
In the Supreme Court of the United States

TRACY DEARL CAIN,

Petitioner,

v.

RONALD DAVIS, Warden

Respondent.

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

BRIEF IN OPPOSITION

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
MICHAEL R. JOHNSON
Deputy Solicitor General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General
*KIMARA A. AARONS
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 269-6092
Kim.Aarons@doj.ca.gov
**Counsel of Record*

**CAPITAL CASE
QUESTIONS PRESENTED**

1. Whether the court of appeals erred in concluding that the California Supreme Court reasonably rejected Cain's ineffectiveness challenge to his lawyer's penalty-phase investigation.

2. Whether there is any reason to remand this case for the court of appeals to consider whether this Court's decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), affects the court of appeals' conclusion that the California Supreme Court reasonably rejected Cain's constitutional challenge to his lawyer's guilt-phase concession that petitioner is legally liable for felony murder.

TABLE OF CONTENTS

	Page
Statement.....	1
Argument	10
Conclusion.....	19

TABLE OF AUTHORITIES

Page

CASES

<i>Burger v. Kemp</i> 483 U.S. 776 (1987)	13
<i>Cain v. California</i> 116 S. Ct. 783 (1996)	6
<i>Cullen v. Pinholster</i> 563 U.S. 170 (2011)	11, 13
<i>DeBruce v. Commissioner, Alabama Department of Corrections</i> 758 F.3d 1263 (11th Cir. 2014)	14, 15
<i>Florida v. Nixon</i> 543 U.S. 175 (2004)	16, 17
<i>Green v. Fisher</i> 565 U.S. 34 (2011)	16
<i>Harrington v. Richter</i> 562 U.S. 86 (2011)	11
<i>In re Reno</i> 55 Cal. 4th 428 (2012)	16
<i>McCoy v. Louisiana</i> 138 S. Ct. 1500 (2018)	<i>passim</i>
<i>Porter v. McCollum</i> 558 U.S. 30 (2009)	13, 14
<i>Strickland v. Washington</i> 466 U.S. 668 (1984)	<i>passim</i>
<i>Wood v. Allen</i> 558 U.S. 290 (2010)	15

TABLE OF AUTHORITIES
(continued)

	Page
STATUTES	
28 U.S.C. § 2254(d)(1)	7
Cal. Pen. Code § 189, 190	2
Cal. Pen. Code § 190	2
Cal. Pen. Code § 190.2(a)	2
CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. VI	6, 11
COURT RULES	
9th Cir. R. 22-1(e)	7
OTHER AUTHORITIES	
Antiterrorism and Effective Death Penalty Act of 1996	7

STATEMENT

1. Petitioner Tracy Cain broke into the home of his father's neighbors, William and Modena Galloway, robbed them, sexually assaulted Mrs. Galloway, and beat the couple to death with their grandchild's rocking chair. Pet. App. 227-228, 230-233. The police investigation revealed that, on the night of the murders, Cain hosted a party at his father's house while his father was out of town. *Id.* at 5. During the party, Cain drank beer and smoked crack cocaine. *Id.* at 228. He wanted to buy more drugs but was low on money, so he asked Ulysses Mendoza and David Cerda to help him burglarize the Galloways' home, as the couple was known to keep large amounts of cash. *Id.* at 5-6, 229-230. Mendoza refused, but Cerda agreed. *Id.* at 5-6.

Witnesses reported that Cain and Cerda left the party together and that Cerda returned without Cain after only a few minutes. Pet. App. 6. Sometime later, Cain returned with a large amount of money and blood all over his clothes, bragging that he "had thousands" and had "knocked them smooth out." *Id.* at 6, 231. The following day, Cain spent more than \$200 in cash. *Id.* at 6-7.

The crime scene was consistent with Cain's admissions. Mr. Galloway had been struck in the head and chest at least thirteen times. Pet. App. 232-233, 237; D.Ct. Dkt. 55:43 at 2. Mrs. Galloway's head was severely beaten, and blood was splattered on the wall near her body. Pet. App. 7, 234. She was nude from the waist down, with her legs spread wide apart. *Id.* at 8, 235. Pubic hairs found on her clothing matched Cain's. *Id.* at 236-237. And various items,

including cash and a jewelry box, were missing from the Galloways' home. *Id.* at 234.

