

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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NATHAN RIVERA,  
*Petitioner,*

v.

BRIAN CATES,  
*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Whether the district court erred in denying the petition for a writ of habeas corpus, where Petitioner's trial counsel provided ineffective assistance of counsel at his murder trial by failing to object to inadmissible, highly damaging testimony.

## **PARTIES TO THE PROCEEDING**

All parties appear in the caption of the case on the cover page.

## **RELATED PROCEEDINGS**

- *Nathan Rivera v. Brian Cates*, No. 21-cv-01586, U.S. District Court for the Southern District of California. Judgment entered June 30, 2022.
- *Nathan Rivera v. Brian Cates*, No. 22-55602, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Oct. 15, 2024.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Nathan Rivera respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## **OPINION BELOW**

The unpublished memorandum disposition of the United States Court of Appeals is reproduced in the Appendix. *See* Pet. App.-1.

## **JURISDICTION**

Petitioner challenged his state conviction in a petition for a writ of habeas corpus, under 28 U.S.C. § 2254, in the United States District Court for the Southern District of California. The United States Court of Appeals for the Ninth Circuit affirmed the district court's denial of his petition, and denied a petition for rehearing on October 15, 2024. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

28 U.S.C. § 2254

**28 U.S.C. § 2254 provides:**

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement 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

1. Petitioner was tried in state court for murdering his girlfriend, Donna Hixon, by strangulation. Before trial, the state moved to admit testimony under California Evidence Code § 1109, which allows for admission of “evidence of the defendant’s commission of other domestic violence” in a “criminal action in which the defendant is accused of an offense involving domestic violence.” *See* Cal. Evid. Code § 1109 (a)(1). The state proffered that Petitioner’s former girlfriend, Jennifer Davidson, would testify about decades-old incidents wherein Petitioner had been violent towards her.

Under California’s Evidence Code, however, prior acts of domestic violence that occurred more than ten years before the offense are presumptively inadmissible. *See* Cal. Evid. Code § 1109 (e) (“[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible under this section”). Given this, the state sought to admit the testimony of a different ex-girlfriend, Shannon Gohlich, proffering that Petitioner had been violent towards Gohlich more recently than the incidents involving Davidson. The state argued Gohlich’s testimony would make Davidson’s testimony about the stale incidents admissible “in the interests of justice,” and satisfy the criteria for admission. *See id.* (evidence more than ten years old is inadmissible “unless the court determines that the admission of this evidence is in the interests of justice”).

2. Over the defense’s objection, the trial judge ruled that both women could testify about specific incidents of violence they experienced, but could not testify

about whether Petitioner was ever arrested or convicted for the incidents. The judge explained that “the reason” it found Davidson’s testimony was not too stale to be admissible—despite the fact that she would testify about incidents more than twenty years old—was because “there is similar conduct with a woman [*i.e.*, Gohlich] after Ms. Davidson and before Ms. Hixon.” This ruling that Davidson’s testimony was admissible was conditioned on Gohlich “present[ing] an [incident involving violence] in 2005,” and the judge cautioned that “[Gohlich] not testifying could affect [the] determination” that Davidson’s testimony was admissible. The trial court’s rationale was supported by California caselaw indicating that while remote prior acts of violence are less probative of propensity than more recent conduct, if there are recent acts of violence this increases the probative value of the remote conduct, and it may be within the interests of justice to admit the remote conduct under California Evidence Code § 1109 (e). *See, e.g., People v. Johnson*, 185 Cal. App. 4th 520, 534 (Cal. Ct. App. 2010).

Gohlich was in state prison, and needed to be transported several hundred miles to testify at trial. Though this presented logistical issues for the prosecution, the state never moved to admit other evidence in place of Gohlich’s testimony, like evidence that Petitioner had been convicted of arson for one of the incidents involving violence towards Gohlich. Instead, the prosecution took the trial judge at his word that Gohlich needed to testify in order for Davidson’s testimony to be admissible. The state overcame its transportation issues, and put Gohlich on the stand.

