

No. 18-6214

**In The
Supreme Court of the United States**

RICARDO RENE SANDERS,

Petitioner,

v.

RONALD DAVIS,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF LOYOLA LAW SCHOOL'S ALARCÓN
ADVOCACY CENTER AND CALIFORNIA FEDERAL
DEFENDERS OFFICES AS AMICI CURIAE
IN SUPPORT OF PETITIONER**

PAULA M. MITCHELL
LOYOLA LAW SCHOOL
ALARCÓN ADVOCACY CENTER
919 Albany Street
Los Angeles, CA 90015
Telephone: (213) 736-8143
Paula.Mitchell@LLS.edu

HILARY POTASHNER
Federal Public Defender
JOSEPH A. TRIGILIO
Counsel of Record
Deputy Federal Public
Defender
321 East 2nd Street
Los Angeles, CA 90012
Telephone: (213) 894-2854
Facsimile: (213) 894-0081
Joseph_trigilio@fd.org
Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
A. The Alarcón Advocacy Center at Loyola Law School.....	1
B. California Federal Public Defender Offices	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
A. In California, a habeas case is fundamen- tally transformed upon the issuance of an order to show cause	5
1. Post-petition proceedings prior to an order to show cause are limited	6
2. After an OSC has issued, the Califor- nia court has the jurisdiction and power to resolve factual issues and al- low a petitioner to prove his case.....	8
B. A federal court must look to a state-court's process and rules when determining whether the state court reasonably adju- dicated a claim.....	10
1. Examining the state-court process un- der § 2254(d)(1).....	10
2. Examining the state-court process and rules under § 2254(d)(2)	12
a. A state court's failure to apply its own standard of review	13
b. A state court making factual deter- minations without reasonable pro- cesses	14

TABLE OF CONTENTS—Continued

	Page
C. Sanders’ claims were denied before an OSC issued, depriving the state court of any mechanism to reasonably resolve factual disputes and credibility determinations	16
D. Federal habeas review is necessary to ensure that petitioner’s constitutional rights are reasonably protected by California courts	19
CONCLUSION.....	21

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	13
<i>Brumfield v. Cain</i> , 135 S. Ct. 2269 (2015).....	13, 14
<i>Bryan v. Mullin</i> , 335 F.3d 1207 (10th Cir. 2003).....	15
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011)	4, 10, 11, 18
<i>Gaston v. Palmer</i> , 417 F.3d 1030 (9th Cir. 2005).....	7, 17
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	4, 19
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2005).....	15
<i>Nunes v. Mueller</i> , 350 F.3d 1045 (9th Cir. 2003).....	11, 12
<i>Sanders v. Cullen</i> , 873 F.3d 778 (9th Cir. 2017)	12, 18
<i>Schriro v. Landrigan</i> , 550 U.S. 464 (2007).....	11
<i>Taylor v. Maddox</i> , 366 F.3d 992 (9th Cir. 2004)	15
<i>Walker v. Martin</i> , 562 U.S. 307 (2011).....	7
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	15
STATE CASES	
<i>Aguilar v. Atlantic Richfield Co.</i> , 25 Cal. 4th 826 (2001).....	6
<i>In re Clark</i> , 5 Cal. 4th 750 (1993)	6, 7
<i>Ex parte Collins</i> , 151 Cal. 340 (1907).....	6
<i>In re Hochberg</i> , 2 Cal. 3d 870 (1970).....	8
<i>In re Lawler</i> , 23 Cal. 3d 190 (1979).....	5
<i>Mercer v. Comm’r of Corr.</i> , 644 A.2d 340 (Conn. 1994)	20

