No. 19-7501

In the Supreme Court of the United States

STEVEN LIVADITIS,

Petitioner,

v.

RON DAVIS,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the court of appeals erred in concluding that the California Supreme Court did not unreasonably apply federal law or unreasonably determine facts in denying petitioner's claim that his counsel was ineffective at the penalty phase.

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Livaditis v. Davis, No. 14-99011, judgment entered August 9, 2019, petition for rehearing and rehearing en banc denied October 28, 2019 (this case below).

United States District Court for the Central District of California:

Livaditis v. Woodford, No. CV 96-2833 SVW, judgment entered July 8, 2014 (this case below).

California Supreme Court:

In re Livaditis, No. S063733, judgment entered November 24, 1998 (state collateral review).

People v. Livaditis, No. S004767, judgment entered June 18, 1992 (direct appeal).

Los Angeles County Superior Court:

People v. Livaditis, No. A095327, judgment entered June 19, 1987.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

STATEMENT

1. In June 1986, petitioner Steven Livaditis took five hostages during the robbery of a jewelry store in Beverly Hills, California. Pet. App. A5. Over the next thirteen hours, petitioner stabbed a security guard and shot a sales clerk in the head. *Id.* Petitioner then tried to flee with three surviving hostages. *Id.* at A6. An officer mistook one as petitioner and shot and killed the hostage before taking petitioner into custody. *Id.* Petitioner admitted after his arrest that he killed the security guard because he had been "uncooperative and antagonistic" and that he shot the sales clerk because "he felt he had to kill another hostage in order to prove that his demands should be taken seriously." *Id.* Petitioner apologized and stated he had planned only to rob the store. *Id.*

2. A deputy public defender with nearly two decades of experience was appointed as petitioner's trial counsel. Pet. App. A9-A10. Trial counsel recognized "early on that a penalty phase investigation was of primary importance" and devoted a year to conducting that investigation. *Id.* at A10. In that time, trial counsel spoke with petitioner "multiple times" about petitioner's background, learning that he "came from a very dysfunctional family." *Id.* at A10, C102. Petitioner reported that he had been physically abused by his mother, uncles, an aunt and school officials, and that he had watched as his father beat his mother. *Id.* at A10; C.A. Dkt. 31 at 1SER 1, 3, 14, 42-43.[1] Interviews of

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[1] "ER" refers to the Excerpts of Record and "SER" refers to the Supplemental Excerpts of Record filed in the court below.

petitioner's family members, family friends, co-workers, school officials, and an attorney from a prior criminal case confirmed the same. Pet. App. A10, C57-C62, C102; C.A. Dkt. 31 at 1SER 81-110; 2ER 106-113. Trial counsel also obtained information suggesting that petitioner may have been mentally ill and consulted a mental health expert. Pet. App. A12.[2] But during trial counsel's representation of petitioner, there was "no indication that petitioner had significant mental health issues that would qualify either as a legal defense or as persuasive mitigation evidence." *Id.* at C121. Petitioner, for his part, told trial counsel that he was "not crazy" but that he had "heard that they could not execute an insane person." *Id.* at A12. He also told trial counsel that it had "crossed his mind to act crazy." *Id.*

Initially, trial counsel considered emphasizing petitioner's "dysfunctional" childhood and physical and mental abuse as a penalty-phase defense. Pet. App. A10, C99. But trial counsel changed his strategy after a trip to Greece, where he interviewed petitioner's mother, siblings, other family members and family friends. *Id.* at A10, C63, C102; C.A. Dkt. 22 at 2ER 89. Trial counsel later explained, "when I went to Greece and met with various family members, I saw that there were members of the family who would make good

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[2] The record does not reveal the results of that consultation.

impressions with the jury. I hoped that the jury would like these family members and would want to do something for them, even if they did not want to do something for [petitioner]." Pet. App. A10, C99.

