No. _____

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

TEDDY BRIAN SANCHEZ,
Petitioner,

v.

RON BROOMFIELD,
Warden of San Quentin State Prison,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner, Teddy Brian Sanchez, was convicted as a secondary participant in three murders and sentenced to death for his role in two of them. This petition concerns the Ninth Circuit's denial of three claims of attorney error at the penalty phase of Petitioner's trial.

The first of Petitioner's two questions involves a conflict with this Court's jurisprudence because the Ninth Circuit severely circumscribed the ambit of a capital trial attorney's duties. *See* Supreme Court Rule 10(c). Petitioner's second question gives this Court an opportunity to address a long-standing circuit split. *See* Supreme Court Rule 10(a).

The following questions are presented for review:

1. Did the Ninth Circuit err when it found that Petitioner's "organic" brain dysfunction was not enough of a red flag to trigger a duty for trial counsel to investigate it for use at the penalty phase of Petitioner's capital trial?

2. Must the errors of counsel at the penalty phase of a capital trial be assessed cumulatively for the purpose of establishing prejudice, and if so, should the Ninth Circuit have issued a certificate of appealability on Petitioner's claim of cumulative error?

PARTIES TO THE CASE

All parties are listed in the caption.

LIST OF ALL PROCEEDINGS

People v. Sanchez,
No. 34638, Kern County (California) Superior Court, judgment entered October 31, 1988.

People v. Sanchez,
No. S007780, California Supreme Court, opinion issued December 14, 1995.

Sanchez v. California,
No. 95-9037, this Court, certiorari denied October 7, 1996.

In re Sanchez,
No. S049502, California Supreme Court, order issued October 22, 1997.

Sanchez v. Chappell,
No. 1:97-cv-06134-AWI-SAB, United States District Court, E.D. Cal., judgment entered July 23, 2015.

Sanchez v. Davis,
No. 16-99005, United States Court of Appeals for the Ninth Circuit Court, opinion and modified memorandum opinion issued on April 22, 2021 and February 10, 2022, respectively.

In re Sanchez,
No. HC016214A, Kern County (California) Superior Court, pending.

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Petitioner Teddy Brian Sanchez respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the denial of his petition for writ of habeas corpus.

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. App. 1-43) is reported at 994 F.3d 1129. The Order on Rehearing and Amended Memorandum Opinion (Pet. App. 44-50) is unreported but can be found at 2022 WL 413953. The opinion of the district court (Pet. App. 51-263) is unreported but can be found at 2015 WL 4496379. The opinion of the California Supreme Court on habeas review (Pet. App. 264) is unreported. The opinion of the California Supreme Court on direct appeal (Pet. App. 265-318) is reported at 12 Cal. 4th 1.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals filed its published opinion and a concurrent unpublished memorandum opinion on April 22, 2021. Pet. App. 1, 44. A timely petition for rehearing and rehearing *en banc* was

denied on February 10, 2022. Pet. App. 44.[1] Upon request, Justice Kagan then extended the time to file this petition until July 10, 2022. *See* No. 21A676, docket (May 3, 2022). This petition is being filed on the first court day after July 10. Supreme Court Rule 30(1).

The district court had jurisdiction pursuant to 28 U.S.C. § 2241. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> 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 defense.

28 U.S.C. § 2254(d) provides:

> (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

[1] The court also modified its memorandum opinion at this time.

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

A. Introduction

In 1987, Teddy Sanchez, Robert Reyes and Joey Bocanegra were charged in Kern County, California with robbery and first-degree murders of Joey's parents, Juan and Juanita Bocanegra and allegations of robbery-murder and multiple-murder special circumstances. CT III: 621-25, 628-29, 970.[2] Sanchez and Reyes also were charged with robbery and first-degree murder of William Tatman and an allegation of the robbery-murder special circumstance. CT III: 621-25, 628. On the prosecution's motion, the trial court dismissed the charges against Joey Bocanegra. ER-II: 466-68.

