

No. 17 - _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID FIERRO

Petitioner,

v.

WILLIAM MUNIZ,
Acting Warden of Salinas Valley State Prison

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JAMES S. THOMSON
Counsel of Record
732 Addison Street, Suite A
Berkeley, California 94710
Telephone: (510) 525-9123

Attorney for Petitioner
DAVID FIERRO

QUESTION PRESENTED

On April 28, 1986, Dr. Sayed Hamed evaluated petitioner to determine whether he was competent to stand trial. Dr. Hamed interviewed petitioner for a mere two hours. Although prevailing standards commanded him to do so, Dr. Hamed did not conduct any testing or review petitioner's available school records. Ultimately, Dr. Hamed opined that petitioner possessed "average intelligence" and that he was competent to be tried.

In subsequent proceedings pursuant to *Atkins v. Virginia*, the Riverside County Superior Court vacated petitioner's death sentence after finding that he was intellectually disabled. The state court focused its review on evidence from before petitioner was 18 years old, *i.e.*, evidence that would have been available to Dr. Hamed. During the *Atkins* proceedings, the *State's* expert witness, Dr. Martha Rogers, opined that petitioner was "more likely" than not intellectually disabled and that the evidence was "pretty strong in terms of the intellectual criteria" for intellectual disability. Dr. Rogers based her conclusion almost exclusively on data that was available to Dr. Hamed.

In denying petitioner's claim that he was incompetent at the time of his trial, the court of appeals below refused to give subsequent evaluations greater weight than it gave to Dr. Hamed's demonstrably unreliable evaluation. In denying petitioner's claim that trial counsel was ineffective for failing to raise the issue of petitioner's competency, the court held that counsel was shielded from such a claim by his reliance on Dr. Hamed. And despite acknowledging at oral argument that Dr. Hamed may have been ineffective, the court held that petitioner had no constitutional right to the effective assistance of expert witnesses.

This case presents the following question:

- I. Whether the Constitution guarantees the right to the effective assistance of expert witnesses.

LIST OF PARTIES

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

TABLE OF CONTENTS

OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
I. STATEMENT OF FACTS	2
A. Social History	2
1. Trauma	2
2. Intellectual Disability	5
3. Substance Addiction	6
B. Trial Counsels' Representation	6
C. Neuropsychological Evaluation	7
D. Psychiatric Evaluation	8
II. PROCEDURAL HISTORY	9
A. Trial Court	9
B. Direct Appeal	10
C. State Post-Conviction	10
D. Federal Post-Conviction—Pre- <i>Atkins</i> Determination	10
E. <i>Atkins</i> Proceedings	10
F. Federal Post-Conviction—Post- <i>Atkins</i> Determination	11
G. Decision Below	12

REASONS FOR GRANTING THE WRIT	14
I. THE QUESTION OF WHETHER INDIGENT DEFENDANTS ARE ENTITLED TO EFFECTIVE EXPERT ASSISTANCE IS IMPORTANT ..	14
II. THE DECISION BELOW PERPETUATES AN UNCONSTITUTIONALLY NARROW VIEW OF THE RIGHT TO EXPERT ASSISTANCE	17
III. THIS CASE PRESENTS AN IDEAL VEHICLE THROUGH WHICH TO ESTABLISH STANDARDS FOR EVALUATING THE QUALITY OF EXPERT ASSISTANCE	29
CONCLUSION	32

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985)	<i>passim</i>
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	11, 12, 13, 14
<i>Brown v. Dodd</i> , 484 U.S. 874 (1987)	21, 28, 31
<i>Castro v. Ward</i> , 138 F.3d 810 (10th Cir.1998)	18
<i>Chaney v. Stewart</i> , 156 F.3d 921 (9th Cir. 1998)	18
<i>Clisby v. Jones</i> , 960 F.2d 925 (11th Cir. 1992)	19
<i>Davie v. Mitchell</i> , 291 F.Supp.2d 573 (N.D. Ohio 2003)	20
<i>Sec’y, Florida Dep’t of Corr</i> , 932 F.Supp.2d 1257 (M.D. Fla. 2013)	19
<i>Drope v. Missouri</i> , 420 U.S. 162 (1975)	31
<i>Dusky v. United States</i> , 362 U.S. 402 (1960)	31
<i>Earp v. Cullen</i> , 623 F.3d 1065 (9th Cir. 2010)	14, 18
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985)	21
<i>Fierro v. California</i> , 506 U.S. 907 (1992)	10
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	23
<i>Harris v. Vasquez</i> , 949 F.2d 1497 (9th Cir. 1990)	18, 29, 30
<i>Hendricks v. Calderon</i> , 70 F.3d 1032 (9th Cir. 1995)	28
<i>Little v. Armontrout</i> , 835 F.2d 1240 (8th Cir. 1987)	18
<i>McWilliams v. Dunn</i> , 582 U.S. ___, (2017)	15
<i>Medina v. California</i> , 505 U.S. 437 (1992)	17, 18
<i>Pruett v. Thompson</i> , 996 F.2d 1560 (4th Cir.1993)	18

<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	21, 22, 23, 28
<i>Terry v. Rees</i> , 985 F.2d 283 (6th Cir.1993)	18
<i>United States v. Duhon</i> , 104 F.Supp.3d 663 (W.D. La. 2000)	25, 26
<i>Vickers v. Arizona</i> , 497 U.S. 1033 (1990)	22
<i>Waye v. Murray</i> , 884 F.2d 765 (4th Cir. 1989)	19
<i>Wilson v. Greene</i> , 155 F.3d 396 (2d Cir. 1998)	19

STATE CASES

<i>Alley v. Tennessee</i> , 882 S.W.2d 810 (Tenn. 1994)	21
<i>Florida v. Sireci</i> , 502 So.2d 1221 (Fla. 1987)	20, 27
<i>In re Hawthorne</i> , 105 P.3d 552 (Cal. 2005)	11
<i>Louisiana v. Tyler</i> , 181 So.3d 678 (La. 2015)	21
<i>Mason v. Florida</i> , 489 So.2d 734 (Fla. 1986)	20, 27
<i>New Jersey v. DiFrisco</i> , 804 A.2d 507 (N.J. 2002)	21
<i>People v. Fierro</i> , 821 P.2d 1302 (Cal. 1991)	10
<i>People v. Samayoa</i> , 938 P.2d 2 (Cal. 1997)	21
<i>Raleigh v. Florida</i> , 932 So.2d 1054 (Fla. 2006)	20
<i>Stewart v. Florida</i> , 37 So.3d 243 (Fla. 2010)	20
<i>Turpin v. Bennett</i> , 513 S.E.2d 478 (Ga. 1999)	21
<i>Woodward v. Mississippi</i> , 843 So.2d 1 (Miss. 2003)	21

