

No. _____

IN THE
Supreme Court of the United States

TRACY CAIN,

Petitioner,

v.

RON DAVIS,

Respondent.

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

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Petitioner, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner is indigent and the Office of the Federal Public Defender for the Central District of California was appointed by the United States District Court for the Central District of California to represent him under the authority of 18 U.S.C. § 3599 and the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(b), and this appointment continued on appeal to the Ninth Circuit.

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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DATED: May 25, 2018

By /s/ Jonathan C. Aminoff
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CAPITAL CASE QUESTIONS PRESENTED

Question 1: In his dissent in *Wood v. Allen*, 558 U.S. 290 (2010), Justice Stevens, joined by Justice Kennedy, wrote that there is a “world of difference” between a guilt- and a penalty-phase investigation in a death-penalty trial. But whether there is a difference, and if it is constitutionally significant, remain open questions in this Court. Notwithstanding the applicable “double deference” standard, is counsel prejudicially ineffective where he concludes his penalty-phase investigation based on a psychologist’s guilt-phase mental-state assessment and accordingly fails to discover and present powerful mitigation evidence at penalty even if it did not rise to the level of a defense to the charges at guilt?

Question 2: *Florida v. Nixon*, 543 U.S. 175 (2004), established that the Constitution does not bar defense counsel from conceding a capital defendant’s guilt at trial when the defendant, informed by counsel, neither consents nor objects to counsel’s strategy. *McCoy v. Louisiana*, 584 U.S. __ (2018), established that the Constitution bars defense counsel from conceding a capital defendant’s guilt at trial over the defendant’s in-court objection. Does the Constitution bar defense counsel from conceding a capital defendant’s guilt at trial when the defendant consistently and continually refuses to plead guilty to murder, asserts his innocence, and insists on going to trial, but does not object on the record?

Question 3: If the Court is not inclined to consider this case on the merits, should it vacate the decision of the Ninth Circuit Court of Appeals and remand for further consideration in light of *McCoy v. Louisiana*, 584 U.S. __ (2018)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tracy Cain (“Cain” or “Petitioner”) respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in *Cain v. Chappell*, No. 13-99008.

I. OPINIONS BELOW

The Ninth Circuit’s order denying panel rehearing and rehearing en banc was not reported. Petitioner’s Appendix (“Pet. App.”) 45. The Ninth Circuit’s opinion denying relief is reported, *Cain v. Chappell*, 870 F.3d 1003 (9th Cir. 2017). Pet. App. 1-44. The district court’s orders denying relief without granting discovery or an evidentiary hearing and entering judgment are unreported. Pet. App. 46-205.

The California Supreme Court’s summary denials on habeas are not reported. Pet. App. 206-225. The California Supreme Court’s appellate opinion affirming Cain’s convictions and sentences is reported, *People v. Cain*, 10 Cal. 4th 1 (1995). Pet. App. 226-320.

II. JURISDICTION

The Ninth Circuit’s opinion affirming the denial of habeas relief was filed on September 13, 2017. The Ninth Circuit’s order denying Cain’s petition for rehearing was filed on December 27, 2017. On March 19, 2018, Justice Kennedy granted Cain’s request for a 60-day extension of time to file this petition to and including May 25, 2018. The Court’s jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend. VI

“In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence.”

Title 28 U.S.C. § 2254(d)

“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

IV. STATEMENT OF THE CASE

Petitioner Tracy Cain is a black man with an IQ in the borderline intellectually-disabled range. He was prosecuted for the murders of his white neighbors William and Modena Galloway in Ventura County, California, a predominantly white community with a history of disproportionately seeking death sentences against indigent men accused of killing white victims. Although Cain maintained his innocence and refused to plead guilty in exchange for a life sentence,

his attorney Willard Wiksell¹ conceded Cain’s guilt of the capital crimes, making the penalty phase the focus of the trial. At the ensuing penalty trial, however, Wiksell painted a falsely positive image of Cain and failed to investigate and present any of the classic mitigation evidence that *the State’s* post-conviction expert would later describe as mitigating, having “compromised” Cain’s development, and having “clearly contributed” to his criminal conduct. Pet. App. 636. In a cursory decision reached without adversarial briefing and certifying this issue after oral argument, the Ninth Circuit affirmed the denial of habeas relief, but ignored much of the substance of Cain’s ineffective-assistance claim, and this Court’s precedent, and concluded that because counsel hired a psychologist to evaluate Cain for guilt-phase mental-state defenses, counsel had performed a reasonable penalty-phase investigation and reasonably decided to forego investigating and presenting evidence of Cain’s deeply troubled background and extensive psychological and neurological impairments.

A. Crime and Trial

On October 17, 1986, Cain held a party at his father’s house. Late that night, or early the next morning, Cain, assisted by co-defendant David Cerda, entered the garage of William and Modena Galloway’s next-door home. Although Cerda’s jacket and other physical evidence not linked to Cain was found inside the house, the

¹ According to figures maintained by the California Appellate Project, Wiksell currently has seven former clients on death row in California – the second most of any practicing attorney in California. These figures are available upon request.

State contends that Cain alone then entered the house, beat the Galloways to death, attempted to rape Mrs. Galloway, and stole property. Pet. App. 227-38.

Prior to Cain's 1988 capital trial, appointed defense counsel Willard Wiksell hired psychologist Theodore Donaldson to examine Cain for possible guilt-phase defenses. Donaldson met with Cain once and administered four tests. Donaldson rejected a sociopathy diagnosis, noted possible central nervous system dysfunction, and recommended a neuropsychological evaluation. Donaldson did not know Cain was facing the death penalty. Wiksell did not provide him with any records aside from law-enforcement reports about the crime and did not act on Donaldson's advice. Pet. App. 468-470, 691-697.

The State offered to let Cain plead to both murder counts in exchange for a life-without-parole sentence, but Cain refused to plead guilty and elected to go to trial. Pet. App. 698. The State prosecuted Cain under a felony-murder theory and conceded his lack of premeditation. Wiksell conceded Cain's guilt of the murder and burglary charges in his closing argument. Pet. App. 716:16-17 ("Without question. I submit that he's guilty [of burglary]. The evidence has proven it."); Pet. App. 719:16-20 ("What about murder? Is the defendant guilty of murder? Well, this may surprise you, but in my understanding of the law, yes, he is. He's guilty of murder."). Cain was convicted of two counts of burglary, two counts of felony murder, and one count of robbery, and was acquitted of rape. The jury found true the special circumstances of burglary, robbery, attempted rape, and multiple murder. Pet. App. 226.

