

No. S282548

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re)
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)
)
 GREGORY SUMMERS,)
)
)
 Petitioner,)
 _____)

**REPLY TO INFORMAL RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS**

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**REPLY TO INFORMAL RESPONSE TO
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Petitioner Gregory Summers is a California state prisoner held pursuant to a 2009 conviction and judgment following a jury trial for second degree robbery, California Penal Code §§ 211, 212.5, and serving 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) (Exhibit D, page 60, Exhibit E, page 68.) Petitioner asserts he was prejudiced by the ineffective assistance he received from trial counsel and presents evident to show that had trial counsel adequately investigated Petitioner's mental health, he would have been able to present to the trial court significant mitigating evidence relevant to sanity and, if convicted, to the sentence appropriate

for the case. Petitioner was thus 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.

This Court requested an Informal Response from the Respondent which was filed, after a granted extension of time, on May 1, 2024. This Court directed Petitioner to file his Reply within 20 days. This Reply is thus timely filed.

ARGUMENT

I. The Warden Errs in Setting out the Pleading Standards

In its Informal Response, the Warden discusses the *prima facie* pleading requirements but cites to various cases that address the substantive standards of assessing the ultimate merits of an ineffective assistance of counsel claim for habeas relief. *See e.g.*, Informal Reponse, pp. 12-13, citing *People v. Hinton* (2006) 37 Cal.4th 839, 876 (a death penalty direct appeal to this Court and so not a case addressing the habeas pleading standards); *In re Alcox* (2006) 137 Cal.App.4th 657, 665 (this Court's review of a superior court decision post it granting an order to show cause, and so again not a case that addressed the pleading

standards); *Strickland v. Washington* (1984) 466 U.S. 668, 689 (U.S. Supreme Court decision recognizing the Sixth Amendment guarantees the right to effective assistance of counsel; discussing the merits standards for evaluating such a claim for relief).

The Warden thus errs in setting out the pleading standards. As this Court has repeatedly explained, the pleading requirements are not the same as an ultimate merits assessment. Rather, “[i]n a proceeding in habeas corpus, the petitioner bears the ‘burden ... of alleging ... the facts on which he relies in support of his claim [or claims] for relief’ (*In re Lawler* (1979) 23 Cal.3d 190, 195 [151 Cal.Rptr. 833, 588 P.2d 1257].) He also ‘bears the burden of proving [those] facts ... by a preponderance of the evidence.’ (*People v. Ledesma* (1987) 43 Cal.3d 171, 243 [233 Cal.Rptr. 404, 729 P.2d 839] (conc. opn. of Grodin, J.).)” *Sassounian*, (1995) 9 Cal. 4th 535, 546-47. It is not appropriate at the pleading stage to consider the substantive merits of Petitioner’s claim for relief.

Rather this Court is to assess whether the Petition simply alleges the necessary elements of the claim. Here, Petitioner Summers does so: Petitioner Summers alleges that he is imprisoned and restrained of his

liberty, that he is held by the Warden Matteson at the California State Prison, Solano, where he still remains; Petition p. 8; Petitioner has alleged that his imprisonment is illegal and set forth the elements of the constitutional basis for his convictions unconstitutionality – ineffective assistance of counsel from trial counsel’s failures, Petition, pp. 24-37; and the Petition was verified by the oath or affirmation of the party making the application. Petition, p. 40.

Respondent does not assert any procedural bar. Thus, at this stage, one before a formal order to show cause has been issued, Petitioner needs only to make a sufficient prima facie statement of specific facts which, if established, entitle him to relief on the claims he has raised in the petition. (*See Sassounian*, 9 Cal.4th at 547.)^{1/} As the Warden acknowledges, Petitioner’s claims for relief allege his trial counsel rendered him deficient and prejudicial assistance. But rather

¹ *Sassounian*, explains” “In issuing an order to show cause in [a habeas] proceeding, a court makes ‘an implicit preliminary determination’ as to claims within the order that the petitioner has carried his burden of allegation, that is, that he ‘has made a sufficient prima facie statement of specific facts which, if established, entitle him to ... relief’” (9 Cal. 4th at 547, *quoting In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4, 87 Cal.Rptr. 681, 471 P.2d 1.)

than admit prima facie allegations have been pleaded in the petition, the Warden focuses on the merits of the claims for relief. (*See* Informal Response, page 14 (arguing “Summers fails to give sufficient weight to a competency report), *ibid.*, pages 15 (arguing Summers’s history and the facts of this case demonstrate his actions in this case were “goal directed behavior not the work of a deranged person.”) This arguments do not rebut the pleading standards that this Court must assess at this stage in the habeas proceeding.

