No. _____

In the Supreme Court of the United States

STERLING ATKINS, JR.,
Petitioner.
v.
JEREMY BEAN, Warden, et. al.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

Lead counsel proceeded to trial just six days after her appointment in this capital case, with two of those days devoted to another case. She did not ask for a continuance because the judge would not have appointed her had she had requested one. Her co-counsel was a newly-minted attorney fresh out of law school who had never tried a case to a jury. No investigator or mitigation specialist was hired, and, predictably, disaster ensued. At the penalty phase, counsel relied mainly on Mr. Atkins' father to describe abuse perpetrated on his son, despite his being the principal abuser. Yet the Ninth Circuit opinion mentions nothing about these glaring deficiencies. Instead relief was denied on the basis that the record did not show "how much investigation was performed, or what information was uncovered. Neither does the record reveal what, if any, avenues counsel failed to pursue. This lack of evidence is fatal to Atkins' claim." *Atkins v. Bean*, 122 F. 4th 760, 774 (9th. Cir. 2024) (App. 0008).

The Ninth Circuit's misapplication of this Court's standards for effective assistance of counsel, under *Strickland v. Washington,* 466 U.S. 668 (1984), is a concern broader than just this case.

The questions presented are:

1. Can a claim of ineffective assistance of counsel be denied on the basis of an alleged failure to show what trial counsel did rather than what they failed to do?

2. Can a claim of ineffective assistance of counsel be denied on this basis when the record plainly showed that nothing was done or could be done?

PARTIES TO THE PROCEEDING

Petitioner is Sterling Atkins Jr.. Respondents are Jeremy Bean, Warden, and the Nevada Department of Corrections, who have custody of Mr. Atkins.

Mr. Atkins asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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Sterling Atkins Jr. respectfully petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit affirming his conviction and death sentence.

OPINIONS BELOW

On December 2, 2024, the United States Court of Appeals for the Ninth Circuit issued an opinion denying relief on Atkins' claim that he was deprived of his constitutional Sixth Amendment rights because lead trial counsel rendered ineffective assistance of counsel ("IAC") by proceeding to trial just days after her appointment with co-counsel who had never previously tried a case. This opinion, reported as *Atkins v. Bean*, 122 F.4th 760 (9th Cir. 2024) is attached as Appendix (App.) A. The order of the Ninth Circuit denying Atkins'

petition for rehearing and the suggestion for rehearing *en banc* on February 26, 2025 is attached as App. B. The opinion of the United States District Court for the District of Nevada denying Atkins' petition for writ of habeas corpus on July 10, 2020, *Atkins v. Gittere*, 2020 U.S. Dist. LEXIS 121991, 2020 WL 3893628, is attached as App. C. An earlier opinion of the federal district court dismissing some claims and denying discovery, *Atkins v. Filson*, United States District Court, District of Nevada, 2017 No. 2:02-cv-01348, Aug. 19, 2009, is attached as App. D. The order of the United States District Court dismissing several claims, finding certain claims unexhausted in state court, *Atkins v. McDaniel*, No. 2:02-cv-001348, Aug. 19, 2009, is attached as App. E. The opinion of the Nevada Supreme Court, *Atkins v. State*, No. 60756, April 23, 2014, affirming state district court's order dismissing Atkins' second state habeas petition, *State v. Atkins*, No. 94C120438-3 (Mar, 22, 2012) are both attached as App. F.

STATEMENT OF JURISDICTION

The federal district court had jurisdiction over this habeas cause under 28 U.S.C. §§ 2241 & 2254. The Ninth Circuit Court of Appeals had jurisdiction on appeal pursuant to 28 U.S.C. §1291, § 2241(a) and (c), and §§2253(a). This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1) over all issues previously presented to the state and federal courts under 28 U.S.C. §§ 1291 & 2253.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented implicate the Fifth Amendment to the United States

Constitution, which provides in pertinent part that "[n]o person...shall be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

The questions also implicate the Sixth Amendment right to counsel: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

This case also involves the Eighth Amendment to the United States Constitution, which precludes the infliction of "cruel and unusual punishments..." U.S. CONST. amend. VIII.

The case also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states and which provides, in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

A. Introduction.

i. The rush to trial.

The multiple failures of defense counsel here were shocking. Lead counsel Laura Melia, who dominated the proceedings, proceeded to trial a mere six days after her

appointment, and two of those days were devoted to another case. (USCA9-284).[1] Although she had a brief stint as second-chair counsel at the preliminary hearing in 1994, Ms. Melia had absolutely no involvement in the case in the nine months prior to her 1995 appointment. (USCA9-285,507). During that time, Atkins was represented by Ms. Melia's former employer, attorney Anthony Sgro, who also performed virtually no investigation or trial preparation, mistakenly gambling that he would obtain a continuance of Atkins' trial due to his other commitments. When that was denied, virtually on the eve of the scheduled trial, Mr. Sgro moved to have Ms. Melia appointed (USCA9-567-569), who failed to request a continuance despite her last-minute appointment. (USCA9-566). The trial judge informed her that he would not have excused Mr. Sgro had she announced "not ready," which would have deprived her of this lucrative capital-case appointment. (USCA9-340-344). Second chair counsel, Mr. Kent Kozal, newly-admitted to the Nevada Bar (USCA9-486, 507), played a minimal and subordinate role and admitted he was not qualified to try capital cases. (USCA9-507, 512-514).This was not only his first capital trial, it was his first jury trial of any kind. (USCA9-512). Atkins twice complained to the court that his attorneys rushed him to trial without any preparation. (USCA9-285, 340).

This unconscionable rush resulted in the failure of defense counsel, *inter alia,* to have Atkins timely evaluated for competency to stand trial and to investigate and present abundant

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[1] The federal record on appeal in the Ninth Circuit Court of Appeals (the excerpts of record) is referred to as "USCA9-[page]."

mitigating evidence and prepare penalty phase witnesses. The victim and her background was not investigated and voluminous jury questionnaires were not reviewed until a lunch break on the first day of trial. (USCA9-281-282). Atkins was not evaluated by a psychologist until a few days before the trial. (USCA9-566; *see also* USCA9-541-548,561-566). That evaluation was received by defense counsel only *after* the trial had commenced. (USCA9-544). It was a cursory six-line statement of "preliminary findings" that "the patient has emotional and intellectual dysfunctions and deficits" by the newly-appointed defense expert, Dr. Philip Colosimo. (USCA9-548).[2] This unpreparedness culminated in the disastrous presentation of his testimony at the penalty phase, where it was prejudicially harmful. (USCA9-392-432).

ii. Mitigating evidence not presented at trial.

Four important and readily-available witnesses were not called upon to give compelling mitigating evidence that would have changed the picture at Mr. Atkins' sentencing phase.

a. Shawn Atkins.

