No. _____

IN THE

Supreme Court of the United States

SERGIO OCHOA

Petitioner,

v.

OAK SMITH, ACTING WARDEN

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

CUAUHTEMOC ORTEGA
Federal Public Defender
C. PAMELA GÓMEZ*
AJAY V. KUSNOOR
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-2854
Facsimile: (213) 894-0081
Pamela_Gomez@fd.org

Attorneys for Petitioner
**Counsel of Record*

CAPITAL CASE

QUESTION PRESENTED

In *Ochoa v. Davis,* the Ninth Circuit endorsed trial counsel's presentation of a "family sympathy" defense at the penalty phase of Sergio Ochoa's capital trial, even though counsel failed to conduct a thorough investigation of Ochoa's background before settling on this strategy. A thorough investigation of Ochoa's background and mental health would have revealed several categories of mitigating evidence that his jury should have heard: Ochoa has since been diagnosed with neuropsychological deficits and post-traumatic stress disorder, and further investigation revealed that he suffered from serious neglect and malnourishment in his earliest years. Does the Ninth Circuit's decision in *Ochoa* create a clear conflict with this Court's precedent in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), all of which compel that counsel conduct a thorough investigation of a capital defendant's background before settling on a penalty-phase strategy?

TABLE OF CONTENTS

TABLE OF CONTENTS

INDEX TO APPENDICES

INDEX TO APPENDICES

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

Federal Constitutional Amendments

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

OPINIONS BELOW

On October 5, 2022, the Ninth Circuit affirmed the district court's denial of relief in a published opinion. (Pet. App. A-069); *Ochoa v. Davis*, 50 F.4th 865 (9th Cir. 2023). The district court denied habeas relief and entered judgment against Ochoa in an unpublished opinion on August 13, 2018. (Pet. App. B-071-198, C-199.)

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). Justice Kagan granted a 60-day extension of the period for filing this petition to August 4, 2023. This petition is timely under Supreme Court Rules 13.1 and 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Section 1 of the Fourteenth Amendment to the U.S. Constitution

" . . . nor shall any State deprive any person of life, liberty, or property, , without due process of law."

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

I. LEGAL FRAMEWORK

Under *Strickland*'s test for ineffective assistance of counsel, a petitioner must show that his lawyer provided deficient performance and that he was prejudiced. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). Trial counsel's performance is deficient if, considering all the circumstances, it "fell below an objective standard of reasonableness . . . under prevailing

professional norms." *Id.* at 688. Under this objective approach, a federal court is required "to affirmatively entertain the range of possible reasons [trial] counsel may have had for proceeding as they did," *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011), without indulging on "'post hoc rationalizations' for counsel's decision-making that contradicts the available evidence of counsel's actions." *Harrington v. Richter,* 562 U.S. 86, 109 (2011) (quoting *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003).)

To prove prejudice, Ochoa "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. This is a lower burden of proof than a preponderance-of-the-evidence standard. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). It does not require proof that counsel's actions "more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. However, as this Court most recently stated, "[a] reasonable probability means a 'substantial,' not just 'conceivable,' likelihood of a different result." *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (quoting *Pinholster*, 563 U.S. at 189.) In determining prejudice, a federal court must "consider all the evidence -- the good and the bad," *Wong v. Belmontes*, 558 U.S. 15, 26, (2009) (per curiam), and "reweigh the evidence in aggravation

against the totality of available mitigating evidence," *Wiggins*, 539 U.S. at 534.

While this court's review of a *Strickland* claim under 28 U.S.C. § 2254(d)(1) is "doubly deferential", requiring a federal court to apply AEDPA deference on top of *Strickland* deference, *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009), this Court has found a state court unreasonably applied *Strickland* bound by the deference owed under § 2254(d)(1) even in cases where some mitigation was introduced. Thus, this Court has found deficient performance when counsel presented what could be described as a superficially reasonable mitigation theory based on remorse and cooperation with police as in *Williams*, 529 U.S. at 398 or residual doubt as in *Rompilla v. Beard*, 545 U.S. 374, 378 (2005), and unreasonable application of the prejudice prong as in this Court's decision in *Porter v. McCollum*, 558 U.S. 30, 42 (2009).

At the time of Ochoa's capital trial, both federal and California law recognized that trial counsel have an "obligation to conduct a thorough investigation of the defendant's background" prior to trial. *Williams,* 529 U.S. at 396 (recognizing such obligation from counsel as early as 1980, and for a state habeas proceeding that took place in 1988); W*iggins*, 539 U.S. at 524-25 (1989 capital trial); *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam) (1988 capital trial); *Jackson v. Calderon*, 211 F.3d 1148, 1162 (9th Cir. 2000)

(mid-1980s capital trial in Los Angeles Superior Court); *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc) (1983 capital trial in San Bernardino County); *In re Gay*, 19 Cal. 4th 771, 814-15 (1998) (1983 capital trial in Los Angeles County Superior Court); *In re Lucas*, 33 Cal. 4th 682, 725 (2004) (1987 capital trial in Los Angeles County Superior Court).)