At penalty, the State presented four acts in aggravation. The parties stipulated that Cain previously served a prison term for a non-violent car theft. RT 6445-46. The State called Anita Parker, Cain's ex-girlfriend, who testified that Cain had hit her with a tire iron in 1986. She admitted that she had pulled a knife on Cain before he hit her, she had previously stabbed him, and she abused alcohol and could not recall what happened. She forgave Cain and asked the jury for mercy. RT 6448-60. Nicholas Perez testified that while he was employed as a guard at a juvenile detention facility, Cain punched him and escaped from the facility. RT 6494-6500. Perez suffered no serious injuries. Finally, the State read Virginia Fontes' testimony from a prior case, wherein she described a brawl during which Cain hit her adult son and was later convicted of misdemeanor battery. RT 6525-40.

The defense called Richard Clayton, who testified that the brawl began when Fontes' relative attacked him and that Cain came to the rescue of a third man who was being badly beaten. RT 6551-67. Two guards testified to Cain's good work habits in prison. James Farley, Wiksell's business partner and Cerda's lawyer, testified that Cerda was not facing a death or a life-without-parole sentence at his separate trial. RT 6645-47. Sociologist John Irwin testified about prison conditions; he never met Cain and provided no testimony specific to him. RT 6648-80. Finally, Cain's father² and stepmother testified that Cain's mother died in the Jonestown massacre, that they loved Cain, and that Cain was "a typical boy" growing up; they

² There is no evidence that Wiksell ever interviewed Cain's father before calling him to testify.

asked for mercy. Pet. App. 337-341; 350-55. Their combined testimony amounted to less than ten transcript pages. The jury deliberated for almost two full days before returning a death sentence.

B. The Merits of Cain’s Penalty-Phase Ineffective-Assistance-of-Counsel Claim

In both state and federal court, Cain’s ineffective-assistance-of-counsel claim was premised on Wiksell’s failure to investigate and present evidence of Cain’s background, substance abuse, and psychological and neurological impairments.

1. Counsel Performed Deficiently

Wiksell’s penalty-phase investigation consisted of single interviews with four of Cain’s thirteen siblings, Cain’s stepmother, and a childhood friend. These interviews did not yield significant information and, apparently based on his conversation with Cain’s stepmother,³ Wiksell opted to have her testify that Cain was a “nice kid” and a “typical boy” with an unremarkable upbringing.

Had counsel consulted the objective records in his possession, he “would have become skeptical of the impression given by the [six witnesses] and would unquestionably have gone further to build a mitigation case.” *Rompilla v. Beard*, 545 U.S. 374, 391 (2005). The court file from Cain’s prior non-violent car theft conviction was a court exhibit in Cain’s capital trial and provided to Wiksell. RT 5509. In that file was Mack Blair’s (Cain’s brother and co-defendant in that case)

³ Wiksell refused to cooperate with federal habeas counsel until the petition was denied in the district court in 2013 – 25 years after the conclusion of the trial – by which time he did not recall the specifics of his investigation. Dist. Court Dkt. No. 321.

presentence report which stated that Cain's stepmother resented having to raise her non-biological children (which included Cain) and abused them both physically and emotionally. Pet. App. 452-467. Despite the State's use of the car theft as an aggravating circumstance and Blair's account of his stepmother's actions, Wiksell failed to interview Blair. Ex. 153.

Also included in the car-theft court file was Cain's presentence report which noted that he spent a portion of his youth confined at the Adobe Mountain School where he was required to attend "psychological and psychiatric counseling sessions." Pet. App. 444-451. In addition, one of the State's aggravating factors, of which Wiksell received notice and was given a related police report, involved Cain punching a guard at the Adobe Mountain School. Yet despite Wiksell's knowledge of the mandated counselling and the State's intended use of an isolated incident of Cain's conduct at the school as an aggravating factor, he failed to obtain Cain's records from the Adobe Mountain School, an "obvious reason" to find Wiksell's performance deficient. *Rompilla*, 545 U.S. at 383 (finding counsel's performance deficient where he failed to obtain case files corresponding to a noticed aggravating factor). Those records, as detailed further below, establish Cain's borderline intellectual disability, severe learning disabilities and possible developmental disability, cognitive impairment, likely organic brain damage, conflict in Cain's homelife, and his overall positive conduct in a confinement setting.

Despite knowledge of Cain's prior mandated psychiatric counseling sessions, Wiksell did not have Cain evaluated by a mental-health professional for purposes of

the penalty trial nor did he gather relevant social-history records such as school or juvenile confinement records to inform that decision or provide them to his guilt-phase mental-health professional Donaldson. Further, even though Donaldson was hired exclusively for the guilt trial, he nevertheless urged Wiksell to have Cain evaluated by a neuropsychologist and warned Wiksell that Cain may suffer from organic brain damage. Wiksell did not heed this advice.

2. Prejudice Resulting From Counsel's Deficient Performance

a. Cain's Social History "Clearly Contributed" To His Later Confinement

When Cain's parents, Ruthie and Percy, married in 1959, they already had one child, Darnell Cain, and quickly had four more: Brenda, Janice, Tracy (Petitioner, born in 1962), and Val. Ruthie had two children from a prior relationship: Collins Jr. and Mack. But by 1965, Ruthie had developed a drug addiction and abandoned her family to live full time with her pimp. As a pre-teen, Cain frequently ran away from home and school to be with Ruthie. Pet. App. 481-86.

Percy hired 19-year-old Wilma Taylor to look after the seven children. Wilma was physically and psychologically abusive towards the children. Wilma and Percy married in 1969, and had four children together. Pet. App. 487-93.

Although she was loving towards her biological children, Wilma continued to abuse her non-biological children. Cain fell behind in school beginning in the third grade and was labeled "slow" academically. His brothers Mack and Darnell were sentenced to six months in a reformatory for burglary. Upon their release, they

returned to Los Angeles where Darnell was arrested for brandishing a machete at school, and Mack and Darnell were arrested on burglary charges. Pet. App. 481-93.

Between the ages of five and twelve, Cain received blows to the head at least six times, which were untreated and left him with two distinct, one-inch indentations in his scalp. Pet. App. 599, 625. In the sixth grade, Cain's teacher noted his poor reading skills, his below average performance in all academic areas, and the neglect of his emotional needs at home. Pet. App. 493-95.

The family moved from the Los Angeles area to Yuma, Arizona at the end of 1975, when Cain was twelve years old. Cain was one of only a few African-Americans at the school. Pet. App. 469.