Sanchez was tried before Reyes. He waived his rights to a jury trial and to confront and cross-examine witnesses for the guilt and

[2] Citations, herein, are to the trial record (CT or RT) or the Ninth Circuit excerpts of record (ER).

special circumstances phases, and agreed to submit the determination of the charges to the trial court on the basis of the preliminary hearing transcripts and additional evidence presented by the prosecution. ER-I: 234-36; CT VI: 892. The state's theory of the case was that Sanchez abetted Joey Bocanegra in the killing of his parents and that Sanchez participated with Reyes in the robbery of Tatman but not in his murder.

Both of the Bocanegras died as a result of massive hemorrhaging due to multiple stab wounds to their bodies, more likely than not inflicted by one person with a single instrument. CT-I: 117, 119, 129-31. Each also had scalp wounds, also which appeared to have been made by a single instrument such as a metal bar. CT-I: 115-6, 118-19, 132. Tatman was killed by "massive blunt force injury to the left chest" which collapsed his left lung and caused an abundant hemorrhage. CT-I: 106, 109. Tatman also sustained several superficial stab wounds to the chest and lower abdomen. CT-I: 106, 109-10, 134-35.[3]

The trial judge found Sanchez guilty of first-degree murder of both Bocanegras, found true the multiple-murder special circumstance and

[3] The California Supreme Court's direct appeal opinion contains a more detailed description of the facts of the trial's entire guilt phase. Pet. App. 274-77.

found true the allegations that Sanchez used a dangerous and deadly weapon, a metal bar, in the murders of Juan and Juanita Bocanegra. CT-VI: 906. The court found Sanchez not guilty of robbery of the Bocanegras and found not-true the robbery-murder special circumstance. *Id*. This necessarily means that the court found that Joey Bocanegra was the actual killer not Sanchez. It also means that any intent to take the property of the Bocanegras by Sanchez arose after the killings, which means the murders were not planned ahead of time.

The court also found Sanchez guilty of robbery and first-degree felony murder of Tatman, but found not-true the robbery-murder special circumstance. CT-VI: 906; RT-I: 235. This means that, while Sanchez had an intent to rob Mr. Tatman, he did not possess an intent to kill, which means that Reyes's killing of Tatman was also not planned ahead of time.

The penalty phase was tried to a jury. CT-VI: 908.

In aggravation of punishment, the prosecution presented the jury with the facts of the crime. *See*, *e.g.*, RT-XI: 2842-44. Additionally, a Detective Boggs testified that Sanchez told him that after removing Tatman's possessions, they "kicked back, drank some whiskey, smoked

some dope, ate some food and just relaxed for the rest of the evening." RT-X: 2663-64. The prosecution also presented evidence that in 1982 Sanchez committed two stabbings. RT-XI: 2864-66, 2868-71. Sanchez served almost two years in prison for these crimes before being paroled about a month before the Tatman and Bocanegra murders. RT-XI: 2877-79; CT-IV: 963.

In mitigation of punishment, Sanchez presented testimony by three relatives, one friend and a social anthropologist to establish that Sanchez had a chaotic and poverty-stricken upbringing in a completely dysfunctional family. Sanchez's mother and stepfather were alcoholics and drug abusers who were violent with each other and the children. RT-XI: 2899, 2900, 2903, 2906, 2908, 2919, 2947, 2955, 2975, 2982, 2995. The family often was transient, at times living in their car or cheap motels. RT-XI: 2963-67, 2978-79, 2908, 2981-82. Sanchez tried to take care of his siblings, who routinely had little or no food. RT-XI: 2906, 2914, 2920-21, 2984-85. When there was no money, he stole food from stores to feed them. RT-XI: 2920. Like his mother and stepfather, he turned to drugs to escape his difficult life. RT-XI: 2993, 2998-99.

Sanchez dropped out of school after the 8th grade, and at the time of trial, he was barely literate. RT-XI: 3003-04.

