No. 05-1575

In The
Supreme Court of the United States

DORA B. SCHRIRO, DIRECTOR
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

JEFFREY TIMOTHY LANDRIGAN, a.k.a,
BILLY PATRICK WAYNE HILL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When the state courts have found that the defendant in a capital case directed his attorney not to present evidence in mitigation and that finding of fact was reasonable based on the evidence before the state court, does 28 U. S. C. § 2254(d)(2) require denial of the ineffective assistance claim without further litigation?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

As in several other recent cases, the Ninth Circuit's opinion substitutes its own debatable inferences to set aside the conclusion reached by the state court. The en banc court's decision is contrary to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the integrity of state court convictions, and the principle that the state courts stand on equal footing to the inferior federal courts. Further, this decision impedes the finality of criminal convictions and is contrary to the interests of justice and public safety that CJLF seeks to advance.

SUMMARY OF FACTS AND CASE

In 1982, Jeffrey Landrigan attacked his "best friend" Greg Brown from behind, stabbing him to death. *Landrigan* v. *Stewart*, 272 F. 3d 1221, 1226-1227 (CA9 2001). Four years later, while incarcerated for murdering Brown, Landrigan stabbed a fellow inmate 14 times because he

[1] This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

"got in an argument" with him. *Id*., at 1227. Three years later, Landrigan broke out of prison and escaped to Arizona. *Id*., at 1223. He convinced Chester Dyer to take him back to his apartment where the two had sex, and Dyer called a friend to arrange a job for Landrigan. Two days later, Arizona police found Dyer fully clothed, face down on his bed, with a pool of blood at his head. An electrical cord hung around his neck. There were facial lacerations and puncture wounds on the body. A half-eaten sandwich and a small screwdriver lay beside it. Blood smears were found in the kitchen and bathroom. Partial bloody shoeprints were on the tile floor. *Ibid*. (citing *State* v. *Landrigan*, 176 Ariz. 1, 2-3, 859 P. 2d 111, 113 (1993)). Landrigan also left an ace of hearts "carefully propped on Dyer's back," ransacked his apartment, and stole his paycheck. See *ibid*.

Landrigan was convicted of first-degree murder and sentenced to death. His attorney attempted to present mitigating evidence during the sentencing phase, but Landrigan objected. Landrigan frustrated his lawyer's attempts to paint him as a caring husband, see *id*., at 1227, and, when his lawyer implied that he had killed Greg Brown in self-defense, Landrigan "interjected with a more inculpatory version of that prior killing." *State* v. *Landrigan*, 859 P. 2d, at 118. Landrigan also prohibited his lawyer from calling his girlfriend as a mitigating witness, and stopped his birth mother from testifying that she used drugs and alcohol while pregnant with him. See *ibid*.

Understanding the potential conflict between his duty to put on mitigating evidence and his duty to follow his client's instructions, Landrigan's attorney explained to the sentencing judge that he was ready to present evidence but that Landrigan would not permit it. *Landrigan* v.

Stewart, 272 F. 3d, at 1225. Landrigan affirmed that he had instructed his lawyer not to raise any mitigating circumstances, and told the court that there were no mitigating circumstances "as far as I'm concerned." *Ibid*. In another exchange, he stated, "If you want to give me the death penalty, just bring it right on. I'm ready for it." *State* v. *Landrigan*, 859 P. 2d, at 117.

The state trial judge sentenced Landrigan to death, finding him to be

> "somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and no regard for human life and human beings and the right to live and enjoy life to the best of their ability, whatever their chosen lifestyle might be. Mr. Landrigan appears to be an amoral person." *Ibid*.

