No. 09-1088

In the Supreme Court of the United States

VINCENT CULLEN, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

v.

SCOTT LYNN PINHOLSTER,
Respondent.

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

BRIEF OF DISABILITY RIGHTS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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BRIEF OF DISABILITY RIGHTS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Disability Rights Legal Center (DRLC) is a non-profit organization dedicated to promoting the rights of people with disabilities and to heightening public awareness of those rights by providing legal and related services.[1] DRLC accomplishes its mission through programs that include the Cancer Legal Resource Center (a joint program with Loyola Law School), the Education Advocacy Program, the Education and Outreach Program, and the Civil Rights Litigation Program. Since 1975, DRLC has handled countless disability rights cases under state and federal civil rights laws challenging discriminatory practices by government, business, and educational institutions. In addition, the DRLC has frequently appeared as an *amicus curiae* in this Court and other courts in cases of particular significance to people with disabilities.

The DRLC's interest in the present case arises from the disproportionate incidence of organic brain damage and related mental disabilities among capital defendants. Although a mental disability frequently is an important mitigating circumstance—as is the trauma that often underlies the condition—persons with mental disabilities are often ill-

[1] No counsel for a party authored this brief in whole or in part and no person other than the amicus and its counsel made a monetary contribution to its preparation or submission. See S. Ct. R. 37.6. Copies of the parties' written consents to the filing of this brief have been filed with the Clerk. See S. Ct. R. 37.3(a).

equipped to assist counsel in their penalty-phase defense; they often cannot accurately report the nature and history of their condition, their symptoms, their upbringing, or their experience. The problem is compounded by similar reporting deficiencies in family members. Among those with mental disabilities who have dysfunctional families whose conduct may have contributed to the disabling condition, family members often have incentives to provide incomplete or inaccurate reports of a defendant's history and the extent of his disability. A full and fair defense at the capital sentencing stage consequently depends in large part on the nature and satisfaction of counsel's duty to investigate a defendant's history and symptoms, and to seek expert evaluation based on the fruits of a full investigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

In resolving the questions presented here, this Court should bear in mind the disproportionate incidence of mental disabilities among the relatively few persons ultimately subjected to capital trials. On the surface, those capital defendants are least likely to impress prosecutors as candidates for leniency. And the same goes for sentencing fact-finders—at least if the defendants' disabilities and the often-horrific circumstances that caused them remain unknown as a result of an inadequate investigation.

That is why this Court has recognized that the Constitution requires counsel to conduct a reasonable investigation of a capital defendant's social, medical, and psychological history. That investigation is necessary for several reasons. To begin with, the historical information itself may have a direct mitigating effect, as in cases of severe childhood abuse. But

the most complete history also is necessary both to obtain an accurate diagnosis of any disabilities and to decide whether to pursue additional and more focused professional opinions as potential evidence at the sentencing phase. It is not always reasonable to stop at the first professional opinion, particularly if that opinion is based on materially incomplete data.

This case illustrates why a constitutionally reasonable investigation cannot simply skim the surface of the capital defendant's life by consulting only a parent and conducting only a superficial consultation with an expert—especially if that consultation is compromised because the expert lacks the information needed to properly evaluate the defendant's condition. By failing to obtain readily available records of the defendant's injuries, abuse, and treatment (as Pinholster's trial counsel did), counsel obviously precludes the possibility of presenting that evidence directly at the penalty phase.

But the same failure has the additional and equally significant consequence of necessarily undercutting (and perhaps rendering entirely useless) any expert evaluation of potential mental disability that counsel may obtain. And the consequences may continue to prejudice the defendant even on collateral review: an expert presented with incomplete evidence who concludes that a defendant lacks a significant mental impairment may evaluate the omitted evidence through a different lens than one who viewed the totality of the evidence at the outset.

Because the question on habeas corpus ultimately is whether a state court reasonably determined that counsel's failure to investigate was reasonable or did not prejudice the defendant, see *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984); *Williams* v.

Taylor, 529 U.S. 362, 407–409 (2000), a federal court sitting in habeas must focus on the evidence presented to the state court. As consistent practice after the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2262 *et seq.*, reflects, however, that does not mean that *no* new evidence may enter the analysis.

