No. 11-

IN THE

Supreme Court of the United States

KRISTIN ROSSUM,

Petitioner,

v.

DEBORAH PATRICK, WARDEN ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 28, 2012

QUESTION PRESENTED

After a habeas petitioner has presented facts to the state court that, if taken as true, establish a federal constitutional violation, and a state court thereafter summarily and unreasonably denies relief, does 28 U.S.C. § 2254 require the federal court to hold an evidentiary hearing when the petitioner presents the federal court with the same facts?

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kristin Rossum respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the decision in this case.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit issued an opinion and judgment on September 23, 2010 which appears at Pet. App. 35a. On rehearing, the Ninth Circuit vacated that decision and issued a second opinion on September 13, 2011. That opinion appears at Pet. App. 1a. The order denying a petition for rehearing as to the second opinion was entered on November 29, 2011 and appears at Pet. App. 85a. The California Supreme Court's summary order denying Ms. Rossum's request for a writ of habeas corpus was issued on August 8, 2007 and appears at Pet. App. 86a.

JURISDICTION

The court of appeals entered judgment on September 13, 2011. Petitioner timely filed a petition for rehearing en banc. The court of appeals denied the petition on November 29, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), reads, in relevant part:

(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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

This case raises the question of what standards federal courts must use under 28 U.S.C. § 2254 and Rule 8(a) of the Rules Governing Section 2254 Cases In the United States District Courts to order evidentiary hearings for habeas petitioners who have presented documentation of ineffective assistance of counsel to state courts. After this Court's decisions in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), and *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011), federal courts have reached different and conflicting conclusions as to whether and when 28 U.S.C. §§ 2254(d) and (e) authorize or require an evidentiary hearing. These issues are substantial, and this Court's guidance is needed to establish a uniform application of national standards.

In 2006, Kristin Rossum alleged facts in her habeas petition to the California Supreme Court that, if proven, satisfied both the deficient performance and prejudice prongs of *Strickland* v. *Washington,* 466 U.S. 668 (1984). Ms. Rossum's petition demonstrated that her November 2002 trial was unfair and the result unreliable because her counsel failed to take the one clear course of action required to make informed decisions about her defense; her lawyer failed to investigate through readily available forensic testing the cause of her husband's death. The

California Supreme Court unreasonably denied her petition in a summary order.

The federal district court likewise wrongly denied the petition and Ms. Rossum's request pursuant to Rule 8(a) for an evidentiary hearing. A unanimous panel of the Ninth Circuit reversed and remanded for an evidentiary hearing. The State petitioned for rehearing and, while the petition was pending, this Court reversed two other Ninth Circuit habeas decisions, *Richter* and *Pinholster*. Those rulings addressed the construction of §§ 2254(d)(1), (2), and (e). Thereafter, two members of the *Rossum* panel reversed course and upheld the district court's denial of Ms. Rossum's petition and hearing application.

As noted above, since *Richter* and *Pinholster*, lower federal courts are in conflict as to when, in ineffective assistance and other types of habeas cases, AEDPA authorizes evidentiary hearings. As Justice Alito's concurrence in *Pinholster* recognized, the statute requires a hearing in some cases. Ms. Rossum's case is itself the kind of claim adverted to in Justice Breyer's additional concurrence in *Pinholster;* that is, one in which the state and federal courts confront the very same factual allegations, and the state court does not conduct a hearing and wrongly denies relief.

Several cases – *Rossum* included – involved trial counsel who failed, without any plausible strategic or other sound reason, to undertake investigation of forensic evidence that was critical to the outcome of the trial. Under circumstances similar to the *Rossum* facts, three federal circuits, the Third, Fourth, and Eleventh Circuits have concluded that *Richter* does not bar further habeas proceedings. See, *e.g., Showers* v. *Beard,* 635 F.3d 625 (3d Cir. 2011); *Elmore* v. *Ozmint,* 661 F.3d 783 (4th Cir. 2011); *Johnson* v. *Secretary, DOC,* 643 F.3d 907 (11th Cir. 2011).

The statute's text, as well as the Rules Governing Section 2254 Cases In the United States District Courts ("Sec. 2254 Rules"), contemplate that hearings must be available in some instances, and this Court's 2011 decisions in *Richter* and *Pinholster* have already resulted in lower court confusion about when federal habeas hearings are required and whether federal courts should direct petitioners to return to state court to seek a hearing. Because the issues raised are central to the administration of AEDPA and to state-federal court relations, and because the circuits and district courts are now puzzling over and have split on how to apply *Richter, Pinholster, Strickland,* and §§ 2254 (d)(1), (2) and (e), this Court should grant certiorari in order to provide uniform national standards.

FACTUAL BACKGROUND

A. The following facts were available to Ms. Rossum's trial counsel prior to her 2002 trial for the first degree, special circumstances murder by poison of her husband, Gregory de Villers:

- The State alleged that Mr. de Villers's death was caused by acute fentanyl intoxication. Pet. App. 3a, 36a.
- Fentanyl is a synthetic opiate that is 80-150 times more powerful than morphine. Pet. App. 45a, 89a.
- The administrator of the San Diego County Office of the Medical Examiner ("OME") determined that the autopsy samples should be sent to an outside laboratory for testing to avoid a conflict of interest because Ms. Rossum worked at the OME's forensic laboratory as a toxicologist. Pet. App. 9a. Ms. Rossum was also

having an affair with the manager of the laboratory, and their relationship engendered significant animosity among her coworkers. Pet. App. 7a-8a.

- The autopsy specimens were handled improperly prior to being sent out for testing. They remained at the OME's forensic laboratory for 36 hours in non-secure containers. During this time, at least one employee – Ms. Rossum's boss and married paramour – handled the specimens and commented to a colleague about the odd color of the specimen coming from Mr. de Villers's stomach. Pet. App. 10a.
- The outside laboratory detected extraordinarily high levels of fentanyl in all of the different samples it was provided (urine, blood, stomach contents and tissue). Thereafter, further samples of the autopsy specimens were sent to two additional outside laboratories for testing. Pet. App. 44a.
- Results from all three labs varied, yet each lab independently reported extraordinarily high levels of fentanyl in the samples tested. Pet. App. 11a.
- According to the laboratories, the level of fentanyl in the specimens was as high as 57.3 nanograms per milliliter ("ng/mL") in Mr. de Villers's blood, between 128-329 ng/mL in his stomach and as high as 236 ng/mL in his urine. Pet. App. 11a. The amounts detected would be expected to result in death in as soon as a matter of minutes, and at most an hour or two. See Pet. App. 73a.

- The autopsy determined that there was a large amount of urine in Mr. de Villers's bladder and an accumulation of fluids in the lungs, both of which indicated that Mr. de Villers had been in an impaired state of consciousness for six to twelve hours prior to death. Pet. App. 9a.
- Ms. Rossum's trial counsel had the right to test the autopsy samples for the presence of fentanyl metabolites. Under California law, the results would remain confidential work product unless counsel introduced the tests as evidence. Cal. Penal Code § 1054.3(a) (West 2002).
- Oxycodone, a drug Ms. Rossum reported to emergency personnel that Mr. de Villers may have taken, and clonazepam, another drug she later told an investigator he may also have taken, were also present in the autopsy samples; the clonazepam levels were at the high end of the therapeutic range and may have been even higher at the time death and reduced through post-mortem redistribution. Pet. App. 10a, 20a-21a, 43a.
- No direct evidence was presented at trial to show that Ms. Rossum had administered fentanyl or any other drug to Mr. de Villers. See Pet. App. 27a-28a, 37a. The prosecution presented evidence that circumstantially linked her to Mr. de Villers's death; fentanyl patches were missing from cases she had worked on at the OME, as was the contents of a vial of fentanyl and other drugs, including clonazepam, and oxycontin. See Pet. App. 46a.

B. At trial, prosecutors asserted: "Fentanyl killed Greg de Villers. That's what killed him. There's not going to be any debate about that." Trial Tr. 3, Oct.

15, 2002 (Prosecutors' Opening Statement). The prosecution's murder-by-fentanyl theory, however, was inconsistent with the forensic evidence in two respects.

First, the extraordinarily high fentanyl levels in all of the specimens did not comport with the evidence indicating that Mr. de Villers was in an impaired state of consciousness for some six to twelve hours, and did not die rapidly. Second, the extraordinarily high levels of fentanyl in both the stomach and the blood could not coexist in the same body at the same time.

If the fentanyl had been absorbed through the stomach in sufficient quantity to account for the high levels in the stomach samples, Mr. de Villers could not have survived long enough to have had the extremely high levels detected in the blood samples; the reason is that there could be no additional absorption from the stomach post-mortem. Pet. App. 14a. Similarly, if the fentanyl had been injected into his bloodstream, then death would have occurred so rapidly as to preclude fentanyl from being absorbed through the stomach (and into the urine as well) at the levels found in the autopsy samples.

Despite the central question of the cause of death raised by the perplexing and inconsistent laboratory results, Ms. Rossum's trial counsel did not conduct any investigation of the samples or the results. Simply put, counsel never investigated the inconsistencies between fentanyl's "fast-acting" effect, the "extraordinarily high" levels obtained from the blood, stomach and urine samples, and the evidence that death was preceded by a six to twelve hour period of impaired consciousness. Instead, trial counsel conceded that fentanyl was the cause of death and put forth a suicide-by-fentanyl defense. Pet. App.

4a-5a. The suicide-by-fentanyl defense, however, not only failed to raise the inconsistencies in the prosecution's theory of murder-by-fentanyl but credited and endorsed the claim that death was caused by fentanyl. The defense of suicide-by-fentanyl was itself even more implausible, because of the same inconsistencies.

Confusion over the import of the levels of fentanyl issue arose at trial during the testimony of the prosecution's principal expert, Dr. Thomas Stanley. Dr. Stanley stated (at Trial Tr. vol. 9, 651, Oct. 17, 2002) that the high levels of fentanyl in Mr. de Villers's stomach "are irrelevant because even if the blood level was only one quarter of these levels in the stomach, they would be so high still that they would be lethal." He went on to explain, however, that "[i]t almost doesn't matter. The blood levels and tissue levels are so, so high here that, you know, you don't know really was the drug coming in through the stomach? Probably it was, some of it. Was it coming in some other place? Probably some other place as well." Trial Tr. vol. 9, 651. Dr. Stanley noted that, "there's not huge amounts of data to make these judgments on," but said that "[i]t seems to me that these stomach amounts . . . are so high that I don't know that the stomach could concentrate this much of the drug out of the blood. So that makes me think that somehow there was a drug introduced into the stomach in some way. I have never seen stomach levels quite so high in my experience." Trial Tr. vol. 9, 651-52.