In deciding whether trial counsel exercised "reasonable professional judgment," the focus is on whether "the investigation supporting counsel's decision not to introduce [particular] mitigating evidence of [a defendant's] background *was itself reasonable*." *Wiggins*, 539 U.S. at 523 (citing *Strickland*, 466 U.S. at 691). Such inquiry "includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time," *id.*, at 689 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight"). *Id.* at 523.

II. PROCEEDINGS BELOW

After a jury trial in Los Angeles County in 1992, Ochoa was sentenced to death for the murder and attempted robbery of Jose Castro and the murder of Pedro Navarette. At trial, the prosecution presented evidence that Ochoa and six other members of the 18th Street Gang were implicated in one or both homicides. Five of Ochoa's cohorts secured favorable dispositions in exchange for their testimony against Ochoa, who is the only person serving a death sentence for these crimes. (Pet. App. J-304 ("With the exception of Juan

Velasquez, who fled the country, defendant's cohorts all pleaded guilty prior to defendant's trial").)

A. Guilt-Phase Trial

1. The Navarette shooting

Pedro Navarette's death was the tragic fallout from an escalating confrontation between rival gangs: the Crazy Riders and the 18th Street Gang. In the weeks leading up to this crime, Crazy Riders shot two members of the 18th Street Gang: Luis Magallanes and Oscar Quijada. The 18th Street Gang believed that a Crazy Rider named Pompis was responsible for these crimes. Pedro Navarette, who was not a gang member, drove a car that looked like Pompis'. Mistaking Navarette's car for Pompis', an 18th Street gang member, Juan Velasquez, shot and killed Navarette. The district attorney prosecuted Ochoa as an accomplice to this crime. (Pet. App. J-249-50.)

As noted above, the 18th Street Gang sought to retaliate against the Crazy Riders for the shooting of Oscar Quijada. Quijada was shot on January 3, 1990, the same day as the Navarette crime. Quijada's brother, Walter Aguilar, met up with his friends from the 18th Street gang that night. When Ochoa arrived, he announced that he had just seen the Crazy Riders, and he instigated a pursuit of Pompis in retaliation. Aguilar, armed with a shotgun, got in Ochoa's car, along with Jacinto Alonzo, Mauricio Soriano, and Juan

Velasquez. Ochoa caught up to the white car they were looking for, and Velasquez fired a shotgun into the car, killing Navarette. (Pet. App. J-250.)

The prosecution called Detective Michael Bercham, who testified that Ochoa was a "hard-core" gang member, and that after his arrest, Ochoa had the number "187," tattooed on his forehead. (Pet. App. J-250-51.)

2. The David Castro shooting

David Castro was shot and killed during an attempted robbery on the night of January 20, 1990. The night of the crime, David Lozano, another 18th Street Gang member, drove Ochoa, Velasquez, Soriano, and Oscar Montes as they looked for a car to steal. They drove past a Trans Am (Castro's car). Lozano parked his car, and the other four got out and approached the Trans Am. Castro, sitting in the driver's seat, refused to give up his car and was shot. (Pet. App. J-251.) According to Lozano, Ochoa returned to Lozano's car and announced that he had shot a man in the leg. (Pet. App. J-252.) Ochoa was charged with and convicted of first-degree murder under a felony-murder theory, and the prosecutor repeatedly told the jury they need not find an intent to kill in order to convict Ochoa of this crime. (Pet. App. J-265-66.)

3. Guilt Verdict

The jury convicted Ochoa of two counts of first degree murder and one count of attempted second degree robbery, along with special circumstances for multiple murder and murder in the course of a robbery. (Pet. App. J-248.)

B. Penalty-Phase Trial

1. Evidence in Aggravation

Ochoa was previously found guilty for second degree robbery. Lionel Fricks testified that Ochoa assaulted him and stole his radio. (Pet. App. J-253.)

The prosecution also presented evidence that Ochoa was involved in a carjacking. Ochoa and three others approached Freddie Garcia and asked what gang he belonged to. Ochoa and another suspect kicked him. Ochoa allegedly threatened to shoot him if he refused to give up his car. (Pet. App. J-254.)

While he was awaiting trial, Ochoa was involved in a skirmish between Black and Hispanic inmates at the North County Correctional Facility. (Pet. App. J-254.)

A deputy sheriff at the jail recovered a home-made handcuff key from Ochoa. Ochoa's property was searched—he was found in possession of a shank. (Pet. App. J-254.)

The prosecution also presented victim impact testimony. Pedro Navarette's brother and Jose Castro's sisters and wife testified about how the loss of their loved ones impacted their lives. (Pet. App. J-254-55.)