3. Petitioner pleaded guilty to three counts of first degree murder, as well as additional counts of robbery, kidnapping, and burglary. Pet. App. C1, D9. He admitted special-circumstance allegations of murder during the commission of robbery and burglary, and a special-circumstance allegation of multiple murders, making him eligible for the death penalty. *Id.* at A6, C8, D10.

At the penalty phase, the prosecution presented evidence about the robbery and murders, as well as evidence of a violent armed robbery petitioner had committed months earlier. Pet. App. A6. The prosecution also presented evidence of two other felony convictions and three times that petitioner had forcibly resisted arrest. *Id.*

In mitigation, trial counsel presented testimony from seven witnesses, including petitioner's mother, two siblings and a family priest. Pet. App. A6. Those witnesses described petitioner's difficult childhood—marred by physical and psychological abuse and extreme poverty—and repeatedly assured the jurors that petitioner felt remorse. *Id.* at A6-A7, C55-C56, C103-C105. One sister closed by testifying that she wanted petitioner "to live" and that she forgave him for his actions. *Id.* at A7. Other witnesses expressed "shame and regret" for petitioner's actions and "begged the victims' families and the court for forgiveness." *Id.* at C56. In closing arguments, trial counsel urged the jury to

spare petitioner's life, pointing to his willingness to plead guilty, "even though he knew that he would either get life in prison without parole or the death penalty." *Id.* at A7, C105. Trial counsel also requested sympathy for petitioner's family members, asking the jurors to consider how the death penalty would affect them. *Id.* at A7.

After three days of deliberations, the jury set the penalty at death. Pet. App. A7. In accordance with the jury's verdict, the trial court sentenced petitioner to death. *Id.* at A7, C8. The California Supreme Court affirmed the judgment on direct appeal. *People v. Livaditis*, 2 Cal. 4th 759 (1992); Pet. App. D. This Court denied certiorari in 1993. Pet. App. A7, C8. In November 1998, the California Supreme Court summarily denied petitioner's application for habeas relief. *Id.* at A8, C9, E1.

4. Petitioner then sought relief from the federal district court, where he filed a second amended petition for a writ of habeas corpus. Pet. App. A8, C9; D.Ct. Dkt. 89. Following four evidentiary hearings, the district court issued an order denying the petition in its entirety. *Id.* at A8, C157.[3] With respect to a claim alleging ineffective assistance at the penalty phase, the court concluded

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[3] After the hearings, this Court issued *Cullen v. Pinholster*, 563 U.S. 170 (2011), limiting federal review of habeas claims in most circumstances to the record before the state court when it adjudicated the merits. The lower courts accordingly limited review to the facts before the California Supreme Court. Pet. App. A8-A9.

that the "California Supreme Court could have reasonably concluded" that petitioner failed to rebut "the strong presumption that counsel's mitigation strategy fell 'within the wide range of reasonable professional assistance,'" and that petitioner could not establish prejudice regardless. *Id.* at C107, C121. The court observed that the record before the California Supreme Court showed that trial counsel had deliberately selected a defense that did not "deflect responsibility" and embraced a mitigation theme that assured the cooperation of most family members. *Id.* at C105. The court concluded that the kind of "reasonable, tactical choice" made by petitioner's trial counsel in selecting a penalty phase defense is "immune from attack under *Strickland*." *Id.* at C106.

The district court denied a certificate of appealability. D.Ct. Dkt. 306. Petitioner sought and obtained a certificate of appealability from the court of appeals, limited to the claims that trial counsel was ineffective in failing to present mitigating evidence concerning petitioner's abusive and mentally unstable mother and petitioner's own alleged mental health problems. Pet. App. A8.

