No.

In the Supreme Court of the United States

VINCENT CULLEN, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner,*

v.

SCOTT LYNN PINHOLSTER, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a federal court may reject a state-court adjudication of a petitioner's claim as "unreasonable" under 28 U.S.C. § 2254, and thus grant habeas corpus relief, based on a factual predicate for the claim that the petitioner could have presented to the state court but did not.

2. Whether a federal court may grant relief under 28 U.S.C. § 2254 on a claim that trial counsel in a capital case ineffectively failed to produce mitigating evidence of organic brain damage and a difficult childhood because counsel, who consulted with a psychiatrist who disclaimed any such diagnosis, as well as with petitioner and his mother, did not seek out a different psychiatrist and different family members.

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PETITION FOR WRIT OF CERTIORARI

Vincent Cullen, Acting Warden of San Quentin State Prison [1] (the State), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit *en banc* opinion affirming the district court's judgment is reported at *Pinholster* v. *Ayers*, 590 F.3d 651 (9th Cir. 2009). The Ninth Circuit three-judge panel opinion reversing the district court's judgment is reported at *Pinholster* v. *Ayers*, 525 F.3d 742 (9th Cir. 2008). The United States District Court decision, addendum to decision, and judgment granting habeas corpus relief are unreported. The California Supreme Court's orders summarily denying habeas corpus relief are unreported. The California Supreme Court's opinion affirming respondent's conviction and sentence on appeal is reported at *People* v. *Pinholster*, 824 P.2d 571 (Cal. 1992). Each is reproduced in the Appendix to this Petition (App.).

JURISDICTION

The Ninth Circuit *en banc* opinion was filed on December 9, 2009. App. 1-193. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), reads, in

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[1] Acting Warden Cullen has succeeded Warden Robert L. Ayers as respondent Scott Lynn Pinholster's custodian at San Quentin State Prison. See Sup. Ct. R. 35.

relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – [¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or [¶] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. [¶] (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that – [¶] (A) the claim relies on – [¶] (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or [¶] (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and [¶] (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

A. Introduction

In preparation for a possible penalty phase at respondent's trial, a defense-retained psychiatrist examined respondent and reported to trial counsel that respondent was a psychopath who suffered from no mitigating mental or medical disability. In later state habeas corpus petitions claiming ineffective assistance of counsel, respondent alleged—and, under state law, the state court provisionally assumed—that counsel could have produced evidence that respondent suffered from a bipolar "mood disorder" and was in the throes of an "epileptic seizure" at the time he stabbed to death two men who had interrupted him during a burglary. The state court denied that claim on the merits.

Respondent then filed a federal petition, alleging that same factual basis for his "exhausted" ineffective-counsel claim. But, as the federal case unfolded, respondent largely abandoned—and in any event never proved—the mood-disorder/epilepsy allegations in federal court. Instead, the federal court allowed respondent to produce evidence, from new-found psychiatrists, that respondent really suffered from traumatic brain damage that led him to stab his victims in a rage without realizing he was doing so. Ultimately, the district court concluded that trial counsel was ineffective in failing to investigate and present this evidence.

The Ninth Circuit affirmed, concluding that the California Supreme Court's adjudication of respondent's ineffective-counsel claim was erroneous and "objectively unreasonable" under 28 U.S.C. § 2254(d)(1) in light of evidence produced at the federal hearing—even though respondent had never alleged the underlying facts in state court. The Ninth Circuit never explained why the state court ruling was "unreasonable" in light of the acknowledged fact that counsel had relied on the opinion of the defense psychiatrist that respondent was simply a psychopath suffering from no mitigating mental or

medical disorder or defect—a psychiatrist whom respondent himself presented as an expert in the later federal proceedings, only to hear him testify that, despite the new evidence assembled by habeas corpus counsel, he still adhered to his original diagnosis.

Nor did the Ninth Circuit explain, in connection with another facet of the ineffective-counsel claim, why it was unreasonable for trial counsel to interview respondent and his mother and then present the mother's testimony regarding the circumstances of respondent's upbringing, or why it was doubly unreasonable for the state court to credit counsel's performance as competent in that regard.

Finally, the Ninth Circuit did not explain why the state court erred or acted unreasonably in rejecting respondent's ineffective-counsel claim, given the strong aggravating evidence that respondent had committed two murders and had gloated about his life of violent crime while testifying at the guilt phase of his capital trial.

B. The State Criminal Proceedings

In 1982, respondent stabbed Thomas Johnson and Robert Beckett to death when they interrupted him and his accomplices during a home burglary. He then cleaned the knife and divided with his accomplices the loot: $23 and a quarter-ounce of marijuana. At the guilt phase of his trial on two counts of first-degree capital murder, respondent testified that he was elsewhere at the time of the homicides and asserted that while he had committed "hundreds" of robberies, he only victimized drug dealers, and he only used guns, rather than knives. The jury found him guilty as charged.

At the penalty phase, the prosecution produced evidence that respondent had suffered a prior kidnapping conviction; that he had been involved in gangs as a juvenile; that he had twice resisted arrest and feigned seizures; that he had once broken his wife's jaw; and that, while in prison, he had assaulted inmates, provoked a racial fight, and

threatened to kill a guard and a prosecution witness.

