No. 15-

IN THE
SUPREME COURT OF THE UNITED STATES

Clark Elmore,
Petitioner,
v.

Donald R. Holbrook,
Respondent.

On Petition for a Writ of Certiorari
to the Ninth Circuit Court of Appeals

REPLY IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF

I. INTRODUCTION

Trial counsel's exclusive "remorse defense" of Mr. Elmore's life consisted of allowing Elmore to be introduced to his jurors heavily shackled and then calling a judge to testify that Elmore appeared "subdued" and another who said he was "dejected" during prior short appearances in court. Trial counsel did not once suggest to Elmore's jury that the shackles were evidence of Elmore's remorse and later admitted he did not consider that the shackles might instead covey dangerousness, one of only two factors specifically identified for jurors to consider in determining Elmore's sentence.

Counsel even failed to conduct an adequate investigation of his supposed exclusive defense. As an example, in comparison to the tepid evidence presented at trial, in state post-conviction Elmore proffered a declaration of the jail chaplain who met Elmore:

> ….the day after he arrived there [the Whatcom County Jail]. He was huddled into a ball at the back of the room, shaking uncontrollably. I will never forget that image.
> ****
> ….I saw him about once or twice a week, whenever Clark would ask to see me.
>
> Clark was unlike any prisoner I had counseled before. He was wracked with anguish and dripping with remorse. He seemed to be genuinely confused by what he had done, and did not understand how he could have done what he did.

> ….He never blamed anyone but himself. He accepted full responsibility, and was sickened and agonized by what he had done.
>
> He felt so much remorse and so much guilt that, in the beginning, he could not even talk about God. He was so ashamed, he felt he could not turn to God. He was convinced that even God could not forgive him.
>
> ****
> I never had any contact with Clark's lawyers. I did talk with Michael Sparks on a couple of occasions prior to Clark's trial. He knew I was talking to Clark. He would usually tell me he was glad I was visiting with Clark. He never asked me for any information or impressions I had about Clark. If he had asked, I would have told him everything….

III ER 21-24.

In his certiorari petition, Elmore sought review of two issues: (1) whether capital counsel is relieved of his duty to conduct a thorough mitigation investigation when he later claims that he decided to present only one mitigating factor or when he claims fear of uninvestigated possible rebuttal evidence; and (2) whether a habeas court must examine the reasons given by a state court for rejecting a constitutional claim.

The State largely fails to respond to either argument raised by Elmore. Instead, the State provides a list of reasons that the Ninth Circuit could have used to support its conclusions. But, the State's arguments are drawn from an incomplete reading of the state court record. Moreover, the State's argument that the Ninth Circuit found that the state court's conclusion was reasonable, without regard for the reason given for that conclusion, demonstrates the circuit split.

II. ARGUMENT

A. Trial Counsel's Investigation Failed to Discover Significant Mitigation, Including the Most Persuasive Evidence of Counsel's So Called Exclusive Defense.

This Court has emphatically and repeatedly held that capital defense counsel has a duty to conduct a thorough investigation of possible mitigating evidence. The Ninth Circuit's holding in this case eviscerates that rule. The Ninth Circuit held that once counsel "reasonably selects a defense, it is not deficient performance to fail to pursue alternative defenses." *Elmore v. Sinclair,* 799 F.3d 1238, 1250 (9th Cir. 2015). "Considering what they perceived to be the relative strength of a remorse defense, Komorowski and the defense team made the strategic decision to pursue this defense exclusively." *Id.*

Capital lawyers, in consultation with their client, cannot make a valid strategic decision about the presentation of mitigating evidence without a reasonable understanding of *all* available mitigating evidence. Therefore, a reasonable independent investigation into mitigation evidence should be "complete" in the sense that counsel should examine all areas where reasonable capital defense attorneys generally search for mitigation evidence *and* any other areas of which counsel are on special notice in their particular case. In *Sears v. Upton*, 561 U.S. 945, 955 (2010), this Court stated:

> We certainly have never held that counsel's effort to present *some* mitigation should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.

(emphasis in original).