But she didn't testify as the prosecution hoped. Not only did she not "present an event in 2005," as the state had proffered, but Gohlich denied any abuse ever occurred. She testified that Petitioner had never choked or strangled her, that Petitioner was "always" trying to improve their living situation, and that she was shocked to hear that he was charged with Ms. Hixon's murder. Regarding 2005, she denied telling the police that Petitioner grabbed her by the neck and threw her to the ground.

3. Although Gohlich failed to testify that any abuse occurred in the time between Ms. Hixon's death and the incidents Davidson was supposed to testify to, Petitioner's trial counsel never re-raised the previous objection to exclude Davidson's testimony as stale and inadmissible under the California Evidence Code. Instead, Davidson took the stand immediately after Gohlich. She testified that "there was a lot of abuse" during her relationship with Petitioner, and recounted several specific incidents. Davidson also testified that Petitioner repeatedly strangled her almost a dozen times, just as he was alleged to have done to Ms. Hixon.

Apart from Davidson's damaging testimony that painted Petitioner as someone with a propensity to strangle his girlfriends, the state relied mostly on circumstantial evidence connecting him to Ms. Hixon's murder: evidence that the couple often argued and a neighbor once saw Ms. Hixon with a broken nose after an argument; testimony that Ms. Hixon told the neighbors she wanted Petitioner to move out; and that Petitioner had recently put a knife to her throat during sex so that she would remain quiet.

In addition to this circumstantial evidence pointing to general violence, the government introduced evidence directly related to the murder. A neighbor, Tamara Wheaton, testified that she saw Petitioner “peel[] out” in someone else’s truck and “crash[] right through the [property’s] gate,” shortly before Ms. Hixon’s body was discovered. Wheaton’s testimony was contradicted by photographic evidence introduced at trial, as there were no tire tracks in the dirt near the gate as there would be if Petitioner “peeled out,” and the truck Petitioner was driving had no damage of the sort that would be expected if he crashed the truck through a gate, as Wheaton claimed. Additionally, although the medical examiner explained that it wasn’t unusual or particularly probative to find matching DNA when the people involved were in a sexual relationship, like Petitioner and Ms. Hixon, the state introduced evidence that Petitioner’s DNA was found on Ms. Hixon’s neck and under her fingernails, and that Ms. Hixon’s DNA was found on Petitioner’s hand.

4. During its closing, the state relied heavily on Davidson’s testimony about violence during her relationship with Petitioner, with the prosecutor arguing that the prior domestic violence “is something that the law tells you you get to use. You heard from Jennifer Davidson, and she told us about prior domestic violence involving the defendant and her.” The jury could consider Davidson’s testimony to determine “[d]oes he have a propensity? Was that something he did in this situation with his girlfriend, Donna Hixon? You get to consider that.”

The state admitted to the jury that its case was circumstantial. It conceded that “no one saw what” happened to Ms. Hixon, and the evidence was only

“consistent” with Petitioner strangling Ms. Hixon. The deficiencies in the state’s case were underscored by the length of the jury’s deliberations, which lasted a day and a half, in comparison to the two-and-a-half-day trial. Further demonstrating that this was not a slam dunk for the state, the jury asked a number of questions during its deliberations, including for readbacks of the testimony from the medical examiner and Wheaton, the woman who found Ms. Hixon’s body. The jury also was confused about the standard for first-degree murder, which led to the judge re-instructing the jury on the standard and allowing the parties additional argument.

Despite the weakness of the state’s case, however, the jury ultimately convicted Petitioner of first-degree murder, and he was sentenced to 75 years to life in prison.

5. Petitioner filed a direct appeal to the California Court of Appeal, arguing, among other things, that his trial counsel was ineffective for failing to object that Davidson’s testimony was too stale to be admitted, after Gohlich failed to testify to any intervening abuse by Petitioner. The state court ruled that Petitioner had “not established his counsel was ineffective for failing to renew her objection to” Davidson’s testimony. App-44. The court reasoned that there was “a conceivable tactical reason for counsel’s actions” because, if counsel had renewed her objection, the prosecutor would have likely moved to admit “evidence the incident against [Gohlich] resulted in a conviction.” App-45. The trial court would have either “left its ruling unchanged,” or admitted the conviction, which would have been worse for Petitioner. *Id.* Additionally, the state court reasoned that defense counsel was able to impeach Davidson’s credibility on cross-examination with “inconsistencies in her

accounts of the domestic violence,” so Petitioner had not established that the admission of Davidson’s testimony required reversal of his conviction. *Id.* The California Supreme Court denied a petition for review, without comment.

