

No. 09-1088

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IN THE  
**Supreme Court of the United States**

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

*vs.*

SCOTT LYNN PINHOLSTER,  
*Respondent.*

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

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**BRIEF *AMICUS CURIAE* OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF PETITIONER**

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## **QUESTIONS PRESENTED**

1. Whether a federal court may reject a state-court adjudication of a petitioner’s claim as “unreasonable” under 28 U. S. C. § 2254, and grant habeas corpus relief, based on facts never presented to the state court.

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

This brief *amicus curiae* addresses only Question 1.

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**BRIEF *AMICUS CURIAE* OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF PETITIONER**

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**INTEREST OF *AMICUS CURIAE***

The Criminal Justice Legal Foundation (CJLF)<sup>1</sup> is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

The habeas corpus reform of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was enacted to reduce the relitigation in federal court of cases already fairly considered and decided in state courts. The central reform of AEDPA was the enactment of 28 U. S. C. § 2254(d), protecting the reasonable decisions of state courts from second-guessing by the lower federal courts.

In the present case, the federal courts permitted the petitioner to relitigate an issue already reasonably decided by the state court and bring in new evidence never presented to the state court. The Ninth Circuit then declared the state court decision to be an unreasonable application of federal law to facts never presented to that court. This kind of undercutting of § 2254(d) has become routine in many federal courts. It requires extended relitigation of cases that should be dismissed at the threshold. It is contrary to both the letter and purpose of the governing Act of Congress, and it is contrary to the interests CJLF was formed to protect.

### **SUMMARY OF FACTS AND CASE**

On January 9, 1982, during the course of a home burglary, petitioner Scott Lynn Pinholster stabbed to death Robert Beckett. *People v. Pinholster*, 1 Cal. 4th 865, 903-904, 824 P. 2d 571, 582-583 (1992), disapproved in part on other grounds in *People v. Williams*, 49 Cal. 4th 405, 459 (2010). Another victim, Thomas Johnson, was also murdered by one of Pinholster's accomplices. *Id.*, at 904, 824 P. 2d, at 583. The jury convicted Pinholster of two counts of first-degree murder. *Id.*, at 902, 824 P. 2d, at 581.

The state sought the death penalty. In preparation for the penalty phase of the trial, Pinholster's defense

team consulted with psychiatrist Dr. John M. Stalberg, who concluded that Pinholster did not suffer from any mental disorder or defect aside from antisocial personality disorder. *Pinholster v. Ayers*, 590 F. 3d 651, 657-658 (CA9 2009). At the penalty proceeding, Pinholster's defense team elected not to call Dr. Stalberg as a witness, instead presenting Pinholster's mother, who testified that as a child, Pinholster had a troubled relationship with his stepfather, suffered some head injuries, and spent some time in a state hospital for being emotionally handicapped. 1 Cal. 4th, at 910-911, 824 P. 2d, at 587. "The jury fixed the penalty at death." *Id.*, at 903, 824 P. 2d, at 582. The California Supreme Court affirmed on direct appeal, in a unanimous opinion by Justice Stanley Mosk. *Id.*, at 975, 824 P. 2d, at 631.

Pinholster then filed a state habeas petition claiming, relevant to the issues here, ineffective assistance of counsel at the penalty stage of his trial for his defense team's failure to adequately investigate his mental health. 590 F. 3d, at 659. The petition attacked Dr. Stalberg's conclusions as incompetent and cursory, and presented the testimony of a new expert, Dr. George Woods, who indicated that Pinholster suffered from bipolar disorder and epilepsy. *Ibid.* On July 9, 1995, the California Supreme Court denied the petition "on the substantive ground that it is without merit." App. to Pet. for Cert. 302.

In 1997, Pinholster filed a federal habeas petition, resurrecting Dr. Stalberg as his mental health expert. 590 F. 3d, at 659. Dr. Stalberg now asserted that he would have made further inquiry into the possibility of medical disorders if trial counsel had provided him with more information about Pinholster's background. *Id.*, at 659-660. Because the federal petition contained new material facts and unexhausted claims, the District

Court dismissed the unexhausted claims and held the remainder of Pinholster's petition in abeyance. *Id.*, at 660. Pinholster filed a second state habeas petition in the California Supreme Court, which the court denied "on the substantive ground that it is without merit." App. to Pet. for Cert. 300-301. The claim at issue here, the third claim in the petition, was also denied on the grounds that it was both untimely and successive.

Pinholster returned to federal court, where, applying pre-AEDPA law, the District Court granted Pinholster an evidentiary hearing on his penalty phase ineffective assistance of counsel claim. 590 F. 3d, at 660. At the hearing, Pinholster offered two new mental health experts, Dr. Donald Olson and Dr. Sophia Vinogradov, who opined that Pinholster suffered from brain damage as a result of childhood and later-life head trauma. *Id.*, at 660-661. Pinholster also presented for the first time additional mitigating evidence related to his upbringing. *Ibid.* In light of this evidence, the District Court granted Pinholster's petition based on trial counsel's ineffective assistance during the penalty phase. *Id.*, at 661.

The same day, this Court decided in *Woodford v. Garceau*, 538 U. S. 202, 207 (2003), that AEDPA does apply in circumstances similar to Pinholster's, contrary to Ninth Circuit precedent. In an addendum to its order, the District Court found that AEDPA review did not affect Pinholster's entitlement to a federal evidentiary hearing or habeas relief on his claim. *Pinholster*, 590 F. 3d, at 661. This conclusion was not based on an application of § 2254(d). Rather, it was based on an assertion that the California Supreme Court did not adjudicate the claim, *ibid.*, despite the fact that the court twice rejected penalty phase ineffective assistance claims expressly on the merits. *Id.*, at 661.

