No. 09-1088

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 Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

BRIEF ON THE MERITS FOR PETITIONER

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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 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 the defendant and his mother, did not seek out a different psychiatrist and different family members.

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OPINIONS AND JUDGMENTS BELOW

The en banc opinion of the United States Court of Appeals for the Ninth Circuit, affirming the district court judgment granting habeas corpus relief, is reported as *Pinholster* v. *Ayers*, 590 F.3d 651 (9th Cir. 2009). The Ninth Circuit three-judge panel opinion, which had reversed the district court judgment, is reported as *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 orders summarily denying habeas corpus relief are unreported. The California Supreme Court opinion affirming respondent's conviction and sentence on appeal is reported as *People* v. *Pinholster*, 824 P.2d 571 (Cal. 1992). Each is reproduced in the appendix to the petition for writ of certiorari (PA).

JURISDICTION

The petition for writ of certiorari was filed on March 9, 2010, and was granted on June 14, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall

enjoy the right . . . to have the Assistance of Counsel for his defence."

2. Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides, in 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. The State Criminal Proceedings

1. Respondent was charged with the capital murders of Thomas Johnson and Robert Beckett. The evidence adduced by the prosecution at the guilt phase of the trial proved that, early in the morning on January 9, 1982, Johnson and Beckett, house-sitters for a marijuana dealer named Michael Kumar, returned to Kumar's house only to find that the house was being burglarized by Art Corona, Paul David Brown, and respondent. Reporter's Transcript in Los Angeles County Superior Court case no. A800733, district court docket (dkt.) no. 49, lodgment A.6 (Trial RT), vol. 35 at 4897, 4902, 4909, 4914-36.

Johnson went around the house to the back door, where he encountered Corona, followed by respondent

and Brown, fleeing the crime scene. As Johnson backed away, respondent stabbed him in the chest, saying such things as "Give up your dope, your money." Johnson took out his wallet and dropped it to the ground. Respondent ordered Johnson to sit down; Johnson complied. Trial RT, vol. 35 at 4937, 4939, 4945-46, 5009; vol. 35, at 5063-65.

Beckett came running from a side gate, screaming. Trial RT, vol. 35 at 4940, 5065-66. Respondent stabbed him and forced him to lie face down. Respondent demanded, "Where is your fucking money? Give it up. . . . Where is all the dope?" Beckett simply grunted. Respondent picked up the wallet Johnson had dropped, and took Beckett's wallet too. Trial RT, vol. 35 at 4946. Respondent stood over Beckett and kicked him repeatedly in the head. Trial RT, vol. 35 at 4934, 4942-44. Beckett suffered three stab wounds: one fatal chest wound, another wound to his hip, and a third wound to his leg. Trial RT, vol. 40 at 5669-73.

As respondent was stabbing Beckett, Brown squatted next to Johnson, clenched his knife in his fist as one would hold an ice pick, and plunged the knife into Johnson's upper chest. Trial RT, vol. 35 at 4994, 5014-16. Johnson suffered three stab wounds in all: two fatal wounds to his chest, and one to his back. Trial RT, vol. 40 at 5675.

Respondent, Brown, and Corona fled the scene and drove to respondent's apartment. On the way there, Brown and respondent made statements such

as, "We did it, we got 'em man, we got 'em good"; and Brown boasted that he had "buried the knife to the hilt" in Johnson. Trial RT, vol. 35 at 4946-47. At the apartment, respondent cleaned his knife in the kitchen sink, saying, "It had to be done the way it was done. We had to do what we had to do." Trial RT, vol. 35 at 4949-51; vol. 37 at 5247. Respondent then divided up equally some marijuana taken during the burglary and $23 from Beckett and Johnson's wallets. Trial RT, vol. 35 at 4953.

The prosecution evidence also proved that in May 1981 respondent and another man had entered the home of drug dealer Todd Croutch, and robbed Croutch and his family at gun point. PA 306.

Testifying in his own defense, respondent admitted that he had committed the Croutch robbery, that he had burglarized Kumar's home earlier on the evening of the homicides, and that he had given Corona directions to Kumar's home. But respondent insisted that he was elsewhere at the time of the Johnson and Beckett homicides. Respondent asserted that he had committed "hundreds" of robberies, but that he victimized only drug dealers and that he only used guns rather than knives. PA 305-15.

The jury found respondent guilty as charged. PA 304-05.

2. At the penalty phase of the trial, the prosecution relied upon the circumstances of the murders, and also produced further aggravating evidence. That evidence showed that respondent

earlier had been convicted of kidnapping; that he had been involved in gangs as a juvenile; that he had twice resisted arrest; 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. PA 316-18.

In preparing for the penalty phase, defense counsel retained psychiatrist John Stalberg. After examining respondent, Dr. Stalberg sent a written evaluation to counsel. Dr. Stalberg reported that a mental examination indicated that respondent was cognitively intact and that he showed no sign of brain damage or any significant signs or symptoms of any other mental disorder or defect—other than antisocial personality disorder. Although noting allegations that respondent had epilepsy, the doctor further reported that, even though respondent had not been taking any medication, he had suffered no seizures while in county jail over the course of the previous year. JA 129-32.

In addition, based on respondent's ability to describe his actions on the night in question in great detail, Dr. Stalberg reported that respondent did not appear to have been significantly intoxicated or impaired at the time of the charged crimes. JA 130-31. Concluding from police reports and statements attributed to respondent in those reports that respondent had planned the robbery in the days leading up to the offenses, Dr. Stalberg also reported to counsel that respondent appeared to have been fully aware of what he was doing at the time of the offenses. JA 131.

Dr. Stalberg's written evaluation noted that respondent had a history of hyperactivity as a child and that he had been hospitalized for incorrigibility at a state hospital at the age of 14. However, Dr. Stalberg reported, respondent had not been medicated during his stay and had been released after a 90-day observation. Further, respondent thereafter had spent time in the California Youth Authority and various state prisons without requiring psychiatric treatment or medication. JA 130-31.

Addressing potential mitigating factors, Dr. Stalberg concluded that it did not appear that respondent's epilepsy, his hyperactivity as a child, or his incorrigibility related to the charged offenses—except to the extent that the incorrigibility reflected respondent's psychopathic personality traits. Finally, Dr. Stalberg reported his opinion that, because of respondent's antisocial personality disorder, it was likely that he would be recalcitrant and a security problem while in custody. JA 131-32.

Defense counsel did not call Dr. Stalberg as a witness. Rather, the defense called respondent's mother, Burnice Brashear. She testified that, although respondent grew up in a home free of material deprivation, respondent's stepfather sometimes disciplined respondent as a child to the point of 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. PA 319.

The jury returned a verdict of death. PA 305. The California Supreme Court affirmed the conviction and sentence on direct review. PA 304-433.

B. Habeas Corpus Proceedings

1. The First State Habeas Petition

Respondent then filed a petition for writ of habeas corpus in the California Supreme Court, claiming among other things that trial counsel had failed to competently investigate and present mitigating evidence at the penalty phase of his trial. He also claimed that Dr. Stalberg "perfunctorily, unreasonably and incompetently failed to adequately investigate, recognize, or consider evidence of [respondent's] significant mental health impairments." RA 111. In support, respondent presented a declaration from Dr. George Woods that contained diagnoses different from those made by Dr. Stalberg. Dr. Woods diagnosed respondent as suffering from a psychotic form of bipolar disorder and opined that, at the time of his crimes, respondent was in the throes of a partial complex epileptic seizure. Respondent further claimed that defense counsel was incompetent in failing to interview and present testimony from other family members who, contrary to the testimony of respondent's mother, would have described respondent's childhood as being marked by substantial

deprivation and abuse. Respondent's Appendix for Opposition to the Petition for Writ of Certiorari (RA) 148-71.