5. The court of appeals affirmed in a published opinion. Pet. App. A1-A14. Applying the deferential standard of review required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the court held that the

California Supreme Court's summary denial of relief was not based on an unreasonable application of the law or determination of the facts under 28 U.S.C. § 2254(d). *Id.* at A9.[4]

a. First, the court held that the state court did not unreasonably deny the claim challenging trial counsel's failure to further investigate and present evidence of petitioner's mother's mental impairments and abusive conduct. Pet. App. A10-A11. The record showed that trial counsel's investigation had revealed evidence that the mother was mentally unwell and abusive. *Id.* at A11. But "[o]nce [trial counsel] became aware of an alternative strategy" involving pleas for mercy from petitioner's sympathetic family members, trial counsel could have made a reasonable decision about how to proceed, and whether to continue to investigate the mother's mental health. *Id.* The court below also observed that much of the new evidence "did not differ meaningfully from the evidence" that trial counsel already had about petitioner's mother, so the state court could have reasonably concluded that this additional evidence would not have altered trial counsel's strategy. *Id.*

The court of appeals also recognized that "a 'mercy' or 'family sympathy' theme is a valid approach to mitigation" and held that the state court could

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[4] Because the California Supreme Court denied habeas relief in a summary order, the court of appeals examined "what arguments or theories … could have supported[] the state court's decision" and then evaluated "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with" this Court's precedents. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

reasonably have determined that trial counsel selected a "legitimate strategy" based on information learned during "extensive interviews with the family." *Id.* The state court could also have reasonably determined that "emphasizing" the mother's "abuse … would have been inconsistent with portraying her as a sympathetic witness," blunting the "efficacy of a family sympathy approach" and jeopardizing her participation in the trial. *Id.*

The court of appeals further held that the state court could have reasonably concluded that petitioner suffered no prejudice. Pet. App. A11. The record showed that the jury had heard about petitioner's "difficult upbringing" and much of the new evidence about his mother was cumulative. The state court therefore reasonably could have concluded that evidence of petitioner's mother's mental illness and abuse would not have changed the outcome of petitioner's sentencing. *Id.*

b. Next, the court of appeals addressed petitioner's claim that counsel was ineffective for failing to further investigate and present evidence of petitioner's own mental impairments and held that the state court did not unreasonably apply *Strickland* in denying that claim. Pet. App. A11-A14. The court of appeals deemed it unnecessary to examine the state court's holding on deficient performance on this ground because the state court could reasonably have denied the claim on prejudice alone. *Id.* at A13 & n.4.

The record before the state court showed that trial counsel did have evidence that petitioner might have been mentally ill, drawn mostly from petitioner's odd statements to investigators and trial counsel. Pet. App. A12. Trial counsel discussed the issue of mental illness with petitioner, learning that petitioner did not believe himself to be "crazy" but thought he could "do a good job" feigning mental illness. *Id.* Trial counsel also consulted a mental health expert, although the record does not reveal the results of that consultation. *Id.*

In state post-conviction proceedings, petitioner presented the testimony of three mental health experts with varying opinions about petitioner's mental health. Pet. App. A12. One concluded that petitioner's childhood trauma "adversely affected his subsequent psychological development[.]" *Id.* A second concluded that petitioner had a "mild degree of neuropsychological impairment" and below-expected intellectual functioning. *Id.* A third opined that petitioner suffered a "severe psychiatric disorder," which "significantly compromised his ability accurately to perceive and understand the world around him." *Id.* According to petitioner, his attorney should have investigated his mental illness and presented similar expert testimony in mitigation. *Id.*

In concluding that the state court could have reasonably determined that petitioner had not been prejudiced, the court of appeals first observed that several aggravating factors supported the jury's verdict. Petitioner exhibited "ruthlessness" during a prior violent armed robbery, where he tied up the vic-

tims at gunpoint, threatened to kill them, and "kicked one of the bound employees repeatedly." Pet. App. A13. Petitioner "exhibited similar callousness" during the robbery here: petitioner admitted to stabbing the guard because the victim had "verbally defied him"; "let him bleed to death in front of the other hostages"; and then told the press that the stabbing was "appropriate." *Id.* Petitioner also shot the clerk—who had been forced to lie next to the guard's body—because "she had screamed at the start of the robbery." *Id.*; *see also id.* at D10-D11. That "cruelty," the court of appeals observed, was a "substantial aggravating factor." *Id.* at A13.

