

No.

IN THE
SUPREME COURT OF THE UNITED STATES

RICARDO SANDERS,

Petitioner,

vs.

RONALD DAVIS, WARDEN,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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QUESTIONS PRESENTED

1. Whether this Court should clarify that under *Harrington v. Richter*, 562 U.S. 86, 98 (2011), when the federal habeas courts evaluate the summary denial of a California habeas petition, the issue is whether the court reasonably found the petitioner failed to allege a prima facie case for relief and not whether he failed to prove his claims, because this is what the “state knew and did” under *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)?

2. Whether the Ninth Circuit misapplied the materiality test of *Kyles v. Whitley*, 514 U.S. 419, 436-438 (1995) by analyzing the multiple *Brady* violations item-by-item rather than collectively?

2. Whether a certificate of appealability (“COA”) should have been issued to decide if the Eighth Amendment tolerates 36 years on death row without any evidentiary hearing on numerous claims of prosecutorial misconduct affecting a conviction based on questionable eyewitness identification and unreliable criminal informants?

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Petitioner Ricardo Sanders respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on October 13, 2017. The decision is published. *Sanders v. Cullen*, 873 F.3d 778 (9th Cir. 2017).

OPINION BELOW

On October 13, 2017, the Court of Appeals entered its decision affirming the denial of Petitioner's 2254 habeas petition. (Appendix D [slip

opinion].) The petition for rehearing and rehearing en banc was denied on June 4, 2018. (Appendix C.) On June 27, 2018, the Ninth Circuit stayed the mandate pending the disposition of the petition for writ of certiorari. (Appendix B.)

JURISDICTION

On October 13, 2017, the Court of Appeals affirmed the denial of Petitioner’s 2254 habeas petition. (Appendix D.) The petition for rehearing and rehearing en banc was denied on June 4, 2018. (Appendix C.) This Court granted an extension of time to file the petition for writ of certiorari until October 2, 2018. (Appendix A.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction existed in the District Court pursuant to 28 U.S.C. § 2254 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §§ 1294 and 2253.

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Fourteenth Amendment Due Process Clause (relevant part)

“No state ... shall ... deprive any person of life, liberty, or property, without due process of law.”

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to a 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 law Federal law, as determined by the Supreme Court of the United States; or

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

STATEMENT OF THE CASE

A. Introduction

Petitioner was sentenced to death after being convicted of four murders at a restaurant in Los Angeles. He has maintained his innocence since his arrest in 1980. The evidence against him was eyewitness identification and informants, two of the leading causes of wrongful convictions. Petitioner has been on death row since 1982, but has never been granted discovery or an evidentiary hearing by either state or federal court, despite numerous allegations of prosecutorial misconduct. These allegations were supported by

substantial documentary evidence in the form of transcripts from other cases and notes in the prosecutor's own handwriting.

Petitioner's habeas petition was summarily denied by the California Supreme Court. Under California law, the summary denial means that the Court has determined there was a failure to make a prima facie case. It does not mean that there was a failure to prove the allegations. *People v. Duvall*, 9 Cal.4th 464, 475 (1995). The Ninth Circuit Court of Appeals, however, affirmed the denial of Petitioner's 2254 petition on the grounds that he failed to prove his allegations in state court. (Appendix D at 39, 42, 46, 51, 55, 60, 78.)

This petition for writ of certiorari asks this Court to clarify the import of *Harrington v. Richter*, 562 U.S. 86, 98 (2011), which held that when a state court summarily denies a petition, the federal court must determine what the state court could have reasonably found as a basis for its denial. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) held that when determining reasonableness under 28 U.S.C. § 2254(d), the federal court must look "at what the state knew and did." Given that nearly all habeas petitions are summarily denied by the California Supreme Court, the Ninth Circuit is in need of significant guidance as to how to properly evaluate 2254 habeas petitions arising from California convictions. See Arthur L. Alarcon, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 741, 749 (2007) (estimating that 92 percent of

death row habeas petitions are summarily denied without issuance of an Order to Show Cause “OSC”).

This petition also asks this Court to resolve whether the Eighth Amendment permits the execution of an individual who has been on death row for 36 years without having had an evidentiary hearing to evaluate his numerous claims of prosecutorial misconduct in a case where the only evidence was questionable eyewitness identification and less than credible criminal informants. Though “*Lackey*” claims [*Lackey v. Texas*, 514 U.S. 1045 (1995)] are often raised this Court has yet to determine their validity.

B. The State’s Case Consisted of Questionable Eyewitness Identification and Unreliable Informants

1. The Shootings at Bob’s Big Boy

At 2:00 a.m. on December 14, 1980, two young black men armed with shotguns entered the Bob’s Big Boy restaurant in West Los Angeles just as the last two patrons (Tami Rogoway and David Burrell) were leaving. Once inside, one robber struck Ahmad Mushuk on the head causing him to fall. The taller robber forced several people to lie face down on the floor (Dionne Irvin, Evelyn Jackson, Dita Agtani, Rhonda Robinson, Cesario Luna). The shorter robber directed others to do the same (Derwin Logan, Michael Malloy, Burrell, and Rogoway). The taller robber had Michael Malloy remove cash from the office

safe. Ismael Luna, who had been alone in the kitchen, was ordered to lie down. Afterwards, the armed men ushered everyone into a freezer and ordered them to give up their wallets and jewelry. The men then told everyone to turn around and face the wall.

The men fired into the freezer, killing Agtani, Mushuk, Cesario Luna, and Burrell. Malloy lost his right eye. Rogoway was shot in the back, leaving her with limited feeling on her right side. Jackson sustained permanent brain injury. Irvin was shot in the arm and eventually found incompetent to testify at trial. Robinson developed emotional problems requiring psychiatric treatment.