On direct appeal, the Arizona Supreme Court rejected each of his contentions, and found his ineffective assistance claim to be meritless. *Id*., at 118. Landrigan then filed a state postconviction petition, claiming that he would have cooperated had his lawyer raised the fanciful mitigation theory that Landrigan was genetically predisposed to kill people. *Landrigan* v. *Stewart*, 272 F. 3d, at 1228. But the state habeas judge – the same judge who presided over Landrigan's sentencing – found that Landrigan's "statements at sentencing belie his new-found sense of cooperation." *Id*., at 1228, n. 3. That is, she found that Landrigan was lying. She also found that "defendant instructed his attorney not to present *any* evidence at the sentencing hearing. . . . " Appendix F to Petition for Writ of Certiorari 3 (emphasis in original).

The state supreme court denied review, and a federal district court rejected his federal habeas petition. *Id*., at

1224. A unanimous panel of the Ninth Circuit affirmed, *id*., at 1231, but a limited en banc court[2] reversed and remanded for an evidentiary hearing. See *Landrigan* v. *Schriro*, 441 F. 3d 638 (CA9 2006) (en banc). The en banc court held that the state courts had unreasonably held that Landrigan had "instructed his lawyer not to present mitigating evidence." *Id*., at 646-647. According to the en banc majority, the state supreme court and the state habeas judge – the same judge who presided over Landrigan's sentencing – had taken "the sentencing judge's questions" and Landrigan's answers "out of context." *Id*., at 646. As applied to the superior court finding, this is a holding that Judge Hendrix had taken *her own* questions out of context. The en banc court also conducted its own review of the record, determined that Landrigan was prejudiced, and remanded the case for an evidentiary hearing.

SUMMARY OF ARGUMENT

In substituting its judgment for the state courts, the Ninth Circuit failed to accord the deference required under AEDPA. Where the state court has made a finding of fact that precludes a claim, the threshold inquiry the federal courts need to make is whether that finding was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. § 2254(d)(2). If not, relief cannot be granted on that claim, and there is nothing more to litigate on it.

[2] Because of its size, the Ninth Circuit rarely sits truly en banc. See Ninth Circuit Rule 35-3.

Here, the state courts found that Landrigan had "instructed his attorney not to present any evidence at the sentencing hearing." *Landrigan* v. *Schriro*, 441 F. 3d 638, 646 (CA9 2006). And while it may be possible to read the black and white record to find an ambiguity, this finding easily meets AEPDA's "highly deferential" standard of review. *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7 (1997).

With this decision, the Ninth Circuit has effectively changed "unreasonable" to "possible to read the record differently." This is just the kind of Monday-morning quarterbacking that Congress was trying to eliminate with AEDPA. The state court's reasonable finding of fact that Landrigan instructed his attorney not to present mitigating evidence should end this matter, and there is no need for discovery or evidentiary hearings. The term "unreasonable" does not mean "debatable" or even "incorrect." This Court should clarify that an unreasonable factual determination is one which wholly lacks support in the record. If there is room for debate about a state court's finding, then it is not unreasonable.

ARGUMENT

The fundamental error underlying the Ninth Circuit's en banc decision in this case is evident from the opening sentence of the majority's opinion. "In this appeal, we consider whether petitioner, Jeffrey Timothy Landrigan, received ineffective assistance of counsel in the penalty phase of his capital murder trial." *Landrigan* v. *Schriro*, 441 F. 3d 638, 641 (CA9 2006). But this is an AEDPA case, which means that the appropriate threshold inquiry is merely into whether the decisions of the Arizona courts

were "unreasonable." 28 U. S. C. § 2254(d). A negative answer to this question is dispositive under AEDPA. If the state court's decision is not unreasonable, then Landrigan's claim is precluded, and that is the end of the matter. It does not matter if the Arizona courts' decisions were questionable, debatable, or even incorrect. This is especially so for the factual determinations of the state courts. For if it is inappropriate for the inferior federal courts to second-guess the *legal* judgments of coequal state courts, see, *e.g.*, *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997), how much less appropriate is it for the *factual* findings of the state trial courts who are in a superior position to find the facts?

