

SOTOMAYOR, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 09–1088

VINCENT CULLEN, ACTING WARDEN, PETITIONER
v. SCOTT LYNN PINHOLSTER

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

[April 4, 2011]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE KAGAN join as to Part II, dissenting.

Some habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own. Congress recognized as much when it enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, and permitted therein the introduction of new evidence in federal habeas proceedings in certain limited circumstances. See 28 U. S. C. §2254(e)(2). Under the Court’s novel interpretation of §2254(d)(1), however, federal courts must turn a blind eye to new evidence in deciding whether a petitioner has satisfied §2254(d)(1)’s threshold obstacle to federal habeas relief—even when it is clear that the petitioner would be entitled to relief in light of that evidence. In reading the statute to “compe[l]” this harsh result, *ante*, at 9, the Court ignores a key textual difference between §§2254(d)(1) and 2254(d)(2) and discards the previous understanding in our precedents that new evidence can, in fact, inform the §2254(d)(1) inquiry. I therefore dissent from the Court’s first holding.

I also disagree with the Court that, even if the §2254(d)(1) analysis is limited to the state-court record, respondent Scott Pinholster failed to demonstrate that the California Supreme Court’s decision denying his ineffec-

SOTOMAYOR, J., dissenting

tive-assistance-of-counsel claim was an unreasonable application of *Strickland v. Washington*, 466 U. S. 668 (1984). There is no reason for the majority to decide whether the §2254(d)(1) analysis is limited to the state-court record because Pinholster satisfied §2254(d)(1) on either the state- or federal-court record.

I

The Court first holds that, in determining whether a state-court decision is an unreasonable application of Supreme Court precedent under §2254(d)(1), “review . . . is limited to the record that was before the state court that adjudicated the claim on the merits.” *Ante*, at 9. New evidence adduced at a federal evidentiary hearing is now irrelevant to determining whether a petitioner has satisfied §2254(d)(1). This holding is unnecessary to promote AEDPA’s purposes, and it is inconsistent with the provision’s text, the structure of the statute, and our precedents.

A

To understand the significance of the majority’s holding, it is important to view the issue in context. AEDPA’s entire structure—which gives state courts the opportunity to decide factual and legal questions in the first instance—ensures that evidentiary hearings in federal habeas proceedings are very rare. See N. King, F. Cheesman, & B. Ostrom, *Final Technical Report: Habeas Litigation in U. S. District Courts* 35–36 (2007) (evidentiary hearings under AEDPA occur in 0.4 percent of noncapital cases and 9.5 percent of capital cases). Even absent the new restriction created by today’s holding, AEDPA erects multiple hurdles to a state prisoner’s ability to introduce new evidence in a federal habeas proceeding.

First, “[u]nder the exhaustion requirement, a habeas petitioner challenging a state conviction must first at-

SOTOMAYOR, J., dissenting

tempt to present his claim in state court.” *Harrington v. Richter*, 562 U. S. ___, ___ (2011) (slip op., at 13); see also §2254(b)(1)(A). With certain narrow exceptions, federal courts cannot consider a claim at all, let alone accept new evidence relevant to the claim, if it has not been exhausted in state court.¹ The exhaustion requirement thus reserves to state courts the first opportunity to resolve factual disputes relevant to a state prisoner’s claim. See *O’Sullivan v. Boerckel*, 526 U. S. 838, 845 (1999).

Second, the exhaustion requirement is “complement[ed]” by the standards set forth in §2254(d). *Harrington*, 562 U. S., at ___ (slip op., at 14). Under this provision, a federal court may not grant habeas relief on any “claim that was adjudicated on the merits in State court proceedings” unless the adjudication

“(1) 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; or

“(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

These standards “control whether to grant habeas relief.” *Schriro v. Landrigan*, 550 U. S. 465, 474 (2007). Accordingly, we have said, if the factual allegations a petitioner seeks to prove at an evidentiary hearing would not satisfy these standards, there is no reason for a hearing. See *id.*, at 481. In such a case, the district court may exercise its “discretion to deny an evidentiary hearing.” *Ibid.*; see also *infra*, at 13–14. This approach makes eminent sense: If district courts held evidentiary hearings without first

¹Relatedly, a state prisoner must, as a general matter, properly exhaust his federal claims in state court to avoid having his claim defaulted on procedural grounds. See *Coleman v. Thompson*, 501 U. S. 722, 750 (1991).

SOTOMAYOR, J., dissenting

asking whether the evidence the petitioner seeks to present would satisfy AEDPA’s demanding standards, they would needlessly prolong federal habeas proceedings.

Third, even when a petitioner seeks to introduce new evidence that would entitle him to relief, AEDPA prohibits him from doing so, except in a narrow range of cases, unless he “made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court.” *Williams v. Taylor*, 529 U. S. 420, 435 (2000) (*Michael Williams*). Thus, §2254(e)(2) provides:

“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 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; and

“(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”

In *Michael Williams*, we construed the opening clause of this provision—which triggers the bar on evidentiary hearings—to apply when “there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.”² *Id.*, at 432. AEDPA thus bars an

²Section 2254(e)(2) also governs an attempt to obtain relief “based on new evidence without an evidentiary hearing.” *Holland v. Jackson*, 542 U. S. 649, 653 (2004) (*per curiam*) (emphasis deleted).

SOTOMAYOR, J., dissenting

evidentiary hearing for a nondiligent petitioner unless the petitioner can satisfy both §§2254(e)(2)(A) and (B), which few petitioners can. Section 2254(e)(2) in this way incentivizes state petitioners to develop the factual basis of their claims in state court.

To the limited extent that federal evidentiary hearings are available under AEDPA, they ensure that petitioners who diligently developed the factual basis of their claims in state court, discovered new evidence after the state-court proceeding, and cannot return to state court retain the ability to access the Great Writ. See *ante*, at 2 (ALITO, J., concurring in part and concurring in judgment). “When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the ‘writ of habeas corpus plays a vital role in protecting constitutional rights.’” *Holland v. Florida*, 560 U. S. ___, ___ (2010) (slip op., at 16) (quoting *Slack v. McDaniel*, 529 U. S. 473, 483 (2000)). Allowing a petitioner to introduce new evidence at a hearing in the limited circumstance permitted by §2254(e)(2) does not upset the balance that Congress struck in AEDPA between the state and federal courts. By construing §2254(d)(1) to do the work of other provisions in AEDPA, the majority has subverted Congress’ careful balance of responsibilities. It has also created unnecessarily a brand-new set of procedural complexities that lower courts will have to confront.³

B

The majority’s interpretation of §2254(d)(1) finds no support in the provision’s text or the statute’s structure as a whole.

1

Section 2254(d)(1) requires district courts to ask

³See, e.g., nn. 5, 7, and 13, *infra*.

SOTOMAYOR, J., dissenting

whether a state-court adjudication on the merits “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.” Because this provision uses “backward-looking language”—*i.e.*, past-tense verbs—the majority believes that it limits review to the state-court record. *Ante*, at 9. But both §§2254(d)(1) and 2254(d)(2) use “backward-looking language,” and §2254(d)(2)—unlike §2254(d)(1)—expressly directs district courts to base their review on “the evidence presented in the State court proceeding.” If use of the past tense were sufficient to indicate Congress’ intent to restrict analysis to the state-court record, the phrase “in light of the evidence presented in the State court proceeding” in §2254(d)(2) would be superfluous. The majority’s construction of §2254(d)(1) fails to give meaning to Congress’ decision to include language referring to the evidence presented to the state court in §2254(d)(2). Cf. *Bates v. United States*, 522 U. S. 23, 29–30 (1997) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (internal quotation marks and brackets omitted)).

Ignoring our usual “reluctan[ce] to treat statutory terms as surplusage in any setting,” *TRW Inc. v. Andrews*, 534 U. S. 19, 31 (2001) (internal quotation marks omitted), the majority characterizes the phrase appearing in §2254(d)(2) as mere “clarifying language,” *ante*, at 12, n. 7. It speculates that “[t]he omission of clarifying language from §2254(d)(1) just as likely reflects Congress’ belief that such language was unnecessary as it does anything else.” *Ante*, at 12–13, n. 7. The argument that this phrase is merely “clarifying” might have more force, however, had Congress included this phrase in §2254(d)(1) but not in §2254(d)(2). As between the two provisions, §2254(d)(2)—which re-

SOTOMAYOR, J., dissenting

quires review of the state court’s “determination of the facts”—more logically depends on the facts presented to the state court. Because this provision needs less clarification on this point than §2254(d)(1), it is all the more telling that Congress included this phrase in §2254(d)(2) but elected to exclude it from §2254(d)(1).