Within a year of moving to Yuma, Cain, like his older brothers, was arrested on burglary and disorderly conduct charges and committed to the Arizona Youth Authority. Cain was assigned to the Adobe Mountain Reform School. He was fourteen years old. Testing placed Cain in the fourth grade/fifth month level in reading and the third grade/fifth month in mathematics – many grades below his age level – and testing revealed a *full-scale IQ score of 64*.⁴ Pet. App. 606. The evaluator recommended remedial courses and daily resource support, but Cain never received them. *Id.*

Cain paroled back to his father's house in Arizona and returned to school in September 1977. He was not placed in remedial classes, and fell behind. He was

⁴ After a hearing, the state court denied Cain's claim that he is intellectually disabled such that the Eighth Amendment would bar his execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). Pet. App. 206.

suspended for a month for fighting with some white students, and then expelled for non-attendance. His parents refused to meet with the school. Mack returned to Percy's house after being released from prison in Mississippi, but quickly picked up new charges in Arizona and California. Darnell also picked up new charges for burglary and armed robbery. Janice, at seventeen, left home and became homeless. Wilma continued to abuse Ruthie's children, and developed alcoholism. Cain, at age fifteen, in early 1978, was returned to the Arizona juvenile system. Cain was paroled again in October 1978. Shortly thereafter, Darnell was sentenced to six-years' imprisonment for a burglary charge. The following month, Cain's mother Ruthie and half-brother died in the mass Jonestown suicide. Cain's substance abuse dramatically increased. He became dependent on drugs and alcohol, and continued to abuse these substances until his arrest for the capital crimes. Pet. App. 505-12; 524-29.

Cain returned to high school, but the results were same. He violated his parole and was sent back to a juvenile detention facility. He returned to Adobe Mountain and at age seventeen tested at the second grade/seventh month level in math and fifth grade/third month in reading and his I.Q. scores placed him in the borderline intellectually-disabled range. Ex. 216 at p 121. Additional testing revealed that: "[Cain] had deficient verbal abilities limited fund of information [sic]. Poor reasoning skills, poor vocabulary, and poor verbal expression. Difficulty understanding the meaning of what he hears, severe short term auditory memory impairment, faulty social judgment. [Cain] is deficient academic achievement [sic]

in the areas of reading, math, and spelling.” *Id.* at 122. The evaluator also noted Cain’s “underlying feelings of personal inadequacy with poor self-esteem.” *Id.* Another evaluator noted, “[t]est results show that [Cain] does possess specific learning disabilities and these coupled with ongoing emotional problems have retarded his academic progress.” He concluded that Cain may have a developmental disability. Pet. App. 524-29.

Cain was released in November 1980 and returned to Yuma. Over the next two years, Wilma was arrested on felony theft and conspiracy charges, Val was arrested on burglary charges, Mack was arrested for possession of stolen property, and Darnell briefly escaped from prison.

In late 1982: (1) Cain was arrested with Mack for car theft; Cain was sentenced to five years in prison; (2) Val was arrested on four counts of burglary; (3) Wilma was sentenced to five years in prison for multiple shoplifting offenses, including shoplifting alcohol; and (4) Darnell was sentenced to ten-years’ imprisonment for burglary, sexual abuse, and attempted sexual assault. Pet. App. 527-28.

Cain was released from prison in December 1984 and moved to California to live with his father. He worked construction jobs, but had difficulty securing regular employment. Cain abused cocaine and crack. Pet. App. 607. “Cocaine” is tattooed on his left inner forearm. Pet. App. 625. Cain continued to struggle with drugs and alcohol, drinking and smoking PCP daily. Pet. App. 529-530.

The Warden contests none of these facts and his state-court post-conviction expert on intellectual disability confirms much of Cain’s social history and concluded that his social history and other associated factors “clearly contributed” to Cain’s criminal conduct. Pet. App. 594-637.

b. Cain’s Mental Impairments

In habeas, following the leads prompted by Donaldson and the Adobe Mountain records, Dr. Froming, Ph.D., a licensed clinical psychologist, administered a full battery of neuropsychological examinations to Cain to evaluate his brain function, behavioral abilities, and intelligence. All of the tests administered were widely used at the time of Cain’s trial. Froming concluded that, at the time of the commitment offenses, Cain suffered global brain impairment, and his deficits were most “pronounced for anterior brain functions.” Pet. App. 557. The anterior portion of the brain is largely correlated with executive functioning, which involves the ability to recognize future consequences of current actions, to choose between good and bad actions, and to override and suppress socially unacceptable responses. Testing also revealed dysfunction in Cain’s orbitofrontal regions of his frontal lobe, which plays a key role in impulse control and monitoring ongoing behavior. *Id.* Dysfunction in this area can lead to disinhibition, impulsivity, aggressive outbursts, sexual promiscuity, and antisocial behavior. These impairments affected Cain’s behavior on the night of the crimes. Pet. App. 584. Froming’s intelligence testing also demonstrated that Cain functions in the borderline intellectually disabled range. Pet. App. 555-58. Froming’s test results are consistent with those from Adobe Mountain. *Compare* Pet. App. 555 *and* Ex. 216.

Donaldson was then provided with social history records and Froming's neuropsychological assessment, as he had requested at trial but only received in habeas, and he diagnosed Cain with "chronic and significant mental disturbance" that was present at the time of the offense. Pet. App. 695.

Dr. Jackman, M.D., a licensed psychiatrist, also evaluated Cain post-conviction. Jackman concurred with Froming's findings that Cain has suffered from organic neurological impairment and cognitive dysfunction since adolescence. He concluded that, based on Cain's social history, his physical appearance, and his specific deficits, Cain's brain damage results from fetal alcohol syndrome or effect, and thus has existed since birth. Pet. App. 579. Jackman also found Cain's history of serious head injuries and chronic drug abuse to be neurologically significant. Jackman concluded that Cain "has significant psychiatric and neurologic dysfunction that affected his behavior at the time of the offense for which he has been sentenced to death." Pet. App. 584.

c. Substance Abuse

Each of the prosecution witnesses who had been with Cain on the night of the crimes told police how they observed Cain consume cocaine, alcohol, and marijuana before the crimes were committed. These statements were all memorialized in police reports provided to counsel pretrial.

Cain's impairments make him particularly vulnerable to cocaine's effects. Pet. App. 533. In habeas, Cain cited multiple articles published in medical journals that pre-dated his trial explaining cocaine's effects on its users, including extreme

disinhibition and a predisposition to violence. These effects increase with concurrent use of alcohol and marijuana.