The defense consulted psychiatrist Dr. John Stalberg, who informed trial counsel that respondent showed no signs of brain damage or of mental disorder or defect—other than antisocial personality disorder. Further, Dr. Stalberg reported that, although respondent might have suffered from epilepsy, he had not had a seizure in over a year even though he was not receiving any anti-seizure medication, and that any epilepsy was unrelated to the crime or to respondent's psychopathic personality traits. Finally, Dr. Stalberg told trial counsel that it was "likely [respondent] would be recalcitrant and a security problem while in custody."

Defense counsel decided not to call Dr. Stalberg as a witness. Instead, having interviewed respondent and his mother, the defense called respondent's mother. She testified that, although respondent grew up in a home free of material deprivation, respondent's stepfather disciplined respondent as a child in ways that bordered on abuse. She also described several accidents respondent had as a child and the onset of his epilepsy at age 18. And she described respondent's behavior as a child and a young man as reflecting a lack of respect for authority or the rights of others.

The jury returned a verdict of death. The California Supreme Court affirmed the conviction and sentence on direct review in 1992.

C. The First State Habeas Petition

Respondent then filed a habeas corpus petition in the California Supreme Court claiming that trial counsel had failed to competently investigate and present mitigating evidence at the penalty phase. Respondent also alleged that Dr. Stalberg "perfunctorily, unreasonably and incompetently failed to adequately investigate, recognize, or consider evidence of [respondent's] significant mental health impairments." In support, respondent presented a declaration from Dr. George Woods. Dr. Woods criticized Dr. Stalberg's methodology and

conclusions and offered a new diagnosis: that respondent suffered from a psychotic form of bipolar disorder and that, at the time of his crimes, he was in the throes of an epileptic seizure. Respondent further asserted that defense counsel failed to interview and present testimony from additional family members who, unlike respondent's mother, allegedly would have described respondent's childhood as being marked by deprivation and abuse. Under state procedures calling for the habeas corpus court to provisionally assume the truth of the factual allegations in the petition, the California Supreme Court summarily denied respondent's petition on the merits as failing to make out a prima facie case for relief.

D. The First Federal Petition

Respondent next filed a federal habeas corpus petition, again claiming ineffective assistance of counsel in the investigation and presentation of mitigating evidence. Respondent again presented Dr. Woods' diagnosis of bipolar mood disorder and partial complex seizure disorder. He also reiterated his claim that Dr. Stalberg had provided incompetent expert assistance.

In addition, respondent raised a new claim that he had not presented in state court: that trial counsel had incompetently "prepared" Dr. Stalberg. This claim was supported by Dr. Stalberg's declaration that, had he known of new and "voluminous mitigating evidence" regarding respondent's life and family history since given to him by habeas corpus counsel, he would have examined respondent more thoroughly for neurological and physical dysfunction. Dr. Stalberg's declaration, however, offered no diagnosis of respondent different from the one he had offered to trial counsel before the penalty hearing.

Respondent stipulated he had never presented this new allegation to the state court. The federal court stayed the proceedings to give respondent a chance to return to state court and exhaust any state

remedies.

E. The Second State Habeas Petition

So, respondent filed a second state petition, claiming not only that he suffered from bipolar mood disorder and seizure disorder, and that Dr. Stalberg had performed incompetently, but also that trial counsel had performed deficiently in failing to "prepare" Dr. Stalberg. In support of this petition, respondent presented the same declaration of Dr. Stalberg he had presented to the federal court. The California Supreme Court summarily denied this petition on the merits.

F. The Amended Federal Petition

Respondent returned to federal court, amending his petition to present his now-exhausted claim that counsel was ineffective in failing to prepare Dr. Stalberg, supported by the same declaration from Dr. Stalberg—but still offering no new diagnosis of respondent. Respondent moved for an evidentiary hearing. The State argued that no evidentiary hearing was necessary because the California Supreme Court's reasonable adjudication of respondent's claims precluded relief under 28 U.S.C. § 2254(d)(1), and that, in any event, an evidentiary hearing was unauthorized under § 2254(e)(2). Declining to apply AEDPA, the district court granted the evidentiary hearing on respondent's claim that counsel had failed to investigate and present mitigating evidence.

At a deposition just before the evidentiary hearing, however, Dr. Stalberg revealed that nothing in the new material he had reviewed called into question his original diagnosis that respondent was simply a psychopathic criminal. Following this revelation, respondent's lead counsel quit the case, and the Federal Public Defender's Office took over.

Respondent's new lawyers jettisoned Dr. Stalberg and found two new experts, Drs. Sophia Vinogradov and Donald Olson. They came up with

yet another theory regarding respondent's mental state: that respondent's childhood accidents resulted in brain damage leading to "personality change, aggressive type," so that, at the time of the crimes, respondent "flew into a murderous rage" that led him to stab his victims without realizing what he was doing. The State objected—unsuccessfully—that the new experts and their new opinions had no place in federal court because respondent had never presented them in state court.

Reviewing the claim *de novo* under Ninth Circuit authority, the district court granted relief. In the court's view, counsel prejudicially erred in failing to produce both the organic-brain-damage diagnosis and evidence from different family members that respondent had grown up under conditions of deprivation and abuse.