A Ninth Circuit panel reversed the District Court's grant of habeas relief. *Pinholster v. Ayers*, 525 F. 3d 742 (CA9 2008). The Court of Appeals then granted rehearing *en banc* and affirmed. *Pinholster*, 590 F. 3d, at 661-662. The court held that a district court's determination of the reasonableness of the state court decision under 28 U. S. C. § 2254(d) is not limited to the evidence presented to the state court. *Id.*, at 666. Rather, review of the reasonableness of the state court's decision should be determined *after* considering any additional evidence presented during a federal evidentiary hearing properly held pursuant to § 2254(e)(2). *Id.*, at 666-668. As related to Pinholster's claim, the Ninth Circuit held that the District Court neither erred in granting him an evidentiary hearing, *id.*, at 668, nor in granting him habeas relief on the substantive ineffective assistance claim. *Id.*, at 684.

This Court granted certiorari on June 14, 2010.

### **SUMMARY OF ARGUMENT**

The language, the nature, and the purpose of 28 U. S. C. § 2254(d) all indicate that the issue presented by this subsection should be resolved on the state court record, before any factfinding by the federal court.

Section 2254(d) is not a standard of review. It is a rule of preclusion based on a prior adjudication, in the same category as *res judicata*. The exception for unreasonable application of clearly established law cannot depend on facts never presented to the state court.

So understood, § 2254(d) is in harmony with § 2254(e)(2). Neither contradicts the other or renders the other superfluous. Section 2254(e)(2) is a default rule, largely codifying pre-AEDPA case law, that forbids

an evidentiary hearing in certain circumstances where § 2254(d) does not resolve the claim. For example, the *Brady* claim in *Michael Williams v. Taylor* was not resolved by § 2254(d) because there was no adjudication on the merits in state court, but an evidentiary hearing was barred by § 2254(e)(2).

Where a claim is barred by § 2254(d) on the face of the state court record, it is an abuse of discretion to authorize discovery or conduct an evidentiary hearing. Such unnecessary delay is a violation of the rights of the victims under 18 U. S. C. § 3771.

When the state court has denied a petition on the merits without an evidentiary hearing, the § 2254(d)(1) question should be answered assuming all genuinely disputed facts alleged in the state court in the petitioner's favor. If the denial of the petition with that assumption was unreasonable, the bar of § 2254(d) is lifted, and the petitioner must prove his case on the merits as before AEDPA.

When the state court has denied the initial petition on the merits and denied a successive petition as both successive and meritless, § 2254(d) applies to both merits rulings. If either denial is reasonable based on the facts alleged in that petition, § 2254(d) bars relief.

The statement of *Wiggins v. Smith* that penalty phase prejudice exists if "there is a reasonable probability that one juror would have struck a different balance" does not apply to California. One juror cannot veto a death sentence under California's symmetrical unanimity statute. The focus should be on the jury as a whole, not individual jurors. Evidence considered weak to irrelevant by many or most jurors is unlikely to have swayed an entire jury to switch from a death verdict to a life-in-prison verdict.

## ARGUMENT

### **I. The § 2254(d)(1) question should be decided on the state court record, before taking any additional evidence.**

#### *A. The Nature of § 2254(d).*

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress added subdivision (d) to 28 U. S. C. § 2254 as a new limitation on the power of federal courts to overturn state criminal judgments via the writ of habeas corpus. This new limitation was not, as some contended, a mere codification or even expansion of the preexisting retroactivity rule of *Teague v. Lane*, 489 U. S. 288 (1989). *Teague* and § 2254(d) are distinct inquiries. See *Horn v. Banks*, 536 U. S. 266, 272 (2002) (*per curiam*).

The new limitation abrogated the pre-AEDPA, post-1953 rule of independent review, taking the step the Court considered but did not take in *Wright v. West*, 505 U. S. 277 (1992). See *Terry Williams v. Taylor*, 529 U. S. 362, 400-402 (2000) (O'Connor, J., concurring in part); *id.*, at 410-412 (opinion of the Court). This new limitation was not unprecedented, however. It was a return to the kind of limitation that existed in case law before 1953.

Before *Brown v. Allen*, 344 U. S. 443 (1953), a federal petition by a state prisoner who had exhausted state remedies was considered to be analogous to a successive federal petition by a federal prisoner. Three years earlier, the Court explained the status of a prior state decision in *Darr v. Burford*, 339 U. S. 200, 215 (1950) (emphasis added):

“Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner.”<sup>40</sup>

On that application, the court may require a showing of the record and action on prior applications, *and may decline to examine further into the merits because they have already been decided against the petitioner.*<sup>41</sup>

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40. *Ex parte Royall*, 117 U. S. 241 [1886].

41. *Salinger v. Loisel*, [265 U. S. 224 (1924)].”

The *Salinger* case cited for the last proposition is a federal successive petition case. See *Salinger v. Loisel*, 265 U. S. 224, 226-228 (1924). In AEDPA, Congress abrogated the *Brown* “independent judgment” rule and restored the basic concept of pre-*Brown* law as explained in *Darr*. The so-called “deference” rule of § 2254(d) is a rule of the same class as the successive petition rules of §§ 2244(b) and 2255(h)—“a modified res judicata rule.” Cf. *Felker v. Turpin*, 518 U. S. 651, 664 (1996). The new statute does not restore the pre-1953 rule in its original, open-ended form, though. Consistently with other developments in the law of habeas corpus, it replaces the discretionary rule with “more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise.” See *Lonchar v. Thomas*, 517 U. S. 314, 322 (1996). The language at the top of subdivision (d) establishes a general rule forbidding relitigation of issues decided on the merits by the state court, and the two numbered paragraphs make exceptions to that general rule. See Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L. Rev. 888, 946, 957-958 (1998).

