In the Supreme Court of the United States

KELLY HARRINGTON, WARDEN, *Petitioner,*

v.

JOSHUA RICHTER, *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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QUESTION PRESENTED

In granting *habeas corpus* relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U.S.C. section 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt?

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Kelly Harrington, Warden of the Kern Valley State Prison at Delano (the State),[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The en banc opinion of the Ninth Circuit Court of Appeals, granting habeas corpus relief, is reported as *Richter* v. *Hickman*, 578 F.3d 944 (9th Cir. 2009) (*en banc*). The earlier panel opinion, denying relief, was reported as *Richter* v. *Hickman*, 521 F.3d 1222 (9th Cir. 2008). The opinion of the district court, also denying relief, is unpublished. The order of the California Supreme Court, denying habeas corpus, is unpublished. The opinion of the California Court of Appeal, affirming respondent's criminal conviction, is unpublished. Each of these decisions is reproduced in the Appendix to this petition. (App. 1a-196a.)

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment granting habeas corpus relief on August 10, 2009. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

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[1] Warden Harrington currently has custody of respondent.

2. Section 2254 of Title 28 of the United States Code provides, in pertinent part:

> (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[.]

STATEMENT OF THE CASE

Summary

Respondent Joshua Richter and Christian Branscombe were convicted of murder, attempted murder, burglary, and robbery. At trial, the prosecution's evidence showed that, in stealing a safe from a residence, respondent and Branscombe shot and injured Joshua Johnson in his bedroom—and that they shot and killed Patrick Klein, with two different firearms, as he lay asleep on a couch in the living room.

In his defense, respondent testified that he and Branscombe went to the residence, around 4 a.m., for innocent reasons, and that Branscombe entered the house while respondent waited in his pickup truck. Upon hearing gunshots, respondent said, he rushed into the house. There, he saw Johnson unconscious on the bed, Klein lying in a pool of blood on the floor by the bedroom door, and Branscombe holding a gun and screaming that "they tried to kill" him. Respondent's defense counsel posited, in argument, that Johnson shot at Branscombe with a handgun, that the bullet had struck Klein instead, and that Branscombe in self-defense then fired a second handgun and hit both Johnson and Klein.

In later habeas corpus petitions, respondent claimed that his lawyer rendered ineffective assistance in refraining from investigating and producing expert-opinion testimony that the pool of blood by the bedroom door—photographed but never tested by anybody—theoretically might have contained blood from victim Klein. In respondent's view, such evidence would have corroborated his testimony that he saw Klein lying there rather than on the couch—so that it would become less likely that Klein had been shot in cold blood, and more likely that he had been shot in the "crossfire" as Branscombe allegedly had described it to respondent at the scene. The California Supreme Court, the federal district court, and a panel of the Ninth Circuit Court of Appeals all rejected respondent's ineffective-counsel claim.

But, in a 7-to-4 opinion authored by Judge Reinhardt, the Ninth Circuit sitting *en banc* granted respondent habeas corpus relief. Even though defense counsel had cross-examined the prosecution's blood experts at trial to good effect, the Ninth Circuit held that he had acted incompetently in declining to investigate and present helpful expert testimony on the source of the pool of blood. Further—even though none of respondent's experts in the federal proceedings ever tested the blood or testified that Klein's blood in fact was present in the pool, and photographs instead showed high-velocity blood spattering on the wall by the couch—the Ninth Circuit also held that counsel's performance had prejudiced the defense. Finally, in a bare one-sentence statement, Judge Reinhardt's opinion characterized the California Supreme Court's adjudication of respondent's ineffective-counsel claim as "objectively unreasonable" so as to permit relief under 28 U.S.C. § 2254.

The Crime and the Investigation.

Late in the evening of December 19, 1994, respondent and Branscombe visited Johnson, a marijuana dealer, at his Sacramento home. Klein

was also there. Johnson, who kept a .380-caliber Mac-12 semiautomatic pistol on his nightstand, noticed Branscombe cleaning a .32-caliber semiautomatic pistol. After Richter and Branscombe left, Klein went to sleep on the couch in the living room. Johnson fell asleep in his bedroom.

Sometime afterwards, Johnson awoke to see respondent and Branscombe in his bedroom taking a gun safe Johnson kept in his closet. Branscombe suddenly shot Johnson, knocking him down. Then Johnson heard another gunshot. Entering the living room, Johnson saw Klein, bleeding from an apparent gunshot wound, on the couch. Johnson's Mac-12 pistol, his hip sack containing $6,000, and his pager all were missing.

