IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCOTT LYNN PINHOLSTER Petitioner-Appellee, v. ROBERT L. AYERS, Warden of California State Prison at San Quentin, Respondent-Appellant.	No. 03-99003 D.C. No. CV 95-0240-GLT
SCOTT LYNN PINHOLSTER Petitioner-Appellant, v. ROBERT L. AYERS, Warden of the California State Prison at San Quentin, Respondent-Appellee.	No. 03-99008 D.C. No. 95-06240-GLT

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC; FED. R. APP. PROC. 35 AND 40

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Honorable Gary L. Taylor
United States District Judge

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I. INTRODUCTION

Scott Pinholster's lawyers spent only 6.5 hours preparing for the penalty phase of his capital trial. The single potential witness they spoke with was his mother. The only mitigation evidence offered was her testimony that Pinholster remained a problem child despite her best efforts to raise him properly. His lawyers failed to discover or present evidence, adduced on habeas, that his birth father abandoned the family; his mother evinced no concern for the well-being of her children, and indeed laughed when they behaved inappropriately and encouraged them to steal; his grandmother and stepfather beat him; and he was raised in extreme poverty. They failed to develop available expert testimony that Pinholster's childhood head injuries caused frontal lobe brain damage and epilepsy. The jury voted for death without hearing any of this mitigation evidence. The district judge, who was able to consider this evidence, granted penalty relief on Petitioner's claim of ineffective assistance of counsel. A divided panel of this Court disagreed, found no prejudice, and reversed.

This case should be reheard en banc because the majority decision conflicts with the recent trio of Supreme Court decisions vacating death judgments where inadequate penalty phase investigation resulted in a failure to present significant mitigation evidence. *See Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005). Further, the majority's

finding that there was no prejudice conflicts with numerous decisions of this Court, which have found prejudice on less compelling records. *Belmontes v. Ayers*, No. 01-99018, 2008 WL 2390140 (9th Cir. June 13, 2008); *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002); *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002); *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000).

II. BACKGROUND

The Capital Trial

Petitioner was charged with two counts of capital murder arising from a burglary of a drug dealer's house. The prosecution's case relied on accomplice testimony that the victims were killed after the accomplice, Petitioner and a co-defendant were caught burglarizing the house. Petitioner stabbed one victim while the co-defendant stabbed the other. Petitioner then stabbed the second victim, too. Petitioner testified in his own defense that he had burglarized the house earlier that evening, but denied being present during the murders.

After the jury returned guilty verdicts, the lawyer responsible for preparing the penalty phase confessed on the record that "[he] had not prepared any evidence by way of mitigation." ER1445. The trial judge asked if he wanted more time to prepare for penalty phase. Counsel declined, stating: "Clearly the only person who comes to mind is the defendant's mother. How much beyond that I don't know. I don't think the passage of time would make a great deal of difference." ER1446-47. Billing records reflect that counsel spent only 6.5 hours preparing for penalty phase. ER

1445.

The prosecution called eight penalty phase witnesses, six of whom were members of law enforcement. A probation officer and several sheriffs testified that Pinholster resisted arrest or fought and faked seizures in their presence. A sixth witness testified that Pinholster attacked him with a razor. Pinholster's wife testified that he broke her jaw.

Defense counsel waived opening statement and called Petitioner's mother, Burnice Brashear, as the sole defense witness. Brashear testified that she had always provided a good home and taken care of her children. She conceded that her husband had been "abusive or near abusive" to Pinholster, but she also portrayed her husband's physical actions as "discipline" brought on by the boy's rebellion and stressed that her son's present relationship with his stepfather was friendly. Brashear mentioned two car accidents in which Pinholster was injured as a young child, but no attempt was made to explain the impact of those accidents on Pinholster. She testified that elementary school officials had diagnosed her son with "perceptive vision," but claimed he "did much better" after being placed in a different classroom. She also testified that her son had epilepsy, but no attempt was made to explain the impact of the epilepsy on Pinholster.

During closing argument, the prosecutor scoffed at the fleeting testimony about epilepsy and head injuries, noting that no evidence of brain damage had been presented. She also questioned the relevance of "discipline" imposed by Pinholster's

stepfather, noting that Brashear's own testimony revealed that Pinholster "came from a good home" and "had many things going for him." Finally, she asked, "What mitigating circumstances were presented? Nothing except for a mother who loves her son."

Defense counsel during his closing made a series of abstract arguments for mercy. He never mentioned Brashear's testimony or the background or character of his client. After deliberating for at least 2 ½ days, the jury returned a death verdict.

Federal Habeas Proceedings

Petitioner filed a federal habeas petition alleging that his attorney's failure to prepare and present mitigation constituted ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 688-94 (1986) (deficient performance that prejudices a defendant is ineffective assistance of counsel). Petitioner presented evidence at the evidentiary hearing that his childhood was marred by neglect and physical and emotional abuse. His father abandoned the family when Pinholster was very young. His mother, Brashear, moved into her parents' home, where Pinholster's grandmother physically abused him because he "looked like his father." Later, Brashear left her children home alone without food while she shopped for expensive clothes or dated men. The children were so hungry that they mixed flour and water to eat. Brashear also encouraged Pinholster to steal as long as the money was given to her. After Brashear remarried, Pinholster's alcoholic stepfather regularly beat

him, using fists, a belt and, once, a 2-by-4 board to the head.[1] School officials recommended that Pinholster be placed in special education classes to treat his learning disabilities. Brashear ignored the recommendation. By age 10, Pinholster began associating with gangs and abusing substances. He sniffed glue and smoked marijuana, and began using heroin by age 14.