Cain was arrested four days after the murders. Pet. App. 228, 231, 234. He had cuts on his fingers and knuckles, and a bruise on his shoulder. *Id.* at 234. During an interview with police, Cain stated that he broke into the Galloways' home to look for money, accompanied by Cerda and two other individuals. *Id.* at 9-10, 234-235. He denied that he was the one who killed the Galloways, but admitted he was present during the murders. *Id.* at 235. Cain also stated that he returned to the Galloways' home the following morning to wipe away fingerprints. *Id.* at 9.

2. The district attorney charged Cain with two counts of first-degree felony murder accompanied by four special-circumstance allegations: multiple murder, burglary-murder, robbery-murder, and attempted rape-murder. Pet. App. 4; D.Ct. Dkt. 55:2 at 86, 89. In California, the penalty for first-degree felony murder in the absence of special circumstances is imprisonment for twenty-five years to life with the possibility of parole. Cal. Penal Code §§ 189, 190, 190.2(a). But if a jury finds the existence of one or more special circumstances, the penalty is either death or life imprisonment without the possibility of parole. Cal. Penal Code § 190.2(a)(3) & (a)(17).

Cain alleges that before trial he rejected an offer from the prosecution to plead guilty to capital murder in exchange for a sentence of life without the

possibility of parole. Pet. 4; Pet. App. 698.¹ According to Cain's stepmother, Cain told her that he would not accept the plea offer because he "didn't want to plead guilty as he hadn't killed anyone." Pet. App. 699-700.

In preparing Cain's defense, his trial counsel retained Dr. Theodore Donaldson to conduct a psychological evaluation. Pet. App. 468. Dr. Donaldson tested and interviewed Cain, then prepared a report summarizing Cain's background and possible psychological problems. *Id.* According to Dr. Donaldson, Cain denied using illegal drugs or alcohol; he did not appear to have any thought disorder; his memory was excellent; his speech was clear, articulate, and of fair quality; and there was no indication that he was psychotic or suffered from any other serious psychological problem. *Id.* at 469-470. In Dr. Donaldson's opinion, Cain had an emotionally unstable personality characterized by poorly controlled anger and a tendency toward temper outbursts. *Id.* at 470. Donaldson concluded that there were "certainly no indications" of a gross brain disorder. *Id.*

Cain's trial counsel also retained Dr. Ronald Siegel to test samples of Cain's hair for the presence of controlled substances. D.Ct. Dkt. 124:23 at 31. Dr. Siegel found no detectable amounts of controlled substances in the hair as far back as nine months prior to the murders. Pet. App. 227. He thought that

¹ Whether any such offer was ever made or declined is unsettled. The courts below assumed the truth of Cain's allegation for purposes of ruling on the federal habeas claim at issue here, and for present purposes this Court may do the same.

Cain's alcohol use at the time of the murders "was of little behavioral significance." D.Ct. Dkt. 124:23 at 31.

At the guilt phase of trial, Cain's defense was that he entered the Galloways' home with other individuals to look for money, and though he was present when the couple was murdered he did not kill them. Pet. App. 238. During opening and closing guilt-phase arguments, Cain's counsel admitted that Cain was guilty of burglary, and consequently legally guilty of felony murder. *Id.* at 719-720. Counsel instead stressed in his argument that Cain was not guilty of any special circumstance that would make him eligible for the death penalty or life without parole, because he lacked the specific intent to kill that was required for the jury to find any of the alleged special circumstances true. *Id.* at 734-738. At no point during trial did Cain voice any objection or opposition to counsel's admission that he was guilty of felony murder. At the conclusion of the guilt phase, the jury convicted Cain of the two murders and found true all four of the special circumstances. *Id.* at 226.

