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Jorge Navarrete Clerk

Deputy

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

In re) NO. _____
)
GREGORY SUMMERS,)
)
Petitioner,)
)
_____)

**MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT PETITION FOR WRIT OF HABEAS CORPUS**

HEATHER E. WILLIAMS, Bar #122664
Federal Defender
ANN McCLINTOCK, Bar #141313
Assistant Federal Defenders
801 I Street, 3rd Floor
Sacramento, California 95814
Telephone: (916) 498-5700
ann_mcclintock@fd.org

Attorneys for Petitioner
GREGORY SUMMERS

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IN THE
COURT OF APPEALS OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

In re	)	NO. _____
	)	
GREGORY SUMMERS,	)	MEMORANDUM OF POINTS
	)	AND AUTHORITIES IN
Petitioner,	)	SUPPORT PETITION FOR
	)	WRIT OF HABEAS CORPUS
_____	)	

I. Petitioner Was Denied His Right under the Sixth and Fourteenth Amendments to the United States Constitution and Under Art. I, § 15 of the California Constitution, to Effective Assistance of Counsel

Petitioner Summers was prejudicially denied his constitutionally protected right to effective assistance of trial counsel by Mr. Staten's failures to:

(1) fully investigate the basis for a plea of not guilty for reason of insanity and obtain additional psychiatric and neurologic tests the appointed psychiatrist he retained concluded were necessary to determine the extent of petitioner's impairment at the time of the charged crime. As a result, trial counsel failed to present evidence of Petitioner's

mental health history and illness and misadvised Petitioner that there was no basis for a plea of not guilty for reason of insanity in his defense;

(2) properly advise Petitioner that it was his decision and not Mr. Staten's to enter or abandon a NGI plea. Staten failed to ensure Petitioner understood the decision Staten made to abandon such a plea and failed to advise Petitioner that it was Petitioner's decision about what plea to enter, that such failure was a result of counsel's inadequate understanding of his role in these proceedings and of the fundamental distinctions between competency findings and NGI pleas. Staten's decision to abandon a NGI plea was a product of his failure to understand that the decision whether to enter a NGI plea rests with the defendant, not his attorney;

(3) fully investigate Petitioner's mental health history and illness, including the failure to obtain additional psychiatric and neurologic tests recommended by the appointed psychiatrist and necessary to determine the extent of petitioner's impairment at the time of the charged crime, resulted in a prejudicially deficient presentation of the "*Romero* motion" at sentencing which requested the trial court to exercise its discretion to not sentence Petitioner under California's Three Strikes Law.

A. Right to Effective Assistance of Trial Counsel

The Sixth and Fourteenth Amendment to the United States Constitution and the Art. I, § 15 of the California Constitution guarantee a criminal defendant the right to effective assistance from trial counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218). To establish trial counsel rendered ineffective assistance, Petitioner must show his trial counsel's representation fell below an objective standard of reasonableness under then-prevailing professional norms and the deficient performance was prejudicial. (*Id.*) Adequate investigation and preparation is required:

A defendant can "reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. (*See, e.g., In re Hall* (1981) 30 Cal.3d 408, 426 [179 Cal. Rptr. 223, 637 P.2d 690]; *People v. Frierson* (1979) 25 Cal.3d 142, 166 [158 Cal. Rptr. 281, 599 P.2d 587]; *see also Strickland, supra*, 466 U.S. at pp. 690-691 [80 L. Ed. 2d at pp. 695-696, 104 S. Ct. at p. 2066] [implying that counsel must make "all significant decisions in the exercise of reasonable professional judgment" (*italics added*)].) If counsel fails to make such a

decision, his action—no matter how unobjectionable in the abstract—is professionally deficient. (See, e.g., *In re Hall*, *supra*, at p. 426 [emphasizing that the exercise of counsel's professional discretion must be reasonable and informed and founded on reasonable investigation and preparation]; *People v. Frierson*, *supra*, 25 Cal.3d at p. 166 [same]; see also *Strickland*, *supra*, 466 U.S. at pp. 690-691 [80 L. Ed. 2d at p. 695, 104 S. Ct. at p. 2066] [implying that "strategic choices made after less than complete investigation are [unreasonable] precisely to the extent that reasonable professional judgments [do not] support the limitations on investigation"].)

(*Ledesma*, 43 Cal.3d at 215). As detailed below, in Petitioner Summers's case, trial counsel failed to investigate adequately the facts supporting an NGI plea, failed to properly advise Petitioner regarding the decision to enter or abandon a NGI plea, and failed to investigate facts in support of the *Romero* motion counsel filed.

The second component of an ineffective assistance of counsel claim requires Petitioner Summers to show prejudice. Summers must therefore show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Ledesma*, 43 Cal. at 217-18.) A "reasonable probability,

"however, does not require a showing that counsel's conduct more likely than not altered the outcome in the case, but simply "a probability sufficient to undermine confidence in the outcome." (*In re Cordero* (1988) 46 Cal.3d 161, 180 (quoting *Strickland*, *supra*, 466 U.S. at 693-694).) Summers can demonstrate prejudice as well.

B. Trial Counsel's Unreasonable Failure to Investigate and Prepare the NGI Plea was Prejudicial

Trial counsel Staten failed to fully investigate the basis for a plea of not guilty for reason of insanity and failed to obtain additional psychiatric and neurologic tests the appointed psychiatrist he retained concluded were necessary to determine the extent of petitioner's impairment at the time of the charged crime. As a result, trial counsel failed to present evidence of Petitioner's mental health history and illness and misadvised Petitioner. Mr. Staten decided to not pursue a plea of not guilty by reason of insanity ("NGI plea"). (Staten Declaration; Exhibit A; Exhibits, pages 7-8.) In doing so, Mr. Staten failed to properly advise Petitioner that it was his decision and not Mr. Staten's to enter or abandon a NGI plea. (*See id.*) Staten failed to ensure Petitioner understood the decision Staten made to abandon such

a plea and failed to advise Petitioner that it was Petitioner's decision about what plea to enter, that such failure was a result of counsel's inadequate understanding of his role in these proceedings and of the fundamental distinctions between competency findings and NGI pleas. (*See id.*)

Mr. Staten's decision to abandon a NGI plea was a product of his failure to understand that the decision whether to enter a NGI plea rests with the defendant, not his attorney. (*See People v. Medina* (1990) 51 Cal.3d 870, 899-900; *Frierson*, 39 Cal.3d at 816; *People v. Henning* (2009) 178 Cal.App.4th 388, 397-398.) Trial counsel also ignored the verbal opinion offered by Dr. Globus as to the merits of an NGI claim and failed to properly weight Dr. Globus's written report, both of which indicated there was strong evidentiary support for an NGI plea. Trial counsel considered a brief competency evaluation trumped the evidence supporting a NGI assessment and failed to understand the distinction between competency and insanity. (Staten Declaration; Exhibit A; Exhibits, pages 7-8.) Trial counsel thus had no reasonable tactical basis to choose to abandon Petitioner's NGI plea. Nor did trial counsel have

the right to make this decision as it was for the Petitioner to make. (*See id.*)

Petitioner was prejudiced by the loss of a viable plea of not guilty by reason of insanity. A timely neuropsychological assessment, as Dr. Khazanov's report demonstrates, would have shown that Petitioner suffered at the time of the offense and at the time of trial from debilitating and longstanding psychiatric, cognitive and emotional disorders. (Khazanov Report; Exhibit C; Exhibits, pages 18-45.) Petitioner suffers from a mood disorder and Post-Traumatic Stress Disorder and did so throughout his childhood and adolescence. As detailed in an assessment done by Dr. Khazanov, Petitioner suffered traumatic exposures throughout his childhood and adolescence which significantly contributed to the development of his polysubstance abuse and dependence, which further exacerbated his mental deficits. Petitioner's trauma came from, in sum, "(1) A childhood characterized by physical and emotional neglect, abandonment and abuse, chaos, and pervasive lack of safety; (2) Childhood exposure and consistent trauma of living in a drug and alcohol infested, often times violent and abusive, environment in conjunction with limited parental influence and neglect;

(3) A persistent absence of parental affection, attention, guidance, and protection; (4) Sexual victimization and repeated sexual abuse by numerous, often unknown individuals, and absence of protection from his mother; (6) Repeated traumatic exposure outside of the range of normal human experience; (7) Minimal attachment opportunities and protective relationships throughout childhood; (9) Absence of the appropriate assessment and interventions at an early age or later for his polysubstance abuse and dependence, depression, PTSD, psychotic symptoms, and intermittent suicidality; [and] (10) Early insult to the brain, occurring pre- or perinatally, and sustaining several traumatic head injuries.” (Khazanov Report, ¶ 75; Exhibit C; Exhibits, page 42.)

