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P R O C E E D I N G S

(10:56 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in 05-1575, Schriro versus Landrigan.

Mr. Cattani.

ORAL ARGUMENT OF KENT E. CATTANI

ON BEHALF OF THE PETITIONER

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

The Ninth Circuit's rejection of a reasoned State court factual determination and decision is improper under any deferential standard of review, and it is particularly improper under the highly deferential standard of review required under the AEDPA. This morning I'd like to try to develop three -- three points.

First, the State court's factual finding that Landrigan instructed his attorney not to present any mitigating evidence was not an unreasonable finding and, in fact, is the most logical interpretation of the record. Although Landrigan now argues that the record does not show whether his decision not to present mitigation evidence was knowing or voluntary, that is not a claim that was ever developed in State court. He never alleged in his State postconviction proceedings

1 that that, his decision to do that was not knowing or
2 voluntary.

3 Secondly, an evidentiary hearing is
4 unwarranted in this case --

5 JUSTICE STEVENS: May I ask about the first
6 point? Does the Constitution require that it be knowing
7 and voluntary?

8 MR. CATTANI: It would require that it would
9 be knowing and voluntary, yes.

10 JUSTICE STEVENS: So if the record showed
11 that he didn't get, there wasn't the procedure followed
12 to normally waive a constitutional right, wouldn't
13 the district court be able to reexamine that?

14 MR. CATTANI: Well, there's no colloquy
15 requirement for a defendant to waive presentation of
16 mitigation. And I think it would have been enough if
17 the defendant or defense counsel had simply said my --
18 if the attorney had said my client has instructed me not
19 to present any mitigating evidence, and that would be
20 adequate. If a defendant chooses to make a claim that
21 his waiver was not knowing or voluntary, the burden
22 would shift to him to do that in a postconviction
23 proceeding, and he did not do that in this case.

24 JUSTICE SCALIA: How would he make such a
25 claim in this case where in open court he was asked by

1 the judge, right, with nobody twisting his arm, whether
2 it was the case that he did not want any mitigating
3 evidence introduced? And he said, right, yes, that's
4 correct?

5 MR. CATTANI: I agree, Your Honor. It would
6 be very difficult for him to make that argument and I
7 suspect that's why the argument was not raised in the
8 State postconviction proceeding.

9 JUSTICE KENNEDY: Well, I don't know if you
10 got to the third point you were going to make. You were
11 outlining three different points. But it seems to me
12 that from the very start, what happens is that you and
13 your brother for the Respondent are talking past each
14 other. You want to talk to us about the adequacy of the
15 State court finding. The Respondent says what we --
16 all we want is a hearing in the district court, and
17 those are two different issues.

18 We want a hearing in the district court,
19 i.e., so that we can show the findings are --
20 insubstantial or incorrect. Those, it seems to me, are
21 two different issues, and I sense the briefs talking
22 past each other on this point.

23 Did you see the same thing?

24 MR. CATTANI: Yes, I did, Your Honor, and I
25 think the reason for that is, in our view an evidentiary

1 hearing is not necessary because the factual finding by
2 the State court obviates the need for one. An
3 evidentiary hearing would be developing evidence that
4 would never have been presented. Given this factual
5 finding, the State court is in effect saying no matter
6 what counsel might or might not have developed, it would
7 not have been presented at sentencing because this
8 defendant specifically instructed his attorney not to
9 present any mitigating evidence.

10 JUSTICE KENNEDY: In your view, what is the
11 standard for when the district court may hold an
12 evidentiary hearing? I know there's an element of
13 discretion in it.

14 MR. CATTANI: A district -- the district
15 court can order an evidentiary hearing if the defendant
16 has been denied an opportunity to develop relevant facts
17 necessary to resolve a colorable claim in State court.
18 And I think here the defendant fails on two different
19 points.

20 First --

21 JUSTICE KENNEDY: That's the only time the
22 district court can hold a hearing?

23 MR. CATTANI: Well, it has to be through no
24 fault of his own and if the facts were not developed in
25 State court. Certainly it's the Petitioner's

1 obligation, a defendant's obligation to present these
2 claims in State court and the only -- the reason --

3 JUSTICE KENNEDY: Yes, it seems that if
4 he doesn't do that, then that's a bar. But if he has
5 done that, when can he ask for a further hearing?

6 MR. CATTANI: Well, but that's the point
7 here. He has not done that. He did not attempt to
8 develop facts or he was not precluded from developing
9 facts that would be relevant to a resolution of his
10 ineffective assistance claim.

11 And if I could, Your Honor, the two
12 different parts of that question. First, the facts are
13 not relevant. The facts that he's seeking to develop in
14 an evidentiary hearing is this additional, this
15 mitigation that should have been developed. If, in
16 fact, his avowal that he did not want any mitigation to
17 be presented is accurate, then these other facts are not
18 relevant.

19 JUSTICE SOUTER: No, but isn't that the
20 problem with your argument? Because your argument
21 assumes, and I think you said this quite candidly a
22 moment ago, that once there has been a finding that he
23 informed the court that he did not want mitigation
24 evidence presented, that in effect is a matter of --
25 binds him as a matter of law for all time.