Ms. Rossum's trial counsel presented an expert, Dr. Mark Wallace, but solely for the limited purpose of rebutting the prosecution's suggestion that, when ingested orally, fentanyl is tasteless. Dr. Wallace explained that even 10 ml of fentanyl diluted into 200

ml of water would, as confirmed by the Physician's Desk Reference, have a very bitter taste. Trial Tr. vol. 19, 2275, Oct. 31, 2002.

Despite the narrow focus of trial counsel's direct examination, prosecutors questioned Dr. Wallace on cross about the same issue that caused great confusion for Dr. Stanley; namely, the question of absorption of fentanyl into the bloodstream through the stomach and how to explain the results showing 57 ng/mL in Mr. de Villers's blood. Dr. Wallace demurred explaining that: "It's just an area that I have very little knowledge on, oral absorption of fentanyl. I wouldn't feel comfortable giving an opinion one way or the other." Trial Tr. vol. 19, 2284. He did not address how Mr. de Villers's blood levels reached 57 ng/mL because he was "unprepared" to do so. As he explained: "I don't know. I just – I wasn't prepared – I did not review this case to this extent[,]" and "I don't want to make any comments on that because I really don't feel comfortable making comments on that." Trial Tr. vol. 19, 2286.

Had Ms. Rossum's trial counsel undertaken forensic testing and hired an expert who was prepared to address the broader inconsistency between "fast-acting" fentanyl and Mr. de Villers's six to twelve hour period of impaired consciousness prior to death, questions about an alternative explanation for the inconsistency, such as contamination of the samples, inevitably would have arisen.

The jury, however, was only given the choice between murder-by-fentanyl and suicide-by-fentanyl, and unsurprisingly chose murder-by-fentanyl and convicted Ms. Rossum. The trial court sentenced her to life imprisonment without parole based on a special finding that Mr. de Villers's death was caused

by poison. Pet. App. 13a. Ms. Rossum's direct appeals failed.

C. On December 15, 2006 Ms. Rossum filed a direct petition seeking habeas relief in the California Supreme Court.[1] She asserted that trial counsel's errors rose to the level of ineffective assistance that violated the constitutional requirements of *Strickland*. Pet. App. 13a-14a.

Specifically, Ms. Rossum maintained that trial counsel's combined failure to investigate the cause of Mr. de Villers's death and decision to present a scientifically inconceivable defense was objectively unreasonable. Pet. App. 13a-14a, 47a. She further alleged that she had been prejudiced by trial counsel's error because: (i) a forensic test of the specimens would have revealed that they did not contain fentanyl metabolites; and (ii) the absence of metabolites would irrefutably establish as a matter of scientific fact that fentanyl had not been in Mr. de Villers's body and could not have been the cause of death, which would have undermined the central thesis of the prosecution. See Pet. App. 15a, 89a-90a. Ms. Rossum requested an evidentiary hearing to test the autopsy samples for fentanyl metabolites. Pet. App. 14a.

In support of these claims, Ms. Rossum presented the affidavit and curriculum vitae of Dr. Steven H. Richeimer, a physician and Director of Pain

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[1] "In California, the state supreme court, intermediate courts of appeal and superior courts all have original habeas corpus jurisdiction. . . . If the court of appeal denies relief, the petitioner may seek review in the California Supreme Court by way of a petition for review, or may instead file an original habeas petition in the same court." Pet. App. 47a n.6 (citing *Redd* v. *McGrath,* 343 F.3d 1077, 1079 n.2 (9th Cir. 2003)).

Management at the Keck School of Medicine at the University of Southern California, and thus an expert in the administration of fentanyl. Dr. Richeimer's affidavit (Pet. App. 87a) offers six key scientific opinions: (1) "the reported concentrations of fentanyl in all of the blood and urine specimens of the decedent in this case are extraordinarily high . . . well beyond by a number of magnitudes the extreme upper limit of what could be considered [] a therapeutic dose" (Pet. App. 89a); (2) "[i]f very high doses are rapidly administered, then death would likely occur rapidly (within minutes) and not in a manner consistent with the six to twelve hours of impaired breathing and consciousness" (Pet. App. 90a); (3) "if the fentanyl is absorbed gradually, perhaps through the stomach, then it would be unexpected for the victim to survive long enough for the blood levels to reach the extremely high levels that were found in the decedent." (*Id.*); (4) "contamination of the specimens would explain the high blood levels better than ingestion or other administration of fentanyl to the decedent" (*Id.*); (5) "in attempting to determine if the cause of death was from fentanyl, it would be necessary to rule out the possibility that the samples were contaminated" (*Id.*); and (6) testing for fentanyl metabolites, is "commonly done" and would have provided "[a] conclusive determination as to whether the fentanyl found in the specimens was the result of contamination." *Id.*

Dr. Richeimer's affidavit further explained that: "Fentanyl metabolites are distinct but related chemical compounds that are produced by the liver as the liver rapidly degrades and destroys the fentanyl . . . If the specimens contained metabolites of fentanyl, it would mean that there was fentanyl in the decedent's body prior to the samples being taken;

if there were no metabolites, it would mean the fentanyl was added to the specimens after they were taken." Pet. App. 90a-91a.

Under California law, the State Supreme Court was required to accept Ms. Rossum's allegations as true. See *People* v. *Duvall*, 9 Cal. 4th 464, 474 (1995). For purposes of reviewing Ms. Rossum's claim then, the State Supreme Court had to accept as true the factual allegation that "contamination of the specimens would explain the high blood levels better than ingestion or other administration of fentanyl to the decedent." Pet. App. 90a. Thus, in the state courts, Ms. Rossum presented her claim that her Sixth Amendment rights were violated because her trial counsel had failed to provide the jury with the "better explanation" of death, which is that the specimens were contaminated and that the drug did not cause Mr. de Villers's death.

The record before the California Supreme Court therefore supported the claim that counsel's "assistance" had been deficient and ineffective. Ms. Rossum's habeas counsel requested that the California courts authorize testing of the samples so as to demonstrate prejudice, as *Strickland* requires. Nevertheless, in a summary order on August 8, 2007 the State Supreme Court rejected her habeas petition. Pet. App. 86a.

D. Ms. Rossum timely filed a petition for habeas relief in federal court. Pet. App. 15a, 48a. She alleged the same facts and supported her claim with the same evidence that she had presented in the state petition. Ms. Rossum formally requested an evidentiary hearing pursuant to Rule 8(a) of the Sec. 2254 Rules, and formally requested discovery pursuant to Rule 6 in the form of forensic testing. See Pet. App. 64a-65a. The federal district court denied

both requests and dismissed her petition on April 8, 2009. Pet. App. 64a-84a.

On September 23, 2010, in a unanimous decision, the Ninth Circuit reversed. Pet. App. 35a-63a. The Ninth Circuit determined that in light of the anomalous medical and toxicological evidence, the availability of an alternative cause of death by clonazepam, enhanced by the synergistic effect of oxycodone, the lapse in the chain of custody of the autopsy specimens, and the failure of trial counsel to investigate obvious inconsistencies in the forensic data and to test for the presence of metabolites, Ms. Rossum had made a strong showing that her lawyers' performance was deficient. Pet. App. 38a. The Ninth Circuit remanded to the district court to hold an evidentiary hearing "particularly, but not exclusively" with respect to prejudice. *Id.*

On October 14, 2010 the State petitioned for rehearing; the State sought solely to clarify the scope of the remand. See Pet. App. 2a. Thereafter, this Court decided *Richter* and *Pinholster* and the court of appeals ordered supplemental briefing. On September 13, 2011 two members of the panel (Judges Nelson and Reinhardt) issued a 2-sentence order vacating the original decision and holding that this Court's intervening decision in *Richter* controlled the case. The court of appeals, therefore, affirmed the district court's denial of the petition and hearing application. Pet. App. 2a. Judge Gertner filed a lengthy dissent, observing that no fairminded jurist could reach the conclusion of the California Supreme Court, and its decision thus constituted an unreasonable application of *Strickland*. Pet. App. 2a-34a.

In her dissent, Judge Gertner explained that, given the record that Ms. Rossum had presented to the

state court, a careful application of *Richter* and of the other relevant decision, *Pinholster,* did not preclude an evidentiary hearing. Pet. App. 30a-33a. Judge Gertner also noted that Ms. Rossum's case satisfied the necessary procedural conditions identified by Justice Breyer in his separate concurrence in *Pinholster*. Pet. App. 31a-32a.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION OF WHEN A § 2254 HEARING IS AUTHORIZED IN FEDERAL COURT ON REVIEW OF A STATE HABEAS PETITION IS ONE OF SUBSTANTIAL AND RECURRING IMPORTANCE TO THE ADMINISTRATION OF AEDPA

A. The Issues Explained

The federal habeas statute contemplates that in some cases, federal courts have jurisdiction to review the judgments of state courts and, in some instances, the federal courts will hold hearings. Specifically, Congress directs federal courts to entertain habeas petitions only when a state adjudication was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law . . ." 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 proceedings." 28 USC §§ 2254(d)(1) & (2).

Section 2254(e)(2) specifies circumstances when federal courts are not to hold hearings. Subject to certain exceptions not relevant here, Congress instructed federal courts not to hold hearings when an applicant has "failed to develop the factual basis of a claim in State court proceedings." See § 2254 (e)(2). Rule 8(a) of the Sec. 2254 Rules, entitled

"Determining Whether to Hold a Hearing," expressly provides for hearings.[2] Moreover, the 2004 Advisory Committee Note to Rule 8 confirms that Congress, by virtue of § 2254(e)(2)'s limitation on hearings in some circumstances, intended that hearings be available in other circumstances. See Rule 8, Sec. 2254 Rules, Advisory Comm. Note 2004 ("Rule 8(a) is not intended to supersede the restrictions on evidentiary hearings contained in 28 U.S.C. § 2254(e)(2).").

In 2011, in *Richter*, this Court concluded that state court "adjudications on the merits" did not require written reasons and that § 2254(d) directed federal judges to assume that the state court had reviewed the arguments for relief and rejected them on the merits as a matter of federal constitutional law. Further, when the issue is ineffective assistance, this Court instructed that the federal court must consider whether "any reasonable argument" supported counsel's action. *Richter,* 131 S. Ct. at 784-785, 787. Thus, two forms of deference are required, one under § 2254(d) to state court decisions and a second, under *Strickland*, to trial lawyers' decisions. The Court explained that only when no "fairminded" jurist could review a record before the state court and conclude that the state court had reasonably applied clearly established law would habeas corpus relief be available, so as to "guard against extreme malfunctions." *Id.* at 786. The Court then concluded that the Ninth Circuit had erred in applying that test and that, under *Strickland*, federal habeas relief was not warranted.