The jury returned a verdict of death. CT-V: 1092. The court then followed the jury's recommendation and sentenced Sanchez to death on the capital Bocanegra murders and to a prison term of 25 years to life on the non-capital Tatman murder. CT-V: 1103.

After Sanchez's trial, Reyes resolved his case. He entered guilty pleas to the first-degree murders of the three victims without special circumstances in exchange parolable terms of 25 years to life. ER-II: 454-65. If a trial had occurred, the prosecution would have argued that Reyes was the one wielding the metal bar at the Bocanegra home instead of Sanchez. *See* ER-V: 1110. Two jailhouse informants had given the prosecution differing stories about who was in this role as Joey Bocanegra's principal accomplice. *See* ER-V: 1078-86. Joey was never tried for instigating the killing of his parents.

On direct appeal, when a justice of the California Supreme Court asked the Deputy Attorney General about the disparity between the actual killer, Joey Bocanegra, going free while Sanchez, as an aider and

abettor, was sentenced to death, the State's lawyer responded, "[S]ometimes justice may not be fair." ER-II: 298.

B. Ineffective Assistance at the Penalty Phase of the Trial

This Petition involves three claims of ineffective assistance of counsel at the penalty phase of Sanchez's trial. The first involves counsel's failure to investigate and present evidence of Sanchez's organic brain dysfunction. The second involves counsel's failure to have stricken the testimony of Detective Boggs who falsely attributed to Sanchez the "kicked back" statement detailed above. The last involves the cumulative effect of both errors.

C. The Brain Damage Claim

Prior to the trial, the trial judge ordered a competency evaluation, which was done by Dr. F.A. Matychowiak. ER-V: 1072-78. Dr. Matychowiak found Sanchez competent. ER-V: 1077. He further found that Sanchez had "no insight and poor general judgment" and that he was "the product of a regrettable, unstable and primitive life." *Id*. He also found Sanchez had a borderline personality. *Id*.

Defense counsel also retained a mental health professional, psychologist Theodore Donaldson, Ph.D., to assess Sanchez's

competence to stand trial as well as a possible insanity defense and whether Sanchez was developmentally disabled. ER-IV: 913. Dr. Donaldson found none of these. ER-IV: 695-696. He did, however, find that Sanchez suffered from "rather severe perceptual motor disturbance . . . undoubtedly due to his lifelong use of drugs and paint sniffing." ER-IV: 696. He also found "indications of organic difficulties in perceptual motor integration" and "serious deficits in both auditory and visual memory." ER-IV: 695. Lastly, Dr. Donaldson found that Sanchez was a "highly sociopathic individual." *Id.*

No mental health professional testified at either phase of the trial.

In state post-conviction, both defense counsel were asked why they did follow up on the evidence of organic brain dysfunction from Dr. Donaldson's report for use at the penalty phase. Lead counsel averred that it was not his responsibility because he was only in charge of the guilt phase of the trial. ER-IV: 913. Second chair counsel did not know why he failed to follow up, but he had no tactical reason for not doing so. ER-IV: 776. Second chair counsel also stated that at the time he was aware that "organic brain damage is good mitigating evidence." *Id.*

Dr. Donaldson was also asked if defense counsel had followed up with him. He said that he could not remember if they did, but he stated that if they had he certainly would have recommended that they hire a neuropsychologist to investigate Sanchez's organic deficits. ER-IV: 712. Dr. Donaldson himself was not qualified to do a neuropsychological exam. *Id*.

Neuropsychological testing was eventually done in state post-conviction. Neuropsychologist Karen Froming, Ph.D. determined that Sanchez suffered, and at the time of the crimes probably suffered, from severe, diffuse organic brain deficits, ER-IV: 796-97, 800, and specific, localized brain dysfunction, including frontal lobe, executive function deficits, and other significant deficits, ER-IV: 803-812. Dr. Froming tested Sanchez with the "oldest and most widely used and respected test for assessing, and generating hypotheses regarding, brain dysfunction and impairments." ER-IV: 799. His impairment index was 1.0. ER-IV: 800. That is the highest impairment index one can achieve on the battery of tests, and is double the index indicating the presence of impairments. *Id*. Of the seven indicators of organic impairments in

the battery, "all seven critical indicators of organic brain damage fell in the impaired range" for Sanchez. ER-IV: 800-03.