For at least two reasons, a bright-line rule limiting review to the cold record of the state court proceedings makes no sense. First, state post-conviction proceedings often are summary, with at best a terse paper record. Federal courts on habeas properly permit more complete presentations of the same arguments presented to the state court, including live and complete witness examinations. Second, it may have been unreasonable for the state court to summarily deny post-conviction relief based on the truncated evidence that can be presented in a summary proceeding without permitting full evidentiary development. Yet a federal court may not be able to evaluate the prejudicial significance of that failure without the benefit of more complete expert analysis. And there are other situations in which new evidence—albeit confined to the same arguments presented in state court—is absolutely necessary in a federal habeas proceeding. For example, an expert witness may become unavailable for further testimony or cross-examination. For all these reasons, the Court should not impose a *per se* bar on the presentation of additional evidence in habeas proceedings.

ARGUMENT

This case rests on established and fundamental constitutional principles. The Sixth Amendment right to effective assistance of counsel extends to the penalty phase of a capital trial. At that stage, the

right to effective assistance imposes on counsel an "obligation to conduct a thorough investigation of the defendant's background" (*Williams*, 529 U.S. at 396) in order to develop and present mitigation evidence that would support a sentence of less than death—an obligation that rests on standards in effect before Pinholster was tried. See *ibid.* (citing 1 ABA Standards for Criminal Justice 4–4.1, commentary at 4–55 (2d ed. 1980)). In particular, as this Court recently and unanimously observed, counsel must exert a reasonable effort to "uncover and present *any evidence* of [a defendant's] mental health or mental impairment, his family background, or his military service." *Porter* v. *McCollum*, 130 S. Ct. 447, 453 (2009) (per curiam) (emphasis added). Counsel cannot settle for "rudimentary knowledge" of the defendant's background, *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003), but rather must affirmatively seek out school and medical records for facts—such as the defendant's childhood trauma or early symptoms—that could have a mitigating effect at sentencing. *Id.* at 522, 524, 527.

A. A Reasonable Application of the Constitutional Duty to Investigate Mitigating History Should Take Into Account the Prevalence and Effects of Mental Disabilities Among Capital Defendants.

The Court has repeatedly acted to ensure that a defendant's mental impairments do not in themselves increase his exposure to a capital sentence, which constitutionally "must be limited to those offenders * * * whose extreme culpability makes them 'the most deserving of execution.'" *Roper* v. *Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins* v. *Virginia,* 536 U.S. 304, 319 (2002)). Defendants who are "less

able to give meaningful assistance to their counsel" face an increased "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Atkins,* 536 U.S. at 320 (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978)). Mental impairments—even the delayed development associated with youth—may lead not only to "impulsiveness," but to "reluctance to trust defense counsel," which in turn can impede the of representation. *Graham* v. *Florida*, 130 S. Ct. 2011, 2032 (2010). And while a mental impairment such as that associated with organic brain damage may not categorically exclude a defendant from eligibility for the death penalty, the lesser disability could significantly affect a fact-finder's perception of both the defendant's degree of culpability and the value of retribution in a particular circumstance. Cf. *Roper*, 543 U.S. at 572 (noting reduced "retribution [and] deterrence" interests for "juvenile offenders"); *Atkins*, 536 U.S. at 319 (noting "lesser culpability of the mentally retarded offender"); *Ford* v. *Wainwright*, 477 U.S. 399, 407–408 (1986) (insane offenders). As this Court specifically recognized, a "troubled history" that includes "diminished mental capacities" is acutely "relevant to assessing a defendant's moral culpability" in a capital case. *Wiggins*, 539 U.S. at 535.

Yet a jury cannot make the proper evaluation of culpability unless it is presented with evidence of the defendant's impairment. And capital defendants are unusually likely to have mental impairments.

