No. 20-6310

In the Supreme Court of the United States

DEAN PHILLIP CARTER,

Petitioner,

v.

RON BROOMFIELD,

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

QUESTIONS PRESENTED

Petitioner seeks review of the court of appeals' decision affirming the denial of two federal habeas petitions regarding separate capital judgments arising out of proceedings in Los Angeles County and San Diego County. The questions presented are:

1. Whether the California Supreme Court's conclusion that the trial court in the Los Angeles case adequately inquired into a potential conflict between petitioner and his defense counsel relied on an unreasonable determination of fact or was contrary to, or an unreasonable application of, clearly established federal law.

2. Whether the California Supreme Court's denial of petitioner's ineffective assistance of counsel claim regarding the penalty phase of his San Diego trial was contrary to, or an unreasonable application of, clearly established federal law.

3. Whether the California Supreme Court's denial of petitioner's ineffective assistance of counsel claim regarding the penalty phase of his Los Angeles trial was contrary to, or an unreasonable application of, clearly established federal law.

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STATEMENT

1. Petitioner Dean Phillip Carter went on a crime spree in 1984 during which he raped and killed two women, killed three others, and raped two more, all in their own homes. Pet. App. 2 at 8-10. His crimes began on March 25, 1984, when petitioner broke into the San Diego home of B.S., wielding a knife and demanding money. *Id.* at 9. He stole her money and then raped her before taking her car. *Id.* Two days later, petitioner raped J.S. at knifepoint in Ventura County, cut her face, strangled her until she was unconscious, and stole her cash. *Id.* Five days after that, petitioner was seen meeting Tok Kim at a bar in Alameda County; about two weeks later Kim's decomposing body was found in her Oakland apartment with a curtain tied beneath her neck. *Id.* at 9-10. By April 11, petitioner had returned to Southern California, where he raped, strangled, and killed Jillette Mills and killed her roommate Susan Knoll, leaving both bodies stacked in a closet in their Culver City apartment. *Id*. at 10. Around the same time, petitioner raped and strangled Knoll's friend Bonnie Guthrie to death with a ligature in Los Angeles. *Id*. at 11. And on April 12 or 13, petitioner strangled Janette Cullins to death with a ligature. *Id*. at 11-12; *see also generally* Pet. App. 14 at 277-287.

On April 17, an Arizona Highway Patrol Officer initiated a traffic stop as petitioner was driving the car of one of his victims (Mills). Pet. App. 2 at 12-13. Seeing what appeared to be a burnt marijuana cigarette, the officer placed petitioner under arrest; while searching the car for marijuana, the officer noticed the bank identification card of another victim (Cullins) between the driver's seat and center console. *Id.* at 13. A later search of the vehicle yielded items belonging to several other victims, including a suitcase, knife, gloves, and gold chain that belonged to Kim; a supermarket card that belonged to Knoll; towels, athletic wear and photographic equipment belonging to Mills; three handwoven sweaters that belonged to Guthrie; and a key ring belonging to Cullins and a piece of paper with Cullins's bank password written on it. *Id.* A "Members Only" jacket that matched the description of the jacket petitioner was seen wearing when he was with Kim was also found inside the car. *Id.* at 13. Inside the jacket, there was a butcher knife, a knee-high nylon sock, and business card from a service station petitioner went to with Kim. *Id.* at 9, 13.

2. Petitioner was prosecuted in separate cases in Los Angeles and San Diego Counties. Pet. App. 2 at 7.[1]

a. In the Los Angeles case, petitioner was charged with three counts of murder and burglary in connection with the deaths of Guthrie, Mills, and Knoll, and with raping Guthrie and Mills. Pet. App. 14 at 276-277. The prosecution alleged that the murders had been committed under special circumstances that would render petitioner eligible for the death penalty if

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[1] In a separate proceeding in Ventura County, petitioner was convicted of robbery, rape, four counts of oral copulation, and two counts of assault with a deadly weapon for his crimes against J.S. Pet. App. 14 at 288. Those convictions are not at issue in this appeal. Petitioner was also charged in Alameda County with crimes arising out of the death of Kim, but those charges were ultimately dismissed. *Id.* at 304.

found to be true: multiple murder, murder during the commission of burglary, and murder during the commission of rape. Pet. App. 7 at 85-86; *see* Cal. Penal Code § 190.2(a)(3), (a)(17)(C),(G).

Petitioner was initially represented by Ezekiel Perlo and Marcia Morrisey in his Los Angeles case. Pet. App. 2 at 21. In March 1988, however, the trial court appointed Rowan Klein to assist petitioner with a motion to substitute counsel. *Id.* The court then conducted an ex parte hearing pursuant to *People v. Marsden*, 2 Cal.3d 118 (1970), a procedure under California law to address substitution of appointed counsel. Pet. App. 2 at 21. After finding a total breakdown of the attorney-client relationship between Perlo and petitioner, the court granted petitioner's motion to substitute counsel, and appointed Howard Gillingham as lead counsel, with Morrisey continuing as co-counsel. *Id.* at 21-22.

The Los Angeles trial began in June of 1989, about a year after Gillingham was appointed. Pet. App. 2 at 20-21; Pet. App. 14 at 351 n., 28. During the guilt phase, the prosecution presented evidence of the charged crimes against Knoll, Mills, and Guthrie as well as evidence of the deaths of Kim in Alameda County and Cullins in San Diego. Pet. App. 14 at 277-285. After the prosecution rested its guilt-phase presentation, Gillingham requested a *Marsden* hearing, and during that hearing informed the court that while there were a number of potential witnesses that could be called during the guilt phase, counsel had made a tactical decision not to call them. Pet.