None of the Pinholster children was unaffected by the years of neglect and abuse. Pinholster developed epilepsy and spent five months in a mental hospital at the age of 11. His sister was made a ward of the state after being convicted of prostitution and sexual battery. His brother was arrested for robbery, rape and sodomy, was diagnosed schizophrenic, and eventually committed suicide.

Petitioner also suffered two childhood head injuries during car accidents. In the first, his mother ran over him with her car, tearing off his ear. In the second, his head went through the front windshield of the car. Both habeas mental health experts testified that these accidents caused frontal lobe brain damage, which affected Pinholster's moral reasoning and decision-making. Dr. Olson said the onset of epilepsy corroborated his diagnosis of frontal lobe brain damage. Dr. Vinogradov

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[1] The evidence of abuse was uncontested at the evidentiary hearing. The majority's opinion emphasizes notes purporting to memorialize a 1991 interview between Pinholster and trial investigator in which Pinholster denied that his stepfather abused him. However, these notes were never authenticated, the investigator was never called as a witness, and the district court ruled the notes were inadmissible hearsay. These notes provide no basis to discount the uncontested evidence of abuse.

diagnosed Pinholster with "personality change, aggressive type, due to serious childhood head trauma." ER 1261. People with such a diagnosis have a "hair trigger" and become enraged with only slight provocation.

The district court found that trial counsel's failure to prepare mitigation because he didn't believe the trial would reach penalty phase was deficient performance. The district judge then reweighed the evidence to determine prejudice. Although he viewed the aggravators as "strong," the district judge concluded that the mitigation was "also strong." He found that the "background evidence was crucial to humanizing Pinholster to the jury." He also noted that the jury deliberated 2 ½ days even though the prosecutor exploited "the meager case in mitigation at trial." After canvassing this Court's ineffective-assistance cases, the district judge found prejudice and granted relief.

Panel Decision

On appeal, a divided panel reversed the grant of penalty relief. *See Pinholster v. Ayers*, 525 F.3d 742, 773 (9th Cir. 2008). The majority proceeded directly to the second prong of *Strickland*, reweighed the mitigation against the aggravation, and held there was no prejudice. The majority concluded that the state court was not objectively unreasonable in denying the ineffective assistance claim. *Id.* at 763-67. The majority did not cite a single Ninth Circuit case reversing a district court's finding of ineffective assistance of counsel at penalty phase, and Petitioner is unaware of any such opinion.

Chief Judge Kozinski in his concurrence doubted whether the majority's reweighing and finding of no prejudice could be reconciled with *Rompilla*, which found prejudice in a case with worse aggravating factors. Consequently, he justified reversal on the alternate ground that interviewing the defendant's mother once satisfied counsel's duty to conduct a reasonable investigation. *Id.* at 774.

Recognizing how far the majority and concurring opinions had strayed from the controlling cases interpreting ineffective assistance at penalty phase, Judge Fisher dissented. He noted that the majority decision could not be reconciled with *Williams*, *Wiggins* and *Rompilla*, and specifically criticized the majority's reweighing and finding of no prejudice as creating a standard higher than *Strickland*. *Id.* at 780.

III. ARGUMENT

A. THIS CASE SHOULD BE REHEARD BECAUSE THE MAJORITY'S PREJUDICE ANALYSIS CONFLICTS WITH SUPREME COURT AND NINTH CIRCUIT LAW

The majority did not address deficient performance because it decided that Petitioner could not prove prejudice. In order to prove *Strickland* prejudice a "defendant 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 majority reached its decision by reweighing all of the mitigation that

habeas counsel uncovered against the aggravation that had already been presented at trial. The majority wrote: "Like the California Supreme Court [2],we conclude that the potential mitigating evidence is insufficient to outweigh the overwhelming aggravating evidence. We are heavily influenced by the damage Pinholster did to himself when he took the stand in the guilt phase and testified to an unrepentant life of violent crime." *Pinholster*, 525 F.3d at 766-67.

The majority's finding of no prejudice marks a radical departure from the law of this Circuit. As the dissent noted, the majority tipped the balance in favor of the State by failing to accord the mitigation its proper weight and assigning far too much weight to the aggravators. " The majority thus imposes a much more stringent test for prejudice than required by *Strickland v. Washington* and its progeny." 525 F.3d at 780. If this error is not corrected, the duty to investigate and present mitigation will exist in name only.

Mitigation

This case reveals why a single interview of the defendant's mother cannot satisfy counsel's duty to conduct a reasonable investigation of mitigation. Based on one interview of Brashear, counsel declined a continuance to prepare for penalty

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[2] It is unclear why the majority claims its reweighing accords with the state court's reweighing. As the majority conceded, "the California Supreme Court summarily denied Pinholster's penalty phase ineffective assistance of counsel claim," leaving the majority "unable to analyze the basis for the state court's decision." 525 F.3d at 766 n. 21.

phase because he incorrectly believed no mitigation existed.