The central purpose of the habeas reform of AEDPA is abundantly clear from the debates. It is to expedite the resolution of habeas corpus petitions, particularly in capital cases. The supporters of reform invariably

bolstered their arguments with horror stories of unconscionable delays. See 141 Cong. Rec. 14,734, col. 1 (1995) (statement of Sen. Feinstein); *id.*, at 15,062, cols. 1-2 (statement of Sen. Hatch); *id.*, at 15,019 (statement of Sen. Specter); *id.*, at 15,036-15,037 (statement of Sen. Nickles).

“After all, State courts are constrained to uphold the Constitution and faithfully apply Federal law as well. There is simply no reason that Federal courts should have the ability to *virtually retry cases* that have been properly adjudicated by our State courts. There is no reason to allow Federal courts to do that.” *Id.*, at 15,062, col. 3 (statement of Sen. Hatch) (emphasis added).

The primary sponsor of § 2254(d) saw it as not only a limitation on relief but also as a limitation on relitigation. This is a rule about respecting the outcome of a previous adjudication, in the same category as res judicata and law of the case. See Scheidegger, *supra*, 98 Colum. L. Rev., at 946; see also *id.*, at 911-917. A substantial part of its value lies in protecting the party who has already prevailed on the merits from the burden and delay of having to litigate those merits over again. It is not enough for that party to win the second battle over the same turf; in most cases he should not have to fight the second battle at all. See *Allen v. McCurry*, 449 U. S. 90, 94 (1980) (“relieve parties of the cost and vexation of multiple lawsuits”).

Respect for the intent of Congress and the purpose of the AEDPA therefore favors addressing the § 2254(d) question at the threshold. Specifically addressing § 2254(d), Senator Hatch noted, “Now, Federal habeas corpus proceedings have become, in effect, a second round of appeals in which convicted criminals are afforded the opportunity to *relitigate* claims already considered and rejected by the State courts.” 141

Cong. Rec. 15,062, col. 2 (1995) (emphasis added); see also K. Scheidegger, *Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform* 27-28 (1995), available at <http://www.cjlf.org/publctns/OverdueProcess.pdf>.

In *Terry Williams*, 529 U. S., at 386, Justice Stevens acknowledged that, “Congress wished to curb delays, to prevent ‘retrials’ on federal habeas, and to give effect to state convictions to the extent possible under law.” (Opinion concurring in the judgment) (emphasis added). The opinion of the Court noted, “That acknowledgment is correct and significant to this case. It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved.” *Id.*, at 404.

For § 2254(d)(1) to achieve its purpose, it is not enough to preclude relief; it must preclude relitigation. The state’s primary interest in habeas reform was not to block relief in cases where it is warranted. Rather, it was to reduce the “burden of federal relitigation of state decisions . . . .” S. O’Connor, *Local Control of Crime, Address to the Attorney General’s Crime Summit* 5 (Mar. 4, 1991), reprinted in *Habeas Corpus Issues: Hearings before the House Subcommittee on Civil and Constitutional Rights*, Serial No. 39, 102d Cong., 1st Sess., 192, 197 (1991). In habeas, as in immunity, once the respondent is forced to litigate the question, much of the value of the protection is lost. Cf. *Mitchell v. Forsyth*, 472 U. S. 511, 526 (1985).

#### *B. Decision on the State Court Record.*

As noted in *Darr, supra*, 339 U. S., at 215, a decision to “decline to examine further into the merits because they have already been decided against the petitioner” normally requires examination of the “record and

action” in the prior proceeding and nothing more. This is true as well under AEDPA.

The threshold requirement for § 2254(d) to apply is that the state court decision must be on the merits. That determination obviously must be made from the state court decision itself, and when there is a written opinion it generally presents little difficulty. Summary dispositions may require reference to lower court decisions, see *Ylst v. Nunnemaker*, 501 U. S. 797, 803 (1991), or to the briefs. See *Coleman v. Thompson*, 501 U. S. 722, 740 (1991) (state court granted motion to dismiss, motion based solely on state procedure). When there is no lower court decision, as in the present case, the state court decision is still a decision on the merits, though, and § 2254(d) still applies. See Brief for Criminal Justice Legal Foundation in *Harrington v. Richter*, No. 09-587.

When the petitioner claims the “unreasonable determination of the facts” exception of § 2254(d)(2), the statute is explicit that this determination is based on “the evidence presented in the State court proceeding.” *Miller-El v. Dretke*, 545 U. S. 231, 241-242, n. 2 (2005), confirmed that the evidence to be considered is limited in this way, while distinguishing “theories about that evidence.” The “contrary to” portion of paragraph (1) refers to the state court’s selection of the governing rule, see *Terry Williams*, 529 U. S., at 405-406, or “if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court.” See *id.*, at 406. Both of those inquiries necessarily depend on the facts before the state court, and only those facts.