Appellant's brother Shawn Atkins, who testified at the guilt phase as a State's witness, could have been called at the penalty phase to describe in vivid detail the hardships of their

[2] No exhibits of any kind were introduced by the defense at either guilt or punishment phases due to their unpreparedness. Dr. Colosimo was not provided with any facts about Atkins or his records or even provided with the facts of the case, and the prosecution argued this defect to the jury. (USCA9-479-480).

deprived upbringing.[3]

Sterling Atkins Jr. (nicknamed "Bubba") was born in Cleveland and grew up in Hawaii. (USCA9-496) (Declaration of Shawn Atkins). Their maternal grandmother, Margaret Batalon, "worked as a go-go dancer as well as a prostitute in a whore house near the military base." (*Ibid.*) A history of violence and criminality was prominent in Atkins' family, as their great-grandfather "stabbed a man at a cock fight and went to prison. All of the maternal side of our family boozed, gambled and went to prison." (*Ibid.*)

Sterling Jr. was raised in an environment suffused with violence. "There was violence all around Bubba and me when we grew up," says Shawn. (USCA9-497). The women would "start families" with servicemen stationed in Hawaii, as their mother did when she married Al Normand. (USCA9-497). It was not a good marriage.

In their first home, Cleveland, there was also violence. Their maternal uncle, "Junior," broke into their house once with a gun, causing the children to hide under the bed. (*Ibid*.) Junior was arrested and later died in prison as a result of cirrhosis of the liver. (*Id.*)

From Cleveland, they moved to California, and "our father's violence in that time was memorable" and escalated to criminal conduct. (*Ibid.*) One day, their mother returned to the hotel they were living in to find "an imprint of my sister Stephanie's body in the wall where my Dad had shoved her." (*Ibid.*) Sterling Sr. "often beat up all us kids, especially us boys

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[3] Shawn's testimony at the guilt phase did not include any mitigating family background evidence, he only testified about the circumstances of the murder.

as well as my mother, and for little or no reason. I got beat up by him once simply because I had trouble putting on my underwear." (*Ibid.*)

Anything could set their father off, but "he was especially violent to Bubba. Bubba could set him off simply by breathing too hard or chewing too hard. He always beat Bubba before coming after the rest of us." (*Ibid.*) Shawn remembered a time when Sterling Sr. was "beating my brother so badly, that I jumped out of a window and ran over to the school to get onto the rooftop to escape." (*Ibid.*) "That incident ended with my dad jamming a cigar down Bubba's throat and throwing him out a window." (*Ibid.*) Sterling Sr. "[b]eat Bubba like he was a grown man. He used tree branches, belts, even a board in which he cut holes and fashioned a handle. (USCA9-497-498).

Shawn and Bubba's parents fought with each other. "I saw black eyes and bruises on my mother and my father once broke her jaw and glasses. My mother had long hair and my father would pull her around by that hair." (USCA9-498). Lorraine, their mother, also engaged in violence, "she once shot him with his own .357; this occurred shortly after our move from Cleveland to Los Angeles." (*Ibid.*) And "another time she gave him a concussion hitting him with an old style ashtray on a stand." (*Ibid.*) Lorraine "became more violent over time; even her grandkids considered her mean." (*Ibid.*)

Drug addiction, alcohol, and gambling played a large part in the family's history. Shawn says "both of my parents were addicts of some sort" and "[a]ll of my mother's side [of] the family boozed, gambled and went to prison." (*Ibid.*) Sterling Sr. drank a lot and

when they lived in California, "we were lucky that we received welfare payments and food stamps because my dad never worked enough to support us. He'd always drink up what little money he made. They both used amphetamines and cocaine." (USCA9-498-499). Sterling Sr. was addicted to heroin, picked up "while serving in Vietnam and [he] remained an addict for the rest of his life even though at times he was a functioning addict." (USCA9-499). He suffered from cirrhosis and his girlfriend in Cleveland "used drugs with him." (*Ibid.*)

When the family moved to Las Vegas, their addiction problems followed them. Shawn says "my mother loved to gamble and often spent all she had doing so." (*Ibid.*) They lived in Salvation Army shelters or, when there was no shelter space, in parking lots. (*Ibid.*) Sterling Sr. followed Lorraine to Las Vegas and, even though they had no home, "the two managed to drink and drug together." (*Ibid*.) "They enabled one another in their worst impulses and were extremely co-dependent; they even fought other people together." (*Ibid.*)

Because of their parents' abusive treatment, Shawn and Bubba were removed from their home. (*Ibid.*) For a while, they were allowed to live with their uncle Philip in Cerritos, California, but "[m]y dad, however, stabbed Uncle Philip at Christmas that year and the children, including Bubba and me, were taken to a facility to await foster care placement." (*Id.*) They were then placed in foster homes in Carson, California. (*Ibid.*)

However, "the foster family was doing it for the money." (*Ibid.*) "They told us to 'shut the hell up' and forced us to sit on the porch. They rationed every thing in the house. I can't even remember their faces, they had so little interaction with us." (*Ibid.*) "They spent

their time instead drinking and collecting checks." (USCA9-499-500). "The foster mother was particularly aggressive and violent." (USCA9-500).

As for Atkins Jr. (Bubba), "he was extremely mediocre in school." (*Ibid.*) When the family lived in Hawaiian Gardens in Los Angeles, he would skip school and "was passed from grade to grade because the teachers "didn't want to deal with him." (*Ibid.*) "Bubba simply didn't have the ability to do well in school. His whole life was geared toward survival, fight or flight." (*Ibid.*) "He had and still has an extremely limited vocabulary and could not function academically in the school environments we were in." (*Ibid.*) Bubba "knew it was expected of him that he would fail; he could not do anything right." (*Ibid.*) "Our father would call him 'stupid' and say 'Put a dunce hat on him, the motherfuckin' short bus is coming to the house.'" (*Ibid.*) Bubba was "always in trouble, even if he didn't cause it." (USCA9-501).

Bubba was "never really there mentally." (*Ibid.*) He "always took all of his anger and stuffed it inside. When our father picked on him, Bubba learned to run away and get picked up by the police." (*Ibid.*) Their situation was so bad that "Bubba would do anything as a way out of what we had to live with at home. He would hang out with street gangs though he never really joined." (*Ibid.*) "Because our father was always beating him, he had a survive or die mentality." (*Ibid.*) Bubba did not have a job "and he could not manage money at all." (*Ibid.*) "He was regularly hit hard on the head. I don't know for sure if he ever lost consciousness, but I am certain that my father hit him often in the head, and hard." (*Ibid.*)

Bubba "was never able to take care of himself and his daily living skills were noticeably lacking." (*Ibid.*) Their mother was constantly intoxicated and their father "simply didn't care." (USCA9-502). Bubba would sleep in his clothes, change them only every few days, and "I never ever saw him brush his teeth." (*Ibid.*) Bubba had no conception of money and could not follow directions. (*Ibid.*) He committed crimes because he was hungry. (*Ibid.*) "Bubba had a child-like mentality; he was good with kids and babies." (*Ibid.*) "When he watched TV, he watched cartoons rather than programs that older people might watch." (*Ibid.*)

Shawn could have told the jury that "Bubba just isn't like everyone else. He doesn't understand what he's doing might be a mistake; instead his conduct is part of his life as a survivor." (*Ibid.*) "I think the kids on the streets of Hawaiian Gardens in Los Angeles taught him how to commit crimes. There, Bubba learned it would be the only way he'd get something to eat." (*Ibid.*) Bubba "stopped growing around 8 or 9 years old, both personally and developmentally. He just never grew up." (USCA9-503). And "[d]espite being beat up on the streets, Bubba preferred that life to the horrific violence he got at home. He avoided home life by surviving on the streets because he never could learn to change his behavior. He's rather be beaten up by some gang or rough street guy than by our father." (*Ibid.*)

b. Evelyn Gomez.

