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## **New Paths for the Court: Protections Afforded Juveniles Under Miranda; Effective Assistance of Counsel; and Habeas Corpus Decisions of The Supreme Court's 2010/2011 Term**

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**NEW PATHS FOR THE COURT:  
PROTECTIONS AFFORDED JUVENILES UNDER *MIRANDA*;  
EFFECTIVE ASSISTANCE OF COUNSEL; AND HABEAS  
CORPUS DECISIONS OF THE SUPREME COURT'S 2010/2011  
TERM**

*Richard Klein*\*

**I. INTRODUCTION**

During the 2010/2011 Term, the Supreme Court continued to engage in two of the trends that have been established over the past couple of decades: first, that the Court treats juveniles differently than adults,<sup>1</sup> and, second, that the Court seeks to limit federal review of state convictions, especially in cases involving claims of ineffective assistance of counsel and habeas corpus.<sup>2</sup> In the cases of this Term, the Court reemphasized its previous holdings and sought to

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<sup>1</sup> See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (holding that a defendant that was fifteen years old at the time he was convicted of first-degree murder cannot be sentenced to death pursuant to the Eighth and Fourteenth Amendments); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (stating that the Court's "acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults"); *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (stating that the State's "power . . . to control the conduct of children reaches beyond the scope of its authority over adults" (quoting *Prince v. Commonwealth*, 321 U.S. 158, 170 (1944) (internal quotation marks omitted))). During this Term, the Court focused particularly on the treatment of juveniles under the prophylactic rule established in its holding in *Miranda v. Arizona*. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2398-99 (2011); see also *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (holding that the accused must be clearly informed of his right to remain silent, that what he says can and will be used against him at trial, that he has the right to have an attorney present during questioning, and that if he is indigent, the court may appoint an attorney for him at no cost to him).

<sup>2</sup> See *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011); *Premo v. Moore*, 131 S. Ct. 733 (2011); *Harrington v. Richter*, 131 S. Ct. 770 (2011); *Felkner v. Jackson*, 131 S. Ct. 1305 (2011).

expound upon them to provide clearer guidance to the federal judiciary to utilize in its review of state court decisions relating to the validity of a criminal conviction.

## II. TREATMENT OF JUVENILES BY THE SUPREME COURT

The Supreme Court's holding in *Roper v. Simmons*<sup>3</sup> is just one recent example of the special considerations juveniles have received as far as protections afforded under our Constitution.<sup>4</sup> In *Roper*, the Court held that a death penalty sentence for a juvenile under the age of eighteen constituted a violation of the Eighth Amendment protection against cruel and unusual punishment.<sup>5</sup> This determination that juveniles need to be treated differently than adults was reinforced by the Court's holding in a case during last year's Term, *Graham v. Florida*.<sup>6</sup> The Court in *Graham* determined that the juvenile defendant's life sentence in prison without the chance of parole in a non-homicide case constituted cruel and unusual punishment under the Eighth Amendment.<sup>7</sup> Juveniles must, at a minimum, have a meaningful opportunity to obtain release from incarceration at some point in their lives in such cases.<sup>8</sup> The defendant in *Graham* was resentenced in February of 2012 to a prison term of 25 years.<sup>9</sup>

<sup>3</sup> 543 U.S. 551 (2005).

<sup>4</sup> See, e.g., *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Thompson*, 487 U.S. 815; *Bellotti*, 443 U.S. 622; *Ginsberg*, 390 U.S. 629.

<sup>5</sup> *Roper*, 543 U.S. at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>6</sup> 130 S. Ct. 2011 (2010).

<sup>7</sup> *Id.* at 2034. The Attorney General of Florida expressed satisfaction that "the ruling does not prohibit 'very stern sentences for juveniles.'" John Kelly, *Will Ruling Save All Lifers?*, YOUTH TODAY, June 1, 2010, available at [http://www.youthtoday.org/view\\_article.cfm?article\\_id=4031](http://www.youthtoday.org/view_article.cfm?article_id=4031).

<sup>8</sup> *Graham*, 130 S. Ct. at 2034 ("A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.").

<sup>9</sup> Phone Interview by Daniel Fier with Bryan S. Gowdy, Attorney for Terrence Graham (Mar. 7, 2012) ("The defendant Graham was sentenced to 25 years in prison to be followed by two years of community control and three subsequent years of probation. The defendant will not be eligible for parole at any point prior to the expiration of his prison sentence; however he may be eligible for Gaintime. Gaintime may serve to reduce his sentence by 15%, to a total of 21.25 years to be served. When he is released, Graham will be approximately thirty-eight years old."). For clarification on Gaintime in Florida, see *FAQ: Gaintime*, FL.

During this year's Term, the Court considered yet another case in which it determined that juveniles should receive different treatment than that which adults are given by the courts. In *J.D.B. v. North Carolina*,<sup>10</sup> the Court examined the issue of whether a juvenile should receive greater protection under the rules established in *Miranda v. Arizona*<sup>11</sup> due to his or her immaturity or heightened vulnerability.<sup>12</sup> In *J.D.B.*, the suspect in question, a thirteen year-old seventh grader, was escorted out of his social studies classroom by a police officer and then brought into a conference room where another officer, along with a school administrator and assistant principal, was present.<sup>13</sup> J.D.B. was then questioned for thirty to forty-five minutes about two break-ins of homes that had occurred five days earlier.<sup>14</sup> At no point during his interrogation was J.D.B. read his *Miranda* warnings, informed of his right to leave, or given the opportunity to contact his legal guardian.<sup>15</sup> While in the apparent custody of the officers, J.D.B. eventually "confessed that he and a friend were responsible for the break-ins."<sup>16</sup> At this point, J.D.B. was first informed of his *Miranda* rights.<sup>17</sup>

The issues the Court was concerned with in *J.D.B.* were whether the suspect was actually in police custody when he was questioned, whether the subsequent statements made could be used against him since no *Miranda* warnings had been given, and lastly, whether the suspect's age should play a role in such an analysis.<sup>18</sup> The traditional test to determine whether an individual is in custody,

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DEP'T OF CORRECTIONS, <http://www.dc.state.fl.us/oth/inmates/gaintime.html> (last visited Mar. 7, 2012).

<sup>10</sup> 131 S. Ct. 2394 (2011).

<sup>11</sup> 384 U.S. 436 (1966); *see supra* information accompanying note 1.

<sup>12</sup> *J.D.B.*, 131 S. Ct. at 2401 ("[The Court] granted certiorari to determine whether the *Miranda* custody analysis includes consideration of a juvenile suspect's age.").

<sup>13</sup> *Id.* at 2399.

<sup>14</sup> *Id.* (Police also questioned J.D.B.'s grandmother regarding the break-ins. The officers were later informed by the school that a digital camera, one of the items reported stolen, was found in J.D.B.'s possession.).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2400.

<sup>17</sup> *J.D.B.*, 131 S. Ct. at 2400 (stating that only after J.D.B.'s admission did [Investigator] DiCostanzo "inform[] J.D.B. that he could refuse to answer the investigator's questions and that he was free to leave").

<sup>18</sup> *Id.* at 2401.

established in the cases following *Miranda*,<sup>19</sup> is whether a reasonable person in that individual's position would have understood that he or she was free to terminate questioning and leave the room.<sup>20</sup> In *Berkemer v. McCarty*,<sup>21</sup> the Court determined that such a test should be objectively applied, and that subjective factors—such as intelligence, age, and occupation—should not be taken into consideration.<sup>22</sup> The issue in *J.D.B.* was whether age should be a factor in the overall determination of whether a suspect knew that he was free to leave the location where the police questioning was being conducted.

