No. 09-1088

In The
Supreme Court of the United States

VINCENT CULLEN, JR., Acting Warden,
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 RESPONDENT

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QUESTIONS PRESENTED

1. Whether a federal court may grant relief in a case governed by AEDPA based, in part, on evidence presented at an evidentiary hearing permitted by 28 U.S.C. § 2254(e)(2) and *(Michael) Williams v. Taylor*.

2. Did trial counsel, who announced at the guilt verdicts that they had "done nothing to prepare mitigation"; declined an offered continuance; worked only 6.5 hours to prepare; and despite compelling evidence of Respondent's brain damage, presented just one lay witness (whose testimony was harmful); render ineffective assistance at penalty?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

Scott Pinholster's trial attorneys were unaware that a death penalty phase would follow a guilty verdict at his murder trial; they had neglected to look in the file and read the state's notice that it was seeking death. When, after the guilt verdict, the attorneys learned of the penalty phase, they proceeded without additional investigation, declining the trial court's offer of a continuance. Six hours of preparation later, they presented one witness, Pinholster's mother. Their preparation did not include investigation of Pinholster's background for physical abuse. It did not include looking for educational or medical records or hiring anyone to evaluate Pinholster beyond the brief, incomplete evaluation that was conducted during guilt phase.

These failures meant, as the evidence submitted to the state habeas court showed, that readily discoverable mitigating evidence went unheard. The jury was never told that Pinholster was repeatedly abused by his stepfather and his grandmother, or that he came from a family rife with mental illness. They never were told that Pinholster was designated for special education classes, committed to a mental hospital at age 11, and suffered two serious childhood head injuries resulting in organic brain damage. The state habeas court ruled, without explanation, that the attorneys had not been ineffective. After an evidentiary hearing, a federal district court granted habeas relief. The court of appeals affirmed, agreeing that the record demonstrated that counsel had rendered ineffective assistance. The case is before

this Court on the State's challenge to the ruling of the lower courts.

1. The Offenses

At a party, Pinholster, David Brown and Art Corona agreed to steal drugs from Michael Kumar, a marijuana dealer whose house had been the target of a "dope ripoff" on prior occasions. Pinholster had been drinking excessively and smoking marijuana at the party. (PA 167-69, 171-72.)[1]

Corona drove them toward Kumar's house, stopping en route at the home of Pinholster's friend, Lisa Tapar. Pinholster left the car and began pounding on the front door. When Tapar answered, Pinholster announced he "had a message from God." Alarmed by Pinholster's appearance and behavior, Tapar and her friend slammed the door shut and refused to speak with him further. Tapar told another guest inside the home that Pinholster was acting "crazy." Pinholster repeatedly stabbed a knife into the door, then vandalized Tapar's car. (RT 4666-71.)

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[1] PA refers to Petitioner's Certiorari Appendix; RA refers to Respondent's Certiorari Appendix; JA refers to the Joint Appendix. RT refers to the state trial court Reporter's Transcript; CT refers to the state trial court Clerk's Transcript; CT Supp. refers to the state trial court Supplemental Clerk's Transcript. EHRT refers to the federal court Evidentiary Hearing Reporter's Transcript; CR refers to the docket number of federal district court case number CV 95-06240.

After this bizarre incident, Pinholster, Brown, and Corona went to Kumar's house. They found it empty and the back door unlocked. (PA 307-08.) While Pinholster and his cohorts ransacked Kumar's home, Thomas Johnson (who worked for Kumar's marijuana operation and was house-sitting for him) and Robert Beckett unexpectedly entered through the front door. (PA 4.) As Pinholster, Brown and Corona headed for the back door, Johnson and Beckett confronted them, yelling "You guys are caught finally!" (CT 207.) Johnson and Beckett were stabbed to death.

Pinholster took each victim's wallet, and he, Brown and Corona left in Corona's car. Pinholster and Brown commented that they "got 'em good." (RT 4947.) The men divided up the proceeds of the robbery: $23 and a quarter-ounce of marijuana. (PA 309.)

When he learned that the police were looking for him, Corona turned himself in and told them that Pinholster had stabbed the victims. He later changed his account to implicate Brown in one of the stabbings. (PA 309.) Based on Corona's statements, Pinholster and Brown were arrested.

2. The Capital Charges and Trial

Pinholster and Brown were joined for trial. Marvin Part was appointed as counsel for Pinholster. Part, however, refused to investigate the case for over a year, leading Pinholster to represent himself. (RT 109-A; 117-A.)

The prosecutor who headed the branch where the charges were filed recommended not seeking the death penalty. Although the district attorney agreed with regard to Brown, he nevertheless sought the death penalty against Pinholster. (RA 25.)

After Pinholster asked for new counsel, Harry Brainard was appointed. (PA 8.) Two weeks before trial, Wilber Dettmar was added as second counsel. (PA 172-73 n.5.) Brainard and Dettmar incorrectly believed that because they never personally received notice of the prosecution's intent to present aggravating evidence at a penalty trial – notice had only been given to Pinholster when he was *pro se* – the case could not proceed to penalty phase. (PA 264-25.) Brainard declined the prosecutor's offer to review her "entire file" (RT 7259-60), which contained a copy of the written notice regarding penalty. (RT 7251.) Accordingly, they took no actions before trial to prepare for penalty phase.

Counsel did not file any pretrial motions, but did undertake some minor preparation for defense of the guilt phase. During the prosecution's case-in-chief, defense counsel retained forensic psychiatrist John Stalberg to interview Pinholster and ascertain his state of mind at the time of the homicides. Stalberg conducted a single, brief interview of Pinholster. Stalberg also reviewed a police report and a 1978 probation report about Pinholster, but counsel failed to provide him with the educational, medical, or psychiatric records that he requested before the examination. (PA 177, 266-67.) Stalberg concluded

that Pinholster was not mentally ill. He sent counsel a report of his conclusions. (JA 129-32.) Stalberg never heard back from trial counsel.

a. The Guilt Phase

At trial, the prosecution relied heavily on the testimony of Corona. In exchange for having murder charges against him dropped, Corona testified that he watched in horror as Pinholster and Brown killed the victims and stole their wallets. (PA 4; CT Supp. 158-59.) He said that as Johnson and Beckett came around the house to block their exit, Pinholster went "crazy." He began stabbing and kicking Johnson and then stabbing Beckett. (RT 5003-17.) Corona said that Brown stabbed Johnson in the chest and later bragged that he had "buried the knife to the hilt" in Johnson. (PA 4.)

Pinholster called several witnesses who testified that he remained at the party all evening, where he became severely intoxicated. (PA 313.) Pinholster testified in his own defense with the approval of trial counsel. He admitted to burglarizing the Kumar house before the party. He said that Corona asked him for Kumar's address so that Corona could burglarize the drug dealer's house later. Pinholster testified that he could not have committed the robbery-murders, in which the victims had been stabbed to death, because he used only a gun during the "hundreds" of robberies of drug dealers he had committed over the years. The jury convicted

Pinholster and Brown of two counts of capital murder. (PA 6.)

b. The Penalty Phase

After the verdicts, Pinholster's counsel admitted in open court that they had "not prepared any evidence by way of mitigation" because they believed notice of the prosecution's intent to seek death and present aggravating evidence had not been given. (RT 7250.) The judge overruled the objection, holding that Pinholster himself had received proper, timely notice before counsel were appointed. The judge offered to continue the penalty trial to give counsel time to prepare. Counsel declined the offered continuance, noting that extra time would not "make a great deal of difference." Counsel then spent 6.5 hours preparing for the penalty phase. (PA 8-9.)

During penalty, the prosecution called six members of law enforcement to testify about their interactions with and opinions of Pinholster. Probation Officer Jack Taube testified that Pinholster was a gang member, even though he came from an "upper middle-class type of home." (PA 173.) He stated that, during a violation hearing, Pinholster had a "violent outburst" in which he struck a bailiff. (*Id.*) Police officer David Kaufman characterized Pinholster as "belligerent" and gave his lay opinion that Pinholster had faked an epileptic seizure when arrested for assault. (PA 173-74.) Police officer Ernest Guzman opined that Pinholster had faked an epileptic seizure

during another arrest and reported that he had acted violently at a hospital. (PA 174.) Deputy Sheriff Michael Wilson testified that Pinholster was involved in a racial fight in jail, refused to follow instructions, and struck a correction officer. (PA 174, 286, 409.) Deputy Sheriff Thomas Piggott testified that Pinholster was "one of the two or three most violent inmates" in jail. (PA 408.) Deputy Sheriff Joseph Barrett testified that, following the guilt verdicts, Pinholster said he was so "mad" at Corona for testifying that he wanted to kill him. (PA 175, 409.)

The prosecution also called two lay witnesses. Theodore Mesquita testified that Pinholster cut his arm with a razor during a fistfight. (PA 7.) Pinholster's former wife, Cathy Smith, testified that Pinholster hit and broke her jaw during a seizure, but the prosecutor impeached her with her previous statement that Pinholster was "pulling a fake seizure." (PA 8.)

Trial counsel stipulated that Pinholster sustained a prior conviction for kidnaping with use of a knife. Counsel also stipulated that Pinholster had several disciplinary infractions while in prison. Counsel made this latter stipulation without any investigation of the circumstances of those events. (PA 175.)

Brainard and Dettmar's presentation was far more limited than the prosecution's. They waived opening statement and called only one witness, Pinholster's mother, Burnice Brashear. (PA 175.) She opined that she had always provided a good home and

taken care of all of her children. She inaccurately portrayed Pinholster's siblings as "basically good children." (PA 11, 58.)[2] She conceded that her husband, Bud Brashear, had been "abusive or near abusive" to Pinholster but characterized the physical abuse as "discipline" brought on by Pinholster. (RT 7392-93.) She then discounted the abuse entirely by stressing that Pinholster was presently on friendly terms with his stepfather. (PA 55.)

Brashear testified that as a young child Pinholster was hurt in two car accidents, without any explanation of the significance of his resulting head injuries. (PA 50, 269-70.) She said that elementary school officials diagnosed Pinholster with "perceptive vision," but she claimed Pinholster "did much better" once he was placed in a different classroom. (PA 11, 270.) Brashear testified that Pinholster suffered from epilepsy due to a beating in custody, but counsel failed to explain the impact of epilepsy on him. (PA 11.)