Counsel was wrong. There was a wealth of mitigation regarding Pinholster's social history and brain damage that would have rebutted the prosecutor's false claims that "he came from a good home" and "had a lot going for him." The district court found the information about Pinholster's background would be "very important" to the decision to give life or death. The medical and psychiatric mitigation was especially important because, as the Court observed in *Caro*, "frontal brain damage may hinder judgment and cause aggressiveness without necessarily diminishing one's intelligence." *Caro*, 280 F.3d at 1247-53. Presenting this evidence would have reduced Pinholster's moral culpability in the eyes of jurors by showing his lack of control over his emotions. *Id.* at 1257.

Aggravators

The majority considered the "brutality" of the murders and Pinholster's "life of crime" to be the most damaging aggravating factors. However, the record does not support the majority's treatment of this case as significantly more aggravating than most capital cases. Pinholster, who was drunk and high, plotted with two cohorts to steal from a drug dealer whom he considered an easy target. The house was empty when they arrived, so they entered and looked for drugs or money to steal. When two men (one of whom worked as a guard for the drug dealer) unexpectedly returned and opened the front door, the three sought to escape out the back door. Unfortunately, the two men had come around the back in an apparent effort to confront the burglars.

Pinholster and a co-defendant then fatally stabbed the two men and stole their wallets. The two felony murders were not so cruel or heinous as to completely eclipse the mitigation. *See, e.g., Bonin v. Calderon*, 59 F.3d 815, 836 (9th Cir. 1995) (affirming district court's finding of no prejudice because defendant committed sadistic, serial murders).

Contrary to the majority's reference to Pinholster's "life of crime," only one prior conviction for kidnaping was admitted at trial. Most of the other references to violent acts came from Pinholster, who testified that he perpetrated hundreds of armed robberies of drug dealers. Witnesses testified to other violent acts that Pinholster had boasted about, but no corroborating evidence was introduced to confirm his extravagant claims. If trial counsel had known of Pinholster's mental problems, they would have been skeptical of his accounts of his activities, both inside and outside the courtroom.

Reweighing

A proper reweighing of the mitigation against the aggravation leads to the conclusion that there is a reasonable probability that the outcome would have been different. Even though the penalty phase was so short, the jury deliberated 2 ½ days, which suggests at least some of the jurors did not consider the aggravators as powerful as the panel majority did. *See Jennings v. Woodford*, 290 F.3d 1006, 1019 (9th Cir. 2002) (two days of jury deliberations supported finding prejudice). If the jury had learned of Pinholster's history of neglect and physical and emotional abuse,

as well as his frontal lobe brain damage, "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

The majority opinion repeatedly states that the mitigation would not have made a difference because Pinholster's guilt-phase testimony was so damaging. Because Pinholster boasted of committing "hundreds of robberies" and was "either laughing or smirking during numerous stages of the deputy prosecutor's cross-examination," 525 F.3d at 773, his testimony became the overriding aggravating factor: "we conclude that no newly-minted expert theory to explain [petitioner's] behavior would have made a difference in the face of what [he] said and did." *Id.* at 770.

These statements betray a fundamental misunderstanding of the role mental illness plays in mitigation. Counsel's failure to conduct a mental heath investigation led them to advise a brain-damaged client to testify, which predictably ended disastrously. Petitioner's damaging testimony reveals, rather than negates, the prejudice caused by counsel's failure to develop mental heath evidence. Because Pinholster's guilt-phase testimony alienated the jury, it needed to be addressed at penalty phase in a way that humanized him. Because they had developed no medical or psychiatric evidence to do this, counsel simply ignored it. The prosecutor then used counsel's failures as proof that there was no mitigation to be offered.

If counsel had conducted a reasonable investigation of mental health, they would have discovered the frontal lobe brain damage and used it to explain Pinholster's bizarre demeanor and testimony. A healthy person who "glories" in his

violent crimes deserves condemnation, but a brain-damaged person who does the same thing is not similarly situated. The latter is impulsive and less able to control his actions and emotions, whether on the streets or in a courtroom.

The majority's assertion that "no amount of clever 'after-the-fact' assessment by habeas defense psychiatrists would have convinced even a single juror to change his vote" marks a disturbing and unprecedented devaluation of mitigation in this Circuit. 525 F.3d at 773. This devaluation of mitigation is inconsistent with the modern capital sentencing scheme created in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972). As the Supreme Court has emphasized, "If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

When faced with existing precedents that are inconsistent, this Court has looked to the reasoning of relevant Supreme Court authorities. *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121, 1127 (9th Cir. 2006) (en banc). The Supreme Court found in *Williams*, *Wiggins* and *Rompilla* that counsel who failed to fully investigate mitigation were ineffective and granted relief under AEDPA. In *Williams*, the defendant contacted the police, who had incorrectly believed that the victim had died

from blood alcohol poisoning, and admitted to killing the victim after he refused to loan Williams money. Williams had prior convictions for armed robbery, burglary and larceny. The prosecution also introduced evidence of two prior auto thefts and two violent assaults on elderly victims after the murder.