In a five-four decision, the Court in *J.D.B.* held that the age of the suspect, while not necessarily a determinative factor, is crucial in determining whether the suspect knew he was free to leave while being interrogated by a police officer.<sup>23</sup> In a strongly worded opinion, Justice Sotomayor, writing for the Court,<sup>24</sup> stated that:

To hold, as the State requests, that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.<sup>25</sup>

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<sup>19</sup> See, e.g., *Thompson v. Keohane*, 516 U.S. 99, 113 (1995) (holding that the determination of whether an individual would understand that they were in custody or that they could terminate interrogation “presents a ‘mixed question of law and fact’ qualifying for independent review”); *Stansbury v. California*, 511 U.S. 318, 322 (1994) (holding that in order to determine whether a person was actually in custody, “a court must examine all of the circumstances surrounding the interrogation, but ‘the ultimate inquiry is simply whether there [was] a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest’ ” (alteration in original) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983))); *Illinois v. Perkins*, 496 U.S. 292, 297 (1990) (“Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will . . .”).

<sup>20</sup> *J.D.B.*, 131 S. Ct. at 2402 (citing *Thompson*, 516 U.S. 99).

<sup>21</sup> 468 U.S. 420 (1984).

<sup>22</sup> *Id.* at 442 n.35 (“[A]n objective, reasonable-man test is appropriate because . . . it ‘is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies [sic] of every person whom they question.’ ”).

<sup>23</sup> *J.D.B.*, 131 S. Ct. at 2406 (stating that consideration of a suspect's age “is consistent with the objective nature of [a custody analysis]”).

<sup>24</sup> Justice Sotomayor was joined by Justices Kennedy, Ginsburg, Breyer, and Kagan in the majority opinion. *Id.* at 2398.

<sup>25</sup> *Id.* at 2407.

The Court in *J.D.B.* explained that in cases such as this, “the custody analysis would be nonsensical absent some consideration of the suspect’s age.”<sup>26</sup> The Court concluded that a child in a similar position to *J.D.B.* would be much more likely to submit to police questioning, and much less likely to understand that he or she was free to leave than would an adult.<sup>27</sup> The Court observed that this was a “common-sense reality.”<sup>28</sup> The Court cited the *Brief for Center on Wrongful Convictions of Youth et al.*<sup>29</sup> in concluding that there exists a heightened risk of false confessions among minors, especially those in a position similar to *J.D.B.*’s.<sup>30</sup> The line between a truthful and false confession, the Court went on to state, is blurred even further due to the “inherently coercive nature of custodial interrogation.”<sup>31</sup> The police not only failed to tell *J.D.B.* that he was free to leave, but also did not provide him with the opportunity to call his legal guardian—his grandmother.<sup>32</sup>

The dissent emphasized that the holding of *J.D.B.* marks a point where the Court may have begun a slide down a slippery slope when it comes to determining whether someone would reasonably understand that he or she was in custody.<sup>33</sup> By including a consideration of the suspect’s age in such a custody analysis, the Court may have been opening the door to any variety of personal characteristics that could impact such a test.<sup>34</sup> Justice Alito proceeded to stress that since its inception, the criteria to determine whether one was in cus-

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<sup>26</sup> *Id.* at 2405.

<sup>27</sup> *Id.* at 2403 (“[A] reasonable child subjected to police questioning will sometimes feel pressured to submit [to interrogation] when a reasonable adult would feel free to go.”).

<sup>28</sup> *J.D.B.*, 131 S. Ct. at 2399.

<sup>29</sup> Brief for Center on Wrongful Convictions of Youth et al. as Amici Curiae Supporting Petitioner, *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2010 WL 5385329, at \*21 (collecting empirical studies that “illustrate the heightened risk of false confessions from youth”).

<sup>30</sup> *Id.*; *J.D.B.*, 131 S. Ct. at 2401.

<sup>31</sup> *J.D.B.*, 131 S. Ct. at 2401, 2403 (stating that young age and immaturity would increase the likelihood of a false confession).

<sup>32</sup> *Id.* at 2399.

<sup>33</sup> *Id.* at 2409 (Alito, J., dissenting) (stating that by allowing consideration of age in a custody analysis, “the Court will[, in the future,] be forced to choose between two unpalatable alternatives[:]” first, to “limit [its] decision [in *J.D.B.*] by arbitrarily distinguishing a suspect’s age from other personal characteristics,” or second, “to effect a fundamental transformation of the *Miranda* custody test . . . into a highly fact-intensive standard resembling the voluntariness test that the *Miranda* Court found to be unsatisfactory”).

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

tody were to be applied objectively, and, any subsequent subjective consideration would devalue and further obscure *Miranda*.<sup>35</sup>

Justice Alito's concern was that the Court's holding would dilute the clarity of *Miranda*—one of the chief justifications, the Justice claimed, for its existence.<sup>36</sup> By combining *Miranda*'s objective application with subjective considerations, it was questioned whether there is any longer any justification for *Miranda* itself. “[U]nless the *Miranda* custody rule is . . . to be radically transformed into one that . . . account[s for] the wide range of individual characteristics that are relevant in determining whether a confession is voluntary, the Court must shoulder the burden of explaining why age is different [and deserves consideration apart] from these other personal characteristics.”<sup>37</sup>

### III. EFFECTIVE ASSISTANCE OF COUNSEL AND PETITIONS FOR HABEAS CORPUS

In the 2010 Term, the U.S. Supreme Court reviewed a number of habeas corpus cases involving claims of ineffective assistance of counsel.<sup>38</sup> A common theme resonated from each of these: there will be a reduction of federal review of criminal convictions, which occurred in the state courts.<sup>39</sup>

In *Cullen v. Pinholster*,<sup>40</sup> the defendant was convicted of first degree murder and sentenced to the death penalty.<sup>41</sup> In 1982, the defendant, Scott Pinholster, and two accomplices, were involved in a robbery at the home of a local drug dealer.<sup>42</sup> After they broke into the home and ransacked the place, two friends of the drug dealer un-

<sup>35</sup> *Id.* at 2415 (“If the Court chooses [to extend its holding in *J.D.B.*], then a core virtue of *Miranda*—the ‘ease and clarity of its application’—will be lost.” (quoting *Moran v. Burbine*, 475 U.S. 412, 425 (1986))).

<sup>36</sup> *J.D.B.*, 131 S. Ct. at 2415.

<sup>37</sup> *Id.* at 2414.

<sup>38</sup> *See Pinholster*, 131 S. Ct. 1388; *Moore*, 131 S. Ct. 733; *Richter*, 131 S. Ct. 770.

<sup>39</sup> *See Pinholster*, 131 S. Ct. at 1398 (“We now hold that [federal habeas] review . . . is limited to the record that was before the state court that adjudicated the claim on the merits.”); *Moore*, 131 S. Ct. at 742 (“[S]ubstantial deference must be accorded to counsel’s judgment.”); *Richter*, 131 S. Ct. at 785 (“A state court must be granted deference and latitude . . .”).

<sup>40</sup> 131 S. Ct. 1388 (2011).

<sup>41</sup> *Id.* at 1396.

<sup>42</sup> *Id.* at 1394.



expectedly arrived on the scene.<sup>43</sup> After the friends threatened to call the police, Pinholster used a buck knife and repeatedly stabbed both men in the chest.<sup>44</sup> Pinholster robbed the victims, kicked one of them many times in the head, and left the scene.<sup>45</sup> Both men died from their injuries.<sup>46</sup> The proceeds of the robbery were twenty-three dollars and a quarter ounce of marijuana.<sup>47</sup> Two weeks after the crime, one of Pinholster's accomplices turned himself into the police and turned state witness;<sup>48</sup> Pinholster was ultimately found guilty of two counts of first-degree murder.<sup>49</sup> Subsequently, Pinholster exhausted all state remedies for review of his conviction.<sup>50</sup>

There are potentially two separate stages in the prosecution of death penalty cases: the guilt phase and the penalty phase.<sup>51</sup> During

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1394-95.