During penalty arguments, the prosecutor noted the lack of mitigation and scoffed at defense counsel's fleeting evidence of epilepsy and head injuries, stressing,

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[2] In reality, Pinholster's older brother, Alvin, was a schizophrenic who at the time of his suicide was facing charges of armed residential burglary, forcible rape and forcible oral copulation. (PA 276.) Pinholster's younger brother Terry suffered from depression and abused drugs, including PCP. Pinholster's half-sister, Tammy, had clinical depression and prior convictions for prostitution and forced oral copulation on a minor. (PA 59.)

"[t]here is no evidence. . . . A doctor [should] have been brought in. Medical records. Something." The prosecutor also argued that Pinholster was "conwise" and learned to fake seizures. (RT 7445.)

The prosecutor questioned the relevance of the "discipline" imposed by Pinholster's stepfather, observing that Pinholster's own mother had testified that Pinholster "came from a good home," was "upper-middle class" and "had many things going for him." (PA 61.) The prosecutor asked rhetorically, "[w]hat mitigating circumstances were presented? Nothing except a mother who loves her son." She concluded by telling the jury that "even the most heinous person ever born, Adolph Hitler, probably had a mother who loved him," and that "it would probably be charitable to refer to [Pinholster] as a member of the human species." (PA 61.)

After two and one-half days of deliberations, the jury returned a death verdict. (PA 12.)

3. The State Habeas Petition

Pinholster's state appeal was denied. (PA 301-433). In 1993, Pinholster filed a state habeas corpus petition alleging ineffective assistance at penalty and requesting an evidentiary hearing. (PA 12.) Specifically, he alleged:

> Trial counsel unreasonably and incompetently failed to recognize, adequately investigate, prepare and present evidence that before, after and at the time of the

> charged offense [Pinholster] suffered from serious neurological, psychological and psychiatric disorders and psychotic ideation. . . . [T]rial counsel unreasonably failed to recognize, adequately investigate, prepare and present evidence that at the time of the offense [Pinholster's] consciousness was significantly impaired secondary to neurological and mood disorders at the time of the homicides.

(RA 158.) The petition alleged that counsel did not "secure readily available school, physician, hospital, jail, Youth Authority, child guidance and other records" that would have revealed Pinholster's and his family members' mental health problems, which, in turn resulted in the failure to "provide said records to mental health professionals." (RA 158.)

The petition alleged that counsel's failure to investigate prejudiced Pinholster because:

> Had trial counsel reasonably investigated, he would have learned that [Pinholster] had a lengthy, well-documented history of profound mental illness. Reasonable investigation would have disclosed that at the time of the offenses, [Pinholster] suffered from bi-polar mood disorder with psychotic features. Additionally, reasonable investigation would have disclosed that at the time of offenses [Pinholster] suffered from severe seizure disorders.

(RA 160.) The petition alleged that Pinholster's mental disabilities were significant because they

"were acting upon [him] at the time of the homicides" and "impl[ied] impaired consciousness and, therefore, the inability to form intent." (RA 170.)

Pinholster submitted the following sworn declarations in support of his well-pleaded claim:

- Trial counsel Harry Brainard declared that "[co-counsel] Dettmar and I did not prepare a case in mitigation" because they believed "there would be no penalty phase." He did not recall interviewing any family members besides Burnice Brashear or attempting to locate Pinholster's school, juvenile or medical records or records of prior placement in a mental health facility. Brainard stipulated to incidents of prior prison misconduct because he felt "obligated" to honor an agreement Dettmar had with the prosecutor even though he had never reviewed Pinholster's custody records and considered the incidents "inadmissible." (JA 186, 201, 202, 214.)

- Paralegal Elizabeth Lynch stated that Brainard retained her approximately two weeks before the start of trial to provide paralegal services and draft pretrial motions. Lynch resigned immediately after learning that Brainard had failed to request a continuance of the penalty trial. (JA 14, CR 49: 8/16/93 State Pet. Ex. 116.)

- James Sussman, counsel for co-defendant Brown, attested that Pinholster's "bizarre" affect and "irrational" behavior at trial caused

him to question Pinholster's competence. (JA 14, CR 49: 8/16/93 State Pet. Ex. 46.)

- Joyce Anderson, who was married to Pinholster's natural father, Garland Pinholster, declared that Garland suffered from depression or violent "moods swings" and had chronic alcohol and substance abuse problems. Two other ex-wives corroborated Anderson's statements. (JA 14, CR 49: 8/16/93 State Pet. Exs. 8, 9, 17.)

- Burnice Brashear declared that her son suffered a "serious head injury" at age 2½ when she ran over his head with her automobile. She stated that just a year later during a second car accident Pinholster's head broke through a windshield. (JA 14, CR 49: 8/16/93 State Pet. Ex. 26.)

- Pinholster's elementary school teacher Lois Rainwater declared that she had referred Pinholster for an evaluation for special education because of his poor academic performance, strange conduct, and inability to relate to his peers. Rainwater suspected the problem was "organic" because of its severity. Pinholster was designated as a good candidate for special education classes but his family moved out of the school district before he could begin them. (JA 14, CR 49: 8/16/93 State Pet. Ex. 19.)

- Pinholster's maternal aunt Lois Fosberg declared that Garland abandoned Burnice, Pinholster and Pinholster's two young brothers to abject poverty. She recalled a young

Pinholster mixing water and flour to get something to eat. Fosberg declared that after Pinholster's mother's second marriage to Bud Brashear, the family's living conditions improved but that Pinholster's mother and stepfather ignored their children. She explained that when Pinholster's maternal grandparents "spanked or disciplined the Pinholster children, Scott always got the worst of it." (JA 14, CR 49: 8/16/93 State Pet. Ex. 98.)

- Pinholster's brother Terry declared that their stepfather frequently "beat" Pinholster with fists or a belt and on at least one occasion with a two-by-four board. Terry recalled that there was so much violence in the house that he dreaded coming home. He added that Pinholster received "the most frequent and violent beatings." Eventually Pinholster left home to escape the beatings. (JA 14, CR 49: 8/16/93 State Pet. Ex. 99.)

- Pinholster's half-sister Tammy Brashear corroborated that Pinholster suffered extensive physical abuse at the hands of his stepfather, declaring that the beatings occurred "as often as several times within one week." She said that Pinholster's mother allowed him to "sleep in the car" to avoid the abuse, but otherwise did nothing to protect her son. (JA 14, CR 49: 8/16/93 State Pet. Ex. 100.)

- Co-defendant Brown declared that as Pinholster's roommate in 1981 he witnessed

Pinholster have a serious seizure. (JA 14, CR 49: 8/16/93 State Pet. Ex. 47.)

- Correctional Officer Allan Crowder, whom the prosecutor claimed Pinholster had threatened to kill during an argument, explained that the threat was overblown and unworthy of even a disciplinary report. (JA 14, CR 49: 8/16/93 State Pet. Ex. 108.)

- Dale Peroutka, senior deputy at the jail where Pinholster was incarcerated before trial, impeached the deputies who testified at Pinholster's penalty trial. Peroutka explained that Pinholster's discipline problems in the jail had been exaggerated and that Pinholster was not an "assaultive person." Based on his own observations and input from other deputy sheriffs, Peroutka had declassified Pinholster from administrative segregation to general population. (JA 14, CR 49: 8/16/93 State Pet. Ex. 112.)

- Lieutenant Thomas Pigott, who despite his trial testimony that Pinholster was "one of the two or three most violent inmates" in the jail, declared that he was aware of and agreed with Sergeant Peroutka's declassification of Pinholster based on the determination that he was not assaultive. (JA 14, CR 49: 8/16/93 State Pet. Ex. 113.)

Pinholster further supported his claim with an extensive declaration from forensic psychiatrist George Woods. Woods opined that Pinholster's actions were the result of a mood disorder that caused him to

engage in "psychotic and grandiose thinking" that interfered with his ability to premeditate and deliberate and prohibited him from forming intent to kill. (RA 238.)

Woods also diagnosed Pinholster with "severe and longstanding seizure disorders." He opined that Pinholster's mixed seizure history included grand mal, complex partial and absence seizures. He explained that complex partial seizures are significant because they cause "repetitive and purposeless movements (automatisms), anger, rage outbursts, disturbances of intellect, hallucinations, involuntary movements, and other bizarre phenomena." (RA 225.) Woods identified "two known major head injuries" that resulted in "[s]erious head trauma in early childhood" as the likely cause of Pinholster's epilepsy. (RA 226.)

Woods buttressed his diagnosis of epilepsy by recounting numerous prior similar diagnoses and prescriptions for anti-seizure medications given by doctors who had examined Pinholster throughout his life and before trial. He also identified Pinholster's abnormal EEG at age nine, his commitment to a mental hospital for five months at age 11, and the documented mental problems of Pinholster's biological father and siblings as further evidence of Pinholster's brain abnormality. (RA 226-30.) All of this evidence was presented to the California Supreme Court with the first state habeas petition.

The State's habeas opposition attacked the credibility of Pinholster's declarations. It argued that Brainard's declarations should be viewed with "skepticism" because he had been disbarred and that co-counsel Dettmar was deceased. (JA 14, CR 49: State Petition Opp. 14.) It argued that Woods' opinion should be given "very little weight" because Woods conducted his mental examination ten years after the offenses. (JA 14, CR 49: State Petition Opp. 15.)

The state supreme court issued an order to show cause (OSC). (PA 13.) Under California law, the issuance of an OSC creates a "cause" and triggers "the state constitutional requirement that the cause be resolved 'in writing with reasons stated.'" *People v. Romero*, 883 P.2d 388, 393 (Cal. 1994). The State filed a return to the OSC, again arguing that Woods was "not credible" and stating that Pinholster did not have epilepsy but instead "feigned" seizures. (JA 14, CR 49: OSC Return 9, 13.) The State explicitly disputed that Brainard and Dettmar had failed to investigate mitigation. It attached the declaration of a government agent who unsuccessfully tried to interview trial counsel but learned that Brainard had been suspended from the practice of law six times before being disbarred in 1990. (JA 14, CR 49: OSC Return Ex. 2.) The State also attached the declaration of defense counsel's investigator, Gordon Sutton, who declared "to the best of his recollection" that he investigated for the penalty trial. (JA 14, CR 49: OSC Return Ex. 1.) Pinholster filed a traverse, in which Sutton declared that he had been mistaken in his

prior declaration and that his investigation had been limited to investigating alibi witnesses for the guilt phase. (JA 14, CR 49: OSC Traverse, Sutton Decl.)