FEDERAL STATUTES

28 U.S.C. §1254(1)	1
28 U.S.C. §2254	<i>passim</i>

STATE STATUTES

Cal. Pen. Code §187	9
Cal. Pen. Code §211	9
Cal. Pen. Code §1368	7, 8
Cal. Pen. Code §1376	11

OTHER AUTHORITIES

American Association on Intellectual and Developmental Disabilities, The Death Penalty and Intellectual Disability (Edward A. Polloway, ed., 2015)	25
Bonnie, R. & Slobogin, C., <i>The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation</i> , 66 Va. L. Rev. 427 (1980)	27
Gordon B. Burns, <i>The Right to the Effective Assistance of a Psychiatrist Under Ake v. Oklahoma</i> , 30 Crim. L. Bull. 429 (1994)	16, 19, 20
Kenneth S. Roberts, Comment, <i>Curing the Ake of an Incompetent Expert: A Separate Reviewable Issue?</i> , 29 San Diego L. Rev. 799 (1992)	16, 17, 30
Nelson P. Miller, The Standard of Care in Medical Malpractice Actions, 30 For the Def. 7 (1988)	30
Paul C. Giannelli, <i>Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World</i> , 89 Cornell L. Rev. 1305 (2004)	16

INDEX OF APPENDICES

Appendix A	Memorandum Opinion, <i>Fierro v. Muniz</i> , Ninth Circuit Case No. 14-56356 (September 18, 2017)	1
Appendix B	Order Denying Rehearing, <i>Fierro v. Muniz</i> , Ninth Circuit Case No. 14-56356 (October 26, 2017)	7
Appendix C	Report and Recommendation of United States Magistrate Judge, <i>Fierro v. Lewis</i> , California Central District Court Case No. 2:94-cv-03198-GHK-AJW (March 22, 2013) . .	9
Appendix D	Order Accepting Report and Recommendation of Magistrate Judge, <i>Fierro v. Lewis</i> , California Central District Court Case No. 2:94-cv-03198-GHK-AJW (June 17, 2014) . .	115
Appendix E	Judgment, <i>Fierro v. Lewis</i> , California Central District Court Case No. 2:94-cv-03198-GHK-AJW (June 17, 2014) . .	117
Appendix F	28 U.S.C. §2254 (1995)	119
Appendix G	Competency Evaluation Report by Dr. Sayed Hamed (May 9, 1986)	138
Appendix H	Findings and Decision, <i>In re Fierro</i> , Riverside Superior Court Case No. RIC 440182/CR 23644 (July 21, 2010)	144

Petitioner, David Fierro, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The court of appeals affirmed the judgment of the United States District Court for the Central District of California, denying petitioner's federal petition for writ of habeas corpus filed under 28 U.S.C. §2254.

OPINION BELOW

The memorandum opinion of the court of appeals on review of the district court's denial of the petitioner's habeas corpus petition appears as Appendix A to this petition.

JURISDICTION

The court of appeals entered its opinion on September 18, 2017. Appendix A. On October 26, 2017, the court denied rehearing. Appendix B. This petition is filed within 90 days of the order denying rehearing.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides (in relevant part):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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.

This case is governed by the standards of the pre-Anti-Terrorism and Effective Death Penalty Act (AEDPA) version of 28 U.S.C. §2254. Appendix F.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. Social History

1. Trauma

Petitioner was born on February 5, 1961. Excerpt 56 at 801.

Approximately six weeks after his birth, petitioner's mother suffered from an emotional breakdown that left her unable to care effectively for petitioner. Excerpt 56 at 802. Petitioner's father, Reyes, refused to care for him. Excerpt 56 at 802–03.

Petitioner's infancy was marked by extreme poverty. Petitioner's sole source of nourishment as an infant came from goat's milk produced on the family's rented plot of land. Excerpt 56 at 803. Petitioner's childhood home was exposed to the elements and lacked plumbing. Excerpt 56 at 807; Excerpt 48 at 724–25; Excerpt 52 at 773.

Petitioner was physically and psychologically abused throughout his

childhood. Reyes forced the children to work long hours, performing dangerous jobs that resulted in serious injuries. Excerpt 56 at 808; Excerpt 53 at 776. Reyes was easily angered, and when in a rage he would physically attack his children with objects, including horsewhips and a belt with a large metal buckle. Excerpt 56 at 809; Excerpt 48 at 725; Excerpt 52 at 768. Reyes made his children physically abuse each other, often forcing his sons to beat each other until one collapsed. Excerpt 56 at 812–13; Excerpt 52 at 769.

Reyes was especially cruel to petitioner. Excerpt 56 at 809–10. Reyes called him names like “nigger,” “tarbaby,” and “retard.” *Id.*; Excerpt 48 at 725–26; Excerpt 53 at 777. Sadly, these insults were adopted by petitioner’s siblings. Excerpt 56 at 809–10. Petitioner was the recipient of the most severe physical abuse of any of his siblings. *Id.*; Excerpt 52 at 768. The severity was driven both by Reyes’s false belief that petitioner was not his son and by petitioner’s intellectual disability. Excerpt 56 at 809–10; Excerpt 52 at 769.

Reyes’s psychological abuse paralleled the physical abuse. Excerpt 56 at 811. An example of Reyes’s cruelty involved him killing petitioner’s pet chicken in front of him and then forcing petitioner to eat it. *Id.* Another example involved petitioner receiving a box of excrement wrapped as a gift with a bow for Christmas. Excerpt 56 at 812.

Petitioner grew up in dilapidated, overcrowded housing in an industrial neighborhood wrought by air, water, noise, and toxic chemical pollution. Excerpt 56 at 805–07. Petitioner and his siblings would chew on contaminated tar because the

family was too poor to afford candies or gum. Excerpt 56 at 815. Petitioner developed amblyopia as a child, a disease caused by toxins such as lead, alcohol, and others as well as malnutrition. Excerpt 56 at 816.

Petitioner suffered chronic stomach issues. *Id.*; Excerpt 48 at 726. When petitioner contracted a severe case of chicken pox at six weeks old, he did not receive medical treatment although the disease is highly dangerous for young infants. Excerpt 56 at 804. He never received medical care when he needed it. *Id.* For example, petitioner once developed a boil on his arm the size of a silver dollar. Excerpt 56 at 815–16. Despite his mother’s pleas to take petitioner to the hospital, Reyes instead used a knife to cut the boil out of petitioner’s arm and then cauterized the wound with a heated soda bottle. *Id.*; Excerpt 48 at 731.

Reyes was sent to prison in 1970 for “lewd and lascivious conduct with a child, a felony,” plunging the family deeper into poverty and despair. Excerpt 56 at 817–18; Excerpt 57. Afterwards, Petitioner’s mother was forced to leave her children alone for days at a time as she worked to provide for the family. *Id.*

Unfortunately, Reyes’s arrest was not a reprieve from physical and psychological abuse for petitioner. His brother Michael continued to abuse petitioner and his other siblings. Excerpt 56 at 818; Excerpt 52 at 772.