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[2] Rule 8(a), "Determining Whether to Hold a Hearing," provides: "If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any material submitted under Rule 7 to determine whether an evidentiary hearing is warranted."

In *Pinholster,* this Court instructed that when deciding whether state court proceedings had been "contrary to" or "'involv[ed] an unreasonable application' of federal law," a federal court could not look to evidence that had not been presented to the state court and was instead limited to the state court record. 131 S. Ct. at 1411 n.20 (quoting 28 U.S.C. § 2254(d)). Justice Alito and Justice Breyer each wrote separately to reaffirm the continued relevance of § 2254 hearings. Justice Breyer explained when hearings under (d) would be necessary, specifically when the federal habeas court "finds that the state-court decision fails (d)'s test (or if (d) does not apply)[.]" *Id.* at 1412. Justice Alito also addressed hearings under (e), and he noted that "evidentiary hearings in federal court should be rare." *Id.* at 1411. Hearings should be available so that the statutory reference to them was respected rather than rendered a nullity.

The Rossum case provides the opportunity to clarify how, in the context of *Strickland* claims, *Richter* and *Pinholster* apply and when, under § 2254, federal evidentiary hearings must be held.

B. Conflicts and Confusion

The degree to which the *Richter* and *Pinholster* rulings altered the applicable standards for assessing what constitutes evidence for purposes of the state court record, when hearings are appropriate, and how *Strickland* claims are established under AEDPA have been the subject of conflicting decisions in the lower courts. The Ninth Circuit's decision creates a 3-1 split as to how *Richter* applies. It also highlights confusion, even after just a year, among district and circuit courts on when hearings in federal court are authorized under AEDPA. The many opinions filed

are a testament to the frequently recurring nature of the question presented.

1. *Richter*'s Scope

Ms. Rossum's case presented the situation the Court referenced in *Richter* where conflicting scientific evidence required trial counsel to undertake a specific course of action. 131 S. Ct. at 789 ("Rare are the situations in which the 'wide latitude' counsel must have in making tactical decisions will be limited to any one technique or approach.") (internal quotations, citation omitted). In this case, any counsel "functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,'" *Strickland*, 466 U.S. at 687, would have undertaken a forensic investigation of the cause of Mr. de Villers's death, including a common test for metabolites of fentanyl which would have led to a "conclusive determination" of whether fentanyl was in Mr. de Villers's body. See Pet. App. 90a. No competent trial counsel could advise a client or develop a defense strategy in the face of the prosecution's theory of murder-by-fentanyl poisoning without first taking this step. See *Lafler* v. *Cooper*, No. 10-209, slip. op. at 6 (U.S. Mar. 21, 2012) (recognizing that the "constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding . . ."); *Missouri* v. *Frye*, No. 10-444, slip. op. at 3 (U.S. Mar. 21, 2012) ("It is well settled that the right to the effective assistance of counsel applies to certain steps before trial.").

Yet, the Ninth Circuit's *Rossum* per curiam radically misread *Richter*, and produced a ruling in which federal courts impermissibly "rubber stamp" state courts. See *Doody* v. *Ryan,* 649 F.3d 986, 1025 (9th Cir. 2011) (Kozinski, C.J., concurring), *cert. denied,* 132 S. Ct. 414 (2011). As a consequence,

conflicts have emerged in the lower courts, as other circuits have read the parameters of this Court's ruling differently.

A vivid example of the conflict comes from comparing the Ninth Circuit's *Rossum* decision to the Third Circuit's decision in *Showers*, which involved facts remarkably similar to *Rossum*. A jury convicted Judy Ann Showers of first degree murder for poisoning her husband with a form of liquid morphine known as Roxanol. In addressing *Richter,* the Third Circuit pointed out that trial counsel had failed to present expert testimony to establish that poisoning in the manner suggested by the prosecution contradicted available scientific evidence. 635 F.3d at 632.

Showers identified factors (also present in *Rossum*) that this Court could use to provide guidance on how to apply *Richter's* injunction to avoid second guessing counsel. *Richter,* 131 S. Ct. at 788-90. For example, in *Showers*, the "potentially exculpatory forensic evidence" was apparent at the time of trial. 635 F.3d at 630-31. Furthermore, pursuit of the alternative theory posed no risk of harm to the defense case. *Id.* at 631. Similarly, if trial counsel for Ms. Rossum had obtained testing for metabolites, the defense would have had no obligation to disclose the testing results unless the defense planned to introduce the results at trial. See Cal. Penal Code § 1054.3.

The Ninth Circuit's response to *Richter* not only conflicts with the Third Circuit but also with the Fourth and Eleventh Circuits. In *Elmore*, the Fourth Circuit carefully parsed *Richter* in analyzing facts again analogous to those in Ms. Rossum's case. *Elmore* involved trial counsel's failure to conduct a forensic investigation into a number of anomalies in the State's scientific evidence, including time-of-

death and finger-print testimony. See 661 F.3d at 862 & n. 47. The Fourth Circuit majority pointed to several aspects that distinguished *Elmore* from *Richter,* and those elements are likewise present here: First, the "forensic evidence was always and obviously vital to the State's case[,]" (*id.* at 863); second, this was not a case in which trial counsel, "having conducted some investigation, made an informed decision to pursue another strategy." *Id.* (citing *Richter*, 131 S.Ct. at 1407).

Similarly, the Eleventh Circuit applied *Richter* properly to a *Strickland* claim in *Johnson*, a capital case. The Eleventh Circuit held that trial counsel failed to undertake an adequate and timely investigation of information available before trial which would have lead to a significant mitigation defense in the penalty phase. 643 F.3d at 932-34.

In sum, in other Circuits, *Richter* would have been no obstacle to federal court habeas review of Ms. Rossum's claim. That divergence of outcome as the product of geography provides a compelling reason for this Court's review.

2. The State And Federal Courts' Application Of *Strickland* Was Unreasonable.

Because the state court issued no written explanation beyond its citation to *Richter*, its ruling has to be assumed to have been on the merits of the constitutional claim. Examination of the federal district court's denial of Ms. Rossum's habeas petition can serve as a proxy for the state court rationale, and both the state court's summary decision and the district court's written opinion constitute unreasonable applications of *Strickland.*

The federal district court made two errors by ignoring evidence that was in the record, and by adding its own theory of death in lieu of what the prosecutor presented to the jury. The record relevant to the district court consisted of the same facts that were presented to the state court – including Dr. Richeimer's declaration. The question was whether, in light of that declaration's information, trial counsel was ineffective as a matter of federal constitutional law. Ms. Rossum maintained that, given trial counsel's failure to investigate the science, she should have the opportunity to prove – as she had sought in state court – prejudice. Ms. Rossum requested that the samples (that defense counsel should have had confidentially tested for metabolites before trial) be sent to a laboratory and that the court then hold a hearing to receive and analyze the legal import of the results.

In ruling against Ms. Rossum's *Strickland* claim, the district court discounted the likely effect that scientific evidence contradicting the prosecution's theory of poisoning by fentanyl would have had upon the jury. According to the district court, Dr. Richeimer's declaration was "equivocal in demonstrating that fentanyl was not the cause of death" and therefore trial counsel was reasonable in not pursuing it. Pet. App. 76a-77a.

To reach this conclusion, the district court relied heavily on the testimony of Dr. Stanley that "the drug was probably administered to Mr. de Villers in several different forms" including (perhaps) transdermal patches. Pet. App. 77a. However, as the record shows and Judge Gertner explained in the *Rossum* dissent, Dr. Stanley's testimony was "very tentative. He admitted that he was 'not sure' that such levels could be achieved [in the blood] because

he had never placed that many patches on a patient." Pet. App. 20a n.7.

The district court also supplied its own theory of the cause of death – that if not by fentanyl, Ms. Rossum had caused her husband's death through administering other drugs. Pet. App. 57a, 81a. Yet that was not the theory on which the prosecution proceeded.

The fundamental *Strickland* question is whether trial counsel was deficient in not pursuing an available and viable defense to the case actually tried by the prosecution. Federal judges are obliged not to second guess defense counsel nor to ignore the possibility of strategy. But here, as in some of the other post–*Richter* decisions, trial counsel had a clear course of action, and trial counsel had absolutely no reason to forgo forensic tests of the cause of death. The district court's conclusion that Ms. Rossum's facts were "equivocal" only serves to show that any minimally functioning trial counsel would have pursued a defense based on the inconsistent and improbable laboratory results, and likely would have obtained an acquittal by demonstrating that the prosecution had not met its burden of proof beyond a reasonable doubt. Instead, trial counsel compounded his own error of the failure to investigate by arguing a completely non-viable "suicide-by-fentanyl" defense.

3. *Pinholster's* Scope

The Ninth Circuit had initially reversed the district court and ordered a hearing. Given that in the interim, this Court issued *Pinholster* and the Ninth Circuit vacated its order in *Rossum*, this case now implicates the proper application of *Pinholster* in light of *Strickland* and *Richter*. Since this Court's ruling, conflicting applications of *Pinholster* have

emerged, and like the *Richter* quandary, demonstrate that further guidance from the Court on the availability of an evidentiary hearing in federal court on a habeas petition is necessary.

In an amicus filing in *Richter*, some 33 States acknowledged that "[s]tate courts across the country deliver summary dispositions." States' Amici Br. at 4, No. 09-587, 20110 WL 2005329 (U.S. May 17, 2010). The practices of state courts in deciding post-conviction claims in summary fashion and without a hearing, coupled with the confusion over when hearings are provided in light of *Pinholster,* raise serious questions of fundamental fairness. Meritorious factual claims raising important constitutional issues – including this case and those like it – may be wrongly passed over in those federal circuits and districts that have misunderstood *Pinholster*. This potential for serious miscarriages of justice undercuts the function of the writ, to "guard against extreme malfunctions." *Richter,* 131 S.Ct. at 786 (quoting *Jackson* v. *Virginia,* 443 U.S. 307, 332 n.5 (1979)). Given the frequency with which federal courts are presented with state court habeas petitions, these issues are important and recurring ones of federal-state relations and of the proper application of AEDPA.