Unlike my colleagues in the majority, I refuse to assume that Congress simply engaged in sloppy drafting. The inclusion of this phrase in §2254(d)(2)—coupled with its omission from §2254(d)(2)’s partner provision, §2254(d)(1)—provides strong reason to think that Congress did not intend for the §2254(d)(1) analysis to be limited categorically to “the evidence presented in the State court proceeding.”

2

The “broader context of the statute as a whole,” *ante*, at 9 (quoting *Robinson v. Shell Oil Co.*, 519 U. S. 337, 341 (1997)), reinforces this conclusion. In particular, Congress’ decision to include in AEDPA a provision, §2254(e)(2), that permits federal evidentiary hearings in certain circumstances provides further evidence that Congress did not intend to limit the §2254(d)(1) inquiry to the state-court record in every case.

We have long recognized that some diligent habeas petitioners are unable to develop all of the facts supporting their claims in state court.⁴ As discussed above, in

⁴See, e.g., *Michael Williams*, 529 U. S. 420, 432 (2000) (noting that diligent efforts to develop the facts might be “thwarted, for example, by the conduct of another or by happenstance”); *id.*, at 434 (noting that the prosecution might have “concealed the facts” supporting “a claim which was pursued with diligence”); *Townsend v. Sain*, 372 U. S. 293, 313 (1963) (requiring federal courts to grant evidentiary hearings when, *inter alia*, “the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing” or “there is a substantial allegation of newly discovered evidence”), overruled in part on other grounds by *Keeney v. Tamayo-Reyes*, 504 U. S. 1, 5 (1992).

SOTOMAYOR, J., dissenting

enacting AEDPA, Congress generally barred evidentiary hearings for petitioners who did not “exercise diligence in pursuing their claims” in state court. *Michael Williams*, 529 U. S., at 436; see also §2254(e)(2). Importantly, it did not impose any express limit on evidentiary hearings for petitioners who had been diligent in state court. See *id.*, at 436 (“[T]he statute does not equate prisoners who exercise diligence in pursuing their claims with those who do not”). For those petitioners, Congress left the decision to hold a hearing “to the sound discretion of district courts.” *Landrigan*, 550 U. S., at 473.

Faced with situations in which a diligent petitioner offers additional evidence in federal court, the courts of appeals have taken two approaches to applying §2254(d)(1). Some courts have held that when a federal court admits new evidence supporting a claim adjudicated on the merits in state court, §2254(d)(1) does not apply at all and the federal court may review the claim *de novo*. See *ante*, at 12; *Holland v. Jackson*, 542 U. S. 649, 653 (2004) (*per curiam*); see, e.g., *Winston v. Kelly*, 592 F. 3d 535, 555–556 (CA4 2010). I agree with the majority’s rejection of this approach. See *ante*, at 12. It would undermine the comity principles motivating AEDPA to decline to defer to a state-court adjudication of a claim because the state court, through no fault of its own, lacked all the relevant evidence.⁵

⁵Of course, §2254(d)(1) only applies when a state court has adjudicated a claim on the merits. There may be situations in which new evidence supporting a claim adjudicated on the merits gives rise to an altogether different claim. See, e.g., Reply Brief for Petitioner 10–11 (evidence withheld by the prosecutor relating to one claim may give rise to a separate claim under *Brady v. Maryland*, 373 U. S. 83 (1963)). The majority opinion does not foreclose this possibility.

I assume that the majority does not intend to suggest that review is limited to the state-court record when a petitioner’s inability to develop the facts supporting his claim was the fault of the state court itself. See generally Tr. of Oral Arg. in *Bell v. Kelly*, O. T. 2008, No. 07–1223.

SOTOMAYOR, J., dissenting

Other courts of appeals, including the court below, have struck a more considered balance. These courts have held that §2254(d)(1) continues to apply but that new evidence properly presented in a federal hearing is relevant to the reasonableness of the state-court decision. See *Pinholster v. Ayers*, 590 F. 3d 651, 668 (CA9 2009) (en banc) (“If the evidence is admissible under *Michael Williams* or §2254(e)(2), and if it does not render the petitioner’s claims unexhausted . . . , then it is properly considered in evaluating whether the legal conclusion reached by the state habeas court was a reasonable application of Supreme Court law”); accord, *Wilson v. Mazzuca*, 570 F. 3d 490, 500 (CA2 2009); *Pecoraro v. Walls*, 286 F. 3d 439, 443 (CA7 2002); *Valdez v. Cockrell*, 274 F. 3d 941, 952 (CA5 2001). This approach accommodates the competing goals, reflected in §§2254(d) and 2254(e)(2), of according deference to reasonable state-court decisions and preserving the opportunity for diligent petitioners to present evidence to the federal court when they were unable to do so in state court.

The majority charts a third, novel course that, so far as I am aware, no court of appeals has adopted: §2254(d)(1) continues to apply when a petitioner has additional evidence that he was unable to present to the state court, but the district court cannot consider that evidence in deciding whether the petitioner has satisfied §2254(d)(1). The problem with this approach is its potential to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court.

Consider, for example, a petitioner who diligently attempted in state court to develop the factual basis of a claim that prosecutors withheld exculpatory witness statements in violation of *Brady v. Maryland*, 373 U. S. 83 (1963). The state court denied relief on the ground that the withheld evidence then known did not rise to the level of materiality required under *Brady*. Before the time for

SOTOMAYOR, J., dissenting

filing a federal habeas petition has expired, however, a state court orders the State to disclose additional documents the petitioner had timely requested under the State’s public records Act. The disclosed documents reveal that the State withheld other exculpatory witness statements, but state law would not permit the petitioner to present the new evidence in a successive petition.⁶

Under our precedent, if the petitioner had not presented his *Brady* claim to the state court at all, his claim would be deemed defaulted and the petitioner could attempt to show cause and prejudice to overcome the default. See *Michael Williams*, 529 U. S., at 444; see also n. 1, *supra*. If, however, the new evidence merely bolsters a *Brady* claim that was adjudicated on the merits in state court, it is unclear how the petitioner can obtain federal habeas relief after today’s holding. What may have been a reasonable decision on the state-court record may no longer be reasonable in light of the new evidence. See *Kyles v. Whitley*, 514 U. S. 419, 436 (1995) (materiality of *Brady* evidence is viewed “collectively, not item by item”). Because the state court adjudicated the petitioner’s *Brady* claim on the merits, §2254(d)(1) would still apply. Yet, under the majority’s interpretation of §2254(d)(1), a federal court is now prohibited from considering the new evidence in determining the reasonableness of the state-court decision.

The majority’s interpretation of §2254(d)(1) thus suggests the anomalous result that petitioners with new claims based on newly obtained evidence can obtain federal habeas relief if they can show cause and prejudice for their default but petitioners with newly obtained evidence supporting a claim adjudicated on the merits in state court

⁶See, *e.g.*, *id.*, at 37–38 (statement by counsel for the respondent warden that Virginia law bars all successive habeas applications, even in cases where the petitioner has new evidence).

SOTOMAYOR, J., dissenting

cannot obtain federal habeas relief if they cannot first satisfy §2254(d)(1) without the new evidence. That the majority's interpretation leads to this anomaly is good reason to conclude that its interpretation is wrong. See *Keeney v. Tamayo-Reyes*, 504 U. S. 1, 7–8 (1992) (“[I]t is . . . irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim”).

The majority responds to this anomaly by suggesting that my hypothetical petitioner “may well [have] a new claim.”⁷ *Ante*, at 14, n. 10. This suggestion is puzzling. New evidence does not usually give rise to a new claim; it merely provides additional proof of a claim already adjudicated on the merits.⁸ The majority presumably means to suggest that the petitioner might be able to obtain federal-court review of his new evidence if he can show cause and prejudice for his failure to present the “new” claim to a state court. In that scenario, however, the federal court would review the purportedly “new” claim *de novo*. The majority's approach thus threatens to replace deferential review of new evidence under §2254(d)(1) with *de novo* review of new evidence in the form of “new” claims.⁹ Because it is unlikely that Congress intended *de novo* review—the result suggested by the majority's opinion—it must have intended for district courts to consider newly discovered evidence in conducting the §2254(d)(1) analysis.

⁷The majority declines, however, to provide any guidance to the lower courts on how to distinguish claims adjudicated on the merits from new claims.

⁸Even if it can fairly be argued that my hypothetical petitioner has a new claim, the majority fails to explain how a diligent petitioner with new evidence supporting an existing claim can present his new evidence to a federal court.