The court of appeals also reasoned that the state court could have discounted the value of the testimony from petitioner's post-conviction experts. The first expert focused on the psychological effects of petitioner's abusive childhood, which was cumulative of testimony offered by his family at the penalty phase trial. Pet. App. A13. The second expert testified only that petitioner suffered from a "mild degree of neuropsychological impairment," which was of "limited" mitigation value. *Id.* The third expert's diagnoses were based on interviews conducted almost a decade after the murders, and the expert's opinion that petitioner's symptoms were "consistent with" brain damage was merely "tentative" and therefore insufficient to establish prejudice. *Id.* The value of those expert opinions was further diminished by reports that petitioner said he could "act crazy" to avoid the death penalty. *Id.* The court of appeals concluded that the "California court may have decided as a result to

treat with skepticism expert statements based on interviews of [petitioner] conducted years after he had been sentenced to death." *Id.*

Finally, the court of appeals emphasized that trial counsel had "put on extensive mitigation evidence," aimed at evoking potential sympathy for petitioner's mother. Pet. App. A14. The force of that defense would have been undermined by the testimony from his proffered experts that she had been abusive. *Id.* The court of appeals concluded that "[a]fter considering the aggravating evidence adduced, the substantial mitigating evidence that [trial counsel] did present, and the mitigation evidence he could have presented, the state court could have reasonably concluded that further evidence concerning [petitioner's] mental health would not have made a difference." *Id.*

ARGUMENT

The court of appeals properly resolved petitioner's ineffective assistance claims under 28 U.S.C. § 2254(d). Its decision does not conflict with this Court's precedent or with the decisions of any other court of appeals. Further review is unwarranted.

1. To establish ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), a petitioner must prove both deficient performance and prejudice. *Id.* at 687. Deficient performance requires a showing "that counsel's representation fell below an objective standard of reasonableness" under "prevailing professional norms" and must overcome the "strong presumption" that counsel's conduct fell "within the wide range of reasonable

professional assistance." *Id.* at 688-689. Prejudice in this context requires a reasonable probability that the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Pinholster*, 563 U.S. at 202.

"Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Relief under AEDPA is warranted only if a state court's adjudication of a claim is contrary to clearly established Supreme Court precedent, involves an unreasonable application of such law, or is based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). When the deferential standards of *Strickland* and § 2254(d) "apply in tandem," review is "doubly" deferential. *Richter*, 562 U.S. at 105. The "question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* Similarly, the question on prejudice is whether the state court "*unreasonably* determined that prejudice is lacking." *Pinholster*, 563 U.S. at 198, 202 (emphasis in original).

2. Petitioner first contends that his trial counsel was deficient in failing to further investigate and present evidence about his mother's abuse and mental illness. Pet. 26-32. As the court below properly concluded, however, the California Supreme Court could have reasonably held that counsel acted competently in pursuing a sympathy defense instead.

During trial counsel's investigation, he became "aware that a focus on [the mother's] abuse and mental illness was a possible mitigation strategy." Pet. App. A11. The record before the state court showed, for example, that petitioner's mother was "depressed, ill, emotionally and mentally unstable, and in need of special therapy," and that she had abused petitioner on occasion herself. *Id.* at A10. While it is true that trial counsel did "not have all of the information" about petitioner's mother that emerged in state habeas proceedings, trial counsel knew enough to be "in a position to make a reasonable decision about how to proceed, and whether to continue to investigate" the mother's background. *Id.* at A11. Trial counsel elected not to pursue such additional evidence, however, when he became aware of an "alternative strategy" that required the jury to favorably consider petitioner's mother. *Id.* A "mercy" or "family sympathy" theme is a valid approach to mitigation and the state court could have concluded that "pleading for mercy on behalf of [petitioner's] family was a legitimate strategy given its closeness[.]" Pet. App. A11. Such a conclusion is consistent with this Court's precedents.[5]