At the penalty phase, the prosecutor presented evidence in aggravation consisting of numerous incidents in which Cain had engaged in violence. Pet. App. 281-283. This included evidence that Cain had struck his ex-girlfriend on the head with a tire iron, that he had hit a man in the head with a rock during a fistfight, and that he had attacked a juvenile detention officer, breaking the officer's nose. *Id.* at 282-283.

In mitigation, Cain's stepmother and father testified about his

upbringing, relating that Cain was a “typical boy” and a “good kid.” Pet. App.

12. Two correctional officers testified about Cain’s good behavior during previous periods of incarceration. *Id.* at 11-12. And a sociologist testified about the deprivations of life in prison and the behavior of life prisoners. D.Ct. Dkt. 55:52 at 47-63. The defense also presented evidence that David Cerda, though charged with the Galloway murders, was not facing the death penalty or life without the possibility of parole. D.Ct. Dkt. 55:52 at 6645-6647.

In his closing argument, Cain’s counsel urged the jury to have mercy on Cain and to spare his life. Pet. App. 433-438. He argued that the murders were unplanned, that Cain was mentally impaired by drugs when he entered the Galloways’ home, and that there was reasonable doubt about whether Cain personally killed the Galloways. *Id.* at 407-409, 419-421. He also argued that life in prison would be a just punishment since it would adequately protect society, Cain was not beyond redemption, and Cerda was not facing death for the same murders. *Id.* at 413-414, 425-438.

After deliberating for about two days, the jury fixed the punishment for each murder at death. Pet. App. 226; D.Ct. Dkt. 55:2 at 452, 455, 481-482.

3. The California Supreme Court affirmed Cain’s convictions and sentence on direct appeal. Pet. App. 226-317. The court rejected Cain’s claim that his trial counsel’s concession of liability for felony murder was ineffective and that the concession was impermissible without specific evidence of a knowing, voluntary, and intelligent personal waiver by Cain. *Id.* at 242-244.

This Court denied certiorari. *Cain v. California*, 116 S. Ct. 783 (1996) (No. 95-6367).

On state habeas corpus, Cain alleged that his trial counsel was ineffective in investigating Cain's social history, substance abuse, and mental impairments for potential penalty-phase mitigation. Pet. 15. In support of the claim, Cain submitted a declaration from Dr. Ruth Zitner, a clinical psychologist, summarizing Cain's background, including poverty, physical abuse, and a possible childhood head injury. Pet. App. 471-537. In Dr. Zitner's opinion, "these experiences and conditions formed the context for [Cain's] behavior" around the time of the killings. *Id.* at 537. Cain also submitted declarations from two other mental health professionals, who concluded that Cain suffered from moderate mental impairments and that he was "particularly deficient in rapid comprehension of verbal material, his ability to do two things at once and to selectively attend to information." *Id.* at 555, 581, 558; *see also id.* at 584. In addition, a declaration by Dr. Donaldson stated that he recalled advising Cain's counsel before trial that "he might want to have Mr. Cain examined by a neuropsychologist." *Id.* at 693-697. The California Supreme Court summarily denied the claim on the merits. *Id.* at 224.

4. On federal habeas corpus, the district court similarly rejected Cain's claims that trial counsel's guilt-phase concession of felony-murder liability violated the Sixth Amendment, D.Ct. Dkt. 275 at 5-6, 49-55, and that trial counsel inadequately investigated potential penalty-phase mitigating

evidence, *id.* at 189-194, 318, 319. That court did not grant a certificate of appealability on these claims.

The court of appeals granted a certificate of appealability as to both claims, but affirmed their rejection. Pet. App. 1-44.² Applying the deferential standard of review required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the court held that the California Supreme Court's denial of the claims was not contrary to, or an unreasonable application of, this Court's clearly established precedent. *See* 28 U.S.C. § 2254(d)(1); Pet. App. 23-27.

