No. 19-7501

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IN THE SUPREME COURT OF THE UNITED STATES

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STEVEN LIVADITIS,
PETITIONER

v.

RON DAVIS,
RESPONDENT

==========

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

REPLY TO BRIEF IN OPPOSITION

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CAPITAL CASE

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Petitioner Steven Livaditis ("petitioner") respectfully submits his Reply to respondent's Brief in Opposition to his Petition for Writ of Certiorari.

Introduction

On June 23, 1986, petitioner embarked on a bizarre scheme to rob an exclusive jewelry store in downtown Beverly Hills, take an employee hostage, board a public bus and ride it to Los Angeles International Airport and catch a flight to Australia, where he would purchase a yacht and live for the remainder of his life off the proceeds of the heist. Predictably, the scheme quickly devolved into a twelve-hour stand-off with the police, chaos, tragedy and petitioner's apprehension.

At one point during the twelve-hour standoff with the police, petitioner inexplicably killed the security guard by stabbing him once. Later in the day, without any provocation or reason, petitioner walked over to one of the hostages and killed her by shooting her in the head. Petitioner was charged with three counts of first degree murder (California Penal Code § 187) each with two special circumstances of robbery and burglary (California Penal Code §§ 190.2(a)(17) (I) and (vii)), one special circumstance of kidnapping (California Penal Code § 190.2(a)(17)(ii)), one special circumstance of multiple murder (California Penal Code § 190.2(a)(3)), five counts of robbery (California Penal Code § 211), three counts of kidnapping (California Penal Code § 207(a)), one count of commercial burglary (California Penal Code § 459), nine allegations of personal use of a firearm (California Penal Code §§ 12022.5 and 1203.6(a) (1)), one allegation of personal use of a deadly and dangerous weapon (California Penal Code § 12022(b)) and one allegation of infliction of great bodily injury (California Penal Code § 12022.7).

On April 28, 1987, petitioner pled guilty to three counts of murder, five counts of robbery, three counts of kidnapping and further admitted the robbery special circumstance on two of the murders, admitted the multiple murder special circumstances and admitted all of the enhancement allegations except the one allegation of infliction of great bodily injury

As a result of petitioner's pleas, only the penalty phase remained to be tried. The jury only had to decide whether petitioner should be given the death penalty or life in prison without the possibility of parole. Armed with reports from petitioner and family members, defense counsel initially planned to present a defense based upon petitioner's abusive childhood and adolescence at the hands of his caretakers. According to defense counsel, this strategy changed after defense counsel traveled to Greece and spoke with petitioner's family. Sitting in a room with multiple family members and translation conducted by petitioner's sister, defense counsel never asked any questions regarding any abuse of petitioner by any caretaker.

Instead, defense counsel adopted an entirely different strategy. Believing that petitioner's family members were sympathetic, defense counsel decided to present a "mercy" defense. Defense counsel hoped that even if the jury was not sympathetic toward petitioner, the jury would feel compassion for his family and vote for life imprisonment without the possibility of parole.

Having adopted this approach, defense counsel halted any efforts to investigate petitioner's childhood, adolescence, prior head injuries or even obtain the mental health records from the hospital on the day petitioner was arrested. The jury was told that petitioner had an abusive father who abandoned the family when petitioner was five and that the family suffered from severe poverty. The jury was not told that petitioner's childhood and adolescence were

nothing short of horrendous. The jury was not told that petitioner experienced a serious head injury weeks before the murders at the jewelry store. The jury did not even learn that after petitioner was arrest and taken to the hospital, he received a psychiatric evaluation that documented acute psychotic symptoms and ongoing auditory hallucinations over several days.

Instead of learning the truth, petitioner was presented as a favored child of a loving mother and supportive family. As a result, the jury was not given any explanation of petitioner's actions. Defense counsel left petitioner to be perceived as nothing but a calloused killer. Not only was the penalty phase defense doomed to result in a death penalty, but it was also completely dishonest.