Specifically, federal courts have not consistently applied the Court's holding in *Pinholster*. Three circuits (the First, Fourth, and Fifth) and a number of district courts have read *Pinholster*'s statement that review must be limited "to the record that was before the state court that adjudicated the claim on the merits," *Pinholster,* 131 S. Ct. at 1398, and concluded that a federal evidentiary hearing may only be held on a claim that was not adjudicated on the merits by a state court. See *Atkins* v. *Clarke,* 642 F.3d 47 (1st

Cir. 2011), *cert. denied,* 132 S. Ct. 446 (2011); *Jackson* v. *Kelly,* 650 F.3d 477 (4th Cir. 2011), *cert. denied,* 132 S. Ct. 64 (2011); *Clark* v. *Thaler,* No. 07-70037, 2012 WL 688519 (5th Cir. Mar. 5, 2012); *McCamey* v. *Epps,* No. 10-60224, 2011 WL 4445998 (5th Cir. Sept. 27, 2011). This reading, of course, is wrong.

Several district courts, however, have complied with the statutory parameters and drawn guidance from the two concurring Justices in *Pinholster*, which, had it been followed here, would have entitled Ms. Rossum to an evidentiary hearing based on the view that the state court's decision was unreasonable.[3]

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[3] See, *e.g.*, *Ballinger* v. *Prelesnik,* No. 09-CV-13886, 2012 WL 591931 (E.D. Mich. Feb. 23 2012); *Lynch* v. *Hudson*, No. 2:07-CV-948, 2011 WL 4537890, at *5 (S.D. Ohio Sept. 28, 2011) (where, based solely on the evidence presented to the state court, a state court's decisions contravened or unreasonably applied clearly established federal law, an evidentiary hearing may be used to determine whether the habeas claims are meritorious); *Ahmed* v. *Houk*, No. 2:07-CV-658, 2011 WL 4005328 (S.D. Ohio Sept. 8, 2011); *Hale* v. *Davis*, No. 07-12397, 2011 WL 3163375, at *17 (E.D. Mich. July 27, 2011); *Coddington* v. *Cullen*, No. CIV S-01-1290 KJM GGH DP, 2011 WL 2118855, at *4 (E.D. Cal. May 27, 2011) ("If a federal court finds that the (d)(1) state court ruling is AEDPA unreasonable…[i]t is at this time that the federal court would permit discovery to corroborate/negate the presumed facts"); *Skipwith* v. *McNeil*, No. 09-60361-CIV, 2011 WL 1598829, at *4 (S.D. Fla. Apr. 28, 2011) (concluding on the basis of the state court record that the state court's decision involved an unreasonable factual determination and the district court could conduct an evidentiary hearing to consider new evidence in determining whether the claim was meritorious); *Hearn* v. *Ryan,* No. CV 08-448-PHX-MHM, 2011 WL 1526912, at *2 (D. Ariz. Apr. 21, 2011) (*Pinholster* does not preclude federal evidentiary hearings on whether relief should be granted, but only on the question of whether the state court acted reasonably); *Hale*, 2011 WL 3163375, at *8 ("the full implications of [*Pinholster*] are unclear…[d]espite this, the

A recent illustration of the conflict and confusion about habeas hearings is provided by *Gonzalez* v. *Wong*, 667 F.3d 965 (9th Cir. 2011), a case in which each of the three judges disagreed about when and where a hearing was to be held. Judge Clifton, writing for the panel, concluded that Gonzalez had to return to state court to present that court with the evidence that supported his *Brady* claim. *Id.* at 979-80. Judge William Fletcher concurred, but was of the view that the evidence could be considered by the federal court. *Id.* at 1013 (explaining that "when a petitioner's inability to present *Brady* evidence to the state courts is due to the refusal of the state court to allow appropriate discovery," the evidence may be considered by the federal habeas court). Judge O'Scannlain, in his partial dissent, concluded that the federal court could not consider the evidence, and that Gonzalez should not be allowed to return to state court to present the evidence because he had "engaged in intentionally dilatory litigation tactics" by not immediately requesting a stay and seeking to return to state court after learning of the evidence. *Id.* at 1021.

In short, hearings are required sometimes under § 2254, and moreover, as the statute and Sec. 2254 Rules contemplate, and the concurring opinions in *Pinholster* make plain, at times hearings are to be held in federal court. *Rossum* is one such example, and one that illustrates the legal pattern outlined by Justice Breyer in his *Pinholster* concurrence. Indeed, one of Justice Breyer's examples is on all fours with *Rossum*:

Court believes that granting the evidentiary hearing was proper.").

> [T]he state-court rejection assumed the habeas petitioner's facts (deciding that, *even if* those facts were true, federal law was not violated), then (after finding the state court wrong on a (d) ground) an (e) hearing may be needed to determine whether the facts alleged were indeed true.

131 S. Ct. at 1412 (Breyer, J., concurring in part and dissenting in part) (emphasis in original).

Here, the California Supreme Court, in accordance with its own rules, was required to assume Ms. Rossum's facts to be true but nonetheless summarily denied her petition. Like the scenario set forth by Justice Breyer in *Pinholster*, that decision was wrong on a (d) ground; *i.e.,* the state supreme court unreasonably denied the petition given that trial counsel had failed – also without reason – to undertake an investigation on the cause of death of the deceased. Thus, *Rossum* provides an example of a prototypical case in which a hearing is necessary to permit a petitioner to prove the very facts that were presented to the state court. If a federal hearing is ever available, it should have been here.

II. A REVIEW OF *ROSSUM* PROVIDES THE APPROPRIATE MEANS BY WHICH TO RESOLVE CONFUSION RESULTING FROM *RICHTER* AND *PINHOLSTER*

Ms. Rossum's petition provides a compelling case for the Court to decide precisely when – under *Strickland,* §§ 2254(d) and (e), and Rule 8 of the Sec. 2254 Rules – federal evidentiary hearings are authorized. There are no alternative holdings below; the state and federal courts have confronted the same facts, and the forensic issues present a specific and

concrete question of the proper application § 2254 and *Strickland* in light of *Richter and Pinholster*.

Consideration of this case is particularly appropriate to enable the district and circuit courts to understand the line between deference and abdication of their statutory role. Here, the right at issue is effective assistance of counsel, and this case is therefore one in which *Richter* counseled that AEDPA review is "doubly deferential." 131 S. Ct. at 788 (quoting *Knowles* v. *Mirzayance,* 556 U.S. 111, 112 (2009)).

This "doubly deferential" framework, with deference owed first to defense lawyers and then to state courts, does not render federal judges mere rubber stamps and the congressional directive to entertain habeas petitions a nullity. Even as a wide range of options exist for counsel in many cases, in some, a specific course of action is necessary; trial counsel's obligations are not simply a "general standard" but become a "clear cut" rule. See *Doody,* 649 F.3d at 1025 (Kozinski, C.J., concurring); see also *James* v. *Schirro,* 659 F.3d 855, 880 (9th Cir. 2011) (finding that counsel in a capital case resting on a *Miranda* claim had an "obligation to conduct a thorough investigation of the defendant's background") (quoting *Porter* v. *McCollum,* 130 S. Ct. 447, 452 (2009)). As *Richter* cautioned, there will be cases "where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." 131 S. Ct. at 788-90.

As described above, there is a circuit split on the interpretation of *Richter* and confusion in the lower courts regarding the implications of *Pinholster* on the availability of evidentiary hearings in federal court. As apparent from the proliferation of cases

construing *Richter* and *Pinholster* in conflicting ways in the short time since the Court handed down its opinions, additional guidance from the Court is necessary.

The questions of what federal courts consider when reviewing state records, of when hearings are necessary, and of whether remands to state court or federal hearings are to be held, are recurring. These issues are ones that federal courts must grapple with regularly, and these questions are important to state-federal relations, to the proper administration of AEDPA, and to the safeguarding of constitutional rights to fair trials.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and issue a writ of certiorari to the Ninth Circuit in this case.

Respectfully submitted,

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March 28, 2012

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 09-55666
D.C. No. 3:07-cv-01590-JLS-JMA

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KRISTIN ROSSUM,
Petitioner-Appellant,

v.

DEBORAH L. PATRICK, Warden;
EDMUND G. BROWN, JR., Attorney General
for the State of California,
Respondents-Appellees.

———

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

———

Argued and Submitted
April 6, 2010—Pasadena, California

———

Filed September 13, 2011

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ORDER AND OPINION

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Before: Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges, and Nancy Gertner, District Judge.*

Per Curiam Opinion;
Dissent by Judge Gertner

ORDER

Respondents' petition for panel rehearing is hereby granted. The opinion filed on September 23, 2010, and published at 622 F.3d 1262 (9th Cir. 2010), is withdrawn and replaced by the attached opinion.

No new petitions for panel rehearing shall be accepted in this case.

OPINION

PER CURIAM:

We conclude that this case is now controlled by the Supreme Court's intervening decision in *Harrington v. Richter*, 562 U.S. ___, 131 S.Ct. 770 (2011). Accordingly, we affirm the district court's denial of Kristin Rossum's petition for a writ of habeas corpus.

AFFIRMED.

GERTNER, District Judge, dissenting:

I respectfully dissent. While I appreciate the extent to which the Supreme Court's decisions in *Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770 (2011), and *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 13

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* The Honorable Nancy Gertner, District Judge for the U.S. District Court for Massachusetts, Boston, sitting by designation. Judge Gertner submitted her dissent for filing prior to her September 1, 2011 resignation from the court.

88 (2011) require that we rehear this case and reconsider the panel's original decision, I nevertheless find that our original conclusions — reversing and remanding the case for an evidentiary hearing on both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984) — were entirely appropriate. The substantive finding of a *Strickland* violation in this case fits squarely within the rule of *Richter*; the relief ordered—an evidentiary hearing—fits within the requirements of *Pinholster*.

Kristin Rossum ("Rossum") was convicted of murdering her husband, Gregory de Villers ("de Villers"). The prosecution's theory was that Rossum poisoned him using fentanyl, a powerful synthetic opiate. Her conviction was upheld on direct review at all levels. After the final denial of relief, Rossum, represented by new counsel, filed a habeas petition before the California Supreme Court, raising the same issues as the instant petition, presenting the same expert declaration and seeking the same relief, an evidentiary hearing. It was summarily denied. The federal district court, adopting the recommendations of the magistrate judge, followed suit, rejecting Rossum's petition.

In *Rossum v. Patrick*, 622 F.3d 1262 (9th Cir. 2010) (withdrawn), we reversed. Since the state habeas decision was a summary denial, we reviewed the decision *de novo*. Based on the four corners of the state trial and habeas record, we found that Rossum had made a strong showing that her lawyer's performance was deficient under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and that the state court's contrary determination was unreasonable. We remanded for an evidentiary hearing, focused on the question of whether Rossum

was prejudiced by counsel's deficient performance. Respondent moved for a rehearing initially on the scope of the remand, but subsequently, based on *Richter* and *Pinholster*.