Descriptions of the two robbers given to police varied widely as to height, build, skin complexion, clothing, hair style, facial hair, eyes, glasses, and what type of guns they carried. Logan and Ismael Luna helped police prepare a composite photo of the two suspects.

2. The Informants

After Bob's Big Boy offered a \$10,000 reward, informants began contacting police. Three days after the shootings, Jerry Lankford said Petitioner had asked him to help rob Bob's Big Boy. Lankford, a twice convicted felon, was given assistance by police with pending charges and signed a statement.

Lankford recanted this statement before trial, insisting that he only told police about neighborhood rumors and did not even know Sanders.

Andre Gilcrest, who had a lengthy criminal record, contacted police and told them he had dated a former waitress at Bob's Big Boy named Carletha Stewart. Stewart was now dating Petitioner. Gilcrest claimed that one evening sometime in September he went to the restaurant with Stewart to drink coffee while she checked out the place. Stewart said "Frank and Ricky" were planning to rob it. Franklin Freeman was Stewart's first cousin. Later in the evening Gilcrest saw Petitioner and Freeman sitting in a car holding shotguns. Gilcrest denied being jealous that Petitioner was Stewart's current boyfriend, but admitted that he was still in love with her at the time of trial. He wrote numerous graphic love letters to her after she was arrested.

Bruce Woods, who was in the county jail on burglary charges, contacted police and said Stewart had once asked him to help rob Bob's Big Boy. After testifying at the preliminary hearing, despite a keep-away order, Woods was placed on a jailhouse van where the only other passenger was Petitioner. As the van returned to the jail from the courthouse, Woods claimed that Petitioner threatened him and said if he was convicted he would get "the gas."

Brenda Givens, a waitress at Bob's Big Boy, said she saw Stewart at the county jail in September when she was visiting her boyfriend. Stewart

warned Givens “they” are going to rob Bob’s Big Boy tonight. Givens did not tell police that Stewart was with anyone else at the jail. She also did not know who “they” were. Nevertheless, police brought Givens to a lineup where she picked both Petitioner and Freeman.

At work, Givens told another restaurant employee, Rodell Mitchell, what Stewart said. Mitchell testified that he called police several times that night to report the planned robbery and asked them to come over. He also claimed to have filed incident reports with Bob’s Big Boy. No verification of Mitchell’s calls or reports were produced at trial.

3. Arrest and Physical Evidence

Based on the informant tips, Petitioner was arrested on December 22, 1980, at the apartment he shared with his father.¹ Even though he did not resist, police beat him so badly that he suffered subcutaneous emphysema and three broken ribs. Without receiving medical attention, he was placed in a lineup the next day. While the jail clothing covered his injuries, he was the only

¹ Freeman and Stewart were also arrested. Freeman’s preliminary hearing was severed from Petitioner’s and Stewart’s. Freeman’s separate trial took place after Petitioner’s. After two penalty trials, he was sentenced to life without parole. Stewart pled guilty and agreed to testify against Freeman. She ultimately refused to testify and was sentenced to four concurrent terms of life with parole.

person in the lineup who was barefoot and wearing a jheri curl style haircut. In contrast to the other men in the line, he had difficulty speaking and walking.

There were no expended shell casings at the scene. A shotgun and shell casings were found in Petitioner's apartment, but ballistics experts could not connect them to the crime. Nor were any guns found at Freeman's home linked to the crime.

Rolls of coins and some one dollar bills found under Stewart's bed at her house did not remotely approximate the amount of money taken in the robbery. Michael Malloy testified there was no way he could say this money came from the restaurant.

Police lifted 66 identifiable fingerprints at the restaurant from the path taken by the robbers. After eliminating the prints of the employees, patrons, and police, 42 remained unidentified. No prints belonging to either Petitioner or Freeman were found.

4. The Eyewitnesses

Derwin Logan, who helped to prepare the composite, did not pick either Petitioner or Freeman from any lineup. Nor did he identify Petitioner at trial.

The day after the robbery, while in the hospital, Rogoway positively identified a man in a police photobook as the taller robber. Petitioner's picture

was not in that book. Rogoway viewed a videotape of the lineup on January 2, 1981, but did not identify anyone. Her lineup card then disappeared from police custody.

On February 26, 1981, Rogoway did not identify Freeman at his separate preliminary hearing. On March 2, 1981, after watching Robinson identify Freeman, she told the prosecutor she could now identify him and retook the stand.

On March 23, 1981, at Petitioner's preliminary hearing, Rogoway testified on direct examination by the prosecutor that she did not identify anyone at the videotape lineup. Over defense objection that an in-court identification would be suggestive, she said Petitioner (who had been sitting behind a screen) "was there." (1 SER 119.)

After police lost Rogoway's lineup card, Detective Jacques testified that she did identify him at the videolineup. Rogoway identified Petitioner in front of the jury as the taller robber though her memory of the robbers was "very hazy." (RT 8715-8718.) She could not remember whether she identified him at the videolineup. After being shown a video she then said she was "pretty certain" she had picked him at the video lineup. (34 ER 9790.)

The day after the robbery, Robinson viewed the police photobook that did not contain Petitioner's photo. She picked two photos as looking like the

suspects. At the December 23, 1980, lineup, she picked Petitioner but also said another man in the lineup sounded like the robber. Robinson did not identify Petitioner at the preliminary hearing. At trial, she admitted that she had blocked out the entire incident and had no picture of either robber in her mind. Nonetheless, she said Petitioner was the taller robber and hoped he would die.

