No. _____

IN THE

Supreme Court of the United States

Robin Lee Sherwood,

Petitioner,

v.

GEORGE A. NEOTTI,

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

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QUESTION PRESENTED

In evaluating the prejudice prong of habeas petitioner Robin Sherwood's ineffective assistance of counsel claim concerning his competency to plead guilty, the Ninth Circuit required him to show a reasonable probability that he would have been found incompetent. Does this prejudice standard conflict with *Strickland v. Washington*, 466 U.S. 668 (1984) and *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985), which ask the broader question of whether there is a reasonable probability that the result of the proceedings would have been different, or, in in the context of a guilty plea, whether Sherwood would have pled guilty?

LIST OF RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

Robin Lee Sherwood v. George Neotti, Case No. 20-55636, Order entered October 25, 2021, mandate issued November 16, 2021

Robin Lee Sherwood v. Stu Sherman, Case No. 15-55659, Order, entered May 16, 2018, mandate issued June 19, 2018

United States District Court for the Central District of California

Robin Lee Sherwood v. Fernando Gonzalez, Case No. EDCV 08-00554-AWI-TAG, pro se petition for writ of habeas corpus filed April 22, 2008, dismissed without prejudice at request of petitioner on October 10, 2008

Robin Lee Sherwood v. George Neotti, Case No. EDCV 11-01728-CJC-PLA, petition for writ of habeas corpus, filed October 31, 2011, originally denied April 7, 2015, denied on remand on May 21, 2020

California Supreme Court

People of the State of California, v. Robin L. Sherwood, Case No. S160022,
petition for review, filed January 17, 2008, denied February 20, 2008

In re Robin Lee Sherwood, Case No. S193350, pro se petition for writ of habeas corpus, filed May 23, 2011, denied October 19, 2011

In re Robin Lee Sherwood, Case No. S243515, petition for writ of habeas corpus, filed August 1, 2017, denied December 20, 2017[1]

[1] This habeas petition was filed pursuant to changes in state case law to the felony-murder special circumstances.

California Court of Appeal

People of the State of California v. Robin L. Sherwood, Case No. E041930, direct appeal, filed April 2, 2007, unpublished decision filed December 7, 2007

In re Robin Lee Sherwood, Case No. B225349 pro se petition for writ of habeas corpus filed June 25, 2010, denied July 6, 2010

In re Robin Lee Sherwood, Case No. E052765, petition for writ of habeas corpus, filed January 26, 2011, denied February 16, 2011

People v. Robin Lee Sherwood, Case No. E073236, appeal of denial of resentencing, filed on October 23, 2019 remanded to superior court on June 16, 2020.[2]

People v. Robin Lee Sherwood, Case No. E077239, appeal of denial of resentencing, filed on November 10, 2021.[3]

San Bernardino County Superior Court

People v. Robin Lee Sherwood, Case No. FBV3726-2, judgment entered November 30, 2006, resentencing pursuant to SB 1437 denied May 31, 2019 denied again on remand on May 28, 2021.

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[2] This was an appeal of the superior court's denial of a resentencing petition filed pursuant to California Senate Bill 1437, which redefined who can be convicted of felony-murder.

[3] This is an appeal of the superior court's denial of the resentencing petition after the remand mentioned in note 2 above and is currently pending.

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

Petitioner Robin Sherwood (Sherwood or Petitioner) respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in *Sherwood v. Neotti*, Case No. 20-55636.

OPINIONS BELOW

The Ninth Circuit's opinion denying relief is reported at *Sherwood v. Neotti*, Case No. 20-55636. (App. 1-1-4.) The district court adopted the Report and Recommendation of the magistrate judge, dismissed Sherwood's petition with prejudice and entered judgment against him. (App. 4-14-19; App. 3-13.) Sherwood filed a petition for writ of habeas corpus in the California Court of Appeal on January 15, 2011 in case number E052765, alleging ineffective assistance of counsel, which was denied on February 16, 2011. (App. 8-27-28.) He also filed a pro se habeas petition in the California Supreme Court on May 23, 2011 in case number S193350, alleging the same claim, which was denied on October 19, 2011. (App. 7-25-26.)