1 And what he is saying here is look, if I had
2 known that there was this kind of mitigating evidence,
3 as opposed to what was proffered to the court at the end
4 of the trial in fact, I would not have made that waiver,
5 if you want to call it that. I would not have made that
6 representation to the court. And what I want is an
7 evidentiary hearing to show that, to show that in fact,
8 when I said to the court no mitigating evidence, I
9 didn't mean this.

10 And he wants a hearing for that. The only
11 way it seems to me that you can properly win on the
12 issue that he thus raises is exactly the way that I
13 think you said a moment ago. That once there is a
14 finding that he made a statement, whatever its
15 predicate, a statement that I don't want any mitigating
16 evidence presented, that is the end of the issue as a
17 matter of law.

18 My question is, do you have any authority
19 for that?

20 MR. CATTANI: Simply the AEDPA 2254(e). I
21 don't have a specific case that also would go directly
22 to that point.

23 Your Honor, I would also --

24 CHIEF JUSTICE ROBERTS: Justice Souter's
25 question highlights an ambiguity in this Ninth Circuit

1 opinion, for me anyway. Do you understand the hearing
2 that they directed to be on the waiver question, or is
3 the hearing that they directed on the alleged mitigation
4 evidence that he now wants to present?

5 MR. CATTANI: It seems to me the hearing is
6 directed at presenting all of the mitigation evidence
7 that he now wants to present.

8 JUSTICE SOUTER: Doesn't it have to go to
9 both? Because I mean, he's saying look, first I want to
10 show that there's a certain kind of mitigation evidence
11 that was not proffered, that I didn't have in mind, that
12 I wouldn't have objected to.

13 And he then wants to proceed with respect to
14 his inadequacy of counsel claim based also on the
15 existence of this kind of evidence that counsel didn't
16 look to.

17 There's a dual purpose, I thought.

18 MR. CATTANI: I would agree with that, but
19 Your Honor --

20 JUSTICE SCALIA: I wouldn't agree with it.
21 I thought that the Ninth Circuit had been very clear
22 that it did not agree with the district court's
23 determination that he had waived mitigating evidence. I
24 thought the Ninth Circuit simply disagreed with that
25 finding and remanded for a hearing on the mitigating

1 evidence.

2 MR. CATTANI: Yes.

3 JUSTICE SCALIA: Isn't that so? Didn't --
4 I mean, I thought that's -- one of the reasons the case
5 was here, that the Ninth Circuit simply smacked down a
6 district court factual finding that he had waived any
7 mitigating evidence. Isn't that what happened?

8 MR. CATTANI: That's correct, Your Honor.

9 JUSTICE SCALIA: So it wasn't remanding for
10 a hearing on whether he had waived mitigating evidence.
11 It made the determination that he had not waived it, and
12 then remanded for investigation into what that
13 mitigating evidence would be.

14 MR. CATTANI: I don't know that it's
15 completely clear as to what the Ninth Circuit is saying
16 can be developed and how that evidence can be used.

17 JUSTICE SCALIA: Well, it's clear at least
18 that they disagreed with the finding of the district
19 court that there had been a waiver, no?

20 MR. CATTANI: That's right, Your Honor, and
21 I think --

22 JUSTICE SOUTER: Well, it's clear that they
23 disagreed that the finding was necessarily dispositive.
24 Is anything clear beyond that? I mean, I guess I'm
25 having to say I'm raising the same question that the

1 Chief Justice did, about the ambiguity of what the court
2 did.

3 And there's no question that they found
4 that the -- the State trial court's finding with respect
5 to waiver or whatever we want to call it was not
6 necessarily dispositive. I don't think it's clear that
7 they found anything beyond that, but correct me if I'm
8 wrong.

9 MR. CATTANI: The Ninth Circuit ordered an
10 evidentiary hearing to allow him to develop whatever
11 mitigation he's proffered in Federal court.

12 JUSTICE SOUTER: Right. But that could
13 have, as we said a moment ago, that could have a dual
14 purpose. One to show the, in effect, the inadequacy or
15 the nondispositive character of the State court's
16 finding; and two, to show relief for inadequate
17 assistance of counsel.

18 And the question here is that, the immediate
19 question is what exactly did the State court find with
20 respect to -- oh, sorry -- what exactly did the Ninth
21 Circuit find with respect to the State court finding?

22 And there's no question that the Ninth
23 Circuit assumed that the State court finding was not
24 necessarily dispositive, but I don't know that it's
25 clear that it went beyond that, and that's where perhaps

1 you could help me if I'm wrong.

2 MR. CATTANI: Well, the Ninth Circuit
3 clearly held that the State court's determination of the
4 facts was unreasonable. And that's the problem with its
5 decision because if the determination of facts was
6 reasonable, it obviates the need for any further
7 evidentiary hearing.

8 JUSTICE KENNEDY: Well, on the waiver point,
9 let's assume that this case had not come in -- come
10 here, and you had gone back to the district court
11 pursuant to the order of the Ninth Circuit.