Petitioner later filed a petition for a writ of habeas corpus in the California Court of Appeal, alleging, among other claims, ineffective assistance of his trial counsel. He argued in part that trial counsel was ineffective for failing to call an expert witness to point out that the wounds on his stomach were from drug injections and not, as the state claimed, defensive wounds from a struggle with Hixon. He also argued counsel was ineffective for failing to impeach Wheaton’s testimony that he crashed a truck through the property’s front gate. The appellate court denied Petitioner’s habeas petition.

6. After exhausting his state court remedies, Petitioner filed a petition for a writ of habeas corpus in district court. *See* 28 U.S.C. § 2254. He argued, among other things, that his trial counsel was constitutionally deficient for failing to renew her pre-trial objection that Davidson’s testimony was inadmissible under the California Evidence Code, after Gohlich testified that Petitioner had never abused her. The district court looked through the California Supreme Court’s summary denial of the claim to the California Court of Appeal’s analysis. App-24. Reviewing the intermediate court’s denial of Petitioner’s claim, the district court denied Petitioner’s petition for habeas relief. It determined that any objection to Davidson’s testimony “would have been futile because the prosecution would have likely been able to successfully argue for the admission of [Petitioner’s] conviction for his assault

on Gohlich.” App-26. “For these same reasons,” the district court held, Petitioner could not establish prejudice from the lack of an objection, because “[e]ven if counsel had objected, the evidence of [Petitioner’s] assault on Gohlich would have likely been admitted.” *Id.*

7. Petitioner obtained a certificate of appealability and appealed the denial to the Ninth Circuit Court of Appeals. He argued the state court’s determination that he was not entitled to relief for his counsel’s ineffective assistance was an unreasonable determination of the facts, and also an unreasonable application of the clearly established federal law in *Strickland v. Washington*, 466 U.S. 668 (1984). He addressed both the performance and prejudice prongs of the *Strickland* analysis. Regarding deficient performance, he argued that his counsel’s failure to object fell below an objective standard of reasonableness and that the state court ignored the record evidence demonstrating both that a renewed objection would have been meritorious and that there was no tactical reason for counsel’s failure to re-object. He also argued that the state court failed to evaluate counsel’s conduct at the time of trial, which was an unreasonable application of *Strickland*.

Addressing prejudice, Petitioner argued that the state court’s ruling that he was not prejudiced was based on an unreasonable determination of the facts in light of the state court record because the state court ignored evidence demonstrating that defense counsel failed to impeach Davidson, and that Davidson’s testimony was quite impactful and prejudicial in terms of the jury’s verdict.

After oral argument, the Ninth Circuit affirmed the district court's denial of Petitioner's habeas petition. It reviewed de novo and held, in an unpublished memorandum, that Petitioner had failed to establish prejudice from counsel's performance. App-2. Even if counsel had objected, the jury still heard:

overwhelming evidence of [Petitioner's] guilt, including, among other things: [Petitioner's] prior acts of domestic violence against the murder victim (including testimony that [Petitioner] held a knife to the victim's throat on the day before the murder); physical evidence consistent with the victim having fought back during strangulation (including evidence of his DNA on the victim's neck and fingernails and the victim's DNA on [Petitioner's] right hand); and testimony that a neighbor had seen Petitioner jump into a nearby idling truck that belonged to another neighbor, crash it through a gate, and speed away, moments before that neighbor discovered the victim's body.

App-2. The court reasoned that in "light of this evidence," Petitioner couldn't demonstrate a reasonable probability of a different outcome, and affirmed the denial of habeas relief. *Id.*

## REASONS FOR GRANTING THE PETITION

The district court reversibly erred by denying the petition for a writ of habeas corpus. Petitioner demonstrated that the state court reached a decision was based on an unreasonable determination of the facts in light of the state court record, and that the state court's decision was contrary to the clearly established federal law in *Strickland v. Washington*, 466 U.S. 668 (1984). Still, the Court of Appeals affirmed the denial of the writ, making the same errors as the district court. Given the denial of Petitioner's constitutional right to effective assistance of counsel, the clarity of the error, and the immense sentencing consequence Petitioner faces as a result, this is the rare case in which this Court should grant review for error-correction purposes.