With respect to the guilt-phase ineffectiveness claim, the court observed that, as a strategic matter, any attempt to dispute Cain's involvement in the crime "would have been unpersuasive given the evidence," and that counsel's "acknowledgment of his client's guilt in the killing could reasonably have been intended to establish credibility with the jury in the face of horrendous facts" Pet. App. 25 (citation and internal quotation marks omitted). The court noted that Cain had suggested "no alternate theory, let alone one more likely to succeed than the one chosen by his counsel," *id.*, and that "convincing the jury that Cain was not guilty of felony murder would have been an

² Cain included the claims in his brief on appeal as "uncertified issues," which in the Ninth Circuit constitutes a motion to expand the certificate of appealability. Ninth Cir. R. 22-1(e). The State did not respond to the uncertified issues in its brief. After oral argument, the court of appeals expanded the certificate of appealability and addressed the claims in its opinion. Pet. App. 22-23.

exceedingly difficult task for even the most skilled attorney,” *id.* (citation and internal quotation marks omitted). The court observed that counsel could have made a reasonable strategic calculation to focus on avoiding a capital sentence by arguing that, although involved in the crimes, Cain did not actually kill the Galloways and lacked the specific intent to kill required for the jury to find any of the alleged special circumstances. *Id.* The court therefore concluded that the California Supreme Court’s rejection of the claim was not contrary to, or an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 26.

The court of appeals similarly concluded that there were reasonable grounds for the California Supreme Court’s rejection of Cain’s penalty-phase ineffectiveness claim. Pet. App. 33-36. The court observed that “counsel may have seen limited utility in presenting a defense premised on Cain’s mental state” because Dr. Donaldson found that “Cain’s ‘sociopathy’ and predisposition to ‘episodic and violent acting out’ were not the result of any ‘gross brain disorder’ or psychosis.” *Id.* at 34. The court concluded that it “would not have been unreasonable for the California Supreme Court to determine that Cain’s counsel did perform an investigation and relied on Dr. Donaldson’s evaluation in deciding to emphasize Cain’s positive conduct during past incarcerations and his lack of premeditation rather than Cain’s troubled background and psychological problems.” *Id.* at 34-35.

The court of appeals also rejected Cain’s argument that counsel was

ineffective in failing to follow up on certain “red flags” raised by Dr. Donaldson’s report suggesting the possibility of central nervous system dysfunction. Pet. App. 35. The court explained that no such dysfunction was found in Dr. Donaldson’s own evaluation, “and Dr. Donaldson concluded that there were ‘certainly no indications of gross brain disorder.’” *Id.* The court acknowledged that Dr. Donaldson signed a declaration more than a decade after his initial report stating that he recalled advising trial counsel that he might want to have Cain examined by a neuropsychologist. *Id.* But the court determined that “even if Dr. Donaldson’s assertion is accepted as true, the state court could reasonably conclude that not all competent attorneys would pursue additional expert testing based on Dr. Donaldson’s mere suggestion that certain dysfunctions ‘may’ or ‘might’ exist, especially where Dr. Donaldson’s own report found no evidence of such dysfunctions.” *Id.*

Finally, the court of appeals rejected Cain’s argument that counsel was ineffective in failing to present sufficient mitigating evidence of his family background. Pet. App. 35-36. The court acknowledged that the postconviction evaluations indicated that “Cain was not a typical child.” *Id.* The court determined, however, that Cain was not prejudiced by the omission of such evidence, because “although Cain’s social and psychological histories may have provided potential mitigating circumstances, the additional background information is not sufficiently compelling to warrant habeas relief” and “it could have opened the door to inflammatory and prejudicial aggravating

evidence.” *Id.* at 36 (citation and internal quotation marks omitted). The court concluded that “in light of the aggravating circumstances involving the brutal murders of a couple in their sixties, the thirteen blows administered to Mr. Galloway, the attempted rape of Mrs. Galloway, and Cain’s prior violent acts, the state court’s denial of this claim was not unreasonable.” *Id.*

ARGUMENT

Cain asks this Court to review his claim that trial counsel’s penalty-phase investigation was constitutionally ineffective. The court of appeals properly resolved that claim under the deferential AEDPA standard, and its decision does not conflict with this Court’s *Strickland* precedent or with that of other courts of appeals. Cain also seeks review of his claim that trial counsel was ineffective when he conceded Cain’s liability for felony murder at the guilt phase of the trial, or a remand for reconsideration of that claim in light of this Court’s recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). But analysis under AEDPA focuses on the reasonableness of a state court’s adjudication of a claim. *McCoy* had not been decided at the time of the state decision here, and in any event would not support Cain’s claim. There is no need for further review.

