

## Boston College Law Review

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Volume 52

Issue 6 Volume 52 E. Supp.: Annual Survey of Federal  
En Banc and Other Significant Cases

Article 11

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4-1-2011

# Deferential Dilemmas: *Pinholster v. Ayers* and Federal Habeas Claims of Ineffective Assistance of Counsel After AEDPA

Katherine A. McAllister  
[katherine.mcallister@gmail.com](mailto:katherine.mcallister@gmail.com)

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### Recommended Citation

Katherine A. McAllister, *Deferential Dilemmas: Pinholster v. Ayers and Federal Habeas Claims of Ineffective Assistance of Counsel After AEDPA*, 52 B.C.L. Rev. E. Supp. 121 (2011), <http://lawdigitalcommons.bc.edu/bclr/vol52/iss6/11>

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# DEFERENTIAL DILEMMAS: *PINHOLSTER V. AYERS* AND FEDERAL HABEAS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AFTER AEDPA

**Abstract:** On December 9, 2009, the Ninth Circuit Court of Appeals, sitting en banc, concluded that Scott Lynn Pinholster had received deficient, prejudicial assistance of counsel at the penalty phase of his capital case, vacating an earlier decision by a panel of the Ninth Circuit. The U.S. Supreme Court subsequently granted certiorari to consider whether this was an appropriate application of both *Strickland v. Washington* and the Antiterrorism and Effective Death Penalty Act of 1996. This Comment argues that the latter en banc majority opinion more effectively ensures that capital defendants such as Pinholster are permitted to vindicate their Sixth Amendment rights to effective assistance of counsel because the position advocated by the dissent would largely erode these fundamental constitutional protections.

## INTRODUCTION

In April 1984, following a lengthy trial, a jury convicted Scott Lynn Pinholster of two counts of first-degree murder and found him eligible for the death sentence.<sup>1</sup> His court-appointed counsel, astonished to learn that the prosecution planned to offer aggravating evidence at the penalty phase, admitted to the judge that they had not yet prepared a mitigation case.<sup>2</sup> Nevertheless, Pinholster’s counsel then declined a continuance, determining that the additional time would not “make a great deal of difference” to Pinholster’s sentence.<sup>3</sup> At the penalty phase, Pinholster’s counsel waived opening statement; provided no medical or psychiatric testimony regarding Pinholster’s childhood brain injury, deprived childhood, family history of criminal activity, and mental illness; and presented only one witness, whose testimony was

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<sup>1</sup> *Pinholster v. Ayers (Pinholster III)*, 590 F.3d 651, 656 (9th Cir. 2009) (en banc), *cert. granted sub nom.* Cullen v. Pinholster, 78 U.S.L.W. 3549 (U.S. June 14, 2010) (No. 09-1088).

<sup>2</sup> *See id.* at 671.

<sup>3</sup> *Id.*

“brief[,] . . . damaging, incomplete, and inaccurate.”<sup>4</sup> The jury deliberated for two days before returning a death sentence.<sup>5</sup>

After the California Supreme Court upheld Pinholster’s conviction on direct appeal and later denied his two state habeas petitions that claimed ineffective assistance of counsel at the guilt and penalty phases of his trial, Pinholster brought a habeas petition in federal district court.<sup>6</sup> Following an evidentiary hearing, the district court denied Pinholster’s petition with respect to the guilt phase but found that counsel had performed deficiently at the penalty phase, concluding that Pinholster was denied his Sixth Amendment right to effective assistance of counsel.<sup>7</sup> On appeal, a panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the district court’s conclusion regarding the guilt phase but reversed the finding of ineffective assistance of counsel regarding the penalty phase.<sup>8</sup> After rehearing en banc, the Ninth Circuit Court of Appeals affirmed the district court’s judgment.<sup>9</sup>

Sitting en banc, the judges of the Ninth Circuit were divided with respect to two primary points: (1) whether the federal courts had been sufficiently deferential to the state courts in permitting an evidentiary hearing on Pinholster’s federal habeas corpus petition, and (2) whether the analysis of ineffective assistance of counsel was sufficiently deferential to Pinholster’s counsel under the appropriate standard as articulated in 1984 by the U.S. Supreme Court in *Strickland v. Washington*.<sup>10</sup>

Part I of this Comment briefly summarizes the factual and procedural history of Pinholster’s underlying criminal case.<sup>11</sup> Part II then explores the competing interpretations of deference with which the Ninth Circuit grappled en banc.<sup>12</sup> Finally, Part III argues that the en banc majority’s interpretation of deference is most appropriate and best serves the spirit of the Sixth Amendment’s guarantee of effective representation.<sup>13</sup> A contrary interpretation, such as the argument furthered by Chief Judge Alex Kozinski’s dissent in the case, would not only render *Strickland* a meaningless standard but would also eviscerate

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 659.

