IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL A. KNOWLES, :

WARDEN, :

Petitioner :

v. : No. 07-1315

ALEXANDRE MIRZAYANCE. :

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Washington, D.C.

Tuesday, January 13, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:01 p.m.

APPEARANCES:

STEVEN E. MERCER, ESQ., Deputy Attorney General, Los Angeles, Cal.; on behalf of the Petitioner.

CHARLES M. SEVILLA, ESQ., San Diego, Cal.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:01 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this afternoon in Case 07-1315, Knowles v. Mirzayance.

Mr. Mercer.

ORAL ARGUMENT OF STEVEN E. MERCER

ON BEHALF OF THE PETITIONER

MR. MERCER: Mr. Chief Justice, and may it please the Court:

Under the deferential review required by the ADPA, Mr. Mirzayance was not entitled to Federal habeas corpus relief on his ineffective counsel claim because the State court adjudication of that claim was not contrary to, nor an unreasonable application of, the clearly established Strickland test. And because the Strickland rule is a general one, the California Supreme Court had wide latitude in resolving that claim.

In this case, the Ninth Circuit applied something different from Strickland, finding that Wager was duty-bound to present a State law affirmative defense because no other defenses were said to be available at that time and because it merely might have worked. But even the Ninth Circuit conceded that this Court has never announced such a test. And as in --

JUSTICE KENNEDY: At some point during the oral argument, and perhaps at the beginning because it is the beginning inquiry: When there is an evidentiary hearing, how does the standard for the court of appeals differ than when there has been no evidentiary hearing?

MR. MERCER: Well, I think it depends on whether the Federal habeas court is doing a section 2254(d) analysis. The fact is that section 2254(d), for example, doesn't speak to denying a claim on the merits, even if it's unexhausted. So, in theory, a Federal habeas court could perhaps accept new evidence that the State court never had before it in order to deny relief. But we cannot envision a situation where it would ever be efficacious to hold a hearing in light of --

JUSTICE KENNEDY: Well, let me put it --

MR. MERCER: -- a --

JUSTICE KENNEDY: Let me put it this way: We're the Court of Appeals for the Ninth Circuit, let's assume. What effect do we give to what the district court did, and how would that -- how would the case be different than if we were simply reviewing the same situation and it came from the State court? What's the difference?

MR. MERCER: Well, there shouldn't be a difference.

JUSTICE KENNEDY: We just pretend the hearing didn't happen?

MR. MERCER: Well, I would say that in virtually every case it, in fact, is a meaningless distraction from what the State court did based on the record presented it, and here's why. Because if the State court made a reasonable adjudication of the merits of the claim based on the State court record, then even holding a hearing wouldn't make any difference because relief would still be precluded under 2254(d).

JUSTICE KENNEDY: Do we look to the Federal court evidentiary hearing as part of the analysis to determine whether what the State court did was reasonable? And you -- and you have -- you have thought about this, and obviously the problem is, since the California appellate courts didn't see the hearing, this is an artificial exercise, and you know the problem.

MR. MERCER: Well, I think, again, the only question that matters is the 2254(d) question that says that relief shall not be granted unless that State court adjudication based on the State court record presented was unreasonable, and here is why.

JUSTICE SCALIA: Well, I guess it could be -- it could be if we have an opinion that makes it clear that you -- you must grant an evidentiary hearing in --

in certain cases. And if the State court did not grant an evidentiary hearing, I guess you could say that that was contrary to established Supreme Court law, couldn't you?

MR. MERCER: Perhaps, and -- and under extremely rare cases that may --

JUSTICE SCALIA: But unless -- unless there is a Supreme Court requirement that there be an evidentiary hearing, I don't see how holding an evidentiary hearing could show that the State court decision, which was legitimately held without an evidentiary hearing, was contrary to our opinions. I don't see how you can do that.

MR. MERCER: Well, I agree, Justice Scalia, and this Court said in Holland v. Jackson that the pertinent question is what the State court had in front of it. And the reason here is simple: That it is unfair to find that the State courts made an unreasonable application of law based on facts that they didn't have. So --

JUSTICE KENNEDY: Did at any point -- did the State at any point challenge the correctness, the propriety, of holding the Federal evidentiary hearing?

MR. MERCER: Yes, Justice Kennedy. Mr. Mirzayance raised --

JUSTICE KENNEDY: And if so, is that before us?

MR. MERCER: I don't think so. We -- we disagreed that there should have been an evidentiary hearing in the first place, and we argued that below. It's our position that there should not have been an evidentiary hearing in the first place.

It's our position that, frankly, this was a straightforward, routine Strickland case that was uncomplicated, properly adjudicated by the district court when they first reached it in 2001 without a hearing, and that the Ninth Circuit has come at this matter with a -- a chestful of monkey wrenches in the sense that they should not have ordered the evidentiary hearing in the first place, and then when they did, they should not have disregarded the very factfinding that they ordered be done.

JUSTICE KENNEDY: But -- so then -- so then we do look at the facts. I don't want to take up your or the Court's time on this any more, but I remain puzzled, I have to tell you, about what to do with this hearing. I went through it at great length. It's very careful factfinding, really.

MR. MERCER: Yes.

JUSTICE KENNEDY: But I -- I just don't know

how to fit that with the standard when I look at the -- the reasonableness of the -- of the State court decision.

MR. MERCER: Well, I don't think it changed the standard because 2254 simply requires an adjudication on the merits, and we have that here.

JUSTICE SOUTER: Well, would you -- would you agree just as a general rule that unless we find -- unless there is some rule under which we can conclude that the State court should have held a hearing, that there is no occasion to have a Federal evidentiary hearing?

MR. MERCER: Yes, I would agree with that.

JUSTICE SOUTER: That would be the general proposition.

MR. MERCER: Yes.

JUSTICE SOUTER: Okay.

MR. MERCER: And I think --

CHIEF JUSTICE ROBERTS: Would that -- would that principle have to be clearly established by one of our decisions?

MR. MERCER: I think that question is unclear, Mr. Chief Justice, because this Court did recently say in Landrigan that the decision to hold an evidentiary hearing remains within the sound discretion

of the district court, but in the same sentence said that that discretion was circumscribed by the ADPA.

JUSTICE SCALIA: Why -- why should we hold a hearing ourselves in the -- in the hypothetical situation that Justice Souter mentioned? Why shouldn't we just reverse the State courts for not having held an evidentiary hearing? Remand it to them, let them hold it, and let -- let them make the factual determination on the basis of that, after which we would -- we would apply the rather strict 2254 standard to -- to the result of that hearing?