Respondent argued that the omission of Dr. Woods's diagnoses and the alternative version of respondent's upbringing "unquestionably altered the outcome during both guilt and penalty phases of trial." RA 171. Under state procedures calling for the 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. PA 302-03.

2. The First Federal Habeas Petition

Respondent next filed a federal habeas corpus petition, again claiming ineffective assistance of counsel in the investigation and presentation of mitigating evidence. JA 149-84. And, again, respondent presented Dr. Woods's diagnoses of bipolar mood disorder with psychotic features and seizure disorder. JA 183. Respondent also reiterated that his trial counsel should have investigated and presented alternative family-background witnesses. JA 172-82.

In addition, respondent raised a new claim that he had not presented in state court: that trial counsel had incompetently "prepared" Dr. Stalberg. Respondent relied on Dr. Stalberg's declaration that, had he known of new and "voluminous mitigating evidence" regarding respondent's life and family history given

to him years after the trial by habeas counsel, he would have examined respondent more thoroughly for neurological and physical dysfunction.[1] Dr. Stalberg's declaration, however, offered no diagnosis of respondent different from the one he had offered to trial counsel before the penalty phase of respondent's trial. JA 218-39.

Respondent stipulated that he had never presented this new claim to the state court. Dkt. no. 59. The district court permitted respondent to withdraw the "unexhausted" portions of the petition, and stayed the proceedings to give respondent a chance to return to state court and exhaust any state remedies. Dkt. no. 60.

3. The Second State Habeas Petition

Respondent filed a second state petition claiming, as in the first state petition, that he suffered from bipolar mood disorder with psychotic features and seizure disorder, and that Dr. Stalberg had performed incompetently. Respondent also claimed 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 that he had presented to the federal court.

[1] Although respondent relied on Dr. Stalberg in support of this claim in his federal petition, he also continued to press his claim that Dr. Stalberg provided incompetent assistance at the time of trial. JA 161-69.

RA 65-147. The California Supreme Court summarily denied this petition on the merits. PA 300-01.

4. The Amended Federal Habeas Petition

Respondent returned to federal court, amending his petition to again present his now-exhausted claim that counsel was ineffective in failing to prepare Dr. Stalberg, supported by the same declaration from Dr. Stalberg that offered no new diagnosis of respondent. RA 1-64. Respondent requested an evidentiary hearing. Dkt. no. 106. 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). Dkt. no. 118. Deeming AEDPA inapplicable to respondent's case, the district court granted the evidentiary hearing on respondent's claim that trial counsel had failed to investigate and present mitigating evidence. Dkt. no. 144.

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 psychopath. See Dkt. no. 202 at 6. Following this revelation, respondent's lead counsel quit the case. Dkt. no. 171.

New lawyers were appointed for respondent. They jettisoned Dr. Stalberg and found two new

experts, Drs. Sophia Vinogradov and Donald Olson, who 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. RA 172-75, 176-217. The State objected—unsuccessfully—that the new experts and their new opinions had no place in the federal proceedings because respondent had never presented them in state court. Dkt no. 192 at 1-6; Dkt. no. 207 at 3 n.1.

Reviewing the claim de novo under Ninth Circuit case authority, the district court granted relief. In the district court's view, counsel prejudicially erred in failing to adduce the evidence of the organic-brain-damage diagnosis and the testimony from different family members that respondent had grown up under conditions of deprivation and abuse. PA 261-99.

C. The Ninth Circuit Opinions

1. A three-judge Ninth Circuit panel reversed. PA 164-253. Applying the AEDPA-amended § 2254(d)(1), as required by *Woodford* v. *Garceau*, 538 U.S. 202 (2003), Judge Tallman's majority opinion concluded that the California Supreme Court's decision was reasonable, and thus precluded relief. In the panel's view, there was no reasonable likelihood that respondent was prejudiced by the omission of the

opinions of Drs. Vinogradov and Olson offered at the federal evidentiary hearing. Of particular significance to the panel's prejudice analysis was respondent's smirking and gloating testimony describing his lifelong violent criminality. PA 164-222. Chief Judge Kozinski, concurring, further concluded that counsel's performance at the penalty phase of respondent's trial had not been deficient. PA 222-26. Judge Fisher dissented. PA 226-53.

2. The Ninth Circuit granted en banc review and, in an 8-3 decision authored by Judge Smith, affirmed the district court's determination that trial counsel had provided ineffective representation at the penalty phase of respondent's trial. PA 1-70. The majority first issued a series of rulings on AEDPA procedures. The majority 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." PA 29. The majority next 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 court may consider new facts proven at a federal evidentiary hearing even if the federal court has not otherwise concluded that the state habeas court decision involved an unreasonable application of Supreme Court law. PA 30. The majority further held that, under § 2254(e)(2), respondent was entitled to present, and the federal court was entitled to consider, 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. . . ." PA 34. Given these rulings on AEDPA procedure, the majority considered respondent's claim in light of new facts respondent presented only in federal court.

Next, in identifying the law applicable to the facts, 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. PA 36-38. More specifically, the Ninth Circuit interpreted the standards to require counsel to investigate and present evidence "humanizing" the defendant. PA 47, 49, 53-54. Here, that obliged trial counsel to investigate, discover, and present evidence from the new experts that respondent had organic brain damage, and to investigate, discover, and present evidence from other family members who would have testified that respondent's childhood was marked by deprivation and abuse.

The Ninth Circuit concluded that trial counsel failed to meet the standard of care, notwithstanding that trial counsel had investigated respondent's family life and background and had consulted with a psychiatrist. PA 35-47. Further, the Ninth Circuit held that there was a reasonable probability that respondent would have received a more favorable

determination if trial counsel had presented such evidence. PA 47-68. Without further explanation, the Ninth Circuit concluded that the California Supreme Court's failure to grant relief was "unreasonable." PA 68-69.

In dissent, Chief Judge Kozinski rejected the majority's reliance on new facts presented in federal court as a basis for rejecting the California Supreme Court's decision under § 2254(d)(1). PA 70-163. As he explained, "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." PA 79. The dissent further opined that the majority's reliance on the general 1982 ABA standards as laying down specific obligations on trial counsel in respondent's case 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). PA 88, 98. The dissent also criticized the majority for failing to show any deference to the California Supreme Court's adjudication of the case; and it set out in detail why rejection of respondent's claim, as presented to the state court, was reasonable. PA 123-62. The dissent found that the facts alleged to the California Supreme Court supported the conclusion that trial counsel reasonably investigated the available mitigating mental-health and family-background evidence, PA 126-31, and that respondent was not

prejudiced by trial counsel's purported shortcomings, PA 132-62.

SUMMARY OF ARGUMENT

I.

A. The Ninth Circuit was wrong to grant respondent habeas corpus relief on his ineffective assistance of counsel claim based on facts—most crucially new medical diagnoses of mental disorders—that respondent presented for the first time in an evidentiary hearing in federal court. A federal habeas corpus court may not consider, as a basis for rejecting the state court's adjudication of a prisoner's claim as "unreasonable" so as to open the door to relief under 28 U.S.C. § 2254(d)(1), facts the prisoner withheld from the state court. The plain language of § 2254(d)(1) demonstrates that its standard of deferential review is retrospective and contextual, asking if the state court's decision was reasonable in light of the claim as it was presented to the state court.