<sup>6</sup> *Id.* at 659–60.

<sup>7</sup> *Pinholster III*, 590 F.3d at 654–55.

<sup>8</sup> *See id.* at 655.

<sup>9</sup> *Id.* at 684.

<sup>10</sup> *See id.* at 662–64, 684–85; *see also* *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

<sup>11</sup> *See infra* notes 15–58 and accompanying text.

<sup>12</sup> *See infra* notes 59–94 and accompanying text.

<sup>13</sup> *See infra* notes 95–110 and accompanying text.

the constitutional safeguards that serve as an essential check on capital punishment in the United States.<sup>14</sup>

## I. FACTUAL AND PROCEDURAL HISTORY

### A. *The Guilt Phase of the Underlying Case*

Pinholster was charged with the 1982 murders of Thomas Johnson and Robert Beckett, as well as burglary and robbery charges arising out of the same incident.<sup>15</sup> At the guilt phase of Pinholster's trial, the jury heard testimony from Art Corona, one of Pinholster's accomplices, who testified as part of a plea arrangement.<sup>16</sup> Corona explained that on the night of the murders, he, Pinholster, and David Brown robbed a house belonging to Michael Kumar, a local drug dealer who was then out of town.<sup>17</sup> Unbeknownst to the three accomplices, however, Kumar had arranged for Johnson and Beckett to serve as house-sitters to take care of his property during his absence.<sup>18</sup> In the midst of the robbery, the two house-sitters arrived and attempted to thwart Pinholster and his accomplices.<sup>19</sup> Pinholster and Brown drew knives during the confrontation, fatally stabbing Beckett and Johnson.<sup>20</sup> Pinholster, Brown, and Corona split the proceeds of the crime, which amounted to twenty-three dollars and a fraction of an ounce of marijuana.<sup>21</sup>

Several weeks later, Corona came forward and turned himself in to the police.<sup>22</sup> Corona described what Pinholster had been wearing on the night of the crime, and a search of Pinholster's apartment led the police to discover traces of human blood on the clothing matching Co-

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<sup>14</sup> See *Pinholster III*, 590 F.3d at 685 (Kozinski, C.J., dissenting); see also *Strickland*, 466 U.S. at 687. At the time this Comment went to press, a divided U.S. Supreme Court reversed the Ninth Circuit. *Cullen v. Pinholster*, No. 09-1088, slip op. at 1, 31 (U.S. Apr. 4, 2011), <http://www.supremecourt.gov/opinions/10pdf/09-1088.pdf>. That the opinion of the Court garnered the unequivocal support of only four of the justices indicates that the factual circumstances under which relief would be appropriate remain unsettled. See *id.* The reversal of habeas relief in Pinholster's case demonstrates the inadequacies—and inequities—of the current framework and illustrates the need for congressional action both to clarify the appropriate inquiry under the AEDPA and to bring it more into line with the spirit of the Sixth Amendment. See *id.*

<sup>15</sup> *Pinholster v. Ayers (Pinholster III)*, 590 F.3d 651, 654–56 (9th Cir. 2009) (en banc).

<sup>16</sup> See *id.* at 655–56; *People v. Pinholster (Pinholster I)*, 824 P.2d 571, 582, 607 (Cal. 1992).

<sup>17</sup> *Pinholster III*, 590 F.3d at 655.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> *Id.* at 655–56.

<sup>21</sup> *Id.* at 656.