After hiding evidence of his own drug dealing, Johnson called the police. Upon their arrival, two sheriff's deputies saw that Johnson was covered with blood on his cheeks, shirt, hands, and right shoulder. They also saw Klein, lying on a sleeping bag on the couch but not breathing, with blood on his face and shoulder from an apparent gunshot wound. Later, near the couch, investigators found one expended CCI Stinger .22-caliber shell casing and one .32-caliber casing; and, in the bedroom, they found two expended .32-caliber shell casings. There was a pool of blood, just inside the bedroom, that appeared to have been disturbed, possibly by a "foot stomp"; and there was blood on the wall inside the bedroom, just above the floor molding. A sample of the blood on the wall was obtained by crime scene investigators. But no samples ever were collected from the blood pool. Another pool of blood also gathered in the kitchen where Johnson talked to the police. Johnson's pager was found in the front yard.

The day after the shootings, sheriff's deputies found Johnson's backpack and gun safe—bearing respondent's fingerprints—at respondent's house. Investigators also found several live CCI Stinger .22-caliber cartridges in two boxes and a gun magazine of a type usable with a semiautomatic handgun.

After their arrest, respondent and Branscombe were questioned separately. Respondent denied that his pickup truck had been at the crime scene and claimed that he was being set up. During a break, the police recorded a conversation in which Branscombe asked respondent what he had told the police. Respondent replied that he had told the police that he did not kill anyone and "da, da, da." Branscombe responded that he thought "we were going to tell the truth." [2] In addition, respondent's girlfriend told the police that she had talked to respondent after the shootings, but said she did not believe it would be helpful to respondent to reveal their conversation.

The Criminal Trial

Respondent and Branscombe were charged with murder, attempted murder, burglary, and robbery. At trial, the prosecution produced testimony from Johnson and from the police investigators.

In addition, the prosecution—which had never sought to analyze the blood at the crime scene until after the trial had begun—produced expert testimony from two witnesses. Jill Spriggs, a county criminalist who analyzed a sample of blood taken from the bedroom wall, opined that it could have been Johnson's but not Klein's. Detective Robert Bell, a blood-spatter expert, opined that the various blood droplets, smears, transfers, and spatter in Johnson's home were all consistent with an injured person moving about inside the house. Bell further testified, based on the blood flow patterns on the victim's face, that Klein was "on that couch fully or slightly above the couch at the time he was shot." In Bell's opinion, it was "highly unlikely" that Klein could have been shot somewhere other than on or very near the couch and then moved to the couch. He explained that, if Klein had been shot near the door to the bedroom and had fallen straight down, the victim "would have

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[2] At trial, respondent's counsel successfully moved to suppress evidence of the recorded conversation.

had to have been lifted straight up because we have no transfer of blood."

Testifying in his own defense, respondent asserted that he and Branscombe had returned to Johnson's residence sometime after 3 a.m. to deliver some things to Johnson's roommate and to return Johnson's .32-caliber gun. Klein let Branscombe in through the front door while respondent waited outside in his pickup truck. Then, respondent testified, he heard "a series of gunshots." Entering the house, he saw Klein lying in the bedroom doorway; and, entering the bedroom, he saw Johnson contorted on the bed. Branscombe, holding a gun, told respondent, "They fired. They shot at me, . . . they tried to kill me." Then, according to respondent's testimony, he and Branscombe picked up Johnson's Mac-12 pistol and ran out of the house. They threw the two firearms—the Mac-12 and the .32—into a river.

Respondent's counsel called six other witnesses. They testified that Johnson's safe was already in his garage before the incident and that the incident had occurred at 4:20 a.m., rather than 5:00 a.m., so that Johnson would have had enough time to move Klein's body from the hallway to the couch and to otherwise contrive evidence to incriminate respondent.

The jury found respondent and Branscombe guilty as charged. The court sentenced them to prison for life without parole.

State Post-Trial Proceedings.

In 1998, the California Court of Appeal affirmed the judgment. App. 1a-21a. The California Supreme Court denied further direct review.

In 1999, respondent filed a petition for writ of habeas corpus in the California Supreme Court. He alleged that his lawyer had rendered ineffective assistance by not presenting, among other things, "readily available expert testimony" regarding the blood spatter and the pool of blood at the crime scene that allegedly would have corroborated respondent's trial testimony. In support of this allegation,

respondent presented the declarations of four "experts," who claim that they could have offered evidence (1) to refute the prosecutor's theory that the large pool of blood near the bedroom was made by Johnson and (2) to show that Klein was a possible contributor to the blood spatter sample. The California Supreme Court summarily denied the petition, on the merits, in March 2001. App. 22a.