Trial counsel began investigating mitigation one week before trial. They called the defendant's mother and two neighbors, all of whom testified that Williams was a "nice boy" and not a violent person. Counsel also introduced evidence that during a prior robbery Williams removed the bullets from a gun so as not to injure the victims.

Habeas counsel discovered evidence that Williams suffered abuse and deprivation during childhood and was borderline mentally retarded. The Court held that trial counsel was ineffective for failing to prepare and present this mitigation. The Court warned against underestimating the value of mitigation in assessing *Strickland* prejudice:

> Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case. The Virginia Supreme Court did not entertain that possibility. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel.

529 U.S. at 398.

In *Wiggins*, the defendant, who had no prior record, was convicted of murdering an elderly woman, whose body was found in the bathtub with insecticide

sprayed over her face and her panties pulled down. At penalty phase, counsel presented evidence that Wiggins did not kill the victim. *Wiggins*, 539 U.S. at 553.

Habeas counsel subsequently showed that Wiggins was raised by an alcoholic and abusive mother. Wiggins was eventually put in foster care, where he was sexually abused by his foster father and other family members. He also had limited intellectual abilities. *Wiggins*, 539 U.S. at 516-17.

The Court held that trial counsel's failure to conduct a thorough investigation of their client's background and upbringing was deficient performance. The Court then reweighed the mitigation against the aggravation and found prejudice, writing:

> Wiggins' sentencing jury heard only one significant mitigating factor--that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history on the mitigation side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.

Id. at 537.

In *Rompilla*, the defendant was convicted of the murder of a bar owner, whose body was found stabbed multiple times and burned. Rompilla had prior convictions for rape, burglary and theft, arising from a factually similar attack on a female bar owner. At penalty phase, counsel called five family members, who argued residual doubt and begged for mercy. Counsel also called Rompilla's teenage son, who testified that he loved his father and would visit him in prison. The jury returned a death verdict. *Rompilla*, 545 U.S. at 377-78.

Habeas counsel discovered documents showing that Rompilla had suffered a deprived and abusive childhood and had mental impairments. Using these records, habeas counsel proved that Rompilla was raised in poverty by alcoholic parents. His father beat him and he became an alcoholic himself. He suffered organic brain damage caused by fetal alcohol syndrome and was borderline mentally retarded. *Rompilla*, 545 U.S. at 392.

The Court held that trial counsel's failure to review the records of a prior rape conviction constituted ineffective assistance of counsel. The Court held that viewing these files would have alerted counsel that there was significant mitigation that could be presented. The Court wrote:

> This evidence adds 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 decided on the death penalty that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability . . . and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing.

545 U.S. at 393.

The prejudice determinations in *Williams*, *Wiggins* and *Rompilla* reveal how far the majority in this case has strayed from ordinary *Strickland* reweighing

principles. As in those cases, Petitioner presented a combination of childhood abuse and serious mental impairments. During oral argument, one member of the majority referred to this mitigation as a "sob story." However, the Supreme Court has called this type of mitigation "powerful." *See Wiggins*, 539 U.S. at 534. The murders in those cases were more aggravated than the murders in this case. Williams and Rompilla had violent priors rivaling Pinholster's, even if one accepts his questionable portrayal of his own criminal past.

The majority decision also conflicts with a Ninth Circuit case holding that a similar eleventh-hour investigation and half-hearted mitigation presentation resulted in ineffective assistance. *See Jackson v. Calderon*, *supra*. In *Jackson*, the defendant, who was high on PCP, resisted arrest and eventually shot a police officer with his own rifle. As in this case, defense counsel opted not to investigate mitigation because he incorrectly believed the case would not proceed to penalty phase. Ill-prepared for the penalty phase, counsel called the defendant's mother and estranged wife, both of whom testified that they loved the defendant and that he had good qualities. No social history or mental heath evidence was presented, and the jury returned a death verdict.

On habeas, this Court held that counsel's reliance on a single interview of these two witnesses "clearly fell below the requisite standard of competence." 211 F.3d at 1162. The Court also found prejudice, noting that the true circumstances of Jackson's upbringing were "a very different picture from [the mother's] testimony at

the penalty phase" and stressing that expert testimony was needed to explain how PCP intoxication affected Jackson's intent. *Id.* at 1164. *See also Belmontes*, 2008 WL 2390140, at *27-31. (finding prejudice because counsel didn't prepare defendant's mother to testify and failed to present expert testimony about childhood trauma).

Other Ninth Circuit cases have held the failure to prepare and present evidence of brain damage was prejudicial, even in the face of multiple murders. *Caro*, 280 F.3d at 1257 ("The omission of this evidence [frontal lobe brain damage] renders Caro's death sentence unreliable."); *Jennings*, 290 F.3d at 1016-19. (finding prejudice because counsel's failure to investigate mental illness and drug use caused him to select a weak alibi over a strong mental defense).