TABLE OF AUTHORITIES—Continued

	Page
<i>People v. Duvall</i> , 9 Cal. 4th 464 (1995).....	6, 7, 17
<i>People v. Getty</i> , 50 Cal. App. 3d 101 (1975)	7, 9
<i>People v. Pancini</i> , 120 Cal. App. 3d 877 (1981)	6
<i>People v. Romero</i> , 8 Cal. 4th 728, 737 (1994)	5, 7, 9
<i>Quinn v. City of Los Angeles</i> , 984 Cal. App. 4th 472 (2000)	7
<i>State v. McHone</i> , 499 S. E. 2d 761 (N.C. 1998)	20
<i>State v. Runningeagle</i> , 859 P.2d 169 (Ariz. 1993)	20
<i>In re Swain</i> , 34 Cal. 2d 300 (1949)	7, 17
 STATE STATUTES	
Cal. Pen. Code § 1474	5
Cal. Pen. Code § 1476	7
Cal. Pen. Code § 1484	8, 9

**BRIEF OF LOYOLA LAW SCHOOL'S ALARCÓN
ADVOCACY CENTER AND CALIFORNIA
FEDERAL DEFENDERS OFFICES AS
AMICI CURIAE IN SUPPORT OF
PETITIONER-APPELLANT SEEKING
PANEL AND EN BANC REVIEW**

INTEREST OF AMICI CURIAE¹

A. The Alarcón Advocacy Center at Loyola Law School

The Alarcón Advocacy Center at Loyola Law School is home to several legal clinics serving indigent individuals, including the Capital Habeas Clinic, which permits law students to work on cases of inmates on California's death row through a collaboration with the Federal Public Defender's Office, the Ninth Circuit Appellate Clinic, which permits students to represent pro se litigants before the Ninth Circuit, and Loyola's Project for the Innocent, a wrongful conviction clinic that files petitions for a writ of habeas corpus in state and federal courts on behalf of individuals with claims of actual innocence.

¹ No party's counsel authored this brief in whole or in part. No party, party's counsel, or person contributed money to fund the preparing or submission of this brief, other than amici curiae. Counsel of record for all parties received timely notice of the intent to file this brief under Rule 37.2. Both parties consented to the filing of this brief pursuant to Rule 37.2, as shown in the electronic communications submitted concurrently with this brief.

One of the Alarcón Advocacy Center's core missions is to ensure that punishments imposed under California state law not only meet with constitutional requirements but also promote confidence and integrity in our judiciary and criminal justice system. Indigent individuals who seek assistance through our clinics rely on access to habeas review in state and federal courts to correct constitutional errors. The federal courts have long been an essential guardian of the right to habeas review for those convicted of state crimes. Federal review of constitutional claims raised by those convicted in California is especially critical because appellate courts in California summarily deny petitions without articulating reasons or ordering evidentiary hearings with alarming frequency.

Indeed, over the last twenty years alone, federal courts have granted relief to petitioners convicted of serious offenses in California in at least 13 non-capital cases where those individuals were later *exonerated*, including six cases in which petitioners' Sixth Amendment right to effective counsel was denied under *Strickland*. In five of those *Strickland* cases, state courts summarily denied relief without ordering an evidentiary hearing or stating reasons for denying relief. The men who were exonerated spent over 80 years in prison. The state courts' error rate is distressing, to say the least.

Ensuring that state courts apply their own rules for post-conviction review and that those state courts are properly applying constitutional standards is essential to promoting confidence and integrity in our

judiciary and criminal justice system. Since 1973, the Death Penalty Information Center has documented 163 cases in which individuals sentenced to death were later acquitted, had all charges subsequently dismissed, or were granted a complete pardon based on evidence of innocence. In cases where the ultimate punishment of death has been imposed, there is a heightened responsibility for federal courts to guard against perpetrating state court errors by misconstruing state law.

B. California Federal Public Defender Offices

The Federal Public Defender Offices (FPD) for the Central District, Eastern District, Southern District and Northern District of California are appointed to represent inmates challenging their state-court convictions and sentences throughout the state of California. Many of the FPD's clients are sentenced to death and are statutorily entitled to counsel, and the FPD is appointed to represent non-capital habeas petitioners on an individual basis. The vast majority of the FPD's habeas clients are in federal court following the California Supreme Court declining to grant habeas relief. The FPD, therefore, has an interest in the federal and California state courts reasonably respecting California's rules for adjudicating petitioners' constitutional claims.