1. Cain contends that the court of appeals incorrectly interpreted and applied the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), in rejecting his penalty-phase ineffectiveness claim, in conflict with this Court’s precedent and a decision of the Eleventh Circuit. Pet. 19-32. But the court below properly applied AEDPA in deciding that the California Supreme

Court's adjudication of Cain's claim satisfied the doubly deferential standard of review that governs a *Strickland* claim in these circumstances. Pet. App. 31; *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

a. The court of appeals' decision does not weaken the Sixth Amendment duties of counsel, as Cain claims, by failing to make proper inquiry into counsel's performance. Pet. 19-24. As Cain acknowledges, the *Strickland* inquiry is case-specific. Pet. 22. This Court has warned against "attributing strict rules" to particular *Strickland* decisions in addressing claims of ineffective assistance of counsel. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011). It has cautioned that, "[b]eyond the general requirement of reasonableness, 'specific guidelines are not appropriate.'" *Id.* at 195 (quoting *Strickland*, 466 U.S. at 688).

Cain essentially disputes the court of appeals' assessment of the facts of his case, arguing again that Dr. Donaldson's report should have prompted trial counsel to pursue further investigation into Cain's possible mental impairments for purposes of penalty-phase mitigation. Pet. 21-25. He argues that the report was focused on guilt-phase considerations, did not fully take account of his social history, and nonetheless disclosed information that should have alerted competent counsel that further investigation might have borne fruit. *Id.* As the court of appeals observed, however, it would at least be reasonable, under AEDPA's doubly deferential standard, for the state court to reach a contrary conclusion given the report's finding that Cain did not suffer

from any significant mental impairment. Pet. App. 35.

To the extent the court below did not address the adequacy of counsel's investigation into Cain's social history, Pet. 23-24, that is because it concluded that any failure to present the additional social-history evidence Cain offered on collateral review was not prejudicial, Pet. App. 36. It was therefore unnecessary for the court to address whether counsel's performance was deficient in that regard. *Strickland*, 466 U.S. at 697 (in analyzing a claim of ineffective assistance, a court may first consider either the question of deficient performance or the question of prejudice; if the petitioner fails to satisfy one prong, the court need not consider the other).

b. The court of appeals' opinion does not establish any new and "insurmountable" *Strickland* prejudice standard that conflicts with this Court's decisions. Pet. 24-27. Cain again re-argues the application of settled law to the facts of his case, contending that the court below did not adequately consider all of the aggravating and potential mitigating evidence. *Id.* He establishes no reason for review by this Court of the court of appeals' proper determination, under AEDPA, that the California Supreme Court could reasonably reject his claim.

Cain faults the court of appeals for observing that evidence of his social and psychological history could have opened the door to inflammatory and prejudicial aggravating evidence without citing any "examples" of that evidence. Pet. 24; see Pet. App. 36. There is no requirement that a reviewing

court enumerate specific examples of such potential aggravating evidence. See *Pinholster*, 563 U.S. at 201 (holding that potential mitigating evidence would have opened door to rebuttal without discussing specific examples). Moreover, the possible aggravating effect of such evidence was apparent from the record. The type of behavior and personality traits identified in Dr. Donaldson's report, such as Cain's "episodic and violent acting out," Pet. App. 34-35, may readily cut both ways, see *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (such evidence can establish "the defendant's unpredictable propensity for violence that resulted in murder" or the likelihood that the "defendant would be dangerous in the future").

Nor does the prejudice assessment made in *Porter v. McCollum*, 558 U.S. 30 (2009), control Cain's case, as he suggests. Pet. 26-27. A state court described Porter's conduct as "a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful." *Porter*, 558 U.S. at 33. And the mitigating evidence his counsel failed to present was far stronger than Cain's. It involved Porter's heroic military service in "two of the most critical—and horrific—battles of the Korean War," the trauma he suffered because of it, and "his struggles to regain normality upon his return from war"; his abusive childhood; his long-term substance abuse; and his impaired mental health and mental capacity, which included "brain damage that could manifest in impulsive, violent behavior." *Id.* at 32-40. In granting relief, this Court stressed that Porter's military service was significant since "[o]ur Nation has

a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did.” *Id.* at 42-43.