App. 2 at 22; *see also* Pet. App. 15 at 403-407. Gillingham indicated that petitioner disagreed with that strategy, and wanted his disagreement preserved in the record. Pet. App. 2 at 22. The trial court noted that the record was clear and agreed with Gillingham that the decision about whether to call witnesses was one reserved for counsel. *Id.*

The defense did not present any evidence at the guilt phase. Pet. App. 14 at 287. Before closing argument, Gillingham requested another *Marsden* hearing, during which he clarified that his decision not to call any defense witnesses also precluded petitioner from testifying about "what those witnesses would have testified to and the effect of their testimony." Pet. App. 2 at 23; *see also* Pet. App. 16 at 413. Later that day (and after closing arguments) the court held another hearing in which Gillingham informed the court that petitioner wanted the record to reflect that he disagreed with the defense closing argument, found it inadequate, and believed it compounded the problems he perceived regarding not presenting defense witnesses. Pet. App. 16 at 414. During jury deliberations, Gillingham requested another hearing "under the ambit of *Marsden*," explaining that petitioner continued to express disappointment with how counsel had handled the case and that petitioner was requesting the court to appoint Klein to prepare a new trial motion or some pre-penalty phase motion. Pet. App. 17 at 417-421. The court denied the motion, concluding that it was premature. *Id.* at 420-421.

The jury found petitioner guilty of forcible rape and first degree murder of Mills, forcible rape and first degree murder of Guthrie, first degree murder of Knoll, and two counts of residential burglary. Pet. App. 7 at 85. It also found true a multiple-murder special-circumstance allegation and a rape special-circumstance allegation as to the murders of Mills and Guthrie, and burglary special-circumstance allegations as to all three murders. *Id.* at 85-86.

b. During the penalty phase, the prosecution presented evidence of petitioner's rape of J.S. in Ventura County and his felony convictions for burglary in 1974 and 1977. Pet. App. 14 at 287-289. Defense counsel presented "an extensive mitigation case" by calling 21 witnesses in support of a "multi-faceted" presentation of "various aspects of" petitioner's "background and character." *Id.* at 289. Two of petitioner's siblings testified that their parents were alcoholics who stayed out late drinking and engaged in "extreme arguing," including hitting and throwing furniture at each other, and described how their mother would sometimes get "carried away" with discipline. Pet. App. 2 at 62. A neighbor described petitioner as being "like an orphan" as a child. *Id.* "Set against this background, the jury heard about dramatic instances of abuse and petitioner's unusual family life." *Id.* When petitioner was seven or eight, his mother came home around 2 a.m., and started to leave again to pick up his father when petitioner ran after the car and hung onto the bumper while his mother drove off, dragging him over a gravel road. *Id.* When petitioner was eight or nine years old, his father chained him to a bed "at least once." *Id*. Petitioner often ran away from home "in the midst of all this misery," including once by plane to Anchorage. *Id*. When he was eight or nine, his parents sent him to a home, described as a "jail or something for children," far from his family's home; his family did not visit him there. *Id*.; *see also* Pet. App. 14 at 289-290.

Petitioner's counsel also introduced evidence showing that petitioner had turned his life around by the late 1970s. Pet. App. 14 at 290. Witnesses testified that he became an accomplished cameraman, got married, and had twin boys. *Id.* Shortly thereafter, however, petitioner became addicted to cocaine, which soon "dominated his life." *Id.* By 1983, petitioner and his wife had divorced and he was no longer permitted to visit his children, leaving petitioner "'disgruntled,'" "'heartbroken,'" and "'angry.'" *Id.*

The jury returned a death verdict for the murders of Knoll, Mills, and Guthrie. Pet. App. 14 at 277. After that verdict, Gillingham again requested a *Marsden* hearing and asked that he and Morrisey be relieved as counsel, citing petitioner's lack of confidence in them and petitioner's feelings and opinions about how the case was handled. Pet. App. 2 at 25-26. Gillingham confirmed that he and Morrisey would be unable ethically to pursue the types of claims petitioner wished to raise in a motion for a new trial. *Id* at 26. The court relieved Gillingham and Morrisey, and appointed Klein to represent petitioner on his motion for a new trial. *Id*.

In the hearing on that motion, Gillingham testified that petitioner "wanted to put on at all times a full-blown defense," and that Gillingham knew at the end of the prosecution's case-in-chief that petitioner disagreed with his decision not to present any witnesses at the guilt phase. Pet. App. 19 at 443; *see also id.* at 442-457. Petitioner also testified that he wanted to "call witnesses, put on a defense and testify." *Id.* at 461; *see also id.* at 458-472. The trial court denied the motion. *Id.* at 478.

c. In his direct appeal, petitioner claimed (among other things) that his constitutional right to testify in his own defense had been violated, and that the trial court failed to adequately inquire into the nature of his conflict with his trial counsel. Pet. App. 2 at 28; Pet. App. 14 at 376. The California Supreme Court rejected both claims. Pet. App. 14 at 376-379. The court recognized that the right to testify is a "question of fundamental importance," and a decision that must be made by the "defendant after consultation with counsel." *Id.* at 378. But it held that this right had not been violated in petitioner's case, in light of the fact that petitioner had never asked the trial court to testify, even though he "had ample opportunity during the course of three *Marsden* hearings to inform the court that he wished to testify, against the advice and over the objection of defense counsel, *even if defense counsel were permitted to decline to present any other defense witnesses who would support defendant's testimony*." *Id.* at 378-379. The court also noted that petitioner's defense counsel had repeatedly informed the trial court of the conflicts that had arisen with his client, but never told the trial court that his client wished to testify. *Id.* at 378-379. As a result, the court concluded that defendant had "acceded" to his attorney's "trial strategy" and had not "in fact" insisted on testifying. *Id.* at 377 n.40, 379.