These experiences Petitioner suffered are “known risk factors for mental illness and brain dysfunction have had longterm implications for Mr. Summers’ overall psychological, cognitive, and social functioning, and profoundly impaired his perceptions, insight, judgment, and overall behavior.” (Khazanov Report, ¶ 76; Exhibit C; Exhibits, page 42.)

Petitioner suffers from multiple serious mental and emotional impairments, namely: major depressive disorder, substance-induced psychotic disorder, panic attacks without agoraphobia poly-substance

abuse and dependence, and several prominent features of post-traumatic stress disorder (PTSD), which were present at the time of his trial. (Khazanov Report ¶ 77; Exhibit C; Exhibits, page 42.) He was receiving psychiatric treatments and psychotropic medication prior to his trial, and was hospitalized to a psychiatric institution for prior suicidal attempt, current suicidal ideation and major depression in December 2006. (*Id.*) Neuropsychological testing of Petitioner “identified localized dysfunction, primarily in the frontal lobes, with additional right hemisphere-based deficits, disrupting his cognitive and neurological functioning. It is apparent from these findings that Mr. Summers mental illness, in conjunction with his significant neuropsychological impairments, substantially impair his abilities to plan or carry out a specific course of action, act independently or make informed decisions, interpret social or interpersonal cues (whether verbal or non-verbal), assess his environment or specific situations accurately and respond rationally or thoughtfully.” (Khazanov Report, ¶ 78; Exhibit C; Exhibits, page 43.)

Dr. Khazanov concluded her findings regarding Petitioner are consistent with what a qualified neuropsychologist would have found

had Petitioner been assessed at the time of his arrest and trial. (*Id.* ¶ 81; Exhibits, page 43.) Such an assessment, Dr. Khazanov also concluded, “would have provided substantial evidence for the court about Mr. Summers’ compromised ability to control his impulses and make decisions at the time of his offense due to his detrimental combination of complex mental illness, comorbid brain damage, illicit drug addiction, and multiple prescribed psychotropic medications.” (*Id.* ¶ 81; Exhibits, page 43.) Dr. Khazanov concluded that the factual basis for a NGI plea may have been found had a timely neuropsychological assessment been done:

It is my professional opinion that at the time of the crime Mr. Summers was under the influence of extreme mental disturbance. I can not rule out the possibility that if he was tested by a qualified neuropsychologist such assessment would have established that at the time of the offense his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was impaired as a result of mental defect and the effects of intoxication, which would have supported the not guilty by reason of insanity defense.

(*Id.* ¶ 81; Exhibits, pages 43-44.)

C. Trial Counsel Unreasonably Failed to Advise Summers that the Decision to Enter or Abandon a NGI Plea was for Summers to Make and Counsel's Decision to Abandon the NGI Plea Was Not to Make

As detailed above, Petitioner Summers had a viable NGI plea that was supported by the facts had his case been adequately investigated. Mr. Staten failed to properly advise Petitioner that it was his decision and not Mr. Staten's to enter or abandon a NGI plea. Staten failed to ensure Petitioner understood the decision Staten made to abandon such a plea and failed to advise Petitioner that it was Petitioner's decision about what plea to enter, that such failure was a result of counsel's inadequate understanding of his role in these proceedings and of the fundamental distinctions between competency findings and NGI pleas. Staten's decision to abandon a NGI plea was a product of his failure to understand that the decision whether to enter a NGI plea rests with the defendant, not his attorney. (Staten Declaration; Exhibit A; Exhibits, pages 7-8.) (*See Medina*, 51 Cal.3d at 899-900; *Frierson*, 39 Cal.3d at 816; *Henning*, 178 Cal.App.4th at 397-398.)

Trial counsel also ignored the verbal opinion offered by Dr. Globus as to the merits of an NGI claim and failed to properly weigh Dr.

Globus's written report, both of which indicated there was strong evidentiary support for an NGI plea. Trial counsel unreasonably believed that a brief competency evaluation trumped the evidence supporting a NGI assessment and failed to understand the distinction between competency and insanity. Trial counsel thus had no reasonable tactical basis to choose to abandon Petitioner's NGI plea. Nor did trial counsel have the right to make this decision as it was for the Petitioner to make.

As a result of Mr. Staten's deficient performance in these ways, Petitioner was prejudiced by the loss of a viable plea of not guilty by reason of insanity. The neuropsychological assessment that Dr. Globus reported was needed shows that Petitioner Summers suffered at the time of the offense and at the time of trial from debilitating and longstanding psychiatric, cognitive and emotional disorders. (Dr. Khazanov Report, Exhibit C; Exhibits, pages 18-44.) Petitioner suffers from a mood disorder and Post-Traumatic Stress Disorder and did so throughout his childhood and adolescence. As detailed in an assessment done by Dr. Khazanov, Petitioner suffered traumatic exposures throughout his childhood and adolescence which significantly contributed to the

development of his polysubstance abuse and dependence, which further exacerbated his mental deficits. Petitioner's trauma came from, in sum, "(1) A childhood characterized by physical and emotional neglect, abandonment and abuse, chaos, and pervasive lack of safety; (2) Childhood exposure and consistent trauma of living in a drug and alcohol infested, often times violent and abusive, environment in conjunction with limited parental influence and neglect; (3) A persistent absence of parental affection, attention, guidance, and protection; (4) Sexual victimization and repeated sexual abuse by numerous, often unknown individuals, and absence of protection from his mother; (6) Repeated traumatic exposure outside of the range of normal human experience; (7) Minimal attachment opportunities and protective relationships throughout childhood; (9) Absence of the appropriate assessment and interventions at an early age or later for his polysubstance abuse and dependence, depression, PTSD, psychotic symptoms, and intermittent suicidality; [and] (10) Early insult to the brain, occurring pre- or perinatally, and sustaining several traumatic head injuries." (Khazanov Report ¶ 75; Exhibit C, ¶ 75; Exhibits, page 42.)

Petitioner has shown prejudice from this failing. His experiences with trauma, abuse, neglect, and head injury are “known risk factors for mental illness and brain dysfunction have had longterm implications for Mr. Summers’ overall psychological, cognitive, and social functioning, and profoundly impaired his perceptions, insight, judgment, and overall behavior.” (Khazanov Report ¶ 76; Exhibit C; Exhibits, page 42.)

Petitioner suffers from multiple serious mental and emotional impairments, namely major depressive disorder, substance-induced psychotic disorder, panic attacks without agoraphobia, poly-substance abuse and dependence, and several prominent features of post-traumatic stress disorder (PTSD), which were present at the time of his trial. (Khazanov Report, ¶ 77; Exhibit C; Exhibits, page 42.)

Petitioner was receiving psychiatric treatments and psychotropic medication prior to his trial, and was hospitalized to a psychiatric institution for prior suicidal attempt, current suicidal ideation and major depression in December 2006. (*Id.*) The neuropsychological testing of Mr. Summers “identified localized dysfunction, primarily in the frontal lobes, with additional right hemisphere-based deficits, disrupting his cognitive and neurological functioning. It is apparent from these findings that Mr.

Summers mental illness, in conjunction with his significant neuropsychological impairments, substantially impair his abilities to plan or carry out a specific course of action, act independently or make informed decisions, interpret social or interpersonal cues (whether verbal or non-verbal), assess his environment or specific situations accurately and respond rationally or thoughtfully.” (Khazanov Report, ¶ 78; Exhibit C; Exhibits, page 43.)