MR. MERCER: Well, if a petitioner or a State prisoner was somehow precluded from developing facts in the State court and should have had an evidentiary hearing under this Court's clearly established law, then that would be the correct solution.

Here, however, we have a fully developed State court record.

JUSTICE SCALIA: No, I understand that. So your -- your answer to Justice Souter would -- would not be that -- that you can conduct a hearing if the State should have conducted a hearing? What you should do if the State should have conducted a hearing is send it back for the hearing.

MR. MERCER: That is correct. The point here under the ADPA -- and I think it is Congress's clear intent -- is that all of these claims are to be funneled through the State courts first. And Congress has entrusted the State courts to be the primary and first interpreters and enforcers of Federal constitutional law for State prisoners' claims. And as this Court has said many times, including in Sawyer v. Smith, they're co-equals to the Federal courts in doing so.

So what should have happened in this case we contend is what the district court first did when confronted with the claim in 2001. And that is you assess the facts and claims as presented to the State court and then decide whether it would be reasonable to reject the claim under either prong of Strickland. And as this Court said in Strickland itself, the easiest and most direct way to answer that question is through the prejudice prong here.

We have to remember the reality of this case that for an affirmative defense of insanity, or NGI under California law, Attorney Wager bore the burden of proving by a preponderance of the evidence that his client did not know the difference between right and wrong when he committed this crime.

And every bit of Mirzayance's own deeds and words show that he did. Before the killing itself, he closed the curtains and waited until he was alone with the victim before entering her room with a gun in his pocket and the silent weapon drawn. He struck with the silent weapon, delivering fatal blows, resorting to the gun only when she screamed and struggled, and then immediately collected the shell casings, turned off the lights, collected the knife, went back to his apartment where he showered, disposed of the bloody clothes, concocted a false alibi message on the machine -- excuse me -- and then, overcome with guilt at the wrongfulness of his conduct, he calls his friend and says: "I messed up big-time." And that's at page 120 of the State reporter's transcript.

And then, further acknowledging both the legal and moral wrongfulness of his actions, he turns himself in to the police. He says: "I did a murder." When they asked him how he felt about it, he said: "I felt very guilty, very bad for what I've done. That's why I turned myself in."

JUSTICE SOUTER: Was -- was -- is all of this factual material in the -- in the documents submitted with the habeas, with the State habeas and the response to the State habeas?

MR. MERCER: All of this was in the State trial transcript, so, yes, Justice Souter.

JUSTICE SOUTER: What -- what did they do? Did they submit the trial transcript with the -- in -- with the response to the habeas petition at the State? In other words, how did it get in front of the State court, is all I want to know.

MR. MERCER: It was a direct appeal to the California Court of Appeals with a concurrently filed habeas petition.

JUSTICE SOUTER: Ah, okay.

MR. MERCER: Yes, okay.

So he was faced with that. And then on the flip side, there was not a shred of evidence that Mr. Mirzayance ever thought that doing what he did was legally or morally right. So given all that, given the extensive effort to cover his tracks and his own admissions about the wrongfulness of his conduct, it was not reasonably probable under Strickland for this jury to believe that he somehow did not know.

JUSTICE GINSBURG: How about getting another jury? That was -- one of the reasons that counsel gave why he, counsel, was withdrawing the NGI plea was the jury had just found -- rejected the second-degree murder charge and found that he had acted deliberately with

premeditation. But couldn't -- because the first jury had -- in the guilt phase, couldn't the attorney have requested a brand new jury to hear the NGI plea?

MR. MERCER: Mr. Wager did not believe that he had grounds to do so in this case. And the district court first addressed that opinion at the petition appendix H in a footnote -- I believe it was footnote 21, but I don't have that in front of me right now -- where the district court talked about the standards for getting a new jury and that under Penal Code, California Penal Code 1026, you had to show some cause to the trial court why this jury could not fairly address the claim. Wager felt that he had no basis to do that at this time.

JUSTICE SCALIA: Mr. Mercer -- Mr. Mercer, I guess we could resolve the case by saying if there was any error it was harmless, but we didn't take the case for that. That wouldn't be very helpful to the bar, would it? I mean, I thought that the important issue here is -- is the one you've been discussing, whether -- whether, in fact, you're bound to stick with the facts that were -- were adjudicated by the State.

MR. MERCER: I agree with you, Justice Scalia.

JUSTICE SCALIA: So let's not do that, then. Let's -- let's decide something.

MR. MERCER: Okay.

JUSTICE SCALIA: Good.

MR. MERCER: Well, I'm confident that, you know, as this Court addressed in Strickland itself, the claim fails for lack of --

JUSTICE KENNEDY: Well, if -- if the Profitt -- the Fifth Circuit -- Profitt, the Fifth Circuit case, applies in the Ninth, Ninth Circuit, and I would think it would, just as the magistrate judge thought that it would, then that would be -- present a very close case and it would probably require reversal of the State court, wouldn't you think, if the Profitt rule applied? What is it, the "all or" -- not "all or nothing" --

MR. MERCER: "Nothing to lose."

JUSTICE KENNEDY: "Nothing to lose."

MR. MERCER: Well, if -- we agree that nothing to lose, in fact, was what happened here, as in Profitt. The dissent recognized it, the District Court recognized it, and I think you're right that this case smacks of application of something like a "nothing to lose" type rule. And perhaps it's announced in Profitt, but it surely has not been clearly established by this Court in any decision, and that pre-AEDPA Profitt decision from the Fifth Circuit certainly did not compel

the California court or any other State court to apply a "nothing to lose" rule on Strickland performance.

CHIEF JUSTICE ROBERTS: Well, isn't that -- the fundamental question is what level of generality you look to determine what law has been clearly established? Certainly Strickland is clearly established.

MR. MERCER: Certainly.

CHIEF JUSTICE ROBERTS: But as far as I can tell, the "nothing to lose" issue has not been addressed by us and is not clearly established. So why do we look at it at the latter level of generality as opposed to the former?

MR. MERCER: Well, certainly this Court could indeed take a more narrow view of what is clearly established law. We agree that Strickland here covers the vast majority of ineffectiveness cases. But certainly, this Court has never squarely addressed such an issue before, and certainly, this Court has never announced that test to bind the States to resolve this claim.