### **I. The district court committed error.**

Petitioner collaterally attacked the California appellate court decision that denied his ineffective assistance claim because it found there was a "conceivable reason for counsel's actions." In short, there was a tactical reason trial counsel failed to renew the previous objection to Davidson's testimony after Gohlich testified there was no intervening abuse. The state court speculated that if counsel had renewed her objection after Gohlich testified, the trial judge would have left the prior admissibility ruling unchanged and admitted the arson conviction Petitioner sustained after an incident involving Gohlich.

However, as Petitioner argued in his § 2254 petition, the state court's determination was based on an unreasonable determination of the facts in light of

the state court record because it ignored evidence that supported Petitioner's claim and contradicted the state court's decision. In denying Petitioner's claim, the state court also unreasonably applied the clearly established federal law in *Strickland*.

1. The state court ignored the record evidence that trial counsel actually employed a tactical trial strategy of excluding Davidson's testimony. Defense counsel knew that Davidson's testimony would be harmful to Petitioner's case, and that is why her strategy was to exclude it. She moved *in limine* to exclude it, zealously argued against admitting the testimony at the *in limine* hearing, and again during trial asked the court to reconsider its earlier admissibility ruling. Counsel recognized how damaging Davidson's testimony about prior acts of domestic violence would be to Petitioner's defense, as she also tried to take the sting out of the testimony during her opening statement. She noted that the state would try to "fill in the blanks" in its case by relying on "evidence of [Petitioner's] history as proof that he's guilty in this case." The state court ignored this evidence of counsel's actual trial strategy, as well as her view of the case and the evidence at the time of trial, when it speculated that counsel had a tactical reason not to renew her objection. In doing so, the state court reached a "decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254 (d)(2).

But it's not just that the state court ignored the record evidence. In speculating that counsel had a conceivable tactical reason for her failure to object, the state court also unreasonably applied clearly established federal law. See 28 U.S.C. § 2254(d)(1);

*see also Williams v. Taylor*, 529 U.S. 362, 409 (2000) (question is whether the state court’s application of clearly established federal law was “objectively unreasonable”). Clearly established federal law requires that when reviewing whether counsel’s performance was deficient, a court must “evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689-90. But here, the state court made no attempt to accurately “reconstruct the circumstances of counsel’s conduct,” *see id.*, and determine that counsel’s trial strategy was to exclude Davidson’s testimony. Instead, the state court unreasonably engaged in a “*post hoc* rationalization of counsel’s conduct rather than an accurate description of” counsel’s strategic thinking. *See Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003). It speculated—even though the record evidence demonstrated otherwise—that there was a conceivable tactical reason for failing to renew an objection to Davidson’s testimony. The state court’s failure to judge counsel’s performance based on counsel’s perspective *at the time of trial*, and instead engage in a *post hoc* rationalization, was an objectively unreasonable application of the clearly established federal law in *Strickland* and *Wiggins*. *See Bell v. Cone*, 535 U.S. 685, 694 (2002) (A state court’s decision is an unreasonable application of Supreme Court law if the “state court correctly identifies the governing legal principle ... but unreasonably applies it to the facts of the particular case.”).

2. Additionally, the state court relied on the “distorting effect of hindsight,” *see Strickland*, 466 U.S. at 689, to speculate that—despite her previous strategy of excluding Davidson’s testimony—trial counsel failed to renew the objection because

she didn't want Petitioner's arson conviction admitted instead. The state court's determination that the trial judge would have admitted Petitioner's arson conviction and still allowed Davidson to testify overlooks clear facts in the record demonstrating that the judge would not have admitted Petitioner's arson conviction to substitute for Gohlich's testimony if defense counsel objected. For instance, the state court ignores the fact that the trial judge had already explicitly ruled that while Gohlich could testify about specific incidents of domestic violence, she could not testify that Petitioner was convicted or arrested for any incidents, including the incident leading to the arson conviction. Similarly, the state court decision also ignores the fact that Petitioner's arson conviction was "not a domestic violence crime," as the trial judge himself said. The arson conviction wouldn't have substituted, then, for Gohlich's testimony, as it was not "evidence of the defendant's commission of other domestic violence." *See* Cal. Evid. Code § 1109 (a)(1).<sup>1</sup>