Federal Habeas Corpus Proceedings

In April 2001, respondent filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California. Again he claimed that his trial counsel had rendered unconstitutionally ineffective assistance in declining to investigate and produce expert opinion evidence on the blood pool and blood spatters. At the district court's suggestion, respondent's trial counsel testified in a deposition. Among other things, respondent's counsel said that, because the State had not conducted any forensic analysis of the blood evidence from the crime scene nor identified any expert witnesses in regard to this evidence as of the start of trial, he intended to exploit this deficiency. Accordingly, respondent's counsel concentrated on defending his client by demonstrating the unreliability of Johnson as a witness and the lackadaisical investigation conducted by the police.

The district court denied the petition. App. 23a-57a. The court explained that respondent's counsel's "pretrial investigation and study led him to the belief that the trial would be primarily a credibility case." App. at 39a. This determination was reasonable, the district court held, because the prosecution had "not prepar[ed] a blood spatter analysis or even test[ed] any of the blood samples taken from the crime scene." *Id.* Moreover, upon being presented with the serologist's report and being informed that the prosecution intended to use Bell as a blood spatter expert, respondent's counsel objected—but to no avail. Under the circumstances, the district court

found, counsel's "actions were reasonable." App. at 40a.

In a published opinion issued in 2008, a three-judge panel of the Ninth Circuit affirmed. See *Richter* v. *Hickman*, 521 F.3d 1222. App. 58a-85a. That panel held that even if respondent's counsel's "failure to consult and present [scientific] experts was unreasonable," respondent was not prejudiced thereby. App. at 66a. Thus, the panel wrote:

> There is no reasonable probability that the jury would have rendered a different verdict had [respondent's] proffered serology experts testified at trial. The serology experts' testimony, even if believed, would not significantly weaken the State's case. All the testimony says is that it is *possible* that the blood sample taken from the bedroom doorway might be a mixture of Klein and Johnson's blood, instead of being exclusively Johnson's blood. Because these expert reports do not foreclose the likelihood that the blood from the blood sample came exclusively from Johnson, they do not impeach Johnson's testimony that the blood came from him alone. The expert reports also do nothing to contradict the weight of the evidence presented at trial that supported the State's theory of the case.

App. at 70a.

The panel also found unpersuasive the declaration of respondent's pathologist. Thus, the panel held: "The reasons the expert provided in reaching his conclusion [i.e., that Johnson could not have made the blood pool because he had not bled enough while he awaited the arrival of the police] are flawed and are partially contradicted by the record." App. at 71a.

On August 10, 2009, however, a limited *en banc* panel granted respondent habeas corpus relief from the state criminal judgment. App. 86a-196a. Judge

Reinhardt, writing for a 7-to-4 majority, began his opinion by quoting Sun Tzu about the need to be prepared for "any contingency." Then, asserting that the source of the blood in the hallway by the bedroom door was "the single most critical issue in the case, at least from the standpoint of the defense," App. at 103a, the majority opinion faulted respondent's counsel for not consulting forensic experts at three stages: before choosing a defense, while preparing a defense, and in the middle of trial when the prosecution suddenly produced two expert witnesses. According to the majority, counsel should have anticipated the prosecution calling a blood spatter expert. App. at 103a-107a. Although acknowledging that counsel reasonably had decided *not* to have any of the blood tested before trial because it would have risked harm to the defense, App. at 109a-110a (n. 9), the majority nonetheless stated there was "no negative consequence" to consulting a serology expert before trial. *Id.* The majority further opined that cross examination will rarely serve as an adequate substitute for affirmative defense testimony. Ultimately, the en banc majority concluded that, while the decision not to call a serology expert alone was not prejudicial, respondent was prejudiced by the failure to call a blood spatter specialist. After explaining over 35 pages of the printed opinion why it believed counsel had rendered ineffective assistance, the majority in a bare one-sentence statement asserted that the California Supreme Court's adjudication of respondent's ineffective-counsel claim had been "objectively unreasonable" so as to permit federal relief under § 2254(d). App. at 135a-136a.

In an exhaustive dissent for four judges, Judge Bybee concluded that defense counsel had acted reasonably and that the state court's decision had been objectively reasonable. In the dissent's view, the en banc majority had not taken *Strickland*[3] and

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[3] *Strickland* v. *Washington*, 466 U.S. 668 (1984).