<sup>45</sup> *Pinholster*, 131 S. Ct. at 1395.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Pinholster*, 131 S. Ct. at 1395.

<sup>51</sup> *Id.*; see also *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (per curiam). *Furman* is the seminal case which temporarily stopped all death penalty sentencing and executions in the United States, because certain state death penalty laws created an arbitrary manner in which death was imposed. The Court in *Furman* held that the "carrying out of the death penalty in these cases constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S. at 240; see *id.* at 310 (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); cf. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). In *Gregg*, the case that re-established death penalty sentencing in the United States, the Court stated that:

*Furman* did not hold that the infliction of the death penalty Per se violates the Constitution's ban on cruel and unusual punishments . . . . Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

*Gregg*, 428 U.S. at 188; see *id.* at 191-92 ("When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*."); *id.* at 206 ("The new . . . sentencing procedures . . . focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. [T]he jury is permitted to consider any aggravating or mitigating circumstances."); *id.* at 207 ("[W]e hold that the statutory system under which *Gregg* was sentenced to death does not violate the Constitution.").

the guilt phase, the jury's responsibility is to make the determination as to whether the defendant is guilty of the murder with which he is charged.<sup>52</sup> If guilt is found, then the penalty phase begins.<sup>53</sup> At the penalty phase, the job of the same jury is to determine whether the aggravating factors related to the defendant and to the nature of the crime outweigh any possible mitigating factors.<sup>54</sup> An aggravating circumstance is a factor that increases "the degree of moral culpabili-

<sup>52</sup> *Pinholster*, 131 S. Ct. at 1395.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1395-96; *see also* *Kansas v. Marsh*, 548 U.S. 163, 181 (2006) (stating the Court held that a "capital sentencing system, which directs the imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise, is constitutional"). The facts established that Michael Marsh broke into the unoccupied home of the Marry Ane Pusch. *Marsh*, 548 U.S. at 166. Upon her return, Marsh repeatedly shot her and slashed her throat. *Id.* Marsh set fire to the home, and Ms. Pusch's 19-month-old daughter was burned to death. *Id.* ("The jury found beyond a reasonable doubt the existence of . . . aggravating circumstances, and that those circumstances were not outweighed by any mitigating circumstances.").

[Here the State] bears the additional burden of proving beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances. [T]he defendant appropriately bears the burden of proffering mitigating circumstances—a burden of production—he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence.

*Id.* at 178-79. *See generally* Brief for Petitioner, *Kansas v. Marsh*, 548 U.S. 163 (2006) (No. 04-1170) 2005 WL 3157602, at \*18-19. In the brief, the petitioner states:

Arizona's capital sentencing law . . . operates in functionally the same manner as the Kansas law. Idaho's law is likewise differently worded, but similar in function. [S]ome states have adopted capital sentencing laws with different weighing equations [those states include Ohio and Indiana]. And other states, including Texas, have chosen to adopt capital sentencing systems with no weighing equation whatsoever . . . yet this Court has found it to be constitutional.

*Id.*; Brief for Petitioner as Amici Curiae in Supporting Petitioner, *Kansas v. Marsh*, 548 U.S. 163 (2006) (No. 04-1170) 2005 WL 1986025, at \*2 ("[N]umerous States . . . do not currently require any weighing of aggravating and mitigating factors [those states include Georgia, Louisiana, South Carolina, South Dakota, Texas, Virginia, and Washington]."); *see also* *Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990) ("The presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury."). The Court has held only that a sentencer must consider any mitigating factors and has "emphasized the need for a broad inquiry into all relevant mitigating evidence . . . [and the State must] not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998).

ty or blame” of the defendant in regards to the murder committed.<sup>55</sup> A mitigating circumstance decreases “the degree of moral culpability of blame” and “fairness or mercy may be considered” to “justify a sentence of less than death” for a defendant in a capital crime case.<sup>56</sup> The Court has determined that a statute that limits or prevents a jury from considering any and all mitigating factors which are offered by the defense “creates [a] risk the death penalty will be imposed” and that risk is incompatible with the requirements of the Fourteenth and Eight Amendments.<sup>57</sup> If aggravators outweigh, or are in equipoise with, mitigators, the jury is allowed to impose the death penalty.<sup>58</sup>

In *Pinholster*, the claim was the defendant was not provided the effective assistance of counsel<sup>59</sup> in that defendant’s counsel failed to take necessary steps to address the mitigating issues to the jury.<sup>60</sup> Specifically, the defense attorney had never mentioned the defendant’s existing medical records.<sup>61</sup> Therefore, jurors were not exposed to any expert testimony regarding the defendant’s epileptic condition, incidents of head trauma received from two automobile accidents, nor the fact that as a twelve-year-old he was sent to a mental institution.<sup>62</sup>

The Supreme Court of California upheld the death penalty,<sup>63</sup>

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<sup>55</sup> See *Marsh*, 548 U.S. at 176; see also *Ring v. Arizona*, 536 U.S. 584, 593 (2002) (stating that some examples of aggravating circumstances might include a defendant: “knowingly create[ing] a grave risk of death to another person or persons in addition to” the murdered victim during the offense, receiving money for the commission of a murder, committing the offense “in an especially heinous, cruel or depraved manner,” and committing the offense while in custody or on probation). Other aggravating factors could pertain to age of victim, for example, under fifteen or over seventy-five years old, or the number of victims, or the profession of the victim, for example, a law enforcement officer or a judge, and any prior convictions of the defendant. *Ring*, 536 U.S. at 593.

<sup>56</sup> See *Marsh*, 548 U.S. at 176; see also *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The Court held that:

[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

*Lockett*, 438 U.S. at 604 (emphasis in original).

<sup>57</sup> *Id.* at 605.

<sup>58</sup> *Pinholster*, 131 S. Ct. at 1396; see also *Marsh*, 548 U.S. at 179-80.

<sup>59</sup> *Pinholster*, 131 S. Ct. at 1396.

<sup>60</sup> *Id.* (stating defense counsel “failed to adequately investigate and present mitigating evidence, including evidence of mental disorders”).

<sup>61</sup> *Id.* at 1395.

<sup>62</sup> *Id.* at 1409.

<sup>63</sup> *Id.* at 1397.

and, accordingly, the defendant sought habeas corpus relief in the federal system.<sup>64</sup> The District Court proceeded to conduct a hearing where new psychiatric evidence was introduced.<sup>65</sup> The evidence indicated that the defendant had a record of serious mental problems.<sup>66</sup> The District Court granted the habeas relief petition “for inadequacy of counsel by failure to investigate and present mitigation evidence at the penalty hearing.”<sup>67</sup> In an en banc decision, the Ninth Circuit confirmed the overturning of the death penalty based upon ineffective assistance of counsel.<sup>68</sup> However, the Supreme Court granted certiorari and a habeas review was conducted under 28 U.S.C. § 2254(d),<sup>69</sup> as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).<sup>70</sup>

The Supreme Court determined that its review would be strictly limited to what had been presented at the California state court level.<sup>71</sup> The consideration of the new evidence by the District Court and the Ninth Circuit was labeled as inappropriate.<sup>72</sup> The evidence presented to the California Supreme Court and that court’s de-

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<sup>64</sup> *Pinholster*, 131 S. Ct. at 1397.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (stating expert medical witnesses testified the defendant suffered from “organic personality syndrome” and “epilepsy and brain injury”).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (“Taking the District Court evidence into account, the en banc court determined that the California Supreme Court unreasonably . . . den[ie]d Pinholster’s claim of penalty-phase ineffective assistance of counsel.”).

<sup>69</sup> 28 U.S.C. § 2254(d) (2006). § 2254(d) reads as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(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.

*Id.*

<sup>70</sup> *Pinholster*, 131 S. Ct. at 1398; *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

<sup>71</sup> *Pinholster*, 131 S. Ct. at 1398 (“We now hold that review . . . is limited to the record that was before the state court that adjudicated the claim on the merits.”).