Petitioner was exposed to violence from numerous other sources during his teenage years. In 1977, when petitioner was sixteen, his brother was stabbed in the face by his ex-father-in-law. Excerpt 56 at 835–36. A day later, two of petitioner’s friends were killed by gunfire. *Id.* Later that year, another of petitioner’s friends

was killed at a New Year's Eve party. Excerpt 56 at 837. By 1982, at least a dozen other close friends or relatives of petitioner had been killed or seriously wounded. Excerpt 56 at 835–38.

When petitioner was twelve, he was abducted and beaten by a group of white supremacists. Excerpt 56 at 839. This incident was especially traumatic in light of the racially abusive language Reyes had directed at him when he was a young child because he was the “darkest” child. Excerpt 56 at 802–03, 839–40; Excerpt 53 at 776.

2. Intellectual Disability

Petitioner was identified as a slow learner from the moment he entered school. Excerpt 56 at 819. He was identified early on as having psychological troubles. Excerpt 56 at 820. He was unable to keep up even with the slow learners in his grade. Excerpt 56 at 822.

By age twelve, petitioner had been placed in the educable mentally retarded (EMR) program. Excerpt 56 at 828. After failing to progress even in special classes, petitioner withdrew from his ninth-grade EMR class due to “possible mental deficiency and emotional problems.” Excerpt 56 at 829. Petitioner's school attendance was sporadic and chaotic. He was psychologically evaluated three separate times. Excerpt 56 at 830, 832, 834. In 1978, petitioner dropped out of school having never learned to read or write. Excerpt 56 at 835.

Petitioner had his IQ tested as a child. Excerpt 56 at 821, 834, 853. Petitioner's verbal IQ scores were consistently lower than his overall scores. *Id.*

During petitioner's *Atkins* proceedings in the Riverside Superior Court, the State's expert, Dr. Martha Rogers, opined that petitioner's intellectual scores obtained in school are most accurately represented by full scale IQ scores of 72, 68, 62, and 66. Excerpt 31 at 470–71, 473. These scores are indicative of intellectual disability. Excerpt 14, Appendix H.

3. Substance Addiction

Petitioner first began using substances at age eleven to cope with the extreme trauma of his violent and abusive upbringing. Excerpt 56 at 827, 837.

Petitioner's substance use included alcohol, marijuana, huffing paint, sniffing glue, LSD, and PCP, all before he turned eighteen. Excerpt 56 at 827. These substances are known to cause direct, permanent brain damage.

Petitioner was using heroin regularly by the time he was in eighth grade. *Id.* By June 1984, petitioner was addicted to heroin. Excerpt 56 at 848.

Following his arrest and incarceration, petitioner was prescribed Vistaril. Excerpt 56 at 846–847. The Vistaril was later replaced with Xanax. *Id.* Petitioner used heroin in jail as well. While incarcerated, he was charged with being under the influence of heroin and found to have opiates in his blood. Excerpt 56 at 850.

B. Trial Counsels' Representation

The prosecutor sought the death penalty in petitioner's case.

Deputy Public Defender John Morris was assigned petitioner's case in June 1985. In late April 1986, Mr. Morris retained Dr. Sayed Hamed to assess whether a doubt should be declared about petitioner's competence. Excerpt 32 at 520; *see also*

Cal. Pen. Code §1368.

On April 28, 1986, Dr. Hamed interviewed Petitioner for a mere two hours. Excerpt 12 at 234, Appendix G at 139. Dr. Hamed did not administer any testing. *Id.* Dr. Hamed claimed to have found that petitioner was of average intelligence, was not suffering from anxiety, and was competent to stand trial. Excerpt 12 at 237–238, Appendix G at 142–143. Dr. Hamed reached these conclusions without reviewing or asking to review petitioner’s school records. *Id.* The records were available. Excerpt 32 at 520; Excerpt 60 at 1059. Indeed, they had been turned over in discovery by the prosecution. *Id.*

Subsequent court proceedings have demonstrated that Dr. Hamed’s findings as to petitioner’s intellectual abilities were objectively erroneous. *See* Excerpt 14 at 370–371, Appendix H at 157–158 (adjudicating petitioner intellectually disabled and thus ineligible for the death penalty) (Petitioner “exhibited a low intellectual capacity . . . prior to age 18” and in 1992 had the intellectual ability of an eleven-year-old.); *and* Excerpt 15 at 387 (State’s expert psychologist conceded that the evidence is “pretty strong in terms of the intellectual criteria” for intellectual disability).

With only Dr. Hamed’s inadequate report to provide clinical guidance, Mr. Morris did not move for a competency hearing in petitioner’s case.

C. Neuropsychological Evaluation

In 1992, petitioner was evaluated by neuropsychologist Dr. Karen Froming. Froming Declaration, Excerpt 47. Dr. Froming’s testing placed petitioner in the

moderately severe range of neurocognitive impairment. Excerpt 47 at 710. He was measured as having deficits in the auditory processing of words, ordering of linguistic information, and memory for verbal information. *Id.*

Petitioner was found to have the verbal intelligence of an eleven-year-old child. Excerpt 47 at 710–711. Petitioner was severely impaired in his ability to interpret complex sentences. *Id.* Petitioner was found to have severely impaired verbal memory, especially when distracted. Excerpt 47 at 712. Petitioner’s IQ was consistent with intellectual disability.¹ Excerpt 47 at 713; Excerpt 14 at 370, Appendix H at 157.

Dr. Froming opined that “given [petitioner’s] verbal auditory processing deficits, limited comprehension of meaning or semantic complexity, and poor memory, [petitioner] was simply unequipped to understand and participate in the trial proceedings.” Excerpt 47 at 718.

D. Psychiatric Evaluation

In 1993, petitioner was evaluated by psychiatrist Dr. Jay Jackman. Excerpt 49. Dr. Jackman found that petitioner suffered from organic brain damage, intellectual disability, and psychological disorders, including post-traumatic stress

¹ At the time of Dr. Froming’s evaluation, “mental retardation” was the prevailing term for what is now referred to as “intellectual disability.” *See Frequently Asked Questions on Intellectual Disability*, AAIDD <http://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability#.V4QXkC3YKM8> (last visited January 23, 2018). The two terms have the same meaning. *Id.* While many of the records in this case use the term “mental retardation,” this petition will use the updated term “intellectual disability.”

disorder. Excerpt 49 at 736. Dr. Jackman opined that these impairments affected petitioner’s cognitive functioning, before, during, and after the time of the crime and his trial.

