John Atlas, Jr. stated a *prima facie* case of ineffective assistance of trial counsel where (1) Atlas was charged with making criminal threats mere days after being prescribed a new regimen of psychotropic medication for a longstanding schizophrenia diagnosis of which trial counsel was aware, but trial counsel conducted no mental state investigation and failed to present the testimony of a mental health expert regarding Atlas's mental state at the time of the alleged offense, (2) Atlas was convicted of and received a life sentence for making said alleged criminal threats, and (3) Atlas was subsequently able to produce an expert report and declaration, based on medical records and accounts from Atlas's family that were available at the time of trial, opining that Atlas was suffering from mental illness at the time of, and with symptoms consistent with, the charged offense, calling into question whether he possessed the requisite intent for making a criminal threat with the intent to benefit a criminal street gang?

LIST OF PARTIES

All parties to this proceeding are listed in the caption.

RELATED PROCEEDINGS

1. *John Atlas, Jr. v. Eric Arnold*, case no. 20-55452 (9th Cir. Oct. 27, 2021)
2. John Atlas, Jr. v. Eric Arnold, case no. 5:15-cv-01504-RSWL-RAO (C.D. Cal. Mar. 27, 2020)
3. *In re John Atlas Jr., on Habeas Corpus*, case no. S246827 (Cal. Jan 2, 2019)
4. *In re John Atlas Jr., on Habeas Corpus*, case no. WHCJS1600118 (Super. Ct. San Bernardino Cnty. Dec. 14. 2016)
5. *People v. John Atlas, Jr.*, case no. S224728 (Cal. Apr. 15, 2015)
6. *People v. John Atlas, Jr.*, case no. E060974 (Cal. Ct. App. Jan. 28, 2015)

TABLE OF CONTENTS

| | Page(s) |
|--|---------|
| OPINIONS BELOW | 1 |
| JURISDICTION..... | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... | 2 |
| STATEMENT OF THE CASE..... | 3 |
| A. Facts Material to the Consideration of the Question Presented..... | 4 |
| 1. Atlas's Arrest | 4 |
| 2. Pretrial Competency Evaluation | 5 |
| 3. Trial..... | 6 |
| 4. Direct Appeal | 7 |
| 5. Initial Federal Habeas Proceedings..... | 7 |
| 6. Counseled State Habeas Exhaustion Proceedings..... | 8 |
| 7. Federal Habeas Proceedings Following Exhaustion | 11 |
| REASONS FOR GRANTING THE WRIT | 13 |
| A. No reasonable jurist could have held that Atlas did not state a prima facie case of ineffective assistance of counsel for failure to investigate and present a mental state defense..... | 13 |
| 1. Applicable law..... | 14 |
| 2. Atlas's trial counsel performed deficiently. | 15 |
| 3. Trial counsel's deficient performance prejudiced Atlas. | 16 |
| CONCLUSION..... | 20 |
| INDEX TO APPENDICES | 21 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|------------|
| Federal Cases | |
| <i>Bemore v. Chappell</i> , 788 F.3d 1151 (9th Cir. 2015) | 20 |
| <i>Bloom v. Calderon</i> , 132 F.3d 1267 (9th Cir. 1997) | 20 |
| <i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011) | 14 |
| <i>Cunningham v. Wong</i> , 704 F.3d 1143 (9th Cir. 2013) | 18, 19 |
| <i>Douglas v. Woodford</i> , 316 F.3d 1079 (9th Cir. 2003) | 15 |
| <i>Lafferty v. Cook</i> , 949 F.2d 1546 (10th Cir. 1991) | 18 |
| <i>Lokos v. Capps</i> , 625 F.2d 1258 (5th Cir. 1980) | 18 |
| <i>Porter v. McCollum</i> , 558 U.S. 30 (2009) | 20 |
| <i>Rompilla v. Beard</i> , 545 U.S. 374 (2005) | 15, 19 |
| <i>Strickland v. Washington</i> , 466 U.S. 668 (1984) | 15 |
| <i>Weeden v. Johnson</i> , 854 F.3d 1063 (9th Cir. 2017) | 15, 17, 20 |
| <i>Wiggins v. Smith</i> , 539 U.S. 510 (2003) | 15 |
| <i>Williams v. Taylor</i> , 529 U.S. 362 (2000) | 15 |
| <i>Yun Hseng Liao v. Junious</i> , 817 F.3d 678 (9th Cir. 2016) | 18, 19 |