G. The Ninth Circuit Opinions

1. A three-judge panel of the Ninth Circuit reversed. App. 164-253. Applying the AEDPA-amended version of § 2254(d)(1), as required by *Woodford* v. *Garceau*, 538 U.S. 202 (2003), the majority concluded that the California Supreme Court's decision was reasonable because there was no reasonable likelihood that respondent was prejudiced by the omission of the evidence presented at the federal evidentiary hearing. Of particular significance to the prejudice analysis was respondent's smirking and gloating testimony describing his lifelong violent criminality. App. 164-222. Chief Judge Kozinski concurred, also concluding that counsel's performance at the penalty phase was not deficient. App. 222-26. Judge Fisher dissented. App. 226-53

2. The Ninth Circuit granted *en banc* review and affirmed the district court's determination, agreeing in an 8-3 decision that trial counsel had provided ineffective representation at the penalty phase. App. 1-70. The majority first issued a series of rulings on AEDPA procedures. It held that "Congress did not intend to restrict inquiry under §

2254(d)(1) only to evidence introduced in the state habeas court, or to have federal courts imply any such restriction." App. 29. Second, it held that the right to a federal evidentiary hearing is not tied "to a prior determination that the state habeas court unreasonably applied Supreme Court law to the record before it," and that, accordingly, the federal count may consider such evidence even if it has not otherwise concluded that the state habeas court decision involved an unreasonable application of Supreme Court law. App. 30. Third, it held that respondent was entitled under § 2254(e)(2) to present evidence in support of new factual allegations never asserted in state court because he had been denied an "evidentiary hearing" in state court on the same basic claim of "mitigation ineffective assistance . . . ." App. 34. In the Ninth Circuit's view, the federal court properly received and considered evidence in support of factual allegations never made to the state court because the new facts fell within that broadly-stated claim.

On the substantive constitutional claim, the Ninth Circuit treated its interpretation of the 1982 Supplement to the American Bar Association Standards for Criminal Justice as the "prevailing professional norm" for the defense of death penalty cases in Los Angeles in 1984. App. 36-38. Specifically, the Ninth Circuit interpreted the ABA Standards to require counsel to investigate and present evidence "humanizing" the defendant. App. 47, 49, 53-54. Here, that required trial counsel to investigate and present evidence from new experts that respondent had organic brain damage, and evidence from family members other than respondent's mother, who would have testified that respondent's childhood was marked by deprivation and abuse. The Ninth Circuit held that trial counsel failed to meet that standard, notwithstanding that trial counsel investigated respondent's family life and background and consulted with a psychiatrist. The Ninth Circuit concluded that the California Supreme Court's failure to grant relief therefore was unreasonable. App. 68-69.

Chief Judge Kozinski, joined by Judges Rymer and Kleinfeld, dissented. App. 70-163. Chief Judge Kozinski rejected the majority's reliance on new facts presented in federal court as a basis for rejecting under § 2254(d)(1) the California Supreme Court's decision. In the dissent's view, the Ninth Circuit majority had failed to show any deference to the California Supreme Court's resolution of the case. The dissenting opinion set out in detail why the California Supreme Court's resolution of the claim as presented to that court was entirely reasonable. App. 127-62. "It makes no sense to say that a state court unreasonably applied clearly established Supreme Court law to facts it didn't know existed. The state court might well have ruled differently had petitioner presented different facts." App. 79.

The dissenting opinion also concluded that the majority had erred in interpreting the general 1982 ABA standards as articulating a specific standard of care applicable to respondent's case. In this respect, the dissent concluded, the majority's decision was irreconcilable with this Court's recent decisions in *Bobby* v. *Van Hook*, 130 S. Ct. 13, 16-17 (2009) and *Wong* v. *Belmontes*, 130 S. Ct. 383 (2009). App. 88, 98.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT DECISION UNDERMINES THE CORNERSTONE AEDPA REFORM OF HABEAS CORPUS AND REPRESENTS ANOTHER IN A SERIES OF FAILURES TO DEFER TO REASONABLE STATE-COURT RULINGS

The Ninth Circuit opinion undermines the cornerstone habeas corpus reform of AEDPA: the rule, embodied in 28 U.S.C. § 2254(d), prohibiting relief where the state court's adjudication of the prisoner's federal claim was, if not correct, at least not "objectively unreasonable." Here the Ninth Circuit interpreted § 2254 to again permit, as if in the old pre-AEDPA days of non-deferential review,

federal review of a prisoner's claim as transmogrified by a different factual basis never presented to the state court. In granting relief for alleged ineffective counsel based on facts radically different from those respondent presented to the state court, and different from those alleged as an "exhausted" claim in his federal petition, the Ninth Circuit's interpretation makes deferential review meaningless under § 2254(d). That the Ninth Circuit disregarded a reasonable state-court ruling in a death-penalty case—where a habeas corpus petitioner always can produce some new "mitigating" evidence never presented at trial—illustrates in particular the broad threat the Ninth Circuit decision poses to the "effective death penalty" goal that Congress set in the very title of its reform legislation.

The federal court could have—and should have—disposed of respondent's petition simply and directly, and without an evidentiary hearing that could only skew the analysis, on the basis of the state-court record and adjudication.[2] Because the factual basis for respondent's claim as presented to the California Supreme Court was very weak on both prongs of the ineffective-counsel test, see pp. 21-26, *post*, so that the state court acted reasonably, and indeed correctly, in rejecting it on the merits—§ 2254(d)(1) precluded relief at the threshold. See *Strickland* v. *Washington*, 466 U.S. 668, 687-88, 694 (a claim of ineffective assistance of counsel has two prongs: 1) deficient performance under prevailing professional norms and 2) a reasonable probability of prejudice). In this respect, this case is another in a long and growing line of cases in which the Ninth Circuit has failed to review state court decisions deferentially. This Court has deemed it important to

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[2] In recently granting certiorari in *Richter* v. *Hampton*, No. 09-587, this Court raised on its own the following question: "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984)?" For the purposes of this case, the State assumes that the deferential standard applies.

correct many such Ninth Circuit errors in the past, and should do so again in this case.