Dr. Jackman opined that petitioner “was not competent to assist his counsel with a reasonable degree of rational and factual understanding of the proceedings against him.” Excerpt 49 at 748. This conclusion was based on Dr. Jackman’s observations that petitioner’s “deficits had important implications in understanding his inability to assist counsel. His brain damage and his borderline [intellectual disability] vitiated his ability to participate in a meaningful fashion in legal proceedings. His understanding of the legal process was critically inadequate and his neurocognitive deficits markedly impaired his ability to process, retain and act upon verbal communications.” Excerpt 49 at 748–49.

Dr. Jackman opined that Dr. Hamed’s evaluation of petitioner’s competence was “incomplete, inadequate, erroneous, and insupportable.” Excerpt 49 at 750.

II. PROCEDURAL HISTORY

A. Trial Court

In 1986, petitioner was convicted of first-degree murder and two counts of robbery. Cal. Penal Code §§187(a), 211; Excerpt 64 at 1183–84, 1188, 1190, 1192, 1196, 1198. The jury found true a special circumstance allegation that the murder was committed during the commission of a robbery and that petitioner used a firearm to commit the offenses. §§190.2(a)(17)(I), 12022.5; Excerpt 64 at 1185–86, 1189, 1191, 1193–94, 1197, 1199. The jury fixed the penalty at death. Excerpt 64

at 1201–1202.

B. Direct Appeal

On December 26, 1991, the California Supreme Court affirmed petitioner’s convictions and sentence on automatic appeal. *People v. Fierro*, 821 P.2d 1302 (Cal. 1991), Excerpt 7. On June 18, 1992, petitioner filed a petition for writ of certiorari with this Court. On October 5, 1992, the Court denied the petition. *Fierro v. California*, 506 U.S. 907 (1992).

C. State Post-Conviction

On March 15, 1993, petitioner filed a state petition for writ of habeas corpus. Excerpt 37. On February 23, 1994, the California Supreme Court denied the petition in a minute order. Excerpt 5.

D. Federal Post-Conviction—Pre-*Atkins* Determination

On October 16, 1995, petitioner filed a federal petition for writ of habeas corpus with the District Court for the Central District of California. Excerpt 60. The district court had jurisdiction under 28 U.S.C. §2254 based on petitioner’s unlawful confinement and restraint of his liberty at the California State Prison at San Quentin by Arthur Calderon.

Accordingly, this case is governed by the standards of the pre-AEDPA version of 28 U.S.C. §2254.

E. *Atkins* Proceedings

On June 18, 2003, petitioner filed a state petition for writ of habeas corpus, alleging, in part, that he was intellectually disabled and that the Eighth

Amendment prohibited his execution. Excerpt 36.

On May 18, 2004, the district court placed petitioner's case in abeyance to allow the state courts the opportunity to decide whether petitioner was intellectually disabled and therefore ineligible for capital punishment under *Atkins v. Virginia*, 536 U.S. 304 (2002). Excerpt 67 at 1529.

On March 16, 2005, the California Supreme Court ordered the State "to show cause . . . why petitioner's death sentence should not be vacated" Excerpt 35. The case was remanded to the Riverside Court. *Id.*

On July 21, 2010, the Riverside Court determined that petitioner was intellectually disabled within the meaning of *Atkins*, *In re Hawthorne*, 105 P.3d 552 (Cal. 2005), and California Penal Code section 1376. Excerpt 14, Appendix H. The Riverside Court vacated petitioner's death sentence and imposed a sentence of life without the possibility of parole. *Id.*

F. Federal Post-Conviction—Post-*Atkins* Determination

On October 29, 2010, petitioner returned to the district court for consideration of his guilt phase claims. Excerpt 67 at 1530.

On March 22, 2013, the magistrate judge recommended that the petition be denied. Excerpt 4, Appendix C.

On June 17, 2014, the district court adopted the magistrate judge's report and recommendations and denied the petition. Excerpt 1, Appendix E; Excerpt 2, Appendix D. The same day, the district court *sua sponte* denied a certificate of appealability as to all claims. Excerpt 11.

G. Decision Below

On June 23, 2014, petitioner filed a notice of appeal of the district court's judgment. Excerpt 10.

On October 22, 2014, petitioner filed a motion for a certificate of appealability with the Ninth Circuit Court of Appeals. Excerpt 9. On November 10, 2015, the court granted a certificate of appealability as to three issues: "(1) whether [petitioner's] substantive due process rights were violated because he was incompetent to stand trial; (2) whether counsel was ineffective for failing to adequately investigate whether [petitioner] was competent to stand trial; and (3) whether counsel was ineffective for failing to adequately investigate and pursue a mental state defense." Excerpt 8.

On July 20, 2016, petitioner submitted the opening brief on appeal. *Fierro v. Muniz*, 9th Cir. Case No. 14-56356, General Docket (Doc) #16. Petitioner argued in relevant part that his "substantive due process rights were violated because he was incompetent to stand trial" and that his trial counsel was "ineffective for failing to adequately investigate whether [he] was competent to stand trial." *Id.* at 11. Petitioner argued that Dr. Hamed "erroneously found that [petitioner] was competent" and that Dr. Hamed's report was "incomplete, inadequate, erroneous, and insupportable." *Id.* at 37, 60 (quoting Excerpt 49 at 750 (Declaration of Dr. Jackman)). In the reply brief, petitioner reiterated these claims, noting that Dr. Hamed "reached numerous conclusions that are demonstrably false or unreliable." Doc #51 at 23.

On August 31, 2017, oral argument was held before the Honorable Judges William A. Fletcher, Sandra S. Ikuta, and Sarah Evans Barker. Doc #60.

During argument, Judge Barker remarked that “[m]aybe it was Dr. Hamed that was ineffective.” Oral Argument at 32:45–32:50. Judge Fletcher noted that “[s]omebody with [petitioner’s] degree of mental capacity is going to have trouble giving any real assistance to the lawyer.” Oral Argument at 22:30–22:40. Judge Fletcher added: “So I’ve got trouble thinking that he was, in fact, competent to assist in his own defense. . . . I mean, it bothers—I think it bothers all of us that we’ve got that problem.” *Id.* at 22:55–23:00, 23:50–23:55. The Attorney General acknowledged that petitioner’s IQ scores are in the “60s to high 70s” and that the issue of his competence is “difficult.” Oral Argument at 22:20–22:25, 29:40–29:45.

Yet, on September 18, 2017, the court of appeals issued a Memorandum denying petitioner’s claims. The court held that the “district court did not err by denying relief on [petitioner’s] first certified claim that he was incompetent to stand trial, because the evidence meriting the most weight indicated he met the competency standard.” Memorandum at 2, Appendix A at 3. In support of this conclusion, the court emphasized that “[a]ll contemporaneous medical evaluations opined that [petitioner] was able to understand the nature and purpose of the proceedings against him and could cooperate in a rational manner with counsel in presenting a defense.” *Id.*

Although the court’s language suggests that multiple contemporaneous evaluations were conducted, that was not the case. Dr. Hamed’s two-hour

evaluation was the only contemporaneous evaluation of petitioner's competency conducted.