<sup>22</sup> *Id.*

rona's description.<sup>23</sup> Pinholster was charged with the murders, as well as robbery and burglary.<sup>24</sup> He received court-appointed counsel, whom he later fired, and endeavored to represent himself for several months before trial.<sup>25</sup> After Pinholster reconsidered his decision to proceed in his own defense, Harry W. Brainard and Wilbur G. Dettmar were appointed to represent him for the guilt and penalty phases of his trial.<sup>26</sup>

At trial, Pinholster took the stand, boasting of his criminal past and attempting to defend himself by emphasizing his habit of committing similar crimes with guns, not knives.<sup>27</sup> He also presented an alibi defense, admitting to the burglary and robbery charges but denying any participation in the two murders.<sup>28</sup> Pinholster's counsel did not attempt to introduce medical or psychiatric testimony to explain Pinholster's brash and apparently remorseless demeanor on the witness stand.<sup>29</sup>

### B. *The Penalty Phase*

At the close of the guilt phase of Pinholster's trial, the jury returned a guilty verdict, finding that two special circumstances necessary to consider imposing a death sentence had been satisfied.<sup>30</sup> Under California law, the prosecution is required to provide notice before seeking to present aggravation evidence at the penalty phase when seeking capital punishment.<sup>31</sup> Brainard and Dettmar did not receive such notice, and assumed that this meant that the prosecution would not present aggravation evidence at sentencing.<sup>32</sup> What Brainard and Dettmar failed to take into account, however, was that during Pinholster's several-month period of representing himself, the prosecution had given Pinholster actual notice of the intent to put on an aggravation case.<sup>33</sup> As a result, the judge denied Pinholster's motion to exclude aggravation evidence.<sup>34</sup>

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<sup>23</sup> See *Pinholster III*, 590 F.3d at 656.

<sup>24</sup> *Id.* at 654.

<sup>25</sup> *Id.* at 657.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 656.

<sup>28</sup> *Id.*

<sup>29</sup> See *Pinholster III*, 590 F.3d at 677.

<sup>30</sup> *Id.* at 656.

<sup>31</sup> *Id.* at 657 (citing *Pinholster v. Ayers (Pinholster II)*, 525 F.3d 742, 751 (9th Cir. 2008)); see CAL. PENAL CODE § 190.3 (West 2008).

<sup>32</sup> *Pinholster III*, 590 F.3d at 657, 671.

<sup>33</sup> See *id.* at 657.

<sup>34</sup> *Id.*

Pinholster's counsel were thus less than a week away from sentencing, and frankly acknowledged to the judge that they had not begun to prepare a mitigation case.<sup>35</sup> Although the judge had denied the motion to exclude aggravation evidence, he informed Pinholster's counsel that he would grant a request for a continuance given the circumstances.<sup>36</sup> Brainard and Dettmar declined the judge's offer, concluding that the extra time would not "make a great deal of difference" to the sentence Pinholster would ultimately receive.<sup>37</sup>

According to billing records, Brainard and Dettmar then spent six and a half hours preparing for the penalty phase of Pinholster's trial.<sup>38</sup> They waived opening statement and presented Pinholster's mother, Burnice Brashear, as the sole witness.<sup>39</sup> The district court would later describe Brashear's testimony as "brief[,] . . . damaging, incomplete, and inaccurate."<sup>40</sup> In addition, although Brashear's testimony somewhat confusingly alluded to Pinholster's epilepsy and childhood head trauma, Pinholster's counsel declined to produce any medical or psychiatric expert testimony, causing the prosecution to encourage the jury to ignore the existence of these factors.<sup>41</sup> Nor did counsel explore the truth of Brashear's account, accepting her version of events without seeking corroboration from Pinholster's siblings or others who knew him well.<sup>42</sup> As a result, the jury was not made aware of the circumstances of Pinholster's deprived childhood, including the abuse he suffered at the hands of his grandparents and stepfather; the connection between his childhood head trauma and his subsequent behavioral problems; and the large incidence of mental illness and criminal activity among his immediate family.<sup>43</sup> In addition, Pinholster's counsel failed to explain his erratic and unrepentant demeanor when testifying during the guilt phase of the trial.<sup>44</sup>

By contrast, the state supplied significant aggravation evidence, calling eight witnesses to describe Pinholster's lengthy criminal record and his behavioral problems while incarcerated.<sup>45</sup> The prosecution also took

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<sup>35</sup> *Id.* at 657, 671.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 671.