Dr. Khazanov’s findings regarding Petitioner are consistent with what a qualified neuropsychologist would have found had Petitioner been assessed at the time of his arrest and trial. (*Id.* ¶ 81; Exhibit C; Exhibits, page 43.) Such an assessment, Dr. Khazanov also concluded, “would have provided substantial evidence for the court about Mr. Summers’ compromised ability to control his impulses and make decisions at the time of his offense due to his detrimental combination of complex mental illness, comorbid brain damage, illicit drug addiction, and multiple prescribed psychotropic medications.” (*Id.*) Dr. Khazanov concluded that the factual basis for a NGI plea may have been found had a timely neuropsychological assessment been done:

It is my professional opinion that at the time of the crime Mr. Summers was under the influence of extreme mental disturbance. I can not rule out the possibility that if he was tested by a qualified neuropsychologist such assessment would have established that at the time of the offense his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was impaired as a result of mental defect and the effects of intoxication, which would have supported the not guilty by reason of insanity defense.

(*Id.* ¶ 81; Exhibits, pages 43-44.)

Thus, Petitioner demonstrates both deficient performance and prejudice and is entitled to relief. *See Strickland*, 466 U.S. at 684; *Ledesma*, 43 Cal.3d at 215-218. The superior court erred by ignoring this claim for relief.

D. Trial Counsel's Unreasonable Failure to Investigate and Prepare the *Romero* Motion was Prejudicial

Once convicted, Petitioner was subject to a sentence calculated under California Penal Code §667.5, California's Three Strikes Law. After denying counsel's *Romero* request, the trial court imposed a 25-years-to-life sentence under the provisions of California Penal Code § 667(e) and the Three-strikes Law, and an additional two five-year

consecutive enhancements under § 667(a). (2 RT 396; Exhibits, page 60.) Petitioner's total sentence was thus 25-years-to-life plus ten years. (*Id.*)

Prior to sentencing, Mr. Staten made a motion pursuant to *People v. Superior Court (Romero)* 13 Cal.4th 497 (1996) (holding the sentencing court has the power to dismiss one or more prior strikes in the interest of justice), to strike the finding of Petitioner's prior 1993 robbery conviction (Penal Code § 211) and sentence him outside the Three Strikes Law. (Clerk's Transcript 133-37; Exhibit E; Exhibits, pages 63-67.) The motion principally relied on Petitioner's mental illnesses to justify this request. (CT 136 [complaining the criminal justice system is used to house mentally ill instead of focusing on treatment]; Exhibit E; Exhibits, page 66.) But it relied solely on Dr. Globus's testimony and incomplete testing. Wholly missing from the evidence was any finding that Petitioner had rehabilitation potential. Dr. Globus could flag the interplay in Petitioner's life between the offense conduct and his substance abuse and addictions. But he had little evidence upon which to base a proper diagnosis of Petitioner's

mental illnesses and so could give no evidence on his prognosis for treatment and recovery.

At the sentencing hearing, the trial court had no factual basis to distinguish Petitioner from other recidivist offenders the Three-Strikes Law was designed to remove from society for life terms. (*See* 2 RT 390-91, 394; Exhibit D; Exhibits, pages 57-59.) Mr. Staten did not seek appointment of an expert to complete the work Dr. Globus explained was needed. Nor did Staten seek funds to retain an expert to conduct that neurological assessment to fully and accurately understand Petitioner's mental health and functioning. Dr. Khazanov's testing and report also demonstrates that had such testing been done, it would have provided needed evidence to support the "*Romero* motion" Mr. Staten had filed. Dr. Khazanov concluded that Petitioner mental illnesses were both extensive, interfered with his ability to control his drug abuse, but were nonetheless treatable:

It is my professional opinion that findings consistent with this report would have been reached at the time of Mr. Summers' most recent arrest and trial had a qualified neuropsychologist evaluated him. This would have provided substantial evidence for the court about Mr. Summers' compromised

ability to control his impulses and make decisions at the time of his offense due to his detrimental combination of complex mental illness, comorbid brain damage, illicit drug addiction, and multiple prescribed psychotropic medications. These multiple impairments are relevant to several specific factors set forth in Penal Code § 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497,504 to be considered in Mr. Summers' penalty.

(Khazanov Report ¶ 81; Exhibit C; Exhibits, page 43.) Dr. Khazanov also assessed Petitioner's potential for rehabilitation, a key issue in a *Romero* motion. Dr. Khazanov found, "to a reasonable degree of psychological certainty, that Gregory Summers is a good candidate for rehabilitation." (*Id.* ¶ 82; Exhibits, page 44.) Though his deficits are serious, Dr. Khazanov found they are treatable:

Proper medication can aid in reducing his depressive and psychotic (primarily auditory hallucinations) symptoms. Therapies designed to assist people in healing from trauma can decrease his Post-traumatic Stress Disorder (PTSD) symptoms, thus decreasing the need to self medicate, and increase his adaptive coping abilities. Mr. Summers appears quite motivated to participate in treatment for his mental health issues and has always cooperated whenever treatment was offered, as evidenced by his longstanding mental health treatment during prior periods of

incarceration. His motivation, in conjunction with his interest in contributing positively to society, his willingness to use the time in custody to learn the skills he has been lacking, his willingness to stop using drugs and remain clean, and his lack of violent tendencies make success for rehabilitation likely, if offered. People like Mr. Summers with multiple psychiatric comorbidities often times do very well in structured supportive environments, and are able to acquire cognitive, emotional, and practical skills they are lacking as a result of adverse childhood experiences and subsequent substance abuse. Should Mr. Summers be provided treatment and assistance and guidance in obtaining employment and housing, with continued mental health supports, his recidivism potential would be exponentially decreased.

(*Id.* at ¶ 82; Exhibits, page 44.)

The record presented establishes that trial counsel failed to adequately and fully investigate Petitioner's mental health or his mental health history and the difficulties resulting from these issues. Had attorney Staten done so, he would have developed relevant and material evidence to support the *Romero* motion he filed. Dr. Khazanov's report and the supporting mental health records clearly show that such evidence was available and supported a *Romero* motion. The *Romero* court indicated that the proper factors to take into consideration in

determining whether to *dismiss a prior strike* "in furtherance of justice" include the defendant's background, the nature of the present offenses, and other individualized considerations. (*Romero*, 13 Cal.4th at 531). "[A] defendant's sentence is also a relevant consideration when deciding whether to strike a prior conviction allegation; in fact, *it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences.*" (*People v. Garcia* (1999) 20 Cal.4th 490, 500, 85 Cal.Rptr.2d 280, 286, 976 P.2d 831) (emphasis added).

When Petitioner initially presented his claims for relief to the state court of appeals in *In re Summers*, C08340, the Court asked for informal briefing. After reviewing the Attorney General's Informal Response (Exhibit Y; Exhibits, pages 301-331) and Petitioner's Reply (Exhibit Z; Exhibits, pages 332-69), that Court issued an Order to Show Cause returnable in superior court. (Exhibit AA; Exhibits, pages 370-75.) The local prosecutor filed a return (Exhibit BB; Exhibits, pages 376-83) to which Petitioner filed a Traverse. (Exhibit CC; Exhibits, pages, 384-407.)

The superior court denied relief as detailed in the petition. (Exhibit DD; Exhibits, pages 408-31.)