To prove a claim of ineffective assistance of trial counsel, Petitioner needs to prove by a preponderance of the evidence that his counsel’s performance was deficient and that Petitioner was prejudiced as a result. (*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). Deficient performance is shown when trial counsel’s representation fell below an objective standard of reasonableness under then-prevailing professional norms. (*Id.*) At its core, Petitioner’s assertion is that his trial counsel failed to adequately investigate Petitioner’s mental state before abandoning a plea of NGI and before presenting a *Romero* motion. In such a context, an adequate

investigation and preparation is required. (*Ledesma*, 43 Cal.3d at 215.) “[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” (*Strickland, supra*, 466 U.S. at pp. 690-691, 104 S. Ct. at p. 2066, 80 L. Ed. 2d at p. 695.)

The prejudice prong is met when the evidence presented, if proved, demonstrates a reasonable probability that but for counsel's errors, the outcome would have been different. “The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at 694, 104 S. Ct. at p. 2068, 80 L. Ed. 2d at 698)

The analysis for both the deficient performance and prejudice prongs focuses on the specific claims presented. Here, the focus must be on trial counsel’s failure to fully investigate Petitioner’s mental state before withdrawing the not guilty by reason of insanity plea and, after Petitioner’s conviction, the failure to complete this investigation to support the *Romero* motion counsel made. The Warden’s focuses on the

competency examination, which like trial counsel's focus was and is misplaced. There are distinct differences between the competency question and the questions raised here: Petitioner's mental state at the time of the offense, not at trial, and the gathering of mitigating mental health evidence before sentencing to support the sentencing strategy that counsel chose.

As detailed next, the evidence presented makes a prima facie showing of ineffective assistance of trial counsel.

II. The Petition States a Prima Facie Claim of Prejudicial Ineffective Assistance of Trial Counsel

Pursuant to California Rules of Court Rule 4.551(c), this Court “must issue an order to show cause if the petitioner has made a prima facie showing that he or she is entitled to relief. In doing so, the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause.” The basic pleading requirements are set out in Penal Code section 1474; it requires the application for the writ of

habeas relief be “made by petition, signed either by the party for whose relief it is intended, or by some person in his behalf, and must specify:

“1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them, if they are not known;

“2. If the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists;

“3. The petition must be verified by the oath or affirmation of the party making the application.”

California Pena Code § 1474. Petitioner Summers’s habeas petition in this Court meets these standards. Petitioner Summers’s petition makes a statement of prima facie case for relief and alleges claims which are not procedurally barred, this Court is obligated to issue an order to show cause. *People v. Romero* (1994) 8 Cal.4th 728, 737-38.

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A. Petitioner has Made a *Prima Facie* Showing of Ineffective Assistance in Investigating Petitioner's Mental State at the Time of the Offense and Regarding the Decision to Abandon a NGI Plea

The petition alleges that “[t]rial counsel Staten failed to fully investigate the basis for a plea of not guilty for reason of insanity, 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.” (Petition, p. 24.) It further alleges that the defense expert, Dr. Globus, had advised Staten that complete investigation not only of Petitioner’s “psychiatric but also his neuropsychological and neurological state” was needed to obtain an accurate diagnosis. (Petition, p. 27, citing Globus Report, page 4; Exhibit B; Exhibits, page 17.) The minimal report Dr. Globus provided nonetheless demonstrated the need for further investigation because it suggested Petitioner’s functioning at the time of the offense was impaired not simply due to drug use. Rather Petitioner “may well have been impaired from birth on” (Petition, p. 28, citing (Globus Report, page 4; Exhibit B; Exhibits, page 17.)

To prevail in a plea of not guilty by reason of insanity California law requires a defendant to prove “by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.” (Cal. Pen Code § 25, sub. (b).) A defendant can plea both not guilty and not guilty by reason of insanity. (Cal. Pen. Code § 1016.) Once a NGI plea is entered, the trial court is obligated to appoint at least two psychiatrists or licensed psychologists who have a doctoral degree in psychology to examine the defendant and investigate his or her mental status. (Cal Pen Code § 1027, sub. (a).) The report from these experts must “include, but not be limited to, the psychological history of the defendant, the facts surrounding the commission of the acts forming the basis for the present charge used by the psychiatrist or psychologist in making his or her examination of the defendant, the present psychological or psychiatric symptoms of the defendant, if any, the substance abuse history of the defendant, the substance use history of the defendant on the day of the offense, a review of the police report for the offense, and any other credible and relevant

material reasonably necessary to describe the facts of the offense.” (Cal. Pen. Code § 1027, sub. (b).)