For similar reasons, the California Supreme Court rejected petitioner's claim that the trial court had not adequately inquired into the conflict between petitioner and his counsel. Pet. App. 14 at 379. The court noted that during the three *Marsden* hearings, petitioner's counsel "brought to the [trial] court's attention [petitioner's] dissatisfaction with counsel's trial strategy and tactics," but had not mentioned petitioner's desire to testify. *Id.* Based on the record before it, the California Supreme Court concluded that the trial court had "adequately inquired as to the issues raised by the defense, and that counsel fairly characterized the nature of the conflict for the trial court." *Id.*

Petitioner also filed a habeas corpus petition in the California Supreme Court, arguing that his counsel had rendered ineffective assistance during the penalty phase by failing to adequately investigate and present evidence of his abuse as a child and that he suffered from Fetal Alcohol Syndrome (FAS) and other mental impairments. Pet. App. 2 at 63. The court summarily denied that petition. *Id.*; Pet. App. 9 at 233-234.

c. Petitioner then sought federal habeas relief. Pet. App. 2 at 30; Pet. App. 7 at 86-87. With respect to his right-to-testify claim, the district court held that the California Supreme Court's factual determination that petitioner acceded to his counsel's tactical decision not to testify was reasonable. Pet. App. 7 at 101. In reaching that conclusion, the district court relied on a presumption that defendants assent to their attorney's tactical decision not to have them testify, as well as "[p]etitioner's failure to move for new counsel when [his counsel] intended to rest" without calling witnesses. *Id.* The court also noted that petitioner never insisted on testifying even if no other defense witnesses would be called. *Id.* at 99. And it held that the California Supreme Court's determination that the trial court adequately inquired into petitioner's disagreement with his counsel was not objectively unreasonable. *Id.* at 103.

With respect to his ineffective assistance of counsel claim, because the California Supreme Court did not assess that claim in a reasoned decision, the district court was required to "determine what arguments or theories supported . . . or could have supported . . . the state court's decision." Pet. App. 7 at 89 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). The district court held that the California Supreme Court could reasonably have concluded that counsel's choice not to present additional evidence of petitioner's abuse as a child did not prejudice petitioner because it "'largely duplicated' the evidence that was presented"; and that the decision not to introduce evidence about FAS or other mental impairments could have been explained by counsel's concern that the "jury would have reacted unfavorably to the suggestion that once [p]etitioner had left childhood, his brutal aggression was essentially inevitable." *Id.* at 145-146.

d. The court of appeals affirmed in a unanimous, per curiam decision. *See* Pet. App. 2 at 3-71. With respect to petitioner's conflict-of-counsel claim, the court recognized that, under circuit precedent, a defendant could establish that his right to effective counsel had been violated by establishing that there had been an "'irreconcilable conflict'" between himself and his trial attorneys. Pet. App. 2 at 31 (quoting *United States v. Moore*, 159 F.3d 1154, 1158-1159 (9th Cir. 1998)). But the court held that the California Supreme Court's conclusion that no such conflict existed was reasonable, in light of the fact that both petitioner and his counsel testified that they spoke "many times before and throughout the trial about tactical decisions." *Id.* at 31. In light of that evidence, the California Supreme Court had reasonably concluded that the conflict in petitioner's case was over trial strategy and tactics, but did not rise to the level of a "complete breakdown in communication." *Id.* at 31-32.

In the alternative, the court of appeals held that even if petitioner could demonstrate such a breakdown, his claim would fail because the decisions of this Court had never held that an "irreconcilable conflict with one's attorney constitutes a per se denial of the right to effective counsel." Pet. App. 2 at 32. Instead, this Court's conflict-of-interest cases had all arisen in the context of "conflicts of interest between other clients the counsel represented." *Id.* at 33. As a result, the court reasoned that petitioner could not show that the California Supreme Court's decision was an unreasonable application of "'clearly established Federal law' as pronounced by the U.S. Supreme Court."

Id. at 32 (quoting 28 U.S.C. § 2254). And petitioner's claim that the trial court failed to adequately inquire into the "nature of the attorney client-relationship" failed for the same reason: no decision of the Supreme Court "explicitly hold[s] that a trial court must ask the defense attorney and defendant about a conflict." *Id.* at 34.

The court of appeals also rejected petitioner's claim that his right to testify had been violated. Pet. App. 2 at 35-39. It reasoned that the California Supreme Court had correctly identified that the right to testify was a "fundamental constitutional right." *Id.* at 37. And the state court's conclusion that petitioner "acceded to [his attorney's] trial strategy"—which included the decision not to have petitioner testify—was "not an unreasonable determination of fact." *Id.* at 37.

Finally, the court of appeals rejected petitioner's ineffective assistance of counsel claim. Pet. App. 2 at 61-70. It held that the California Supreme Court could have reasonably concluded that the decision to limit the number of witnesses who testified about petitioner's childhood abuse was "based on strategic choices after a reasonable investigation." *Id.* at 63. In particular, it noted that defense counsel had decided that "there was no history of child abuse so significant that it would tie in with a general theory as-to why [petitioner] ends up murdering anyone." *Id.* at 67. It also observed that petitioner's "arguments downplay[ed] his own role in what he claims to be a stunted investigation," noting there was evidence that he told his siblings not to talk with defense investigators. *Id*. at 66. And it held that the California Supreme Court could have reasonably concluded that petitioner was not prejudiced by any failure to introduce more evidence about his childhood abuse because much of it was based on "hearsay," or "contradictory," or otherwise "weak." *Id*. at 70. In addition, the court of appeals rejected petitioner's claim that his counsel should have investigated whether he suffered from FAS or other mental impairments, concluding that such evidence "would not have been well received because of the evidence that [petitioner] acted so rationally over such a long period of time." *Id*. at 68.