First, the superior court's analysis is not supported by the facts presented to the court. The underlying finding the superior court makes is that Attorney Staten made a reasonable tactical decision to not seek funding for more psychological testing because Petitioner is a malingerer. (Exhibit DD, page 17; Exhibits, page 425.) The malingering finding is based solely on a brief competency report that made that conclusion based on a single memory-focused test. A copy of Dr. Nakagawa report is Exhibit A to Informal Reply; Exhibits, pages 362-63.) Dr. Nakagawa's report explains that she spent little time with Petitioner. She billed a total of 3 hours for "the clinical interview at RCCC [a local jail], administration and scoring of psychological testing, and report preparation." (Exhibits, pages 361 [cover letter/invoice]). Dr. Nakagawa does not mention reviewing any of Petitioner's mental health records or interviewing Petitioner's family regarding this history. Dr. Nakagawa assessed Petitioner to be showing signs of malingering. (Exhibits, page 363.) This directly conflicts with both Dr. Globus's findings and the results of Dr. Khazanov's full neuropsychological

assessment. (*See* Reporters' Transcripts, pp. 249-252; Exhibits, pages 364-67 [Dr. Globus describing Summers's long history of mental illness and explaining his "functional disturbance" is "profound and impair[ed]"], Exhibit C; Exhibits, pages pp. 23-27 [Dr. Khazanov describing Summers's social history and childhood abandonment, neglect, abuse and trauma], *ibid.* at pp. 28-29 [Dr. Khazanov's summary of Summers's documented psychiatric and medical history], *ibid.* at pp. 30-44 [Dr. Khazanov's summary of testing and assessment explaining Summers's diagnoses and absence of malingering.]) Dr. Khazanov explained that the "Test of Memory Malingering (TOMM) . . . is a brief visual recognition test designed to help discriminate between individuals with true memory impairment and potential malingerers. [Mr. Summers's] score (46 out of 50 correct on the first trial and 47 out of 50 on the second trial) indicates that Mr. Summers was not malingering on the given tests. I detected no indications of any effort to malingering or intentionally perform poorly, and his test results confirmed this: Mr. Summers did well in some areas, and poorly in others. In addition, I tested Mr. Summers with multiple measures of the same domain and obtained the same or similar results. Such consistent results are another

sign that Mr. Summers gave his best effort. Subsequently, the test results provide a valid estimate of his neuropsychological functioning.” (Exhibit C, ¶ 42; Exhibits, page 32.)

Thus, the facts do not support unquestioning reliance on Dr. Nakagawa’s finding. Further, Attorney Staten’s declaration does not state that he made a strategic decision to not seek funding because of the malingering finding from Dr. Nakagawa. It states that he did not pursue a NGI plea because of her report. But the main point is that Attorney Staten failed to make an adequate investigation into the facts regarding Mr. Summers’s mental health and condition at the time of the offense before he made this decision. Had he done the investigation, he would have learned that a thorough assessment found no malingering and ample evidence of life-long mental illness beginning in childhood. A thorough investigation would have shown that Mr. Summers was not simply an addict with “a non-stop criminal history,” as the superior court viewed Summers, but a mentally ill man who was capable of recovery and rehabilitation if he were properly treated. The superior court dismissed Summers as a one who “was difficult to figure out whether petitioner’s [his] mental health issues caused his drug use or

vice versa” (Exhibit DD, p. 21; Exhibits, p. 429.) And so, it concludes a different course would have made no difference. (*Id.*) The facts presented demonstrate the contrary. Summers’s addiction and mental health issues stemmed not from lack of moral fiber, but from a life long series of factors – starting with severe and numerous adverse childhood experiences: abuse, neglect and trauma that are known to directly link to adults who suffer academic failure, mental illness, substance abuse and resulting criminality. (Exhibit C, ¶¶ 21-27 ; Exhibits, pages 24-28.)

At sentencing, the superior court rejected the *Romero* motion because it found Mr. Summers to be just one “among the majority of ... criminal defendants ... that come before the Court routinely.” (RT 391, D, Exhibits, p. 391.) That assessment that Summers was just another criminal and not worthy of a different decision is demonstrably wrong once the social history of adverse childhood trauma, stress, abuse, and injury is known. Mr. Summers was and is different. The evidence, had the trial attorney completed a minimally adequate investigation, demonstrated just how completely this dismissal of Mr. Summers was.

Dr. Khazanov's report also addressed why a Three Strikes sentence was not needed to assure public safety because it also found that Mr. Summers was a "good candidate for rehabilitation" through proper medication and therapies. (Exhibit D, ¶ 82; Exhibits, p. 44.) She explained that Summers "has always cooperated whenever treatment was offered, as evidenced by his longstanding mental health treatment during prior periods of incarceration. His motivation, in conjunction with his interest in contributing positively to society, his willingness to use the time in custody to learn the skills he has been lacking, his willingness to stop using drugs and remain clean, and his lack of violent tendencies make success for rehabilitation likely, if offered. People like Mr. Summers with multiple psychiatric comorbidities often times do very well in structured supportive environments, and are able to acquire cognitive, emotional, and practical skills they are lacking as a result of adverse childhood experiences and subsequent substance abuse." *Id.* Prison is not the only structured environment available. Thus, the investigation that trial counsel failed to conduct would have shown that Mr. Summers, with treatment and continued mental health support, had an "exponentially decreased" risk of recidivism. *Id.*

The court of appeals denied Mr. Summer's subsequent petition without citation or explanation. (Exhibit GG.) To the extent this decision implies acceptance of the findings of the superior court, the court of appeals erred for the reasons just given.

II. CONCLUSION

For all the above reasons, together with the allegations in the petition and evidence in the supporting exhibits submitted with the petition, trial counsel's failures to investigate and present evidence of Petitioner's mental health history and issues, which would have supported a NGI plea as well as a *Romero* motion, constituted prejudicial ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 15 of the California Constitution. Trial counsel's failure to advise Petitioner regarding the facts supporting a NGI plea and his decision to abandon such a plea, without making sure that Petitioner made that decision and

///

understood that it was his decision to make, also amount to prejudicial ineffective assistance of counsel.

Dated: November 1, 2023

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender

s/ Ann C. McClintock
ANN C. McCLINTOCK
Assistant Federal Defender

Attorneys for Petitioner
GREGORY SUMMERS

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Summers**

Case Number: **TEMP-JG5KL9YC**

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McClintock, Ann (141313)

Last Name, First Name (PNum)

Federal Defenders CAE

Law Firm

S282548

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

In re)
) NO. _____
)
 GREGORY SUMMERS,)
)
 Petitioner,)
)
 _____)

**PETITION FOR WRIT OF
HABEAS CORPUS**

HEATHER E. WILLIAMS
State Bar No. 122664
Federal Defender
ANN M'CLINTOCK
State Bar No. 141313
Assistant Federal Defender
801 I Street, 3rd Floor
Sacramento, California 95814
Telephone: (916) 498-5700
Email: ann_mcclintock@fd.org

Attorneys for Petitioner
GREGORY SUMMERS

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IN THE
COURT OF APPEALS OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

In re	)	
	)	NO. _____
	)	
GREGORY SUMMERS,	)	
	)	
Petitioner,	)	
	)	
_____	)	

**PETITION FOR WRIT OF
HABEAS CORPUS**

GREGORY SUMMERS petitioner herein, by and through his counsel, respectfully petitions the Court for a Writ of Habeas Corpus, and, in support thereof, alleges by this verified petition:

Gregory Summers is a California state prisoner, number P10870, held by Warden Giselle Matteson at the California State Prison, Solano. Petitioner is held pursuant to a 2009 conviction and judgment following a jury trial for second degree robbery pursuant to California Penal Code §§ 211, 212.5. On May 1, 2009, Summers received an indefinite prison term under California's Three Strikes Law, one which requires him to serve at least 35 years in prison before he can be paroled. (RT II,

pages 396; CT 189) Exhibits, pages 60, 68.) Petitioner has been complaining about his mental illness and sanity issues since he was first sentenced. His attorney for his state direct appeal moved to expand the scope of her appointment to include assisting Summers in the preparation of a petition for writ of habeas corpus concerning these issues. (Exhibit F; Exhibits, pages 71-77.) Counsel also explained that if the state court “requires a more definitive showing that entry of an NGI [not guilty by reason of insanity] plea likely would have produced a better result, I will request authorization for the additional funds to complete the testing Dr. Globus indicated should have been provided at trial.” (*Id.* ¶ 18; Exhibits, p. 76.) That request was denied. (*People v. Summers*, C061900, order of March 11, 2011) (*See* Exhibit G, page 3; Exhibits, page 81.) Petitioner persisted, filing several petitions and alleging evidence of mental health issues; but he was acting *pro se* and not able to obtain records or a neuropsychological assessment. It was only after this United States District Court for the Eastern District of California appointed counsel on federal habeas that Petitioner, through that counsel, was able to have the neuropsychological testing done. Thus, this new evidence is available. The federal habeas matter,

Summers v. Price, 2:11-cv-02584 TLN AC, is currently stayed to permit Petitioner to return to state courts and fully present the factual basis of his claims.