Dr. Froming tied Sanchez's impairments to his likely mental state during the murders:

> In a situation such as occurred at the time of the Bocanegra killings, Mr. Sanchez's deficits in nonverbal memory most likely would compromise his ability to accurately perceive and appreciate what was going on. Given such a situation, requiring both perceiving and reacting to the spatial relationships and rapid movements of four other people involved in a violent, stressful, and highly emotionally-charged situation, Mr. Sanchez's general inability to accurately perceive and appreciate events around him would be intensified. * * * Mr. Sanchez's frontal lobe deficits substantially impaired his ability at the time of the Bocanegra killings to plan ahead, assess the consequences of his actions, or carry out a preconceived design. * * * Due to his neurocognitive deficits, when Mr. Sanchez saw the fight erupt between Joey and Juan Bocanegra and saw Joey stab Juan, he almost certainly would not have been able to act with a cold, calculated judgment resulting from careful thought and weighing of considerations.

ER-IV: 820-21.

Psychiatrist David Foster, M.D. also examined Sanchez for the state post-conviction action. He determined that Sanchez suffered, at the time of the crimes probably suffered, from psychiatric disorders as a result of chronic and severe childhood and adolescent trauma. These included Post-Traumatic Stress Disorder, a probable dissociative

disorder, depression and a history of severe substance abuse. ER-IV: 723-41, 758-59. Dr. Foster concluded that due to his organic brain damage and Post-Traumatic Stress Disorder, Sanchez likely experienced an automatic, non-volitional traumatic stress reaction "when a fight, first verbal and then physical, unexpectedly erupted between father and son, and quickly escalated to Joey stabbing his father." ER-IV: 746-47. Sanchez's actions were "inconsistent with an action taken after careful thought, weighing of considerations, or reflection." ER-IV: 747.

Based on the above facts, Sanchez made a claim in state post-conviction that defense counsel were ineffective at the penalty phase of the trial for not pursuing his organic brain damage. ER-III: 576-583. The California Supreme Court denied the claim in an unexplained decision. Pet. App. 264. In federal habeas, the district court also denied the claim, Pet. App. 199, and did not issue a COA, Pet. App. 262. The Ninth Circuit issued a COA, Pet. App. 5-6, and affirmed, albeit on different grounds, Pet. App. 28-36.

Here is the Ninth Circuit's legal analysis:

> The California Supreme Court could have reasonably concluded that Toton's and Frank's performance did not fall

below an objective standard of reasonableness when they did not seek neuropsychological testing at the penalty phase. Because we hold that Toton's and Frank's performance was not deficient, we do not reach the prejudice prong of *Strickland*.

Although Dr. Froming's and Dr. Foster's declarations may provide relevant details about Sanchez's possible mental impairments, such details were not available to Toton and Frank. At the penalty phase, Toton and Frank were in possession of Dr. Donaldson's and Dr. Matychowiak's reports. Dr. Donaldson concluded that Sanchez was well adapted to the world in which he lived, was "highly sociopathic," and showed no indications of other significant mental illness. That opinion was consistent with Dr. Matychowiak's opinion, which also diagnosed Sanchez with a personality disorder and no other significant mental impairment. Neither Dr. Matychowiak nor Dr. Donaldson apparently communicated a need for further testing to counsel at the time of the penalty phase. Sanchez asserts that Toton should have hired additional experts. The choice of what type of expert to use, however, is one of trial strategy and deserves "a heavy measure of deference." *Turner v. Calderon*, 281 F.3d 851, 876 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 691) (trial counsel was not ineffective for using a general psychological expert rather than one specialized in the effects of PCP). Counsel is not constitutionally ineffective because, with the benefit of hindsight, other strategies or experts may have been a better choice. *Id.*