Ismael Luna selected one photo from the police book as similar to one of the suspects. At the lineup he tentatively identified Petitioner as one of the robbers. At the preliminary hearing he said Petitioner did not appear to be one of the robbers. At trial, he said he had trouble identifying black people, but when asked if one of the robbers was in the courtroom he pointed to Petitioner.

Michael Malloy identified Petitioner at the videolineup. He identified Petitioner at the preliminary hearing and at trial as the taller robber. At trial, when shown his lineup card, he twice testified that the word “positive” on the card was not in his handwriting. Detective Jacques, who last handled Rogoway’s lineup card before it was lost, admitted writing the word “videotape” on Malloy’s lineup card.

C. Petitioner’s State Habeas Petition Alleging Multiple *Brady* Violations and Supported by Substantial Documentary Evidence Was Summarily Denied by the California Supreme Court²

Petitioner raised 26 claims (including cumulative error) in his state habeas petition supported by 74 exhibits. The available documentary evidence came from California Public Records Act requests (Government Code § 6250, *et seq.*); court records; transcripts from Franklin Freeman’s subsequent trial and Tami Rogoway’s civil lawsuit; a grand jury report; and independent investigation. Petitioner alleged that the prosecution failed to disclose, *inter alia*, suggestive influences on the eyewitness identification³ and evidence casting

² At the time Petitioner filed his habeas petition, the California Supreme Court had exclusive jurisdiction over death penalty appeals. Article VI, § 11, California Constitution. Recently enacted “Proposition 66” now requires death penalty habeas petitions to be first filed in the superior court. *Briggs v. Brown*, 3 Cal.5th 808 (2017) (upholding Penal Code § 1509). Further, at the time Petitioner filed his habeas petition, he was not entitled to post-judgment discovery to prepare his habeas petition. *People v. Gonzalez*, 51 Cal.3d 1179, 1257 (1990). Penal Code § 1054.9 was enacted in 2002, to allow for discovery of prosecution and law enforcement files the defendant would have been entitled to at the time of trial. *See Barnett v. Superior Court*, 50 Cal.4th 890 (2010); *In re Steele*, 32 Cal.4th 682 (2004);

³ “The influence of suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor.” *United States v. Wade*, 388 U.S. 218, 228-229 (1967); *see Kyles v. Whitley*, 514 U.S. 419, 444 (1995) (“the evolution over time of a given eyewitness’s” identification “can be fatal to its reliability”).

doubt on the credibility of both the eyewitnesses and the informants.⁴ Given space considerations only highlights of these allegations are detailed here.

Petitioner's case was tried during the heyday of the infamous jailhouse informant scandal, where informant misuse was rampant. The Los Angeles District Attorney frequently salvaged weak cases by using untrustworthy informants.⁵ In 1988, six years after Petitioner was sent to death row, Leslie White touched off the scandal by appearing on "60 Minutes" and demonstrating how easy it was to obtain confidential information to use in fabricating a confession. The scandal was investigated by a watchdog grand jury that produced a report faulting both the Sheriff and the District Attorney for facilitating the movement of informants in close proximity with inmates, resulting in *false* claims of confessions.

⁴ "Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison." *United States v. Bernal-Obeso*, 989 F.2d 331, 334 (9th Cir. 1993).

⁵ See e.g. *Maxwell v. Roe*, 628 F.3d 486 (9th Cir. 2010) (granting habeas relief for misconduct during 1980s by Los Angeles District Attorney vis-a-vis jailhouse informant) and *Gonzalez v. Wong*, 667 F.3d 965, 984 (9th Cir. 2011) (remanding for further proceedings due to misconduct during 1980s by Los Angeles District Attorney vis-a-vis jailhouse informant).

1. Tami Rogoway

Petitioner alleged and requested an opportunity to prove that Tami Rogoway's initially uncertain identification was unduly influenced by undisclosed conjugal visits with Leslie White. Pretrial, defense counsel Leslie Abramson had some inkling that White was involved with Rogoway. Deputy District Attorney ("DDA") Harvey Giss said only that Rogoway was "romantically involved" with White after meeting him on a visit to the state prison with her friend Gina Gutierrez. Giss denied that White was an agent of the police.

Significantly, Giss failed to disclose that White had been brought from state prison to the county jail and then released on illegal furloughs where he had conjugal visits with Rogoway. She could not possibly have had conjugal visits with White at state prison. *See Williamson v. United States*, 512 U.S. 594, 599-600 (1994) ("One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.")

After "60 Minutes," White testified as a defense expert witness in another capital case and said he had been used by DDA Giss behind the scenes to keep tabs on Tami Rogoway. White also fed Rogoway false information about Petitioner's case he heard in the county jail. White had been released on illegal

furloughs from the local jail (he was a sentenced state prisoner who could not be legally released for any reason) where he met up with Rogoway in hotels. DDA Giss publicly denounced White's testimony as false.

However, Petitioner submitted corroboration of White's testimony to the California Supreme Court in the form of the actual furlough orders from relevant time period and Giss' own handwritten notes (disclosed by the District Attorney from Petitioner's file in the wake of the scandal): (1) Giss wrote that "Les had a conjugal visit with Tami ... no forms, police escort" (5 ER 1393); (2) reminded himself to use Rogoway at Freeman's trial "only for injuries and not for identification as it opens up a can of worms re prison visits and Leslie White" (5 ER 1407); and (3) requested a mid-trial order to have White wired for sound by the District Attorney when he spoke to Petitioner's trial counsel Leslie Abramson.

