No. 23-5277

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

Whether the court of appeals properly held that the California Supreme Court's denial of petitioner's ineffective assistance of counsel claim regarding the penalty phase of his trial was not contrary to or an unreasonable application of clearly established federal law.

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Ochoa v. Davis, No. 18-99007 (October 5, 2022) (affirming district court judgment) (this case below).

United States District Court for the Central District of California:

Ochoa v. Davis, No. CV 02-7774-RSWL (August 13, 2018) (denying habeas petition) (this case below).

California Supreme Court:

In re Ochoa, No. S121184 (December 21, 2010) (denying petition on state collateral review).

In re Ochoa, No. S095304 (August 21, 2002) (denying petition on state collateral review).

People v. Ochoa, No. S005868 (August 6, 2001) (affirming judgment on state direct appeal).

California Superior Court, Los Angeles County:

People v. Ochoa, No. BA020873 (December 10, 1992) (entering judgment of conviction and sentence).

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STATEMENT

Petitioner Sergio Ochoa was sentenced to death for participating in two murders involving gang activity. Pet. App. 5-6. The evidence presented at trial showed that Ochoa drove a truck from which a fellow passenger (and fellow gang member) shot and killed one victim. Weeks later, Ochoa instigated a carjacking, during which Ochoa shot and killed another victim. *Id*. at 8.

1. From the age of eleven, Ochoa was a member of the 18th Street Gang, a Los Angeles criminal street gang. Pet. App. 7-8. In late 1989 and early 1990, Ochoa participated in the gang-related killings of two individuals. *Id*.

In the first incident, which occurred on January 3, 1990, Ochoa believed he had seen a vehicle used by gang rivals in a prior shooting. Pet. App. 7. He recruited four fellow gang members to get into his truck and pursue the vehicle. *Id.* Ochoa pulled up next to the target vehicle, someone in Ochoa's truck fired into the vehicle twice, and Ochoa drove off. *Id*. at 7-8. The shots fired from Ochoa's truck killed the driver of the other vehicle, a nineteen-year-old named Pedro Navarette who was not involved with any gang. *Id*.

The second murder took place just a few weeks later, on January 20, 1990. Pet. App. 8. Ochoa and some of his cohorts decided to commit a carjacking. *Id.* They selected and approached a vehicle. *Id.* Ochoa walked up to the driver, Jose Castro, pointed a gun at his head, and ordered him out of the car. *Id*. Castro refused, so Ochoa shot and killed him. *Id.*

2. Ochoa was tried and convicted by a jury of two counts of first degree murder and one count of attempted robbery. Pet. App. 5, 9. The jury found

true two special circumstance allegations making Ochoa eligible for the death penalty: that he committed multiple murders and that the second murder was committed during the course of a robbery. *Id.* at 5.

The trial then proceeded to the penalty phase. The prosecution presented evidence of prior crimes and violent acts committed by Ochoa. Pet. App. 43-44. It also presented victim-impact evidence from the families of both murder victims. *Id.* at 44.

Defense counsel presented evidence in mitigation that focused on Ochoa's family background, describing his childhood and relationships with his family members, as well as rebuttal evidence that attempted to minimize Ochoa's role in prior violent incidents. Pet. App. 44-45. Ochoa's counsel called his oldest sister, his father, and his daughter's mother (who was also his ex-girlfriend) to testify about his life and character. *Id.* Those witnesses detailed the history of his relationships with his parents and siblings, as well as his daughter and his daughter's mother. *Id.* For example, Ochoa and his daughter's mother "lived together with Ochoa's parents and siblings for two years." *Id.* Ochoa "loved and played with Claudia [his daughter] a lot" and "stayed in touch with [her]" after being incarcerated. *Id.* at 45. He also remained close to his sister's children, who "visited him in prison and were excited when he called to speak with them on the phone." *Id.*

Defense counsel also called Dr. Michael Maloney, a respected clinical psychologist whom counsel had hired to assess Ochoa. Pet. App. 54. Dr.

Maloney testified that Ochoa had a "low-end IQ" (*id.* at 309) and had suffered a head injury at age eighteen when he was beaten with a baseball bat (*id.* at 54). Dr. Maloney had also interviewed Ochoa and reviewed documents, including medical records and police reports, and he testified about Ochoa's family background and gang involvement. *Id.* at 49-50, 370-381.