<sup>72</sup> *Id.* at 1401 (“[W]e conclude that the Court of Appeals erred in considering the District Court evidence in its review . . .”).

cision on the matter based on that evidence is all that should be reviewed.<sup>73</sup> AEDPA requires overturning a conviction or a sentence only if the sentence or the conviction was found to be unreasonable,<sup>74</sup> and a high degree of deference is to be given to the state court.<sup>75</sup> The role of the federal court is only to review a state court's decision as of the time it was made.<sup>76</sup> Therefore, a very high level of deference is required to be given to the state court's holding as to the effectiveness and competency of the defense attorney in this matter.<sup>77</sup>

The crucial case that governs claims based on ineffective assistance of counsel has been *Strickland v. Washington*.<sup>78</sup> The first part of the *Strickland* decision requires the courts to be deferential to an attorney's strategic choices.<sup>79</sup> In a claim of ineffective assistance of counsel, competence shall be presumed.<sup>80</sup> In *Pinholster*, the Court again re-emphasized that the courts are to be highly deferential in determining whether or not an attorney was effective.<sup>81</sup> The holding, furthermore, highlights an apparent need for what can be classified as a doubly highly deferential standard.<sup>82</sup> A state court is to be highly deferential when it reviews whether counsel was effective,<sup>83</sup> and this

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<sup>73</sup> *Id.* at 1398 (“[R]eview is limited to the record that was before the state court that adjudicated the claim on the merits. [The defendant] contends that evidence presented to the federal habeas court may also be considered. We agree with the State.”).

<sup>74</sup> *Id.* at 1402 (“In these circumstances, [the defendant] can satisfy the ‘unreasonable application prong’ . . . only by showing that ‘there was no reasonable basis’ for the California Supreme Court’s decision.” (quoting *Richter*, 131 S. Ct. at 784)).

<sup>75</sup> *Id.* at 1398 (stating there is a “‘highly deferential standard for evaluating state-court rulings’” (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002))).

<sup>76</sup> *Pinholster*, 131 S. Ct. at 1399 (“Limiting . . . review to the state-court record is consistent with our precedents . . .”).

<sup>77</sup> *Id.* at 1403 (“[C]ounsel should be ‘strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment . . .’” (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984))).

<sup>78</sup> 466 U.S. 688 (1984).

<sup>79</sup> *Id.* at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential.”).

<sup>80</sup> See *Pinholster*, 131 S. Ct. at 1403. But see Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1477 (1999). The *Strickland* opinion has been widely criticized as one which has allowed many convictions to be upheld in spite of the clear incompetence of defense counsel.

<sup>81</sup> *Pinholster*, 131 S. Ct. at 1407 (“*Strickland* specifically commands that a court ‘must indulge [the] strong presumption’ that counsel ‘made all significant decisions in the exercise of reasonable professional judgment.’” (quoting *Strickland*, 466 U.S. at 689-90)).

<sup>82</sup> *Id.* at 1403 (“Our review of the California Supreme Court’s decision is thus ‘doubly deferential.’” (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009))).

<sup>83</sup> See, e.g., *id.* at 1402 (stating that the California Supreme Court denied each petition as

is followed by the federal courts acting in a highly deferential manner in the assessment of the state court's decision.<sup>84</sup> The double deferential standard governs the Supreme Court's review of ineffectiveness claims; Justice Thomas's decision was very clear: "[o]ur review . . . is thus 'doubly deferential.'"<sup>85</sup>

In *Pinholster*, the main issue was whether the Ninth Circuit acted improperly in considering new evidence not presented during the trial.<sup>86</sup> In a very forceful dissent, Justice Sotomayor, joined in part by Justices Ginsburg and Kagan, chastised the Court's decision.<sup>87</sup> In Sotomayor's view, the majority held that even if it is abundantly clear that a defendant would be entitled to habeas relief due to new evidence being brought to the attention of a federal district court, the courts are to turn a blind eye to it.<sup>88</sup> The reasoning for the failure to provide relief would be that the new evidence was not presented before the state court at the time at which the state court's decision was determined.<sup>89</sup> Sotomayor suggests possible impropriety in the Court's holding; she wrote, "[T]he majority omits critical details relating to the performance of [the] trial counsel, the mitigating evidence they failed to discover, and the history of these proceedings."<sup>90</sup> She concludes by highlighting the fact that the trial lawyer did virtually no investigation in the death penalty case and never looked into what would be the most significant factors to raise in possible mitigation.<sup>91</sup>

The new evidence revealed in the federal district court hear-

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having no merits).

<sup>84</sup> See *id.* at 1398 (stating a "highly deferential standard for evaluating state-court rulings, which demands that the state-court decisions be given the benefit of the doubt." (quoting *Woodford*, 537 U.S. at 24)).

<sup>85</sup> *Id.* at 1403 (quoting *Knowles*, 556 U.S. at 123).

<sup>86</sup> *Pinholster*, 131 S. Ct. at 1397 (stating the Court of Appeals "determined that new evidence from the hearing could be considered").

<sup>87</sup> *Id.* at 1413 (Sotomayor, J., dissenting) (stating "[t]his holding is unnecessary . . . and it is inconsistent with . . . our precedents.").

<sup>88</sup> *Id.* ("[F]ederal courts must turn a blind eye to new evidence in deciding whether a petitioner has satisfied . . . [a] threshold obstacle to federal habeas relief – even when it is clear that the petitioner would be entitled to relief in light of that evidence.").

<sup>89</sup> *Id.* (stating the "analysis is limited to the state-court record").

<sup>90</sup> *Id.* at 1422.

<sup>91</sup> *Pinholster*, 131 S. Ct. at 1435 ("[T]he evidence confirmed what was already apparent from the state-court record: [the defense] counsel failed to conduct an adequate mitigation investigation . . .").

ing raised important issues that sharply contrasted with the evidence heard by the jury which was determining whether there was any possible mitigation.<sup>92</sup> There were new revelations that the defendant suffered organic brain damage, mental disease, childhood beatings, abandonment, and a family history filled with violence and mental illness.<sup>93</sup> Additional facts which were revealed included information that a psychiatrist had recommended shortly before the murder that had taken place that the defendant be admitted to a psychiatric facility because he was diagnosed as suffering from severe psychosis.<sup>94</sup> This type of evidence certainly has the potential of being highly significant.<sup>95</sup> Historically in death penalty cases, when a jury assesses mitigating factors the existence of a mental disorder may lead jurors to find the defendant less culpable, and therefore not as responsible for the murder, because of the debilitating effects associated with mental illness.<sup>96</sup>

Another decision of the Court which involved a habeas corpus matter, *Premo v. Moore*,<sup>97</sup> shifted focus to the plea bargaining arena and also involved an ineffective counsel claim.<sup>98</sup> In December of 1995, the defendant, Randy Moore, and two accomplices attacked Kenneth Rogers<sup>99</sup> by assaulting him in his home and tying him up with duct tape.<sup>100</sup> Moore and his two accomplices threw Rogers in a car truck and drove to a desolate area in the Oregon countryside.<sup>101</sup>

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<sup>92</sup> *See id.* (“The additional evidence presented at the hearing only confirmed that the California Supreme Court could not reasonably have rejected [the defendant’s] claim.”).

<sup>93</sup> *Id.* at 1434 (stating expert testimony included the defendant suffering from “childhood head traumas, history of epilepsy, abusive and neglected upbringing, history of substance abuse, and bizarre behavior” and “antisocial personality disorder”).

<sup>94</sup> *Id.* at 1425 (“Just months before the homicides, a doctor recommended placement in the Hope Psychiatric Institute, but this did not occur.”).