Atkins' great aunt, Evelyn Gomez, also could have told the jury about the hardships of his youth. (USCA9-512-516). Ms. Gomez's mother, Alice Goo and her older brother

Henry, raised Atkins' mother Lorraine. (USCA9-513). Ms. Gomez's mother raised Lorraine until she married a serviceman, Al Normand. (*Ibid.*) However, Lorraine divorced Normand "when she met yet another serviceman, Sterling Atkins [Sr.]" (*Ibid.*) "Sterling [Sr.] was a bad influence from the very beginning." (*Ibid.*) Lorraine lived with Stephanie but "did not work and lived off of food stamps and Social Security Disability checks." (*Ibid.*)

As for Sterling Sr., he "swindled people by soliciting payment in advance for house painting jobs never completed. Lorraine and Sterling [Sr.] left for Sterling's native Ohio when irate customers in Hawaii began looking for him." (*Ibid.*) However, "Sterling [Sr.] continued swindling people in Ohio just as he had done in Hawaii... The family decided to run from their troubles and head back to Hawaii." (USCA9-514).

The family "lived out of their car, moving it around on the streets until it broke down. They stayed at homeless shelters after that because Lorraine's family refused to offer them any assistance. Her own siblings did not offer to help even the children." (*Ibid.*)

The situation was dire, as "Sterling [Sr.] and Lorraine spent any money they had on alcohol." (*Ibid.*) Lorraine's alcoholism started when she met Sterling Sr. (*Ibid.*) "Sterling [Sr.] frequently beat Lorraine, leaving marks and bruises on her body. He was usually drunk and drank any kind of alcohol he could get his hands on. Lorraine began drinking early in the day and was drunk most of the time as well. Their drinking was out of control." (*Ibid.*)

As a result, Bubba's education was neglected and he frequently got into trouble. (USCA9-515). When Bubba's father left for Ohio, his mother moved to Las Vegas "with her

three younger children." (*Ibid.*) Lorraine would periodically return to Hawaii but "she lived on the streets, carrying around a gallon-sized bottle of vodka." (*Ibid.*) Ms. Gomez once ran into Lorraine sleeping on the streets in Honolulu and gave her money. (*Ibid.*) Eventually, this took a toll on Lorraine and she "suffered a strong stroke while living on the streets" in Las Vegas. (*Ibid.*) She "lost most of her muscle mobility along with the ability to speak." (*Ibid.*)

c. Alicia Palencia.

Atkins's aunt Alicia Palencia was also not called as a witness but could have given helpful testimony. (USCA9-485-489). Bubba's mother Lorraine was Ms. Palencia's younger sister. (USCA9-485). Ms. Palencia also relates how her mother mistreated Lorraine because of racist attitudes. (*Ibid.*)

Lorraine eventually married Sterling Atkins Sr. "who was a very cocky young kid and an alcoholic." (USCA9-486). Lorraine became an alcoholic after marrying Sterling Sr., and she also "used cocaine and a form of methamphetamine called 'ice.'" (*Ibid.*) None of the family members liked Bubba's father as he was abusive and "they considered him crazy." (*Ibid.*)

Lorraine began drinking heavily. (*Ibid.*) Sterling Sr. killed their dog and "would beat other dogs and then the kids. He cursed at everyone else. He tried it on me once but I kicked him down the stairs of our apartment building." *(Ibid.*)

Lorraine and Sterling Sr. soon began living on the streets "because it gave them more money to spend on alcohol." (USCA9-486-487). Lorraine would use her social security

disability money for alcohol. (USCA9-487). Sterling Sr. would fight with Lorraine and "often left marks of abuse on Lorraine, including bruises on her face and arms. He was a horrible man. Lorraine ended up shooting him in the arm while they still lived together in Hawaii." (*Ibid.*) They tried to convince Ms. Palencia that it was better living on the streets than to pay rent. They often lived out of their car and "even took the two oldest children with them to the streets." (*Ibid.*)

They moved to Ohio but Sterling Sr.'s father kicked them out of his house because "they did nothing but drink." (*Ibid.*) Eventually, they moved to the Hawaiian Gardens section of Los Angeles. (*Ibid.*) But "most of their income came from welfare payments." (*Ibid.*) Shawn and Sterling Jr. were removed from their home "and placed in foster care because their father disciplined them [by] burning their hands on a hot stove." (USCA9-488). "At one point Lorraine and Atkins [Sr.] had such a terrible fight that Lorraine stabbed Atkins [Sr.]." (*Ibid.*)

Eventually, Bubba's parents returned to Hawaii, but by this time Lorraine's alcoholism "was very severe." (*Ibid.*) She would drink vodka straight from the bottle. (*Ibid.*) Lorraine then took her family to Las Vegas where Ms. Palencia lost touch with them. (*Ibid.*) Stephanie became addicted to drugs and Lorraine suffered a stroke on the streets of Las Vegas. (*Ibid.*) She had to be placed in a care facility where she "was unable to care for herself and relied on staff for feeding and getting in and out of bed. She is now deceased." (*Ibid.*)

Like Ms. Gomez, Ms. Palencia believed that "Atkins [Sr.] led my sister to addiction. She had never suffered from those issues or from abuse before she met Atkins. I wish she had saved herself and her children by leaving Atkins [Sr.] sooner." (USCA9-489).

d. Vaedra Sowerby-Jones.