I think that the fallback position is, absent a clear answer from this Court, as stated in Van Patten, absent a clear answer, the State courts are left with a very general Strickland principle, and as this Court stated in Yarborough v. Alvarado, the more general

the rule, the more leeway the States have in deciding cases on a case-by-case basis.

So certainly we feel that Wager's decision was patently reasonable under a traditional Strickland analysis. We're not asking for anything different. Now --

CHIEF JUSTICE ROBERTS: So you think -- I guess it's not open to us to issue a decision on the "nothing to lose" question or we don't have to. It's the only -- the way we have to decide the case is to determine whether the Ninth Circuit's determination on the "nothing to lose" question was clearly established by one of our cases.

MR. MERCER: That's correct, Mr. Chief Justice. And I think this comes back to our original point, that the only dispositive question here that really matters is where -- when the State court adjudicates --

JUSTICE STEVENS: Let me ask you this question. Supposing we were convinced, and I'm not suggesting we should be on the record, but supposing we were convinced that only the dumbest, untrained lawyer in the world could have failed to advance this defense, and that therefore I would have no doubt about it as an original proposition that he was incompetent under

Strickland -- under the general Strickland standard. Would we be permitted to say that in the case, or would we have to say, well, this particular kind of attorney error has never been addressed before, and therefore, we can't look at it?

MR. MERCER: Well, I think that because this Court has never even addressed conduct anything like this by an attorney --

JUSTICE STEVENS: But isn't it true that there's a whole host of counsel errors that could violate Strickland? But do you have to find one that we have addressed before before a Federal court can apply and say Strickland was violated?

MR. MERCER: I don't think you need one on all fours, exact fact patterns. That would be unworkable. What you do need to do is give the courts a clear answer to the question, and generally --

JUSTICE STEVENS: Would it be -- wouldn't it be a clear answer in this case to say this was a terrible lawyer, and therefore Strickland -- Strickland applies? Or could you say, we don't care how bad the lawyer was, Strickland -- we haven't adjudicated this precise set of facts before, so that's the end of the ball game?

MR. MERCER: This Court could say you

haven't adjudicated this --

JUSTICE STEVENS: Is that what you're asking us to do?

MR. MERCER: We're not asking you to say that a decision like this could never be unreasonable.

JUSTICE STEVENS: Oh, okay.

MR. MERCER: Okay? We're asking that this Court continue its Strickland jurisprudence that says the Constitution makes one general requirement and, as stated in Roe v. Flores-Ortega, that requirement is that counsel make reasonable choices.

So certainly, there could be a situation where counsel flipped a coin or made an arbitrary decision or made an unreasonable decision --

JUSTICE KENNEDY: Why is it, then -- if we say that and if Profitt is inconsistent with that, do we then remand or do we say on this record clearly it was reasonable? Obviously you want us to do the latter, I take it?

MR. MERCER: Well, I don't frankly think this case necessarily should be remanded back to the Ninth Circuit. They've had it three times already. But I think that the writ needs to be denied under a traditional Strickland analysis, and --

JUSTICE KENNEDY: Don't we have to go --

don't we have to say that this was reasonable?

MR. MERCER: No. I think what this Court simply needs to say is that it was not objectively unreasonable --

JUSTICE KENNEDY: Of course.

MR. MERCER: -- for the California courts to come out the other way.

CHIEF JUSTICE ROBERTS: I don't understand why you keep talking about Strickland. We sent this case back to the Ninth Circuit for further consideration in light of Carey v. Musladin. In that case we said that the grant of relief was unreasonable because of the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, which seems to me a much narrower focus on the level of generality than Strickland.

I would have thought you would have said -- maybe you are saying -- that because we don't have a precedent from this Court rejecting the "nothing to lose" case, that that should be the end of it.

MR. MERCER: Well, I did not make such an aggressive argument to this Court that a decision like this could never be unreasonable, but certainly there is no case from this Court that has announced such a

standard. So --

JUSTICE SCALIA: Excuse me. The issue is not whether it's unreasonable or not. The issue is whether it's an unreasonable application of -- of clearly established Supreme Court law.

MR. MERCER: Yes, Your Honor.

JUSTICE SCALIA: Reasonableness or unreasonableness is out of the question. You -- you first just have to look to Supreme Court law and say, is it conceivably an unreasonable application of that. And the -- and the answer to that is we -- we haven't decided the question of whether this is reasonable or unreasonable, and therefore, it cannot possibly be an unreasonable application of Supreme Court law.

JUSTICE STEVENS: That's his argument, not the one you've been making.

JUSTICE SCALIA: That's right. That seems to me --

JUSTICE STEVENS: You say the standard is Strickland.

MR. MERCER: Well, what I say is that this Court has held that Strickland generally applies to almost all ineffective counsel cases. And certainly this Court has stated it applies in specific type issues of conduct. For example, counsel has a duty to conduct

a reasonable investigation; counsel has a duty to consult his client about filing an appeal. But Justice Scalia is absolutely right, this Court has never said anything remotely like the rule applied by the Ninth Circuit here.

JUSTICE BREYER: Well, they didn't. But what we're going to discover, I suspect, when we actually dig into this record, which is pretty extensive, are two things. The first is the California Court of Appeals does not seem to have dealt with the particular issue in front of us. They talked about a due process issue at the end of their paragraph, they have talked about things that are close to it, but they nowhere say expressly how they are deciding the question of whether there was ineffective assistance of counsel for the reason that he didn't put on this insanity defense. That's going to be our first problem.

Then I looked to see, I got the record out to see, if he raised it, and he didn't. So we have the fact that they didn't talk about it, and then we have the fact that of course the Supreme Court of California says just one word, "Denied."

Then when we discover round two in the Ninth Circuit, we are going to discover some language which says: We are not relying on this rule, there is no such

rule, as a rule of you have to make a defense as a last resort. Here's what they say. Instead of that we say, forget about that, we were wrong the first time, we assume. "Where the State court has provided an adjudication on the merits, that is, it did say denied, but has not explained its underlying reasoning or held an evidentiary hearing, we conduct an independent review of the record to determine the State court's final resolution of the case, whether it was reasonable or unreasonable."

So they say: We did conduct that record independent review. And our conclusion is that it was unreasonable, okay? Nothing to do with any special rule here or anything. We just think it was unreasonable.

All right; now, what are we supposed to do with this?

MR. MERCER: I think this Court needs to give full deference to the adjudication of the State courts.