Cain's pre-existing mental impairments and cocaine-alcohol-marijuana intoxication are significant in that they interacted to decrease his ability to control his behavior. The combined effect of Cain's specific brain impairments and intoxication greatly impaired his impulse control and executive functioning, consistent with what prosecution witnesses described to police about Cain's behavior on the night of the crime.

Two days before the start of the penalty phase, Wiksell received a letter from Dr. Ronald Siegel, whom Wiksell had hired to analyze Cain for exposure to intoxicants. Siegel's report indicated that Cain had not abused intoxicants to any significant degree around the time of the crime. Ex. 46 at 2440-41. Wiksell, however, did not accept this conclusion, as he continually argued to the jury that Cain was heavily intoxicated on the night of the crime. *See e.g.* Pet. App. 408 (counsel's penalty-phase argument describing the crime and Cain "as a person who is so drug-impaired, he goes in there, stumbles around trying to get some money, and he acts in a rage reaction because that's what happened."). However, Wiksell failed to substantiate his argument by eliciting testimony from the State's eyewitnesses of Cain's intoxication prior to the crime. Pet. App. 274 ("[A]lmost no evidence was presented regarding the quantity and effects of the drugs consumed by defendant on the night of the murders or the effect consumption had on defendant."). Moreover, Wiksell failed to consider the impact of Cain's mental

impairments in combination with his substance abuse; because Cain was more susceptible to intoxicants than the average person, a lower level of intoxicants in his system would still be significant even if Siegel's report was correct, which it was not. Indeed, Respondent has conceded that Cain was abusing cocaine on the night of the crimes, and a doctor employed by Respondent diagnosed Cain with psychoactive substance abuse shortly after Cain was sentenced to death. *See California v. Cerda*, Case No. B036702, Respondent's Brief, at 3; Ex. 46 at 2442.

C. State Appeal and Habeas Proceedings

On appeal, the California Supreme Court affirmed Cain's convictions and sentences. Pet. App. 226-320. In habeas, Cain presented his ineffective-assistance claim with substantial supporting evidence including four expert declarations, numerous lay witness declarations, and hundreds of pages of social history records. The State did not dispute any of Cain's factual allegations. The state court summarily denied Cain's petition without granting discovery or an evidentiary hearing. Pet. App. 224, 225.

D. Federal Habeas Proceedings

Cain timely filed a habeas petition in the district court pursuant to 28 U.S.C. section 2254 raising his ineffective-assistance claim with all supporting evidence. His petition was pending when this Court issued *Atkins v. Virginia*, 536 U.S. 304 (2002) which held that the Eighth Amendment prohibits the execution of intellectually-disabled persons. Cain amended his petition to include a claim that his execution was barred because he is intellectually disabled and filed a new petition in the state court to exhaust this issue. The district court stayed the

federal action, and the California Supreme Court issued an order to show cause as to why Cain's petition should not be granted under *Atkins*; an evidentiary hearing was held in state trial court. In support of its case, the state filed an expert report by Dr. Beliz, a psychologist, who conducted his own investigation on the issue of Cain's intellectual disability. Beliz rejected an intellectual-disability diagnosis, but found Cain's social history diagnostically significant and mitigating. Pet. App. 594-637. Ultimately, the state court denied relief and Cain returned to federal court.

Cain moved in federal court for an evidentiary hearing on several claims, including his ineffective-assistance claim. On March 14, 2011, citing *Harrington v. Richter*, 562 U.S. 86 (2011), *Schriro v. Landrigan*, 550 U.S. 465 (2007), and *(Michael) Williams v. Taylor*, 529 U.S. 420 (2000), the district court held that Cain diligently presented the factual basis of his claims in state court and was entitled to an evidentiary hearing taking the 28 U.S.C. section 2254(d) standards into account. Dist. Court Dkt. No. 275 at 4-7, 21. The court held that the state court record was silent on important disputed issues and that "[a]n evidentiary hearing is needed to resolve these fact-dependent issues," including the credibility and weight of witnesses' testimony. *Id.* at 21, *see also id.* at 37, 42, 64, 100-101, 105, 106, 109, 111.

About three weeks later, this Court issued *Cullen v. Pinholster*, 563 U.S. 170 (2011), and the very next day the district court stayed its order granting a hearing. Dist. Court Dkt. No. 281. After briefing, the court held that a hearing was impermissible under *Pinholster*, and also *Richter* and *Landrigan*, cases that

according to the court's prior order, *supported* a hearing. Pet. App. 175-205. The district court subsequently denied relief and granted a certificate of appealability ("COA") on an appellate issue not relevant here.

In his opening brief to the Ninth Circuit, Cain moved to expand the COA to include his penalty-phase ineffective-assistance-of-counsel claim and briefed the claim at length. Ninth Circuit Dkt. Entry 18 at 76-108. The State declined to respond to this claim in its answering brief. Dkt. Entry 39 at 2 n.3. Cain addressed the claim again in his reply brief. Dkt. Entry 47 at 17-24. Cain discussed the claim extensively at oral argument, but the State again demurred, saying it was not prepared to discuss the claim as it had not briefed it. Oral Argument at 33:58-37:30.⁵ The panel expanded the COA to include the claim but only *in its opinion denying relief on the claim*, after oral argument and without ordering the State to brief the claim (and without, obviously, Cain having a chance to respond to any arguments crafted by the Panel in its opinion). Cain's claim has thus been summarily denied in state court without an opinion or fact development; denied in district court without fact development; and denied in the Ninth Circuit without the adversarial briefing or oral argument process that occurs in "an appeal in the normal course." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017).

In denying Cain's penalty-phase ineffective-assistance-of-counsel claim, Ninth Circuit Judges Rawlinson, Callahan, and O'Scannlain concluded that, (1) Wiksell reasonably relied on Donaldson's report in making a reasonable decision to

⁵ Available at:
https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010033

present lack of premeditation and evidence of good behavior during prior incarcerations and, (2) although Cain’s actual social and psychological histories were significantly more mitigating than what was presented, Cain was not prejudiced. Pet. App. 30-36.

V. REASONS FOR GRANTING THE WRIT

“Certiorari is appropriate when ‘a United States court of appeals ... has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court’s supervisory power.’” *Kalamazzo County Road Com’n v. Deleon*, 135 S. Ct. 783, 783 (2015) (Alito, J. dissenting from the denial of certiorari) (quoting Supreme Court Rule 10(a)).