3. After petitioner had been convicted and sentenced to death in Los Angeles County, he was prosecuted in San Diego County for the murder and robbery of Cullins and the burglary of her home, and the rape, forced oral copulation, and robbery of B.S., and the burglary of her home. Pet. App. 2 at 8, 14. Special circumstances were alleged that, if true, would render petitioner eligible for the death penalty: that the murder was committed while lying in wait; that it was committed during the commission of a robbery and burglary; and that petitioner had previously been convicted of murder. Pet. App. 13 at 240; *see* Cal. Penal Code §190.2(a)(2), (a)(15),(a)(17)(C),(G).

a. During the guilt phase of trial, the prosecution presented evidence about the crimes charged against Cullins and B.S., in addition to evidence regarding the murders of Kim, Knolls, Guthrie and Mills and the rape of J.S. Pet. App. 13 at 241-247. The defense called witnesses relating to the murders of Knoll, Mills, Guthrie, and Cullins, and the rape of B.S. Pet. App. 13 at 247. Outside the presence of the jury, the trial court admonished petitioner that he had the right to testify or not testify, and petitioner replied that he was not going to testify. *Id*. The jury found petitioner guilty of each crime charged. *Id.* at 240.

During the penalty phase, the prosecution introduced evidence of petitioner's two prior burglary convictions and his conviction in Ventura County for rape. Pet. App. 13 at 248. It also presented evidence that petitioner possessed a "shank" and 22-inch pipe while in the San Diego County jail. *Id.* Petitioner presented a mitigation defense similar to the defense in his Los Angeles case, consisting of "extensive evidence pertaining to [his] difficult childhood and upbringing in Alaska . . . as well as evidence that he was an accomplished and cooperative television cameraman and a good father and friend." *Id*. at 248-249. The jury returned a death verdict. *Id*. at 240.

b. The California Supreme Court affirmed the judgment (although it set aside the lying-in-wait special circumstance.) Pet. App. 13 at 241. Petitioner filed a state habeas corpus petition, alleging that his counsel was ineffective during the penalty phase for inadequately investigating mitigating evidence of childhood abuse, FAS, or other mental impairments. Pet App. 2 at 43. The court summarily denied the petition. *Id*.

c. Petitioner then sought federal habeas relief, alleging that his counsel rendered ineffective assistance for failing to adequately investigate and present mitigating evidence in the penalty phase (among other things). Pet. App. 2 at 16, 42. The district court denied the petition. *Id.* at 16, 71.

d. The court of appeals affirmed the denial of habeas relief in the same opinion in which it addressed petitioner's appeal of the denial of his federal habeas petition regarding the Los Angeles judgment. *See* Pet. App. 2 at 4. The court held that the California Supreme Court could reasonably have concluded that counsel made a legitimate tactical decision to pursue a "strategy of focusing on positive aspects of [petitioner's] career and family life as an adult rather than giving greater emphasis to his traumatic childhood and mental illness." *Id.* at 42. It also recognized that if counsel had decided to present petitioner as a "metaphorical feral dog kenneled by his alcoholic parents," some of the additional testimony about his childhood abuse would have been relevant. *Id.* at 48. But it concluded that the decision not to introduce that evidence was reasonable in light of the chosen strategy, and because that evidence "may have backfired by leading the jury to infer that the adult [petitioner] was beyond rehabilitation." *Id.*

The court of appeals also rejected petitioner's contention that competent counsel would have investigated and presented evidence of FAS or other mental impairments. Pet. App. 2 at 56. It held that the California Supreme Court could have reasonably concluded that counsel's decision not to further investigate FAS was a legitimate tactical decision in light of the fact that the only evidence about petitioner's mother's drinking was that it occurred *after* she had children. *Id.* The court of appeals also held that the California Supreme Court could have concluded that counsel's decision not to pursue a mental health defense was a reasonable strategic decision. *Id.* at 54-57. It noted that counsel had ordered a PET scan of petitioner's brain and, after conferring with an appropriate expert, informed the trial court that counsel was making an express tactical decision not to present mental health evidence. *Id.* at 55. That tactical decision, the court of appeals held, was supported by the aggravating mental health evidence in the record, including one mental health report that petitioner had a "'fairly classic sociopathic personality.'" *Id.* at 54-56 & n. 7.

ARGUMENT

Petitioner asks this Court to grant certiorari to review his claims that his Sixth Amendment right to effective trial counsel was violated in his Los Angeles case, and that counsel in both his Los Angeles and San Diego cases rendered ineffective assistance. The court of appeals properly resolved each claim under 28 U.S.C. § 2254(d), and 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. Petitioner first asks this Court to grant review of his claim that the trial court failed to "'take adequate steps to ascertain whether' new counsel [was] warranted" after learning about a "potential conflict between [petitioner]

and his attorney." Pet. 14 (quoting *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978)). That claim does not merit further review.

a. A federal habeas court may only grant relief upon a showing that a state court's adjudication of the claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d). For purposes of this provision, "clearly established Federal law" includes "only the holdings, as opposed to the dicta, of this Court's decisions." *White v. Woodall*, 572 U.S. 415, 419 (2014) (internal citations and quotation marks omitted). This rule reflects Congress's conclusion that under AEDPA, "state courts play the lead role in assessing challenges to state sentences based on federal law." *Shinn v. Kayer*, 141 S. Ct. 517, 526 (2020) (per curiam).

