

No. 09-1088

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**In The  
Supreme Court of the United States**

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VINCENT CULLEN, Acting Warden  
of the California State Prison at San Quentin,  
*Petitioner,*

v.

SCOTT LYNN PINHOLSTER,  
*Respondent.*

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

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**REPLY BRIEF**

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**REPLY BRIEF**

The Antiterrorism and Effective Death Penalty Act of 1996 mandated a fundamental change in the attitude of the federal habeas corpus courts toward state-court determinations of federal constitutional claims. Gone are the days when a federal court could substitute its own independent de novo judgment regarding a claim's validity. Following the AEDPA reforms in 28 U.S.C. § 2254(d), a federal court may not grant relief unless the state-court decision was not only wrong but also “unreasonable.”

The Ninth Circuit violated § 2254(d) in two fundamental ways. First, it deemed the California Supreme Court decision to be “unreasonable” under § 2254(d)(1) on the basis of facts and evidence respondent never presented to the state court. This approach is antithetical to the deference to the state-court decision that Congress has mandated. See *Uttecht v. Brown*, 551 U.S. 1, 10 (2001). The State's argument that the Ninth Circuit erred is supported by the plain language of § 2254(d) as well as this Court's consistent recognition that whether a decision was “reasonable” is logically determined by what was known to the decision-maker at the time the decision was made.

The Ninth Circuit also erred by substituting its own view of the validity of respondent's ineffective-counsel claim rather than deferring to the California Supreme Court's reasonable rejection of the claim. The state habeas corpus record established that trial counsel had respondent examined by a qualified psychiatrist, who reported that respondent suffered

from no mitigating mental defects. It also established that trial counsel investigated and presented evidence of respondent's family and social background. It thus supported a reasonable conclusion, under the clearly-established federal law that bound the state court, that trial counsel acted as a reasonably diligent advocate under prevailing professional norms. And, given the severity of the crimes and the meager alternative case in mitigation that respondent offered, nothing in the state-court record compelled the California Supreme Court to conclude that respondent was prejudiced by counsel's purported deficiencies.

Respondent's contrary arguments are based on three fallacies. First, respondent asserts that there was no difference between his claim as presented in state court and the claim upon which the federal court granted relief. However, the Ninth Circuit acknowledged, and its opinion made manifest, that it was relying on new evidence in support of facts never presented to the state court in condemning the state-court determination as unreasonable.

Second, respondent and his amici argue that the Ninth Circuit's reliance on new facts is somehow consistent with the AEDPA statutory scheme. In their view, § 2254(d)(1) deference must be discarded because the claim transformed in federal court was no longer the claim that the state court rejected. But respondent's and amici's plan for do-it-yourself circumvention of deferential review would make a mockery of AEDPA's central habeas corpus reform.

Instead, § 2254(d) requires that the state-court merits decision must always be respected and reviewed for unreasonableness under clearly established law before habeas corpus relief may be granted. So the logical conclusion to be drawn from § 2254(d)(1) is the opposite of that drawn by respondent and his amici. Indeed, to avoid waste and to avoid undermining deferential review, resolution of the § 2254(d)(1) reasonableness question—in this Court’s words, the “only question that matters”—should precede any de novo review of the claim presented to the state court, and certainly any presentation of evidence to prove new facts in the federal proceedings.

Third, in pressing his substantive claim of ineffective counsel, as noted, respondent ignores the fact that well before the penalty phase trial, counsel hired a qualified psychiatrist who examined respondent and who, without any hint of limitation on his ability to give a complete diagnosis, reported that respondent suffered from no mitigating mental disease, defect, or disability. But, the California Supreme Court was not compelled to ignore this fact. Nor was the state court required to ignore the fact that trial counsel investigated and presented background and family evidence. Finally, the state court was not required to minimize the aggravating nature of respondent’s crimes when assessing the potential for prejudice from trial counsel’s purported deficiencies.

## **I. THIS COURT NEED NOT RECONSIDER RESPONDENT'S ARGUMENT AGAINST GRANTING CERTIORARI**

Respondent argues that this Court should dismiss certiorari as improvidently granted because “the factual predicate for Pinholster’s federal habeas petition was the same as for his state petitions.” Brief for Respondent (Resp. Brf.) at 32-38. However, respondent made this argument in opposing certiorari, Cert. Opp. at 19-24, and when this Court granted certiorari, it “necessarily considered and rejected that contention as a basis for denying review.” *United States v. Williams*, 504 U.S. 36, 40 (1992). Respondent has presented no basis for revisiting this already-rejected argument.