The court further held that “[t]he district court also properly denied relief on [petitioner’s] certified claim that his trial counsel was ineffective for failing to investigate his competency to stand trial.” Memorandum at 3, Appendix A at 4. The court found that it “[could] not impute the expert’s deficiency, if any, to trial counsel.” *Id.* (citing *Earp v. Cullen*, 623 F.3d 1065, 1077 (9th Cir. 2010)).

On September 28, 2017, petitioner submitted a petition for panel rehearing and rehearing en banc. Doc #65. Petitioner argued that Dr. Hamed’s findings are “incompatible with [petitioner’s] judicially-determined intellectual disability, [Dr.] Froming’s neuropsychological findings, and [petitioner’s] then-existing educational record.” *Id.* at 25.

On October 26, 2017, the court denied rehearing. Doc #66.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF WHETHER INDIGENT DEFENDANTS ARE ENTITLED TO EFFECTIVE EXPERT ASSISTANCE IS IMPORTANT.

This Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985) held that “when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” 470 U.S. at 83. In reaching its holding, the Court described the “pivotal role that

psychiatry has come to play in criminal proceedings.” *Ake*, 470 U.S. at 79. The Court explained that when, as here, “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.

“The Court [in *Ake*] began by stating that the ‘issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an *effective* defense based on his mental condition, when his sanity at the time of the offense is seriously in question.’” *McWilliams v. Dunn*, 582 U.S. ___, 137 S.Ct. 1790, 1793 (2017) (quoting *Ake*, 470 U.S. at 70) (emphasis added). This Court has clarified that the decision in *Ake* “clearly establishe[d] that when its threshold criteria are met, a State must provide a mental health professional capable of performing a certain role: ‘conduct[ing] an *appropriate examination* and assist[ing] in evaluation, preparation, and presentation of the defense.’ Unless a defendant is ‘assure[d]’ the assistance of someone who can *effectively perform these functions*, he has not received the ‘minimum’ to which *Ake* entitles him. *Id.* at 1794 (quoting *Ake*, 470 U.S. at 83).

The question of whether a defendant is entitled to the effective assistance of expert witnesses is important because “without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether [a] defense is viable, to present testimony, and to assist in preparing the cross-examination of a State’s psychiatric witnesses, the risk of an

inaccurate resolution of [material] issues is *extremely high*.” *Ake*, 470 U.S. at 82 (emphasis added).

Unsurprisingly, the Court’s opinion in *Ake* has “spawned much commentary” among academics. Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L. Rev. 1305, 1311 (2004). This commentary includes discussion regarding whether or not a separate right to the *effective* assistance of experts is necessary to satisfy the Fourteenth Amendment. *Id.*; see also Gordon B. Burns, *The Right to the Effective Assistance of a Psychiatrist Under Ake v. Oklahoma*, 30 Crim. L. Bull. 429 (1994); and Kenneth S. Roberts, Comment, *Curing the Ake of an Incompetent Expert: A Separate Reviewable Issue?*, 29 San Diego L. Rev. 799 (1992). The commentary on *Ake* has “uniformly concluded that the implementation of *Ake* falls far short of what is needed.” Giannelli, *Post-DNA World*, 89 Cornell L. Rev. at 1311; see also Burns, *Right to Effective Assistance*, 30 Crim L. Bull. at 440–450 (critiquing circuit court opinions and concluding that *Ake* requires recognition of the right to replace ineffective experts); and Roberts, *Curing the Ake*, 29 San Diego L. Rev. at 811 (“[B]y not recognizing a right to performance review after providing the defendant with expert assistance, the decisions by [state and lower federal courts] only mock *Ake*’s decree of fundamental fairness.”).

By holding that it could not grant petitioner relief based on his “expert’s deficiency,” the court of appeals has “decided an important question of federal law that has not been, but should be, settled by this Court” Sup. Ct. R. 10(c); see

also Roberts, *Curing the Ake*, 29 San Diego L. Rev. at 812 (“Until the courts adopt the right to competent expert assistance as a reviewable right . . . the potential for inaccurate findings and risk of erroneous deprivations of life, liberty, and property remains.”). In light of the importance of the issue and the ready evidence that *Ake*—as currently interpreted—“falls far short of what is needed,” this Court should grant certiorari to announce that the Constitution requires inquiry into whether or not an indigent defendant has received the *effective* assistance of a critical expert witness.

II. THE DECISION BELOW PERPETUATES AN UNCONSTITUTIONALLY NARROW VIEW OF THE RIGHT TO EXPERT ASSISTANCE.

In a concurring opinion in *Ake*, Chief Justice Burger attempted to cabin the Court’s holding narrowly: “The facts of the case and the question presented confine the actual holding of the Court. In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court’s opinion reaches non-capital cases.” *Ake*, 470 U.S. at 87 (Burger, C.J., concurring). None of the seven other Justices in the majority joined in Chief Justice Burger’s concurring opinion. *Id.* The Court later clarified that the holding in *Ake* “can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him ‘a fair opportunity to present his defense’ and ‘to participate meaningfully in [the] judicial proceeding.’” *Medina v. California*, 505 U.S. 437, 444–445 (1992) (quoting *Ake*, 470 U.S. at 76. The Circuit Courts have followed suit.

The Ninth Circuit has characterized *Ake* as holding that “a state must provide indigent criminal defendants with expert psychiatric assistance if the defendant’s mental condition is a significant factor at trial to satisfy Fourteenth Amendment due process requirements.” *Chaney v. Stewart*, 156 F.3d 921, 925 (9th Cir. 1998). The Eighth Circuit held that *Ake* applies to non-psychiatric expert witnesses in non-capital cases. *Little v. Armontrout*, 835 F.2d 1240, 1243 (8th Cir. 1987). The Sixth Circuit relied on *Ake* to find that a defendant was denied due process when he was not appointed an independent pathologist to rebut evidence of the victim’s cause of death in a non-capital case. *Terry v. Rees*, 985 F.2d 283, 284 (6th Cir.1993). And the Tenth Circuit has extended *Ake* to the provision of investigators and non-psychiatric experts as well. *Castro v. Ward*, 138 F.3d 810, 826 (10th Cir.1998).