Petitioner argues that the "clearly established law" governing his claim that the trial court did not adequately inquire into the conflict between petitioner and his trial counsel was articulated by this Court in *Holloway,* 435 U.S. 475, *Wood v. Georgia*, 450 U.S. 261, 272 (1981), *Wheat v. United States*, 486 U.S. 153, 160 (1988), and *Mickens v. Taylor*, 535 U.S. 162, 168 (2002). Pet. 12-18. According to petitioner, these cases establish a "general principle that a [trial] court must inquire into a conflict between a defendant and his attorney." *Id.* at 14. As the court of appeals explained, however, there is no "clearly established federal law" holding "that a trial court's failure to inquire into the nature of the attorney-client relationship is a per se violation of a defendant's Sixth Amendment rights." *Id.* at 34. Instead, all of the cases petitioner cites involve only a "conflict[] of interest between *other* clients the counsel represented." *Id.* at 33 (emphasis added).

For example, in *Holloway* this Court held that the trial court erred by failing to appoint separate counsel or take "adequate steps" to determine whether separate counsel was needed after the attorney representing three codefendants moved for each defendant to be represented by separate counsel because of the risk that he would be forced to "represent[] conflicting interests." 435 U.S. at 477, 484. In *Wood*, the Court held that the trial court should have investigated whether there was an "actual conflict of interest," where the evidence before it showed that the defendants' attorneys were being paid by their employer, who may have had an interest in the outcome of the litigation that diverged from the defendants'. *Wood*, 450 U.S. at 272-273. The other cases petitioner cites likewise address conflicts of interests arising from other clients counsel represented. *See Mickens*, 535 U.S. at 165 (representing the victim in the charged crime at time of the crime); *Wheat*, 486 U.S. at 163 (representing co-conspirators government intended to call as witness against defendant).

Petitioner would expand these decisions to apply to any case in which the trial court "learns about a potential conflict between a defendant and his attorney." Pet. 14. But this Court has explained that when none of its cases "confront 'the specific question presented by th[e] case'" at bar, a state court's decision cannot be "'contrary to' any holding from this Court." *Woods v. Donald*, 575 U.S. 312, 317 (2015) (per curiam) (quoting *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam)). And while petitioner is correct that Section 2254(d) does not require a "nearly identical factual pattern before a legal rule must be applied," Pet. 15, his assertion that *Holloway* and its progeny apply anytime there is a "conflict between a defendant and his attorney," Pet. 14, frames the "issue at too high a level of generality," *Woods*, 575 U.S. 318. As the court of appeals explained, "[t]he term 'conflict' can refer to different forms of conflict, and care must be taken not to mix them up." Pet. App. 2 at 33. And this Court has never held that a disagreement between a defendant and his attorney over "trial strategy . . . amounts to an actual conflict of interest" that violates the Constitution. *Id.* (citation omitted).

b. Even if petitioner were correct that clearly established federal law requires an investigation any time there is a conflict between a defendant and his attorney, the California Supreme Court reasonably concluded that the trial court adequately investigated the conflict here. *See* Pet. App. 14 at 372-380. The trial court "conducted three *Marsden* hearings during the course of the trial for the purpose of permitting the airing of the conflict between defendant and his attorneys." *Id.* at 379. During those hearings, petitioner's counsel informed the trial court that petitioner was "dissatisf[ied] with [his] trial strategy and tactics." *Id.* Based on the "record before [it]," the California Supreme Court held that counsel had "fairly characterized the nature of the conflict for the trial court" as a disagreement over trial tactics, and that the trial court had "adequately inquired as to the issues raised by the defense." *Id.*

In arguing otherwise, petitioner emphasizes that the trial court did not ask him a "single question and it asked counsel only four questions." Pet. 17. But he does not dispute that the trial court held several *Marsden* hearings, during which his defense attorneys informed the trial court that they were of the "firm belief that [they] should rest" and not put on a defense at the guilt stage; that they were making a "tactical decision not to call" witnesses at that juncture; and that petitioner "emphatically disagree[d]" with that strategy. Pet. App. 15 at 403-405. After hearing counsel's description of the points of disagreement, the trial court concluded that the dispute was one over trial tactics; and that in those matters the "decisions should be with counsel." *Id.* at 405, 407. This is not a case where the "trial judge cut off any opportunity of defense counsel to do more than make conclusory representations," *Holloway*, 435 U.S. at 484 n.7; nor is it a case where the trial court made *no* inquiry into the possibility of a conflict in the face of facts that "convincingly" suggested that such a conflict existed, *Wood*, 450 U.S. at 272-273.[2]

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[2] To the extent petitioner argues that the trial court was required to ask him about the nature of his relationship with his attorney, he is incorrect: as this Court has recognized in the context of cases in which an attorney represents

c. Petitioner also attempts to recast his claim as a dispute over his "right to testify in [his] own defense." Pet. 15. While the Constitution guarantees criminal defendants the right to "testify in one's own behalf," *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018), in this case the "California Supreme Court did not conclude that [petitioner] lacked a right to testify if he had asserted that right." Pet. App. 2 at 37.[3] Instead, it held as a factual matter that petitioner "acceded to [his counsel's] trial strategy," Pet. App. 14 at 377 n.40, including the decision not to put petitioner on the stand. That conclusion was supported by the record: petitioner's counsel repeatedly informed the trial court about conflicts that had arisen between petitioner and his counsel, but during those *Marsden* hearings the trial court was not presented with any information indicating that petitioner had demanded to testify in his own defense. *Id.* at 378-379. And it was "reasonabl[e]" for the trial court to conclude that if petitioner had wanted to testify on his own behalf, his counsel would have "conveyed that demand" to the trial court. *Id.* at 379; *see also Cuyler v.*

multiple parties in the same proceeding, trial courts "necessarily rely in large measure upon the good faith and good judgment of defense counsel" in determining whether a conflict of interest exists. *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980).

[3] As discussed, *Holloway* and its progeny discuss only the constitutional concerns that arise when an attorney's loyalties are divided between more than one client. *See supra* pp. 17-18. But this Court has recognized that the right to make certain fundamental decisions about a trial—including the right to testify—is guaranteed by "several provision of the Constitution," including the Due Process Clause of the Fourteenth Amendment and various provisions of the Fifth and Sixth Amendments. *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987).