The allegations of fact presented to the California Supreme Court and the facts upon which the federal court predicated its decision to grant relief were fundamentally different. In his state habeas corpus petitions, respondent alleged that he “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. The expert witnesses respondent presented at the federal evidentiary hearing, however, testified that respondent did not have bipolar mood

disorder, and they were adamant that respondent was not in the throes of a seizure while he was stabbing his victims. Rather, according to the new experts, respondent suffers from organic brain damage that caused him (apparently for the only time in his entire life) to fly into an uncontrollable rage during which he murdered his victims. RA 197; Ninth Circuit Excerpts of Record (9th Cir. ER) vol. 5 at 1298, 1358; see District Court Evidentiary Hearing Reporter's Transcript (EH RT) of 9/10/2002, dkt. no. 221 at 82-83.

Tellingly, respondent points to no place in either of his state habeas corpus petitions where he alleged that trial counsel had erred in failing to investigate and discover that respondent was in the throes of a brain-damage-induced homicidal rage at the time of his crimes. Neither of respondent's experts in the California Supreme Court, Drs. George Woods and Irving Stalberg, diagnosed respondent with brain damage, and Dr. Stalberg at no point ever withdrew his 1984 diagnosis, set out in his report to trial counsel, that respondent was cognitively intact upon examination and did not appear to have brain damage.<sup>1</sup>

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<sup>1</sup> Respondent points to Dr. Stalberg's vague declaration in support of the second state habeas petition which avers that he would have made "further inquiry" into the question of possible organicity had he been aware of respondent's history. Resp. Brf. at 35 n.6. Nowhere, however, did Dr. Stalberg opine that respondent suffered from organic brain damage. RA 218-20. The

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By making this unsupportable argument, respondent parts company with the opinion below. The Ninth Circuit acknowledged that it was relying on new evidence in support of new facts. It held that “Congress did not intend to restrict inquiry under § 2254(d)(1) only to evidence introduced in the state habeas court, or to have federal courts imply any such restriction.” PA 29. Further, the Ninth Circuit held, “[w]e conclude that the mitigation evidence introduced at the federal evidentiary hearing is properly before us in considering Pinholster’s penalty phase ineffective assistance claim.” PA 35. And the Ninth Circuit relied upon a lengthy recital of new facts adduced from new evidence only ever presented in federal court in support of its ruling. PA 50-54. Respondent’s stubborn refusal to acknowledge what occurred in the Ninth Circuit, and explain how it comports with the law, is a tacit admission that the Ninth Circuit’s reliance on the new facts to grant relief was indefensible.

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California Supreme Court was not required to speculatively presume that respondent suffered from organic brain damage, when respondent never alleged such was the case in either of his state court petitions, and no expert he presented to the California Supreme Court ever so opined. It is ironic that respondent relies on Dr. Stalberg for this point, given Dr. Stalberg’s testimony at the federal evidentiary hearing that, upon the “further inquiry” vaguely alluded to in the declaration, nothing he saw caused him to doubt his original diagnosis that respondent is simply a psychopath. 9th Cir. ER vol. 4 at 976.

## II. PROPER § 2254(d)(1) DEFERENCE REQUIRES EXAMINING THE REASONABLENESS OF THE STATE-COURT DECISION IN LIGHT OF THE FACTUAL BASIS FOR THE CLAIM PRESENTED TO THE STATE COURT

A. The plain language of § 2254(d)(1) requires that the state-court determination be reviewed in light of the factual basis for the claim presented to the state court. Any other interpretation of the statute does violence to the entire purpose of § 2254(d) and to the well-settled definition of “unreasonable,” as this Court has defined that term. Respondent would have this Court conclude that, because Congress did not employ additional language reiterating that reasonableness depends on the facts known to the decision-maker at the time the decision was made, this Court must read the “unreasonableness” limitation out of the statute entirely.