A. The Ninth Circuit's interpretation of AEDPA procedure presents an important question casting doubt on the efficacy of the statutory rule prohibiting relief where the state court's merits adjudication of the petitioner's claim was reasonable.

In enacting AEDPA, Congress restored the primacy of the state courts in determining claims of constitutional error in state criminal trials. *Woodford* v. *Visciotti*, 537 U.S. 19, 27 (2002) (per curiam). Section 2254(d), as amended by AEDPA, provides a limiting comprehensive framework for federal adjudication of collateral attacks on state court judgments. As under pre-AEDPA law, relief is unavailable unless the petitioner first exhausts his state remedies by fairly presenting both the factual and legal bases of his federal claim to the state courts. *Gray* v. *Netherland*, 518 U.S. 152, 162-63 (1996); *Duncan* v. *Henry*, 513 U.S. 364, 365-66 (1995) (per curiam). The state court merits adjudication then becomes the focus of later federal review. *Bell* v. *Cone*, 535 U.S. 685, 694 (2002). Thus, under § 2254(d)(1), federal habeas corpus relief

> *shall not be granted* with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim– [¶] (1) resulted in a decision that was contrary to, or involved the unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

(Emphasis added.) The federal court's opinion of the merits of the claim in the federal petition is not the question. *Woodford* v. *Visciotti*, 537 U.S. at 24-25; *Yarborough* v. *Alvarado*, 541 U.S. 652, 665 (2002).

Rather, "the only question that matters" under § 2254(d) is whether the state court ruling was at least "reasonable" under this Court's clearly-established law. *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003).

1. The principal vice of the Ninth Circuit's opinion on AEDPA procedure lies in its erroneous and illogical view that a state adjudication may be deemed "unreasonable" on the basis of new and different factual allegations and evidence never presented in the federal petition and, more importantly, never presented to the state court at all. As the Ninth Circuit mistakenly saw it here, "Congress did not intend to restrict inquiry under § 2254(d)(1) only to evidence introduced in the state habeas court, or to have federal courts imply any such restriction." App. 29. The Ninth Circuit's mistake proceeded from its apparent misapprehension of the determinative question under § 2254(d). In explaining that "the mitigation evidence introduced at the federal evidentiary hearing is properly before us in considering respondent's ineffective assistance claim," App. 35, the Ninth Circuit focused on the evidence produced in the federal evidentiary hearing, rather than on whether the state court adjudication "involved an unreasonable application" of clear law to the claim presented to it.

2. The statutory language, however, dictates that the state adjudication must be reviewed only in light of the facts as presented or alleged in the state court. Section 2254(d)(1) speaks in the past tense to the question of whether the state ruling "involved" an unreasonable application of clear law to the facts or "resulted" in a ruling that "was" contrary to clearly established law. Similarly, § 2254(d)(2) also requires that the state court's determination of the facts offered in support of the claim be reviewed for reasonableness only "in light of the evidence presented at the state court proceeding . . . ." Review of the reasonableness of the state court's application of precedent to the factual basis of a claim likewise must be limited to the factual bases for the claim presented to the state court.

3. The Ninth Circuit's approach is also inconsistent with this Court's pronouncements on § 2254(d). *Holland* v. *Jackson*, 542 U.S. 649, 652 (2004), instructed that, in analyzing a claim under § 2254(d)(1), "whether a state court's decision was unreasonable must be assessed *in light of the record the court had before it.*" (Emphasis added.) The Ninth Circuit somehow took the view that *Holland* permitted it to deem the state court decision "unreasonable" in light of facts and evidence never presented to the state court. App. 30-31. But, as Chief Judge Kozinski noted in dissent, the court of appeals' decision in *Holland* was reversed for doing precisely what the Ninth Circuit did here. As he predicted, "We could be next." App. 82.

In addition, this Court explained in *Williams (Terry)* v. *Taylor*, 529 U.S. 362 (2000), that § 2254(d) review focuses on how a state court "applies" the law "to the facts of a state prisoner's case." *Id.,* at 407-408. That would seem to rule out inquiry into facts the state court never saw. Similarly, *Terry Williams* explained the § 2254(d) inquiry in the past tense as asking "whether the state court's application of clearly established federal law *was* objectively unreasonable." *Id.* at 409 (emphasis added). Further corroborating that the inquiry is a retrospective and contextual one, *Terry Williams* also explained that the § 2254(d) "clearly established Federal law standard," against which state adjudications are measured, refers to Supreme Court holdings "as of the time of the relevant state-court decision." *Id.* at 412. That is, the state ruling is reviewed in the context of the facts and the law that confronted it at the time.