While this Court has upheld some decisions by counsel not to present mitigating evidence, this Court has premised such findings on counsel's having made fully informed decisions. *See Darden v. Wainwright,* 477 U.S. 168, 185 (1986) ("The record clearly indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing."); *Burger v. Kemp*, 483 U.S. 776, 790 (1987) ("Based on these interviews, Leaphart made the reasonable decision that his client's interest would not be served by presenting this type of evidence."); *Bell v. Cone,* 535 U.S. 685 (2002) (counsel utilized what he believed to be the most compelling mitigating evidence in the case extensively at trial and weighed the possibility of recalling witnesses or calling other witnesses in the penalty phase).

Departing from that rule, the Ninth Circuit posits that counsel can justify his failure to investigate by simply later claiming that he decided to present a single mitigating fact. The State's unwillingness to defend this rule is perhaps the best evidence that it conflicts with the constitutional rule crafted by this Court over the last several decades.

Instead, the State seeks to assure this Court that trial counsel conducted a thorough investigation into numerous aspects of Elmore's life. The State begins by noting that trial counsel conducted an investigation to determine if Elmore was mentally ill. Elmore has never assigned error to counsel's failure to present that evidence. Instead, Elmore claimed that counsel deficiently failed to investigate whether Elmore was brain damaged as a result of exposure to numerous harmful substances, which (like the current crisis in Flint, Michigan from exposure to lead) can cause brain damage. Due to his inexperience, trial counsel never considered such an investigation. *Elmore,* 799 F.3d at 1255 (Horwitz, J. concurring) ("Counsel not only failed to undertake any brain damage investigation, but offered no explanation for this omission other than inexperience.").

The State next argues that trial counsel's mental illness investigation revealed facts that would have become admissible if counsel had investigated and presented evidence of brain damage. First, there is no legal support for this proposition. The caselaw cited by the State has never been expanded in Washington from insanity and diminished capacity defenses to a penalty phase presentation. Second, the facts during this investigation were more helpful than harmful to Elmore. Elmore is not a psychopath. This crime was instead the result of an emotional disturbance. The facts presented to the jury reasonably suggested that Elmore had a history of pedophilic acts. In fact, mock jurors made that

conclusion. The truth was otherwise. SR 7237-44. Third, trial counsel never suggested he had contemplated investigating Elmore's brain damage. He never considered such an investigation solely due to his inexperience.

In any event, these arguments do not explain why counsel failed to investigate Elmore's prison rapes; whether he was a danger in prison; the aberrant nature of this crime; and his positive redeeming qualities—none of which made the unused mental illness investigation admissible. Moreover, trial counsel never suggested that he had contemplated these lines of investigation, but then decided against it because he had settled on remorse as Elmore's sole mitigating factor. In addition, none of this mitigation undermines remorse.

The Ninth Circuit's failure to even mention this evidence demonstrates the scope of its rule. The rule adopted by the Ninth Circuit relieves counsel of the duty to investigate as soon as he has discovered a single piece of viable mitigation, eviscerating the Eighth Amendment rule.

The Ninth Circuit's rule goes so far as to relieve counsel of the duty to thoroughly investigate his supposed exclusive defense. By far, the best witnesses to Elmore's remorse were not interviewed by defense counsel. But, the Ninth Circuit relieved counsel even of that duty.

But, the harm from the ruled adopted by the Ninth Circuit does not stop there. Because counsel did not competently investigate even his supposed

exclusive defense, counsel was able to claim that he shut down his investigation (without ever identifying what additional investigation he planned to conduct) for fear that the State would investigate his proffered evidence. Counsel specifically stated he feared that the prosecution would interview Elmore's jailers or the chaplain and learn that Elmore was no longer remorseful.

If that was counsel's fear, pursuing an exclusive remorse defense was the worst possible strategy. But, the more profound problem with the rule is that it justifies ignorance of the facts. In post-conviction Elmore interviewed those witnesses that counsel supposedly feared would undo his defense. In fact, they would have done just the opposite. The fact that the Ninth Circuit did not feel obliged to discuss the true facts after reciting counsel's excuse shows just how far its "exclusive defense" rule departs from this Court's oft repeated exhortation of capital counsel's duty to conduct a thorough investigation.