Petitioner makes the following averments in support of this petition:

I

On May 1, 2009, following a jury trial, Petitioner Summers was convicted of second degree robbery pursuant to California Penal Code §§ 211, 212.5. Generally, the penalty for second degree robbery in California is “imprisonment in state prison for two, three or five years.” (Cal. Penal Code § 213(a)(2).) But Summers received an indefinite prison term under California’s Three Strikes Law, one which requires him to serve at least 35 years in prison before he can be paroled. (RT II, pages 396; CT 189) (Exhibits, pages 60, 68.)

II

Before trial, Petitioner’s court-appointed counsel asked the trial court for funding for an expert to assess Petitioner’s sanity at the time of the offense. Only limited funds were granted. Given this restriction, the expert, Dr. Albert Globus, conducted a limited review, which

included interviewing Petitioner twice, interviewing Petitioner's mother, and reviewing records, including the crime report, Petitioner's medical, mental health and psychiatric records. Dr. Globus determined that neuropsychological testing was needed before he could give an opinion regarding Petitioner's sanity at the time of the offense. He nonetheless reported that records indicated Petitioner had been episodically psychotic his entire life and had an extensive history of drug abuse and suicidal ideation. Dr. Globus saw indications that Petitioner potentially suffered from chronic schizophrenia and definite loss of brain function. (Exhibit B; Exhibits, pages 13-17.) No funding was given and no neuropsychological testing was done. (RT 266; Exhibits, page 56.)

III

Before sentencing, Petitioner's trial counsel filed a *Romero*^{1/} motion in which he asked the sentencing court to exercise its discretion, pursuant to Penal Code § 1385(a), to strike Petitioner's prior robbery convictions. (He suffered one in 1993 and another in 1999. (CT 133-

¹ (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504 (judges retain power under Penal Code § 1385 to stay or dismiss prior serious or violent felony convictions when the judge believes that doing so would be "in the interests of justice."))

137; Exhibit E; Exhibits, pages 63-67.) Defense counsel argued that Petitioner's mental illness and addiction, and lack of treatment for these ills, effectively forced Petitioner to steal; counsel asked for "a long period of mental treatment and care." (CT 136; Exhibit E; Exhibits, page 66.) Defense counsel did not request funding for an expert to examine Petitioner's amenability to treatment or his future risk to society if he received mental health and addiction treatment. Thus, no supporting evidence was presented for the *Romero* motion.

IV

Petitioner has been complaining about his mental illness and sanity issues since he was first sentenced. His appointed attorney for his state direct appeal moved to expand the scope of her appointment to include assisting Summers in the preparation of a petition for writ of habeas corpus concerning these issues. (Exhibit F; Exhibits, pages 70-77.) Counsel also explained that if the state court "requires a more definitive showing that entry of an NGI plea likely would have produced a better result, I will request authorization for the additional funds to complete the testing Dr. Globus indicated should have been provided at trial." (*Id.* ¶ 18; Exhibits, page 76.) That request was denied. (*People*

v. Summers, C061900, order of March 11, 2011; Exhibit G, page 3; Exhibits, page 81.)

V

Petitioner persisted in trying to raise this issue, filing several petitions and alleging evidence of mental health issues; but he was acting *pro se* and not able to obtain records or a neuropsychological assessment. Petitioner's prior state court post-conviction efforts raised the following claims:

At superior court on habeas: *In re Summers*, No. 09F04154/07F07863 (Exhibit J; Exhibits, pages 142-50)

(1) ineffective assistance by trial counsel in violation of the Sixth Amendment by (a) failing before trial to advise petitioner that he would be better off by being admitted to a psychiatric hospital; and (b) failing to take any action to ensure Petitioner was adequately medicated during trial after Petitioner told counsel that his medications' dosages had been lowered and this resulted in Petitioner being "out of it most of the time during trial." (Petition, page 4 of 8, Exhibit J, page 3 of 8; Exhibits, page 146);

(2) Trial court violated Petitioner's Due Process rights by allowing Petitioner to be tried while incompetent and by trial counsel coercing Petitioner into not being evaluated by a third psychiatrist. (*Id.* page 5 of 8; Exhibit J, page 4 of 8; Exhibits, page 147.)

The superior court denied relief. (Exhibit K; Exhibits, pages 152-53.)

In this Court on habeas, *In re Summers*, C063442, Petitioner's *pro se* petition raised these claims:

(1) Ineffective assistance of trial counsel by (a) failing to call character witnesses; and (b) failing to have a third psychiatric examination to determine competence to stand trial and mental state at the time of the offense. (Petition, page 3 of 8; Exhibit L, page 3 of 8; Exhibits, page 158.)

(2) Trial court abused its discretion by not dismissing Petitioner's strike priors during the *Romero* hearing, relying in part on the allegation that the trial court failed to "take in consideration Petitioner['s] personal background and mental disabilities." (*Id.* page 4 of 8; Exhibits, page 159.)

This Court denied relief. (Exhibit M; Exhibits, page 165.)

On direct appeal, *People v. Summers*, C061900, Petitioner raised the following issues:

- (1) The admission of uncharged conduct violated Summers's federal constitutional rights to a fair trial and Due Process of law, (Appellant's Opening Brief, pages 8-22; Exhibit H, pages 12-26 of 43; Exhibits, pages 94-108);
- (2) The trial court's refusal to give a lesser included offense instruction for battery (as a lesser included offense the robbery committed by force and fear) violated Summers's Sixth and Fourteenth Amendments to adequate instructions on the defense theory and the Sixth Amendment right to a jury trial. (Appellant's Opening Brief, pages 23-37; Exhibit H, pages 27-41 of 43; Exhibits, pages 109-123.)

This Court affirmed the judgment. (Exhibit I; Exhibits, pages 127-141.) Both of these claims were raised in the California Supreme Court via a petition for review, including the federal constitutional basis for the claims. (*People v. Summers*, S191817, pages 3-13; Exhibit N, pages 7-17 of 20; Exhibits, pages 177-183.) The Supreme Court denied review. (Exhibit O; Exhibits, page 188.)

After the direct appeal was complete at the intermediate court level, but before the petition for review was denied, Petitioner again sought habeas relief at the superior court level. (*In re Summers*, 11F02549; Exhibit P; Exhibits, pages 189-212.) This petition raised a claim of “ineffective assistance of counsel for misadvisement and failure to fully investigate the basis for a plea of not guilty by reason of insanity and failure to obtain additional psychiatric and neurological tests recommended by the appointed psychiatrist and necessary to determine the extent of petitioner’s impairments at the time of the charged crime.” (Exhibits, page 192.) This petition included a supporting statement of facts and declarations from both Summers, Dr. Globus and trial counsel, Keith Staten, which had not been available before. (Exhibits, pages 206-09 (Summers), 202-05 (Globus), and 210-11 (Staten).) The superior court summarily rejected the petition as a successive petition, citing *In re Clark* (1993) 5 Cal.4th 750, 775. (Order Denying 11F02549; Exhibit Q; Exhibits, pages 214.)

Summers raised these same ineffective assistance of trial counsel claims with this Court. (*In re Summers*, C068478; Exhibit R; Exhibits, pages 217-38.) This Court summarily denied the petition without

citation. (Order Denying *In re Summers*, C068478; Exhibit S; Exhibits, page 244.)

Summers filed a timely petition for review in the California Supreme Court again raising this Sixth Amendment challenge. (*In re Summers*, S194591; Exhibit T; Exhibits, pages 246-61.) The California Supreme Court directed the state to file an answer to the petition. (Order in *In re Summers*, S194591; Exhibit U; Exhibits, page 263.) In its answer, the state urged the Supreme Court to deny relief by adopting the reason the trial court gave and, even assuming trial counsel had been deficient in his representation, petitioner has failed to make out a prima facie case for relief as he has not offered competent facts sufficient to show the required prejudice. (Answer in *In re Summers*, S194591, pages 1 & 7; Exhibit V; Exhibits, pages 271 & 277.) The Supreme Court denied review without citation. (Order denying *In re Summers*, S194591; Exhibit W; Exhibits, page 286.)