AEDPA[4] "to heart". Judge Bybee criticized the en banc majority for creating a novel rule that required defense counsel to seek expert advice on every potential evidentiary issue. Viewing the case from the perspective of counsel at the time, Judge Bybee noted that the available evidence of respondent's guilt had made it highly unlikely that forensic investigation would produce helpful evidence. Nor was there any showing that the "modest" difference between cross examination and expert testimony would have made a difference in this case. Finally, counsel's decision to refrain from producing expert testimony such as that proffered in the federal proceedings—about hypothetical possibilities that did not actually eliminate Johnson as the source of the blood in the hallway—did not undermine confidence in the verdict in light of the strong evidence of respondent's guilt.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S HABEAS CORPUS DECISION CONFLICTS WITH *STRICKLAND* V. *WASHINGTON* AND *KNOWLES* V. *MIRZAYANCE* IN ERRONEOUSLY EXPANDING THE SCOPE OF THE SIXTH AMENDMENT TO REQUIRE DEFENSE COUNSEL TO PRODUCE EXPERT-OPINION TESTIMONY RATHER THAN CHOOSING A DIFFERENT TACTIC TO CHALLENGE THE PROSECUTION'S CASE

Two clear rules govern the proper resolution of this case, and the Ninth Circuit violated both of them.

First, the Sixth Amendment standard laid down in *Strickland* v. *Washington* for determining whether counsel has rendered ineffective assistance is a broadly general and deferential one recognizing that

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[4] Hereafter "AEDPA" refers to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

there are many ways reasonably competent counsel might choose to defend any particular case and that counsel need not advance all non-frivolous lines of defense even if there is "nothing to lose" by doing so. *Knowles* v. *Mirzayance*, 556 U.S. ___, 129 S.Ct. 1411, 1422, 173 L.Ed.2d 251 (2009); *Jones* v. *Barnes*, 463 U.S. 745, 752-54 (1983); *Strickland*, 466 U.S. at 688-89. Second, under 28 U.S.C. § 2254(d) as amended in AEDPA, the federal habeas corpus court may review state criminal judgments only against the standard of federal constitutional law as "clearly established" in the holdings of this Court's decisions, and may not extend or embellish those holdings as a basis for granting relief. *Mirzayance*, 129 S.Ct. at 1413; *Carey* v. *Musladin*, 549 U.S. 70, 76-77 (2006); *see Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

In resolving respondent's ineffective-counsel claim in this habeas corpus case, the Ninth Circuit should have denied relief under a "doubly deferential" review of the State court's adjudication under the broad *Strickland* test. Instead, the Ninth Circuit invoked a spurious extension of *Strickland's* Sixth Amendment rule that now would require counsel to produce expert-opinion evidence—as opposed to, as counsel did here, challenging the State's case through cross-examination—whenever it might appear potentially helpful to the defense and "no negative consequences" might appear to flow from it.[5] App. at 109a-116a In doing so, the Ninth Circuit not only erroneously interpreted the Sixth Amendment standard, but did so to upset a state conviction retroactively in violation of § 2254(d).

When the Ninth Circuit committed precisely these same errors in the recent cases of *Knowles* v.

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[5] In this respect, the Ninth Circuit has reiterated its view that investigating and/or presenting expert testimony is an essential element of effective representation under *Strickland* and that the failure to do so is unreasonable even where it might be harmful to the defense. *Belmontes v. Ayers*, 529 F.3d 834, 856-863 (9th Cir. 2008), cert. pending, *Wong* v. *Belmontes* (No. 08-1263).

Mirzayance and *Carey* v. *Musladin*, this Court was constrained to intervene. It should do so again in this case.

A. The Ninth Circuit's Decision Conflicts with *Strickland* and *Knowles*.

1. In *Knowles* v. *Mirzayance*, 129 S.Ct. at 1419-20, this Court confirmed that, under 28 U.S.C. § 2254(d), federal habeas relief may be granted on an ineffective-counsel claim *only if* the state-court decision unreasonably applied the general standard established by *Strickland* v. *Washington*, 466 U.S. 668. Accordingly, it cannot be "'an unreasonable application of clearly established Federal law'" for a state court to decline to apply a specific legal rule that has not been squarely established by this Court. *Mirzayance*, 129 S.Ct. at 1419; *Wright v. Van Patten*, 552 U.S. 120, ___, 128 S.Ct. 743, 169 L.Ed.2d 583, 586-587 (2008) (*per curiam*); *Schriro* v. *Landrigan*, 550 U.S. 465, 478 (2007); *Carey* v. *Musladin*, 549 U.S. 70, 76-77 (2006).

Further, as this Court has explained, a "doubly deferential judicial review" standard applies to a *Strickland* claim [6] evaluated under § 2254(d). *Mirzayance*, 129 S.Ct. at 1410; *see Yarborough* v. *Gentry*, 540 U.S. 1, 5-6 (2003) (*per curiam*). And, "because the *Strickland* standard is a general

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[6] In *Strickland*, this Court held that a defendant must show both deficient performance and prejudice in order to prove that he received ineffective assistance of counsel. 466 U.S., at 687. "The proper measure of attorney performance [is] simply reasonableness under prevailing professional norms." *Id.*, at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689. Expounding on the proper assessment of attorney competency in *Yarborough v Gentry*, this Court observed that "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." 540 U.S. at 8.

standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Mirzayance*, 129 S.Ct. at 1420 ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations").