⁹In this vein, it is the majority's approach that “would not take seriously AEDPA's requirement that federal courts defer to state-court decisions.” *Ante*, at 10, n. 3.

SOTOMAYOR, J., dissenting

The majority’s reading of §2254(d)(1) appears ultimately to rest on its understanding that state courts must have the first opportunity to adjudicate habeas petitioners’ claims. See *ante*, at 9–10 (“It would be contrary to [AEDPA’s exhaustion requirement] to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*”).¹⁰ JUSTICE BREYER takes the same position. See *ante*, at 2 (opinion concurring in part and dissenting in part) (AEDPA is designed “to give the State a first opportunity to consider most matters”). I fully agree that habeas petitioners must attempt to present evidence to state courts in the first instance, as does JUSTICE ALITO, see *ante*, at 2. Where I disagree with the majority is in my understanding that §2254(e)(2) already accomplishes this result. By reading §2254(d)(1) to do the work of §2254(e)(2), the majority gives §2254(e)(2) an unnaturally cramped reading. As a result, the majority either has foreclosed habeas relief for diligent petitioners who, through no fault of their own, were unable to present exculpatory evidence to the state court that adjudicated their claims or has created a new set of procedural complexities for the lower courts to navigate to ensure the availability of the Great Writ for diligent petitioners.

3

These considerations lead me to agree with the courts of appeals that have concluded that a federal court should assess the reasonableness of a state court’s application of clearly established federal law under §2254(d)(1) in light of evidence properly admitted in a federal evidentiary hearing. There is nothing “strange” about this approach.

¹⁰ Under my reading of §2254(d)(1), of course, the district court would review properly admitted new evidence through the deferential lens of §2254(d)(1), not *de novo*.

SOTOMAYOR, J., dissenting

Ante, at 10. Under §2254(d)(1), federal courts routinely engage in analysis that the state court itself might never have conducted or did not conduct. For example, when a state court summarily denies a claim without explanation, as the California Supreme Court did here, district courts must deny habeas relief pursuant to §2254(d)(1) so long as “there is any reasonable argument” supporting the denial of the petitioner’s claim. *Harrington*, 562 U. S., at ____ (slip op., at 16). We likewise ask whether a state-court decision unreasonably applied clearly established federal law when the state court issued a reasoned decision but failed to cite federal law altogether. See *Early v. Packer*, 537 U. S. 3, 8 (2002) (*per curiam*). Determining whether a state court could reasonably have denied a petitioner relief in light of newly discovered evidence is not so different than determining whether there is any reasonable basis for a state court’s unreasoned decision.

Admittedly, the text of §2254(d)(1), standing alone, does not compel either reading of that provision. But construing §2254(d)(1) to permit consideration of evidence properly introduced in federal court best accords with the text of §2254(d)(2) and AEDPA’s structure as a whole. By interpreting §2254(d)(1) to prevent *nondiligent* petitioners from gaming the system—the very purpose of §2254(e)(2)—the majority potentially has put habeas relief out of reach for *diligent* petitioners with meritorious claims based on new evidence.

C

The majority claims that its holding is “consistent” with our case law. *Ante*, at 10. Quite the opposite is true: Our cases reflect our previous understanding that evidence properly admitted pursuant to §2254(e)(2) is relevant to the §2254(d)(1) analysis.

In *Landrigan*, JUSTICE THOMAS, the author of today’s opinion, confirmed this understanding of the interplay

SOTOMAYOR, J., dissenting

between §§2254(d)(1) and 2254(e)(2). As noted above, we admonished district courts to consider whether a petitioner’s allegations, if proved true, would satisfy §2254(d) in determining whether to grant a hearing. After highlighting the deference owed to state courts under §§2254(d) and 2254(e)(1), we stated:

“In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief. Because the deferential standards prescribed by §2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate.” 550 U. S., at 474 (citation omitted).

By instructing district courts to consider the §2254(d) standards in deciding whether to grant a hearing, we must have understood that the evidence admitted at a hearing could be considered in the §2254(d)(1) analysis. See Brief for American Civil Liberties Union as *Amicus Curiae* 9 (“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*”).¹¹

In *Michael Williams*, the warden argued that §2254(e)(2) bars an evidentiary hearing whenever a petitioner was unable to develop the factual record in state court, “whether or not through his own fault or neglect.”

¹¹The majority overlooks this aspect of *Landrigan*. It quotes *Landrigan*’s observation that “if the record refutes the applicant’s factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing,” 550 U. S., at 474, but that statement has no bearing on the question decided by the Court today.

SOTOMAYOR, J., dissenting

529 U. S., at 430. Under the warden’s argument, a petitioner who did not develop the record in state court, whatever the reason, would be barred from presenting evidence to the federal court. In rejecting that argument, we observed:

“A prisoner who developed his claim in state court and can prove the state court’s decision was ‘contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,’ is not barred from obtaining relief by §2254(d)(1). If the opening clause of §2254(e)(2) covers a request for an evidentiary hearing on a claim which was pursued with diligence but remained undeveloped in state court because, for instance, the prosecution concealed the facts, a prisoner lacking clear and convincing evidence of innocence could be barred from a hearing on the claim *even if he could satisfy §2254(d)*.” *Id.*, at 434 (citation omitted; emphasis added).

A petitioner in the latter situation would almost certainly be unable to “satisfy §2254(d)” without introducing the concealed facts in federal court. This passage thus reflects our understanding that, in some circumstances, a petitioner might need an evidentiary hearing in federal court to prove the facts necessary to satisfy §2254(d). To avoid foreclosing habeas relief for such petitioners, we concluded that §2254(e)(2) could not bear the warden’s “harsh reading,” which essentially would have held petitioners strictly at fault for their inability to develop the facts in state court. *Ibid.* The majority today gives an equally “harsh reading” to §2254(d)(1) to achieve the result we rejected in *Michael Williams*.¹²

¹² The majority claims that *Michael Williams* supports its reading of §2254(d)(1). With respect to one claim asserted by the petitioner, we observed that “[t]he Court of Appeals rejected this claim on the merits

SOTOMAYOR, J., dissenting

None of the other cases cited by the majority supports its result. In *Williams v. Taylor*, 529 U. S. 362 (2000) (*Terry Williams*), we interpreted §2254(d)(1) to ask whether the state-court decision “identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.*, at 413. However, we had no reason to decide whether the §2254(d)(1) inquiry was limited to the state-court record, as the District Court did not hold an evidentiary hearing in that case. See *id.*, at 372.

In *Holland v. Jackson*, we stated that “we have made 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. In the next sentence, however, we observed that the evidence at issue “could have been the subject of an evidentiary hearing by the District Court, but only if respondent was not at fault in failing to develop that evidence in state court.” *Id.*, at 652–653. We proceeded to find that the evidence was not properly admitted under §2254(e)(2) *before* concluding that the Court of Appeals had erred in its §2254(d)(1) analysis. *Id.*, at 653; see also *Bradshaw v. Richey*, 546 U. S. 74, 79 (2005) (*per curiam*).

In sum, our cases reflect our recognition that it is sometimes appropriate to consider new evidence in deciding whether a petitioner can satisfy §2254(d)(1). In reading our precedent to require the opposite conclusion, the majority disregards the concerns that motivated our decision in *Michael Williams*: Some petitioners, even if diligent,

under §2254(d)(1), so it is unnecessary to reach the question whether §2254(e)(2) would permit a hearing on the claim.” 529 U. S., at 444. That statement merely reflects the fact that the Court of Appeals had rejected that claim under §2254(d)(1) without considering whether the petitioner was entitled to a hearing because the petitioner had not requested a hearing on that claim. See *Williams v. Taylor*, 189 F.3d 421, 425, 428–429 (CA4 1999).

SOTOMAYOR, J., dissenting

may be unable to develop the factual record in state court through no fault of their own. We should not interpret §2254(d)(1) to foreclose these diligent petitioners from accessing the Great Writ when the state court will not consider the new evidence and could not reasonably have reached the same conclusion with the new evidence before it.

II

I also disagree with the Court's conclusion that the Court of Appeals erred in holding that Pinholster had satisfied §2254(d)(1) on the basis of the state-court record.¹³

A

The majority omits critical details relating to the performance of Pinholster's trial counsel, the mitigating evidence they failed to discover, and the history of these proceedings. I therefore highlight several aspects of the facts and history of this case.