After receiving the State's return and Pinholster's traverse, the state supreme court withdrew its OSC as "improvidently issued" and denied the claim "on the merits" without permitting an evidentiary hearing or discovery. (PA 302.)

4. The Federal Habeas Petition

Pinholster raised the same ineffective-assistance claim in federal court and again requested an evidentiary hearing. The federal petition alleged:

> Counsel unreasonably failed to competently investigate, prepare and present relevant evidence and law in mitigation and/or relevant evidence or law pertinent to the prosecution's case in aggravation. Counsel's failure to investigate potentially mitigating penalty phase evidence prevented the presentation of wealth of mitigating evidence and created a false impression that there was no such evidence.

(RA 46.)

The petition alleged that counsel's "failure to investigate [Pinholster's] background, including [Pinholster's] educational, psychological, social, or familial history, kept from the jury a wealth of mitigating evidence that was readily available." (RA 49.) It alleged that Pinholster suffered "severe head

traumas during early childhood" and suffered from "seizure disorder" and "bipolar mood disorder with psychotic features." (RA 59.)

In support of the federal petition, Pinholster tendered the same declarations and corroborating records that were filed in state court, adding only a new declaration by John Stalberg, the psychiatrist trial counsel had retained to examine Pinholster mid-guilt trial. Stalberg declared that trial counsel had provided him with only a police report and a 1978 probation report. (RA 218.) Upon reviewing educational, medical and psychiatric records that federal habeas counsel provided, Stalberg concluded that there was "voluminous mitigating evidence," including evidence of "repeated head trauma," "brain damage," "a childhood of physical abuse, emotional neglect, and a family history of mental illness and criminal behavior," that could have been presented at trial. (RA 219-20.) Stalberg believed that Pinholster's epilepsy was potentially mitigating because "epileptics are more sensitive to drugs," and "are prone to abnormal behavior" between seizures. (RA 220.) He noted that Pinholster's "bizarre behavior" at the Tapar house just prior to the burglary would have made him inquire further as to whether Pinholster "was under the influence of an extreme emotional disturbance or had an impaired ability to appreciate the criminality of his actions or conform his conduct to the requirements of the law" at the time of the killings. (RA 219-220.) The petition alleged that, if counsel had provided Stalberg with accurate information

about Pinholster's history and his conduct during and just prior to the offenses, Stalberg would have concluded and testified at trial that Pinholster's conduct was influenced by a "strong genetic/hereditary component," "repeated head trauma," and evidence of "brain damage." (RA 62-63.)

Pinholster then filed a second state habeas petition that included the Stalberg declaration and related allegations about trial counsel's failure to properly prepare him for the forensic psychiatric examination. As with the first state petition, the California Supreme Court summarily dismissed the claim "on the merits" without an evidentiary hearing or discovery. (PA 300-01.)

Back in federal court, both parties moved for summary judgment on the claim of ineffective assistance at penalty phase, and Pinholster, in the alternative, moved for an evidentiary hearing. (JA 28, CR 106; JA 31, CR 188; JA 33, CR 125, 126.) The district court granted an evidentiary hearing and authorized pre-hearing discovery. (JA 37, CR 144.)

The State deposed Stalberg, questioning whether a psychiatrist without neurology training was competent to diagnose Pinholster as epileptic or opine on the cause of the epilepsy. The State also challenged the accuracy of Stalberg's opinion that epileptics are prone to impulsivity and violence between seizures and are more sensitive to the effects of drug and alcohol. (Stalberg Deposition Vol. 1, pp. 160-61.) The State tendered its own mental health expert,

Dr. David Rudnick, who diagnosed Pinholster with anti-social personality disorder and denied that Pinholster suffered seizures at the time of the homicides. (JA 50, CR 201: Rudnick Dec.)

Pinholster responded to the State's new attack on his mental health mitigation by calling forensic psychiatrist Sophia Vinogradov and pediatric neurologist Donald Olson to corroborate Stalberg's opinion that Pinholster's epilepsy and intoxication affected his mental state during the crimes. Vinogradov concluded that Pinholster suffered from "personality change, aggressive type, due to serious childhood head trauma." (RA 205.) Olson, who directs the Pediatric Epilepsy Program at Stanford University Medical Center, determined that Pinholster suffered from childhood epilepsy and brain damage, which corroborated Vinogradov's and Stalberg's opinions. (RA 175, 205, 219-20.)

The State moved to preclude Vinogradov and Olson from testifying because their testimony was never presented in state court. (JA 49, CR 192.) Judge Taylor denied the motion in limine without prejudice because he wanted to hear the new experts' entire testimony to determine whether it fundamentally altered the ineffective-assistance claim. (JA 49-50, CR 195.)

5. The Federal Evidentiary Hearing

At the evidentiary hearing, Pinholster called Joyce Anderson, Lois Fosberg, and Lois Rainwater,

each of whom testified about Pinholster's troubled childhood and educational and mental problems consistent with their state-court declarations. *See supra* at 12-13. Keith Baumbach, Pinholster's uncle, was not a state-court declarant,[3] but he testified to many of the incidents that were alleged in the state and federal petitions. Baumbach testified that on numerous occasions he witnessed his mother, Magdalena, physically abuse Pinholster as a young child. Baumbach testified that his sister, Burnice Brashear, hid the fact that Pinholster was on trial for capital murder because she was "embarrassed" and didn't want anybody to know. (JA 52, CR 201, 203, 221.) All of the facts referred to by Baumbach were included in the state-court filings. (JA 14, CR 49: 8/16/93 State Pet. Exs. 8, 9, 98.)

Pinholster called Vinogradov and Olson to opine about his mental health before and at the time of the homicides. Vinogradov testified that Pinholster suffered frontal lobe brain damage as a result of the two car accidents. In the first, Pinholster's mother ran him over with her car when he was two years old, injuring his head, tearing his ear, and driving a bolt through his shoulder. Pinholster was hospitalized for two weeks. In the second, which occurred one year later, Pinholster's mother's car collided with another

[3] Baumbach testified that he lived out of state and had been estranged from his sisters, Burnice Brashear and Lois Fosberg, for years. (JA 52, CR 221: 9/11/02 EHRT 84, 145.)

car, propelling Pinholster head-first through the windshield. (JA 52, CR 221: 9/12/02 EHRT 37.)

Pinholster's frontal lobe brain damage impaired his impulse control and made him prone to violent outbursts in response to stress. Pinholster's documented behavioral and learning problems in school (including a diagnosis of "academic retardation" by a school psychologist), his abnormal EEG at age 9, his placement in a mental facility for five months at age 11, and his life-long history of seizures and prescribed anti-seizure medications corroborated Vinogradov's opinion that the accidents caused organic brain damage. (RA 173-74, 180, 184, 202, 204-05, 214; JA 52, CR 221: 9/12/02 EHRT 37.)

Vinogradov also testified that Pinholster began sniffing glue at age 10 and progressed to marijuana and heroin at ages 13-14. (RA 185.) She agreed with Stalberg that Pinholster's bizarre conduct at Lisa Tapar's house on the night of the homicides suggested he was severely intoxicated or possibly psychotic. (RA 198, 214.) Finally, she testified that because Pinholster's conduct was affected by organic brain damage it was inappropriate to label him antisocial or psychopathic. (RA 200-01; PA 279; JA 52, CR 221: 9/12/02 EHRT 63, 74.)

Olson conducted an independent review of Pinholster's medical records, including reports of eyewitness accounts of Pinholster's seizures. Olson concluded that Pinholster suffered from brain damage

since at least age five and from epilepsy since at least age nine. (RA 175.)

The State called Stalberg, who was now working as their expert witness. Although he did not waver from his original determination that Pinholster was antisocial, Stalberg confirmed that Pinholster suffered from brain damage and epilepsy and explained that trial counsel never provided him with the readily-available records to determine the nature and extent of Pinholster's mental health history before trial. Stalberg categorized those records as "voluminous mitigation," implying that he would have advised trial counsel and testified at trial accordingly if he had seen the records then. (JA 52, CR 221: 9/10/02 EHRT 111-14) Stalberg also testified that epileptics such as Pinholster are hyper-sensitive to drugs and alcohol and that Pinholster's bizarre conduct at the Tapar house prior to the homicides suggested he was severely intoxicated. (JA 52, CR 221: 9/10/02 EHRT 114, 200.)

The State also called Rudnick, who testified that, contrary to all the other experts, including Stalberg, Pinholster's head trauma in early childhood did not cause epilepsy or brain damage. (JA 50, CR 201: Rudnick Decl.) Rudnick said that Pinholster may have had epilepsy of unknown origin between the ages of 18 and 21, but that he did not have it when he committed the crimes at age 23. (JA 50, CR 201: Rudnick Decl.)

6. The Federal Court Opinions

After the evidentiary hearing, the district court granted relief on penalty ineffective-assistance claim. The court found that trial counsel's presentation at the penalty phase was deficient. (PA 263, 266.) Based on Brainard's contemporaneous in-court admission and habeas declarations, the court found that the failure to present evidence of brain damage and a troubled childhood was due to a lack of preparation, not a strategic decision. (PA 266.) The court also found that counsel failed to investigate evidence of epilepsy, which would have rebutted the prosecution's aggravating evidence. The district court acknowledged that the experts differed over whether Pinholster suffered from antisocial personality disorder, but concluded that even if Pinholster were "antisocial," the extensive evidence of childhood neglect and abuse and mental health problems would have overcome any negative aspect of such a diagnosis. (PA 291-92.) After reweighing the mitigation against the aggravation, and considering the two and one-half days of jury deliberations, the court concluded that, but for counsel's errors, there was a reasonable probability that the outcome of the penalty phase would have been different. (PA 290.)