2. Evidence in Mitigation

Defense counsel's case in mitigation rested largely on the testimony of four witnesses: Rosalba ("Rosie") Gallegos, Lisa Martinez, Eduardo Ochoa, Sr., and a psychologist, Dr. Michael Maloney. All four portrayed Ochoa as the product of a loving and supportive home environment. Ochoa's sister and father characterized him as an outlier in contrast to his law-abiding and well-adjusted siblings, and Dr. Maloney testified that there was no "mental health cause" for his behavior. Collectively, their testimony portrayed Ochoa as a person who had many advantages in life, but nonetheless chose to affiliate with a gang and commit crimes for unexplained reasons. Mitigating evidence regarding Ochoa's traumatic life history was limited to testimony about his immigrant family's difficult adjustment to life in Los Angeles and testimony about a violent assault on his sister, Gloria.

Rosie testified that Ochoa came from a loving family that cared for him and emotionally supported him. Rosie testified that she had been a surrogate mother to Ochoa from birth, that she and her parents both looked after Ochoa, that their mother was always at home when the kids came back from school, and that there was never a time when her brothers and sisters had to

fend for themselves. (Pet. App. N-340-42) She testified that Ochoa's parents did everything they could to help Ochoa turn out right and their parents gave the Ochoa children everything they needed. (Pet. App. N-343-44) She claimed Ochoa was the only one of her siblings to have substantial problems with the law. (Pet. App. N-342.) She claimed that she was upset by Ochoa's gang tattoos, and that she, herself, did everything she could to help him. (Pet. App. N-343.) Rosie's testimony about the challenges she and her siblings faced growing up was limited to the following: (1) when Ochoa was 3 years old and the family first moved to Los Angeles from Mexico, they were taunted and tormented by neighborhood children, who threw hot water on them, called them "wetbacks," took their food, and destroyed their laundry (Pet. App. N-327-31); (2) when Ochoa was 7 or 8, the family moved to 27th and Arlington Street, and was again taunted by neighborhood children, suffered a robbery a month after they moved to the neighborhood, and later saw other children wearing their clothing at school (Pet. App. N-332-35); (3) at age 14, Ochoa started dressing differently and skipping school (Pet. App. N-336-37); and (4) Ochoa's sister Gloria was brutally assaulted and hospitalized when Ochoa was 17 years old (Pet. App. N-337-38.)

Similarly, Ochoa's ex-girlfriend, Lisa Martinez, emphasized that Ochoa's parents were loving parents and grandparents. (Pet. App. O-365-66.) Martinez met Ochoa when she was 17 and he was 15. They had a child

together. (Pet. App. O-351-52.) She moved to Mexico City with Ochoa for 6 or 7 months when he was 17 years old. (Pet. App. O-353-54.) She lived in the Ochoa house for two years. (Pet. App. O-355.) Martinez attended a dental technology school with Ochoa, but they both had trouble getting any work from it. (Pet. App. O-356-62.) She testified that Ochoa was an attentive father and not on the streets much when they were living together. (Pet. App. O-363-64.)

Ochoa's father, Eduardo Sr., testified that he and his wife always took an interest in their children and their problems. (Pet. App. Q-391.) He went to court with Ochoa whenever he got in trouble and advised him to stay out of trouble. (Pet. App. Q-391-93.) He testified that Rosie was like a mother to Ochoa and that she looked after him when he and his wife were at work. (Pet. App. Q-393.) He claimed that, of all of his children, only Ochoa got in trouble with the law. (Pet. App. Q-393-94.) He testified that he and his wife worked long hours when they first arrived in the United States and later when they tried to run a restaurant (Pet. App. Q-386, Q-388-89); that his children had problems with neighborhood children when they first moved to Los Angeles (Pet. App. Q-387); and that the family was robbed shortly after they moved to Arlington and 27th Street. (Pet. App. Q-390.)

The only mitigation expert who testified at Ochoa's trial was a psychologist, Dr. Michael Maloney. He testified "largely on [Ochoa's] own

report" (Pet. App. P-381), that Ochoa's family was supportive and concerned, without any evidence of problems. (Pet. App. P-375 (Ochoa "comes from a supportive family, a concerned family;" "I don't see a negative family background," any evidence of "alcohol or drug abuse problems," or "significant emotional disturbances.").) He further testified that Ochoa's older sister was like a surrogate mother for him. (Pet. App. P-375, 852.)

Dr. Maloney opined there was no mental health cause for Ochoa's behavior (Pet. App. P-375-77), although he acknowledged that Ochoa's verbal I.Q. was at 74 and he had marginal academic skills (Pet. App. P-371; P-373-74; P-377); that he had elevated levels on three scales of the Minnesota Multi-Phasic Personality Inventory (MMPI), which suggested higher-than-normal levels of anxiety and alienation; and that he seemed depressed (Pet. App. P-379.) Dr. Maloney testified that the "187" that Ochoa had tattooed on his forehead after his incarceration on the murder charges could have indicated a lack of remorse for the offenses, or alternatively, a simple desire to assert himself in the "pecking order" of the prison gang hierarchy and to signal to fellow inmates that he was tough. (Pet. App. P-379.)