Sullivan, 446 U.S. 335, 347 (1980) (trial courts may rely on "good faith and good judgment of defense counsel" in evaluating conflict of interest claims).

Petitioner attacks that conclusion as an unreasonable determination of fact, based largely on testimony introduced during a hearing on his motion for a new trial. *See* Pet. 13 n.2. As the California Supreme Court explained, however, a careful reading of that testimony shows that petitioner is incorrect. During the hearing, petitioner testified that he had wanted to "*call witnesses*, put on a defense and testify." Pet. App. 19 at 461 (emphasis added); *see also id.* ("I told [my attorneys] I wanted them to subpoena the witnesses I wanted to call, and that I wanted to put on a defense, and I wanted to testify."). Petitioner's trial counsel similarly testified that petitioner wanted to put on a "full-blown defense," which may have included calling petitioner to testify. *Id.* at 443. At most, the record shows that petitioner wanted to testify in conjunction with the presentation of other evidence—including the calling of the other "witnesses [he] wanted to call." *Id.* at 461. On this record, it was not unreasonable for the California Supreme Court to conclude that petitioner did not express a desire to testify "*even if defense counsel were permitted to decline to present any other defense witnesses*." Pet. App. 14 at 378.[4]

[4] Petitioner does not dispute that his attorneys' decision "not to put certain witnesses on the stand" was a tactical decision that they were entitled to make. *Taylor v. Illinois*, 484 U.S. 400, 418 (1988).

2. Petitioner also argues that the court of appeals erred in rejecting his claim that defense counsels' investigation and presentation of mitigating evidence in the penalty phase of his San Diego trial denied him effective assistance of counsel. Pet. 20-31. That fact-intensive argument does not warrant further review.

a. As the court of appeals recognized, *Strickland v. Washington*, 466 U.S. 668 (1984), governs ineffective assistance of counsel claims. Pet. App. 2 at 19. *Strickland*'s two-part test requires petitioner to show that (1) his counsel's performance was deficient, meaning that it fell below an objective standard of reasonableness, and (2) but for counsel's failings, there is a reasonable probability the outcome of the proceeding would have been different. *Id*. (citing *Strickland*, 466 U.S. at 687-88). Where a claim of ineffective assistance of counsel involves the alleged failure to present mitigating evidence, as here, the petitioner must "establish 'a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing,' and 'that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned a different sentence.'" *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (citation omitted).

Strickland's performance prong requires a court to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. And establishing that a state court's application of *Strickland* is unreasonable under Section 2254(d) is "all the more difficult." *Harrington v. Richter*, 562 U.S. 86, (2011). As the court of appeals explained, review of a federal habeas court's analysis of *Strickland*'s performance prong is "'doubly deferential,'" as both the state court and defense counsel must be afforded the benefit of the doubt. Pet. App. 2 at 20 (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)). And where the state court summarily denied the claim advanced in a federal habeas petition, the petitioner must show that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. In that circumstance, the federal habeas court must "determine what arguments or theories . . . could have supported[] the state court's decision," and decide whether "it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with . . . a prior decision of this Court." *Id.* at 102. This standard is "difficult to meet." *Id.*

b. Petitioner claims that his counsel in the San Diego case rendered ineffective assistance by failing to conduct a more "thorough background investigation and wholly failing to present evidence in mitigation" that was "readily available, compelling, and non-cumulative" about his abuse as a child. Pet. 21. But the record shows that petitioner's counsel conducted an extensive investigation into his background. Pet. App. 2 at 51. Prior to trial, his five-person defense team traveled to his hometown of Nome, Alaska to gather evidence and interview family members and residents who knew petitioner as a child. *Id.* at 44, 52. At trial, petitioner's counsel called six of the people they interviewed to testify about his abuse as a child. *Id.* at 44-46. Included among the witnesses was petitioner's brother, who testified that their parents hit petitioner with branches, a belt, and a razor strap, and chained him to his bed on at least one occasion. *Id.* at 44-45. Petitioner asserts that his attorneys should have interviewed more witnesses about his childhood abuse; but counsel is entitled to "balance limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 107. At the very least, on this record it would have been reasonable for the California Supreme Court to conclude that petitioner's counsel made the "'requisite, diligent'" investigation that *Strickland* requires. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

The California Supreme Court also could have concluded that defense counsel's decision not to present additional evidence of petitioner's childhood abuse was reasonable in light of the defense strategy. While some of the evidence that petitioner now contends should have been introduced would have been non-cumulative and "relevant" to the claim that petitioner was a "metaphorical feral dog kenneled by his alcoholic parents," petitioner's trial counsel opted for a different mitigation theory: that petitioner overcame an abusive childhood home to find personal and professional success before his divorce sent him "spiraling into a life of violence." Pet. App. 2 at 48-50; *see also id.* at 50 (counsel procured the testimony of 21 witnesses whose testimony "formed a cohesive narrative of abuse, perseverance, success, and unraveling"). Petitioner does not dispute that this approach was a "legitimate tactical decision" for his attorneys to make, *id.* at 48; and there is a "strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect," *Richter*, 562 U.S. at 109 (internal quotation marks and citations omitted).

