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

REPLY BRIEF FOR PETITIONER

CAPITAL CASE

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REPLY BRIEF FOR PETITIONER

Petitioner Ricardo Sanders respectfully submits this reply to Respondent's Brief in Opposition. He does not reply to that which is adequately addressed in the petition.

Respondent does not dispute that a federal court must evaluate a 2254 petition based on what the California Supreme Court "knew and did." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). Respondent does not dispute that a summary denial by the California Supreme Court means the petitioner failed to make a prima facie case for relief. *People v. Duvall*, 9 Cal.4th 464, 475

(1995). Nor does Respondent dispute that neither the district court nor the Ninth Circuit evaluated his claims for whether they stated a prima facie case for relief. However, Respondent asserts:

> But Sanders does not even identify which of his many claims for relief the California Supreme Court or the federal courts were mistaken about – let alone how his state habeas petition established a prima facie case for relief.

BIO[1] at 12.

First, Respondent fails to address the detailed allegations in the Petition where he reprises the claims made in the California Supreme Court respecting all the eyewitnesses and informants which demonstrated a prima facie case for relief. Petition at 12-19.

Second, Respondent fails to acknowledge that the district court, in denying an evidentiary hearing, repeatedly held that Petitioner Sanders had failed to prove his allegations. Appendix H at 191, 196, 198, 199, 203, 206, 207, 209, 212, 213, 220, 223, 226, 227, 231, 232.

Third, Respondent lightly acknowledges in a footnote that the Ninth Circuit rejected his claims on grounds that he failed to prove his allegations and

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[1] "BIO" stands for Brief in Opposition. "AOB" stands for Appellant's Opening Brief. "ER" stands for Excerpts of Record.

that it made credibility findings when no evidentiary hearing was ever held. BIO at 12-13, n.6.

This is not a mere issue of error correction. Sanders seeks a ruling that clarifies how a summary denial by the California Supreme Court must be evaluated by the Ninth Circuit. A remand to the Ninth Circuit to evaluate the prima facie sufficiency of Petitioner's claims would not be an exercise in futility.

Michael Malloy

- The Ninth Circuit found that Michael Malloy, the prosecution's star eyewitness, saves the day (see e.g. Appendix D at 23 "unequivocal"; 24 "without hesitation"; at 38 "much stronger"; at 39 "never wavered"; at 39 "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.") The court misapprehended *Kyles v. Whitley*, 514 U.S. 419 (1995). Although the court acknowledged that materiality is to be determined collectively and not item-by-item, the Ninth Circuit then evaluated materiality item-by-item. Appendix D at 50. *Kyles* instructs that materiality is not a "sufficiency of evidence test" and Sanders did 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.

- The Ninth Circuit failed to consider problems with Malloy's identification. For example, his testimony was replete with inconsistencies in regard to the suspect descriptions (AOB at 20-24), casting doubt on his ability to accurately identify anyone. *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977). Professing to be "positive" has nothing to do with accuracy *Id.* at 130, *quoting United States v. Wade*, 388 U.S. 217, 229 (1967) (Marshall, J., dissenting) (degree of certainty is "worthless as an indicator that he is correct"). And someone, not Malloy, wrote the word "positive" on his lineup card. (28 ER 1071; 28 ER 8247-8248.)

- Without discovery and an evidentiary hearing it is unknown precisely what David Lind told Malloy on the way to the lineup. Lind's primary duty, after all, was to Bob's Big Boy and Marriott Corporation, not the truth. The inconsistency between Malloy's testimony at the trial and his testimony in Rogoway's civil lawsuit is enough to make a prima facie case that Malloy intentionally lied at Sanders' trial about how he knew to go to the lineup, which undermines the accuracy of his identification. (AOB at 11-12.)

Tami Rogoway

- The Ninth Circuit asserted that when DDA Giss asked Tami Rogoway at the preliminary hearing that "she never picked anyone out of the video-tape lineups" and she answered "I don't believe so" this was merely consistent with the fact that she did not pick Freeman. Appendix D at 35. This is not correct. The opinion fails to mention that trial counsel objected that it would be suggestive to have Rogoway identify Sanders in court since she did not identify him at the video lineup. Giss responded, "I have nothing to say." (4 ER 992, 1 SER 115.) Giss did not dispute that Rogoway failed to identify Sanders at the video lineup. Further, Giss himself admitted that having Rogoway identify Sanders at the preliminary hearing would be suggestive since he was the only person in the courtroom she could identify. (1 SER 118.) The Ninth Circuit also stated that "it is more likely that she misunderstood Giss' questions at the preliminary hearing than that she gave false, or even inconsistent testimony." Appendix D at 36. Of course, without an evidentiary hearing, no court can reasonably find that Rogoway misunderstood Giss' question.