2. Rhonda Robinson

Petitioner alleged and requested an opportunity to prove that Robinson's uncertain identification was unduly influenced by the police who left a photograph of Petitioner and Carletha Stewart holding a machine gun in the witness waiting room prior to the preliminary hearing. The customary blue evidence notebooks were opened for the eyewitnesses to see. The prosecution not

only failed to disclose that evidence was left in the witness waiting room but also failed to disclose that the photo was taken at a carnival and the gun was a toy.

Petitioner also alleged and requested an opportunity to prove that when defense counsel Abramson asked Robinson if she had seen any blue notebooks she falsely denied it. Because of Robinson's denials, Abramson did not further inquire if she had seen a photograph. Robinson's testimony was shown to be false when in Freeman's subsequent trial she freely admitted seeing some "blue notebooks" that contained a picture of Petitioner and "a girl ... holding a gun." (6 ER 1495.)

3. Michael Malloy

Petitioner alleged and requested an opportunity to prove that Michael Malloy's identification was unduly influenced by his exposure to the carnival photograph, which he admitted having seen at Freeman's subsequent trial.

Petitioner also alleged and requested an opportunity to prove that Malloy falsely denied at Petitioner's trial that he could not remember how he knew to go downtown for the lineup. During a deposition three years later for Rogoway's civil lawsuit, Malloy freely admitted that David Lind, the head of security for Bob's Big Boy (and a de-facto prosecution agent who sat with the prosecution at counsel table during the preliminary hearing and who was

responsible for bringing all the eyewitnesses to court) told him to go downtown and “identify the guys.” (6 ER 1534.)

4. Ismael Luna

Petitioner alleged and requested an opportunity to prove that Ismael Luna’s identification of Petitioner at trial was false when he freely admitted at Freeman’s subsequent trial that he could only say Petitioner looked like one of the robbers.

5. Andre Gilcrest

Petitioner alleged and requested an opportunity to prove that Andre Gilcrest’s testimony at Petitioner’s trial was materially false. At Petitioner’s trial, DDA Giss said Gilcrest (and Bruce Woods) “cracked the case” and the jury should get “down and kiss the ground” he walked on. However, at Freeman’s subsequent trial, Gilcrest said he helped Stewart to plan the robbery (in contrast to his testimony at Petitioner’s trial that he only went with Stewart to drink coffee). Further, after he revealed himself to be an habitual liar, DDA Giss told the jury that he was a “sleazy” “slimy” “opportunist” who had lied on the witness stand. (6 ER 1655, 1616, 1661.)

Petitioner also alleged and requested an opportunity to prove that Gilcrest was promised the reward money. At Petitioner’s trial, Gilcrest denied being motivated by the reward but both he and his mother were paid the reward

after Freeman's conviction, despite Giss' opinion that he was a sleazy, slimy, opportunist, who lied on the witness stand.

6. Bruce Woods

Petitioner alleged and requested an opportunity to prove that Bruce Woods had been deliberately planted on the jailhouse bus with Petitioner in order to make it look like he had been privy to a confession and that Wood's testimony was false. The whole scenario was a paradigm of the jailhouse informant scandal. The grand jury report wrote:

“there appeared to be an unusual number of claims of defendants confessing on buses while being transported to and from court. Some of these confessions were alleged to have occurred in very short time intervals, such as during movement from the Hall of Justice Jail to the Central Jail (both located within the central downtown area).” (*Grand Jury* at 46, n.22; 5 ER 1137.)

7. Brenda Givens

Petitioner alleged and requested an opportunity to prove that Brenda Givens had undisclosed mental problems. At Freeman's subsequent trial it was revealed that she had developed serious mental problems after the

shootings for which she sought treatment. She was also hospitalized and lied about the extent of her illness.⁶

8. Rodell Mitchell

Petitioner alleged and requested an opportunity to prove that the prosecution failed to disclose Mitchell's testimony was a bald faced lie. At Petitioner's trial, the prosecution's position was that Mitchell told the truth even though it could not find documentary evidence to back up his claims. The prosecution made an about face in response to Rogoway's civil lawsuit. During depositions, both David Lind of Bob's Big Boy and Police Detective Stallcup swore that what Mitchell said could not have been true or there would have been written verification of his claims.

D. Petitioner Has Never Had Discovery or An Evidentiary Hearing in State or Federal Court

1. California Supreme Court

On September 21, 1995, Petitioner Sanders timely filed a petition for writ of habeas corpus. He sought an Order to Show Cause ("OSC"),

⁶ See *Silva v. Brown*, 416 F.3d 980, 988 (9th Cir. 2005) (failure to disclose witnesses' mental problems and competency requires habeas relief) and *Gonzalez v. Wong*, 667 F.3d 965, 983-984 (9th Cir. 2011) (failure to disclose mental illness impacts on witness' credibility).

discovery, and an evidentiary hearing on all claims. The petition was summarily denied “on the merits” on February 14, 1996. (No. S049002). (Appendix F.)

2. District Court

Petitioner filed a petition for writ of habeas corpus on April 7, 1997, raising the exhausted claims from the state habeas and automatic appeal. The case was assigned to the Honorable Spencer Letts. Over the course of four years, Judge Letts addressed, *inter alia*, Respondent’s motions to dismiss and for summary judgment and Petitioner’s request to have law enforcement run the unidentified fingerprints through the Automated Fingerprint Identification System (“AFIS”), which did not exist at the time of Petitioner’s trial. The court denied summary judgment on the claims arising from the state habeas petition and directed Petitioner to file a motion for an evidentiary hearing. The motion was to renew the request to run the fingerprints through AFIS, which the court had tentatively granted in 1997. (Appendix I at 264.)