TABLE OF AUTHORITIES

Page(s)

State Cases

| | |
|--|----|
| <i>In re Waltreus,</i> 62 Cal. 2d 218 (1965)..... | 11 |
|--|----|

| | |
|---|--------|
| <i>People v. Larsen,</i> 205 Cal. App. 4th 810 (2012)..... | 16, 18 |
|---|--------|

Federal Statutes

| | |
|---------------------------|------|
| 18 U.S.C. § 3006A(b)..... | 1, 2 |
|---------------------------|------|

| | |
|---------------------------|---|
| 28 U.S.C. § 1254(1) | 2 |
|---------------------------|---|

| | |
|-----------------------|---|
| 28 U.S.C. § 1291..... | 2 |
|-----------------------|---|

| | |
|-----------------------|-------|
| 28 U.S.C. § 2241..... | 2, 11 |
|-----------------------|-------|

| | |
|-----------------------|---|
| 28 U.S.C. § 2253..... | 2 |
|-----------------------|---|

| | |
|-----------------------|-------|
| 28 U.S.C. § 2254..... | 2, 14 |
|-----------------------|-------|

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

OPINIONS BELOW

John Atlas, Jr. (“Atlas” or “Petitioner”) petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit’s memorandum affirming the district court’s final judgment denying habeas relief is unreported. (Petitioner’s Appendix (“Pet. App.”) A-1-21.) The district court’s final judgment (Pet. App. B-22), its order accepting the magistrate judge’s report recommending the denial of relief and the dismissal of Atlas’s habeas action with prejudice (Pet. App. C-23-26), and said report and recommendation are unreported. (Pet. App. D-27-46). The Ninth Circuit’s order denying Atlas’s petition for rehearing is unreported. (Pet. App. E-47.) The California Supreme Court’s order denying Petitioner’s state habeas petition is unreported. (Pet. App. F-48.) The San Bernardino County Superior Court’s order denying Petitioner’s state habeas petition is unreported. (Pet. App. G-49-53.) The California Court of Appeal’s opinion affirming the state court judgment on direct appeal is unreported. (Pet. App. H-54-65.)

JURISDICTION

The Ninth Circuit’s memorandum affirming the district court’s denial of habeas relief was filed on August 5, 2021. (Pet. App. A-1.) The Ninth Circuit’s order

denying Atlas's Petition for Rehearing was issued on October 27, 2021. (Pet. App. E-47.) The district court had jurisdiction under 28 U.S.C. § 2241 and 28 U.S.C. § 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed under United States Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2254 (a)

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254 (d)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted

with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Petitioner John Atlas, Jr. was a forty-three-year-old man with a well-documented history of severe mental illness and no history of gang affiliation when he was convicted of two counts of dissuading a witness by force or threat with the intent to benefit a criminal street gang and sentenced to eight years to life in prison. Atlas's trial counsel, despite purportedly presenting a mental state defense, failed to investigate Atlas's mental health history, review or proffer any of Atlas's mental health records as evidence, or hire an expert to opine and testify as to Atlas's mental state at the time of the offense. Trial counsel instead had Atlas, who was not a mental health expert and was specifically barred from testifying as one, provide only limited testimony as to his diagnosis, prescriptions, and failure to take his medication the night before the offense, prompting the prosecution to argue that the jury should disregard Atlas's testimony because it was self-serving and did not come from a doctor.