Nevertheless, in the absence of further clarification from this Court akin to that found in *Medina*, no federal court has extended the reasoning in *Ake* to hold that indigent defendants have a right to the *effective* assistance of experts. The Ninth Circuit has held that “[a]n expert’s failure to diagnose a mental condition does not constitute ineffective assistance of counsel, and [petitioners] ha[ve] no constitutional guarantee of effective assistance of experts.” *Earp v. Cullen*, 623 F.3d 1065, 1077 (9th Cir. 2010); *see also Harris v. Vasquez*, 949 F.2d 1497, 1518 (9th Cir. 1990) (same). The Fourth Circuit has consistently “rejected the notion that there is either a procedural or constitutional rule of ineffective assistance of an expert witness, rather than ineffective assistance of counsel.” *Pruett v. Thompson*,

996 F.2d 1560, 1573 n.12 (4th Cir.1993); *see also* *Waye v. Murray*, 884 F.2d 765 (4th Cir. 1989) (same). The Second and Seventh Circuits are in accord. *Wilson v. Greene*, 155 F.3d 396, 401 (2d Cir. 1998) (“The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness.”); *Silagy v. Peters*, 905 F.2 986, 1013 (7th Cir. 1990) (“[W]e [are] reluctant to open up this type of *Ake* claim to a battle of the experts in a ‘competence’ review.”).²

The Eleventh Circuit allows claims of ineffective expert assistance in extremely limited form. *See Correll v. Sec’y, Florida Dep’t of Corr.*, 932 F.Supp.2d 1257, 1291–1292 (M.D. Fla. 2013) (entertaining claim that petitioner “was denied the effective assistance of a mental health expert”); *and Clisby v. Jones*, 960 F.2d 925, 929 (11th Cir. 1992). The right to expert assistance is limited, however, to cases in which the trial court was “advised that the psychiatrist allegedly conducted an inadequate evaluation[.]” *Correll*, 932 F.Supp.2d at 1292 (citing *Clisby*, 960 F.2d at 934 (“Unable to pinpoint the ruling in which the trial court denied him due process by violating his right to competent psychiatric assistance, [Clisby] is left with a naked complaint about the purported incompetence of Dr. Callahan's assistance.”)). “The [Eleventh Circuit’s] test, then, is too narrow to address an absolute right to effective psychiatric assistance. . . . [T]he court’s focus on the trial court’s decision avoids the primary issue, which is whether the psychiatrist actually

² It has been argued that the Seventh Circuit’s opinion in *Silagy* “did not deny the existence of a right to competent assistance.” Burns, *Right to Effective Assistance*, 30 Crim L. Bull at 443. All the same, no subsequent cases in that circuit have articulated a right to effective expert assistance.

was incompetent.” Burns, *Right to Effective Assistance*, 30 Crim L. Bull at 450.

At least one district court in the Sixth Circuit has similarly held that no right to effective expert assistance is required by the Constitution. *Davie v. Mitchell*, 291 F.Supp.2d 573, 616 (N.D. Ohio 2003) (“A defendant is entitled to effective assistance of counsel, not effective assistance of experts.”). Indeed, petitioner is not aware of any federal case that has recognized a constitutional right to the effective assistance of expert witnesses.

The Supreme Court of Florida *has* recognized a right to the effective assistance of experts. In Florida, “a defendant is entitled to litigate during postconviction a claim that a prior mental health expert’s examination was so ‘grossly insufficient’ that the expert ‘ignore[d] clear indications of either mental retardation or organic brain damage.’” *Stewart v. Florida*, 37 So.3d 243, 255 (Fla. 2010) (quoting *Raleigh v. Florida*, 932 So.2d 1054, 1060 (Fla. 2006)). The right was first recognized by the Florida Supreme Court in 1986 in a case, like petitioner’s, involving a dubious competency determination. *Mason v. Florida*, 489 So.2d 734, 737 (Fla. 1986) (“Since no other documents are cited in the other interviewer’s reports, too great a risk exists that these determinations of competency were flawed as neglecting a history indicative of organic brain damage.”). Indeed, the claim is so well recognized by Florida courts that such claims are exempt from the procedural bar against claims that could have been raised on direct appeal. *Florida v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987) (“Sireci’s claim regarding incompetent psychiatric evaluations is cognizable under a successive motion for post-conviction relief.”)

Nevertheless, the majority of state courts have failed to recognized the right to effective expert assistance. *See, e.g., People v. Samayoa*, 938 P.2d 2, 31 (Cal. 1997) (“Neither *Ake* . . . nor the broader rule guaranteeing court-appointed experts necessary for the preparation of a defense . . . gives rise to a federal constitutional right to the effective assistance of a mental health expert.”) (citation omitted); *Louisiana v. Tyler*, 181 So.3d 678, 680 (La. 2015) (same); *Woodward v. Mississippi*, 843 So.2d 1, 15 (Miss. 2003) (same); *New Jersey v. DiFrisco*, 804 A.2d 507, 244 (N.J. 2002) (same); and *Turpin v. Bennett*, 513 S.E.2d 478, 481 (Ga. 1999) (same); *Alley v. Tennessee*, 882 S.W.2d 810, 814 (Tenn. 1994) (same).

These overly-restrained applications of *Ake* are inconsistent with this Court’s prior cases. *See* Sup. Ct. R. 10(c). “The guarantee recognized in *Ake*, it is important to stress, is not just that the State ensure access to a psychiatrist, but that it ensure that the psychiatrist be a *competent* professional who will perform an *appropriate* examination.” *Brown v. Dodd*, 484 U.S. 874, 876 (1987) (Marshall, J., dissenting from denial of cert.).³ As Justice Marshall observed, this Court’s cases “interpreting the constitutional guarantee of counsel have recognized that that guarantee comprehends a degree of competence; thus, a State cannot discharge its duty to provide counsel by appointing an attorney who fails to render adequate legal assistance.” *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 685–686 (1984); and *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (“[N]ominal representation on an appeal

³ Justice Marshall authored the majority opinion in *Ake*.

as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.”)).

A review of this Court’s holding in *Strickland v. Washington*, explaining the contours of the right to the *effective* assistance of counsel, shows why the holding in *Ake* requires recognition of the right to the *effective* assistance of experts:

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Washington, 466 U.S. at 685. As the Court’s holding in *Ake* demonstrates, expert witnesses also “play[] a role that is critical to the ability of the adversarial system to produce just results.” *Id.*

Although required by different parts of the Constitution, this Court has previously analogized the right to expert witnesses to the right to counsel. *See Vickers v. Arizona*, 497 U.S. 1033, 1035 (1990) (“The right to a competent psychiatrist necessarily includes the right to have the State provide the psychiatrist with the tools he requires to conduct an adequate examination and evaluation of the defendant. To hold otherwise is analogous to requiring the State to provide an indigent defendant with an attorney, but not requiring it to pay for the attorney’s

legal research expenses.”).

And just as the Sixth Amendment envisions “counsel’s playing a role that is critical to the ability of the adversarial system to produce just results,” *Washington*, 466 U.S. at 685, this Court held in *Ake* that the Fourteenth Amendment envisions experts playing a role that is “crucial to the defendant’s ability to marshal his defense.” *Ake*, 470 U.S. at 80. Indeed, this Court has recognized the uniform aims of the Sixth and Fourteenth Amendments: “The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment” *Washington*, 466 U.S. at 684–685.