The remaining defense evidence at penalty was presented in rebuttal to the prosecution's case-in-aggravation. Leland Bradford testified that Ochoa was an accomplice to the Frick robbery, rather than the principal. Three witness testified that Ochoa was a lesser player in the jail fight. (Pet. App. J-

255.) A correctional consultant, James Park, testified regarding security measures in place at high-security California prisons housing life prisoners. (Pet. App. J-257.)

The jury sentenced Ochoa to death for both the Castro homicide and the Navarette homicide.

C. Ochoa's convictions and sentences were affirmed on direct appeal.

Ochoa appealed his convictions and sentences to the California Supreme Court. The judgment was affirmed in full. (Pet. App. J-315.)

D. New Mitigating Evidence Uncovered in Habeas Proceedings

Substantial mitigating evidence was available to trial counsel, but as a result of trial counsel's unreasonably truncated investigation, it was never presented to the jury.

1. Dr. Francisco Gomez's social history.

Ochoa's family escaped poverty in Mexico and faced serious challenges after settling in Los Angeles, as summarized in the social history report prepared by Dr. Francisco Gomez, a clinical psychologist.

Sergio Ochoa's parents, Ofelia and Eduardo Sr., grew up in poverty in rural Mexico. (Pet. App. S, Gomez Declaration ¶¶ 23, 25.) Both only attended school through the third grade. (Pet. App. S ¶¶ 23-24.) At the time of his

birth, Sergio's family lived in a Tijuana neighborhood notorious for its "execrable" living conditions. (Pet. App. S ¶ 26.)

When Sergio was still an infant, his parents immigrated to the United States to find work, leaving their children in the care of a babysitter. (Pet. App. S ¶ 21.) Ofelia and Eduardo Sr. later learned she fed the children only tortillas and black coffee, stealing the money they had left behind for the children's care. When the parents returned home to Tijuana, "all of the children would be vomiting and [they] had spots on their faces from drinking so much coffee." (Pet. App. S ¶¶ 16-17.)

The Ochoa family eventually settled in Los Angeles, where Eduardo Sr. and Ofelia worked long hours in low-wage jobs to support their five children—Rosalba ("Rosie"), Eduardo Jr., Sergio, Gloria, and Lisa. (Pet. App. S ¶ 30.) The children grew up in squalid conditions. Rosie's friend Maria Madrigal, recalls visiting the Ochoas' "dark and depressing home" in which "there would be dog poo or pee on the couch or the carpet and nobody would even bother to clean it up." (Pet. App. S ¶ 6.)

Eduardo Sr.'s alcoholism exacerbated the family's financial troubles. (Pet. App. S ¶ 32.) Eduardo Sr. drank heavily every weekend. Ofelia worked Saturdays in order to have enough money to support the family because her husband "threw away so much money on drinking." (Pet. App. S ¶¶ 30-32.) Sergio responded to his father's alcoholism "by withdrawing from the family

altogether." (Pet. App. S ¶ 40.) According to his sister Lisa, "when Sergio came home and found our father drunk, he would leave the home and go out into the streets. Sergio may have been as young as ten years old when he started taking off this way." (Pet. App. S ¶ 4.)

Sergio's parents did little to ensure that he learned about basic personal hygiene. (Pet. App. S ¶ 49.) He and his younger sister Gloria "didn't brush their teeth and looked like they never showered." (Pet. App. S ¶ 24.) Both "had bed wetting problems and sometimes reeked of urine." (Pet. App. S ¶ 50.) Both Sergio and Gloria were slow learners. As a result, their siblings referred to them as "slow" or "retarded." (Pet. App. S ¶ 22.)

Friends of the Ochoa family believe that Eduardo Sr. sexual abused his daughter, Gloria, and is the likely father of her five children. (Pet. App. S ¶¶ 59-76.)

Sergio's parents provided "little or no supervision to Sergio and his siblings." (Pet. App. S ¶ 78.) Lacking proper guidance and supervision from the adults in their lives, Sergio's older siblings drifted into gang life. His oldest sister, Rosie Ochoa, started associating with members of the 18th Street gang and dating a gang member when she was in high school. (Pet. App. S ¶ 5.) Eduardo Ochoa, Jr., joined the 18th Street Gang when he was in the 8th grade. (Pet. App. S ¶ 7.) Consequently, Sergio followed his older siblings into the 18th Street gang. (Pet. App. S ¶ 4.)

Collectively, these traumatic experiences made an indelible mark on Ochoa. Dr. Gomez opines that Ochoa suffers from symptoms consistent with Post Traumatic Stress Disorder and depressive illness. (Pet. App. S ¶ 174.)