I. If a state court makes a reasonable finding of fact that is dispositive, further action in the case is inappropriate.

The Ninth Circuit's determination that Landrigan is entitled to an evidentiary hearing misses an essential point. Here, the state courts held that Landrigan had instructed his lawyer not to present mitigating evidence during his sentencing phase and rejected his claim that he would have cooperated in presenting other mitigating evidence. If that finding was reasonable, Landrigan's claim is precluded and there is nothing else to do but deny the petition for relief. A decision to effectively concede the penalty phase is the client's decision to make, see *Florida* v. *Nixon*, 543 U. S. 175, 187 (2004) (noting defendant's authority to make waivers of basic trial rights), and failure

to override it is *per se* not ineffective.[3] But in Part II-A-3 of its opinion, see *Landrigan* v. *Schriro*, 441 F. 3d 638, 647-648 (CA9 2006), the en banc majority contends that the federal courts must conduct a *post hoc* inquiry into Landrigan's counsel's investigation even if the state court finding that Landrigan instructed his attorney not to present evidence was reasonable. This is certainly mistaken. So long as the state's finding that Landrigan instructed his attorney not to present evidence was not unreasonable, the petition must be denied.

To hold otherwise would conflict with the purposes of AEDPA. One of AEDPA's principal purposes is to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases. . . . " *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003). As Senator Dole noted in introducing the bill, one of the reasons for habeas reform was to make sure criminals will "get what they deserve – punishment that is swift, certain, and severe." 141 Cong. Rec. S5841 (daily ed. April 27, 1995) (statement of Sen. Dole). These purposes were repeatedly emphasized as AEDPA made a difficult journey through the Senate. A week before the bill passed, Senator Specter explained on the floor that the bill was aimed at changing the circumstances where the "death penalty [was] applied and then there are delays of up to 17 years while the cases languish in the Federal courts." 142 Cong. Rec. S3470 (daily ed. April 17, 1996) (statement of Sen. Specter). He also noted that the "lengthy appeals process in the Federal court has, in effect, defeated the deterrent effect of the

[3] At the very least, the state court's conclusion to this effect is reasonable, and that is sufficient under AEDPA. This point is addressed in Part II of the State's brief.

death penalty" and that the penalty needed to be "certain and reasonably swift." *Ibid.*; see also Shepherd, Murders of Passion, Execution Delays, Capital Punishment, 33 J. Legal Studies 283 (2004). During another debate over AEDPA's habeas reform provisions, Senator Hatch explained that the provisions were important because "these people try to get into the Federal courts where they figure they have more liberal judges who are going to find any excuse they can to overturn a death penalty." 142 Cong. Rec. S3362 (daily ed. April 16, 1996) (statement of Senator Hatch).

This Court has also recognized that "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams (Terry)* v. *Taylor*, 529 U. S. 362, 404 (2000) (opinion of the Court quoting Justice Stevens' opinion). It has also recognized that section 2254(d) was one of the critical methods that "Congress used to advance these objectives." *Garceau*, 538 U. S., at 206. Requiring an evidentiary hearing to investigate whether counsel's investigation was adequate would be nothing more than an academic exercise in light of the state court's finding that Landrigan did not want to admit any mitigating evidence. As this Court has explained, Congress "inten[ded] to avoid unneeded evidentiary hearings in federal habeas corpus," *Williams (Michael)* v. *Taylor*, 529 U. S. 420, 436 (2000), because, at some point, the State must be allowed to exercise its "'sovereign power to punish offenders.'" *McCleskey* v. *Zant*, 499 U. S. 467, 491 (1991) (quoting *Murray* v. *Carrier*, 477 U. S. 478, 487 (1986)).

Another principal objective of AEDPA is "to further the principles of comity, finality, and federalism." *Williams*, 529 U. S., at 436. Allowing endless evidentiary

hearings on issues that will not affect the ultimate resolution of the case is both a poor use of judicial resources and an insult to the coequal state judiciary. See *Sawyer* v. *Smith*, 497 U. S. 227, 241 (1990); see also *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 587-588 (1999). During the debates that led to the passage of AEDPA, one Senator explained that "the present system of review is demeaning to the State courts and pointlessly disparaging to the efforts to comply with Federal law in criminal proceedings" because it presumed that state courts were "incapable of applying Federal law, or unwilling to do so." 141 Cong. Rec. S7821 (daily ed. June 7, 1995) (statement of Sen. Nickles). But state courts are not only competent, they are equal to the lower federal courts when it comes to interpreting and applying the Constitution. The federal courts may not pour over their opinions looking for mistakes like a teacher grading exams.

