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 FOR THE STATES OF PENNSYLVANIA, ALABAMA, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, MONTANA, NEVADA, NEW MEXICO, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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

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

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INTEREST OF *AMICI CURIAE*

Amici, the Commonwealth of Pennsylvania and seventeen other States, have an abiding interest in the proper construction and application of the standard for *habeas corpus* relief prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), because that standard preserves the proper balance of state and federal interests served by principles of comity. Rigorous enforcement of AEDPA's deferential standard, which permits *habeas* relief only where a state court's ruling on the merits of a claim is contrary to, or an unreasonable application of the then-existing clearly-established controlling precedent of this Court, *see* 28 U.S.C. § 2254(d)(1), not only promotes finality and the preservation of properly-rendered state court adjudications but also serves other interests important to the States' administration of criminal justice.

The sheer volume of ineffectiveness claims that nowadays are being pursued in capital and non-capital cases alike makes it all the more essential that state court rulings be evaluated correctly under AEDPA. Where a State is ordered to retry a defendant or to conduct a new sentencing hearing based on a *habeas* court's improperly-skewed review of an ineffectiveness claim, it is not only unjust because the State hasn't received its due under AEDPA, but it is also unduly burdensome. A State which finds itself in that unhappy situation is forced, for no valid reason, to deal with all of the traditional difficulties associated with repeating a court proceeding that took place in the distant past, *e.g.,* dead or incapacitated witnesses, dimmed memories, retrieval of evidence, and also with a significant outlay of its resources. To

have to shoulder that burden simply because a reviewing federal court has failed to adhere to this Court's repeated instructions about how to review ineffectiveness claims is unsupportable. Where, as here, an erroneous evaluation of a claim is compounded by the fact that relief was based, in significant part, upon facts that the district court was not entitled to consider because the petitioner did not present them to the state courts, although he could have, it is even more unfair.[1]

Finally, the States have an interest in seeing that the decisions of their many jurists who take seriously their shared responsibilities to interpret the Constitution and to safeguard the rights of citizens are afforded proper respect. *See Miller v. Fenton*, 474 U.S. 104, 111 (1985) (noting the "coequal" authority of this state court to interpret the Constitution). The state courts have not hesitated to grant relief on ineffectiveness claims when appropriate. *See*, *e.g.*, *Commonwealth v. Smith*, 995 A.2d 1143 (Pa. 2010) (capital defendant awarded new penalty hearing based on trial counsel's ineffectiveness); *Commonwealth v. Cooper*, 941 A.2d 655 (Pa. 2007)(same); *Commonwealth v. Collins*, 888 A.2d 564 (Pa. 2005)(same); *Commonwealth v. Zook*, 887 A.2d 1218 (Pa. 2005)(same); *Commonwealth v. Chmiel*, 639 A.2d 9 (Pa. 1994)(capital defendant awarded new trial based on trial counsel's ineffectiveness);

[1] Although this brief addresses only the latter of the issues presented in the petition for *certiorari*, *amici* agree with California and other *amicus curiae,* the Criminal Justice Legal Foundation, that it was error for the court of appeals to affirm the district court's grant of the writ because relief was improperly based on factual material that could have, and should have, been presented to the state courts, but was not.

Commonwealth v. Perry, 644 A.2d 705 (Pa. 1994)(same).

SUMMARY OF ARGUMENT

The *en banc* ruling of the court of appeals, which affirmed the district court's issuance of a writ of *habeas corpus* on the ground that trial counsel was ineffective for not presenting evidence of organic brain damage and childhood difficulties during the penalty phase of respondent's capital murder trial, is flawed for several reasons. Although the court of appeals' decision recognized that this case is subject to AEDPA's deferential standard, and that this Court's decision in *Strickland v. Washington*, 466 U.S. 688 (1984) also required "highly deferential" scrutiny of counsel's performance, it did not give effect to those principles.