Further, under the procedure discussed in *Williams (Michael)* v. *Taylor*, 529 U.S. 420 (2000), the federal courts are necessarily limited to the facts presented to the state court. Contrary to the Ninth Circuit's interpretation, App. 30, this Court's decision in *Michael Williams* was predicated on the assumption that the § 2254(d)(1) analysis precedes consideration of new evidence that might be developed under § 2254(e)(2). This Court specifically

held that it was "unnecessary to reach the question whether § 2254(e)(2) would permit a hearing" on a claim because the claim failed "on the merits under § 2254(d)(1)." 529 U.S. at 444. And *Michael Williams* refers to the "needless tension" that would ensue if § 2254(e)(2) were to be read as denying a petitioner an evidentiary hearing *after* demonstrating that the state court's determination was unreasonable under § 2254(d)(1): "a prisoner lacking clear and convincing evidence of innocence could be barred from a hearing on the claim even if he could satisfy § 2254(d)." *Id.* at 434. The "tension" to which this Court referred in *Michael Williams*, an which this Court structured the decision in *Michael Williams* to avoid, would not exist if, as the Ninth Circuit has held here, the evidentiary hearing *precedes* examination of the reasonableness of the state court's determination.

4. The Ninth Circuit's interpretation of § 2254(d), condemning the state court for acting "unreasonably" based on evidence withheld from it, also fails as a matter of logic. If facts proved in state court, or assumed to be true by the state court, reasonably support the state court's adjudication under clearly established law, then the state ruling cannot be condemned as "unreasonable" because different facts might have warranted a different result. But the Ninth Circuit condemned it for that reason here.

Under California law, the California Supreme Court consulted the record and provisionally assumed that the well-pleaded factual allegations in respondent's state habeas petition were true. On that basis, the state court denied respondent's ineffective-counsel claim on the merits because the factual allegations did not make out a prima facie case of a constitutional violation. See *People* v. *Duvall*, 886 P.2d 1252, 1258 (Cal. 1995); *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993). Thus, the California Supreme Court adjudicated respondent's claim on its proffered basis: that although trial counsel had been told by Dr. Stalberg that respondent had no mental or medical disability, consultation with another mental health expert

would have produced evidence that respondent suffered from a "mood disorder" and stabbed the two victims in an "epileptic seizure," and that if trial counsel had spoken with other family members, they would have been willing to testify to a version of respondent's life different from that testified to by his mother.

The Ninth Circuit, however, condemned the California Supreme Court's decision as "unreasonable" because different facts alleged and proved in the federal proceedings convinced the federal court that counsel was ineffective for failing to present different evidence: that respondent's organic brain damage plausibly mitigated his culpability by thrusting him into an uncontrollable rage at the time of the crime. As borne out by the Ninth Circuit's emphasis on this alleged organic brain damage, respondent certainly believed that this last theory presented a better case for relief. He serially presented and discarded the different opinions of Dr. Woods and then Dr. Stalberg before, 18 years after trial and nine years after the initiation of habeas corpus proceedings, trumpeting the brand new diagnosis, offered by Drs. Sophia Vinogradov and Donald Olson.

All that mattered to the Ninth Circuit was that, in the end, the new and different factual basis of the claim fit under the broad rubric of a claim denominated as "ineffective counsel" in the state court. The Ninth Circuit's ex post facto holding, that the state court acted "unreasonably" in light of new evidence never disclosed to it, not only encourages the gamesmanship of rotating expert opinions *du jour* but, more important, defeats Congress' demand for deferential review of state judgments. As Chief Judge Kozinski noted in dissent, "I don't believe that AEDPA sanctions this bait-and-switch tactic, nor will it long endure." App. 83-84.

5. The Ninth Circuit, it is true, asserted that respondent was entitled under § 2254(e)(2) to go beyond the state record, and to rely on new and different facts as adduced in the federal evidentiary hearing, because he somehow was not at fault in

failing to develop such facts in support of his claim in the state court. App. 32-34. But, as Chief Judge Kozinski's dissenting opinion makes clear, the (e)(2) excuse does not work here. App. 79-84.

Section 2254(e)(2) provides that the federal court "shall not" hold an evidentiary hearing on a claim "[i]f the applicant has failed to develop the factual basis of the claim in State court proceedings." Here, however, the California Supreme Court gave respondent every opportunity to develop the facts in support of his claims. Policies in place at the time authorized state habeas counsel to expend, without prior approval of the court, up to $3,000 for investigation alone; additional funds for investigation were available if needed. *In re Clark*, 855 P.2d at 751 n.19. Indeed, prior to the filing of the first state habeas corpus petition, respondent hired Dr. Woods, who examined respondent; respondent presented to the state court Dr. Woods' opinion about respondent's mental health, as well as his criticisms of Dr. Stalberg's prior diagnosis. In the second state habeas proceedings, respondent had the services of both Dr. Woods *and* Dr. Stalberg. And, in each instance, the California Supreme Court considered, and rejected, respondent's claims on the merits.

Moreover, as Chief Judge Kozinski recognized, App. 82-83, nothing prevented respondent from returning to the state court after he developed the brand new diagnoses offered by Drs. Vinogradov and Olson. See *In re Robbins*, 959 P.2d 311, 328-30 (Cal. 1998) (a petitioner may return to state court to present claims based upon facts first discovered in federal court if they could not have been discovered previously in the exercise of due diligence).