Further, these delays are no theoretical problem. The "average time spent in prison for a death row inmate in 2004 was ten years and two months." *Allen* v. *Ornoski*, 435 F. 3d 946, 954 (CA9 2006) (citing U. S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment, 2004, p. 11 (Nov. 2005)). Despite having the most prisoners on death row in 2004, California did not even manage to execute one of the 637 that year. Indeed, California has only managed to execute 10 inmates since 1977, but 43 died of other causes in that same time. See Capital Punishment, 2004, at 16. Nationwide, there were 214 inmates on death row in 2004 who had been under sentence of death for more than *20 years*. See *id.*, at 14. At that time, 657 prisoners had been on death row for more than 15 years. See *ibid*.

Aside from burdening the states in their battle against crime, these delays wreak havoc on the victims' families.

John Collins, the father of a 19-year-old young woman who was brutally murdered in 1985, may have put it best when he testified before the Judiciary Committee in 1991:

> "Extended habeas corpus proceedings mean no closure to our grief, no end to our mental and emotional suffering, no end to nightmares, and no relief from the leaden weights that remain lodged in our hearts. It means we continue to bleed." 141 Cong. Rec. S7672 (daily ed. June 5, 1995) (statement of Sen. Kyl).

A woman whose husband had been killed in the Oklahoma City bombing while she was pregnant favored habeas reform because she did "not want his daughter to be in high school wondering why his killers are still on death row." 141 Cong. Rec. S7820 (daily ed. June 7, 1995) (statement of Sen. Nickles). And the wife of a Secret Service agent killed in Oklahoma City explained that her pain "would be much, much greater if the perpetrators of this crime are allowed to sit on death row for many years." *Ibid*.

Because the state courts reasonably found that Landrigan had instructed his attorney not to present any mitigating evidence, this Court must reverse the en banc decision of the Ninth Circuit. This is not a case where the defendant waived his right to present mitigating evidence because he was poorly informed as to his options. Rather, Landrigan thwarted his lawyer's efforts to introduce even the most basic mitigating evidence. Requiring an evidentiary hearing into whether his counsel did a sufficient

investigation serves no purpose in a case where the defendant was unwilling to present mitigating evidence. Under such circumstances, an evidentiary hearing into the nature of the investigation only causes needless delay, and it conflicts with the chief purpose of AEDPA to streamline habeas proceedings. It also demeans the status of the state courts and causes more needless pain for the victims and their families. This Court should therefore hold that the federal courts must deny a petition without further action where there has been a reasonable finding of fact that precludes a petitioner's claims.

II. This Court should adopt a clear definition of the term "unreasonable" for purposes of § 2254(d).

In AEDPA cases, this Court has defined what "unreasonable" isn't, rather than what it is. *Wiggins* v. *Smith*, 539 U. S. 510, 520 (2003) (a decision must be "more than incorrect or erroneous" to be unreasonable). Thus, this Court has held that unreasonable does not mean "incorrect or erroneous" but must be something "more." *Lockyer* v. *Andrade*, 538 U. S. 63, 75 (2003). This Court has further explained that it "is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous." *Ibid*. (internal quotation marks omitted). *Andrade* also explained that "unreasonable" does not mean "clearly erroneous." "The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Ibid*.