Instead of conducting a proper review of whether the state court's ruling denying relief on this claim was an unreasonable application of *Strickland*, the *en banc* court of appeals essentially engaged in a *de novo* analysis of both prongs of the *Strickland* test for ineffectiveness and pronounced the state court ruling "unreasonable" in both respects because it didn't reach the same conclusions. The *en banc* court's evaluation of *Strickland*'s performance prong was marred by its undue reliance on American Bar Association (ABA) guidelines as the measure of constitutionally-adequate representation.

In contrast, the earlier panel decision of the court correctly recognized that review of respondent's ineffectiveness claim was governed by AEDPA and that, in keeping with the same, its role was not to substitute its judgment for state court's examination of the merits of that claim. Rather, it rightly understood that its very different responsibility was

to assess whether the state court's decision denying relief constituted an unreasonable application of *Strickland*. Looking at the issue of prejudice from this perspective, the panel majority concluded that, based on the record which was before it, the California Supreme Court decision did not reflect an unreasonable application of *Strickland*. Given the record that was before the state court, it could legitimately conclude there was no reasonable probability of a different outcome had the evidence respondent maintains should have been presented actually been put before the jury. The panel's conclusion that respondent was therefore not entitled to relief and its reversal of the district court's grant of the writ was sound.

ARGUMENT

I. The Decision of the Ninth Circuit Panel Was Based on A Proper Application of AEDPA and Its Conclusion that The District Court Erred In Granting Relief Was Sound.

It is both disturbing and frustrating that despite the length of time the Antiterrorism and Effective Death penalty Act of 1996 ("AEDPA") has now been in effect, and the many decisions of this Court providing guidance as to its application, there still remains some confusion about how a Sixth Amendment claim that counsel was ineffective must be evaluated during federal *habeas* review. More than a decade ago, in *Williams v. Taylor*, 529 U.S. 362 (2000), this Court made it very clear that the AEDPA is not "your father's §2254." In enacting AEDPA, "Congress wished to bring change to the field." *Id.* at 404. *See also id.* at 386 ("Congress wished to curb delays, to prevent 'retrials' on federal *habeas*, and to give effect to state convictions to the extent possible under law").

State criminal defendants may not look to federal *habeas* review for an opportunity to do over claims that have been decided on the merits by the state courts. AEDPA's new rule of deference only permits relief where a state court's adjudication of the merits of a claim was "contrary to or an unreasonable application of" this Court's controlling precedent. 28 U.S.C. §2254(d)(1). The writ may not be granted because the reviewing federal court believes that a state court decided a claim incorrectly. *Williams*, 529 U.S. at 411 (explaining that "[b]ecause Congress

specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect," a federal *habeas* court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly").

This Court's teachings have also made it clear that, when it comes to ineffectiveness claims, for which *Strickland v. Washington*, 466 U.S. 688 (1984) is the controlling precedent, *habeas* review must be "doubly deferential." *Knowles v. Mirzayance*, ___ U.S. ___, 129 S.Ct. 1411, 1420 (2009)(citing *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003)(*per curiam*). There are two layers of deference that figure in the proper scrutiny of those claims. Not only must a state court's decision be afforded the deference effected by the standard in §2254, but a reviewing federal court's evaluation of the state court decision must also recognize that *Strickland* required the state court to be "highly deferential" and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." 466 U.S. at 689. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

Strickland's instructions about the manner in which attorney performance must be evaluated, including, specifically, that a high degree of deference always attend any scrutiny, are not mere suggestions, but are instead *mandatory*. *See* 466 U.S. at 689 (explaining that "[b]ecause of the difficulties inherent in making the evaluation, a court *must* indulge a

strong presumption" that counsel's performance was within the bounds of what was professionally reasonable)(emphasis added). *Strickland* repeatedly stresses the importance of a reviewing court's obligations to presume counsel was professionally reasonable and to guard against second-guessing or judging things in hindsight. Put another way, there is always a "default setting" of competence that can only be altered if it is established that "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. *See also id.* at 690 ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment").