As a further proffered justification for straying beyond the state-court record, the Ninth Circuit apparently concluded that, before the preclusion on federal evidentiary hearings under § 2254(e)(2) applies, a state court must have granted a petitioner a state evidentiary hearing. App. 32-34. But respondent can hardly complain about the lack of an evidentiary hearing. As explained above, he was provided counsel and investigative assistance that in

fact enabled him to develop a succession of mental-health claims, including the eventual organic brain damage claim that he then declined to present to the state court, before any evidentiary hearing was ever held. Moreover, in provisionally assuming his factual allegations to be true, see *Duvall*, 886 P.2d at 1258, the California Supreme Court considered respondent's claim in a light equal to or better than anything he could have hoped for in an evidentiary hearing, where the State could disprove his allegations by cross-examination and by contrary evidence.

The Ninth Circuit provided no reasoned basis for the proposition that a state evidentiary hearing is a prerequisite to the § 2254(e)(2) bar on federal hearings—and the consequences of its ruling will be profound. Certainly, no language in AEDPA mentions any such requirements. If a petitioner satisfies due diligence under § 2254(e)(2) merely by presenting *any* allegation of fact to the state court, even one that, as here, is inconsistent with the allegation sought to be developed in federal court, then there could be no circumstance in which a petitioner "failed to develop" the facts in state court.

Indeed, the district court's factual findings, relied upon by the Ninth Circuit, are inconsistent with the central factual allegation underlying respondent's claim as presented to the California Supreme Court. The claim presented to the state court was premised on Dr. Woods' diagnoses that respondent suffers from bipolar mood disorder and was having a seizure at the time of the crime. According to the experts credited by the district court and the Ninth Circuit, respondent suffers from organic brain damage. If the district court and Ninth Circuit are right, then Dr. Woods' diagnosis was *wrong*. Thus, following the federal evidentiary hearing, the federal courts should have concluded that the state court rejection of respondent's claim was not only *reasonable*, it was undoubtedly *correct*. Further, contrary to the Ninth Circuit's conclusion, App. 35, it is difficult to envision a more fundamental alteration of a claim than from a claim that

necessarily fails because the underlying allegations of fact are false to one upon which relief is granted based upon the determination that the underlying allegations of fact are true.

6. Conducting an evidentiary hearing before making the § 2254(d) reasonableness determination based only on the state-court record, moreover, creates a risk that the evidence adduced at the hearing will influence the federal court's review of the reasonableness of the state court's resolution. This danger is well-illustrated in this case. The Ninth Circuit found the lure of the new facts so irresistible that it not only considered them in passing on the reasonableness of the state court determination but actually went so far as to articulate a new rule of general application *encouraging* this wasteful and pointless practice.

And a federal evidentiary hearing, particularly in a death penalty case, is an expensive proposition. A 1999 PricewaterhouseCoopers report, commissioned by the Administrative Office of the United States Courts, shows the magnitude of the resources expended in such hearings. The average cost of just an evidentiary hearing to federal courts paying for indigent representation in a California capital case was approximately $113,000 per hearing. "Cost of Private Panel Representation in Federal Capital Habeas Corpus Cases from 1992 to 1998" (Feb. 9, 1999), pp. i, xvi. To this must be added the cost incurred by the State prosecutor's office in defending the warden. Proper application of § 2254(d) before expensive federal discovery and evidentiary-hearing litigation presumably would put a big dent in the average $372,000 in overall costs to the federal district court of a California death-penalty habeas corpus case. See *id.* p. v-51. But the Ninth Circuit opinion here would unnecessarily ratchet up the costs.

7. In implicit recognition that it was at least dubious for it to rely on facts never presented to the state court, the Ninth Circuit asserted in a conclusory way that it would have reached the same result even if the new facts had not been considered.

App. 34-35. This improbable assertion was unsupported by any analysis, and it is irreconcilable with the great weight the Ninth Circuit obviously placed on the new facts in its discussion of respondent's claim of prejudice.

The Ninth Circuit relied on the purported organic brain damage as the central mitigating evidence in its own right, reasoning that the jury might have been convinced that respondent was "physically compelled" to murder his victims, thereby diminishing his moral culpability. App. 52. The Ninth Circuit further concluded that the organic brain damage evidence would also have convinced the jury to discount the profoundly aggravating effect of respondent's guilt-phase testimony. App. 50-54. In the absence of the organic brain damage evidence, no such explanation for respondent's murderous acts would have been available, and the aggravating evidence of respondent's testimony would stand unanswered.

Those two factual points were essential to the Ninth Circuit's determination that the alleged error of counsel in failing to present the organic brain damage evidence was prejudicial. As Chief Judge Kozinski said about the majority's assertion,

> I don't believe the majority does mean it. The majority *must rely heavily on the new experts*, *see*, *e.g.*, maj. op. at 16057, 16082-85, because everything else respondent's lawyers managed to dig up—after sifting through the rubble of his life for close to two decades—is so piddling. It's hardly the stuff that would justify finding the state court unreasonable.

App. 84, emphasis in original.

* * *

Consistent with Congress's intent in enacting AEDPA, as interpreted by this Court, that state courts be the primary forum for litigating the constitutionality of state criminal convictions, the §

2254(d)(1) inquiry must be resolved without reference to facts or legal theories that were not presented to the state courts. Accordingly, consistent with the procedures outlined in *Michael Williams*, in furtherance of the preference for avoiding issues "unnecessary" to the appropriate disposition of the case, and to avoid any improper influence that facts never presented to the state court might exert on the federal court's decision-making under § 2254(d)(1), the § 2254(d)(1) inquiry must be resolved before the federal courts turn their attention to the question of whether an evidentiary hearing is authorized under § 2254(e)(2).

