NO.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. AYERS, WARDEN, *Petitioner*,

v.

JACKSON CHAMBERS DANIELS, *Respondent* .

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

PETITION FOR WRIT OF CERTIORARI

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FORMER CAPITAL CASE
QUESTIONS PRESENTED

Respondent Jackson Daniels murdered two police officers who had tried to arrest him for a prior robbery. Based in part on his paranoid delusion that defense counsel were conspiring with the prosecution to kill him, Daniels refused to cooperate with counsel at trial. Daniels was convicted and sentenced to death. After the California Supreme Court affirmed the judgment, the Ninth Circuit granted a writ of habeas corpus. In light of these facts, the questions for review are as follows:

1. When a criminal defendant refuses to cooperate with his counsel due to his subjective mistrust of them, (a) is he constructively denied his right to counsel? or (b) is counsel ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to overcome that impediment?

2. May defense counsel be found to have provided ineffective representation under *Strickland v. Washington*, based on the failure to investigate and present evidence regarding a defendant's mental health when trial counsel rely on the opinions of two mental health experts that the defendant does not suffer from mental illness?

3. When a state trial court denies a criminal defendant's change of venue motion, may a court of review presume prejudice based solely on pre-trial publicity and without regard to jurors' statements of impartiality during voir dire?

4. After *Brown v. Sanders*, 546 U.S. 212 (2006), can it be constitutional error for a California court to fail to instruct a capital sentencing jury, sua sponte, not to double count redundant multiple-murder "special circumstance" factors where the jury could consider the same underlying evidence as aggravating?

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Robert L. Ayers, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 428 F.3d 1181. Petition Appendix ("App.") at 2a-55a. Its order denying rehearing en banc is unreported. App. at 1a. The order of the United States District Court for the Southern District of California denying the petition for writ of habeas corpus is unreported. App. at 56a-97a.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was filed on November 2, 2005. An order denying Daniels's petition for rehearing en banc was filed on November 17, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of

counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges and immunities of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

1. In 1980, while fleeing from a bank robbery, respondent Daniels drove his car directly towards the patrol car of a pursuing police officer. The officer fired a shotgun blast, causing Daniels's car to go out of control. In an exchange of gunfire, police officers shot Daniels, causing permanent paralysis in his legs.

Daniels pleaded "no contest" to robbery and assault with a deadly weapon on a police officer and was sentenced to thirteen years in state prison. He posted bail pending the appeal of his convictions. When the state court denied Daniels's appeal, Andrew Roth, Daniels's attorney in the appeal of his robbery case, told Daniels the result and that he had to appear in court, but Daniels twice failed to appear in court as required.

On the morning of May 13, 1982, Riverside City Police Officers Dennis Doty and Phillip Trust went to the residence of James Cornish, where Daniels was temporarily staying, in order to arrest Daniels. Alma Renee Ross, who had agreed to work for Daniels as his attendant, admitted the officers. The officers identified themselves to Daniels, who was sitting on a bed in one of the bedrooms, and told him they had a warrant for his arrest.

Because Daniels was undressed, one of the officers asked Ross to get Daniels some clothes. While Ross was showing Daniels different pairs of shoes, Daniels reached between his legs, pulled out a gun, and pointed it at one of the officers.

Ross jumped into the bedroom closet. She heard gunshots and then got down on her knees and prayed. After a few

minutes, Daniels called Ross out. She saw one police officer on the floor by the closet. Daniels was also on the floor, with an injury to his right hand. Ross later saw the other officer kneeling on the floor in another bedroom, hanging onto the bed and moaning. Ross had not seen anyone other than Daniels, the two police officers, and Cornish's infant son in the house at the time of the incident.

At Daniels's direction, Ross drove him to the home of Clara and Delores Butler in San Bernardino. During the drive, Daniels told Ross that he had to "pay them back because of what they had done to him." At the Butler residence, Daniels admitted shooting the officers.

Daniels later told a friend that, when one of the officers went to get some clothes for him, he "saw his opportunity and took it." According to Daniels, he pulled out his gun and shot at the officer who was getting his clothes out of the closet. The other policeman shot the gun out of Daniels's hand. Daniels rolled off the bed, managed to get the gun from the body of the officer near the closet, and then shot the second officer, who was running away down the hall.

The police investigation revealed that Officer Doty had been shot three times with an unidentified gun; Officer Trust had been shot six times, mostly with Officer Doty's weapon. After Daniels was arrested, one of the bullets fired from Officer Trust's gun was recovered from Daniels's hand.

2. Daniels was charged with two counts of first-degree murder. For each count the following "special circumstances"were alleged making him eligible for the death penalty: murder of a peace officer; murder to avoid arrest; and multiple murder. The Riverside County Public Defender's Office was originally appointed to represent Daniels at trial. The trial court denied Daniels's motion to substitute his former attorney, Roth. Roth nevertheless agreed to work on the case pro bono, and was later formally appointed as co-counsel. One month after his appointment, however, the judge removed Roth from the case because he was a percipient witness insofar as he had notified Daniels that he would have to surrender himself.

The Public Defender's Office later declared a conflict of interest. So the trial court appointed Carl Jordon, a former prosecutor with over a dozen years experience, to act as Daniels's lead counsel. The court appointed Warren Small to serve as co-counsel.