Ms. Sowerby-Jones is the mother of co-defendant Anthony Doyle's child. (USCA9-490-495). She testified for the State at Atkins' trial, but she was not interviewed by the defense. (USCA9-495). Her testimony would have been useful in showing Doyle's violence and greater culpability, and that the police had made a deal with State's witness Jerry Anderson. (USCA9-490-495).[4]

Sowerby-Jones was a pre-law freshman and 18 years old when she was living with Doyle. (USCA9-490). He was violent with her and once pushed her down a hallway where she had to be defended by a 16-year old. (*Ibid.*)

Sowerby-Jones describes Atkins as emotional and unstable and she was "concerned about his mental capacity." (USCA9-492). "I thought he seemed alone and with no family and he seemed disconnected. It was my impression that his brother Shawn got all the attention in his family." (*Ibid.*) Bubba liked to hear Sowerby-Jones' stories about her Trinidad background. (*Ibid.*)

Sowerby-Jones did not recall Bubba ever saying "I'm in a lot of trouble." (USCA9-

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[4] Jerry Anderson testified about an alleged confession by Atkins (USCA9-328-329, 330-331) but also admitted he had lied to the police about Atkins to protect co-defendant Doyle. (USCA9-332-335).

493). She states that "the DA brought that up but I have no recall of that then or now." (*Ibid.*)

Sowrby-Jones also states that she was concerned testifying "about Bubba saying he didn't want to go back to prison. I was concerned that this would alert the jury to Bubba's prior incarceration and I thought that would be harmful to his case." (*Ibid.*) She talked with the prosecutor and he said to drop the word "back." (*Ibid.*) She still had reservations and she expected Bubba's attorneys to object to this but they didn't. (*Ibid.*) She does not recall meeting with the defense attorneys, although she met with the prosecutors. (USCA9-494).

Doyle sued Sowerby-Jones for custody of their daughter, even though he was on death row. "I was afraid because Tony had gang contacts and I thought he was crazy. My partner of twenty-two years, my daughter and I left Las Vegas because I was fearful of Tony." (*Ibid.*) She would have told Atkins's attorneys this had they interviewed her. (USCA9-495).

iii. Post-trial.

Mr. Atkins' poor representation followed him after the trial. On appeal, he was represented by trial counsel Ms. Melia, who did not and could not raise issues of her own ineffectiveness. On state habeas, his counsel abandoned him, performed virtually no investigation, and caused many issues to be unexhausted, as the Ninth Circuit held. (App. A). Similarly, initial federal habeas counsel failed to investigate, failed to exhaust issues, and basically abandoned him.

The Ninth Circuit opinion needs review on certiorari because it sets a new and unreasonably high standard for relief in cases of ineffectiveness of counsel by requiring the

petitioner to show what trial counsel did, in a case where the record clearly shows that nothing was done or could be done in the very few days between counsel's appointment and the commencement of the trial.

B. Procedural History.

i. Pre-trial and Trial Proceedings.

On February 25, 1994, an amended criminal complaint was filed against Sterling Atkins Jr. and co-defendants Anthony Doyle and Petitioner's brother Shawn Atkins, for the capital murder of Ebony Mason, which occurred on January 15-16, 1994, on the outskirts of Las Vegas, Nevada. *State v. Atkins,* No. C120438. (USCA9-642-644).

Mr. Atkins was initially represented by lead counsel Anthony Sgro, appointed on or about March 3, 1994,[5] and co-counsel Laura Melia, an employee of Mr. Sgro, appointed on March 24, 1994. (USCA9-640-641).[6] A preliminary hearing was held on May 19-20, 1994 and the Atkins brothers and Doyle were ordered to answer in the Eighth Judicial District Court of Clark County, Nevada. (USCA9-632-633).

On May 27, 1994, the State filed its "Notice of Intent To Seek the Death Penalty" identifying the aggravating circumstances, alleging that the murder was committed by a

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[5] As stated in his fee request. (USCA9-598).

[6] Ms. Melia worked only briefly on the preliminary hearing and soon left the case when her employment with Mr. Sgro ended. She states that she did no work on the case after June of 1994 (USCA9-507, 509) and the final date of her 1994 billing records is May 20. (USCA9-612). Her 1994 work did not involve any mitigation investigation or trial preparation.

person who was 1) previously convicted of a felony involving the use or threat of violence to the person of another (NEV. REV. STAT. 200.033(2)); 2) under a sentence of imprisonment (NEV. REV. STAT. 200.033(l)); 3) engaged in the commission of or an attempt to commit a robbery (NEV. REV. STAT. 200.033(4)); 4) engaged in the commission of or an attempt to commit a sexual assault (NEV. REV. STAT. 200.033(4)); and 5) engaged in the commission of or an attempt to commit first degree kidnaping (NEV. REV. STAT. 200.033 (4)). (USCA9-629-631). Additional allegations were that the murder was committed 6) to avoid or prevent a lawful arrest or to effect an escape from custody (NEV. REV. STAT. 200.033(5)); and 7) it involved torture, depravity of mind or the mutilation of the victim (NEV. REV. STAT. 200.033(8)). (USCA9-629-631).[7]

An information was filed against Atkins and his co-defendants on June 1, 1994. (USCA9-623-628).[8] A jury trial was ordered to commence on February 13, 1995, over eight months in the future. (USCA9-620). Atkins's lead counsel Anthony Sgro had been appointed in March of 1994 (USCA9-598).[9] But virtually no investigation or trial preparation had been done due to Mr. Sgro's mistaken assumption that Atkins' trial would be postponed. When he failed to obtain a continuance, almost on the eve of the trial Mr. Sgro filed a "Motion To

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[7] On August 25, 1994, the third aggravating circumstance, relating to robbery, was dismissed by the trial court. (USCA9-595-597).

[8] Co-defendant Anthony Doyle was tried first and in January of 1995 he was convicted and sentenced to death. (USCA9-573-576). Mr. Atkins' brother Shawn Atkins accepted a plea deal. (USCA9-556).

[9] Attorney Kent Kozal, employed by Sgro as an associate in his office, "was instructed to work on this case" by Sgro. (USCA9-512). Nothing in the record shows that he did.

Allow Substitution of Attorneys" on March 10, 1995 due to his scheduling conflict. (USCA9-567-575). The substitution of attorney Laura Melia was approved on March 14, 1995, only six days[10] prior to the commencement of Atkins's trial. (USCA9-569).[11] Although Melia had briefly represented Atkins at his preliminary hearing as junior co-counsel, she had no involvement with his case since she left Mr. Sgro's office in June of 1994, nine months prior to the trial. (USCA9-507). Kent Kozal, Mr. Sgro's employee, was Ms. Melia's co-counsel at Atkins' trial, although he was only "a few months out of law school;" "had never tried a jury trial, much less a capital case;" and "was not qualified under Nevada Supreme Court Rule 250 to serve on a capital case." (USCA9-512-514). Kozal admits his "role in Atkins' trial was very minimal." (USCA9-513).

Atkins was charged with four counts in an amended information filed at the beginning of the trial. The charges were murder, conspiracy to commit murder, kidnaping and sexual assault. (USCA9-549-553).

Atkins' trial commenced on March 20, 1995 in Dept. XI of Clark County District Court, Judge Addeliar Guy presiding.[12] *State v. Atkins,* No. C120438. At the guilt phase, the

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[10] Ms. Melia effectively had only four days to prepare, as she appeared in the Nevada Supreme Court in another case on two of those days. (USCA9-284).