The jury sentenced Ochoa to death. Pet. App. 9. On direct appeal, the California Supreme Court affirmed the judgment and sentence. *Id.* This Court denied certiorari. *Id.*

3. a. Ochoa filed two state habeas petitions. Pet. App. 42. In each, he raised the claim presented in this petition for certiorari: that his trial attorneys were ineffective for failing to investigate and present evidence of his brain damage and traumatic childhood at the penalty phase of his capital trial, specifically. *Id.* The California Supreme Court summarily denied the claims "on the merits." *Id.* at 241, 246; *see id.* at 42. It also ruled that the ineffective-assistance claim in Ochoa's second state habeas petition was procedurally barred—both as "repetitive" "to the extent" the arguments were "raised and rejected in the first petition," and as "successive" "to the extent there are new allegations . . . that could have been raised in the first petition." *Id.* at 241, 242.

b. Ochoa renewed his ineffective-assistance claim in a federal habeas petition. Pet. App. 42. The district court recognized that the claim might be procedurally defaulted, but elected to address the merits of the claim in the interest of "judicial economy." *Id.* at 223. Consistent with this Court's decision in *Harrington v. Richter*, 562 U.S. 86 (2011), the district court applied "both highly deferential" standards governing a federal habeas claim alleging ineffective assistance: the presumption under *Strickland v. Washington*, 466 U.S. 669 (1984), that counsel's conduct fell "within the wide range" of reasonable professional conduct; and the standard of review set by Congress in 28 U.S.C. § 2254(d). Pet. App. 76-77. The district court ruled that, for purposes of Section 2254(d), it was not an unreasonable application of clearly established federal law for the California Supreme Court to hold that Ochoa "failed to rebut the presumption of competence mandated by *Strickland*." Pet. App. 80.

c. The court of appeals granted Ochoa's request to expand the certificate of appealability to encompass the ineffective-assistance claim presented here. Pet. App. 6. It unanimously affirmed the district court's denial of Ochoa's habeas petition as to that claim and other claims not at issue here. *Id.*

Reviewing under the deferential standard of Section 2254(d), the court of appeals held that the state court reasonably denied Ochoa's claim of ineffective assistance at the penalty phase. Pet. App. 41-60. It began by explaining that Ochoa "fail[ed] to rebut the presumption of counsel's competence mandated by *Strickland*." *Id.* at 48. It thoroughly reviewed the evidence that Ochoa submitted along with his state habeas petitions. *Id.* at 41-48. Based on that review, it concluded that defense counsel conducted a thorough and reasonable investigation of mitigating evidence. *Id.* at 48-58.

The court of appeals explained 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.'" Pet. App. 54 (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)). Ochoa's attorneys retained three outside consultants—including a mitigation investigator, a respected clinical psychologist, and an academic—and they reasonably relied on the information gathered and analyzed by those experts. Pet. App. 48-58. And counsel made "a reasonable decision" to advance a "'family sympathy' defense at the penalty phase," emphasizing that Ochoa's parents were "loving [and] hardworking" yet struggled to supervise their children and prevent them from gang involvement. *Id.* at 52. The court of appeals rejected Ochoa's argument that other evidentiary points should have been investigated or presented at trial, explaining that those arguments could have undermined counsel's primary strategy (*id.*), were not supported by the record (*id.* at 51-52, 57-58), or were not supported by the hired experts' analyses (*id.* at 54, 56).

The court of appeals further held that Ochoa "fail[ed] to establish prejudice with respect to counsel's alleged deficiencies." Pet. App. 58. "The additional evidence" that Ochoa argued his counsel should have presented "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." *Id.* at 59.

In light of that analysis, the court of appeals concluded that it was "neither an unreasonable factual determination nor contrary to or an unreasonable application of clearly established Supreme Court precedent" for the California Supreme Court to reject Ochoa's ineffective-assistance claim. Pet. App. 60.

ARGUMENT

Ochoa argues that the court of appeals departed from this Court's precedent in rejecting his claim of ineffective assistance of counsel at the penalty stage. But Ochoa cannot establish that the California Supreme Court's merits determination was contrary to or an unreasonable application of *Strickland v. Washington*, 466 U.S. 669 (1984), or any other clearly established precedent of this Court. The state court properly denied relief because Ochoa did not establish that his counsel's performance was deficient or that he suffered prejudice as a result of counsel's alleged errors. The court of appeals' decision does not create any conflict of authority. And Ochoa offers no other persuasive reason for further review.

1. A federal court may only grant habeas relief upon a showing that a state court's adjudication of a 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). The federal law governing Ochoa's ineffective assistance claim required him to demonstrate that (1) "counsel's

performance was deficient"; and (2) the "deficient performance prejudiced [his] defense." *Strickland*, 466 U.S. at 687. Under the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Under the second prong, petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694. "The *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). That makes it "all the more difficult" to "establish[] that a state court's application of *Strickland* was unreasonable under § 2254(d)." *Id.*

2. a. The court of appeals here ruled that the state supreme court's summary denial of Ochoa's ineffective-assistance claim was not unreasonable because Ochoa failed to carry his burden under the deficient-performance prong of *Strickland*. Pet. App. 42. As the court detailed, the decisions by Ochoa's counsel not to further investigate or present certain mitigating evidence of psychological deficiency and parental neglect were reasonable. *Id.* Counsel engaged multiple reputable experts who evaluated Ochoa and his background, including by reviewing documents, administering psychological tests, interviewing Ochoa and his family and friends, and meeting with counsel. *Id.* at 48-58. Based on that preparation, counsel reasonably pursued a "family sympathy" defense emphasizing that Ochoa's family was well-meaning but struggled to give him the level of attention that might have

avoided his involvement in gang activity. *Id.* at 51-52. Counsel's exclusion of other evidence that Ochoa now highlights was a reasonable choice made in reliance on expert evaluations and in an effort to avoid undermining the defense's chosen strategy. *Id.* at 42, 51-58.