¹³I agree with the majority that the state-court record in this case consists of "the 'allegations of [the] habeas corpus petition . . . and . . . any matter of record pertaining to the case.'" *Ante*, at 16, n. 12 (quoting *In re Hochberg*, 2 Cal. 3d 870, 874, n. 2, 471 P. 2d 1, 3–4, n. 2 (1970); some internal quotation marks omitted).

The majority does not decide which of the two state-court decisions should be reviewed. See *ante*, at 15, n. 11. One *amicus* argues that Pinholster must prove that *both* state-court decisions involved an unreasonable application of law. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* 26. This argument is based on *amicus*' understanding that the California Supreme Court rejected the second petition as successive and, alternatively, on the merits. The State has not argued, however, that the second ruling rests on a procedural ground. See *ante*, at 6, n. 2. When a state court denies two petitions on the merits and the difference between the petitions is that the second petition contains additional evidence supporting the petitioner's claim, I see no reason why the petitioner must independently show that the first decision was unreasonable.

After the jury returned a guilty verdict, the court instructed the jury to return six days later for the penalty phase. This prompted discussion at sidebar regarding whether the State had provided notice of its intent to offer aggravating evidence. Pinholster's court-appointed attorney, Wilbur Dettmar, argued that the State should be precluded from offering aggravating evidence:

"I am not presently prepared to offer anything by way of mitigation. If I was going to proceed on mitigation, the people would have the right to rebuttal with or without notice.

"I took the position, since the people had not given notice, *I had not prepared any evidence by way of mitigation*. I would submit it on that basis." 52 Reporter's Tr. 7250 (hereinafter Tr.) (emphasis added).

Undoubtedly anticipating that counsel might need additional time to prepare an adequate mitigation defense, the court asked Dettmar whether a continuance would be helpful in the event it ruled against him. He declined the offer on the spot, stating: "I think we would probably still go forward on Monday. Clearly the one person that comes to mind is the defendant's mother. How much beyond that I don't know. I don't think the pa[ss]age of time would make a great deal of difference." *Id.*, at 7257–7258. After hearing testimony, the court denied Pinholster's motion to preclude aggravating evidence.

At the penalty phase, defense counsel called only one witness: Pinholster's mother, Burnice Brashear. Brashear testified that Pinholster "never really wanted for anything at home too much" and "had everything normally materialwise that most people have." *Id.*, at 7395. She said that Pinholster was "different" from his siblings, whom she characterized as "basically very good children." *Id.*, at 7401–7402. Pinholster, she said, had a "friendly" relation-

SOTOMAYOR, J., dissenting

ship with his stepfather, although his stepfather “sometimes would lose his temper” with Pinholster, who “had a mind of his own.” *Id.*, at 7392–7393; see also *id.*, at 7293 (stating that his stepfather was “at times” “abusive or near abusive”).

Brashear provided brief testimony regarding Pinholster’s childhood. She described two car accidents—one when she ran over him in the driveway and one when he went through the windshield. *Id.*, at 7389–7391. She stated that he started failing school in the first grade and that the school eventually “sent him to [an] educationally handicapped class.” *Id.*, at 7393–7394. When Pinholster was 10, a psychologist recommended placing him in a mental institution, but she “didn’t think he was that far gone.” *Id.*, at 7395. A few years later, she testified, he spent six months in a state hospital for emotionally handicapped children. *Id.*, at 7402.

According to Brashear, Pinholster had suffered from epilepsy since age 18, when he was beaten in jail. *Id.*, at 7397. She said that her family doctor, Dr. Dubin, had given him medication to treat the epilepsy. *Ibid.* Brashear also suggested that Pinholster did not have long to live, stating that he had “a chip in his head floating around” and that “they don’t think—he won’t be here very much longer anyway.”¹⁴ *Ibid.*

In closing argument, the prosecutor ridiculed Brashear’s testimony. See 53 *id.*, at 7442 (“She said his stepfather disciplined him. So what? I am sure you have all disciplined your children. I was disciplined myself”); *ibid.* (“He was run over by a car when he was three years old. That’s very unfortunate. There is no evidence of any brain damage. A lot of children get dropped, fall from their cribs or

¹⁴The judge instructed the jury to disregard this testimony upon motion by the prosecutor, but the prosecutor then discussed the testimony in her closing argument. See *infra*, at 33–34.

SOTOMAYOR, J., dissenting

whatever”); *id.*, at 7444–7445 (“I submit to you that if this defendant truly had epilepsy, . . . a doctor would have been brought in to tell you that. Medical records, something”). The prosecutor also highlighted Brashear’s testimony about Pinholster’s stable home environment, arguing, “He came from a good home. You heard that he was not a deprived child. Had many things going for him, probably more than many children.” *Id.*, at 7442.

Notwithstanding the meager mitigation case presented by Pinholster’s counsel, it took the jury two days to reach a decision to sentence Pinholster to death. His counsel later moved to modify the sentence to life imprisonment. In denying the motion, the trial judge stated, “The evidence which the defense offered concerning the defendant’s extenuation was merely some testimony from his mother that was not persuasive. His mother did not, in the court’s opinion, present any evidence which the court would find to be a moral justification or extenuation for his conduct. No witness supplied such evidence.” 54 *id.*, at 7514.

2

After his conviction and sentence were affirmed on appeal, Pinholster filed a habeas petition in the California Supreme Court alleging, among other things, that his counsel had “unreasonably failed to investigate, prepare and present available mitigating evidence during penalty phase.” Record ER–103.

Pinholster’s state-court petition included 121 exhibits. In a series of declarations, his trial attorney Harry Brainard (who had by then been disbarred) confirmed what Dettmar had forthrightly told the trial court: Brainard and Dettmar neither expected nor prepared to present mitigation evidence.¹⁵ See *id.*, at ER–333 (“Mr.

¹⁵By the time of Pinholster’s state-court habeas petition, Dettmar was deceased.

SOTOMAYOR, J., dissenting

Dettmar and I did not prepare a case in mitigation. We felt there would be no penalty phase hearing inasmuch as we did not receive written notice of evidence in aggravation pursuant to Penal Code §190.3). Brainard further confirmed what was apparent from the mitigation case they eventually put on: They conducted virtually no mitigation investigation. See *id.*, at ER–182 (“I have no recollection of Mr. Dettmar having secured or reviewed any of Scott’s medical records, nor did I see any of Scott’s medical records. So far as I recollect, neither Mr. Dettmar nor myself interviewed any of Scott’s previous medical providers”); *id.*, at ER–183 (“I do not recall interviewing or attempting to interview Scott’s family members or any other persons regarding penalty phase testimony, except Mrs. Brashears [*sic*]”); *ibid.* (“I have no recollection of seeing or attempting to secure Scott’s school records, juvenile records, medical records, or records of prior placements”); *ibid.* (“I have no recollection of interviewing or attempting to interview Scott’s former school teachers, counselors, or juvenile officers”).¹⁶

Statements by relatives (none of whom trial counsel had attempted to interview regarding Pinholster’s background) and documentary evidence revealed that the picture of Pinholster’s family life painted by his mother at trial was false. Pinholster was “raised in chaos and poverty.” *Id.*, at ER–312. A relative remembered seeing the children mix together flour and water in an attempt to get something to eat. Pinholster’s stepfather beat him several times a week, including at least once with a two-by-four board. “There was so much violence in [the] home” that Pinholster’s brother “dreaded coming home each day.” *Id.*, at ER–313. Pinholster’s half sister was removed from the home as a result of a beating by his stepfather.

¹⁶ Counsel’s billing records, which were before the California Supreme Court as part of the trial record, confirmed Brainard’s recollection.

SOTOMAYOR, J., dissenting

Documentary evidence showed, directly contrary to Brashear's trial testimony, that Pinholster's siblings had very troubled pasts. Pinholster's elder brother was arrested for armed burglary, robbery, and forcible rape of a 14-year-old with a deadly weapon. While in custody, he was diagnosed as "catatonic-like" and "acutely psychotic, probably suffering some type of schizophrenia." *Id.*, at ER-219, ER-224. He later committed suicide.¹⁷ Pinholster's half sister, a recovering alcoholic, had been made a ward of the juvenile court for prostitution and forcible sexual battery on a 14-year-old.