In this death-penalty case, the Ninth Circuit’s opinion ignores much of the evidence that Cain presented in support of his ineffective-assistance claim, and concludes that trial counsel reasonably relied on a psychologist’s guilt-phase evaluation in terminating his penalty-phase investigation. Based on the specific factual circumstances presented in this case, counsel’s actions were unreasonable.

The danger of this opinion is not limited to Cain’s unjust execution; it’s holding that a guilt-phase mental-state investigation satisfies counsel’s duty to investigate “moral culpability” for the penalty phase clashes with and undermines this Court’s precedent and diminishes trial counsels’ duty to their capital clients. Indeed, since *Pinholster*, as demonstrated by the polar swings in this case from the grant of an evidentiary hearing to the abrupt summary denial and truncated appellate process, the federal courts are in disarray as to when habeas relief is appropriate on claims of ineffective assistance at capital-penalty trials. *See, e.g.,*

Bemore v. Chappell, 788 F.3d 1151, 1171 (9th Cir. 2015) (granting penalty-phase relief on an ineffective-assistance-of-counsel claim where counsel failed to expand upon his guilt-phase mental-state investigation for the penalty phase); *Andrews v. Davis*, 888 F.3d 1020 (9th Cir. 2018) (granting petition for rehearing en banc following the panel’s denial of an ineffective-assistance-of-counsel claim so factually similar to Cain’s that the *Andrews* decision was cited 15 times in the *Cain* decision). This case provides the ideal opportunity for this Court to provide guidance on when a capital petitioner’s well-pled and supported penalty-phase ineffective-assistance-of-counsel claim requires relief despite the deference owed to *Strickland* claims under AEDPA. *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) (“Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review, and does not by definition preclude relief.”) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

QUESTION 1

A. The Ninth Circuit Applied *Strickland* in Contradiction with this Court’s Precedent

The Eighth Amendment guarantee of reliable, individualized capital sentencing requires penalty juries to consider as a mitigating factor “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Penry v. Lynaugh*, 492 U.S. 302, 317 (1989), *overruled on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002). The Eighth Amendment guarantee is dependent on the Sixth Amendment command that capital-defense counsel “conduct a thorough

investigation of the defendant's background" in preparation for the penalty phase.

Williams v. Taylor, 529 U.S. 362, 396 (2000). Because counsel failed to perform this duty, Cain's jury did not receive the mitigating evidence of his character and record necessary to reach a reliable, individualized death judgment.

1. The Ninth Circuit's Opinion Substantially Weakens the Sixth Amendment Duties of Capital Counsel

The Ninth Circuit's opinion found that Wiksell's guilt-phase investigation into possible mental-state defenses satisfied counsel's duty to provide effective assistance at the penalty trial. This ruling fails to differentiate between the burden on counsel in capital versus non-capital cases, and substantially weakens the Sixth Amendment obligations of attorneys who represent defendants at the penalty portion of a capital trial.

An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Performance is deficient if it falls below an objective standard of reasonableness. An attorney's strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *Id.* at 691. On four occasions, the Court has found counsel ineffective at the penalty phase of a capital trial in the federal habeas context. *Williams*, 529 U.S. 420 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam).

In *Pinholster*, the Court chided the Ninth Circuit for reading a “constitutional duty to investigate” into *Williams*, *Wiggins*, *Rompilla*, and *Porter*. 563 U.S. 170, 195 (2011). The Court reiterated that counsel’s constitutional duty is to act reasonably, which may require in-depth investigations depending on the facts of the case, and is informed by the prevailing professional norms at the time of the trial. *Id.*; *Wiggins*, 539 U.S. at 521. Cain was tried in 1988, and “[i]t is unquestioned that under the prevailing professional norms [for a 1988 capital trial], counsel had an ‘obligation to conduct a thorough investigation of the defendant’s background.’” *Porter*, 558 U.S. at 41 (quoting *Williams*, 529 U.S. at 396); *see also Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (In 1988, the prevailing professional norms required that a lawyer “explore all avenues leading to facts relevant to ... the penalty” and “called for [trial] counsel to cover several broad categories of mitigating evidence.”).

Without analyzing the objective standard of reasonableness in California in 1988, the Ninth Circuit here concludes that the state court could have held that Wiksell, based on Donaldson’s 2.5-page guilt-phase report, decided not to present evidence of Cain’s background and impairments at penalty. Pet. App. 33-36. The Ninth Circuit’s ruling necessarily finds that by commissioning a guilt-phase mental-state evaluation, counsel conducted a reasonable penalty-phase investigation, which supported a reasonable strategic decision to conclude his investigation and present no mental-impairment evidence and a limited (and falsely positive) social history through Cain’s stepmother and father. *Contra Williams*, 529 U.S. at 396 (rejecting that a decision to focus on one potentially reasonable trial strategy was “justified by

a tactical decision” when “counsel did not fulfill their obligation to conduct a thorough investigation of the defendant’s background.”).

The *Strickland* analysis is case-specific. Perhaps a cursory psychological evaluation could, in some cases, constitute a reasonable investigation, but that is not true here. The Ninth Circuit holds that Wiksell could have relied on Donaldson’s reference to “Cain’s ‘sociopathy’ and predisposition to ‘episodic and violent acting out’ that were not the result of any ‘gross brain disorder’ or psychosis” in deciding to cease investigation into Cain’s psychological impairments. Pet. App. 34-35. This misstates the evidence and does not justify the court’s decision.

First, Donaldson’s report actually rejected sociopathy as “too simple a diagnosis.” Pet. App. 470.

Second, the reference to “no indications of gross brain disorder” was preceded by a reference to “the possibility of [Cain’s] central nervous system dysfunction” and Donaldson’s acknowledgement that although no dysfunction was found in the evaluation, “that part of the evaluation was somewhat limited.” *Id.* Moreover, in a sworn post-conviction declaration, Donaldson affirms that he advised Wiksell to have Cain evaluated by a neuropsychologist to further investigate Cain’s brain dysfunction, yet counsel failed to do so.

Third, Donaldson’s reference to Cain’s seeming predisposition to “episodic and violent acting out” reflects rather than disproves that Cain had a neurological or psychiatric impairment relevant at penalty. *See Porter*, 558 U.S. at 36, 41 (citing

Porter's brain damage resulting in impulsive, violent behavior as strong mitigating evidence).