<sup>38</sup> *Pinholster III*, 590 F.3d at 658.

<sup>39</sup> *Id.* at 658, 671.

<sup>40</sup> *Id.* at 671.

<sup>41</sup> *See id.* at 671, 676.

<sup>42</sup> *See id.* at 658.

<sup>43</sup> *See id.* at 675–80.

<sup>44</sup> *See Pinholster III*, 590 F.3d at 677.

<sup>45</sup> *See id.* at 657, 660; *Pinholster II*, 525 F.3d at 752.

advantage of the lack of psychiatric or medical testimony to convince the jury that such diagnoses were false, commenting that had Pinholster really been mentally ill, “a doctor would have been brought in” to explain Pinholster’s condition to the jury.<sup>46</sup> The trial court instructed the jury to impose a death sentence if it determined that the aggravating circumstances outweighed the mitigating circumstances.<sup>47</sup> After two and a half days of deliberation, the jury returned a death sentence.<sup>48</sup>

On direct appeal, the California Supreme Court affirmed Pinholster’s sentence.<sup>49</sup> Pinholster next filed habeas petitions at the state level, arguing that his Sixth Amendment right to effective counsel had been violated by Brainard and Dettmar’s deficient, prejudicial performance.<sup>50</sup> The court initially ordered a show-cause hearing on the penalty phase allegations, then abruptly reversed course and denied his petition “on the substantive ground that it is without merit.”<sup>51</sup> A subsequent state habeas petition was denied with the same language.<sup>52</sup>

Having exhausted his state remedies, Pinholster next turned to the federal courts for habeas relief.<sup>53</sup> The district court granted his request for an evidentiary hearing, at which point evidence of Pinholster’s organic brain damage, traumatic and abusive childhood, substance abuse, and family history of mental illness and criminal behavior was finally presented.<sup>54</sup> The district court denied Pinholster’s claim of ineffective assistance at the guilt phase but found that his counsel’s performance at sentencing was sufficiently deficient and prejudicial to constitute ineffective assistance, and the court granted Pinholster’s petition accordingly.<sup>55</sup> A panel of the Ninth Circuit affirmed the district court’s ruling with respect to the guilt phase but reversed the ruling of ineffective assistance at the penalty phase, concluding that counsel’s performance was not deficient under *Strickland* and that California’s denial of Pinholster’s state habeas petition was therefore not an unreasonable application of federal law.<sup>56</sup> Following a rehearing en banc, the Ninth Circuit affirmed the district court’s decision after determining that

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<sup>46</sup> See *Pinholster III*, 590 F.3d at 676.

<sup>47</sup> *Pinholster I*, 824 P.2d at 627.

<sup>48</sup> *Pinholster III*, 590 F.3d at 659.

<sup>49</sup> *Pinholster I*, 824 P.2d at 631.

<sup>50</sup> *Pinholster III*, 590 F.3d at 659–60.

<sup>51</sup> *Id.* at 659.

<sup>52</sup> See *id.* at 660.

<sup>53</sup> *Id.* at 659–60, 669.

<sup>54</sup> *Id.* at 660–62.

<sup>55</sup> *Id.* at 661.

<sup>56</sup> See *Pinholster II*, 525 F.3d at 773.

Brainard and Dettmar's performance at Pinholster's sentencing was both deficient and prejudicial.<sup>57</sup> The U.S. Supreme Court granted certiorari on June 14, 2010.<sup>58</sup>

## II. COMPETING INTERPRETATIONS OF DEFERENCE

### A. *Deference to the State Court Under AEDPA*

As a threshold matter, the U.S. Court of Appeals for the Ninth Circuit grappled with the question of whether Pinholster's habeas corpus petition was properly before the federal courts.<sup>59</sup> The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) severely circumscribes federal habeas relief following state court adjudications, noting that in general it "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings" except in two exceptional circumstances.<sup>60</sup> Where "the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," however, such claims may be heard by federal courts.<sup>61</sup> The en banc majority concluded that the California Supreme Court's "postcard" denials of Pinholster's habeas petitions constituted an unreasonable application of federal law.<sup>62</sup>

### B. *Deference to Attorneys Under Strickland*

The AEDPA's severe restrictions on federal habeas petitions under section 2254(d) require that federal courts look to the U.S. Supreme Court's pronouncements on the subject to ascertain whether the state court's decision was an unreasonable application of such law.<sup>63</sup> The Supreme Court articulated the standard for claims of ineffective assistance of counsel in *Strickland v. Washington* in 1984.<sup>64</sup> In *Strickland*, the Court established a two-pronged test for ineffective assistance of counsel, requiring the petitioner to prove both that (1) counsel's perform-

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<sup>57</sup> See *Pinholster III*, 590 F.3d at 684.