In disputing the court of appeals' analysis, Ochoa focuses on statements from the prosecutor and defense attorney in their respective closing arguments. Pet. 27-28. First, Ochoa argues that the prosecutor tried to turn Ochoa's mitigating evidence against him, showing that defense counsel's presentation "backfired spectacularly." *Id.* at 27. The prosecutor suggested that evidence that Ochoa's parents love him showed that his "criminal behavior was an unexplained aberration" because he was given "everything he needed in life." *Id.* But those comments, made as part of strategic advocacy by Ochoa's adversary, do not demonstrate that defense counsel's selected strategy was deficient or that the state court's decision was unreasonable. If anything, the remarks show that the mitigation case presented by Ochoa's counsel was coherent and potentially persuasive enough that it demanded identification and attack by the other side.

Second, Ochoa points to his own attorney's comments that Ochoa joined the gang at an earlier age than counsel previously believed and that Ochoa's father knew little about his child's life. Pet. 28-29. Again, those statements do not reflect any defect in defense counsel's strategy. Pet. App. 51. Counsel used the surprisingly young age at which Ochoa joined the gang (at only eleven) to "illustrate the mitigating factor that they had been presenting throughout the penalty phase—that Ochoa's family was well-meaning, but not attentive and did not notice him joining a gang for two years." *Id.* Defense counsel's observation that Ochoa's father knew little about his life was also consistent with that overall strategy: it underscored that Ochoa's family, though loving, failed to provide the supervision necessary to help Ochoa resist the pull of gang involvement. *See, e.g.*, *id.* at 51-52.

b. Ochoa also asserts that the court of appeals' decision conflicts with three Supreme Court cases—*Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 375 (2005). He is incorrect. Those cases each involve the same principles that the court of appeals properly applied: that "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," and any "particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins*, 539 U.S. at 521-522 (internal quotation marks omitted). In each case, the conclusion that counsel's investigation was deficient rests on clear factual distinctions between those cases and Ochoa's claim.

In *Williams*, the Court primarily focused on the state supreme court's mishandling of the prejudice inquiry. 529 U.S. at 394-396. The Court also noted that defense counsel's performance was deficient—a conclusion "barely disputed by the State"—because counsel did not reasonably investigate defendant's background. *Id.* at 396. The defense attorneys did not even prepare for the penalty phase until a week before trial, and they "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, *not because of any strategic calculation* but because they incorrectly thought that state law barred access to such records." *Id.* (emphasis added).

Ochoa does not dispute that here, unlike in *Williams*, his counsel took multiple concrete steps to prepare for the penalty phase, including engaging with experts and presenting a "family sympathy" defense supported by multiple witnesses. Pet. 9-13. Although counsel's penalty-phase presentation did not focus on Ochoa's childhood or brain impairments (*id.* at 13-18), that was "a reasonable strategic choice." psychological deficits was not supported by the expert opinion of the clinical Pet. App. 52. Evidence of Ochoa's alleged psychologist retained by counsel, and "[t]here is no indication that counsel was deficient in relying on Dr. Maloney's opinion." *Id.* at 55. And the family background evidence that Ochoa now highlights (such as his father's drinking and his siblings' gang affiliations, Pet. 14-17) was both not "material" *and* "could have undermined th[e] 'family sympathy' defense" that counsel pursued. Pet. App. 52.

Ochoa's argument based on *Wiggins* fares no better. The defense attorneys there told the jury that it would hear mitigating evidence about

Wiggins' personal background, but in fact "introduced *no* evidence of Wiggins' life history." 539 U.S. at 515, 526 (emphasis added). The attorneys' investigation into Wiggins' background was limited to reviewing a single presentence report and department of social services records. *Id.* at 523. They did not even prepare a social history report, which was "standard practice in Maryland capital cases at the time." *Id.* at 524. This Court "emphasize[d] that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence." *Id.* at 533. But counsel's performance in *Wiggins* fell below that standard because it was the product of "inattention," not "reasoned strategic judgment," and did not accord with prevailing professional standards at the time. *Id.* at 534.