Once Atlas was appointed counsel on federal habeas review, he was able to procure medical and legal records and accounts from his family that led experts to opine that his diagnoses of mental illness and their concomitant symptoms were wholly consistent with his conduct at the time of the charged offenses, making it very likely that Atlas's behavior was a result of his mental illness and not the requisite criminal intent. Trial counsel's failure to adequately investigate and present this evidence in support of his supposed mental state defense was prejudicially ineffective assistance.

A. Facts Material to the Consideration of the Question Presented

1. Atlas's Arrest

On April 2, 2013, a couple reported their car stolen after they left it running to warm up and came back to find it missing. (Pet. App. H-56.)¹ The car was spotted in a Stater Brothers parking lot, and the police responded to the scene. (Pet. App. H-56.) The police found Dunnell Crawford, who they later determined was a documented member of the Five Time gang, in the driver's seat of the car and arrested him. (Pet. App. H-56, 58.) Atlas, who had accepted a ride from Crawford, was present but was not detained in connection with the car's theft and was free to leave. (Pet. App. H-57.) Atlas asked the police if he could retrieve his jacket, which was in the car, and the police examined the jacket and found prescriptions for Risperdal, Depakote and Benadryl in the pocket with Atlas's name on them. (Pet.

¹ For the purpose of this petition for certiorari, Atlas relies on the factual findings of the lower courts. In doing so, Atlas does not concede the accuracy or reliability of those findings.

App. H-57, 59.) The police nonetheless required Atlas to wait for the car's owners to arrive and confirm that the jacket did not belong to them before he would be allowed to take it. (Pet. App. H-57.) Once the couple arrived and confirmed the jacket was not theirs, Atlas was given the jacket and instructed to leave the scene. (Pet. App. H-57.)

Instead, Atlas began walking back and forth and yelling statements like "you better not go to court," and "we know you live in Five Time." (Pet. App. H-57.) One of the witnesses later testified that they thought he "was just drunk or something." (Pet. App. A-9.) The police were unable to calm Atlas down and therefore arrested him. (Pet. App. H-57.) When the police searched him in connection with the arrest and found two lighters on his person, he shouted that they were "to burn [the couple's] house down." (Pet. App. H-57.)

2. Pretrial Competency Evaluation

Prior to trial, Atlas's then-current counsel (who was not the attorney who represented him at trial) alerted the court that there were "mental health issues" regarding Atlas and declared a doubt as to his competency. (Pet. App. D-35-36.) Two medical reports were prepared and a competency hearing was held where the court ultimately found him competent. (Pet. App. D-35-36.) At the same time, the reports detailed that Atlas had a diagnosis of Bipolar Disorder I and had arrived at the detention center following his arrest "angry and hitting walls," "irritable," and "responding to internal stimuli." (Pet. App. A-9, D-40.)

3. Trial

At trial, the fact witnesses recounted the events of Atlas's arrest as described above. In addition, the prosecution's gang expert opined, based solely on the events of Atlas's arrest (i.e., the words Atlas said and Dunnell Crawford's presence), that Atlas acted with intent to benefit Crawford's Five Time gang. (Pet. App. D-29-31.) While the expert was able to identify Crawford as a member of Five Time, he did not have any evidence of Atlas being a member of Five Time himself. (Pet. App. D-30-31.)

Atlas's testimony was the only evidence proffered by the defense. (Pet. App. D-31-32.) Just before Atlas took the stand, Atlas's trial counsel told the court that his chosen defense was that Atlas did not take his medication the night before the offense, and that, when he does not take his medication and is under stress, he has schizophrenic events. (Pet. App. D-36.) The prosecution objected that Atlas was not a mental health expert and therefore could not testify that his behavior was typical of people with schizophrenia. (Pet. App. D-36.) The court sustained the prosecution's objection and limited Atlas's testimony regarding his mental state to the fact that he takes certain medication and that he believed that he did not have the intent to commit the charged offenses because he had not taken his medication the night before the offense. (Pet. App. D-36-37.)