B. The Ninth Circuit opinion erroneously embellished *Strickland* v. *Washington* and represents another in a long line of Ninth Circuit failures to adhere to the deferential review standard set out in AEDPA in this Court's precedents.

As in many other instances in which this Court has intervened in recent years[3], the Ninth Circuit erred here in granting habeas corpus relief in derogation of the strict § 2254(d) limits on federal review. A proper application of § 2254(d)(1) to the state-court adjudication here should have resulted directly in the denial of relief on the basis of the state

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[3]E.g., *McDaniel* v. *Brown*, 130 S. Ct. 665 (2010), *Waddington* v. *Sarausad*, 129 S. Ct. 823 (2009); *Knowles* v. *Mirzayance*, 129 S. Ct. 1411 (2009); *Uttecht* v. *Brown*, 551 U.S. 1 (2007); *Schriro* v. *Landrigan*, 550 U.S. 465 (2007); *Carey* v. *Musladin*, 549 U.S. 70 (2006); *Rice* v. *Collins*, 546 U.S. 333 (2006); *Kane* v. *Garcia-Espitia*, 546 U.S. 9 (2005) (per curiam); *Brown* v. *Payton*, 544 U.S. 133 (2005); *Yarborough* v. *Alvarado*, 541 U.S. 652; *Middleton* v. *McNeil*, 541 U.S. 433 (2004) (per curiam); *Yarborough* v. *Gentry*, 540 U.S. 1, 8 (2003) (per curiam); *Lockyer* v. *Andrade*, 538 U.S. 63; *Woodford* v. *Visciotti*, 537 U.S. 19; *Early* v. *Packer*, 537 U.S. 4 (2002) (per curiam).

court record, without any federal evidentiary hearing.

1. The state court's rejection of the ineffective-counsel claim was reasonable because, for example, it was uncontested that defense psychiatrist Dr. Stalberg had examined respondent and had reported to trial counsel that respondent was a psychopath with no mental or medical disabilities relating to the commission of the crime, and who would likely be a security problem while in custody. The California Supreme Court, moreover, was not required to accept the notion that Dr. Woods' improbable explanation—that respondent had stabbed two people to death while committing burglary in the midst of an epileptic seizure—undermined confidence in the jury's verdict. Respondent, indeed, discarded that notion in federal court.

While respondent complained that counsel had failed to "prepare" Dr. Stalberg, nothing in *Strickland* clearly required the state court to accept that any such duty devolves upon counsel, rather than upon the psychiatrist whose expertise is sought precisely because lawyers are not medical experts. Indeed, even the Ninth Circuit at the time had ruled that, absent some complaint by the retained mental health expert about the sufficiency of the information to support a well-founded opinion, trial counsel had no duty to seek out and provide additional information to the expert. *Hendricks* v. *Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995). Here, even in his post-conviction declaration, Dr. Stalberg never said that the opinion he expressed to trial counsel had changed in light of the new material he had reviewed during the habeas corpus process. Thus, the California Supreme Court confronted a proffered record showing that, even if counsel had undertaken the additional investigation, the retained expert would not have offered a different opinion more useful to the defense.

And, in fact, Dr. Stalberg admitted as much at the evidentiary hearing. Dr. Stalberg could not have been clearer: "the additional materials I reviewed did not alter my conclusions that Mr. Pinholster suffers

from Antisocial Personality Disorder, as the term is defined in the DSM-III." (3ER 793.)

Further, respondent's unexplained—and inexplicable—delay in presenting his organic brain damage allegation logically precludes the district court's and Ninth Circuit's conclusion that any reasonably competent lawyer would have investigated, discovered, and presented organic brain damage evidence to the jury at the time of respondent's trial in 1984. Respondent presented his first habeas corpus petition to the state court in 1993; then, in 1997, he presented a petition to the federal district court; then another petition to the state court; and finally an amended petition to the federal court. In none of those petitions did respondent allege that he suffers from organic brain damage.

It was not until 18 years after his trial, on the eve of respondent's federal evidentiary hearing, that the possibility that respondent had organic brain damage was first mentioned. How trial counsel, in the heat of trial, could have discovered a diagnosis that it took post-conviction counsel 18 years to discover, is not readily apparent, and is nowhere explained. On the contrary, as Chief Judge Kozinski recognized, "[t]he 18 year delay in presenting the diagnosis of 'organic personality syndrome' must either mean that habeas counsel was not diligent or trial counsel was not ineffective. There's no escape." App. 80-81.

2. The state court's rejection of the *Strickland* claim was at least "objectively reasonable" when evaluated in the broader context of, not just trial counsel's reliance on Dr. Stalberg's expert opinion, but counsel's investigation of respondent's family background. Here, counsel interviewed respondent and his mother, who offered similar accounts of a relatively benign upbringing (though one not entirely free from strife) in which respondent elected to engage in antisocial behavior. And he presented the testimony of respondent's mother regarding the circumstance of respondent's childhood. This is precisely the kind of "humanizing" evidence that the Ninth Circuit criticized counsel for failing to adduce.

The reasonableness of the state court adjudication in this regard is illustrated by a comparison to the facts in *Strickland* itself. There, trial counsel

> spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. App. to Pet. for Cert. A265. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. *Id*., at A266. [¶] Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state.