JURISDICTION

The Ninth Circuit's opinion affirming the denial of habeas relief was filed on October 25, 2021. The Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend XIV

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const., Amend. VI

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

STATEMENT OF THE CASE

A. Trial and plea

Sherwood was one of four men charged with the murder, attempted robbery, and burglary of Allen Allison on September 8, 2003. (App. 16-119-46.) Sherwood was charged with the special circumstance that the murder was committed during an attempted robbery and burglary. (App. 16-147-73.) The prosecution also alleged several prior convictions and the personal use of

a firearm. (App. 16-176-90; App. 18-225-241.) Sherwood was represented by Michael Belter, who was appointed on October 22, 2004. (App.16-174.)

At Sherwood's 2006 trial, the prosecution elicited evidence that Sherwood had previously been an employee of Allison's. (App. 17-200-01.) Donald Jaramillo, a convicted burglar and arsonist (App. 17-203.), testified that Sherwood had borrowed a car belonging to Jaramillo's grandmother in order to visit his wife's parents. (App. 17-204-05.) Sherwood picked up the car in the company of James Franklin, Jose Ceja, and Vavao ("Bobo") Faumui later the same day. (App.17-203-06.) Sherwood returned the car around 2:00 a.m. the next morning. (App. 17-208-09.) At that time Sherwood told Jaramillo that Franklin, Ceja, and Faumui used the car to commit a robbery and that Franklin had shot someone while Sherwood was "around the corner or something." (App. 17-209-11.) Jaramillo then confronted Franklin, Ceja, and Faumui and Franklin admitted that he, Ceja, and Faumui, were at the house and that he shot the victim several times after Faumui attacked the victim with a flashlight. (App. 17-212, 17-214.) Franklin reported that Sherwood was not present inside the house. (App. 17-213-14.) Physical evidence also pointed to Faumui's guilt, including a firearm and ammunition from his residence (App. 18-219-20.) and DNA samples from a hat found on the scene. (App. 18-221-22.) No physical evidence pointed to Sherwood's presence at the house.

The jury heard a videotaped interview of Sherwood from September 5, 2006. (App. 18-223.) In that interview Sherwood denied shooting Allison or being present when he was shot. *Sherwood v. Sherman*, Ninth Cir. Case No. 15-55659. Dkt. 25, Ex. 1 at 5 (May 31, 2017). He only learned of the shooting after the others came back from Big Bear and told him what had happened. *Id*. at 31-32.

Immediately after the tape was played, the court recessed for lunch. (App. 18-224.) After the recess, Sherwood informed the court that he wanted to plead guilty to all of the charges and enhancements. (App. 18-227.) As part of the plea colloquy, the trial judge asked Sherwood if he understood "that this Court is not merciful" and told Sherwood, "I want you to know straight up. They call me the hammer for a reason." (App. 18-233.) After accepting Sherwood's plea the trial judge told the jury:

> Folks, I've been in this business for 26 years, okay. I've never had a defendant plead guilty to a murder and all the things that he was charged with. He pled guilty to everything. Everything. I have never had that happen before, okay. It wasn't a plea bargain. He pled guilty as charged, okay.

(App. 18-242.)

At Sherwood's sentencing hearing on November 30, 2006, true to his word, the trial judge sentenced Sherwood to eight years and life without the possibility of parole. (App. 16-193-94.)

At no time during trial did counsel request a competency evaluation, nor did counsel request a mental health expert.

B. Post-conviction evidence

1. Pretrial records indicating mental illness

Prior to trial, while represented by Belter, Sherwood suffered from mental illness. On March 14, 2004, another inmate attacked Sherwood with a razor in the shower, slicing the right side of Sherwood's face, and resulting in a 12-14 inch laceration. (App. 12-51-52.) Officers found Sherwood bleeding profusely, with a blood-soaked towel around his head. (App. 12-51.) Shortly after this traumatic incident, Sherwood sought a psychological evaluation and medication to help with his "anger and paranoia." (App. 12-46.)

On April 19, 2004, while in jail awaiting trial, Sherwood was assessed as being very unstable and unpredictable, and placed on suicide watch. (App. 12-62-64.) Other times his mental illness was deemed significant enough to warrant special housing for suicide watch. This occurred on April 24, 2004, May 28, 2004, June 24, 2004 and February 1, 2005. (App. 12-65-79.) On June 24, 2004, Sherwood was observed squeezing blood from his left arm, and told a deputy that he cut himself with a razor. (App. 12-69.)

