No. ________

In the

Supreme Court of the United States

RICHARD GALVAN MONTIEL,
Petitioner,

v.

KEVIN CHAPPELL,
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 A WRIT OF CERTIORARI

David A. Senior, Esq.*
**counsel of record*
Ann K. Tria, Esq.
McBREEN & SENIOR
1901 Avenue of the Stars, Suite 450
Los Angeles, California 90067
Telephone: (310) 552-5300
dsenior@mcbreensenior.com

Saor E. Stetler, Esq.
P.O. Box 2189
Mill Valley, California 94942
Telephone: (415) 388-8924

Counsel for Petitioner
RICHARD G. MONTIEL

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

1. Where a capitally sentenced habeas corpus petitioner relies on uncontradicted *Strickland*[1] mitigating evidence and United States District Court findings that he is mentally retarded to establish counsel's deficient investigation and *Strickland* prejudice (i.e., exemption from execution), can a federal court ignore the mitigating evidence under the guise of labeling it an unexhausted *Atkins* claim?

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Ninth Circuit were Richard Galvan Montiel (appellant below), and the Warden of San Quentin State Prison, Kevin Chappell (appellee below).

LIST OF ALL PROCEEDINGS

1. *Montiel v. Chappell*, 43 F.4th 942 (9th Cir. Aug. 5, 2022), Published Opinion, Case No. 15-99000, Doc. 98-1.

2. *Montiel v. Chappell*, Case No. 15-99000 (9th Cir. Oct. 13, 2022), Order Denying Petition for Rehearing and Rehearing En Banc, Doc. 104.

3. *Montiel v. Chappell*, Case No. 15-99000 (9th Cir. Aug. 5, 2022), Unpublished Memorandum, Doc. 99-1.

4. *Montiel v. Chappell*, Case No. 1:96-cv-05412-LJO-SAB (E.D. Cal. Nov. 26, 2014), Memorandum and Order (1) Denying Petition for Writ of Habeas Corpus, and (2) Issuing Certificate of Appealability for Claims 24 and 25; Order Denying Motion for Evidentiary Hearing; Order Terminating Respondent's Motion for Summary Judgment, Doc. 232.

5. *People v. Montiel*, 705 P.2d 1248 (Cal. Oct. 31, 1985), Case No. S004297, Opinion (*Montiel I*).

6. *People v. Montiel*, 855 P.2d 1277 (Cal. Aug. 12, 1993), Case No. S004756, Opinion (*Montiel II*).

7. *Montiel (Richard Galvan) on Habeas Corpus*, Case No. S033108 (Cal. Feb. 21, 1996), Order.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard G. Montiel respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion denying relief on Mr. Montiel's *Strickland* claims is reported at *Montiel v. Chappell*, 43 F.4th 942 (9th Cir. Aug. 5, 2022). Pet. App. 1. The Ninth Circuit's memorandum opinion denying relief on the uncertified claims is not reported. Pet. App. 48. The district court's order denying relief is unreported. Pet. App. 55.

The California Supreme Court's opinion reversing Mr. Montiel's death sentence following his second penalty trial is reported at *People v. Montiel*, 705 P.2d 1248 (Cal. Oct. 31, 1985), (*Montiel I*). Pet. App. 197. The California Supreme Court's opinion affirming Mr. Montiel's sentence of death following his third penalty trial is reported at *People v. Montiel*, 855 P.2d 1277 (Cal. Aug. 12, 1993) (*Montiel II*). Pet. App. 211. The California Supreme Court's order summarily denying his Petition for Writ of Habeas Corpus is unreported. Pet. App. 255.

JURISDICTION

The basis for federal jurisdiction in the district court is 28 U.S.C. § 2254. The court of appeals had jurisdiction based on 28 U.S.C. § 1291. The Ninth Circuit judgment was entered on August 5, 2022. The Ninth Circuit's order denying panel rehearing and rehearing en banc was issued on October 13, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of 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.

This case also involves provisions of the federal habeas corpus statute, 28 U.S.C. § 2254 (d)(1) & (2):

> 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

Forty-four years ago (January, 1979), Petitioner Richard G. Montiel ("Montiel") was charged with a single stab wound homicide in Kern County, California. He also was capitally charged with three special circumstances under California's then newly enacted death penalty statute: robbery-murder, murder for financial gain, and the murder was especially heinous, atrocious or cruel. He was capitally tried three months later in April.