There is nothing like those facts in the record here. Neither the reasoning nor the result of the decision below is in tension with *Porter*.

c. There is also no conflict between the court of appeals’ decision in this case and the Eleventh Circuit’s decision in *Debruce v. Commissioner, Alabama Department of Corrections*, 758 F.3d 1263, 1273 (11th Cir. 2014). Pet. 27-32. In *Debruce*, an AEDPA case, the court held that trial counsel’s decision not to pursue an investigation into the defendant’s mental health and background after receiving a social worker’s pretrial report addressing those topics was unreasonable, as was the state court’s rejection of a *Strickland* challenge to counsel’s decision. *Debruce*, 758 F.3d at 1173-1174. The court concluded that counsel’s testimony at an evidentiary hearing showed that his tactical choice was based on the “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.” *Id.* And counsel’s decision was “all the more unreasonable” because the social worker’s report contradicted information counsel had received from other sources, but counsel made no effort to reconcile the conflicting information. *Id.* at 1274.

Donaldson’s evaluation in this case did not present the same type of “troubling” and conflicting leads that the social worker’s report did in *Debruce*. 758 F.3d at 1275. Donaldson’s report concluded that Cain did not suffer from

any brain disorder or other serious mental problem, Pet. App. 33-34, while the pretrial report in *Debruce* suggested the opposite, 758 F.3d at 1271-1272. Nor was there any comparable indication here that trial counsel or the state court conflated the legal standards applicable at the guilt phase with the pertinent standards governing the penalty phase. *Id.* at 1273-1274 (counsel's decision "could not have been reasonable as it would have been based on a failure to understand the law").

The court below thus addressed substantially different facts from those in *Debruce* and concluded that the state court's rejection of Cain's claim on those facts was within the broad range of AEDPA reasonableness. That decision does not contradict *Debruce*.³

2. Cain also asks that this Court review his guilt-phase ineffectiveness claim, or remand his case for further proceedings, in light of last Term's decision in *McCoy v. Louisiana*, 138 S. Ct. 1500. Pet. 32-36. *McCoy* has no bearing on this AEDPA case, however, because that decision was not clearly established authority at the time of the state court's adjudication. In any event, it does not undermine the court of appeals' decision.

AEDPA prohibits federal habeas relief on a claim that has already been

³ Cain argues that in *Wood v. Allen*, 558 U.S. 290 (2010), this Court recognized a question concerning whether the reasonableness of counsel's decision not to pursue a particular avenue of investigation at the guilt phase carries over to the penalty phase in light of the different focus of the penalty proceeding. Pet. 28. As he acknowledges (Pet. 29-30), however, the Court simply declined to reach a question of reasonableness that was not before it in the posture of that case. *Wood*, 558 U.S. at 302-303.

rejected on the merits by a state court unless the state court's adjudication was contrary to, or an unreasonable application of, this Court's clearly established precedent. *E.g.*, *Green v. Fisher*, 565 U.S. 34, 37-38 (2011). Clearly established precedent for these purposes is limited to this Court's decisions "as of the time the state court renders its decision." *Id.* at 38. Cain does not dispute that his guilt-phase ineffectiveness claim is subject to this limited standard of review. And under that standard, *McCoy* cannot affect the resolution of Cain's current claim.⁴

As the court of appeals concluded (Pet. App. 24-27), the California Supreme Court reasonably rejected Cain's claim under the law established by *Strickland* and *Florida v. Nixon*, 543 U.S. 175 (2004). In *Nixon*, the defendant did not respond to his trial counsel's attempts to explain his proposed strategy of conceding guilt and focusing on the penalty phase at a capital trial. *Id.* at 181-182. This Court held that counsel's failure to obtain the defendant's express consent to the strategy did not automatically render counsel's performance deficient under *Strickland*. *Id.* at 190-192. It explained that, in a capital case, a decision to focus on the penalty phase can be a reasonable tactical choice and is reviewed under general *Strickland* principles, free from "any blanket rule demanding the defendant's explicit consent." *Id.* The court