But at the time Congress passed AEDPA, it was firmly established that whether a decision was “reasonable” was determined in light of the facts known to the decision-maker at the time the decision was made. See *Graham v. Connor*, 490 U.S. 386, 396-97 (1989); *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *Scott v. United States*, 436 U.S. 128, 137-38 (1978). Well-settled principles of statutory construction require an interpreting court to conclude that Congress was using the term in the same sense as it had previously been interpreted by this Court. *United States v. Noland*, 517 U.S. 535, 539 (1996). In this

specific context, such a reading requires an interpreting court to conclude that when Congress used the term “unreasonable,” it meant what this Court said it meant in *Graham*, *Strickland*, and *Scott*: that is, unreasonable in light of what was known to the decision-maker at the time the decision was made.

Respondent’s contrary interpretation violates this principle of statutory construction. Indeed, under respondent’s interpretation, the term “unreasonable” means what this Court has repeatedly held it does *not* mean. As this Court has instructed, the question under § 2254(d)(1) is not whether the state-court decision was correct, but whether it was reasonable. *Renico v. Lett*, 130 S. Ct. 1855, 1866 (2010); *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004). But, as even respondent recognizes, Resp. Brf. at 50-51 n.11, once new facts never presented to the state court are considered, the federal court is no longer considering the claim presented to the state court. Introducing facts that were never before the state court into the analysis changes the question to whether the state court was correct in denying relief. Respondent’s construction of the statute thus would neutralize the central reform of federal habeas corpus that Congress enacted in AEDPA.

B. Respondent retorts that interpreting § 2254(d) as limiting reasonableness review to the facts presented to the state court “would render § 2254(e)(2) superfluous.” Resp. Brf. at 54-63. But respondent errs in assuming that, because he might

avoid preclusion of his claim under § 2254(d)(1), he therefore becomes entitled to relief. Even where the state-court determination of the claim in light of the factual allegations presented to the state court amounts to an unreasonable application of law under § 2254(d)(1), the petitioner must still prove that the factual allegations are true. It is not uncommon that even superficially compelling factual allegations presented to the state court fail in the crucible of an evidentiary hearing. Section 2254(e)(2), limiting the prisoner's opportunity to prove facts he failed to develop in state court, retains continued applicability where the state-court adjudication was unreasonable, or where the state court has not adjudicated the merits of the claim at all. Certainly there will be situations where resolution of the § 2254(d)(1) inquiry will render resolution of the § 2254(e)(2) question "unnecessary," as this Court held in *Michael Williams v. Taylor*, 529 U.S. 420, 444 (2000). But that reality does not read § 2254(e)(2) out of the statute. Rather, it is the natural result of the statutory scheme as envisioned by Congress and already endorsed by this Court in *Michael Williams*.

C. Respondent, further, endorses the Ninth Circuit's view that the only limitation on holding an evidentiary hearing under § 2254(e)(2) is that found in traditional exhaustion principles. In short, in respondent's and the Ninth Circuit's view, § 2254(d)(1) did nothing to limit the federal habeas court's power to review de novo and grant relief on any claim simply by permitting the petitioner to

present facts never presented to the state court, so long as those new facts do not offend traditional exhaustion principles. This view is wrong. Given the crux of the claim on which the Ninth Circuit granted relief—that trial counsel failed to present evidence of organic brain damage at the time of trial—respondent’s failure to first present the factual basis supporting his claim to the state court should have precluded a federal evidentiary hearing under § 2254(e)(2). For respondent “failed to present” to the California Supreme Court the central facts underlying the Ninth Circuit’s decision to grant relief: that respondent suffers from organic brain damage that drove him into a homicidal rage at the time of the murders.

D. The American Civil Liberties Union posits a hypothetical in which a state court overrules a defendant’s objection to evidence of his confession by crediting police officer testimony that he had waived his *Miranda* rights; and then, after expiration of a state statute of limitations on post-judgment attacks, the police belatedly disclose a recording showing that the defendant had invoked his rights instead. ACLU AC Brf. at 17-18. The ACLU complains that, if the rule advocated by the State were adopted, the prisoner would not be entitled to an evidentiary hearing in federal court to prove an unquestionably valid *Miranda* claim.

Although the ACLU might conceive of its hypothetical as illuminating a “perfect storm” of intolerable unfairness under the State’s interpretation of § 2254(d)(1), it does nothing of the sort. In the hypothetical scenario, the prisoner would retain a seemingly viable due-process discovery claim under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 514 U.S. 419 (1995), as well as an apparent false-testimony claim under *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). If a state court simply closed its doors to the diligent presentation of such claims, as the ACLU improbably speculates, then there would be no state-court determination on the merits of the claims entitled to deferential review in federal court. So § 2254(d)(1) would be no impediment to granting the prisoner relief.

