CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Respondent, Jeffrey Timothy Landrigan, did nothing to impede his trial counsel's ability to conduct an investigation for the sentencing phase of the capital proceedings. To the contrary, respondent met with a psychologist and authorized the release of various records. At the sentencing hearing, respondent simply told trial counsel not to present testimony by two witnesses. The failure here is that trial counsel did not conduct an adequate investigation and was therefore unable to present mitigating evidence at the sentencing hearing. The court of appeals found that counsel did little to prepare for the sentencing hearing. After determining respondent made a colorable claim of deficient performance and prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, the court remanded this matter to the district court for an evidentiary hearing.

The question presented is whether the court of appeals properly applied the standard set forth in *Strickland* when it remanded the case to the district court for an evidentiary hearing after concluding respondent raised a colorable claim that trial counsel was ineffective at the sentencing phase of the capital proceedings.

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Respondent, Jeffrey Timothy Landrigan, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the *en banc* opinion by the Ninth Circuit in this case. The opinion is reported at 441 F.3d 638 (9th Cir. 2006) (*en banc*).

STATEMENT OF THE CASE

Respondent respectfully directs this Court to, and adopts herein, the detailed recitation of the underlying facts and procedural history set forth in the opinion below.[1]

REASONS FOR DENYING THE PETITION

1. Respondent was convicted of first degree murder in Arizona and sentenced to death. His conviction and sentence were affirmed on direct appeal. *State v. Landrigan*, 859 P.2d 111 (Ariz. 1993).[2] In state collateral proceedings, respondent raised a claim of ineffective assistance of trial counsel. To support this claim, he sought appointment of experts and an evidentiary hearing. Those requests were denied. *Landrigan v. Schriro*, 441 F.3d at 643. Apx. A-6. In habeas corpus proceedings in the district court, respondent moved to expand the record to include declarations by persons familiar with respondent's background as well as mental health experts. The request was granted in part. However, respondent's request for an evidentiary hearing was denied. 441 F.3d at 641. Apx. A- 6. The district court denied the petition on the

1. Petitioners attached as Appendix A to their petition for writ of certiorari a copy of the opinion below. Reference to the opinion below in this brief will be to Appendix A and will be noted as "Apx. A- ____."

2. Petitioners did not append the state supreme court opinion to the petition for writ of certiorari.

merits and in so doing, concluded that even if trial counsel's performance was deficient, respondent did not show prejudice. *Id.* On appeal, a three-judge panel upheld the decision of the district court. *Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001). Petition for Writ of Certiorari at Appendix B. Subsequently, the court of appeals granted rehearing *en banc*, *Landrigan v. Stewart*, 397 F.3d 1235 (9th Cir. 2005), and reversed the district court.

The court of appeals relied upon *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny in reaching its decision. Citing to *Rompilla v. Beard*, 545 U.S. 374, ___, 125 S. Ct. 2456, 2462-63 (2005), and *Wiggins v. Smith*, 539 U.S. 510, 534-38 (2003), the court concluded respondent "made a colorable claim that he did not receive effective assistance of counsel in his sentencing" and remanded the case to the district court for an evidentiary hearing. *Landrigan*, 441 F.3d at 642. Apx. A-7.

In *Strickland*, this Court established the standard for addressing claims of ineffective assistance of counsel at capital trials and for determining whether any such deficient performance was prejudicial to the defendant. The analytic process set forth in *Strickland* has been repeatedly reviewed and affirmed by this Court. *See Rompilla*, 125 S. Ct. at 2469 ("[T]oday's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*. . . .") (O'Connor, J., concurring); *Wiggins*, 539 U.S. at 521-23 (reiterating that *Strickland* is the metric by which claims of ineffective assistance of counsel are judged); *Terry Williams v. Taylor*, 529 U.S. 362, 391-95 (2000) (discussing the *Strickland* analysis in detail). This case presents no compelling reason to depart from such solid precedent.

a. In finding a colorable claim of deficient performance of trial counsel under *Strickland*, the court of appeals was guided by 28 U.S.C. § 2254(d)(2). Relying upon *Terry Williams*, 529 U.S. at 396, *Wiggins*, 539 U.S. at 522-23 and *Rompilla*, 125 S. Ct. at 2466, the court of appeals determined that based upon the record before it, "counsel did little to prepare for the sentencing aspect of the case." *Landrigan*, 441 F.3d at 643. Apx. A-10. The court went on to observe that "the initial investigation *did* reveal potential mitigating evidence, but that evidence was not developed." *Id.* at 644. Apx. A-11. The court expressed "grave doubts whether Landrigan received effective assistance of counsel during his penalty phase proceeding." *Id.* at 645. Apx. A-12.