Atlas was then called and testified that he had been diagnosed with schizophrenia in 2009. (Pet. App. D-31.) He stated that the prescriptions the police found in his jacket were meant to treat his schizophrenia, but he did not take them the night before the offense because they made him sleepy. (Pet. App. D-31.) He

further testified that he recalled making some of the statements ascribed to him, but that he did not intend to dissuade anyone from testifying, and that, though he knew Crawford to be a member of Five Time because Crawford had mentioned it, he did not have any intent to benefit the Five Time gang. (Pet. App. D-31-32.)

In closing arguments, trial counsel argued that Atlas was having a schizophrenic event at the time of the offense and did not intend to benefit the Five Time gang. (Pet. App. D-37.) In response, the prosecution emphasized the defense's failure to call an expert witness regarding Atlas's schizophrenia and argued repeatedly that the defense had given the jury nothing more than the defendant's self-serving statements. (Pet. App. D-37.) Atlas was convicted of two counts of dissuading a witness by force or threat with the intent to benefit a criminal street gang and sentenced to eight years to life in prison. (Pet. App. D-27.)

4. Direct Appeal

On direct appeal, Atlas's appellate counsel raised no issues, so Atlas argued pro se that his trial counsel was ineffective because he failed to call Atlas's psychiatrist to testify about his mental illness and his prescriptions. (Pet. App. H-62.) The court of appeal denied Atlas's claim, holding that testimony from his psychiatrist could not have affected the outcome of his trial because the evidence against him was "overwhelming." (Pet. App. H-63.) The California Supreme Court summarily denied discretionary review. (Pet. App. D-28.)

5. Initial Federal Habeas Proceedings

Atlas next filed a pro se petition in the United States District Court for the Central District of California. (Pet. App. D-28.) The district court appointed counsel

and granted Atlas's motion to stay his federal proceedings while he returned to state court to exhaust (1) his claim of ineffective assistance of trial counsel for failure to investigate and adequately present a mental state defense and (2) his evidence in support thereof. (Pet. App. D-28.)

6. Counsel State Habeas Exhaustion Proceedings

Atlas's superior court petition presented his ineffective assistance of counsel claim and was supported by Atlas's past legal and medical records and an expert opinion by Dr. Jason Yang. Dr. Yang opined that, based on said records and interviews with Atlas and his family, Atlas was likely experiencing a manic episode at the time of the offense which caused him to behave the way he did. (Pet. App. G-49-50.)

Dr. Yang reported that Atlas has been diagnosed with "variations of bipolar disorder, psychotic disorder, and schizoaffective disorder." (Pet. App. A-12.) Atlas has suffered from mental illness since he was a child, when he heard voices and saw ghosts but was able to ignore them. (Pet. App. A-11.) After high school, Atlas moved to England, where he played football and started a family. Though he still suffered from auditory and visual hallucinations, he was able to ignore them by staying active. (Pet. App. A-11.) Atlas remained in England until around the age of 37, when he moved back to the United States. (Pet. App. A-11.)

Atlas's worsening mental illness symptoms brought him into conflict with the law in December 2009, when he was arrested and subsequently recommended for a psychiatric hold as a danger to himself because he was hitting the walls and "afraid of demons coming out of the toilet." (Pet. App. A-12, D-42.) In October 2011, he was

placed on suicide watch for hitting his head on the wall after not taking his medication. (Pet. App. D-42.) In December 2011, he was already hospitalized for psychiatric care when he was placed on a psychiatric hold for lunging at a patient and calling out to people who weren't there. (Pet. App. D-42.) In February 2012, he was hospitalized on another psychiatric hold after he walked into a McDonald's restaurant and "threatened to blow the place up." (Pet. App. A-12, D-42.) He again had not taken his medication and was "very agitated" and "actively hallucinating." (Pet. App. D-42.) Lastly, in March 2013, just days before the offense in question, Atlas's symptoms worsened again, and he was seen at the local clinic, where a psychiatrist noted that he was experiencing "building mania" and prescribed him the antipsychotics and mood stabilizers the police found in his jacket pocket at the scene of his arrest. (Pet. App. A-12-13.) In detention immediately following the April 2, 2013 arrest, he was again observed hitting walls and reported auditory hallucinations. (Pet. App. D-42.)