Although the available records during Sherwood's pretrial detention are incomplete, records show that Sherwood was evaluated between 2004-2006 and determined to need psychotropic medication. In January of 2005,

Sherwood was prescribed Paxil (paroxetine) (used to treat depression, anxiety disorders and obsessive-compulsive disorder). (App. 12-81.) In February of 2005 he was under the treatment of a psychiatrist, and he was prescribed Wellbutrin (bupropion) (an antidepressant). (App. 12-81.) A record from November 15, 2006, just weeks before his November, 30 2006 sentencing, shows that he was receiving Wellbutrin and Seroquel (quetiapine) (an antipsychotic) at this time. (App. 11-45.)

2. Post-plea letters and sentencing

After his plea, Sherwood sent several letters addressed to the judge and the district attorney.[4] (*See generally* App. 14-98-113, App. 16-195-97.)

In one letter post-marked September 20, 2006, Sherwood insulted the judge, telling him his "hammer [was] limpid" and he "sounded like a jackass," telling the judge he should be more respectful. (App.14-99.)

In other letters to the trial judge, Sherwood mistakenly described his case as a death penalty case. (App.16-191-92.) He complained that he had never had a psychological evaluation, despite being on medication and his designation as an inmate with mental illness. He also complained about his

[4] Some letters purportedly written by Sherwood were not contained in the Clerk's transcript or trial counsel's file, but were produced by Respondent in discovery in preparation for the federal evidentiary hearing.

attorney and asked to have his case overturned. (App. 16-191-92, App. 16-195.)

In a letter apparently sent to the trial judge on November 11, 2006, before the November 30, 2006 sentencing, Sherwood asked for a new trial and a new attorney. (App. 14-100-05.) He asked the trial judge to "pull [his] plea" and change venue. (App. 14-102.) He continued to refer to his case as a "death penalty case" although his case had never been a capital case. (App. 14-102.) He also requested a psychiatric evaluation and referenced being on psychiatric medication. (App. 14-103.) In another letter dated November 12, 2006, Sherwood again expressed that he was mentally ill and had not taken his medications the day of his plea. (App. 14-108.) Sherwood again complained about his attorney and asked to "pull [his] plea" because his attorney did not argue critical issues. (App. 14-105.)

Counsel took no actions to address these letters prior to sentencing.

3. Post-trial prison records demonstrating mental illness

Prison medical records show a continuation of the symptoms of mental illness that were present before and during Sherwood's trial. In the years after his plea, Sherwood has been diagnosed with many different conditions by California Department of Corrections and Rehabilitation ("CDCR") mental health staff, including: Schizoaffective Disorder, Depression with Psychotic

Features, Psychosis Not Otherwise Specified, and Bipolar Disorder, and has been prescribed many different types of psychotropic medications, including antipsychotic medications such as Seroquel (quetiapine) and Risperdal (risperidone), along with mood stabilizing medications, such as Lamictal (lamotrigine) and Tegretol (carbamazepine), as well as antidepressant medications, such as Wellbutrin and Paxil. These medications, particularly Risperdal and Seroquel, are powerful and potent antipsychotics. (App. 13-92.)

On December 28, 2006, just weeks after he was sentenced, a prison record noted Sherwood's history of symptoms, including anger, violent behavior, depression and paranoia, and prior medication. (App. 10-35.) It also noted his prior suicide attempts, delusions and preoccupied thought content. (App. 10-35-36.) At that time he was diagnosed with Depression Not Otherwise Specified, with psychotic features. (App. 10-37.) A suicide risk assessment from December 29, 2006 noted that his stability was contingent on medication. (App. 10-38.)

In 2007, Sherwood received mental health treatment for his mood and psychotic disorders. (App. 10-39-42.) He received Lamictal, Wellbutrin and Seroquel. (App. 10-39; App. 13-90, 93.)

C. Direct appeal and initial state habeas proceedings

Sherwood timely appealed, alleging that 1) the trial court failed to conduct a hearing to replace his counsel pursuant to *People v. Marsden*, 2

Cal. 3d 118 (1970); and 2) his parole revocation fine should not have been imposed. On December 7, 2007, the California Court of appeal struck the fine but affirmed Sherwood's conviction.[5] (App. 9-29-34.)