The district judge explicitly rejected the State's argument that the new experts should not be permitted to testify because they had not been presented in state court. The court found that Pinholster's factual predicate, which Vinogradov and Olson addressed, was the same as what was presented in state court:

> In his state court petition, Pinholster claimed his attorneys were ineffective for failing to investigate and present mitigating evidence regarding his "serious mental impairment," including "organic mental disorders." State Pet. (Lodged Doc. C-1), 184. In support, he offered evidence of his childhood head injuries and beatings, problems in school, abnormal EEG, and epilepsy. *Id*. at 174-185. At the evidentiary hearing before this Court, Drs. Olson and Vinogradov merely elaborated on these factual allegations. Their testimony did not fundamentally alter the substance of Pinholster's claim. If anything, Pinholster's "inability to fully explore [the claim] stemmed from the state courts' refusal to grant him an evidentiary hearing on the matter, rather than from any failure of diligence on his part." *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999). The "legal basis" for the claim "remained unchanged." *Id.*

(PA 296.)

In a separate order, the district court applied the standards of the Antiterrorism and Effective Death Penalty Act ("AEDPA") to Pinholster's case.[4]

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[4] The district judge had initially ruled that AEDPA applied to this case. The Ninth Circuit subsequently held that AEDPA does not apply to cases in which the petitioner requested appointment of counsel prior to the effective date of the Act. *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 539-40 (9th Cir. 1998). The district court complied with this

(Continued on following page)

Citing and applying *(Michael) Williams v. Taylor*, 529 U.S. 420 (2000), the court found that Pinholster had been diligent in seeking to develop the facts in state court and thus was not barred by § 2254(e)(2) from receiving a federal hearing. It also ruled that § 2254(d)(1) did not apply because the state supreme court did not adjudicate the ineffective-assistance claim. (PA 254-58.)

The Ninth Circuit affirmed the district court in an 8-3 en banc opinion. (PA 1-163. Contrary to the district court, the majority concluded that, under circuit law, § 2254(d)(1) applied to the state supreme court's summary, unreasoned denial of the ineffective-assistance claim. (PA 20-21.) After acknowledging uncertainty amongst the circuit courts whether to apply *de novo* or "independent" review of an unreasoned, summary denial, the majority applied the latter standard and held "that the California Supreme Court's 'postcard' denial of Pinholster's penalty phase ineffective assistance claim constituted an objectively unreasonable application of clearly established federal law in *Strickland*." (PA 68.)[5] Counsel's performance was deficient because they "conducted no investigation into Pinholster's background *at all*, aside from interviewing his mother," (PA 45

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ruling and applied pre-AEDPA standards on whether to hold an evidentiary hearing. After *Woodford v. Garceau,* 538 U.S. 202 (2003), overruled the Ninth Circuit's position, the district judge *sua sponte re*considered Pinholster's case under AEDPA.

[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

(emphasis in original)), and the lack of investigation could not be justified as strategic because "they did not expect a penalty phase to occur, and then, out of apparent apathy or neglect, declined a continuance without an informed or strategic basis for doing so." (PA 46.) The unreasonable failure to prepare and present mitigation was prejudicial because reweighing the "evidence in aggravation against the totality of the available mitigating evidence" created a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (PA 24, 47-48.)

The court also affirmed the district court's holding that § 2254(e)(2) did not prohibit a federal evidentiary hearing because Pinholster had been diligent in attempting to develop the facts in state court. The majority noted:

> [E]ven if those [§ 2254(e)(2)] limitations did apply, we find that both the federal and state habeas petitions detail many substantially identical facts, including trial counsel's failure to file a motion for a continuance to prepare a mitigation case for the penalty phase, counsel's introduction of Brashear's testimony, Pinholster's home life as a child, and Pinholster's educational, medical, social and psychological and family background. Although Pinholster substituted experts during the proceedings who ultimately developed different mental impairment theories, these experts nonetheless relied on the same background facts that Pinholster presented

> to the state court. Accordingly, if § 2254(e)(2) were to limit the scope of the evidence before us, it would exclude only the new mental impairment theories introduced in federal court, and their exclusion would not affect our result.

(PA 34-35.)

SUMMARY OF ARGUMENT

The court below correctly found that Pinholster's attorneys were ineffective at penalty. Counsel had been unprepared for the penalty phase, indeed, unaware that a penalty phase was coming. (PA 3.) The evidence presented to the state habeas court showed that had counsel conducted a reasonable investigation they would easily have discovered plentiful and persuasive mitigating evidence. That mitigating evidence included organic brain damage, epilepsy, significant educational deficits, repeated and substantial physical abuse by family members, an extensive family history of mental illness, and commitment to a mental health facility as early as age 11. (PA 271-77.)

Instead of conducting a reasonable investigation, counsel, after preparing just six and one-half hours for penalty, presented one witness, Pinholster's mother, who gave a falsely positive account of Pinholster's upbringing and mental health. (PA 11, 58.) The prosecutor exploited counsel's presentation

in her closing, arguing that counsel had presented nothing serious by way of mitigation. Despite the lack of mitigation presented, the jury deliberated two and one-half days before returning a death verdict. (PA 12.)

The California Supreme Court summarily denied Pinholster's penalty phase ineffective-assistance claim "on the merits" but without an opinion or citation to authority, and without holding an evidentiary hearing or authorizing discovery. (PA 300-01.) The district court granted relief after discovery and a hearing, and the en banc circuit court affirmed. The circuit court correctly concluded that the mitigation presented in habeas "starkly contrasts with the unheard evidence in Pinholster's case: organic brain damage, mental disease, childhood beatings, abandonment, and a nuclear family filled with mental illness and violence." (PA 67-68.)

The State argues the circuit court erred. It claims that Pinholster presented "radically different" facts in state and federal court. (Cert. Petition 11.) The record shows, however, that Pinholster presented the "factual predicate for [his] claim" in state court (Pet. Brief 21), and any differences between the state and federal presentations are legally insignificant.

In state court, Pinholster alleged that "[t]rial counsel unreasonably and incompetently failed to recognize, adequately investigate, prepare and present evidence that before, after and at the time of the charged offense, [Pinholster] suffered from serious neurological, psychological and psychiatric disorders

and psychotic ideation" (RA 158), including "severe seizure disorders." (RA 160.) Supporting declarations filed in state court recounted Pinholster's "serious head injuries" in early childhood and "brain damage," a childhood of physical abuse and emotional neglect, and a family history of mental illness. (JA 14, CR 49: 8/16/93 State Pet. Exs. 19, 26, 98, 99, 100; RA 219-20, 226.)

Likewise, in federal court, Pinholster alleged that trial counsel's "failure to investigate [Pinholster's] background . . . kept from the jury a wealth of mitigating evidence that was readily available"; alleged that Pinholster suffered "severe head traumas during early childhood" and from "seizure disorder"; and submitted an expert declaration attesting to Pinholster's "brain damage." (RA 46, 59, 220.)

Indisputably, both the State and Pinholster added mental health experts as Pinholster's claim moved from state to federal court, and from affidavit to live testimony. But Pinholster presented the same legal theories and core operative facts in state and federal court. Because the record does not support the State's claimed basis for review, certiorari was improvidently granted, and the case should be dismissed. *Cf. Bell v. Kelly*, 129 S. Ct. 393 (2008) (mem.) (per curiam). In the alternative, the Court should affirm the judgment below, which is based on a straightforward and faithful application of this Court's ineffective-assistance and AEDPA precedents.

Trying to avoid the clear direction of this Court's precedent, the State makes a number of proposals on how various AEDPA provisions should be interpreted, but the Court need not reach those arguments to affirm the judgment below. *Cf. Wood v. Allen*, 130 S. Ct. 841, 845, 851 (2010) (declining to reach issues of AEDPA interpretation because their resolution was not necessary to affirm the judgment). The Ninth Circuit granted relief on the basis of the evidence presented in state and federal court, but it also granted relief in the alternative without considering the purported "new mental impairment theories introduced in federal court" about which the State complains. (PA 35.) This Court should affirm that judgment. Pinholster's federal experts merely elaborated on the state and federal allegations of mental illness and cognitive deficits, and focused on the same allegations of "epilepsy," "repeated head trauma" and "evidence of brain damage" that were presented in state court.

The State's AEDPA arguments fail on the merits. The State argues that "when examining whether a state-court rejection of a claim was objectively unreasonable under § 2254(d)(1), a federal court must confine itself to *only* those facts presented to the state court in support of the claim." (Pet. Brief 31 (original emphasis).) This argument is contrary to the plain text of § 2254(d)(1), renders § 2254(e)(2) (AEDPA's evidentiary hearing provision) and the exhaustion doctrine superfluous, and is contrary to this Court's cases interpreting § 2254(d) and (e). Similarly flawed

is the State's argument that a habeas petitioner must prove a state court decision unreasonable under § 2254(d) in order to obtain a federal evidentiary hearing. If a habeas petitioner could show without any further fact development that the state-court denial of his claim was unreasonable, what need would he have for a federal evidentiary hearing? The habeas petitioner would be entitled to relief on the state-court record.

ARGUMENT

I. CONTRARY TO THE STATE'S CLAIM, PINHOLSTER PRESENTED THE SAME LEGAL THEORIES AND CORE OPERATIVE FACTS IN STATE AND FEDERAL COURT

The State asks this Court to rule that federal habeas relief may not be granted on a factual predicate that the habeas petitioner could have presented in state court, but did not. (Pet. Brief 16.) This issue is not presented by Pinholster's case. Contrary to the State's argument, the factual predicate for Pinholster's federal habeas petition was the same as for his state petitions. Because the record does not support the State's claimed basis for review, certiorari was improvidently granted, and the case should be dismissed. *Cf. Bell*, 129 S. Ct. 393.