- The Ninth Circuit said that Petitioner Sanders failed to show that Rogoway was influenced by her undisclosed conjugal visits with White because she identified him at the preliminary hearing. Appendix D at 38. Here again, the Ninth Circuit failed to mention that the trial prosecutor Harvey Giss *conceded* her identification at the preliminary hearing would be suggestive. (1 ER 118.)
- The opinion also asserted that Giss disclosed the relationship between White and Rogoway. Appendix D at 38. This is not correct. Giss' testimony at the pretrial hearing was misleading as he only admitted that a romantic relationship between White and Rogoway came about when she went to Chino State Prison with her friend Gina Gutierrez. The Ninth Circuit asserted it did not know whether Giss' handwritten note – "Les had a conjugal visit with Tami" – was penned before the pretrial hearing, even though a handwritten date on the note indicates it was. Appendix D at 52. On its face, Giss' own note corroborates Leslie White's testimony at the grand jury and the *Marshall* case. To the extent that there is any ambiguity or confusion about what Giss' note meant or when it was written, only Giss' testimony at an evidentiary hearing can clear that up.

- The Ninth Circuit said that Sanders failed to prove that White was an agent of the prosecution. Appendix D at 51. The opinion failed to mention that Giss sought an order during the trial to have Leslie White "wired for sound" when he spoke to Abramson at the jail. (6 ER 1414.) If White was going to be wired for sound by the District Attorney, he was in no uncertain terms their agent, which contradicts Giss' testimony at the pretrial hearing. The Ninth Circuit found that the "state court could have reasonably decided to credit" Giss' sworn testimony that he did not use White as an agent over the testimony of a jailhouse informant ..." Appendix D at 53. Not only is Giss' typewritten order evidence that White was indeed his agent, but the state court could not credit Giss' denials over White's testimony without an evidentiary hearing.
- The reasonably available documentary evidence Sanders submitted in support of his allegations that the prosecution failed to disclose the conjugal visits with Leslie White (which served to improperly influence her testimony at trial so that she falsely identified him), stated a prima facie case for relief, entitling Sanders to discovery and an evidentiary hearing. (AOB at 10.)

- As for the loss of Rogoway's lineup card, Appendix D at 70, discovery and an evidentiary hearing would enable Sanders to prove that the police lied about Rogoway's identification – just as they wrote on Malloy's lineup card – particularly when Rogoway herself admitted at the preliminary hearing she did not identify anyone at the video lineup. The reasonably available documentary evidence obtained to date about all the undisclosed misconduct committed by the prosecution states a prima facie case as to Sanders' allegation that the prosecution in bad faith destroyed Rogoway's lineup card to avoid revealing that she did not identify him at the lineup. (AOB at 10-11.)

Rhonda Robinson

- The opinion asserted that there was no conflict between Rhonda Robinson's testimony at Sanders' trial and Freeman's trial. She denied seeing some blue notebooks (which contained the inflammatory carnival gag photo of Sanders and Stewart holding a toy machine gun) at Sanders' trial, but admitted having seen them at Freeman's trial, along with the photo. She was not asked at Sanders' trial whether she had seen the photo. Appendix D at 43. The issue, however, is that Robinson's denial that she had seen the

blue notebooks was material because she knew that Abramson wanted to examine her about whether she had seen the photograph which was in the blue notebook. The opinion fails to mention that Robinson admitted she had no mental picture of either of the robbers and had blocked the incident from her mind. Yet, she hoped that Sanders would die. (Reply at 55-56, record citations.) Discovery and an evidentiary hearing would enable Sanders to prove his allegations that Robinson's testimony was false. (AOB at 11.)

Ismael Luna

- The Ninth Circuit said that Luna, who identified Sanders as one of the robbers, admitted at Sanders' trial he had difficulty identifying black people and said the same thing at Freeman's trial. Appendix D at 45-46. The opinion fails to mention that at Freeman's trial Luna said he could not say Sanders' was one of the robbers, only that he looked like him. This completely contradicts what he said at Sanders' trial. (6 ER 1591.) Discovery and an evidentiary hearing would enable Sanders to prove his allegation that Luna's identification of him was not merely inconsistent, but false. (AOB at 12.)