JUSTICE BREYER: What is that deference going to be? I take it what it would be is that the person, the defendant, would have in his petition -- which we don't actually have -- would have said the facts are thus and so, and since they had no hearing, they would have to take those facts as being thus and

so.

MR. MERCER: Correct.

JUSTICE BREYER: And then we would have to say, was it unreasonable of them on the facts as they might have taken them most favorable to the defendant. Is that what we're supposed to do? Is it unreasonable of them to conclude for the State's favor in light of reading these facts as most possible favorable for the defendant? Is that what we should do?

MR. MERCER: Correct, yes.

JUSTICE BREYER: Yes.

MR. MERCER: And that's the situation and the circumstance outlined by the California Supreme Court in People v. Duvall, and it's a case and a procedure designed for judicial economy --

JUSTICE BREYER: Then we have to reach this hearing issue because we have to say, insofar as the hearing reached a different result, we should ignore it for the reason that the statute tells us to consider the reasonableness of the State court's decision in light of the facts on the record before it.

MR. MERCER: Correct.

JUSTICE BREYER: So we have to reach a huge number of issues which we've never decided.

MR. MERCER: I actually think that that

issue is not really properly before this Court.

JUSTICE BREYER: Well, then how are we supposed to do it? That's why I raised it.

MR. MERCER: Based on the State court adjudication, a straightforward analysis under 2254(d) of the California Supreme Court's legal resolution of this claim.

JUSTICE GINSBURG: We should treat the district court proceeding as though it had never happened on the ground that the Ninth Circuit never should have remanded it to the district court, and we just take it as though we had a 2254 petition from the State supreme court in the district court. And then the district court doesn't conduct any hearing; it just applies the standard. So that the whole thing about clearly erroneous at the district court, that -- that should be out of the case.

MR. MERCER: That is our primary contention, yes.

JUSTICE SOUTER: Then if we get to that point, I think your argument is as follows. I'm not sure. I want you to tell me.

If the State court adjudication was -- was contrary to what Justice Stevens' hypo suggested might be the "total fool" rule, in other words no one but a

complete nincompoop would have failed to -- to press forward with this defense, then we can decide the case simply under Strickland, because Strickland unreasonableness is certainly going to cover the total fool case.

But if we have something less egregious than the total fool case, then we've got to look for more precise Supreme Court precedent, and that's what gets us into the Musladin or Musladin rule.

MR. MERCER: Correct.

JUSTICE SOUTER: And if we get to the Musladin sort of level of generality, we do not have any determination from this Court, any clearly established law from this Court, that would indicate that the State court's adjudication or determination was unreasonable here.

MR. MERCER: Absolutely.

JUSTICE SOUTER: Is that your road map?

MR. MERCER: Yes, it is.

And if there are no further questions, I would like to reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Sevilla.

ORAL ARGUMENT OF CHARLES M. SEVILLA

ON BEHALF OF THE RESPONDENT

MR. SEVILLA: Mr. Chief Justice, and may it please the Court:

I would like to begin by addressing the so-called "nothing to lose" rule, which is a fiction attributed to Profitt v. Waldron, which -- it does not say that in Profitt v. Waldron. It's a fiction attributed to the Ninth Circuit, because the Ninth Circuit not only did not say that; they rejected the idea that they were relying on a "nothing to lose" rule. The Ninth Circuit applied -- well, I might also add that in a case called Lowery v. Lewis, which is cited at the Petitioner's appendix for cert 94, the Ninth Circuit specifically and in no uncertain terms said it rejected a "nothing to lose" rule.

CHIEF JUSTICE ROBERTS: And you reject it as well, I take it --

MR. SEVILLA: Yes.

CHIEF JUSTICE ROBERTS -- and concede it is an improper -- it is not a basis for ineffective assistance that somebody did not pursue a "nothing to lose" case argument?

MR. SEVILLA: It -- essentially, because it's an irrelevant concern because the decision has to be made on whether counsel's decision, as he faced the trial facts, was objectively reasonable.

Now, in that calculus if there is nothing to lose by going forward, if there is a great benefit to achieve by going forward, if he's got a credible defense, as it was determined by the district court at the evidentiary hearing on insanity, then it's objectively unreasonable on the morning of trial on the way to court, to, out of a sense of despair or hopelessness, subjectively speaking, to decide that: I'm going to jettison this defense that's been prepared over the year. There was --

CHIEF JUSTICE ROBERTS: Well I -- I don't under -- I didn't follow that answer. You're saying if he does have nothing to lose, it is objectively unreasonable for him not to go ahead with it?

MR. SEVILLA: I'm saying that's one of the factors. I'm not saying that's the sole factor, because, as the case that I cited, Lowery, there was a motion to suppress which attorneys were making in this case. They all lost, and his -- the client in that case argued, well, there was nothing to lose in presenting this motion to suppress, and the Ninth Circuit said: That's not the rule; it's under the circumstances whether the performance is objectively unreasonable, so we need to take into consideration the compete -- competing factors.

CHIEF JUSTICE ROBERTS: So we have to look at this counsel's performance under Strickland, I guess, and determine whether it was objectively unreasonable in light of Strickland filtered through Yarborough?

MR. SEVILLA: Correct. And in -- in that regard, the State has argued --

JUSTICE SCALIA: Is that precisely what we have to decide? Or wouldn't it be whether it would be unreasonable for the State court not to come to that conclusion, which is one step removed?

MR. SEVILLA: It would be one step removed were it not for the fact that there was an evidentiary hearing which resolved facts that should have been resolved in the State court. Appellant filed a separate petition in the court of appeal in California, filed the same petition in the California Supreme Court, asked -- first argued up front that this was unreasonable performance under Strickland, and then said if the court disagrees, then it ought to be remanded to a referee for fact development.

JUSTICE SCALIA: So -- so the usual test that the State court has to be affirmed unless it's unreasonable application of Supreme Court law is altered when the State court has not had an evidentiary hearing that the Federal habeas court believes should have been

held?

MR. SEVILLA: And holds it. But --

JUSTICE SCALIA: How do you get that out of the statute? I don't understand it; it makes no --

MR. SEVILLA: Well, there's a hole in the statute, there's no question about it, under 2254(d)(1).

JUSTICE SCALIA: Right.

MR. SEVILLA: When you have the -- the statute requiring the application of, or nonapplication of law contrary to the United States Supreme Court --

JUSTICE SCALIA: Right.