And while this practice of "definition by negative" is generally sufficient for most cases (and ought to be sufficient for lower courts), it lacks clear guidelines. A

well-intentioned court, in an effort to correct a perceived injustice, might "recite[ ] the proper standard of review" but mistakenly "substitute[ ] its evaluation of the record for that of the state trial court." *Rice* v. *Collins*, 546 U. S. __, 126 S. Ct. 969, 973, 163 L. Ed. 2d 824, 831 (2006). As in this case, this temptation results in a court saying "unreasonable" but applying "debatable." But a decision is not unreasonable merely because an appellate court's "generous reading" of the record presents a "reason to question" the trial court's decision. *Id*., 126 S. Ct., at 975, 163 L. Ed. 2d, at 833.

It appears that the only "positive" definition of unreasonable that this Court has offered is the self-referential "objectively unreasonable" standard. See, *e.g.*, *Williams (Terry)* v. *Taylor*, 529 U. S. 362, 409 (2000); see also *Andrade*, 538 U. S., at 75; *Wiggins*, 539 U. S., at 521. But "objectively" does not add much as a practical matter. The "unreasonable determination of the fact" standard is the most deferential standard known to the federal courts. For while findings of fact may not be disturbed on direct review unless they are "clearly erroneous," see *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424, 440, n. 14 (2001), the respect paid to the trial court's findings of fact must be even greater on habeas review. In other contexts, this Court has explained that the deference required under the "unreasonable" standard of review is much greater than "clearly erroneous":

> "[T]he 'clearly erroneous' standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.' And application of a reasonableness standard is even more deferential than that, requiring the reviewer to sustain a finding of fact unless it is so unlikely that no reasonable

> person would find it to be true, to whatever the required degree of proof." *Concrete Pipe and Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U. S. 602, 623 (1993) (ERISA).

Applying this same articulation of "unreasonable" to AEDPA would be consistent with this Court's past decisions. In *Rice* v. *Collins*, the lower court found an "unreasonable determination of the facts" because it concluded that "no reasonable factfinder" could have found as the trial court did. 126 S. Ct., at 974, 163 L. Ed. 2d, at 832. And though this Court rejected the circuit court's reasons for so holding, it applied the same standard: whether any reasonable person could have found as the state court did. See *id*., 126 S. Ct., at 974-976, 163 L. Ed. 2d, at 832-834. Such a holding would eliminate, to the degree possible, the difficulty that some lower courts seem to have applying the unreasonableness standard of § 2254(d). Rather than asking "*would we* have found as the trial court did," the courts will ask "*could anyone* have found as the trial court did." This Court should make its implicit adoption of the "no reasonable person" explicit.

The explicit adoption of the "no reasonable person" standard would be consistent with this Court's long-standing practice of according "great deference" to state court findings of fact on direct appeal as well as habeas. *Hernandez* v. *New York*, 500 U. S. 352, 364 (1991) (plurality opinion); see also *id*., at 372 (O'Connor, J., concurring); *Batson* v. *Kentucky*, 476 U. S. 79, 98 n. 21 (1986) (factual determinations, such as credibility of witness, due "great deference"); *Burden* v. *Zant*, 498 U. S. 433, 437 (1991) (*per curiam*). Even before AEDPA, former subdivision (d) of section 2254 "require[d] the federal courts to show a high measure of deference to the factfindings made by the state

courts." *Sumner* v. *Mata*, 455 U. S. 591, 597-598 (1982) (*per curiam*). On habeas review, it has never been sufficient that the federal court "simply disagree" with a state court's finding of fact. *Marshall* v. *Lonberger*, 459 U. S. 422, 432 (1983). The former subdivision (d) required a federal court to defer to a state court finding of fact unless it was not "fairly supported by the record." *Ibid*. AEDPA's "unreasonable" standard is even more deferential. Thus, the "no reasonable person" standard fits well within both AEDPA and this Court's prior habeas jurisprudence.

This inquiry into the reasonableness of state court's factual finding must be assessed "in light of the record before the court," *Miller-El* v. *Cockrell*, 537 U. S. 322, 348 (2003), not by considering evidence that was not before the state court. See, *e.g.*, *Bell* v. *Cone*, 535 U. S. 685, 697, n. 4 (2002); 28 U. S. C. § 2254(d)(2). So long as the evidence in the record could have led any reasonable trier of fact to find as the trial court did, the federal courts are precluded from granting habeas relief.