[11] March 14, 1995 was the day the substitution was approved (USCA9-569); the actual order of appointment is dated later, on May 24, 1995 (USCA9-575). In that order the Court refers to March 10, 1995, which is the date of the filing of the substitution motion. (USCA9-567-575).

[12] The district court's order citing the date of attorney substitution and the start of the trial as occurring in May of 1995 (USCA9-16) is in error.

State presented testimony from ten police officers or persons associated with the Las Vegas Metropolitan Police Department, the coroner, and nine lay witnesses, including both parents of the victim Ebony Mason.[13] The defense did not present any evidence or witnesses at the guilt phase. (USCA9-338). On March 30, 1995, Atkins was found guilty of all four counts of the amended information. (USCA9-534-537).

The penalty phase commenced on April 26, 1995 and the State presented victim impact testimony from Ms. Mason's mother and father, and testimony regarding a prior offense from two police officers and two parole officers. The defense presented only two family members, a prison expert and a psychiatrist.[14] On April 28, 1995, the jury returned a verdict of death. (USCA9-538). Six charged aggravating factors (enumerated *supra*) were also found, the robbery charge having been previously dismissed. (USCA9-539-540).

On June 6, 1995 Atkins was sentenced as follows: Count 1, murder, (death); Count 2, conspiracy to commit murder (six years to be served consecutively to Count 1); Count 3, first degree kidnaping (life without the possibility of parole, consecutive to Count 2); Count 4, sexual assault (life without the possibility of parole, concurrent with Count 3). (USCA9-

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[13] This otherwise inadmissible victim impact evidence at the guilt phase was caused by Melia's failure to investigate the victim, calling her a "hood rat" (erroneously transcribed as "hood rag"). (USCA9-317). This opened the door to her parents' guilt phase testimony and the prosecutor emphasized this in his closing argument: "Call her what you may...hood rat, troubled young vulnerable individual...she was a living, breathing mother of two, 20 year old girl." (USCA9-337).

[14] Sterling Atkins Sr.; Stephanie Normand; prison expert Jack Hardin; and Dr. Philip Colosimo. (USCA9-355-432).

522-531). The Judgment of Conviction was filed on June 8, 1995. *State v. Atkins,* No. C120438. (USCA9-520-521).

ii. Proceedings on Appeal.

Lead trial counsel Laura Melia represented Atkins on appeal. The Nevada Supreme Court affirmed Atkins' conviction but reversed as to Count 4, sexual assault. *Atkins v. State,* 112 Nev. 1122, 923 P.2d 1119 (1996). (USCA9-259-281). Rehearing was denied on October 17, 1996. (USCA9-258). An amended judgment of conviction was entered on April 30, 1997, reflecting the reversal of the sexual assault charge.[15] (USCA9-254-256).

iii. Initial State Post-Conviction Proceedings.

Atkins filed a *pro per* petition for writ of habeas corpus in the Eighth Judicial District Court of Nevada on April 18, 1997 (USCA9-646-649) and a supplemental brief in support on April 25, 2000. *Atkins v. Nevada,* C120438. (USCA9-650-682). The petition was denied by the state district court on January 4, 2001, without holding an evidentiary hearing. (USCA9-215-253).

The state district court held that defense counsel "did present evidence in mitigation of sentence" but "[d]efendant's claim of ineffectiveness is simply that Ms. Melia and Mr. Kozal could have presented even more evidence of the abuse by calling several more witnesses." (1-ER-234). Additionally, "[t]here is nothing in the record to indicate that Ms.

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[15] However, this amended judgment was erroneous in that it reflected seven aggravating circumstances, including the robbery, which had been previously dismissed.

Melia and Mr. Kozal were not aware of these other witnesses" and "they were very aware of Defendant's background and presented two witnesses that they believed were the best witnesses to put before the jury...in fact who would be more believable than Defendant's father, the person who actually abused Defendant." (1-ER-234).

The Nevada Supreme Court holding on this claim, affirmed by the federal district court (1-ER-44-45), was that

> Atkins contends that his trial counsel failed to discover and present corroborating evidence of his physical and emotional abuse that Atkins suffered throughout his childhood. The record belies this claim. To develop such evidence, defense counsel called Atkins' father and sister to testify at Atkins' penalty hearing. Both of these witnesses testified to the repeated physical and emotional abuse Atkins received from his formerly alcoholic father and otherwise determined that Atkins grew up in a very dysfunctional environment and at one point was removed from his parents' home and placed in foster care. Further, Atkins has failed to explain how additional testimony would have altered the outcome of his trial.
> Order of Affirmance (USCA9-201).

The Nevada Supreme Court affirmed the denial on May 14, 2002, and the remittitur issued on June 11, 2002. *Atkins v. State,* No. 37293, Order of Affirmance, May 14, 2002. (USCA9-198-214).

iv. Federal Habeas Proceedings.

Atkins filed his initial *pro se* petition in the United States District Court for the District of Nevada on October 11, 2002. (USCA9-683-696). A "supplemental petition" was filed on May 19, 2005. (USCA9-697-721). A first amended petition was filed in the district court on December 10, 2007 (USCA9-722-757) and a second amended petition was filed on

October 29, 2008. (USCA9-758-792).

On August 19, 2009 the district court dismissed some of Atkins's claims, others were held to be unexhausted in state court, and Atkins was ordered to file a motion to stay proceedings. (USCA9-170-197) (App. E). A stay was granted on March 15, 2010, and Atkins was ordered to file a third amended petition within 30 days. (USCA9-159-169). A third amended petition was filed on April 13, 2010. (USCA9-793-825). The district court again ordered the action stayed on April 30, 2010. (USCA9-156-158).

v. Subsequent State Habeas Proceedings.

A second amended petition for writ of habeas corpus was filed on November 4, 2009 in Clark County District Court, Dept. 9. *Atkins v. McDaniel,* No. C120438. (USCA9-842-891). On March 22, 2012, the state district court dismissed this petition. (USCA9-137-155) (App. F). Atkins appealed and the Nevada Supreme Court affirmed on April 23, 2014, holding that the claims in this second state habeas petition were untimely under NEV. REV. STAT. 34.726, barred by laches under NEV. REV. STAT. 34.800, and successive and an abuse of the writ under NEV. REV. STAT. 34.810. Order of Affirmance, *Atkins v. Nevada,* No. 60756. (USCA9-133-136) (App. F). A petition for rehearing was denied by the Nevada Supreme Court on July 31, 2014. (USCA9-130-132).

vi. Return to Federal Court.

A fourth amended petition and exhibits were filed on August 26, 2016. (USCA9-842-891). On September 28, 2017, the district court dismissed some claims on the ground that

they were barred by the statute of limitations or were not cognizable. (USCA9-96-129) (App. D). After further briefing, on July 10, 2020 the district court denied the remaining claims but granted a certificate of appealability ("COA") on five claims or sub-claims. (USCA9-95) (App. C). Atkins timely filed a notice of appeal on August 6, 2020. (USCA9-934-935).

vii. Ninth Circuit proceedings.