After a series of *pro se* habeas filings in state and federal court, on January 15, 2011, Sherwood filed a *pro se* petition for writ of habeas corpus with the California Court of Appeal, Fourth Appellate District.[6] *Sherwood v. Neotti*, Case No. EDCV 11-01728-CJC-PLA, Dkt. 29, Ldg.13 (Jan. 17, 2013).[7] The petition raised the claims that his confession was involuntary and that his counsel was ineffective. *Id*. Ldg. 13 at 10-15. This petition was summarily denied on February 16, 2011. (App. 8-27.) On May 3, 2011, Sherwood filed a *pro se* habeas petition with the California Supreme Court raising the same claims. *Sherwood v. Neotti*, Case No. EDCV 11-01728-CJC-PLA, Dkt. 10, Ldg. 8 (Jan. 10, 2012). This petition was summarily denied on October 19, 2011. (App. 7-25-26.)

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[5] As noted above, n.4, some letters written by Sherwood were omitted from the Clerk's transcript on appeal. Although two of these letters were stamped as received by the trial court, the Court of Appeal did not have them at the time it rendered its decision. In these letters, Sherwood unequivocally requested to "pull" his plea and replace his counsel. (App. 14-100-09.)

[6] A detailed history of Sherwood's prior pleadings is contained in the Magistrate's Report and Recommendation from February 5, 2014. *Sherwood v. Neotti*, Case No. EDCV 11-01728-CJC-PLA, Dkt. 50 at 1-5 (Feb. 5, 2014).

[7] "Ldg." refers to the state court record lodged by Respondent in district court.

D. Federal district court and the Ninth Circuit

On October 27, 2011, Sherwood filed a pro se habeas petition under 28 U.S.C. § 2254[8] in district court alleging: 1) trial court error for failing to hold a hearing on the substitution of counsel, 2) his plea was involuntary, and, 3) his counsel was ineffective. *Sherwood v. Neotti*, Case No. EDCV 11-01728-CJC-PLA, Dkt. 1 (Oct. 31, 2011).

In district court, Sherwood presented a psychiatric evaluation by psychiatrist Nathan E. Lavid, who opined that from January 2004 through November 2006, Sherwood was suffering from severe mental illness that rendered him incompetent to stand trial and plead guilty. (App. 15-114-17.)

The district court denied his petition, but the Ninth Circuit reversed, finding that trial counsel was constitutionally deficient in failing to move for a competency hearing at the time of the guilty plea. (App. 2-8-12.)

The Ninth Circuit cited several pieces of evidence in the record supporting the conclusion that trial counsel Belter's failure to investigate Sherwood's mental state constituted deficient performance:

- At the time of trial, evidence available to Belter showed that Sherwood had reported having psychological and mental health

[8] Because the state court denied Sherwood's ineffective assistance of counsel claim on procedural grounds, § 2254(d) does not apply and review below was de novo.

issues, including anger, paranoia and sleep issues, and had been diagnosed with Schizoaffective Disorder, Depression with Psychotic Features, and Psychosis Not Otherwise Specified. (App. 2-9.)

- Jail records showed that Sherwood had been treated with psychotropic, anti-psychotic, anti-depressant and stabilizing medications in the time leading up to trial and after. (App. 2-9.)
- Sherwood had been placed on suicide watch at the West Valley Detention Center on five separate instances, once following an apparent suicide attempt. (App. 2-9.)
- Belter was aware of several events leading up to trial that could have triggered Sherwood's mental health problems, including another inmate's violent attack on Sherwood, which led to medical treatment and a civil lawsuit, and the arrest of Sherwood's father-in-law at the pretrial hearing. (App. 2-9.)
- Belter was aware of Sherwood's prior drug use and drug-related convictions. (App. 2-9.)

All of this evidence, the Ninth Circuit found, was "sufficient to trigger a duty on the part of Belter to investigate Sherwood's mental state." (App. 2-9.) That Belter may not have had actual knowledge of Sherwood's psychological impairment was "of no moment" where this evidence was readily available.

(App. 2-9.) Further, "[t]he fact that Sherwood appeared lucid and mentally competent does not relieve counsel of the duty to perform reasonable investigation." (App. 2-10.)

The Ninth Circuit further found that "Sherwood has also shown a reasonable probability that he was prejudiced by Belter's failure to investigate Sherwood's competency." (App. 2-10.) The panel remanded to the district court with instructions to "determine whether there are either disputed issues of fact or issues requiring further factual development, such that an evidentiary hearing would be necessary." (App. 2-8-12.)