III. The state courts' determination that Landrigan would not have cooperated with counsel in presenting any mitigation defense was not unreasonable and disposes of Landrigan's habeas petition.

The Ninth Circuit's independent review of the record amounts to nothing less than a *de novo* review of the state court proceedings. It is no surprise that, upon an independent review of the black-and-white record, the court "set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record." *Rice* v. *Collins*, 546 U. S. ___, 126 S. Ct. 969, 972, 163 L. Ed. 2d 824, 830 (2006). But, with the proper "no reasonable

person" standard in mind, this case is rather simple. The state court held that Landrigan waived his right to present mitigating evidence in the following exchange:

> "THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish him to bring **any** mitigating circumstances to my attention?
>
> "THE DEFENDANT: Yeah.
>
> "THE COURT: Do you know what that means?
>
> "THE DEFENDANT: Yeah.
>
> "THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?
>
> "THE DEFENDANT: Not as far as I'm concerned." *Landrigan* v. *Stewart*, 272 F. 3d 1221, 1225 (CA9 2001) (emphasis added).

Here, it is likely that the state court's conclusion was correct and it was certainly not unreasonable. This exchange *could* be read to mean that Landrigan was only opposed to having his mother and ex-wife testify, but that is not the only "objectively reasonable" reading. It is not even the best reading. As the original Ninth Circuit panel put it, "Landrigan's position could hardly have been more plain." *Ibid*. He refused to permit his lawyer to put "any mitigating circumstances" before the court, and even objected when his lawyer proffered the evidence that he would have put on. *State* v. *Landrigan*, 859 P. 2d, at 118. The most natural reading of this colloquy, adopted by the Arizona Supreme Court and the trial court, is that Landrigan purposely chose not to put forth mitigating evidence. See *ibid*.

Given this record, the Arizona Supreme Court's determination that Landrigan "instructed his lawyer not to present any mitigating evidence" is well within AEDPA's wide boundaries. In this case, though, there is an even stronger reason for deferring to the state court-finding of fact. For when Landrigan filed his state habeas petition, it was heard by the same judge who had presided over his sentencing proceeding. *Landrigan* v. *Stewart*, 272 F. 3d, at 1228, n. 3. Landrigan argued that he would have permitted his counsel to introduce evidence that he was genetically predisposed to murder, but the state court *rejected* this claim, judging Landrigan not credible. That is, the judge who presided over both hearings found that Landrigan's "statements at sentencing belie his new-found sense of cooperation." *Ibid*. Any doubt about the "context" of Landrigan's statements to the sentencing judge are resolved by this finding.

Even in a pre-AEDPA habeas case, this Court held that "determinations of demeanor and credibility . . . are peculiarly within a trial judge's province." *Wainwright* v. *Witt*, 469 U. S. 412, 428 (1985); see also Fed. Rule Civ. Proc. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"). Under AEDPA, they are nearly unreviewable. So long as the judge presiding at the hearings could rationally have rejected Landrigan's claim, the federal courts may not grant habeas relief.

IV. Even if Landrigan's lawyer was ineffective, Landrigan could not have been prejudiced.

Even if the state court's finding that Landrigan waived his right to present mitigation was unreasonable, this Court should affirm his sentence. Landrigan can meet neither prong of the *Strickland*[4] test, that his counsel fell below the constitutionally minimal standards or that he was prejudiced. See *Rompilla* v. *Beard*, 545 U. S. 374, 380 (2005) ("Ineffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice").

This Court has held that the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough* v. *Gentry*, 540 U. S. 1, 8 (2003). Further, courts must "indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable." *Bell* v. *Cone*, 535 U. S. 685, 702 (2002). This review is "doubly deferential when it is conducted through the lens of federal habeas." *Yarborough*, *supra*, at 6. So long as a lawyer's representation is not the functional equivalent of having no counsel at all, the Sixth Amendment is not offended.