Strickland also makes unmistakable the need for flexibility when evaluating an attorney's work. *See id.* at 688 (explaining that there is no "checklist for judicial evaluation of attorney performance" and that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions how best to represent a criminal defendant"). "More specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance." *Id.*

A more rigid approach would be at odds with the practical reality that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 690 (citation omitted). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693.

In *Strickland*, the Court pointedly referred to some of the concerns which underlie the deferential, context-based analysis it prescribes:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Id. at 690.

In this case, the Ninth Circuit panel's majority decision reflects an appropriate adherence to these principles. (P.A. 183-184) (discussing AEDPA);[2] (P.A. 185) (identifying *Strickland* as the controlling procedure of this court and discussing its requirements). The panel reached its conclusion that

[2] "P.A." refers to the appendix that was filed with the petition for *certiorari.*

the district court erred in granting relief on this claim after determining that, with respect to the "prejudice" element, the state court decision did not involve an unreasonable application of *Strickland*.[3] (P.A. 202-222) In taking up that issue, it did precisely what it was supposed to do: it examined in detail what was contained in the record that was before the state court when it denied relief on Pinholster's ineffectiveness claim and then it considered whether, given what that record reflected, the state court decision denying the claim was objectively reasonable. *Id.*

Because the California Supreme Court did not issue an opinion detailing its reasoning—it was, of course, not required to, *see Early v. Packer*, 537 U.S. 3, 8 (2002)(a state court need not cite or discuss this Court's controlling precedent in its ruling)—the panel took an expansive approach in its review, taking into account all of what was before the state court when it ruled. As the panel observed, there was a very strong case for a capital sentence here. The double murders respondent committed were especially vicious, involving "the intentional infliction of great bodily injury." Also working strongly against respondent was the fact that during his testimony, he had not shown himself to be very sympathetic: unrepentant,

[3] *Strickland* made it clear that a court need not address both the performance and prejudice elements necessary for an ineffectiveness claim, nor is there any obligation to consider them in any particular order. A court may choose to proceed in the way it believes to be most efficient. 466 U.S. at 697. Here, the panel opted to address "prejudice," something the Court anticipated would often be the case. *Id.* ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.")

inappropriately laughing and smirking, disrespectful of the proceedings and those involved and bragging about his criminal history. *See* (P.A. 222)("In his testimony, Pinholster portrayed himself as a career criminal who reveled in his anti-social persona.") Other evidence documented a continuous pattern of criminal conduct in his life, at times including involving violence. Given all this, it would not be objectively unreasonable for the state court to determine that presenting evidence of organic brain damage and childhood difficulties would not have affected the jury's sentencing verdict, the panel concluded. *See* P.A. 221-222. ("The California Supreme Court, which acknowledged the fact that Pinholster 'gloried' in his criminal history, could reasonably have concluded that no amount of clever "after-the-fact" assessment by *habeas* defenses psychiatrists would have convinced even a single juror to change his vote.")

Following its analysis to its logical and merited conclusion, the panel reversed the district court's grant of *habeas* relief based on this ineffectiveness claim. (P.A. 222) That should have represented the final resolution of this already much-litigated claim, but unfortunately, it was not.[4] An *en banc* court of appeals decided to eschew this properly-reasoned review of respondent's ineffectiveness claim that ultimately led it to reverse the trial court's grant of relief. This Court should now reverse the *en banc* ruling and remand for reinstatement of the panel's

[4] As discussed, *supra*, the two-pronged test for ineffectiveness that *Strickland* established was intended to avoid "a second trial" in which the counsel's representation would be at issue. This case illustrates that all too often these claims have become the very thing the Court sought to prevent.

plainly correct disposition of this claim.

II. The *En Banc* Decision of the Ninth Circuit Fails to Afford the State Court Decision Denying Pinholster Relief on His Penalty Phase Ineffectiveness Claim Proper Deference and Should be Reversed.