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[5] *See, e.g.*, *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) ("It is instead a case, like *Strickland* itself, in which defense counsel's 'decision not to seek more' mitigating evidence from the defendant's background 'than was already in hand' fell 'well within the range of professionally reasonable judgments.'"); *Pinholster*, 563 U.S. at 193 ("[I]t would have been a reasonable penalty-phase strategy to focus on evoking sympathy for Pinholster's mother."); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect."); *Strickland*, 466 U.S. at 690.

Petitioner nonetheless contends that trial counsel could not have made any strategic decisions about a defense because the pre-trial investigation was inadequate. Pet. 26-32. But petitioner misdescribes the record in two ways. First, petitioner characterizes trial counsel's pre-trial investigation as "limited" to a personal interview of petitioner in county jail and the receipt of reports and records from his investigator and other officials. *Id.* at 28. But the record before the state court showed that trial counsel conducted a far more substantial investigation, even traveling to Greece to interview witnesses personally. Pet. App. A10; *see also id.* at C55. Through that work, trial counsel was at least aware that petitioner's mother was abusive and mentally unwell. *Id.* at A11. But his trip to Greece prompted him to select a different mitigation strategy in the hopes that "the jury would like these family members and would want to do something for them, even if they did not want to do something for" petitioner. *Id.* at C99. Petitioner identifies no case from this Court supporting his argument that this kind of investigation is insufficient to support a strategic decision to pursue a family-sympathy defense.

Petitioner also suggests that his attorney conceded during post-conviction proceedings that his "penalty phase investigation was missing an investigation of Petitioner's medical and social history." Pet. 27. That distorts the record. As the court of appeals explained, trial counsel submitted a declaration during state habeas proceedings challenging the denial of a request to continue the

trial. Pet. App. A10.[6] In that declaration, trial counsel explained what he would have done if allowed a continuance and, in that context, explained that he would have obtained "additional medical records and related social history" if offered additional time. *Id.*[7] But trial counsel's desire for additional records does not establish that the investigation he did conduct in the time allotted fell short or that he was unable to make a reasoned tactical decision. The record shows that trial counsel conducted numerous interviews with petitioner; flew to Greece in furtherance of the investigation; interviewed family members, friends, colleagues, and former attorneys; and obtained petitioner's medical and personnel records. *Id.* at A11-A13. This case is thus far different from the cases invoked by petitioner (at 26-32), where attorneys conducted facially inadequate investigations in which "*none* of [the mitigating] evidence was known to" trial counsel. *Sears v. Upton*, 561 U.S. 945, 951 (2010); *see also Williams v. Taylor*, 529 U.S. 362 (2000) (trial attorneys obtained no records relating to defendant's "nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records").

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[6] The court of appeals observed that petitioner did not pursue a claim that "trial counsel did not have adequate time to prepare for the penalty phase." Pet. App. A10 n.3.

[7] The record reflects that trial counsel asked to pause jury selection proceedings so he could obtain medical records from a hospital in New York that was no longer operational. Pet App. C14-C22. The trial court denied the continuance. *Id.* As the lower court observed, petitioner never explained "how the records would have assisted trial counsel in his approach to the jury selection process" and he does not explain how those particular records would help now. *See id.* at C22.