VI

Petitioner next sought timely relief in federal court. He attached to his federal petition the exhibits he had to support his claims: trial counsel's declaration regarding the NGI plea, Dr. Globus's declaration

the assessment he could do pretrial and the scope of work that needed to be done to give a valid opinion regarding Petitioner's sanity at the time of the offense. Petitioner still had no neurological assessment to provide diagnoses based on testing and clinical evaluation and thus no expert opinion on how mental health issues related to his criminal history.

After federal habeas counsel was appointed by the federal court, Petitioner's medical and psychological records, which contained further evidence of mental health issues, were gathered and a neuropsychological testing and evaluation was performed, which resulted in evidence of Petitioner's long term mental health issues based on neurological deficits and a history of trauma. Such evidence establishes the prejudice to Petitioner's ineffective assistance of trial counsel claim, showing that had trial counsel adequately investigated Petitioner's mental health, he would have been able to present to the court significant mitigating evidence relevant to sanity and, if convicted, to the sentence appropriate for the case. Although the legal basis for the ineffective assistance of trial counsel claim is exhausted, the factual basis is not fully exhausted because the full records and the

neuropsychologist's report has not yet been presented to the state court. Petitioner thus presents the *Romero*-related Sixth and Fourteenth Amendments claim in this state court petition together with the new evidence supporting prejudice.

Petitioner filed a substantively identical petition to this petition in the superior court. That court denied relief (Exhibit X) after concluding the claims were successive and untimely (Exhibits, page 292) and "the entirety of petitioner's claim" had been previously presented to the superior court in *In re Summers* 11F02549. (Exhibits, page 293.)

In April 2017, Petitioner filed a substantively identical petition to the Court of Appeals for the Third District. (*In re Summers*, C084340.) That Court requested an informal response from the state. The state filed its response in late June 2017. (Exhibit Y; Exhibits, pages 302-321.) Petitioner filed a reply and additional supporting exhibits. (Exhibit Z; Exhibits, pages 333-59, 360-69.)

On July 24, 2017, the appellate issued an order to show cause returnable before the superior court to address the merits of the claims raised in the petition for writ of habeas corpus. (Exhibit AA; Exhibits,

pages 371-73.) The district attorney filed her return on November 11, 2017. (Exhibit BB, Exhibits, pages 376-83.) Petitioner filed his traverse on December 1, 2017. (Exhibit CC, Exhibits, pages 385-407.)

On December 18, 2017, the superior court filed its order denying all habeas relief. (Exhibit DD, Exhibits, pages 409-31.) It found that Petitioner “failed to present ‘new evidence’ in the instant habeas petition, that meets the standard set forth in Penal Code § 1473(b)(3)(B), that it be evidence ‘that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence.’” (Exhibit DD, page 16; Exhibits, page 424.) The superior court concluded that trial counsel “made a reasonable tactical choice not to request funding for further psychological testing” after he received a brief competency assessment that suggested the defendant was malingering.” (Exhibit DD, page 17; Exhibits, page 425.) The superior court dismissed the full neuropsychological report from Dr. Khazanov, which was submitted with the habeas petition and which found, after significant testing, no signs of malingering. The superior court called this detailed report “simply evidence that could have been discovered prior to trial by the exercise of due diligence.” (Exhibit DD, page 17;

Exhibits, page 425) (emphasis in original). It concluded Dr. Khazanov's report was not "new evidence" within the meaning of Penal Code § 1473(b)(3)(3). It then cited its earlier denial of relief to conclude the referred petition needed to be denied. (Exhibit DD, page 17; Exhibits, page 425.)

The superior court alternatively ruled, in light of this Court's referral order, that even with Dr. Khazanov's report "petitioner still fails to establish that the 'new evidence' would have more likely than not changed the outcome at trial." (Exhibit DD, page 18; Exhibits, page 426.) The court found Dr. Khazanov's report to be little different from Dr. Globus's report, a report trial counsel had available to him when he abandoned a not guilty by reason of insanity plea. The court explained:

The court does not find that Dr . Khazanov's report is so substantially different from Dr. Globus's report that counsel Keith Staten did consider, as to be more likely than no to have changed Staten's mind about abandoning an insanity plea, as Staten still would have had before him Dr. Nakagawa's report that petitioner had been deliberately malingering. As noted above, Dr . Khazanov's report was based primarily on information that petitioner himself had told Dr . Khazanov, and the neuropsychological testing that was done does not appear to have involved any organic testing and instead involved only petitioner's performance responses to various tasks, as well as tests to determine whether petitioner was malingering in taking these tests.

Staten would have realized that were he to go forward with an insanity plea, that the court would appoint two psychiatrists or psychologists pursuant to Penal Code § 1027 to examine petitioner, and that the prosecution would have opportunity to request that petitioner submit to an examination by a prosecution-retained mental health expert pursuant to Penal Code § 1054.3(b). Staten also would have realized that one of those appointments could have been of Dr. Nakagawa or another psychotherapist who could have made a similar determination of malingering.

(Exhibit DD, pages 18-19; Exhibits, pages 426-27.) After discussing Petitioner's criminal history, the superior court stated that "Any reasonable attorney would have seen that [Summer's had] a non-stop criminal history with [him] always being convicted, not once ever being found not guilty by reason of insanity, and always incarcerated either in prison or in jail only to get out and immediately commit another offense resulting in re-incarceration." (Exhibit DD, pages 19-20; Exhibits, pages 427-28.) Without evidence to support its finding, the superior court further concluded that Mr. Summers "could easily be found to be malingering about insanity by any psychotherapist that the court would appoint to examine him or that the prosecution would seek appointment of, and that a malingering diagnosis from a psychotherapist would have

been devastating to the case.” (Exhibit DD, page 20; Exhibits, page 428.)

The superior court takes it as a given that any insanity plea would have resulted in Mr. Summers being labeled a malingerer, in contrast to Dr. Khazanov’s declaration that the accepted tests for malingering demonstrated Mr. Summers had real and profound deficits and was not malingering. The superior court then attributed to Attorney Staten strategic reasons for his actions that Mr. Staten has not claimed. (Exhibit DD, pages 20-21; Exhibits, page 428-29.)

Regarding the *Romero* motion, the superior court concluded that Dr. Khazanov’s evidence “was not so substantially different from Dr . Globus's as to have been more likely than not to change this court’s view” and that had this new evidence been presented, “it would not have made any difference.” (Exhibit DD, pages 21; Exhibits, page 429.)

Mr. Summer returned to the state appellate court with an updated petition, raising the same claims as before, and providing the superior court’s decision as an exhibit. (Exhibit EE.) The appellate court requested an informal opposition which, after a few extensions of time,

was filed. (Exhibit FF.) The appellate then denied relief without citation or explanation. (Exhibit GG.)

In order to complete the exhaustion of state remedies, Petitioner alleges as follows:

VIII

GROUND FOR RELIEF: Petitioner was denied his rights under the Sixth and Fourteenth Amendments of the United States Constitution, and under Art. I, § 15 of the California Constitution, to effective assistance of counsel.

A. Trial counsel Staten failed to fully investigate the basis for a plea of not guilty for reason of insanity by failing to obtain additional psychiatric and neurologic tests the appointed psychiatrist he retained concluded were necessary to determine the extent of petitioner's impairment at the time of the charged crime. As a result, trial counsel failed to present evidence of Petitioner's mental health history and illness and misadvised Petitioner to drop a plea of not guilty for reason of insanity in his defense.

B. Mr. Staten failed to properly advise Petitioner that it was his decision and not Mr. Staten's to enter or abandon a NGI plea. Staten

failed to ensure Petitioner understood the decision Staten made to abandon such a plea and failed to advise Petitioner that it was Petitioner's decision about what plea to enter, that such failure was a result of counsel's inadequate understanding of his role in these proceedings and of the fundamental distinctions between competency findings and NGI pleas. Staten's decision to abandon a NGI plea was a product of his failure to understand that the decision whether to enter a NGI plea rests with the defendant, not his attorney.

C. Additionally, once Petitioner was convicted, the trial counsel's failure to fully investigate Petitioner's mental health history and illness, including the failure to obtain additional psychiatric and neurologic tests recommended by the appointed psychiatrist and necessary to determine the extent of petitioner's impairment at the time of the charged crime, resulted in a prejudicially deficient presentation of the "*Romero* motion" at sentencing which requested the trial court to exercise its discretion to not sentence Petitioner under California's Three Strikes Law.