1. Apparently believing that this Court's more recent decisions in *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard,* 545 U.S. 374 (2005) required a different type of evaluation, the court of appeals, sitting *en banc*, supplanted the panel's *Strickland*-compliant analysis with its own considerably different approach. While the majority opinion is chock full of correct recitations of the governing principles of AEDPA and type of scrutiny mandated by *Strickland, see, e.g.,* (P.A. 18-22) and (P.A.24-25), there is a major disconnect between what the court said about the law and how it applied it, or more precisely, how it failed to apply it. In stark contrast to the panel's decision, the court's *en banc* ruling makes no serious attempt to ascertain whether the decision of the California Supreme Court constituted a reasonable application of *Strickland* taking into account the record that it had before it and the state court's indisputable obligations "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689.

There is no worthy reason to believe that *Wiggins* or *Rompilla* required a different type of review of Pinholster's claim than what the panel conducted. Neither of these cases altered *Strickland*'s instructions about how performance must be assayed. *See* 466 U.S. at 688 (saying that there is no "checklist

for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances"). The rulings in *Wiggins* and *Rompilla*, both of which found counsel's performance to be constitutionally sub-par, merely reflect the application of those very principles in the particular factual contexts of those cases. *See Wiggins*, 539 U.S. at 522-533; *Rompilla*, 545 U.S. at 383-388.

The facts in *Wiggins* and *Rompilla* and those here are not equivalent, or even comparable, despite the majority's efforts to try to make it appear so. As the dissent correctly clarifies, there are major differences. (P.A.94-109) In *Wiggins*, the record showed that counsel did virtually nothing to prepare for the penalty phase. Critically, they had no reason to believe investigation would be unproductive. 539 U.S. at 522-533. Here, on the other hand, counsel clearly did engage in investigation and took logical steps to mine mitigation evidence. Counsel only ceased exploring mental health issues and the defendant's background any further after learning from persons they had every reason to believe to be knowledgeable—a psychiatrist and the defendant's mother, whose information mirrored that relayed by the defendant—that there did not appear to be anything they could use in either regard. Though the majority understates the amount of time counsel devoted to this effort, as the dissent shows in concrete terms, they were suitably attentive. (P.A.98-103)

This case is also not *Rompilla*. There, this Court found counsels' performance wanting chiefly because they failed to obtain readily available and

important information that was responsive to an aggravating circumstance the Commonwealth sought to establish.[5] 545 U.S. 383-388. That particular failure to investigate basically meant there was no defense presented on this important issue. There is no parallel concern here. Counsel did not fail to present a defense; they just presented a different one than the *en banc* majority thinks they should have.

2. Instead of examining counsel's performance as ordained by *Strickland*, the *en banc* majority refocused—actually, misfocused—the discussion, essentially making it an evaluation of whether trial counsel's performance satisfied the American Bar Association's (ABA) guidelines. (P.A.35-47) There is, of course, nothing wrong with looking to the ABA Guidelines as guides, as long as they remain guides. *See* 466 U.S. at 688 (where the Court said that, in taking measure of counsel's performance, a reviewing court may look to "[p]revailing norms of practice as reflected in the American Bar Association standards and the like" as "guides to determining what is reasonable," but also stressed that "they are *only* guides")(emphasis added). *Accord Bobby v. Van Hook*, ___ U.S. ___, 130 S.Ct. 13, 16-17 (2009). *See also id*. at 20 (Alito, J., concurring)(observing that the ABA's guidelines do not have "special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment,", nor should they "be given a privileged position"). Here, however, the majority morphed

[5] One of the aggravating circumstances that the Commonwealth asked the jury in *Rompilla* to find was that the defendant had a significant history of felony convictions involving the use or threat of violence. *See* 42 Pa.C.S. §9711(d)(9); *Rompilla*, 545 U.S. at 378.

these guides into criteria. Its action cannot be squared with the teachings of *Strickland*. *See Van Hook*, 130 S.Ct. at 16-17 (where the Court explains that a reviewing court's undue reliance on the standards fixed by a state or by a private professional organization does not sync with the Federal Constitution's "one general requirement: that counsel make objectively reasonable choices")(quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000).