In any event, petitioner does not seriously challenge the court of appeals' conclusion on prejudice with respect to this theory, which is independently sufficient to support the judgment. *See* Pet. App. A11. The court of appeals observed that the jury heard "testimony about [petitioner's] difficult upbringing," and properly concluded that much of the evidence about his mother "was cumulative." *Id.*; *see also id.* at C55-C56. The jury heard from petitioner's mother that she was in a "tumultuous marriage" and that petitioner's father "abused her in front of their children" and abused petitioner as well. *Id.* at A6; *see also id.* (testimony that petitioner's father was a "monster" who terrorized the family). They heard that petitioner was sent to an orphanage, that he was "never happy there," and that he suffered head injuries as a child. *Id.* at A6. They heard that he grew up in poverty, "forced to sort through garbage cans to find food and clothes." *Id.* at A7. Thus, this was not a case where the jurors had a "misleading" profile of petitioner or where they could believe that he had a "normal, non-violent childhood." Pet. 30-31. Petitioner does not explain why it would have been unreasonable for the California Supreme Court to conclude that additional evidence relating to petitioner's mother "would not have changed the outcome of [petitioner's] sentencing," or why the court of appeals erred in holding that such a decision would be reasonable. Pet. App. A11.

3. Petitioner next contends that he was prejudiced by trial counsel's failure to further investigate and present evidence about petitioner's own mental impairments. Pet. 19-26. Consistent with this Court's precedent, however, the

court of appeals "reweigh[ed] the evidence in aggravation against the totality of available mitigating evidence" and properly concluded that the state court could have reasonably determined that petitioner had not been prejudiced by the failure to further investigate and present evidence about his mental condition. *Pinholster*, 563 U.S. at 198; *see* Pet. App. A13-A14.

The court of appeals appropriately observed that several aggravating circumstances supported the jury's verdict. The court pointed to petitioner's "demonstrated ruthlessness" in a robbery four months earlier, where the victims were bound at gunpoint, threatened with death and repeatedly kicked. Pet. App. A13. It also noted that petitioner "exhibited similar callousness" during the robbery here, stabbing the guard for defiance and letting him "bleed to death in front of the other hostages." *Id.* The other clerk was forced to lie next to the guard's body and then killed because petitioner "wanted to prove that his demands were serious." *Id.*; *see id.* at D10-D11. Both victims were "helpless." *Id.* at A13. And petitioner later claimed that the stabbing was "appropriate." *Id.*

Against those facts in aggravation, the court of appeals concluded that the state court could have reasonably deemed the new evidence about petitioner's impairments to be of limited value. The testimony of one expert about petitioner's abuse as a child was "cumulative," since the jury had heard that petitioner "had been abused as a child and the jury could have inferred negative effects from that treatment." Pet. App. A13. Another expert testified only

that petitioner suffered a "mild degree of neuropsychological impairment." *Id.* And the last expert's opinions were formed based on interviews conducted a decade after the murders. That expert's most important conclusion was equivocal about whether petitioner was actually impaired. *Id.*

Even assuming some value in the experts' testimony, the court of appeals observed that the state court could have discounted the weight of that testimony since petitioner had previously told trial counsel he could "act crazy" to avoid the death penalty. Pet. App. A12-A13. The state court therefore "may have decided as a result to treat with skepticism expert statements based on interviews of [petitioner] conducted years after he had already been sentenced to death." *Id.* at A13.

Finally, trial counsel put on an extensive mitigation case that would have been undercut by the new evidence. Pet. App. A14. Testimony from the experts "would almost certainly have touched" on the mother's abuse, for example, which "could have rendered" the mother "far less sympathetic in the jurors' eyes." *Id.* Considering the penalty phase evidence in whole, the court of appeals properly concluded that "the California Supreme Court could have reasonably concluded that further evidence concerning [petitioner's] mental health would not have made a difference." *Id.*