<sup>58</sup> *Cullen v. Pinholster*, 78 U.S.L.W. 3549 (U.S. June 14, 2010) (No. 09-1088).

<sup>59</sup> *Pinholster v. Ayers (Pinholster III)*, 590 F.3d 651, 662–65 (9th Cir. 2009) (en banc).

<sup>60</sup> See 28 U.S.C. § 2254 (2006).

<sup>61</sup> § 2254(d)(1). The second exception, set forth in § 2254(d)(2), applies when a decision is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2).

<sup>62</sup> *Pinholster III*, 590 F.3d at 684.

<sup>63</sup> See § 2254(d)(1).

<sup>64</sup> See 466 U.S. 668, 687 (1984).



ance was objectively deficient, and (2) there was a reasonable probability that the deficient performance was prejudicial.<sup>65</sup> With concerns about “the distorting effects of hindsight” clouding assessments of performance, the *Strickland* court made clear that this standard was to be highly deferential, with a strong but rebuttable presumption that counsel’s performance was not deficient.<sup>66</sup>

The Ninth Circuit en banc majority concluded that Pinholster had overcome this presumption, finding that Brainard’s and Dettmar’s performance at sentencing was deficient even under a highly deferential standard.<sup>67</sup> In particular, the majority relied on recent Supreme Court cases in which *Strickland*’s highly deferential standard was met.<sup>68</sup> For instance, in *Terry Williams v. Taylor*, decided in 2000, the Supreme Court determined that the petitioner’s attorneys’ failure to investigate and introduce mitigating evidence at the penalty phase was unconstitutionally deficient and prejudicial representation under *Strickland*.<sup>69</sup> Similarly, in *Porter v. McCollum*, decided in 2009, the Court concluded that a defendant received ineffective assistance following inadequate investigation into mitigating evidence.<sup>70</sup> *Wiggins v. Smith*, decided in 2003, and *Rompilla v. Beard*, decided in 2005, both involved a Supreme Court finding that counsel’s performance did not meet prevailing norms and was prejudicial, with analogous failures to conduct sufficient investigations.<sup>71</sup>

The majority’s criticisms of Pinholster’s representation at sentencing similarly focused on the inadequacy of the investigation into his background for potentially mitigating evidence, as well as the failure to glean further information about the mitigating evidence brought to their attention by the defendant’s mother, Burnice Brashear.<sup>72</sup> As later investigations would reveal, Brainard’s and Dettmar’s decision to rely exclusively on Brashear’s testimony for mitigation resulted in a misleading and incomplete defense penalty case.<sup>73</sup> For instance, although Brashear indicated that Pinholster was particularly deviant as compared to his siblings and his other relatives, subsequent investigation revealed

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<sup>65</sup> *Id.* at 687; *Pinholster III*, 590 F.3d at 663–64.

<sup>66</sup> *See* 466 U.S. at 689.

<sup>67</sup> *See Pinholster III*, 590 F.3d at 669–74.

<sup>68</sup> *See id.* at 665; *see, e.g.*, *Porter v. McCollum*, 130 S. Ct. 447, 452–56 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 381–83, 390–93 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523–38 (2003); *Terry Williams v. Taylor*, 529 U.S. 362, 395–99 (2000).

<sup>69</sup> *See Terry Williams*, 529 U.S. at 395–99.

<sup>70</sup> *See Porter*, 130 S. Ct. at 452–56.

<sup>71</sup> *See Rompilla*, 545 U.S. at 390–93; *Wiggins*, 539 U.S. at 524–26, 534–38.

<sup>72</sup> *See Pinholster III*, 590 F.3d at 675–80.