Prior to trial, Daniels brought a motion for change of venue, which the trial court deferred until jury selection. Although many of the sixty-four prospective jurors who were subsequently examined during voir dire expressed some familiarity with the case, four of the selected jurors had no recollection of the incident. Moreover, all of the selected jurors said unequivocally that they could set aside any impressions formed outside the courtroom and consider the evidence without prejudice. Defense counsel utilized only fifteen out of twenty-six peremptory challenges before agreeing to the jury as selected. Based on the jurors' responses during voir dire, the trial court denied the motion, finding that Daniels had failed to show the necessity for a change of venue.

The jury was sworn in late August 1983, over six months after Jordon and Small were appointed. At trial, the defense sought to prove that someone else, including Ross, her brother, or Cornish, committed the killings; that a bullet that struck Officer Trust did not come from the bed where Daniels had been sitting; that Daniels was physically incapable of holding a gun after being injured in the hand; and that Daniels bore no animosity towards the police officers despite the earlier shooting that rendered him a paraplegic.

Daniels evidently believed that his defense counsel were conspiring with the prosecution to have him executed, and so generally refused to cooperate with the defense. He never admitted to his attorneys that he was the shooter. The defense attorneys did not pursue a mental state defense, in part because two psychiatrists who examined Daniels, Dr. Robert Philips and Dr. Anthony Oliver, concluded that he did not suffer from any mental defect.

In rebuttal, the prosecution introduced evidence that Cornish was at work at the time of the shooting, and elicited expert and eyewitness testimony that Daniels remained capable of holding

and firing the gun. Further, the prosecution produced evidence that Daniels had told a nurse he was "sorry for getting his friends involved and he felt bad about what he did to the officers' wives."

On December 1, 1983, the jury found Daniels guilty of the first-degree murder of both officers—among other offenses—and the six special circumstances.

The penalty phase began on December 12, 1983. The prosecution proved a number of prior convictions, including an armed robbery in Arizona in 1959, and eight separate armed robberies Daniels committed in the Los Angeles area in 1961. In addition, in 1976, Daniels shot at two victims in a dispute over money. That same year, he pulled a gun—with a bullet ready in the chamber—on a police officer who had asked Daniels for identification. Daniels later told a neighbor that he had tried to fire the gun at the officer, but that the gun had jammed.

The defense presented a dozen witnesses who all testified to the effect that Daniels was not bitter at police, despite having been rendered a paraplegic, and that he never spoke of taking revenge. Psychologist Robert Banks, Ph.D., administered various psychological tests, which showed that Daniels exhibited confused or schizophrenic thinking. After consulting with two other experts concerning some of the test results, Banks opined Daniels may have suffered brain damage. Banks did not consider Daniels to have a sociopathic personality and attributed his past history of criminal actions to his schizophrenia.[1/] However, Banks believed Daniels capable of rehabilitation and positive change.

In rebuttal, the prosecution presented its own psychologist who reviewed Banks's testimony and concluded Daniels

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1. Dr. Banks did not provide defense counsel with his opinions until after the jury had returned its guilt-phase verdicts.

suffered from a sociopathic personality disorder.

The jury affixed the penalty at death.

3. In January 1991, the California Supreme Court affirmed the judgment of death. *People v. Daniels*, 52 Cal. 3d 815, 802 P.2d 906, 277 Cal. Rptr. 122 (1991). The court rejected Daniels's assertions that he suffered presumptive prejudice from the trial court's failure to grant the change of venue motion and that it committed prejudicial instructional error by failing to admonish the jury not to "double count" the redundant multiple-murder special circumstances during penalty deliberations. *Id.* at 849-854, 876. On October 7, 1991, this Court denied Daniels's petition for a writ of certiorari.

In 1992, the California Supreme Court denied a petition for a writ of habeas corpus filed by Daniels. The court did not discuss the merits of Daniels's claims.

4. In October 1992, Daniels filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California. Nearly a decade later, after holding an evidentiary hearing, the district court entered an order upholding Daniels's convictions for two counts of murder, but granting relief as to the death penalty. Both sides appealed.

5. On November 2, 2005, a three-judge panel of the Ninth Circuit reversed the district court as to the denial of the petition on the guilt phase and affirmed as to granting and directing issuance of the writ as to the penalty phase. App. at 2a-55a. In an opinion authored by Circuit Judge Pregerson, the Ninth Circuit held that: (i) Daniels was constructively denied his right to counsel when Daniels's paranoid delusions led to a complete breakdown of communication between him and his counsel; (ii) trial counsel rendered ineffective assistance at both penalty and guilt phases by failing to resolve the communication conflict with Daniels, and by failing to investigate mental health defenses/mitigation evidence; (iii) the trial court's failure to grant a change of venue motion resulted in a presumption of prejudice at the penalty phase based upon the extent of pre-trial publicity; and (iv) the jury's finding of overlapping multiple-murder special circumstances for each victim was prejudicial

error pushing the jury towards a death sentence because California is a "weighing state."

6. Petitioner petitioned for rehearing and rehearing en banc; on November 17, 2006, the court denied the petition. App. at 1a.

REASONS FOR GRANTING THE WRIT

Introduction

1. The Sixth Amendment guarantees to a defendant the right to a lawyer who performs effectively, *Strickland v. Washington*, 466 U.S. at 688, but not "a meaningful relationship with counsel," *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983). "A defendant cannot base a claim of inadequate representation upon his refusal to cooperate with appointed counsel. Such a doctrine would lead to absurd results." *Shaw v. United States*, 403 F.2d 528, 529 (8th Cir. 1968) (*per curiam*).