The Court’s language in *Washington* describing the right to effective assistance of counsel rings equally true with respect to the right to effective assistance of experts: “In giving meaning to the requirement, however, we must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Washington*, 466 U.S. at 686. Just as the holding in *Washington* was essential to give full meaning to the guarantee of counsel established in *Gideon v. Wainwright*, 372 U.S. 335 (1963), so too should this Court give full meaning to the guarantee of expert assistance established in *Ake*. As petitioner’s case demonstrates, the need to ensure the fundamental fairness of trials cannot be satisfied without recognizing some right to challenge the effectiveness of

expert assistance on collateral review.

Assuming for the sake of argument that petitioner was indeed incompetent to stand trial, the current state of the law would leave him with no means of redress. Petitioner's direct claim that he was incompetent at trial was denied because Dr. Hamed's "contemporaneous medical evaluation[]" opined that [petitioner] was able to understand the nature and purpose of the proceedings against him and could cooperate in a rational manner with counsel in presenting a defense." Memorandum at 2, Appendix A at 3. Despite its demonstrable flaws, Dr. Hamed's report was deemed more significant than the opinion of two experts that petitioner was not, in fact, competent to stand trial and that Dr. Hamed's report was "incomplete, inadequate, erroneous, and insupportable." Excerpt 49 at 750.⁴

Assuming that petitioner had indeed been incompetent when he was evaluated by Dr. Hamed, it is hard to imagine what other showing he could have made. It is uniquely difficult to detect an intellectually disabled defendant's incompetence based on a simple review of the record. As the District Court for the Western District of Louisiana has explained, individuals with intellectual disability

⁴ Dr. Froming opined that "given [petitioner's] verbal auditory processing deficits, limited comprehension of meaning or semantic complexity, and poor memory, [he] was simply unequipped to understand and participate in the trial proceedings." Excerpt 47 at 718. Dr. Jackman opined that petitioner "was not competent to assist his counsel with a reasonable degree of rational and factual understanding of the proceedings against him." Excerpt 49 at 748. Respondent never presented any expert opinion countering these diagnoses apart from Dr. Hamed's fatally-flawed report—prepared after a two-hour interview and conducted without the administration of testing or the review of petitioner's then-available school records.

can be challenging to evaluate for competency: “[B]ecause persons with [intellectual disability] are cognitively impaired, not mentally ill, the strongly cognitive elements of a competency evaluation need to be given special attention.” *United States v. Duhon*, 104 F.Supp.3d 663, 671 (W.D. La. 2000) (emphasis removed) (quoting National Benchbook on Psychiatric and Psychological Evidence and Testimony, Chapter 7 at 168 (ABA Commission on Mental and Physical Disability Law, Sept. 1998)).

The court’s analysis in *Duhon* is supported by other authorities in the field of intellectual disability: “Many defendants with [an intellectual disability] can recite the roles of the courtroom players . . . know the basic processes of the trial . . . and can provide surface-level definitions for possible outcomes . . . and pleas What is particularly problematic for defendants with [an intellectual disability,] however, is active and meaningful participation in the trial process.” American Association on Intellectual and Developmental Disabilities (“AAIDD”), *The Death Penalty and Intellectual Disability* 253–254 (Edward A. Polloway, ed., 2015).⁵ Furthermore, for

⁵ The AAIDD has highlighted the Wechsler Memory Scale and the Peabody Picture Vocabulary Test (“PPVT”) as particularly useful for assessing the competence of people with intellectual disabilities. AAIDD, *The Death Penalty and Intellectual Disability* at 255. When petitioner was 16 years old, his verbal IQ score on the PPVT was 66, a score consistent with intellectual disability. Excerpt 14 at 367, Appendix H at 153. In testing with Dr. Froming, petitioner’s score on the PPVT Revised Form L was 58, which is “below the 1st percentile.” Excerpt 30 at 458. And petitioner’s verbal score on the Wechsler Memory Scale-Revised was 64. *Id.* at 459. These scores are all substantially lower than petitioner’s full-scale IQ scores, and they show that his disability was most pronounced in verbal abilities associated with competence.

defendants with an intellectual disability, “the rational ability to consult with their attorney is an area of difficulty Given the difficulties with problem-solving and abstract thought, it is easy to see how this can prove difficult even for defendants with [an intellectual disability] whose impairment is not severe.” *Id.*

Petitioner was thus presented with an insurmountable hurdle on his direct claim of incompetence in the form of Dr. Hamed’s flawed report. As to his claim of ineffective assistance of counsel, petitioner presented effectively unassailable evidence that Dr. Hamed’s report was unreliable. After all, one of the core conclusions of that report—that petitioner possessed “average” intelligence—has been soundly rejected by both the Riverside Superior Court and the sole expert hired on behalf of the State to evaluate petitioner. *Compare* Excerpt 12 at 237, Appendix G at 142 (“His intelligence is estimated to be in the average range.”); *with* Excerpt 14 at 370–371, Appendix H at 156–157 (petitioner “exhibited a low intellectual capacity . . . prior to age 18” and, in 1992, had the intellectual ability of an eleven-year-old); *and* Excerpt 15 at 387 (the evidence is “pretty strong in terms of the intellectual criteria” for intellectual disability) (testimony of state expert Dr. Rogers).

Furthermore, Dr. Hamed conducted his examination of petitioner without conducting any testing and without reviewing petitioner’s then-available school records. Excerpt 12, Appendix G. The Florida Supreme Court has held that such a failure is “grossly insufficient” under *Ake*, particularly where, as here, it leads the expert to overlook “clear indications of either [intellectual disability] or organic

brain damage.” *Sireci*, 505 So.2d at 1224 (citing *Mason*, 489 So.2d 734). The indications of petitioner’s intellectual disability were so clear that the *State’s* expert on collateral review of petitioner’s death sentence agreed that he was “more likely” than not intellectually disabled. Excerpt 15 at 384–385. Dr. Rogers based her conclusion almost exclusively on records that would have been available to Dr. Hamed upon request. Excerpt 15 at 384–385.

As the Florida Supreme Court in *Mason* explained: “Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved. . . . In light of the patient’s inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data.” *Mason*, 489 So.2d at 737 (citing Bonnie, R. & Slobogin, C., *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427, 508–10 (1980)); see also Excerpt 49 at 750 (“[W]hen [petitioner’s] limited intellectual capacity precluded him from understanding the context of a particular situation, his natural response was not to acknowledge his own deficiencies. Instead, his coping system required him to mask his deficits.”).

Despite his ready demonstration of the flaws with Dr. Hamed’s report, Ninth Circuit law did not allow petitioner to raise a claim of the ineffective assistance of his expert. Instead, he was forced to argue that trial counsel’s reliance on the report constituted deficient performance. But the court of appeal held that trial

counsel was entitled to rely on Dr. Hamed’s report, no matter how unreliable it was, and that no right to the effective assistance of experts existed. Memorandum at 3, Appendix A at 4 (citing *Hendricks v. Calderon*, 70 F.3d 1032, 1038–1039 (9th Cir. 1995) (an attorney’s “reliance on the conclusion of his experts shields [him or her] from ineffective assistance of counsel claims under existing caselaw.”)).