<sup>73</sup> *See id.*

that his father and several of his siblings had severe mental illnesses and serious criminal histories.<sup>74</sup> Moreover, Brashear's descriptions of Pinholster's childhood were suspiciously self-serving and dismissive of the abuse Pinholster's other relatives recall him suffering at the hands of his grandparents and stepfather throughout his childhood.<sup>75</sup> Also lacking from counsel's presentation was any medical or psychiatric evidence to contextualize Pinholster's jarring behavior on the stand or his lengthy criminal record.<sup>76</sup> The majority placed some significance on the jury's lengthy two-day deliberations, interpreting this as an indication of their reluctance to impose death even in the face of the dearth of mitigation evidence presented.<sup>77</sup>

Chief Judge Kozinski's dissent presents a dramatically divergent application of *Strickland*, casting Pinholster's attorneys' performance in a far more forgiving light than the majority.<sup>78</sup> This disagreement stemmed in part from his interpretation of Brainard's and Dettmar's billing records, suggesting that they were not diligent in their timekeeping and must have spent more than the six and a half hours reflected in their records,<sup>79</sup> although counsel's own recollections of their performance did not corroborate this interpretation.<sup>80</sup> In addition, Chief Judge Kozinski disagreed with the majority about counsel's likely motivation for approaching sentencing as they did, arguing that counsel may have made a strategic choice to use a "family sympathy" defense rather than attempt the more modern defense of "humanizing" Pinholster, and then opted to "fall[] on [their] swords" at postconviction proceedings.<sup>81</sup> The en banc majority, however, anticipated and rejected Chief Judge Kozinski's argument.<sup>82</sup> In the majority's view, "the Sixth Amendment guarantee of effective counsel . . . would be rendered meaningless if every attorney who is unable to explain his ineffective assistance is assumed to be effective because he is 'falling on his sword.'"<sup>83</sup> In addition, the majority rejected Chief Judge Kozinski's argument that Brainard and Dettmar knowingly elected to pursue a line of defense—

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<sup>74</sup> See *id.* at 659, 661.

<sup>75</sup> See *id.* at 660–61, 672, 678–79.

<sup>76</sup> See *id.* at 677.

<sup>77</sup> See *id.* at 680, 684.

<sup>78</sup> See *Pinholster III*, 590 F.3d at 691–92 (Kozinski, C.J., dissenting).

<sup>79</sup> See *id.* at 697–701.

<sup>80</sup> See *id.* at 658 (majority opinion).

<sup>81</sup> See *id.* at 692, 701 n.10, 707 (Kozinski, C.J., dissenting).

<sup>82</sup> See *id.* at 673 (majority opinion).

<sup>83</sup> *Id.* at 672–73 n.10.

“family sympathy”—that has since become outmoded.<sup>84</sup> Under the majority’s view, the question of deference to counsel’s professional judgment is not without limits, and depends on the adequacy of counsel’s investigation into other possible defenses.<sup>85</sup> For a trial strategy to constitute a reasonable professional judgment call, counsel would have had to have at least considered the alternatives, which was not possible here “[g]iven the absence of a minimally adequate defense investigation.”<sup>86</sup> With no such investigation into Pinholster’s background to reveal other mitigating evidence, the majority rejected Chief Judge Kozinski’s conclusion that counsel made a reasonable tactical decision.<sup>87</sup>

A final point of contention between the majority and the dissent was the propriety of the evidentiary hearing allowed by the district court in response to Pinholster’s ineffective assistance of counsel habeas petition, as it introduced evidence not heard by the state courts.<sup>88</sup> 28 U.S.C. § 2254(e) (2) provides that:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

- (A) the new claim relies on—
  - (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
  - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence.<sup>89</sup>

The en banc majority did not conclude that this provision was problematic—or even applicable—in Pinholster’s case, because Pinholster was diligent in developing the factual record at the state level to the best of his ability.<sup>90</sup> Indeed, Pinholster had almost achieved this goal with his first state habeas petition; the state court, however, withdrew its show-cause order as “improvidently granted” before Pinholster could sup-

<sup>84</sup> See *Pinholster III*, 590 F.3d at 673.