At the time of Pinholster's 1984 trial, ABA Guidelines spoke to counsel's duty to investigate the merits of a case and mitigating evidence in only the most general of terms:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admission or statements to the lawyer constituting guilt or the accused's stated desire to plead guilty.

ABA Standards for Criminal Justice §4-4.1 (2d ed. 1980). *See Van Hook*, 130 S.Ct. at 17 (describing this standard as general in nature).

The ABA Standards did not prescribe any specific course that had to be followed or dictate in

detail how counsel had to meet this obligation. To the contrary, that was left to counsel's professional judgment, something that, at least tacitly, acknowledges something about which *Strickland* was clarion: that there is a wide range of professionally-competent performance. One size does not fit all and a reviewing court must always undertake an evaluation of an attorney's representation with this in mind.

Here, after reading this aspect of the majority's opinion, one is left with a clear impression that it had a fixed view of what had to be done by counsel to satisfy ABA standards and that this fixed view served as a silent checklist for assessing attorney performance. (P.A.35-47) This is not only wrong, *see Flores-Ortega*, 528 U.S. at 479 (reiterating that *Strickland* rejects "mechanistic rules"), but this approach also transmogrifies the standard of review for ineffectiveness claims and fundamentally alters it in a way that offends *Strickland*.

What's more, in its discussion of this element, the *en banc* majority seems to presume *deficient* performance instead of starting its examination, as *Strickland* commands, with the opposite and "strong presumption" that counsel's representation was professionally reasonable. 466 U.S. at 689.

It is interesting to note the possibility that the California Supreme Court may very well have looked to this ABA Standard as a guide when it assessed Pinholster's claim and may have reached a very different, but equally valid, conclusion that counsel met their duties thereunder. Obviously, we do not have any clear indication as there was no opinion

detailing its review that accompanied its ruling, but it cannot be automatically assumed that the ABA Guidelines did not inform the state court's decision.

But even if the California Supreme Court did not take the ABA Guidelines into account, there is nothing here to suggest that it did not take a proper measure of counsels' performance. If anything, the record evinces very good reasons to conclude that it, not the federal courts, had the best perspective for making the context-based assessment that *Strickland* requires. The California Supreme Court ruled relatively close in time to Pinholster's trial and therefore could be seen to have an appropriate current temporal orientation. (P.A.27) That court, too, had deep knowledge about the nature and quality of representation at that time, especially in capital cases. Like many States, California provides for an automatic appeal in capital cases. (P.A. 305) This means that, on an ongoing basis, that court would see other examples of attorney performance and strategies that were being employed during the same time frame and would have a sense of the broad spectrum of what was constitutionally adequate representation and what was not.

How greatly the *en banc* majority veered off course can be seen in the dissent authored by Chief Judge Kozinski and joined by Judges Rymer and Kleinfield, which illustrates in very detailed and concrete terms how trial counsel's performance in the penalty phase claim should have been treated under AEDPA and the teachings of *Strickland*. Not only does the dissent carefully reconstruct the circumstances in which counsel provided professional services but also highlights the fact that there were

aspects of the record to which the majority either turned a blind eye or otherwise failed to see as an important part of the calculus. (P.A. 70-163)

