No. 17-9218

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

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

This case presents open issues concerning the duties of trial counsel in a death-penalty case versus a non-capital case, and the growing tendency amongst the circuit courts to dismiss mitigation evidence without engaging in the prejudice analysis required by *Strickland v. Washington,* 466 U.S. 668 (1984). Additionally, this case presents novel issues concerning the impact of this Court's recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), and how that case interacts, if at all, with *Strickland* and *Florida v. Nixon*, 543 U.S. 175 (2004).

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

Respondent incorrectly frames the ineffective-assistance issue as simply one of error correction. BIO at 11, 12. Even if this were true, which it is not, it would nevertheless be appropriate for this Court to exercise its supervisory power to remedy the Ninth Circuit's constitutional errors, particularly because this is a death-penalty case. *See Burger v. Kemp*, 483 U.S. 776, 785 (1987) ("Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"); *Calderon v. Thompson*, 523 U.S. 538, 569 (1988) (Souter, J. dissenting) ("It is, after all, axiomatic that this Court cannot devote itself to error correction, and yet in death cases the exercise of our discretionary review for just this purpose may be warranted.").

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

The Court has explicitly held that, when considering a claim of ineffective assistance of counsel, an attorney's performance is judged based on reasonableness and "'specific guidelines are not appropriate.'" *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). In the four post-AEDPA cases in which this Court has found counsel ineffective at the penalty-phase of a death-penalty trial, the Court has found that counsel acted unreasonably where he failed to investigate and present mitigating evidence at sentencing. *Williams v. Taylor*, 529 U.S. 420 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam). These cases all granted relief to the petitioners with respect to their death sentences, but not as to their guilt of the capital crimes. Although the Court has not explicitly so held, the seemingly obvious conclusion is that trial counsel's duties at guilt and penalty are different. *See, e.g., Marshall v. Hendricks*, 307 F.3d 36, 103 (3d Cir. 2002) ("[C]ounsel's duty of inquiry in the death penalty sentencing phase is somewhat unique. First, the preparation and investigation for the penalty phase are different from the guilt phase. The penalty phase focuses not on absolving the defendant from guilt, but rather on the production of evidence to make a case for life. The purpose of investigation is to find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense.")

The Ninth Circuit eschews this conclusion, holding that counsel's failure to investigate a capital client's social history[1] and mental impairments beyond a guilt-

[1] Respondent contends that the Ninth Circuit did not address trial counsel's failure to investigate Cain's social history and instead skipped to the prejudice analysis. BIO at 12. This is not accurate. The Ninth Circuit actually found that "It

phase mental-state evaluation satisfies the reasonableness requirement. Pet. App. 30-36. *Contra Wessinger v. Vannoy*, 138 S. Ct. 952, 953 (2018) (Sotomayor, J., dissenting from the denial of certiorari) ("This Court repeatedly has held that the failure to perform mitigation investigation constitutes deficient performance.").

Respondent has not disputed that: (1) trial counsel's mental health expert, Dr. Donaldson, was hired solely for the purpose of evaluating Cain for guilt-phase mental-state defenses; (2) Donaldson did not know that Cain was facing the death penalty; (3) he was not provided and did not consult life-history records; and, (4) he did not interview anyone other than Cain. As a result, this case very cleanly presents the issue left open in *Wood v. Allen*, 558 U.S. 290, 304 (2010), of whether counsel's strategic decision to forgo a presentation of classic mitigating evidence was reasonable when that decision was based on a guilt-phase investigation.

Respondent argues that under the applicable doubly-deferential standard, the Ninth Circuit correctly upheld the California court's decision that counsel performed reasonably. Cain has already outlined the myriad of ways counsel was unreasonable, Petition at 6-8, and how this Court's deficient-performance jurisprudence, particularly *Williams*, *Wiggins* and *Rompilla*, establish that the California court's decision was factually and legally unreasonable. Respondent's argument is thus in contravention with this Court's holding that double-deference

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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 impairments." Pet. App. 34-35 (emphasis added).

limits, but does not preclude, habeas relief. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

2. The Ninth Circuit Joins the Fifth and Eleventh Circuits In Misapplying the *Strickland* Prejudice Standard

Cain v Chappell holds that a reviewing court may presume that mitigation evidence presented in habeas would open the door to additional aggravating evidence, and deny relief on that basis, even where no additional aggravating evidence has been proffered by the State or cited to by the reviewing court.

The crux of Respondent's defense of the Ninth Circuit's decision is that a reviewing court need not weigh the mitigating evidence adduced in habeas and at trial against all of the aggravating evidence. BIO at 12-13 ("There is no requirement that a reviewing court enumerate specific examples of such potential aggravating evidence.") In support of this erroneous position, Respondent argues that this Court in *Pinholster,* 563 U.S. 170 (2011), applied the same analysis as the Ninth Circuit and held that Pinholster failed to establish prejudice where "potential mitigating evidence would have opened door to rebuttal without discussing specific examples." BIO at 13. Neither *Pinholster* nor any other precedent of this Court makes this holding. In actuality, in *Pinholster*, the petitioner offered mental-health expert evidence in habeas that established his severe mental-health issues, but the State offered rebuttal expert testimony that disputed that diagnosis and instead found that Pinholster was a sociopath.[2] As a result, this Court held that

[2] In *Pinholster*, the parties were granted discovery, depositions, and an evidentiary hearing at which experts for Pinholster and the State testified

Pinholster's mitigating evidence would open the door to the State's aggravating evidence and, after weighing all of the evidence, the Court found that Pinholster could not establish prejudice. *See Pinholster*, 563 U.S. at 201 (stating that Pinholster's evidence would have opened the door to rebuttal from the State's expert) and 179 (summarizing the testimony of Dr. Rudnick, the State's expert). Far from supporting the Ninth Circuit's analysis, *Pinholster* actually takes the contrary view.

