No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2024

DANIEL COHEN,

Petitioner,

vs.

JAMES HILL, WARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner Daniel Cohen and his mother Diana Cohen killed their apartment manager, victim Jonathan Gordon Smith. The Cohens killed Smith based upon their *delusional* beliefs that (1) their downstairs neighbors were running a methamphetamine lab, (2) Smith failed to protect the Cohens from the poisonous methamphetamine fumes, and (3) Smith's plan to evict the Cohens would kill the sickly Diana. As in most states, California law permits evidence of mental illness for an insanity defense or to mitigate a crime by negating a specific criminal intent. Negating specific intent in a first degree murder case can result in a mitigated verdict of second degree murder or manslaughter, or it can negate the special circumstance which made Petitioner ineligible for parole. *Daniels v. Woodford*, 428 F.3d 1181, 1208 (9th Cir. 2005). Killing based on delusions may also support an insanity defense. *People v. Leeds*, 240 Cal.App.4th 822, 829 (2015).

Appointed defense counsel, however, did not investigate and obtain Petitioner's medical records, which showed he had at one time been found mentally disabled. Instead, without presenting evidence of mental illness, defense counsel argued that the killing was manslaughter in defense of his mother Diana. As the state courts held, this was a *legally flawed theory* because there was no evidence that Petitioner believed the threat of injury to his mother was *imminent*.

On direct appeal and state habeas review, trial counsel refused to provide a declaration to appellate counsel. Appellate counsel moved for funds for a mental health expert and provided a declaration and a tentative expert opinion that

Petitioner suffered from a shared delusional disorder ("folie á deux"), which could have supported defenses of diminished intent or insanity. The state court, however, refused to provide funds for an expert and summarily denied the habeas petition without a hearing at which an expert could be presented and trial counsel could be compelled to testify.

The District Court denied a pro per federal habeas petition. Although the Court found counsel's performance deficient, the Court found that Petitioner could not establish prejudice due to the lack of appointed expert. The Court did not address whether the State's fact-finding was unreasonable per 28 U.S.C. § 2254(d)(2). The Court did not appoint an expert or counsel. Nor did the Court order a hearing per 28 U.S.C. § 2254(e). The Ninth Circuit filed a memorandum opinion affirming the denial of the petition and finding that the State's fact-finding was not unreasonable, due primarily to the lack of an expert declaration and declaration from trial counsel.

The questions presented are:

I. Whether this Court should resolve the question left open in *Brumfield v. Cain*, 576 U.S. 305, 312 (2015): Where a state court refused funds for a mental health expert to demonstrate prejudice from counsel's deficient failure to investigate a defendant's mental illness, which supported partial defenses to the murder charge or mitigated punishment under settled state law, and where a state court refused to hold a hearing on ineffective assistance of counsel, is the state court's denial of a petitioner's ineffective assistance claim an unreasonable

determination of facts per 28 U.S.C. § 2254(d)(2) or an unreasonable determination of settled constitutional due process law per § 2254(d)(1) and *Ford v. Wainwright*, 477 U.S. 399 (1986)?

II. Whether this Court should resolve the disputes among the lower courts about the interpretation of *Brumfield*, 576 U.S. 305 as to when a state court's refusal of funds for a mental health expert and refusal to hold a hearing on ineffective assistance of counsel results in an unreasonable determination of facts per 28 U.S.C. § 2254(d)(2), as held in *Brumfield*, 576 U.S. at 317-322 and the Eleventh Circuit's decision in *Smith v. Campbell*, 620 Fed.Appx. 734 (11th Cir. 2015); *see King v. Emmons*, 144 S.Ct. 2501, 2504 (2024) (Jackson, Sotomayor, JJ., dissenting from denial of certiorari)? Or, contrarily, where the state appoints deficient trial counsel who fails to obtain an expert and investigate mental illness, and where state appellate courts refuse to order appointment of an expert or a hearing, is the denial of expert funds and denial of hearing unreviewable by federal courts per 28 U.S.C. § 2254(d) as held by the panel below?

III. Whether this Court should resolve the question left open in *Brumfield*, 576 U.S. at 322, and define the relationship between § 2254(d)(2) and (e)(1), where the District Court denied an evidentiary hearing despite that (a) trial counsel had deficiently failed to obtain the records and a mental health expert to support valid mitigating defenses, and (b) state appellate courts had refused to appoint an expert and hold a hearing?

IV. Where state appointed defense counsel presented a legally flawed

defense and deficiently failed to obtain medical records and a psychiatric expert, was the state appellate court's decision denying appointment of an expert, denying an evidentiary hearing, and denying a habeas writ contrary to, or an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668 (1984) or *Ake v. Oklahoma*, 470 U.S. 68 (1985)?

TABLE OF CONTENTS

/ / /

Table of Contents (Cont'd.)

Table of Contents (Cont'd.)

INDEX OF APPENDICES

TABLE OF AUTHORITIES

FEDERAL CASES

Table of Authorities (Cont'd.)

STATE CASES

Table of Authorities (Cont'd.)

STATUTES

MISCELLANEOUS

PETITION FOR WRIT OF CERTIORARI

Petitioner Daniel Cohen respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeal for the Ninth Circuit denying his petition for writ of habeas corpus.

OPINION BELOW

The unpublished Ninth Circuit Memorandum affirming the District Court's denial of a writ of habeas corpus is published at *Cohen v. Hill*, 2024 WL 4164119 (9th Cir. Sept. 12, 2024) and appears at Appendix A. The unpublished Ninth Circuit summary order denying rehearing on October 17, 2024 appears at Appendix B.

The unpublished District Court order denying Petitioner's petition for federal writ of habeas corpus is published at *Cohen v. Pollard*, 2022 WL 1003180 (N.D. Cal. April 04, 2022) and appears at Appendix C.