On remand, the district court found that the issue of deficient performance was expressly disposed of on appeal. However, applying the Ninth Circuit's prejudice test for an ineffective assistance of counsel claim based on failure to question competency, the court determined that an evidentiary hearing was warranted with respect to the prejudice prong. This was because the Ninth Circuit did not make an explicit finding that there was a reasonable probability that Sherwood would have been declared incompetent to stand trial or plead guilty. (App. 6-12-13.) The magistrate judge conducted an evidentiary hearing on November 20, 2019. *Sherwood v. Neotti*, Case No. EDCV 11-01728-CJC-PLA, Dkt. 153 (Nov. 20, 2019). Sherwood presented the testimony of psychiatrist Dr. Nathan Lavid.

Respondent presented testimony from psychiatrist Dr. Alan Abrams, and trial counsel Michael Belter.[9]

Ultimately, the district court concluded that Sherwood was not prejudiced by trial counsel's failure to investigate the possibility of incompetence. (App. 4-18-19.) The district court acknowledged both prejudice theories but concluded that, even under the *Hill* standard, it was not reasonably probable that had counsel declared a doubt as to Sherwood's competency, the trial court would have found him incompetent, and Sherwood had not made a showing that "had a competency hearing been held, petitioner would have chosen to continue with his trial after being found competent." (App. 4-18-19.)

The district court dismissed the petition and granted a Certificate of Appealability on the question of whether the district court "was correct in its denial of [Sherwood]'s claim of ineffective assistance as to [his] competency to plead guilty." (App. 5-21.)

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[9] Belter testified over Sherwood's objection. *See Sherwood v. Neotti*, Case No. EDCV 11-01728-CJC-PLA, Dkt. 151 (Nov. 14, 2019). Many of the supporting documents, including the evidentiary hearing testimony and some expert and attorney declarations were filed under seal in federal district court and the Ninth Circuit. Herein, Sherwood cites only to information that is publicly available. (*See* App. 19-246-77.) If this Court grants certiorari, Sherwood intends to seek leave to file these additional records.

In the Ninth Circuit, Sherwood argued that he satisfied the prejudice standard in two ways: 1) because there was a reasonable probability that he would have been found incompetent if evaluated at the time of trial, and 2) because, in light of his mental impairments, there was a reasonable probability that he would not have pled guilty absent his counsel's failures. After briefing and oral argument, the Ninth Circuit affirmed the district court's denial in an unpublished memorandum dated October 25, 2021, applying the prejudice test asking whether there was a reasonable probability that Sherwood was incompetent. (App. 1-2.) The Ninth Circuit found that 1) Dr. Lavid's opinions rested mainly on Sherwood's prison medical file, which contained no information for the fifteen months preceding the guilty plea, and 2) Dr. Lavid's opinion of incompetence was at odds with direct evidence of Sherwood's statements and notes during trial, which the court found showed he was able to assist his counsel and understand his legal situation. (App. 1-3.)

Instead, the Ninth Circuit credited Dr. Abrams's opinion testimony that Sherwood's handwritten notes to his attorney demonstrated that he understood his case and the circumstances of his guilty plea. (App. 1-3.) The Ninth Circuit also credited Belter's testimony that Sherwood had "above average" comprehension of his case, participated in his defense and pled guilty because he was "racked with guilt." (App. 1-3.) The Ninth Circuit found

this evidence was corroborated by the transcripts of the change of plea, Sherwood's post-plea letters and his statements at sentencing. (App. 1-3.) Ultimately, the Ninth Circuit found that Sherwood failed to demonstrate a reasonable probability that he would have been found incompetent to plead guilty. (App. 1-4.) The decision was silent on Sherwood's argument that *Strickland* and *Hill* required a prejudice analysis considering whether it was reasonably probable that Sherwood would have pled guilty.