The case against Rossum hinged in large measure on toxicological and medical evidence which was equivocal. The fentanyl levels in de Villers's autopsy samples were extraordinarily, even unnaturally, high. And while these elevated levels suggested that death was immediate, they were at odds with medical evidence which indicated that de Villers lingered for several hours before he died. There was also a plausible alter-native theory of death, accidental overdose of cold medicines and oxycodone. A conceded lapse in the chain of custody of de Villers's autopsy specimens raised the not insubstantial chance of contamination, that is, that the fentanyl was added to the samples after de Villers's death. Both Rossum and her lover worked at the San Diego County Office of the Medical Examiner (OME), which ordinarily would have performed the toxicological analysis. While the OME was sufficiently concerned about the possibility of a conflict of interest to send the samples to another lab for testing, they were stored in an unsecured refrigerator at the OME for thirty-six hours. In addition to opportunity, there was motive to contaminate because of the various personal relationships among the OME's employees.

Under the circumstances, the failure of Rossum's attorneys to have de Villers's autopsy samples tested for fentanyl metabolites, a test that would have resolved whether de Villers had in fact ingested fentanyl or whether fentanyl found in the samples was a product of laboratory contamination subsequent to his death, could have been critical. Rather

than investigating this possibility, Rossum's counsel conceded that the cause of death was fentanyl; the defense theory was suicide-by-fentanyl, which was implausible in the light of the toxicological evidence. If testing indicated that the fentanyl found in the samples had never been in de Villers's body, the prosecution's theory that fentanyl was the cause of death would have been proven wrong.

The panel remanded the case to the district court to hold an evidentiary hearing. *Rossum*, 622 F. 3d at 1275-76. The *state trial record* was inadequate to decide the *Strickland* question precisely because trial counsel failed to develop the evidence outlined in Rossum's state Supreme Court habeas petition. And the *state habeas* record was likewise inadequate because it only provided the one sided conclusions of petitioner's fentanyl expert in affidavit form. Without a hearing it was necessarily untested by cross examination or the evidence of a competing expert.

Indeed, the respondent's initial Petition for Rehearing of the panel decision underscored the importance of holding an evidentiary in a case such as the one at bar. Respondents reasonably wanted to make certain that they would be permitted to call witnesses to counter the petitioner's expert's declaration, and to cross examine the declarant. In addition, they sought to present evidence challenging counsel's alleged deficient performance (*Strickland's* first prong) as well as show that petitioner was not prejudiced by counsel's alleged ineffectiveness (*Strickland's* second prong).

Neither *Richter* nor *Pinholster* should change the panel's original conclusions. To be sure, *Richter* mandates deference even to the California Supreme Court's summary denial of the habeas petition. And

deference means that we are to hypothesize the arguments that "could have been made to support the state court's decision," and then determine if "fair minded jurists could disagree" as to whether these arguments were unreasonable under federal law. *Richter*, 131 S. Ct. at 786. In addition, where the right at issue is ineffective assistance of counsel, habeas review is "doubly" deferential. *Id*. at 788. But even applying these standards, I conclude that no "fair minded jurist could disagree" that the arguments that could have been made in support of the state decision—particularly the decision to deny a hearing on these facts—were unreasonable under *Strickland*. *Richter*, 131 S. Ct. at 785-86.

Richter is wholly distinguishable by the substantial evidence in that case of the petitioner's guilt, as well as the plausible reasons for not pursuing the forensic testing on which the *Strickland* violation was premised. In contrast, in the case at bar, if the fentanyl metabolite test demonstrated the absence of metabolites in the autopsy samples, the government's theory of murder would have been demonstrably erroneous. On this record, I can conceive of no plausible reason for counsel to have not conducted the test.

And, while *Pinholster* narrowed the circumstances under which a federal court can order an evidentiary hearing, I believe that the instant case falls within those narrow circumstances. In *Pinholster*, the Court was concerned about a federal ruling based on facts no state court had had an opportunity to evaluate. The *Pinholster* majority did not address the situation here (although it was raised in the concurrence)—where the untested facts in the state habeas record made out a strong showing of a *Strickland* violation,

and the state's contrary determination was unreasonable. Under such circumstances, the critical question is whether those facts are true, precisely what an evidentiary hearing seeks to uncover and which the state court unreasonably denied.

It cannot be that a federal court is obliged to repeat the state court's error. Without a hearing both sides are disadvantaged. It would be unfair to the government to assume the truthfulness of the expert's untested declaration and order habeas relief. And, it would be equally unfair to Rossum to conclude that she is entitled to no relief in federal court in the face of a strong showing of a constitutional violation which the state court precluded her from developing. Nothing in *Pinholster* requires that result.

Accordingly, I would remand for an evidentiary hearing.

BACKGROUND

I. Factual Background

I recite the facts in detail because they underscore the circumstantial nature of the case and the centrality of the forensic testing issue. Rossum and de Villers married in 1999. In 2000, Rossum was hired as a toxicologist at the OME. Around the time of her hiring, the OME appointed Michael Robertson to the position of Forensic Laboratory Manager. Robertson, a new hire, replaced Russ Lowe, a longtime employee who had been serving as acting laboratory manager.

Rossum and Robertson—who, like Rossum, was married at the time—began having an affair. Lowe and OME toxicologist Catherine Hamm testified that some of Rossum's coworkers resented her for it,

believing that she might receive special treatment from Robertson, who was her supervisor.

On Thursday, November 2, 2000, de Villers confronted Rossum about his suspicion that she was using drugs (she had abused methamphetamines in college), and worse, that she was having an affair with Robertson. He threatened that if she did not resign, he would reveal both her drug use and her affair.

Rossum testified that when de Villers awoke on the morning of Monday, November 6, he seemed "out of it." At 7:42 a.m., she left a message at his workplace stating that he was ill and probably would not come to work that day. Rossum went to work soon thereafter; coworkers saw her crying in Robertson's office. That afternoon, she went back and forth from her work to her apartment. At midday, according to Rossum, she ate lunch with her husband. When she asked him why he had been so "out of it" that morning, he told her that he had taken some of her oxycodone and clonazepam, which she had obtained years earlier when she was trying to end her methamphetamine addiction. According to Rossum, de Villers went back to bed after lunch, and she returned to work.

Rossum left work at 2:30 p.m. and stayed with Robertson until about 5:00 p.m., when she went back to her apartment, leaving again at 6:30 p.m. to run errands. Upon her return at about 8:00 p.m., de Villers appeared to be sleeping. After a bath and shower, she found that de Villers was not breathing.

Rossum called 911 at 9:22 p.m. The operator instructed her to move de Villers's body to the floor and attempt CPR. When paramedics arrived, they

found his body on the floor with red rose petals strewn around him.[1] Rossum initially told the paramedics that he had not taken any drugs as far as she knew, but later told them that he may have taken oxycodone.

De Villers was pronounced dead at 10:19 p.m. While at the hospital, Rossum told a nurse that de Villers may have overdosed on oxycodone.

Dr. Brian Blackbourne, the San Diego County Medical Examiner, who performed de Villers's autopsy, determined that de Villers had been dead for at least an hour before the paramedics arrived. He concluded that de Villers had developed early bronchopneumonia, a condition that results when secretions that are normally removed by the breathing process accumulate in the lungs because the person is "unconscious or not breathing very deeply." He also noted that de Villers had a substantial amount of urine in his bladder, an amount which would have been "very uncomfortable" to a conscious person. The combination of the two—the bronchopneumonia in de Villers's lungs and the amount of urine in his bladder—led Dr. Blackbourne to conclude that de Villers had been not breathing properly for approximately six to twelve hours prior to his death.

Lloyd Amborn, the OME's operations administrator, decided to send the autopsy samples to an outside laboratory to avoid any potential conflict of interest; this was the first time that he ordered an outside lab to conduct such tests. The specimens were placed in a cardboard box, with each container marked as a sample taken from de Villers's body.

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[1] The parties disputed the source of the rose at trial. *See Rossum*, 622 F.3d at 1266 n.2.

They were supposed to be transported to the sheriff's office for transfer to the outside lab, but, since the individual who was to receive the samples was not immediately available, the box was taken to the OME. It remained in an OME refrigerator for approximately thirty-six hours until it was taken to the sheriff's crime lab on the morning of Thursday, November 9, 2000.

While the autopsy specimens were at the OME, anyone with a key to the building had access to them. The containers were not sealed; their tops could be pulled off and then replaced. Indeed, on Wednesday, November 8, 2000, Robertson commented to one of the toxicologists at the OME that he had looked at a sample of de Villers's stomach contents.

That same day, November 8, Russ Lowe—the veteran OME employee who served as acting laboratory manager before Robertson supplanted him—called the police to report Rossum's and Robertson's affair. Lowe's call was a turning point in the investigation, focusing the police's attention on the possibility of foul play.

Toxicology tests showed that de Villers's autopsy specimens contained extraordinarily high concentrations of fentanyl, as well as a smaller amount of clonazepam and a trace level of oxycodone. Dr. Blackbourne characterized the concentration of clonazepam found in de Villers's blood as a high therapeutic level, but not at the level of an overdose and "not fatal." He conceded, however, that sometimes postmortem testing reveals a lower concentration of a drug than had previously been present in the body. The jury also heard testimony that oxycodone, which is an opiate, and clonazepam, a benzodiazepine, can have a "synergistic" effect on each other, meaning

that each drug is made more powerful when taken with the other.

The discovery of fentanyl in de Villers's samples was unexpected; the OME did not ordinarily test for it; Pacific Toxicology, the outside laboratory to which the samples were first sent, did so regularly. After receiving the test results, Dr. Blackbourne concluded that de Villers died of acute fentanyl intoxication.