SUMMARY OF ARGUMENT

“The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law.” *Harrington v. Richter*, 562 U.S. 86, 91 (2011). This safeguard is failing where California courts routinely fail to abide by their own standards and rules for adjudicating habeas petitions, denying process to hundreds of inmates who may have righteous claims of an unconstitutional conviction or sentence. Even with the deference owed the state courts under 28 U.S.C. § 2254(d) (“AEDPA”), the federal courts are the final—if extraordinary—check to ensure a proper balance of a state’s interest in upholding a lawful conviction and an individual’s constitutional rights.

In addressing a state habeas court’s decision under 28 U.S.C. § 2254(d), this Court has instructed federal courts to look to “what [the] state court knew and did” when it denied relief. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). In this case, to determine what the California Supreme Court knew and did when it denied Sanders relief, it is important that a federal court examine the process that the state court purported to employ in adjudicating Sanders’ claims. If the California Supreme Court failed to reasonably apply its own standards to the adjudication of Sanders’ claims, or if no fair-minded jurist could agree with denying relief in light of those standards, then a federal court is not constrained by 28 U.S.C. § 2254(d) to grant federal habeas relief.

The Ninth Circuit, by affirming the dismissal of Sanders’ federal petition, found that the California Supreme Court reasonably denied relief. But this finding failed to acknowledge or consider California’s unique procedure and standards for adjudicating habeas petitions. The Ninth Circuit instead justified the state habeas court’s decision by imposing rules—and a burden on Sanders—that contradicted those applied by the state court when it adjudicated the claim, and that are unreasonable under 28 U.S.C. § 2254(d). The issuance of a writ of certiorari and a remand to the Ninth Circuit are necessary to ensure that state-court procedures are respected and reasonably followed, and that the fundamental safeguard of habeas corpus is more than a hollow shell to petitioners like Sanders—and inmates similarly situated with him.

ARGUMENT

A. In California, a habeas case is fundamentally transformed upon the issuance of an order to show cause.

In California, a death-sentenced prisoner initiates a post-conviction action by filing a verified petition for writ of habeas corpus. *People v. Romero*, 8 Cal. 4th 728, 737 (1994). The petition must merely allege that a petitioner is unlawfully restrained and specify the facts on which the petitioner bases her claim that the restraint is unlawful. *In re Lawler*, 23 Cal. 3d 190, 194 (1979); Cal. Pen. Code § 1474. A petitioner is also

tasked with supporting his allegations with “reasonably available documentary evidence.” *People v. Duvall*, 9 Cal. 4th 464, 474-75 (1995). The petition serves a “limited function.” *Id.* at 743; *see also People v. Pancini*, 120 Cal. App. 3d 877, 884 (1981) (“The petition for a writ of habeas corpus is thus preliminary in nature.”). “The function of the petition is to secure the issuance of the writ, and, when the writ is issued, the petition has accomplished its purpose.” *Ex parte Collins*, 151 Cal. 340, 342 (1907).

1. Post-petition proceedings prior to an order to show cause are limited.

Upon receipt of a properly-filed petition, a California court has only two options to act.² Its first option is to summarily deny the petition, which it must do if the petition does not state a prima facie case for relief or if the claims are procedurally defaulted. *In re Clark*, 5 Cal. 4th 750, 769 nn. 9, 21 (1993). If a state court’s order summarily dismissing a petition says the claims were denied on the merits, it concluded that no prima facie claim was raised. When deciding whether a prima facie claim has been made, a court must consider the facts alleged by the petitioner as true, set aside any possibility of contradiction or impeachment, and draw all legitimate inferences in favor of the presence of a prima facie case. *Aguilar v. Atlantic Richfield Co.*, 25

² A court may ask for informal briefing to assist it in deciding which of the two options to take. Cal. Rules of Ct. R. 8.385(b).