12 Surely you would have taken the position, or
13 you could have taken the position if the evidence
14 developed that way, that he really knew or should have
15 known about all this mitigating evidence and he waived.
16 You certainly could continue to take that position in
17 the district court.

18 MR. CATTANI: Yes.

19 JUSTICE KENNEDY: And the district court
20 would say I now have a more full, factual record, and I
21 make the finding that there was knowing waiver, or that
22 there wasn't.

23 MR. CATTANI: Yes, but the point that we've
24 tried to make is that he was allowed an opportunity to
25 develop his claim about whether his -- whether he made

1 that statement and whether he intended to instruct his
2 attorney not to present any mitigating evidence. He
3 submitted an affidavit where he said, if my counsel had
4 told me there was this evidence of a genetic
5 predisposition to violence, I would have allowed that to
6 be presented.

7 The court -- there was no need for an
8 evidentiary hearing because the court simply accepted --
9 accepted as true that Landrigan would have provided that
10 testimony.

11 JUSTICE ALITO: Well, how could the district
12 court on remand find that there was a valid waiver when
13 the Ninth Circuit says on A-17, the appendix to the
14 petition, "for all the foregoing reasons, Landrigan has
15 not waived the right to assert a claim for ineffective
16 assistance of counsel"?

17 MR. CATTANI: I think you're correct. The
18 Ninth Circuit has specifically found that the
19 determination of facts was unreasonable and found that
20 Landrigan has established a colorable claim of
21 ineffective assistance.

22 JUSTICE SCALIA: And it has not waived. Not
23 that the district court was -- didn't have enough
24 evidence before it. It says the foregoing, Landrigan
25 has not waived the right to assert a claim for effective

1 assistance.

2 So how can you possibly say that that
3 question is still open?

4 MR. CATTANI: Well, I --

5 JUSTICE SCALIA: The district court has to
6 accept that he hasn't waived. And what it's sent back
7 for is for all of the facts that show -- that show he
8 had ineffective assistance of counsel.

9 JUSTICE STEVENS: May I ask this question?
10 It seems to me that there are two separate parts to the
11 waiver issue. One, did he intend to say I don't want to
12 put on any mitigating evidence?

13 But then the second part of the question is,
14 was that statement made knowingly and voluntarily, just
15 as a guilty plea or something like that has to be.

16 So is it enough for you to say it's clear
17 what he intended, or is it also part of your burden to
18 say that that intent was expressed in a way that was
19 knowing and voluntary, compliant with the rule that
20 applies to waivers of constitutional rights?

21 MR. CATTANI: I think it's clearly enough
22 simply to say that, as I indicated, even if it had just
23 been an avowal by the attorney that this defendant has
24 instructed me not to present mitigating evidence, that
25 that would be enough.

1 JUSTICE STEVENS: Is that a sufficient
2 waiver without inquiring as to whether it was a knowing
3 and intelligent waiver, that he knew what he could put
4 in, and so forth and so on?

5 MR. CATTANI: Yes, it is, Your Honor. I
6 think to the extent that the defendant wants to raise
7 that, he can raise that in a State postconviction
8 proceeding and he should make that type of argument in the
9 postconviction proceeding.

10 And that's not what he did here. An
11 analogous situation is that -- came up in a case that
12 the defense, that Landrigan has cited, Iowa versus
13 Tovar. And this Court expressly noted that the time to
14 raise a claim -- that case involved whether it was a
15 counsel -- it was a decision to waive counsel at a plea
16 proceeding. And this Court noted that the time to raise
17 that is in a postconviction proceeding, and that the
18 burden shifts to the defendant to raise that issue.

19 And here if you look at the, the petition
20 for postconviction relief, if you look at the affidavit
21 that Mr. Landrigan submitted, there, there is nothing in
22 there that suggests that "I did not understand what I
23 was doing when I instructed my counsel not to present
24 mitigation. I, I did not understand the concept of
25 mitigation." There's nothing in there that suggests

1 that. So I would --

2 JUSTICE SOUTER: Isn't there something --
3 isn't he saying implicitly "I didn't have this kind of
4 evidence in mind; if I had been aware of this kind of
5 evidence, I wouldn't have given that instruction?"

6 So he is, it seems to me, implicitly saying
7 well, my waiver was not knowing, in the sense that I
8 understood there was this kind of evidence and intended
9 to preclude its introduction? Isn't that clear?

10 MR. CATTANI: It's clear that he is saying
11 that I would have permitted one type of mitigating
12 evidence.

13 JUSTICE SOUTER: But that's the same thing,
14 isn't that the same, a way of saying that to that extent
15 my waiver was not knowing?

16 MR. CATTANI: He, he's raised it to that
17 extent as to that particular piece of mitigation. And
18 the trial court is expressly saying I disbelieve you
19 when you say that you would have allowed presentation
20 of that mitigation.