Petitioner's federal habeas writ challenged the unpublished October 24, 2018 opinion of the California Court of Appeal denying his direct appeal (which appears at Appendix D), the unpublished October 24, 2018 order of the California Court of Appeal denying his state petition for writ of habeas corpus (which appears at Appendix E), and the January 19, 2017 unpublished order of California Court of Appeal denying funds for an expert (which appears at Appendix F).

JURISDICTION

On September 12, 2024, a panel of the United States Court of Appeal for the Ninth Circuit issued an opinion affirming the District Court's denial of Petitioner's writ of habeas corpus. On October 17, 2024, Petitioner's motion for rehearing was also denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

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CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law ...

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d) provides:

> 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.

28 U.S.C. § 2254(e) provides:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

A. Introduction and summary of argument

This is a tragic case both factually and legally. Foremost, of course, the case is tragic for victim Jonathan Gordon Smith ("Smith") and his family. Smith was shot and killed by Petitioner Daniel Cohen and his mother Diana Cohen ("Diana").

The Cohens killed Smith based upon their shared delusional belief that Smith failed to protect them from poisonous methamphetamine fumes coming from the methamphetamine lab run by their downstairs neighbor–the lab and fumes were entirely hallucinations. The Cohens also believed that Smith's plan to evict them would kill the sickly Diana.

The case is also *legally and constitutionally* tragic and represents the type of "extreme malfunction[] in the state criminal justice systems" for which the Great Writ of habeas corpus remains a guard. *Harrington v. Richter*, 562 U.S. 86, 102-103 (2011). As in most states, California law permits evidence of mental illness for an insanity defense or to mitigate a crime by negating a specific criminal intent such as malice, premeditation, or a special circumstance here–an enhancement which made Petitioner ineligible for parole. Negating specific intent can result in a mitigated verdict of second degree murder or manslaughter, or it can negate a special circumstance. *Daniels v. Woodford*, 428 F.3d 1181, 1208 (9th Cir. 2005).

The federal constitution also clearly guarantees criminal defendants the effective assistance of counsel and the right to ancillary experts, which are required to present legally valid defenses. *Strickland v. Washington*, 466 U.S. 668 (1984) or *Ake v. Oklahoma*, 470 U.S. 68 (1985). Here, however, the state appointed defense counsel did only a cursory investigation of Petitioner's mental illness and was advised to obtain Petitioner's medical records. Despite ample evidence, later confirmed in the trial testimony, that Petitioner and his mother were delusional, counsel failed to obtain Petitioner's medical records and did not obtain an expert report. These medical records, later obtained by state appointed appellate counsel, showed that Petitioner had at one time been found mentally disabled by the Social Security Administration.

Petitioner's trial counsel instead argued that the killing was manslaughter

based upon an actual but unreasonable belief that the killing was required to save his mother Diana from future harm. Without evidence of mental illness, however, the state courts deemed this to be a *legally flawed theory* because there was no evidence that Petitioner believed any threat to Diana's health to be sufficiently imminent to negate malice, as required by state law. (Appendix ["App."] 18).

The malfunction in the trial court was exacerbated on direct appeal and the accompanying state habeas. After cooperating briefly, trial counsel cut off communication with appellate counsel and refused to sign a declaration. Appellate counsel nonetheless obtained and provided to the state appellate court portions of Petitioner's medical records, a tentative expert opinion that Petitioner suffered from a shared delusional disorder ("folie á deux"), and articles explaining the disorder. The tentative expert opinion suggested that Petitioner and his mother shared delusions and had a fused psychological state, which supported a defense of diminished intent that could have mitigated the crime and supported an insanity defense under settled state law.

The state court, however, denied appellate counsel's request for funds for an expert, and the court summarily denied the habeas petition and Petitioner's requests for an evidentiary hearing. (App. 23, 25).

Petitioner filed a pro per federal habeas petition. Although the District Court found counsel's performance patently deficient, the Court found that, due to the lack of appointed expert, Petitioner could not establish prejudice. (App. 11). The Court did not address whether the State's fact-finding was unreasonable per 28 U.S.C. § 2254(d)(2), and the Court did not appoint an expert or counsel. Nor did the Court order a hearing per 28 U.S.C. § 2254(e). On appeal, the Ninth Circuit filed a memorandum opinion affirming the denial of the petition and finding that the state court's decision was not unreasonable. (App. 2-3).

The state court's appointment of deficient counsel who failed to obtain Petitioner's medical records and an expert report, coupled with the state court's summary denial of the ineffective assistance claim, while also denying funds for an expert and a hearing on the issue, represents an extreme malfunction in the state court criminal justice system. The Ninth Circuit's holding below conflicts squarely with this Court's decision in *Brumfield v. Cain*, 576 U.S. 305 (2015) and the Eleventh Circuit's decision in *Smith v. Campbell*, 620 Fed.Appx. 734 (11th Cir. 2015). *See also Wright v. McCain*, 703 Fed.Appx. 281 (5th Cir. 2017); *Velasquez v. Ndoh*, 824 Fed.Appx. 498 (9th Cir. 2020).

Additionally, this case raises two issues left open in *Brumfield* regarding (1) whether a state court's refusal to provide funds for a mental health expert results in an unreasonable determination of facts or law per § 2254(d)(1) and (2) (*Brumfield*, 576 U.S. at 313), and (2) the relationship between § 2254(d)(2) and (e)(1). *Brumfield*, 576 U.S. at 322.

Finally, the Ninth Circuit found that Petitioner could not demonstrate that the state court's fact-finding was unreasonable based upon the assertion that there is no clearly established constitutional right to an appointed expert on direct appeal or collateral review, and that without a declaration from trial counsel or an expert, the state court's denial of the habeas petition was not unreasonable. (App. 2-3). No other circuit court has made such a holding limiting *Ake* to trial experts, and the Court cited no authority for this holding. Because the state court refused to provide the defense with the means to establish *Strickland* prejudice, the state court's ruling essentially renders *Strickland* and *Ake* meaningless, and is contrary to *Strickland*, *Ake*, and numerous cases holding that due process requires, at minimum, an opportunity to be heard.