In sum, by disallowing claims of ineffective assistance of experts, by shielding trial counsel from a finding of ineffectiveness whenever counsel relies on an expert opinion, and by prioritizing contemporaneous evaluations over post-conviction evaluations no matter how drastic the difference in quality and accuracy, the court of appeals has blocked off all avenues for potential redress of the harm created by ineffective expert assistance. This state of affairs is inconsistent with this Court’s recognition in *Ake* that expert assistance is an essential part of the right to present a defense in cases in which a defendant’s mental state is at issue, and inconsistent with the Court’s recognition in *Washington* that the right to assistance at trial necessarily embodies the right to effective assistance.

As Justice Marshall explained: “[A] defendant subjected to a substandard examination by an unqualified professional may be placed in a worse position than a defendant who is denied an evaluation in the first place. If the ‘expert’ concludes the defendant is competent to stand trial, that conclusion is cloaked in the special authority that [this Court] ha[s] recognized an expert witness conveys to the jury.” *Brown*, 484 U.S. at 876 (Marshall, J., dissenting from denial of cert.).

III. THIS CASE PRESENTS AN IDEAL VEHICLE THROUGH WHICH TO ESTABLISH STANDARDS FOR EVALUATING THE QUALITY OF EXPERT ASSISTANCE.

In explaining its refusal to recognize the right to the effective assistance of experts, the Ninth Circuit has held that allowing “battles of psychiatric opinions during successive collateral challenges to a [conviction] would place federal courts in a psycho-legal quagmire resulting in the total abuse of the habeas process.”

Harris, 949 F.2d at 1518. The court of appeals in *Silagy* expressed similar concerns: “[W]e would be reluctant to open up this type of *Ake* claim to a battle of the experts in a ‘competence’ review. Every aspect of a criminal case which involves the testimony of experts could conceivably be subject to such a review—a never ending process.” *Silagy*, 905 F.2d at 1013. The courts’ concerns are misplaced, particularly under the facts of petitioner’s case.

First, allowing claims of ineffective assistance of experts, even if done liberally, would not open up Pandora’s box. In order to raise such a claim, a petitioner would have to demonstrate a *prima facie* case that the expert was, in fact, ineffective. Post-conviction counsel would only be able to raise such claims when they had serious merit. The State of Florida has been entertaining such claims for more than three decades with no indications that doing so has overwhelmed its court system. Furthermore, the effective assistance of counsel touches literally every aspect of a criminal case, and yet the court system is readily able to address challenges to counsel’s effectiveness. The same would be true as to experts’ ineffectiveness.

Second, as the cases cited above demonstrate, challenges to the effectiveness of experts are already being raised in miscast form as elements of challenges to the effective assistance of counsel. It is difficult to imagine a post-conviction attorney learning of an error in a crucial expert witness's analysis and nevertheless choosing to leave the issue unaddressed. As such, recognizing a limited right to the effective assistance of expert witnesses is not likely to lead to any significant increase in post-conviction cases or claims. Such claims are already being raised, they are simply not giving rise to relief.

Third, state and federal courts are already well-accustomed to adjudicating disputes over the adequacy of experts' performance. "[T]he medical malpractice standard has long been based on the customary standard of practice of members in good standing in the profession." Nelson P. Miller, *The Standard of Care in Medical Malpractice Actions*, 30 For the Def. 7 (1988). Adapting the medical malpractice standard to claims of ineffective assistance of experts would create a workable standard to which the courts are already accustomed. *See* Roberts, *Curing the Ake*, 29 San Diego L. Rev. at 822–826 ("[A]dequate performance of a psychiatric expert can be defined by accepted professional practices."). "As academic institutions have learned to measure effective performance in the contentious disciplines that constitute their curriculum, as courts of law have learned to measure effective performance in criminal trials, so there is no barrier to standards of competent performance being set and applied to the psychiatric assistance furnished the accused." *Harris*, 949 F.2d at 1532 (Noonan, J., dissenting).

Fourth, petitioner's case presents this Court with an ideal vehicle through which to securely limit the right to effective assistance of experts. In petitioner's case, not only is Dr. Hamed's opinion discredited by petitioner's post-conviction experts, it is also discredited by the *State's* post-conviction expert and by the findings of the Riverside Superior Court. Thus, if this Court is concerned about overwhelming the lower Courts, it could fashion a limited avenue to relief rule based on the ineffective assistance of an expert as shown here.

Fifth, this Court could further cabin the right to effective assistance of experts by requiring petitioners to show that the expert's opinion was material to their case. In petitioner's case, this requirement would be met by virtue of the fact that a finding of incompetence would have precluded petitioner from being tried until his competency could be restored and the fact that all subsequent analyses of his competency to stand trial have found that he was not competent. *See Dusky v. United States*, 362 U.S. 402 (1960); and *Brown*, 484 U.S. at 876 ("We already have recognized that 'the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.' An examination that meets minimum professional standards performed by a competent psychologist or psychiatrist must count among these adequate procedures.") (quoting *Drope v. Missouri*, 420 U.S. 162, 172 (1975)) (Marshall, J., dissenting).

In sum, claims of ineffective assistance of experts could only be raised in the limited set of cases to which *Ake* already applies and in which the petitioner could

state a *prima facie* case of ineffective assistance. Workable and familiar standards presently exist to adjudicate such claims. The right to effective expert assistance could further be limited by requiring petitioners to show that the expert's performance was deficient and had a material effect on the petitioner's case. In all, as three decades of Florida practice has proved, recognizing the right to effective expert assistance would not create any significant burden on the lower courts. Indeed, in all likelihood, these claims are already being raised in miscast form as claims of ineffective assistance of counsel or otherwise.

In the alternative, the Court should hold that a court may entertain an ineffective assistance of expert claim to rebut the presumption in favor of relying on contemporaneous evaluations of competency.

CONCLUSION

Review of the decision below is necessary to end a longstanding failure in the lower courts to recognize the right to the effective assistance of experts. The disposition of this case depended on the court of appeals' refusal to recognize that right. Under the facts of petitioner's case, this Court could, and should, fashion a right to challenge the effectiveness of an expert.

Accordingly, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

DATED: February 1, 2018

Respectfully submitted,



JAMES S. THOMSON
Attorney for Petitioner
DAVID FIERRO
Counsel of Record

CERTIFICATE OF COMPLIANCE

PURSUANT TO Sup. Ct. R. 33.2(b)

Case No. 17 - _____

I certify that the foregoing petition for writ of certiorari is proportionally spaced, has a typeface of 12 points, is in Century font, is double-spaced, and is 33 pages long.



JAMES S. THOMSON