REASONS FOR GRANTING THE WRIT

This case is appropriate for review by this Court because the Ninth Circuit's decision conflicts with this Court's decisions in *Strickland*, 466 U.S. at 694 and *Hill*, 474 U.S. at 52. *See* Sup. Ct. Rule 10(c). For an ineffective assistance of counsel claim, a petitioner must show 1) that trial counsel's performance was deficient and 2) that the petitioner was prejudiced by that performance. *Strickland,* 466 U.S. at 687-88. To establish prejudice, Sherwood must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Sherwood's claim centered around his counsel's failure to investigate obvious signs of Sherwood's mental illness prior to his plea, and the Ninth Circuit agreed, finding counsel to have performed deficiently. (App. 2-8-10.) The Ninth Circuit further found that "Sherwood has also shown a reasonable

probability that he was prejudiced by Belter's failure to investigate Sherwood's competency," arguably satisfying *Strickland*'s prejudice test. (App. 2-10.) However, after a remand for an evidentiary hearing, the district court denied relief. When Sherwood returned to the Ninth Circuit, that court required Sherwood to show a reasonable probability that he would have been found incompetent to plead guilty. (App. 1-4.) Applying that standard, the Ninth Circuit affirmed the district court's denial of Sherwood's claim.

In requiring a showing of a reasonable probability of incompetence, the Ninth Circuit ignored Sherwood's argument that a broader and more faithful reading of *Strickland* in the guilty plea context required consideration of whether Sherwood had shown a reasonable probability of a different outcome. *See Hill*, 474 U.S. at 57 (*Strickland* standard applies to ineffective assistance of counsel claims arising out of the plea process). Under, *Strickland* and *Hill*, Sherwood can show that, absent counsel's failures, he would not have pled guilty, but instead would have proceeded with his trial.

This Court should grant certiorari because the Ninth Circuit applied *Strickland*'s prejudice prong in way that conflicts with this Court's precedent.

A. The Ninth Circuit's prejudice analysis conflicts with this Court's decisions in *Strickland* and *Hill*.

To establish *Strickland* prejudice, the ultimate question is whether there is "a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. On a claim that counsel was ineffective for failing to move for a competency hearing, Ninth Circuit case law requires "a reasonable probability that the defendant would have been found incompetent." *Dixon v. Ryan*, 932 F.3d 798 (9th Cir. 2019), *citing Hibbler v. Benedetti*, 693 F.3d 1140, 1149-50 (9th Cir. 2012); *see also Stanley v. Cullen*, 633 F.3d 852, 862 (9th Cir. 2011) (applying the same standard).[10]

However, in the guilty plea context, this Court has held that a petitioner satisfies *Strickland's* prejudice prong if he can show a reasonable probability that but for his counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 58-59. "Reasonable probability" is "a probability sufficient to undermine confidence in the

[10] Due process prohibits prosecuting a criminal defendant who is not competent to stand trial. *Pate v. Robinson*, 383 U.S. 375,378 (1966). Under this Court's law, a defendant is considered incompetent if he "lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975); *see also Dusky v. United States*, 362 U.S. 402 (1960) (establishing the standard for competence to stand trial as whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understand" and has a "rational as well as factual understanding of the proceedings against him"). A defendant must be competent under the *Dusky* standard before he can plead guilty. *Godinez v. Moran*, 509 U.S. 389, 398-99 (1992).

outcome," but does not require showing that counsel's unreasonable performance more likely than not altered the outcome in the case. *Coleman v. Mitchell*, 268 F.3d 417, 432-34, (6th Cir. 2001), citing *Strickland*, 466 U.S. at 693-94; *Evans v. Lewis*, 855 F.2d 631, 636 (9th Cir. 1988).

In the court below, Sherwood argued that he satisfied *Strickland* in two ways: First, he argued that he had satisfied the Ninth Circuit's test by showing a reasonable probability that he would have been found incompetent. Second, he argued that he satisfied *Strickland*'s prejudice test by showing there was a reasonable probability that he would not have pled guilty absent counsel's failures.

However, the Ninth Circuit addressed the prejudice question only with respect to Sherwood's first argument, and concluded that, although he "indeed had some mental-health issues" he retained the capacity to make a rational choice to plead guilty and thus had not shown a reasonable probability that he would have been found incompetent. (App.1-3-4 (citations omitted).) The Ninth Circuit's prejudice test, however, asks the wrong fundamental question, which should be whether Sherwood has shown a reasonable probability of a different result. This standard is dictated both by *Strickland*, as well as by *Hill*.