21 JUSTICE SOUTER: And he is saying, "if you
22 will give me a hearing, district court, I will try to
23 demonstrate to you why, why the State court's finding on
24 that point was unreasonable. The State court made that
25 finding based on its observation of me at trial and, and

1 at the sentencing phase; but it didn't give me a, a
2 further chance to develop my evidence on, on
3 postconviction.

4 And I want a hearing to develop that
5 evidence in front of you, Federal district court, in
6 order to prove that the State court's finding in light
7 of that evidence was unreasonable."

8 Isn't, isn't it correct that that's what
9 he's asking for now?

10 MR. CATTANI: He is, Your Honor, but I would
11 suggest that there is no further evidence that was
12 presented that he was attempting to present in State
13 court regarding whether his waiver was knowing or
14 voluntary.

15 JUSTICE SOUTER: How would -- how do we know
16 that?

17 MR. CATTANI: We know that because of the,
18 the affidavit that he submitted. And he, he's required
19 to submit an affidavit to establish a colorable claim.
20 And, and he's required to allege in his postconviction
21 petition that his waiver is not knowing or voluntary.
22 But the burden is on the defendant --

23 JUSTICE SOUTER: But you, I don't think you
24 mean this, but you're not arguing that he just omitted
25 the magic words not knowing and voluntary?

1 MR. CATTANI: I don't think, I don't think
2 he just omitted them. I think he was not raising that
3 claim.

4 JUSTICE SOUTER: No, but, I thought a second
5 ago you -- you admitted that to a degree he was, because
6 he is saying implicitly, "if I had known about this kind
7 of mitigating evidence, I wouldn't have waived.
8 Therefore, my waiver was, as to this, not a knowing
9 waiver."

10 MR. CATTANI: He raised that as to that one
11 aspect of mitigation. But it would have been very
12 simple for him, a simple matter for him to argue I
13 didn't understand the whole concept of mitigation. I
14 didn't understand what I was doing.

15 JUSTICE SOUTER: Look, it would have been a
16 better affidavit, it would have been better pleading.
17 We can stipulate to that. But is there, I don't see
18 that there is any serious question that he is arguing
19 right now that as to this kind of evidence, had I known
20 about it I wouldn't have waived and therefore, I
21 shouldn't be precluded from, from getting it in now.

22 And, and if there's no question about that,
23 then -- then I think we're just fighting about words.

24 MR. CATTANI: Well, I think the issue was
25 resolved by the State court's factual determination that

1 Landrigan was not credible even in making that assertion
2 that I would have allowed presentation of genetic
3 predisposition of violence.

4 JUSTICE SOUTER: And he says in the
5 district, he says in the district court: I want a
6 hearing to show that I was credible. So credible that
7 the State court finding should be seen as an
8 unreasonable resolution of a factual issue. I want a
9 hearing.

10 That's all he's asking for, isn't it?

11 MR. CATTANI: I would just suggest that
12 there is no further evidence other than putting
13 Landrigan on the stand to say --

14 JUSTICE SOUTER: Well, that's pretty good
15 evidence, isn't it? I mean, he may be a believable
16 witness on this point. I don't know.

17 MR. CATTANI: Well, I don't think there was
18 any need for an, for the trial court to put Landrigan on
19 the stand having already presided over Landrigan's trial
20 and sentencing.

21 CHIEF JUSTICE ROBERTS: If he wants, if he
22 wants a hearing on that, we'd have to reverse the Ninth
23 Circuit, right? Because the Ninth Circuit held that he
24 didn't waive --

25 MR. CATTANI: That's right.

1 CHIEF JUSTICE ROBERTS: -- his claim?

2 MR. CATTANI: That's right.

3 CHIEF JUSTICE ROBERTS: The part of the
4 opinion that Justice Alito quoted on page A-17.

5 MR. CATTANI: That, that's right, Your
6 Honor. And I think that's why this case should be
7 relatively straightforward.

8 Because the Ninth Circuit, the Ninth
9 Circuit's finding, that the State court unreasonably
10 found that, that Landrigan expressly instructed that his
11 attorney not present any mitigation, given that --
12 that's the problem with the Ninth Circuit's opinion.
13 Everything else builds on top of that.

14 If that's an incorrect holding, then the
15 rest of the ruling is, is incorrect.

16 JUSTICE BREYER: If it is incorrect, if
17 we -- we don't know precisely what he meant by the words
18 he said, why doesn't that argue even more strongly for a
19 hearing? At the hearing he wants to introduce, doesn't
20 he, his stepparents, or the foster parents, a school
21 teacher, the various others? And he'll say, "anyone who
22 listens to those people will see that I had the most
23 horrendous upbringing anyone could have. The worst
24 you've ever heard.

25 And my argument is that if only my lawyer

1 had looked into this at that moment in the trial, he
2 would have said in the sentencing proceeding, look what
3 I can present for you. And if he had done it and told
4 me that, anyone would have said, "of course, present
5 it." And I want a chance to show that that's true of my
6 case."