Thus there was nothing in California’s law that required Petitioner’s counsel to choose between pleading not guilty and still pleading not guilty by reason of insanity. Given the court’s obligation to appoint at least two mental health experts, the expense restrictions that are alluded to in Dr. Globus’s report are in fact nonfactors. A full and independent assessment of Petitioner’s mental health and state at the time of the offense was obtainable by entering a NGI plea.

The NGI plea and process is separate and distinct from a claim of incompetency. The latter is focused on a defendant’s ability to understand and assist in his own defense. (Cal. Pen. Code § 1367, sub. (a) [incompetent “if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.”])

It is also clear that “the decision to enter or withdraw a plea of NGI is one for the defendant, not counsel, to make even if doing so may be tactically unwise.” (*People v. Clark* (2011) 52 Cal.4th 856, 963,

citing *People v. Gauze* (1975) 15 Cal.3d 709, 125 Cal. Rptr. 773, 542 P.2d 1365.) “[N]either the court nor counsel may override a defendant’s decision to plead NGI when such a decision is made freely and voluntarily and with knowledge of the consequences.” (*Id.*, citing *Gauze*, *supra*, 15 Cal.3d at pp. 717–718.) A defendant cannot be compelled by counsel to forego such a plea because counsel opposes it on tactical grounds. (*Id.*)

The evidence presents a *prima facie* showing the trial counsel Staten failed to fully investigate the NGI plea, failed to make sure that Petitioner understood the decision to enter such a plea rested with him (and not counsel). Mr. Staten 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.

Dr. Nakagawa’s competency report explains that she spent little time with Petitioner. She billed a total of 3 hours for the interview, test administration, test scoring and her report preparation. (Nakagawa cover

letter dated Oct. 25, 2007; Exhibits Volume II, page 361). It mentions no review of any of Petitioner's mental health records or interviews with Petitioner's family regarding this history. (Nakagawa Report, Exhibit Volume II, p. 361.) Dr. Nakagawa assessed Petitioner to be showing signs of malingering. (*Id.* at p. 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 Volume II, page 364-67; Exhibits to Petition, p. 17 [Dr. Globus describing Summers's long history of mental illness and explaining his "functional disturbance" is "profound and impair[ed]"], *ibid.* at pp. 23- 28 [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.]

The Warden also errs in asserting these facts fail to *prima facie* demonstrate that trial counsel was unreasonably deficient in failing to seek further mental health testing. (Informal Response, p. 15.) In fact,

Attorney Staten's expert told him additional testing was needed. (*See* Exhibits, p. 17 [explaining an accurate diagnosis required more in depth neuropsychological and neurological examination].) Dr. Globus suggested Petitioner Summers "may well have been impaired from birth" and that Summers's drug abuse may have "an inept and pathetic attempt to treat his long term illness" instead of being evidence of "some basic antisocial personality development." (*Id.*)

Turning to the *prima facie* case for prejudice on this ineffective assistance of counsel claim, the Warden errs by imposing a higher burden than exists. (*See* Informal Response, pp. 17-21.) Petitioners need only demonstrate a reasonable probability sufficient to undermine confidence in the outcome. (*Strickland, supra*, 466 U.S. at 694, 104 S. Ct. at p. 2068, 80 L. Ed. 2d at 698.) Dr. Khazanov's declaration provides more than sufficient evidence to undermine confidence on this point. The Warden suggests that Khazanov's opinions would lose persuasiveness in the face of the facts of the offense conduct. (Informal Response, p. 18.) But the Warden ignores that Dr. Khazanov's report is based on her review of the crime facts, including experts of trial testimony which described Petitioner's behavior on the date of the

offense. (See Exhibits, p. 22, ¶ 12.) The ultimate persuasiveness of Dr. Khazanov's testimony is also not the standard to be applied at this point in assessing whether a *prima facie* case has been established.

Finally the Warden states that Summers was "a drug abuser stealing money" (Informal Response, p. 18.) There is nothing inconsistent with Summers suffering from profound and life long mental illnesses that affected his criminal culpability with him being an addict. The two conditions can and do coexist. The evidence presented plainly states a *prima facie* case of prejudicial and deficient performance by failing to investigate fully Summers's mental state. Summers suffers from brain damage, including in the frontal lobe, and did so at the time of the offense. (Exhibits, pp. 33, 37-40.) He suffered a traumatic and abusive childhood, chronic psychiatric illnesses and deficits that left him "substantially impair[ed in] 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." (Exhibits, p. 43.)

For all these reasons, together with the facts and arguments presented in the petition and supporting exhibits, this Court should conclude a *prima facie* case has been pleaded and issue a formal order to show cause requiring the Warden to answer the petition.