Further, Congress' overarching purpose in enacting this cornerstone AEDPA reform of habeas corpus—channeling a prisoner's claims to the state court as the court with primary responsibility for resolving them, and then treating the resulting state-court decision with great deference—would be frustrated if a prisoner were allowed to play "bait and switch" by relying in federal court on crucial new

facts withheld from the state court. Consistent with other areas of the law where review for "reasonableness" considers the decisionmaker's judgment only in context, and as Chief Judge Kozinski recognized in his dissent in this case, "It makes no sense to say that a state court unreasonably applied clearly established law to facts it didn't know existed."

B. Further, respondent should not have been afforded a federal evidentiary hearing to develop his new medical-opinion "facts," as he "failed to develop" them in state court despite ample opportunity to do so. Here, the California Supreme Court appointed counsel for respondent and gave him funds to hire experts. Respondent presented opinions of various medical experts to support his state habeas corpus petitions. Although respondent later presented other experts with new and fundamentally different opinions in federal court, he never showed that he was unable to present that evidence to the state court first. On the contrary, respondent proved fully able to develop the factual bases underlying his ineffective assistance of counsel claim before the federal evidentiary hearing was conducted. Indeed, the entire thrust of respondent's ineffective assistance of counsel claim—that counsel at the earlier trial should have ferreted out the evidence respondent later

presented in federal habeas corpus proceedings—is an admission that such evidence always had been available.

Despite the Ninth Circuit's reliance on it as entitling respondent to a federal evidentiary hearing, the fact that California Supreme Court did not afford respondent a state evidentiary hearing was immaterial. California habeas law required the state court, in determining whether respondent had made out a prima facie case of a constitutional violation, to assume provisionally that his factual allegations were true. Respondent hardly could be aggrieved where his allegations were provisionally deemed true without having to prove them in a contested hearing.

C. In order to prevent federal courts from misusing facts developed for the first time in federal court to inform, improperly, the § 2254(d)(1) inquiry, it should be made clear that the § 2254(d)(1) inquiry must be resolved before a federal evidentiary hearing is considered. Such a procedure is consistent with how this Court has previously conducted the § 2254(d)(1) inquiry, and how this Court has instructed that related inquiries should be conducted. It also best serves principles of judicial economy, and is the best method for ensuring the federal courts pay genuine deference to state-court adjudications of federal constitutional claims.

II.

Section 2254(d)(1) precludes federal habeas corpus relief on respondent's ineffective assistance of counsel claim because the state-court record supported, as objectively reasonable under this Court's "clearly established" law, the California Supreme Court's rejection of respondent's claim on the merits. That is, the state-court record afforded a reasonable basis for the conclusion that trial counsel's performance was neither incompetent nor prejudicial under *Strickland* v. *Washington*.

A. Here, trial counsel investigated respondent's mental state, by hiring a psychiatrist who examined respondent and reported to counsel that respondent was simply a psychopath who suffered from no mitigating mental disease or defect. Further, trial counsel investigated and presented mitigating evidence of respondent's background and upbringing, through respondent's mother. These actions met, indeed, exceeded, the constitutional minima established in *Strickland* v. *Washington* and further illuminated by this Court in *Burger* v. *Kemp*. At the very least, such a conclusion would be reasonable and therefore sufficient under § 2254(d)(1).

B. Similarly, the state-court record reasonably supported the conclusion that the alternative evidence respondent relied upon would not likely have mattered. The circumstances of the crime were strongly aggravating: respondent stabbed to death two men whose only offense was to come upon

respondent and his accomplices as they were burglarizing the house they had been asked to watch. Also aggravating was respondent's own guilt-phase testimony, in which he boasted about his lifelong career as a violent criminal. And the state-court record was clear that the only psychiatrist who examined respondent at the time of trial was of the opinion that respondent was simply a psychopath with no mitigating mental defects or disorders.

Conversely, despite the Ninth Circuit's exaggerated view of it, the alternative mitigation evidence that respondent presented to the state court would hardly have been persuasive in a case in which respondent's clear-thinking and motivations were plain.

* * *

When properly viewed with the requisite "double deference" required by *Strickland* and § 2254(d)(1), the California Supreme Court's rejection of respondent's ineffective assistance of counsel claim cannot be dismissed as "unreasonable" on the basis of the evidence presented to it and the clearly-established law that governed respondent's claim. The state court's adjudication, therefore, precludes relief on respondent's claim.

———♦———

ARGUMENT

I.

A FEDERAL COURT MAY NOT REJECT A STATE-COURT ADJUDICATION OF A CLAIM AS "UNREASONABLE" UNDER 28 U.S.C. § 2254 BASED ON A FACTUAL PREDICATE FOR THE CLAIM THAT THE PETITIONER NEVER PRESENTED TO THE STATE COURT

As amended by AEDPA, 28 U.S.C. § 2254 sets out a framework of tight preconditions to a grant of federal habeas corpus relief to a state prisoner. First, relief is available only if the petitioner first exhausts his state remedies by fairly presenting both the factual and legal bases of his federal claim to the state courts. § 2254(a)-(c). Second, where the state court denies relief on the merits, § 2254(d)(1) provides that habeas relief "shall not be granted" unless the state-court adjudication of the claim "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. . . ." § 2254(d)(1). This is a " 'highly deferential standard for evaluating state-court rulings' which demands that state-court decisions be given the benefit of the doubt." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 333 n.7 (1997); *Schriro* v. *Landrigan*, 550 U.S. 463, 473 (2007) (unreasonableness is a "significantly higher threshold" than correctness).

Section 2254(d) therefore focuses the question of relief on the state-court adjudication. *Bell* v. *Cone*, 535 U.S. 685, 694 (2002). Regardless of the federal court's opinion of the merits of the claim, federal collateral relief is precluded if the state-court rejection of the claim was at least reasonable. *Lockyer* v. *Andrade*, 538 U.S. 63, 75-76 (2003); *Visciotti*, 537 U.S. at 24-25; *Yarborough* v. *Alvarado*, 541 U.S. 652, 665 (2002). The reasonableness of the state court's decision is "the only question that matters." *Andrade*, 538 U.S. at 71.

The Ninth Circuit's opinion reveals a fundamental misunderstanding of § 2254(d)(1). Rather than examining the record that was before the California Supreme Court when analyzing whether the state court's decision was reasonable, the Ninth Circuit tainted that inquiry by relying on facts presented for the first time in federal court. The Ninth Circuit compounded this error by misinterpreting 28 U.S.C. § 2254(e)(2) as allowing the federal court to consider, on the § 2254(d)(1) question, new evidence to prove new factual allegations that respondent could have presented to the state court, but did not.

Instead, review of the reasonableness of the state court's application of this Court's precedents to a petitioner's claim may be accomplished under § 2254(d)(1) only if the review is limited to "clearly established" law at the time of the state ruling and to the same facts as were presented to the state court. This conclusion follows from the plain language of

§ 2254(d)(1), the structure and logic of AEDPA's habeas corpus reforms, and from this Court's own stated understanding of how § 2254(d)(1) works.

A. A Federal Court May Not Deem a State Adjudication "Unreasonable" Based on Facts Never Presented to the State Court

1. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross* v. *FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2350 (2009) (quoting *Engine Mfrs. Assn.* v. *South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004)). Accordingly, courts "must enforce plain and unambiguous statutory language according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010). Thus, when a statute's language is clear under the ordinary meaning of the words, interpretation of the statute "begins . . . and . . . ends there as well." *Harris Trust and Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 254 (2000).