Strickland v. *Washington*, 466 U.S. at 673. Based on these efforts, this Court concluded that "the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable." *Id.* at 698. Here, of course, trial counsel did more: he actually called respondent's mother to the stand, and he had respondent examined by a psychiatrist. If *Strickland*—decided on May 14, 1984, one week to the day after the verdicts were rendered in respondent's case—articulates the standard of care applicable to respondent's trial attorneys, the state court's ruling should be accepted as not just reasonable, but correct.

3. Further, nothing required the state court to minimize the aggravating effect of respondent's guilt-phase testimony on any potential penalty-phase defense—as the Ninth Circuit did in reducing it to two sentences compared to the over three pages the Ninth Circuit spends discussing respondent's alleged organic brain damage. Compare App. 48 (discussing respondent's guilt-phase testimony) with App. 50-54 (discussing organic brain damage). As the majority

opinion from the original three-judge panel noted,

> Pinholster's violent past—a past Pinholster proudly boasted about to the jury—offsets the mitigating evidence. Pinholster bragged that he had committed hundreds of armed robberies within a three-year time period. In addition, he admitted to a prior kidnaping, during which he held a knife to the victim's throat. And, unlike the petitioner in *Williams*, Pinholster neither expressed remorse over the murders of Thomas Johnson and Robert Beckett, nor attempted to aid the police in their investigation. Rather, Pinholster threatened to kill the State's lead witness, Art Corona, and proudly recounted his recusant behavior in front of the jury.

App. 217. The devastating effect of respondent's guilt-phase testimony on the penalty phase was also evident to dissenting Judge Fisher, who purported to find a constitutional violation in the decision to "allow" respondent to testify in such a damaging way at the guilt phase. App. 227-32. Given his own testimony, it was not "objectively unreasonable" under *Strickland* to conclude that respondent was not prejudiced by any alleged deficiency of counsel. See *Smith* v. *Spisak*, 130 S. Ct. 676, 687-88 (2010) (this Court concluded that the defendant was not prejudiced by the purported ineffective assistance of counsel based, in part, on the defendant's "boastful" testimony regarding his life of crime).

4. In erroneously rejecting the state court ruling, the Ninth Circuit treated the generalized 1982 ABA Standards as defining the prevailing professional norm governing a capital-case mitigation defense in California in 1984. See *Bobby* v. *Van Hook*, 130 S. Ct. at, 16-17. As Chief Judge Kozinski recognized, however, the more crucial mistake was relying on those standards to erect a constitutional rule that compels capital-case counsel to present, not just "humanizing evidence," see App. 86, but a specific *kind* of humanizing evidence: that the

defendant had a bad childhood. The Ninth Circuit's rule is precisely the sort of "rigid" and hindsight ineffective-counsel rule that this Court has condemned. See *Yarborough* v. *Gentry*, 540 U.S. at 8; *Strickland* v. *Washington*, 466 U.S. at 688-89.

The chief judge aptly noted that the earlier Ninth Circuit case of *Belmontes* v. *Ayers*, 529 F.3d 834 (9th Cir. 2008), had similarly imposed such rule only to have this Court step in and reject it. See *Wong* v. *Belmontes*, 130 S. Ct. 383.) He lamented, "That *Belmontes* was unanimously–and unceremoniously–reversed seems to have made no impression around here." App. 88. He also might have noted that this Court, in *Knowles* v. *Mirzayance*, 129 S. Ct. at 1419, rejected a similar attempt by the Ninth Circuit to engraft on *Strickland* a rigid corollary requiring lawyers to pursue tactics when there is "nothing to lose." See also *Richter* v. *Hickman*, cert. granted (No. 09-587) (whether *Strickland* requires counsel to meet scientific evidence with contrary expert opinion).

Under the Ninth Circuit's rule, trial counsel should have disregarded what respondent told them, what respondent's mother told them, and what their psychiatric expert told them, and continued to dig into respondent's past. But that is contrary to this Court's teaching that trial counsel is entitled to make a reasonable decision to curtail additional investigation depending upon what the initial investigation reveals. *Burger* v. *Kemp*, 483 U.S. 776, 795 (1987). To survive "reasonableness" review under § 2254(d), the California Supreme Court ruling hardly needed to conform to the Ninth Circuit's idiosyncratic view of the obligations purportedly imposed on respondent's trial counsel by the generalized 1982 ABA Standards.

In the end, the Ninth Circuit's decision here is inconsistent with its determination in *Hendricks* that counsel ordinarily has no obligation to determine what information an expert might need to form an opinion. 70 F.3d at 1038. And it relied on generalized ABA standards to deduce a rigid rule requiring counsel to "humanize" capital defendants

with evidence of a bad childhood. As Chief Judge Kozinski's dissent put it, "This is *Van Hook* on stilts." App. 98.

* * *

The Ninth Circuit once again has disregarded the limitations on federal collateral relief codified in § 2254(d)(1). And it improperly ratified, in derogation of § 2254(e)(2), the decision of the district court to take evidence on factual allegations that could have been presented to the state court, but were not. The Ninth Circuit's decision is wrong on the law, wrong on the facts, and creates a new legal paradigm that will place a substantial burden on the states to defend criminal convictions against baseless attacks. It warrants either summary or plenary review and reversal by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted

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