Unfortunately, it is precisely such an absurd result that the Ninth Circuit has reached in the present case. Here, the Ninth Circuit has concluded that a criminal defendant is constructively denied the right to counsel where he refused to cooperate with trial counsel because the defendant disagreed with the trial court's pre-trial rulings, wished to be represented by another attorney (who was unavailable because he was a witness for the prosecution), and distrusted his defense attorney because he was a former prosecutor who supposedly conducted an inadequate investigation. The Ninth Circuit's decision provides a detailed and easy to follow roadmap for every criminal defendant intent upon disrupting our system of criminal justice: A defendant will be able to overturn a death judgment simply by refusing to cooperate with counsel at trial.

This absurd result follows inexorably from the Ninth Circuit's reliance on the defendant's *subjective* evaluation of his counsel's performance and the rulings of the trial court. The court, however, went even further in holding that the defendant's *unilateral* decision not to cooperate created a

"conflict" that resulted in the constructive denial of counsel, thereby giving rise to a presumption of prejudice. But the Ninth Circuit did not stop there. It alternatively found that defense counsel provided ineffective assistance because they did not do more to resolve the "communication conflict." Aside from its sheer absurdity, the Ninth Circuit's decision directly conflicts with the requirements in *Strickland v. Washington* that a defendant must show both that counsel's performance fell below *objective* professional norms and that the defendant suffered *prejudice* as a result. Without citation to authority, the Ninth Circuit has adopted the position that the Sixth Amendment guarantees a defendant the right to have counsel prevent him from refusing to cooperate in his own defense. Such a rule cannot stand.

2. This Court should also grant certiorari to decide the important question, and resolve the conflict among the circuit courts, regarding when attorneys may rely on the opinions of mental health experts. Attorneys are neither psychiatrists nor psychologists. Yet, to practice law within the Ninth Circuit, attorneys must not only know the law for which they were trained, but they must also be more knowledgeable about mental health issues than the experts they retain. In the instant case, the Ninth Circuit ruled that defense counsel acted incompetently in relying on the opinions of two psychiatrists that Daniels did not suffer from mental illness, because the psychiatrists' reports did not indicate what testing or evaluation procedures were relied upon. The Ninth Circuit's ruling creates a direct conflict with the Fourth and Eighth Circuits, which have held that an attorney may reasonably rely on an expert mental health opinion even if the expert omitted standardized testing. Trial counsel require guidance as to when they may rely on the opinions of qualified experts.

3. The Ninth Circuit ruled that prejudice from the denial of a change of venue motion could be presumed based solely on pre-trial publicity, without regard to the jurors' assurances of impartiality. This ruling creates an intolerable conflict with this Court's decisions that a reviewing court must consider the

totality of the circumstances, including the jurors' responses during voir dire. *Murphy v. Florida*, 421 U.S. 794, 799 (1975); *Mu'Min v. Virginia*, 500 U.S. 415, 428-30 (1991).

4. Finally, the Ninth Circuit's ruling on the sentencing jury's "double counting" of an aggravating factor repeats the same error that this Court corrected just last Term in *Brown v. Sanders*, 546 U.S. 212, __, 126 S. Ct. 884, 893, 163 L. Ed. 2d 723 (2006). Here, the jury returned two multiple-murder special circumstances, one for each count of murder. Concluding that California is a "weighing state," the Ninth Circuit held that the trial court committed prejudicial error by failing to instruct the jury it could not double count the redundant special circumstance during penalty deliberations. In *Sanders*, however, this Court ruled that California was not a "weighing state"—and that, in any event, there is no prejudicial error where the jury remains authorized, as it was here, to consider the same underlying evidence in their sentencing consideration. There is no reason to believe the jury here was confused as to how many persons were shot, or how many multiple murders occurred.

A. The Ninth Circuit's Subjective Standard For Finding An Irreconcilable Conflict, And Its Presumption Of Prejudice Based On Such A Conflict, Is Contrary To This Court's Decisions

1. The Sixth Amendment does not guarantee "a right to counsel with whom the accused has a 'meaningful attorney-client relationship.'" *Morris v. Slappy*, 461 U.S. at 3-4. "[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988). As this Court has recently reiterated, the right to counsel of choice does not extend to cases in which defendants require counsel to be appointed for them. *United States v. Gonzalez-Lopez*, __ U.S. __, 126 S. Ct. 2557, 2565, 165 L. Ed. 2d 409 (2006). In evaluating whether a defendant

has received effective representation of counsel, "[T]he appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such. If counsel is a reasonably effective advocate, he meets constitutional standards *irrespective of his client's evaluation of his performance*." *United States v. Cronic*, 466 U.S. 648, 657 n. 21 (1984), italics added. In order to demonstrate that he received ineffective assistance of counsel, a defendant must prove: (i) counsel's deficient performance under an *objective* standard of professional responsibility; and (ii) prejudice under a test of reasonable probability of an adverse effect on the outcome. *Strickland v. Washington*, 466 U.S. at 688, 691-94.

2. Prior to any of these decisions, the Ninth Circuit concluded that a defendant may be denied the effective assistance of counsel where he becomes embroiled in an irreconcilable conflict, even if the defendant himself refused to cooperate or communicate with counsel. *Brown v. Craven*, 424 F.2d 1166, 1169-70 (9th Cir. 1970). Even in the Ninth Circuit's view, however, the defendant may not demonstrate "obstinance, recalcitrance, or unreasonable contumacy." *Id* at 1170.