Of course, the ACLU’s hypothetical prisoner would have to overcome the separate federal-court procedural bar that likely would descend on any claim a prisoner forfeits under state procedural law. See *Coleman v. Thompson*, 501 U.S. 722, 729-732 (1991). Just as the federal court itself would not reopen its own previous adjudication of a state prisoner’s constitutional claim whenever the prisoner seeks to present new evidence, see 28 U.S.C. § 2244(b)(2), state courts are hardly required to do so either. But that has nothing to do with § 2254(d)(1).

On the other hand, the ACLU hypothetical highlights fundamental deficiencies in the Ninth Circuit's decision in this case. Here, the evidence and facts on which the Ninth Circuit predicated relief were uniquely available to respondent at all times in state and federal court. They consisted of his own family background, his own personality, and his own purported mental condition. If the mental state diagnoses on which the Ninth Circuit relied were available to trial counsel at the time of trial in 1984, then they were necessarily available to state habeas counsel in 1995. But state habeas counsel never presented those diagnoses to the state court. Thus, the very theory of respondent's claim, predicated upon the assertion that the evidence was available and should have been presented at the time of trial, fatally undermines any claim that it was impossible for respondent to present the facts to the state during the subsequent state habeas corpus proceedings. This is why respondent has never explained why he did not present the opinions expressed in the reports of Drs. Vinogradov and Olson in either of the petitions he filed in state court. The lack of an explanation is fatal to any conclusion that respondent exercised the diligence required by § 2254(e)(2) before a federal evidentiary hearing is authorized.

The ACLU hypothetical also brings into relief the fact that no statute of limitations operates in California habeas corpus proceedings. See *In re Clark*, 855 P.2d 729, 738 (Cal. 1993). As Chief Judge Kozinski noted in his dissent, nothing prevented respondent from presenting his new facts to the state court before

asking the federal courts to consider them. PA 82-83; see *In re Robbins*, 959 P.2d 311, 328-30 (Cal. 1998). Unlike the hapless defendant in the ACLU hypothetical, respondent had available to him and actually presented the Vinogradov/Olson diagnoses in federal court, but declined to return to state court to present them there.

Finally, the ACLU hypothesizes late-discovered evidence completely consistent with the facts alleged by the prisoner to the state court. But, here, the evidence respondent presented to the federal court proved that the factual allegations he had made to the state court were false; and the facts found by the federal court were contrary to the facts that had been alleged to the state court. Building on the ACLU's hypothesis, it would be as if the late-discovered recording unquestionably proved that the prisoner never invoked his rights—just as the hypothetical police officers had testified. Under those circumstances the state-court decision to reject the claim presented to it would not only have been reasonable, it unquestionably would have been correct. Here, the evidence presented at the federal evidentiary hearing in the instant case, and the facts found true by the federal court, demonstrated that the factual allegations respondent presented to the California Supreme Court were false.<sup>2</sup> The California Supreme Court's decision

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<sup>2</sup> In addition, the ACLU hypothetical posits a crucial factual determination by the state court that implicates questions about the operation of separate fact-finding provisions in § 2254(d)(2) and (e)(1)—not at issue in the claim of § 2254(d)(1) legal error

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was not only reasonable, see pp. 14-24, post, it was correct.

### **III. THE CALIFORNIA SUPREME COURT REASONABLY REJECTED RESPONDENT'S CLAIM OF INEFFECTIVE COUNSEL**

As outlined in the State's brief on the merits, the facts presented to the California Supreme Court compel the conclusion that the state-court decision rejecting respondent's ineffective-counsel claim was correct—or at least objectively reasonable when viewed through the “double deference” required by AEDPA and *Strickland*. See *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2004) (per curiam). Respondent, however, betrays a fundamental misunderstanding of AEDPA and *Strickland*. For, much like the Ninth Circuit did in the opinion below, respondent engages in an analysis of the substantive claim of ineffective assistance of counsel without showing deference to trial counsel's decisions, and without ever addressing whether the state court could have reasonably come to another conclusion. Resp. Brf. at 39.