B. THIS CASE SHOULD BE REHEARD BECAUSE THE MAJORITY RELIED ON A VACATED BRIEF

The majority found no error in the admission of narcotics seized from Pinholster's apartment, testimony about him throwing a gun out the window, and the prosecutor's references to white supremacists during voir dire. *Pinholster*, 525 F.3d at 764. Pinholster's replacement brief, filed on December 12, 2005, never challenged these rulings. An earlier brief, which was stricken by the Court on June 9, 2005 after Pinholster moved to fire prior counsel, did raise these issues. *See* Ninth Circuit Docket nos. 33, 50. The replacement brief differs significantly from the vacated brief. Reliance on a vacated brief to decide a capital appeal justifies rehearing.

IV. CONCLUSION

The Court should rehear this case en banc to address and correct the majority's errors.

Dated: July 12, 2008

SEAN K. KENNEDY
Federal Public Defender

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCOTT LYNN PINHOLSTER,
Petitioner-Appellee,

v.

ROBERT L. AYERS, Warden of the California State Prison at San Quentin,

Respondent-Appellant.

SCOTT LYNN PINHOLSTER,
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v.

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Respondent-Appellee

CAPITAL CASE

No. 03-99003
DC No. CV 95-0240-GLT

No. 03-99008
DC No. CV 95-06240-GLT

On Appeal from the United States District Court
for the Central District of California, No. 03-99008
The Honorable Gary L. Taylor, Judge

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SCOTT LYNN PINHOLSTER, Petitioner-Appellee, **v.** **ROBERT L. AYERS, Warden of the California State Prison at San Quentin,** Respondent-Appellant.	**CAPITAL CASE** No. 03-99003 D.C. No. CV95-0240-GLT
SCOTT LYNN PINHOLSTER, Petitioner-Appellant, **v.** **ROBERT L. AYERS, Warden of the California State Prison at San Quentin,** Respondent-Appellee	No. 03-99008 D.C. No. 95-06240-GLT

THE PETITION FOR PANEL AND EN BANC REHEARING SHOULD BE DENIED BECAUSE THE PANEL CORRECTLY DETERMINED THAT THE CALIFORNIA SUPREME COURT'S REJECTION OF THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE WAS OBJECTIVELY REASONABLE

I.
INTRODUCTION

The petition for panel and en banc rehearing challenges the panel's determination that the California Supreme Court's rejection of petitioner's claim that he received ineffective assistance of counsel at the penalty phase of his capital trial was objectively reasonable. The panel found that any deficiency in counsel's

investigation and presentation of additional mitigating evidence was not prejudicial. Petitioner asserts that this decision conflicts with three recent Supreme Court cases vacating death judgments where inadequate penalty phase investigation resulted in a prejudicial failure to present significant mitigation evidence. Pet. at 2. These cases are *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005).

The petition should be denied because of two prominent features of this case which distinguish it from *Williams* and *Wiggins* and *Rompilla*, and indeed from any other AEDPA death penalty case decided by the Supreme Court or by this Court. First, Petitioner proudly boasted in his own testimony that he was a professional armed robber. As Justice Stanley Mosk put it in his opinion for a unanimous California Supreme Court, "[Pinholster] himself made his criminal disposition clear [to the jury.] In fact, he gloried in it." *People v. Pinholster*, 1 Cal. 4th 865, 4 Cal. Rptr. 765 (1991). Second, during the long course of collateral review, Petitioner presented a series of mental health experts who undermined and contradicted each other. In effect, as the panel correctly found, Petitioner's case self-destructed.

Neither *Wiggins* nor *Williams* nor *Rompilla* provided their juries with the compelling aggravating evidence Petitioner himself introduced into his own case. Indeed, Respondent has not located another capital case in which the defendant

boastfully testified that he was a professional armed robber who had successfully robbed "hundreds" of drug dealers over only three years. The evidence of a hard childhood that Petitioner assembled over the course of two decades of litigation, and upon which he relies in the current petition, pales in comparison to Petitioner's own proud description of his "unrepentant life of violent crime." Petitioner does not dispute that his extreme psychopathy hurt his penalty phase defense, but simply argues that his proferred showing would have "humanized him" (Pet. at 12) and that the jury would therefore have spared him. However, there can be no prejudice for an alleged failure to investigate where a defendant's own conduct undermines such an investigation. *See Schriro* v. *Landrigan*, 127 S. Ct. 1933, 1942 (2007).

Just as significantly, nothing in *Wiggins* or *Williams* or *Rompilla* remotely resembles Petitioner's presentation of a "revolving door" series of experts who over the course of 20 years of litigation in state and federal court attacked and rejected *each other's* ideas and diagnoses. By the time the federal evidentiary hearing in this case was over, Petitioner had conclusively established that there simply *was* no genuine or credible mental impairment evidence or diagnosis available.

The panel concluded that "[t]he California Supreme Court, which acknowledged the fact that Pinholster 'gloried' in his criminal history, could reasonably have concluded that no amount of clever 'after-the-fact' assessment by

habeas defense psychiatrists would have convinced even a single juror to change his vote." *Pinholster v. Ayers*, 525 F.3d 742, 773 (9th Cir. 2008). This is particularly true when those assessments are as shifting and unstable as the ones Petitioner has presented. On this basis, the panel correctly found that the rejection by the California Supreme Court of Petitioner's claims of ineffective assistance of counsel at the penalty phase was an objectively reasonable application of the principles of *Strickland*.