<sup>95</sup> *Id.* at 1432 (“[I]t was especially important for counsel to present the available evidence to help the jury understand [the defendant].”).

<sup>96</sup> *See Pinholster*, 131 S. Ct. at 1433 (“[I]t is not a foregone conclusion, as the majority deems it, that a juror familiar with [the defendant’s] troubled background and psychiatric issues would have reached the same conclusion regarding [the defendant’s] culpability.”).

<sup>97</sup> 131 S. Ct. 733 (2011).

<sup>98</sup> *Id.* at 738 (“The instant case . . . concerns the adequacy of representation in providing an assessment of a plea bargain without first seeking suppression of a confession assumed to have been improperly obtained.”).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

Upon arriving at the isolated area, it was maintained that Moore shot Rogers in the temple and killed him.<sup>102</sup> Moore told the police that he only wanted to scare Rogers;<sup>103</sup> the plan was to leave Rogers in an unknown area and force him to walk home alone.<sup>104</sup> Moore claimed he took the gun from one of his accomplices,<sup>105</sup> and at the time Moore grabbed the gun, Rogers “slipped backwards in the mud and the gun discharged.”<sup>106</sup>

The defendant’s lawyer advised his client to take a plea of three hundred months to a felony murder charge.<sup>107</sup> The defense lawyer had not engaged in any attempt to have the defendant’s confession or previous statement to a police officer held to be inadmissible.<sup>108</sup> Instead, the lawyer completely bypassed such motion and simply advised the defendant to enter the plea.<sup>109</sup> The defendant did,

<sup>102</sup> *Moore*, 131 S. Ct. at 738.

<sup>103</sup> *Id.*; see Brief for Respondent, *Premo v. Moore*, 131 S. Ct. 733 (2011) (No. 09-658) 2010 WL 3251630, at \*2 (“[T]he prosecutor stated at Mr. Moore’s sentencing, after Rogers had burglarized the home of a mutual friend, Moore and several other men ‘were going to take [Rogers] out into the woods, release him and let him walk home, basically, to put the fear of God in him at least.’” (second alteration in the original)).

<sup>104</sup> *Moore*, 131 S. Ct. at 738.

<sup>105</sup> *Id.*; see Brief for the Respondent, *supra* note 103, at \*2 (“While walking up [a] hill, one of the other men fell in the mud. Mr. Moore took the gun.”).

<sup>106</sup> *Moore*, 131 S. Ct. at 738; see Brief for the Respondent, *supra* note 103, at \*2 (“Shortly after, Rogers slipped and fell into Mr. Moore and the gun discharged, killing Rogers.”).

<sup>107</sup> *Moore*, 131 S. Ct. at 738; see also Brief for the Respondent, *supra* note 103, at \*3.

Two days after the shooting, Mr. Moore went to the police station with his half-brother, Lonnie Woolhiser (the man who fell first on the hill), his brother, Raymond, and his half-brother’s girlfriend, Debbie Zeigler. Either on the ride or before, Mr. Moore told Raymond and Zeigler something about the incident. When questioned by the police, Mr. Moore placed himself at the scene, admitted his participation in taking Rogers to the hill, and described the shooting accident. This tape-recorded statement was obtained through promises of leniency and after the police ignored Mr. Moore’s request for counsel.

Mr. Moore’s attorney failed to recognize that the police had unconstitutionally obtained the statement and did not move for its suppression.

Shortly after entering his plea of *nolo contendere*, Mr. Moore decided to seek to withdraw it, but was talked out of those efforts.

*Id.*

<sup>108</sup> *Moore*, 131 S. Ct. at 740 (“The question becomes whether [the defendant’s] counsel provided ineffective assistance by failing to seek suppression of [the defendant’s] confession to police before advising [the defendant] regarding the plea.”).

<sup>109</sup> *Id.* at 738 (stating defense lawyer did “not file[ ] a motion to suppress [the] confession



upon the advice of counsel, enter a plea of no contest to the charges.<sup>110</sup> Subsequently, the defendant filed a claim that the defense attorney provided ineffective assistance of counsel.<sup>111</sup> The basis for the petition was that the lawyer did not pursue a challenge to the confession or the statement to the police officer.<sup>112</sup> The petition alleged that there were some very legitimate challenges to the defendant's statement to the police that could have and should have been pursued.<sup>113</sup> The failure of the lawyer to have engaged in what could have proven to be a crucial pretrial motion, was claimed to constitute ineffective assistance of counsel.<sup>114</sup>

The Ninth Circuit granted the defendant's petition for habeas corpus relief.<sup>115</sup> The court held the state court's conclusion that the defense lawyer did not act ineffectively was unreasonable.<sup>116</sup> The Ninth Circuit held Moore's taped confession to the police was highly damaging and unconstitutionally obtained, therefore, defense counsel's failure to suppress the confession did not meet an "objective standard of reasonableness" and "constituted deficient performance" of counsel.<sup>117</sup> The Supreme Court granted certiorari, Justice Kennedy wrote the majority opinion.<sup>118</sup> Kennedy relied on the *Strickland* declaration that courts have a limited role in assessing a lawyer's compe-

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to police in advance of the . . . advice that [the defendant] considered before accepting the plea").

<sup>110</sup> *Id.* (stating defendant "agreed to plead no contest to felony murder in exchange for a sentence of 300 months").

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Moore*, 131 S. Ct. at 742 (stating the defendant's claim "that it was an accident when he shot the victim").

<sup>114</sup> *See id.* at 738. Defense "[c]ounsel . . . justified his decision by asserting that any motion to suppress was likely to fail." *Id.* at 741.

<sup>115</sup> *Id.* at 739.

<sup>116</sup> *Id.* ("In [the Ninth Circuit's] view[,] the state court's conclusion that counsel's action did not constitute ineffective assistance was an unreasonable application of clearly established law.").

<sup>117</sup> *Moore v. Czerniak*, 574 F.3d 1092, 1102 (9th Cir. 2009); *id.* at 1104 ("[T]he confession unconstitutionally obtained by the police was so critical to the prosecution and so damaging to Moore . . ."); *id.* at 1107 ("[T]he [S]tate has conceded that a motion to suppress Moore's confession would have succeeded. Further, Moore's counsel did not 'reasonably' reach his erroneous conclusion [not to file a motion to suppress], as he was entirely ignorant of the relevant law.").

<sup>118</sup> *Moore*, 131 S. Ct. at 737-39.

tence.<sup>119</sup> The opinion emphasized that lawyers must have the freedom to engage in strategic choices and the ability to make tactical decisions.<sup>120</sup> Therefore, the courts should substantially defer to the course of action a lawyer opted to take.<sup>121</sup> A particular concern that might well arise from the *Moore* holding is that the Supreme Court seemed willing to sacrifice a meaningful examination of the effective assistance of counsel claim in the Court's desire for finality.<sup>122</sup> The Court expressed the desirability and needs of the criminal justice system for the plea bargaining process, and that pleas were presumed to be conclusive.<sup>123</sup>

In *Hill v. Lockhart*,<sup>124</sup> the Court held that the two-part *Strickland* test is to apply to challenges to plea bargain guilty pleas based upon claims of ineffective assistance of counsel.<sup>125</sup> The first-part of the test is based upon an assessment of attorney competence.<sup>126</sup> The second-part of the test is a “ ‘prejudice’ ” requirement which focuses on whether the ineffective assistance of counsel “affected the outcome of the plea process.”<sup>127</sup> For example, if an attorney failed to uncover exculpatory evidence, the determination of “whether the er-

<sup>119</sup> *Id.* at 741 (“[H]abeas courts must respect their limited role in determining whether there was manifest deficiency in light of information then available to counsel.”) (citing *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)).

<sup>120</sup> *Id.* (“Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.”).

<sup>121</sup> *Id.* at 740 (“[T]he standard for judging counsel’s representation is a most deferential one.”).