B. Petitioner has Made a *Prima Facie* Showing of Ineffective Assistance in Investigating Petitioner's Mental Health History Regarding the *Romero* Motion

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.

The Warden asserts that this claim fails because it fails to demonstrate a *prima facie* showing of prejudice. (Informal Response, p. 19.) In particular, the Warden relies on the sentencing court's statement that Petitioner's "drug use may have a great deal to do with the mental issues that he has. But he still seems to be able to commit crimes and lots

of them. And he's able to at least think in a logical fashion and plan - and he knows how to get money in order to support his drug habits. And he doesn't generally accost large burly men. He --he has a pattern -- since 1982 he has a pattern of going after fairly vulnerable people when he commits his crimes.'" (Informal Response, p. 20, quoting from Exhibit D to the Petition, Exhibits at p. 58.)

The sentencing judge also stated that he recognized "[t]here's sort of an interplay between mental health issues and --- drug use." (Exhibits at p. 58.) But without the evidence that should have been investigated and gathered through an assessment like Dr. Khazanov's, the sentencing judge was left with the opinion that Summers's drug use was the cause of his mental health issues. The court thus implied a lack of moral justification to strike a Three Strikes allegation, concluding "I do not find that it would be in the interest of justice for the Court to strike any of the priors in this case. [¶] And, in fact, I think it would be an abuse of discretion for the Court to strike any of the priors." (*Id.*)

Without the missing neuropsychological assessment that Dr. Globus reported was needed, the court was not informed that Petitioner suffered at the time of the offense and at the time of trial from

debilitating and longstanding psychiatric, cognitive and emotional disorders that were not his fault. (See Dr. Khazanov Report, Exhibit C; Exhibits, pages 19-45.) Petitioner's mood disorder and Post-Traumatic Stress Disorder explains his drug abuse, not the other way around. That he suffered these mental illnesses throughout his childhood and adolescence further demonstrates that the sentencing court's decision to deny the *Romero* motion was premised on inaccurate and incomplete information. 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. The sentencing court did not receive any information about Petitioner's trauma, that he experienced "(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.)

Nor was the sentencing court given Dr. Khazanov’s finding, or another expert’s similar finding, that through this suffering Petitioner was at a greater risk for long term mental illness and impairment, that these experiences 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.)

As Dr. Khazanov explained in her declaration, Petitioner's multiple impairments are relevant to several specific factors set forth in Penal Code § 1385 and *Romero*, 13 Cal.4th at 504, and should have been considered by the sentencing court in setting Mr. Summers's sentence. (Khazanov Report, ¶ 82; Exhibit C; Exhibits, page 44.) But perhaps most importantly, Petitioner was prejudiced by not having evidence presented to the sentencing court that would show he was nonetheless capable of rehabilitation. This is a key issue in a *Romero* motion and apparently the key one the sentencing court implicitly rejected. Dr. Khazanov found, "to a reasonable degree of psychological certainty, that Gregory Summers is a good candidate for rehabilitation" because he remained treatable. (*Id.* ¶ 82; Exhibit C; Exhibits, page 44.) Intervention both medical and through social services gives Petitioner a future without recidivism. (*Id.*) Yet none of this information was provided to the sentencing judge.

Given the facts and legal points raised above and in the petition and its supporting exhibits, Petitioner has presented a *prima facie* case for granting relief on his second ineffective assistance of counsel claim.

///

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: May 21, 2024

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender

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

Attorneys for Petitioner
GREGORY SUMMERS

WORD COUNT CERTIFICATE

I hereby certify that the attached **REPLY TO THE INFORMAL RESPONSE** is proportionally spaced, has a typeface of 14 points or more, is double-spaced and contains 3,965 words (excluding the verification and required tables).

Dated: May 21, 2024

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

PROOF OF SERVICE

I, ANN C. McCLINTOCK, certify:

I am an active member of the State Bar of California and am not a party to this cause. My electronic service address is ann_mcclintock@fd.org and my business address is Federal Defender's Office, 801 I Street, 3rd Floor, Sacramento, CA 95814. On May 21, 2024, I served the persons and/or entities listed below by the method indicated. For those marked "Served Electronically," I transmitted a PDF version of **REPLY TO INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** by e-mail to the e-mail service address(es) provided below. Transmission occurred at approximately 4:35 p.m.. For those marked "Served by Mail," I had deposited in a United States Mailbox regularly maintained by the United States Postal Service at Sacramento, California, a copy of the above document in a sealed envelope with postage fully prepaid, addressed as provided below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 21, 2024, 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: **SUMMERS (GREGORY WAYNE) ON H.C.**

Case Number: **S282548**

Lower Court Case Number:

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