No. 09-1088

IN THE

Supreme Court of the United States

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

—v.—

SCOTT LYNN PINHOLSTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

John Holdridge
American Civil Liberties Union Foundation
201 West Main Street
Durham, North Carolina 27701
(919) 682-5659

Larry Yackle
Counsel of Record
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826
yackle@bu.edu

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 thus grant habeas corpus relief, based on a factual predicate for the claim that the petitioner could have presented to the state court but did not.

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 petitioner and his mother, did not seek out a different psychiatrist and different family members.

This *amicus curiae* brief addresses only Question 1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. We respectfully submit this brief to assist the Court in resolving serious questions regarding a federal court's authority to address a habeas corpus petition filed by a state prisoner claiming that he is in custody in violation of federal law. Given its longstanding interest in the vindication of federal rights, the questions before the Court are of substantial importance to the ACLU and its members.

STATEMENT OF THE CASE

The respondent, Scott Lynn Pinholster, was convicted in a California state court and was condemned to death. He sought postconviction relief in state court, contending, *inter alia*, that he had been denied effective assistance of counsel at the penalty phase of the trial, because counsel had not properly investigated his background and mental condition and had not presented important mitigating evidence to the jury. The California Supreme Court denied relief on the "substantive

---

[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

ground" that the Sixth Amendment claim was "without merit," but gave no explanation for that conclusion.

Pinholster then petitioned the United States District Court for the Central District of California for a federal writ of habeas corpus. The district court held a hearing, heard testimony from two new witnesses regarding Pinholster's mental condition, concluded that Pinholster's Sixth Amendment claim was meritorious, and awarded federal relief.

A panel of the Ninth Circuit reversed on the ground that the state court could reasonably have concluded that Pinholster's right to effective assistance of counsel had not been violated and that federal relief was therefore barred by 28 U.S.C. § 2254(d)(1), a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Pinholster v. Ayers*, 525 F.3d 742 (9th Cir. 2008). The full court, sitting *en banc*, reinstated the district court's judgment. *Pinholster v. Ayers*, 590 F.3d 651 (9th Cir. 2009) (*en banc*).

The *en banc* court cited alternative bases for its decision. On the one hand, the court explained that Pinholster's petitions in state and federal court contained "many substantially identical facts" and that while the two new witnesses in federal court had offered "different mental impairment theories," they had "relied on the same background facts" already in the state court record. Given that understanding, the evidentiary record developed in the federal habeas proceedings provided additional support for, but was not essential to, the Ninth Circuit's holding that the state court's rejection of

Pinholster's Sixth Amendment claim was unreasonable within the meaning of § 2254(d)(1) and that federal relief was warranted. *Id.* at 669.

On the other hand, the *en banc* court held that the district court's conduct of an evidentiary hearing was appropriate under another provision of AEDPA, 28 U.S.C. § 2254(e)(2);[2] that the additional theories about Pinholster's mental health introduced in federal court could inform a decision on whether the state court's decision on the Sixth Amendment claim was unreasonable for purposes of § 2254(d)(1); that, in light of all the evidence advanced in state and federal court, the state court's decision *was* unreasonable; and. accordingly, § 2254(d)(1) did not bar federal habeas relief. *Id.* at 684.

This Court granted the warden's petition for certiorari to examine the two questions presented.

SUMMARY OF ARGUMENT

This *amicus* brief notes, but lays aside, a threshold issue in this case—whether the California Supreme Court's summary disposition of the respondent's Sixth Amendment claim triggered 28 U.S.C. § 2254(d). The questions the warden has framed for review proceed from an erroneous

[2] The district court had decided to hold a hearing on the erroneous assumption that § 2254(e)(2) was inapplicable. Later, the district court issued an addendum explaining that § 2254(e)(2) did not prohibit a federal hearing in the circumstances of this case. The *en banc* circuit court sustained the addendum. *Pinholster*, 590 F.3d at 668.

premise—namely, that the California Supreme Court "adjudicated" Mr. Pinholster's claim "on the merits," thus triggering the restrictions on federal habeas relief in § 2254(d). *Amicus* briefs filed in *Harrington v. Richter*, No. 09-587, demonstrate that a summary disposition like the order in this case is not "on the merits" and does not bring § 2254(d) into play. Brief for California Attorneys for Criminal Justice and the California Academy of Appellate Lawyers; Brief for the National Association of Criminal Defense Lawyers. We need not rehearse that argument here. We respectfully submit, however, that because the premise underlying the questions presented in this case is unsound, the Court should dismiss the writ as improvidently granted.