The plain language of § 2254(d)(1) requires that "reasonableness" review be confined to the state-court adjudication in context, rather than in light of new facts the state court never saw. Section 2254(d)(1) refers, in the past tense, to whether the state-court ruling "involved" an unreasonable application of clear

law to the facts or "resulted" in a ruling that "was" contrary to clearly established law. The plain and ordinary meaning of these words is retrospective, requiring an examination of the reasonableness of the state-court decision at the time it was made—in the past. See *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2331-33 (2008) (use of the past tense refers to a completed action). If the completed action of the state court—denying relief—was objectively reasonable under clearly-established law as applied to the facts alleged or assumed true by the state court, then the state-court ruling cannot be condemned as "unreasonable" just because different facts later seem to a federal court to warrant a different result.

The subdivision's reference to "clearly established Federal law" corroborates this plain-language construction. This Court has instructed that "clearly established federal law" under § 2254(d)(1) is the "governing legal principle or principles set forth by the Supreme Court *at the time the state court renders its decision*." *Lockyer* v. *Andrade*, 538 U.S. at 71 (emphasis added). Likewise, this Court in *Williams (Terry)* v. *Taylor*, 529 U.S. 362, 412 (2000), explained that the "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"—clarifying that the inquiry is retrospective and contextual. 529 U.S. at 412.

2. The broader § 2254 plan confirms the plain language of § 2254(d)(1). The § 2254(d)(2) companion provision also requires that the reasonableness of state-court factual determinations is to be reviewed "in light of the evidence presented in the State court proceedings." There is no reason to think that Congress meant the concept of reasonableness in § 2254(d)(2) to be fundamentally different from reasonableness in § 2254(d)(1). Further, the obvious point of § 2254 is to channel a prisoner's claims first to the state court as the court with "primary responsibility for resolving claims of constitutional error in state criminal trials," *Woodford* v. *Visciotti*, 537 U.S. at 27, and then to require deference to the state court's adjudication of such claims in furtherance of the goal of giving effect to state criminal convictions "to the extent possible under law." *Terry Williams*, 529 U.S. at 404. To allow the federal court to reject a state-court adjudication based on facts never presented in the state court would make § 2254's "exhaustion" rule pointless and its centerpiece requirement of deference to reasonable state-court rulings illusory.

3. This Court, moreover, has recognized that reasonableness review under § 2254(d)(1) depends on the case only as presented to the state court. In *Terry Williams*, this Court explained that § 2254(d)(1) review focuses on how a state court applies the law "to the facts of a state prisoner's case." 529 U.S. at 407-08. As this Court described the inquiry, it is the facts that the state court "confronts" that inform the

§ 2254(d)(1) analysis. *Id.* at 405. This rules out consideration of facts the state court did not confront. Further reflecting the statutory language, *Terry Williams* articulated the federal court's § 2254(d)(1) inquiry in the *past* tense, asking "whether the state court's application of clearly established federal law *was* objectively unreasonable." *Id*. at 409 (emphasis added). That is, under § 2254(d)(1), the state-court ruling is reviewed in the context of the facts and the law presented to the state court.

This Court's decision in *Holland* v. *Jackson*, 542 U.S. 649, 652 (2004), should have eliminated any potential remaining ambiguity on the question. *Holland* 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.) This Court criticized the Sixth Circuit for finding the state-court determination unreasonable under § 2254(d)(1) based upon evidence that had not been presented to the state court in a procedurally proper manner. *Id.* Because the evidence was "not properly before the state court," it was not proper for the federal court to rely upon the evidence in assessing the reasonableness of the state-court determination under § 2254(d)(1). *Id.*

4. *Holland*'s holding, that whether a state-court decision is reasonable is assessed in light of the facts available to the state court, is consistent with how this Court has instructed reviewing courts to assess whether an action was "reasonable" in other contexts.

In *Strickland* v. *Washington*, 466 U.S. 668, 691 (1984), this Court instructed that whether a trial attorney's decisions were reasonable—an assessment that, like § 2254(d)(1), involves judicial deference, *Yarborough* v. *Gentry*, 540 U.S. 1, 6 (2004)—must be made in light of the facts known to counsel at the time. Similarly, in interpreting another part of § 2254, this Court in *Williams (Michael)* v. *Taylor*, 529 U.S. 420, 435 (2000), held that the determination of whether a prisoner made a "reasonable attempt" to investigate and pursue claims in state court—and thus satisfy due diligence under § 2254(e)(2)—is assessed "in light of the information available to him at the time." Other examples abound. Whether a search was "reasonable" under the Fourth Amendment is assessed "in light of the facts and circumstances *then* known to" the officer. *Scott* v. *United States*, 436 U.S. 128, 137 (1978) (emphasis added). Whether the force used to effectuate a detention was reasonable "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). In short, this Court has recognized that whether a past decision was "reasonable" must be assessed in terms of what was known to the decision-maker at the time the decision was made.

5. The Ninth Circuit's contrary view—that nothing in § 2254(d)(1) precludes consideration of facts withheld from the state court when analyzing whether the state court's determination was

reasonable, PA 29—defies logic and strays from this Court's teaching. Under the Ninth Circuit's construction of § 2254(d)(1), a federal court would be free to invalidate a state-court decision rejecting a claim of federal constitutional error *even if every court would agree that the state-court decision was perfectly reasonable based upon the factual allegations presented to the state court*, if other facts never presented to the state court support a different result. As explained above, the Ninth Circuit's rule upends the central AEDPA reform of federal habeas corpus review of state-court judgments.

The Ninth Circuit's decision in this case is a stark illustration of how it is inimical to § 2254(d) deference to allow the federal court to reject a state-court adjudication as "unreasonable" in light of facts that the petitioner withheld from the state court. In concluding that the new facts did not render respondent's ineffective assistance of counsel claim "unexhausted," the Ninth Circuit asserted that the new facts did not "fundamentally alter[ ] the penalty phase ineffective assistance claim that the California Supreme Court already considered. . . ." PA 35. But the factual allegations respondent presented to the California Supreme Court and the new facts suggested by the evidence adduced at the federal evidentiary hearing are not simply different; they are irreconcilable. And the new facts were crucial to the Ninth Circuit's decision.

Both habeas corpus petitions filed in the California Supreme Court alleged that respondent

"was substantially impaired by a bipolar mood disorder operating synergistically with seizure disorder at the time the crime was committed," and that "[a]t the time of the offenses, [respondent's] disorders impaired his capacity to appreciate the criminality of his conduct and/or to conform his conduct to the requirements of law." RA 142, 170. In support of those assertions, respondent presented the declaration of his retained expert, Dr. Woods, who opined "that at the time of the stabbings Mr. Pinholster was suffering a complex partial seizure which by definition would imply impaired consciousness and therefore the inability to form intent." RA 239. Respondent also offered Dr. Woods's opinions in support of both his original federal petition and his amended federal petition. JA 183; RA 419, 422.