⁴ Cain may return to state court and seek to present his claim anew on the basis of *McCoy*, if he contends that decision amounts to "a change in the . . . law substantially affecting [his] rights." See *In re Reno*, 55 Cal. 4th 428, 496-497 (2012) (habeas claim may be excused from successiveness bar based on such a change).

below therefore correctly determined that the state court reasonably applied *Strickland* in rejecting Cain's guilt-phase ineffectiveness claim, in light of the overwhelming evidence of guilt (including direct admissions of presence during the home invasion and murders) and the unavailability of any viable alternative defense.

Even if reconsideration of petitioner's present claim in light of *McCoy* were proper under AEDPA, it would not lead to a different result. In *McCoy*, unlike in *Nixon*, the capital defendant "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *McCoy*, 138 S. Ct. at 1505. He opposed his counsel's strategy to concede guilt "at every opportunity, before and during trial, both in conference with his lawyer and in open court." *Id.* at 1509. This Court held that counsel's decision to go ahead with the strategy under those circumstances violated McCoy's constitutionally protected autonomy right to maintain his innocence. *Id.* at 1509-1511. Counsel's strategic choice was therefore not subject to the usual *Strickland* inquiry, but required automatic reversal. *Id.* at 1510-1511.

This case is not comparable to *McCoy*. Although Cain claims that he "voiced his continued objections to counsel," Pet. 35, he has never presented a declaration (from himself or trial counsel) or any other evidence to support that allegation. He relies instead on an inference from his rejection of an alleged offer to allow him to plead guilty to capital murder in exchange for a sentence of life without parole. Pet. 4; Pet. App. 698. Even assuming, however, that

such an offer was made and rejected, trial counsel's strategy was not inconsistent with that rejection. The plea offer would have required a sentence of life without parole. While Cain's attorney conceded at the guilt phase that Cain was liable for felony murder, he argued strenuously that Cain lacked the specific intent necessary to support a finding as to any of the alleged special circumstances. Pet. App. 734-738. Had the argument persuaded the jury, Cain would not have been exposed to a life-without-parole sentence; the sentence for felony murder without a special circumstance would have been twenty-five years to life, with the possibility of parole.

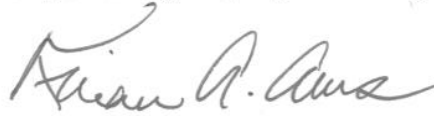
Since there is nothing in the record here showing that Cain's will was overborne by counsel either before or at trial, as was true in *McCoy*, that decision would not alter the assessment of his guilt-phase ineffectiveness claim. Accordingly, even apart from the AEDPA context here, there is no reason for either review or remand for the purpose of reconsidering Cain's claim in light of *McCoy*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
MICHAEL R. JOHNSEN
Deputy Solicitor General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General

A handwritten signature in dark ink, appearing to read "Kimara A. Aarons", written in a cursive style.

KIMARA A. AARONS
Deputy Attorney General
Counsel for Respondent

October 4, 2018

In the Supreme Court of the United States

TRACY DEARL CAIN, Petitioner,

v.

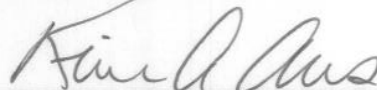
RONALD DAVIS, Warden, Respondent.

CERTIFICATE OF SERVICE BY MAIL

I, Kim Aarons, Deputy Attorney General, a member of the Bar of this Court hereby certify that on **October 4, 2018**, one copy of the BRIEF IN OPPOSITION in the above-entitled case was mailed, first class postage prepaid to:

Jonathan C. Aminoff
Office of the Federal Public Defender
321 E. 2nd Street
Los Angeles, CA 90012

I further certify that all parties required to be served have been served.



KIMARA A. AARONS, Deputy Attorney General
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6092
Counsel for Respondent