Petitioner murdered Robert Beckett and Thomas Johnson during the burglary of a home and was sentenced to death in 1984. The California Supreme Court affirmed the judgment and sentence. *People v. Pinholster*, 1 Cal.4th at 865. The Court later denied two habeas petitions, both of which included claims of ineffective assistance of counsel in the investigation and presentation of mitigating evidence.

Following an evidentiary hearing, the district court issued an order granting the writ of habeas corpus and vacating the death sentence based on its conclusion that trial counsel inadequately investigated and failed to produce mitigating evidence at the penalty phase of Petitioner's trial.

On May 2, 2008, the panel issued its decision affirming the denial of relief on the guilt phase judgment of conviction and reversing the grant of relief on the claim of ineffective assistance of counsel at the penalty phase.

II.

THE PANEL CORRECTLY DETERMINED THAT THE UNPRESENTED MITIGATING EVIDENCE WAS INSIGNIFICANT COMPARED TO THE AVAILABLE AGGRAVATING EVIDENCE

In attacking counsel's performance, Petitioner's presentation in the state court habeas petitions and in the federal evidentiary hearing identified two kinds of mitigating evidence that he claimed trial counsel should have located and presented: allegations of a troubled childhood and the conclusions of mental health experts who explained and interpreted that history in an effort to present a theory of mitigation.

A. Childhood History Evidence

Petitioner submitted declarations from family members in support of his claim that trial counsel failed to uncover and present mitigating evidence concerning his early life, including what the panel termed "a turbulent, dysfunctional, violent and abusive home life; serious, well-documented educational disabilities; and profound mental disorders." *Pinholster*, at 753. In assessing the significance of this unpresented evidence, the panel properly weighed it against the aggravating evidence presented at trial and developed during collateral review. The panel correctly found that it was reasonable for the California Supreme Court to conclude that no juror would be impressed by the evidence of a hard childhood after hearing Petitioner describe his success as one of the most dangerous and violent of all criminals. Petitioner's own guilt-phase description at trial of his *recent* history completely

trumped the allegations of his childhood history presented in the state habeas petitions and at the federal evidentiary hearing. After Petitioner himself *boasted* of his propensity to commit violent acts, his proud refusal to assimilate himself into society, his failure to accept responsibility for his crimes, his lack of remorse, and his lack of rehabilitative potential, no juror would be impressed by an effort to blame Petitioner's parents for giving him a bad start. In attacking the panel's finding that the California Supreme Court reasonably rejected this claim, Petitioner simply subtracts the critical evidence of his own testimony. In so doing, he distorts the reality of his case.

Moreover, the additional mitigating evidence concerning a hard childhood would not have affected the result because Petitioner did not show a credible connection between that troubled history and the murders. In order to make that case, it would have been necessary for Petitioner to show how that bad childhood somehow caused or mitigated his choice of a professional career as an armed robber. Petitioner did not even attempt to show such a connection.

B. Expert Opinion Evidence Regarding Mental History

Petitioner's proffered expert testimony would not have changed the result, either. None of Petitioner's shifting and unstable theories of mental impairment is remotely credible in light of Petitioner's own guilt-phase testimony admitting that he was "an unregenerate career criminal" responsible for hundreds of armed robberies of drug dealers. No juror would be credulous enough to believe that on the night of

the murders such a compulsive and successful professional robber was so psychotic that he was out of touch with reality, or undergoing a seizure, or suffering significant mental impairment because of childhood head injuries.

As the panel correctly noted, in evaluating the weight to assign Petitioner's proposed expert testimony, it is important to summarize the twists and turns that have marked this case as Petitioner struggled to find a theory of "mental health problems" that might stretch far enough to cover the basic realities of the record. This is a case where the "battle of the experts" took place within Petitioner's own camp.

Dr. John Stalberg, a psychiatrist, interviewed Petitioner in jail awaiting trial, near the time of the murders, and wrote a letter to trial counsel reporting his view that Petitioner was merely a sociopath. Trial counsel decided not to present evidence of mental impairment at trial. In the first state habeas petition, Petitioner launched an all-out assault on Dr. Stalberg's opinion, openly impugning his competence and lack of professional standards and acumen. The only expert Petitioner relied upon in this first petition was Dr. George Woods. Dr. Woods, who interviewed Petitioner eight years after the murders, found that he suffered from a bipolar *psychosis*. Dr. Woods also reached the astounding conclusion that *during* the murders, Petitioner was in the midst of a grand mal epileptic seizure. Dr. Woods came to these conclusions in the face of Petitioner's own testimony that he was a successful professional armed robber, and that he broke into the Kumar home to burglarize it just hours before the two murders. He also reached these conclusions without a shred of evidence from

either Petitioner or his accomplices that Petitioner was undergoing a seizure as he stabbed the victims to death, and in the face of Petitioner's ability to recall his actions on the night of the murders in detail. The California Supreme Court rejected the claim that trial counsel were constitutionally ineffective because they did not present this theory to the jury. There is no need to speculate about whether it was sound or persuasive, however, and there is certainly no need to look very far for proof that trial counsel could not possibly have been ineffective in failing to find and present Dr. Woods. Petitioner himself said so. He later presented two experts who found that Dr. Woods' theories and conclusions were wholly unsupported and were, in fact, bogus.