At the federal evidentiary hearing, however, respondent never even attempted to prove the allegations he made in state court (or, for that matter, in his federal petition). Instead, respondent presented his new expert Dr. Vinogradov who, in her direct testimony declaration submitted to the district court, and confirmed by her on cross-examination at the district court evidentiary hearing, specifically *excluded* a diagnosis of bipolar disorder, thus directly contradicting the first diagnosis Dr. Woods offered to the state court (as well as the diagnosis respondent pled in his federal petition). RA 197; Ninth Circuit Excerpts of Record (9th Cir. ER) vol. 5 at 1298. Dr. Vinogradov also unambiguously testified that respondent was *not* in the throes of a seizure at the time of the murders—directly contradicting Dr. Woods's

second diagnosis. 9th Cir. ER vol. 5 at 1358. Respondent's other expert at the federal evidentiary hearing, Dr. Olson, likewise admitted on cross-examination that it was his opinion that respondent had *not* been experiencing an epileptic seizure at the time he committed the murders—also directly contradicting Dr. Woods's second diagnosis. See district court evidentiary hearing reporter's transcript (EH RT) of 9/10/2002, dkt. no. 221 at 82-83.

Thus, the evidence respondent presented to the district court specifically and explicitly repudiated the mental health allegations made in state and federal court.[2] The principal operative fact alleged to the California Supreme Court, that trial counsel should have discovered and presented evidence that respondent was a bipolar psychotic who was in the midst of a seizure at the time of the crimes, was abandoned and, ultimately, disproven. Instead, the district court and the Ninth Circuit relied on a "fact" different from the one respondent presented to the state court: that trial counsel should have discovered and presented evidence that respondent has organic brain damage. PA 50-54. There can be no more fundamental alteration of a claim than to abandon,

[2] One of the ironies of the instant case is that the Ninth Circuit's decision ignored the fact that the evidence adduced at the federal evidentiary hearing proved that the California Supreme Court's rejection of respondent's claim of ineffective assistance of counsel was not only *reasonable*, it was *correct*, because the central facts in support of the claim presented to the California Supreme Court were, as noted, false.

then disprove, its central factual allegations, and substitute in other, irreconcilable factual allegations, that the federal court then treats as crucial to validate the claim. As Chief Judge Kozinski said in his dissent: "I don't believe that AEDPA sanctions this bait-and-switch tactic. . . ." PA 84.

* * *

The plain language of the statute, Congress' intent as found by this Court, this Court's prior decisions interpreting the subdivision, and simple logic all compel the conclusion that when examining whether a state-court rejection of a claim was objectively reasonable under § 2254(d)(1), a federal court must confine itself to *only* those facts presented to the state court in support of the claim. It must *not* consider facts that were not presented to the state court in support of the claim.

B. Section 2254(e)(2) Provides No Basis for Attacking the Reasonableness of the State Court's Adjudication

In seeking to justify its erroneous reliance on evidence withheld from the state court as a basis for condemning the state-court adjudication as "unreasonable" under § 2254(d)(1), the Ninth Circuit committed a second error. It interpreted § 2254(e)(2) as permitting the federal evidentiary hearing that gave respondent the opportunity to prove new facts that he could have presented to the state court but did not. PA 28-35. But respondent did not qualify for an

evidentiary hearing under § 2254(e)(2), because he failed to develop the new factual bases for his ineffective assistance of counsel allegation in state court. And, in any event, nothing in § 2254(e)(2)—or in any other source of authority to hold an evidentiary hearing—allows a federal court to dispense with § 2254(d)(1)'s prohibition against relief where the state court reasonably adjudicated the petitioner's exhausted claim on its merits.

1. 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." Respondent ran afoul of § 2254(e)(2), because he failed to develop in state court the psychiatric opinion evidence that ultimately served as the basis for the Ninth Circuit's grant of federal habeas corpus relief.

In *Michael Williams* v. *Taylor*, this Court explained that "failed to develop" means "lack of diligence or some greater fault attributable to the prisoner or the prisoner's counsel." 529 U.S. at 432. There, the petitioner alleged that the prosecution had violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to turn over a report containing the results of a psychiatric examination of a prosecution witness. *Id.*, 529 U.S. at 427. This Court found that the petitioner had failed to exercise diligence in presenting the claim to the state court because state habeas counsel had the same access to the file containing the allegedly improperly withheld report as federal habeas counsel. 529 U.S. at 438-39.

Further, numerous references to the report in a transcript to which state habeas counsel had access had put state habeas counsel on notice that the report existed. *Id.* Because state habeas counsel failed to diligently investigate the report, the petitioner was not entitled to a federal evidentiary hearing to prove his factual allegations. *Id.* at 439-40.

Respondent's case is in this important respect like *Michael Williams*. Here, respondent had the same access to psychiatric opinion evidence in the state post-conviction proceedings as he did in federal court. The California Supreme Court's capital-case policies, in place at the time respondent was preparing his state petitions, required the appointment of state habeas counsel and authorized counsel to expend, without prior approval of the court, up to $3,000 for investigation alone, with additional funds for investigation available if needed. *In re Sanders*, 981 P.2d 1038, 1050-52 (Cal. 1999); *In re Clark*, 855 P.2d 729, 751 n.19 (Cal. 1993). And, in fact, respondent's counsel hired Dr. Woods, who examined respondent, reviewed the earlier examination conducted by Dr. Stalberg, and presented the California Supreme Court with a new expert opinion in support of respondent's ineffective assistance of counsel claim. RA 221-50. In addition, during the second state habeas proceedings respondent had the services of *two* mental health professionals, Drs. Woods and Stalberg; and respondent presented declarations from both of these experts to the California Supreme Court

in support of his ineffective assistance of counsel claim. RA 221-50, 218-20.

The record further shows that Drs. Vinogradov and Olson were retained by respondent's attorneys, that they examined respondent, and that they generated reports detailing their opinions about respondent *all before the federal evidentiary hearing began*.[3] That respondent did not decide to contact Drs. Olson and Vinogradov until after the district court granted an evidentiary hearing fatally undermines any claim that respondent was diligent. Nothing in the federal court's order granting an evidentiary hearing provided respondent any access to these experts that was previously unavailable. Certainly, "[t]he District Court made no finding that respondent had been diligent in pursuing [Dr. Vinogradov's and Dr. Olson's] testimony (and thus that § 2254(e)(2) was inapplicable) or that the limitations set forth in § 2254(e)(2) were met." *Holland* v. *Jackson*, 542 U.S. at 653. In the absence of such a finding, the district court's determination that respondent "did not fail to

[3] Dr. Vinogradov was retained by respondent's attorneys in April 2002, examined respondent on April 10 and July 8, 2002, and executed a declaration outlining her conclusions on September 6, 2002. RA 176-77, 217. Dr. Olson was retained by respondent's attorneys in May 2002, examined respondent on June 27, 2002, and executed a declaration outlining his conclusion on September 9, 2002. RA 172, 175. The evidentiary hearing began on September 10, 2002. PA 262.

develop the factual basis of the claim in state court . . . ," PA 256—a showing required by § 2254(e)(2) and *Michael Williams*—is unsupportable. On the contrary, as Chief Judge Kozinski noted in his dissent, "The reports of Drs. Olson and Vinogradov are just like the evidence in *Michael Williams* that the Supreme Court said couldn't be used because it was not first presented in state court." PA 82.

Indeed, as Chief Judge Kozinski noted in his dissent, any argument that Drs. Vinogradov and Olson, or other experts offering similar opinions, could not have been presented to the California Supreme Court on habeas would fatally undermine the necessary conclusion that trial counsel was deficient in failing to secure such experts at the time of trial. "[E]ither . . . habeas counsel was not diligent, or trial counsel was not ineffective. There's no escape." PA at 80-81.

2. The Ninth Circuit was also wrong in its further ruling that, just because the California Supreme Court did not afford respondent an evidentiary hearing, he somehow became entitled to a § 2254(e)(2) hearing and could not be faulted for having failed to develop in state court the evidence of Dr. Olson's and Vinogradov's opinions. PA 33-34. As explained above, the California Supreme Court gave respondent every opportunity to develop his ineffective assistance of counsel claim.