<sup>85</sup> See *id.*; see also Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1107–09 (2009) (describing the sources of law used to determine the reasonableness of counsel’s failure to investigate and uncover mitigation evidence in capital cases).

<sup>86</sup> *Pinholster III*, 590 F.3d at 673, 680.

<sup>87</sup> See *id.* at 673–74.

<sup>88</sup> See *id.* at 666–69.

<sup>89</sup> 28 U.S.C. § 2254(e) (2) (2006).

<sup>90</sup> See *Pinholster III*, 590 F.3d at 666–69.

plement the factual record in state court.<sup>91</sup> Chief Judge Kozinski in dissent interpreted Section 2254(e) in a light much less favorable to Pinholster's claim, finding that a strict interpretation did not permit development of the factual record even under these circumstances.<sup>92</sup> The en banc majority, however, found support for its position in *Michael Williams v. Taylor*, decided by the Supreme Court in 2000, noting that "the clear import of *Michael Williams* is . . . that any new evidence admissible either under § 2254(e)(2) or because the petitioner did not exhibit a lack of diligence in state court, is pertinent to the petitioner's claims under AEDPA."<sup>93</sup> In the majority's assessment, "[b]ecause Pinholster was diligent, the limitations of 28 U.S.C. § 2254(e)(2) are inapplicable."<sup>94</sup>

### III. THE CASE AGAINST AN OVERLY DEFERENTIAL STANDARD

The U.S. Court of Appeals for the Ninth Circuit en banc majority's analysis in the 2010 decision *Pinholster v. Ayers* better comports with the purposes of the Sixth Amendment without compromising congressional intent as articulated in the AEDPA.<sup>95</sup> Interpreting the AEDPA in an overly broad manner so as to prohibit Pinholster from challenging his death sentence, as Chief Judge Kozinski's dissent in *Pinholster* advocates, would be a radical departure from the Supreme Court's modern death penalty jurisprudence.<sup>96</sup> Under similar reasoning in applying the Eighth Amendment, the Supreme Court has recently held unconstitutional capital punishment when applied to juveniles,<sup>97</sup> the mentally challenged,<sup>98</sup> and the insane.<sup>99</sup> Such conclusions can be seen as part of a larger trend toward critically analyzing the appropriateness of death

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<sup>91</sup> See *id.* at 659.

<sup>92</sup> See *id.* at 685, 687 (Kozinski, C.J., dissenting).

<sup>93</sup> *Id.* at 667 (majority opinion) (citing *Michael Williams v. Taylor*, 529 U.S. 420, 437–44 (2000)).

<sup>94</sup> *Id.* at 668 (citing *Holland v. Jackson*, 542 U.S. 649, 653 (2004)).

<sup>95</sup> See *Pinholster v. Ayers* (*Pinholster III*), 590 F.3d 651, 656 (9th Cir. 2009) (en banc). See generally Steven Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (noting the practical inadequacies of the ineffective assistance of counsel standard); Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005) (describing the funding shortages and other institutional barriers to adequate representation of indigent criminal defendants under the *Strickland* standard).

<sup>96</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560–79 (2005); *Atkins v. Virginia*, 536 U.S. 304, 311–21 (2002); *Ford v. Wainwright*, 477 U.S. 399, 405–18 (1986).

<sup>97</sup> See *Roper*, 543 U.S. at 578–79.

<sup>98</sup> See *Atkins*, 536 U.S. at 321.

<sup>99</sup> See *Wainwright*, 477 U.S. at 417–18.

sentences to ensure that they are applied only to the groups of offenders who are fully culpable.<sup>100</sup> Tellingly, the en banc majority in *Pinholster* considered this argument in concluding that the court's

paramount concern is not whether few death sentences are safe from federal judges, . . . but rather that federal judges acknowledge . . . the uniqueness of the punishment of death [and] the corresponding . . . need for reliability in the determination that death is the appropriate punishment.<sup>101</sup>