Mr. Atkins appealed to the Ninth Circuit Court of Appeals. The appeal centered on the issues of ineffective assistance of counsel. After oral argument, the panel denied all claims in a published opinion on December 2, 2024. *Atkins v. Bean*, 122 F.4th 760 (9th Cir. 2024). (App. A). On February 26, 2025, Mr. Atkins's petition for panel rehearing and suggestion for rehearing en banc were denied. (App. B).

REASONS FOR GRANTING CERTIORARI

I. Introduction

On December 2, 2024, the Ninth Circuit issued a published opinion affirming the denial of habeas corpus relief as to two certified and two uncertified issues mainly dealing with ineffective assistance of counsel. (App. A). That opinion conflicts with decisions of this Court and a grant of certiorari is necessary to maintain the uniformity of this Court's decisions.

The Ninth Circuit's decision on the certified ineffective assistance of counsel issues sanctions lead trial counsel's gross unpreparedness, a financial conflict of interest that

explains it, and co-counsel's utter lack of experience or qualifications in a capital case. It ignores the clearly-established ineffective-assistance framework of *Strickland v. Washington,* 466 U.S. 668 (1984) (court looks to reasonable standards of representation in investigation and presentation of mitigating evidence) and its progeny. By any objective standard, it cannot be reasonable performance for lead counsel to proceed to trial in a capital case a few days after being appointed with a co-counsel fresh out of law school who had never tried a case to a jury. Yet not a word in the Ninth Circuit's opinion condemned or criticized this performance.

A grant of certiorari is needed because the Ninth Circuit's opinion sets the bar unreasonably high for any such claims that will come before this Court in the future. This is a prime example of a rare "extreme malfunction in the state criminal justice system," *Shinn v. Ramirez*, 596 U.S. 366, 377 (2022), citing *Harrington v. Richter*, 562 U.S. 86, 102 (2010), for which federal habeas corpus relief is specifically reserved.

II. Argument

A. The Ninth Circuit denied the ineffective assistance claim using criteria contrary to *Strickland*'s performance standards.

Atkins' first claim of ineffective assistance of counsel was that "trial counsel was ineffective at the penalty phase for failing to investigate and present mitigating social history evidence." (App. 0003). The claim was held to be exhausted. (App.0007). However, the Ninth Circuit panel, following the state court, denied relief on the basis that

> [a]lthough there is documentation of hours billed by counsel, the record does

> not include much information to show what avenues of investigation counsel followed, how much investigation was performed, or what information was uncovered. Neither does the record reveal what, if any, avenues counsel failed to pursue. This lack of evidence is fatal to Atkins' claim.
> *Atkins v. Bean*, 122 F. 4th 760, 774 (9th Cir. 2024) (App. 0008).[16]

First, nothing in *Strickland* or its progeny requires a showing of what counsel did. The Ninth Circuit's holding adds a new requirement to the *Strickland* standards, and sets them too high. Ineffective assistance claims focus on what was *not done* and what *should or could have been done*. *See, e.g., Williams v. Taylor,* 529 U.S. 362, 395, 398 (2000) (defense counsel ineffective for failing to present "Williams' childhood, filled with abuse and privation, that he was 'borderline mentally retarded," and "did not begin to prepare for [the punishment] phase of the proceeding until a week before the trial"); *Wiggins v. Smith,* 539 U.S. 510, 532-536 (2003) (defense counsel ineffective for failure to investigate and present evidence of dysfunctional family history, physical abuse, homelessness "relevant to assessing a defendant's moral culpability"); *Rompilla v. Beard,* 545 U.S. 374, 381-382, 391-393 (2005) (mitigation investigation and presentation far more extensive than in Atkins' case was inadequate; defendant was "actively obstructive" to the investigation, unlike Atkins).

Nor has the Ninth Circuit, in line with those cases and *Strickland*, required a showing of what was done by counsel, but rather has similarly focused on what was not done. *See., e.g., Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) *(en banc*) (counsel held ineffective under

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[16] That holding was repeated in the panel's summary of this issue: "The record before the state court did not show what investigation did occur, or how that investigation was deficient..." *Ibid.*, 122 F.4th at 779. (App. 0012).

Williams based on failure to interview witnesses and failure to investigate and present evidence of co-defendant's background); *Andrews v. Davis*, 944 F.3d 1092 (9th Cir. 2019) (counsel held ineffective for failing to investigate and present mitigating evidence); *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002) (same); *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009) (trial counsel's lack of diligence in pursuing mitigating evidence was deficient performance at sentencing phase of trial); *Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009) (trial counsel deficient in failing to pursue mitigating evidence).

Second, the panel held that a failure to show what investigation was done or what "information was uncovered" was "fatal" to the claim. *Atkins v. Bean*, 122 F.4th at 773-774 (App. 0008). However, the record plainly showed that virtually nothing was done nor any information uncovered mainly because *there was no investigator and no time to investigate*.[17] There was nothing to show, even if such a showing was required. The substitution of the prior attorney as lead counsel by Laura Melia was approved on March 14, 1995, only six days[18] prior to the commencement of Atkins's trial. (USDA9-569).[19] Although Melia had

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[17] At the beginning of the trial, Mr. Atkins complained that the previous investigators, hired by attorney Sgro for the preliminary hearing, had quit (USCA9-285), and there is no evidence that new investigators were hired.

[18] As mentioned *supra*, Ms. Melia effectively had only four days to prepare, as she appeared in the Nevada Supreme Court in another case on two of those days. (USCA9-284).

[19] March 14, 1995 was the day the substitution was approved (USCA9-569); the actual order of appointment is dated later, on May 24, 1995. (USCA9-575). In that order the Court refers to March 10, 1995, which is the date of the filing of the substitution motion. (USCA9-567-575).

briefly represented Atkins at his preliminary hearing as junior co-counsel, she had no involvement with his case since June of 1994, nine months prior to the trial. (USDA9-507).

There was no pre-trial investigation so nothing was uncovered, as both trial attorneys admit. Melia states that she had spent only "*numerous hours in the last several days* preparing the case;" and "I did not have the opportunity to do any further investigation." (USDA9-341) (emphasis added). Her only previous investigation was for the preliminary hearing, which did not and could not touch on penalty phase issues. So too co-counsel Kent Kozal does "not recall any investigator being used in Mr. Atkins' defense." (USDA9-513). Nor was there evidence of any pre-trial investigation in the few days after Melia's appointment. Atkins cannot be faulted for not showing what does not exist.