We also set to one side the questions that divided the parties and the circuit judges below—whether the circuit court's *en banc* judgment rests on evidence that emerged in federal court and, if so, whether that evidence was considered consistent with 28 U.S.C. § 2254(e)(2). Because those issues are fully addressed by respondent, this brief focuses instead on several additional arguments presented by the warden and his *amicus*, the Criminal Justice Legal Foundation (CFLF). These arguments are not only wrong; they distract attention from the actual issues raised by this case. We nonetheless address them here since similar arguments have also surfaced in other recent and pending cases in this Court. *See e.g., Harrington v. Richter, supra.*

First, the warden contends that a federal court entertaining a habeas corpus petition must always begin by determining whether a state court decision

rejecting a federal claim was unreasonable in view of the evidence in state court alone. Second, he insists that this is so because a state decision that was not unreasonable in light of the state record always forecloses federal relief—despite a proffer of additional proof that, if accepted, would demonstrate either that the state court's decision was not on the merits or that the state decision against the prisoner was unreasonable. Neither of these propositions is sound.

The habeas corpus statutes do not require a federal court to determine the reasonableness of a previous state court decision exclusively in view of the state record—*before* deciding whether federal fact-finding is warranted. Quite the opposite. If it appears that factual allegations outside the state record may be dispositive, the first order of business is to consider whether those allegations are premature under 28 U.S.C. § 2254(b), which codifies the exhaustion doctrine, or barred by 28 U.S.C. § 2254(e)(2), which prohibits federal consideration of factual matters because of the prisoner's default in state court. If federal fact-finding is neither premature nor barred, the federal court may take more evidence and find additional facts.

In some cases, new facts properly developed in federal court materially change the factual basis of a claim so that the previous state court decision in ignorance of those facts should not be deemed a decision "on the merits" and thus should not trigger § 2254(d). In other cases, new facts leave habeas petitions subject to § 2254(d), but nonetheless demonstrate that a state decision against the

prisoner was unreasonable on the full record and, accordingly, that habeas relief can be awarded.

The positions taken by the warden are inconsistent with this Court's decisions regarding federal fact-finding, particularly *Schriro v. Landrigan*, 550 U.S. 465 (2007), and, if accepted, would frustrate the overarching framework Congress has established for processing habeas litigation, particularly the functions served by § 2254(e)(2).

The CJLF's argument that § 2254(d) is a rule of preclusion defies both this Court's precedents and the congressional plan. This single provision was never meant to deal with all the questions that habeas litigation presents. Congress enacted § 2254(b) and § 2254(e)(2) to ensure that federal courts do not address factual allegations that might yet be taken to state court or were not presented in state court because of the prisoner's default. The CJLF's revisionist account of § 2254(d) would largely displace those provisions from their fields of operations.

ARGUMENT

I. WHEN THE PLEADINGS IN A HABEAS CASE REVEAL DISPUTED ISSUES OF FACT, THE FIRST ORDER OF BUSINESS FOR THE FEDERAL COURT IS TO DETERMINE WHETHER FEDERAL FACT-FINDING PROCEEDINGS ARE WARRANTED

The warden reads § 2254(d)(1) to mean that, in every case, a federal court entertaining a habeas

corpus petition must first determine whether a previous state court decision on a prisoner's claim was unreasonable when judged exclusively in view of the facts (or factual allegations taken to be true) already in the state court record. Pet.Br. at 38.

As a threshold matter, this argument assumes that the evidence introduced at the federal fact-finding hearing was central to the *en banc* court's grant of habeas relief. But, as explained above, the court below offered alternative grounds for its decision, one of which did not depend on the federal evidence to support its holding. *See* pp. 2-3, *supra*.[3]

In any event, neither § 2254(d)(1), nor any other habeas statute, establishes any such order of march for a federal court to follow. This Court explained in *Schriro v. Landrigan*, 550 U.S. 465 (2007), that AEDPA did not change the standards previously adopted to guide a habeas court in deciding whether to grant a federal hearing. *Id.* at 473, citing *Brown v. Allen*, 344 U.S. 443 (1953), and *Townsend v. Sain*, 372 U.S. 293 (1963).

As in any kind of litigation, the court begins with the basic papers—the petition, any answer filed by the warden, and any reply by the prisoner. Those documents typically reveal whether there are disputed issues of fact that must be resolved to decide the ultimate legal questions. In most cases, the quarrel between the parties is over the proper disposition of a claim in light of the state court record as it stands. Neither party offers to augment that

[3] This point is more fully developed in respondent's brief.

record, and a federal court's attention is therefore necessarily confined to it.

When, however, the initial pleadings indicate that the parties dispute factual matters outside the existing record in state court, the federal court must decide whether a federal hearing is warranted. 28 U.S.C. § 2254, Rule 8(a) of the Rules Governing Section 2254 Cases.

The court's discretion is restricted in important respects. Under 28 U.S.C. § 2254(b), new factual allegations may be premature if, at the time the petition is filed, state avenues for treating them are open and must be exhausted. *Vasquez v. Hillery*, 474 U.S. 254 (1986). And, under § 2254(e)(2), federal fact-finding may be barred because of the prisoner's default. If the prisoner failed through lack of diligence to develop the facts in state court, a federal court can hold a hearing only if one of the conditions in § 2254(e)(2) is satisfied.