Moreover, the absence of a state-court evidentiary hearing hardly prevents a petitioner from alleging the factual bases of his claim in the state court. In California, especially, prisoners such as respondent cannot fairly complain about the absence of an evidentiary hearing. In both habeas cases presented to it by respondent, the California Supreme Court under state law reviewed the well-pleaded factual allegations in the state habeas petitions in the light most favorable to granting relief. Once respondent identified the alleged illegality underlying the conviction and "state[d] fully and with particularity the facts on which relief [was] sought," the California Supreme Court "evaluate[d] it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995). Here, the California Supreme Court found that no prima facie case for relief had been stated, and so it summarily denied the petitions on the merits. PA 300-03, see *Duvall*, 886 P.2d at 1258-59.[4] But that

[4] If a prima facie case for relief had been found, an order to show cause would have issued, directing the custodian to file a return justifying the confinement. *Duvall*, 886 P.2d at 1258-59. The issuance of an order to show cause would have indicated that the California Supreme Court had made a preliminary assessment that respondent would be entitled to relief if the factual allegations were proven true. *Id*. Following the return, respondent would then have had the opportunity to file a traverse. If, following the pleadings, there had been a disputed issue of material fact, a referee would have been appointed to conduct an evidentiary hearing. *Id.* at 1260-61.

ruling does not detract from the fact that respondent in effect received the benefit of an evidentiary hearing and ran none of its risks: his factual allegations were treated as true for purposes of the state court's ruling.

So, the evidentiary hearing that the Ninth Circuit criticized the California Supreme Court for denying to respondent would have done nothing to improve the factual posture of respondent's case. Indeed, given that the State would have been entitled to meet any evidence that respondent presented in support of his factual allegations with cross-examination and responsive evidence, the factual posture of respondent's claim only would have gotten worse. See, e.g., 9th Cir. ER vol. 4 at 976 (Dr. Stalberg testifies at the federal evidentiary hearing that the additional material he has reviewed since trial did not alter—indeed, it confirmed—his opinion that respondent is simply a psychopath).

* * *

The Ninth Circuit failed to pay proper respect to the limitations on relief codified in § 2254(d)(1) or to the limitations on federal evidentiary hearings codified in § 2254(e)(2). Evidence in support of facts that could have been presented to the California Supreme Court but were not should not have been received, and should not have formed the basis for granting respondent habeas corpus relief.

C. Resolution of the § 2254(d)(1) "Reasonableness" Question Should Precede Any Presentation of Evidence in Federal Court

Given how the Ninth Circuit misused the evidence taken at the federal evidentiary hearing, it is clear that some guidance is needed regarding how to best approach the various components of the § 2254 analysis of a claim that was denied on the merits in state court. As this Court has recently stated, § 2254(d) sets forth "threshold restrictions . . . on granting federal habeas relief to state prisoners." *Renico* v. *Lett*, 130 S. Ct. 1855, 1862 n.1 (2010). In order to ensure that § 2254(d)(1) is properly treated as a threshold restriction, the § 2254(d)(1) reasonableness question—"the only question that matters," *Lockyer* v. *Andrade*, 538 U.S. at 71—should be resolved before any evidence is taken in a federal evidentiary hearing.

1. This Court has already recognized the logic and prudence of undertaking the § 2254(d)(1) inquiry before taking evidence. As noted above, this Court in *Michael Williams* v. *Taylor*, 529 U.S. 420, limited the factual context of the § 2254(d)(1) inquiry to the facts presented to the state court. That holding was predicated on the assumption that the § 2254(d)(1) analysis precedes consideration of new evidence that might be developed in a federal evidentiary hearing under § 2254(e)(2). This Court 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)." *Id.*, at 444.

2. Resolving the § 2254(d)(1) question before taking evidence is also consistent with this Court's expressed preference in a related context. In *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994), this Court held that the question of whether habeas relief would depend on recognition of a "new rule" of law, in derogation of *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion), must be addressed "before considering the merits of the claim." Accord, *Beard* v. *Banks*, 542 U.S. 406, 412 (2004) (*Teague* requires a "threshold" analysis "in addition to any analysis required by AEDPA"). While the *Teague* inquiry is distinct from the § 2254(d)(1) inquiry, *Horn* v. *Banks*, 552 U.S. 264, 272 (2002) (per curiam), the habeas corpus restrictions in § 2254(d)(1) and *Teague* arise from a common concern. *Terry Williams* v. *Taylor*, 529 U.S. at 381-82. The same concerns that led this Court to direct the lower federal courts to examine the *Teague* question before examining the merits of the claim, then, also suggest that the federal courts likewise should resolve the § 2254(d)(1) at the threshold before any evidence is taken.

3. Sound practical reasons clearly support such an approach. Undoubtedly, the great majority of federal habeas corpus petitions filed by state prisoners will prove unsuccessful under § 2254(d)(1). In accord with the plain language of § 2254(d)(1) and this Court's decision in *Holland* v. *Jackson*, the federal court's dismissal of claims reasonably

adjudicated by the state court will be based on the facts alleged or proved in the state court, without reference to any new facts that might be developed in the federal proceedings. A federal evidentiary hearing conducted prior to resolving the § 2254(d)(1) issue would thus prove an unnecessary, if not pointless, exercise in this great majority of cases, because the evidence taken would be unnecessary to the disposition of the case.

Conducting unnecessary evidentiary hearings before resolving the § 2254(d)(1) question is very expensive, too. This is especially so in death penalty cases such as this one. A 1999 Pricewaterhouse-Coopers report, commissioned by the Administrative Office of the United States Courts, hints at the tip of the iceberg of resources expended in such hearings. At the time the report was written, the average federal court cost for legal representation for indigents in California capital cases was approximately $113,000 per evidentiary hearing. PRICEWATERHOUSECOOPERS, "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 significant costs of federal habeas corpus review" on "[t]he State and the victims." See *Magwood* v. *Patterson*, 130 S. Ct. 2788, 2810 (2010) (Kennedy, J. dissenting), citing *McCleskey* v. *Zant*, 499 U.S. 467, 490-91 (1991). These significant resources should be reserved for cases where the taking of evidence might actually inform

some question of fact relevant to the disposition of the case.

4. Conducting an evidentiary hearing before resolving the likely-dispositive § 2254(d)(1) question also gives rise to a needless risk that facts developed for the first time at the federal evidentiary hearing will improperly influence the federal court's review of the reasonableness of the state court's resolution of the claim. This case well might be an example. Perhaps recognizing that relying on facts never presented to the state court when analyzing the § 2254(d)(1) question was, to say the least, dubious, 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. PA 34-35. This improbable assertion is unsupported by any analysis, and is irreconcilable with the Ninth Circuit's treatment of the new facts as the principal basis for its determination that respondent was prejudiced by his trial attorneys' decisions. PA 50-54. As Chief Judge Kozinski discussed in his dissent:

> If the majority means that, it should avoid making such terrible law and reach its result without relying on Pinholster's new psychiatric evidence. But I don't believe the majority does mean it. The majority *must rely heavily on the new experts*, *see*, *e.g.*, maj. op. at 661, 675-77, because everything else Pinholster'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. *See* pp. 709-16 *infra*. The proof is in the pudding: If the expert declarations didn't matter, the majority would leave them out and avoid making an obvious error under *Michael Williams*. That it won't tells us something important.

PA 84.