Mr. Montiel was grossly intoxicated from phencyclidine ("PCP") and alcohol when he inflicted the single lethal wound. *People v. Montiel*, 855 P.2d 1277, 1287 (Cal. 1993) (*Montiel II*). His state appointed counsel, Eugene Lorenz, thought Mr. Montiel's diminished capacity was "crucial." ER 611; RT 190.[2] Yet, Lorenz failed to investigate the defense, and later conceded to the trial judge: "it's true that perhaps preparation wise the case could have been better prepared, but I just never really had a chance to do that." ER 607; RT 185.

Mr. Montiel was found guilty. The jury rejected the special circumstance that the murder was especially heinous, atrocious or cruel, but found true the robbery-murder and financial gain special circumstances.

Lorenz neither conducted a social history investigation nor obtained a psychosocial expert evaluation of Mr. Montiel and presented no penalty phase mitigation evidence. A mountain of available mitigation evidence was readily available, including that Mr. Montiel is mentally retarded. *Montiel v. Chappell*, 43

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[2] Citations to "ER" refer to the Excerpts of Record filed in the Ninth Circuit. Citations to "RT" refer to the trial transcript.

F.4th 942, 962, 964-65 (9th Cir. 2022). The jury was hung on whether to sentence Mr. Montiel to death. Zero mitigation evidence was presented, yet no death sentence despite the State's full presentation of its aggravating evidence, including an improper financial gain special circumstance, discussed *infra*.

Mr. Montiel was retried in October on the penalty by a second jury. After two days of deliberations, the second jury announced they were deadlocked and asked to talk to the judge. The judge sent the jurors back for further deliberations; they returned a death verdict 90 minutes later.[3]

On direct appeal to the California Supreme Court, Justice Malcom Lucas, writing for the unanimous court, reversed Mr. Montiel's death sentence. The financial gain special circumstance does not apply here and was inappropriate for jury weighing in aggravation. There were other reversible errors. *People v. Montiel*, 705 P.2d 1248 (Cal. 1985) (*Montiel I*).

Mr. Montiel was retried on the death penalty again in 1986. Numerous trial errors were noted on appeal. *Montiel II*, 855 P.2d at 1285. The judge, district attorney, and defense counsel – all oblivious to *Montiel I* – erroneously applied the financial gain special circumstance against Mr. Montiel *again*. In closing, the

[3] Two years after Mr. Montiel's trial, Lorenz deficiently represented Felipe Sixto, also charged with murder in Kern County, California (and sodomy of his five-year-old victim), by failing to investigate and present a diminished capacity defense predicated upon his gross intoxication from PCP and alcohol. Lorenz's deficient performance (with his same expert Dr. Ronald Linder) was prejudicial to Sixto. The conviction and death sentence were vacated under *Strickland*. Lorenz's ineffective representation was reported to the State Bar for disciplinary action. *In re Sixto*, 774 P.2d 164 (Cal. 1989).

prosecutor exhorted the jury to "count them up," referring to the two – not one – special circumstances to be weighed as aggravating evidence.

The jury deliberated for as long as the length of the entire trial. Throughout the deliberations, the jury returned to ask several questions about instructions, the aggravating evidence, reasonable doubt, and how the penalty should be determined; they eventually were given a copy of the instructions; and they also asked to rehear testimony. ER 379, RT 772, 782-83 (Nov. 6-7, 1986). Following three days of deliberations and five ballots, Mr. Montiel was sentenced to death.[4]

Virtually all of the factors judicially recognized as rendering an error harmful have coalesced in the present case: the first jury was unable to reach a verdict,[5] the jury deliberations (three days) were protracted compared to the length of the trial (approximately three days),[6] there were mid-deliberation requests for a re-reading

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[4] The State appointed Robert Birchfield as counsel for Mr. Montiel's third trial. Birchfield was admitted to practice in 1979 and resigned from the bar in 1990 "with charges pending." http://members.calbar.ca.gov/fal/Member/Detail/90759 (last visited Dec. 7, 2022). Birchfield's career was punctuated by a Public Reproval by the State Bar, received on the eve of his assignment to represent Mr. Montiel for, *inter alia*, willfully failing and refusing to use reasonable diligence and his best judgment in representing his client. *Id.*; ER 521, *In the Matter of Robert E. Birchfield*, 84-0-00403, Stip. Facts and Discipline Pursuant to Rules 405-408, State Bar R. Proc., July 10, 1985, at 3. Birchfield "wilfully committed acts involving moral turpitude, dishonesty, or corruption . . ." *Id.*

On the heels of his Public Reproval, Birchfield's performance here earned him a public reprimand from the California Supreme Court. His resignation from the bar flowed from, *inter alia*, his felony convictions for forging judges' signatures. ER 361. Jail ultimately prevented further damage to the justice system by Birchfield.

