No. 09-1088

In the Supreme Court of the United States

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

v.

SCOTT LYNN PINHOLSTER, *Respondent.*

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

REPLY BRIEF FOR PETITIONER

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General
Counsel of Record
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2049
E-mail: Bill.Bilderback@doj.ca.gov
Counsel for Petitioner

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

Blank Page

REPLY BRIEF FOR PETITIONER

Respondent's Brief in Opposition (Opp.) illustrates that there is substantial confusion about the two important issues that petitioner seeks to raise in this Court, and thus that there is a compelling need for clarification on these issues from this Court. The first issue involves the appropriate scope of review under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The second issue involves the standard of review applicable to claims of ineffective assistance of counsel. The confusion about these two issues is revealed by the flaws in the reasoning of the *en banc* majority and is highlighted by respondent's unwillingness to directly address those issues in his opposition.

I.

The first issue is whether it is appropriate under § 2254 for a federal court to conclude that a state court's rejection of a claim was unreasonable in light of facts that an applicant could have but never alleged in state court. Respondent says that this issue is somehow well settled in his favor. Opp. at 1-2. But the Chief Judge of Ninth Circuit Court of Appeals, in his lengthy dissent, demonstrated that respondent's assertion is wrong. As repeatedly emphasized in the dissent, there is need for this Court to review the *en banc* majority's fundamental misinterpretation of the limits § 2254 imposes on such reliance on newly-alleged facts in federal collateral review. See, e.g., App. 82, 83-84, 88, 163 (Kozinski, J., dissenting).

Indeed, in *Bell* v. *Kelly*, 07-1223, this Court granted certiorari on a question almost identical to the first question petitioner seeks to present in this case. The question in *Kelly* was: "Did the Fourth Circuit err when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for

claims 'adjudicated on the merits' in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?" This Court in *Kelly* dismissed certiorari as improvidently granted after oral argument revealed that the facts and procedural posture of that case prevented the Court from reaching the question. But the question remains worthy of review.

Respondent's own arguments demonstrate that there is a need for this Court's guidance. Respondent asserts that there was nothing at all controversial about the *en banc* majority's holding that § 2254(d)(1) authorizes a federal court to rely on facts never presented to the state court as a basis for concluding that that the state court unreasonably rejected the claim for relief. Opp. at 1-2, 36-38. He asserts that "[t]his is a correct statement of law in every circuit." Opp. at 2. But he cites no case authority from *any* circuit, let alone *every* circuit.

Even if respondent's point were supported by some circuit authority, it unavoidably would conflict with this Court's holding, in *Holland* v. *Taylor*, 542 U.S. 649, 652 (2004) (per curiam), that the determinative § 2254(d)(1) question of "whether a state court's decision was unreasonable must be assessed *in light of the record the court had before it.*" (Emphasis added.) In attempting to explain away *Holland's* unconditional statement of law, respondent in essence claims that, while this Court *said* that, it did not *mean* it. He goes on to characterize petitioner's reading of the plain language of § 2254(d)(1), as corroborated by this Court in *Holland,* as "radical[]." Opp. at 37. But, if respondent's position were as settled as he represents, and if petitioner's discussion of the converse rule were so "radical," then this Court would not have concluded, in *Williams (Michael)* v. *Taylor*, 529 U.S. 420, 444 (2000), that it was "unnecessary" to reach the § 2254(e)(2) question because the § 2254(d)(1) question had already been resolved adversely to the applicant. Respondent fails to discuss, or even acknowledge, the

impact of this language from *Michael Williams* on this dispute. Respondent's and the *en banc* majority's treatment of § 2254(d) and *Holland* only confirm that this Court should grant certiorari review in this case.

Ironically, respondent himself provides tacit support for petitioner's purportedly radical position that consideration of new facts is irreconcilable with the limitations on federal review and the primacy of state-court determinations codified in § 2254(d)(1). For respondent expends considerable time and energy arguing that petitioner "exaggerates the differences between [respondent's] allegations in state court and his allegations and proof in federal court." Opp. at 19-23. He further implies that some vague, undefined principle of equity should estop petitioner from complaining that respondent developed new facts in federal court, because petitioner was constrained to present new facts in federal court too. Opp. at 23-24. That respondent senses the need to minimize and justify the differences between the facts presented in his state petition and the facts upon which the *en banc* majority based its decision to grant relief suggests an understandable intellectual discomfort with what the *en banc* majority did here.