Petitioner and his counsel obviously became skeptical of the Woods diagnosis soon after it was summarily rejected by the state court. In an amazing about-face, Petitioner re-hired Dr. Stalberg, whose ability and reputation and performance he had just assailed, and named him as the only psychiatric expert for the federal proceedings. At that stage, Petitioner candidly acknowledged the bizarre shift of position. Counsel was quick to acknowledge that this about-face resulted in a new theory based on new evidence which presented exhaustion problems, and so Petitioner readily stipulated to a dismissal and returned to the California Supreme Court to see if that court would be willing to buy the change. In his exhaustion petition, Petitioner presented a new declaration from Dr. Stalberg, in which he stated that he had reviewed a large volume of potentially mitigating evidence, but, most significantly, did not retract or alter his original diagnosis that Petitioner had no

mental impairment, certainly no psychosis, other than the Anti-Social Personality Disorder, and that he definitely was not undergoing a seizure as he stabbed his two victims to death. The state supreme court, noting that Dr. Stalberg had rejected Dr. Woods who had rejected Dr. Stalberg, understood that this shell game undercut Petitioner's entire presentation. In addition, the California Supreme Court, which had been impressed by Petitioner's vain guilt phase testimony that he had been a highly successful professional armed robber, was unimpressed with the additional "troubled history" mitigating evidence, and denied the petition on the merits.

But Petitioner's search for a theory and evidence that might work was only beginning. He proceeded to prepare for the federal evidentiary hearing with Dr. Stalberg as the sole named mental health expert. Petitioner became aware during a deposition noticed by respondent, however, that it had not been wise to return to Dr. Stalberg as his psychiatric expert when it became apparent that Dr. Stalberg had not changed his original diagnosis. During the depostion, Dr. Stalberg utterly rejected Dr. Woods' view that Petitioner was psychotic and in the midst of an epileptic seizure when he committed the murders, and held to his original view that Petitioner simply had Antisocial Personality Disorder. After these revelations, Petitioner understood that Dr. Stalberg would not help, indeed, that he would seriously damage the case. Petitioner dismissed him, again.

After months of searching, Petitioner was able to locate two new experts, and one new theory, just weeks before the scheduled federal evidentiary hearing. Dr.

Sophia Vinogradov swept away all of Petitioner's earlier submissions and came up with a brand new theory designed to plug the holes in the Woods and Stalberg versions. Dr. Vinogradov totally rejected the Woods diagnosis of psychosis and seizure disorder, and scoffed at the Stalberg view of Antisocial Personality Disorder. In her view, Petitioner had a condition she termed "personality change, aggressive type, due to serious childhood head trauma." It apparently never occurred to Petitioner, nor to the district court, that the manner in which Petitioner's experts attacked and impeached each other proved that none of them was credible. The panel, however, noted these discrepancies, and carefully documented them in its evaluation of the relative strength of the unpresented mitigation evidence.

Petitioner cannot establish that he was prejudiced by trial counsel's alleged deficiencies in light of the overwhelming evidence of his guilt and the insurmountable aggravating evidence of criminal history and disposition, and because Petitioner's own experts impeached and undermined each other's theories. The panel correctly found that the state court's rejection of his claims of ineffective assistance of counsel at the penalty phase was not an objectively unreasonable application of *Strickland*.

III.

THE SUPREME COURT'S DECISIONS IN *WILLIAMS* AND *WIGGINS* AND *ROMPILLA* ARE DISTINGUISHABLE

Petitioner's argument for rehearing depends entirely on his contention that the panel's decision is inconsistent with the holding in *Williams* and *Wiggins* and

Rompilla. The panel gave careful and detailed attention to this contention, and its determination that Petitioner's case differs from these three cases is demonstrably correct.

As the panel noted, in assessing prejudice related to a claim of ineffective assistance at a penalty trial, the reviewing court must re-weigh the evidence in aggravation against the totality of available mitigating evidence. In its review of *Williams*, *Wiggins* and *Rompilla*, the panel concluded that "while trial counsel could have presented more detailed mitigating evidence–in the form of Pinholster's social history and mental health history–that evidence falls short when compared to the mitigating evidence available in *Williams*, *Wiggins* and *Rompilla*, and the overwhelming evidence in aggravation which Pinholster faced." *Pinholster*, 525 F.3d at 770.