Atlas's grandmother and sister, with whom Atlas lived from time to time upon his return to the United States, also described Atlas exhibiting symptoms of mental illness. When he lived with his sister in 2011 and/or 2012, she noted that he acted strangely and "as though he had a split personality." (Pet. App. A-12.) He would say "things that would sound threaten[ing] to anyone who did not know him well." (Pet. App. A-12.) He also lived with his grandmother in 2013, who said he "act[ed] very strangely, said "things that were weird or did not make sense," and discussed "hearing voices." (Pet. App. 12, D-42-43.) In addition, Atlas's father also

lived with mental illness, having once been acquitted at trial by reason of insanity. (Pet. App. D-40.)

In light of this information, Dr. Yang opined that, at the time of the offense, Atlas was suffering from “bouts of mania, paranoia, and disorganized outbursts.” (Pet. App. A-14.) He noted that Atlas was already suffering from “building mania” a few days before the offense and was non-compliant with his medication, and that any new medication regimen he had been prescribed would have taken four weeks to be fully effective. (Pet. App. A-14.) Yang further explained that Atlas’s behavior at the time of the offense was consistent with his behavior at McDonald’s in 2012, when he was non-compliant with his medication and “yelled what could have been perceived as threats in public.” (Pet. App. A-14.) He therefore concluded that Atlas “was suffering from delusional thoughts and lack of control” and “was not in touch with reality” at the time of the offense. (Pet. App. D-43.) Atlas alleged that, had the jury heard this evidence in addition to or instead of his testimony, the prosecution could not have undermined his testimony, which was the whole of his mental state defense, the way they did at his trial, and at least one juror would have voted to acquit.

The superior court denied Atlas’s petition on the procedural ground that Atlas unsuccessfully raised an ineffective assistance of counsel claim pro se on direct appeal, and “[t]he addition of the declaration of family members and the report prepared by Dr. Yang are insufficient to overcome the procedural bar precluding this court from addressing claims previously rejected on appeal . . .”

(Pet. App. G-51-52.) The court added: “[t]his is particularly true in light of [] criminal and ethical concerns pertaining to Dr. Yang” (Pet. App. G-52 n. 2), referring to the fact that Dr. Yang had recently been implicated in an insurance fraud scheme. (Pet. App. A-15.) Atlas then filed the same claim in the California Supreme Court, which the court summarily denied after informal briefing and taking judicial notice of Dr. Yang’s subsequent guilty plea. (Pet. App. A-15, D-28.)

7. Federal Habeas Proceedings Following Exhaustion

Atlas then returned to the district court and the parties submitted the case to the magistrate judge. The magistrate judge first noted that there was some uncertainty as to whether any state court had ruled on Atlas’s ineffective assistance claim on its merits, and therefore whether there was any decision to which AEDPA² deference attached. The magistrate judge found that “Petitioner raised his current ineffective assistance of counsel claim for the first time in his state habeas petitions” because his direct review claim “did not include [the] new sub-claims and evidence that Petitioner presented to the state courts on habeas review.” (Pet. App. D-34.) But the superior court applied California’s *Waltreus*³ bar to Atlas’s new claim, denying it on procedural grounds because it had purportedly been presented and rejected on direct appeal, and the California Supreme Court’s summary denial followed. (Pet. App. D-34.) There was thus a question of whether the look through presumption instructed that the California Supreme Court had adopted the

² “AEDPA” refers to the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2241, *et seq.*

³ *In re Waltreus*, 62 Cal. 2d 218 (1965).

superior court's reasoned procedural denial or had issued a silent merits denial divorced from the superior court's reasoning.