There is no denying that both the State and Pinholster added mental health experts as

Pinholster's ineffective-assistance claim moved from state court to federal court and from affidavit to live testimony, and they ultimately relied on those experts to litigate mental health claims. After the federal court granted an evidentiary hearing, the State tendered a new mental health expert, and Pinholster responded with additional experts to elaborate on the diagnosis of Pinholster's mental illness. But a comparison of the substance of the experts' opinions presented in state and federal court, and the bases for those experts' diagnoses, supports the lower courts' findings that Pinholster's claims did not change. The State attempts to exploit mere nuances in medical terminology to support its claim. This attempt fails. Pinholster's case does not present the issue the State wants reviewed.

A. In State Court, Pinholster Alleged, And Supported With Declarations, The Claim That His Trial Counsel Failed To Investigate And Present Evidence Of His Organic Disorders And Brain Damage

Pinholster's first state petition alleged that he suffered from "profound mental disorders" and serious mental impairments throughout his life. (RA 160.) The petition specifically pleaded "head traumas during early childhood" as one of the causes for his mental disorders and impairments. (JA 14, CR 52: 8/16/93 State Pet. 182.) Counsel tendered Woods' declaration, which more thoroughly discussed Pinholster's childhood head injuries and opined that

he suffered from both mood and seizure disorders that affected his ability to form specific intent and control his actions during the offenses. (RA 221-50.)

Pinholster's second state petition alleged that trial expert Stalberg "failed to alert trial counsel that [Pinholster's] organic disorders provided a mental state defense" to the charged offenses and aggravators. (RA 111.) The petition alleged that Pinholster's "mental disorders" mitigated the crimes for a variety of reasons. (RA 112.) Pinholster tendered Stalberg's declaration stating that he had made his initial diagnosis without having received any of the educational, medical and psychiatric treatment records that he had requested from counsel. (RA 218-20.) Stalberg declared that he did not know of Pinholster's "irrational and highly aggressive actions immediately before the homicides" (RA 219), which he later explained was a reference to Pinholster's telling the occupants of Tapar's house that he "had a message from God." (JA 232-33.) Stalberg noted that epileptics such as Pinholster "are more sensitive to drugs, have difficulty controlling their behavior and are prone to abnormal behavior between seizures." (RA 220.) After reviewing all of the social history records and learning the relevant facts of the night of the crimes, Stalberg opined that there was a wealth of mitigation to be offered at trial, including "epilepsy," "severe

genetic and mental disorders," "repeated head trauma," and "evidence of brain damage."[6] (RA 219-20.)

B. Pinholster Raised The Same Claim In Federal Court

Although the State asserts that Pinholster completely changed his ineffective-assistance strategy when he moved from state to federal court, the reality is that the federal petition contained the same operative facts presented in the state petitions. In his federal petition, Pinholster presented the same declarants who provided the same information about his background and upbringing that had been presented in state court. Just as he had in the state proceeding, Pinholster emphasized that trial counsel had unreasonably failed to thoroughly investigate his mental state at the time of the homicides in the face of several red flags of serious mental health problems. (RA 4-64.) Just as in state court, the mental health experts identified two serious head injuries during early childhood as the probable cause of Pinholster's longstanding and severe epilepsy. (RA 173-74, 204-05, 219, 226.) And just as in state court, the experts opined that the cognitive deficits associated with epilepsy negatively affected Pinholster's state of mind and conduct at

[6] The State's repeated assertions, adopted by the Ninth Circuit dissent, that Pinholster never alleged "brain damage" in state court are incorrect. (RA 94, 145, 146, 226.)

the time of the offenses. (RA 174, 181, 215, 219-20, 239-40.)

In response to a new State witness, Rudnick, Pinholster added testimony in the federal hearing from forensic psychiatrist Sophia Vinogradov and pediatric neurologist Donald Olson. These experts, however, focused on the same allegations of "epilepsy," "severe genetic disorders," "repeated head trauma," and "evidence of brain damage" that were presented in state court. (RA 172-217, 218-50.) The minor differences in the new testimony were the natural result of taking live testimony subject to cross-examination and of responding to the opposition's arguments.

In state proceedings, Woods had referred to the "synergistic" effect of substance abuse, mood disorder and seizures, while in federal proceedings Vinogradov referred to the "confluence" of substance abuse, brain damage-related impairments and seizures. (RA 181, 237.) But both focused on how the combination of impairments diminished Pinholster's ability to control his behaviors and form specific intent at the time of the homicides. (RA 215, 237.) The fact that different experts used different but related nomenclature to talk about the same operative facts in support of the same legal theories did not fundamentally alter the claim, circumvent exhaustion, or violate § 2254(d)(1). As the district court found, "Olson and Vinogradov merely elaborated on these factual allegations. Their testimony did not fundamentally alter the substance of Pinholster's claim." (PA 296.)

The en banc court of appeals agreed that the new experts did not change Pinholster's claim. (PA 35.) The court held that, even if it did not consider Vinogradov's diagnosis of "personality change, aggressive type, due to serious childhood head trauma" (RA 205), it still found an unreasonable application of *Strickland* based on counsel's failure to present the evidence of Pinholster's documented history of mental problems and his abusive childhood that was indisputably before the state court. (PA 35, 68.) If Vinogradov's testimony had actually created a new factual predicate for relief, such a statement would be impossible.[7]

Counsel's failure to investigate a capital client's mental health history and troubled childhood is a classic basis for relief based on ineffective assistance. That was the basis of both of Pinholster's state petitions, and it is the basis for his federal petition. From the beginning of his post-conviction proceedings, Pinholster consistently alleged that trial counsel's failure to prepare and present evidence of his troubled childhood and mental health problems resulted in ineffective assistance at penalty. The State does not, and cannot, claim that Pinholster changed his presentation regarding his troubled childhood. The record shows no more than the normal progression of this claim through litigation, from written pleadings

[7] The State suggests that the en banc majority does not really mean what it says (Pet. Brief 27-28), but that is no basis for review by this Court.

to an adversarial, fact-finding proceeding. That progression did not change the predicate of Pinholster's claim. The State is wrong to claim otherwise. Because there is no basis for consideration of the question presented for review, certiorari should be dismissed as improvidently granted. *Bell*, 129 S.Ct. 393.

II. COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF PINHOLSTER'S TROUBLED CHILDHOOD AND BRAIN DAMAGE WAS INEFFECTIVE ASSISTANCE UNDER THE *WILLIAMS-WIGGINS-ROMPILLA* LINE OF CASES.

The Court set out a two-part test for ineffective assistance in *Strickland*, 466 U.S. at 687-88. It has elaborated on and applied that test to claims of ineffective assistance at penalty in a trilogy of AEDPA cases. *See (Terry) Williams v. Taylor*, 529 U.S. 362, 399 (2000) (holding that state supreme court's denial of ineffective-assistance-at-penalty claim was an "objectively unreasonable" application of *Strickland*); *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (same); *Rompilla v. Beard*, 545 U.S. 374, 389-90 (2005) (same). The court below applied these cases to the facts of Pinholster's case and determined that Pinholster's counsel had been ineffective. This decision is correct and unremarkable.

The State's brief completely ignores *Wiggins* and *Rompilla* and mentions *(Terry) Williams* only in support of its proposals for reformulating the habeas

statute. The omission is telling. *Williams*, *Wiggins* and *Rompilla* are the relevant substantive precedent, the cases relied upon by the court below, and the cases that teach that the type of failure to investigate that occurred here constitutes ineffective assistance.

The State does not engage these precedents. Instead, it prefers to allege that the court below created a new test for ineffective assistance, one that looks to the American Bar Association ("ABA") standards and requires counsel to churn experts until he hears what he wants. The State's allegations are phantasms. The court below adhered to this Court's clear law, nodded to the ABA standards in a way already approved by this Court, and held that counsel's failures to investigate and provide any expert with the relevant data and records to make a reliable assessment was deficient performance. The performance of Pinholster's trial counsel was deficient and prejudicial and relief was properly granted under AEDPA.

A. Deficient Performance

To establish deficient performance, a "[petitioner] must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The district court held that counsel's failure to adequately investigate Pinholster's social history and mental health problems was unreasonable. The district court was right; its factual findings were not clearly erroneous, the standard for reversing

them on appeal after an evidentiary hearing. *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1421 (2009).

This Court has repeatedly found that the failure to investigate mitigation in a capital case is unreasonable. *(Terry) Williams*, 529 U.S. at 395 (finding deficient performance where counsel "did not begin to prepare for [penalty] until a week before trial" and failed to discover that defendant was "borderline mentally retarded" and had suffered severe abuse and neglect as a child); *Wiggins*, 539 U.S. at 524-34 (finding deficient performance because counsel had only a "rudimentary knowledge" of defendant's life based on a single psychological report, a one-page "personal history" in probation report and Department of Social Services records that lacked information about sexual abuse of client as a child); *Rompilla*, 545 U.S. at 383-90 (finding deficient performance where counsel failed to review court file that would have revealed defendant had organic brain damage and suffered an abusive, neglectful childhood).

Each of the trial counsel in the above cases did far more to prepare for penalty than trial counsel in this case. By their own contemporaneous courtroom admission, Dettmar and Brainard did nothing to prepare prior to the guilt verdicts. They then declined an offered continuance. (RT 7257-80.) They billed 6.5 hours total to prepare for penalty. (PA 263.) Although the dissent in the opinion below posits that counsel called only Brashear to pursue a "family sympathy defense," Brainard's in-court admission

and post-conviction declarations reveal that counsel called her because she was literally the only penalty witness they had interviewed. (JA 188, 201-03, 207, 214.) Brashear falsely testified that she had provided her son with discipline and a good home, then added that her son was essentially incorrigible and justly deserved the harshest of punishments even as a small child. The prosecutor used her testimony to argue that there was no mitigation at all. (RT 7452.)

The State invokes *Strickland*, which was decided contemporaneously with Pinholster's trial, as if the standard for reasonable representation was lower in 1984 than as explained and applied in the trilogy of cases. But Brainard and Dettmar do not benefit from comparison to trial counsel in *Strickland*. In that case, counsel decided to forego certain areas of mitigation investigation because the defendant, who was arrested for one murder but in fact had committed three murders and three more attempted murders, initiated a meeting in custody with the police, confessed to all of his crimes and pled guilty against the advice of counsel. *Strickland*, 466 U.S. at 671. Consequently, counsel concluded his only option was to rely on the judge's professed respect for defendants who accepted responsibility for their crimes. *Id.* at 673.