Of note was an event that occurred at the sentencing hearing. The state supreme court and the state post-conviction court determined respondent instructed his lawyer not to present mitigating evidence. The court of appeals took issue with these findings and observed they were "an overly broad characterization" of what actually occurred and were not supported by the record. *Landrigan*, 441 F.3d at 647. Apx. A-16. The court concluded the state court findings "amount[ed] to an 'unreasonable determination of the facts.'" *Id.* (quoting 28 U.S.C. § 2254(d)(2)).

The court of appeals also concluded that even if it overlooked the erroneous findings by the state courts, counsel's failure to conduct an adequate investigation before the sentencing hearing was not reasonable and could not be excused. *Landrigan*, 441 F.3d at 647 (discussing *Wiggins*, 539 U.S. at 522-23 and *Terry Williams*, 529 U.S. at 396). Apx. A-16. The state post-conviction court's conclusion that respondent's claim was "'frivolous' and 'meritless' was an unreasonable application" of this Court's precedent. *Id.* (citing 28 U.S.C. § 2254(d)(1)).

b. The court of appeals then addressed the prejudice prong of *Strickland*. Following the direction set forth in *Wiggins*, 539 U.S. at 534 and *Terry Williams*, 529 U.S. at 397-98, the court of appeals reviewed the mitigating evidence adduced at trial and in the habeas proceedings. *Landrigan*, 441 F.3d at 648. Apx. A-18. The court, citing *Terry Williams*, 529 U.S. at 398, and *Boyde v. California*, 494 U.S. 370, 381 (1990), determined the allegations put forth by respondent, "[i]f true, . . . are the very sort of mitigating evidence that might well have influenced the judge's appraisal of Landrigan's moral culpability." *Id.* at 649 (brackets, internal quotations and citations omitted). Apx. A-19. Had this information been presented, the court of appeals concluded, "there is a reasonable probability that, if Landrigan's allegations are true, the sentencing judge would have reached a different conclusion." *Id.* at 650. Apx. A-21.

c. Having determined that respondent set forth a colorable claim of ineffective assistance of counsel at sentencing, the court of appeals went on to consider whether he was entitled to an evidentiary hearing under 28 U.S.C. § 2254(e). Relying on *Michael Williams v. Taylor*, 529 U.S. 420, 432 (2000), the court concluded "Landrigan did not 'fail to develop' the factual basis for his ineffective assistance claim in state court." *Landrigan*, 441 F.3d at 642. Apx. A-8. In state post-conviction proceedings, respondent sought the appointment of an expert and an evidentiary hearing to further develop his claim of ineffective assistance of counsel at sentencing.[3] Both requests were denied by the state court.

3. During state collateral proceedings, the state of Arizona opposed respondent's request and argued it was "simply a waste of time and scarce resources to pay a medical expert to explore" allegations of ineffective assistance at sentencing. Trial Docket, Dec. 5, 1995 at 125, p. 4.

Id. at 643. Apx. A-9. The court of appeals found that respondent was not precluded from seeking an evidentiary hearing in the federal court under 28 U.S.C. § 2254(e). *Id.*

2. The decision by the court of appeals is unremarkable. The opinion below turns upon its own facts and it will affect few others, if anyone, besides respondent. The decision was correct as it relied on this Court's precedent.