3. In more recent decisions, including the present case, the Ninth Circuit has expanded on the concept of when an irreconcilable conflict may deny a defendant the Sixth Amendment right to counsel even when the defendant has sabotaged the relationship by refusing to cooperate. For instance, in *Plumlee v. Del Papa*, 465 F.3d 910 (9th Cir. 2006), the Ninth Circuit found an irreconcilable conflict where the defendant held an "objectively reasonable belief that his lawyers had betrayed him." *Id.* at 921. Notably, the trial court had concluded that the defendant's suspicions of disloyalty were untrue. *Id.* at 922. Nevertheless, the Ninth Circuit panel majority reasoned that "A defendant simply cannot be expected to cooperate with attorneys he reasonably believes are working behind his back to undermine his defense." *Id.* at 922.

The Ninth Circuit's decision in the present case takes this conclusion another step further. Here, the Ninth Circuit went so far as to conclude that Daniels's refusal to cooperate was

"understandable" given that: (i) the trial court had not acknowledged Daniels's conflict with the public defender until "close to trial"; (ii) the trial court refused to appoint Roth, who was Daniels's attorney of choice; (iii) the trial court appointed an inexperienced former prosecutor to represent Daniels; and (iv) trial counsel failed to conduct reasonable preparation. App. at 26a. Having found a "conflict" based on Daniels's subjective beliefs and unilateral actions, the Ninth Circuit further exacerbated its own jurisprudence by concluding the "conflict" amounted to a "constructive denial of prejudice," in which prejudice is presumed.

4. The test created by the Ninth Circuit for deciding whether there is an "irreconcilable conflict" is based solely upon the subjective beliefs of the defendant—that is, the defendant's evaluation of pre-trial rulings and the trial preparation of his counsel. Even if Daniels had known of counsels' trial preparation,[2/] the Ninth Circuit simply disregards this Court's admonishment that "If counsel is a reasonably effective advocate, he meets constitutional standards *irrespective of his client's evaluation of his performance*." *United States v. Cronic*, 466 U.S. at 657 n. 21 (italics added). As previously noted, in order to demonstrate ineffective assistance of counsel, a defendant must establish counsel's deficient performance under an *objective* standard of professional responsibility. *Strickland v. Washington*, 466 U.S. at 688. The measure cannot "be determined 'solely according to the subjective standard of what the defendant perceives.'" *Thomas v. Wainwright*, 767 F.2d 738, 742 (11th Cir. 1985). Such a rule, nonsensically, could award a defendant a new trial "simply on the basis of a 'breakdown in communication' which he himself induced."

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2. The Ninth Circuit does not maintain that Daniels was even aware of what preparation his trial counsel had undertaken, because, of course, he refused to even communicate with them. App. at 26a-27a. Thus, the Ninth Circuit's conclusion that it was "understandable" Daniels refused to cooperate was based in part on alleged facts Daniels did not even know.

McKee v. Harris, 649 F.2d 927, 932 (2nd Cir. 1981).[3/]

5. The Ninth Circuit's decision would not only make the defendant the final arbiter of whether his counsel's performance is deficient, but *it would also do away with any need to show prejudice*. The Ninth Circuit concluded that the "conflict" gives rise to a presumption of prejudice. App. at 28a. This conclusion is directly contrary to this Court's decision in *Strickland*. In noting that prejudice is appropriately presumed in cases involving the actual or constructive denial of counsel, this Court observed that such circumstances "involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland v. Washington*, 466 U.S. at 692. This Court has never recognized a constructive denial of counsel based on facts even remotely resembling the present case. *See Plumlee v. Papa*, 465 F.3d at 943 (Bea, J. dissenting) (noting this Court's failure to recognize "irreconcilable conflict" doctrine); *United States v. Doe*, 272 F.3d 116, 125 (2nd Cir. 2001) (citing cases declining to presume prejudice based on a trial court's failure to inquire as to an "irreconcilable conflict").

6. For similar reasons, the Ninth Circuit was also misguided in alternatively concluding that defense counsel were ineffective in failing to overcome Daniels's mistrust of them and resolve the "communication conflict." App. at 31a-33a. The Ninth Circuit failed to provide any authority for the novel proposition that the Sixth Amendment places upon defense counsel the burden of ensuring their clients' cooperation.

The Ninth Circuit suggested defense counsel should have apprised the trial court of the extent of the communication conflict. App. at 32a. But the trial court could not have made Daniels cooperate any more than defense counsel could. The

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3. Remarkably, the Ninth Circuit reluctantly acknowledged that Daniels's paranoia and distrust of his lawyer "may have been unwarranted," yet even this acknowledgment did not alter the court's conclusions that Daniels's mistrust of his lawyer was "understandable." App. at 26a.