Chief Judge Kozinski's dissenting view would yield the perverse result of barring *Pinholster* from challenging his death sentence for failing to develop the factual record.<sup>102</sup> *Pinholster* was prevented from so doing, however, because the state court specifically reversed course and declined to give *Pinholster* the opportunity to present factual evidence in state court.<sup>103</sup> Moreover, Chief Judge Kozinski's approach would reject virtually all claims of ineffective assistance by setting the standard for deference impossibly high.<sup>104</sup> This is not the position taken by the Supreme Court in its most recent ineffective assistance of counsel cases.<sup>105</sup> By setting the standard at an unattainable level, Chief Judge Kozinski's approach would effectively strip state prisoners of their ability to vindicate their Sixth Amendment rights, which is far more than the AEDPA purported to—or would be constitutionally permitted to—accomplish.<sup>106</sup>

Chief Judge Kozinski would defer to counsel's "family sympathy" defense strategy as a reasonable technique, even in the face of evidence that counsel did not pursue any alternative strategies that would take advantage of the wealth of mitigation evidence that would serve to "humanize" *Pinholster* and diminish his culpability in at least one of

<sup>100</sup> See *Pinholster III*, 590 F.3d at 676–77.

<sup>101</sup> See *id.* at 684 (citing *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (internal quotations omitted))).

<sup>102</sup> See *id.* at 685 (Kozinski, C.J., dissenting).

<sup>103</sup> See *id.* at 668 (majority opinion).

<sup>104</sup> See *id.* at 668, 673 n.10; see also Bright, *supra* note 95, at 1860–65 (explaining why an overly deferential standard, coupled with increasingly strict rules governing the preservation of issues for appellate review, essentially rewards ineffective counsel's negligence by barring appellate review of the most egregious cases).

<sup>105</sup> See, e.g., *Porter v. McCollum*, 130 S. Ct. 447, 452–56 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 381–83, 390–93 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523–38 (2003); *Terry Williams v. Taylor*, 529 U.S. 362, 395–99 (2000).

<sup>106</sup> See *Pinholster III*, 590 F.3d at 685 (Kozinski, C.J., dissenting). See generally Bright, *supra* note 95.

the twelve jurors' minds.<sup>107</sup> Chief Judge Kozinski's dissenting argument would undoubtedly be more persuasive were there any evidence of a "minimally adequate defense investigation."<sup>108</sup> In the absence of such an investigation, however, deference should not excuse attorneys from ignoring basic professional obligations at the expense of their clients.<sup>109</sup> The Supreme Court has not been inclined to view with approval bald pleas for clemency where adequate investigation would have yielded a legitimate mitigation case.<sup>110</sup>

## CONCLUSION

Pinholster's representation at the penalty phase of his trial was deficient by any metric, and his counsel's performance unquestionably prejudiced his defense. Applying a formalistic and impossibly high standard to federal habeas claims of ineffective assistance by encasing such claims in Chief Judge Kozinski's impenetrable "double layer of deference" would prevent federal courts from exercising a fundamental check on the capital sentencing process: ensuring that defendants in capital cases receive adequate, effective representation. Pinholster's counsel did not live up to this standard, and there was a very real possibility that at least one of the members of the jury weighing the aggravating and mitigating evidence would have voted not to impose a death sentence had they heard an adequate defense on Pinholster's behalf, satisfying the conditions set forth under *Strickland*. As a result, the California Supreme Court's dismissal of Pinholster's ineffective assistance of counsel habeas claim was contrary to established U.S. Supreme Court precedent, and the en banc majority's conclusion was accordingly the appropriate resolution.

KATHERINE A. McALLISTER

**Preferred citation:** Katherine A. McAllister, Comment, *Deferential Dilemmas: Pinholster v. Ayers and Federal Habeas Claims for Ineffective Assistance of Counsel After AEDPA*, 52 B.C. L. REV. E. SUPP. 121 (2011), [http://www.bc.edu/bclr/esupp\\_2011/10\\_mcallister.pdf](http://www.bc.edu/bclr/esupp_2011/10_mcallister.pdf).

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<sup>107</sup> See *Pinholster III*, 590 F.3d at 692 (Kozinski, C.J., dissenting); see also *Wiggins*, 539 U.S. at 537 (stating that prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance" had he or she heard the mitigation evidence).

<sup>108</sup> See *Pinholster III*, 590 F.3d at 680.

<sup>109</sup> See *id.* at 673, 680.

<sup>110</sup> See *id.* at 680 (quoting *Rompilla*, 545 U.S. at 393).