[5] *See United States v. Paguio*, 114 F.3d 928, 935 (9th Cir. 1997) (noting that hung jury at the first trial "persuades us that the case was close").

[6] *See Jennings v. Woodford*, 290 F.3d 1006, 1019 (9th Cir. 2002) (holding guilt phase jury's deliberations for two full days demonstrated prejudice of trial counsel's failure to investigate mental state defense to capital murder charge); *United States v. Varoudakis*, 233 F.3d 113, 126 (1st Cir. 2000) (noting lengthy deliberations "weigh against a finding of

of testimony,[7] and counsel's omissions provided not merely an incomplete picture for the jury, but one that was inaccurate and affirmatively false and misleading as well.[8]

On direct appeal, the California Supreme Court found the universal disregard for *Montiel I* to be "serious and deeply troubling," reprimanded the judge, the prosecutor, and Mr. Montiel's counsel, and then upheld the death sentence. *Montiel II*, 855 P.2d at 1304. Justice Mosk dissented on the grounds that the trial was tainted by prosecutorial misconduct and pervasive and serious deficiencies by defense counsel unrelated to prosecutorial misconduct.

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harmless error" because "such deliberations suggest a difficult case"); *Davis v. Lane*, 814 F.2d 397, 401 (7th Cir. 1987) (opining that lengthy deliberations over course of three days rendered error prejudicial); *United States v. Nyman*, 649 F.2d 208, 212 (4th Cir. 1980) (finding jury's deliberations of five hours was one factor militating toward finding case was close).

[7] *See United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985) (finding jury requested doctors' reports during deliberations rendered error harmful); *United States v. Blueford*, 312 F.3d 962, 976 (9th Cir. 2002) (determining jury's request for readback during deliberations meant the jury "evidently did not regard the case as an easy one").

[8] *Lambright v. Schriro*, 490 F.3d 1103, 1123 (9th Cir. 2007) (explaining counsel's failure in 1982 trial to investigate traumatic childhood, frequent moves, depression was prejudicial because, *inter alia*, picture of childhood was inaccurate and unsubstantiated); *Boyde v. Brown*, 404 F.3d 1159, 1177-78 (9th Cir. 2005) (finding prejudice in 1980s where counsel failed to "dig deeper" based on known information because parents' false testimony minimizing abuse suggested defendant had a normal non-violent life and left the jury without an explanation for his conduct); *Stankewitz v. Woodford*, 365 F.3d 706, 724 (9th Cir. 2004) (holding in 1983 trial that counsel's failure to investigate documents containing mitigation was prejudicial because it resulted in the false impression that defendant lived in a suitable foster home and a more detailed examination of defendant's life "would have foreclosed" the prosecutor's argument downplaying defendant's experiences and cognitive deficits); *see also Rompilla v. Beard*, 545 U.S. 374, 391 (2005) (holding with respect to the scope of counsel's investigation, the accumulated undiscovered information "would have destroyed the benign conception" of defendant's upbringing mistakenly held by counsel).

Mr. Montiel was represented by a convicted felon, tried before a judge who was reprimanded for misconduct, and convicted by materially false testimony knowingly presented by the State's jailhouse informant and embellished by its paid expert. He was sentenced to death, on the State's third attempt, after deliberations that lasted as long as the trial, after the State, *inter alia*, unlawfully added a special circumstance to the aggravating evidence, wrongfully goaded the jury to use the aggravator against Mr. Montiel in its deliberations, and after his counsel failed to investigate and present mitigating evidence that Mr. Montiel is indeed mentally retarded which provided a direct nexus to his gross intoxication from PCP and alcohol at the time of the crime.[9]

A. Procedural History.

Mr. Montiel presented identical *Strickland* habeas corpus claims in California and then in federal court alleging counsel's deficient representation regarding, *inter alia*, the failure to:

- investigate and present mitigating evidence that Mr. Montiel, *inter alia*, is mentally retarded;