Respondent further argues that requiring an applicant to pass through the § 2254(d)(1) threshold before permitting the applicant the opportunity to develop evidence would render § 2254(e)(2) superfluous. For, in respondent's untenable view of § 2254(d)(1), an applicant who can prove that a state-court determination was unreasonable without an evidentiary hearing "would be entitled to relief on the present record." Opp. at 39-40. Respondent's misapprehension emphasizes, again, the need for this Court's guidance. Even if an applicant overcomes the threshold bar to relief set up by § 2254(d)(1), he has not yet established the validity of his claim. He then must prove that his crucial allegations of fact are true. With § 2254(d)(1) satisfied, the applicant might do this in an evidentiary hearing—a hearing that only at that point might be necessary and that in any event would be subject to limitations on the

development of new facts in § 2254(e)(2) and to other limitations under (e)(1).

Echoing the *en banc* majority, respondent protests that petitioner's interpretation would place an undue restriction on the federal courts. Opp. at 36-37. According to respondent, this Court should deny certiorari review because there is absolutely nothing wrong with an applicant withholding facts from a state court, waiting to present them for the first time to a federal court, and then accusing the state court of acting unreasonably in failing to grant relief based upon the very material that was withheld—*even if all courts would agree that the state court determination, based on the facts and law presented to the state court, was perfectly reasonable.* Opp. at 38-39.

Respondent's position is also irreconcilable with AEDPA's limitations on the development of new facts never presented to the state court. Section 2254(e)(2) forbids the federal courts from granting an evidentiary hearing as to *any* fact that the applicant failed to develop in state court (subject to exceptions that have no application to the instant case). Here, respondent never alleged in state court that he suffered from organic brain damage, notwithstanding the state court provided him with funding that was used to retain mental health experts who offered opinions to the state court. However, the allegation of organic brain damage, and the evidence in support of that allegation, were the central operative facts that informed the *en banc* majority's decision to grant relief. And respondent failed to present these central operative facts to the state court notwithstanding the multiple opportunities the state court afforded respondent to do so. Instead, respondent presented to the state court other facts; facts the federal evidentiary hearing proved were not true. The *en banc* majority's position, that being denied an evidentiary hearing as to *any* allegation of fact fulfills the requirement of due diligence as to *every* allegation of fact that the applicant might thereafter wish to present in federal court is illogical and unsupportable, and must be corrected.

Under the plain language of § 2254(d)(1), federal courts may only grant relief on the merits of a state-court-adjudicated claim if it was unreasonably rejected by the state courts under clearly established Federal law, and under § 2254(e)(2) an applicant may not bypass the state court process by withholding material facts from the state court. *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308, 2324-25 (2009) (Alito, J., concurring). Thus, § 2254(d)(1) requires federal courts to stand in the shoes of the state court and to defer to the state court's determination of the claim if it was reasonable in light of the facts and law presented to the state court. It is only if the state court determination of the claim as presented to the state court was unreasonable that a federal evidentiary hearing under § 2254(e)(2) should even be considered—for, where the state court decision meets the deferential § 2254(d)(1) criteria, relief is barred and a federal evidentiary hearing is beside the point. *Michael Williams*, 529 U.S. at 444.

Under the *en banc* majority's strained construction of the statute, however, § 2254(d)(1) largely will be rendered a nullity, and § 2254(e)(2) will be substantially undermined. Under the *en banc* majority's view, as long as an applicant engages in the simple formality of requesting an evidentiary hearing in state court, he may choose to decline to present relevant, material facts to the state court; for, even if the state court then justifiably denies relief based on the facts alleged rather than withheld, the applicant still would be allowed to move to federal court and add the dispositive new facts to his claim (provided the factual allegation does not render the claim "unexhausted").[1] The

---

[1] The *en banc* majority has a new, expansive interpretation of exhaustion principles: as they stated, so long as the new facts inform the same broadly-stated claim, such as "mitigation ineffective assistance" (App. 33-34) the new facts cannot render the claim unexhausted, and evidence in support of those facts must be permitted at the federal evidentiary

(continued...)

applicant, further, would apparently be entitled to an evidentiary hearing—before any § 2254(d)(1) analysis is undertaken—at which he could present new evidence in support of a dispositive factual allegation that he never presented to the state court, and § 2254(e)(2) would not stand in his way. App. 32. Then, following the hearing, the federal court would be free to find that the newly-presented facts the state court never knew about prove that that the state court decision denying relief was "unreasonable" under § 2254(d)(1).