The magistrate judge opted to leave this question unresolved, instead stating that it would deny Atlas's ineffective assistance claim on prejudice grounds even if it were to review the claim *de novo*. (Pet. App. D-34-35.) The court held that Atlas's counsel performed deficiently because he "was on notice of Petitioner's mental condition and should have investigated it further prior to trial," and because "[a] mental health expert could have bolstered Petitioner's testimony by explaining what paranoid schizophrenia is and what it may cause in the absence of medication." (Pet. App. D-40-41.) Nevertheless, the court held that, even taking Atlas's newly developed mental state defense at face value, no juror would have had a reasonable doubt as to his guilt because the lay witnesses at the scene of the offense did not describe Atlas as exhibiting the same florid symptoms of mental illness he had exhibited when he had been hospitalized in the past. (Pet. App. D-41-46.) The district court adopted the magistrate judge's report and recommendation and entered judgment against Atlas. (Pet. App B, C.)⁴

The Ninth Circuit affirmed the district court's denial in a 2-1 split decision. (Pet. App. A.) The majority held that (1) the California Supreme Court's summary

⁴ In light of Dr. Yang's conviction, Atlas submitted an additional expert report by Dr. Amanda Gregory in support of his ineffective assistance claims with his objections to the magistrate judge's report and recommendation. (Pet. App. C-23-24.) The magistrate judge's report and recommendation nonetheless stated that it was taking Dr. Yang's report "at face value" (Pet. App. D-38), and the district court's order adopting the report and recommendation stated that it considered Dr. Gregory's report but concluded that it "[did] not warrant departure from the conclusions articulated in the Report." (Pet. App. C-24.)

denial was a denial on the merits despite the intervening reasoned denial from the superior court on procedural grounds, and (2) whether the court then (a) looked through to the direct appeal decision or (b) searched the state court record for any reasoning that could support denial, the court would deny relief because the state court reasonably rejected Atlas's claim on prejudice grounds (Pet. App. A-2-7). The dissent generally agreed that the California Supreme Court's summary denial was a denial on merits (Pet. App. A-8), but opined that the state court's denial without the issuance of an order to show cause was an unreasonable determination of the facts because Atlas had stated a *prima facie* case for relief (Pet. App. A-8-15). The dissent further opined that Atlas had (1) not failed to develop the factual basis for his claim in state court and (2) established that the state court had not afforded him a full and fair hearing, and therefore was entitled to an evidentiary hearing in the district court. (Pet. App. A-15-17.) Atlas moved for panel rehearing and rehearing en banc, and the panel voted 2-1 against each, with no member of the court voting for rehearing en banc. (Pet. App. E-47.) This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

A. No reasonable jurist could have held that Atlas did not state a *prima facie* case of ineffective assistance of counsel for failure to investigate and present a mental state defense.

Assuming *arguendo* that the California Supreme Court's summary denial was a denial on the merits, it was objectively unreasonable. "Under California law, the California Supreme Court's summary denial of a habeas petition on the merits reflects that court's determination that "the claims made in th[e] petition do not state a *prima facie* case entitling the petitioner to relief." *Cullen v. Pinholster*, 563

U.S. 170, 188 n.12 (2011). The district court rightly held that Atlas's trial counsel performed deficiently, which the Ninth Circuit did not dispute. But the Ninth Circuit panel's majority opinion that the state courts reasonably rejected Atlas's ineffective assistance claim at the *prima facie* stage because Atlas did not and could not show prejudice from his counsel's deficient performance is not supported by the record. Trial counsel's deficient performance prevented the jury from considering (1) medical and legal records documenting Atlas's history of mental illness, including his need for psychiatric intervention mere days before the offense (2) corroborating descriptions of Atlas's symptoms and family history of mental illness from his grandmother and sister, and (3) expert testimony that explained how Atlas's mental health history, his diagnoses, and the symptoms of those ailments were consistent with and likely explained his conduct at the time of the charged offenses. The Ninth Circuit's holding that not a single juror might have voted to acquit in light of this evidence, taken as true, particularly at the *prima facie* stage, was objectively unreasonable and should be reversed.

1. Applicable law

AEDPA provides that a state court decision on the merits of a habeas petitioner's claim cannot be disturbed by the federal courts unless that decision is (1) (a) contrary to or (b) an unreasonable application of clearly established federal law or (2) based on an unreasonable determination of the facts in light of the evidence presented to the state court. 28 U.S.C. § 2254(d).