In arguing otherwise, petitioner asserts that the court of appeals "laid the blame for counsel's failure to follow-up on readily available and compelling mitigation evidence at the feet of [petitioner] and his mother, rather than at the feet of counsel, where it rightly belonged." Pet. 23 (internal quotation marks omitted). As just discussed, however, petitioner's counsel conducted a thorough investigation of his abuse as a child and put on substantial evidence about it. In any event, it was entirely appropriate for the court of appeals to consider petitioner's own conduct—which included telling two of his siblings not to cooperate with his defense counsel, *see* Pet. App. 2 at 66-67—in evaluating whether counsel rendered ineffective assistance. As this Court held in *Strickland*, the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691.[5]

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[5] To the extent petitioner argues that his trial counsel erred by failing to secure his mother's testimony, the record shows that counsel tried to interview her; that she cut the interview short; and that after the interview she refused to provide any further assistance to her son's trial defense. Pet. App. 2 at 46. *Strickland* requires only that counsel conduct "reasonable investigations," 466 U.S. at 691, and petitioner cites no case suggesting that counsel must compel a witness to testify in support of a family member convicted of capital murder.

Petitioner also argues that his counsel was ineffective because introducing more evidence about his childhood abuse would have supported the argument that petitioner "overc[ame] the horrors of his abusive childhood home." Pet. 24. But decisions about what evidence to introduce in support of a particular argument are the kind of tactical decision that counsel is entitled to make, especially in light of the "strong[] presum[ption]" that counsel "rendered adequate assistance and made all significant decisions in the exercises of reasonable professional judgment." *Strickland*, 466 U.S. at 690. In this case, petitioner's trial counsel could have reasonably decided that introducing more evidence of his childhood abuse would have "backfired by leading the jury to infer that the adult [petitioner] was beyond rehabilitation." Pet. App. 2 at 48; *cf. Cullen v. Pinholster*, 563 U.S. 170, 201 (2011) (additional evidence of childhood abuse is "by no means clearly mitigating, as the jury might have concluded that [the defendant] was simply beyond rehabilitation"); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 255 (2007) (mental retardation and child abuse evidence may diminish blameworthiness for a crime while also indicating defendant is dangerous in the future).

See Pet. App. 2 at 52-53 (the decision of whether to testify in these circumstances is an "intensely difficult, personal" one that "belongs to the witness alone"). Contrary to petitioner's suggestion, this case is nothing like *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam). *See* Pet. 23. In that case, the defendant's counsel "did not even take the first step of interviewing witnesses or requesting records." *Porter*, 558 US. at 39.

Petitioner further contends that this Court's decisions in *Williams v. Taylor*, 529 U.S. 362 (2000) and *Wiggins*, 539 U.S. 510 provide a "baseline standard for capital defense counsel" that was not met in his San Diego case. Pet. 22. But both cases are "materially []distinguishable" from this one. *Williams*, 529 U.S. at 406. As discussed, petitioner's trial counsel conducted an extensive investigation of his childhood by "travel[ing] to Alaska, hir[ing] a professional investigator to interview his relatives and neighbors, and put[ting] six of them on the witness stand to testify about his abusive childhood, his parents' alcoholism, and the conditions of discrimination he faced as an Alaska native." Pet. App. 2 at 52. Based on that investigation, counsel decided to argue at the penalty phase that petitioner "had suffered under abusive, negligent parents but had risen above this poor upbringing." *Id.* at 51. Petitioner's San Diego case is unlike *Williams*, where the defendant's attorneys failed to "uncover extensive records graphically describing [his] nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." *Williams*, 529 U.S. at 395. Nor is it similar to *Wiggins*, where the trial attorney's investigation was limited to reviewing a Presentencing Investigation Review Report and social service records, and the attorney failed to "follow up on any of the red flags apparent in Wiggins's social service records, including his mother's history of alcoholism and child neglect." Pet. App. 2 at 52 (citing *Wiggins*, 539 U.S. at 525).

b. Petitioner also argues that his trial counsel was deficient for "failing to investigate and present mental health evidence," including evidence that he suffered from Fetal Alcohol Syndrome (FAS). Pet. 26. As the court of appeals explained, however, there is "no evidence in the trial record that would have put [petitioner's] counsel on notice that [petitioner's mother] drank while pregnant." Pet. App. 2 at 56. Instead, the only evidence about the mother's drinking was that it occurred "in her later years, after she gave birth to her children." *Id.* And while petitioner suggests that his counsel should have suspected that his mother drank while pregnant because "alcoholism had pervaded the Native community for generations" and there is "no reason to think" that his mother (who was Native) had not "suffered from the same societal ills as her peers," Pet. 27, he cites no case in which that kind of speculation triggered a duty to conduct further investigations. Moreover—and as petitioner's own experts acknowledge—at the time of petitioner's trial in 1989, research about FAS was "still being undertaken" and "focused primarily [on] children." Pet. App. 46 at 778. Indeed, it was not until the American Bar Association updated its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty in 2003 that the ABA specifically listed FAS as a condition that trial counsel should screen for. *See Strickland*, 466 U.S. at 688 (ABA's standards are "guides to determining what is reasonable"); *cf.*

Richter, 562 U.S. at 107 (counsel is entitled to "balance limited resources" and "avoid activities that appear 'distractive from more important duties'").[6]

Petitioner's claim that his counsel did not adequately investigate whether he suffered from other mental impairments, Pet. 27, also fails. The record here shows that counsel in his San Diego case *did* investigate the issue by asking a physician to perform a positron emission tomography (PET) scan, consulting with "several experts" about the results, and sending them to Dr. Monte Buschbaum for analysis. Pet. App. 2 at 54. After the trial court held an in-chambers teleconference with petitioner's attorneys and Dr. Buschbaum, petitioner's counsel made a tactical decision not to present evidence about petitioner's mental health during the penalty phase. *Id.*; *see also* Pet. App. 23 at 497-520. As the trial court explained, allowing evidence on this point would have "open[ed] the door to more than just the testimony of this particular doctor and other issues." Pet. App. 23 at 520. For example, it may have led to the admission of several damaging mental health reports, including one that concluded that he had a "fairly classic sociopathic personality." Pet. App. 2 at 54-55; C.A. ER 1768.2 (Case No. 13-99007); *see also* Pet. App. 38, 39, 40, 41. This is "'not a case in which counsel failed to conduct *any* mental health investigation,'" Pet. App. 2 at 55; and it would not have been unreasonable for