The limitations on habeas relief established by 28 U.S.C. § 2254(d) also must be taken into account. If it is clear that the prisoner cannot be entitled to relief even if his or her allegations are proven, the court is "not required" to hold a federal hearing. *Landrigan*, *supra* at 474. If, however, the allegations, if sustained, might justify habeas relief, and if federal fact-finding is neither premature nor barred, the federal court is obliged to conduct its own investigation.

If the federal court concludes that a federal hearing is warranted, not premature under § 2254(b), and not barred by § 2254(e)(2), the court

must take additional evidence that supplements the record built previously in state court. Then, with the complete factual predicate in hand, the court will turn to the federal legal claim itself.

The additional facts developed in federal court may materially change the factual basis of the prisoner's claim. When this is true, the previous state court decision, reached without consideration of the additional facts, was not "on the merits" within the meaning of § 2254(d). Accordingly, there is "no relevant state-court determination to which one could defer," and the federal court must address the merits *de novo*. *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (*per curiam*) (acknowledging lower court authority on this point and assuming *arguendo* that this analysis is correct). By hypothesis, crucial facts were not developed in state court despite the prisoner's diligence. Any state hearing therefore did not, and could not, properly evaluate the factual underpinnings of the claim to determine its merits.

If the additional facts developed in federal court do not materially alter the factual basis of the claim, and the case remains subject to § 2254(d)(1), the federal court may consider the additional facts in determining whether habeas relief is available. The whole point of *Landrigan's* admonition that the court must decide whether to hold a hearing with an eye on § 2254(d)(1) is that some proffers of evidence will not justify federal fact-finding in view of § 2254(d)(1), but that other proffers of proof *will*.

This logical sequence for addressing fact-sensitive cases would be frustrated if a federal court were required to ignore factual disputes outside the

state record and to determine the availability of federal relief exclusively on the basis of the more limited evidence in state court—before deciding whether federal fact-finding is warranted and neither premature under § 2254(b), nor barred by § 2254(e)(2). Until appropriate federal fact-finding is conducted, the federal court cannot know even whether § 2254(d) is applicable, far less dispositive.

Accordingly, the federal court must first determine whether federal fact-finding is called for. If it is, the court must resolve the extra-record factual dispute between the parties and determine the truth. Then, the federal court will turn to the effect, if any, that § 2254(d)(1) may have on the availability of relief. It would be "bizarre if a federal court had to defer to state-court factual findings made without an evidentiary record to decide whether the factual findings were erroneous." *Wellons v. Hall*, ___ U.S. ___, 130 S.Ct. 727, 730-31 n.3 (2010). Congress has not established "such a crabbed and illogical approach to habeas procedures." *Id.*

II. REQUIRING A FEDERAL COURT TO DENY RELIEF UNDER § 2254(d)(1) IN LIGHT OF THE STATE RECORD ALONE WOULD ELIMINATE FEDERAL FACT-FINDING WHERE THIS COURT'S PRECEDENTS AND THE CONGRESSIONAL PLAN CONTEMPLATE THAT FEDERAL FACTUAL INVESTIGATION IS WARRANTED

The construction the warden would impose on § 2254(d)(1) does not merely postpone federal fact-finding, but extinguishes federal consideration of additional facts entirely. The warden insists that § 2254(d)(1) requires a federal habeas court always to determine whether a previous state decision was unreasonable in light of the facts presented in state court. By his account, if the federal court concludes that the state decision was not unreasonable in view of the factual record in state court, the case is at an end. Pet.Br. at 24. According to the warden, a federal court cannot consider additional facts (or factual allegations) advanced in federal court under these circumstances and, indeed, is unable to receive more proof. Federal relief is foreclosed even if the parties dispute other facts, extrinsic to the state record, and even if a federal hearing on those facts is warranted and not foreclosed by § 2254(e)(2). Of course, if the federal court concludes that the state court decision *was* unreasonable in view of the facts in the state record, there will typically be no reason for further federal fact-finding. An unreasonable state court was incorrect *a fortiori*.

The warden's interpretation conflicts with this Court's relevant precedents and, if adopted, would frustrate the general statutory scheme established by AEDPA.

A. The Precedents

This Court has often recognized that, in some circumstances, a federal habeas court can hold its own fact-finding proceedings and can rely on facts developed in federal court to resolve the legal issues.