2. This case presents the question of counsel's duty to investigate as articulated by this Court in *Strickland* v. *Washington* and subsequent cases. In *Strickland,* this Court explained: "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S., at 691. This Court has reiterated that standard in cases involving capital-case sentencing investigations: "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing . . . ." *Wiggins* v. *Smith*, 539 U.S. 534 (2003).

In another capital case, *Rompilla* v. *Beard*, 545 U.S. 374 (2005), this Court elaborated on defense counsel's duty when investigating the prosecution's case in aggravation. This Court found Rompilla's counsel ineffective because they were on notice of the aggravating evidence the prosecution intended to present, but failed to investigate that easily accessible evidence.

Rompilla's analysis, however, arguably applies to counsel's investigation of a prosecution's guilt case as well. Echoing *Strickland*, this Court explained that "[a] standard of reasonableness applied as if one stood in counsel's shoes spawns few hard-edged rules." *Rompilla*, 545 U.S. at 381. Defense lawyers are not deficient when they carefully exercise their judgment "about how best to marshal their time and serve their client." *Id.* at 395 (O'Connor, J. conc.).

This Court acknowledged that defense attorneys are not obligated to "scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Id.* at 383. Defense counsel need not go "looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there." *Id.* at 389. An assessment of counsel's performance includes considering whether the attorneys spent their time pursuing "other crucial leads," whether pursuit of other leads would be an unnecessary diversion from "more promising" tasks, and whether the prosecution's announcement of additional evidence occurred at the "11th hour." *Id.* at 395. (O'Connor, J. conc.)

In a related context, this Court has recognized that the defense attorney's reasonable assessment of the relative strengths and weaknesses of his client's case may influence tactical decisions. For instance, evidence of a client's guilt understandably will influence the defense—including, in a capital case, whether to actively challenge the guilt phase at all. *Florida* v. *Nixon*, 543 U.S. 175 (2004).

Thus, this Court repeatedly has explained that defense counsel need not exhaustively investigate every avenue of defense. Rather, counsel must use reasonable professional judgment in deciding which lead to pursue and which lines of attack will be a waste of investigative time. The dissent astutely notes that the court of appeals' "decision will force counsel to seek expert advice at every stage of the proceedings, even when counsel believes that it will detract from the other issues counsel must confront." App. at 139a. Nothing in this Court's Sixth Amendment jurisprudence even hints at such an expansive obligation on the part of defense counsel in the routine case.

3. But here—much like in *Mirzayance*—the Ninth Circuit created and applied its own, different standard for attorney competence. Relying on Sun Tzu's philosophy of war, rather than on this Court's precedents recognizing that there are countless ways for a lawyer to render competent assistance in a

given case, the Ninth Circuit in effect laid down a per se rule requiring counsel to investigate and to produce expert-opinion testimony. This eccentric Circuit rule applies regardless of whether counsel could reasonably conclude that such investigation would not be promising or would simply produce equivocal results. App. at 110a-120a.

Thus, citing Circuit law, rather than the law as clearly established by this Court's precedents as required by § 2254(d), Judge Reinhardt's majority opinion invoked a "rule" that "counsel *must* . . . *present* to the jury *any evidence* he finds that tends to show his client's innocence, tends to undermine the prosecution's case, or raises a reasonable doubt as to his client's guilt." App. at 110a. It cannot be enough, in the *en banc* majority's idiosyncratic opinion, for counsel to rely on cross-examination—"beyond any doubt the greatest legal engine ever invented for the discovery of truth," 5 J. WIGMORE, EVIDENCE 32 [§ 1367] (J. Chadbourn rev. 1974)—to make the defense's point. Instead, even while constrained to recognize that cross-examination of the State's witnesses may establish reasonable doubt, the court below imposed its own rule that "[l]eaving the jurors to believe or disbelieve defendants solely on the basis of their own testimony, without supporting evidence, where such evidence could be obtained with diligent investigation, is objectively unreasonable." *Id.*, at 114a. In essence, defense counsel may not reasonably rely on cross examination, if "affirmative" defense evidence may be produced. Indeed, in the Ninth Circuit's peculiar view—but not in any view expressed by this Court—defense counsel bears special *Strickland* obligations with respect to forensic-expert testimony. *Id.*, at 111a ("The obligation to investigate only grows more imperative where the evidence at issue is the 'only forensic evidence' that could reasonably support the defense theory.").