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B. Statement of the case

Petitioner Daniel Cohen and his mother Diana Cohen were charged in Santa Cruz County Superior Court by complaints filed on November 14, 2013 with the murder of Jonathan Gordon Smith on November 8, 2013, in violation of Cal. Penal Code[1] § 187. Charges against both defendants included special circumstance allegations of lying in wait (§ 190.2(a)(15)) and murder committed during a robbery, each of which carried a potential sentence of life without parole. (§ 190.2(a)(17)). The latter was later dismissed. Daniel Cohen's charges included additional enhancements for personal use of firearm (§ 12022.5(a)(1)), personal discharge of firearm (§ 12022.53(c)), and personal discharge of firearm causing death. (§ 12022.53(d); App. 7).

Petitioner and his mother were convicted of all counts in a joint trial. (App. 7). On April 21, 2016, the court sentenced Petitioner *to life without parole.* (App. 7).

In addition to filing a direct appeal, on January 11, 2017, Petitioner filed a motion in the state appellate court seeking funds for an expert psychiatrist to assist in preparation of a writ of habeas corpus. (2-Excerpts of Record ["ER"]-111-120). That motion was summarily denied on January 19, 2017. (App. 25).

On March 8, 2018, Petitioner filed a petition for writ of habeas corpus in the state appellate court alleging ineffective assistance of counsel and seeking an evidentiary hearing and appointment of an expert. On October 24, 2018, the appellate court issued an opinion affirming the convictions (App. D) and summarily denied the habeas petition and request for a hearing and renewed request for funds for an expert. (App. 23).

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[1] Statutory references are to the California Penal Code unless otherwise noted.

On January 30, 2019, the California Supreme Court denied review of the direct appeal and the habeas petition. (App. 7).

On April 12, 2019, Appellant filed a pro per habeas petition in the Northern District of California. On April 4, 2022, the district court denied the petition. (App. 7-13).

On August 31, 2023, the Ninth Circuit granted a Certificate of Appealability. On September 12, 2024, the Ninth Circuit affirmed the denial of the petition (App. 2-3), and on October 17, 2024, the Court denied rehearing. (App. 5).

C. Statement of facts

The following factual and procedural background is taken from the California Court of Appeal's opinion:

> Gordon Smith was found dead on the floor at his office in Capitola on a November morning in 2013. He had been shot four times, including twice in the head. Pooled blood around his body indicated he had been dead for some time.
>
> Police interviewed Smith's administrative assistant, who told them Smith was in the property management business and had recently had some unusually negative interactions with two tenants he was attempting to evict, defendants Daniel and Diana Cohen. The assistant described defendants as "disgruntled" and "threatening" and recounted an incident several weeks before when Daniel came to the office to confront Smith about an eviction notice. Daniel was erratic and angry and told Smith that proceeding with the eviction would be like "murdering his mom," who was in poor health. After the incident, Smith remarked to his assistant that he was relieved Daniel "didn't just come down and shoot" him. The assistant also relayed to police that on the day he was shot, Smith received a phone call from Daniel and became visibly upset during the conversation.
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> The search of defendants' apartment and car yielded four expended bullet casings and an invoice from a storage facility in Santa Cruz. The invoice led police to a storage unit rented to Daniel Cohen. Inside was a .357 caliber revolver. The revolver had six bullet chambers; two bullets remained in the gun, and the other four chambers were empty. Forensic analysis confirmed the bullets that killed Smith were fired from that gun, and that Daniel's fingerprints were on it. DNA from a blood spot on Daniel's shoe was a match to Smith.

> Statements from a used car dealer and witnesses at Smith's office, along with surveillance footage and records from the storage facility where the gun was found, chronicled defendants' activities the day of the killing. That morning, they took an SUV from a used car dealership, purportedly for a test drive. After obtaining the SUV–which Diana drove off the lot–they went to the storage facility (arriving at 12:38 p.m.), then left 14 minutes later. They were next seen in the parking lot of Smith's office building at around 5:15 p.m. The borrowed SUV was backed into a parking space with Daniel in the passenger seat. Cigarette butts found in the parking lot had DNA from both Daniel and Diana. Data extracted from an office computer indicated that Smith last used it at 6:42 p.m., at which time he would have been alone in the office. Twelve minutes later, defendants were back at the storage facility (which is about a four-minute drive from Smith's office).

(App. C 7-8).

D. Facts related to mental illness

As the District Court found below, there was substantial objective, undisputed evidence available to counsel that Daniel Cohen was mentally ill and was suffering from delusions. (App. 10-11).

1. Facts in the trial record

a. The Cohens' persistent delusional beliefs that neighbors were cooking methamphetamine and that the fumes were poisoning the Cohens

The Cohens' downstairs neighbor Kristin Maya testified at length about the Cohens's delusional beliefs that Maya and her young son were cooking and selling methamphetamine and that the methamphetamine fumes were poisoning the Cohens in their apartment above Maya. Maya described Diana's frail health and the Cohens' accusations that Maya was cooking methamphetamine, that they could smell the fumes in their apartment, and that the fumes were making them sick. The Cohens even accused Maya's 14-year old son of cooking methamphetamine and smuggling chemicals in his school backpack. They accused property manager Smith of cooking methamphetamine at his other properties too. These delusions persisted even when Maya allowed Daniel to search in every part of Maya's apartment, under

Diana's persistent direction. Maya showed Daniel that there was no methamphetamine or equipment to cook methamphetamine. Diana directed Daniel to look in closets and cupboards. Daniel seemed confused that he could not find evidence of methamphetamine. When no lab was discovered, Diana told Daniel that Maya's son and her friends had taken the equipment away in their school backpacks. (2-ER-271-286, 297-300). Daniel *seemed desperate* and said "we're begging you to stop" cooking methamphetamine. (2-ER-295-297).

