No. 22-6570

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

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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THE STATE COURT'S *STRICKLAND* DECISION WAS UNREASONABLE UNDER 28 U.S.C. § 2254 (d)(1) & (2)

Counsel's failure to investigate and present mitigation evidence of Petitioner Richard Montiel's ("Montiel") mental retardation was deficient performance and prejudicial to Montiel, and the state court's summary *Strickland*[1] decision to the contrary was unreasonable under 28 U.S.C. § 2254 (d)(1) & (2).

An uncontested determination was made by Dr. Dale Watson that Montiel is mentally retarded. The factual finding was presented during habeas corpus proceedings in the state and federal courts. The district court recounted the uncontested determination made by Dr. Watson *three times* while reweighing the *Strickland* habeas corpus mitigation evidence against the aggravating evidence. Respondent concurs. Respondent's Brief at 5 n.1. Each time, it appears the district court was oblivious to this Court's *Atkins* decision.[2]

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

[2] Respondent's contention that "no determination" was made regarding Montiel's retardation is undermined by his contention that "a reasonable jurist could conclude that Montiel's jury would

The question before this Court is straightforward: accepting as true the uncontested fact that Montiel is mentally retarded (*see Cullen v. Pinholster*, 563 U.S. 170, 188 n.12 (2011)), was the state court summary denial of *Strickland* relief unreasonable? Indeed, it was. With mental retardation on the mitigation side of the scale, the mitigation presumptively outweighs the minimal aggravating evidence in this very closely decided third penalty trial. This conclusion is fully supported by all the reasons that are the basis of this Court's *Atkins* decision. *See* Petition for a Writ of Certiorari at 14-16.

The state court either misapplied *Strickland* and its elements, and/or failed to consider the facts in the state record, including: 1) the first jury did not render a death verdict even when *no mitigation evidence* was presented for Montiel; 2) the

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likely have returned a verdict of death even if it had heard [Dr.] Watson's opinion that Montiel is mildly intellectually disabled." Respondent's Brief at 12. If a reasonable jurist could consider Dr. Watson's uncontested and well-founded opinion, then apparently a determination that Montiel is mentally retarded was in fact made. And to the contrary, no reasonable jurist could sentence Montiel to death after consideration that he is mentally retarded. *See Atkins v. Virginia*, 536 U.S. 304 (2002).

first jury rendered a verdict that the homicide *was not* heinous, atrocious, or cruel (Respondent's Brief at 3), minimizing the gravity of the aggravation of this single stab wound homicide that occurred when Montiel was grossly intoxicated by alcohol and PCP; 3) the first jury did not render a death verdict despite receiving a reversible *Briggs* error instruction (*see People v. Montiel*, 705 P.2d 1248, 1258 (Cal. 1985)); 4) the first jury did not render a death verdict despite unlawfully considering a financial gain special circumstance as aggravating ballast; 5) the third jury failed to know or consider any of the foregoing; and 6) Montiel is mentally retarded, and the predicate factors supporting this Court's *Atkins* decision (*see* Petition for a Writ of Certiorari at 14-16).

While Respondent takes no issue with the underpinnings of *Atkins* that unreasonably were disregarded by the state court, he argues that Montiel's mental retardation garners no mitigation gravitas because, as a young unsupervised, abused, and neglected child, his retardation was self-inflicted from his ingestion of copious amounts of toluene. Respondent's Brief at 12-13. While it

is true that Montiel ingested horrifying amounts of toluene and that it likely contributed to his mental retardation, it is unlikely that it would have been so easily dismissed by the jury if it was reasonably presented with Montiel's accurately developed social history.

> [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.

Montiel v. Chappell, 43 F.4th 942, 964-65 (9th Cir. 2022).

Respondent argues that Dr. Watson's opinion is undermined by the opinion of Dr. Nuernberger, a prison psychiatrist [not a clinical psychologist versed in testing for intellectual disabilities], that Montiel suffered from no gross mental disorder. However,

Nuernberger performed no clinical testing for mental retardation [nor was he qualified to do so] and examined Montiel only for the purpose of entry placement in the prison. Montiel's childhood failing school grades *in passim* and his third-grade academic work at San Quentin State Prison at age 37 refute Respondent's attempt to contest – for the first time in 30 years – Dr. Watson's fully supported conclusions.

While Respondent attempts to enhance the aggravation of this homicide with gratuitous labels, Respondent concedes that the first jury found that the homicide was not heinous, atrocious, or cruel. Brief at 3.

Against that backdrop, the state court was to weigh trial counsel's deficient failure to investigate and present evidence that Montiel is mentally retarded, i.e., the most compelling mitigation evidence available to any defendant for the reasons outlined by this Court in *Atkins*.

Respondent claims that this Court's decisions in *Williams v. Taylor*, 529 U.S. 362 (2000) and *Rompilla v. Beard*, 545 U.S. 374 (2005) do not assist the analysis here. Respondent asserts that

counsel in *Williams* made only a single mitigation argument, thereby justifying this Court's §2254 relief. Perhaps so, but more to the point than how many arguments were advanced is whether a full mitigation investigation, analysis, and presentation of available evidence was made. As in *Williams,* it was not, to Montiel's incontrovertible prejudice. And when nothing was done in this regard at Montiel's first trial, the State still could not get a death verdict – the case was that close. The state court's unreasonable failure here was its defective review and consideration of the entire habeas corpus record, including the first non-death-verdict and – as this Court considered in *Williams* and the Ninth Circuit sets forth in detail in its opinion – counsel's failure to investigate and accurately set forth Montiel's social history which was filled red flags such as early traumatic experiences, impoverished conditions, and verifiable cognitive and neuropsychological deficits, including that he is mentally retarded. Knowing that this verdict was a verifiably close call and using the first trial as a habeas corpus record baseline, the state court's prejudice finding was unreasonable.

The same weaknesses are present with Respondent's critique of *Rompilla*. Counsel in *Rompilla*, like in Montiel, also failed to investigate and accurately present his social history. As the Ninth Circuit clearly sets forth, counsel failed to investigate robust mitigating evidence that was not cumulative to other evidence and grossly alters counsel's depiction that Montiel's social history was "normal." *Montiel*, 43 F.4th at 965. The state court's unreasonable failure here includes its failure in its prejudice analysis to do exactly what should be done – and what this Court did in *Rompilla* – consider the full mitigating impact of the Petitioner's mental retardation. For the reasons articulated to support the *Atkins* decision, consideration of that fact by the state court warranted relief.

The state court decision was unreasonable because, based upon the uncontested factual habeas corpus record before it, when reweighing the mitigation and aggravation evidence adduced from the habeas corpus record, it failed to give proper credence to the mitigation evidence that Montiel is mentally retarded and he was

prejudiced by counsel's deficient performance in failing to investigate this compelling evidence and present it at trial.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 29, 2023 MCBREEN & SENIOR

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