A. Respondent ignores a number of facts that undermine his claim. For example, respondent—as the Ninth Circuit did—places great weight on defense counsel Wilbur Dettmar's assertion, made when the

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here—that his Court has yet to resolve. See *Wood v. Allen*, 130 S. Ct. 841, 851 (2010).

trial court was considering whether to permit the prosecution to present aggravating evidence, that he had done nothing to investigate available mitigating evidence because he had not received proper notice of the prosecution's aggravating evidence. See RT 7249-50. Respondent and the Ninth Circuit also rely upon the statement in one of defense counsel Harry Brainard's declarations that "Mr. Dettmar and I did not prepare a case in mitigation." JA 214. However, the trial records and documentary evidence provided by respondent proved that these assertions were false.

Dettmar's statement to the trial court was made on April 24, 1984. RT 7223, 7249-50. But, Dr. Stalberg's letter to Dettmar was dated March 14, 1984, and referred to an interview of respondent he had conducted on March 11, 1984, pursuant to an even earlier confidential order of the trial court. JA 129-32. In that letter, Dr. Stalberg specifically referred to the directions he had been given: "The issues are past mental state *as well as mitigation*, if the special circumstances are found to be true." JA 129 (emphasis added). Further, in a paragraph that begins "[a]s for mitigation," Dr. Stalberg referred to "extreme mental or emotional disturbance," and to whether respondent had "impaired ability to appreciate the criminality or conform his conduct to the requirements of the law." JA 131. These statements precisely echo language found in California Penal Code section 190.3, the statute defining the factors considered by the penalty-phase jury in determining whether to sentence the defendant to death or to life in prison without parole. JA 131. The letter therefore proves that trial counsel had begun investigating

penalty phase defenses by March 11, 1984, six weeks before the penalty phase commenced.

In support of his state habeas petitions, respondent presented the California Supreme Court with Dr. Stalberg's letter to defense counsel. Exhibits in Support of Petition for Writ of Habeas Corpus, California Supreme Court case no. S034501, district court docket no. 49, lodgment C.2, exhibit 5. Thus, respondent's allegation that trial counsel had not investigated mitigating evidence prior to the penalty trial was expressly and directly contradicted by the undisputed documentary evidence submitted by respondent himself. This evidence provided a reasonable basis for the California Supreme Court's decision rejecting the ineffective-counsel claim.

Respondent would have this Court believe, however, that the California Supreme Court willfully blinds itself to anything not contained in the four corners of the petition, and that it automatically accepts as axiomatic any factual allegation in the petition, regardless of how far-fetched or how inconsistent with the evidence attached to the petition or with the underlying record. Respondent misunderstands California law. A habeas corpus petitioner in California bears the initial burden of establishing "a prima facie case" for the requested relief. *In re Lawler*, 588 P.2d 1257, 1259 (Cal. 1979). Unless "it initially appears from the allegations of a habeas corpus petition filed in an appellate court, and from '*any matter of record pertaining to the case,*'" that the required "prima facie" showing has been made, the court will not issue the order "to show cause why the relief sought should not be granted." *In re Hochberg*,

471 P.2d 1, 873 n.2 (Cal. 1970) (emphasis added). Thus, under California law, the entire record of the case is considered when passing on the question of whether the petition alleges a prima facie case of constitutional defect. *In re Clark*, 855 P.2d at 741-42 (state habeas court assumes the often burdensome task of reviewing the state-court record to see if the claims in the petition have merit and to ascertain if the purported error was prejudicial).<sup>3</sup>

While respondent *alleged* that trial counsel had failed to investigate the availability of mitigating mental health evidence, the California Supreme Court was aware that trial counsel had done exactly that investigation, because the records provided by respondent himself—in the form of Dr. Stalberg’s report to trial counsel—established that indisputable fact. The California Supreme Court was also aware—because the documents supplied by respondent also established it—that Dr. Stalberg had offered respondent a number of unhelpful opinions that were in no way tentative, and that in no way expressed any reservation about his confidence in opining on respondent’s mental state and on the unavailability of mental defenses at either the guilt or penalty phases

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<sup>3</sup> No other rule makes sense. Following respondent’s logic, a California state petitioner alleging, for example, that he was completely denied counsel at trial would always be entitled to an order to show cause and an evidentiary hearing for the alleged Sixth Amendment violation, even if the trial record indisputably showed that he was represented by counsel at every stage of the proceedings.

of the trial. Under these circumstances, the state court reasonably concluded that respondent had failed to make out a prima facie claim that trial counsel acted in a prejudicially deficient manner. See *Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (state court unreasonably accepted as true allegations contradicted by the documentary record).