No fair reading of *Landrigan*, *supra*, can conclude that § 2254(d)(1) prohibits federal fact-finding. The Court's very point was that a federal court must consider whether the facts a prisoner wishes to develop in federal court, if established, would warrant relief within the scheme that includes § 2254(d)(1). The premise of that crucial point was obviously that any evidence the federal court might hear, and any facts the federal court might find, would go to the merits of the prisoner's claim and, in cases subject to § 2254(d)(1), to the availability of federal relief—provided that the federal court develops additional evidence and facts consistent with the standards for federal fact-finding, § 2254(b), and, most important, § 2254(e)(2).[4]

---

[4] Justice Thomas' opinion for the Court in *Landrigan* cited lower court decisions also taking the view that a federal court's decision regarding a hearing must take account of whether the prisoner's allegations, if sustained in federal court, can win habeas relief under § 2254(d)(1). In the first case cited, *Mayes v. Gibson*, 210 F.3d 1284 (10th Cir. 2000), the prisoner had requested a state hearing on a claim of ineffective assistance, supporting the claim with affidavits from acquaintances stating

Other decisions confirm that federal courts can take and consider additional evidence. To be sure, in *Holland v. Jackson*, *supra*, the Court initially stated that "[i]n this and related contexts we have made it clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." 542 U.S. at 652.[5] But, in

---

that they would have given mitigation testimony if only counsel had contacted them. The state court denied a hearing and rejected the claim. The Ninth Circuit concluded that a federal hearing on the affidavits was necessary to determine whether the state court's decision was unreasonable under § 2254(d). *Id.* at 1288-91. In other cases, circuit courts had found federal hearings unnecessary, because prisoners did not allege facts outside the state record that *could* win relief. In *Totten v. Merkle*, 137 F.3d 1172 (9th Cir. 1998), the circuit court affirmed the denial of a federal hearing, but explained that the evidence the prisoner proffered to show counsel's ineffectiveness could not establish the necessary prejudice. *Id.* at 1176. In *Anderson v. Attorney General*, 425 F.3d 853 (10th Cir. 2005), the court affirmed the denial of a hearing where the prisoner offered no particularized allegations demonstrating a dispute of material fact outside the state record. *Id.* at 858-59. In *Clark v. Johnson*, 202 F.3d 760 (5th Cir. 2000), the court declined to find that the district court had abused its discretion by denying discovery and a hearing. Again, the explanation was that the prisoner had alleged "no fact" that, if proved, would entitle him to relief. In the last case cited, *Campbell v. Vaughn*, 209 F.3d 280 (3d Cir. 2000), the prisoner made no proffer of new evidence in federal court, but sought a federal hearing to determine a factual question he insisted the state court had not resolved. The circuit court found that the state court *had* resolved the issue and concluded that, accordingly, a federal hearing was not required.

[5] On this point, the Court cited *Yarborough v. Gentry*, 540 U.S. 1 (2003) (*per curiam*), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and a footnote in *Bell v. Cone*, 535 U.S. 685 (2002). The prisoner in *Gentry* proffered no additional evidence in federal

the next breath, the Court recognized that evidence not in the state record "could have been the subject of an evidentiary hearing" in federal court, provided such a hearing was not barred by § 2254(e)(2). *Id.* at 652-53.

In *Bradshaw v. Richey*, 546 U.S. 74 (2005) (*per curiam*), the warden objected that the circuit court below had improperly relied on evidence that had not been before the state court, but had surfaced via discovery in federal court. The argument was not that § 2254(d)(1) foreclosed consideration of the evidence, but that the circuit court had examined it without determining that the prisoner had exercised the diligence required by § 2254(e)(2). *Id.* at 79. The prisoner responded that the warden had not preserved his § 2254(e)(2) objection, and this Court remanded for a determination of that question. *Id.* at 80.

The warden contends that this Court has recognized that the § 2254(d)(1) inquiry always

---

court, so the reasonableness of the state court's rejection of his claim necessarily had to be determined on the basis of the existing state court record. The prisoner in *Miller-El* also relied exclusively on evidence that had been before the state court. Moreover, *Miller-El* involved § 2254(d)(2), which, for reasons explained below, contains an explicit limitation to the evidence presented in state court. In the footnote in *Cone*, the Court faulted the dissent for relying on medical records that had not been presented in state court. The Court noted that the prisoner himself did not contend that this Court "*could* consider … records obtained in the federal habeas proceedings." *Cone*, *supra*, at 697 n.4 (emphasis added). Neither the Court nor the dissent in *Cone* addressed the question whether the Court "could" consider the records under § 2254(e)(2).

comes first and depends entirely on the evidence in state court. Pet.Br. at 38. The warden's only pertinent citation is to a single sentence in *Michael Williams v. Taylor*, *supra*, where the Court explained that it was "unnecessary to reach the question whether § 2254(e)(2) would permit a hearing" on a claim that the prosecution had failed to disclose that a key witness had entered an informal plea agreement, where the circuit court below had rejected the claim "on the merits under § 2254(d)(1)." *Id.* at 444.[6]

This sentence is not authority for the proposition that once a federal court has concluded that a state court decision was not unreasonable in view of the facts in state court, it is futile to hold a hearing and supplement the state record with additional evidence. The claim regarding the witness' plea agreement *had* been considered and rejected in state court, and the circuit court below had treated the state court's decision as on the merits within the meaning of § 2254(d)(1). But the circuit court had concluded that the prisoner could not succeed with the claim *even if* a federal hearing was held and he established that his allegations about the plea agreement were true. As a matter of law, the plea agreement was not material. *Williams v. Taylor*, 189 F.3d 421, 429 (4th Cir. 1999). *That* was the reason it was unnecessary to decide whether a hearing could be held—because the prisoner's

[6] The *Michael Williams* case was primarily about whether § 2254(e)(2) permitted the prisoner to develop the facts underlying two other claims that had not been adjudicated in state court.

allegations, if true, did not make out a meritorious claim.