That leaves the “unreasonable application” clause. “[W]hen a state-court decision unreasonably applies the law of this Court *to the facts* of a prisoner’s case, a federal court applying § 2254(d)(1) may conclude that

the state-court decision falls within that provision’s ‘unreasonable application’ clause.” *Terry Williams*, 529 U. S., at 409. What facts? It would make no sense to speak of “unreasonable application” to facts never presented to the court. See 590 F. 3d, at 688 (Kozinski, C. J., dissenting). This must refer to facts that have been reasonably found under § 2254(d)(2), are undisputed, or have been alleged by the petitioner and assumed to be true for the purpose of disposition without factfinding. It cannot refer to evidence never presented in any form to the state court.

We can put to one side, for now, the scenario where a state court decides a claim on the merits but refuses to consider the petitioner’s evidence. A claim along those lines was alleged in a case before this Court two years ago, but the allegation was false. See Tr. of Oral Arg. in *Bell v. Kelly*, No. 07-1223, pp. 4-5. A procedurally unreasonable determination of facts might fit within § 2254(d)(2). The Court can decide that issue when a case actually presents it.

When the state court record shows a decision on the merits after either a reasonable fact-finding process or an assumption of genuinely disputed material facts in the petitioner’s favor, the § 2254(d)(1) question should be decided solely on the state court record. New evidence is not relevant to the decision, and the delay caused by hearing it is contrary to the core purpose of AEDPA.

*C. Relation to § 2254(e)(2).*

Treating § 2254(d) as a threshold issue does not render § 2254(e)(2) superfluous. Cf. Brief in Opposition 39. Properly understood, each subdivision has a role to play. *Holland v. Jackson*, 542 U. S. 649, 652 (2004) (*per curiam*), recognized that “whether a state court’s decision was unreasonable must be assessed in light of

the record the court had before it.” However, in the next paragraph the *Holland* opinion muddies this clear language with a reference to § 2254(e)(2). *Bradshaw v. Richey*, 546 U. S. 74, 79 (2005), is similar. The confusion arises from a failure to recognize that subdivisions (d) and (e) are distinct rules.

As discussed *supra*, at 8, § 2254(d) is a “modified res judicata rule.” By its terms, it applies only to claims “adjudicated on the merits in State court proceedings . . . .” Paragraph (e)(2), in contrast, is a procedural default rule. In *Keeney v. Tamayo-Reyes*, 504 U. S. 1, 5-6 (1992), the Court overruled *Townsend v. Sain*, 372 U. S. 293 (1963), on the question of when a federal court must hold an evidentiary hearing for evidence not presented to the state court. The *Keeney* dissent maintained that the decision was inconsistent with the pre-AEDPA subdivision (d) of § 2254, regarding the presumption of correctness of state findings of facts. See 504 U. S., at 12, 20-23 (opinion of O’Connor, J.).

In AEDPA, Congress resolved the tension in favor of the *Keeney* majority opinion by repealing the former subdivision (d) and enacting the new subdivision (e). Paragraph (e)(1), like former subdivision (d), addresses the presumption of correctness when the state court has found the facts. Paragraph (e)(2), like *Townsend* and *Keeney*, addresses the default situation where the defendant fails to present the facts to the state court. See *Michael Williams v. Taylor*, 529 U. S. 420, 433-435 (2000) (discussing § 2254(e)(2) as a partial codification of *Keeney*).

Paragraph (e)(2) can come into play in two different scenarios, as illustrated by *Keeney* and *Michael Williams*. In *Keeney*, the petitioner made his claim in state court but made an inadequate factual showing, and the state court denied his claim on the merits. See 504 U. S., at 3-4. In *Michael Williams*, the petitioner raised

three new claims on federal habeas based on facts not known to him at the time of his state habeas proceeding. See 529 U. S., at 427.

In the *Keeney* situation, an evidentiary hearing would usually be barred both by § 2254(e)(2) and by a denial of relief under § 2254(d) based on the state court record alone, but not always. If the state court found the facts reasonably based on the evidence the petitioner presented, but then chose the wrong standard of law to apply, § 2254(d) would not bar relief. See *Terry Williams*, 529 U. S., at 405-406. However, if the petitioner left out evidence through a lack of diligence and did not qualify for one of § 2254(e)(2)'s exceptions, an evidentiary hearing would be barred, and the federal court's decision would be limited to *de novo* application of the correct standard to the facts proved in state court.

The *Williams* scenario is different. Michael Williams never presented his *Brady*<sup>2</sup> claim to the state court. See 529 U. S., at 427. Hence, there was no state court decision on the merits, and § 2254(d) did not apply. However, because the facts were readily available to petitioner at the time of the state habeas proceeding and neither of § 2254(e)(2)'s exceptions applied, no evidentiary hearing on this claim was permitted in federal habeas. See *id.*, at 437-440.

In cases where § 2254(e)(2) bars an evidentiary hearing by itself, without overlap with § 2254(d), relief will often also be barred by the nonstatutory procedural default rule. That fact does not render § 2254(e)(2) superfluous for several reasons. First, the procedural default rule does not necessarily protect the state from the burden and delay of retrying the facts before the

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2. *Brady v. Maryland*, 373 U. S. 83 (1963).

federal court rules on the default question. As discussed *supra*, at 9, protection from this burden is an important aspect of habeas reform, independent of protection from an erroneous ultimate judgment. Second, the default rule has loopholes that allow many defaulted claims in. Section 2254(e)(2) does not depend on the state default rule being “adequate.” Cf. *Lee v. Kemna*, 534 U. S. 362, 376 (2002) (noting exceptions); see also Scheidegger & Gede, *The Inadequate Jurisprudence of Adequate State Grounds*, 11 Engage No. 2 (forthcoming Aug. 2010) (discussing confused state of this area of the law). Indeed, California’s default rules are brushed aside so routinely by the Ninth Circuit, see, e.g., *Townsend v. Knowles*, 562 F. 3d 1200, 1206-1208 (CA9 2009);<sup>3</sup> Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Philip Morris USA v. Williams*, No. 07-1216, pp. 4-7, that for all practical purposes the state remains under the discredited regime of *Fay v. Noia*, 372 U. S. 391 (1963), overruled in *Coleman v. Thompson*, 501 U. S. 722 (1991).