This Court's ineffective assistance of counsel cases compare what was done with what could or should have been done by trial counsel and look at the disparity to gauge the prejudice. But here the record plainly shows that nothing was or could be done in the short time available for trial preparation. Denying this claim solely on the basis of an alleged failure to show what trial counsel did misapplies this Court's ineffective assistance of counsel precedents.

The record plainly shows that trial counsel failed to undertake any investigation at all. There is no reference to an investigator either before or during the trial. In a capital case, this was an obvious and serious misstep. Nor was Atkins evaluated for competency or psychiatric issues prior to the trial. Defense expert Dr. Colosimo was substituted as a court-appointed

psychologist on March 14, 1995 (USCA9-565-566) only a few days before trial. Subpoenas for Atkins' medical records were not issued until the same day. (USCA9-554-557). Dr. Colosimo's 6-line "evaluation" was received March 21, 1995, *after* the trial had commenced. (USCA9-544).[20] No mitigation specialist was hired to gather family and background information, another serious omission. It was plain error for the Ninth Circuit to hold that the record did not show what trial counsel did not do or should have done. *Atkins v. Bean*, 122 F.4th at 773-774. (App. 0008).

With Atkins's life in the balance, Melia and second-chair counsel Kozal performed virtually no pre-trial investigation or preparation for either the guilt or the penalty phase. As this Court and the Ninth Circuit have observed, "[c]learly established federal law required [counsel] to undertake a 'reasonable investigation' in preparation for the penalty phase." *Andrews v. Davis*, 944 F.3d at 1109, quoting *Strickland*, 466 U.S. at 691.

The Ninth Circuit held that it is "limited to considering evidence that was presented to the state court," *Atkins v. Bean*, 122 F.4th at 773 (App. 0008), and in state court Atkins "did not present any evidence...in support of his claim, but instead relied on the trial record." *Ibid*. at 772 (App. 0007). However, the trial record alone contains abundant evidence of glaring omissions in trial preparation, as shown above, unmentioned by the Ninth Circuit.

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[20] It was a cursory six-line statement of "preliminary findings" that "the patient has emotional and intellectual dysfunctions and deficits" by the newly-appointed Colosimo. (USCA9-548). There were no details as to competency or any other matters that could have helped at the guilt phase.

Lead counsel Ms. Melia irresponsibly handed over the penalty phase preparation to second chair counsel Kozal who confirmed that he "was not qualified under Nevada Supreme Court Rule 250 to serve on a capital case."[21] (USCA9-512). Kozal states that "[a]t the time of Mr. Atkins' trial, I was a newly-licensed attorney a few months out of law school. I had never tried a jury trial, much less a capital case." (*Ibid.*) He also recalled that his employer, Mr. Sgro, asked Melia to take over the Atkins case because of Sgro's responsibilities in another case. (*Ibid.*) Melia also confirms that Kozal was not Rule 250 qualified, that is, he did not have the requisite experience to be appointed as lead chair. (USCA9-507).[22]

Kozal describes his involvement in this case as "extremely limited" and "very minimal" (USCA9-512-513), yet he was handed the primary responsibility for the penalty phase. He remembers meeting only with Atkins' father and mother, who appeared to be drug addicts. (USCA9-512). "Laura Melia's role was much more significant, as first chair counsel." (*Ibid.*)

As to the Ninth Circuit's holding that "[n]either does the record reveal what, if any, avenues counsel failed to pursue," *Atkins v. Bean*, 122 F. 4th at 774 (App. 0008), here again

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[21] Kozal met none of the three requirements relating to experience and time licensed as an attorney for appointed counsel representing indigent defendants facing the death penalty. (NEV. SUP. CT. R. 250).

[22] Kozal was admitted to the Nevada Bar in October of 1993, only five months prior to his appointment. (USCA9-486). He was unaware of basic trial procedures, as on the second day of jury selection he approached the bench and asked "[d]o we have to make [juror] challenges for cause in open court?" (USCA9-287). The Court answered "yes" and added "[i]f you notice, the State has in every case." (USCA9-288). As he admits, this was his first jury trial. (USCA9-512).

the record developed in state court shows that virtually nothing was pursued. As to the Ninth Circuit's holding that the additional evidence adduced in federal court was "largely cumulative of the mitigation evidence presented at trial through Sterling Sr., Normand and Dr. Colosimo," *Atkins v. Bean*, 122 F. 4th at 774 (App. 008), this ignores the fact that the trial court mitigation evidence was extremely minimal and deficient under the *Strickland* standards.

Atkins' father, Sterling Atkins Sr., testified on direct for only seven pages of transcript. (USCA9-356-363). He gave misleading testimony about his taking an active role in his son's life and portrayed Atkins' mother as doing "the best she could" (USCA9-359) while minimizing his wife's and his own abuse and neglect, as discussed *supra*. Presenting the abuse through the main perpetrator of the abuse meant that it was presented in a light favorable to the abuser, not the defendant. This cannot be effective assistance, and it is troubling that the Ninth Circuit approved it without comment.

Stephanie Normand also testified for only seven pages on direct with only bare-bones mentions of Atkins' parents' alcoholism and fighting. (USCA9-366-373). Dr. Colosimo painted Atkins unfavorably and as a future danger and trial counsel have admitted he was not properly prepared.[23] By well-established standards of this Court, this is ineffective assistance

[23] The two defense experts also testified very briefly: Mr. Hardin for seven pages on direct (USCA9-376-383) and Dr. Colosimo for fifteen pages on direct. (USCA9-392-407). The entire defense penalty phase presentation was about 37 pages on direct, or about a half-hour of court time.

of counsel without considering any additional "cumulative" evidence that might have been adduced in either state or federal court.

This was a virtually complete abdication of anything resembling an effective penalty phase preparation under the *Strickland, Wiggins, Rompilla* and *Williams* standards. For instance in *Williams*, trial counsel produced the defendant's mother, two neighbors and a psychologist's statement, and began penalty phase preparation a week before the trial, more than here, yet this was held inadequate under *Strickland*. *Williams v. Taylor,*529 U.S. 362 at 403, 419, 420. So too, in *Rompilla v. Beard,* 545 U.S. 374 (2005), Rompilla's trial counsel conducted a far more extensive investigation than Atkins' attorneys. Even though Rompilla's attorneys interviewed various family members and presented testimony from five of them at trial, and consulted with three mental health experts, this was held insufficient. *Ibid*. at 381-382. The Court also noted that Rompilla's "own contributions to any mitigation case were minimal" as he was uninterested in helping counsel and at times "even actively obstructive" (*Ibid*. at 381), unlike the defendant here.

B. Prejudice.

As to the prejudice component of the claim, here too the Ninth Circuit faults Atkins for not showing what trial counsel did: "[n]one of Atkins's proffered new evidence, including the declarations from counsel, address what investigation counsel undertook regarding Atkins's background or social history." *Atkins v. Bean*,122 F. 4th at 774 (App. 0008).