Cal. 4th 826, 851 (2001); *Quinn v. City of Los Angeles*, 984 Cal. App. 4th 472, 279-80 (2000).

If the state court denies the claim for procedural reasons, the state court will include citations to the case law setting forth those procedural deficiencies. An example of a procedural deficiency is untimeliness, and a state court will cite to *In re Clark*, 5 Cal. 4th 750 (1993) to indicate a denial on that basis. *Walker v. Martin*, 562 U.S. 307, 313 (2011) (“A summary denial citing *Clark* . . . means that the petition is rejected as untimely.”). Another example is a failure to plead the claims with sufficient particularity or to attach reasonably available documentary evidence, shown by citations to *In re Swain*, 34 Cal. 2d 300 (1949) or *Duvall*, 9 Cal. 4th at 474. See, e.g., *Gaston v. Palmer*, 417 F.3d 1030, 1039 (9th Cir. 2005) (“In light of its citations to *Swain* and *Duvall*, we read the California Supreme Court’s denial of [the petitioner’s] . . . habeas application as, in effect, the grant of a demurrer, *i.e.*, a holding that [the petitioner] had not pled facts with sufficient particularity.”).

The second option available to a court once a petitioner files a petition for writ of habeas corpus is for the court to grant the petition, *i.e.*, issue the writ of habeas corpus. The writ must issue if a petitioner’s allegations state a *prima facie* case on a claim that is not procedurally barred. *Romero*, 8 Cal. 4th at 738; Cal. Pen. Code § 1476. The issuance of the writ “is largely procedural” and “does not decide the issues and cannot itself require the final release of the petitioner.” *Romero*, 8 Cal. 4th at 738; *People v. Getty*, 50 Cal. App.

3d 101, 110 (1975). Taken literally, the writ requires the custodian to bring the detained person (“the body”) before the court. But because of the obvious impracticality of such a requirement, California courts have substituted bringing the body (habeas corpus) to the court with issuing an order to show cause (OSC), requiring the custodian to show cause for why the relief sought should not be granted. *In re Hochberg*, 2 Cal. 3d 870, 873-74 (1970).

2. After an OSC has issued, the California court has the jurisdiction and power to resolve factual issues and allow a petitioner to prove his case.

The issuance of an OSC transforms a habeas action into an actual case that can be resolved. Prior to an OSC, a court does not even have jurisdiction to resolve factual disputes, order a hearing or discovery, or grant other measures to resolve a petitioner’s claims. Cal. Pen. Code § 1484. Once an OSC issues, however, the court has the “full power and authority” to hold a hearing, allow discovery, “and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case.” *Id.* The OSC is, therefore, “an intermediate but nonetheless vital step in the process of determining whether the court should grant the affirmative relief that the petitioner has requested.” *Romero*, 8 Cal. 4th at 740.

The next step after the issuance of an OSC is the custodian's filing of a Return. This is analogous to civil complaint because it is "the central pleading in the action, to which another pleading must respond[.]" *Id.* at 739 n. 6. The custodian (the Warden) has the burden in the Return of alleging facts that establish the legality of the petitioner's incarceration. It "is an essential part of the scheme' by which relief is granted in a habeas corpus proceeding." *Id.*, quoting *Getty*, 50 Cal. App. 3d at 110.

The petitioner will then file a Traverse that denies or controverts any of the material facts set forth in the Return, or allege any facts showing that he is in custody unlawfully, which will typically include the allegations set forth in the petition. Cal. Pen. Code § 1484. This along with the Return are the formal pleadings in a habeas case; "it is through the return and the traverse that the issues are joined in a habeas corpus proceeding." *Romero*, 8 Cal. 4th at 740. After formal pleadings are filed, a court must decide whether petitioner's entitlement to relief—*i.e.*, his release from custody—"hinges on the resolution of factual disputes;" if so, an evidentiary hearing is necessary. *Id.* Only following such a hearing can a court determine whether petitioner has *proven* his claims by demonstrating that the factual disputes should be resolved in his favor.