The Cohens also ran the water in their shower for three months straight. Daniel told Maya that the running water helped alleviate the fumes that were coming from Maya cooking methamphetamine. (2-ER-287-289).

The Cohens complained three times about toxic fumes to law enforcement which resulted in Sheriff Department deputies coming to Maya's apartment and asking to inspect her apartment based upon a complaint of toxic chemical smells. Maya allowed them to inspect, and they found nothing. (2-ER-290-294).

The Cohens complained about methamphetamine fumes to contractor Jeffrey Steckler (2-ER-254-255) and to car rental employee Joe Cricchio. (2-ER-237-229).

The Cohens also complained to the police after their arrest about the methamphetamine fumes. At the time of her arrest on November 11, Diana looked sickly and had a colostomy bag. (2-ER-314-316). Diana told the police she got an ulcer "from living on top of a dope lab and chemicals coming up." (2-ER-210-212).

When interviewed by the police, Daniel also repeatedly complained (delusionally) about methamphetamine lab fumes. He was convinced that his mother was dying because of exposure to methamphetamine fumes. They had the bad fortune to have lived in three different apartments where the people living beneath them were cooking methamphetamine. He was sure that the fumes gave him pneumonia, even though the nurse told him it was statistically impossible to

have methamphetamine labs under each of the three different apartments where they had lived. (2-ER-217-223). Letters in the Cohens' apartment complained about being poisoned by fumes from their downstairs neighbors cooking methamphetamine at the apartments where the Cohens previously lived. (2-ER 301-311).

b. Inappropriate hygiene

Numerous witnesses confirmed that Daniel was dressed poorly or inappropiately, had strong body odor, and did not appear capable of caring for himself. (2-ER-231-232, 240-247, 250-253, 256-259, 264-265, 295-297).

Daniel was scratching himself during his entire interview with the police. He looked unclean and unkempt. (2-ER-312-313).

The Cohens' apartment was a mess and the bathtub was full of malodorous, mildewed clothing. (2-ER-233-239, 267-270).

c. Other symptoms of mental illness

Daniel explained to the police that he was a germaphobe. (2-ER-213). His memory was bad; everything after the beginning of high school was "fuzz." (2-ER-215). His days were awful. His mother's bad health prevented them from ever going out. (2-ER-216).

Daniel informed the police that his mother had an appointment tomorrow to reverse her colostomy. He was afraid the doctor would negligently kill his mother. His second biggest fear was that the doctor would further damage her intestines. He explained how he constantly had to help his mom change her colostomy bag. It was a living hell. (2-ER-224-226).

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E. Facts related to trial counsel's failure to investigate Petitioner's medical records and counsel's presentation of a legally flawed defense

1. Trial counsel's limited consultation with Dr. Dondershine and appellate counsel's efforts to obtain expert funds

The District Court's opinion recites appellate counsel's efforts in state court to obtain expert funds and a hearing. Petitioner's trial counsel, Mitchell Page, hired Dr. Harvey Dondershine to evaluate Petitioner prior to trial. (App. 10). After consultation, Page concluded that there was not a viable insanity defense and did not investigate further expert testimony regarding mental illness as applied to premeditation, malice, or imperfect self-defense. (App. 10). When appellate counsel contacted Dr. Dondershine in 2016, he stated that his examination of Petitioner indicated a long history of serious and worsening major mental illness, leading him to suspect that Petitioner and his mother had a fused psychological state, and that Dr. Dondershine had asked Page to obtain specific medical records, but never heard back from Page. (App. 10). In January 2017, counsel provided Dr. Dondershine a summary of 500 pages of Petitioner's medical and psychiatric records. (App. 10). Dr. Dondershine stated that the summary tended to confirm his initial, tentative diagnosis that Petitioner and his mother had a shared delusional disorder and that Petitioner may have been in a dissociative state or a fused mental state with his mother, where he was controlled by her delusions. (App. 10).

2. Medical and mental health records that provide support to the diagnosis of mental illness

After trial, appellate counsel obtained Petitioner's medical, mental health, and social security records. Records from the Social Security Administration indicate that in 2003, Petitioner was analyzed by Ute Kollath, Ph.D. He was diagnosed as suffering from Axis I: "Bipolar II Disorder, Depressed, Severe With Psychotic Features," and also "Obsessive-Compulsive Disorder." (2-ER-152).

Although he was considered an "unreliable historian," Dr. Kollath noted that Daniel's mother related that Daniel sustained a concussion when he was sixteen years old and that he began to isolate himself, refused to leave the house, and became obsessive about cleanliness. (2-ER-148-149). He was agitated, reported a fear of germs, reported auditory hallucinations and appeared preoccupied, and also reported paranoid ideation. (2-ER-149-150). He was found to be disabled. (2-ER-128).

In 2013, he was evaluated by Social Security again. A health exam noted several physical problems possibly related to his morbid obesity. (2-ER-140-142). A psychological exam by Aparna Dixit, PsyD noted that Petitioner was able to complete more tasks than in the 2003 exam. He was diagnosed with Axis I "Depressive Disorder NOS." His IQ was in the low average range. (2-ER-144-147). A hearing officer found that Daniel no longer met the Social Security criteria for disability. (2-ER-125-139).

3. Denial of funds for an expert to review records and further evaluate Daniel Cohen

On January 11, 2017, appellate counsel filed a motion in the state appellate court seeking funds for an expert to review Daniel Cohen's medical, psychiatric, and Social Security records. The motion outlined proposed expert Dr. Dondershine's preliminary opinion of Petitioner's shared delusional disorder, trial counsel's failure to obtain the medical records for Dr. Dondershine to evaluate, a summary of the Social Security records obtained by appellate counsel, and trial counsel's refusal to cooperate with defense counsel. (2-ER-106-109, 111-120, 173-179).

