No. 11-99013

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCIS G. HERNÁNDEZ,

Petitioner-Appellant,

vs.

KEVIN CHAPPELL, Warden, California State Prison at San Quentin,

Respondent-Appellee.

On Appeal from the United States District Court for the Central District of California, No. CV 90-04638-RSWL, The Honorable Ronald S. W. Lew, Judge

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR REHEARING

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SUMMARY OF FACTS AND CASE

In 1981, petitioner Francis Hernandez committed horrible crimes against Edna Bristol, 21, and Kathy Ryan, 16. The crimes were exceptionally brutal, even by the standards of capital murder cases. Hernandez was convicted of two counts each of first-degree murder, forcible rape, and forcible sodomy. The jury found true the special circumstances of murder in the course of a rape, murder in the course of sodomy, and multiple murder. At the penalty phase, the jury returned a sentence of death. The California Supreme Court affirmed unanimously, except for correction of a duplicate multiple murder

finding. *See People v. Hernandez*, 47 Cal.3d 315, 327-328, 763 P.2d 1289, 1294-1295 (1988).

The California Supreme Court denied a state habeas corpus petition. *In re Hernandez*, No. S013027 (Cal., May 31, 1990). After the filing of an initial federal petition, *see* Panel Opinion 9-10 ("Op."), the California Supreme Court denied a second, "exhaustion" petition as untimely and successive as well as on the merits. *In re Hernandez*, No. S029520 (Cal., Jan. 27, 1993).

Eighteen years later, the federal district court granted habeas corpus relief as to the penalty but denied as to guilt. *See Hernandez v. Martel*, 824 F.Supp.2d 1025, 1163 (C.D. Cal. 2011). The warden did not appeal the penalty decision. Unsatisfied with his escape from the death sentence, petitioner appealed the guilt decision.

The district court granted a certificate of appealability on Hernandez's claim of ineffective assistance for failure to call a witness. Op. 10. The court did not grant a certificate on other claims, including the claim for "ineffective [assistance] for failing to investigate or present a defense of diminished capacity based on mental impairment." That is, the district judge found that this claim did not meet the standard that "reasonable jurists would find the district court's assessment of the constitutional claim[] debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

On January 21, 2015, a panel of this court consisting of Judges Pregerson, Reinhardt, and Nguyen heard oral argument. The opinion had still not been issued on November 25, 2017, when Judge Pregerson died. *See* Public

Information Office for the United States Courts for the Ninth Circuit, News Release, Ninth Circuit Court of Appeals Mourns Passing of Judge Harry Pregerson (Nov. 28, 2017), http://cdn.ca9.uscourts.gov/datastore/ce9/2017/11/28/R3_Passing_of_Judge_Harry_Pregerson.pdf. The panel opinion issued on December 29, 2017, with Judge Nguyen dissenting in part. A footnote says, "Prior to his death, Judge Pregerson fully participated in this case and formally concurred in this opinion after deliberations were complete." Op. 1, n.*.

In a divided decision, the panel reversed on the ineffective assistance claim regarding the diminished capacity defense. Judge Nguyen dissented in part, finding that the prejudice component of *Strickland v. Washington*, 466 U.S. 668 (1984) had not been met. Like the district judge, she found that "[i]t's not even a close call." Op. 30.

The warden has petitioned for panel rehearing and rehearing en banc.

ARGUMENT

The warden has presented several reasons for rehearing, any one of which is sufficient. First, Ninth Circuit General Order 3.2h requires drawing a replacement judge if a member of the panel dies while the case is under submission. Pet. Reh'g 3. Second, the panel majority erred on material facts. *See* Pet. Reh'g 4-9. Third, the opinion conflicts with precedents of the Supreme Court and this court. *See* Pet. Reh'g 10.

There is, in addition, a fourth reason for this court to grant rehearing, preferably en banc. The panel majority rests heavily on an assumption about

the prejudice standard of *Strickland* that has also been made in other cases but never closely examined. Given the importance of the issue, it is important that it be examined.

The majority says in the second paragraph that it must find *Strickland* prejudice if "there is a reasonable probability—that is, even less than a fifty-fifty chance—that *at least one juror* would have declined to convict Hernandez of first degree murder if his counsel had presented a diminished capacity defense based on mental impairment." Op. 3 (emphasis altered). So important is this "one juror" standard to the majority's analysis that it reiterates the point ten times. *See* Op. 4 (three times), 17 (twice), 18, 24, 26, 27, 29.