While the fully briefed motion for evidentiary hearing was pending, the case the case was transferred from Judge Letts to the Honorable Carlos R. Moreno on January 19, 2001. Nine months later, on October 15, 2001, Judge Moreno denied the motion for an evidentiary hearing on the grounds that Petitioner had failed to prove his claims, even though he was only required to allege a colorable claim for relief. (Appendix H at 170.) Three days later Judge

Moreno was sworn in as a justice on the California Supreme Court. Petitioner's case was then transferred to the Honorable Robert J. Timlin.

On January 7, 2002, Petitioner filed a motion to vacate and/or reconsider the order denying an evidentiary hearing. Three years later, on February 8, 2005, the case was transferred from Judge Timlin to the Honorable Nora M. Manella for all further proceedings. A year later, on April 6, 2006, the case was transferred from Judge Manella to the Honorable Stephen G. Larson. Three years later, on October 20, 2009, Judge Larson denied the motion to vacate or reconsider. (Appendix H at 119.) The very next day, the case was transferred to the Honorable John F. Walter.

On December 23, 2009, Judge Walter ordered the parties to file simultaneous briefs as to whether discovery of the 42 unidentified fingerprints was necessary to resolve the remaining claims 10, 27, 40, and/or 44. After the briefs were filed, the court denied the request for discovery. On May 6, 2010, after briefing on the remaining claims, the court denied the petition for writ of habeas corpus; entered judgment for respondent and against petitioner; and denied a certificate of appealability ("COA") as to all claims. (Appendix G.)

3. Ninth Circuit

On April 22, 2013, the Ninth Circuit granted a COA on all claims except for the *Lackey* claim. (Appendix E.) In his opening brief, Petitioner

briefed the *Lackey* claim as an uncertified issue, which Respondent did not address. Petitioner also detailed California habeas procedure. He argued, *inter alia*, that if the Ninth Circuit did not grant relief outright the case should be remanded for an evidentiary hearing because he had alleged a colorable claim for relief.⁷

On October 13, 2017, the Ninth Circuit affirmed the denial of Petitioner’s 2254 habeas petition. The opinion agreed that there was no physical evidence linking Petitioner to the crimes. (Appendix D at 25.) It also agreed that the primary informant was “a liar.” (Appendix D at 68.) Nevertheless, it held that the California Supreme Court could have reasonably found that Petitioner failed to prove his claims. (Appendix D at 39, 42, 46, 51, 55, 60, 78.) On June 4, 2018, the petition for rehearing en banc was denied. (Appendix C.)

⁷ See *Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir. 2001) citing *Townsend v. Sain*, 372 U.S. 293 (1963) (there is a “colorable claim” if “the allegations, *if proved*, entitle him to relief . . .”); see also *Pinholster*, 563 U.S. at 185 (federal habeas courts may take new evidence when § 2254(d) does not bar relief).

REASONS FOR GRANTING THE WRIT

I. WHEN THE CALIFORNIA SUPREME COURT SUMMARILY DENIES A HABEAS PETITION THIS MEANS THAT THE COURT HAS FOUND THERE IS A FAILURE TO ALLEGE A PRIMA FACIE CASE AND NOT THAT THERE WAS A FAILURE TO PROVE THE ALLEGATIONS

A. California Habeas Law Requires the Petition Only to State A Prima Facie Case for Relief

People v. Duvall is the seminal case where the California Supreme Court summarized well settled black letter state habeas law. A habeas petitioner is only required to plead a prima facie case for relief. He is not required at the pleading stage to prove his allegations. That comes “later.” 9 Cal.4th at 474.

To satisfy the initial burden of pleading adequate grounds for relief, an application for habeas corpus must be made by petition, and if the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists.

Duvall, 9 Cal.4th at 474, citing Penal Code § 1474(d).

The petition should both (i) state fully and with particularity the facts in which relief is sought as well as (ii) include copies of

reasonably available documentary evidence⁸ supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing.

Duvall, 9 Cal.4th at 474, citations omitted.

An appellate court receiving such a petition evaluates it by asking whether, assuming the petition’s factual allegations are true, the petitioner would be entitled to relief. If no prima facie case for relief is stated, the court will summarily deny the petition.⁹ If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC.

Duvall, 9 Cal.4th at 474-475.

The order to show cause (“OSC”) “directs the respondent to address” the issues raised in the petition. *Duvall*, 9 Cal.4th at 475. “Issuance of an OSC,

⁸ The sole purpose of the exhibits attached to the petition are to support or supplement the allegations in the petition. *In re Rosenkrantz*, 29 Cal.4th 616, 675 (2002); *In re Fields*, 51 Cal.3d 1063, 1070, n.2 (1990) (“declarations attached to the petition and traverse may be incorporated into the allegations, or simply serve to persuade the court of the bona fides of the allegations.”)

⁹ “Summary disposition of a petition which does not state a prima facie case for relief is the rule.” *In re Morgan*, 50 Cal.4th 932, 940 (2010).

signifies the court's preliminary determination that the petitioner has pleaded sufficient facts that, if true, would entitle him to relief." *Id.*

The return should allege facts tending to establish the legality of the petitioner's detention. Such facts must include more than the mere existence of the judgment of conviction. The return must respond to the allegations and where appropriate, provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed. *Duvall*, 9 Cal.4th at 476. If the return "effectively acknowledges" or "admits" allegations in the petition "which, if true, justify the relief sought, such relief may be granted without a hearing on other factual issues joined by the pleadings." *Id.* at 477.

After the return is filed, the petitioner may file a traverse, stating what allegations in the return are admitted or denied. "This interplay frames the factual issues that the court must decide."¹⁰ *Duvall*, 9 Cal.4th at 477. "Facts set forth in the return that are not disputed in the traverse are deemed true."