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[6] The Guidelines can be found at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf.

the California Supreme Court to conclude that the decision not to introduce evidence that petitioner suffered from other mental impairment was part of a "sound trial strategy," *Strickland*, 466 U.S. at 689.[7]

3. Petitioner similarly argues that his trial counsel in the Los Angeles case was ineffective for failing to introduce evidence of his "nightmarish childhood, his FAS diagnosis, and evidence that he was brain damaged." Pet. 32. That argument also fails. Like his counsel in the San Diego case, petitioner's attorneys in the Los Angeles case "went to great lengths to investigate [petitioner's] troubled childhood." Pet. App. 2 at 65. They traveled to petitioner's hometown of Nome, Alaska, and spoke with about 40 different people. *Id.* They put on 21 witnesses during the penalty phase, who testified that petitioner's mother sometimes "got carried away administering discipline with the children"; that petitioner once tried to prevent his mother from leaving the family home by running after her car and "hanging on to the bumper" before being "dragged over a gravel road"; and that petitioner's father "chained him to a bed at least once." *Id.* at 62 (brackets omitted). And like his

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[7] Because petitioner's counsel in the San Diego case did not perform deficiently, there was no need to decide whether petitioner was prejudiced by that performance, and the court of appeals did not reach that issue. In any event, in light of the circumstances of this case and the aggravating evidence presented at the penalty phase, *see supra* pp. 1, 13, there is no reasonable probability that the jury "would have returned a different sentence" had it been confronted with the additional mitigating evidence petitioner argues should have been introduced. *Wong*, 558 U.S. at 20 (internal quotation marks and citation omitted).

attorneys in the San Diego case, petitioner's attorneys in the Los Angeles case could have reasonably decided not to present more evidence of his childhood abuse in light of their chosen defense strategy: to tell "the good about [petitioner]" and to "plead with the jury to spare his life." C.A. ER 994-995 (Case No. 13-99003); *see also* Pet. App. 2 at 67.

Petitioner's claim that his Los Angeles trial counsel failed to adequately investigate whether he suffered from FAS, Pet. 32-33, also fails. As in his San Diego case, there was no evidence in the Los Angeles case suggesting that his mother drank while pregnant with him; and FAS was a relatively new condition that was still being studied at the time of his trial. *See supra* p. 28.

Nor can petitioner prevail on his claim that his Los Angeles counsel was ineffective for failing to present evidence that he suffered from other mental impairments. Pet. 32-33. Like his San Diego counsel, petitioner's Los Angeles counsel made a strategic choice to present petitioner as someone who overcame a traumatic childhood, rehabilitated himself as an adult, got married, and had a "good job" before problems in his marriage developed and caused him to "fall[] apart." C.A. ER 994-995 (Case No. 13-99003). The California Supreme Court could have reasonably concluded that any decision to introduce evidence that petitioner was mentally impaired would have undermined the argument that petitioner had "acted . . . rationally over such a long period of time." Pet. App. 2 at 68. And as the district court concluded, much of the evidence petitioner argues should have been introduced was "speculative" and "vague"; indeed, one expert even opined that there was "insufficient evidence of impairment severe enough to compromise [petitioner's] capacity to know right from wrong." Pet. App. 7 at 120-122; *see also* Pet. App. 45 at 736.

To be sure, petitioner's trial counsel filed a declaration in support of the habeas petition criticizing his own performance in this respect. *See* Pet. App. 25 at 530. But that does not warrant a different result in this case. As the court of appeals concluded, an attorney's decision to "fall[] on his sword in retrospect is not dispositive," Pet. App. 2 at 65, for "even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better" after an adverse verdict, *Richter*, 562 U.S. at 109. *Strickland* is not an inquiry into counsel's "subjective state of mind," *id.* at 110; instead, it requires a court to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct," *Strickland*, 466 U.S. at 690.[8]

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[8] And even if the performance of petitioner's counsel in the Los Angeles case were viewed as deficient, petitioner could not establish prejudice. As the court of appeals observed, most of the additional evidence petitioner argues should have been introduced about his childhood abuse was "hearsay, contradictory, and weak." Pet. App. 2 at 70. And it is not reasonably probable that the jury would have reached a different conclusion had it been presented with evidence of FAS or other mental impairments, in light of the overwhelming evidence showing that petitioner concealed the bodies, staged crime scenes, moved the victim's vehicles to make it seem like they were not home, and attempted to escape by fleeing California in one of his victim's cars. *See* Pet. App. 14 at 277-287; *see also* Pet. App. 7 at 122 (district court's conclusion that under these circumstances, there is no reasonable probability of a different result at trial "in light of the evidence of rational decision making" that was placed before the jury).

4. Finally, the decision below does not create a circuit split about the importance of "evidence of FAS and brain damage" when conducting the prejudice analysis under *Strickland*. Pet. 34-35. As petitioner acknowledges, *see* Pet. 35, the court of appeals did not reach that prong of the *Strickland* inquiry in his San Diego case. *See also* Pet. App. 2 at 42-57. And in his Los Angeles case, the court concluded only that the failure to introduce "more evidence about the extent of the abuse [petitioner] suffered" was not prejudicial, because much of the additional evidence he pointed to was based on "hearsay, contradictory, and weak." Pet. App. 2 at 70. Petitioner's assertion that the Ninth Circuit has taken a "dismissive attitude" toward the significance of evidence of FAS or other mental impairments in other cases, Pet. 35, is not a basis for granting review in this one.

CONCLUSION

The petition for a writ of certiorari should be denied.

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