Regardless, Donaldson reports that Cain's predisposition to acting out began when he was in his late teens, which suggests possible central nervous system dysfunction, but which also coincides with Cain's move from Los Angeles, where he attended an "all black school," to Arizona, away from his mother, into the full-time care of his stepmother, and into a predominantly white environment. Pet. App. 468-69. Learning this from Donaldson's report, a reasonable attorney would have been prompted to investigate Cain's nervous system dysfunction and social history to try to understand why Cain's behavior changed for the worse in his teens. *See Wiggins*, 539 U.S. at 534 (finding counsels' performance deficient where he ended his investigation when a reasonably competent attorney would have been prompted to investigate further.)

But instead of responding to these red flags, counsel ceased his social-history investigation based on one page of Donaldson's report which summarizes Cain's statements to Donaldson about his social history. This portion of the report notes that Cain faced racially-motivated violence as a child, served extended juvenile confinement, and struggled in, and failed to finish, school. Pet. App. 469. Based on this information, and Wiksell's knowledge of Cain's physical abuse, his mandated psychiatric counseling, and his mother's extreme mental illness requiring hospitalization, Wiksell could not reasonably end his investigation. *See Wiggins*, 539 U.S. at 525 (finding counsel deficient when they ceased investigation after

discovering Wiggins’ mother’s alcoholism and his foster care placements, emotional difficulties, and long absences from school).

The Opinion conflicts with this Court’s precedent, and the applicable ABA guidelines, which hold that an investigation should not be limited to a defendant’s self-report. *Porter*, 558 U.S. at 39-40; 1979 ABA Standards, 4-4.1 at 55.

Donaldson’s recitation of Cain’s history was based solely on Cain’s self-report – he interviewed no relatives or friends and received no social history records – which was particularly unreasonable because the report itself states that Cain “oversimplif[ies] stimuli in order to make the world less threatening.” Pet. App. 470.

The Ninth Circuit makes no mention of counsel’s failure to interview members of Cain’s family or to obtain records. The Ninth Circuit also makes no mention of any of the details of Cain’s life that counsel subjectively knew based on the few files provided to him in discovery. Instead, the Ninth Circuit’s sole focus is the Donaldson report and, for the reasons stated above, it was unreasonable for the court to decide that this report justified counsel’s curtailed investigation.

2. The Ninth Circuit Creates a New, Insurmountable *Strickland* Prejudice Standard

To establish *Strickland* prejudice, the petitioner must show a “reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695. This requires the reviewing court to “reweigh the evidence in aggravation against the totality of available mitigating evidence.”

Wiggins, 539 U.S. at 534; *Wong v. Belmontes*, 558 U.S. 15, 8 (2009) (per curiam) (“it is necessary to consider *all* the relevant evidence that the jury would have had before it not just the mitigation evidence [counsel] could have presented, but also the [additional aggravating evidence] that almost certainly would have come in with it”). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

The Ninth Circuit recognized that counsel’s “typical child” presentation was false and found that Cain’s actual social and psychological history “may” be mitigating. Pet. App. 36. Indeed, this Court has acknowledged the weakness of “good guy”-styled mitigation defenses. *See, e.g., Sears v. Upton*, 561 U.S. 945 (2010) (remanding for a *Strickland* prejudice analysis when counsel presented a falsely positive image of Sears’ middle-class upbringing after inadequately investigating his background and impairments). But here, counsel’s approach was particularly ineffective. Cain was prosecuted under a felony-murder theory, and the State conceded his lack of premeditation. In response, Wiksell argued, without evidentiary support, that Cain was “drug-impaired” and “acted[ed] in a rage reaction.” Pet. App. 13. This theory is consistent with the classic mitigation themes offered in habeas, and inconsistent with the “typical child” presentation Wiksell offered at trial. *See Williams*, 529 U.S. at 369, 370-71 (granting penalty-phase relief where counsel presented a “nice guy” mitigation case, but failed to investigate and present evidence establishing a troubled social history and mental impairments).

But the Ninth Circuit denied relief on the theory that “Cain’s social and psychological histories could have ‘opened the door to inflammatory and prejudicial aggravating evidence,’” Pet. App. 36, without citing any examples of such evidence. There are none. Neither Respondent nor any court has identified *any* additional aggravation that could have been presented in response to the mitigation that reasonable counsel would have presented at Cain’s trial. The Ninth Circuit’s approach violates this Court’s instruction to reweigh the specific mitigating and aggravating evidence that the jury would have heard had defense counsel acted competently. *Belmontes*, 558 U.S. at 8.

The Ninth Circuit further supports its prejudice decision by referencing “Cain’s prior violent acts,” Pet. App. 36, which amount to: (1) a misdemeanor battery conviction that the prosecutor conceded was a “minor deal” (Pet. App. 382); (2) an uncharged act of domestic violence wherein the victim asked Cain’s penalty jury to spare his life; and (3) a juvenile assault on a prison guard resulting in no serious injuries. These acts pale in comparison to the evidence of aggravation in *Williams*, 529 U.S. at 368-69, 418 (relief granted despite prior convictions for armed robbery, burglary, two prior assaults on elderly victims which left one victim in a permanent vegetative state, pre-trial jailhouse crimes including choking two inmates and breaking an inmate’s jaw); and *Rompilla*, 545 U.S. at 399 (relief granted despite prior convictions for burglary, theft, and rape which included stabbing the victim and holding her at knifepoint for over an hour while he raped her).

Finally, the Ninth Circuit cited to the capital crime in support of its prejudice holding. Pet. App. 36. Yet in *Porter*, this Court found *Strickland* prejudice, under AEDPA deference, in a case involving a considerably more aggravated crime. 558 U.S. 30 (relief granted where Porter, after multiple prior incidents of domestic violence and several days of planning and stalking, broke into his ex-girlfriend's house and shot and killed her. Porter then taunted the victim's daughter and threatened to kill her before also killing the victim's boyfriend.).

B. The Ninth Circuit's Decision Creates a Circuit Split Regarding Counsels' Duty in a Death-Penalty Case

"There is a world of difference between a decision not to introduce evidence at the guilt phase of a trial and a failure to investigate mitigating evidence that might be admissible at the penalty phase." *Wood v. Allen*, 558 U.S. 290, 305 (2010) (Stevens, J. dissenting). The Eleventh Circuit is in agreement. *Debruce v. Commissioner, Alabama DOC*, 758 F.3d 1263, 1273 (11th Cir. 2014) ("The Alabama Court of Criminal Appeals' determination that Mathis acted strategically in failing to conduct a mitigation investigation is based on its erroneous conflation of the issues of guilt-phase mental health defenses and competence to stand trial with the separate issue of whether to conduct a mitigation investigation.").