Pinholster's petition and exhibits described a long history of emotional disturbance and neurological problems. A former schoolteacher stated that, as a child, Pinholster "seemed incapable of relating either to his peers or to adults," that "[i]t was even hard to maintain eye contact with him," and that "[h]is hyperactivity was so extreme that [she] formed the opinion it probably had an organic base." *Id.*, at ER-231. School records revealed that he "talk[ed] to self continuously," had "many grimaces," fought in his sleep, and could "control self for only 1 hour per day." *Id.*, at ER-230, ER-233. He "show[ed] progressive deterioration each semester since Kindergarten." *Id.*, at ER-230. School officials recommended placement in a school for emotionally handicapped students and referral to a neurologist. At age nine, he had an abnormal EEG, revealing "an organic basis for his behavior." *Id.*, at ER-157, ER-234. Just months before the homicides, a doctor recommended placement in the Hope Psychiatric Institute, but this did not occur.

This and other evidence attached to the petition was

¹⁷ According to Pinholster's half sister, "The death of our brother Alvin was a severe emotional blow to me and to Scott. I believed Scott's substance abuse (heroin) arose following and as a result of Alvin's death." Record ER-314.

SOTOMAYOR, J., dissenting

summarized in a declaration by Dr. George Woods. Dr. Woods opined that Pinholster “suffer[ed] from severe and long standing seizure disorders,” *id.*, at ER–156, that his childhood head traumas “may have been the precipitating factors for [his] seizure disorder,” *id.*, at ER–157, and that he suffered from bipolar mood disorder. He pointed to trial testimony that immediately before the burglary on the night of the homicides, Pinholster announced that he “ha[d] a message from God”—which Dr. Woods believed to reflect “[a]uditory hallucinations” and “severe psychosis.” *Id.*, at ER–169. He concluded that at the time of the homicides Pinholster “was suffering from bipolar mood disorder with psychotic ideation and was suffering a complex partial seizure.” *Id.*, at ER–170. He also observed that Pinholster’s “grossly dysfunctional family, the abuse he received as a child, his history of suffering from substantial seizure and mood disorders, his frequently untreated psychiatric and psychological disabilities and his educational handicaps were relevant circumstances which would extenuate the gravity of the crime.” *Id.*, at ER–171.

On the basis of Pinholster’s submission, the California Supreme Court denied Pinholster’s ineffective-assistance-of-counsel claim.

Pinholster then filed a habeas petition in Federal District Court. He included an additional exhibit: a declaration by Dr. John Stalberg, a psychiatrist who had hastily examined Pinholster and produced a two-page report in the middle of the original trial.¹⁸ After reviewing the new material collected by Pinholster’s habeas counsel, Dr. Stalberg stated that the available evidence showed a

¹⁸Counsel had arranged for Dr. Stalberg to examine Pinholster in the middle of his original trial. The only documents they provided to him were police reports relating to the case and a 1978 probation report. In a two-page report that focused primarily on Pinholster’s mental state at the time of the offenses, Dr. Stalberg concluded that Pinholster had “psychopathic personality traits.” *Id.*, at ER–187.

SOTOMAYOR, J., dissenting

familial history of “severe psychiatric disorders,” “a history of seizure disorders of unknown etiology,” “repeated head traumas,” “an abnormal EEG,” and “evidence of mental disturbance during Mr. Pinholster’s childhood and some degree of brain damage.” *Id.*, at ER–493. He also opined that “there [was] voluminous mitigating evidence which includes a childhood of physical abuse, emotional neglect, and a family history of mental illness and criminal behavior.” *Id.*, at ER–494.

The District Court stayed the federal proceedings while Pinholster sought state-court review of claims the District Court deemed unexhausted. Pinholster’s second habeas submission to the California Supreme Court included Stalberg’s declaration. That court summarily denied Pinholster’s petition on the merits.

Pinholster returned to Federal District Court and filed an amended petition. After an evidentiary hearing, the District Court concluded that Pinholster had demonstrated deficient performance and prejudice under *Strickland*.¹⁹ The Ninth Circuit, sitting en banc, affirmed. 590 F. 3d 651.

B

As the majority notes, Pinholster’s claim arises under *Strickland v. Washington*. “The benchmark for judging any claim of ineffectiveness [under *Strickland*] must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” 466 U. S.,

¹⁹The District Court based its decision on the evidence adduced at an evidentiary hearing. The District Court did not apply 28 U. S. C. §2254(d) because it thought, erroneously, that the California Supreme Court had not adjudicated Pinholster’s claim on the merits. App. to Pet. for Cert. 257. For the reasons I discuss, however, the District Court could have concluded that Pinholster had satisfied §2254(d)(1) on the basis of the state-court record alone.

SOTOMAYOR, J., dissenting

at 686. To satisfy this benchmark, a defendant must show both that “counsel’s performance was deficient” and that “the deficient performance prejudiced the defense.” *Id.*, at 687.

When §2254(d)(1) applies, the question is whether “‘fair-minded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington*, 562 U. S., at ____ (slip op., at 11) (quoting *Yarborough v. Alvarado*, 541 U. S. 652, 664 (2004)). When the state court rejected a *Strickland* claim on the pleadings assuming the allegations to be true, as here, see *ante*, at 16, n. 12, the federal court must ask whether “there is any reasonable argument” supporting the state court’s conclusion that the petitioner’s allegations did not state a claim, *Harrington*, 562 U. S., at ____ (slip op., at 16). This standard is “difficult,” but not impossible, “to meet.” *Id.*, at ____ (slip op., at 12). This case is one in which fairminded jurists could not disagree that the state court erred.

C

Under *Strickland*, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness,” measured according to “prevailing professional norms.” 466 U. S., at 688. We “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.*, at 689. When §2254(d) applies, federal-court review is “‘doubly’” deferential. *Harrington*, 562 U. S., at ____ (slip op., at 16) (quoting *Knowles v. Mirzayance*, 556 U. S. ____, ____ (2009) (slip op., at 11)). In the present AEDPA posture, “[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Harrington*, 562 U. S., at ____ (slip op., at 16). Here, there is none.

The majority surmises that counsel decided on a strategy “to get the prosecution’s aggravation witnesses ex-

SOTOMAYOR, J., dissenting

cluded for lack of notice, and if that failed, to put on Pinholster's mother." *Ante*, at 19. This is the sort of "*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions" that courts cannot indulge. *Harrington*, 562 U. S., at ____ (slip op., at 20) (quoting *Wiggins v. Smith*, 539 U. S. 510, 526–527 (2003)). The majority's explanation for counsel's conduct contradicts the best available evidence of counsel's actions: Dettmar's frank, contemporaneous statement to the trial judge that he "had not prepared any evidence by way of mitigation." 52 Tr. 7250. The majority's conjecture that counsel had in fact prepared a mitigation defense, based primarily on isolated entries in counsel's billing records, requires it to assume that Dettmar was lying to the trial judge.²⁰

In any event, even if Pinholster's counsel had a strategic reason for their actions, that would not automatically render their actions reasonable. For example, had counsel decided their best option was to move to exclude the aggravating evidence, it would have been unreasonable to forgo a mitigation investigation on the hope that the motion would be granted. With a client's life at stake, it would "flou[t] prudence," *Rompilla v. Beard*, 545 U. S. 374,

²⁰The majority misleadingly cites entries showing that counsel were preparing Brashear's penalty phase testimony *after* counsel learned that the State intended to present aggravation evidence. The cited entries predating that event show only that counsel conducted about one day's worth of investigation—consisting of talking to Brashear and researching epilepsy—two months before the penalty phase. See 3 Clerk's Tr. 798 (1.5-hour phone call to Brashear on Jan. 13); *id.*, at 864, 869 (3-hour meeting with Brashear regarding "childhood problems" on Feb. 23); *id.*, at 869 (3.5 hours for "[r]esearch re; epilepsy and conf. with nurse" on Feb. 25). There is no evidence in the records that counsel actually planned to present mitigating evidence. Indeed, their complete failure to follow up on any of the information they learned in their minimal investigation only confirms that they were not planning to present mitigating evidence. See *infra*, at 29–31.

SOTOMAYOR, J., dissenting

389 (2005), for an attorney to rely on the possibility that the court might preclude aggravating evidence pursuant to a “legal technicality” without any backup plan in place in case the court denied the motion, *ante*, at 19. No reasonable attorney would pursue such a risky strategy. I do not understand the majority to suggest otherwise.

Instead, I understand the majority’s conclusion that counsel’s actions were reasonable to rest on its belief that they did have a backup plan: a family-sympathy defense. In reaching this conclusion, the majority commits the same *Strickland* error that we corrected, applying §2254(d)(1), in *Wiggins*: It holds a purportedly “tactical judgment” to be reasonable without assessing “the adequacy of the investigatio[n] supporting [that] judgmen[t],” 539 U. S., at 521. As we stated in *Strickland*:

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” 466 U. S., at 690–691.