<sup>122</sup> *Id.* at 742 (“The prospect that a plea deal will afterwards be unraveled when a court second-guesses counsel’s decisions . . . could lead prosecutors to forgo plea bargains that would benefit defendants, a result favorable to no one.”).

<sup>123</sup> *Moore*, 131 S. Ct. at 742 (“Prosecutors must have assurances that a plea will not be undone years later.”).

<sup>124</sup> 474 U.S. 52 (1985).

<sup>125</sup> *Id.* at 58.

<sup>126</sup> *Id.*; see *Strickland*, 466 U.S. at 690 (stating counsel should be “strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment”). But see *Hill*, 474 U.S. at 62 (White, J., concurring) (“The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis adopted by the majority, as such an omission cannot be said to fall within ‘the wide range of professionally competent assistance’ demanded by the Sixth Amendment.” (quoting *Strickland*, 466 U.S. at 690)).

<sup>127</sup> *Hill*, 474 U.S. at 59; see *id.* (“In other words, in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”).

ror ‘prejudiced’ the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea.”<sup>128</sup> This assessment objectively depends on “whether the evidence likely would have changed the outcome of the trial.”<sup>129</sup> The same assessment would be made concerning a defense which could have possibly been raised at trial and whether the “defense[s] likely would have succeeded at trial.”<sup>130</sup> Since the analysis is derived from the *Strickland* test, it has proven quite difficult for a defendant to meet the requirements or burden necessary to have a plea bargain overturned for ineffective assistance of counsel.<sup>131</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* In March of 2012, the Court greatly expanded the application of the Sixth Amendment right to other situations involving plea bargaining. In recognizing the vital role that plea bargaining has in the criminal justice system, the Court declared that the entry of pleas constituted a “critical stage” of the prosecution and therefore the right to counsel attached. *Missouri v. Frye*, No. 10–444, 2012 WL 932020, at \*6-7 (U.S. March 21, 2012). In *Missouri v. Frye*, the defense counsel had failed to inform his client that the prosecutor had offered a plea deal entailing a recommended sentence of ninety days. *Id.* at \*3. After the offer had expired, and after once again the defendant had been charged with driving with a revoked license, the defendant pled guilty and received a sentence of three years. *Id.* at \*3-4. The Court applied the *Strickland* test and determined that the lawyer was deficient in failing to inform his client of the offer, and that the defendant had been prejudiced. *Id.* at \*9-11. The prejudice determination had two aspects: (1) would the defendant have accepted the plea offer had he known of it, and (2) would the court have abided by the plea deal. *Id.* at \*9-10. In *Lafler v. Cooper*, counsel had incorrectly informed his client that, were he to go to trial on the attempted murder charge, he could not be convicted because the bullet that was fired had hit the victim below the waist. No. 10-209, 2012 WL 932019, at \*3 (U.S. March 21, 2012). The pretrial offer by the prosecutor was for a sentence of 51-85 months; the sentence given by the court after trial was 185-360 months. *Id.* The Supreme Court held that the incorrect advice by counsel constituted inadequate representation and that the defendant had indeed been prejudiced. *Id.* at \*12.

<sup>131</sup> Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1367-68 (2004).

[T]he [Supreme] Court emphasized [in *Hill*] that because the vast majority of criminal convictions arise from guilty pleas, the need for finality in judgment [is] particularly great. . . . The standard set forth in *Hill* for a defendant to successfully challenge a plea bargain is an exceptionally demanding one. Once the defendant has entered the guilty plea[,] there will ordinarily be no appellate review of counsel’s preparation of the case. [An] overburdened [defense attorney] knows, therefore, that if his client pleads guilty, counsel will not be examined as to what investigation or preparation he may have done or failed to have done on his client’s case.

*Id.*

The *Moore* opinion reinforced the idea that pleas bring “to the criminal justice a stability and a certainty that must not be undermined . . . .”<sup>132</sup> The Court emphasized that “[h]indsight and second guesses are also inappropriate, and more often so, where a plea has been entered without a full trial . . . .”<sup>133</sup> The decision again relies on double deference and Justice Kennedy found that such deference is highly significant in light of the uncertainty inherent in plea negotiations.<sup>134</sup> The Court declared that “[t]here is a most substantial burden . . . to show ineffective assistance” in cases involving the entrance of a plea.<sup>135</sup> There are several levels of deference at play here: the federal courts are to have a limited role in reviewing what transpired at the state level; deference ought to be given due to the system’s need for finality; and there should be an overall reluctance to find that the lawyer who recommended acceptance of the plea was ineffective.<sup>136</sup>

In *Harrington v. Richter*,<sup>137</sup> the Supreme Court granted certiorari following a reversal by the Ninth Circuit of the denial of defendant’s petition for a writ habeas corpus by the state supreme court and federal district court.<sup>138</sup> The defendant asserted, among other grounds, that his attorney was ineffective in his assistance at trial.<sup>139</sup>

Defendant Richter was among four individuals who had been smoking marijuana at the home of one of the men, Joshua Johnson.<sup>140</sup> Officers were later called to the house by Johnson who alleged that Richter and another man appeared in his bedroom when he awoke from his sleep.<sup>141</sup> Johnson was shot by the other man, and Richter shot the fourth person, who was still in the living room.<sup>142</sup> The two assailants proceeded to steal Johnson’s pistol and \$6,000 cash.<sup>143</sup> Evidence found at the scene, including shell casings, pools of blood,

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<sup>132</sup> *Moore*, 131 S. Ct. at 745.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 745-46 (stating that pleas exist to provide “stability and a certainty” and should not be emasculated by federal review absent unreasonable action at the state level).

<sup>137</sup> 131 S. Ct. 770 (2011).

<sup>138</sup> *Id.* at 783.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 781.

<sup>141</sup> *Id.*

<sup>142</sup> *Richter*, 131 S. Ct. at 781.

<sup>143</sup> *Id.*

and blood spatters, corroborated Johnson's claims and was used at trial to convict Richter.<sup>144</sup>

At trial, the district attorney had called two expert witnesses who testified in regard to whose blood was found at the scene of the crime, a matter which was essential to the defendant's claim of self-defense.<sup>145</sup> Defense counsel did not present a single expert witness of his own to challenge or refute the prosecution's experts.<sup>146</sup> The defendant was convicted of murder and sentenced to life in prison without parole.<sup>147</sup>

The defendant's writ of habeas corpus to the California Supreme Court asserted ineffective assistance of counsel and was accompanied by affidavits from several experts including a blood serologist, pathologist, and a bloodstain analyst.<sup>148</sup> It was claimed that these affidavits showed that the location and content of the blood pools, as well as the lack of "satellite droplets" present, meant that the defendant's account of the conflict was the most truthful and such affidavits would solidify his claim of self-defense.<sup>149</sup> The California Supreme Court summarily denied the writ in a single sentence summary order.<sup>150</sup> The defendant then filed a petition for habeas corpus with the United States District Court for the Eastern District of California asserting the same claims.<sup>151</sup> Again, the writ was denied.<sup>152</sup> The Ninth Circuit Court of Appeals initially affirmed the district

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<sup>144</sup> *Id.* at 781-82 ("Blood evidence [d[id] not appear to have been part of the prosecution's planned case prior to trial, . . . [b]ut the opening statement from the defense[, which highlighted the blood evidence as supporting a claim of self-defense,] led the prosecution to alter its approach.").

<sup>145</sup> *Id.* at 782.

<sup>146</sup> *Id.* at 783 (Defendant "claimed his counsel was deficient for failing to present expert testimony on serology, pathology, and blood spatter patterns . . . [which] he argued would disclose the source of the blood pool in the bedroom doorway," a fact which would have supported his claim of self-defense.).

<sup>147</sup> *Richter*, 131 S. Ct. at 782.