7 Now, why shouldn't he have a hearing on
8 that? No hearing was given him in the State court.

9 MR. CATTANI: Well, the problem with that,
10 Your Honor, is that he didn't ask for, for a hearing to
11 present testimony from, for example, his biological
12 mother and his ex-wife, who could have presented the
13 very evidence --

14 JUSTICE BREYER: In State court he didn't.

15 MR. CATTANI: In State court in the --

16 JUSTICE BREYER: Well, I mean, is the
17 requirement such that when you ask for a hearing in a
18 State court on a general matter, "I would like to show
19 through a hearing," then he gives a whole lot of
20 affidavits of the kind of thing he's going to produce,
21 that then the State says "no," and you go into Federal
22 court and say "I'm roughly going to do the same thing,
23 I have a few extra witnesses, some of the people say
24 some extra things," no, you can't do that?

25 MR. CATTANI: Well, there is a requirement

1 in State court that you plead with specificity what type
2 of claims you're raising in a postconviction
3 proceeding --

4 JUSTICE BREYER: Didn't he say my claim is
5 ineffective assistance?

6 MR. CATTANI: Ineffective assistance --

7 JUSTICE BREYER: Yes. Because he didn't
8 investigate to discover the horrendous circumstances in
9 which I was raised, and had he done it, he would have
10 found roughly this kind of thing, and I would like to
11 show that he should have done that because it would have
12 changed the result?

13 MR. CATTANI: Well, his argument at
14 State court was not that he didn't investigate that; his
15 argument in the postconviction proceeding was he could
16 have presented that through some other witnesses.
17 The -- his argument at the trial -- at the
18 postconviction --

19 CHIEF JUSTICE ROBERTS: That's not what I
20 understood his argument that he wants to raise to be.
21 In his affidavit, it is a different argument. It is the
22 biological component of violence. "Look, my grandfather
23 was convicted, my father was convicted," and so the
24 mitigating evidence he wants to present at sentencing
25 is that I'm biologically predetermined to commit crime.

1 JUSTICE SCALIA: The criminal gene argument.

2 CHIEF JUSTICE ROBERTS: That -- which is
3 certainly an ambiguous argument to present in mitigation
4 at a sentencing hearing.

5 MR. CATTANI: Certainly. And that is, that
6 is the main point I'm trying to make is that that was
7 the only thing he was asserting in his postconviction
8 proceeding, was that "I would have liked to have raised
9 this argument that I'm generically predisposed to
10 violence." The rest of the argument I think would have
11 been frivolous because it was so obvious that he had
12 restricted, he had limited his counsel's, restricted his
13 counsel from presenting the very type of evidence that
14 we're talking about now, this other type of evidence.

15 JUSTICE SCALIA: I thought all that evidence
16 was basically before the district court anyway. Didn't
17 the district court know about all of that when it made
18 its ruling?

19 MR. CATTANI: Yes, Your Honor and the trial
20 court knew about it when it made its ruling.

21 JUSTICE SOUTER: Well, the district court
22 had a proffer, but the district court had not heard
23 witnesses, it had not heard evidence.

24 MR. CATTANI: But, but the focus here is on
25 the reasonableness of the State court's factual finding.

1 JUSTICE SOUTER: Sure, but the
2 reasonableness of factual findings depends on what the
3 evidence is that can go in on the issue of
4 reasonableness. And there's a universe of difference
5 between a proffer of evidence which the district court
6 says "well, I'll assume that," on the one hand, and on
7 the other hand, the actual presentation of witnesses
8 perhaps including Landrigan himself, which the court
9 actually hears.

10 You know, you, sometimes you get a lot more
11 impressed by real evidence than by assumptions you make
12 for the sake of argument. And that seems to me a world
13 of difference.

14 MR. CATTANI: I don't necessarily disagree
15 except that we're -- the focus has to be on what the
16 claim was that was raised in the State postconviction
17 proceeding; and --

18 JUSTICE SOUTER: Okay. But the --
19 the -- I guess on that point, my only, my only reason
20 for raising this with you is on that point, it's not
21 enough to say well, the district court assumed this. Or
22 for that matter, the State trial court assumed this.

23 That is not the same thing as putting in the
24 evidence.

25 MR. CATTANI: Except in this case we

1 certainly had the trial court had presided over the
2 sentencing and had seen Landrigan in person and was
3 uniquely qualified to make a credibility assessment
4 regarding the point that Landrigan made in his
5 affidavit, that "I would have allowed presentation of
6 genetic predisposition."

7 JUSTICE STEVENS: May I ask what might be an
8 awfully elementary and stupid question? But it seems
9 to me that there's no question about the facts of what
10 he said. And you can interpret him saying I don't want
11 any mitigating evidence put it. But isn't it clear that
12 the waiver of the right to put in any mitigating
13 evidence at a capital sentencing hearing is a
14 constitutional right of very important dimensions?

15 And can that right be waived if the record
16 does not show whether or not he knew the full right
17 of -- that is available to every defendant in a capital
18 case? Namely, he had been advised by his counsel he
19 could put in all sorts of stuff. But is there anything
20 to show that there was that kind of waiver here, on the
21 face of the record?