On January 19, 2017, the state appellate court denied funds for an expert to review the records, further evaluate Petitioner, and provide an opinion to assist appellate counsel with preparation of this writ of habeas corpus. (2-ER-122).

As the District Court found, after the state appellate court denied expert

funds, counsel asked Dr. Dondershine to provide a declaration in support of the state habeas petition, but Dr. Dondershine suffered a stroke before he could do so. (App. 10). When counsel asked trial counsel Page to sign a declaration confirming the contents of the prior conversations, Page stopped responding. (App. 10-11).

4. The state appellate court's findings

The state appellate court summarily denied Petitioner's habeas writ based upon ineffective assistance of counsel and denied him an evidentiary hearing. On direct appeal, however, the state court found that the defense presented by Daniel Cohen's trial counsel of his mother was a "*legally flawed"* defense without any evidence that his mother was under an apparent threat of *imminent* harm. (App. 18).

5. The District Court's opinion finding deficient performance but lack of demonstrable prejudice due to the lack of an expert declaration

The District Court found that counsel's failure to obtain Petitioner's medical and psychiatric records and adequately investigate and present mental health defenses, was deficient performance. (App. 11). The Court, however, found a lack of prejudice due to the lack of expert testimony in the state appellate record; "[a]lthough Petitioner's medical and psychiatric records were before the state court, without the assistance of an expert witness interpreting the medical and psychiatric records, the Court cannot assess whether these records would have supported an insanity or mental health defense, or otherwise affected the outcome of the underlying state proceeding." (App. 11). The District Court thus held that it could not find that "the state court's summary denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law, or that the denial resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." (App.

11). The Court further held that the failure to appoint a mental health expert was not an unreasonable application of the right to ancillary services. (App. 11-12).

REASONS FOR GRANTING THE WRIT

I. By Holding that the State Court's Rejection of Petitioner's *Strickland* Claim was Not Based on an Unreasonable Determination of the Facts or Law Due to the Lack of an Expert Declaration or Declaration of Trial Counsel, the Ninth Circuit Contravened this Court's Opinion in *Brumfield v. Cain*, Raised Questions Left Open in *Brumfield*, and Created a Split Among Circuits.

This case presents a good vehicle for settling two questions left open in this Court's decision in *Brumfield v. Cain*, 576 U.S. 305 (2015) regarding when a state court's refusal to hold an evidentiary hearing and appoint experts constitutes an unreasonable determination of facts or law per 28 U.S.C. § 2254(d)(1) and (2), and which have created a split among the circuit courts. It also merits review to clarify that the right to a mental health expert set forth in *Ake v. Oklahoma*, 470 U.S. 68 (1985) clearly and necessarily also applies to appellate review of claims that the trial proceedings failed to protect a defendant's right to a mental health expert per *Ake* and *Strickland v. Washington*, 466 U.S. 668 (1984).

A. Counsel has a clearly established duty to investigate a defendant's background, including mental illness and medical records, and courts have a clearly established constitutional duty to appoint a mental health expert to assist the defense and the court.

This Court has long held in numerous contexts that the Sixth Amendment guarantee of effective assistance of counsel requires counsel to diligently investigate defenses to crimes and mitigating evidence. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Strickland*, 466 U.S. at 691. In particular, this Court has held that counsel has a duty to investigate a defendant's mental defects, *Williams*, 529 U.S. at 396, and a duty to obtain records of "mental health or mental impairment." *Porter*, 558 U.S. at 40.

A *Strickland* claim of ineffective assistance of counsel requires a demonstration that "counsel's performance was deficient" and "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

As to deficient performance, "[i]t is unquestioned that under the prevailing professional norms," counsel has an "'obligation to conduct a thorough investigation of the defendant's background.'" *Porter*, 558 U.S. at 39, quoting *Williams*, 529 U.S. at 396. This includes investigating and obtaining records of "mental health or mental impairment." *Id.* at 40. Indeed, more than any other singular factor, mental defects have been respected as a reason for leniency in our criminal justice system. 4 William Blackstone, Commentaries *24–*25 ("[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself.... [A] total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses ....", quoted in *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

This Court has recognized that a "defendant's mental illness ... should militate in favor of a lesser penalty." *See Zant v. Stephens*, 462 U.S. 862, 885 (1983). Lesser penalties are required "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable ... to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J.,

concurring).

California law also recognizes that a defendant's mental illness may negate certain specific intents such as malice (required for murder), premeditation (required for first degree murder), or the intent required for the lying in wait special circumstance (which increases the penalty to life without parole). This defense is alternatively called diminished intent or diminished actuality. *Daniels v. Woodford*, 428 F.3d 1181, 1208 (9th Cir. 2005); *People v. Cortes*, 192 Cal.App.4th 873, 909-912 (2011); *see also People v. Coddington*, 23 Cal.4th 529, 582-583 (2000), *disapproved on other grounds in Price v. Superior Court,* 25 Cal.4th 1046, 1069 n.13 (2001); Cal. Penal Code §§ 28, 29. Further, evidence of mental illness is admissible to support a person's subjective belief in imminence, which can mitigate murder to manslaughter. *People v. Humphrey*, 13 Cal.4th 1073, 1088-89 (1996); *People v. Sotelo-Urena*, 4 Cal.App.5th 732, 747, 756-757 (2016). California's standard instruction CALCRIM 3428 explains these principles to juries. California also permits admission of mental illness to support an insanity defense. *People v. Leeds*, 240 Cal.App.4th 822, 829 (2015); *see People v. Rittger*, 54 Cal.2d 720, 732 (1960), quoting *M'Naghten's Case*, 10 Clark & Fin. 200, 211, 8 Eng. Rep. 718 (1843) (killer who "'labours under ... partial delusion ... must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real'").