Response to Opposition Arguments

Petitioner will not repeat the facts or the law cited in his petition for writ of certiorari. Instead, petitioner will focus on certain of the arguments presented by respondent in the Brief in Opposition ("BO"). For the sake of clarity, petitioner's replies will be identified by the numbers assigned by respondent in the BO.

No. 2. (Statement, BO at p. 1.) Respondent describes defense counsel as a "deputy public defender with nearly two decades of experience" when he was appointed to represent petitioner. The implication is that defense counsel was well qualified to represent petitioner in a capital case. The implication is not warranted. Prior to petitioner's case, defense counsel had tried one capital case. In that case, the penalty phase imposition of the death penalty was reversed on the grounds on ineffective assistance of counsel. *In re Hardy*, 41 Cal.4th 997, 1031-1036 (2007)(trial counsel unreasonably failed to investigate an individual with motive and means to commit the murders, the failure was prejudicial and the penalty phase reversed).

No. 2 (Statement, BO at pp. 2,8.) Respondent asserts that defense counsel "consulted" with a mental health expert, and cites to the Ninth Circuit opinion. Contrary to the Ninth Circuit's belief, there is no evidence in the record that defense court *consulted* a metal health expert. In the state proceedings, defense counsel submitted a declaration that makes only an oblique reference to a "mental expert," to whom defense counsel would have shown social history records *if* he had found them.

No. 2 (Argument, BO at p. 11.) Respondent argues that a "mercy" or "family sympathy" theme is a "valid approach to mitigation" and is "consistent with this Court's precedents. (BO, at p. 12.) This argument misses petitioner's point. As this Court held in *Rompilla v. Beard*, 545 U.S. 374 (2005), the defense counsel's failure to investigate petitioner's personal and family history of multigenerational mental illness made it unreasonable for counsel to rely on a mitigation defense based on "naked pleas for mercy" from petitioner's family. (*Id.*, at pp. 383-385, 393.) Petitioner's argument is not that presentation of a "mercy" defense constitutes *per se* ineffective assistance of counsel. Rather, presentation of a "mercy" defense must be based upon an adequate investigation. In petitioner's case, no such investigation occurred.

Respondent frames the issue as limited to whether defense counsel reasonably could choose between a penalty phase based on sympathy for petitioner's the mother and family as opposed to revealing the mother's own mental illness and abuse. In fact, the relevant comparison is between the limited evidence counsel *knew* to existence and much broader and significant evidence he failed to *know* existed before purporting "electing" a penalty theory. Respondent overlooks defense counsel's failure to investigate evidence of petitioner's repeated head injuries

and brain damage, as well as his major psychiatric illnesses. In short, defense counsel could not "elect" a defense strategy without conduction an adequate investigation.

No. 3 (Argument, BO at p. 17.) Respondent adopts the Ninth Circuit's observation that presentation of the "family sympathy" defense could have been undermined by a truthful portrayal of petitioner's mother and childhood abuse. This claim lacks merit. Defense counsel's mercy defense would not have been inconsistent with presenting evidence of petitioner's horrific childhood and adolescence. If defense counsel had conducted an adequate investigation, he also could have presented evidence that petitioner's mother herself suffered from mental and physical abuse.

An explanation of her own mental and physical disabilities would have enabled defense counsel to explain in a non-judgmental fashion how petitioner's mother's own mental defects resulted in her abuse of petitioner and his siblings. This evidence would have been consistent with a truthful presentation of the facts that petitioner's brother's experience as a youth was so painful that he blocked the memories, that petitioner's youngest sister ran away from home and ended up in a juvenile facility and that petitioner's older sister was suffering from mental illness.

No. 3 (Argument, at pp. 16-17.) Respondent adopts the Ninth Circuit opinion that presentation of expert testimony regarding petitioner's mental impairments would have been of limited value. The testimony of one expert would have been cumulative. Another expert characterized petitioner's impairment as "mild." The opinion of third expert was based on interviews conducted a decade later and was equivocal. (*Id.*, at pp. 16-17.)