Here, the district court considered and explicitly rejected the notion that counsel limited their investigation to interviewing Pinholster's mother based on strategic reasons, such as relying on a family sympathy defense or avoiding opening the door to Stalberg's

conclusion that Pinholster was antisocial. Judge Taylor held:

> The record shows counsel's actions were not the result of a reasonable strategic decision. Counsel believed there would be no penalty phase because they had not received notice of the aggravating evidence that the state intended to introduce. After learning of their mistake, counsel elected to proceed without a continuance because they did not think the passage of time "would make a great deal of difference."

(PA 264-65.) The lack of a bona fide strategic reason for failing to investigate Pinholster's childhood and mental health history further evidences counsel's deficient performance. *(Terry) Williams*, 529 U.S. at 394 (noting in discussion of deficient performance that counsel "failed to conduct an investigation that would have uncovered records graphically describing [petitioner's] nightmarish childhood, not because of any strategic reason but because they incorrectly thought that state law barred access to such records").

Rather than honestly grapple with the disconnect between its argument and the *Williams-Wiggins-Rompilla* line, the State and its amici set up a strawman to knock down. They argue that the Ninth Circuit, based on an alleged blanket adoption of the ABA guidelines, created a "'rigid' and hindsight ineffective-assistance rule" that compels counsel in every case to present "bad childhood" evidence, and

then correctly note that such a Procrustean rule would conflict with *Strickland*, which eschews hard-and-fast rules for proper representation. (Pet. Brief 51.) This is an obvious attempt to capitalize on *Bobby v. Van Hook*, 130 S. Ct. 13 (2009) (per curiam), where this Court summarily reversed the Sixth Circuit for holding that counsel in a 1985 trial must comply with ABA guidelines that were not issued until 2003. But the Ninth Circuit did not inflate the importance of the ABA guidelines, and it certainly did not create a *per se* rule that evidence of a bad childhood must be presented in all cases. Rather, it used the more general 1982 ABA standards in effect at the time of trial and stressed: "[W]e make clear, as the Supreme Court has, that such standards do not define reasonable representation, but rather are 'guides to determining what is reasonable.'" (PA 38.)

B. Prejudice

To establish prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The district court found that counsel's failure to prepare for penalty prejudiced Pinholster. (PA 268.) It acknowledged that the aggravation was strong, but noted that the new mitigation was also strong. After re-weighing the totality of the mitigation against the aggravation, it determined that there was a

reasonable probability that but for counsel's errors the outcome would have been different. (PA 269, 290.) This determination fits squarely within this Court's case law finding prejudice at penalty.

The murders in *(Terry) Williams*, *Wiggins* and *Rompilla* were every bit as aggravated, if not more so, than the homicides in this case. Pinholster was convicted of murdering two men who were guarding a marijuana dealer's house. One of the victims sold drugs in the residence before the offenses, and both men ran around the house to the backyard in attempt to ambush people they believed had been stealing the marijuana dealer's drugs. (PA 167-68.) In this respect, the victims in *(Terry) Williams*, *Wiggins* and *Rompilla* were significantly more vulnerable than the victims here.

Although Wiggins was a first-offender, Terry Williams and Rompilla had violent prior convictions rivaling if not exceeding Pinholster's self-reported criminal history, even if Pinholster's boastful testimony is taken at face value.

The mitigation omitted by trial counsel in this case is qualitatively and quantitatively similar to the omitted mitigation in *(Terry) Williams*, *Wiggins* and *Rompilla*. Pinholster presented evidence of a troubled childhood that included neglect, physical abuse, learning disabilities and placement in a mental institution at age 11 with a recommendation that he not be released to the custody of his parents.

Pinholster also presented evidence of epilepsy and frontal lobe brain damage similar to the organic brain damage in *(Terry) Williams*. The Court noted that brain damage was especially important to assessing culpability because "[the defendant's] violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation." *(Terry) Williams*, 529 U.S. at 398.

Counsel's failure to discover and present evidence of Pinholster's brain damage was especially prejudicial because it allowed the prosecutor to argue that there was nothing wrong with Pinholster and that he had "faked" seizures in the past as a way to garner sympathy and lenient treatment. *See Banks v. Dretke*, 540 U.S. 668, 700 (2004) (finding undisclosed evidence material under *Brady*[8] based in part on prosecutor's exploitation of the non-disclosure in closing argument). In addition, several mental health experts (including Stalberg, who was called by the State) testified that epileptics have a heightened response to drugs and alcohol. (PA 278, RA 220.) Severe intoxication at the time of the offense is important to assessing culpability at penalty even if it falls short of a guilt-phase defense. *Cone v. Bell*, 129 S. Ct. 1769, 1785-87 (2009).

The Court's recent decision in *Sears v. Upton*, 130 S. Ct. 3259 (2010) (per curiam), further shows why Pinholster's counsel's failure to investigate brain

[8] *Brady v. Maryland*, 373 U.S. 83 (1963).

damage prejudiced him at penalty. In *Sears*, trial counsel prepared "one day or less" for the penalty phase and called seven family members who testified that Sears came from a stable, loving home and that the execution of Sears would devastate the family. *Id.* at 3261-62, 3264. The prosecutor argued that Sears' purportedly stable and advantaged background showed there was no mitigation to be offered, and the jury sentenced Sears to death. *Id.* at 3262 n.2.

State habeas counsel conducted a more thorough mitigation investigation that uncovered evidence that Sears had been physically abused as a child, had learning disabilities, and suffered "frontal lobe brain damage" as a result of childhood head injuries. *Sears,* 130 S. Ct. at 3262. The state court found deficient performance but denied relief because it determined that trial counsel's presentation of "some mitigation" rendered it impossible to assess *Strickland* prejudice. *Id.* at 3264-65. This Court vacated and remanded for the state court to reweigh the evidence of Sears' troubled childhood and frontal lobe brain damage against the aggravation presented at trial to determine whether Sears was prejudiced by his counsel's cursory investigation. *Id.* at 3267.

Sears demonstrates that a troubled childhood and frontal lobe brain damage caused by a childhood head injury – the precise overlooked mitigation in Pinholster's case – are critical to assessing culpability and deciding whether death is the appropriate sentence, even when the defendant has committed an aggravated rape-murder of a young girl. *See also*

Porter v. McCollum, 130 S. Ct. 447, 455 (2009) (per curiam) (in AEDPA case, holding counsel's failure to discover that petitioner "suffered from brain damage that could manifest in impulsive, violent behavior" was prejudicial, and noting that the state court "was not reasonable to discount entirely the effect that [expert] testimony [about brain abnormality] might have on the jury or sentencing judge").

The State cites *Strickland* to support its claim that prejudice should not be found. But *Strickland* reveals, not negates, the prejudice here. When habeas counsel in *Strickland* conducted a thorough mental health investigation, their psychiatrists concluded that the petitioner was not under the influence of "extreme mental or emotional disturbance" at the time of the murders. *Washington v. Strickland*, 693 F.2d 1243, 1248 (5th Cir. 1982). The opposite is true in this case. Vinogradov and Olson testified that Pinholster suffered from epilepsy and brain damage that affected his conduct at the time of the homicides. Stalberg, who was a State witness, testified that Pinholster's epilepsy rendered him more susceptible to the effects of intoxication during the homicides. The experts' finding of brain damage that affected intent and culpability demonstrates the concrete prejudice of counsel's failure to investigate mental health that is absent in *Strickland*.

In the end, the combination of Pinholster's troubled childhood and his frontal lobe brain damage:

> [A]dds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] culpability," *Wiggins*, 539 U.S. at 538 (quoting *(Terry) Williams*, 529 U.S. at 398), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine the confidence in the outcome" actually reached at sentencing. *Strickland*, 466 U.S. at 694.

Rompilla, 545 U.S. at 393.

III. SECTION 2254(d) POSES NO BARRIER TO A GRANT OF RELIEF

The State devotes a substantial portion of its brief to arguing an array of issues concerning the order in which §§ 2254(d) and (e) ought to apply, the sources and content of the requirements to be satisfied before a federal evidentiary hearing may be held, and the scope of § 2254(d) analysis, if any, to be conducted where a federal court hears material new evidence. (*See* Pet. Brief 21-42.) As demonstrated in the preceding sections, however, nothing in this case

turns on the resolution of any of those issues, and the State's assertions about them are therefore irrelevant.[9] *See Wood*, 130 S. Ct. at 845 (declining "to address the relationship between §§ 2254(d)(2) and (e)(1)" because doing so was unnecessary to disposition of the case); *Smith v. Spisak*, 130 S. Ct. 676, 688 (2010) (noting prisoner's contention that "federal court should not defer to a state court that may not have decided a question," but finding it unnecessary to "decide whether deference under § 2254(d)(1) is required here" because doing so would not affect the outcome); *Rice v. Collins*, 546 U.S. 333, 339 (2006) (noting dispute over applicability of § 2254(d) and (e) in analysis of prisoner's *Batson v. Kentucky*[10] claim, but concluding that, "We need not address that question"); *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam) (recognizing that, "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer," but finding court of appeals' decision unsustainable for separate reasons) (emphasis in original).

Because the evidence considered by the lower federal courts (and presently before this Court) is not

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[9] Apart from being irrelevant, the arguments concerning §§ 2254(d) and (e) propounded by the State and its amici are also wrong, as explained briefly below and more thoroughly in the *Amicus Curiae* Brief submitted by the American Civil Liberties Union ("ACLU").