B. The General Plan Embodied in AEDPA

The warden points out that § 2254(d)(1)'s companion provision, § 2254(d)(2), explicitly states that a federal court is to determine whether a previous state court decision on a claim was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Pet.Br. at 25. It follows, he insists, that a federal court is equally confined to an examination of the evidence in state court under § 2254(d)(1).

This argument has things precisely backward. Under the relevant canon, the explicit reference in § 2254(d)(2) to the evidence in state court, coupled with the absence of any such reference in § 2254(d)(1), invites the inference that a federal court must restrict itself to the state record in the one context, but not in the other. *Expressio unius est exclusio alterius.*

The warden protests that there is "no reason to think that Congress meant the concept of reasonableness in § 2254(d)(2) to be fundamentally different from reasonableness in § 2254(d)(1)." Pet.Br. at 25. But there *is* a reason to limit the analysis in § 2254(d)(2) to the evidence in state court, but to allow for the consideration of additional evidence in the § 2254(d)(1) analysis.

It makes perfect sense, in the context of § 2254(d)(2), that the reasonableness of a state court's factual determinations should be appraised

exclusively on the basis of the state record. The point of the exercise is to identify factual findings that were reasonable given the evidence the state court had at the time and, on that basis, to instruct a federal habeas court to respect those findings. The form this respect takes is a presumption of correctness, established by 28 U.S.C. § 2254(e)(1), rebuttable only by compelling evidence in federal court showing that the state court findings were erroneous, after all.[7]

A hypothetical may help to show how the warden's interpretation of § 2254(d)(1) would frustrate the routine application of the analysis contemplated by § 2254(d)(2) and § 2254(e)(1). Suppose that defense counsel intends to object to the admission of a statement elicited from the defendant on the ground that it was obtained in violation of *Miranda*. The defendant insists that he explicitly stated in the interrogation room that he did not want to talk to the police, but, instead, wished to invoke his privilege to remain silent. The officers state, by contrast, that the defendant was willing to cooperate and that he waived the privilege. Defense counsel requests access to any recording of the interrogation session, but is told that none exists. Counsel then rests his objection exclusively on the defendant's testimony. The trial judge believes the officers and admits the statement; the defendant is convicted; the state appellate courts affirm, expressly approving the

---

[7] The ACLU explained the interplay between § 2254(e)(1) and § 2254(d)(2) more fully in an *amicus* brief in *Wood v. Allen*, ___ U.S. ___, 130 S.Ct. 841 (2010), where the Court found it unnecessary to engage the issue. *Id.* at 849.

trial court's treatment of the *Miranda* claim. Later, a property clerk provides defense counsel with a recording of the interrogation session that unambiguously substantiates the defendant's account.

Counsel files an application for postconviction relief in state court, but both the trial-level and appellate courts hold that the application is too late under the state statute of limitations. Counsel then petitions for federal habeas relief, offering to prove what actually happened in the interrogation room on the basis of the recording.

1. The Analysis Under § 2254(d)(2) and § 2254(e)(1).

As in any other case, the federal court in this hypothetical must begin with the basic pleadings and assess whether there are disputed questions of fact that must be resolved in order to determine the legal issues. Of course, this prisoner does proffer proof outside the extant state record. The federal court must then determine whether examining the recording is warranted under the standards in *Brown* and *Townsend* and neither premature under § 2254(b) nor barred by § 2254(e)(2). And, here again, following *Landrigan*, the court must make this determination with an eye on the limits on habeas relief established by § 2254(d).

In this instance, the prisoner proposes not to only to supplement the factual record on which the state court relied, but to disprove key facts the state court reached in light of an incomplete record. Accordingly, in deciding whether to consider the

recording the federal court must take account of § 2254(d)(2), which bars relief unless the state court's decision was based on an unreasonable determination of the facts in light of the state court record, and, in turn, § 2254(e)(1), which creates the presumption in favor of state factual findings that were not unreasonable, given the evidence the state court had at the time.[8]

In this scenario, the federal court will conclude that federal fact-finding is warranted. The exhaustion requirement in § 2254(b) is satisfied, because the state court has barred the prisoner's postconviction petition as untimely, and there is no currently available avenue for presenting the recording to the state courts. The diligence requirement in § 2254(e)(2) is satisfied, because defense counsel asked for the recording but was told none existed. And, under § 2254(e)(1), the court needs to examine the recording to determine whether it provides clear and convincing evidence showing that the state court's factual findings were erroneous. The court is not required to hold a