We have repeatedly applied this principle since *Strickland*. See *Sears v. Upton*, 561 U. S. ___, ___ (2010) (*per curiam*) (slip op., at 9); *Porter v. McCollum*, 558 U. S. ___, ___ (2009) (*per curiam*) (slip op., at 10); *Wiggins*, 539 U. S.,

SOTOMAYOR, J., dissenting

at 527; *Terry Williams*, 529 U. S., at 396.²¹

As these cases make clear, the prevailing professional norms at the time of Pinholster's trial required his attorneys to "conduct a thorough investigation of the defendant's background," *ibid.* (citing 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed. 1980) (hereinafter ABA Standards)), or "to make a reasonable decision that makes particular investigations unnecessary," *Strickland*, 466 U. S., at 691.²² "In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made, and by giving a 'heavy measure of deference to counsel's judgments.'" *Rompilla*, 545 U. S., at 381 (quoting *Strickland*, 466 U. S., at 689, 691; citation omitted). In some cases, "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla*, 545 U. S., at 383; see, e.g., *Bobby v. Van Hook*, 558 U. S. ___, ___ (2009) (*per curiam*) (slip op., at 8); *Burger v. Kemp*, 483 U. S. 776, 794–795 (1987). In other cases, however, *Strickland* requires further investigation.

²¹I do not doubt that a decision to present a family-sympathy mitigation defense might be consistent "with the standard of professional competence in capital cases that prevailed in Los Angeles in 1984" in some cases. *Ante*, at 24. My point is that even if counsel made a strategic decision to proceed with such a defense, that decision was unreasonable because it was based on an unreasonably incomplete investigation.

²²See also 1 ABA Standards 4–4.1, commentary, at 4–55 ("Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself"). As we recognized in *Strickland*, the ABA Standards, though not dispositive, "are guides to determining what is reasonable." 466 U. S., at 688; see also *Wiggins v. Smith*, 539 U. S. 510, 524 (2003).

SOTOMAYOR, J., dissenting

Wiggins is illustrative of the competence we have required of counsel in a capital case. There, counsel's investigation was limited to three sources: psychological testing, a presentencing report, and Department of Social Services records. 539 U. S., at 523–524. The records revealed that the petitioner's mother was an alcoholic, that he displayed emotional difficulties in foster care, that he was frequently absent from school, and that on one occasion, his mother left him alone for days without food. *Id.*, at 525. In these circumstances, we concluded, “any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses.” *Ibid.* Accordingly, we held, the state court's assumption that counsel's investigation was adequate was an unreasonable application of *Strickland*. 539 U. S., at 528.²³

This case is remarkably similar to *Wiggins*. As the majority reads the record, counsel's mitigation investigation consisted of talking to Pinholster's mother, consulting with Dr. Stalberg, and researching epilepsy.²⁴ *Ante*, at 20. What little information counsel gleaned from this “rudimentary” investigation, *Wiggins*, 539 U. S., at 524, would have led any reasonable attorney “to investigate further,” *id.*, at 527. Counsel learned from Pinholster's mother that he attended a class for educationally handicapped children, that a psychologist had recommended placing him in a mental institution, and that he spent time in a state

²³As the majority notes, see *ante*, at 24–25, *Wiggins*' trial counsel acknowledged that the investigation he conducted was inconsistent with standard practice in Maryland. See 539 U. S., at 524. We independently concluded, however, that the investigation “was *also* unreasonable in light of what counsel actually discovered in the . . . records.” *Id.*, at 525 (emphasis added).

²⁴The majority also posits that Brainard likely spent time preparing Pinholster's brother Terry. However, Terry averred in a declaration that Pinholster's attorneys “never asked [him] any questions relating to Scott's background or [their] family history.” Record ER–313.

SOTOMAYOR, J., dissenting

hospital for emotionally handicapped children. They knew that Pinholster had been diagnosed with epilepsy.

“[A]ny reasonably competent attorney would have realized that pursuing” the leads suggested by this information “was necessary to making an informed choice among possible defenses.” *Id.*, at 525; see also *Penry v. Lynaugh*, 492 U. S. 302, 319 (1989) (“[E]vidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse” (internal quotation marks omitted)). Yet counsel made no effort to obtain the readily available evidence suggested by the information they learned, such as Pinholster’s schooling or medical records, or to contact Pinholster’s school authorities. They did not contact Dr. Dubin or the many other health-care providers who had treated Pinholster. Put simply, counsel “failed to act while potentially powerful mitigating evidence stared them in the face.” *Bobby*, 558 U. S., at ____ (slip op., at 8) (citing *Wiggins*, 539 U. S., at 525).

The “impediments” facing counsel, *ante*, at 21, did not justify their minimal investigation. It is true that Pinholster was “an unsympathetic client.” *Ibid.* But this fact compounds, rather than excuses, counsel’s deficiency in ignoring the glaring avenues of investigation that could explain why Pinholster was the way he was. See *Sears*, 561 U. S., at ____ (slip op., at 7) (“This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts—especially in light of his purportedly stable upbringing”). Nor can Dr. Stalberg’s two-page report, which was based on a very limited record and focused primarily on Pinholster’s mental state at the time of the homicides, excuse counsel’s failure to investigate the

SOTOMAYOR, J., dissenting

broader range of potential mitigating circumstances.

“The record of the actual sentencing proceedings underscores the unreasonableness of counsel’s conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment.” *Wiggins*, 539 U. S., at 526. Dettmar told the trial judge that he was unprepared to present any mitigation evidence. The mitigation case that counsel eventually put on can be described, at best, as “halfhearted.” *Ibid.* Counsel made no effort to bolster Brashear’s self-interested testimony with school or medical records, as the prosecutor effectively emphasized in closing argument. And because they did not pursue obvious leads, they failed to recognize that Brashear’s testimony painting Pinholster as the bad apple in a normal, nondeprived family was false.

In denying Pinholster’s claim, the California Supreme Court necessarily overlooked *Strickland*’s clearly established admonition that “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations.” 466 U. S., at 690–691. As in *Wiggins*, in light of the information available to Pinholster’s counsel, it is plain that “reasonable professional judgments” could not have supported their woefully inadequate investigation.²⁵ 466 U. S., at 691. Accordingly, the California Supreme Court could not reasonably have concluded that Pinholster

²⁵The majority chastises the Court of Appeals for “attributing strict rules to this Court’s recent case law.” *Ante*, at 24. I agree that courts should not interpret our cases to prescribe strict rules regarding the required scope of mitigation investigations. See *Rompilla v. Beard*, 545 U. S. 374, 394 (2005) (O’Connor, J., concurring) (noting “our longstanding case-by-case approach to determining whether an attorney’s performance was unconstitutionally deficient under *Strickland*”). The Ninth Circuit, however, did no such thing. It appropriately gave thoughtful consideration to the guideposts contained in these cases, just as we have previously done. See, e.g., *Bobby v. Van Hook*, 558 U. S. ___, ___ (2009) (*per curiam*) (slip op., at 8).

SOTOMAYOR, J., dissenting

had failed to allege that his counsel's investigation was inadequate under *Strickland*.

D

The majority also concludes that the California Supreme Court could reasonably have concluded that Pinholster did not state a claim of prejudice. This conclusion, in light of the overwhelming mitigating evidence that was not before the jury, is wrong. To establish prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 694. When a habeas petitioner challenges a death sentence, “the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Id.*, at 695. This inquiry requires evaluating “the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation.” *Terry Williams*, 529 U. S., at 397–398. The ultimate question in this case is whether, taking into account all the mitigating and aggravating evidence, “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U. S., at 537; see Cal. Penal Code Ann. §190.4(b) (West 2008) (requiring a unanimous jury verdict to impose a death sentence).

1

Like the majority, I first consider the aggravating and mitigating evidence presented at trial. By virtue of its verdict in the guilt phase, the jury had already concluded that Pinholster had stabbed and killed the victims. As the majority states, the jury saw Pinholster “revel” in his history of burglaries during the guilt phase. *Ante*, at 26.

SOTOMAYOR, J., dissenting

The jury heard evidence of Pinholster’s violent tendencies: He had kidnapped someone with a knife, cut a person in the arm with a razor, and had a history of hitting and kicking people. He threatened to kill the State’s lead witness. And he had an extensive disciplinary record in jail.