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The Ninth Circuit's conclusion, that facts never presented to the California Supreme Court undermined the objective reasonableness of the California Supreme Court's rejection of respondent's ineffective assistance of counsel claim, violated § 2254(d)(1). And its concomitant decision to approve an evidentiary hearing to take evidence in support of those new facts violated § 2254(e)(2). These errors resulted in the Ninth Circuit's erroneous decision to grant habeas corpus relief to respondent.

As explained in the following section, an analysis of respondent's claim in light of the state-court record, and paying proper respect to the limitations found in § 2254(d)(1), would have compelled the conclusion that federal collateral relief was unavailable.

II.

FEDERAL HABEAS CORPUS RELIEF IS UNAVAILABLE BECAUSE THE STATE COURT'S REJECTION OF RESPONDENT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS REASONABLE

The California Supreme Court rejected respondent's claims on the merits.[5] Thus, the question under § 2254(d)(1) is whether the state-court determination was unreasonable under clearly established federal law.

Strickland v. *Washington*, 466 U.S. 668, articulated a two-prong test for assessing claims of ineffective assistance of counsel. The first prong

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[5] In both its July 19, 1995 order denying the first state petition and its October 1, 1997 order denying the second state petition, the California Supreme Court held, in relevant part, "The petition for writ of habeas corpus is denied on the substantive ground that it is without merit." PA 300, 302. In *Harrington* v. *Richter*, No. 09-587, currently pending before this Court, this Court posed the 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)?" The positions taken in the instant brief are consistent with those taken by the State in *Richter*. Because the state court summarily disposed of respondent's claims "on the merits," the question under § 2254(d)(1) is whether the state court's rejection of the *Strickland* claims was reasonable. As argued here, and in *Richter*, the record before the state court supported a reasonable conclusion that counsel had acted competently and that in any event there was no reasonable probability of prejudice. Relief, therefore, is precluded.

requires the defendant to prove that trial counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. The second prong requires the defendant to prove that there is a reasonable probability that he would have received a more favorable determination in the absence of the shortcomings of counsel. *Id.* at 694. The *Strickland* test is "clearly established Federal law" under § 2254(d)(1). *Bell* v. *Cone*, 535 U.S. at 693.

Judicial review of a *Strickland* claim is not only "highly deferential," it is "doubly deferential when it is conducted through the lens of federal habeas." *Yarborough* v. *Gentry*, 540 U.S. at 5; accord, *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1420 (2009). The first level of deference is that mandated by *Strickland* itself: "Judicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (citing *Michel* v. *Louisiana*, 350 U.S. 91, 101 (1955)). In assessing the performance prong, *Strickland* imposes a "highly demanding" standard upon the defendant to prove "gross incompetence." *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 (1986).

The second level of deference is that owed to the state-court determination that respondent's claim of federal constitutional error lacks merit. § 2254(d)(1);

Yarborough v. *Gentry*, 540 U.S. at 5. That level of deference forbids the federal courts from granting habeas corpus relief even when the state-court decision rejecting the claim was erroneous, provided the decision was reasonable. *Gentry*, 540 U.S. at 5. In applying § 2254(d)'s deference standard, "evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway [state] courts have in reaching outcomes in case by case determinations." *Yarborough* v. *Alvarado*, 541 U.S. at 664. Because the *Strickland* standard is a general one, state courts have great leeway in applying it. *Mirzayance*, 129 S. Ct. at 1420. In federal habeas, the petitioner must show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *Woodford* v. *Visciotti*, 537 U.S. at 25. Unless it was "unreasonable for the state court to conclude that . . . defense counsel's performance was not deficient," federal collateral relief must be denied. *Knowles* v. *Mirzayance*, 129 S. Ct. at 1420. Likewise, a federal court may not disturb a state court's decision rejecting a claim of ineffective assistance of trial counsel unless under the facts presented there, the state court could not reasonably determine that the petitioner was not prejudiced by trial counsel's deficiencies. *Sears* v. *Upton*, 130 S. Ct. 3259, 3265-66 (2010); *Porter* v. *McCollum*, 130 S. Ct. 447, 454-55 (2009) (per curiam).

Review of the facts presented to the California Supreme Court under this Court's clearly established

authority reveals that the California Supreme Court's rejection of the claim was reasonable under § 2254(d)(1).

A. The Facts Presented to the State Court Supported the Reasonable Conclusion that Trial Counsel Provided Objectively Reasonable Assistance Under Prevailing Professional Norms

Proof of deficient performance requires a showing that counsel's performance was "outside of the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The decision in *Strickland*, handed down on May 14, 1984, only one week after respondent's jury entered its death-penalty verdicts, 466 U.S. at 668; Trial RT, vol. 54 at 7497-7501, did not simply inform the California Supreme Court of the general constitutional standard applicable to evaluate a given set of facts; it also provided the state court with a clear example of the kind of performance by counsel that satisfies the Sixth Amendment. With *Strickland* as the template for trial counsel's performance, the California Supreme Court's resolution of the ineffective assistance of counsel claim was reasonable. For respondent's counsel did everything defense counsel in *Strickland* did, and more.

Like the instant case, *Strickland* was a capital case in which the defendant accused his trial attorney of failing to adequately investigate and present

evidence in mitigation. 466 U.S. 667. This Court in *Strickland* summarized trial counsel's investigation as follows:

> In preparing for the sentencing hearing, 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. . . . Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems.
>
> Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state.

Id. at 672-73. On federal habeas, the petitioner in *Strickland* argued that his counsel was ineffective because "he failed . . . to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts." *Id.* at 675, 678.

1. This Court found it sufficient that trial counsel in *Strickland* spoke with potential background mitigation witnesses only by telephone, did no further investigation of background mitigation witnesses, and did not use any background mitigation

witnesses at the penalty phase. This Court held that, after the investigation outlined above, it was reasonable for trial counsel to settle on a theory of the case that involved the presentation of no mitigating evidence whatsoever, and to simply argue that the defendant's life should be spared. *Strickland*, 466 U.S. at 699.

Here, respondent's trial attorneys did more. They not only investigated, but also *presented* a family-background mitigation witness: respondent's mother, Burnice Brashear. Given that the investigation of background mitigation witnesses in *Strickland* passed constitutional muster, the California Supreme Court's decision rejecting respondent's similar claim was at least reasonable.

2. The state record also showed that respondent's trial attorneys did more than did the petitioner's in *Strickland* in investigating and presenting expert opinion testimony. This Court found it acceptable that trial counsel in *Strickland* discarded the notion of presenting mental health evidence without consulting a psychiatrist or securing a psychiatric examination. In respondent's case, by contrast, trial counsel secured the services of a psychiatrist, who examined respondent and issued a report. It was just that the report did not provide any support for a mental health case in mitigation. Rather, the psychiatrist retained by the defense made it clear that respondent "did not manifest any significant signs or symptoms of mental disorder or defect other than his antisocial personality disorder

by history," "it does not appear he suffers brain damage," and neither respondent's "epilepsy, hyperactivity as a child, or incorrigibility were related to the offenses except the incorrigibility reflects upon his psychopathic personality traits." JA 130-31. Given that the investigation of mental health evidence in *Strickland* passed constitutional muster, the record before the California Supreme Court supported a reasonable conclusion that what respondent's attorneys did in respondent's case at least met the same standard. That is, "the state court's application of [this Court's] law fits within the matrix of [this Court's] prior decisions." *Yarborough* v. *Alvarado*, 541 U.S. at 665. Certainly, nothing this Court said in *Strickland* or its progeny "clearly established" that defense counsel must engage in "witness shopping" before a trial may be considered fair and reliable. Indeed, the Ninth Circuit itself repudiated a witness-shopping requirement in *Hendricks* v. *Calderon*, 70 F.3d 1032, 1038-39 (9th Cir. 1995), which was decided shortly after the California Supreme Court denied respondent's first state petition.