The court of appeals thus improperly enlarged counsel's duty to investigate to include consultation with and presentation of an expert in virtually every case in which the prosecution could conceivably offer

relevant forensic evidence. While Sun Tzu's exhortation to be prepared for any contingency and the Boy Scouts' motto, "Always Be Prepared," might express laudable goals, the demands of a criminal trial force counsel to marshal his or her resources in order to best respond to the evidence the prosecution has signaled it intends to present to prove the charges—not evidence the prosecution *might* present *if* it happens to develop at some point in time. This Court has never held, and thus the federal habeas court under § 2254(d) may not on its own establish, that defense counsel *must conduct* any particular kind of investigation in order to render effective assistance or that the failure to conduct an adequate investigation *simpliciter* is prejudicial.

4. As purported justification for its novel expert-opinion corollary to the *Strickland* rule, the Ninth Circuit explained that counsel was required to investigate and consult with experts because there was "no negative consequence" in doing so. App at 109a-110a. This is inconsistent with this Court's teaching that counsel is not required to search for "needles in haystacks" if counsel reasonably believes there is no "needle" or to "scour the globe" on the "off chance" something will turn up. *Rompilla*, 545 U.S. at 383, 395. The Ninth Circuit's "no negative consequence" notion is but the same "nothing to lose" twist on the *Strickland* rule that the Ninth Circuit invented in *Mirzayance*—and that this Court in *Mirzayance* repudiated.[7]

5. It is true that, in Judge Reinhardt's written opinion, the Ninth Circuit disclaimed adoption of any per se rule about presenting available forensic or expert evidence. App. at 116a (n. 12). The Ninth

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[7] Ironically, the en banc majority's attempt to distinguish *Mirzayance* merely exposes the conflict. The en banc majority described *Mirzayance* as a case in which counsel reasonably investigated and decided not to pursue a hopeless defense. App. at 116a. However, in this case, respondent's counsel also reasonably decided not to pursue an investigation that presented little prospect of a favorable result.

Circuit similarly disclaimed adopting a "nothing to lose" rule in *Mirzayance*. But this Court correctly discerned that, in substance, the Ninth Circuit had done precisely that. It is the same here. As graphically illustrated by its immediate appeal to Sun Tzu, rather than to *Strickland,* the en banc court's majority opinion apparently applied, in the guise of "clearly established Federal law," a novel rule requiring investigation of "any" conceivable line of defense despite counsel's reasonable professional judgment as to the necessity for such investigation as long as there was "no negative consequence" to the defense and regardless of whether it deprived counsel of time to check out more promising leads. The Ninth Circuit spawned a "hard edged rule" without looking at the case as if standing in counsel's shoes. Cf. *Rompilla*, 545 U.S. at 341.

B. The Ninth Circuit's Interpretation of the Right to Effective Counsel is Untenable

1. As Judge Bybee's dissent correctly discerned, the new hard-edged "any contingency" rule of Sun Tzu, as adopted by the Ninth Circuit, is exposed as untenable when applied to one standing in the shoes of respondent's counsel. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions . . . And, when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland,* 466 U.S. at 691. Here, counsel had good reason to believe that respondent was a murderer and a liar. Respondent tried to destroy the firearms evidence. He made inconsistent statements and lied to the police in claiming that his truck was not at the murder scene. Rather than protesting respondent's innocence, his own girlfirend informed the police that she did not think she should reveal what respondent had told her (inferably because it would not be helpful). And, in a

recorded conversation with Branscombe, respondent said he told the police he had not killed anyone, and "da, da, da," to which Branscombe replied that he thought "we were going to tell the truth." Even respondent admitted that this exchange implicated him in the crime. (Respondent's counsel successfully prevented the admission of this post-arrest conversation at trial and, of course, respondent lied on the stand when he denied making the statements.)

Respondent's apparent consciousness of his own guilt, and his damaging adoptive admissions, were not the only problems confronting respondent's counsel. Extensive circumstantial evidence tied respondent to the crime and proved that the shootings occurred in the commission of a robbery and not as the result of a spontaneous gunfight. Klein was shot with both a .32- and a .22-caliber bullet; an expended .32-caliber shell casing was found a few feet from the couch where Klein was lying; a .22-caliber shell casing was on a pillow next to the couch; and the identical brand of .22-caliber bullets were found in respondent's garage near the gun safe that Johnson said respondent and Branscombe had stolen. Respondent's fingerprints were on the safe. Further, Johnson's backpack was found in respondent's garage. Finally, Johnson's pager, which had been in his missing hip sack on his nightstand, was found by the police on the front lawn. This evidence alone persuasively supported the prosecution's theory that Klein was shot on the couch with two separate firearms, both of which were directly traceable to respondent and Branscombe.