MR. SEVILLA: -- or an unreasonable application thereof, what happens when that issue really cannot be decided without an evidentiary hearing under Strickland?

JUSTICE SOUTER: No, but you're saying -- the need for the evidentiary hearing, as I understand it, was raised by you in the following way. You said to the California Supreme Court: There is on the face of the papers filed here a violation of Strickland and a -- or a misapplication of Strickland in -- in the way the California trial court came out; but if you do not find a facial violation of Strickland based on these papers, then you should remand for an evidentiary hearing. And it doesn't seem to me that that follows at all.

If there's no Strickland error, that seems to me a -- a -- an odd premise to say you ought to remand for a hearing. Aren't you under an obligation to specify factual issues that -- specifically that need to be developed, before you would make out a case for saying they were in error in not holding the evidentiary hearing?

MR. SEVILLA: Well, we argued that because Mr. Wager, defense counsel, presented a declaration which was contradicted by other declarations as to the reason he gave up this defense, we argued it was objectively unreasonable if the court -- the State court took all of the intendants in favor of our declaration and Mr. Wager did not really address the reasons for giving up the defense, he just said, I felt it was hopeless.

It took the evidentiary hearing to determine why he felt it was hopeless. So we argued that on the face of it it is Strickland error. If the court disagrees, then we're entitled to an evidentiary hearing to determine --

JUSTICE SOUTER: But you're saying that you specified the evidentiary issues that you wanted to develop?

MR. SEVILLA: What we specified is why his

rationale was unreasonable.

JUSTICE SOUTER: Well, with that, I'm just asking you --

MR. SEVILLA: And we --

JUSTICE SOUTER: I'm asking you -- I'm throwing you a softball.

MR. SEVILLA: Right.

JUSTICE SOUTER: Are you saying that that was, in effect, an adequate way to tell the California Supreme Court that these are the issues that we want to develop in an evidentiary hearing that aren't sufficiently developed in the documents? Is that your position?

MR. SEVILLA: Yes.

JUSTICE SOUTER: Okay.

JUSTICE BREYER: But there is no hole in the statute. What it says to do, quite explicitly, is it says that you have to see whether the State court decision was unreasonable in light of the evidence presented in the State court. So it tells us what to do. It says, look at the evidence in the State court, and like any other instance where there is no hearing, every day of the week, judges refuse to give a hearing. Now, when they do that, they have to assume the facts in favor of the losing party. So the question is, assuming

the facts in favor of your client, was the decision that he loses unreasonable?

MR. SEVILLA: We argued yes.

JUSTICE BREYER: And you said yes. Is there any finding on that in the Federal court? No.

MR. SEVILLA: No.

JUSTICE BREYER: All right. Now, that's -- that's why I don't know how to proceed because it seems to me to decide that question just as I said it. When I said it, I don't think what I said is clear in the law of this statute. There are two sides to it. We just had a case where there were many briefs on this question. So I'm slightly uncertain what to do.

MR. SEVILLA: Was that Bell v. Kelly?

JUSTICE BREYER: That's a good one.

MR. SEVILLA: I think it was, and the Court dismissed as improvidently granted, and --

JUSTICE SCALIA: Excuse me. What do you rely on for the proposition that if -- if you deny a hearing, all of the facts for which the hearing was demanded have to be assumed in favor of the party who asked for the hearing?

MR. SEVILLA: That's California law.

JUSTICE BREYER: That's the law of the Federal Government, I would have thought.

MR. SEVILLA: That is --
JUSTICE BREYER: It's summary judgment law.
MR. SEVILLA: In order to deny relief, one has to -- the court has to presume the adequacy of the showing, or the truth of the showing made by the --
JUSTICE SCALIA: No, but that can't be. What if I deny the hearing because there are ample facts that show what the situation was, and a hearing would in my view be absolutely redundant? And therefore all of the facts that support the other side have to be washed out simply because I've denied a hearing?
MR. SEVILLA: No. We're not making any claim that there has to be a hearing in every Federal case when there is an argument that could be deemed on its face cumulative evidence.
JUSTICE SCALIA: I wasn't addressing that. I was addressing the proposition that when you deny a hearing, all of the facts for which you demanded the hearing have to be assumed in your favor. I -- it seems to be --
JUSTICE BREYER: That's my fault. I'm referring by shorthand to a Rule 56 summary judgment type standard. All those facts are assumed on your side in which they're material, and there has to be in the evidence a reasonable basis for dispute.

MR. SEVILLA: I --

JUSTICE BREYER: That's my mistaken refusal to -- I should have said Rule 56.

MR. SEVILLA: Well, it's -- it also is California law, and I believe it is habeas corpus law, that when the petitioner files a petition and attaches declarations, in order to deny those, assuming that the truth of those declarations is presumed in order to evaluate the prima facie case -- for example, in this case, in Strickland, that if that can't be resolved without a hearing, the hearing should be held. And the court of appeal on the first go-around held exactly that. The court said there are competing reasons here why the defense counsel waived this defense on the morning --

CHIEF JUSTICE ROBERTS: Counsel, talking about -- in Strickland -- right here. In Strickland, we said that if a decision by counsel is made upon, quote, "thorough investigation," it is, quote, "virtually unchallengeable." Now, which of these facts in the Petitioner's brief is wrong: That Wager retained eight expert doctors to evaluate Mirzayance's mental health; he retained jury consultants; he conducted a mock trial in which he presented mental health defenses to two juries; he hired a private investigator to interview

friends and associates; he consulted with Mirzayance's parents and their attorneys; he discussed the case with a retained expert doctor after decision and his co-counsel?

Now, that sounds like pretty thorough investigation of the defense you say he should have raised.

MR. SEVILLA: Well, there are a couple of problems with -- all of that is true. I might quibble with one, but what -- Mr. Wager was operating under a fundamental misunderstanding of California law. All of that was ready to go, to present. He had a great not-guilty-by-reason-of-insanity case supported by lay testimony, childhood history, and these psychiatric opinions of very formidable experts. But he had a fundamental error that was only revealed at the evidentiary hearing in the understanding of California law. He said -- and he said this six times at the evidentiary hearing -- he said that when a jury has found the defendant has maturely and meaningfully deliberated, that that means they found the equivalent of wrongfulness. That is absolutely wrong. He was quoting from a statute that was repealed in 1982, when California had a major revision of its statutes and moved mental health concepts --

CHIEF JUSTICE ROBERTS: So all the points that your friend began with, which shows his conscious deliberation, his knowledge not only about how to go about killing somebody, but also guilt, the recognition of the wrongfulness of what he had done -- all that under California law doesn't enter into a consideration of insanity?