[9] In *three* trials (36 jurors plus alternates), Mr. Montiel had one Latino surnamed juror. Kern County had a 22% to 28% Hispanic population during that period. The State also used its single judicial peremptory challenge to strike Superior Court Judge Joseph Noriega – a Latino. "In the 14 years since *Johnson v. California*, [545 U.S. 162 (2005), the California Supreme Court] has reviewed the merits of a first-stage *Batson* denial in 42 cases, all death penalty appeals (citation omitted). Not once did th[e] court find a prima facie case of discrimination — even though all 42 cases were tried before *Johnson v. California* disapproved the 'strong likelihood' standard and held that 'an inference of discrimination' is enough." *People v. Rhoades*, 453 P.3d 89, 146 (Cal. 2019) (Liu, J., dissenting); *see also People v. Battle*, 489 P.3d 329, 370 (Cal. 2021) (Liu, J., dissenting) (noting the "unbroken pattern in [California Supreme Court] case law" now extends 16 years.).

- present an evaluation of Mr. Montiel after his 1979 arrest finding him to be "mind damaged if not brain damaged" [*Montiel*, 43 F.4th 942, 962 (9th Cir. 2022)];
- introduce readily available expert evidence confirming that Mr. Montiel was in fact brain damaged;
- investigate and present a psychosocial history that constituted "a starkly different narrative than the story of a relatively normal childhood" the jury heard [*Montiel*, 43 F.4th 964-65];
- investigate and present a diminished capacity defense at the guilt and penalty trials predicated upon Mr. Montiel's gross intoxication from PCP and alcohol;
- prepare a qualified expert for the penalty re-trial;
- prevent the trial court from improperly informing the jury of the financial gain special circumstance finding, prevent its added ballast to the minimal aggravation evidence, and prevent the prosecutor's arguments to use it against Mr. Montiel in determining the sentence; and
- present expert testimony to explain the significance of the fact that the prosecution's mental health expert predicated his opinion of Mr. Montiel's purported mental state on the perjured and inaccurate testimony of a jailhouse informant.

The California Supreme Court denied certain claims in *Montiel II* and others in a post-card habeas corpus denial order on the grounds that Mr. Montiel failed to

present even a prima facie claim for relief. *Cullen v. Pinholster,* 563 U.S. 170, 188 n.12 (2011).

Federal habeas corpus proceedings followed. The United States District Court ordered the parties to submit full merits briefing on the claims in the petition in 1999. After having the parties' merits briefing under submission for *fifteen years*, on November 26, 2014, the district court denied Mr. Montiel's habeas corpus petition. Pet. App. 55. With only pre-*Atkins*[10] merits briefing in hand and based upon the uncontested evidence presented by Mr. Montiel in the state court in 1993, the district court's denial order repeatedly confirms the uncontested record that Mr. Montiel is "*mentally retarded.*" *Id.* at 67, 86, and 94.

In 1992, Dr. Dale Watson, a qualified neuropsychologist and clinical psychologist, conducted a thorough clinical, neuropsychological, and mental status evaluation, and administered a full battery of neuropsychological tests on Mr. Montiel.[11] ER 248, ¶8 (Decl. Dr. Watson). Dr. Watson's evaluation included a comprehensive review of Mr. Montiel's documented psychosocial and medical history, upbringing, educational performance, family environment, adaptive behavior, and mental condition. *Id.* Based on this review, and the results of his neuropsychological testing, Dr. Watson concluded that Mr. Montiel suffers from

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[10] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[11] The California Supreme Court has recognized Dr. Watson as "a qualified clinical neuropsychologist practicing in 'neuropsychological and psychodiagnostic assessment, psychotherapy, forensic psychology and in-patient hospital consultation" and fully qualified to render an opinion on mental retardation (intellectual disability). *In re Hawthorne*, 105 P.3d 552, 559 (Cal. 2005).

cognitive and neuropsychological deficits and probable brain dysfunction, including mild mental retardation. *Id.* at ¶10.

> Within the overall clinical picture of impairment, specific indices reveal that Mr. Montiel functions at the level of borderline intelligence, and is impaired by significant learning disabilities and very severe attention/ concentration deficits (in the mildly retarded range).

Id.