[10] *Batson v. Kentucky*, 476 U.S. 79 (1986).

materially different from the well-pleaded allegations and supporting documents put before the state habeas court, the question under § 2254(d) is – at most – whether the California Supreme Court's summary denial of relief was defective in one or more of the ways enumerated in § 2254(d)(1) or (2).[11] While the

[11] If the evidence taken at the federal evidentiary hearing *had* materially altered the facts supporting Pinholster's claim, then the applicability of § 2254(d) to the components of that claim would depend upon the results of a comparison of "the merits" as adjudicated by the state court, and the merits of the claim as seen by the federal court in light of the new evidence. Where evidence properly developed in federal court materially affects one or more elements of a claim – *e.g.*, the reasonableness of counsel's decisions, or the likely effect of mitigating evidence not put before the jury – § 2254(d) cannot apply because the version of "the merits" adjudicated by the state court in the absence of that evidence is no longer relevant. *See Holland*, *supra*; *Winston v. Kelly*, 592 F.3d 535, 555-56 (4th Cir. 2010) *petition for cert. filed*, 78 U.S.L.W. 3715 (U.S. May 21, 2010 and May 24, 2010) ("If the record evidence after the hearing is substantially the same as the evidence presented to the state court, [§ 2254(d)(2) can apply]. . . . When, however, the petitioner offers . . . new, material evidence that the state court could have considered had it permitted further development of the facts, an assessment under § 2254(d) may be inappropriate. . . . If the [state court] record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d)."); *Wilson v. Workman*, 577 F.3d 1284, 1290-91 (10th Cir. 2009) (*en banc*) ("We hold that when the state court makes . . . findings on an incomplete record, it has not made an adjudication on the merits to which we owe any deference. . . . If the state court fails to consider the very evidence that the claim is based upon, then the state court has not adjudicated the merits of the claim."); *Wilson v. Mazzuca* 570 F.3d 490, 500 n.8 (2d Cir. 2009) (recognizing a "narrow

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state court's failure to explain its decision forestalls most of the inquiries necessary to answering that question,[12] the information that is available

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sphere" of cases where "the state court's unjustified failure to permit adequate development of the factual record may warrant *de novo* review"); *Brown v. Smith*, 551 F.3d 424, 437 (6th Cir. 2008) (applying *de novo* review to new evidence "whenever the reviewing state court improperly limits the scope of its review when considering a [petitioner's] federal constitutional claim"); *Bryan v. Mullin*, 335 F.3d 1207, 1215-16 (10th Cir. 2003) (applying *de novo* review to claims where new evidence was introduced in federal court when the state-court findings were made on an incomplete record).

[12] For example, the state court's summary order fails to indicate: whether both the deficient performance and prejudice components of Pinholster's claim were adjudicated on their merits, *see*, *e.g.*, *Porter*, 130 S. Ct. at 452 ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*."); how the court might have assessed the reasonableness of trial counsel's performance with regard to penalty phase preparation, *see*, *e.g.*, *Rompilla*, 545 U.S. at 389 (explaining that state court "conclusion" as to trial counsel's performance "fails to answer the considerations we have set out, to the point of being an objectively unreasonable conclusion"); and whether (and if so how) the state court gave consideration to the potential effects of the evidence overlooked by trial counsel on the jury's penalty verdict, *see*, *e.g.*, *Porter*, 130 S. Ct. at 454 (explaining that § 2254(d)(1) authorized relief because the "Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing"). This lack of susceptibility to review under § 2254(d) would justify withholding application of that provision altogether on the basis that the statute simply cannot accommodate wholly unexplained state court decisions. *See Harrington v. Richter*, No. 09-587, Amicus Curiae Brief of National Association of Criminal Defense Lawyers.

establishes that the California Supreme Court's decision was contrary to, or involved an unreasonable application of, this Court's ineffective assistance of counsel jurisprudence.

As explained in the State's brief, state law obligated the California Supreme Court to assume the truth of the allegations put forth by Pinholster, and then to determine whether those allegations amounted to a *prima facie* case of ineffective assistance of counsel. (Pet. Brief 36 (quoting *People v. Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995)).) Given the detailed allegations and supporting documents that were before it, the state court would thus have been required to assume, *inter alia*, that trial counsel erroneously proceeded as if there would be no penalty phase for which to prepare, interviewed only one witness during 6.5 hours of penalty phase-related work, failed to fulfill Dr. Stalberg's request for pertinent background materials, and lacked a strategic basis for any of these omissions, and for declining the court's offer of a continuance to facilitate better preparation. (PA 8-9, 175, 266-67; RT 7250.) The state court was further required to assume the truth of Pinholster's allegations concerning the available mitigating evidence, *e.g.*, that he suffered at least two significant head injuries resulting in frontal lobe damage, epilepsy and chronic seizures, that this brain disorder made him more susceptible to the effects of drugs and alcohol and led to periods of psychosis, and that, as a child, he endured physical abuse, neglect and institutionalization. (RA 219-20, 225, 231.)

By any rational measure, the well-pleaded allegations Pinholster presented to the California Supreme Court, if taken as *true*, easily constituted a *prima facie* case of deficient performance and prejudice under the rule of *Strickland*. While the state court's order does not disclose precisely how or why it failed to reach that conclusion, there are only a few plausible explanations. The state court may have misconceived the legal standard governing Pinholster's claim, such that the omissions by trial counsel could be seen as reasonable, or the undeveloped evidence could be regarded as insufficient to have influenced the outcome at trial. In that case, the state court's decision would have been "contrary to" this Court's precedents. Alternatively, the state court may have known the claim was governed by *Strickland*, but failed to recognize or acknowledge the conclusions dictated by Pinholster's evidence under that standard. In that case, the state court's decision would have "involved an unreasonable application of clearly established Federal law."

Whatever the actual explanation, the California Supreme Court's determination that Pinholster's allegations, taken as true, failed even to make out a *prima facie* claim was not only wrong, it was objectively unreasonable. It follows that § 2254(d) does not prohibit a grant of relief on the ground that trial counsel rendered constitutionally ineffective assistance at the penalty phase of Pinholster's capital trial.

IV. THE STATE'S INTERPRETATION OF § 2254(d)(1) IS FUNDAMENTALLY FLAWED

The State advances several novel interpretations of § 2254 (d)(1) that, if accepted, would lead to irrational results and unintended conflicts and confusion in habeas law. As shown above, the Court need not resolve any of the AEDPA issues raised by the State to affirm the judgment. Pinholster nevertheless briefly responds to the State's proposal here. The amicus brief by the ACLU more fully addresses issues of AEDPA interpretation.

A. The State's Interpretation Of § 2254(d)(1) Is Contrary To The Plain Language Of The Statute, Renders § 2254(e)(2) And The Exhaustion Doctrine Superfluous, And Is Contrary To This Court's Caselaw

The State argues that § 2254(d)(1) prevents a habeas petitioner from presenting any new evidence in federal court because only evidence first presented in state court is relevant to assessing the reasonableness of state-court decisions challenged as "contrary to" or "an unreasonable application" of federal law. (Pet. Brief 22.)[13] Petitioner's argument is meritless for three reasons.

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[13] The State overstates AEDPA's restrictions on the authority of a federal court to expand the record and consider new evidence. The Court has considered state-court decisions to be objectively unreasonable after considering evidence presented

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First, as the Ninth Circuit correctly concluded, Petitioner's argument is refuted by the text of § 2254(d)(1). (PA 27-34.) "As with any question of statutory interpretation, our analysis begins with the plain language of the statute. . . . It is well established that, when the statutory language is plain, we must enforce it according to its terms." *Jimenez v. Quarterman,* 129 S. Ct. 681, 685 (2009); (Pet. Brief 23.)

The plain language of § 2254(d)(1) does not limit the federal court to the state-court record. The provision states:

> 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. . . .

28 U.S.C. § 2254(d)(1) (West 2010)

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for the first time in federal court. *Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005) (considering new evidence of jury sample to assess claim of racial discrimination during jury selection); *Schriro v. Landrigan*, 550 U.S. 465, 472 (2007) (noting without criticism that the district court "expand[ed] the record" to include mitigation evidence to assess *Strickland* claim).

In support of its counter-textual argument, the State cites Congress' passage of AEDPA as evidence of its intent to "channel" habeas decision-making to state courts. (Pet. Brief 25.) But even assuming such an intent, Petitioner's reading of (d)(1) conflicts with the text of the provision, and the Court "cannot replace the actual text with speculation as to Congress' intent." *Magwood v. Patterson*, 130 S. Ct. 2788, 2798 (2010).

A comparison of § 2254(d)(1) with its companion provision § 2254(d)(2) further refutes Petitioner's argument. Whereas § 2254(d)(1) has no mention of the state-court record, § 2254(d)(2) provides that a petitioner challenging a state factual determination cannot obtain relief unless the state adjudication "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." The Ninth Circuit correctly found it significant that "Congress omitted [the phrase] 'in light of the evidence presented in the State court proceeding' from § 2254(d)(1), while including that language in § 2254(d)(2)." (PA 29.) The court properly concluded that "[t]his omission strongly indicates that Congress did not intend to restrict the inquiry under § 2254(d)(1) only to the evidence introduced in the state habeas court, or to have federal courts imply any such restriction." *Id*.; *see Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

generally presumed that Congress acts intentionally in the disparate inclusion or exclusion.") (Internal citations and quotations omitted.)

The State argues that there is no reason under AEDPA to treat fact-finding differently than legal reasoning, but the omission of the phrase "in light of the evidence presented in the State Court proceeding" in § 2254(d)(1), juxtaposed with its inclusion in § 2254(d)(2), suggests that Congress intended to treat post-conviction attacks on legal holdings differently than attacks on factual findings. This Court has also treated challenges under the two subsections differently. *See Collins*, 546 U.S. at 342 ("The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law.").

The State tries to escape the plain language of § 2254(d)(1) by selectively quoting from *Holland,* 542 U.S. 649. In *Holland*, the Court refused to consider the affidavit of Martha Gooch, who impeached the prosecution's star eyewitness, in analyzing an ineffective-assistance claim because the affidavit had never been presented to the state court. The Court wrote, "[i]n this and related contexts we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Id.* at 652. The Court did not suggest that the state-court record was the sole consideration in assessing reasonableness or that it is improper to consider additional factors, including newly developed evidence that is before the court. Moreover, a fair

reading of *Holland* makes clear that the Court refused to consider Gooch's affidavit because the habeas petitioner never explained why he had not presented Gooch's testimony at the two-day evidentiary hearing in state court, resulting in a finding that the petitioner was not diligent. Citing *(Michael) Williams*, the Court stressed, "[u]nder the habeas statute, Gooch's statement could have been the subject of an evidentiary hearing by the District Court, but only if [the petitioner] was not at fault in failing to develop that evidence in state court." *Id.* at 652-53. This shows that the Court was applying traditional AEDPA principles, not radically restricting the analysis of reasonableness in all § 2254(d)(1) claims to solely what was presented in state court.