22 MR. CATTANI: There, there's not a specific
23 colloquy that goes through --

24 JUSTICE STEVENS: Then it is, as a matter of
25 law, an ineffective waiver. Isn't the Ninth Circuit

1 dead right, not factually, but just as a matter of law,
2 you cannot waive this right unless the record shows
3 that he's fully advised of the scope of the right that
4 he's waiving?

5 MR. CATTANI: Well, first, there's no
6 authority that I'm aware of that would require any type
7 of a specific colloquy. And I think this record --

8 JUSTICE SCALIA: It's new to me also. I
9 never heard of it.

10 MR. CATTANI: And I think that would be --

11 JUSTICE STEVENS: But why should it be, why
12 should there be a less complete colloquy for this kind
13 of waiver than for a guilty plea itself? Now maybe
14 there's no authority on the point. But isn't it
15 absolutely obvious?

16 MR. CATTANI: Well, I think the reason
17 there's no need for one is because a defendant can come
18 in and if he really believes that his waiver was not
19 knowing and voluntary, he has an opportunity to pursue
20 that type of claim in a postconviction proceeding. And
21 he can come in and proffer whatever evidence he wants to
22 proffer if, in fact, that's his claim, that he didn't
23 understand --

24 JUSTICE SCALIA: Some kind of waivers, like
25 waiver of the right of counsel, we do indeed require a

1 colloquy, because a defendant is not likely to know what
2 the consequences of foregoing counsel are. So the judge
3 discusses with him and, you know, points out what a --
4 what a significant decision that is. But it doesn't
5 take a whole lot of smarts to answer yes or no to the
6 question, you know, "do you agree that your counsel
7 should not introduce any mitigating evidence?" I mean,
8 it's clear on, on its face.

9 MR. CATTANI: I would agree, Your Honor.
10 And I think --

11 JUSTICE KENNEDY: But doesn't that assume
12 that the defendant knows what mitigating evidence is?
13 And this defendant, I suppose wants to show, "I
14 thought mitigating evidence was just going to be what
15 the, these two relatives were going to testify to.
16 There was really much more, if my counsel had
17 investigated." And that's not a knowing waiver.

18 MR. CATTANI: I think that type of argument
19 was belied by what, what happened at the time of
20 sentencing.

21 JUSTICE SCALIA: Well, unless the argument
22 is, and maybe this is what the other side is going to
23 argue, that -- that when you make a waiver of all
24 mitigating evidence, knowing as any person knows who's
25 reached that far in the criminal process what mitigating

1 evidence is, you must know, in fact, all of the elements
2 of mitigation that could have been introduced. Which
3 will almost never be the case. So that it's always
4 possible after waiving the right to introduce mitigating
5 evidence to come into the court a year later and say,
6 "Oh, my goodness, here's the sort of mitigating evidence
7 I didn't know about at the time. My grandfather was a
8 criminal. I didn't realize that at the time. And now I
9 want" -- you know -- "therefore my waiver was
10 uninformed" and, you know, we go back to square one and
11 try the case again.

12 That would always be possible, wouldn't it?

13 MR. CATTANI: Well, I agree, Your Honor.
14 And it's because the nature of mitigation is so open
15 ended, it would be difficult to explain precisely and
16 have a waiver
17 of every conceivable item of mitigation.

18 JUSTICE SOUTER: And so are you, are you in
19 effect then saying that the waiver does not need to be a
20 knowing waiver in the sense that it needs to be based
21 upon an appreciation of all the possible mitigation
22 evidence that in this case might come in? Are you
23 saying it need not be knowing in that sense?

24 MR. CATTANI: I think a defendant needs to
25 understand the nature -- the basic nature and concept of

1 mitigation. But this case provides a good example --

2 JUSTICE SOUTER: Well, you're not answering
3 my question. I -- we all agree that he needs to
4 understand the basic concept of mitigation. Does his
5 waiver have to be a knowing one in the sense that I just
6 described? Or doesn't it? What's your position?

7 MR. CATTANI: It does not have to -- it does
8 not have to be knowing as to every conceivable aspect of
9 mitigation.

10 JUSTICE SOUTER: And it will nonetheless
11 bind him if he comes in later and says, "look, I accept
12 the fact that it's my burden to show at this point that
13 my waiver was not a knowing one, and that there is
14 mitigating evidence that I would have let in."

15 Are you saying that he simply as a matter of
16 law cannot say that? Or cannot be heard to say that?

17 MR. CATTANI: He is bound by that, Your
18 Honor. And if I could --

19 JUSTICE SOUTER: So -- so the answer to my
20 question is yes?

21 MR. CATTANI: Yes.

22 JUSTICE SOUTER: As a matter of law, he
23 cannot do what he is trying to do here?

24 MR. CATTANI: Yes.

25 JUSTICE SOUTER: Okay.

1 MR. CATTANI: And Your Honor, I think here
2 we have a situation where the defendant is now trying to
3 proffer evidence that is inconsistent with what counsel
4 was trying to present at the time of sentencing.