<sup>148</sup> *Id.* at 783.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*; Phone Interview by Daniel Fier with Cliff Gardner, Esq., attorney for defendant Richter (Feb. 29, 2012) ("The California Supreme Court's summary order simply stated that the defendant's petition for writ of habeas corpus was denied.").

<sup>151</sup> *Richter v. Hickman*, No. S-01-CV-0643-JKS, S-01-CV-0963-JKS, 2006 WL 769199 (E.D.Cal. March 24, 2006).

<sup>152</sup> *Id.* at \*15 (holding that the defendants' claims of ineffective assistance of counsel fail to meet the burden imposed by the Court's holding in *Strickland* and are therefore denied).

court's decision to deny the petition.<sup>153</sup> Defendant subsequently filed a petition for a rehearing and the Court of Appeals in an en banc hearing reversed its earlier decision.<sup>154</sup>

The Supreme Court reviewed the case in order to determine whether the state court's order was an unreasonable adjudication on the case's merits, thereby triggering 28 U.S.C. § 2254(d),<sup>155</sup> as amended by the AEDPA, and, additionally, if the state court incorrectly applied the standard outlined in *Strickland*.<sup>156</sup> In the Court's majority opinion, Justice Kennedy concluded that even though a one sentence summary order<sup>157</sup> makes it difficult to determine whether there was a reasonable and final determination of the case on the merits, the burden is that of the habeas petitioner to show that the state court had "no reasonable basis . . . to deny relief."<sup>158</sup> The Court's opinion emphasized that courts are entitled and enabled to "concentrate [their] resources on the cases where opinions are most needed," and, therefore, a single sentence summary order can be fully sufficient to imply an adequate reasonable basis for denying relief under § 2254(d).<sup>159</sup>

The Court also concluded that even when there exists a strong case for habeas relief, it does not directly imply that the state court's conclusion to the contrary was unreasonable under the AEDPA.<sup>160</sup>

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<sup>153</sup> See *Richter v. Hickman*, 521 F.3d 1222, 1238 (9th Cir. 2008) (holding that there was no constitutional error at the trial court level which would have resulted in a different outcome, and, therefore, the petition should be denied).

<sup>154</sup> *Richter*, 131 S. Ct. at 783; see *Richter v. Hickman*, 578 F.3d 944, 947 (9th Cir. 2009) (holding that defense counsel's failure to present expert testimony to refute the State's experts represented ineffective assistance of counsel and, therefore, the denial of the petition by the district court should be reversed).

<sup>155</sup> See 28 U.S.C. § 2254(d).

<sup>156</sup> *Richter*, 131 S. Ct. at 783-85.

<sup>157</sup> See *supra* information accompanying note 150.

<sup>158</sup> *Richter*, 131 S. Ct. at 784; see also *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (holding that habeas relief is appropriate in cases where it can be shown that the court's decision was made "contrary to, or involved an unreasonable application of, clearly established Federal law"); *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) (stating that a reasoned judgment issued by the state court need not explain every detail of its decision and that the habeas petitioner must demonstrate that the state court's decision was unreasonable or not made on the merits).

<sup>159</sup> *Richter*, 131 S. Ct. at 784 (stating that the avoidance of "collateral attack[s] in federal court" does not, contrary to defendant's assertion, comprise all the conditions of which the court considers when writing its opinions).

<sup>160</sup> *Id.* at 786 (referencing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)).

The habeas corpus petition does not exist as a secondary remedy for the correction of state court holdings, but rather, to protect the petitioner against “extreme malfunctions” in the judicial process.<sup>161</sup> For those reasons, the standard that exists for federal courts to grant habeas relief is a substantial one that is difficult to meet.<sup>162</sup>

The defendant’s claim for habeas relief based upon the ineffective assistance of defense counsel depends upon whether counsel gave deficient assistance and if the resulting outcome was prejudiced due to counsel’s actions or inactions.<sup>163</sup> The Court, once again, emphasized that lawyers are to be given substantial leeway in the strategic and tactical decisions they make, and that a high level of deference is appropriate.<sup>164</sup> In its review of the case, the Court determined that even given the failure of defense counsel to call his own expert witnesses, there was nothing to indicate that his performance and assistance was “deficient under *Strickland*,” and, therefore, the state court acted correctly in its utilization of *Strickland*.<sup>165</sup> The Court observed that a battle of the experts is not always necessary for the adequate representation of a defendant and that, in this case, defense counsel skillfully and appropriately represented his client, utilizing mechanisms such as cross-examination to defeat some points of the state’s expert witnesses.<sup>166</sup> Since the state court’s application of the standards for assessing possible ineffective assistance of counsel was appropriate, the Court held that the Ninth Circuit erred in reversing the district court’s decision.<sup>167</sup>

The Supreme Court reviewed a fourth significant case involv-

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (“As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings.”); see *Renico v. Lett*, 130 S. Ct. 1855, 1866 (2010) (holding that an incorrect ruling by a state court does not necessarily render that decision unreasonable pursuant to § 2254(d)); *Brown v. Payton*, 544 U.S. 133, 147 (2005) (emphasis added) (holding that, absent proof of an *unreasonable* application of federal law, habeas relief is not available pursuant to § 2254(d)); *Lockyer*, 538 U.S. at 77 (holding that the “gross disproportionality principle” regarding California’s repeat offender law, when applied for the purposes of § 2254(d), is not an unreasonable application of federal law, and, therefore, defendant’s petition for habeas relief should be denied).

<sup>163</sup> *Richter*, 131 S. Ct. at 787.

<sup>164</sup> *Id.* at 789.

<sup>165</sup> *Id.* at 791.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 792.

ing a habeas petition this past Term, *Felkner v. Jackson*,<sup>168</sup> also an appeal from the Ninth Circuit.<sup>169</sup> In *Jackson*, the prosecution had used two peremptory challenges to strike two black jurors from the venire.<sup>170</sup> Under the Court's holding in *Batson v. Kentucky*,<sup>171</sup> race cannot be used as a basis for a peremptory challenge.<sup>172</sup> If such a challenge is contested by the opposing party, the party that used the challenge must show that there was a race-neutral basis for the use of the said challenge.<sup>173</sup> The defendant in *Jackson* had claimed that the two jurors were struck on the basis of their race,<sup>174</sup> to which the prosecution contended that race was not the factor which led to the use of the challenges.<sup>175</sup> It was claimed that the first juror that was challenged had significant involvement with law enforcement officers and may, therefore, have harbored animosity.<sup>176</sup> The second juror challenged had a background and degree in social work, which, the prosecutor maintained, may have clouded her judgment in the case.<sup>177</sup> The trial court accepted the prosecutor's explanation that the second juror was struck "based on her educational background," and that the prosecutor "does not 'like to keep social workers' " on a jury.<sup>178</sup>

After losing on appeal in the California Supreme Court, the defendant filed a petition for habeas relief with the federal court

<sup>168</sup> 131 S. Ct. 1305 (2011).

<sup>169</sup> *Id.* at 1307.

<sup>170</sup> *Id.* at 1305.

<sup>171</sup> 476 U.S. 79 (1986).

<sup>172</sup> *Id.* at 100 (holding that if the trial court is able to come to the determination that there is a prima facie showing that peremptory challenges were utilized on the basis of race and the prosecutor is unable to provide a sufficient race-neutral explanation for the use of said challenges, the challenges at issue are unconstitutional).

<sup>173</sup> *Id.* at 94 ("[T]he State must demonstrate that 'permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972))).

<sup>174</sup> *Jackson*, 131 S. Ct. at 1305.

<sup>175</sup> *Id.* at 1306.

<sup>176</sup> *Id.* (stating that the juror in question was continuously stopped by police officers between the ages of 16-30, because of—in his words—"his race and age").

<sup>177</sup> *Id.* (explaining that the prosecutor believed said juror was prejudiced because of her previous internship at a jail, which the prosecutor alleged was "probably in the psych unit as a sociologist of some sort").