Brashear offered brief testimony that was apparently intended to be mitigating. See *supra*, at 19–20; see also *ante*, at 27–28.²⁶ However, as the prosecutor argued, Brashear was not a neutral witness. See 53 Tr. 7441 (“A mother clearly loves her son, ladies and gentlemen. Clearly not the most unbiased witness in the world”). Notwithstanding Brashear’s obvious self-interest, counsel failed to offer readily available, objective evidence that would have substantiated and expanded on her testimony. Their failure to do so allowed the prosecutor to belittle her testimony in closing argument. See *supra*, at 19–20. And Brashear’s statement that Pinholster would not be alive much longer because he had “a chip in his head floating around,” 52 Tr. 7397, could only have undermined her credibility, as the prosecutor urged, see 53 *id.*, at 7447 (“Does she want you to believe sometime before he got to

²⁶The majority mischaracterizes several aspects of Brashear’s testimony. Although Brashear testified that the family “didn’t have lots of money,” she followed up that comment by stating that Pinholster did not bring friends to the house because “it was too nice a house.” 52 Tr. 7404. The prosecutor did not understand Brashear to have testified that Pinholster’s childhood was deprived. See 53 *id.*, at 7442 (“You heard that he was not a deprived child”). Nor did the California Supreme Court on direct appeal. *People v. Pinholster*, 1 Cal. 4th 865, 910, 824 P. 2d 571, 587 (1992).

Brashear did testify that Pinholster’s stepfather tried to “discipline” him and that he was “at times” “abusive or near abusive.” 52 Tr. 7392–7393. She suggested, however, that Pinholster deserved the “discipline” he received. See, e.g., *id.*, at 7392 (“Scott was always—he had a mind of his own”). It is unlikely the jury understood Brashear to be suggesting that her husband routinely beat Pinholster. The prosecutor did not come away with this understanding. See 53 *id.*, at 7442.

SOTOMAYOR, J., dissenting

country jail some doctor looked in a crystal ball and said, ‘In three years you are going to die’? That’s ridiculous”). The trial judge was thoroughly unimpressed with Brashear’s testimony. See *supra*, at 20.

Moreover, the evidence presented in Pinholster’s state-court petition revealed that Brashear distorted facts in her testimony in ways that undermined Pinholster’s mitigation case. As in *Sears*, 561 U. S., at ___ (slip op., at 3), the prosecutor used Brashear’s testimony that Pinholster came from a good family against him. See 53 Tr. 7442.

In sum, counsel presented little in the way of mitigating evidence, and the prosecutor effectively used their half-hearted attempt to present a mitigation case to advocate for the death penalty. The jury nonetheless took two days to reach a decision to impose a death sentence.

2

The additional mitigating evidence presented to the California Supreme Court “adds up to a mitigation case that bears no relation” to Brashear’s unsubstantiated testimony. *Rompilla*, 545 U. S., at 393.

Assuming the evidence presented to the California Supreme Court to be true, as that court was required to do, the new mitigating evidence presented to that court would have shown that Pinholster was raised in “chaos and poverty.” Record ER–312. The family home was filled with violence. Pinholster’s siblings had extremely troubled pasts. There was substantial evidence of “mental disturbance during Mr. Pinholster’s childhood and some degree of brain damage.” *Id.*, at ER–493.

Dr. Woods concluded that Pinholster’s aggressive conduct resulted from bipolar mood disorder. Just months before the murders, a doctor had recommended that Pinholster be sent to a psychiatric institute. Dr. Woods also explained that Pinholster’s bizarre behavior before the murders reflected “[a]uditory hallucinations” and “severe

SOTOMAYOR, J., dissenting

psychosis.” *Id.*, at ER–169. The available records confirmed that Pinholster suffered from longstanding seizure disorders, which may have been caused by his childhood head injuries.

On this record, I do not see how it can be said that “[t]he ‘new’ evidence largely duplicated the mitigation evidence at trial.” *Ante*, at 29; see *Arizona v. Fulminante*, 499 U. S. 279, 298–299 (1991) (evidence is not “merely cumulative” if it corroborates other evidence that is “unbelievable” on its own). Brashear’s self-interested testimony was not confirmed with objective evidence, as the prosecutor highlighted. The new evidence would have “destroyed the [relatively] benign conception of [Pinholster’s] upbringing” presented by his mother. *Rompilla*, 545 U. S., at 391. The jury heard no testimony at all that Pinholster likely suffered from brain damage or bipolar mood disorder, and counsel offered no evidence to help the jury understand the likely effect of Pinholster’s head injuries or his bizarre behavior on the night of the homicides. The jury heard no testimony recounting the substantial evidence of Pinholster’s likely neurological problems. And it heard no medical evidence that Pinholster suffered from epilepsy.

The majority responds that “much” of Pinholster’s new mitigating evidence “is of questionable mitigating value.” *Ante*, at 29. By presenting psychiatric testimony, it contends, “Pinholster would have opened the door to rebuttal by a state expert.” *Ibid.* But, because the California Supreme Court denied Pinholster’s petition on the pleadings, it had no reason to know what a state expert might have said. Moreover, given the record evidence, it is reasonably probable that at least one juror would have credited his expert. In any event, even if a rebuttal expert testified that Pinholster suffered from antisocial personality disorder, this would hardly have come as a surprise to the jury. See *ante*, at 22 (describing Pinholster as a “psychotic client whose performance at trial hardly endeared

SOTOMAYOR, J., dissenting

him to the jury”). It is for this reason that it was especially important for counsel to present the available evidence to help the jury understand Pinholster. See *Sears*, 561 U. S., at ___ (slip op., at 6–7).

Had counsel conducted an adequate investigation, the judge and jury would have heard credible evidence showing that Pinholster’s criminal acts and aggressive tendencies were “attributable to a disadvantaged background, or to emotional and mental problems.” *Penry*, 492 U. S., at 319 (internal quotation marks omitted). They would have learned that Pinholster had the “‘kind of troubled history we have declared relevant to assessing a defendant’s moral culpability.’” *Porter*, 558 U. S., at ___ (slip op., at 12) (quoting *Wiggins*, 539 U. S., at 535). Applying *Strickland*, we have repeatedly found “a reasonable probability,” 466 U. S., at 694, that the sentencer would have reached a different result had counsel presented similar evidence. See, e.g., *Porter*, 558 U. S., at ___ (slip op., at 12–13) (evidence of the defendant’s childhood history of physical abuse, brain abnormality, limited schooling, and heroic military service); *Rompilla*, 545 U. S., at 392 (evidence of severe abuse and neglect as a child, as well as brain damage); *Wiggins*, 539 U. S., at 535 (evidence of the defendant’s “severe privation and abuse” as a child, homelessness, and “diminished mental capacities”); *Terry Williams*, 529 U. S., at 398 (evidence of childhood mistreatment and neglect, head injuries, possible organic mental impairments, and borderline mental retardation).

The majority does not dispute the similarity between this case and the cited cases. However, it criticizes the Court of Appeals for relying on *Rompilla* and *Terry Williams* on the ground that we reviewed the prejudice question *de novo* in those cases. See *ante*, at 31. I do not read *Terry Williams* to review the prejudice question *de novo*.²⁷

²⁷ *Terry Williams* held that the state court’s decision was “unreason-

SOTOMAYOR, J., dissenting

More fundamentally, however, I cannot agree with the premise that “[t]hose cases . . . offer no guidance with respect to whether a state court has unreasonably determined that prejudice is lacking.” *Ante*, at 31 (emphasis deleted). In each of these cases, we did not purport to create new law; we simply applied the same clearly established precedent, *Strickland*, to a different set of facts. Because these cases illuminate the kinds of mitigation evidence that suffice to establish prejudice under *Strickland*, they provide useful, but not dispositive, guidance for courts to consider when determining whether a state court has unreasonably applied *Strickland*.

In many cases, a state court presented with additional mitigation evidence will reasonably conclude that there is no “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U. S., at 694. This is not such a case. Admittedly, Pinholster unjustifiably stabbed and killed two people, and his history of violent outbursts and burglaries surely did not endear him to the jury. But the homicides did not appear premeditated. And the State’s aggravation case was no stronger than in *Rompilla* and *Terry Williams*. See 545 U. S., at 378, 383 (the defendant committed murder by torture and had a significant history of violent felonies, including a rape); 529 U. S., at 418 (Rehnquist, C. J., concurring in part and dissenting in part) (the defendant had a lifetime of crime, and after the murder he “savagely beat an elderly woman,” set a home on fire, and stabbed a man (internal quotation marks omitted)). Even on the trial record, it took the jury two days to decide on a penalty. The contrast between the “not

able in at least two respects”: (1) It applied the wrong legal standard, see 529 U. S., at 397, and (2) it “failed to accord appropriate weight to the body of mitigation evidence available to trial counsel,” *id.*, at 398. We did not purport to conduct *de novo* review.