Prior to Rossum's trial, de Villers's samples were also sent to two other laboratories for testing: the Alberta Office of the Chief Medical Examiner in Canada and Associated Pathologist Laboratories in Las Vegas, Nevada. As the following chart demonstrates, the concentration levels of fentanyl measured by the different laboratories varied:

	Alberta Office of the Chief Medical Examiner	Pacific Toxicology Laboratories	Associated Pathologist Laboratories
Stomach Contents	201 ng/mL, 210 ng/ML	286.5 ng/mL, 329.7ng/mL	128 ng/mL
Urine	—	189 ng/mL	236 ng/mL
Blood	—	57.3 ng/mL	32.8 ng/mL
Peripheral Blood	—	11.2 ng/mL	—
Antemortem Blood	—	35.8 ng/mL	—
Right Proximal Forearm Ulnar Aspect Tissue	—	21.3 g	—
Key: "g" is grams; "ng" is nanograms; "mL" is milliliters; "—" indicates that there are no results in the record			

The prosecution called Dr. Theodore Stanley as an expert witness on fentanyl. Dr. Stanley testified that fentanyl is a potent and generally fast-acting pain reliever with a serious side effect; it can cause a person to stop breathing. Fentanyl begins to affect respiration at a concentration level in the blood of 2 ng/mL. At a concentration of 4 ng/mL, about half of "opioid naive" individuals—people without significant experience taking opiates—would be breathing very slowly or not at all. At 57.3 ng/mL, the extraordinarily high concentration found in de Villers's blood by Pacific Toxicology, no opioid naive individual would be conscious or breathing.[2]

Dr. Stanley testified that the speed with which fentanyl takes effect depends on the manner in which it is administered: the peak effect occurs about sixteen hours after administration of a transdermal patch, twenty to thirty minutes after oral consumption, fifteen to twenty minutes after intramuscular injection, and five minutes after intravenous injection. He explained that fentanyl is not normally administered orally because when the drug is taken in this way, the liver destroys about 65 percent of it, leaving only about 35 percent to enter the bloodstream.

None of the three physicians who testified at Rossum's trial —Dr. Blackbourne, Dr. Stanley, or the defense expert on fentanyl, Dr. Mark Wallace—could provide a definitive opinion as to how the fentanyl was introduced into de Villers's body. Dr. Stanley, however, testified that the differing concentration levels in de Villers's system, along with the evidence

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[2] No evidence was presented at trial that de Villers was inured to the effects of fentanyl through the regular abuse of opiates.

indicating that de Villers had been unconscious and breathing shallowly for hours before his death, suggested that fentanyl likely had been administered to de Villers on multiple occasions.

After de Villers's death, the OME audited its impounded drugs and drug standards.[3] It discovered that fifteen fentanyl patches and ten milligrams of fentanyl standard were missing. Rossum had logged in the fentanyl standard and had worked on each of the three cases in which the missing fentanyl patches had been impounded. The OME also determined that quantities of methamphetamine, clonazepam, and oxycontin (a time-released form of oxycodone) were missing.

II. Rossum's Trial and Post-Trial Proceedings

Rossum was prosecuted for de Villers's murder. Cal. Penal Code §§ 187, 190.2(a)(19). The prosecution's theory was that Rossum poisoned de Villers with fentanyl, possibly after the clonazepam she gave him failed to kill him. The defense conceded that fentanyl caused de Villers's death but contended that de Villers committed suicide because he was despondent over his marital problems.

The jury found Rossum guilty; the court sentenced her to prison for life without parole. All reviews failed.

On December 15, 2006, Rossum, represented by new counsel, filed a petition for a writ of habeas

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[3] The OME impounds drugs discovered at the scene of an individual's death and maintains an inventory of "drug standards"—quantities of particular drugs used as reference material during testing procedures.

corpus in the California Supreme Court.[4] The petition asserted for the first time the claim at issue in this proceeding—that Rossum's trial counsel rendered ineffective assistance by not having de Villers's autopsy samples tested for fentanyl metabolites despite the fact that if metabolites were not found in the sample, the results would have ruled out fentanyl as the cause of de Villers's death and disproven the prosecution's theory. Rossum offered a declaration from Dr. Steven H. Richeimer, a physician with substantial experience in anesthesiology, and requested an evidentiary hearing. Dr. Richeimer's declaration underscored the anomalous nature of the evidence in the light of fentanyl's properties as "a very rapidly acting drug." On the one hand, "[i]f very high doses [were] rapidly administered" to de Villers, then he likely would have died "within minutes," "not in a manner consistent with the 6-12 hours of impaired breathing and consciousness described by Dr. Blackbourne." On the other hand, if de Villers absorbed fentanyl "gradually, perhaps through the stomach," then he likely would not have survived "long enough for [his] blood levels to reach the extremely high levels" measured by the toxicology labs.

According to Dr. Richeimer, contamination of the samples drawn from de Villers's body would have explained the seeming "inconsistency between the rapid action of fentanyl, the extraordinarily high concentration levels, and the lengthy period of impaired breathing and reduced consciousness" that de Villers suffered. Indeed, Dr. Richeimer opines:

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[4] In California, the state supreme court, intermediate courts of appeal and superior courts all have original habeas corpus jurisdiction. *See* Cal. Const. art. VI, § 10.

> [C]ontamination of the specimens would explain the high blood levels better than ingestion or other administration of fentanyl to the decedent . . . . [I]n attempting to determine if the cause of death was from fentanyl, it would be necessary to rule out the possibility that the samples were contaminated.

Richeimer Decl. at 3.

Dr. Richeimer further noted that a toxicology lab could conclusively resolve the contamination issue by testing his samples for metabolites of fentanyl. If de Villers's specimens contain metabolites of fentanyl, then fentanyl must have been present in his body at the time the specimens were taken. If no metabolites are present, then the specimens must have been contaminated after his death.

The California Supreme Court summarily denied Rossum's habeas petition in a one-sentence order on August 8, 2007. Two days later, Rossum filed a federal habeas petition under 28 U.S.C. § 2254. The district court adopted the recommendation of the magistrate judge and denied Rossum's petition. It also denied Rossum's motion, made under Rule 6 of the Rules Governing Section 2254 Cases, for leave to test de Villers's autopsy specimens for metabolites of fentanyl.

DISCUSSION

I. Governing Legal Standards

Review of the instant petition is framed by Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), and upon rehearing, by the Supreme Court's recent decisions in *Richter* and *Pinholster*.

A. *Richter*

Under AEDPA, the district court could not grant Rossum's habeas relief unless the California Supreme Court's decision denying her state habeas petition "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Reynoso*, 462 F.3d at 1109. Under *Richter*, even if the state court's decision is unaccompanied by an explanation, § 2254(d) still requires that federal court to hypothesize what arguments *could have* supported the state court's decision and then ask if "fair-minded jurists could disagree that those arguments . . . are inconsistent with the holding in a prior decision" of the Supreme Court. *Richter*, 131 S. Ct. at 784-86.

Richter also emphasized the interplay between AEDPA's deferential review and the deference accorded trial counsel in an ineffective assistance claim. Under *Strickland*, Rossum must prove that (1) her counsel's performance was deficient, and (2) she suffered prejudice as a result. 466 U.S. at 687. To be deficient, an attorney's conduct must fall below an "objective standard of reasonableness" established by "prevailing professional norms." *Id*. at 687-88. To demonstrate prejudice, Rossum must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. Under AEDPA, we may not merely reverse the state court finding that there are no Strickland violations, but we must conclude that that determination is itself unreasonable. *Id*. at 788. Strickland presupposes that there is a "wide range" of reasonable professional assistance which meets the constitutional standard. *Richter* at

787. As such, the application of AEDPA's standards to ineffective assistance of counsel claims is "doubly" deferential. *Id*. at 788. In effect, trial counsel is given a wide berth under *Strickland* as in addition are state courts under AEDPA.

I will first address the arguments that could have been made to support the California Supreme Court's decision, and then consider whether their acceptance by that Court represents an unreasonable application of *Strickland*. In considering the latter, I evaluate not only whether the state court was unreasonable in its ultimate conclusion that there was no *Strickland* violation, but also in its conclusion that Rossum had not made an adequate showing for an evidentiary hearing in state court. Then I will consider what remedy is appropriate.

B. The Merits of Rossum's *Strickland* Claim

Rossum argued that a competent attorney would not have conceded that fentanyl caused de Villers's death without first having his autopsy specimens tested for metabolites of fentanyl. The California Supreme Court, in considering Rossum's habeas petition, asked itself "whether, assuming the petitioner's factual allegations [were] true, the petitioner would be entitled to relief." *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). The court's summary denial of Rossum's petition without issuing an order to show cause or holding an evidentiary hearing reflected its determination that "the claims made in the petition [did] not state a prima facie case entitling the petitioner to relief." *In re Clark*, 5 Cal. 4th 750, 770 (1993). The question is whether, under § 2254(d)(1), given the facts alleged by Rossum before the state court, the court's summary rejection of her claims was, in light of the entire state court record, an unreasonable

application of federal law. *See Pinholster*, 131 S. Ct. at 1403 n.12.

Clearly, the state's decision was an unreasonable application of federal law. There were "tantalizing indications" in the state court record that de Villers's autopsy specimens might have been contaminated: The medical and toxicological evidence raised serious questions as to whether fentanyl could have caused de Villers's death, an alternative cause of death was plausible, and there was a lapse in the chain of custody of de Villers's autopsy specimens. *Stankewitz v. Woodford*, 365 F.3d 706, 719-20 (9th Cir. 2004). Furthermore, given the significance of the test to this case, counsel could not show any strategic reason for his failure to have the samples tested. Proving that there were no metabolites would render the prosecution's theory untenable. Proving that there were metabolites would be wholly consistent with the theory the defense adopted in the absence of such proof and to the facts to which it stipulated. Thus there could be no possible harm to Rossum as a result of the performance of the metabolite test.[5] Accordingly, any state court determination to the contrary, particularly without an evidentiary hearing, would have constituted an unreasonable application of *Strickland*.

Five arguments could have been made in support of the California Supreme Court's decision. First, Rossum's counsel's decision not to challenge the evidence that fentanyl caused the victim's death was

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[5] Only if the defense intended to offer the results into evidence at trial, which they would do if they were negative, would there be a duty to disclose. *See* Cal. Penal Code § 1054.3(a) (West 2002); *see also Rossum*, 622 F.3d at 1274.

a reasonable exercise of trial strategy in light of the overwhelming evidence of fentanyl poisoning. Second, defense counsel's failure to pursue a contamination theory was not unreasonable because the contamination theory was too speculative. Third, it was reasonable for defense counsel to concede the cause of death and decline to pursue a contamination theory because those arguments would have been contradicted by Rossum's testimony that she believed her husband had died as a result of his voluntary ingestion of fentanyl and other drugs. Fourth, the facts of *Richter* closely track the case at bar and, as the Supreme Court found, do not warrant relief. Finally, even if counsel's performance were deficient, Rossum cannot show prejudice.