¹⁰ The California Supreme Court generally requests an informal response from the Attorney General in capital cases prior to determining whether to issue an OSC. The California habeas courts rarely request an informal response in non-capital cases before issuing a summary denial. The informal response serves as a screening function for procedural defects and prima facie sufficiency but it "is not a pleading, does not frame or join issues, and does not establish a 'cause' in which the court may grant relief." *People v. Romero*, 8 Cal.4th 728, 741-742 & n.9 (1994).

Id., citation omitted. In lieu of a traverse, the parties may stipulate that the petition be treated as the traverse. *Id.* The traverse can also except to the sufficiency of the return. *Id.* The traverse may allege additional facts, but may not “introduce additional claims or wholly different factual bases for those claims.” *Id.* at 478.

When the court reviews the return and traverse and finds material facts in dispute it may appoint a referee and order an evidentiary hearing. *Duvall*, 9 Cal.4th at 478. “Conversely” where there are no disputed factual questions outside the trial record, the petition can be decided without an evidentiary hearing. *Id.*

As noted above, however, as revealed in an exhaustive study by the Honorable Arthur Alarcon, 92 percent of capital habeas petitions are summarily denied without issuance of an OSC. (Alarcon, 2007.) It goes without saying that the summary denial rate of non-capital habeas petitions is even higher. “Generally, most habeas rulings issued by the California Supreme Court are summary denials.” *Miles v. Martel*, 696 F.3d 889, 896 (9th Cir. 2012) withdrawn after case settled, 704 F.3d 1010 (9th Cir. 2012).¹¹

¹¹ This practice of issuing summary denials in almost all habeas petitions, both capital and non-capital, would tend to indicate that it is extremely rare for a petition to allege a prima facie case for relief. This is, of course, a phenomenon that is not only inconceivable but actually a signal that California routinely fails to follow its own rules. Since California provides a procedure for post-conviction

The Ninth Circuit did acknowledge in Petitioner's case that summary denial means the court determined the claims did not state a prima facie case for relief. (Appendix D at 32, citing *Pinholster*, 563 U.S. at 188 n.12.) The opinion also acknowledged that in evaluating a habeas petition, the California Supreme Court will assume that the allegations are true. *Id.* Nevertheless, the opinion incorrectly analyzed Petitioner's numerous claims by holding that the state court could reasonably have found he failed to prove his allegations. (Appendix D at 39, 42, 46, 51, 55, 60, 78.)

It cannot be overemphasized that under California law Petitioner was not required to prove his allegations at the pleading stage. *Duvall*, 9 Cal.4th at 464-465.¹² If anything, this Court should clear up the difference between alleging a prima facie case and proving the allegations. It may well be that the lower courts are confused as to the difference¹³ in addition to

collateral relief and guarantees the appointment of habeas counsel for capital cases, summary denials in most cases would appear to raise procedural due process concerns. *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹² There is only one Ninth Circuit opinion that correctly states California habeas procedure but it is ignored. *Nunes v. Mueller*, 350 F.3d 1045, 1053-1054 (9th Cir. 2003) (state trial court that drew inferences against petitioner unreasonable since it was only supposed to be determining prima facie sufficiency and should not have required him to prove his claims with absolute certainty).

¹³ In the context of civil litigation, this Court clarified that a complaint is required to allege entitlement to relief and is not required to prove the

misapprehending California black letter habeas law. Petitioner most certainly alleged a prima facie case for relief (or colorable claim for relief) and should have been entitled to, at a minimum, discovery and an evidentiary hearing in the district court so that he could prove his allegations.

B. This Court Has Not Yet Correctly Acknowledged California Habeas Procedure

In a footnote, *Pinholster* acknowledged that California’s summary denial of a habeas petition on the merits “reflects that court’s determination that the claims did not state a prima facie case for relief. The allegations are generally assumed to be true, but the court does ‘not accept wholly conclusory allegations.’” *Pinholster*, 563 U.S. at 188, n.12, citing *Duvall*, 9 Cal.4th at 474 and *In re Clark*, 5 Cal.4th 750, 770 (1993). *Pinholster* did not further explain that a summary denial has nothing to do with a failure to prove the allegations in the petition.

When *Harrington v. Richter* reviewed the California Supreme Court’s summary denial of a petition alleging ineffective assistance of counsel, this Court did not mention the words “prima facie case” even once. It held that: “When a state court’s decision is unaccompanied by an explanation, the habeas

allegations. See *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 554-56 (2007).

petitioner's burden still must be met by showing there was no reasonable basis to deny relief." 562 U.S. at 98. When this Court found Richter could not, inter alia, establish prejudice given the physical evidence, *id.* at 113, perhaps it meant that he failed to make out a prima facie case for relief vis-a-vis *Strickland v. Washington*, 466 U.S. 668 (1984) and California habeas law.

In any event, given that neither *Pinholster* nor *Richter* answer the question of how to correctly analyze § 2254(d) reasonableness when the California Supreme Court has issued a summary denial, it behooves this Court to clarify what the California Supreme Court "knew and did" when it summarily denied Petitioner's habeas petition. *Pinholster*, 563 U.S. at 182.

C. The Per Curiam Reversal in *Sexton v. Beaudreaux* Illustrates Why Certiorari Should be Granted

A recent per curiam opinion of this Court illustrates why it is critical to correctly analyze federal habeas petitions vis-a-vis California habeas procedure. In *Sexton v. Beaudreaux*, 585 U.S. ___, 138 S.Ct. 2555, 201 L.Ed.2d 986 (2018), this Court reversed a Ninth Circuit decision granting habeas relief in a per curiam decision. This Court found that the Ninth Circuit "ignored well-established principles" in that it "did not consider reasonable grounds that could have supported the state court's summary decision, and it analyzed respondent's argument without any meaningful deference to the state court." 138 S.Ct. at 988.