"An ineffective assistance claim has two components: [a] petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced

the defense.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The deficiency component requires a showing that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). The prejudice component requires a petitioner to establish that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). “Although counsel’s deficient performance must have had more than a ‘conceivable effect’ on the outcome, it need not have ‘more likely than not altered’ the outcome.” *Weeden v. Johnson*, 854 F.3d 1063, 1071 (9th Cir. 2017) (quoting *Strickland v. Washington*, 466 U.S. 668, 693 (1984)). “And, because the jury was required to reach a unanimous verdict on each count, the outcome could have differed if only ‘one juror would have struck a different balance.’” *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 537 (2003)).

2. Atlas’s trial counsel performed deficiently.

Atlas’s trial counsel performed deficiently for all the reasons stated by the district court and in Judge Watford’s dissenting opinion. (Pet. App. A-8-17, D-40-41.) Where “there is evidence to suggest that the defendant is impaired,” this triggers trial counsel’s “duty to investigate a defendant’s mental state.” *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003); *see also Williams v. Taylor*, 529 U.S. 362, 415 (2000) (O’Connor, J., concurring) (counsel must conduct a “requisite, diligent” investigation into his client’s background). Here, counsel was on notice of

Atlas's mental condition, his need for treatment just before and after the offense, and the fact that his father had once been found not guilty by reason of insanity. *See Sections I.A.2-3 above.* Counsel also knew or should have known that "expert medical opinion testimony is *necessary* to establish that a defendant suffered from a mental disease, mental defect, or mental disorder within the meaning of CALCRIM No. 3428, *because jurors cannot make such a determination from common experience.*" *People v. Larsen*, 205 Cal. App. 4th 810, 824 (2012) (emphasis added); *see also* Judicial Council Of California Criminal Jury Instruction 3428 (instructing jury to consider "evidence that the defendant may have suffered from a mental [disease, defect, and/or disorder]" for "the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime"). Counsel nevertheless did not seek or present any evidence in support of his supposed mental state defense other than Atlas's own testimony. (Pet. App. D-40-41.) Atlas more than satisfied his burden of pleading a *prima facie* case of deficient performance.

3. Trial counsel's deficient performance prejudiced Atlas.

Atlas also provided compelling evidence that trial counsel's deficient performance prejudiced him. As described above and noted in Judge Watford's dissent, Dr. Yang's report, as supported by Atlas's mental health and legal records and family statements and history, painted a picture of a forty-three-year-old man with a well-documented history of mental illness, specifically mental illness that led to unintentionally threatening statements and behavior. (Pet. App. A-8-17; *see also* Section I.A.6 above.) Had the jury heard the evidence presented above, there is a

reasonable probability at least one juror would have had a reasonable doubt as to whether Atlas intended to threaten the stolen car's owners for the benefit of the Five Time game.

The courts' finding that the evidence of Atlas's guilt was overwhelming (Pet. App. 6) is objectively unreasonable in light of the record. The only potential evidence of Atlas's intent was his words, and Atlas's mental state defense would have "added an entirely new dimension to the jury's assessment of the critical issue of . . . mens rea," calling in question whether those words should have been taken at face value. *Weeden*, 854 F.3d at 1072. This is particularly true given that, despite living forty-three years without a single gang-related offense or identification card and being free to leave the scene of Crawford's crime, Atlas instead put himself in jeopardy by threatening Crawford's victims under circumstances that would surely lead to his arrest. (Pet. App. A-9.) One of the theft victims even testified that Atlas appeared to be "just drunk or something." (Pet. App. A-9.) In light of this evidence, it is much less reasonable to infer that Atlas's intent was congruent with his words and actions.