Also, having consulted two doctors who did not provide support for the conclusion that Sanchez was mentally impaired in a way that could provide a defense, counsel was under no duty to continue to search in an unending quest to find a supportive expert, especially when if that were done, the views of the first experts would still be discoverable and usable by the prosecution to contradict. *See Burger v. Kemp*,

483 U.S. 776, 794 (1987) ("[C]ounsel's decision not to mount an all-out investigation . . . in search of mitigating circumstances was supported by reasonable professional judgment."); *Preston v. Delo*, 100 F.3d 596, 605 (8th Cir. 1996) ("Counsel can reasonably decide not to present potentially helpful mitigating evidence—including the testimony of mental experts—if such evidence would result in the introduction of damaging evidence."). Even if Dr. Foster and Dr. Froming had been available to testify, and had testified consistent with their declarations, the prosecution could have cross-examined them by introducing Dr. Donaldson's report, which found no severe mental illness or cognitive impairment and concluded that Sanchez was a "highly sociopathic individual." Toton and Frank could have reasonably opted to avoid further exploration of that diagnostic "basket of cobras," potentially uncovering more evidence harmful to the defense. *Gerlaugh*, 129 F.3d at 1035 (noting the "obvious countervailing tactical dangers" of evidence regarding antisocial personality disorder and holding that trial counsel was not ineffective for failing to develop possibly dual-edged psychological evidence).

Dr. Donaldson states that he was not in possession of all the reports, records, and other information that was available. But an attorney is not responsible for gathering background material that might be helpful to an expert evaluating his client in the absence of a specific request for that information. *Turner*, 281 F.3d at 876 (citing *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995)). To impose such a duty would "defeat the whole aim of having experts participate in the investigation." *Turner*, 281 F.3d at 876–77 (quoting *Hendricks*, 70 F.3d at 1038).

Toton and Frank possessed two expert reports that came to similar conclusions, neither of which was helpful to the defense. Both opined that Sanchez suffered from a personality disorder and did not display evidence of serious brain dysfunction. There is no indication that Dr. Donaldson

> advised Toton or Frank that they would need to hire additional experts or run further tests.
>
> We hold that Toton and Frank did not render deficient performance when they did not raise Sanchez's mental impairments as mitigating evidence.

Pet. App. 34-36.

D. Alleged Lack of Remorse Claim

As detailed above, Detective Boggs testified at the penalty phase that after Tatman was killed Sanchez said "they returned to their own room and, just, again, in his own words, kicked back, drank some whiskey smoked some dope, ate some food and just relaxed for the rest of the evening." ER-VI: 1347-48; ER-I: 232. Sanchez, however, did not say this. Reyes did, as Boggs correctly testified at the preliminary hearing. ER-VI: 1200; ER-III: 594.

In post-conviction, both counsel declared they were not aware at the time of the false testimony. ER-IV: 778, 923. However, the lead counsel was present at the preliminary hearing, where he heard both Boggs's correct testimony attributing the statement to Reyes, ER-VI: 1200, and the court sustain his objection to its admissibility against Sanchez, ER-VI: 1199. *See People v. Anderson*, 43 Cal.3d 1104, 1118-21 (1987) (a non-testifying codefendant's extrajudicial self-incriminating

statement which inculpates another defendant is generally unreliable and inadmissible). Nor could counsel have been legitimately surprised by Boggs's incorrect penalty-phase testimony. The prosecutor highlighted it in her opening statement. ER-VI: 1340. The prosecutor also trumpeted the testimony in her closing argument:

> And did he show any remorse for his actions, was he sorry? What evidence do we have of that?
>
> Well, we have the evidence that when they got back to the room, after they had killed him and left him on the floor, they cooked up his food and kicked back. Is that a sign of a man who is sorry because there's a man two doors down laying dead on the floor?