B. A federal court must look to a state-court’s process and rules when determining whether the state court reasonably adjudicated a claim.

Federal habeas review of a state-court conviction and sentence is constrained by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). For claims adjudicated on the merits in state court, the relevant inquiry in federal court is not whether a death-sentenced inmate had a fair trial, but whether a state post-conviction court reasonably concluded that he did. Under 28 U.S.C. § 2254(d), a state habeas court’s dismissal of a petition is unreasonable—and federal habeas relief available—when it was either (1) contrary to or involved an unreasonable application of that Supreme Court law (§ 2254(d)(1)) or (2) based on an unreasonable determination of facts (§ 2254(d)(2)). The process employed by the state habeas court—such as California’s unique procedures dictated by the issuance, *vel non*, of an OSC—must be considered by a federal court when it determines whether a claim can overcome either section (d)(1) or (d)(2).

1. Examining the state-court process under § 2254(d)(1)

This Court announced in *Pinholster* that under § 2254(d)(1), the relevant inquiry is “what [the] state court knew and did” when it denied relief. 563 U.S. at 182. It is, therefore, axiomatic that a federal court must, in examining a California case, frame the question of whether a state court’s decision is an

unreasonable application of Supreme Court law under § 2254(d)(1) in the context of what the California court was doing when it purported to apply this Court’s clearly-established law. Applying this maxim here, the question under § 2254(d)(1) review is appropriately this: Was the California Supreme Court’s conclusion that, considering Sanders’ allegations as true and resolving all credibility determinations in his favor, he failed to raise even a *prima facie* claim that would warrant relief if proven at an evidentiary hearing? *Pinholster*, 563 U.S. at 188 n. 12 (noting that a California Summary denial “reflects that court’s determination that the claims made in the petition do not state a *prima facie* case entitling the petitioner to relief”) (internal citations omitted); *see also Nunes v. Mueller*, 350 F.3d 1045, 1054-55 (9th Cir. 2003) (AEDPA case addressing California’s unique habeas procedures).

The Ninth Circuit, in *Nunes*, explained that a *prima facie* case of a constitutional violation exists where the petitioner has demonstrated that “he ha[s] sufficient evidence for a reasonable fact finder to conclude” that he has met the elements of a constitutional claim. *Id.* at 1054. This standard is in accord with this Court’s instructions to federal district courts concerning the ability to grant a federal evidentiary hearing. *Schriro v. Landrigan*, 550 U.S. 464, 474 (2007) (“In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.”). This “sufficiency” test does not

require that a petitioner “prove his claim without affording him an evidentiary hearing,” since before an evidentiary hearing is granted a petitioner has no way to do so. *Nunes*, 350 F.3d at 1054. Applied to California habeas cases, the state court “surely should not have required [a petitioner] to prove his claim with absolute certainty” before and unless it grants an OSC. *Id.*

Rather, if a California habeas court adjudicates the merits of a petition and dismisses it without granting an OSC, its conclusion that the petitioner has failed to make a *prima facie* showing amounts to a determination that no reasonable factfinder could find in a petitioner’s favor, even considering all of the petitioner’s allegations and supporting evidence true and credible. *Id.* at 1055. Accordingly, if a federal court concludes that the petitioner unarguably presented sufficient allegations to satisfy this standard, even if those allegations may be ultimately discredited or disproven at an evidentiary hearing, then the state court’s summary denial is unreasonable under § 2254(d)(1). *Id.*