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D. Supporting Facts

Petitioner was arrested and charged with robbing Belinda Carston in a common area of a doctor's office in mid-town Sacramento on August 14, 2007. (1 RT 63; Exhibit D; Exhibits, page 48.) Ms. Carston described Petitioner as being “retarded” and “not normal.” (1 RT 66, 67; Exhibit D; Exhibits, pages 49-50.) Just after Petitioner thanked Carston for giving him directions to the reception area and started to walk away, Petitioner abruptly reappeared in front of her. He was very close to her and put his hand behind her left ear while holding something hard. Petitioner said he had a gun, threatened to kill her, and spoke in a “deranged” tone of voice. (1 RT 68-70; Exhibit D; Exhibits, pages 51-53.) Carston described him as “speaking to me in low tone, angry almost possessed. Very just angry but in a low tone.” (1 RT 69; Exhibit D; Exhibits, page 52.) Carston explained that Petitioner was “right in my face” with only about 6-8 inches separating them. (*Id.*) She told him to “just take whatever” (1 RT 72; Exhibit D; Exhibits, page 55.) Petitioner grabbed her bag and took off. (1 RT 72; Exhibit D; Exhibits, page 55.)

Trial counsel, Keith Staten, took Petitioner's case over from the county public defender's office. The public defender had done a limited initial investigation to determine whether there were factual grounds for a plea of not guilty by reason of insanity. It had hired Dr. Albert Globus to prepare a forensic evaluation. After Mr. Staten took over Petitioner's case, he sought funding for expert services from the Conflict Criminal Defenders for Sacramento County for this work. It authorized funding at a significantly reduced rate and for a limited number of hours. Staten specifically asked Dr. Globus to prepare a small report so that he could save the remaining authorized hours for testimony at trial. Dr. Globus's report explained that "an accurate diagnosis will always be difficult if not impossible . . . without a very expensive and long term investigation of not only his psychiatric but also his neuropsychological and neurological state." (Globus Report, page 4; Exhibit B; Exhibits, page 17.) Dr. Globus "explained that Petitioner's "capacity to understand the consequences of his behavior at the time of the alleged offense was substantially reduced to next to non-existent." (*Id.*) Globus explained that Petitioner was addicted to drugs which "[p]resented with the persistent and intensely uncomfortable need for another drug fix,"

suffered from “slow thinking,” “poor memory,” lacked “mature social judgment,” had “acute cognitive deficit secondary to intoxication at the time of alleged offense, his drug induced paranoia impairing his sense of reality, his capacity to understand the consequences of his behavior at the time of the alleged offense was substantially reduced to next to non-existent. In fact, he may well have been impaired from birth on and his drug abuse was more an inept and pathetic attempt to treat his long term mental illness than some basic antisocial personality development.” *(Id.)*

Mr. Staten decided to not pursue a plea of not guilty by reason of insanity (“NGI plea”). In doing so, Mr. Staten failed to properly advise Petitioner that it was his decision and not Mr. Staten’s to enter or abandon a NGI plea. Staten failed to ensure Petitioner understood the decision Staten made to abandon such a plea and failed to advise Petitioner that it was Petitioner's decision what plea to enter. This failure was a result of counsel's inadequate understanding of his role in these proceedings and of the fundamental distinctions between competency findings and NGI pleas. (Staten Declaration; Exhibit A; Exhibits, pages 7-8.) Staten’s decision to abandon a NGI plea was a

product of his failure to understand that the decision whether to enter a NGI plea rests with the defendant, not his attorney. (See *People v. Medina* (1990) 51 Cal.3d 870, 899-900; *People v. Frierson* (1985) 39 Cal.3d 803, 816; *People v. Henning* (2009) 178 Cal.App.4th 388, 397-398.) Trial counsel also ignored the verbal opinion offered by Dr. Globus as to the merits of an NGI claim and failed to properly weigh Dr. Globus's written report, both of which indicated there was strong evidentiary support for an NGI plea. Trial counsel unreasonably believed that a brief competency evaluation trumped the evidence supporting a NGI assessment and failed to understand the distinction between competency and insanity. Trial counsel thus had no reasonable tactical basis to choose to abandon Petitioner's NGI plea. Nor did trial counsel have the right to make this decision as it was for the Petitioner to make.

As a result of Mr. Staten's deficient performance in these ways, Petitioner was prejudiced by the loss of a viable plea of not guilty by reason of insanity. A neuropsychological assessment, as Dr. Globus reported was needed, shows that Petitioner suffered at the time of the offense and at the time of trial from debilitating and longstanding

psychiatric, cognitive and emotional disorders. (Dr. Khazanov Report, Exhibit C; Exhibits, pages 18-44.) Petitioner suffers from a mood disorder and Post-Traumatic Stress Disorder and did so throughout his childhood and adolescence. As detailed in an assessment done by Dr. Khazanov, Petitioner suffered traumatic exposures throughout his childhood and adolescence which significantly contributed to the development of his polysubstance abuse and dependence, which further exacerbated his mental deficits. Petitioner's trauma came from, in sum, "(1) A childhood characterized by physical and emotional neglect, abandonment and abuse, chaos, and pervasive lack of safety; (2) Childhood exposure and consistent trauma of living in a drug and alcohol infested, often times violent and abusive, environment in conjunction with limited parental influence and neglect; (3) A persistent absence of parental affection, attention, guidance, and protection; (4) Sexual victimization and repeated sexual abuse by numerous, often unknown individuals, and absence of protection from his mother; (6) Repeated traumatic exposure outside of the range of normal human experience; (7) Minimal attachment opportunities and protective relationships throughout childhood; (9) Absence of the appropriate

assessment and interventions at an early age or later for his polysubstance abuse and dependence, depression, PTSD, psychotic symptoms, and intermittent suicidality; [and] (10) Early insult to the brain, occurring pre- or perinatally, and sustaining several traumatic head injuries.” (Khazanov Report ¶ 75; Exhibit C, ¶ 75; Exhibits, page 42.)

Dr. Khazanov found that these experiences Petitioner suffered are “known risk factors for mental illness and brain dysfunction have had longterm implications for Mr. Summers’ overall psychological, cognitive, and social functioning, and profoundly impaired his perceptions, insight, judgment, and overall behavior.” (Khazanov Report ¶ 76; Exhibit C; Exhibits, page 42.) Petitioner suffers from multiple serious mental and emotional impairments, namely major depressive disorder, substance-induced psychotic disorder, panic attacks without agoraphobia, poly-substance abuse and dependence, and several prominent features of post-traumatic stress disorder (PTSD), which were present at the time of his trial. (Khazanov Report, ¶ 77; Exhibit C; Exhibits, page 42.) Petitioner was receiving psychiatric treatments and psychotropic medication prior to his trial, and was hospitalized to a

psychiatric institution for prior suicidal attempt, current suicidal ideation and major depression in December 2006. (*Id.*) Neuropsychological testing of Petitioner “identified localized dysfunction, primarily in the frontal lobes, with additional right hemisphere-based deficits, disrupting his cognitive and neurological functioning. It is apparent from these findings that Mr. Summers[’s] mental illness, in conjunction with his significant neuropsychological impairments, substantially impair his abilities to plan or carry out a specific course of action, act independently or make informed decisions, interpret social or interpersonal cues (whether verbal or non-verbal), assess his environment or specific situations accurately and respond rationally or thoughtfully.” (Khazanov Report, ¶ 78; Exhibit C; Exhibits, page 43.)

Dr. Khazanov found her findings regarding Petitioner are consistent with what a qualified neuropsychologist would have found had Petitioner been assessed at the time of his arrest and trial. (*Id.* ¶ 81; Exhibit C; Exhibits, page 43.) Such an assessment, Dr. Khazanov also concluded, “would have provided substantial evidence for the court about Mr. Summers’ compromised ability to control his impulses and make decisions at the time of his offense due to his detrimental

combination of complex mental illness, comorbid brain damage, illicit drug addiction, and multiple prescribed psychotropic medications.”