This case also involved eyewitness identification to a shooting, but one of the eyewitnesses recognized the shooter from middle school although he did not know his name. *Sexton v. Beaudreaux*, 138 S.Ct. 988. Beaudreaux’s habeas petition to the Court of Appeal alleged that trial counsel was ineffective for failing to move to suppress the identification of another eyewitness. The appellate court summarily denied the petition and the California Supreme Court denied review (also a summary denial). *Id.* at 989.

This Court faulted the Ninth Circuit for conducting *de novo* review of the merits of the “would-be suppression motion – relying in part on arguments and theories that Beaudreaux had not presented to the state court in his second habeas petition.” *Sexton v. Beaudreaux*, 138 S.Ct. at 989. This Court reiterated that under *Harrington v. Richter*, 562 U.S. 86, the federal court must:

determine what arguments or theories ... could have supported the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those argument or theories are inconsistent with the holding in a prior decision of this Court.

“If such disagreement is possible, then the petitioner’s claim must be denied.” 138 S.Ct. at 989.

A fair minded jurist could have reasonably concluded that the motion to suppress would have failed. *Beaudreaux*, 138 S.Ct. at 990. This Court

also held that: “The state court could have reasonably concluded that Beaudreaux *failed to prove* that, ‘under the totality of circumstances,’ the identification was not ‘reliable.’” *Id.* at 991 (emphasis added), citing *Neil v. Biggers*, 409 U.S. 188, 199 (1977).

A review of the respondent’s petition for writ of certiorari, Beaudreaux’ brief in opposition, and respondent’s reply [all available on this Court’s website (Docket No. 17-1106)] reveal that there was no discussion by either party about California habeas procedure, much less any discussion about whether Beaudreaux alleged a *prima facie* case for relief, before his state habeas petition was summarily denied. It is speculative, of course, if the case had been fully briefed on the merits, whether the parties would have discussed what the California courts “knew and did” before summarily denying the petition. Petitioner Sanders does not quarrel with this Court’s admonition to the Ninth Circuit that it may not conduct *de novo* review. But the statement in *Beaudreaux*, that the California Supreme Court could reasonably have found he “failed to prove” the eyewitness identification was unreliable is not tenable.

Petitioner’s case presents the perfect opportunity to provide much needed guidance to the Ninth Circuit as to how to properly evaluate the summary denial of a habeas petition by the California Supreme Court vis-a-vis *Harrington v. Richter*, which was also a California habeas case. The sheer

number of summarily denied California habeas petitions that the Ninth Circuit must review, some of which eventually make their way to this Court, further highlight why certiorari should be granted.

D. Federal Habeas Review of a State Court Summary Denial Has Application to Other Circuits

Thus far, cursory research indicates that California appears to be unique in its routine practice of issuing summary denials of habeas petitions in capital cases.¹⁴ While the highest courts of other states do issue summary denials, they usually do so after a reasoned decision by a lower court. *See e.g. Wilson v. Sellers*, ___ U.S. ___, 138 S.Ct. 1188, 200 L.Ed.2d 530 (2018) (federal court should employ “look through” procedure when Georgia Supreme Court did not explain its denial of probable cause but there was a reasoned lower court decision); *Brumfield v. Cain*, 135 S.Ct. 2269, 192 L.Ed.2d 356 (2015) (Louisiana Supreme Court summarily denied application for supervisory writ to review trial court’s reasoned ruling denying an *Atkins* hearing [*Atkins v. Virginia*, 536 U.S. 304 (2002)]).

¹⁴ Many states require a substantive response to a capital habeas petition as a matter of course and summary dispositions are rare. *See e.g.* Arkansas Rule of Crim. Proc. § 37.5; Georgia Code § 9-14-47.1; Ohio Revised Code § 2953.21; Oregon Revised Statutes §§ 138.510-138.680; Pennsylvania R. Crim. P. 906(E)(1).

Nevertheless, it is imperative that this Court make explicit that when a federal court attempts to determine what theories could have supported a state court's summary denial, per *Harrington v. Richter*, it must *at the same time* ascertain what the state court "knew and did," per *Pinholster*, in order to determine reasonableness under §2254(d). The Ninth Circuit failed to evaluate Petitioner's claims for prima facie sufficiency and instead required him to prove his claims. This is a recurring problem that is in dire need of resolution by this Court.

II. IN FINDING THAT PETITIONER FAILED TO PROVE HIS CLAIMS, THE NINTH CIRCUIT ALSO MISCONSTRUED THE MATERIALITY TEST OF *KYLES V. WHITLEY*

Insofar as the Ninth Circuit held that Petitioner failed to prove his claims, a brief discussion of the court's faulty reasoning as to Michael Malloy, is worth noting. The Ninth Circuit found that Malloy's testimony saved the day because "it would not have been unreasonable for the state court to decide that the jury would have convicted Sanders, even without Rogoway's testimony, based solely on the strength of Malloy's identification." (Appendix D at 39.)

The Ninth Circuit failed to address all the inconsistencies in Malloy's identification. The court did find that Malloy's identification was

“unequivocal” (Appendix D at 23); “without hesitation” (*Id.* at 24); “much stronger” (*Id.* at 38); and “never wavered” (*Id.* at 39.) In so doing, the court incorrectly analyzed the habeas allegations item-by-item, rather than collectively as required by *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995). *Kyles* further instructs that materiality is not a “sufficiency of evidence test” and the petitioner does not have to show he would have been acquitted. *Id.* at 434. “The effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others.” *Id.* at 445.