2. The forces that drove Ochoa to join a gang are further explored in Father Gregory Boyle's declaration.

Father Gregory Boyle, the founder of the non-profit Homeboy Industries, reviewed Ochoa's social history and provided additional context about Ochoa's gang involvement. Father Boyle has a long history of working with gang members and former gang members in Los Angeles, starting with his work at the Dolores Mission Church in Boyle Heights. Based on this experience, he has learned that "the forces that impel youth to join gangs are overwhelmingly negative experiences that push them away from their homes, their school, and their communities, rather than glamour or any sense of belonging that gangs allegedly offer youth . . ." (Pet. App. T, Boyle Declaration ¶ 12.) "[L]ife is circumscribed" for children who join gangs—they experience "constant danger" and "can travel through very few neighborhood safely." (Pet. App. T ¶ 14.) In Boyle's experience, "gangs are not attractive to even minimally adjusted children; they are filled with despairing and despondent youth, who have internalized the adage that misery loves company." In his two decades working with gang members, Boyle has "never met a hopeful child who joined a gang." (Pet. App. T ¶ 17.)

Ochoa's experiences echo those of many other young people who joined gangs in Southern California. When he joined a gang at age 11, he "lived in an out-of-control family, and attended an out-of-control school, in an out-of-control community." In such a setting, "it may well have appeared . . .that the only people who had any sense of control . . . were the gang members who his siblings brought into his house when his parents were away." (Pet. App. T ¶ 19.)

Conditions at home and conflict with his parents no doubt contributed to Ochoa's gang involvement. His father, Eduardo Sr., "was often drunk and when he was at home, he was loud, argumentative, and disruptive." (Pet. App. T ¶ 20.) The four walls of Sergio's home, which should have held him in, pushed him out into the street and into a gang." (Pet. App. T ¶ 21.) Ochoa and his siblings suffered from their parents' neglect and inattention. "Each of the Ochoa [siblings] joined the 18th Street gang, and became tattooed, one after another, and their parents took no effective actions to stop them." (Pet. App. T ¶ 23.)

3. Ochoa's jury never heard about his neuropsychological impairment, low intellectual functioning, and adaptive deficits.

Ochoa's neuropsychological functioning was assessed after trial. This testing revealed that he suffered from serious brain impairments. In her 2003 declaration, neuropsychologist Dr. Patricia Pérez-Arce opined that Ochoa

"suffers from brain damage to the posterior right side of his brain." (Pet. App. U, Pérez-Arce Declaration ¶ 28.) He "has difficulty perceiving, understanding and recalling information received by the right hemisphere of his brain (from the left side of his body) through physical touch and auditory stimulation, in integrating visuospatial information, in understanding the meaning of abstract concepts, and in spontaneously analyzing and solving problems through reasoning." (Pet. App. U ¶ 25.) These deficits likely impaired his adaptive functioning. (Pet. App. U ¶ 28.) And during childhood, his deficits along with his undetected myopia "left him at severe risk for academic failure." (Pet. App. U ¶ 36.)

Ochoa has consistently performed poorly on tests of intellectual functioning. In 1983, at age 15, he had a Wide Range Achievement Test score of 78, within the lowest 7 percent of the population. At age 24, he had a verbal IQ of 74, in the low borderline to mild intellectual disability range. In 2003, when Dr. Perez-Arce tested him, his verbal IQ was 79 on the Wechsler Adult Intelligence Scale III. His mathematical abilities were at 5th grade level. (Pet. App. U ¶ 29.)

E. Post-Conviction Proceedings

In both state and federal court, Ochoa raised a claim of ineffective assistance of counsel for failing to investigate and present mitigating evidence, including evidence of his brain impairments and evidence about his

difficult upbringing. The state and federal courts all denied this claim without granting Ochoa discovery power or conducting an evidentiary hearing.

1. California Supreme Court and District Court Proceedings

Ochoa first alleged ineffective assistance at penalty in a habeas petition submitted to the California Supreme Court (CSC). The CSC summarily denied relief in a one- sentence order on August 21, 2002. (Pet. App. H-246.)

Represented by new counsel, the Federal Public Defender for the Central District of California, Ochoa then sought habeas relief in federal district court, once again asserting ineffective assistance of counsel at the penalty phase. He supplemented the record with new mitigating evidence not previously presented in state court. Because Ochoa's petition contained unexhausted claims for relief, the federal district court stayed the litigation while he exhausted new claims before the CSC. (Pet. App. G-243.)

Ochoa then filed a new habeas petition in the CSC. All of the mitigating evidence summarized above was presented to the CSC in this proceeding. The CSC once again denied relief on Ochoa's claim of ineffective assistance at the penalty phase. It denied relief on the merits and on procedural grounds (as untimely and successive, to the extent it raised claims that could have been raised in Ochoa's earlier petition). (Pet. App. F-241.)