The state court decision also completely ignores the trial judge's clear rationale for admitting Davidson's testimony, and that it depended on Gohlich testifying to acts of abuse. The trial judge said "the reason" he found the incidents against Davidson

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<sup>1</sup> "Domestic violence," in Evidence Code section 1109, means "abuse committed against an adult ... who is a ... person with whom the suspect has had a child ... or has had a dating relationship." Cal. Evid. Code § 1109(d)(3); Cal. Pen. Code § 13700(b). "Abuse" means "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." Cal Evid. Code § 1109 (d)(3); Cal. Pen. Code § 13700(a). Given this, the bare fact of the arson conviction would not have satisfied the definition for domestic violence.

weren't too "stale to be excluded" was because "there is similar conduct with a woman after Ms. Davidson and before Ms. Hixon." Indeed, the judge specifically warned the prosecutor that Gohlich "not testifying could affect that determination." Not once did the trial judge ever mention that admitting the arson conviction was an acceptable alternative, nor did the prosecution ever propose substituting the arson conviction for Gohlich's testimony. The state court's speculation that a renewed defense objection would have been fruitless because the trial judge would have allowed Davidson to testify and would have admitted Petitioner's arson conviction is flatly contradicted by the record evidence, which the state court either overlooked or ignored in its decision.

Moreover, the state court's decision doesn't just ignore the record evidence that undermines its conclusion. In ignoring this evidence and speculating that the lack of an objection wouldn't have changed the evidentiary outcome, the state court failed to "keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. Failing to challenge Davidson's testimony once it was too stale to be admitted under Evidence Code section 1109 was a breakdown in the adversarial testing process, and a decision that could produce no tactical advantage. The state court's contrary conclusion was an unreasonable application of *Strickland*, see 28 U.S.C. § 2254 (d)(1), and no fairminded jurist could conclude otherwise.

## **II. The Ninth Circuit erroneously determined that Petitioner had not shown prejudice.**

In affirming the district court's denial of the writ based on de novo review, the Ninth Circuit similarly erroneously determined that Petitioner hadn't demonstrated prejudice from his counsel's ineffective assistance, pointing to what the court called "overwhelming evidence of [Petitioner's] guilt." App-2. But this determination overlooks several facts in the record demonstrating that the so-called "overwhelming" evidence was contradicted, pointed only to generalized violence, and was not credited by the jury.

First, the memorandum points to evidence of Petitioner's prior acts of domestic violence against Ms. Hixon. But the memorandum overlooks that this evidence was not only based on hearsay from unreliable witnesses, but also that it didn't demonstrate that Petitioner was specifically prone to strangulation. It's true that Missy Johnson and Tamara Wheaton both testified about hearing the couple argue. But both were also discredited by the defense on cross-examination, and even the prosecution had to concede that they weren't "model citizens" and were "no strangers to drugs."

Further, the defense pointed out that Johnson herself had a domestic violence conviction, that she had stolen Ms. Hixon's job, and that her boyfriend who lived on the property left the murder scene before police arrived. And while Johnson testified that she heard the couple argue and once saw Ms. Hixon with a broken nose, she didn't know what had caused the broken nose, never testified that she had seen

Petitioner be violent towards Ms. Hixon, and, in fact, testified that she saw the couple the morning of the murder and didn't notice anything amiss.

As for Wheaton, she testified that she heard Petitioner and Ms. Hixon argue, and that Ms. Hixon had told her about Petitioner holding a knife to her throat during sex. But the defense also elicited on cross that Wheaton didn't hear any arguing between Petitioner and Ms. Hixon on the morning of the murder, and that after the police were called Wheaton's friend left the property to avoid having to speak to the police. Additionally, no witness ever corroborated Wheaton's claim about Petitioner threatening Ms. Hixon with a knife.