The Ninth Circuit, however, holds that a psychologist's cursory evaluation of a criminal defendant for guilt-phase mental-state defenses satisfies trial counsel's duty to investigate for the penalty phase of trial. Pet. App. 35-37. Indeed, under the Ninth Circuit's interpretation, no more would be expected of counsel in a capital

case than would be expected in a non-capital case, in total disregard for this Court’s “death is different” line of cases. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

This important federal question was considered by the Court in *Wood v. Allen*, 558 U.S. 290 (2010), but was left undecided. Now is the time to settle this matter.

In *Wood v. Allen*, Petitioner Wood claimed that his three court-appointed lawyers were ineffective because they failed to investigate and present evidence of his mental deficiencies at the penalty phase of his death-penalty trial. 558 U.S. at 294. The habeas record established that trial counsel had engaged Dr. Kirkland, a clinical psychologist, to evaluate Wood pre-trial for competency to stand trial and mental state at the time of the offense. Kirkland provided counsel with a 9-page report, and a 2-page addendum, concluding that Wood was competent to stand trial and that there was no applicable mental-state defense to the crimes. *Wood v. Allen*, Case No. 08-9156, Joint Appendix at 323-333. Kirkland’s report contained various aggravating facts including details of Wood’s 19 earlier arrests and his prior attempt to murder an ex-girlfriend, and concluded that despite Wood’s low IQ and borderline intellectual disability, he had a high level of adaptive functioning.⁶ *Id.*, *Wood*, 558 U.S. at 298. The record established that Wood’s three attorneys all reviewed Kirkland’s report and decided that there was nothing in the report that merited further investigation. *Id.* at 301. Wood’s post-conviction counsel further

⁶ Intellectual disability is established by showing significant deficits in both intellectual and adaptive functioning with the onset of these deficits during the developmental period. *See Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014).

investigated Kirkland's conclusion that Wood functioned in the borderline intellectually-disabled range and discovered that Wood had been classified by the school system as "educable mentally retarded." *Id.* at 307 (Stevens, J., dissenting).

The seven-justice majority held that the state court could have made a reasonable factual determination that counsel made a strategic decision to not pursue or present evidence of Wood's mental deficiencies at penalty. *Id.* at 300-303. The Court's holding was based exclusively on trial counsels' testimony at the state habeas hearing that they had each read Kirkland's report and that one of the attorneys had concluded that nothing in the report merited further investigation and told the trial judge that they would not be introducing the Kirkland report. *Id.* at 301.

Wood argued that Kirkland's report was prepared for the guilt phase, not the penalty phase, and that counsel's decision to not use Kirkland's report at guilt did not carry over to penalty. Moreover, Wood argued, counsel had failed to pursue additional evidence about mental health for the penalty phase because they believed the trial court would not grant a continuance. Indeed, trial counsel told the trial judge that they would request an additional psychological evaluation of Wood before sentencing even though the results would come too late to be considered by the jury at the penalty phase, and they did, in fact, present evidence of Wood's mental deficiency to the trial judge at sentencing. *Id.* at 302. The Court, however, punted on the issue. The Court held that these arguments did not address the factual question of whether counsel made a decision or whether that decision

was strategic, an issue reviewed under section 2254(d)(2), but instead addressed whether counsel's strategic decision was reasonable, a determination reviewed under section 2254(d)(1). Unfortunately for Wood, although the section 2254(d)(2) determination was fairly included in the questions presented to the Court for review, the section 2254(d)(1) determination was not, and the Court refused to decide the issue. *Id.* at 304. Despite two justices of this Court indicating that they would grant habeas relief because counsels' decision could not be classified as strategic, the Court denied Wood's petition and Wood was executed later that year.

Cain now presents the same issue that the Court refused to decide in *Wood*, but in even clearer terms. Kirkland provided an 11-page report, and was given access to background materials, including prior psychological testing and probation reports from Wood's department of corrections file, was aware that Wood was facing capital punishment, and arguably considered issues outside of guilt-phase mental-state defenses. Donaldson provided a 2.5-page report, he relied on no background materials because counsel gave him none, his report was solely focused on mental-state guilt defenses, and he did not know that Cain was facing the death penalty. The Ninth Circuit held Wiksell was not ineffective because, based on Donaldson's guilt-phase evaluation, he may have seen limited utility "in presenting a defense premised on Cain's mental state." Pet. App. 340. Moreover, the appeals court concluded, the state court would not have been unreasonable for deciding that Wiksell could have reasonably relied on Donaldson's report to decide to emphasize Cain's positive conduct during past incarcerations and his lack of premeditation

rather than Cain's troubled background and psychological impairments. Pet. App. 34-35.

The Ninth Circuit's conclusion overlooks the differences between the guilt trial, where criminal liability is at issue, and the penalty trial, where moral culpability is relevant. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 251-52 (2007). At penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry*, 429 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)) (O'Connor, J., concurring). The emotional or mental problems relevant at penalty need not rise to the level of guilt-phase defenses of insanity, incompetence, inability to form the requisite mental state for the crime, or intellectual disability to be relevant and admissible at the penalty trial. *See Porter*, 558 U.S. 30 (finding ineffective assistance of counsel at the penalty trial, but not at the competency hearing, and finding Porter's brain impairments and psychological impairments mitigating even though they did not raise to the level of guilt-phase defenses); *see also Bell v. Cone*, 535 U.S. 685, 710 (2002) (Stevens, J., dissenting) (noting that evidence of defendant's troubled childhood would have been admissible at the penalty phase even if not admissible at the guilt phase).

The Court has continually held that the jury must be permitted to consider mitigating evidence, "and that such consideration 'would be meaningless' unless the

jury not only had such evidence available to it, but also was permitted to give that evidence meaningful, mitigating effect in imposing the ultimate sentence.” *Abdul-Kabir*, 550 U.S. at 260 (quoting *Penry*, 492 U.S. at 321, 323). By enforcing only counsel’s duty to investigate guilt-phase mental-state defenses, and not the duty to investigate mental-state evidence that is also relevant at penalty, the Ninth Circuit renders this right meaningless. This ruling runs afoul of this Court’s death-penalty jurisprudence and constitutes a circuit split that must be eliminated.