"'Mild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70." *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002). *See also Hall v. Florida*, 572 U.S. 701, 719 (2014). That comprises approximately one to three percent of the population. *Atkins*, 536 U.S. at 309 n.5.[12]

"The neuropsychological sequelae exhibited by Mr. Montiel are not inconsistent with Mr. Montiel's history of solvent abuse, particularly the inhalation of toluene. The long-term abuse of this neurotoxin is an important cause of encephalopathy in children. Clinical studies have documented cerebellar and cerebral cortical atrophy induced by chronic solvent abuse." ER 248, ¶11 (Decl. Dr. Watson). "A history of solvent abuse such as Mr. Montiel's is thus more likely to lead to diffuse brain damage, rather than discrete, localized lesions." *Id.*[13]

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[12] At age 37, Mr. Montiel enrolled in the academic program at San Quentin and "the school teacher Mr. Russo . . . started out giving [him] . . . third grade work." ER 404, RT 643 (Nov. 3, 1986 [R. Montiel]). Academic testing at age 37 placed Mr. Montiel on average in sixth or seventh grade work. ER 404, RT 506 (Nov. 3, 1986 [S. Russo]).

[13] Mr. Montiel ingested toluene by sniffing copious amounts of glue. His history of toluene ingestion likely contributed to his extensive self-medication. Toluene inhalers tend to crave other drugs, and a cross-over into other types of drug abuse is common. ER 254, ¶28 (Decl. F. Pitts, M.D.). Heavy and sustained exposure to toluene causes significant neurological damage, and this in turn can translate into dysfunctional emotional functioning and behavioral functioning. There may well have been damage to cortical areas of the brain,

Dr. Watson's conclusions were based in part upon the history of impairment in adaptive capacities, including depressed intellectual skills; trouble with basic reading, writing, and arithmetic; and his inability to perform at age-appropriate levels in school. ER 248, ¶12 (Decl. Dr. Watson). While "the etiology of Mr. Montiel's impairments is uncertain, the onset of these deficits dates at least from adolescence." *Id.*

Mr. Montiel's history suggests that a contributing cause of the clinical symptomatology is childhood and adolescent solvent abuse secondary to anxiety and depression resulting from familial and other environmental factors. ER 248, ¶15 (Decl. Dr. Watson).

The foregoing analysis is fully consistent with the social history developed during habeas corpus proceedings and presented to the State and district courts, including documented evidence of extensive pesticide exposure; abundant glue-sniffing beginning at age 10; failing high school grades; elementary level course work at ages 25 and 37; and a prison psychiatric opinion that Mr. Montiel was "chronically depressed and mind damaged, if not brain damaged, by his extensive drug use," with "deficits in judgment, self control, and social skills as a consequence of toxic substance abuse, especially glue-sniffing, paint sniffing, and the continued use of PCP" (ER 288, ¶155).

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and damage to this region has been associated with a lessened threshold of impulse control and, therefore, an increase in non-judgmental behavior. This is noteworthy regarding Mr. Montiel because the more neurologically or emotionally unstable a PCP user is prior to ingestion of that drug, the more vulnerable he is to its effects. *Id.* at ¶27.

The district court's repeated reference that Mr. Montiel is mentally retarded is fully consistent with and supported by a competent mental health and neuropsychological evaluation, which also found the existence of other mental health and organic vulnerabilities.

Only two claims of ineffective assistance of penalty phase counsel were certified by the district court for appeal: 1) Claim 24 (*Strickland*): regarding the failure to investigate and present independent expert testimony regarding the psychopharmacological effects of PCP on Mr. Montiel's ability to harbor the mental requisites for robbery and murder (ER 238), including whether trial counsel "failed to investigate or present evidence of Montiel's psychosocial history, including his impoverished childhood, abusive and neglectful parents, life-long alcohol and drug abuse, and the impacts of these events had on his mental health." ER 57-58; 2) Claim 25 (*Strickland*): regarding the failure to investigate, prepare, and adequately present expert witness testimony to demonstrate Mr. Montiel's impaired mental state before, during, and after the offense. ER 241.

In a published opinion and an unpublished order, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's order denying Mr. Montiel relief. The Ninth Circuit notes that "[o]ne psychiatrist observed that Montiel was 'chronically depressed and "'mind damaged,'" if not brain damaged, by his extensive drug use,'" and that Dr. Watson opined that Mr. Montiel "'suffers from cognitive and neuropsychological deficits and probable brain dysfunction,' that he 'functions at the level of borderline intelligence,' and that he 'is impaired by significant learning

disabilities and very severe attention/concentration deficits (in the mildly retarded range).'" *Montiel*, 43 F.4th 942, 962 (9th Cir. 2022).