1. Overwhelming Evidence

The evidence of fentanyl poisoning as the cause of death was not overwhelming, and thus this explanation for defense counsel's conduct could not have served as a reasonable basis for the California Supreme Court's decision that Rossum had not established that her counsel's performance was constitutionally deficient. The fentanyl concentration levels measured by the three toxicology labs were widely disparate, and extraordinarily high, suggesting that something might have been amiss with de Villers's autopsy specimens. Dr. Stanley conceded that in his decades of experience, he had never seen fentanyl concentrations as high as those measured in de Villers's stomach. Given fentanyl's potency, a competent attorney would have wondered how the concentration of fentanyl in de Villers's blood, urine,

and stomach contents could have reached these levels before the drug killed him.[6]

The record also raises question as to how de Villers could have lingered for six to twelve hours before finally succumbing. Dr. Richeimer's declaration reflected that if Rossum administered a single, large dose of fentanyl to de Villers, he would have died within a matter of minutes. If de Villers absorbed fentanyl gradually, his breathing would have stopped; he would have perished long before the concentration of fentanyl in his blood reached the stratospheric levels measured by the toxicology labs.[7] The inconsistency between fentanyl's potency and its relatively rapid onset, on the one hand, and de Villers prolonged period of unconsciousness and his extraordinarily high toxicology results, on the other, would have prompted a competent attorney to investigate the possibility that de Villers's death was caused by something else.

There was an alternative explanation of de Villers's death, although one that was not fully developed once the high fentanyl levels were found. Toxicologists also found clonazepam and oxycodone in de Villers's autopsy specimens. True, the concentration of clona-

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[6] There is some evidence suggesting that fentanyl has a unique property: unlike most drugs, concentrations of fentanyl may increase after death, but not enough to explain the extraordinarily high levels found in the samples. *See Rossum*, 622 F. 3d at 1270 n.7.

[7] Dr. Stanley did testify that de Villers's blood levels potentially could have been obtained through the application of multiple transdermal patches. But his opinion on this issue was very tentative. He admitted that he was "not sure" that such levels could be achieved because he had never placed that many patches on a patient.

zepam was in the high therapeutic range, not fatal, and only a trace amount of oxycodone was found. But Dr. Stanley testified to the synergistic effect of clonazepam and oxycodone, each multiplying the effect of the other when they are taken in combination. Thus, a concentration of clonazepam near the top of the therapeutic range could potentially have turned lethal when its effect was compounded by the presence of oxycodone. In addition, Dr. Blackbourne conceded that the concentration of clonazepam in de Villers's body might have fallen after his death due to postmortem redistribution.

2. Contamination

The possibility of contamination was not too speculative, and therefore could not reasonably justify the California Supreme Court's rejection of Rossum's petition. The samples were stored at the OME lab for thirty-six hours before they were transferred to the sheriff's office. Anyone with a key to the OME had access to them. (Indeed, Robertson claimed to have opened at least one of the samples while they were housed at the OME.) Since the OME also stores fentanyl at its lab, contamination—whether intentional or unintentional—could have occurred.

The samples could have been contaminated by a coworker upset by the preferential treatment Rossum seemed to receive from Robertson. Alternatively, an OME employee seeking to dethrone Robertson from his position as laboratory manager could have contaminated the specimens to cast suspicion on both him and Rossum.[8]

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[8] Robertson appears to have had a special interest and expertise in fentanyl. Russ Lowe testified that he discovered approximately thirty-seven articles on fentanyl while cleaning

Respondent further claims that because toxicology labs rarely test for fentanyl, if one of Rossum's coworkers was trying to frame her or Robertson, he would not have used fentanyl. The trial record suggests otherwise. OME employees could well have known that de Villers's specimens would be sent to an outside lab, and that the first lab selected to analyze de Villers's samples, Pacific Toxicology, did test for fentanyl. Moreover, the argument ignores the manner in which toxicology testing is ordinarily done. Dr. Blackbourne testified that if a toxicology lab's initial testing fails to disclose a cause of death, further tests are often conducted to determine if less common substances—like fentanyl—are present.

In any event, contamination could have been definitively determined through testing for the presence of metabolites of fentanyl, according to Dr. Richeimer's declaration.[9] Although the Respondent

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out Robertson's office after his departure from the OME. If Robertson's interest in fentanyl was widely known, then contaminating de Villers's samples with fentanyl might have seemed like an effective way of implicating Robertson in de Villers's death.

[9] Respondent argued at the District Court that "Petitioner presents no evidence that the autopsy specimens were not already tested for the presence of metabolites," and quoted directly from Dr. Richeimer's declaration, "testing for these metabolites is commonly done by many laboratories." Answer to Pet. for Writ of Habeas Corpus 15. At oral argument, however, Respondent instead claimed that a competent attorney would not have realized that de Villers's samples could be tested for contamination by analyzing them for the presence of fentanyl metabolites. Respondent directed our attention to the cross-examination of toxicologist Michael Henson. Rossum's attorney asked Henson, "Do you have any way of knowing or testing to determine if any [of de Villers's] samples . . . has been tampered with or spiked by anybody?" Henson answered, "No." ER 305.

notes that the absence of fentanyl metabolites would not have exonerated Rossum because she could have killed de Villers with another drug, it is highly unlikely that a jury would have convicted her if the defense were able to conclusively contradict the prosecution's only theory, that fentanyl was the cause of death. In any event, if fentanyl metabolites *were* found, the defense would have suffered no harm; it could proceed just as readily as before with its unsuccessful suicide-by-fentanyl theory.

3. Suicide Defense

The state court may have relied on Respondent's argument that Rossum's attorneys could reasonably have decided not to pursue a contamination theory so as not to contradict Rossum's trial testimony. However, this could not have been the basis for counsel's decision not to pursue a contamination theory in the first instance. They had an obligation to investigate such a theory *before* the trial, when there was no testimony to contradict. In any event, this argument gives undue prominence to a single question and answer made during Rossum's cross-examination:

An answer given by a single prosecution witness during cross-examination cannot, however, be dispositive, particularly given Rossum's allegation in her state habeas petition that her trial counsel "could have determined the viability of a contamination defense by having the specimens confidentially tested." State Habeas Petition at 4, *see also id.* at 30. In any case, defense attorneys are obligated to pursue lines of investigation that hold out the promise of proving their clients' innocence prior to deciding on a trial strategy. *See Hart v. Gomez*, 174 F.3d 1067, 1070-71 (9th Cir. 1999).

> Q. So it is your testimony, then, that Greg de Villers voluntarily took fentanyl, clonazepam, and oxycodone, correct?
>
> A. As far as his death, yes.

Trial Tr. vol. 21, 2569.

Rossum's answer was nothing more than a restatement of her defense. She insisted that she did not have firsthand knowledge of how her husband died because de Villers, not she, administered whatever drugs caused his demise. She simply believed he had committed suicide by voluntarily taking the drugs that had been found in his system.

While there were significant holes in the prosecution's theory that Rossum murdered de Villers with fentanyl, the defense's suicide-by-fentanyl theory was even more implausible. The medical and toxicological evidence suggested that de Villers could only have died from an overdose of fentanyl if he was administered the drug on multiple occasions through-out the day. If de Villers self-administered a large, single dose of fentanyl, then he would have died too rapidly for the bronchopneumonia to develop in his lungs and for the large quantity of urine to collect in his bladder. But de Villers could not have voluntarily taken multiple doses of fentanyl over the course of the day because in the last hours of his life, he was too comatose even to breathe properly, much less self-administer fentanyl. In any event, administering the test for metabolites could have only proven the prosecution's case wrong; it could in no way have harmed the defendant's case.[10]

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[10] *See supra* note 6.

4. Comparison with *Richter*

Respondent also attempts to draw factual parallels to *Richter*, where the Supreme Court found that it was reasonable for the state court to deny an ineffective assistance of counsel claim based on counsel's failure to conduct forensic testing. In contrast to Rossum's case, however, the failure to do forensic testing was not unreasonable in *Richter* because testing might have undermined the only plausible defense available to Richter, that the victim was killed in the cross fire of the co-defendant's shooting battle, and not at Richter's hands. 131 S.Ct. at 789-90. Furthermore, the Court found "sufficient conventional circumstantial evidence pointing to Richter's guilt." *Richter* at 792.

Rossum's case, in contrast, is about forensic testing that would have been dispositive on the cause of death. The state's case against Rossum pivoted entirely on the fentanyl finding. And unlike Richter, counsel's performance with regard to this test could not reflect competent legal strategy—at least on the record before the state court. By confidentially testing for fentanyl metabolites, counsel would have given up nothing.

Notably, *Richter* acknowledges that there will be criminal cases where the "only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." 131 S. Ct. at 788. Indeed, the Third Circuit recently applied this principle in *Showers v. Beard*, 635 F. 3d 625 (3d. Cir. 2011), a post-*Richter* case, involving yet another murder case in which a woman was accused of killing her husband with liquid morphine, Roxanol. The government claimed the defendant administered the drug; the

defense claimed that her husband committed suicide. At issue was whether the bitter taste of Roxanol could be masked. At an evidentiary hearing in the state court—this state court *granted* an evidentiary hearing—new experts testified that the taste could not be masked, and one of the experts who had testified at trial indicated he had informed the defense that he did not know one way or the other. What is significant in *Showers* is i) that the Court distinguished wholly circumstantial cases and in particular, cases involving forensic issues from others, and ii) the state record is far more complete precisely because it granted an evidentiary hearing. The terms on which the Court distinguished *Richter* apply precisely to the case at bar:

> The facts in *Richter* were radically different from the facts and circumstances here. The dissenting judge in the Pennsylvania Superior Court stated that "[t]he defining issue in this matter is whether the victim, who according to the Commonwealth's theory unknowingly ingested a toxic substance, Roxanol (liquid morphine), would have or could have done so without any evidence that the drug's acute bitterness was masked so as to conceal its presence." *Showers II*, 782 A.2d at 1023 (Tamilia, J., dissenting). The properties of Roxanol and the autopsy results were known well before the trial. If Roxanol could not be masked by another substance, the only plausible explanation for the manner of death would have been willing, selfadministration. *The Commonwealth's evidence in the case against Showers, other than expert testimony regarding the properties of liquid morphine, was wholly circumstantial, making scientific evidence all the more important. See Duncan v. Ornoski*, 528 F.3d

> 1222, 1235 (9th Cir. 2008) ("It is especially important for counsel to seek the advice of an expert when he has no knowledge or expertise about the field."). Dr. Doyle provided Showers' counsel with the names of three experts but counsel failed to consult even one of the three experts that Dr. Doyle had already suggested would have supported the defense's suicide theory.