The prejudice is not just, as the state courts and the Ninth Circuit held, simply a matter of "what additional evidence could have been produced" or "where is the missing evidence," *Atkins v. Bean*, 122 F. 4th at 773-774 (App. 0008), although much was missing and much was not produced. One can see the prejudice as much as what WAS done, through ineptitude and a rush to trial, as from what was NOT done. For example, Dr. Colosimo's testimony was harmful and a prison expert incorrectly testified Atkins could be paroled if given life. Atkins' father sugar-coated the abuse he himself inflicted, yet the state court held "who would be more believable than Defendant's father, the person who actually abused Defendant."[24] Defense counsel called the victim a "hood rat"[25] which opened the guilt phase to otherwise inadmissible victim impact testimony regarding the victim's character. All these are examples of ineffectiveness by commission, in addition to the numerous examples of omissions. We do not need to go outside the state court record to find abundant prejudice here.

Because counsel unreasonably relied on Atkins's father, the main perpetrator of the abuse, the true scope and extent of his abuse was never revealed to the jury. Nor was Ms. Normand able to tell the jury the full story of Atkins's abuse, neglect, poverty, and emotional and intellectual disabilities. The expert witness, Dr. Colosimo, was so ill-prepared that he was a liability.[26] Coupled with defense counsels' complete abdication at the guilt phase

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[24] USCA9-235

[25] USCA9-319-320

[26] Trial co-counsel Kozal, who has primary responsibility for the penalty phase, admitted that Dr. Colosimo was ill-prepared (USCA9-510) and Ms. Melia admits she was remiss in

(USCA9-338), this amounted to a virtual abandonment of Atkins' right to a defense.

The prejudice analysis looks to the weight of the available evidence and its effect on the case. *Strickland*, at 693-95. "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. Atkins's jurors sentenced him to death "knowing hardly anything about him." *Porter*, 558 U.S. at 33. Nevada requires a unanimous vote on penalty, so the omitted evidence only had to convince one juror that there was reasonable doubt to vote for life.[27]

This Court, in *Sears v. Upton,* 561 U.S. 945 (2010) (*per curiam*) reviewed the mitigating evidence that was available through reasonable investigation and pointed out that, as in Atkins' case, a finding of prejudice under *Strickland* has never been limited to cases "in which there was little or no mitigation evidence presented." *Ibid*. at 955.

As discussed above, the trial judge stated that "this Court would not have excused Mr. Sgro if Ms. Melia had indicated that she would not be prepared for it" (USCA9-340), which meant that she would not have been appointed had she truthfully answered "not ready." This put her in a conflict of interest with her client: either proceed unprepared to her client's detriment or ask for more time to prepare, and lose the appointment, which would have hurt her financially.

An attorney who acts under a conflict of interest may deny his client the effective

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not pursuing Atkins' "significant cognitive deficits." (USCA9-507).

[27] NRS 175.556(1).

assistance of counsel. *Holloway v. Arkansas,* 435 U.S. 475 (1978); *Cuyler v. Sullivan,* 446 U.S. 335 (1985). The focus is on whether defense counsel did, or failed to do, something because of the conflict. *Holloway*, 435 U.S. at 490 ("the evil – it bears repeating – is in what the advocate finds himself compelled to refrain from doing"). The failure here was Melia's refusal to ask for a continuance when she knew that if she did, she would not be appointed.

To establish that a conflict of interest adversely affected counsel's performance, in other words, "actual prejudice," the defendant need only show that *some effect* on counsel's handling of *particular aspects* of the trial was *likely*." *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992) (emphasis added). Here there were multiple damaging effects of the rush to trial. Defense counsel had only two hours to review voluminous juror questionnaires of almost 500 pages.[28] The failure to have Atkins timely evaluated by Dr. Colosimo led to the inability to show Atkins's incompetency and diminished responsibility at the guilt phase.[29] Defense counsel's failure to investigate the victim led to defense counsel

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[28] Although the trial court authorized juror questionnaires "some months" prior to trial, they were not prepared by defense counsel until March 20, 1995, the day jury selection began. (USCA9-283). That left only "a half hour to go over the 60 questionnaires that are 8 pages each." *Ibid*. The Court granted her two hours. (USCA9-284).

[29] No EEG or CAT scans were done, despite many red flags. (USCA9-418). The witness did not spend any time "reviewing the facts and circumstances of this particular crime of which the Defendant's charged." (USCA9-422). Yet Dr. Colosimo's report stated that "the defendant was competent at the time of the incident." (*Ibid*.) By "competent" the witness meant that "he knew right from wrong, was not under the influence of any psychoactive drugs or illicit drugs at the time of the incident, had not any particular history of illness during the time that this occurred." (USCA9-429). The witness was comfortable in rendering this opinion of "competence" without reviewing any of the reports or facts and circumstances of the case or the incident. (USCA9-423). It was based

calling her a "hood rat" which invited otherwise inadmissible damaging victim impact testimony at the guilt phase.[30] The failure to prepare Dr. Colosimo led to his harmful testimony at the penalty phase. And the lack to time to investigate mitigating evidence led to an inadequate and truncated penalty phase presentation.

The Ninth Circuit also erred in holding that "we cannot say that the omission of Dr. Colosimo's [guilt phase] testimony would have altered the outcome of the proceeding." *Atkins v. Bean*, 122 F. 4th at 778 (App. 0011). This is the outcome-determinative test explicitly rejected in *Strickland* ("we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case," *Strickland* 499 U.S. at 693), which held that "a reasonable probability is a probability sufficient to **undermine confidence** in the outcome." *Ibid*. at 694 (emphasis added). Had the defense merely not presented Dr. Colosimo at all, the defense would have been better off.

Atkins has shown deficient performance, the first prong of *Strickland*, as well as prejudice, and has shown that the Ninth Circuit's holding and the Nevada Supreme Court's

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on "his [Atkins's] version of the facts." (*Ibid*.)

[30] Ms. Melia asked Shawn Atkins whether the victim was a "hood rat" (erroneously transcribed as "hood rag") USCA9-319, in reference to Mason allegedly having sex with neighborhood males, "[b]ecause this is what a hood rat does, right?" (USCA9-320). Shawn answered affirmatively. (*Ibid*.) This allowed otherwise-inadmissible guilt phase testimony of the father of the victim, who told the jury of his daughter's depression, drug problems, efforts at rehabilitation, and the drowning death of her young child. (USCA9-321-327). The prosecutor emphasized this in his closing argument: "Call her what you may...hood rat, troubled young vulnerable individual...she was a living, breathing mother of two, 20 year old girl." (USCA9-339).

holding were both contrary to clearly established Supreme Court law under 2254(d)(1) and an unreasonable determination of the facts under 2254(d)(2).

III. Conclusion

For the foregoing reasons, Mr. Atkins requests that this Court grant his petition for certiorari.

Dated this 22nd day of May, 2025

Respectfully submitted,

/s/ A. Richard Ellis

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