The unpublished Ninth Circuit order incorrectly asserts that Mr. Montiel "attempts to raise a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), that his intellectual disability precludes his execution . . ." Pet. App. 53. The court then concluded that the *Atkins* claim was not exhausted, and the COA would not be expanded to include such a claim. *Id.* In fact, Mr. Montiel did not raise an *Atkins* claim on appeal. In pursuing his certified *Strickland* claims on appeal, Mr. Montiel asserted that in reweighing *Strickland* prejudice during habeas corpus proceedings, and considering this Court's reasoning in *Atkins*, Mr. Montiel's mental retardation was mitigating ballast that could not be outweighed by any lawfully presented aggravating evidence. Accordingly, this is a valid Sixth Amendment *Strickland* violation that warrants relief.

ARGUMENT

A. The State Court Unreasonably Failed to Give Proper Weight to the Uncontested Habeas Corpus Mitigation Evidence that Mr. Montiel is Mentally Retarded.

Mr. Montiel presented his *Strickland* claims to the state court together with reasonably available documentation to support the claim. Included in this material was Mr. Montiel's social history, psychosocial analysis, and the professional opinions of Dr. Watson and Dr. Pitts. Under California "state-law procedural principles" (*Harrington v. Richter*, 562 U.S. 86, 99 (2011)), Mr. Montiel's allegations and factual presentation are accepted as true for prima facie claim review. *See*

People v. Romero, 883 P.2d 388 (Cal. 1994) (detailing California habeas corpus procedures); *Pinholster,* 563 U.S. at 188 n.12.

During the prima facie review process, i.e., before pleadings are filed (Return and Traverse), issues are joined, discovery takes place, and material issues of fact are vetted and/or resolved (*see Romero,* 883 P.2d at 388), Mr. Montiel's claims were summarily denied. Accepting the deficient performance facts and allegations as true, the only plausible basis for summary denial is because the state court concluded that Mr. Montiel was not prejudiced by trial counsel's failure to investigate and present mitigating evidence that, *inter alia*, he is mentally retarded. The state court's summary denial in this regard was contrary to *Strickland* (or *Strickland* was unreasonably applied) under 28 U.S.C. § 2254(d)(1), and/or the decision was based on an unreasonable determination of the facts in light of the evidence presented under § 2254(d)(2).

For the reasons articulated by this Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), evidence of Mr. Montiel's mental retardation provides compelling reasons not to sentence Mr. Montiel to death, and even more so in a case where three juries over seven years struggled to determine the penalty with minimal or no mitigating evidence, and in all instances unlawfully applied an inappropriate aggravating special circumstance finding. *See also Williams v. Taylor*, 529 U.S. 362, 395 (2000) ("Counsel failed to introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school."); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) ("School records showed Rompilla's IQ was in the

mentally retarded range.”).

Mr. Montiel’s “mitigating evidence of mental retardation . . . has relevance to his moral culpability” and should have been fully considered and given effect by his jury at the penalty phase of his trial. *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). As recognized in *Atkins*, in 1986 society began moving toward a national consensus against the execution of mentally retarded persons. Between 1986 and 1996, when the California Supreme Court rejected Montiel’s *Strickland* claims, eleven state legislatures and the federal government had enacted legislation prohibiting the execution of mentally retarded offenders. *Atkins*, 536 U.S. at 314. Even in those states without such a prohibition, executions of mentally retarded offenders were rare. *Id.* This nationwide consensus reflected “widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. *Id.* at 317.

Scholarship published prior to 1996 and cited in *Atkins* recognized that mentally retarded offenders “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” *Id.* at 318 & n.23, 24 (citing J. McGee & F. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, The Criminal Justice System and Mental Retardation 55, 58–60 (R. Conley, R.