Victims of head trauma are far more likely than the general population to land on death row; studies estimate that from 25 to 87 percent of the death row inmates have a history of head injuries, compared to

8.5 percent of the general population.[2] Some reasons for this overrepresentation are understood. Death row inmates are far more likely to show damage to the frontal lobes, which form part of the "pre-frontal cortex" or PFC.[3] See *Sears* v. *Upton*, 130 S. Ct. 3259, 3262–3263 (2010) (per curiam) (noting functional consequences of frontal lobe abnormalities). Indeed, "an extensive literature links PFC damage with im-

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[2] See Robert F. Morrell *et al.*, *Traumatic Brain Injury In Prisoners*, 27 J. OFFENDER REHAB. 1, 1–8 (1988) (24.9% of inmates interviewed suffered from traumatic brain injury); Bill Slaughter *et al.*, *Traumatic Brain Injury In A County Jail Population: Prevalence, Neuropsychological Functioning And Psychiatric Disorders*, 17 BRAIN INJURY 731, 734 (2003) (77% of sample inmate population suffered from traumatic brain injury); Jonathan M. Silver *et al.*, *The Association Between Head Injuries And Psychiatric Disorders: Findings From The New Haven NIMH Epidemiologic Catchment Area Study*, 15 BRAIN INJURY 935, 938–939 (2001) (8.5% of general population suffers from traumatic brain injury). See also John M. Fabian, *Neuropsychological and Neurological Correlates in Violent and Homicidal Offenders: A Legal and Neuroscience* Perspective, 15 AGGRESSION AND VIOLENT BEHAV. 209, 211 (2010) ("[[Y]oung adult males from socially deprived backgrounds are most likely to suffer significant head injuries," "the same group prone to engage in juvenile delinquency and adult criminality.") (internal citations omitted). Dorothy O. Lewis *et al.*, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584 (1988); Dorothy O. Lewis *et al.*, *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986).

[3] See generally Sharon L. Thompson Schill *et al.*, *The Frontal Lobes and the Regulation of Mental Activity*, 15 CURRENT OPINION IN NEUROBIOLOGY 219 (2005).

pulse control, antisocial behaviour and criminality."[4] Consequently, scientists "now consider the realm of PFC dysfunction most relevant to legal matters, namely, when the frontal cortex is damaged."[5]

The PFC regulates impulse control, risk assessment, and evaluation of risk and reward.[6] As a consequence, PFC injuries "may result in an inability to maintain emotional equilibrium, and an inability to

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[4] Robert M. Sapolsky, *The Frontal Cortex and the Criminal Justice System*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON B 1787, 1793 (2004). See also Earl K. Miller & Jonathan D. Cohen, *An Integrative Theory of Prefrontal Cortex Function*, 24 ANNUAL REV. OF NEUROSCIENCE 167 (2001); M.C. Brower & Bill Price, *Neuropsychiatry Of Frontal Lobe Dysfunction In Violent And Criminal Behaviour: A Critical Review*, 71 J. NEUROL. NEUROSURG. PSYCHIATRY 720 (2001) (reviewing literature); Thomas Nyffeler & Marianne Regard, *Kleptomania In A Patient With A Right Frontolimbic Lesion*, 14 NEUROPSYCHIATRY NEUROPSYCHOL. BEHAV. NEUROL. 73 (2001) (reviewing literature); Fabian, *supra,* 15 AGGRESSION AND VIOLENT BEHAVIOR at 211 ("Impairments within the prefrontal brain regions may in part cause a biological vulnerability to impulsive aggression by limiting the capacity to inhibit subcortical emotional centers.")

[5] See Sapolsky, *supra*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON B at 1793.

[6] See Antoine Bechara *et al.*, *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2198–2199 (2000) (impulse control); Facundo Manes *et al.*, *Decision-Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624 (2002) (risk assessment); John P. O'Doherty *et al.*, *Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex*, 4 NATURE NEUROSCI. 95 (2001) (risk and reward); Robert D. Rogers et al., *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 J. NEUROSCI. 9029 (1999) (same).

control the behavioral expression of mood changes; the usual capacity to mediate between intellect and emotion breaks down."[7] Childhood or adolescent damage to the PFC may have particularly profound effects on these characteristics because the PFC (and the brain more generally) continues to develop into early adulthood.[8] When PFC damage "occurs at earlier ages, executive function is impaired and the impulsivity takes on a more global and malign nature."[9]