[8] Not every offer of additional evidence in federal court challenges the accuracy of the facts found in state court. This hypothetical does involve such a challenge in order to illustrate the connection between § 2254(d)(2) and § 2254(e)(1). The hypothetical shows that only facts that were *reasonably* determined in state court warrant acceptance, unless the prisoner produces clear and convincing rebuttal evidence. See Brief for the ACLU in *Wood v. Allen*, *supra*. Since Mr. Pinholster does not challenge factual determinations made by the California Supreme Court, the presumption in § 2254(e)(1) is not implicated here.

hearing on *any* offer of proof outside the state record, but in this instance it appears that the recording, if it shows what the prisoner says it shows, will prove that the state court's factual findings were wrong, albeit reasonable in light of the conflicting testimony the state court was given.

If the federal court concludes, on the basis of the clear and convincing evidence supplied by the recording, that the prisoner's account of the interrogation was true all along, the court will equally conclude that the *Miranda* claim is meritorious. Obviously, § 2254(d)(2) will not bar relief. For one thing, the evidence provided by the recording materially alters the factual basis of the *Miranda* claim. The state court's decision without benefit of the recording was not "on the merits" and thus did not trigger § 2254(d). The federal court must therefore treat the claim *de novo* on the basis of facts developed in federal court. In these circumstances, it would be "bizarre" if the federal court were obliged to ignore facts properly established by clear and convincing proof in deference to a state decision based on incomplete, and in this instance misleading, evidence. Cf. *Wellons*, *supra*.

Alternatively, even if § 2254(d) remains in play, federal relief is still available. This is not because the state court unreasonably determined the facts in light of the evidence the state court saw. By hypothesis, the state court reasonably accepted the police officers' testimony that the defendant had voluntarily cooperated with them. Federal relief is permissible under § 2254(d)(1), because the federal

court has now lawfully found additional facts showing what really happened, notwithstanding what the state court reasonably thought was true on the evidence the state court had at the time.

2. The Warden's Interpretation of §2254(d)(1).

According to the warden's understanding of § 2254(d)(1) in this case, federal relief would *not* be permissible in this hypothetical—because the federal court's analysis under § 2254(d)(1) would preempt any consideration of the recording. By the warden's account, the federal court must first determine whether the state court's rejection of the *Miranda* claim was unreasonable in view of the state court record alone. Since it was not unreasonable for the state court to believe what the officers said at the state hearing, federal relief is foreclosed—notwithstanding the prisoner's offer to refute the officers' testimony with the recording. See Pet.Br. at 22-24 (asserting that a federal court's analysis under § 2254(d)(1) cannot take into account evidence outside the record on which the state court acted).

This is not the law. Section § 2254(d)(1) cannot be read to bar habeas relief when a routine analysis under § 2254(d)(2) and § 2254(e)(1) leads to the conclusion that relief is available. As noted previously, the evidence provided by the recording materially alters the factual basis of the *Miranda* claim. The state court's decision without consideration of the recording was not "on the merits" and thus did not trigger either § 2254(d)(2) or § 2254(d)(1). Even if § 2254(d)(1) is applicable,

federal relief is still permissible, because the new evidence supplied by the recording establishes that a judgment against the prisoner was unreasonable, given the true facts.

The hypothetical demonstrates that requiring a federal court always to undertake a § 2254(d)(1) analysis before anything else, and confining the court to the evidence that was before the state court, would not be *consistent* with § 2254(d)(2), as the warden maintains. Instead, restricting the federal court to the state record for purposes of the legal question under § 2254(d)(1) would *frustrate* the arrangements contemplated by § 2254(d)(2) and § 2254(e)(1) for deciding when the facts found on an incomplete record in state court may be proved erroneous by additional evidence in federal court.

The warden contends that it "makes no sense to say that a state court unreasonably applied clearly established … law to facts it did not know existed." Pet.Br. at 17, quoting *Pinholster v. Ayers*, 590 F.3d at 688 (Kozinski, C.J., dissenting). But it *does* make sense to speak this way—that is, in the way Congress has actually spoken. Congress signaled the different functions served by § 2254(d)(1) and § 2254(d)(2) by specifying that only the evidence in state court is pertinent for purposes of § 2254(d)(2), but forgoing the same limitation with respect to § 2254(d)(1).

The facts for purposes of § 2254(d)(1) may therefore include facts supported by evidence outside the state record—provided that those facts have been developed consistent with the standards for federal fact-finding and § 2254(e)(2). Put simply, the facts

were the facts—whether the state court was aware of them or not. A decision applying the law to the facts may have been unreasonable wholly apart from what the state court knew at the time. And a federal court can make such a determination where, consistent with the rules governing (and severely restricting) federal fact-finding, the federal court develops a fuller understanding of what really happened.