As the dissent correctly recounts, this is not a case where defense counsel ignored their obligation to prepare a case in mitigation, but rather a case in which counsel did not have very many options. Pinholster's attorneys had undertaken to investigate evidence of mitigation but what they located was not helpful and did not otherwise signal that continued efforts to explore mental health issues or the defendant's background would be profitable. Counsel had retained a qualified mental health professional—a psychiatrist—to evaluate respondent but that evaluation identified no condition that might potentially be a source of mitigation. Instead, the psychiatrist reported "that Pinholster did not manifest by history any significant signs of mental disorder or defect other than Antisocial Personality Disorder." (P.A. 177) Counsel also interviewed respondent's mother to explore his background and upbringing but again learned of nothing that might be used in mitigation. The information supplied by Pinholster's mother, did not differ from what Pinholster himself had told counsel. (*Id.*)

Accordingly, at the time the defense was preparing Pinholster's case for trial, counsel had no reason to think that they should proceed further along these lines. To the contrary, they could reasonably think they had hit a dead end and that they needed to try a different tack. Absent some evidence demonstrating that, at such time, counsel had reason to believe contacting other family members or seeking out an expert to testify about organic brain damage

might be helpful, the reviewing state court was obliged to indulge the strong presumption that counsel was performing in a constitutionally-acceptable manner. Indeed, this court has made it clear that *Strickland* does not require defense to pursue what appears to be a fruitless investigation. *See Wiggins*, 539 U.S. at 533 ("we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing").

At bottom, what is clear from the *en banc* majority's opinion is that exposes no misapprehension or other error on the part of the California State Supreme Court that could lead to a legitimate determination that it unreasonably applied *Strickland*.

3. The *en banc* majority's discussion of the prejudice element of Pinholster's ineffectiveness claim is equally, if not more, flawed. In critical part, it is based on conclusory, wholly speculative "facts" relating to the impact of the evidence that counsel did not present, *i.e.*, evidence of Pinholster's purported organic brain damage and evidence of difficulties he experienced as a child. *See* (P.A. 47-70) For example, the *en banc* majority says that "evidence of Pinholster's organic brain injury *would have* humanized him in the eyes of the jury. . . . " (P.A. 53) (Emphasis added.)

In reality, there is no support in the record for the majority's stated-with-certainty views on this point. Surely, it is possible that the evidence might be received this way, but it is equally also just as

possible it might not. There is nothing in this record that tilts the balance in favor of the majority's interpretation. But this is beside the point because there is a much larger problem that quickly emerges from a review of the court's discussion, namely, that it is conducting a *de novo* review on the issue of prejudice. As the panel correctly understood, because the state court adjudicated the merits of this claim, federal review had to be governed and shaped by §2254(d)(1)'s "contrary to or unreasonable application" standard. The issue before the court of appeals was not whether the state court's ruling was correct but whether it could be seen as a reasonable application of *Strickland*. As the panel's decision explained, it clearly could; the state court reasonably conclude on the record of this case that the evidence not produced would have little or no impact. (P.A.221-222)

This assessment aligns with what experienced practitioners and the state court before which they appear know: that evidence of mental health issues or other medical problems or a difficult childhood does not always have a positive effect. It can be perceived as excuse-making; as an attempt to avoid responsibility; or as an exercise in blame-shifting. It may even make things worse for a defendant, not better. *See*, *e.g.*, *Commonwealth v. Rivers*, 786 A.2d 923, 930 n. 5 (Pa. 2001)(where, discussing the possible impact of evidence of this sort, the Pennsylvania Supreme Court observed that: "It may be that upon hearing evidence of [a capital defendant's] appalling background, jurors might decide that she is incapable of rehabilitation, and deserving of the harshest punishment available"). It would therefore be reasonable for counsel representing a defendant such as Pinholster, who had committed brutal multiple

murders and who had engaged in offensive and alienating behavior in the jury's presence to choose not to go there. As Judge Kozinski's dissent aptly summed up the situation, "[t]his wasn't a case where defendant sat doe-eyed at counsel's table looking sad and contrite while others spoke for him." (P.A. 111)

Just as with the "performance" element, the *en banc* majority decision evinces no analysis from the proper perspective on this issue, and for this reason as well warrants reversal.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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