This analysis mirrors a troubling pattern found in a growing number of circuits of misapplying the *Strickland* prejudice standard in contravention of this Court's precedent. In *Trevino v. Davis*, 138 S. Ct. 1793 (2018), and *Peede v. Jones*, 138 S. Ct. 2360 (2018), Justices Sotomayor and Ginsburg dissented from the denial of certiorari to the Fifth and Eleventh Circuits because "the panel majority did not properly 'reweigh the evidence in aggravation against the totality of available mitigating evidence.'" *Trevino*, 138 S. Ct. at 1794 (quoting *Wiggins*, 539 U.S. at 534).

In *Trevino*, the petitioner offered new evidence in habeas that established that he suffered from Fetal Alcohol Spectrum Disorder (FASD). When considering whether the petitioner was prejudiced by his attorney's failure to present this evidence, however, the Fifth Circuit "dismissed the new FASD evidence because it purportedly created a significant double-edged problem in that it had both

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extensively concerning Pinholster's mental health. *Pinholster*, 563 U.S. at 179. Cain, however, was denied a hearing and the State has not offered any evidence, expert or otherwise, to rebut Cain's mitigating evidence.

mitigating and aggravating aspects, and stopped its analysis short without reweighing the totality of all the evidence." *Id.* at 1794 (internal quotation omitted). Similarly, in *Peede*, the Eleventh Circuit found that Peede was not prejudiced by his counsel's deficient performance because the mitigation evidence offered in habeas concerning his mental health and difficult childhood was deemed "double-edged" in that the "new information could have hurt as much as it helped." *Peede*, 138 S. Ct. at 2360 (Sotomayor, J., dissenting).

In *Cain*, *Trevino*, and *Peede*, the circuit courts failed to conduct the required holistic inquiry whereby the court considers the entirety of the evidence and reweighs it as if the jury had considered it all together in the first instance. *Wiggins*, 539 U.S. at 534. *Cain* presents an even more flagrant departure from this Court's precedent because, unlike *Trevino* and *Peede*, the Ninth Circuit did not find the new mitigation evidence "double-edged" but rather concluded that it was mitigating. Pet. App. 35-36. Nevertheless, the court simply disregarded the new mitigating evidence because it could possibly open the door to hypothetical aggravating evidence that may not even exist. This is not the inquiry demanded by *Strickland*.

"The true impact of new evidence, both aggravating and mitigating, can only be understood by asking how the jury would have considered that evidence in light of what it already knew." *Trevino*, 138 S.Ct. at 1794. The truncated consideration of new mitigating evidence does not advance the *Strickland* inquiry and only serves to deny petitioners habeas relief. *Cain* provides the ideal opportunity for this Court to end the growing number of circuits misapplying the *Strickland* standard.

B. 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*

Respondent makes two arguments with respect to the applicability of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), to this case. First he argues that because *McCoy* was not clearly established federal law when the California Supreme Court denied Cain's claim, the state court could not have been unreasonable under 2254(d)(1) for the denial. BIO at 15-16. However, this Court has held that courts must give retroactive effect, on collateral review, to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (citing *Teague v. Lane*, 489 U.S. 288, 312-13 (1989)). In *McCoy,* the Court found that counsel's concession of the defendant's guilt over the defendant's objection was a structural error because it violated the fundamental legal principle that a defendant be allowed to make his own choices about the way to protect his liberty and that the effects of the concession were too difficult to measure. *McCoy*, 138 S. Ct. at 1511. Cain's counsel conceded Cain's guilt over his out-of-court objection. Petition at 32-33. As in *McCoy,* Cain's fundamental rights were violated in a manner too difficult to measure which certainly calls into question the fairness and accuracy of Cain's capital trial and renders this issue retroactive on collateral review.

Second, Respondent argues that the record is lacking regarding Cain's objections to his attorney's strategy of conceding guilt and that Cain's refusal to plead guilty could be consistent with counsel's concession. BIO at 15-18. These factual issue should be resolved by the district court on remand after this Court determines that *McCoy* should apply retroactively.

Respondent does not address the intersection between *Florida v. Nixon*, 543 U.S. 175 (2004), and *McCoy* as applied to a petitioner, like Cain, who makes out-of-court objections to counsel's proposed strategy to concede guilt. Because this is a novel issue, and the lower court did not have the benefit of *McCoy* in deciding this case, the Court should grant this petition, vacate the decision of the Ninth Circuit, and remand the case such that the lower court can consider this issue. *Lawrence v. Chater*, 516 U.S. 163, 168-69 (1996) (per curiam) (recognizing the propriety of a GVR where the lower court did not have sufficient opportunity to apply recent Supreme Court precedent).

CONCLUSION

With respect to Question 1, Cain submits that certiorari review is warranted to review the decision of the Ninth Circuit in this death-penalty case. With respect to Questions 2 and 3, Cain submits that certiorari review is warranted to decide whether *McCoy* is retroactive or, alternatively, Cain submits that certiorari should be granted, the Ninth Circuit's decision should be vacated, and this case should be remanded to the lower court to decide the *McCoy* issues in the first instance.

Respectfully submitted,

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DATED: October 18, 2018

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CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,102 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 October 18, 2018.

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CERTIFICATE OF SERVICE

I, Jonathan C. Aminoff, do swear or declare that on this date, October 18, 2018, as required by Supreme Court Rule 29, I have served the enclosed Reply Brief in Opposition, 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 Sates mail properly addressed to each of them and with first-class postage prepaid.

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