Additionally, this Court has clearly established that the Sixth Amendment right to counsel includes the right to funds for a mental health expert. *McWilliams v. Dunn*, 582 U.S. 183, 187-188 (2017); *Ake*, 470 U.S. at 76-77. "[W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Ake*, 470 U.S. at 80; *see*

McWilliams, 582 U.S. at 187-188.

Finally, in *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court considered an inmate who showed symptoms of mental illness after he was sentenced to death, thus making him potentially ineligible for execution. For the post-conviction Governor's review of the sentence, the state court provided only state appointed experts and did not afford the defendant the opportunity for an appointed defense mental health expert. *Id.* at 424-425. This Court held that "[i]f there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.'" *Id.* at 424 (Powell, J., concurring) (quotations omitted).[2] In particular, this includes the right of an indigent defendant to present a defense mental health expert to determine sanity in post-conviction context regarding imposition of the death penalty. *Id.*

B. The Ninth Court's decision below created a conflict among the Circuits in the wake of *Brumfield v. Cain*, regarding when a state court's refusal to grant a hearing on a petitioner's mental illness has resulted in an unreasonable determination of facts.

Per 28 U.S.C. § 2254(d)(2), a writ of habeas corpus should be granted to a state prisoner where the state court's adjudication of the claim "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." This Court has held that, per § 2254(d)(2), "a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "We may not characterize ... state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance." *Brumfield*, 576 U.S. 313-314 (2015) (quotations omitted). This Court has found a state court's

[2] Justice Powell's concurring opinion has long been recognized as the holding of the Court. *See Panetti v. Quarterman*, 551 U.S. 930, 949 (2007).

factual finding to be unreasonable where the record before the state court did not support the factual finding. *See Wiggins v. Smith*, 539 U.S. 510, 528-529 (2003). Further, this Court has made clear that states have a duty under § 2254(d)(2) to provide fact-finding procedures which are "adequate for reaching reasonably correct results or, at a minimum" a process that is adequate "for the ascertainment of the truth." *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007). This Court has made clear that deference to state factual findings does not preclude relief. *Brumfield v. Cain*, 576 U.S. 305, 314 (2015); *Miller-El*, 537 U.S. at 340.

In *Brumfield*, this Court found that a state court's decision was an unreasonable determination of facts where the state court refused to give the petitioner an evidentiary hearing on his claim per *Atkins v. Virginia*, 536 U.S. 304 (2002). *Brumfield*, 576 U.S. at 317-322. This Court held that, while there was certainly contrary evidence suggesting that Brumfield might not be intellectually disabled per *Atkins*, Brumfield did not need to prove his disability to obtain the evidentiary hearing; he needed only to show that he could raise a reasonable doubt. *Id.* at 320.

The District Court in *Brumfield* found that the court's refusal to appoint an expert also rendered the state court's decision an unreasonable determination of the due process right to be heard per § 2254(d)(1). Indigent prisoners who are denied an expert are subjected to a cruel Catch-22: "without expert funding, no prima facie showing is likely possible, yet without a prima facie showing, no expert funding is forthcoming." *Brumfield v. Cain*, 854 F.Supp.2d 366, 378 (M.D. La. 2012). The Fifth Circuit had disagreed. *Id.* at 311-312. Because this Court decided the case based upon the state court's denial of an evidentiary hearing, the Court declined to address whether the state court's refusal to appoint an expert resulted in an unreasonable determination of law or facts. *Id.* at 312.

In the wake of this Court's decision regarding the denial of a hearing, and the question left open regarding the denial of expert funds, the lower courts have disagreed on how to apply *Brumfield* and what to do in cases where hearings and experts are denied by state courts in similar constitutional claims. For instance, in *Smith v. Campbell*, 620 Fed.Appx. 734 (11th Cir. 2015), the Eleventh Circuit found that a state court's failure to hold a hearing for an *Atkins* claim and its reliance upon disputed facts to deny the *Atkins* claim was an unreasonable determination of facts per § 2254(d)(2). *Id.* at 750-751. The Court remanded for the petitioner to be allowed to present his own expert on the issue and for consideration of whether to grant an evidentiary hearing. *Id.* at 751.

Similarly in *Wright v. McCain*, 703 Fed.Appx. 281 (5th Cir. 2017) (per curiam), the Fifth Circuit found that the state court's denial of a petitioner's claim per *Faretta v. California*, 422 U.S. 806 (1975) was based upon unreasonable determination of facts, where the state court had failed to accord the defendant a hearing. *Wright v. McCain*, 703 Fed.Appx. at 283-284; *see King v. Emmons*, 144 S.Ct. 2501, 2504 (2024) (Jackson, Sotomayor, JJ., dissenting from denial of certiorari).

By contrast, the Ninth Circuit in Petitioner's case, conflated the reasonableness of the state court's fact-finding with the question of whether the constitution provides a right to funds for an expert on appeal or in collateral proceedings. The Court found that failure to provide expert funds to support a *Strickland* habeas claim can never be an unreasonable determination of facts because there is no clearly established right to expert funds on appeal or in a collateral proceeding. (App. 2-3).

In a Catch-22 reasoning, the Ninth Circuit held that Petitioner could not show that the state court was unreasonable in failing to conduct an evidentiary

hearing because Petitioner did not provide "any explanatory expert declaration" demonstrating the relevance of the medical records or evidence of mental illness in the trial transcripts and medical records. (App. 2-3). Yet, the state court had refused to provide funds for the expert to provide such an "explanatory expert declaration," which the Ninth Circuit held was lacking, and the state court had refused to order a hearing for presentation of expert mental health testimony.