QUESTIONS 2 AND 3

A. The Court Should Clarify Whether Counsel’s Concession of Guilt Notwithstanding His Subjective Knowledge that the Defendant Objected to this Strategy Constitutes a Sixth Amendment Violation Under *McCoy v. Louisiana* or Ineffective Assistance of Counsel Under *Florida v. Nixon*

Prior to trial, Wiksell approached Cain on at least two occasions and tried to persuade him to accept a plea offer from the district attorney. Pet. App. 698.

Although the exact parameters of the deal are not clear, an investigator’s memo in Wiksell’s file confirms that the State offered to allow Cain to plead guilty and, in exchange, the State would not pursue the death penalty and Cain would receive a life-in-prison-without-the-possibility-of-parole sentence, which is available in California only on a finding of guilt of first-degree murder with special circumstances. The investigator’s notes memorializes that Cain rejected the plea offer at both meetings and insisted on proceeding to trial. *Id.*

At trial, Wiksell nevertheless conceded Cain’s guilt to burglary in his opening statement. Pet. App. 704:20-22 (“Mr. Cain, along with others, committed a crime. They went next door to their neighbors’ and they broke in and Mr. Cain went there

to steal property with others, and the evidence will show that without a doubt.”). And, in closing, he conceded that Cain was guilty of burglary and “guilty of murder.” Pet. App. 716, 719. Wiksell did not challenge *any* element of either murder or burglary.

On appeal, Cain argued, *inter alia*, that his Sixth Amendment rights were violated when counsel conceded his guilt over his objection, and that the trial court erred in permitting counsel’s admissions. In the alternative, Cain argued that counsel’s concessions constituted ineffective assistance of counsel. The California Supreme Court denied relief finding that the absence of evidence in the trial record that Cain objected to Wiksell’s approach was fatal to the claim, and that Wiksell’s concessions were not necessarily an incompetent tactical choice. Pet. App. 242-44.

In state habeas, Cain submitted both the investigator’s memo and a declaration from Brunell Cain, Cain’s father’s third wife and to whom he was married at the time of Cain’s trial. Brunell Cain declared that Wiksell had requested that she and Cain’s father meet with Cain and try to persuade him to accept the plea offer. Brunell Cain confirms that Cain again refused to accept the offer and insisted on maintaining his innocence. Pet. App. 699-700. The investigator’s memo confirms the meeting between Cain and his parents. Pet. App. 698. Despite evidence of these three attempts to convince Cain, and his staunch opposition to pleading guilty, the state court summarily denied the claim.

The district court looked through the summary denials to the state appellate decision and held that Cain’s Sixth Amendment and *Strickland* claims were

foreclosed by *Florida v. Nixon*, 543 U.S. 175 (2004). Pet. App. 91-92. The district court did not consider whether Cain consented to counsel's strategy. *Id.* On appeal, the Ninth Circuit held that Wiksell made a reasonable strategic decision to concede guilt, and did not address Cain's opposition to counsel's approach. Pet. App. 23-27.

In *Florida v. Nixon*, an ineffective-assistance-of-counsel case, this Court held that defense counsel's performance is not deficient per se where counsel concedes his capital defendant's guilt at trial after the "defendant, informed by counsel, neither consents nor objects" to counsel's proposed strategy. 543 U.S. at 178. Indeed, once counsel has explained the strategy to the defendant, and the defendant has not objected, "counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." *Id.* at 192.

Cain has consistently maintained that he is entitled to relief under *Nixon* because, as the extrinsic evidence proves, Cain objected to conceding his guilt of the crimes. The only reasoned decision from the state court on this issue is the appellate decision, which did not have the benefit of the extrinsic evidence, and thus denied Cain's claim because he did not object to counsel's strategy on the trial record. Pet. App. 244. Because the state court in habeas summarily denied Cain's claim, and the Ninth Circuit's practice is to look through that summary denial even where, as here, the rationale for the reasoned decision is undercut by evidence presented in the subsequent proceeding leading to the summary denial, *see e.g.* *Cannedy v. Adams*, 706 F.3d 1148, 1156–1159 (9th Cir. 2013), neither the district court nor the Ninth Circuit examined the significance of Cain's objection to counsel's

admission of Cain's guilt, and whether the state court's disregard for Cain's objection was unreasonable under section 2254(d). Pet. App. 23-27.

The Court recently revisited this issue in *McCoy v. Louisiana*, 584 U.S. ___, 2018 WL 2186174 (May 14, 2018), holding that the defendant's Sixth Amendment right to counsel was violated when his attorney conceded guilt over the defendant's in-court objection, and that this constituted a structural error.

Unlike Nixon, Cain voiced his continued objections to counsel of admitting guilt to the murder charges, and unlike McCoy, Cain failed to voice his objection to the trial court. For death-sentenced petitioners who find themselves in this posture, *McCoy* leaves many questions open: (1) does a capital defendant waive the Sixth Amendment right articulated in *McCoy* by failing to personally object on the record at trial or can the defendant's opposition to counsel's concession be established by extrinsic evidence?; (2) is *McCoy* retroactive?; (3) has Cain established deficient performance under *Nixon* and, if so, is prejudice presumed as in *McCoy*?

Both *Nixon* and *McCoy* are limited holdings. Indeed the *McCoy* majority explained that the situation that arose in *McCoy* had only occurred three times in the past twenty years, 2018 WL 2186174 at *8, a point that the dissent believes supports its view that the right articulated in *McCoy* is "likely to appear only rarely." *Id.* at *13. In order for lower courts to adequately apply the rights articulated in *McCoy* and *Nixon*, it is incumbent on this Court to clarify the

application of these rights, or remand this case to the Ninth Circuit to consider Cain's claim in light of *McCoy*.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: May 25, 2018

By: /s/ Jonathan C. Aminoff
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CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8913 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 25, 2018.

/s/ Jonathan C. Aminoff
Jonathan C. Aminoff*
Deputy Federal Public Defender

Attorneys for Petitioner
Tracy Cain
**Counsel of Record*

No. _____

IN THE
Supreme Court of the United States

TRACY CAIN,

Petitioner,

v.

RON DAVIS,

Respondent.

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

CERTIFICATE OF SERVICE

I, Jonathan C. Aminoff, do swear or declare that on this date, May 25, 2018, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari, on each party to the above proceeding required to be served, or that party's counsel, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Kim Aarons, Deputy Assistant Attorney General Counsel for Respondent
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 897-2270

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 25, 2018 at Los Angeles, California.

/s/ Jonathan C. Aminoff
JONATHAN C. AMINOFF*
Deputy Federal Public Defender

Attorneys for Petitioner
Tracy Cain
**Counsel of Record*