Respondent and the Ninth Circuit minimize the experts' findings, based on their use of clinical terminology, without regard for its true clinical and medical significance. The Ninth Circuit minimizes one expert's findings as showing "only" a "'mild degree of neuropsychological degree of neuropsychological impairment,'" and faults another expert for being "'tentative'" in concluding that petitioner's "symptoms were 'consistent with ' brain damage.'"

The expert's detection of right hemisphere brain damage was obtained using "the most widely researched and validated neuropsythological battery." He further noted that "bilateral findings are also present." As the other expert explained, the use of the term "mild" did *not* mean "the *effect* of these impairments are mild," only that measured damaged compared to other brain damaged individuals was mild. Significantly, the area of the brain that was damaged made it likely that petitioner would suffer difficulty understanding reality and controlling his impulses.

The expert's use of the term "consistent" with regard to brain damage referred to his *own* administration of neuropsychological testing during his evaluation of petitioner, which yield "consistent" results i.e., results that confirmed the other expert's finding. The fact that petitioner's measured brain damage was "consistent" with the findings of both experts constituted congruent medical findings that supported the experts' conclusions.

No 3. (Argument, BO at pp. 15–16.) Respondent argues that petitioner was not prejudiced by defense counsel's failure to conduct an adequate investigation and present an accurate picture of petitioner's childhood, adolescence and mental impairments. (*Id.*, at p. 16.)

Neither respondent's argument nor the decision of the court of appeals accounts for the prejudicial impact of failing to provide the jury with the bases to support two statutory mitigating

factors. *Porter v. McCullum*, 558 U.S. 30 (2009) (prejudice analysis failed to consider the prejudicial impact of failing to present readily available evidence of mental illness and brain damage that would have supported two state statutory factors in mitigation). In *Porter*, the Supreme Court held it was objectively unreasonable to find no reasonable probability of different penalty for defendant, convicted of two counts of murder, where counsel failed to present evidence that included defendant's military background and mental illness that met state counterparts of Cal. Penal Code § 190.3(d) and (h). (*Id.*, p. 31.)

The probability of a more favorable result was even greater here because petitioner's jury deliberated for three days and requested clarification of another mitigating factor that required consideration of petitioner's mental state in committing the crimes. The jurors' question demonstrates their willingness to consider and give full mitigating effect to specific mitigating factors. Defense counsel's abysmal failure to uncover such evidence prejudicially deprived the jurors – and petitioner – of an opportunity to consider such factors.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, petitioner respectfully requests that his petition be granted.

Dated: July 2, 2020

Respectfully submitted,

JAN B. NORMAN
GARY D. SOWARDS

By: */s/ Jan B. Norman*
JAN B. NORMAN

Attorneys for Petitioner-Appellant
STEVEN LIVADITIS

CERTIFICATE OF COMPLIANCE

I certify that pursuant to United States Supreme Court Rules, Rule 33.1(h)2, the attached **REPLY TO BRIEF IN OPPOSITION** is proportionately spaced with a Times New Roman typeface of 12 points, contains 2374 words according to my word processing program.

Dated: July 2, 2020

Respectfully submitted,

JAN B. NORMAN
GARY D. SOWARDS

By: */s/ Jan B. Norman*
JAN B. NORMAN

Attorneys for Petitioner-Appellant
STEVEN LIVADITIS

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2020, I electronically filed the **REPLY TO BRIEF IN OPPOSITION** with the Clerk of the Court for the United States Supreme Court using the United States Supreme Court electronic filing system.

Participants in the case who are registered United States Supreme Court electronic filing system users will be served by the United States Supreme Court electronic filing system.

I further certify that I served a copy of the **REPLY TO BRIEF IN OPPOSITION** by placing a copy in the United States mail with postage fully paid and addressed to:

Julie A. Harris
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

/s/ *Jan B. Norman*

JAN B. NORMAN