In federal court, the Warden moved to dismiss the instant claim as procedurally defaulted. The district court denied the Warden's motion, opting instead to address the merits of the claim before deciding whether Ochoa could show cause and prejudice to overcome procedural default. (Pet. App. E-223.) In 2018, the district court denied relief on the merits and declined to grant a certificate of appealability (COA) as to Ochoa's claim of ineffective assistance at penalty. (Pet. App. B-197.) The lower court issued a COA on two claims: (1) erroneous removal of jurors for cause under *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Witherspoon v. Illinois*, 391 U.S. 510 (1968); and (2) ineffective assistance of counsel for failing to rehabilitate jurors who were improperly struck for cause. (Pet. App. B-197.)

2. Ninth Circuit Decision

The Ninth Circuit expanded the certificate of appealability to include Ochoa's claim of ineffective assistance at the penalty phase on the merits. Because the state court reached the merits of Ochoa's claim, the Ninth Circuit reviewed it under § 2254(d). The court concluded that the state court's decision was reasonable.

The Ninth Circuit acknowledged that trial counsel: (1) admitted they first learned during the trial that Ochoa had joined a gang as a child (at the age of 11); (2) obtained funding to investigate Ochoa's early life experiences and family background in Mexico, Ochoa's country of origin, but failed to do

so; (3) knew that Ochoa's father was an alcoholic, but failed to investigate how his addiction impacted Ochoa; (4) knew that Ochoa's older siblings joined the 18th Street Gang before he did, but failed to follow up on this; (5) knew that Ochoa had a history of head trauma and showed signs of possible mental deficits, but failed to have a neuropsychologist conduct a full battery of tests to assess his impairments; (6) consulted with a gang expert, but failed to present any expert testimony rebutting the prosecution's gang evidence; and (7) failed to investigate allegations that Ochoa's father sexually abused his sister and is suspected to have fathered her children. (Pet App. A-043-058.) It is thus undisputed that trial counsel failed to pursue several potentially fruitful lines of investigation. But according to the Ninth Circuit, trial counsel made a reasonable choice to cut their investigation short and settle on a "family sympathy" strategy at the penalty phase. (Pet. App. A-052.) The court reasoned that the "Constitution does not compel counsel 'to mount an all-out investigation into petitioner's background in search of mitigating circumstances' if, as here, the decision not to do so 'was supported by reasonable professional judgment.'" *Id.* (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987))).

The Ninth Circuit also concluded that Ochoa failed to show *Strickland* prejudice. On the issue of prejudice, the Court held that "[t]he additional evidence submitted by Ochoa was not so different in quality or kind that it

would have shifted the jury's view of Ochoa as a person or his responsibility for the killings." The post-conviction mitigating evidence "is largely cumulative of the evidence presented at trial, and the remainder fails to dramatically change the way the jury would have viewed Ochoa." (Pet. App. A-058.)

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's decision flouts *Strickland*'s requirement that counsel conduct a reasonable investigation before settling on a penalty-phase strategy.

In *Ochoa*, the Ninth Circuit endorsed trial counsel's presentation of a "family sympathy" defense at the penalty phase, even though counsel failed to conduct a thorough investigation of Ochoa's background before settling on that strategy. In doing so, the lower court flouted Supreme Court case law that requires counsel to conduct a thorough investigation of potential mitigating evidence *before* choosing a strategy.

In *Williams v. Taylor*, 529 U.S. 362 (2000), trial counsel's penalty-phase strategy centered on the fact that the defendant had confessed voluntarily. The Virginia Supreme Court concluded that trial counsel's performance was not deficient, even though five categories of mitigating evidence were available, but not presented at trial. This Court held that the Virginia Supreme Court unreasonably applied *Strickland* in reaching this conclusion because trial counsel did not "conduct a thorough investigation of the

defendant's background" before settling on a strategy. *Id.* at 396. The Court reached this conclusion even though "not all of the additional evidence was favorable to Williams." *Id.* For instance, "juvenile records revealed that [the defendant] had been thrice committed to the juvenile system--for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15." *Id.*

Likewise, in *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court addressed a claim of ineffective assistance of counsel for failing to investigate and present mitigating evidence at the penalty phase. Trial counsel's strategy was to focus on residual doubt of the defendant's guilt. As in *Williams*, counsel settled on this strategy before fulfilling their obligation to conduct a thorough investigation of the defendant's background and social history. "[C]ounsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 524.

Finally, in *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court reaffirmed that counsel must thoroughly investigate potential mitigating evidence before settling on a strategy. In *Rompilla*, trial counsel attempted to gather evidence regarding the defendant's life history and mental health--they interviewed the client's family members and hired three mental health professionals to prepare reports. The Pennsylvania Supreme Court found

counsel's performance adequate under *Strickland*. This was an unreasonable application of *Strickland*. That is because, once again, counsel unreasonably cut short their investigation. Counsel were on notice that the prosecution intended to present evidence of the defendant's prior conviction as evidence in aggravation. If counsel had gathered readily available court records regarding the defendant's prior convictions, they would have found range of materials that they could have given their mental health experts "pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling." 545 U.S. at 391.