In *Williams*, the unpresented mitigating evidence would have informed the jury that Williams suffered abuse as a child so extreme that his parents were imprisoned for criminal neglect, and that he was borderline mentally retarded. But the Supreme Court emphasized another aspect of mitigation that the jury did not hear: Williams turned himself in, expressed remorse for the murder and cooperated with the police and the prison authorities. The Court also stressed that Williams' violent behavior was not "a product of cold-blooded premeditation." *Williams*, at 398. The panel noted the stark contrast in this case: "Pinholster, on the other hand, presented himself to the jury as a classic antisocial personality who revels in his disobedience to the law

and social mores." *Pinholster*, at 770. The mitigating evidence that was not presented in *Williams* was far more compelling than what counsel did not present in this case, but, more significantly, it was certainly free of the weaknesses and contradictions inherent in the additional mitigation Petitioner insists counsel should have offered.

In addition, the decision in *Williams* turned on a glaring and fundamental error committed by the lower courts, namely, the application of the wrong legal standard by the both the Virginia Supreme Court and the Fourth Circuit. Both courts mistakenly assumed that the *Strickland* prejudice analysis had been altered by *Lockhart v. Fretwell,* 506 U.S. 364, 369, (1993), which resulted in an incorrect review of the ineffective counsel claim. *Williams*, at 371, 374. There is no claim or indication in this case that the California Supreme Court misunderstood *Strickland.*

Just as in *Williams*, the Supreme Court in *Wiggins* listed the elements of a background that was considerably harsher than Pinholster's. More pertinently, the Court found that the Wiggins "does not have a record of violent conduct that could have been introduced by the State to offset this powerful mitigating narrative." *Wiggins*, at 537. Once again, the panel in this case underlined the distinction: "Pinholster, in contrast, is the epitome of a repeat offender who specializes in violent crimes." *Pinholster*, at 771.

In *Rompilla*, the available evidence of mitigation was so powerful in comparison to the evidence in aggravation that the state did not even contest

prejudice. *Rompilla*, at 377. That evidence pointed to a childhood marred by fetal alcohol syndrome, severe beatings, and parental violence which included his mother stabbing his father. As the panel noted, "Rompilla suffered a depraved childhood, during which he was locked in a mesh dog pen, isolated from other children, and slept in an attic with ho heat." *Pinholster*, at 771. Pinholster's unfortunate history did not reach this abysmal level. But in any event, the panel found that the overwhelming aggravating evidence presented against Pinholster trumped the unpresented mitigation evidence.

It was objectively reasonable for the California Supreme Court to reject the claim of ineffective assistance of counsel in the first state habeas on the ground that Dr. Woods' theory that Petitioner was a psychotic so far out of touch with reality, that he was incompetent and that he was in the midst of a seizure at the time he committed the murders was so outlandish and incompatible with the trial record and Petitioner's own account of his history that no jury would credit it. Similarly, it was objectively reasonable for the court to deny relief on the basis of Petitioner's allegations of his troubled and deprived background because Petitioner's own testimony proved that nothing in the distant past could ameliorate or excuse his freely and proudly chosen life in crime.

It was objectively reasonable for the California Supreme Court to reject the claim of ineffective assistance of counsel in the second state habeas on the ground that Petitioner's decision to present Dr. Stalberg's criticism of the key elements of Dr.

Woods' assessment undercut *both* of them, and that Petitioner's unguarded use of inconsistent theories showed that he simply did not have a coherent theory of mitigation, nor any genuine or persuasive mitigating evidence based on mental impairment. In both cases, it was objectively reasonable for the California Supreme Court to find that Petitioner had not established prejudice resulting from counsel's failure to present such deeply flawed and vulnerable additional mitigation.

But the California Supreme Court's denial of relief was also reasonable on the basis of what emerged during the subsequent federal habeas review. As previously argued, Petitioner's own experts showed in graphic detail what would have happened to any of Petitioner's shifting theories if counsel had been reckless enough to try them out in front of a jury. If the best that Petitioner could do with two decades and a blank check was to present psychiatric experts who criticized and contradicted and impeached each other, it is palpably absurd to suggest that trial counsel should have discovered and presented one or more of those experts in the short time they had to prepare for trial. To be blunt, if trial counsel had presented Dr. Woods' thesis of psychosis and a seizure during the murders, the prosecution would have used Dr. Stalberg and Dr. Vinogradov, or experts like them, to nullify it. If trial counsel had offered Dr. Vinogradov and her theories, she would have been rendered useless or even counter-productive by the testimony of Dr. Woods and Dr. Stalberg, or experts like them. Trial counsel's decision not to call Dr. Stalberg, whom they had retained to examine Petitioner, was also shown to be very wise when Dr. Stalberg never

strayed from his original diagnosis of AntiSocial Personality Disorder.

After a quarter century of litigation, Petitioner has not shown that there was any available mitigating evidence that trial counsel could and should have found that would have made a difference. The panel correctly determined that the California Supreme Court's adjudication on the merits of the ineffective assistance counsel at the penalty phase was an objectively reasonable application of *Strickland*, and the petition for panel and en banc rehearing should be denied.

Dated: August 18, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 03-99003; 03-99008

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Dated: August 18, 2008

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Robert Ayers, Warden v. Scott Lynn Pinholster***
Case No.: **03-99003**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **August 18, 2008**, I served the attached **RESPONSE IN OPPOSITION TO PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Sean K. Kennedy
Federal Public Defender
321 East Second Street
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **August 18, 2008**, at Los Angeles, California.

E.Obeso
Declarant

Signature

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