Because of the conflict among the Circuits on application of *Brumfield*, this Court should grant review per Rule 10. *See* Supreme Court Rules 10(a), (b), (c). Indeed, because the case conflicts so clearly with *Brumfield*, this Court may deem this case appropriate for summary reversal. *Sears v. Upton*, 561 U.S. 945 (2010).

C. This Court should grant review to resolve two questions left open in *Brumfield* whether denial of funds for a mental health expert results in unreasonable application of facts or law and to settle the relationship between § 2254(d)(2) and § 2254(e)(1).

As described above, after determining that the denial of an *Atkins* hearing resulted in an unreasonable determination of facts per § 2254(d)(2), this Court left unresolved whether a denial of funds for a mental health expert resulted in an unreasonable determination of facts per § 2254(d)(2) or an unreasonable application of due process law. *Brumfield*, 576 U.S. at 312. Although this case involves a mental health expert in the context of a *Strickland* claim rather than an *Atkins* claims, the postures are similar. As in the *Atkins* determination at issue in *Brumfield*, for a *Strickland* ineffective assistance claim, a court must hold a hearing whenever the petitioner "alleges facts which, if proved, would entitle him to relief." *Townsend v. Sain*, 372 U.S. 293, 312 (1963), overruled in part by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *see People v. Duvall*, 9 Cal.4th 464, 475-477 (1995) (same).

As shown above, the Ninth Circuit rejected this claim on the grounds that failure to provide expert funds to support a *Strickland* habeas claim can never be an unreasonable determination of facts because there is no clearly established right to

expert funds on appeal or in a collateral proceeding. (App. 2-3). But, as the District Court stated in *Brumfield*, this reasoning leads to a Catch-22, which effectively precludes review of an indigent defendant's constitutional claims based upon mental illness. *Brumfield*, 854 F.Supp.2d at p. 378; *cf. Cruz v. Arizona*, 598 U.S. 17, 29 (2023) (Arizona's rule requiring significant change in the law *and* retroactivity imposed a Catch-22).

Certainly, had trial counsel presented the same request for expert funds to the trial court before trial, failure to grant the request would be clear reversible constitutional error per *Ake* and *McWilliams*. *Ake*, 470 U.S. at 80; *see McWilliams*, 582 U.S. at 187-188. Had counsel investigated and proffered this evidence only to be excluded by the trial court, the exclusion would be clear reversible constitutional error per *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). An appeal on the basis of the trial court's denial of funds would undeniably be meritorious. The Ninth Circuit's limitation of *Ake* and *McWilliams* to trial courts was unreasonable. The AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti*, 551 U.S. at 953.

Further, *Strickland* and this Court's multiple cases confirming counsel's duty to investigate evidence of a defendant's mental illness, which is relevant to a defense of a mitigated crime or mitigation of punishment, would be rights in name only without a meaningful post-conviction opportunity to be heard and present expert evidence on counsel's deficient performance and prejudice. *See Ford*, 477 U.S. at 424-425.

This Court held that "[i]f there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.'" *Id.* at 424 (Powell, J., concurring) (quotations omitted). In particular, this includes the right of an indigent defendant to present a defense mental health expert to determine

sanity in post-conviction context regarding imposing the death penalty. *Id.* This Court has applied this basic due process right to be heard to a wide variety of other proceedings. *Crane*, 476 U.S. at 690 (right to present evidence at trial); *Morrissey v. Brewer*, 408 U.S. 471, 488-489 (1972) (parole revocation proceeding); *In re Oliver*, 333 U.S. 257, 273 (1948) (contempt hearing); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (lawsuit over real property).

This due process right was the foundation for this Court's decisions in *Ake* and *McWilliams*, which each held that, where mental health is an issue, a defendant has a clearly established due process right to an appointed mental health expert. *McWilliams*, 582 U.S. at 186; *Ake*, 470 U.S. at 83. Indeed, *Ake* held that the due process right to a mental health expert was based in part upon cases which held that due process requires that indigents have the right to ancillary services *on appeal*. *Ake*, 470 U.S. at 76, citing *Griffin v. Illinois*, 351 U.S. 12 (1956) (free transcript on appeal); *Burns v. Ohio*, 360 U.S. 252 (1959) (appeal without fee); *Douglas v. California*, 372 U.S. 353 (1963) (counsel on appeal); *Evitts v. Lucey*, 469 U.S. 387 (1985) (effective assistance of counsel on appeal).

An adjudication of a *Strickland* claim certainly fits within this clearly established rubric. The Sixth Amendment's guarantee of effective assistance of counsel set forth in *Strickland* and its progeny "would be an empty one if the State were permitted to" effectively deny a defendant an opportunity to be heard on his ineffective assistance of counsel claim. *Crane*, 476 U.S. at 690. The state courts did so here. The trial court assigned Petitioner an appointed counsel who (1) presented a *legally flawed defense*, (2) deficiently failed to investigate the defendant's history of mental illness, which could support *valid* defenses of diminished intent or insanity, and (3) refused to provide a declaration to appellate counsel. When appellate counsel attempted to raise that claim on habeas corpus accompanying the

direct appeal,[3] the appellate court denied a motion for funds for an expert to provide a declaration supporting prejudice, and denied a hearing at which trial counsel could be questioned and an expert presented.

On federal habeas, the District Court recognized that trial counsel's performance was deficient, but held that, without an expert declaration, Petitioner could not demonstrate *Strickland* prejudice, and that Petitioner had no clearly established right to an expert to prove prejudice in a post-conviction proceeding. (App. 10-11). The Court also found no clearly established right to an expert. (App.11-12).