Disregarding the clear import of these more recent precedents, the Ninth Circuit instead relied on the Court's decision in *Burger v. Kemp*, 483 U.S. 776 (1987). Applying *Burger*, the *Ochoa* court held that "[c]ounsel need not undertake exhaustive witness investigation. The question is not 'what is prudent or appropriate, but only what is constitutionally compelled.'" *Ochoa*, 50 F.4th at 897 (quoting *Burger*, 483 U.S. at 794). "The Constitution does not compel counsel 'to mount an all-out investigation into petitioner's background in search of mitigating circumstances' if, as here, the decision not do so 'was supported by reasonable professional judgment.'" *Id.* (quoting *Burger*, 483 U.S. at 794.)

The lower court's opinion recites these abstract legal principles, while omitting the specific circumstances that led this Court to sanction counsel's

choice to cut their investigation short in *Burger*. There, counsel "interviewed all witnesses brought to his attention," and discovered much possibly harmful evidence that risked highlighting the defendant's "unpredictable propensity for violence." *Burger*, 483 U.S. at 794. Unlike in *Burger*, trial counsel here did not limit their investigation into mitigating evidence because they uncovered evidence that might portray Ochoa in an unsympathetic light. *Burger* is inapposite because counsel had no reason to suspect that further investigation would have been "counterproductive" or "fruitless." *See Wiggins*, 539 U.S. at 529 (distinguishing *Burger* on this basis).

This Court should grant certiorari because the Ninth Circuit's decision in *Ochoa* represents a clear departure from *Williams*, *Wiggins*, and *Rompilla*. All three cases reviewed state court decisions under § 2254(d)(1). Despite this limitation on the availability of relief, the Court still found deficient performance under *Strickland*, based on counsel's failure to conduct a reasonable investigation. Because the Ninth Circuit's decision creates a clear conflict with these holdings, the Court should grant certiorari. Supreme Court Rule 10(c) (certiorari appropriate where a United States Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court.")

Ochoa acknowledges that this Court condoned a "family sympathy" defense in *Cullen v. Pinholster*, 563 U.S. 170 (2011), another decision

reviewing a California court's denial of an IAC claim under § 2254(d). There, the Court concluded "it would have been a reasonable penalty-phase strategy to focus on evoking sympathy for Pinholster's mother." *Id.* at 193. But in *Pinholster*, counsel's decision to focus on "family sympathy' evidence was the natural outgrowth of the defendant's self-defeating guilt-phase testimony and the highly aggravated circumstances of that case. This Court found that "counsel confronted a challenging penalty phase with an unsympathetic client, which limited their feasible mitigation strategies." *Id.* at 193. According to this Court, as a result of his guilt-phase testimony, the jury "observed Pinholster glory in his criminal disposition and hundreds of robberies." *Id.* (cleaned up.) According to the Court's opinion, "Pinholster laughed or smirked when he told the jury that his 'occupation' was 'a crook,' when he was asked whether he had threatened a potential witness, and when he described thwarting police efforts to recover a gun he had once used." *Id.* at 193. To make matters worse, this Court found that "Pinholster also said he was a white supremacist and that he frequently carved swastikas into other people's property as 'a sideline to robbery.'" *Id.* Unlike in *Pinholster*, Ochoa's counsel had no reason to assume the jury could never sympathize with him or that further investigation would be fruitless. As the Ninth Circuit acknowledged, counsel were aware of his many positive attributes, including the fact that he was a good father to his children. (Pet. App. A-059.)

The Ninth Circuit also failed to consider that counsel's "family sympathy" defense backfired spectacularly: it became a central theme of the prosecution's case-in-aggravation. In her closing argument, the prosecutor emphasized that Ochoa grew up in a loving, stable and supportive home environment:

> There really was no evidence that these family members could tell you about that would explain why the defendant turned out the way he did. [¶] You didn't hear evidence about a horrible childhood this defendant had. You didn't hear evidence that he was beaten and abused by his parents. You didn't hear evidence about the home he came from being an unstable environment and the family was not a family unit, an intact family unit. . . . [¶] What evidence did you hear? You heard evidence that this defendant had a life that was better and is better than most people today. He had a loving family and still has a loving family.

(Pet. App. R-401-02) She continued: "We know that these parents are good loving parents that gave this defendant everything he needed in life, because of the children, the five Ochoa children, everyone else turned out okay except for this defendant." (Pet. App. R-403) This Court recently found deficient performance in a case where defense counsel's presentation "unwittingly aided the State's case in aggravation." *Andrus v. Texas*, 140 S. Ct. 1875 (2020). Here, as in *Andrus*, counsel's deficient performance resulted in the presentation of a "family sympathy" defense that fed a false narrative that

the defendant's criminal behavior was an unexplained aberration, rather than an outgrowth of criminogenic life circumstances beyond his control.