Here, Landrigan complains only that his lawyer's ineffective investigation deprived him of the chance to present that he was genetically predisposed to murder, which he claims was the only mitigation defense in which he was willing to cooperate. *Landrigan* v. *Stewart*, 272 F. 3d 1221, 1228 (CA9 2001) ("Landrigan's only personal

[4] *Strickland* v. *Washington*, 466 U. S. 668 (1984).

declaration indicates that he would have cooperated in presentation of evidence on a single ground – genetic predisposition"). As the original Ninth Circuit panel put it, the theory that Landrigan ought to be excused from the death penalty because he was genetically violent is "rather exotic." *Ibid*. Indeed, while it may not be constitutionally ineffective to present the theory, see, *e.g.*, *Mobley* v. *Head*, 267 F. 3d 1312, 1318 (CA11 2001); see also *Turpin* v. *Mobley*, 269 Ga. 635, 642-645, 502 S. E. 2d 458, 465-467 (1998), it is certainly not constitutionally ineffective to fail to present it. In the first place, the theory borders on the ridiculous. Second, such evidence could well make it *more likely* that a defendant would get the death penalty, not less. See, *e.g.*, *People* v. *Franklin*, 167 Ill. 2d 1, 26, 656 N. E. 2d 750, 761 (1995) (genetic violence evidence "could have also demonstrated defendant's potential for future dangerousness"). Landrigan had already violently stabbed his best friend to death, stabbed a fellow prisoner more than a dozen times over a trivial dispute, and escaped from prison only to murder Chester Dyer in a brutal manner and for no evident reason.

"Even if some of the arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them. Focusing on a small number of key points may be more persuasive than a shotgun approach." *Yarborough*, 540 U. S., at 7. It is entirely reasonable to conclude, as Landrigan's lawyer may have, that only the "Officer Krupke" defense, see Leonard Bernstein & Stephen Sondheim, *West Side Story*, *Gee Officer Krupke*, available at http://www.westsidestory.com/site/level2/lyrics/krupke.html (last visited October 28, 2006), was likely to do his client any good. To put on evidence that Landrigan was genetically compelled to stab

more people to death seems counterproductive; it provides even more reason to execute him. It seems extraordinarily unlikely that "prevailing professional norms" require the presentation of such a ridiculous defense.[5]

But even if Landrigan's counsel should have investigated the merits of the "born to kill" defense, there can be little doubt that Landrigan would have received the death penalty even had he thoroughly convinced the trial court of his position. Under *Strickland*, a defendant is not entitled to relief unless he can show prejudice. See, *e.g.*, *Rompilla*, 545 U. S., at 380. Here, the only reasonable probability is that the evidence Landrigan claims he wanted introduced would have made it *more* likely for him to get the death penalty, not less. His theory shows that it would be difficult, if not impossible, to deter him from extreme violence. So does his past. While incarcerated for the murder of one man, he stabbed a fellow prisoner, escaped from prison, and within two months murdered still another man. The evidence did no more than confirm that neither the public, nor even Landrigan's fellow prisoners, will be safe until he is executed.

Landrigan "failed to show remorse" and even "flaunted his menacing behavior." *State* v. *Landrigan*, 859 P. 2d, at 118. The sentencing judge found him to be "amoral" and found that he had "no regard for human life and human beings." *Id.*, at 117. The evidence that

[5] The fact that cases are litigated for many years on claims of "mitigating" evidence that most people would find aggravating is further evidence that the *Lockett* v. *Ohio*, 438 U. S. 586 (1978) line of cases is a failure. See *Graham* v. *Collins*, 506 U. S. 461, 500 (1993) (Thomas, J., concurring). In an appropriate case, probably one on direct review, this line should be reconsidered.

Landrigan sought to introduce, such as it was, could not have aided Landrigan's cause. At best, it would have been unhelpful. At worst, it could have further cemented Landrigan's place on death row. This is doubtless why Landrigan's wild theory that he is less culpable because he is genetically predisposed to kill people does not appear to have worked in any reported case, state or federal.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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