Under the *en banc* majority's rule, no federal court need ever examine the ruling made by the state court "in light of the record the state court had before it." *Contra, Holland v. Jackson*, 542 U.S. at 652. Rather, the state court should, and perhaps even must, consider new facts never presented to the state court in assessing the reasonableness of the state court's determination. In short, the rule the *en banc* majority has articulated permits any federal court that so desires to avoid ever having to show genuine deference to a state court adjudication ever again. This ruling must not be permitted to stand.

II.

Similarly bootless is respondent's attempt to defend the *en banc* majority's analysis of the underlying claim of ineffective assistance of counsel. As pointed out in the petition, trial counsel in the instant case did much more than what counsel did in *Strickland* v. *Washington*, 466 U.S. 668 (1984). And the decision in *Strickland* was almost precisely contemporaneous with the penalty phase of respondent's trial. So it would have been reasonable for the California Supreme Court to rely on

---

(...continued)
hearing. The *en banc* majority apparently believes that § 2254(e)(2) did no more than codify some portions of pre-AEDPA exhaustion principles; indeed, given the expansive re-definition of "exhaustion," it did not even do that much.

Strickland for guidance regarding what counsel had an obligation to do under the constitutional minima compelled by the Sixth Amendment, and to deny relief if the conduct of respondent's trial counsel seemed reasonably similar to that of Strickland's counsel.

Respondent is dissatisfied with *Strickland*, however, and chooses to ignore both its underlying facts and the test articulated in that case in favor of other, more recent cases in which relief was granted. However, this Court's opinions in those later cases do not in any way alter or amend the test articulated in *Strickland*. Notwithstanding respondent's belief that there is a different reading of *Strickland* "in the AEDPA era" than there was before (Opp. at 25), this Court could not have been more clear that the cases that respondent discusses were nothing more than straightforward applications of *Strickland* to the particular facts of those cases. *Rompilla* v. *Beard*, 545 U.S. 374, 380-81 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 521 (2003); *Williams (Terry)* v. *Taylor*, 529 U.S. 362, 367 (2000).

And none of those cases is as instructive on either the standard of care or how to apply the standard of care to respondent's case as *Strickland* itself. Petitioner would concede that other attorneys confronted with other sets of facts who did or did not do other things might have failed to satisfy the *Strickland* standards for performance in ways that were prejudicial to their clients. However, this concession, much like respondent's argument, does nothing to illuminate whether respondent's trial attorneys rendered prejudicially deficient performance. *Strickland* does. And respondent does not even attempt to distinguish *Strickland* from the instant case. That is understandable: there is no reasoned basis for doing so, or for concluding that it would be "unreasonable" to validate the performance of respondent's trial counsel under the *Strickland* test.

Respondent identifies no flaw in petitioner's analysis of the standard of care or the test for prejudice articulated in *Strickland*, or petitioner's

application of *Strickland* to respondent's case. As petitioner explained, given that *Strickland* controls the instant case, and given that trial counsel in *Strickland* did less than what trial counsel in respondent's case did, it certainly would have been reasonable for the California Supreme Court to conclude that what trial counsel did in respondent's case met the constitutional minima discussed in *Strickland*. Further, given the relatively sparse case in aggravation respondent presented to the California Supreme Court, and the aggravated nature of respondent's crimes as magnified by respondent's own testimony at his trial, the state court also reasonably could have concluded that no reasonable juror would have been persuaded to sentence respondent to some lesser punishment.

The California Supreme Court's rejection of respondent's claim of ineffective assistance of counsel was reasonable under *Strickland*; indeed, a fair reading of *Strickland* compels the result reached by the California Supreme Court. This Court should grant certiorari review to correct the *en banc* majority's misunderstanding regarding the deference that must be shown to a state-court determination of a claim of ineffective assistance of counsel.

***

The *en banc* majority misunderstood and misapplied key provisions of the AEDPA amendments to § 2254 in such a way that the plain language and unambiguous intent of that statute are thwarted. The *en banc* majority also failed to show proper deference to the California Supreme Court's reasonable rejection of respondent's claim of ineffective assistance of counsel. This Court has recently evinced interest in both of these important and difficult areas of law. Petitioner asks that this Court take this opportunity provide much-needed clarification and correct the Ninth Circuit's misunderstanding.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: May 24, 2010

Respectfully submitted

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General

Counsel of Record
Counsel for Petitioner

LA2003XF0001
60542295.doc

Blank Page