Nor was it reasonable for the panel majority to decide, based on its lay interpretation of Atlas's medical and legal records, that Atlas was not suffering from symptoms of mental illness at the time of the offense because, "[w]hen suffering a psychotic episode, according to the record, Atlas acted in recognizably aberrant and incoherent ways." (Pet. App. 7). This conclusion betrays a fundamental misapprehension of mental illness that should have yielded to, not

supplanted, Atlas's expert report. This is because "a defendant suffering from [mental] illness may outwardly act logically and consistently but nonetheless be unable to make decisions on the basis of a realistic evaluation of his own best interests." *Lafferty v. Cook*, 949 F.2d 1546, 1555 (10th Cir. 1991) (citing *Bouchillon v. Collins*, 907 F.2d 589, 593 (5th Cir. 1990)); *see also Lokos v. Capps*, 625 F.2d 1258, 1267-69 (5th Cir. 1980) (expert testimony that the defendant was suffering from paranoid schizophrenia overcame lay testimony regarding the defendant's rational behavior); *cf. Lokos*, 625 F.2d at 1267 (noting that "[o]ne need not be catatonic, raving or frothing" to be experiencing symptoms of mental illness that prevent him from acting rationally). Expert testimony thus "bestows upon the jury [and the court] 'appreciable help' in understanding matters with which they are unfamiliar," here, why the symptoms of Atlas's mental illness would were in fact consistent with his statements and conduct at the time of his arrest. *Cunningham v. Wong*, 704 F.3d 1143, 1168 (9th Cir. 2013) (Pregerson, J., dissenting); *see also Yun Hseng Liao v. Junious*, 817 F.3d 678, 693 (9th Cir. 2016) (an expert "would have served to explain and to interpret" the defendant's mental health history so that his "diagnosis would not have existed in a vacuum"); *Larsen*, 205 Cal. App. 4th at 824 (mental health expert testimony is "*necessary*" to a mental state defense (emphasis added)). No reasonable jurist would have disregarded Atlas's mental health expert testimony because it did not comport with their lay impression of what mental illness looked like.

Lastly, the panel majority ignored the uniquely vulnerable position trial counsel left Atlas in by having him and him alone testify regarding his mental state at the time of the offense. “[A]n expert opinion is very different from a lay opinion, especially a defendant’s opinion. An expert opinion is one from an objective third party that carries an ‘aura of special reliability and trustworthiness . . .’” *Cunningham*, 704 F.3d at 1168 (Pregerson, J., dissenting). “A defendant’s testimony, on the other hand, may be viewed by the jury as a desperate attempt to save himself.” *Id.* This was exactly what the prosecution argued at Atlas’s trial to convince the jury to disregard his mental state testimony. *See* Section I.A.3 above. The unreasonable decision by trial counsel to proffer Atlas’s “bare testimony left him without any effective defense.” *Yun Hseng Liao*, 817 F.3d at 694 (quoting *Brown v. Myers*, 137 F.3d 1154, 1157-58 (9th Cir. 1998)).

For all the foregoing reasons, the courts were unreasonable in finding that Atlas failed to state a *prima facie* case of prejudice from his trial counsel’s deficient performance. As this Court explained in *Rompilla*, “it is possible that a jury could have heard [Petitioner’s mental state defense] and still have decided on [guilt], [but] that is not the test.” *Rompilla*, 545 U.S. at 393. Atlas’s mental state defense, “taken as a whole, might well have influenced the jury’s appraisal of [Petitioner’s] culpability, and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at [trial].” *Id.* (cleaned up) (quoting *Wiggins*, 539 U.S. at 538; *Strickland*, 466 U.S. at 694); *see also* *Weeden*, 854 F.3d 1063; *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997);

Porter v. McCollum, 558 U.S. 30, 42 (2009); *Bemore v. Chappell*, 788 F.3d 1151 (9th Cir. 2015). This Court should therefore reverse the panel majority's decision.

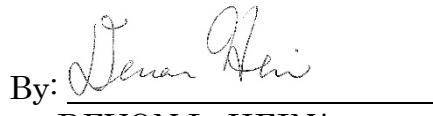
CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: January 24, 2022

By: 

DEVON L. HEIN*
Deputy Federal Public Defender

Attorneys for Petitioner
JOHN ATLAS, JR.
**Counsel of Record*