The exceptions to § 2254(e)(2) for defaulted facts are more stringent than the caselaw exceptions for defaulted claims. See *Michael Williams*, 529 U. S., at 433-434. A petitioner who is allowed to bring a defaulted claim for any of several reasons may nonetheless have had a fair opportunity to establish the factual basis of the claim in state court. For example, if the trial court admitted an out-of-court statement over a hearsay objection after finding it was a dying declaration, a petitioner who is permitted to raise a Confrontation Clause claim on federal habeas (e.g., because the state default rule is deemed “inadequate”) should not also be excused from a failure to introduce evidence refuting

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3. The correctness of *Townsend* is presently before this Court in *Walker v. Martin*, No. 09-996.

the status of the statement as a dying declaration. See *Giles v. California*, 554 U. S. \_\_\_, 128 S. Ct. 2678, 2684-2685, 171 L. Ed. 2d 488, 497-498 (2008) (noting dying declaration as established exception to confrontation right).

In summary, § 2254(e)(2) is an independent bar on evidentiary hearings in certain circumstances of default by the petitioner. It does not, by negative implication, authorize a hearing in those circumstances where it does not bar one. Whether a hearing is required, discretionary, or prohibited in those other circumstances must be determined by reference to other rules of law. One of those other rules, *amicus* submits, is that the State is entitled to a ruling under § 2254(d) on the state court record, *before* being burdened with any fact-finding procedures, for any claim that was decided on the merits by the state court.

#### *D. Discretion and Limits.*

Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts (“Habeas Rules”) permits the district judge to expand the record, and Habeas Rule 8 directs the judge “to determine whether an evidentiary hearing is warranted.” Neither rule indicates when these steps are warranted.

*Schriro v. Landrigan*, 550 U. S. 465, 468-469 (2007), was a case where the District Court denied an evidentiary hearing and the Court of Appeals held that a hearing was mandatory. The case therefore directly addresses only the limit on the court’s discretion to deny a hearing, not the limit on the court’s discretion to grant one. *Landrigan* discusses how AEDPA changed the factors to be considered without directly altering the judge’s authority. See *id.*, at 473-474. The Court then continues, “It follows that if the record refutes the applicant’s factual allegations or *otherwise precludes*

*habeas relief*, a district court is not *required* to hold an evidentiary hearing.” *Id.*, at 474 (emphasis added). This holding implements AEDPA’s purpose of reducing delays in execution. See *id.*, at 475.

This passage in *Landrigan* emphasizes factual findings that dispose of the claim because that was the situation presented by the case. As a matter of historical fact, Landrigan had forbidden all mitigating evidence, and that fact precluded any possibility of establishing prejudice under *Strickland v. Washington*, 466 U. S. 668 (1984). See 550 U. S., at 477. However, the “otherwise precludes” language indicates that the principle is not limited to dispositive facts. A reasonable application of the correct precedent to the facts before the state court “otherwise precludes habeas relief” on that claim. Therefore, the District Court is not *required* to take new evidence on a claim if the state court decided that claim on the merits and neither exception to § 2254(d) applies.

Is a district court *permitted* to hold a hearing on such a claim? There is no reason to hold one. If the claim is precluded by § 2254(d) on the basis of the state record, no facts introduced in federal court can lift that bar. A hearing would be an unnecessary delay and a waste of resources. An unnecessary delay is an unreasonable delay and therefore a violation of the rights of the victims. See 18 U. S. C. §§ 3771(a)(7), (b)(2)(A), (b)(2)(D).

The present case is procedurally unusual in that the District Court held the evidentiary hearing in the belief that AEDPA did not apply, based on circuit precedent that was overruled after the hearing but before the District Court’s final decision. Even so, it is worth noting what the correct procedure would have been if the District Court had been applying AEDPA from the beginning.

The correct procedure is to decide whether the § 2254(d) exceptions apply or not based solely on the record in state court. That record may be expanded if necessary to add material missing from it but necessary for understanding the state court proceedings, but not with additional evidence on the merits never presented to the state courts. If no § 2254(d) exception applies, the claim should be finally denied at that point. If an exception does apply, petitioner has cleared that hurdle and must now establish his claim on the merits, just as before AEDPA. If a hearing is needed for that purpose and not precluded by § 2254(e)(2), the court should hold one.

Conceivably, there might be a case where a state court acts unreasonably in summarily deciding material factual questions against the petitioner despite a proffer of solid evidence. When and if that case arises, the Court can consider whether § 2254(d)(2) provides relief. This is not that case. The § 2254(d) question should have been decided solely on the record of proceedings in the state court, and receipt of evidence outside that record would have been an abuse of discretion if the District Court had been applying AEDPA from the start. Even after the erroneous receipt of that evidence, it remained irrelevant to the question to be decided under § 2254(d). Once the applicability of AEDPA was clarified, the District Court should have evaluated the reasonableness of the state court decision solely on the evidence proffered to the state court.