ER-VI: 1360.

The prosecutor pressed hard on Sanchez's purported remorselessness for good reason. "In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring); *see also Brown v. Payton*, 544 U.S. 133, 142-143 (2005). Conversely, a lack of remorse, which equates with future dangerousness, *see Estelle v. Smith*, 451 U.S. 454, 464 (1981), aggravates a defendant's culpability and jeopardizes his chance for a life-without-parole sentence. *See*

Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 Colum. L. Rev. at, 1539, 1560-61 (finding that jurors "show little mercy to defendants who show no remorse.").

Petitioner had brought this claim in state post-conviction as a part of a larger claim involving Sanchez's remorse. ER-III: 570-575. The California Supreme Court denied it in an unexplained order. Pet. App. 264. On federal habeas, the district court also denied it, Pet. App. 191, and did not issue a COA, Pet. App. 262. The Ninth Circuit issued a COA, Pet. App. 46, and then on different grounds affirmed:

> Although Detective Boggs erroneously attributed an incriminating statement by Reyes to Sanchez, Sanchez could not show prejudice. Alleged juror statements suggested that Sanchez's demeanor at trial had a significant impact on their belief that Sanchez showed no remorse.

Pet. App. 50 (citation omitted). The opinion indicates that the Ninth Circuit found that trial counsel performed ineffectively, though there was insufficient prejudice from the error. *Id.*

E. Cumulative Ineffectiveness Claim

In state post-conviction, Sanchez asserted a claim of cumulative ineffective assistance of his counsel at the penalty phase. ER-III: 584-87. It was summarily denied by the California Supreme Court. Pet.

App. 264. The district court also denied the claim, finding no individual claim satisfied § 2254(d), so it found no cumulative error. Pet. App. 209-10. The district court did not grant a COA. Pet. App. 262. The Ninth Circuit also did not grant a COA, although it granted COAs on all of Petitioner's individual ineffective assistance claims. *See* Pet. App. 46.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Decision Flouts This Court's Jurisprudence and Turns Attorneys Into Automatons Who Have No Need To Think For Themselves

Under this Court's jurisprudence, Petitioner's damaged brain claim should have been simple to decide correctly. The Ninth Circuit's approach, however, tied trial counsel and their expert together in such a way to limit counsel's duty to think independently. The court also dreamed up a strategic reason that trial counsel did not proffer and that was counter-factual.

First, though, because this is a case under AEDPA, it must be noted that when a state court denies a claim without a reasoned decision, §2254(d) requires a federal habeas court to "focus[] on what a state court knew and did." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). An understanding of state law is essential to understand what

the state court did here. *See Brumfield v. Cain*, 576 U.S. 305, 320-21 (2015) (under §2254(d), a court looks to state law requirements for an evidentiary hearing in reviewing a denial of federal constitutional claim without a hearing). Under California law, a habeas petition should allege with particularity the facts on which relief is sought and include reasonably available documents, such as transcripts and declarations, supporting the claim. *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). A court presented with a verified state habeas petition must (1) "assum[e] the petitioner's factual allegations are true" unless they are "wholly conclusory" and (2) based on those facts, determine whether the habeas petitioner has pled a prima facie case for relief. *Id*. at 474-75. Here, the California Supreme Court did not find that Petitioner's allegations were conclusory. *See Curiel v. Miller*, 830 F.3d 864, 869 (9th Cir. 2016) (en banc)(explaining California Supreme Court's summary denial citations that indicate a claim has not been alleged with sufficient particularity). Thus, the question is whether Petitioner's facts, as pled, entitled him to relief. If so, Petitioner was entitled to an evidentiary hearing on any facts still disputed after briefing. *Duvall*, 9 Cal. 4th at 474-78.