Burger v. *Kemp*, 483 U.S. 776 (1987), likewise provides an instructive example. Defense counsel talked with Burger's mother, a family friend who had acted as a "big brother" to Burger, and friends of Burger. *Id.* at 790-91. Counsel also hired a psychologist, who examined Burger. *Id.* Based upon this investigation, counsel elected to present no evidence at the penalty phase. *Id.* at 788. In finding that counsel performed to the constitutional minima,

this Court found that "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment." *Id.* at 794. Respondent's counsel investigated respondent's background to essentially the same extent as Burger's counsel did Burger's. Thus, the record before the California Supreme Court supported the reasonable conclusion that trial counsel's efforts satisfied the constitutional standard.

3. The Ninth Circuit not only disregarded the cautionary "doubly deferential" approach to claims of ineffective assistance of counsel this Court has mandated, *Yarborough* v. *Gentry*, 540 U.S. at 5, it added an unsupportable element to the performance inquiry. Ignoring the instructive examples of *Strickland* and *Burger*, 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. PA 38; compare *Bobby* v. *Van Hook*, 130 S. Ct. at 16-17. The Ninth Circuit compounded that error by relying on those standards to erect a constitutional rule that compels capital-case counsel to present, not just "humanizing evidence," see PA 86, but a specific kind of humanizing evidence: that the defendant had a bad childhood. PA 47, 49, 53, 54.

The resulting Ninth Circuit rule is precisely the sort of "rigid" and hindsight ineffective-assistance-of-counsel rule that this Court has condemned. See *Yarborough* v. *Gentry*, 540 U.S. at 8; *Strickland*, 466 U.S. at 688-89. As Chief Judge Kozinski noted in his dissent, "This is exactly what the Supreme Court summarily reversed the Sixth Circuit for doing in *Van Hook*. . . ." PA 86. *Knowles* v. *Mirzayance*, 129 S. Ct. at 1419, similarly rejected an attempt by the Ninth Circuit to engraft onto *Strickland* a rigid corollary requiring lawyers to pursue tactics when there is "nothing to lose." Yet here, the Ninth Circuit once again betrayed its misapprehension that there is a "one-size-fits-all" approach to the investigation and presentation of evidence at the sentencing phase of a death-penalty trial. Contrary to the Ninth Circuit's holding, nothing this Court has ever said would have led the California Supreme Court to conclude that such a rule was clearly established. Indeed, this Court has said precisely the opposite: "There are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689.

Under the Ninth Circuit's novel rule, trial counsel should have disregarded what respondent's own mother told them about respondent's background, and should have disregarded what the defense-retained psychiatrist told them. Instead, according to Ninth Circuit, trial counsel should have continued to dig into respondent's past and further investigated his mental state. 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. at 795. To survive "reasonableness" review under § 2254(d)(1), 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. And, while the Ninth Circuit ignored the conclusions of the expert the defense retained at trial—Dr. Stalberg—in its decision criticizing trial counsel for failing to further investigate possible mental health evidence, the California Supreme Court was not required to do so

Given the clear guidance of *Strickland*—particularly the mandated presumption that trial counsel performed competently—it was reasonable for the California Supreme Court to reject respondent's claims that trial counsel performed incompetently. On this basis alone, the California Supreme Court reasonably rejected respondent's claim of ineffective assistance of counsel.

B. The Facts Presented to the State Court Supported the Reasonable Conclusion that Respondent Was Not Prejudiced by Any Alleged Deficiencies of Counsel

The second prong of the *Strickland* test—prejudice—requires a showing of a "reasonable

probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.*; see also *Woodford* v. *Visciotti*, 537 U.S. at 22. Based on the facts presented to the California Supreme Court, it was reasonable to conclude that respondent failed to meet this standard.

1. Any argument that respondent was prejudiced by the purported deficiencies of counsel faces special and insuperable obstacles in this case. First, the circumstances of the crime were profoundly aggravating: respondent personally stabbed both victims in the chest, inflicting fatal wounds to both and then bragged how he and Brown "did it" and "got 'em good." Later, while washing his victims' blood off his knife, respondent said, "you got to do what you got to do."

And respondent himself presented damning aggravating evidence in his own guilt-phase testimony: he "gloried" in his criminal disposition, boasting of having committed "hundreds" of armed robberies during his lengthy and successful life in crime. PA 312-13, 379-80. In *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. Similarly, the original three-judge panel of the Ninth Circuit found that any alleged shortcomings in

trial counsel's investigation and presentation of the case in mitigation were harmless:

> 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 [*Terry*] *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.

PA 217. Given the profoundly aggravating evidence that came out of respondent's own mouth, the purportedly mitigating effect of the alternative background evidence that the Ninth Circuit relied upon would have been minimal.

2. Further, the California Supreme Court was well aware that the opinions of the only mental health expert who examined respondent at the time of trial would have been of no assistance in the case in mitigation. See JA 129-32. As noted, Dr. Stalberg informed trial counsel that respondent had no signs or symptoms of any brain damage or other mental disease or defect, other than his epilepsy, which had no bearing on his behavior during the crimes, and his

history of antisocial personality disorder. Respondent was

> able to describe his action on the night in question in great detail, omitting of course any direct involvement with the victims. It would not appear therefore he was significantly intoxicated or impaired on the night in question.
>
> Additionally, considering the statements attributed to the defendant by witnesses, it would appear that he was fully aware of what he was doing at the time of the offenses.

JA 130-31.

Finally, Dr. Stalberg concluded,

> As for mitigation, it does not appear Mr. Pinholster's epilepsy, hyperactivity as a child, or incorrigibility were related to the offenses except the incorrigibility reflects upon his psychopathic personality traits. He was not under the influence of extreme mental or emotional disturbance, nor did he have impaired ability to appreciate the criminality or conform his conduct to the requirements of the law.

Id. at 131. Tellingly, in neither his first nor his second state habeas petition did respondent ever withdraw the opinion of Dr. Stalberg. And in light of the well-reasoned opinions of Dr. Stalberg, the facts presented to the California Supreme Court compelled the conclusion that any mental-health case in mitigation

that respondent might have attempted to put together at the time of trial would have been unpersuasive in attempting to convince the jury to spare respondent's life.

Even if respondent had attempted to mount a penalty-phase defense predicated on mental disease or defect, he could only have presented the evidence that he actually had available to him. That evidence proved that during the murders respondent was sober and fully in control of his actions; it is simply that his actions were those of a remorseless, conscienceless psychopath. Such evidence would hardly have mitigated respondent's moral culpability for the two murders he committed with his own hands.

* * *

Section 2254(d)(1) should have precluded consideration of facts never presented to the California Supreme Court in examining whether the state court's rejection of respondent's claim of ineffective assistance of counsel was reasonable. Section 2254(e)(2) should have precluded the district court from taking evidence in support of facts that could have been, but were not, presented to the California Supreme Court. Finally, the facts presented to the California Supreme Court reasonably supported the conclusion that trial counsel acted reasonably when they relied upon the information they received from respondent and his mother and the advice of their psychiatric expert when formulating and presenting the case in mitigation at

the penalty phase of respondent's trial, and that respondent was not prejudiced by the purported errors.

CONCLUSION

The judgment the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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