5 JUSTICE GINSBURG: But you are -- what you
6 are saying is that it was sufficient when he said, I
7 don't want my lawyer to introduce mitigating evidence,
8 and the trial court said, do you know what that means,
9 and he said yes?

10 MR. CATTANI: Yes.

11 JUSTICE GINSBURG: That doesn't have to be
12 fleshed out at all, unlike a rule 11 colloquy. To see
13 if he really understands? She's just asked do you know
14 what that means, and he says yes and that's the end of
15 it?

16 MR. CATTANI: I think that is sufficient,
17 Your Honor. And again, here he's now raising this claim
18 of genetic predisposition. The sentencing memorandum
19 that counsel submitted attempted to portray Landrigan as
20 someone who is basically a good person who committed
21 this crime because he was under the influence of alcohol
22 and drugs. This new type of evidence -- and the
23 sentencing memorandum -- and you'll see that Landrigan
24 had been evaluated by an expert, who had said that he
25 didn't have any mental deficiencies.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Verrilli.

3 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

4 ON BEHALF OF THE RESPONDENT

5 MR. VERRILLI: Thank you, Mr. Chief Justice,
6 and may it please the Court:

7 I'd like to begin by clearing up what
8 exactly we did and didn't argue with respect to waiver
9 and what exactly is and isn't before this Court on that
10 set of issues in our judgment. I then would like to
11 spend a couple of minutes on what I think the Ninth
12 Circuit did and what effect that would have on this
13 Court's disposition of the case. Then if there's any
14 time remaining, I'd like to turn to the question of
15 whether we have asserted colorable claims that warrant
16 an evidentiary hearing here, which is all that we're
17 asking for.

18 Now, with respect to this question of
19 whether we pursued or didn't pursue waiver, I'm afraid
20 counsel for the State is just wrong about this. It's
21 important to understand how this comes up. We asserted
22 a claim for ineffective assistance of counsel, deficient
23 performance and prejudice. The State asserted as a
24 defense to that claim: No, no, he's waived.

25 And the trial judge, the State habeas judge

1 in the State postconviction ruling, agreed with that
2 and said, well, yes, he's waived. We then filed a
3 petition for rehearing in which we said, no, you can't
4 rely on that defense because it's got to be a knowing
5 and intelligent waiver under Johnson against Zerbst.
6 That's at page 92 of the joint appendix.

7 That motion for rehearing was denied without
8 any further comment. We then took a petition to review
9 to the Arizona Supreme Court. That's also in the joint
10 appendix and I believe the page cite is 101 and 102, in
11 which we specifically argued that you can't look to this
12 so-called waiver as a defense to our claim of
13 ineffective assistance because it wasn't knowing and
14 intelligent.

15 Now, in the State's response to our
16 petition, which unfortunately is not in the joint
17 appendix but is in the record, the State says: No, this
18 waiver is binding and, furthermore, you're procedurally
19 defaulted because this issue was decided on direct
20 review. But the one thing the State does not say is
21 that you raised this Johnson against Zerbst issue too
22 late, and it can't be considered.

23 We then went to --

24 JUSTICE SCALIA: Excuse me. I'm looking at
25 page 92 of the joint appendix. I don't, I don't see

1 that.

2 MR. VERRILLI: I may have the wrong page.

3 JUSTICE SCALIA: Well, that's rather
4 important, don't you think?

5 MR. VERRILLI: I'm sorry. I will find it
6 for Your Honor.

7 I'm sorry for the delay here. The motion
8 for rehearing is, I'm sorry, 99, and on 102 is where we
9 raise it, and then subsequently -- then subsequently we
10 raise it --

11 JUSTICE SCALIA: Is that effective? Does
12 the court have to entertain a motion for rehearing?

13 MR. VERRILLI: Well, it doesn't have to,
14 but, Your Honor --

15 JUSTICE SCALIA: Isn't it your obligation to
16 raise it in your original motion rather than in a motion
17 for rehearing?

18 MR. VERRILLI: Well, there's no -- but the
19 point is that's not -- when we took this to the Arizona
20 Supreme Court that's not an argument that the State made
21 in opposition to our raising Johnson against Zerbst.
22 Then when we got to Federal district court we raised
23 this again, this exact argument in Federal district
24 court, and the State in Federal district court didn't
25 object that we had failed to raise this appropriately in

1 the State proceedings.

2 We took it to the Ninth Circuit. They
3 didn't raise the objection that we failed to raise it
4 appropriately in the State proceedings. The first time
5 that question has even been raised here is in the reply
6 brief on the merits in this Court.

7 And I think that's tied to the next point I
8 want to make, which is significant, which is as the case
9 comes to this Court the Ninth Circuit has ruled that we
10 have met the requirements of 2254(e)(2) and are
11 therefore entitled to an evidentiary hearing.

12 Now, what the State is essentially saying
13 is, well, no, you really aren't entitled to an
14 evidentiary hearing on this set of issues because you
15 didn't raise them adequately in the State courts.

16 CHIEF JUSTICE ROBERTS: And is it just an
17 evidentiary hearing on his biological predetermination
18 to commit violent crime or an evidentiary hearing on the
19 waiver question?