<sup>178</sup> *Id.* (holding that the prosecution's use of peremptory challenges was race-neutral and that the defendant failed to meet his burden in proving purposeful discrimination in jury selection).



based on a claim of ineffective assistance of counsel.<sup>179</sup> As was the case in *Richter*,<sup>180</sup> the federal court reviewed the case pursuant to the AEDPA and § 2254(d), subsection (2).<sup>181</sup> The District Court denied the defendant's petition,<sup>182</sup> but the denial was reversed by the Ninth Circuit.<sup>183</sup> The Ninth Circuit offered the following in support of its decision:

The prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors.<sup>184</sup>

In a strongly worded opinion, the Supreme Court reversed the decision of the Ninth Circuit, and characterized the Circuit's decision as "inexplicable."<sup>185</sup>

In its per curiam opinion, the Court stated that the trial court's review of a *Batson* challenge is largely based on an " 'evaluation of credibility' " and that a "trial court's determination is entitled to 'great deference.' "<sup>186</sup> Furthermore, federal review of habeas petitions under the AEDPA " 'demands that state-court decisions be given the benefit of the doubt.' "<sup>187</sup> In both situations, deference to the findings of the state trial court is paramount absent the demonstration

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<sup>179</sup> *Jackson*, 131 S. Ct. at 1307.

<sup>180</sup> *Richter*, 131 S. Ct. at 783-85.

<sup>181</sup> See 28 U.S.C. § 2254(d)(2).

<sup>182</sup> *Jackson v. Felker*, No. CIV 07-0555RJB, 2009 WL 426651, at \*10 (E.D.Ca. Feb. 20, 2009) ("The California state court decisions . . . were not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, nor did they result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts.").

<sup>183</sup> *Jackson*, 131 S. Ct. at 1307 ("After considering the state Court of Appeal[']s decision and reviewing the record evidence, the District Court held that the California Court of Appeal's findings were not unreasonable.").

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* (stating that the decision of the Ninth Circuit to reverse the District Court "is as inexplicable as it is unexplained"). The Court emphasized that since "[t]he state appellate court's decision was plainly not unreasonable[,] [t]here was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner." *Id.*

<sup>186</sup> *Id.* (citing *Batson*, 476 U.S. at 98 n.21).

<sup>187</sup> *Jackson*, 131 S. Ct. at 1307 (quoting *Lett*, 130 S. Ct. at 1862).

that there was no reasonable basis for the court to have denied relief to a defendant pursuant to § 2254(d).<sup>188</sup> Since the defendant did not meet its burden of showing such an unreasonable basis, the Court reversed the Ninth Circuit's decision.<sup>189</sup> The language of the Court was sufficiently harsh that the Journal of the American Bar Association headlined that the "Supreme Court Slaps 9th Circuit for 'Inexplicable' Decision in Batson Challenge."<sup>190</sup>

#### IV. CONCLUSION

The concept of habeas corpus predates even the Magna Carta, which, in the year 1215, recognized habeas as part of the "law of the land."<sup>191</sup> The Magna Carta itself states the principle that "[n]o free man shall be seized or imprisoned . . . except by the lawful judgment of his equals or by the law of the land."<sup>192</sup> Our Constitution reorganized and emphasized the great import of habeas: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>193</sup> The Great Writ, protecting the individual against illegal imprisonment, was referred to by the Supreme Court in *Harris v. Nelson*<sup>194</sup> as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action."<sup>195</sup>

The powerful nature of the Writ as a guarantor of individual freedom has been threatened in recent years by a number of Supreme Court decisions interpreting the Anti-Terrorism and Effective Death Penalty Act.<sup>196</sup> The holdings of this last Term, however, have been

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Debra Cassens Weiss, *Supreme Court Slaps 9th Circuit for 'Inexplicable' Decision in Batson Challenge*, ABA JOURNAL, Mar. 21, 2011, available at [http://www.abajournal.com/news/article/supreme\\_court\\_slaps\\_9th\\_circuit\\_for\\_inexplicable\\_decision\\_in\\_batson\\_challen/](http://www.abajournal.com/news/article/supreme_court_slaps_9th_circuit_for_inexplicable_decision_in_batson_challen/).

<sup>191</sup> *The Text of the Magna Carta*, FORDHAM UNIVERSITY, <http://www.fordham.edu/halsall/source/magnacarta.asp> (last visited Apr. 3, 2012).

<sup>192</sup> *Id.*

<sup>193</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>194</sup> 394 U.S. 286 (1969).

<sup>195</sup> *Id.* at 290-91.

<sup>196</sup> See, e.g., *Moore*, 131 S. Ct. 733; *Richter*, 131 S. Ct. 770; *Jackson*, 131 S. Ct. 1305; *Pinholster*, 131 S. Ct. 1388.

of particular significance in their impact on the Writ's functioning as the ultimate protector of the Sixth Amendment right to the effective assistance of counsel. The level of concern expressed by many in the legal profession about these recent holdings can, perhaps, best be illustrated in the following draft of a Resolution of the Defense Function Committee of the Criminal Justice Section of the American Bar Association<sup>197</sup>: "Resolved, that the American Bar Association urge Congress to restore the Writ of Habeas Corpus by amending 28 U.S.C. [§] 2254(d) to remove unreasonable restrictions on the scope of the Writ which preclude relief for violations of the Sixth Amendment right to the effective assistance of counsel."<sup>198</sup> The proposed amendment would provide for the granting of the Writ simply upon a finding that the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved a misapplication of, clearly established Federal law . . . ."<sup>199</sup>

In *Premo v. Moore*,<sup>200</sup> a case in which the state had not even challenged the defendant's claim that his confession to the police had been obtained in violation of his constitutional rights, the Court held that although counsel had failed to move to suppress the illegally obtained confession, the Writ was to be denied.<sup>201</sup> In *Harrington v. Richter*,<sup>202</sup> the Court emphasized that even when the state court decision denying the defendant's constitutional claim is limited to a single sentence, deference must be given to the determination of the state court.<sup>203</sup>

The Court's statement in *Richter* that habeas protects only when there have been "extreme malfunctions in the state criminal justice systems,"<sup>204</sup> was strengthened by the Court's decision in *Cullen v. Pinholster*.<sup>205</sup> In *Pinholster*, the Court held that any review of a state court conviction is to be strictly limited to the evidence and

<sup>197</sup> The author of this article is a member of the Committee.

<sup>198</sup> A copy of the proposed Resolution is on file with the *Touro Law Review*.

<sup>199</sup> 28 U.S.C. § 2254(d)(1).

<sup>200</sup> 131 S. Ct. 733 (2011).

<sup>201</sup> *Id.* at 744-46.

<sup>202</sup> 131 S. Ct. 770 (2011).

<sup>203</sup> *Id.* at 784-85.

<sup>204</sup> *Id.* at 786 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

<sup>205</sup> 131 S. Ct. 1388 (2011).

record that was made at the state court level.<sup>206</sup>

In *J.D.B. v. North Carolina*,<sup>207</sup> however, the Court did expand the constitutional protections that are afforded some individuals—in this case, juveniles.<sup>208</sup> The Court held that when considering whether a suspect knew he was free to leave when interrogated by the police, the age of the individual needs to be taken into consideration when determining whether *Miranda* warnings were required.<sup>209</sup> It was in *J.D.B.* that the Court this last Term delivered a decision that seemed at odds with the thrust of its other holdings regarding criminal law and procedure—the safeguards that are to be guaranteed by the Constitution were actually expanded.

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<sup>206</sup> *Id.* at 1398.

<sup>207</sup> 131 S. Ct. 2394 (2011).

<sup>208</sup> *Id.* at 2408.

<sup>209</sup> *Id.* at 2406.