SOTOMAYOR, J., dissenting

persuasive” mitigation case put on by Pinholster’s counsel, 54 Tr. 7514, and the substantial mitigation evidence at their fingertips was stark. Given these considerations, it is not a foregone conclusion, as the majority deems it, that a juror familiar with his troubled background and psychiatric issues would have reached the same conclusion regarding Pinholster’s culpability. Fairminded jurists could not doubt that, on the record before the California Supreme Court, “there [was] a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U. S., at 537.

III

The state-court record on its own was more than adequate to support the Court of Appeals’ conclusion that the California Supreme Court could not reasonably have rejected Pinholster’s *Strickland* claim. The additional evidence presented in the federal evidentiary hearing only confirms that conclusion.

A

At the hearing, Pinholster offered many of the same documents that were before the state habeas court. He also offered his trial attorneys’ billing records, which were before the state habeas court as part of the trial record. Of the seven lay witnesses who testified at the hearing, six had previously executed declarations in support of Pinholster’s state-court petition. (The seventh, Pinholster’s uncle, provided testimony cumulative of other testimony.)

Two experts testified on Pinholster’s behalf; neither had presented declarations to the state habeas court. The first was Dr. Donald Olson, assistant professor of neurology and neurological sciences and director of the Pediatric Epilepsy Program at Stanford University Medical Center. It appears that Pinholster retained Dr. Olson to rebut the testimony of the expert disclosed by the State in the fed-

SOTOMAYOR, J., dissenting

eral proceeding. See Decl. of Michael D. Abzug in Support of Stipulated *Ex Parte* Application to Continue Evidentiary Hearing and Discovery Cut-Off and to Substitute Counsel in *Pinholster v. Calderon*, No. CV 95–6240–GLT (CD Cal.), p. 2. Relying in part on Pinholster’s abnormal EEG, Dr. Olson opined that Pinholster’s childhood accidents “likely result[ed] in brain injury” and that these injuries “conferred a risk of epilepsy.” Record ER–699 to ER–700. He concluded that it was reasonably probable that Pinholster had suffered from partial epilepsy since at least 1968 and had suffered from brain injury since at least 1964. *Id.*, at ER–701.

Pinholster’s second expert was Dr. Sophia Vinogradov, associate professor of psychiatry at the University of California, San Francisco. Dr. Vinogradov’s testimony was based on essentially the same facts as Dr. Woods’ and Dr. Stalberg’s state-court declarations. She highlighted Pinholster’s childhood head traumas, history of epilepsy, abusive and neglected upbringing, history of substance abuse, and bizarre behavior on the night of the homicides. She opined that his aggressive behavior resulted from childhood head traumas:

“All data indicates that there were severe effects of the two serious head injuries sustained at age 2 and age 3, with evidence for behavioral changes related to dysfunction of frontal cortex: severe attentional and learning problems in childhood, hyperactivity, aggressivity, impulsivity, social-emotional impairment, seizure disorder, and explosive dyscontrol.” *Id.*, at ER–731.

She also opined that, right before the homicides, Pinholster was in an “apparently hallucinatory state [that] was likely the result of his intoxication with multiple substances.” *Id.*, at ER–707

The State presented two experts: Dr. Stalberg, the

SOTOMAYOR, J., dissenting

psychiatrist who had examined Pinholster in the middle of trial,²⁸ and Dr. David Rudnick. Although Dr. Stalberg maintained that Pinholster suffered from antisocial personality disorder, which was his original diagnosis in the middle of trial, he again emphasized that there was “voluminous” and “compelling” mitigation evidence that had not previously been made available to him or presented to the jury. *Id.*, at ER–926, ER–953. He stated that conversations with Pinholster’s family revealed that he and his siblings were “raised like animals, wild animals,” *id.*, at ER–948, and he opined that Pinholster’s upbringing was a risk factor for antisocial personality disorder. See *ibid.* (Pinholster’s upbringing “would speak volumes, looking at it from a mitigation point of view”). And he agreed that the mitigation evidence presented at trial was “profoundly misleading.” *Id.*, at ER–966. Dr. Rudnick testified that Pinholster suffered from antisocial personality disorder.

The State also introduced into evidence the 1978 probation report that Pinholster’s counsel had in their possession at the time of his trial. The report demonstrated that counsel were aware that Pinholster was in classes for educationally handicapped children, that he was committed to a state hospital for emotionally handicapped children, and that he suffered two “severe head injuries.” *Id.*, at SER–243.

B

Much of the evidence presented at the federal hearing

²⁸ Before the hearing, Dr. Stalberg had opined that Pinholster was “substantially impaired by a bipolar mood disorder operating synergistically with intoxication and a seizure disorder at the time the crime was committed.” Record ER–587. At a prehearing deposition, however, Dr. Stalberg revised his opinion and stated that he continued to believe that Pinholster suffered from psychopathic personality traits. After the deposition, Pinholster elected to proceed with a different expert, presumably in light of Dr. Stalberg’s unexpected change in position. The State then retained Dr. Stalberg as its own expert.

SOTOMAYOR, J., dissenting

was duplicative of the evidence submitted to the California Supreme Court. The additional evidence presented at the hearing only confirmed that the California Supreme Court could not reasonably have rejected Pinholster's claim.²⁹

For example, the probation report presented by the State confirmed that counsel had in their possession information that would have led any reasonable attorney "to investigate further." *Wiggins*, 539 U. S., at 527. Counsel nevertheless took no action to investigate these leads.

Pinholster's experts opined that his childhood head traumas likely resulted in brain injury and conferred a risk of epilepsy. Although the State presented testimony that Pinholster had antisocial personality disorder, it was not clear error for the District Court to conclude that jurors could have credited Pinholster's experts. Even the

²⁹The State argues that the District Court was not entitled to rely on the evidence adduced at the hearing because Pinholster was not diligent in developing his claims in state court and the hearing was therefore barred by 28 U. S. C. §2254(e)(2). This argument is somewhat imprecise. Pinholster's allegations in his amended federal petition were "identical" to the allegations he presented to the California Supreme Court, *ante*, at 6, and he diligently requested a hearing in state court. The State presumably means to argue that Pinholster's new expert testimony changed "the factual basis" of his claim such that, by the time of the evidentiary hearing, he no longer satisfied §2254(e)(2). However, at oral argument, the State suggested that Pinholster was presenting an altogether new claim in the federal court. See Tr. of Oral Arg. 18. If that is the case, §2254(d)(1) does not apply at all, and the State should be arguing lack of exhaustion or procedural default. I do not understand Pinholster to have presented a new claim to the District Court.

In any event, Pinholster satisfied §2254(e)(2) in this case. He made "a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Michael Williams*, 529 U. S., at 435. His experts relied on the very same facts and evidence. I cannot read §2254(e)(2) to impose a strict requirement that petitioners must use the same experts they presented to the state court. This rule would result in numerous practical problems, for example in the case of the unanticipated death of an expert.

SOTOMAYOR, J., dissenting

State’s own expert, Dr. Stalberg, testified to the “voluminous” mitigation evidence in Pinholster’s case. Record ER–926.

In sum, the evidence confirmed what was already apparent from the state-court record: Pinholster’s counsel failed to conduct an adequate mitigation investigation, and there was a reasonable probability that at least one juror confronted with the “voluminous” mitigating evidence counsel should have discovered would have voted to spare Pinholster’s life. *Ibid.* Accordingly, whether on the basis of the state- or federal-court record, the courts below correctly concluded that Pinholster had shown that the California Supreme Court’s decision reflected an unreasonable application of *Strickland*.³⁰

* * *

I cannot agree with either aspect of the Court’s ruling. I fear the consequences of the Court’s novel interpretation of §2254(d)(1) for diligent state habeas petitioners with compelling evidence supporting their claims who were unable, through no fault of their own, to present that evidence to the state court that adjudicated their claims. And the Court’s conclusion that the California Supreme Court reasonably denied Pinholster’s ineffective-assistance-of-counsel claim overlooks counsel’s failure to investigate obvious avenues of mitigation and the contrast between the woefully inadequate mitigation case they presented and the evidence they should and would have discovered. I respectfully dissent.

³⁰The State’s challenge in this Court is limited to the questions whether the Federal District Court was entitled to consider the additional evidence in the §2254(d)(1) analysis and whether Pinholster satisfied §2254(d)(1) on the basis of the state-court record. It has not challenged the District Court’s ultimate conclusion that Pinholster had proved that he was “in custody in violation of the Constitution or laws or treaties of the United States.” §2254(a).