The facts also upend the State's argument that this case is controlled by *Schriro v. Landrigan,* 550 U.S. 465 (2010). Elmore did not instruct counsel not to present mitigation. Elmore only objected to counsel presenting his family members as witnesses. Elmore has never argued that counsel was ineffective for failing to call family members. Elmore never threatened to act out if counsel investigated further. Elmore always cooperated with counsel's investigation, including meeting with an unlicensed counselor close to the time of trial. Elmore

even attempted to remove counsel because he felt that he was not competently representing him. As this Court put it, " '[i]n the constellation of refusals to have mitigating evidence presented,' " *Landrigan* " 'is surely a bright star.' " 550 U.S. at 477 (citation omitted). *Landrigan* is categorically inapplicable, here.

The Ninth Circuit's error is significant and will unfairly undermine the ability of capital defendants to ensure adequate representation. The decision authorizes courts to reject ineffective assistance of counsel claims involving counsel's failure to develop a mitigation defense virtually every time counsel later justifies that decision by calling the mitigation presented an exclusive defense. This approach is deeply problematic. This Court should grant certiorari.

B. The Ninth Circuit Failed to Review the Reasons Given by the State Court When It Determined the Improper Shackling of Elmore was Harmless.

Mr. Elmore was unjustifiably shackled in full view of all of his jurors. The state court found a due process violation and later found that counsel was ineffective, but concluded that Elmore was not harmed. The state post-conviction court concluded:

> Elmore's trial strategy was to demonstrate remorse and to accept responsibility. This evidence was sufficient to off-set any implication of dangerousness created by Elmore's appearance in shackles. Viewing the evidence as a whole, we do not believe that Elmore has carried his burden of demonstrating that, but for his brief appearance in shackles, the jury would have made a different decision.

In re Elmore, 162 Wash.2d 236, 172 P.3d 335 (2007).

The State's argument in response reinforces, rather than undermines, Elmore's claim of a circuit split on this issue.

While the Ninth Circuit stated that the Washington Supreme Court's "analysis was reasonable," the Ninth Circuit decision fails to discuss the reasoning of the state court decision. The Ninth Circuit did not determine it was reasonable for the state court to conclude that the unexplained appearance of a capital murder defendant in shackles enhances a claim of remorse to such a degree that any perception of dangerousness is "off set." The Ninth Circuit presumably avoided the state court analysis because it is not only unreasonable, it is absurd. Other than the state court decision in this case, counsel is unaware of any decision from any court in this Nation holding that capital jurors always conclude that a shackled defendant is dangerous, but remorseful in equal measure. Shackles are used to control a dangerous prisoner, not an accoutrement of self-flagellation.

Instead of reviewing the reasons given by the state court, the Ninth Circuit concludes that the state court decision was reasonable, but for different reasons. The Ninth Circuit held that "the specific facts of the crime, which were gruesome and violent, also suggest that Elmore was not prejudiced." 749 F.3d at 1248. This reasoning directly conflicts with *Deck v. Missouri,* 544 U.S. 622 (2005) and its progeny. A murder, even if gruesome, does not automatically imply that the defendant poses an immediate danger to others in court.

The Ninth Circuit's finding that Elmore was not harmed based on reasons other than those provided by the state court deepens the circuit and intra-circuit split of authority on this important issue.

The split in authority is not a split on a trivial aspect of AEDPA implementation. Instead, the split goes to the core of habeas corpus: *what* do federal courts review? Aside from the obvious impact on Elmore, the question presented affects federal district courts across the country. It is no longer clear what is and is not a "state court decision." This is a national confusion in need of this Court's national clarity.

Porter v. McCollum, 558 U.S 30, 39 (2009), *Rompilla v. Beard,* 545 U.S. 374, 390 (2005), and *Wiggins v. Smith,* 539 U.S. 510 (2003), all authorized review of the statement of reasons, and not the decision. Each of those cases predate *Harrington v. Richter,* 562 U.S. 86 (2011). If those decisions conflict with *Harrington*, this Court should make clear that they are no longer good law. If *Harrington* applies only to unreasoned decisions, then this Court should so hold. This is a question this Court left open in *Harrington*, and a question this Court should resolve. *See Smith v. Spisak,* 558 U.S. 139, 155-56 (2010).

III. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted this 8th day of March, 2016.

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