The performance of Ochoa's counsel is not remotely similar. The investigation reached far beyond a few written records, and included expert evaluations based on clinical assessments and interviews. Pet. App. 48-58. With that foundation, they presented a coherent defense at the penalty phase, and their decision not to present alternative evidence was a reasoned strategic choice—not error or oversight. *Id.* at 52. And unlike in *Wiggins*, where counsel failed to take the standard step of preparing a social history report, Ochoa does not argue that his counsel neglected any particular investigatory effort that was part of prevailing professional practice at the time.

Nor is there any conflict with *Rompilla*. Pet. 23-24. The Court there said there was "room for debate," on the facts of that case, about whether trial counsel should have followed up on various potential mitigating arguments highlighted by Rompilla. *Rompilla*, 545 U.S. at 383. But there was one "obvious reason" why counsel's performance was deficient: the attorneys failed to examine a publicly available and easily accessible file for a prior conviction for rape, even though they *knew* the prosecution would seek the death penalty based on that conviction and its details. *Id.* at 383-389. The Court specifically caveated that "[o]ther situations, where a defense lawyer is not charged with knowledge that the prosecutor intends to use a prior conviction in this way, might well warrant a different assessment." *Id.* at 389. And Ochoa did not present the courts with any argument that his defense attorneys failed to investigate specific, critical, and available evidence that they knew the prosecution would use to support the death penalty.

Neither *Williams*, *Wiggins*, nor *Rompilla* establish any blanket rule (proposed by Ochoa, Pet. 22) about the specific timing of when defense attorneys must investigate potential mitigating evidence in relation to when they choose a penalty-phase strategy. But even if those cases did establish such a rule, there was no evidence here that Ochoa's attorneys failed to "conduct a thorough investigation of potential mitigating evidence *before* choosing a strategy." *Id.* They engaged experts, analyzed their assessments, and prepared to put forth evidence and call witnesses. Pet. App. 48-50, 80-84. Nothing about the sequencing or timing of that work casts doubt on the state court's conclusion that their penalty-phase conduct was not deficient. *See id.* at 84.

c. Ochoa also seeks to distinguish cases with similar facts in which this Court held that a defense attorney's performance was *not* deficient. Pet. 24-26; *see Burger v. Kemp*, 483 U.S. 776 (1987) (counsel did not undertake an exhaustive witness investigation); *Cullen v. Pinholster*, 563 U.S. 170 (2011) (counsel advanced a "family sympathy" defense). But the central question in this case is not whether the facts of a particular precedent affirmatively demonstrate that counsel's performance was reasonable. It is whether the denial of Ochoa's deficient-performance claim by the state court was an unreasonable application of this Court's clearly established precedent. Ochoa's arguments why the facts of *Burger* and *Pinholster* are not precisely analogous provide no basis to second-guess the court of appeals' analysis. Indeed, Ochoa's discussion of those cases concedes that the state court relied on relevant legal principles from *Burger*. Pet. 23-24 (citing Pet. App. 54).

3. The court of appeals also held that Ochoa failed to establish that his counsel's alleged deficiencies caused prejudice or that the state supreme court's contrary conclusion was unreasonable. Pet. App. 58-60. Ochoa's failure to carry his burden to demonstrate prejudice is an additional reason why his claim does not warrant further review.

It was correct—and certainly not unreasonable—for the California Supreme Court to conclude that Ochoa failed to establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Prejudice is analyzed by "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534; *see* Pet. App. 43. The aggravating evidence here was significant: Ochoa participated in two killings within three weeks; the murder victims were "very sympathetic"; Ochoa participated in another robbery, including assault, within hours of the second murder; he had a long history of violent conduct; and he engaged in additional misconduct while in prison. Pet. App. 59-60. By contrast, the new mitigation evidence that Ochoa argues should have been presented would not have materially changed "the jury's view of Ochoa as a person or his responsibility for the killings." *Id.* at 59. The jury already knew that "even though his family loved him, Ochoa had been neglected growing up," and that he suffered hardships in his childhood, including bullying and crime. *Id.* The jury also knew that "he had a low-end IQ," even if it was not presented with the specific evidence of alleged psychological deficits that Ochoa now advances. *Id.* The new mitigating evidence would have been "largely cumulative" of the evidence already presented. *Id.* And it would not have "dramatically change[d] the way the jury would have viewed Ochoa." *Id.*

Ochoa disagrees with the court of appeals about the significance of both the aggravating evidence and the new mitigating evidence. Pet. 28-31. But Ochoa's arguments just restate his subjective view that the mitigating evidence relating to his childhood and brain damage was "compelling" and "of paramount importance" (*id.* at 28, 29), while the aggravating evidence was less strong than the court of appeals described (*id.* at 30-31). Those assertions are not enough to carry Ochoa's burden to show prejudice under *Strickland*, nor to establish that the California Supreme Court's contrary assessment was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. §2254(d)(1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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