The warden contends that "[t]o allow a federal court to reject a state-court adjudication based on facts never presented in the state court would make § 2254's 'exhaustion' rule pointless…." Pet.Br. at 25. Not so. The exhaustion doctrine is fully applicable to any new allegations of fact in federal court and may well require the federal court to postpone consideration of new evidence until currently available state avenues for determining the truth have been tried.

The warden argues that the availability of a federal hearing may encourage prisoners to play "bait and switch"—that is, to withhold evidence from a state court and proffer it later in federal court. Pet.Br. at 31. If the potential for "bait and switch" is genuine, the answer is not a contrived interpretation of § 2254(d)(1), but the straightforward application of § 2254(e)(2). In *any* habeas case, whether subject to § 2254(d)(1) or not, a prisoner can obtain a federal hearing into evidence that was not presented in state court *only* by demonstrating either that the facts were not developed in state court despite his or her diligent efforts or that one of the statutory standards in § 2254(e)(2) is satisfied. This is the way Congress has provided (explicitly and forthrightly) for cases in

which habeas applicants employ manipulative litigation tactics.[9]

III. THE CJLF'S ARGUMENT THAT § 2254(d)(1) IS A PRECLUSION RULE DEFIES THIS COURT'S SETTLED INTERPRETATION AND MIS-CONCEIVES BOTH § 2254(d)(1) AND THE LARGER AEDPA SCHEME OF WHICH IT IS A PART

The CJLF recognizes that the implications of the warden's position in this case can be defended only by a complete reconceptualization of § 2254(d)(1). According to the CJLF, § 2254(d)(1) is a "rule of preclusion" that is *supposed* to forestall fact-finding in federal court. Brief of the CJLF, at 5, 10-11.[10]

The CJLF declares that § 2254(d)(1) is "not a standard of review." Brief of the CJLF, at 5. But in

---

[9] The warden borrows the "bait and switch" line from Chief Judge Kozinski below. See *Pinholster*, 590 F.3d at 690 (Kozinski, C.J., dissenting). But Judge Kozinski used this phrase in his debate with the *en banc* majority about whether Mr. Pinholster exercised the diligence required by § 2254(e)(2).

[10] The CJLF asserts that the "rule of preclusion" in § 2254(d)(1) is meant not only as a "limitation on relief," but also as a "limitation on *relitigation*." *Id.* at 9 (emphasis added). But the implication of the CJLF's position is that a federal court cannot inquire into factual disputes that were *not* previously litigated in state court, but are presented for the first time in federal court—factual disputes that, again, warrant a federal hearing that is not barred by § 2254(e)(2).

a series of decisions over the last fourteen years, this Court has repeatedly explained that a standard of review is precisely what § 2254(d)(1) *is*. E.g., *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003); *Ayers v. Belmonte*, 549 U.S. 7, 14 (2006). Chief Justice Roberts emphasized this understanding only last Term: "AEDPA … imposes a 'highly deferential standard for evaluating state-court rulings.'" *Renico v. Lett*, ___ U.S. ___, ___, 130 S.Ct. 1855, 1862 (2010), quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997); see also *Lett*, *supra*, at 1862 n.1 (citing numerous other cases).

The operative effect of this deferential standard of review is not to foreclose federal consideration of a potentially meritorious claim, but to limit the availability of federal habeas *relief*. The Court has often explained that the "deference" rule established by § 2254(d)(1) draws the distinction between a decision by a state court that was correct and a decision that was incorrect (in the view of a federal habeas court), but not unreasonable. Only correct or nonetheless reasonable state court decisions bar federal relief. This is the way Congress has chosen to mitigate the tension between state and federal courts in close cases—not by telling federal courts that must always give preclusive effect to state court judgments.

This Court has said that 28 U.S.C. § 2244(b), governing second or successive federal petitions, is a "modified res judicata rule" *Felker v. Turpin*, 518 U.S. 651, 664 (1996). The CJLF asserts, without authority, that the "so-called 'deference' rule of § 2254(d) is a rule of the same class…." Brief of the

CJLF, at 8. But saying this does not make it so. By describing § 2244(b) as a kind of preclusion rule, while repeatedly explaining that § 2254(d)(1) establishes limitations on relief, the Court has indicated that the two are not the same, but quite different.

The notion that § 2254(d)(1) introduces preclusion into habeas corpus is revolutionary, to say the least.[11] If Congress meant to enact a preclusion rule, it would have done so explicitly. Floor speeches complaining of "delays" in habeas cases and "relitigation" scarcely justify reading into § 2254(d)(1) a general common law doctrine that Congress simply did not put there.

AEDPA *did* address perceived delays and inefficiencies in habeas litigation by, for example, establishing a statute of limitations and strict limits on second or successive petitions. And § 2254(e)(2) created important limits on federal hearings. These provisions, not § 2254(d)(1), plainly dealt with any difficulties entailed in federal fact-finding litigation.