Ninth Circuit further offered that defense counsel did not "press" Daniels to testify. App. at 32a. Yet, the Ninth Circuit failed to explain how counsel should have "pressed" a client who would not communicate with them.[4/]

7. Hence, as a matter of law, none of the reasons cited by the Ninth Circuit renders Daniels's refusal to cooperate "understandable" or is sufficient to create a constructive denial of counsel. It is also worth noting that the Ninth Circuit's factual premises are unfounded and distorted. In the caricature drawn by the panel, the trial court failed in some duty to appoint Daniels' favorite lawyer Roth at public expense and instead saddled Daniels with a conflicted public defender until it became too late for the ultimately-appointed novice lawyer Jordon to put together a defense. The actual facts are that the trial court appropriately appointed the public defender in the normal course and declined to remove him in the absence of any assertion by the public defender that he could not proceed in the case. When that indeed happened, the trial court appointed Daniels two independent lawyers—one with a dozen years of experience as a criminal trial lawyer with the district attorney's office—approximately six months before trial commenced. App. at 9a. The only reason they did not have longer to prepare was that *Daniels refused to waive time*. App. at 11a, n. 8. Under the Ninth Circuit's view, Daniels was free

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4. The subtext underlying the circuit court's critique of the counsel afforded Daniels and their performance is this: Had Daniels been appointed counsel he trusted (presumably, Roth), counsel could have convinced Daniels to testify and admit killing the officers and then offer some excuse or justification for the killings. The problem with this scenario is twofold: (i) no court has ever held counsel is ineffective for failing to persuade his client to testify – a decision which rests exclusively with the defendant; and (ii) there has never been evidence produced that Daniels desired to testify (and admit to the murder of two police officers) or that he had a story to tell which would have altered the outcome of the trial. The scenario that a trusted, competent counsel could have induced Daniels to testify and avoid a capital conviction and penalty is a contrivance of appellate judges exercising wishful thinking.

to torpedo his trial because of his disagreement with rulings made *months* before trial even started. Further, even though the trial judge was never required to appoint Roth, respondent's personal choice, it nevertheless did so but later was constrained to relieve him, properly, when it became clear he would be a witness in the trial. Finally, the Ninth Circuit's assertion that trial counsel failed to conduct adequate preparation is also incorrect, as discussed more thoroughly in the following subsection.

In *Morris v. Slappy*, 461 U.S. at 4, this Court reversed a similar ruling by the Ninth Circuit. There, the defendant refused to cooperate with counsel, who was appointed *only six days* before trial and who the defendant believed did not have adequate time to prepare. After noting the defendant's claim that the trial court's refusal to grant a continuance resulted in an "irreconcilable conflict," this Court ruled, "The facts shown by the record conclusively rebut [this] claim[] and are alone dispositive, independent of the correctness of the novel Sixth Amendment guarantee announced by the Court of Appeals." *Id.* at 4.

8. Under the panel's novel decision, a defendant can avoid the objective standards of professional competence under *Strickland*, or any showing of prejudice, and based upon his own evaluation of his attorney and his unilateral unwillingness to cooperate, obtain reversal of a conviction. If allowed to stand, the Ninth Circuit's decision instructs any capital defendant how to avoid the death penalty simply by refusing to cooperate with trial counsel. Certiorari must be granted in the present case to decide this important issue of law, as well as prevent the Ninth Circuit from ignoring this Court's decisions in cases such as *Strickland v. Washington* and *Morris v. Slappy*

B. The Ninth Circuit Decision Creates A Conflict Among The Circuit Courts Regarding When Defense Counsel May Rely On The Opinions Of Experts When Formulating Their Defense Strategy

This Court must grant certiorari to decide the split in the federal circuit courts over when defense counsel may reasonably rely on expert mental health opinions when formulating trial strategy.

1. Numerous decisions from circuit courts outside the Ninth Circuit have recognized that an attorney does not render ineffective assistance by failing to "shop around" for a favorable expert opinion after a defendant has been evaluated by a mental health expert. *See, e.g., Winfield v. Roper*, 460 F.3d 1026, 1040-41 (8th Cir. 2006) (counsel had no duty to shop for a new expert after defendant had been examined by two experts); *Walton v. Angelone*, 321 F.3d 442, 466 (4th Cir. 2003) (no duty to obtain third opinion where two experts did not suggest defendant suffered from mental illness); *Sidebottom v. Delo*, 46 F.3d 744, 752-53 (8th Cir. 1995) ("'[W]e have never suggested [that] counsel must continue looking for experts just because the one he has consulted gave an unfavorable opinion.'"); *Poyner v. Murray*, 964 F.2d 1404, 1418-20 (4th Cir. 1992) ("The mere fact that [defendant's] counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders simply does not constitute ineffective assistance."). As such decisions recognize, defense counsel are entitled to rely on expert opinions when formulating their defense strategies. *See, e.g., Walton v. Angelone*, 321 F.3d at 466.

Notably, different panels of the Ninth Circuit have likewise recognized that defense counsel may reasonably decline to further investigate or pursue a mental-state defense when two mental health experts have concluded that such a defense was not available—even in capital cases. *Moran v. Godinez*, 57 F.3d 690, 699 (9th Cir. 1995); *Harris v. Vasquez*, 949 F.2d 1497,

1525 (9th Cir. 1991); *see also Williams v. Woodford*, 384 F.3d 567, 611 (9th Cir. 2004) (reliance on three mental health opinions).

2. Here, the Ninth Circuit broke with this authority. Prior to trial, two psychiatrists, Dr. Oliver and Dr. Philips, examined Daniels, finding no evidence of psychosis, organic brain disease, or psycholpathology. As Dr. Oliver expressed in his written report, "I very much doubt that mental incapacitation from defect, disease or toxic substance would likely be a factor in this case." Dr. Oliver reached this conclusion after spending three hours with Daniels. Although Daniels refused to discuss personal data or details surrounding the charges because he believed the conversation was being monitored, Dr. Oliver was nonetheless able to establish a "rapport" with Daniels and reach his opinion that Daniels was competent to stand trial.

