No. 22-5109

**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

# REPLY BRIEF

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## INTRODUCTION

Petitioner will answer all of Respondent's arguments that merit a reply. If Petitioner does not address an argument, Petitioner rests on his cert petition.

## ARGUMENT

In *Cullen v. Pinholster*, this Court found that in an unreasoned state habeas denial the California Supreme Court generally accepted all of a petitioner's non-conclusory facts as true after comparing them to the existing record. 563 U.S. 170, 188 fn. 12 (2011). Federal review, then, is akin to the examination of a summary judgment decision. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158–59 (1970).

Here, Petitioner laid out a simple and complete case that his attorneys were ineffective at the penalty phase of his capital trial. Petitioner identified a serious organic mental health issue of which his attorneys were on clear notice because they hired the expert who found the issue. ER-IV: 696 ("rather severe perceptual motor disturbance"); ER-IV: 695 ("indications of organic difficulties in perceptual motor integration" and "serious deficits in both auditory and visual memory"). Petitioner then got a declaration from the attorney responsible for the

penalty phase in which the attorney declared that at the time of the trial he was aware that organic brain dysfunction was mitigating and that he had no strategic reason for failing to investigate it. ER-IV: 776. Lastly, Petitioner did the investigation that his original attorneys should have done and developed further evidence of the mental health issue, including evidence that the issue affected Sanchez's decision-making at the time of the crime. ER-IV: 714-769, 781-829.

The Court of Appeals denied this claim by finding that Sanchez's trial attorneys had not performed deficiently. Pet. App. 28-36. The court rejected that there was a clear mental health issue that trial counsel missed. Pet. App. 31 (evaluation only showed "possible organic disorder"); Pet. App. 34 (evaluation "showed no indications of other significant mental illness"); Pet. App. 36 (Sanchez "did not display evidence of serious brain dysfunction.). The court also found strategic reasons where none existed:

> [H]aving 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.

Pet. App. 35. To all of these conclusions, the circuit court was goaded by Respondent, who feed them a false narrative.

Despite the unqualified language in the report by Dr. Donaldson that states that Sanchez has an organic issue with his brain, *see* above, Respondent has consistently said that Donaldson's report either identifies no malady or engages in a speculative diagnosis. In the Ninth Circuit, for example, Respondent even had the temerity to quote from another case on which Donaldson had worked and pass it off as relevant to the case at bar:

> "[N]ot all competent attorneys would pursue additional expert testing based on Dr. Donaldson's mere suggestion that certain dysfunctions 'may' or 'might' exist."

DE 50 at 23 (Supplemental Brief) (quoting *Cain v. Chappell*, 870 F.3d 1003, 1021 (9th Cir. 2017)). Moreover, in this Court, Respondent repeats this refrain. BIO at 9 (Both experts at the trial level "failed to support a mitigation theory.").

Respondent further argues that trial counsel sufficiently investigated Sanchez's mental health. BIO at 6-8. However, the pre-trial evaluations only addressed possible guilt phase defenses, not mitigation for the penalty phase. ER-IV: 711; ER-V: 1072. Likewise,

Respondent's argument that an expert's recommendation was needed to initiate further investigation into Petitioner's organic disorder, *see* BIO at 7, severely diminishes an attorney's duty to operate with even a modicum of independent intelligence. Attorneys are not robots awaiting programming. The mitigation potential of Donaldson's report should have been obvious to a lay person, let alone a capital defense attorney.

Indeed, trial counsel even acknowledged that he knew an organic disorder was mitigating. ER-IV: 776. He also stated that he had no strategic reason for not pursuing it. *Id.* Respondent argues, though, that the California Supreme Court could have found counsel's admissions to be conclusory. BIO at 8. However, there is nothing conclusory about them. Counsel has made two plain statements of fact wherein he admits his deficiency. The California Supreme Court, by its own rules, should have taken counsel's statement as true. *Pinholster*, 563 U.S. at 188 fn. 12.

Respondent next states that this case is not comparable to *Rompilla v. Beard*, 545 U.S. 375 (2005). BIO at 8-9. Respondent is wrong. Respondent argues that in *Rompilla* trial counsel failed to investigate the obvious. *Id.* However, there is nothing more obvious

than your own expert's report that clearly states that your client has a brain abnormality. Notably, in *Rompilla*, the defendant also had an organic brain issue. 545 U.S. at 392. There, though, the information was buried in a file at the courthouse. *Id.* at 384. Here, by comparison, the information was laying on trial counsel's desk. "No reasonable lawyer would forgo" investigation into such a possibly fruitful issue. 545 U.S. at 388-90.

Respondent also makes much of Donaldson's diagnosis of anti-social personality disorder as a reason unto itself for trial counsel to not further investigate. BIO at 9. However, counsel in *Rompilla* had the same initial diagnosis for their client. *Com. v. Rompilla*, 721 A.2d 786, 790 (Pa. 1998) ("the experts told counsel that Appellant was a sociopath"). Like *Rompilla*, this is not a case where counsel had come to a natural stopping place in their investigation because all leads had been explored. Here, the glaring red flag of a "rather severe" brain issue remained.

Next, there is Ninth Circuit's imagined strategic reason that a presentation of the organic brain dysfunction at the penalty phase would have allowed introduction of Dr. Donaldson's sociopath diagnosis.

*See* Pet. App. 35. This falsehood was feed to the court of appeals by Respondent. DE 50 at 40. Then, in this Court, Respondent doesn't back down from this fiction: "The court of appeals posited that Dr. Donaldson's report could be discoverable in some set of circumstances." BIO at 10. Conspicuously, however, Respondent provides no citation for what these circumstances are. They do not exist.

Moving onto the second question presented, Respondent points out that the court of appeals did not clearly state that it found deficient performance on the Boggs testimony claim. BIO at 11. This is true. However, it is also the only logical way to read the court's opinion. Also, trial counsel not recognizing that the prosecution was attributing a statement to their client that was made by a co-defendant is per se deficiency. This is particularly so when counsel had already objected to such testimony being used against their client at the preliminary hearing. ER-VI: 1200; ER-III: 594.

Respondent lastly says that this case is not a good vehicle for deciding the cumulative error question. BIO at 10-12. However, the lack of analysis by the current Ninth Circuit panel is not a barrier. The Ninth Circuit law on this issue was decided long ago, and so any

current opinion from the court will not come with much discussion. *See Sanders v. Ryder*, 342 F.3d 991, 1000–01 (9th Cir. 2003). Moreover, given the long-standing circuit split, no contemporary opinion coming to this Court from any circuit is likely to come with much analysis.

## CONCLUSION

This Court has a history of overturning habeas decisions when they errantly rule for the defendant. *Cash v. Maxwell*, 132 S. Ct. 611, 616–17 (2012) (Scalia, J. dissenting from denial of cert.). This Court should also spend its resources when the opposite is true. *See Dunn v. Reeves*, 141 S. Ct. 2405, 2420–21 (2021) (Sotomayor, J. dissenting from denial of cert.). After all, the potential sparing of a man's life is surely the equal of the state's potential entitlement to take it. Petitioner, here, only seeks a fair hearing of his claims on the actual facts.

DATED: September 20, 2022.

Respectfully submitted,

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