The causes of organic brain damage are diverse. Organic brain injury of course may result from the childhood abuse so often associated with severe criminal behavior. But it can also result from service in combat. Two different studies have found that a fifth of the veterans of the nation's most recent conflicts have suffered traumatic brain injuries.[10] *f. Porter*,

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[7] Keith A. Hawkins & Krista K. Trobst, *Frontal Lobe Dysfunction and Aggression: Conceptual Issues and Research Findings*, 5 AGGRESSION AND VIOLENT BEHAVIOR 147, 151 (2000). See also Harold V. Hall, *Criminal-Forensic Neuropsychology of Disorders of Executive Functions* in DISORDERS OF EXECUTIVE FUNCTION: CIVIL AND CRIMINAL LAW APPLICATIONS 37 (H.V. Hall & R.J. Sbordone eds., 1993).

[8] Sapolsky, *supra*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON B at 1792 ("[B]rain development is far more prolonged [than previously believed] and, not surprisingly, the PFC is the last region of the brain to fully myelinate. Remarkably, this process extends well beyond adolescence into early adulthood."); see also Tomas Paus *et al.*, *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCIENCE 1908 (1999).

[9] *Id.* at 1793.

[10] See RAND Corporation: Center for Military Health Policy Research, *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery*, at tbl. 4.4 (T. Tanielian & L.H. Jaycox eds., 2008) (19.5%); Heidi

130 S. Ct. at 454 (noting both "heroic military service" and "brain abnormality"). No legal principle should impede the full vindication of Sixth Amendment rights for those whose mental disability results from service to their country, but that would be a consequence of the position urged by the petitioner.

The very brain injuries associated with serious criminal behavior also impede legal representation because they hinder a defendant's ability to communicate with his attorney. As with the habeas petitioner in *Rompilla* v. *Beard*, 545 U.S. 374 (2005), such a defendant's "contributions to any mitigation case" are likely to be "minimal." *Id.* at 381.

Organic brain damage and traumatic brain injury impair communication skills by reducing the ability to understand the nuances of conversation or to speak with enough detail to sustain a conversation.[11] Brain injury also commonly decreases problem-solving ability and "impair[s the] ability to maintain mental set (*i.e.*, to keep a goal and requisite steps in mind)."[12] Persons with brain damage often "cannot go beyond the literal meaning of utterances, not being able to understand what is implied" and are "differently impaired in the production of linguistic communication acts; for example in producing

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Terrio *et al.*, *Traumatic Brain Injury Screening: Preliminary Findings in a US Army Brigade Combat Team*, 24(1) J. HEAD TRAUMA REHAB. 14 (2009) (22.8%).

[11] See R. Angeleri et al., *Communicative Impairment In Traumatic Brain Injury: A Complete Pragmatic Assessment,* 107 BRAIN & LANGUAGE 229, 230–231 (2008).

[12] Hawkins & Trobst, *supra*. 5 AGGRESSION AND VIOLENT BEHAV. at 151.

correct requests or giving the interlocutor sufficiently detailed information" to maintain a conversation.[13]

This impaired ability to communicate is particularly significant for defendants who were abused as children. Abuse victims often cannot provide their counsel with detailed or accurate information about the traumas they suffered (much less their effects). Not only may the mechanisms of memory obliterate recollection of the trauma itself, but victims of childhood abuse may also experience "defensiveness, shame, [or] repression" regarding episodes of abuse.[14] Consequently, victims are often hesitant to disclose mental or physical abuse by a family member.[15] Add to this the physical impairment of a brain injury, and defendants facing the most serious crimes are the ones most likely to be hindered in communicating the most significant mitigating evidence from their life histories.

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[13] Angeleri, *supra*, 107 BRAIN & LANGUAGE at 230. See also Skye McDonald, *Pragmatic Language Skills After Closed Head Injury: Ability to Meet the Informational Needs of the Listener*, 44 BRAIN & LANGUAGE 28, 43 (1993) ("[I]n a significant proportion of nonaphasic CHI (closed head injury) patients there are major long-term disturbances of communication competence in everyday situations. * * * CHI subjects had substantial difficulty meeting the informational needs of the listener.").