**II. A state court decision without an evidentiary hearing or findings of fact should be evaluated assuming genuinely disputed facts in the petitioner’s favor.**

As discussed, *supra*, at 12, one of the exceptions to the issue preclusion bar of § 2254(d) is unreasonable application of the law to the facts of the case. Where a state court decision is rendered without an evidentiary hearing or findings of facts—and where, as here, there is no prior state court decision to look to—there are no factual findings.

In California, upon submission of a petition for writ of habeas corpus, “a court must first determine whether the petition states a prima facie case for relief—that is, whether it states facts that, if true, entitle the petitioner to relief . . .” *People v. Romero*, 8 Cal. 4th 728, 737, 883 P. 2d 388, 391 (1994). If the court finds no prima facie case has been stated, the court will summarily deny the petition. *People v. Duvall*, 9 Cal. 4th 464, 475, 886 P. 2d 1252, 1258 (1995). The issuance of such a summary denial (where the denial is not based on procedural grounds) is an indication that the court has considered the petition, accepted its factual allegations as true, and concluded that the petition fails to state grounds for relief. See *In re Clark*, 5 Cal. 4th 750, 769, 855 P. 2d 729, 741, n. 9 (1993); *In re Robbins*, 18 Cal. 4th 770, 814, n. 35, 959 P. 2d 311, 340, n. 4 (1998). No further pleadings or fact-finding process is required because, even if the petitioner were granted the opportunity to prove his claim, his claim fails as a matter of law.<sup>4</sup>

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4. Federal law similarly contemplates dismissal of collateral review without an evidentiary hearing in appropriate cases. See Rules Governing Section 2255 Proceedings for the United States District Courts, Rules 4(b) and 8(a).

Thus, on federal habeas review, the first question before the District Court is whether, based on the evidence proffered by the petitioner to the state court and assuming in the petitioner's favor all genuinely disputed facts, does the state court's summary dismissal fail the standard of § 2254(d)(1)?<sup>5</sup> If the disputed facts are accepted as presented by the petitioner, and the petition nevertheless fails to state a claim upon which habeas relief can be granted, or if the state court could reasonably so find, there is no need for the federal court to go any further. Even if the petitioner were given an opportunity to prove his factual allegations—and succeeded in doing so—the law would still not afford him a remedy. If, on the other hand, the disputed facts as proffered by the petitioner state a claim for relief, and the state court's contrary holding via summary dismissal of the petition is an unreasonable application of clearly established federal law, then the bar of § 2254(d) is lifted and the petitioner is entitled to an opportunity to prove his claim based on the actual facts.

In this case, the California Supreme Court disposed of Pinholster's penalty phase ineffective assistance of counsel claim with a summary dismissal. See App. to Pet. for Cert. 302. In accordance with California's habeas procedure outlined above, this means that the court accepted as true all facts proffered by Pinholster in his petition and determined that, even if true, Pinholster's allegations failed to state a claim for ineffective assistance of counsel entitling him to relief. The threshold question for the District Court should have been whether, based on Pinholster's allegations,

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5. Naturally, § 2254(d)(2)'s "decision based on an unreasonable determination of the facts" is inapplicable in cases where the state court dismissed the case without conducting an evidentiary hearing or making findings of fact and there are no prior factual findings on the points at issue.

the summary dismissal precluded federal relief under subdivision (d). Only if the answer to that question is “no” should the habeas court proceed to the question of whether an evidentiary hearing is permitted under § 2254(e)(2) and Habeas Rule 8.

As discussed in Part I-C, *supra*, at 12-16, § 2254(e)(2) becomes relevant at this point to determine if an evidentiary hearing is barred by that provision. If not, and if an evidentiary hearing is “warranted” under Habeas Rule 8, then § 2254(e)(1) will apply to any relevant factual findings made by the state courts at any point in the proceedings. “[T]he § 2254(e)(1) presumption of correctness applies regardless of whether there has been an ‘adjudication on the merits’ for purposes of § 2254(d).” *Nara v. Frank*, 488 F. 3d 187, 200-201 (CA3 2007).

In summary, then, when the state habeas petition has been denied on the merits without factual findings and no other bar to relief applies, the federal habeas court should proceed along these steps:

- 1) Determine whether the allegations in petitioner’s *state* habeas petition would, if true, so clearly entitle him to relief under established law that the contrary conclusion is unreasonable. If not, deny the claim under § 2254(d).
- 2) If the claim is not denied at Step 1, determine whether an evidentiary hearing is barred by § 2254(e)(2).
- 3) If not, determine whether an evidentiary hearing is “warranted” under Habeas Rule 8, a determination largely unchanged from pre-AEDPA law.
- 4) If so, conduct the hearing and decide the material facts, applying the § 2254(e)(1) presumption and burden of proof to any facts previously determined by a state court.

5) Apply the law to the facts found or presumed and decide the claim on the merits.

The Court of Appeals in this case erred at step one, holding that the District Court could properly take evidence never presented to the state court in deciding whether the state court's decision was a reasonable application of the law to the facts. *Pinholster*, 590 F. 3d, at 666-668. That holding should be expressly disapproved.<sup>6</sup>

**III. An initial state court decision on the merits, if reasonable on the facts proved or proffered, continues to bar federal habeas relief notwithstanding a later decision on both procedural grounds and the merits.**

In deciding *which* California Supreme Court decision to evaluate under 28 U. S. C. § 2254(d), the Court of Appeals stated simply that “[t]he relevant state court decision is the last reasoned decision regarding a claim . . . .” 590 F. 3d, at 662. The authority cited for this proposition is *Barker v. Fleming*, 423 F. 3d 1085, 1091 (CA9 2005), which in turn relies on *Ylst v. Nunnemaker*, 501 U. S. 797, 803-804 (1991). *Barker* and *Nunnemaker* were both decided in different contexts, and even in its original context the *Nunnemaker* rule is not that simple. A deeper analysis is required.