B. On the question of family background evidence, the California Supreme Court was also aware that trial counsel had actually presented mitigating background and family evidence, in the form of testimony from respondent's mother, Bernice Brashear. That respondent was willing on habeas corpus to question the decision regarding what evidence to present was hardly surprising, given the result of his trial. However, respondent never alleged that he had alerted trial counsel that his mother's testimony was in any way inaccurate,<sup>4</sup> or that there were other family members available who would offer an alternative view on his childhood. Nor did respondent proffer a declaration from Brashear, either recanting her testimony or indicating that she had told trial counsel something that would have alerted them that others in the family might have a different view of things.

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<sup>4</sup> There is a reason for this: respondent's recollections of his young life more closely resembled his mother's penalty-phase testimony than the alternate background/family evidence presented at the federal evidentiary hearing. See JA 133-48.

Further, the California Supreme Court was aware that the mental health investigation trial counsel undertook revealed that respondent suffered from no mitigating mental disease or defect. Quite the opposite: the picture of respondent's mental health that emerged was aggravating. *Darden v. Wainwright*, 477 U.S. 168, 186-87 (1986) (sociopathy evidence is aggravating). Failure to put on this evidence was not incompetent and did not in any way prejudice respondent.

Finally, given the "piddling" mitigating value of the alternative family history evidence respondent presented to the state court, PA 84, respondent likewise failed to meet his burden of demonstrating that the California Supreme Court should have felt compelled to conclude that respondent was prejudiced by trial counsel's alleged deficiencies. The state court decision, therefore, was reasonable.

C. Respondent complains that the State did not address (to his satisfaction) three of this Court's cases analyzing claims of ineffective assistance of counsel: *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510, and *Terry Williams v. Taylor*, 529 U.S. 362 (2000). The State, however, addressed all three cases in the reply brief in support of the petition for writ of certiorari. Cert. Reply at 7. As the State noted in that brief, this Court's holdings in those cases did not in any way alter the analytical framework for assessing claims of ineffective assistance of counsel. *Id.* The State did not re-address

them in the opening brief on the merits because they are inapposite.

*Terry Williams*, *Wiggins* and *Rompilla* are simply as-applied examples of prejudicially deficient performance that did not alter the basic rules articulated in *Strickland*. *Rompilla v. Beard*, 545 U.S. at 380-81; *Wiggins v. Smith*, 539 U.S. at 521; *Terry Williams v. Taylor*, 529 U.S. at 367. None of those cases compel the conclusion that the California Supreme Court's decision denying respondent relief was unreasonable.

In *Rompilla*, 545 U.S. at 388, this Court held that trial counsel was ineffective for failing to conduct any investigation of the evidence that the prosecution said that it was going to introduce in aggravation. Here, by contrast, trial counsel investigated the availability of mitigating mental health evidence by having respondent examined by a qualified psychiatrist.

In *Wiggins*, 539 U.S. at 527, 534, this Court criticized counsel for failing to further investigate when the initial investigation revealed that the defendant had a "disgusting" background of "misery." Here, by contrast, the initial investigations revealed nothing untoward about respondent's background, which was perfectly consistent with the report that was received from the retained expert psychiatrist. This Court has made it clear that it is reasonable for a trial attorney to make decisions regarding what

avenues to further investigate based upon the results of an initial investigation. *Burger v. Kemp*, 483 U.S. 776, 795 (1987); *Strickland v. Washington*, 466 U.S. at 690-91.

Finally, in *Terry Williams*, 529 U.S. 362, the state supreme court erroneously held that *Lockhart v. Fretwell*, 506 U.S. 394 (1993), had altered the *Strickland* analysis. This Court held, therefore, that no § 2254(d)(1) deference was due to the state court's determination of the matter. As to the substantive *Strickland* analysis, Terry Williams's lawyers did not investigate records that they knew existed because they erroneously and incompetently believed that they could not gain access to them. 529 U.S. at 395-99. Here, by contrast, counsel investigated respondent's background and found the evidence they uncovered during that investigation to be consistent with what their expert told them about respondent's mental health. There was no unexplored tantalizing lead such as was present in *Terry Williams*.