[14] Alan M. Goldstein *et al.*, *Assessing Childhood Trauma and Developmental Factors as Mitigation in Capital Cases*, in FORENSIC MENTAL HEALTH ASSESSMENT OF CHILDREN AND ADOLESCENTS 365, 373 (Steven N. Sparta & Gerald P. Koocher eds., 2006) (describing why defendants' testimony about their own abusive childhoods may be unreliable).

[15] See generally Kenneth B. Dekleva, *Psychiatric Expertise in the Sentencing Phase of Capital Murder Cases*, 29 J. AM. ACAD. PSYCHIATRY & L. 58, 61 (2001).

Because a large proportion of capital defendants have some type of mental impairment, it is critically important that the Court enforce meaningful standards for investigating and presenting mitigating evidence of mental impairment—in particular, of brain damage and the abuse or other trauma that caused it. The same brain damage and history of childhood abuse that so often diminish a defendant's capacity for moral deliberation and decision-making also impair his ability to assist in his own defense. The effects of that impairment are particularly acute at the penalty phase, where the specifics of a defendant's disabilities and history of trauma may provide the weightiest mitigation evidence.

B. The Failure to Discover Historical Evidence Of Abuse And Brain Trauma Rendered The Assistance of Pinholster's Counsel Unconstitutionally Ineffective Under Established Law.

What Pinholster's trial counsel failed to discover was undeniably significant: the very "childhood history of physical abuse * * * and * * * brain abnormality" that were dispositive in *Porter*, 130 S. Ct. at 454; see also *Rompilla*, 545 U.S. at 392. Evidence of this kind can be critical to a jury deciding whether a defendant should live or die. As this Court has held, a jury *must* consider the mitigating effect of factors such as "childhood neglect and abandonment" and "real problems with impulse control apparently resulting from central nervous damage combined with * * * [a defendant's] background." *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 240 (2007) (internal quotation marks omitted).

Without an adequate investigation, there can be no "reliability in the determination that death is the

appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976). As this Court unanimously recognized just last Term, an attorney must review medical, school, and other types of records that could contain evidence of mental and emotional impairments that may cast doubt on the defendant's moral or legal culpability. See *Porter*, 130 S. Ct. at 455 (finding prejudice in counsel's unreasonable failure to find and present evidence "regarding the existence of a brain abnormality and cognitive defects").

Counsel's obligation to fully investigate is particularly strong when, as here, counsel knows that the defendant suffered significant head injuries as a child. See *Wiggins*, 539 U.S. at 524–525. If counsel had been alerted to the possibility that a defendant may have a significant disability (such as organic brain damage), a federal court on habeas properly considers what a reasonable investigation *would* have produced, *ibid.*, as well as what expert testimony *could* have been developed with that information in hand.

Yet Pinholster's trial counsel did not obtain or review his medical records even after they learned that Pinholster's mother—the only family member they interviewed—ran over him at the age of two, causing extensive head injuries, and that his head went through a windshield in a separate auto accident a few years later. Pet. App. 10a–11a, 50a, 239a, 277a–278a. The failure to follow up on this known history prevented trial counsel from discovering that these repeated head traumas resulted in damage to his frontal lobes, causing organic brain damage. Cf. *Sears*, 130 S. Ct. at 3262. The reasonably available evidence also would have revealed that Pinholster

had an abnormal neurological exam when he was only 9 years old, that he was committed to a mental hospital for five months at the tender age of 11, and that on his release from the hospital the treating physician recommended that he be placed in a foster home rather than returned to his mother and abusive stepfather. Pet. App. 11a–12a, 275a. Cf. *Sears*, 130 S. Ct. at 3262.

As this case further confirms, a constitutionally sufficient investigation of the defendant's history must adequately rule out the possibility of childhood or other abuse that might provide persuasive and moving evidence in mitigation. At a minimum, counsel's investigation of the defendant's youth must extend beyond an interview with a single family member. Studies have demonstrated that even non-abusing family members often feel guilt or responsibility for the abuse, and their accounts should not be regarded as accurate without corroborating evidence. See Goldstein, *supra*, at 373. Nor is it likely that family members who were responsible for (or passively witnessed) the abuse will volunteer it to outside lawyers. Family members may promote a "benign conception" of a defendant's "upbringing" when in fact the defendant and his siblings "lived in terror." *Rompilla*, 545 U.S. at 391–392 (internal quotation marks and citation omitted).