Similarly, the DNA evidence the memorandum cites as evidence that Ms. Hixon "fought back during strangulation" was virtually meaningless considering that Petitioner and Ms. Hixon were in a sexual relationship and lived together. The expert at trial testified about the concept of transfer DNA, and explained that in addition to transferring another's DNA through something innocuous like using the same blankets, someone could "retain DNA from another person touching them days ago." Similarly, two people living together and involved in a sexual relationship would be expected to have each other's DNA on their bodies, including on their necks and hands. Importantly, the DNA expert admitted that there was no blood found on Petitioner's fingertips, despite the fact that Ms. Hixon's face was bleeding on the left side from her injuries. The memorandum makes no mention of any of these facts that seriously undermine its conclusion that the DNA evidence was "overwhelming."

Finally, as for Wheaton's testimony that she had seen Petitioner jump into his neighbor's idling truck, crash through a gate, and speed away, this evidence was also not "overwhelming." It was contradicted by the photographs of the gate and the truck that were admitted at trial. There were no tire marks seen near the gate, contradicting Wheaton's testimony that Petitioner "peeled out," and the photos of the truck didn't show the damage one would expect if Petitioner had indeed crashed the truck through the gate as Wheaton testified. Not only that, but Wheaton's testimony, even if uncontradicted, only generally demonstrated flight, which the defense pointed out could have been for several reasons unrelated to guilt; leaving in the truck didn't specifically point to Petitioner strangling Ms. Hixon, as the charges alleged, so it wasn't "overwhelming."

In addition to its erroneous characterization of the evidence pointing to guilt, the memorandum also fails to acknowledge just how prejudicial Davidson's testimony was, and the memorandum doesn't weigh its probative value against the evidence it claims was "overwhelming." *See App-2*. First, Davidson's testimony was specific to the strangulation charges. She testified not just that Petitioner was prone to domestic violence, but specifically that when he was angry he had the propensity to strangle his girlfriends. Davidson graphically detailed the years of abuse she said she suffered, testifying that "more than ten times" during arguments Petitioner strangled her by placing his hands around her neck. He "tried to suffocate" her, and Davidson thought she "was going to die a few times."

Second, Davidson's testimony was virtually uncontested at trial, which the memorandum never acknowledges. While the defense tried to impeach Davidson, the only thing defense counsel succeeded in doing on cross-examination was reinforcing Davidson's claims that Petitioner was violent towards her when they argued. For instance, Davidson intimated on cross that there were more unreported incidents of violence, particularly suffocation, and that if she couldn't remember specific details it was only because it was "hard to keep track" of all the incidents because "there were so many of them."

Demonstrating the overwhelming probative value of this testimony, the jury never questioned Davidson's account of the strangulations, her credibility, or her ability to recall what she said was decades of violence. Instead, when given the chance to ask questions of Davidson, the jury asked only how the abuse affected the couple's children, indicating that it credited her testimony as true.

The prosecution, too, credited Davidson's testimony, as it relied heavily on it during closing—a fact the memorandum also never weighed in finding a lack of prejudice from admitting Davidson's testimony. The prosecution linked up Davidson's testimony to the charges that Petitioner had strangled Ms. Hixon. It argued that "all these incidents involving Jennifer Davidson," and particularly the "fact that he strangled her over 10 times," showed that Petitioner was "likely to commit this offense against Donna Hixon." "Does he have a propensity?" the prosecution asked the jury. "Was that something he did in this situation with his girlfriend, Donna Hixon? You get to consider that." In arguing for a first-degree murder verdict, the

prosecution argued that, just like Davidson testified Petitioner had done to her in the past when they argued, Petitioner “chose one of the most calculated, deliberated and cruel ways” to kill Hixon—by strangulation.

The Ninth Circuit’s failure to weigh the probative value of Davidson’s testimony against the other evidence, as well as its failure to accurately characterize the state’s evidence, led it to erroneously affirm the district court’s denial of the writ.

\* \* \*

In sum, the court of appeals erred by affirming the district court’s denial of Petitioner’s petition for a writ of habeas corpus, and Petitioner asks that this Court grant review to correct that error. Given the 75-to-life sentence Petitioner is serving, and the clarity of counsel’s ineffectiveness in failing to object, this is the rare case in which this Court should grant review for purposes of error correction.

### CONCLUSION

The Court should grant the petition for a writ of certiorari.

Date: December 5, 2024

Respectfully submitted,



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