Dr. Philips evaluated Daniels during the course of nine psychotherapeutic sessions in 1980, and an additional session in October 1982. In total, Dr. Philips "stud[ied]" Daniels for over twelve hours. In a report to counsel, Dr. Philips observed that they had developed a good relationship, and that there was "no evidence of psychosis, or organic brain disease."

The Ninth Circuit found defense counsel provided ineffective assistance by failing to adequately investigate Daniels's purported mental illness; in so concluding, it dismissed and disregarded defense counsels' reliance on these two expert opinions. In a footnote, the Ninth Circuit maintained that defense counsel were not reasonable in relying on the opinions of the two psychiatrists because counsel knew Dr. Oliver had not been able to examine Daniels because he did not cooperate and nothing in Dr. Phillips's letters to counsel[5/] indicated that he conducted any testing evaluation procedures, or structured assessment of Daniel's mental state. App. at 38a, n. 28.

3. In so concluding, the Ninth Circuit created a new rule that

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5. In one of the reports, Dr. Phillips noted he had "stud[ied]" Daniels for over twelve hours, assessed Daniels's intelligence, and discussed Daniels's emotional and social immaturity.

counsel may not rely on the opinions of experts and that attorneys must know what psychological tests are minimally necessary to assess a client's potential mental defenses. The problem with this position, of course, is that attorneys are not experts in psychiatry or psychology, nor should they be required to be so in order to be considered minimally competent. As this Court has recognized, the Constitution requires courts to consider "'not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *Untied States v. Cronic*, 466 U.S. at 665, n. 38.) The Ninth Circuit's position is squarely at odds with that of the Fourth and Eighth Circuits, which have rejected claims that an attorney may not rely on a psychiatric evaluation even where the expert does not administer standardized testing to determine brain dysfunction, or where the expert fails to conduct a neuropsychological evaluation, or other psychological tests. *See, e.g.*, *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998); *Six v. Delo*, 94 F.3d 469, 473-74 (8th Cir. 1996); *Sidebottom v. Delo*, 46 F.3d at 753; *Poyner v. Murray*, 964 F.2d at 1416-19.

Although couched as an ineffective counsel claim, Daniels's complaint is not directed at counsel's competence, but instead at the competence of the expert, and there is no constitutional right to effective assistance of expert witnesses. *See, e.g.*, *Campbell v. Polk*, 447 F.3d 270, 285 (4th Cir. 2006). Indeed, as a different panel of the Ninth Circuit has recognized, "If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous." *Hendricks v. Calderon*, 70 F.3d 1032, 1039 (9th Cir. 1995). "To hold otherwise would raise the Sixth Amendment hurdle well above the floor of minimal competence, requiring attorneys to have the specialized knowledge to evaluate an expert's conclusions before relying upon them in making strategic choices." *Id.* *See also Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) ("while there may be a duty to seek out psychiatric evaluation of a client

where appropriate, there is no duty to ensure the trustworthiness of the expert's conclusions.") Here, neither of the psychiatrists suggested a need for further evaluation or testing; nor was there any reason to believe the psychiatrists were not competent. It is unreasonable to require an attorney to second guess a trained professional as to what testing is required. Certainly, the objective professional norms prevailing in 1982 did not require such a conclusion.

4. Once again, it is worth noting that the factual conclusions underlying the Ninth Circuit's decision are wholly unfounded. For the first time by any court, the Ninth Circuit made a factual finding that "Oliver did not *speak* with Daniels, who refused to cooperate in the attempted examination." App. at 14a, n. 13, italics added. Yet, Dr. Oliver and Daniels clearly spoke when they met for three hours and developed a rapport.

The Ninth Circuit also asserted that defense counsel believed Daniels suffered from mental illness and that they did not properly follow up on Dr. Banks's preliminary examination indicating schizophrenia and paranoia. App. at 35a-36a. However, there is no evidence that Dr. Banks informed defense counsel of his opinions concerning potential mental illness until *after* the guilt phase was completed. As the Ninth Circuit correctly recognized, defense counsel did not call Dr. Banks to obtain a psychological diagnosis, but rather as a penalty witness to testify as to his general impressions that Daniels would probably remain a productive person if his life were spared. (App. at 14a-15a; February 24, 2000, evidentiary hearing transcript at 48-9.) At the evidentiary hearing, defense counsel Jordon testified he received Dr. Banks's report on the morning he was called to testify at the penalty phase. (February 24, 2000, evidentiary hearing transcript at 46-7.) Indeed, in his opening brief to the Ninth Circuit, Daniels acknowledged that his counsel had obtained no report from Dr. Banks, and "had not been able to consult with his expert to prepare the testimony in any detail."

Thus, prior to the start of the penalty phase, defense counsel had no reason to suspect Daniels had an available mental illness

defense.[6/] Before the Ninth Circuit's decision, no court, including the district court, which heard the testimony at the evidentiary hearing, found that defense counsel were aware of Dr. Banks's opinion before the penalty phase. Notably, the Ninth Circuit made no finding (express or implied) as to when defense counsel learned of Dr. Banks's opinion; instead, the court simply blurred all the facts together, disregarding when counsel learned of them.[7/]

After Dr. Banks testified, defense counsel consulted with Dr. Skidmore in order to prepare for the prosecution's penalty case. Nothing suggests there was anything defense counsel could or should have done in the middle of the penalty phase to obtain additional testing or expert testimony.

5. The Ninth Circuit's decision creates a direct conflict between the Fourth and Eighth Circuits. This Court should grant certiorari to decide this important question.