The second reason the State's argument fails is because its reading of (d)(1) renders § 2254(e)(2), also enacted as part of AEDPA, superfluous, and is contrary to this Court's cases interpreting (e)(2).

In *Landrigan*, 550 U.S. at 468, this Court held that AEDPA does not alter a district court's discretion to hold an evidentiary hearing if a hearing is not barred by 28 U.S.C. § 2254(e)(2). The State's reading of § 2254(d)(1) contradicts *Landrigan* and would render § 2254(e)(2) superfluous. Under § 2254(e)(2), a petitioner who "failed to develop the factual basis of a claim in State court proceedings" cannot receive a federal hearing absent specific circumstances set forth in subsections (A) and (B). But according to the State, § 2254(d)(1) already imposes a wholesale prohibition on federal evidentiary hearings because

its analysis of unreasonableness is strictly limited to the existing state-court record. If this reading of § 2254(d)(1) were correct, there would be no need for further explicit limitations on the right to an evidentiary hearing in federal court. Congress' inclusion of § 2254(e)(2) in AEDPA and this Court's case law interpreting the provision refute Petitioner's interpretation of § 2254(d)(1).

The State's argument also runs aground on the shoals of *(Michael) Williams v. Taylor*, 529 U.S. 420, the hallmark case on federal evidentiary hearings in the AEDPA era. In *(Michael) Williams*, the Court held that a federal court may properly hold an evidentiary hearing if a habeas petitioner diligently tried to develop the facts in state court, even if his efforts were ultimately unsuccessful. Williams did not know of or raise his claims of juror bias, prosecutorial misconduct and a *Brady* violation until he filed his federal habeas petition. Because the 120-day deadline to file a state petition had passed, the district court granted an evidentiary hearing on the claims. *Id.* at 427, 443. The Commonwealth argued that § 2254(e)(2) prohibited a federal hearing on these claims because Williams had "failed to develop" them in state court. *Id.* at 428. This Court, however, found that § 2254(e)(2) does not preclude a hearing if the petitioner was not at fault for failing to develop the facts in state court. *Id.* at 432.

The Court found that Williams was not at fault for failing to discover the basis for two of the three

claims (juror concealment and prosecutorial misconduct) and remanded for a hearing on those claims. The Court noted, "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *(Michael) Williams*, 529 U.S. at 437.

The unfairness that would result from adopting the State's proposal is shown in Pinholster's case. Pinholster was just as diligent as Williams in trying to develop his claims in state court. (PA 33-34.) He requested a hearing on his ineffective-assistance claim. (JA 14: CR 49 8/16/93, State Pet. 245; 8/29/97 State Pet. 165-66.) Unlike the State, which relied on conclusory denials, Pinholster made specific allegations about counsel's failure to prepare and the mitigation that would have been discovered if counsel had conducted a reasonable investigation. He submitted affidavits and corroborating records in support of his claim. Given that California at that time authorized habeas counsel to incur "up to $3,000 for habeas corpus investigation relating to a death penalty judgment," *see* Cal. Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 2-2.3 (West 2010), Pinholster presented as much evidence as could be reasonably expected in light of the funding limitations and his inability to know with specificity how the State would oppose his mental health evidence.

Using *(Michael) Williams* as the standard, the district court found that Pinholster diligently attempted to develop the facts in state court. (PA 254-58.) The

court's factual finding of diligence is entitled to deference unless it is clearly erroneous. *Hall v. Head*, 310 F.3d 683, 697-98 (11th Cir. 2002). The State has never even addressed this finding, much less shown that it is clearly erroneous.

The third reason the State's (d)(1) argument fails is because its interpretation effectively eliminates the exhaustion doctrine. Before and since the enactment of AEDPA, the exhaustion rule has been the tool used by federal habeas courts to ensure that federal petitioners present the substance of their claim in state court before the federal court can adjudicate the claim in the habeas petitioner's favor. *See* 28 U.S.C. § 2254(b)(1). While the exhaustion doctrine requires that the "substance" of a federal claim must first be "fairly presented to the state courts," *Picard v. Connor*, 404 U.S. 270, 275 (1971), it has never wholly precluded any new evidence in federal court. The State would effectively abolish the exhaustion doctrine in challenges brought under (d)(1), and replace it with an absolute ban on presenting any new evidence in federal court, even if the substance of the claim was fairly presented in state court.

There is no support for the State's proposal in the text or legislative history of AEDPA. Courts assume that Congress is aware of existing law when it passes legislation, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and the exhaustion doctrine predates AEDPA. *See, e.g., Vasquez v. Hillery*, 474 U.S. 254 (1986). The text of AEDPA does not abolish the exhaustion doctrine. To the contrary, the changes to

§ 2254(b)(1) made by AEDPA expressly incorporate the exhaustion doctrine, stating the general rule that a federal writ "shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State . . . " AEDPA also added the provision that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." Far from eliminating the exhaustion rule, AEDPA embraces it.

Prior to AEDPA, this Court rejected a similar argument that a habeas petitioner was barred by the exhaustion rule from presenting any additional evidence in federal court in support of a claim that had been summarily denied by the state court. *Hillery*, 474 U.S. at 260. In *Hillery*, the petitioner submitted "new affidavits" and a statistical expert in response to the district court's request for further information relevant to his claim that the state violated equal protection by systematically excluding Blacks from the grand jury that indicted him. *Id.* at 258-59. The state objected to the consideration of new affidavits and expert testimony in federal court as circumventing the exhaustion requirement. This Court noted that it had "never held that presentation of additional facts to the district court, pursuant to the court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts." *Id.* at 257-58. Noting that Habeas Corpus Rule 7(b) permits a

district court to expand the existing record, the Court rejected the state's objection and considered all the new affidavits and the expert opinion because "supplemental evidence presented by [Hillery] did not fundamentally alter the legal claim already considered by the state courts." *Id*. at 260.

The State's reading of § 2254(d)(1) would supersede the traditional exhaustion doctrine and, contrary to *Hillery*, prohibit the introduction of any new evidence whatsoever in federal court. Thus, an unreasoned, summary denial of the claim, made after refusing a habeas petitioner's request for an evidentiary hearing, would freeze the body of evidence that may be considered in federal court to that which was before the state court, even when the petitioner was diligent under § 2254(e)(2). Although AEDPA was enacted fourteen years ago, no court has ever interpreted § 2254(d) to supersede the traditional exhaustion principles, including its allowance of new evidence in federal court that does not fundamentally alter the claim. If Congress intended for § 2254(d) to implicitly supersede exhaustion principles, it would not have codified the exhaustion rule in enacting AEDPA, or added the rule regarding a state's waiver of exhaustion. *See* § 2254(b).

B. The State's Argument That A Habeas Petitioner Must Prove That The State Decision Was Unreasonable Under § 2254(d)(1) In Order To Receive A Federal Evidentiary Hearing Under (e)(2) Is Contrary To This Court's Caselaw And Illogical

The State also faults the district court for holding an evidentiary hearing without first concluding that the California Supreme Court acted unreasonably in summarily dismissing Pinholster's ineffective-assistance claim. (Pet. Brief 38.) The State does not, and cannot, cite one case in which this Court held that a determination that a state court's adjudication of a claim was objectively unreasonable under § 2254(d)(1) is a necessary prerequisite to receiving a federal evidentiary hearing.

This Court flatly rejected an identical reading of § 2254(d)(1) in *Wellons v. Hall*, 130 S. Ct. 727 (2010) (per curiam). In *Wellons*, the petitioner alleged that it was a due process violation for the bailiff to receive breast-shaped chocolates and for the judge to receive penis-shaped chocolates from the jury deliberating in a rape-murder capital trial. The state court denied the due process claims without a hearing. Just as the State does here, the State of Georgia argued that the district court was not permitted to hold an evidentiary hearing unless it had first determined that the state court's summary denial of the claim was objectively unreasonable. *Id.* at 729.

The majority rejected this view of AEDPA, writing:

> Indeed, it would be bizarre if a federal court had to defer to state-court factual findings, made without any evidentiary record, in order to decide whether it could create an evidentiary record to decide whether the factual finding were erroneous. If that were the case, then almost no habeas petitioner could ever get an evidentiary hearing: So long as the state court found a fact that the petitioner was trying to disprove through the presentation of evidence, then there could be no hearing. AEDPA does not require such a crabbed and illogical approach to habeas procedures.

Id. at 730 n.3. The Court added that the circuit court's "discussion of the deference owed under" AEDPA to the state-court decision "is the classic formulation of a decision of whether to grant habeas relief," not whether to grant an evidentiary hearing. *Id*. The State's proposal directly conflicts with *Wellons*, *(Michael) Williams*, and *Landrigan*, 550 U.S. at 474 (stating that "a federal court must take into account [the § 2254(d)] standards in deciding whether an evidentiary hearing is appropriate," not conclude that the state-court decision was unreasonable under § 2254(d) before granting a hearing, as the State would have it).

The State and amicus Criminal Justice Legal Foundation cite *Teague v. Lane*, 489 U.S. 288 (1989), as support for their proposal that federal courts

should be required to analyze the reasonableness of the state-court decision before deciding whether to hold an evidentiary hearing. (Pet. Brief 39.) While the Court has sometimes used by analogy the non-retroactivity language of *Teague* to address whether a claim is based on "clearly established federal law," it has never suggested that *Teague* should control the order of decision-making under § 2254(d)(1).

The absence of any true authority in support of the State's proposal is not happenstance. If a habeas petitioner could demonstrate without any further fact development that the state court's denial of his claim was objectively unreasonable, what need would he have for a federal evidentiary hearing? The petitioner would be entitled to relief on the extant state-court record. This is a fundamental flaw in the State's unorthodox reading of AEDPA. The interpretation, if accepted, would require every habeas petitioner to actually win his case before being entitled to receive an evidentiary hearing on it. AEDPA does not compel such a nonsensical result.

CONCLUSION

For all the above reasons, this Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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