Given that the Ninth Circuit agreed that there were problems with the eyewitness identification overall, agreed that there was no physical evidence linking Petitioner to the crimes, and agreed that the primary informant was “a liar” (Appendix D at 60), it would have been unreasonable beyond any possibility for fairminded disagreement for the California Supreme Court to find that Michael Malloy’s testimony was all that mattered in the face of multiple *Brady*¹⁵ and *Bagley* violations. *Kyles v. Whitley*, 514 U.S. at 436-38.

The Ninth Circuit also engaged in circular reasoning in regard to other allegations that ignored the materiality test of *Kyles*. The court said that Rodell Mitchell’s testimony was not important because of Brenda Givens and

¹⁵ *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985).

Andre Gilcrest (Appendix D at 48); but Givens was not important because of Mitchell and Gilcrest (*Id.* at 60); and Gilcrest was not important because of Givens and Mitchell (*Id.* at 68).

Certiorari should be granted because the opinion below is yet another example of a court that incorrectly analyzed the various *Brady* claims “in isolation rather than cumulatively.” *See Weary v. Cain*, ___ U.S. ___, 136 S.Ct. 1002, 194 L.Ed.2d 78 (2016) (citing *Kyles*, 514 U.S. at 441) (per curiam reversal of Louisiana death row inmate’s conviction after multiple *Brady* violations undermined confidence in the verdict).

III. IT IS DEBATABLE AMONG JURISTS OF REASON AS TO WHETHER THE EIGHTH AMENDMENT IS VIOLATED WHEN AN INMATE HAS BEEN ON DEATH ROW FOR 36 YEARS WITHOUT DISCOVERY OR A SINGLE EVIDENTIARY HEARING ON HIS NUMEROUS CLAIMS OF PROSECUTORIAL MISCONDUCT

To obtain a COA under § 2253(c), a habeas petitioner must make a substantial showing of a denial of a constitutional right such that reasonable jurists could debate whether the issue should have been resolved differently. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The threshold COA inquiry is not “coextensive with a merits analysis” but asks only if the decision is debatable

among jurists of reason. *Buck v. Davis*, ___ U.S. ___, 137 S.Ct. 759, 774, 197 L.Ed.2d 1, citing *Miller-El v. Cockrell*, 537 U. S. 322, 327, 348 (2017).

In *Lackey v. Texas*, 514 U.S. 1045 (1995) the petitioner argued that his 17 years on death row violated the Eighth Amendment. This Court denied certiorari, but Justice Stevens stressed the importance of the claim "with its legal complexity and its potential for far-reaching consequences." *Id.* at 1047. Justice Breyer agreed that the issue was an "important undecided one." *Ibid.*

Justice Stevens noted that under *Gregg v. Georgia*, 428 U.S. 153 (1976), the death penalty was upheld against Eighth Amendment attacks because it "might serve 'two principal social purposes: retribution and deterrence.'" However, "it is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death." *Lackey*, 514 U.S. at 1045, citing *Furman v. Georgia*, 408 U.S. 238, 312, (1972). Justice Stevens also wrote that "when the death penalty ceases realistically to further these purposes ... with only marginal contributions to any discernible social or public purposes [it] would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Lackey*, 514 U.S. at 1046.

In addition, Justice Stevens observed that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be

subjected during that time is the uncertainty during the whole of it." *Lackey*, 514 U.S. at 1045-1046, citing *In re Medley*, 134 U.S. 160, 172 (1890).

Lackey claims are frequently raised, but this Court has yet to address the issue. There have been a number of dissents from the denial of certiorari. See e.g. *Thompson v. McNeil*, 556 U.S. 1114 (2009) (cases cited therein) (questioning whether inordinate delay is “unacceptably cruel” and violates the Eight Amendment); *Johnson v. Bredeson*, 558 U.S. 1067 (2009) (although certiorari was denied Justices Stevens and Breyer were concerned that this Tennessee death row inmate might have been innocent because the state withheld exculpatory evidence for 11 years and where the conviction was based on eyewitness identification with no physical evidence linking him to the crimes).

The most recent *Lackey* dissent was in *Jordan v. Mississippi*, 585 U.S. ___, 138 S.Ct. 2567 (2018) where Justice Breyer questioned whether the death penalty “as it is applied today lacks ‘requisite reliability’” given the number of death row inmates who have been exonerated as innocent over the years. 138 S.Ct. at 2570, citing *Glossip v. Gross*, 576 U.S. ___, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015).

Because Petitioner Sanders has been on death row for 36 years without having had discovery or an evidentiary hearing on his numerous claims

of prosecutorial misconduct vis-a-vis the eyewitness identification and the criminal informants, and given the absence of physical evidence linking him to the crimes, this is a perfect case to take up the *Lackey* issue once and for all. The delays in his case are attributable in large measure to the revolving door of judges in the district court.

Petitioner's 36 years on death row under the circumstances of this case violate the Eighth Amendment, requiring the death judgment to be set aside. Certainly reasonable jurists would differ as to the merits of this claim. *Buck v. Davis*, 137 S.Ct. at 780 (Buck was wrongly denied a COA as he demonstrated both ineffective assistance of counsel under *Strickland* and entitlement to relief under Rule 60(b)(6)).

CONCLUSION

For the reasons expressed above, petitioner respectfully requests that a writ of certiorari issue to review the decision of the Ninth Circuit Court of Appeals.

Date: October 2, 2018

Respectfully submitted,

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