635 F. 3d at 631 (Italics supplied.)

Like *Showers*, it was critical for counsel to address the forensic evidence and its substantial limitations in order to provide an effective assistance of counsel. And through that lens, I conclude that no fairminded jurist would disagree, based on the record before the state court, that it was unreasonable for defense counsel to pursue a suicide-by-fentanyl theory, with all its defects, without first having de Villers's specimens tested for metabolites.

5. Prejudice

The state court may have found that even if Dr. Richeimer's declarations were true, and Rossum's counsel was ineffective, she could not demonstrate prejudice under *Strickland*'s second prong. However, no fairminded jurist could find such a determination to be reasonable on this record. Rossum alleged in her state habeas petition that testing the samples would reveal that they contained no fentanyl metabolites. State Habeas Petition at 4. As noted, if the defense had tested de Villers's autopsy specimens and found no fentanyl metabolites, it could have refuted the prosecution's theory of murder by fentanyl overdose. And, given the evidence, the prosecution would have had a difficult time convincing the

jury that Rossum committed the murder with different drugs. Indeed, if jurors learned that de Villers's autopsy samples had been contaminated, either intentionally or by accident, they would in all likelihood have viewed the prosecution's evidence as falling short of that needed to meet the beyond a reasonable doubt standard.

Accordingly, I find that based on the state trial record and the evidence and factual allegations presented in Rossum's state habeas petition, including the Richeimer declaration, the state court's summary rejection of her ineffective assistance of counsel claim was an unreasonable application of the Supreme Court's decision in *Strickland*. An evidentiary hearing is necessary—as the Respondent suggested in the rehearing petition—to permit the state an opportunity to question Dr. Richeimer regarding the contents of his declaration. I also find that an evidentiary hearing is necessary to provide the petitioner with the opportunity to prove prejudice by testing de Villers's autopsy samples to determine whether they contain fentanyl metabolites, an opportunity of which the state deprived Rossum by denying her a habeas hearing.

I turn now to the question of whether the Supreme Court's decision in *Pinholster* precludes such a hearing.

C. *Pinholster*

In *Pinholster*, the Court found that review under § 2254(d)(l) is "limited to the record that was before the state court that adjudicated the claim on the merits." 131 S. Ct. at 1398. The *Pinholster* majority was concerned that AEDPA's scheme, a scheme intended to leave primary responsibility for evalua-

ting state convictions with state courts, would be under-mined were a petitioner permitted to overcome an "adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively, *de novo*." 131 S. Ct. at 1399. Thus, Respondent argues that, on the authority of *Pinholster*, this court may not order an evidentiary hearing. It asserts that if the state court trial and habeas record is not adequate to obtain habeas relief, Rossum's claim must fail. *Pinholster*, however, is distinguishable as a matter of fact, law, and logic.

Pinholster was convicted of murder; at the penalty phase, the jury unanimously voted for death. His first state habeas petition, prepared by new counsel, alleged *inter alia*, ineffective assistance of counsel at the penalty phase. He claimed that his trial counsel failed to present mitigating evidence, including evidence of his mental disorders. He offered various corroborative records, as well as factual declarations from family members, prior counsel and a psychiatrist. The California Court denied the claim. Pinholster then filed a federal habeas petition, reiterating his previous allegations, but adding new claims and significantly, new facts. The federal court held the petition in abeyance, to allow Pinholster to return to state court. The state court again denied the petition. Returning to federal court, Pinholster amended his petition, now on all fours with the second state petition, and asked for an evidentiary hearing. At the hearing, new medical experts testified for both sides, experts not presented to the state court at any time.[11]

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[11] Indeed, the government claims that the evidence presented at the hearing was so different from that presented in state court as to amount to unadjudicated claims.

The district court granted habeas relief, and this Court, sitting en banc, affirmed. *Pinholster v. Ayers*, 590 F.3d 651 (9th Cir. 2009).

The Supreme Court reversed. In part II of the majority opinion, the Court held "that review under § 2254(d)(1)" must be limited to the facts presented to the state court; in part III, the Court concluded that, based on the state record, the state court's decision was not unreasonable. *Pinholster*, 131 S. Ct. at 1398-99.

Rossum has satisfied the requirements of *Pinholster*. She has demonstrated that the state court's rejection of her petition was unreasonable, and has done so on the basis of the record that was before the state court. *Pinholster* requires no more. I would now order an evidentiary hearing not to allow petitioner to "overcome the limitation of § 2254(d)(1)" using evidence not presented to the state court, *see id.* at 1400; rather, I would order the evidentiary hearing to determine whether, now that petitioner has demonstrated that the state court's summary decision, including its refusal to afford her a hearing, was unreasonable, a federal court may grant the relief that she requests. *Pinholster* did not hold that AEPDA bars a federal habeas court from ever holding an evidentiary hearing. Indeed, it recognized that "Section 2254(e)(2) [which governs evidentiary hearings] continues to have force where § 2254(d)(1) does not bar federal habeas relief." *Id*. at 1401. In this case, because § 2254(d)(1) does not bar relief—Rossum has demonstrated on the basis of the state court record that the state court's decision was an unreasonable application of federal law—an evidentiary hearing is not precluded by *Pinholster*.

In his concurrence, Justice Breyer explained the effect of *Pinholster's* interpretation of § 2254(d)(1) as follows:

> An offender who believes he is entitled to habeas relief must first present a claim (including his evidence) to the state courts. If the state courts reject the claim, then a federal habeas court may review that rejection on the basis of materials considered by the state court. If the federal habeas court finds that the state court decision fails [§ 2254](d)'s test . . . then a[ ] [§ 2254](e) hearing may be needed."

Id. at 1412 (Breyer, J., concurring in part and dissenting in part). In order to provide support for the majority's contention that its construction did not render § 2254(e) obsolete, Justice Breyer offered examples of situations in which a federal court could properly hold an evidentiary hearing despite *Pinholster*. One such example applies precisely to the instant case:

> "[I]f the state-court rejection assumed the habeas petitioner's facts (deciding that, *even if* those facts were true, federal law was not violated), then (after finding the state court wrong on a (d) ground) an (e) hearing might be needed to determine whether the facts alleged were indeed true."

Id.

In the case at bar, I have reviewed the state court's rejection of petitioner's claims based on the record before it. The state court assumed the truth of petitioner's factual claims, but held that even if those facts were true, she had not established a viable *Strickland* claim. This determination was an unrea-

son-able application of *Strickland*, and as such, Rossum has thus satisfied § 2254(d)(1)'s requirements. To the extent that the conclusions in the panel's original opinion were tentative it was precisely because the state habeas record was one sided—Rossum offered the declaration—and no evidentiary hearing had been ordered. Surely no court could make a definitive determination as to the petition itself without giving the state an opportunity to prove that the facts in Dr. Richeimer's declaration were not true or not complete.[12] This is the very situation that Justice Breyer identified—a hearing to see whether the facts as alleged before the state court, which were sufficient to make out a *Strickland* violation, were true. A hearing is particularly important where, as here, the state court decision at issue is not the ultimate determination—was Rossum denied her constitutional right to the effective assistance of counsel?—but the prior question—did the state court unreasonably fail to order a hearing on the facts as alleged?

My reading of *Pinholster* is bolstered by the lack of any discussion of the body of law governing discovery in federal court habeas proceedings. *Pinholster* does not mention Rule 6 of the Rules Governing Section 2254 Cases, or its own precedent in *Bracy v. Gramley*, "[w]here specific allegations before the court show reason to believe that the petitioner may, if the facts

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[12] The evidentiary hearing in this case surely could be far more narrow than the hearing at issue in *Pinholster*. Indeed, some of the concerns of the majority in *Pinholster* may be addressed more in considering the scope of an evidentiary hearing rather than the fact of it, i.e. making certain that the federal hearing does not go so far afield as to amount to the adjudication of entirely new claims.

are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (internal quotation marks omitted).[13] By not purporting to change or overrule these standards, the Court did not intend to preclude hearings in all cases. *See also Conway v. Houk*, No. 2:07-cv-947, 2011 WL 2119373, at *3 (S.D. Ohio May 26, 2011).

And, my view of *Pinholster* is supported by post-*Pinholster* case law. *See Skipwith v. McNeil*, No. 09-60361-CIV, 2011 WL 1598829, at *4-5 (S.D. Fla. Apr. 28, 2011) (concluding on the basis of the state court record that the state court's decision involved an unreasonable factual determination based on the record and that the district court could conduct an evidentiary hearing and consider new evidence in deter-mining whether the claim was meritorious); *Hearn v. Ryan*, *et al*., No. CV 08-448-PHX-MHM, 2011 WL 1526912, at *2 (D. Ariz. Apr. 21, 2011) (holding that where a federal court finds, based solely on the state court record, that the state court's decision was unreasonable, then the federal court could hold an evidentiary hearing to determine whether the claim warrants habeas relief).

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[13] *Bracy* is quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969), which was decided prior to adoption of Rule 6. *Bracy* explicitly states that "Habeas Corpus Rule 6 is meant to be consistent with *Harris*," and cites to the Advisory Committee's Notes on Habeas Corpus Rule 6.

II. Remedy

I would thus remand for the district court to hold an evidentiary hearing on both prongs of *Strickland*. Rossum is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2) because she did not "fail[ ] to develop the factual basis of [her] claim" before the California state courts, to the extent those courts permitted her to do so. The state court denied her an evidentiary hearing which would have determined the metabolite question. Indeed, § 2254(e)(2) permits a hearing where Rossum (1) alleges facts that, if proven, would entitle her to relief, and (2) shows that she did not receive a full and fair hearing in state court. *See Karis v. Calderon*, 283 F.3d 1117, 1126-27 (9th Cir. 2002); *see also Insyxiengmay v. Morgan*, 403 F.3d 657, 669-70 (9th Cir. 2005). Moreover, under *Jones v. Wood*, 114 F.3d 1002 (9th Cir. 1997), in conducting this evidentiary hearing the district judge is obligated to allow discovery, including testing de Villers's specimens for metabolites of fentanyl. *See Rossum*, 622 F.3d at 1276.

CONCLUSION

For the foregoing reasons, I conclude that Rossum is entitled to an evidentiary hearing on her claim that her trial counsel rendered ineffective assistance under *Strickland*, both as to the first prong, whether her counsel's performance fell below the standard of reasonably competent counsel, and the second prong, whether Rossum was prejudiced by counsel's deficient performance. Accordingly, I would REVERSE the district court's denial of a writ of habeas corpus and REMAND for further proceedings consistent with this opinion.