Further, the Ninth Circuit flouted this Court's precedent by indulging in "post hoc rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions." *Richter,* 562 U.S. at 109 (citation and quotation marks omitted.) As the Ninth Circuit recognized, here, counsel stated on the record their own mitigation presentation was contradicted by the one mental-health expert they put on the stand, when he clarified that Ochoa had joined the gang at a much earlier age than counsel's unreasonable investigation led them to believe. Further, the record shows that it was counsel himself who undermined their unreasonable decision to present a "family sympathy" mitigation theory when counsel himself elicited from the father testimony "indicat[ing] that he had very little real knowledge of what was going on in Sergio's life" (Pet. App. R-408.) Counsel himself recognized their deficient performance when they acknowledged that "ironically . . . although Mr. Ochoa was extremely involved according to the prosecution and knew everything Sergio was going, he testified he worked up until just a few years ago on Seventh Street between Broadway and Spring . . . Yet here is a parent who is working half a block away from where his son is hanging around with the 18th Street gang while he is at work." (Pet. App. R-411.) It was defense counsel himself who elicited that the father for whom the jury

was to felt sympathy to spare his child's life, did not know the most basic facts about his child's life: he only remembered the day and month of Ochoa's birth because they share the same birthday; he did not know Ochoa's year of birth. (Pet. App. Q-394).

Contrary to this Court's clear mandate, the Ninth Circuit, as well as the courts below, indulged in post hoc rationalization of counsel's decision-making that contradicts the available evidence of counsel's actions.

B. Counsel's superficially reasonable strategy of presenting a family sympathy defense resulted in prejudice.

The Ninth Circuit's overvaluation of counsel's "family sympathy" evidence also infected its reasoning regarding *Strickland* prejudice. The Ninth Circuit concluded that the CSC reasonably determined Ochoa failed to prove prejudice. In doing so, the Ninth Circuit disregarded this Court's precedent cautioning lower courts not to rubber stamp counsel's superficially reasonable mitigation strategy, where compelling mitigating evidence was available but not presented at trial. *See Porter*, 558 U.S. at 40-42; *Williams*, 529 U.S. at 398; *Rompilla*, 545 U.S. at 378.

According to the Ninth Circuit, "[t]he additional evidence submitted by Ochoa was not so different in quality or kind that it would have shifted the jury's view of Ochoa as a person or his responsibility for the killings. . . . The evidence gathered by habeas counsel is largely cumulative of the evidence

presented at trial, and the remainder fails to dramatically change the way the jury would have viewed Ochoa." (Pet. App. A-059.) But labeling evidence "cumulative" does not make it so. In these brief sentences, the Ninth Circuit dispensed with the vast amount of mitigating evidence never presented at trial, which includes proof of Ochoa's brain damage and his "nightmarish childhood." This Court has repeatedly held that such evidence is of paramount importance at the penalty phase. *Williams*, 529 U.S. at 395 (failure to present evidence of "nightmarish childhood" was prejudicial); *Wiggins*, 539 U.S. at 516 (failure to present evidence of "bleak life history" was prejudicial); *Sears*, 561 U.S. at 945 (counsel ineffective for failing to present evidence of "significant frontal lobe brain damage").

Just as it undervalued the power of Ochoa's new mitigating evidence, the Ninth Circuit distorted the strength of the state's case-in-aggravation. In its brief "reweighing" of the evidence, the Ninth Circuit stated that Ochoa "participated in the killing of two people" within the span of three weeks. (Pet. App. A-059.) Ochoa acknowledges the gravity of these offenses. But the opinion makes no mention of the fact that Ochoa was prosecuted as an accomplice (a getaway driver) in the Navarette murder, and in the Castro shooting, there was no proof that Ochoa premeditated or deliberated. This Court has previously found *Strickland* prejudice where the defendant was convicted of much more aggravated crimes. *Wiggins*, 539 U.S. at 514 (capital

crime was the drowning of a 77-year-old victim in a bathtub); *Rompilla*, 545 U.S. at 377 (victim of capital crime stabbed and set on fire); *Sears*, 561 U.S. at 947 (capital crime was the kidnap, rape, and murder of a 59-year-old victim). It bears repeating that Ochoa was the only one of his cohorts to receive a death sentence, a fact that clearly signals his case is not among the "worst of the worst."

In short, Ochoa presented new evidence of familial dysfunction, childhood neglect, and brain impairment, but his trial jury only heard that he came from a loving and supportive family and that there was no mental health cause for his behavior. Nonetheless, the Ninth Circuit concluded that the new mitigating evidence presented on habeas "fails to dramatically change the way the jury would have viewed Ochoa." Because it is in clear conflict with this Court's major precedents construing *Strickland*, the Court should vacate the Ninth Circuit's decision and grant certiorari.

CONCLUSION

Based on the foregoing, Ochoa respectfully requests that this Court grant his petition for certiorari.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

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By: _____
C. PAMELA GÓMEZ*
AJAY V. KUSNOOR
Deputy Federal Public Defenders
Attorneys for Petitioner
**Counsel of Record*