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6. The Ninth Circuit asserted that defense counsel would have been tipped off regarding a potential mental defense had they reviewed prison hospital records. App. at 36a. But again, this begs the question whether counsel had a duty to investigate such records in light of their reliance on the opinions of two psychiatrists. *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) ("A failure to obtain available records, however, does not show that counsel's investigation was inadequate."). Unlike *Rompila v. Beard*, 545 U.S. 374 (2005), which the Ninth Circuit cited, this was not a case in which defense counsel failed to review "material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." *Id.* at 377. Unlike a record of a prior conviction as in *Rompila*, there can be no claim that competent defense counsel would have anticipated the prosecution's use of hospital records that did not bear upon the prior offenses and that were separate from the record of Daniels's prior criminal acts. This distinction is especially notable given the Ninth Circuit's conclusion that defense counsels' performance was inadequate not just at the penalty phase, but even at the guilt phase.

7. The Ninth Circuit noted that Dr. Banks attempted to obtain the assistance of neuropsychology experts for further evaluation. However, there is no evidence he undertook such efforts before the penalty phase. An affidavit of Sherry Skidmore, Ph.D., reveals he met with Dr. Banks in January 1983 – over a month after the jury had returned its guilty verdicts. (Daniels's Ninth Circuit excerpts of record at 237.)

C. The Test Employed By The Ninth Circuit To Determine Whether Prejudice Must Be Presumed From The Failure To Grant A Change Of Venue Motion Is Contrary To Decisions By This Court And Fails To Consider The Jurors' Responses During Voir Dire

Certiorari must be granted in order to resolve the direct conflict between *Murphy v. Florida*, 421 U.S. at 799, and the Ninth Circuit's decision presuming prejudice from the denial of a change of venue motion without regard to the jurors' assurances of impartiality.

1. Riverside County abuts Los Angeles County. At the relevant time period, it had a population of over 600,000 persons. *People v. Daniels*, 52 Cal. 3d at 852. On direct appeal, Daniels argued the trial court violated his constitutional rights by denying the change of venue motion. The California Supreme Court rejected this claim, making a number of factual findings in the process. The court discussed the media attention in the days after the shootings, which diminished after Daniels's arrest, and then resumed as trial approached. The court further discussed a statue to fallen officers located outside the courthouse where Daniels was tried.

Turning to the voir dire responses of the jurors, the California Supreme Court observed that sixty-four prospective jurors were examined:

> Most expressed some familiarity with the case. Of the jurors selected, four had no recollection of the incident. The others recalled the police officers were shot; some recalled that the suspect was a Black paraplegic; two remembered Daniels' name. All said unequivocally that they could set aside any impressions formed outside the courtroom and consider the evidence without prejudice.

People v. Daniels, 52 Cal. 3d at 850.

The California Supreme Court discussed the size of the county and the number of jurors who had heard of the case. The decisive factor, however, was that Daniels's trial counsel used only fifteen of twenty-six peremptory challenges, and did not object to the jury as ultimately composed. As the court explained, this inaction demonstrated counsel's recognition that the jury as selected was fair and impartial. *People v. Daniels*, 52 Cal. 3d at 853-54.

2. On federal habeas corpus, the Ninth Circuit held the trial court violated Daniels's right to a fair and impartial jury, and therefore denied him due process, by denying the change of venue motion. In reaching this holding, the Ninth Circuit recognized that it could not conduct an independent review of pre-trial news coverage, and therefore purported to rely on the factual findings by the California Supreme Court. App. at 48a-50a. Because Daniels conceded there was no evidence of actual prejudice, the Ninth Circuit went on to find there was a presumption of prejudice based on its consideration of the following test:

> Three factors should be considered in determining presumed prejudice: (1) whether there was a "barrage of inflammatory publicity immediately prior to trial, amounting to a huge. . . wave of public passion"; (2) whether the news accounts were primarily factual because such accounts tend to be less inflammatory than editorials or cartoons; and (3) whether the media accounts contained inflammatory or prejudicial material not admissible at trial.

App. at 48a (citing *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir. 1998), *as amended*, 152 F.3d 1223). After considering each of these factors, the Ninth Circuit determined, "The nature and extent of the pre-trial publicity, paired with the fact that the majority of actual and potential jurors remembered the pretrial publicity warranted a change of venue." App. at 50a.

3. In *Murphy v. Florida*, 421 U.S. 794, this Court clarified several prior decisions concerning pre-trial publicity, ruling that any presumption of prejudice in such cases must be based on

the "totality of circumstances" and that "juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged" do not alone presumptively deprive a defendant of due process. *Id.* at 799. Turning to the voir dire responses, this Court found no evidence that any partiality by the jurors could not be laid aside. This Court found only one juror who exhibited a colorable claim of partiality, and noted that only twenty of the seventy-eight prospective jurors were excused because they expressed an opinion as to the defendant's guilt. *Id.* at 803.

4. The Ninth Circuit's test for determining presumed prejudice is directly contrary to this Court's decision in *Murphy*. Each of the three factors considered by the Ninth Circuit relates exclusively to juror exposure to news accounts of the crime and pretrial publicity. At no point does the Ninth Circuit's test even consider the jurors' ability to set aside such publicity, or, more generally, their responses during voir dire.