On appeal, the Ninth Circuit filed a memorandum opinion affirming the denial of the petition and finding that the State's fact-finding was not unreasonable. (App. 2-3). In a Catch-22 reasoning, the Ninth Circuit held that Petitioner could not show that the state court was unreasonable in failing to conduct an evidentiary hearing because Petitioner did not provide (1) "any explanatory expert declaration" demonstrating the relevance of the medical records or evidence of mental illness in the trial transcripts and medical records, and (2) "or an executed declaration from trial counsel." (App. 2). But each of these was missing from the record precisely because the state court denied Petitioner an opportunity to be heard. *See Ford*, 477 U.S. at 424. The state court denied funds for the expert declaration and denied a hearing at which counsel could be ordered to testify or provide a declaration.[4] By denying Petitioner any opportunity to collect and present additional evidence

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[3] In California, *Strickland* claims must ordinarily be raised in a habeas writ accompanying an appeal, rather than on direct appeal. *People v. Mendoza Tello*, 15 Cal.4th 264, 266-267 (1997).

[4] Trial counsel's refusal to cooperate with appellate counsel was another violation of his ethical duties as appointed counsel. *See Galbraith v. State Bar of California*, 218 Cal. 329, 333 (1933); ABA Standards for Criminal Justice (2nd ed. 1986 Supplement) Standard 4-1.6; State Bar of California Standing Committee on Professional Responsibility, Formal Opinion No. 1992-127 at 1-2, 4.

related to his mental condition, the state court's decision "invites arbitrariness and error by preventing the affected parties from offering ... evidence" in support of a prejudice finding regarding an insanity defense or mitigated intent based upon mental illness. Ford, 477 U.S. at 424 (Powell, J., concurring).

Further, the District Court did not address whether the State's fact-finding was unreasonable per 28 U.S.C. § 2254(d)(2). The Court did not appoint an expert or counsel. Nor did the Court order a hearing per 28 U.S.C. § 2254(e). (App. 7-12). The Ninth Circuit affirmed these rulings summarily without explanation. (App. 2-3). This refusal to order a hearing or address the relationship of § 2254(e)(1) and (d)(2) thus raises this additional issue left open in *Brumfield*, 576 U.S. at 322.

This Court should grant review on these two questions left open in *Brumfield*.

D. Review is warranted because the Ninth Circuit's decision is contrary to *Ake, McWilliams, and Strickland.*

1. Strickland

The decision of the Ninth Circuit must also be reviewed because it was contrary to this Court's holdings in *Strickland*, *Ake*, *and McWilliams*. In *Porter*, 558 U.S. 30, this Court found that counsel's failure to "to conduct a thorough investigation of the defendant's background"–including obtaining records of "mental health or mental impairment"–was deficient performance. *Id.* at 39-40. This Court further found that the counsel's presentation of an inferior defense blaming the defendant's bad acts on drunkenness, coupled with the failure to discover significant mitigation evidence relating to his substantial mental health difficulties and military service was prejudicial, and that the state court's contrary decision was an unreasonable application of *Strickland* per § 2254(d)(1). *Id.* at 42. Here, counsel similarly pursued a *legally flawed defense* of defense of his mother, which lacked the critical element of whether and why Petitioner believed in the *imminence*

of the threat. Evidence of mental illness could supply the missing element of this otherwise legally flawed defense. Had this mental illness evidence been presented, the jury would be instructed per CALCRIM 3428 to consider where the evidence of Petitioner's shared delusional disorder negated malice (reducing the crime to manslaughter), negated premeditation (reducing the crime to first degree), or negated the special circumstance (reducing the maximum sentence to life *with the possibility* of parole). As in *Porter*, the state court's decision was an unreasonable application of *Strickland* per § 2254(d)(1). *Id.* at 42. *See also Sears*, 561 U.S. 945 (state court's finding that counsel's performance was deficient was at odds with the finding of lack of prejudice). Indeed, because the case conflicts so clearly with *Porter*, this Court may deem it appropriate for summary reversal, *Sears*, 561 U.S. 945, or an order to "grant, vacate and remand." *Youngblood v. West Virginia*, 547 U.S. 867, 868-870 (2006).

2. Ake and McWilliams

The Ninth Circuit and District Court further argued, without citation to authority, that the denial of expert funds was not contrary to *Ake* and *McWilliams* because this Court has not clearly held that the right to a mental health expert extends beyond trial. (App. 2-3, 11-12). But neither the District Court nor Ninth Circuit cited any cases so holding. At most, these two courts noted that *Ake* and and *McWilliams* involved a right to a mental health expert at trial. Yet, as described above, *Ake* made clear that the due process right to funds for a mental health expert was based in large part on this Court's cases holding that the rights to counsel and to due process include the rights to funds services necessary to completing an *effective appeal. Ake*, 470 U.S. at 76, citing *Griffin*, 351 U.S. 12, *Burns*, 360 U.S. 252, *Douglas*, 372 U.S. 353, and *Evitts*, 469 U.S. 387. Indeed, how could a *Strickland* or *Ake* claim be litigated post-conviction without funds to obtain

a report demonstrating prejudice? *Strickland* itself presumes that state and federal post-conviction courts will afford defendants an opportunity to demonstrate entitlement to relief. *Strickland* is meaningless unless it affords a defendant an opportunity to be heard and demonstrate deficient performance and prejudice on review of trial counsel's performance.

Further, *Ford* involved a post-conviction presentation of evidence of mental illness to the Governor in support of mitigation of punishment. *Ford*, 477 U.S. at 424-425. This also suggests that the right to funds for mental health experts cannot be limited to trial.

The Ninth Circuit's unexplained summary claim that *Ake* and *McWilliams* have limited the right to a mental health expert *at trial* has no basis in this Court's cases, nor in logic. Again, because the case conflicts so clearly with *Ake*, this Court may deem it appropriate for summary reversal, *Sears*, 561 U.S. 945, or an order of "grant, vacate and remand." *Youngblood*, 547 U.S. at 868-870.

CONCLUSION

Petitioner respectfully requests that this Court grant certiorari, summarily reverse the decision below and remand, or set the case for briefing and argument to settle these important questions.

Dated: December 23, 2024

Respectfully submitted,

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