It is important to note what petitioners challenge in their application to this Court. Petitioners did not take issue with the findings that respondent made a colorable claim of deficient performance of trial counsel under *Strickland* and that "counsel did little to prepare for the sentencing aspect of the case." *Landrigan*, 441 F.3d at 643.[4] Apx. A-10. Nor did they challenge the finding that "the initial investigation *did* reveal potential mitigating evidence, but that evidence was not developed." *Id.* 644. Apx. A-11. Also unchallenged is the finding that respondent made a colorable claim of prejudice, as well as the determination the allegations put forth by respondent, if true, were the very sort of mitigating evidence that demonstrates prejudice. *Id.* at 649-50. Apx. A-19-21. Finally, left alone is the finding by the court of appeals that respondent is entitled to an evidentiary hearing under 28 U.S.C. § 2254(e) as he "did not 'fail to develop' the factual basis for his ineffective assistance claim in state court." *Landrigan*, 441 F.3d at 642. Apx. A-8. At bottom, petitioners' only complaint is that respondent waived the presentation of mitigating evidence at the sentencing proceedings.

4. All eleven judges on the *en banc* panel agreed that the sentencing investigation by trial counsel was inadequate. *Landrigan*, 441 F.3d at 643-48; *see also id.* at 650 (Bea and Callahan, JJ., dissenting) (agreeing that "counsel's limited investigation of Landrigan's background fell below the standards of professional representation prevailing in 1990[.]"). Apx. A-12-17, 22.

a. With a broad brush, petitioners claim that the court of appeals exceeded its authority when it rejected the state courts' determination that respondent instructed his lawyer not to present mitigating evidence at the sentencing hearing.[5] Petition at 10. According to petitioners, the court of appeals exceeded its authority when it failed to defer to the state courts' factual finding. *Id.* at 17. Sandwiched between these two points are excerpts from the sentencing hearing. Without discussion of how the court of appeals exceeded its authority under 28 U.S.C. § 2254(d)(2), petitioners simply conclude that it did. Absent from petitioners' brief discussion is the fact that trial counsel failed to conduct an adequate investigation. "Indeed, due to his lawyer's meager investigation, there was no other mitigating evidence available to which Landrigan could object or not object." *Landrigan*, 441 F.3d at 646. Apx. A-15.

The court below carefully tracked 28 U.S.C. § 2254(d)(2) when it reviewed the findings by the state courts. Section 2254(d)(2) allows a federal court to look at state court findings to determine if there was "an unreasonable determination of the facts."

Applying section 2254(d)(2), the court of appeals held that the state courts' finding that respondent instructed his trial counsel not to present any mitigating evidence was an "unreasonable determination" of the facts because it was "an overly broad characterization" of what actually occurred and was not supported by the record. *Landrigan*, 441 F.3d at 647. Apx. A-16. In making this finding, the court of appeals did not stray beyond the confines of 28 U.S.C. § 2254(d)(2). Petitioners' complaint lies not with the way the court of appeals applied

5. Landrigan did not foreclose the possibility of investigation; rather, he simply directed counsel not to put two family members on the stand at sentencing. *Landrigan*, 441 F.3d at 645. Apx. A-12.

§ 2254(d)(2); rather, their disagreement is with the conclusion reached by the court below in applying the statute to the particular facts of respondent's case. This is not a reason for this Court to grant certiorari.

b. Petitioners next argue the court of appeals exceeded its authority under 28 U.S.C. § 2254(d)(1) when it found that the state supreme court's ruling was an unreasonable application of clearly established federal law. Petition at 17-18. Again, petitioners' sole focus is on respondent's purported waiver of the presentation of mitigating evidence at sentencing. Petitioners do not discuss why the opinion was unreasonable; they merely state, based on their review of the record, that they disagree with it.

The court below concluded that even if it overlooked the erroneous findings by the state courts, counsel's failure to conduct an adequate investigation prior to the sentencing hearing was not reasonable and could not be excused. *Landrigan*, 441 F.3d at 647 (discussing *Wiggins*, 539 U.S. at 522-23; *Terry Williams*, 529 U.S. at 396). Apx. A-16. The state courts' conclusion that respondent's claim was "'frivolous' and 'meritless' was an unreasonable application" of this Court's precedent. *Id.* (citing 28 U.S.C. § 2254(d)(1)).

Although defense counsel should consider and respect a client's wishes, *Strickland*, 466 U.S. at 688, the obligation to make a reasonable investigation into mitigation evidence is paramount. *Rompilla*, 125 S. Ct. 2466 (citing 1 ABA Standards for Criminal Justice 4-4.1 (2nd ed. 1980)) (finding a duty to investigate exists regardless of the client's desires). Therefore, regardless of the client's directions to the contrary, this Court's precedent mandates a reasonable investigation. *Wiggins*, 539 U.S. at 523. As such, the proper inquiry is the

reasonableness of counsel's investigation. *Id.* at 521-22 (citing *Strickland*, 466 U.S. at 690-91). Here, the opinion by the court of appeals is on all fours with this Court's precedent.