*Barker* is easily distinguished. In that case, the Washington Court of Appeals dismissed a state collateral review petition, the petitioner sought review in the Washington Supreme Court, and that court denied review with an opinion. See *Barker*, 423 F. 3d, at 1091. Where the second opinion is that of a higher court reviewing the decision of a lower court, the proposition

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6. See *infra*, at 29, regarding the alternative holding. *Id.*, at 669.

that only the last opinion need be considered is straightforward, see *id.*, at 1091-1093, at least where the opinion decides the merits.<sup>7</sup>

*Nunnemaker* predates AEDPA and deals with procedural defaults rather than §2254(d), but the principles involved in that decision illuminate the present problem. Generally, if a state defendant fails to make his federal claim when, where, and how state law requires, and if the state court rejects his subsequent attempt to make that claim on that basis, then he cannot make the claim in federal habeas unless an exception applies. See *Coleman v. Thompson*, 501 U. S. 722, 729-730 (1991). The procedural default still bars federal review even if the state “reach[ed] the merits of a federal claim in an *alternative* holding.” *Harris v. Reed*, 489 U. S. 255, 264, n. 10 (1989) (emphasis in original).

A state court may deny a claim on the ground that it has been denied before, and petitioner has not met the criteria state law sets for a second bite at the apple. Such a denial’s “effect upon the availability of federal habeas is nil . . . .” *Nunnemaker*, 501 U. S., at 804, n. 3. If the claim was previously defaulted, it remains defaulted, but if it was not, its rejection as successive does not create a default. See *Cone v. Bell*, 556 U. S. \_\_\_, 129 S. Ct. 1769, 1781, 173 L. Ed. 2d 701, 716 (2009).

What was true for the procedural default bar before AEDPA (and still is) should also be true for the modi-

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7. Occasionally individual Justices of this Court write opinions “respecting denial of certiorari” explaining why a case is not appropriate for discretionary review. See, e.g., *N. C. P. Marketing Group, Inc. v. B G Star Productions, Inc.*, 129 S. Ct. 1577, 1578, 173 L. Ed. 2d 1028, 1029 (2009) (statement of Kennedy, J.). If a state court denied discretionary review with such an opinion, that would call for application of the *Nunnemaker* “look through” rule.

fied issue preclusion bar after AEDPA. That is, a state court’s rejection of a claim on the ground it was previously decided on the merits against the petitioner should have no effect on the application of § 2254(d) in federal habeas. If the prior merits decision reasonably applied the correct rule to the facts *then* before the state court, § 2254(d) bars federal habeas relief. It would defeat the purpose of the statute if the petitioner could do an end-run around that bar simply by filing a successive petition and having it rejected as successive.

In the present case, the claim of ineffective assistance in the penalty phase was the third claim of the successive petition. This claim was rejected on the merits as well as on the grounds that it was untimely and successive.<sup>8</sup> See App. to Pet. for Cert. 300-301. The court even went so far as to cite the “alternative holding” footnote of *Harris v. Reed*, *supra*.

If denial as successive alone would be insufficient to lift a § 2254(d) bar from the prior denial on the merits, should an *alternative* holding that the new petition is still without merit lift that bar? The *Harris* footnote is not controlling, but it is strongly analogous. The *Harris* Court sought to make clear that “a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity.” 489 U. S., at 264, n. 10.

A state needs a strong successive petition rule, particularly in capital cases. The right of the victims to a timely conclusion of the post-judgment proceedings cannot be upheld without one. See Cal. Const., Art. I, § 28(b)(9); cf. 18 U. S. C. § 3771(a)(7). Further, in too

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8. Successive collateral review petitions are likely to also be untimely. In the federal system, for example, few motions that are “second or successive” within the meaning of 28 U. S. C. § 2255(h) will be filed within the year allowed by § 2255(f).

many federal courts any failure to invoke the successive petition rule may be used against the state in other cases under a pointlessly severe interpretation of the “adequate state grounds” doctrine. See Brief for California, *et al.*, as *Amici Curiae* in *Beard v. Kindler*, No. 08-992, p. 12.

At the same time, though, an alternative holding that the petition is still without merit provides an assurance to the public that justice is not being lost in “technicalities.” Where such an alternative holding can be made without unduly prolonging the proceedings, federal law ought not deprive the State of a defense for its judgment that it would otherwise have, as *Harris* recognized in the procedural default context.

In this scenario, the habeas petitioner received two decisions on the merits by the state court, even though he was only entitled to one. Which one needs to be a reasonable application of clearly established federal law in order to preclude federal habeas relief? Either one.

By its terms, § 2254(d) bars federal relief on a claim adjudicated on the merits in state court unless an exception applies. Where a second adjudication is a review of a prior one by a higher court, it makes sense to look only at the later adjudication. This is true whether the second adjudication is an appeal designated as such or a successive habeas petition used as an appeal in practice, even though not in name. See *Carey v. Saffold*, 536 U. S. 214, 221-222 (2002) (describing California practice).

Where the second adjudication on the merits is simply a second adjudication rather than a review, nothing in the text or purpose of § 2254(d) requires that the issue-preclusion effect of the first adjudication be superseded. One of the primary purposes of AEDPA was to reduce the number of reviews of capital cases.