Petitioner contends that the court of appeals' decision conflicts with prior decisions of this Court regarding *Strickland*'s prejudice prong, citing *Sears v. Upton*, 561 U.S. 945 (2010), *Rompilla v. Beard*, 545 U.S. 374 (2005), *Williams*

v. Taylor, 529 U.S. 362 (2000), *Porter v. McCollum*, and *Ake v. Oklahoma*, 470 U.S. 68 (1985). *See* Pet. 19-20, 22. It does not. *Ake* is not an ineffective assistance of counsel case. *Williams* and *Rompilla* are irrelevant because "this Court did not apply AEDPA deference to the question of prejudice." *Pinholster*, 563 U.S. at 202. In *Sears*, counsel presented only evidence that Sears' childhood was stable and loving, and trial counsel knew nothing about the "significant" mental and psychological impairments Sears suffered. *Sears*, 561 U.S. at 947, 956. In *Porter*, "[t]he sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son." *Porter*, 558 U.S. at 32. The defense attorney in *Porter* knew nothing about the fact that Porter had endured an "abusive childhood," or that he had heroically served in the military, or that he suffered "trauma … because of it," and had impaired mental health and mental capacity. *Id*. at 33.[8] Here, in contrast, trial counsel presented substantial testimony about petitioner's difficult childhood and trauma and mounted

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[8] Petitioner also claims an intra-circuit conflict with the decision below. Pet. 21. That is not a reason for this Court to grant review. *See Joseph v. United States*, 574 U.S. 1038 (2014) (Kagan, J., respecting denial of certiorari) ("we usually allow the courts of appeals to clean up intra-circuit divisions on their own"). In any event, not one of the cited cases is like the case here. *See Bemore v. Chappell*, 788 F.3d 1151 (9th Cir. 2015) (counsel ignored a forensic report that the petitioner suffered from organic brain impairment); *Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009) (counsel presented just one witness who revealed nothing about petitioner's abusive childhood or mental health problems); *Frierson v. Woodford*, 463 F.3d 982 (9th Cir. 2006) (counsel failed to investigate and presented no mitigating evidence about early childhood trauma,

a significant defense. The state court could have concluded that petitioner suffered no prejudice. *Pinholster*, 563 U.S. at 202. The court below did not err in finding that conclusion reasonable.

Although the court of appeals found it unnecessary to reach the separate issue of whether trial counsel's performance was deficient, the district court properly concluded that the state court could have reasonably found counsel's performance adequate. Pet. App. A13 n.4, C121. As discussed above, the record before the state court established that trial counsel conducted extensive investigation and prepared for trial over one year, aware that the mitigation presentation would be of primary importance. *Id.* at A9-A10. He met with petitioner numerous times and learned about his background and life experiences, including abuse. *Id*. at A10, C102. He interviewed members of petitioner's family and family friends, including in Greece. *Id*. at A10. He had his investigator interview petitioner's family members, friends, co-workers, officials at his orphanage, and various individuals linked to petitioner's prior offenses. C.A. Dkt. 31 at 1SER 81-110; C.A. Dkt. 22 at 2ER 106-113. He sought petitioner's medical and personnel records. Pet App. C14.

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mental impairments, organic brain damage, and child abuse); *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002) (counsel failed to investigate "substantial and potentially compelling mitigation evidence" about childhood trauma, mental illness, organic brain disorders, and substance abuse); *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000) (counsel prepared mitigation evidence in two hours).

The state court could reasonably conclude that trial counsel competently elected not to further investigate petitioner's mental health or present it in mitigation. There was nothing in the record that should have alerted trial counsel to the fact "that petitioner had significant mental health issues that would qualify either as a legal defense or as persuasive mitigation evidence." Pet. App. C121; *see generally id.* at C107-C121. And while trial counsel was aware of petitioner's odd statements and behavior, trial counsel's decision not to investigate further fell within the wide range of reasonable professional assistance. Trial counsel is permitted to avoid a mental health defense when a jury might disregard it as an effort to "act crazy," or when it may diminish the force of a remorse and family sympathy defense. Pet. App. A13-14. The court of appeal did not err in concluding that the California Supreme Court could have reasonably decided that trial counsel's conduct fell "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 469.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: April 30, 2020