Andre Gilcrest

- The Ninth Circuit stated that "Gilcrest was exposed as a liar at Sanders' trial." Appendix D at 68. The opinion concedes that Gilcrest's lies at Freeman's trial showed he had "little hesitation about" lying and that Giss disparaged Gilcrest as a sleazy, slimy opportunist at Freeman's trial. *Id*. and n.21. The Ninth Circuit found, however, that the state court could reasonably distinguish *Mesarosh v. United States*, 352 U.S. 1, 9 (1956) (convictions overturned when a key informant lied about his background and credibility in subsequent trials because "dignity of United States Government will not permit the conviction of any person on tainted testimony") because Gilcrest was not a government agent; his testimony only went to the conspiracy; and he was corroborated by Brenda Givens and Rodell Mitchell. Appendix D at 68. However, the informant in *Mesarosh* was not an employee of the government but a criminal just like Gilcrest. 352 U.S. at 15. Gilcrest's testimony helped to bolster the shaky eyewitness identification. And, Giss, like the government prosecutors in *Mesarosh*, conceded the primary informant was an habitual liar. Discovery and an evidentiary hearing would allow Sanders to prove his allegations that Gilcrest's

testimony implicating Sanders in a conspiracy was a bald faced lie. (AOB at 13.)

Brenda Givens

- The Ninth Circuit stated that Sanders conceded no one asked Givens about her mental health at his trial. Appendix D at 59. The defense, of course, could not have asked her anything without knowing of her mental problems. The Ninth Circuit acknowledged that Givens had some type of mental problems after the robbery but allowed that the state court could have reasonably determined any failure to disclose did not undermine confidence in the outcome of the trial. This is because Givens only served to corroborate Rodell Mitchell. Appendix D at 60. But Givens and Mitchell's testimony, along with Gilcrest's – regarding a purported conspiracy – served to bolster the shaky eyewitness identification. If Sanders was deprived of exculpatory impeachment evidence about any of these witnesses to an alleged conspiracy, this is surely material under *Kyles*.
- Discovery and an evidentiary hearing would enable Sanders to prove his allegations that the prosecution failed to disclose material impeachment evidence casting doubt not only on Givens' credibility

but her competency to testify at all. See *Silva v. Brown*, 416 F.3d 980, 988 (9th Cir. 2005) (failure to disclose witnesses' mental problems and competency requires habeas relief); *Gonzalez v. Wong,* 667 F.3d 965, 983-984 (9th Cir. 2011) (failure to disclose government witness had severe mental problems impacts on ability to tell the truth). (AOB at 13.)

Rodell Mitchell

- The Ninth Circuit stated that the district court correctly found Sanders' argument attacking Rodell Mitchell's testimony was "conclusory" because testimony by David Lind and Detective Stallcup at Rogoway's civil lawsuit did not prove that Mitchell lied about calling the police to report a robbery. Appendix D at 46-47. Under *Duvall*, however, "conclusory" only means there is no evidentiary support for an allegation, which is not the case here. 9 Cal.4th at 474. Further, the opinion failed to mention that at Sanders' trial, the prosecution merely contended there was no documentary evidence to back up Mitchell's testimony. Whereas during Rogoway's civil lawsuit, David Lind and Detective Stallcup emphatically asserted that Mitchell could not possibly have been telling the truth. The Ninth Circuit also asserts that Mitchell's

testimony was not "important." Appendix D at 48. But Mitchell's testimony was clearly a "link in the chain of evidence" that permitted the prosecution to prove a conspiracy. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

- The opinion's circular reasoning that Mitchell was not important because of Givens and Gilcrest, Appendix D at 48; but Givens was not important because of Mitchell and Gilcrest, Appendix D at 60; and Gilcrest was not important because of Givens and Mitchell, Appendix D at 68, just goes to show that discovery and an evidentiary hearing should have been granted. Under *Kyles*, undermining the credibility of any one of these witnesses would be material. Discovery and an evidentiary hearing would enable Sanders to prove his allegation that Mitchell's testimony was false, thereby discrediting both Givens and Gilcrest as well. (AOB at 13.)

Bruce Woods

- The Ninth Circuit asserted that Sanders' reliance on the grand jury report about misconduct with jailhouse informants is not enough to show Woods lied. Appendix D at 49. The opinion fails to mention that the grand jury report specifically found the sheriff intentionally placed informants with defendants which resulted in false claims of

> confessions. The opinion also failed to mention that the grand jury report highlighted that it heard an unusual number of claims that confessions were obtained on short bus rides from the jail to the courthouse. (7 ER 1097.) The Bruce Woods scenario was a paradigm of the jailhouse informant scandal. Discovery and an evidentiary hearing would enable Sanders to prove his allegations that the prosecution deliberately placed Sanders on a jailhouse bus just to make it look like Sanders made incriminating statements to Woods. (AOB at 14.)

As detailed above, it is beyond cavil that Petitioner Sanders stated a prima facie case with respect to all the eyewitnesses and informants. He was not required to prove his allegations under well established California habeas law. The Ninth Circuit failed to properly evaluate his claims based on what the state court "knew and did." *Cullen v. Pinholster*, 563 U.S. at 182. Though Sanders has never had discovery or an evidentiary hearing, the Ninth Circuit conflated the burden of pleading with the burden of proof. This is a recurring problem in urgent need of resolution by this Court.

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: December 18, 2018 Respectfully submitted,

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