(*Id.*) Dr. Khazanov concluded that the factual basis for a NGI plea may have been found had a timely neuropsychological assessment been done:

It is my professional opinion that at the time of the crime Mr. Summers was under the influence of extreme mental disturbance. I can not rule out the possibility that if he was tested by a qualified neuropsychologist such assessment would have established that at the time of the offense his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was impaired as a result of mental defect and the effects of intoxication, which would have supported the not guilty by reason of insanity defense.

(*Id.* ¶ 81; Exhibits, pages 43-44.)

Once convicted, Petitioner was subject to a sentence calculated under California Penal Code §667.5, California’s Three Strikes Law. Petitioner’s trial counsel, Keith Staten, filed a “*Romero* motion” asking the trial court to exercise its discretion to strike Summers’ prior convictions pursuant to California Penal Code § 1385. (CT 133-37; Exhibits, pages 63-67.) But Mr. Staten did not seek appointment of an expert or funds to retain an expert to conduct the neurological

assessment that Dr. Globus advised was needed to fully and accurately understand Petitioner's mental health and functioning. Dr. Khazanov's testing and report also demonstrates that had such testing been done, it would have provided needed evidence to support the "*Romero* motion" Mr. Staten had filed. Regarding sentencing, Dr. Khazanov concluded:

It is my professional opinion that findings consistent with this report would have been reached at the time of Mr. Summers' most recent arrest and trial had a qualified neuropsychologist evaluated him. This would have provided substantial evidence for the court about Mr. Summers' compromised ability to control his impulses and make decisions at the time of his offense due to his detrimental combination of complex mental illness, comorbid brain damage, illicit drug addiction, and multiple prescribed psychotropic medications. These multiple impairments are relevant to several specific factors set forth in Penal Code § 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497,504 to be considered in Mr. Summers' penalty.

(*Id.* ¶ 81; Exhibit C; Exhibits, page 43.) Dr. Khazanov also assessed Petitioner's potential for rehabilitation, a key issue in a *Romero* motion. Dr. Khazanov found, "to a reasonable degree of psychological certainty, that Gregory Summers is a good candidate for rehabilitation." (*Id.* ¶ 82;

Exhibit C; Exhibits, page 44.) Though his deficits are serious, they are treatable:

Proper medication can aid in reducing his depressive and psychotic (primarily auditory hallucinations) symptoms. Therapies designed to assist people in healing from trauma can decrease his Post-traumatic Stress Disorder (PTSD) symptoms, thus decreasing the need to self medicate, and increase his adaptive coping abilities. Mr. Summers appears quite motivated to participate in treatment for his mental health issues and has always cooperated whenever treatment was offered, as evidenced by his longstanding mental health treatment during prior periods of incarceration. His motivation, in conjunction with his interest in contributing positively to society, his willingness to use the time in custody to learn the skills he has been lacking, his willingness to stop using drugs and remain clean, and his lack of violent tendencies make success for rehabilitation likely, if offered. People like Mr. Summers with multiple psychiatric comorbidities often times do very well in structured supportive environments, and are able to acquire cognitive, emotional, and practical skills they are lacking as a result of adverse childhood experiences and subsequent substance abuse. Should Mr. Summers be provided treatment and assistance and guidance in obtaining employment and housing, with continued mental health supports, his recidivism potential would be exponentially decreased.

(*Id.* at ¶ 82; Exhibit C; Exhibits, page 44.)

IX

Petitioner has previously presented ineffective assistance of counsel claims to the state courts, as set forth in ¶V. Acting *pro se*, he was unable to obtain all the necessary evidence to support the claims, so some of the factual basis for his claims have not yet been presented to the state courts. Only after the appointment of counsel in the federal habeas proceedings, was petitioner able to obtain the evidence supporting these claims for relief.

Petitioner has been dependent on appointed federal counsel to prepare and present this petition to the state courts. Undersigned counsel has been unable to expeditiously revise this petition for filing in this Court after the court of appeal's denial because of preexisting workload and the unusual and extremely time consuming work load for federal prisoners seeking "compassionate" release from federal prison during the COVID-19 pandemic. Though undersigned counsel did not work alone in this effort, the resulting increased work load rendered making progress on the state petition in this case impossible until recently. Further delay in editing this petition was caused by the need

for undersigned counsel to review several state legislative amendments to California sentencing law, to determine whether any of these changes applied to Petitioner and might give rise to additional grounds for a motion to recall his sentence.

Petitioner is not at fault for counsel's delay.

X

Aside from the instant petition and the federal petition discussed above, Petitioner does not have any other appeal or petition challenging his conviction pending in state or federal court.

XI

Petitioner was represented at trial by Keith Staten, Law Office of Keith J. Staten & Associates, PC, 1023 H St ., Suite A, Sacramento, CA 95814, telephone (916) 443-5600.

Petitioner was represented on direct appeal by Thea Greenhalgh. That state bar directory now lists Ms. Greenhalgh as deceased.

X

Petitioner has no other charges pending and no other sentence to serve pending.

XI

Petitioner incorporates into each of the claims set forth above all factual statements, as if fully set forth in this petition, made by Dr. Khazanov and Dr. Globus, as set out in Exhibits C and B, regarding Petitioner's mental and medical health history and condition.

PRAYER

Therefore, Petitioner asks that the Court grant the following relief:

- (1) Issue an order directing the respondent to show cause why the writ should not be granted;
- (2) Authorize discovery to the extent appropriate;
- (3) Authorize expansion of the record to the extent appropriate, including the exhibits attached to this petition;
- (4) Authorize an evidentiary hearing at which evidence may be introduced concerning the factual allegations in the petition;
- (5) Grant the petition for a writ of habeas corpus and order the conviction and sentence vacated; and

///

(6) Grant petitioner any other relief to which he may be entitled.

Dated: November 1, 2023

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender

s/ Ann C. McClinton
ANN C. McCLINTOCK
Assistant Federal Defender

Attorneys for Petitioner
GREGORY SUMMERS

VERIFICATION

STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

ANN C. M^cCLINTOCK declares as follows:

I am the attorney for the petitioner in this matter.

All the facts alleged in this petition for writ of habeas corpus not otherwise supported by citations to the record, exhibits or other documents are true of my own personal knowledge, unless expressly stated on information and belief.

I am executing this verification because my client resides in a different county from that where my office is maintained. My client has authorized me to file this petition on his behalf.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of November, 2023, at Sacramento, California.

s/ Ann C. M^cClintock
ANN C. M^cCLINTOCK

WORD COUNT CERTIFICATE

I hereby certify that the attached **PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM** is proportionally spaced, has a typeface of 14 points or more, is double-spaced and contains 10,717 words (excluding the verification and required tables).

Dated: November 1, 2023

s/ Ann C. M^cClintock
ANN C. M^cCLINTOCK

Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
SacAWTTrueFiling@doj.ca.gov
Attorney for Respondent State of California
Served Electronically

Central California Appellate Program
2150 River Plaza Dr., Ste. 300
Sacramento, CA 95833
eservice@capcentral.org
Served Electronically

GREGORY SUMMERS
P10870
CSP SOLANO
P.O. BOX 4000
VACAVILLE, CA 95696-4000
Served by Mail

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 1, 2023, at Sacramento, California.

s/ Ann C. McClintock
ANN C. McCLINTOCK

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **In re Gregory
Summers**

Case Number: **TEMP-JG5KL9YC**

Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **ann_mcclintock@fd.org**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR WRIT OF HABEAS CORPUS	CalSCt_Petition_2023
ADDITIONAL DOCUMENTS	CalSCt_PAs_2023
EXHIBITS	2023_CalSCt_Exhibits_vol_I
EXHIBITS	2023_CalSCt_Exhibits_vol_II
PROOF OF SERVICE	POS

Service Recipients:

Person Served	Email Address	Type	Date / Time
Attorney General	SacAWTTrueFiling@doj.ca.gov	e-Serve	11/1/2023 4:22:29 PM
CCAP	eservice@capcentral.org	e-Serve	11/1/2023 4:22:29 PM
CCAP-0001			

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/1/2023

Date

/s/Ann McClintock

Signature

McClintock, Ann (141313)

Last Name, First Name (PNum)

Federal Defenders CAE

Law Firm