The CJLF's only response is that there is "no reason" to conduct a federal hearing in any case subject to § 2254(d)(1), because, according to the CJLF, § 2254(d)(1) precludes consideration of any factual matters that such a hearing might uncover. *Id.* at 17. That is circular, lacking any baseline

[11] The CJLF brief in this case largely incorporates the CJLF *amicus* brief in *McDaniel v. Brown*, ___ U.S. ___, 130 S.Ct. 665 (2010). The Court, of course, decided *Brown* on the basis of conventional analysis.

explanation for *why* § 2254(d)(1) forecloses federal fact-finding apart from the CJLF's novel contention that § 2254(d)(1) is a preclusion rule.

The breadth of the CJLF's position invites reflection. Over the years, this Court has seen numerous arguments about § 2254(d)(1), which would extend this single provision's field of operation to matters far beyond its core function to calibrate the availability of federal relief. An expansive reach for § 2254(d)(1) necessarily entails a corresponding diminution in the work left for other AEDPA provisions that often are better suited to particular tasks. The argument the CJLF advances here illustrates that proposition: it would have § 2254(d)(1) deal with cases in which prisoners proffer evidence in federal court that was not presented in state court—the very thing that § 2254(e)(2) so plainly addresses.

Justice Kennedy saw this kind of thing coming a generation ago. Faced with an argument that a federal evidentiary hearing should be barred because of a prisoner's default regarding fact-finding in state court, Justice Kennedy explained that various other aspects of habeas law curbed abuses in this context and that it was unnecessary to add yet another restriction: "We ought not take steps which diminish the likelihood that [federal habeas courts] will base their legal decision on an accurate assessment of the facts." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 24 (1992) (Kennedy, J., dissenting).

AEDPA is an elaborate statutory scheme, whose many provisions have separate, though related, functions. The task is to give all those

provisions their due within an integrated framework consistent with the language Congress has enacted. No single provision must do all the work. It disrupts the congressional plan laid out in AEDPA to fasten an atextual interpretation on § 2254(d)(1) that requires a struggle to explain what remains to be governed by § 2254(e)(2).

The dangers of § 2254(d)(1) mission creep are exacerbated to the extent previous litigation in state court triggers § 2254(d)(1) without providing assurance that the state court carefully examined a claim and its supporting evidence under prevailing precedents and thus reached a decision on the merits that warrants confidence. It is not for nothing that the CJLF stakes its argument that a summary state disposition counts as an adjudication of the merits on the contention that § 2254(d)(1) is a "modified rule of issue preclusion." Brief for the CJLF in *Harrington v. Richter*, No. 09-587, at 13.

IV. NO POLICY CONSIDERATIONS JUSTIFY READING § 2254(d)(1) TO PREEMPT FEDERAL FACT-FINDING IN APPROPRIATE CASES

The warden attempts to buttress his position on policy grounds. Unnecessary hearings are said to be expensive. Pet.Br. at 13. And if an unjustified hearing is conducted before a federal court examines a prior state court decision, the federal court's appraisal of the state court's work on the basis of the state record may be "improperly influenced." *Id.* at 14.

Neither of these contentions is persuasive. There is no evidence that federal habeas courts systematically conduct hearings in violation of § 2254(e)(2) or that they overuse their lawful authority to engage in fact-finding. Federal hearings have always been extremely rare. *Keeney v. Tamayo-Reyes*, *supra*, at 24 (Kennedy, J., dissenting). They have become rarer still since § 2254(e)(2) was adopted in 1996. A recent study of habeas litigation in district courts reports that federal hearings were held in only 9.5% of the capital cases studied and in only .41% of the noncapital cases. Prior to AEDPA, the rates were 19% and 1.1%, respectively. "Executive Summary, Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996," at 5 (N. King, F. Cheesman & B. Ostrom) (Award No. 2006-IJ-CX-002, National Institute of Justice, Office of Justice Programs, United States Department of Justice).

CONCLUSION

The California Supreme Court did not adjudicate the respondent's claim on the merits. Accordingly, this case is not subject to 28 U.S.C. § 2254(d). Because the questions on which this Court granted review presuppose that § 2254(d) applies, the writ should be dismissed as improvidently granted.

With or without consideration of the new theories about the respondent's mental condition introduced in federal court, the circuit court's judgment that federal habeas relief is available and warranted in this case was correct and should be affirmed.

Respectfully Submitted,

Larry Yackle
Counsel of Record
765 Commonwealth Ave.
Boston, MA 02215
(617) 353-2826
yackle@bu.edu

Steven R. Shapiro
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

John Holdridge
American Civil Liberties
Union Foundation
201 West Main Street
Suite 402
Durham, NC 27701
(919) 682-5659

Dated: September 24, 2010