Based on the information available to him, defense counsel reasonably could conclude that forensic investigation into the blood evidence (i.e., the sample from the spatter on the bedroom wall and the pool in the doorway) would be fruitless. Indeed, the en banc majority conceded that, because of the risk it would incriminate respondent, counsel acted reasonably in refraining from testing any available blood ahead of time. App. at 109a-110a (n. 9). The Ninth Circuit nevertheless held that counsel should

have consulted a serology expert for "no negative consequences" would have ensued from doing so. The *en banc* court's holding on this latter point is internally inconsistent with its concession that counsel was not obliged to conduct pretrial blood testing. More broadly, as noted above, the "no negative consequences" justification is merely a rephrasing of the "nothing to lose" rule that the Ninth Circuit adopted—and that this Court rejected—in *Mirzayance*.

2. Moreover, contrary to the import of the en banc opinion, counsel was faced with much more blood-related evidence than just the pool of blood in Johnson's doorway. This other blood evidence supported the conclusion that Klein had been shot on the couch, not in the doorway. And it undermined any speculation, such as that put forward by respondent's habeas corpus experts, that the pool of blood near the bedroom door might not have been Johnson's. For example, there was blood spatter on the arm rest and a concentration of blood near the dying Klein's head on the end of the couch. And there was high-velocity blood spatter on the wall behind the couch. Further, bloodstains on Klein's face indicated he had not been moved from that spot. Finally, Detective Bell's testimony that there was nothing to suggest that Klein had been moved from the doorway to the couch has never been challenged by respondent's experts. Conversely, Johnson himself had blood on his cheeks, covering his shirt, hands and right shoulder. Indeed, while talking to the police, he left a significant pool of blood in his kitchen.

Finally, the prosecution had gathered minimal evidence about the blood at the scene of the crime. And it had not indicated it would be calling witnesses about the blood. The en banc majority has greatly exaggerated the importance of the bedroom blood pool and given it a prominence it does not deserve. Certainly, respondent's counsel reasonably could have concluded that investigation of the blood evidence would be neither relevant nor helpful to the defense case. *See District Attorney's Office for Third*

Judicial District v. *Osborne*, ___ U.S. ____, 129 S.Ct. 2308 , 2329-2330 (2009) (Alito, J. *concurring*). As this Court has recently reiterated, "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Bobby* v. *Van Hook*, ___ U.S. ____ (No. 09–144; decided Nov. 9, 2009), slip opn. at p. 5 (quoting *Roe* v. *Flores-Ortega*, 528 U. S. 470, 479 (2000)).

3. The evidence later offered by respondent in his federal habeas corpus case only vindicates his counsel's decision. The blood on the wall near the pool of blood by the bedroom indisputably included Johnson's blood. As the dissent and panel opinion both recognized, this new evidence does not undermine the prosecution's case that Klein was shot on the couch. App. at 69a-72a, 159a-175a. Nor does it explain the high velocity spray of blood near the couch.

Respondent's "expert" opinion testimony on blood spatter, speculating that Johnson could not have been the source of the pool of blood, does not contradict the strong evidence that Klein was shot on the couch. That "expert" opinion, moreover, is based on the unsupported premise that Johnson must have been standing up at the time. in the hallway doorway. Nor can it account for the fact that Johnson indeed was bleeding sufficiently to leave a pool of blood, as he did in the kitchen while talking to the police. Finally, it can hardly explain how—let alone why— Johnson might have moved Klein's body from the hallway to the couch without smearing the pool.

C. Under Proper "Doubly Deferential" Review, The State Court's Rejection of Respondent's Ineffective-Counsel Claim Proves "Objectively Reasonable" On Both the "Performance" and the "Prejudice" Prongs of the General *Strickland* Test, So Habeas Corpus Relief "May Not Be Granted."

Interpreting the Sixth Amendment as imposing on counsel a specially enlarged and unrealistic duty to investigate expert opinion was the Ninth Circuit's first mistake. Its second was to apply that interpretation, rather than this Court's clearly-established *Strickland* rule itself, to retroactively grant habeas corpus relief from a state conviction despite the restriction on federal review imposed by 28 U.S.C. § 2254(d).

Under the proper "doubly deferential" review required by the combination of *Strickland* and § 2254(d), the California Supreme Court's rejection of respondent's ineffective-counsel claim easily passes muster as "objectively reasonable." For the state-court record provided a reasonable basis for rejecting the ineffective counsel claim on either "competent performance" grounds or in any event on "no prejudice" grounds.

1. The state-court record provided the state court with a reasonable basis to conclude that counsel's challenged decision to refrain from presenting expert-opinion testimony to counter the prosecution's blood evidence, but to minimize it through cross-examination instead, constituted competent performance. First, counsel knew that the prosecution had neither tested nor preserved samples of the photographed blood in the pool by the door. Second, defense counsel succeeded in wresting from prosecution expert Spriggs her acknowledgment that she could not rule out the possibility that Klein's blood, and not just Johnson's, had been present in the nearby spatter of blood on the wall. Third, counsel

reasonably could have assumed that blood spatter reconstruction was inherently speculative and that emphasizing it might have tied his client's defense to it too closely.