Here, in state court Petitioner pled a complete federal constitutional claim under *Strickland v. Washington*, 466 U.S. 668 (1984). Dr. Donaldson's report identified, without qualification, that Petitioner had organic dysfunction in his brain. Second chair trial counsel, who was in charge of the penalty phase, knew that such evidence was good mitigation evidence, yet he did not investigate it. He also stated that there was no strategic reason for not doing so. He did not even follow up with Dr. Donaldson, who says that, if asked, he likely would have recommended neurological testing. Lastly, the results of the testing done in post-conviction show the prejudice. Not only is Sanchez significantly impaired, but his brain damage has a nexus with why the offense occurred.

This Court's case of *Rompilla v. Beard*, 545 U.S. 374 (2005) is instructive. There, trial counsel missed "red flags" that indicated a need for further testing. *Id*. at 392. Those red flags ultimately led to a diagnosis of "organic brain damage." *Id*. Here, counsel's failure is more pronounced. The red flags in Dr. Donaldson's report already indicated that Petitioner had organic dysfunction.

The importance of exploring this avenue of mitigation is obvious. Mental disabilities reduce a defendant's moral culpability. *See California v. Brown*, 479 U.S. 538, 545 (1987) (discussing "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."). In sum, counsel failed in their "obligation to conduct a thorough investigation of the defendant's background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed.1980)).

The Ninth Circuit's decision, at its heart, is a dilution of an attorney's obligation. The court assumed that counsel has an understanding of the unhelpful aspects of Dr. Donaldson's report. However, the court does not similarly assume that counsel can read the helpful portion of it. The Ninth Circuit imbued Sanchez's attorneys with an understanding of "sociopathic personality" but at the same time made them ignorant of the value of "organic difficulties in perceptual motor integration." This is wrongheaded. Attorneys, while not being full-fledged mental health experts, have the duty to get a base

understanding of the field if the case requires it. Here, trial counsel should have known that they had something tangible to investigate for mitigation purposes. They should have been following up with Dr. Donaldson and other experts, not waiting around for Dr. Donaldson to follow up with them.

The Ninth Circuit also makes two factual errors.

First, it is incorrect to equate the borderline personality disorder found by Dr. Matychowiak with the sociopathic personality found by Dr. Donaldson. Any attorney wanting to know the difference could find a ready answer with a quick consult of the pertinent literature. While both disorders are characterized by impulsivity and instability, the main difference is that a sociopath is unempathetic and does not take responsibility for his actions. *The Diagnostic and Statistical Manual of Mental Disorders*, (3d. Rev. Ed. 1987) pp. 342-347. This is an important difference for a jury that would be looking for remorse from Sanchez. *Estelle*, 451 U.S. at 464.

The second factual error made by the court was its finding that Dr. Donaldson's report was discoverable (and thus was a tactical reason to not investigate mental health any further). Unlike Dr. Matychowiak,

who was retained by the trial court, Dr. Donaldson was retained by defense counsel. As such the work-product doctrine applies to his report. *People v. Collie*, 30 Cal. 3d 43, 59 (1981). His report was not discoverable unless defense counsel intended to call him as a witness. Given his finding of sociopathic personality disorder, there is no reason he should ever have been called. Dr. Matychowiak, by contrast, would not have been a damaging witness. Indeed, his report is very sympathetic to Sanchez's upbringing and circumstances. Moreover, because he was not an expert in neuropsychology, the fact that he did not discover Sanchez's organic disorder would not be surprising to the jury, assuming the prosecution took the risk of calling such a compassionate witness.

To conclude, this Court should grant the first question presented in this writ because the Ninth Circuit's decision drastically reduces a capital attorney's intellectual ambit in conflict with this Court's precedents. An attorney doesn't need an expert to tell her that "organic" brain damage needs investigation.

B. This Case Allows for Resolution of A Longstanding Circuit Split

If this Court agrees that the Ninth Circuit erred on the just discussed claim, then there are now two claims where trial counsels' deficiencies have been found, given that the Ninth Circuit previously found counsel deficient in not objecting to the detective's false testimony. As such, the Ninth Circuit should have issued a COA on Petitioner's claim of cumulative ineffective assistance at the penalty phase of a capital trial.