MR. SEVILLA: Surely it enters into the consideration, and every one of the experts considered precisely that evidence, which was for the most part after-the-fact evidence. And as the State's doctor -- and, again, this came out at the evidentiary hearing because it's certainly not discovered in the State doctor's report that was submitted. The State doctor, Dr. Anderson, stated at the trial in Federal court that, yes, he was aware of the consciousness-of-guilt evidence that came about mostly after the event, but that did not speak to his intent, his mental state at the time of the offense. And he stated, which was a great surprise in the Federal evidentiary hearing, that he believed Mr. Mirzayance was, because of the psychosis, feeling that he was justified --

CHIEF JUSTICE ROBERTS: I understand that, but counsel here at the time retained eight expert doctors to evaluate his mental health. He conducted the

mock jury trial. He interviewed the parents. He hired an investigator to interview friends. What you're saying is, well, here's -- if he had hired a ninth expert, he might have come out differently. That sounds like a thorough investigation under Strickland.

MR. SEVILLA: It was a thorough investigation. But this case -- this Court has said, in Terry Williams, counsel has a duty to investigate and proffer mitigation evidence in a capital case.

CHIEF JUSTICE ROBERTS: So isn't that -- aren't you back to the "nothing to lose" argument? He conducted this investigation, which under Strickland we said makes the decision virtually unchallengeable, and you're saying, well, he has an obligation to proffer it.

MR. SEVILLA: He had an obligation to proffer it because he was operating on a fundamental misunderstanding of California law.

JUSTICE ALITO: You say that repeatedly, but what is there to show that he misunderstood, that he misunderstood California law, as opposed to making a practical calculation about how juries would look at this evidence, having found -- having heard the evidence of premeditation and having found premeditation, even though that doesn't decide the NGI issue, as a matter of law. As a practical matter, it makes it quite unlikely

that they're going to accept the NGI defense. Where -- and you say that repeatedly.

MR. SEVILLA: Yes.

JUSTICE ALITO: Where in the record does it show that he misunderstood the law, as opposed to making a practical evaluation of what the jury was likely to do?

MR. SEVILLA: Well, I will -- I could rattle off page numbers from where he said that the jury finding of premeditation and deliberation was the functional equivalent of a finding of sanity. That is absolutely not true. Here's the quote --

JUSTICE KENNEDY: He didn't use the word "functional equivalent" in the portions I read. Maybe you can correct me if I'm wrong about that.

MR. SEVILLA: He did not say "the functional equivalent." He said --

JUSTICE KENNEDY: And he told the trial judge, "I've got an uphill" --

MR. SEVILLA: Yes.

JUSTICE KENNEDY: -- almost perpendicular. And he had -- each and every one of those experts in their affidavits, in their reports, had said that he didn't have deliberation or premeditation. They were getting ready for that. And he felt that this would be

devastating cross-examination material because the jury had already found the opposite -- they had already disbelieved the expert on this point.

Now, it's true, it's true, that knowledge of wrongfulness is probably slightly more extensive than premeditation. But based on the defense that he was going to present -- he didn't know what he was doing at this time -- he had a very, very difficult obstacle to overcome.

MR. SEVILLA: Well, that -- that's a challenge that faces every criminal defense attorney in -- a case when you have a -- a credible defense like this. There -- there are going to be challenges to that by vigorous, trained prosecutors.

JUSTICE GINSBURG: Isn't there something on the other side? You seem to present this as a case, but counsel did a careful job, and then he lost faith. He lost hope, and so he acted irrationally.

But wasn't there on the other side consideration of the sentence that he was going to get, and might not a -- a lawyer perfectly rationally think: If I give up this defense, it is just going to waste everybody's time. The judge is going to give me the benefit of -- of having done that in the sentence, in giving a lower sentence, in giving -- making the

sentences on the multiple offenses concurrent rather than consecutive.

MR. SEVILLA: Well, if there had been a tactical purpose such as that, that would have been an interesting fact to add to the calculus here, but he absolutely denied there was any benefit.

JUSTICE SOUTER: Well, maybe -- maybe he did, but when we come to judge prejudice, don't we have to judge prejudice by considering exactly what Justice Ginsburg just said? In other words, our standard, the -- the standard -- No. 1, the standard for Strickland prejudice is -- is an objective -- I mean the standard for -- for -- of -- of performance is an objective standard. And the standard for prejudice has got to be an objective standard, too.

And even though he said, I didn't do this for tactical reasons, if a -- if a sound lawyer would have entertained exactly the tactical reason that Justice Ginsburg just outlined, isn't that crucial to the determination of prejudice?

MR. SEVILLA: Well, it -- it may well be if there was a --

JUSTICE SOUTER: Well, shouldn't that be?

MR. SEVILLA: -- if there was a possibility that there could be any difference whatsoever at

sentencing. But he testified, well, what was going to happen to Mr. Mirzayance if he were to -- he was going to get 25 or 29 to life, which is exactly what happened. So there was no --

JUSTICE SOUTER: How did he know that?

MR. SEVILLA: How did he know that? Because if you -- he had already been convicted of first-degree murder, which --

JUSTICE SOUTER: Yes, but the judge hadn't sentenced him yet.

MR. SEVILLA: Correct, but under California law there is a mandatory prison sentence for the use of a gun, so -- and the sentence for first-degree murder is 25 to life.

JUSTICE KENNEDY: So you are saying the judge had no discretion whatsoever?

MR. SEVILLA: That is correct. So, therefore --

JUSTICE SCALIA: Twenty-five -- 25, 26, 27, 28, he has 25 years worth of discretion, doesn't he?

MR. SEVILLA: No, no. It's a minimum mandatory 25 to life.

JUSTICE KENNEDY: But couldn't he also give life. He could also give the maximum, which was life, couldn't he, or am I wrong?

MR. SEVILLA: He -- he could give 25 to -- the -- the --

JUSTICE SOUTER: You are saying the terms of the sentence had to be 25 to life?

MR. SEVILLA: Correct.

JUSTICE SOUTER: So there was no discretion on the trial judge's part.

MR. SEVILLA: Correct. Correct. And this -- the defense counsel said as much when answering the question as to whether there was any possible benefit.

CHIEF JUSTICE ROBERTS: So he's got nothing to lose?