Luckasson, & G. Bouthilet eds.1992); Appelbaum & Appelbaum, *Criminal–Justice Related Competencies in Defendants with Mental Retardation*, 14 J. of Psychiatry & L. 483, 487–89 (Winter 1994)). "Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Id.*

The state court was required to "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). Had it given appropriate weight to the evidence of Mr. Montiel's mental impairments, the state court would have recognized that knowledge of Mr. Montiel's mental retardation "might well have influenced the jury's appraisal of his moral culpability." *Williams*, 529 U.S. at 398. There is a reasonable likelihood that had the available mitigating evidence of Montiel's mental retardation been presented to the jury, at least one juror would have voted against death. No fairminded jurist applying the firmly established law of *Strickland* and its progeny to the facts of this case could conclude otherwise. The California Supreme Court, in summarily denying Mr. Montiel's claims at the prima facie presentation stage – before the pleadings were even filed or the issues joined – failed to give the appropriate weight to this powerful evidence while presumably being the only fact finder to eliminate the financial gain special circumstance aggravator from the calculus. The denial therefore was contrary to, or an unreasonable application of *Strickland*, or was based on an unreasonable determination of the facts. This unreasonable *Strickland* prejudice assessment at the pre-pleading prima facie stage of the California proceedings, warrants de novo review by the federal courts.

B. The Ninth Circuit's Failure to Consider Mr. Montel's Mental Retardation in its Mitigation Prejudice Analysis Was Error.

When the state court decision is an unreasonable application of the law and/or determination of the facts, federal relief is appropriate. *See Williams*, 529 U.S. at 397-98; *Miller-El v. Dretke*, 545 U.S. 231, 267 (2005); *Wiggins*, 539 U.S. at 528-29.

No court has taken issue with Mr. Montiel's contention that he received deficient representation at all three trials. Regarding the final trial, the Ninth Circuit correctly notes that much of the psychosocial history presented during habeas corpus was new material, never presented to the juries, and in stark contrast to how Mr. Montiel was portrayed by his counsel and the State. *Montiel*, 43 F.4th at 964. Moreover, there is no pushback that counsel's failure to investigate and present the material to the jury was deficient performance.

> [T]hat history presented a starkly different narrative than the story of a relatively normal childhood that Birchfield presented to the jury. A complete picture of Montiel's childhood would have helped the jury understand that Montiel's behavior as an adult was not, as the prosecution put it, 'a conscious choice for his life, for violence, greed, and drug use.' Rather, the jury would have understood that Montiel's criminal behavior was rooted in early traumatic experiences and the impoverished conditions of his upbringing. The new mental health evidence also offered a non-cumulative and more robust assessment of Montiel's cognitive and neuropsychological deficits, which the jury could have considered in mitigation. *See Boyde v. California*, 494 U.S. 370, 382 [] (1990) ('[E]vidence about [a] defendant's background and character is relevant [at sentencing] because of 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.' (emphasis omitted) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 [] (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 320 [] (2002))).
>
> We assume that Birchfield's failure to present to the jury this more sympathetic picture of Montiel's childhood suffering constituted deficient performance.

Id. at 964-65.

The Ninth Circuit then was required to "consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding' and "reweig[h] it against the evidence in aggravation." *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams*, 529 U.S. at 397-88). It failed to do so. There was no consideration of the mitigating impact of the habeas corpus evidence that Mr. Montiel is mentally retarded. In an unpublished memorandum, the Ninth Circuit improperly states that Mr. Montiel is attempting to present an unexhausted *Atkins* claim. He is not. He is presenting the same *Strickland* claims raised and denied in the state court, certified for review by the district court, and wherein the district court repeatedly noted the undisputed factual record that Mr. Montiel is mentally retarded.

Mr. Montiel may now pursue a timely and fully exhausted Sixth Amendment *Strickland* claim that is predicated in part on this Court's rationale as to the compelling nature of his mitigation evidence and the prejudice to Mr. Montiel resulting from his counsel's failure to investigate and present evidence that he is mentally retarded. *See, e.g.*, *Atkins*, 536 U.S. at 317; *Rompilla*, 545 U.S. at 393 ("School records showed Rompilla's IQ was in the mentally retarded range."). The

petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment of the U.S. Court of Appeals for the Ninth Circuit should be reversed.

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By: /s/ David A. Senior
David A. Senior, Esq.*
counsel of record
Ann K. Tria, Esq.
McBREEN & SENIOR
1901 Avenue of the Stars, Suite 450
Los Angeles, California 90067
Telephone: (310) 552-5300
dsenior@mcbreensenior.com

Saor E. Stetler, Esq.
P.O. Box 2189
Mill Valley, California 94942
Telephone: (415) 388-8924

Counsel for Petitioner
RICHARD G. MONTIEL