2. Examining the state-court process and rules under § 2254(d)(2)

A consideration of state-court rules for adjudicating petitions is also necessary to address the reasonableness of a state-court’s fact-finding to determine whether a particular claim overcomes § 2254(d)(2). While a summary denial like that in *Sanders* makes it difficult to determine what facts the state court determined, there are only two bases for a California habeas

court’s summary merits denial—that, as explained in the section above, it (1) determined that the petitioner’s allegations, deemed true, failed to raise a prima facie claim (prior to requiring the petitioner to “prove” his claim), or (2) discredited, overlooked, or misconstrued petitioner’s allegations, or made factual findings refuting those allegations, before it granted an OSC. The former option is governed by § 2254(d)(1); the latter option would amount to an unreasonable factual determination under § 2254(d)(2). If the latter, the state court’s decision involved unreasonable fact-finding for two reasons.

a. A state court’s failure to apply its own standard of review

A state court must follow its own rules for determining facts for it to be reasonable under § 2254(d)(2). This was the lesson from this Court in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015). There, this Court addressed the reasonableness of a Louisiana court’s denial of a claim that the petitioner was intellectually disabled within the meaning of *Atkins v. Virginia*, 536 U.S. 304 (2002). Louisiana has a rule that requires an *Atkins* hearing once a petitioner presents “sufficient evidence to raise a ‘reasonable ground’ to believe him to be intellectually disabled.” *Brumfield*, 135 S. Ct. at 2274 (citations omitted). The Louisiana court concluded that petitioner failed to meet that burden, so it declined to hold an evidentiary hearing and dismissed *Brumfield*’s petition. *Id.* at 2275.

This Court did “not question the propriety of [Louisiana’s] legal standard; instead, the Court “train[ed its] attention of the two underlying factual determination on which [the state court’s decision was premised[.]” *Id.* at 2276. In conducting its § 2254(d) inquiry, this Court emphasized “how low the threshold for an evidentiary hearing was intended to be” under state law. *Id.* at 2281. This Court found that the Louisiana court’s conclusion that Brumfield’s factual showing failed to satisfy Louisiana’s low threshold for an evidentiary hearing resulted in an unreasonable determination of facts. *Id.* at 2282.

Thus, *Brumfield* teaches federal courts to address the reasonableness of a state court’s decision in light of the state’s unique procedural rules and legal standards for adjudicating the petition. Applied here, *Brumfield* instructs this Court to apply California’s unique procedure of assuming all facts as true and requiring an OSC if a prima facie claim has been raised. If a California court fails to evaluate the petitioner’s allegations under that standard, such as by requiring a higher burden of proof at the pre-OSC stage, then its denial of relief absent an OSC is unreasonable under § 2254(d)(2).

b. A state court making factual determinations without reasonable processes

Moreover, aside from whether California follows its own rules, its decision amounts to an unreasonable determination of facts where it made factual findings

or credibility determinations without an evidentiary hearing, misapprehended or misconstrued material facts, or where it ignored critical evidence. *See Miller-El v. Cockrell*, 537 U.S. 322, 346 (2005) (“Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney’s Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past.”); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003); *Bryan v. Mullin*, 335 F.3d 1207, 1215-16 (10th Cir. 2003) (declining to apply presumption of correctness where state court failed to hold an evidentiary hearing); *Taylor v. Maddox*, 366 F.3d 992, 1000-01 (9th Cir. 2004) (unreasonable where court makes factual findings and/or credibility determinations without first affording the petitioner an evidentiary hearing).

Applied to a California habeas denial, deficient fact-finding exists if the California Supreme Court—before it issued an OSC and held an evidentiary hearing—concluded that a petitioner’s allegation or supporting evidence is not credible. For example, it would also be unreasonable if the state court, pre-OSC, found that the petitioner failed to “prove” his case, or if the state court’s denial was premised on a factual finding that discredited Petitioner’s allegations necessary to satisfy a federal claim.