Tacitly recognizing this deficit, the Ninth Circuit attempted to insert a bare reference to the actual responses of the jurors as an apparent afterthought in its conclusion. As noted above, the court concluded without further discussion that a change of venue was required based the nature and extent of the pre-trial publicity "paired with the fact that the majority of actual and potential jurors remembered the pretrial publicity." App. at 50a.

5. The mere fact that seated jurors have heard of a case prior to trial is not a sufficient basis for finding a presumption of prejudice. *Mu'Min v. Virginia*, 500 U.S. at 428-30 (finding no presumption of prejudice where eight of twelve seated jurors had heard of case, but none had formed an opinion as to guilt or indicated an inability to judge case on evidence presented); *Irvin v. Dowd*, 366 U.S. 717 (1961) (jurors need not be "totally ignorant of the facts and issues involved"; instead, it is sufficient "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.") Significantly, although the Ninth Circuit purported to adopt the

factual findings of the California Supreme Court, the Ninth Circuit made no reference to the fact that all seated jurors stated unequivocally that they could set aside any impressions formed outside the courtroom and consider the evidence without prejudice.

Unlike *Irvin v. Dowd*, 366 U.S. 717, this was not a case where the assurances of the seated jurors that they would be impartial could not be believed. There, this Court found that a "'pattern of deep and bitter prejudice' shown to be present throughout the community" prevented a fair trial. *Id.* at 727. After reviewing the extensive publicity, which included the fact that the petitioner had failed a lie detector test, had confessed, and had offered to plead guilty, the Court observed that the trial court had to excuse 268 persons (out of a panel of 430) for cause. Another 103 jurors were excused because of conscientious objection to the imposition of the death penalty, and the parties peremptorily challenged 30. Fourteen jurors were selected and all the rest were excused for personal grounds. *Id.* at 727. Finally, *eight of the twelve seated jurors had formed the opinion that the petitioner was guilty*. Based on these facts, this Court found it difficult to believe that the jurors could exclude their preconceptions from their deliberations. As this Court expressed, "Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Irvin v. Dowd* 366 U.S. at 728.

The present case is completely different both in terms of the type of community, the nature of the coverage, and the responses of the jurors. Riverside County, unlike the community in *Irvin*, is a large metropolitan community. Because of its proximity to Los Angeles, murders are, unfortunately, all too common. As the California Supreme Court concluded, as demonstrated by defense counsel's failure to exercise all his peremptory challenges, the responses of the jurors that they would be impartial were credible and worthy of belief.

Notably, the Ninth Circuit did not find that *Irvin* controlled; it simply ignored the jurors' oaths of impartiality completely.

6. Certiorari is necessary in order to prevent the Ninth Circuit from undermining this Court's holding in *Murphy v. Florida* by omitting any consideration of the jurors' statements of impartiality, or finding that such assurances of impartiality could not be believed under *Irvin v. Dowd*.

D. The Ninth Circuit's Conclusion That The Trial Court's Failure To Instruct The Jury Not To Double Count A Superfluous Multiple-Murder Special Circumstance Was "Not Harmless" Is Contrary To, And Stands To Undermine, This Court's Decision In *Brown v. Sanders*

The Ninth Circuit's conclusion that California is a "weighing state," and therefore the trial court's failure to instruct the jury not to double count a redundant multiple-murder special circumstance was prejudicial, is directly contrary to this Court's decision in *Brown v. Sanders*, 546 U.S. 212.

1. Multiple murder is a special circumstance in California, rendering the defendant eligible for the death penalty. Cal. Penal Code § 190.2(a)(3). Daniels's jury returned two multiple-murder special circumstances, one for each victim. On direct appeal, the California Supreme Court found the second special circumstance to be superfluous, and set it aside. The court concluded the redundant finding was not prejudicial because there was nothing at trial, in the arguments, or in the instructions calculated to create the impression that two murders were more heinous because two multiple-murder special circumstances had been charged. *People v. Daniels*, 52 Cal. 3d at 876.

The Ninth Circuit found the double counting error "not harmless." App. at 50a-54a. The Ninth Circuit held that California's 1978 death penalty law, under which Daniels was convicted, turned California into a weighing state. Because it found California was a weighing state, the court further concluded that under this Court's decision in *Stringer v. Black*, 503 U.S. 222, 232 (1992), the use of an improper aggravating

factor was one of critical importance and violated the Constitution. Coupling the error with the other penalty phase errors it had already found, the Ninth Circuit held the trial court's failure to instruct the jury that it could not double count the special circumstances gave the jury "one more improper reason to tip the scales against Daniels." App. at 54a.

2. The panel's conclusion is directly contrary to this Court's decision reversing the Ninth Circuit for the same mistake in *Brown v. Sanders*, 546 U.S. 212. As *Sanders* made clear, California remains, under the 1978 death penalty law, a non-weighing state. *Id.* at 126 S. Ct. at 893. Nor does it even matter under *Sanders* whether California is a "weighing" state. The dispositive question in cases involving an invalid sentencing factor is, instead, whether "one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." *Sanders*, 126 S. Ct. at 892. In the instant case, the erroneous factor could not have skewed the sentence. The multiple murders constituted aggravating evidence. And, regardless of the "special circumstance" denomination, the jury knew precisely how many officers Daniels had murdered. There is no reason to believe the jury would have found Daniels more culpable or worthy of a death sentence simply because each murder count carried with it a separate multiple-murder special circumstance. Thus, as *Sanders* makes clear, there was no constitutional error at all.

Review of the Ninth Circuit's decision is necessary because it flatly contradicts this Court's decision in *Sanders*.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)