2. Perhaps more simply and directly to the point—as this Court noted in *Strickland* itself, 466 U.S. at 695-96—the state record provided support for the conclusion that counsel's decision did not result in any "reasonable probability" of prejudice. Contrary to the *en banc* court's analysis, the blood evidence was hardly crucial to the defense case. And, as the federal habeas corpus hearings demonstrated, expert-opinion testimony would have proved hopelessly equivocal and unpersuasive—if admissible at all.

The most challenging evidence confronting respondent's trial counsel was the undisputed proof that Klein had been fatally wounded by a .32-caliber bullet to the head and had suffered a neck wound from a .22-caliber slug. In the face of it, respondent's counsel had to explain how Klein came to be shot by two different firearms. More daunting, in doing so, he also had to offer a plausible reason for respondent's and Branscombe's guilty-knowledge disposal of two guns from the scene and for the discovery of loot from the robbery and incriminating bullets in respondent's house. Conversely, the blood evidence that seemed to mesmerize the en banc court faded in significance in the harsh light of respondent's testimonial claim that he was not even in the house when the shootings occurred.

In any event—and largely because *no samples* from the pool of blood were obtained or preserved—none of respondent's proffered *habeas corpus* experts could offer more than mere speculation that Klein's blood might have been in the pool. Similarly, as Judge Bybee's dissenting opinion notes, none of respondent's habeas corpus experts has ever proffered an opinion challenging Detective Bell's testimony in regard to the blood stains on Klein's face or near the couch where he was found by the police. *See* App. at 186a. In addition, it remains simply implausible to conclude that equivocal expert

testimony of the sort respondent produced in federal court reasonably might have convinced respondent's jury of the improbable scenario suggested by the en banc opinion: that, for some mysterious reason, the wounded Johnson or an unknown person somehow might have picked up Klein vertically from the blood pool—without leaving any smears or any trail of blood—and deposited him on the couch before the arrival of the police. Indeed, as Judge Bybee notes, it is by no means clear that respondent's proffered blood-spatter "expert" would have been qualified to render any opinion on the subject in state court anyway. App. at 179a-180a.

3. Of course, regardless whether a federal court correctly might or might not have found ineffective counsel on these facts under a proper interpretation of the *Strickland* standard, the determinative issue before the Ninth Circuit in this case was the AEDPA question of whether the state court's rejection of respondent's claim was not merely "wrong" but "objectively unreasonable." Given the wide latitude afforded by "double deference" review of *Strickland* claims under § 2254(d), these facts provide no room for a federal court to condemn the state court's adjudication on such grounds.

The four dissenting judges on the *en banc* court, the three judges on the original panel, and the district judge got it right. In erroneously applying its own novel rule rather than the clearly-established *Strickland* standard, and in thus departing from "doubly-deferential" review under *Strickland* and § 2254(d), the Ninth Circuit got the question of whether the state court's adjudication was at least "reasonable"—"the only question that matters"—wrong. *See Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003). Certiorari review is warranted to ensure both that this Court's *Strickland* standard is followed and that Congress' intent in AEDPA is carried out. (E.g., *Waddington* v. *Sarausad*, 129 S.Ct. 823 (2009); *Hedgpeth* v. *Pulido*, 129 S.Ct. 530 (2008) (*per curiam*); *Mirzayance*, 129 S.Ct. 1411; *Schriro* v. *Landrigan*, 550 U.S. 465; *Carey* v. *Musladin*, 549 U.S. 70; *Rice* v. *Collins*, 546 U.S. 333 (2006); *Kane* v.

Garcia-Espitia, 546 U.S. 9 (2005) (*per curiam*); *Brown* v. *Payton*, 544 U.S. 133 (2005); *Yarborough* v. *Alvarado*, 541 U.S. 652; *Middleton* v. *McNeil*, 541 U.S. 433 (2004) (*per curiam*); *Yarborough* v. *Gentry*, 540 U.S. 1 *(per curiam)*; *Lockyer* v. *Andrade,,* 538 U.S. 63; *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (*per curiam*); *Early* v. *Packer*, 537 U.S. 4 (2002) (*per curiam*). As Judge Bybee aptly observes, the breadth of the rule announced by the Ninth Circuit in this case threatens to open up the floodgates to litigation regarding the lack of expert assistance at trial. App. at 172a (n. 13).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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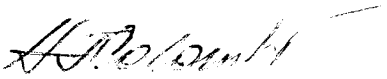

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