While it is hard to know what findings a California court is making with a summary denial (e.g., whether it discredited petitioner’s allegations, ignored them, or simply failed to give them proper legal weight), a

federal court cannot under AEDPA review reasonably justify the state court's pre-OSC decision based on a petitioner's failure to "prove" his case in state court, or based on a conclusion that the state court reasonably discredited the petitioner's evidence. Only after an evidentiary hearing (and an OSC) can such a determination be reasonably made under § 2254(d)(2).

C. Sanders' claims were denied before an OSC issued, depriving the state court of any mechanism to reasonably resolve factual disputes and credibility determinations.

On September 21, 1996, Petitioner Vincent Sanders filed a petition for writ of habeas corpus in the California Supreme Court alleging multiple claims challenging his conviction and death sentence. *See* Cal. Sup. Ct. Case No. S049002. Sanders alleged, *inter alia*, that multiple witnesses testified falsely and that the prosecution withheld multiple items of evidence that could have impeached those witnesses. Sanders supported these allegations with evidence of the witnesses' inconsistent testimony and statements, a witnesses's undisclosed relationship with a jailhouse informant who admitted to frequently providing false testimony, and evidence that witnesses received rewards or other inducements to testify favorably for the prosecution.

The state court summarily denied Sanders' claims at the preliminary petition stage—without issuing an OSC, requiring a Return, or holding an evidentiary

hearing. It denied Sanders' claims "on the merits," meaning that it concluded that the allegations in the petition, considered true and with all inferences in Sanders' favor, did not even state a *prima facie* case. As explained in Section A above, the state court, thus, gave itself no jurisdiction to resolve factual disputes or engage in fact-finding through an evidentiary hearing.

The California Supreme Court's pre-OSC merits denial of Sanders' petition tells us what that Court did *not* determine, assuming the court followed its own rules. The Court did not determine that Sanders' factual allegations were incredible, unbelievable, or impeachable. Nor did it conclude that Sanders failed to prove his case or prove the existence of any particular fact—the court never gave itself jurisdiction to find any facts. Importantly, the California Supreme Court—because it did not cite to *Swain* or *Duvall* (or any case law)—also did *not* deny Sanders' claims because they were conclusory, vague, or unsupported by reasonably-available documentary evidence. *Cf. Gaston*, 417 F.3d at 1039. If the California Supreme Court did not deny Sanders' claims on that basis—perhaps by requiring proof and/or deeming Sanders' evidence not credible—it necessarily failed to abide by its own rules for adjudicating habeas petitions, and it did so without affording Sanders any opportunity to prove his allegations or have factual disputes, including credibility determinations, resolved. Under this scenario, the California Supreme Court's decision was unreasonable within the meaning of § 2254(d)(2).

The Ninth Circuit, by presuming that the California Supreme Court did follow its own rules when it denied Sanders’ petition, ultimately determined that Sanders’ factual allegations, when considered true and credible, failed to amount to a *prima facie* claim of a constitutional violation. The Ninth Circuit’s analysis of the reasonableness of Sanders’ claims, however, failed to account for what the California Supreme Court, in fact, “did” when adjudicating Sanders’ petition. *Pinholster*, 563 U.S. at 182. It instead justified the state-court’s denial of Sanders’ claims by concluding that he “failed to prove” them. *Sanders v. Cullen*, 873 F.3d 778, 797, 798, 800, 803, 804, 807 (9th Cir. 2017). The Ninth Circuit also justified the state-court denial by finding the state court could have “reasonably decided to credit” one witness over another. *Id.* at 803. This reasoning fails to take into account California’s chosen method for handling habeas petitions, flouting a critical role of AEDPA to respect state-habeas adjudications. This Court should grant certiorari to ensure the federal courts—including the Ninth Circuit—respect and consider how state courts handle their own petitions, regardless of how individual state courts decide to do so; and as discussed below, a writ of certiorari is necessary to provide a last check to ensure an individual’s constitutional claims are at least being reasonably considered by those state courts—particularly when the punishment is death.

D. Federal habeas review is necessary to ensure that petitioner’s constitutional rights are reasonably protected by California courts.