Instead, every lead that respondent's trial attorneys explored came back to the same basic set of facts: respondent had a childhood unmarked by substantial abuse or neglect. In light of this Court's teaching in *Burger v. Kemp*, 483 U.S. at 795, and *Strickland v. Washington*, 466 U.S. at 690-91, that an attorney need not continue investigating a particular avenue if it can be reasonably concluded that it will not be fruitful, the California Supreme Court's

decision rejecting the claim was not only reasonable, but also correct.

D. Respondent argues that the State was wide of the mark in asserting that the Ninth Circuit opinion articulated a rule requiring that a specific form of mitigating evidence always be presented—specifically, evidence that the defendant had a bad childhood. Resp. Brf. at 42-43. However, the amicus curiae brief of the Disability Rights Legal Foundation argues not only that evidence that the defendant had a bad childhood must always be presented, but further that trial counsel is constitutionally deficient in any capital case in which the jury is not presented with evidence that the defendant has brain damage. DRLF AC Brf. at 5-12. The DRLF provides no basis for its implicit assertion that the California Supreme Court should be charged with the knowledge of the alleged correlation between brain damage and capital crimes presented in this case for the first time in the DRLF brief. Nor does the DRLF brief explain how “clearly established” law compelled the California Supreme Court to apply this startling new interpretation of *Strickland* to the instant case.

The DRLF argues that the Constitution required trial counsel to reject their retained expert’s opinion that respondent did not suffer from brain damage and had no mitigating mental disease or defect, and seek out additional expert opinions until trial counsel found an expert willing to opine that respondent

had brain damage. DRLF AC Brf. at 16.<sup>5</sup> However, even the Ninth Circuit has rejected the suggestion that the Constitution compels trial counsel to find a particular opinion, regardless of how many experts must be retained and discarded in order to find it. See *Hendricks v. Calderon*, 70 F.3d 1032, 1038-39 (9th Cir. 1995) (rejecting an argument that an attorney must engage in expert-witness shopping). To the contrary, a trial attorney may reasonably abandon investigation into a potential line of defense if it is determined that it is not helpful or may be harmful. *Wood v. Allen*, 130 S. Ct. at 849-51; *Strickland v. Washington*, 466 U.S. at 690-91.

Although the DRLF brief argues that respondent was prejudiced by the purported errors of counsel, respondent presented to the California Supreme Court no declaration from Dr. Stalberg describing any ways his opinions about respondent's mental health would have been different had he been given the additional evidence gathered by habeas corpus counsel.<sup>6</sup> Because respondent never alleged facts

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<sup>5</sup> The DRLF's assertions about an alleged correlation between brain damage and capital crimes were never presented to the California Supreme Court (or to the district court, or to the Ninth Circuit), and the studies cited by the DRLF in support of the alleged correlation significantly post-date respondent's trial. DRLF AC Brf. at 7-11 nn.2-15. There is thus no basis for concluding that trial counsel had any reason to know about the DRLF's alleged correlation between brain damage and capital crimes.

<sup>6</sup> The reason for this omission became clear during the federal evidentiary hearing: none of the information gathered by  
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establishing a reasonable probability of a more favorable determination had trial counsel done the things respondent told the California Supreme Court that trial counsel should have done, *Strickland v. Washington*, 466 U.S. at 694, it is impossible to conclude that the state-court decision rejecting the claim was unreasonable.

\* \* \*

The Ninth Circuit's decision to grant relief based on new evidence in support of facts never alleged to the state court is contrary to the plain language of § 2254(d)(1) and is at war with the central AEDPA habeas corpus reforms. Proper application of the § 2254(d)(1) rule of deference compels the conclusion that the California Supreme Court's decision rejecting respondent's ineffective-counsel claim was reasonable under clearly established law in light of the facts alleged to that court. Federal habeas corpus relief therefore is unavailable.



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habeas counsel in the years following respondent's trial called into doubt Dr. Stalberg's original diagnosis that respondent is simply a psychopath. See Dkt. no. 202 at 6; 9th Cir. ER vol. 4 at 976.

**CONCLUSION**

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

Respectfully submitted,

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