Supporters filled the Congressional Record with absurdly long case histories, showing repeated reviews of the same judgment, far exceeding any need to ensure basic fairness. See, *e.g.*, 141 Cong. Rec. 15,018-15,020 (1995) (statement of Sen. Specter); 142 Cong. Rec. 7574-7575 (1996) (statement of Sen. Gorton). To reward a petitioner for delaying proceedings with an unnecessary successive petition in state court would be contrary to the central purpose of the statute.

Pinholster contends that the California Supreme Court's summary denial of his ineffective assistance claim was an unreasonable application of the rule of *Strickland v. Washington*, 466 U. S. 668 (1984), to the facts he proffered to the state court. See Brief in Opposition 24. He would have to establish that as to *both* adjudications to escape the bar of § 2254(d).<sup>9</sup> If he cannot, a federal court has no authority to disturb the judgment.

#### **IV. The “one juror” standard for assessing penalty-phase prejudice does not apply to California.**

At the beginning of its prejudice assessment, the Court of Appeals said this regarding the standard to be applied:

“Regarding prejudice at capital sentencing, ‘the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.’ [*Strickland v. Washington*, 466 U. S. 668, 695 (1984).] . . . [G]iven California’s

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9. See *infra*, at 29.

requirement that a unanimous jury impose any death sentence, *see* CAL. PENAL CODE § 190.4(b), our inquiry is whether, based on the sum of this evidence, ‘*there is a reasonable probability that at least one juror would have struck a different balance,*’ *Wiggins*, 539 U. S. at 537 (emphasis added).” 590 F. 3d, at 674-675.

The Court of Appeals was fundamentally mistaken. The symmetrical California rule that the jury must be unanimous *either way* is very different from the one-sided Maryland rule in *Wiggins*. In Maryland, a hung penalty jury results in a life sentence, *see* Md. Crim. L. Code § 2-303(j)(2), effectively allowing the opinion of one juror to prevail over the contrary views of eleven jurors. A “different result” in Maryland therefore requires only that one juror “would have struck a different balance” *and* would have held out against the contrary views of the others.<sup>10</sup>

Allowing a single holdout to trump the considered views of the remainder of the jurors has produced grievous miscarriages of justice, such as the inadequate punishment imposed upon the “20th hijacker,” Zacharias Moussaoui. *See* Dwyer, *One Juror Between Terrorist and Death*, *Washington Post*, May 12, 2006, p. A1. The people of California have wisely decided not to go that route.

“If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable

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10. *Wiggins* did not consider the latter requirement. Whether this statement in *Wiggins* should be modified even in a single-juror veto state such as Maryland can be considered in a case that presents the issue.

to reach a unanimous verdict as to what a penalty shall be, the court in its discretion shall either order a new jury or impose the punishment of confinement in a state prison for a term of life without the possibility of parole.” Cal. Penal Code § 190.4(b).

It is not unusual for the second jury to return a unanimous death verdict. See, *e.g.*, *People v. Bonilla*, 41 Cal. 4th 313, 320, 160 P. 3d 84, 89 (2007).

A “different result” in California requires not only that “one juror would have struck a different balance” and held out to the point of producing a hung jury but also that the proceedings that follow do not produce a death sentence. That is, either the district attorney decides to stop seeking the death penalty, the second jury is unanimous for a life sentence, or the second jury is also hung and the judge decides not to summon a third.

The rule that a hung jury produces a second trial and not a life sentence also makes it less likely that a juror who initially favors a life sentence will hold out. In the Moussaoui case, the dissenting juror simply refused to deliberate. See Dwyer, *supra*. A true, symmetrical unanimity requirement makes such behavior less likely, as jurors typically do not want to see their invested time go for naught.

In a state such as California, then, the focus of the prejudice question should be on the jury as a whole, not an individual juror. Would the evidence in question have had a reasonable probability of convincing the jury that voted unanimously for a death sentence to instead have voted unanimously for a life sentence? That would require powerful evidence.

Evidence that is regarded as substantially mitigating by some people but is regarded as having little or no weight by a great many others is particularly unlikely

to swing a jury from unanimous one way to unanimous the other. The “bad childhood” defense falls squarely in this category. One survey of capital jurors found that over three-fifths would give no mitigating weight at all to claims of childhood abuse, and a whopping 85% would give no mitigating weight at all to claims of childhood poverty. See Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1559 (1998).<sup>11</sup>

For the reasons explained in the Brief for the Petitioner, the Brief for Pennsylvania et al. as *Amici Curiae*, Judge Tallman’s opinion for the panel majority, and Chief Judge Kozinski’s en banc dissent, the additional evidence that Pinholster claims counsel should have presented does not meet the *Strickland* requirement of a reasonable probability of a different result. Both of the California Supreme Court’s denials of relief on the merits were not only “reasonable” within the meaning of 28 U. S. C. § 2254(d), they were correct.

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11. Present constitutional doctrine requires consideration (and extensive, expensive litigation) of mitigating factors that jurors give little weight but not of the mitigating factor that jurors give greatest weight—residual doubt of guilt. See *id.*, at 1563; *Lockett v. Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Oregon v. Guzek*, 546 U. S. 517, 523-524 (2006). In an appropriate case, the whole line of constitutionally required mitigation should be rethought. See generally Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in Support of the Petition for Writ of Certiorari in *Schriro v. Styers*, No. 08-1350.

**CONCLUSION**

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

August, 2010

Respectfully submitted,

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