But is this correct? In the guilt phase of a criminal case, where the jury must be unanimous one way or the other and a deadlock results in a mistrial and retrial, is the *Strickland* standard really a reasonable probability that *one juror* would acquit the defendant or a reasonable probability that *the jury* would acquit the defendant?

On its face, *Strickland v. Washington*, 466 U.S. 668 (1984) appears to require an assessment of the impact on the jury as a whole.

> "The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the

> question is whether there is a reasonable probability that, absent the errors, the sentencer — including an appellate court, to the extent it independently reweighs the evidence — would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id*. at 695.

In the preceding and following paragraphs, the *Strickland* court uses the term "judge or jury" in place of "factfinder." *Id*. at 694-695. Nowhere in the opinion does *Strickland* refer to an individual juror.

The "one juror" language made its Supreme Court debut in *Wiggins v. Smith*, 539 U.S. 510 (2003). Reviewing a claim of ineffective assistance in the penalty phase of a capital case, the court said, "there is a reasonable probability that at least one juror would have struck a different balance." *Id*. at 537. The court deemed it necessary to immediately follow this statement with a citation to a decision of the highest court of the state plus the parenthetical "noting that as long as a single juror concludes that mitigating evidence outweighs aggravating evidence, the death penalty cannot be imposed."

This reference to state law indicates that the "one juror" standard employed is not a universal rule of *Strickland* prejudice analysis but rather depends on the effect that state law gives to the failure of the jury to reach a unanimous result in the particular proceeding. This is consistent with the language in the *Strickland* quote above that "[t]he governing legal standard plays a critical role . . . ." Maryland had a "single-juror veto" rule in its capital sentencing system. If eleven jurors thought the aggravating

circumstances outweighed the mitigating and one thought they did not, the outcome was that the opinion of the one prevailed over the opinion of the eleven. The "at least one juror" language also appears in *Buck v. Davis*, 137 S.Ct. 759, 776 (2017). *Buck* was also a claim of ineffective assistance in the penalty phase of a capital case, this time from Texas. *See id*. at 767. Texas also has a "single-juror veto" law for the penalty phase of its capital cases. *See* Tex. Code Crim. Proc. art. 37.071 § 2(g).

No state conducts its guilt trials that way. Nowhere in the United States does a hung jury deadlocked at eleven to one for guilt result in an acquittal. A hung jury typically results in a mistrial and a retrial. *See*, *e.g.*, *Renico v. Lett*, 559 U.S. 766, 773-774 (2010). The two largest states in the Ninth Circuit handle jury deadlock at the penalty phase of a capital trial the same way, at least on the first trial. *See* Cal. Penal Code § 190.4(b); Ariz. Rev. Stat. § 13-752(K). The Supreme Court has never applied the "at least one juror" standard to a guilt-phase verdict or to a penalty-phase verdict in a state where a deadlocked penalty-phase jury results in a retrial.

This court has referred to a "one juror" standard in proceedings where the jury must be unanimous one way or the other, but there has not yet been any thoughtful analysis of the issue. The panel majority, at page 17, cites *Weeden v. Johnson*, 854 F.3d 1063, 1071 (9th Cir. 2017). *Weeden* is a guilt-verdict case, and it says, "because the jury was required to reach a unanimous verdict on each count, the outcome could have differed if only 'one juror would have struck a different balance,' " with the inner quote coming from *Wiggins*. *Id*. That certainly does not follow from *Wiggins* itself. As noted

above, *Wiggins* followed that statement with a citation to the state law that a hung jury precluded the death penalty rather than causing a mistrial.

Other Ninth Circuit cases on this point are similarly conclusory. *Browning v. Baker*, 875 F.3d 444, 475 (9th Cir. 2017), cites *Buck v. Davis*, a penalty-phase, single-juror veto case as discussed above, for the standard in a guilt-phase case without discussion of the difference. *See also Doe v. Ayers*, 782 F.3d 425, 446 (9th Cir. 2015) (penalty phase in California case, no discussion).

This issue is too important to leave to conclusory statements unsupported by analysis. Because these statements are already contained in panel opinions binding on other panels, it requires consideration en banc.

CONCLUSION

The petition for rehearing en banc should be granted.

February 9, 2018

Respectfully submitted,

s/KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 32(a), and Ninth Circuit Rule 32-1, I certify that the attached Brief Amicus Curiae for the Criminal Justice Legal Foundation is proportionally spaced, uses 15-point Times New Roman type and contains 1621 words.

February 9, 2018 s/KENT S. SCHEIDEGGER

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February 2018 I caused the foregoing brief to be electronically filed with the United States Court of Appeals for the Ninth Circuit, and served to counsel, via ECF system.

s/KENT S. SCHEIDEGGER