3. Petitioners' presentation of a circuit split is thin. Petitioners cite two cases that purport to demonstrate the putative split. However, the cases fail to make petitioners' point. Respondent's situation is different from those of the appellants in *Wallace v. Ward*, 191 F.3d 1235 (10th Cir. 1999), and *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir. 1985).

a. The facts of *Wallace* are inapposite to respondent's case. In *Wallace*, appellant pled guilty to two counts of first degree murder. As the only defense witness at the punishment trial, appellant testified that "he instructed counsel not to cross-examine witnesses or to object to the evidence because his goal was to obtain the death penalty." 191 F.3d at 1248. At the sentencing hearing, Wallace again confirmed that he waived investigation and presentation of mitigating evidence after conferring with counsel. *Id.* at 1247. The Tenth Circuit upheld the denial of appellant's ineffective assistance of counsel claim based "on the unique facts of [the] case," as "the record show[ed] petitioner was absolutely determined to plead guilty and to obtain the death penalty." *Id.* at 1248. Here, in contrast, there is nothing in the record to indicate respondent limited counsel in his investigation in any way or instructed counsel not to put on *any* mitigating evidence at sentencing. Thus, *Wallace* cannot be held up as an example of a circuit split on the issue of waiver of mitigation.

b. Petitioners also claim *Mitchell* provides evidence of a circuit split, but again the facts and circumstances of that case are distinguishable from respondent's case. In *Mitchell*, the appellant pled guilty and a sentencing trial, where no mitigating evidence was offered was, held before a judge.

762 F.2d at 887. On appeal, Mitchell raised a claim of ineffective assistance of counsel based upon the trial attorney's failure to conduct any mitigation investigation. *Id.* at 888. The Eleventh Circuit upheld the denial of Mitchell's ineffective assistance of counsel claim based upon the detailed record provided at both the *state* and *federal* evidentiary hearings. *Id.* Further, despite the fact that Mitchell discouraged his attorney from contacting his family, the attorney—unlike respondent's trial counsel in this case—"questioned Mitchell in detail about his background," and "telephoned Mitchell's father." *Id.* at 888-89. As the Eleventh Circuit noted, "[i]t is important to note that Mitchell's attorney did not blindly follow Mitchell's command to leave his family out of it." *Id.* at 890.

Petitioners fail to point out that in *Mitchell* both the state and federal courts conducted an evidentiary hearing on the claim of ineffective assistance of counsel. The record was fully developed. Here, respondent's requests for hearings in the state court and the district court were denied and, through no fault of respondent, the record on the claim was not developed. The court of appeals simply remanded the case to the district court so a hearing could be held and so that the issue can be decided based upon a full record.

c. In *Terry Williams*, the petitioner voluntarily confessed and Williams' counsel failed to investigate mitigating factors. 529 U.S. at 396. The Court described the consequences of that approach in no uncertain terms: "the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession." *Id.* The Court went on to say, "[w]hether or not those omissions were sufficiently prejudicial to have affected the outcome of

sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Id.* (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)).

In *Wiggins*, the Court was even more plainspoken: "In light of [the ABA for Criminal Justice] standards, our principal concern in deciding whether [counsel] exercised 'reasonable professional judgment[]' . . . is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*." 539 U.S. at 522-23 (alterations and citations omitted). A decision by counsel to forego investigation is not reasonable. Even if respondent had thwarted counsel's investigation attempts, this Court's jurisprudence and professional standards nevertheless obligated counsel to conduct a reasonable investigation.

Under *Terry Williams*, *Wiggins* and *Rompilla*, counsel was required to investigate. *Wallace* and *Mitchell* do not lend support to petitioners' argument.

CONCLUSION

For these reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

JON M. SANDS
Federal Public Defender
DALE A. BAICH*
SYLVIA J. LETT
OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE DISTRICT OF ARIZONA
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816

Attorneys for Respondent

* *Counsel of Record*