MR. SEVILLA: He's got nothing to lose and something to gain. There was no benefit in taking the -- the action that he took in waiving this defense, which was credible. He was prepared to present it until the --

CHIEF JUSTICE ROBERTS: I guess that gets me back to what -- what I thought the case was postured in, which is whether or not a case from this Court clearly establishes when you have nothing to lose, you've got to go ahead and present the defense, or it's a violation of Strickland. And what case is that?

MR. SEVILLA: There is no case that this Court has so pronounced. And we are not arguing for

that standard, nor should we have to --

CHIEF JUSTICE ROBERTS: Well, I -- I understood your responses to the various questions here to, in effect, be arguing for that standard. You are saying, look, he was going to get the same sentence anyway. You know, all -- all your answers sound to me like nothing to lose.

MR. SEVILLA: Well, they're all part of the calculus of reasonable performance. Certainly, the fact that there is nothing to lose, that he is going to get an automatic 25-year minimum sentence, that he is -- on the other hand, he's got a credible defense for which there is absolutely no benefit in giving up, and -- and then he decides for reasons --

CHIEF JUSTICE ROBERTS: He made a determination -- he made a determination after a thorough investigation of the various points I went through with you earlier that it was not a credible defense. Now, maybe that was reasonable or unreasonable, but it doesn't seem to me to be -- under Strickland we said it is virtually unchallengeable, and it doesn't seem to me to be objectively unreasonable in light of clearly established law from this Court.

MR. SEVILLA: Well, the -- the -- this Court has said that errors of misunderstanding -- well, the

Court has said that failure to fact-investigate can be a basis for objectively unreasonable performance. The same is true with failure to legally investigate what's the law governing your case.

And he stated on six occasions that the fact that the jury, quote, "had already found Mirzayance guilty of first-degree murder," and, whether they knew it or not, under the facts of this case legally sane, well, then, the question is: Well, how do you make that determination? By the way, he said the equivalent of that six times during the year.

JUSTICE SCALIA: I didn't -- I didn't take that to mean under California law, since the jury found the one, it has to find the other. He wasn't making that argument. He was saying any jury that found that this was done intentionally, that this was done, you know, with -- with planning, with -- with cover-up and what not, that jury is not going to find that he was crazy. That's all he was saying, and -- and that seems to me entirely reasonable.

MR. SEVILLA: Well -- well, I -- that might be the case if he did not misunderstand California law.

JUSTICE KENNEDY: Well, it's hard for me to believe that he didn't. He -- he has tried a hundred cases. He had moot or mock -- mock trials where he was

asking the experts these questions with the co-counsel. And you want us to say that he didn't understand the law? And there is no -- there is no finding to that effect. There's no finding to that effect: That he did not understand the law by the magistrate.

MR. SEVILLA: Well, the circuit --

JUSTICE KENNEDY: By the magistrate, there was no finding to that effect.

MR. SEVILLA: That's correct, because the magistrate did really not make a finding on prong one. The -- the magistrate misapprehended the intention of the circuit's first remand by thinking that it had mandated a nothing-to-lose rule. And if there was nothing to lose, it was prong one ineffectiveness, so there was no need to make a finding. So we're left without a finding.

But the circuit on -- on its second and third opinion noted that his concept of premeditation and deliberation as having mental-health concepts was wrong because of the 1982 amendment to the statutes, which removed many of the mental-health concepts and -- and put them over into the insanity phase. And so when he said to the court at the hearing, Mr. Mirzayance -- after the jury found him maturely and meaningfully deliberated, that's language that was eliminated in --

in 1982, and that is the mental-health concept.

And -- and this point is very important to this argument. When he was arguing to the jury, he said he can't premeditate and deliberate because he's mentally ill. He's mentally diseased. And he was cut off by the prosecutor and the court who gave an instruction that said -- 853 of the trial transcript, saying the fact that Mr. Mirzayance may have deliberated for irrational reasons brought on by mental disease is not a defense to this case. His reasons can be irrational in deliberating.

And that should have tipped him off that this jury was precluded from taking the psychiatric testimony -- the psychological testimony of the one witness at the guilt phase and -- and deeming that a negation of any ability to win on a wrongfulness standard. And -- and I might also add --

JUSTICE KENNEDY: But they didn't -- they didn't strike the experts' testimony. The experts testified at some length, the -- the psychiatrist.

MR. SEVILLA: He did.

JUSTICE KENNEDY: So that was relevant to premeditation and deliberation, and the jury did consider what the mental health expert said.

MR. SEVILLA: They did consider what he

said, but they were precluded from channeling that into a defense to premedication and deliberation.

JUSTICE BREYER: Well, what about -- what do you do with the last sentence of the supreme -- of the California Court of Appeals' opinion? "None of the exculpatory evidence defendant recites, including evidence of his mental disorder, was reasonably likely to persuade a jury that defendant did not premeditate and deliberate the killing." And from that they conclude that there is no reasonable probability that, but for the errors, a different verdict would have been reached, i.e., that it does not satisfy the second part of Strickland.

MR. SEVILLA: And -- and you were reading from the California Court of Appeals --

JUSTICE BREYER: I was just reading from the California court of Appeals. Because I look at that. I think when I go back and see what was the evidence in front of them, I am going to find all of these -- all of these things. Not the last part by the way, not -- not the part about the counsel admitting he was wrong or whatever this argument we are having. We won't find that, but we'll find everything else there.

And so they're using that as the basis to say there was no prejudice, and now I guess that the

Ninth Circuit and the Federal courts would have to defer to that finding on prejudice. Now, what's your response to that?

MR. SEVILLA: Well, the California Court of Appeals did not have before them the evidence that came in by way of petition, which was all of the psychiatric opinions of the forensic psychiatrists who gave declarations saying that Mr. Mirzayance was insane at the time of the homicide. That is not within the court of appeal opinion because the court of appeal opinion is on the four corners of the record, and this was collateral to that.

So any statement along those lines did not encompass the most powerful evidence that was presented, which would have been all of the psychiatric opinion testimony about his mental state at the time of the offense.

And then, of course, we know that at the federal evidentiary hearing, this defense was found credible, and one of the state doctors came over to the defense side and testified that Mirzayance did not understand wrongfulness at the time of the homicide because of the psychosis. And this doctor made an error, and its clear from the record at the evidentiary hearing, he had an error in his understanding of the NGI

test in California. He thought if you met prong one you understood the nature and quality of the act, you were sane, and he never went to wrongfulness.