The Ninth Circuit itself has previously acknowledged the interplay between *Hill* and *Strickland* in the context of guilty pleas. *Hibbler*, 693 F.3d

at 1150 ("In the context of a collateral attack on a guilty plea, *Strickland*'s prejudice prong requires that the petitioner show that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" (citation omitted).) The Ninth Circuit applied this standard in another case, *United States v. Howard*, 381 F.3d 873, 882-83 (9th Cir. 2004), finding that a petitioner could establish *Strickland* prejudice by showing that he would have not have entered a plea and would have taken his case to trial if his counsel had not permitted him to plead while incompetent.

However, in Sherwood's case, the Ninth Circuit diverged from this Court's precedent. While the inquiry into whether Sherwood would have been found incompetent to stand trial absent his counsel's failures is *one* consideration in a claim of ineffective assistance of counsel for failure to investigate and declare a doubt as to competency, it is not the only benchmark for establishing *Strickland* prejudice, particularly in a claim like Sherwood's, which concerns ineffective assistance in the context of a guilty plea.

B. Sherwood can demonstrate prejudice under the appropriate analysis.

Under the appropriate *Hill* standard, Sherwood, who suffered from severe mental illness at the time of his trial and plea, can show that he would not have pled guilty mid-trial but for his counsel's ineffectiveness.

Sherwood's behavior and the circumstances of his trial were highly unusual. The trial judge acknowledged that he had never before seen a client plead guilty to all the charges against him in the middle of a trial without the benefit of a plea bargain. (App. 18-242.) Sherwood's decision was irrational, and the result of his mental illness. Sherwood's mid-trial plea exposed him to a sentence of life without parole before a judge who described himself as "the hammer" when the evidence at trial was unrebutted that he was not the shooter and not present when Allison was shot. (App. 17- 211, 213-14; App. 18-242, 227, 233.) He had nothing to gain by that decision, and everything to lose. *See Drope*, 420 U.S. at 180 (finding evidence of irrational behavior relevant to determination of incompetency). Yet, after Sherwood expressed a desire to plead, his counsel simply acquiesced, without stopping to investigate whether Sherwood's abrupt decision was the product of his mental illness. As discussed above, the Ninth Circuit already found Belter deficient in failing to investigate Sherwood's mental illness. Further, as the Ninth Circuit acknowledged, had Belter investigated, he would have discovered that

Sherwood suffered from acute symptoms of mental illness. Sherwood also had not taken his psychotropic medications the day of his plea. (App. 14-102-103, 104.) Considering Sherwood's vulnerabilities and Belter's complete failure to recognize his client's impairments, Belter's deficient performance surely "affected the outcome of the plea process." *Hill*, 474 U.S. at 58-59.

Further, even if counsel had declared doubt as to Sherwood's competency to plead mid-trial and Sherwood was ultimately found competent, it is reasonably probable that the pause in proceedings, long enough to ensure Sherwood was receiving adequate medication, would have been enough to change Sherwood's mind about pleading guilty. This is evident from the numerous letters that Sherwood wrote to the trial judge immediately after his plea, begging to be allowed to withdraw his irrational plea or obtain other methods of relief. (App. 14-98-113: App. 16-331-32.) Instead, these pleas went unheeded; in fact, Sherwood's unequivocal requests to replace counsel and "pull" his plea were ignored.

In short, if Belter had adequately investigated Sherwood's background, symptoms, and impairments, not only could he have declared doubt as to competence, but there is also a reasonable probability that Sherwood would not have entered his guilty plea mid-trial and would have proceeded with his trial. Either way, Belter's deficient performance resulted in a disastrous consequence for Sherwood, who is serving the rest of his life in prison with no

possibility of parole because his counsel allowed him to enter a dramatic mid-trial plea without investigating obvious signs of severe mental illness. Limiting the prejudice analysis to whether it is reasonably probable Sherwood would have been found incompetent ignores this reality and is contrary to this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the case should be summarily reversed so that the Ninth Circuit may correctly analyze the prejudice prong of Sherwood's ineffective claim under *Strickland* and *Hill*.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: January 21, 2022

By:_____
LAUREN COLLINS*
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*

No. _____

IN THE

Supreme Court of the United States

Robin Lee Sherwood,

Petitioner,

v.

GEORGE A. NEOTTI,

Respondent.

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

CERTIFICATE PURSUANT TO RULE 33

Pursuant to Rule 33.2, I hereby certify that this petition is less than 40 pages, and therefore complies with the page limit set out in Rule 33. This brief was prepared in 13-point Century Schoolbook font.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: January 21, 2022

By:_____
LAUREN COLLINS*
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*