Federal habeas review has historically served as a limited check on the ability of state courts to ignore or dismiss the federal constitutional rights of citizens charged and convicted of state crimes. Following the Civil War, Congress was concerned that former slaves were victims of “cruelty, oppression and murder, which the local authorities are at no pains to prevent or punish.” U.S. Comm’n on Civil Rights, *Law Enforcement: A Report on Equal Protection in the South* 7 (1965). Congress, therefore, passed the Reconstruction Act which allowed federal courts to grant a writ of habeas corpus to state prisoners held in violation of the Federal Constitution. 28 U.S.C. § 2241-2255 (1867).

Even after AEDPA’s constraints on federal review of state convictions, the Writ continues to “stand[] as a safeguard against imprisonment of those held in violation of the law.” *Richter*, 562 U.S. at 91 (2011). Accordingly, the writ of habeas corpus remains an important tool for this Court to ensure localities and States are depriving citizens of their liberty only after a reasonable attempt to ensure their rights were protected.

In California, the need for the check of the federal writ—even as it is limited by AEDPA and the cases interpreting it—is manifest. The unreasonable dysfunction in California’s handling of habeas corpus cases is systemic. The California Supreme Court, at least as of 2007 when the last comprehensive analysis was done,

declined to issue OSCs in 92% of the capital habeas cases that came before it. Only 4% percent of capital petitioners in California receive evidentiary hearings in state habeas proceedings. Arthur L. Alarcon, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 741, 749 (2007). In contrast, many California capital habeas petitioners who have sought relief in federal courts have been successful even though the same claims were denied by the state courts. Cal. Comm'n on the Fair Admin. of Justice, Final Report and Recommendations 137 (2008), <http://www.ccfaj.org/reports.html>. Whether the federal courts have reviewed the claims of those petitioners *de novo* or under AEDPA's constrained lens, the implication is the same: California's state-court process is defective in remedying constitutional violations and granting the basic procedures to allow a petitioner to prove them.

Exposing California's defective fact-finding process is the fact that many states grant evidentiary hearings in *all* capital cases, or at least unless the record demonstrates that the petitioner is not entitled to relief. Ga. Code Ann. §§ 9-14-47, 9-14-47 (mandatory hearing); S.C. Code § 17-27-IJO(C) (same); Ark. R. Crim. P. 37.3; Fla. R. Crim. P. 3.851; *see also Mercer v. Comm'r of Corr.*, 644 A.2d 340, 342 (Conn. 1994). Other states grant a hearing on all colorable claims, Ariz. R. Crim. P. 3 .8; *State v. Runningeagle*, 859 P.2d 169, 173 (Ariz. 1993) (en bane); *State v. McHone*, 499 S. E. 2d 761, 763 (N.C. 1998); Tenn. Code Ann. § 40-30-101, et seq.; Tenn. Sup. Ct. R. 28, sec. 28(A). And in some states an evidentiary hearing is granted whenever there is a

disputed issue of material fact. *See, e.g.*, Ind. Post-Conviction Rule 1, section 4(g); Official Revision Comment-1980 to La. Code Crim. Proc art. 25 929 (West 2011); Pa. R. Crim. P. 908.

◆

CONCLUSION

This Court must hold lower federal courts and California habeas courts to their own standards and to a reasonable standard for fact-finding to ensure a death-row inmate's claims are heard as fairly as they would be in any other state. By granting certiorari and reversing the Ninth Circuit's decision in this case, and by applying § 2254(d) properly, this Court can ensure that death-row inmates obtain reasonable review of their procedurally-sound claims of constitutional violations while respecting and upholding a state's ability to fashion and follow its own rules for adjudicating those claims.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

JOSEPH A. TRIGILIO
Deputy Federal Public Defender

PAULA M. MITCHELL
LOYOLA LAW SCHOOL
ALARCÓN ADVOCACY CENTER

Counsel for Amici

DATED: November 1, 2018