But when he was asked by the State at this hearing, well, what about his ability to understand wrongfulness, and the doctor said he didn't understand wrongfulness.

JUSTICE KENNEDY: Please correct me if I'm wrong, but as a general rule psychiatrists don't -- don't testify as to the ultimate standard. They testify as to the condition and -- and the symptoms of -- of the defendant, and then the jury makes that conclusion.

MR. SEVILLA: In California in 1982, there was a statutory amendment which prohibited forensic experts from testifying to opinions at the guilt phase, so that -- on legal issues like premeditation, deliberation, so they could not, Dr. Satz could not testify at the guilt phase on premeditation and deliberation. At the insanity phase, they absolutely can testify as to whether he was sane or not.

JUSTICE GINSBURG: Had Wager ever represented a defendant who pled NGI?

MR. SEVILLA: No. He testified this was his first NGI defense.

Speaking to -- I think, Justice Kennedy, you

raised the issue about couldn't these -- in the prejudice calculus, couldn't these psychiatrists have been impeached with the fact that they found no premeditation and deliberation? Well, California statute under Penal Code section 28 prohibits their opinion on premeditation and deliberation at the guilt phase where the issue is premeditation and deliberation. So, I can't understand how a court would let in their opinions on premeditation and deliberation when there's a totally separate issue of insanity at the insanity phase.

It's -- if it's irrelevant or prohibited at the guilt phase, where premeditation is the issue, it's surely going to be irrelevant at the NGI phase, where it's not an issue, and we have a totally different standard. As the courts of California have said, one can be guilty of first degree murder and be insane. That's -- that's clear.

So, in this case, we have an attorney who, for whatever reasons, based on a subjective sense of hopelessness, gave up his client's only and best defense, a defense that was found credible at the federal evidentiary hearing. Once -- once that defense is found credible, that bespeaks of the unreasonableness of counsel giving it up. It's a credible defense, it's

the only defense available to him, and counsel gave it up for no tactical benefit.

There was no upside to this. There was a clear downside to it, because it consigned his client to 29 years to life as opposed to the possibility of treatment in a mental hospital, and potentially, upon the restoration of sanity, potential relief -- release if he could prove his restoration.

JUSTICE KENNEDY: Has he served his time so far in a regular institution?

MR. SEVILLA: Yes, he has. He is in Mule Creek State Prison just south of Stockton, California, and --

JUSTICE GINSBURG: Is that the special -- he made a request for a particular prison. Is that the one?

MR. SEVILLA: I don't think so. I don't believe -- I think at the sentencing hearing, the trial judge did not do anything special except sentence him to prison? Although both -- in terms of the bona fides of his disease, both the prosecutor and the judge at the time of the sentencing said he was clearly a mentally diseased person. So that -- this -- this bespeaks back to the credibility of the defense which was established by the mental disease evidence which stemmed from

childhood.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. SEVILLA: Thank you very much.

CHIEF JUSTICE ROBERTS: Mr. Mercer, you have four minutes remaining.

REBUTTAL ARGUMENT OF STEVEN E. MERCER

ON BEHALF OF THE PETITIONER

MR. MERCER: Just a couple of points I would like to make briefly to clarify a couple things.

First off, there was no finding that Attorney Wager misunderstood California law or somehow was under the impression that a finding of first degree murder was legally precluded a finding of NGI. He argued at the State trial that there's no question that an insane person can deliberate, and surely while the jury's verdict was as devastating under the facts of this case, he didn't close up his books and go home.

He told the trial judge, we need to reassess this, I need to decide who I'm going to call, I need to consult with my doctors and my co-counsel and decide what we're going to do.

And as the district court found here, and as Wager stated in the State court declaration, there was no final decision made until the morning of trial when the parents expressed a profound reluctance to assist

their son. And this was, in fact, his first NGI defense, but as Mirzayance's family attorney stated in his State court declaration, Attorney Wager was a ten-year expert on mental health and sanity issues with the Los Angeles District Attorney's Office. He had tried more than a hundred trials. He was the expert. He had done his homework here. He knew what he had to present. He did not make a rash decision. He consulted with co-counsel, and concluded reasonably under his professional valuation that the defense could not meet its affirmative burden of proof here.

The second thing I would like to clarify on Justice Ginsburg's point, there was some sentencing discretion left here. It's correct that Wager in hindsight said, well, perhaps there was nothing to lose. But he argued to the sentencing judge the very fact that his client knew the wrongfulness of his actions and was so remorseful should entitle him to a lesser sentence on the weapons enhancement.

JUSTICE SOUTER: What discretion did the judge have?

MR. MERCER: The -- that the -- the sentencing judge could have imposed a high, middle or low-term for the weapons enhancement. The underlying sentence was 25 to life, my friend is correct, it's set

by statute. But he had discretion on sentence enhancement, and he was convinced that Mirzayance was remorseful, and gave him a mid-term instead of a high-term, despite the fact.

JUSTICE GINSBURG: But there was also something about the revocation? There were three revocations involved, I thought, two years on each.

MR. MERCER: I don't believe that's correct. I think it was a straightforward 25 years to life sentence plus a weapons enhancement of four years added on.

JUSTICE BREYER: You keep saying 29 years. Is it 29 years or is that just a misprint --

MR. MERCER: It's -- the aggregate sentence is 25 -- excuse me. The aggregate sentence is 29 years to life. It's 25 years to life for the first degree murder, plus four years for the weapons enhancement in this term, a mid-term, because Wager successfully argued that his client was remorseful.

CHIEF JUSTICE ROBERTS: What would he have gotten in the high term?

MR. MERCER: I believe that it was -- I believe that it was six years as opposed to four. It may have been eight as opposed to four. I don't know. That's not discussed in the State court record.

And finally, Mr. Mirzayance concedes that "nothing to lose" would be an inappropriate new rule by this Court. He no longer calls it that. He doesn't -- he disagrees with the dissent view on this. What he calls it is this: This is the rule, in his own description, at page 30 of his brief, how the Ninth Circuit granted relief here. Excuse me, I see my time is expired.

CHIEF JUSTICE ROBERTS: Why don't you --

MR. MERCER: That the decision fairly read states only that counsel has a duty to present substantial viable defense where there was an objective prospect for success and no strategic or other benefit abandoning it. This Court has never held such a rule to bind the states.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 2:02 p.m., the case in the above-entitled matter was submitted.)