However, for this Court to correct the Ninth Circuit's failure to issue a COA, this Court must first find that cumulative ineffective assistance is clearly established law as contemplated by 28 U.S.C. § 2254(d). *See White v. Woodall*, 572 U.S. 415, 419-20 (2014). Habeas relief is not available otherwise. *Id*. Deciding this question will resolve a long-standing circuit split.

Most circuit courts have found that cumulative ineffective assistance has already been established by this Court. *Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005) ("*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced.") (citation omitted); *Lindstadt v.*

Keane, 239 F.3d 191, 199 (2d Cir. 2001) ("We need not decide whether one or another or less than all of these four errors would suffice, because *Strickland* directs us to 'look at the totality of the evidence before the judge or jury.'") (citation omitted); *McNeil v. Cuyler*, 782 F.2d 443, 451 (3d Cir. 1986) ("reviewing the cumulative effect of these actions and omissions"); *Richards v. Quarterman*, 566 F.3d 553, 571–72 (5th Cir. 2009) ("review of the record and consider[ation of] the cumulative effect of [counsel's] inadequate performance"); *Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006) ("[T]his Court examines the combined effect of all acts of counsel found to be constitutionally deficient, in light of the totality of the evidence in the case."); *Sussman v. Jenkins*, 636 F.3d 329, 360–61 (7th Cir. 2011) (considering "the cumulative impact" of the errors); *Sanders v. Ryder*, 342 F.3d 991, 1000–01 (9th Cir. 2003) ("Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance.") (citations omitted); *Cargle v. Mullin*, 317 F.3d 1196, 1206–07 (10th Cir. 2003) ("[C]laims should be included in the cumulative-error calculus if they have been individually denied for insufficient prejudice. Indeed, to

deny cumulative-error consideration of claims unless they have first satisfied their individual substantive standards for actionable prejudice would render the cumulative error inquiry meaningless, since it [would] … be predicated only upon individual error already requiring reversal.") (citation and internal quotation marks omitted).

The minority of circuits have found that this Court has not established cumulative ineffective assistance. *Fisher v. Angelone*, 163 F.3d 835, 852, 852 n.9 (4th Cir. 1998) ("[L]egitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient."); *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) ("Errors that are not unconstitutional individually cannot be added together to create a constitutional violation.").

An examination of *Strickland v. Washington* yields that the majority of the circuit courts have decided this question correctly, at least as it pertains to the facts of this case. The holding in *Strickland* was based on whether multiple errors at the penalty phase of a capital trial would have altered the result. 466 U.S. at 675-78, 695. And

"clearly established law" signifies "the holdings, as opposed to the dicta, of this Court's decisions." *Williams*, 529 U.S. at 412.

In conclusion, this Court should grant *certiorari* to the second question presented. It will resolve a long-standing circuit split. It will also allow this Court (or the Ninth Circuit on a remand) to properly decide this important case. Here, a jury sentenced a man to death without knowing about his damaged brain. The jury was also given false information about his lack of remorse. This case is worthy of this Court's attention.

CONCLUSION

Petitioner, for the above reasons, requests that this Court grant his petition for a writ of certiorari.

In the alternative, Petitioner requests that his petition be granted, the opinion and memorandum disposition below be vacated, and the case be remanded to the Ninth Circuit. Full briefing is not necessarily warranted, because the questions before this Court are easily answerable in Petitioner's favor. First, Petitioner's defense attorneys had a clear duty to investigate his "organic" brain injury as mitigation evidence. Second, if counsel's failure in this regard had insufficient

prejudice to reverse Petitioner's sentence, the Ninth Circuit should have issued a certificate of appealability on Petitioner's cumulative error claim, given that the court had already found one other error of counsel.

DATED: July 11, 2022.

Respectfully submitted,

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