The testimony of Pinholster's mother provides a striking example. Her portrayal of his youth glossed over the family's abject poverty and Pinholster's subjection to "the most frequent and violent beatings" by his stepfather, who used a two-by-four and other implements. Pet. App. 55a–57a. She also neglected to mention regular beatings administered his grandmother (her mother) beginning in Pinholster's second

year. Pet. App. 272a. A reasonable investigation would have shown that many of Pinholster's siblings also have exhibited severe mental illness and criminal behavior, a strong indication that their common upbringing was severely deficient. Pet. App. 16a–17a, 58a–59a, 239a. No reasonable investigation of family history can stop with the interview of a single witness, much less when available records would have made that witness's benign version of events unsustainable.

The prejudice resulting from the failure to present such evidence is palpable. As the Court recognized last Term, evidence of this kind may not have made a capital defendant "any more likable to the jury, but it might well have helped the jury understand [him], and his horrendous acts—especially in light of his purportedly stable upbringing." *Sears*, 130 S. Ct. at 3264. That evidence certainly raises a "reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. And that would have been enough. See CAL. PENAL CODE § 190.4(b) (requiring unanimous jury for death sentence).

C. A Federal Habeas Court May Consider New Evidence Addressing How Counsel's Failure to Provide a Defendant's Mental, Psychological and Social History to Evaluating Experts Foreclosed Otherwise-Available Options for Expert Mitigation Evidence.

A gross failure to investigate a defendant's background deprives the defendant of evidence that could weigh in favor of mitigation on its own. And "a constitutionally deficient mitigation investigation * * * at the very least[] call[s] into question the reasonableness" of the mitigation theory, strategy and tactics

the counsel chose without full information. *Sears*, 130 S. Ct. at 3265

But the failure to investigate is especially harmful because it ensures that any medical or mental health expert witness will not have all information that may be necessary to reach an accurate diagnosis. That significantly undercuts the value of any evaluation that counsel may have obtained, and also taints any decision not to pursue additional opinions. An opinion based on incomplete facts not only is constitutionally insufficient, but it does not provide a constitutionally sufficient basis to seek no further evaluations. See *Wiggins*, 539 U.S. at 532; *Rompilla*, 545 U.S. at 382.

Here, trial counsel's failure to investigate the circumstances of Pinholster's childhood prevented Dr. Stalberg, the only expert they consulted, from having the full range of information necessary to make a competent diagnosis. When these records were belatedly provided to Dr. Stalberg, he acknowledged that they contained "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." See Pet. App. 211a–212a. Regardless of his ultimate opinion, his recognition of those circumstances would have provided a strong impetus to seek additional consultation. Counsel who receives a narrowly unfavorable report from an expert presented with significant historical evidence of disability and abuse is far more likely to seek out a second opinion than one who receives a report that the defendant altogether lacks the symptoms or history of significant mental disability.

Counsel who fails to investigate a defendant's background deprives his client of one of the most important sources of mitigating evidence—the expert testimony of medical professionals. Moreover, if an expert *does* form an opinion based on deficient and incomplete evidence, that expert's viewpoint may be incurably tainted. That compounds the effect of the original ineffective assistance by making it more difficult to secure collateral relief in light of the original expert's adherence to his original position notwithstanding the new evidence.

These multiple and related prejudicial consequences underscore why habeas petitioners should not be categorically precluded from offering additional professional perspectives on the evidence of the defendant's medical, psychological, educational, and social history that was not available at trial. Nor should the often-restricted and summary scope of state collateral review categorically limit the habeas court's ability to consider additional professional perspectives on how the overlooked historical evidence could have affected the development of additional mitigation testimony. Additional perspectives are just that: they do not change what should have been discovered, but they clarify the significance of what was missed, by further elucidating what additional mitigating evidence might have resulted from a constitutionally effective investigation. Just as the investigation and evaluation of a defendant's social and medical history should not be cut short, neither should a federal habeas court's evaluation of the significance of trial counsel's shortcomings in developing a mitigation case.

CONCLUSION

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

Respectfully submitted.

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