20 MR. VERRILLI: On both, Your Honor.

21 CHIEF JUSTICE ROBERTS: Well, why did -- the
22 court on page A-17 ruled that there was no waiver. So
23 why would they then send it back for an evidentiary
24 hearing on waiver?

25 MR. VERRILLI: Let me move to that if I

1 could, because I do think that's significant. I think
2 the Court has elucidated the two potential readings of
3 the Ninth Circuit's decision. It seems to us as we
4 prepared this case on the merits that the reality is
5 that the two, that the issue of performance and the issue
6 of waiver, are tied together, because if it turns out
7 after a hearing that counsel did perform an effective job,
8 a diligent job of preparing investigation, and did
9 instruct the client as to what the mitigation evidence
10 was, then you'd view the waiver in a different light than
11 of course you would if the counsel hadn't. So we
12 acknowledge here that the proper disposition of this
13 case ought to be a remand for an evidentiary hearing.

14 JUSTICE SCALIA: But that wasn't your
15 assertion even in this motion for a hearing. It wasn't
16 that he didn't know what he was giving up. It was
17 rather the sentencing transcript, you say, "does not
18 establish that Petitioner knowingly, voluntarily, and
19 intelligently waived his right to present mitigating
20 evidence. Rather, it shows that Petitioner gave up that
21 right without thought, in the heat of anger, and in
22 frustration with his attorney during that particular
23 proceeding."

24 MR. VERRILLI: We're trying to establish
25 there, Your Honor --

1 JUSTICE SCALIA: But that was a factual
2 matter best, best disposed of by the judge who was
3 present at the time. And he didn't think it was in the
4 heat of anger. He did think that it was a valid waiver.
5 Now, you're raising a totally different issue. You're
6 saying, oh, he can't waive validly without knowing all
7 the elements of mitigation that the waiver might
8 embrace. That wasn't the argument you were making here.

9 MR. VERRILLI: Your Honor, I want to respond
10 directly to Your Honor's question, if you'll just permit
11 me one more thought about the Ninth Circuit and I'll
12 turn right back to that.

13 JUSTICE SCALIA: Okay.

14 MR. VERRILLI: So in other words, we are
15 making a more modest request for relief here which is,
16 affirmance of the judgment sending back for an
17 evidentiary hearing, but with a recognition that the
18 evidentiary hearing ought to deal with the issue of
19 waiver, which should be understood to be left open. I
20 think we're conceding something here, that waiver ought
21 to be left open and not definitively resolved. It was
22 premature to definitively resolve that against the State
23 without an inquiry.

24 Now, turning to Your Honor's point, the --
25 with respect to whether there was a waiver here or not

1 and what the State judge did or didn't do, something
2 very significant here that I think the State's argument
3 just overlooks. There's an assumption in the State's
4 argument that Landrigan's conduct at the sentencing
5 hearing itself was a waiver and considered to be a
6 waiver. But if one looks at the transcript of that
7 hearing, and this is D to the appendix to the petition
8 and beginning at page D-4 -- D-3 is where the colloquy
9 occurs where this alleged waiver happened. The very
10 next thing that occurs, the very next thing that occurs,
11 is the trial judge says: Okay, I want to hear from the
12 mitigation witnesses.

13 Then the mitigation witnesses say: Well,
14 we're not going to testify. Then the very next thing
15 that occurs is the trial judge says: Well, I want a
16 proffer of what they would have said. Then when -- then
17 when all that's said and done, the trial judge says to
18 the lawyer -- and this is at D-15 -- you got anything
19 else, and the lawyer says, no, Your Honor, that's all
20 I've got, all I've got is what's in the sentencing memo
21 and these two witnesses. Then the judge proceeds to
22 pass sentence. That's the -- the particularly important
23 pages are D-20 and D-21, and on those pages you will see
24 that what the judge does is not treat Mr. Landrigan's
25 statements as a waiver, because if she had treated those

1 statements as a waiver what she would have said is,
2 well, here's the aggravation case, Mr. Landrigan has
3 waived mitigation, he has a right to do that.

4 JUSTICE SCALIA: This is belt and
5 suspenders, that's all. The -- I don't think any judge
6 likes to decide a case just on the basis of waiver.
7 This judge is saying he waived it and even if he hadn't
8 waived it there's nothing there --

9 MR. VERRILLI: I respectfully --

10 JUSTICE SCALIA: -- because he wasn't
11 bringing in at this point the biological -- by the way,
12 biological proclivity to violence is a mitigating factor
13 rather than an aggravating factor?

14 MR. VERRILLI: Let me address your second
15 question first and then your first question.

16 I think that that in two senses does not
17 accurately represent what this mitigation case presented
18 to the State court and presented to the Federal court is
19 all about. With respect even to his affidavit, which I
20 don't think fairly under Arizona procedure can define
21 the full scope of his claim, but with respect to that
22 affidavit alone, what it says is not genetic
23 predisposition. It says the "biological component of
24 violence." That's the language that Mr. Landrigan's
25 affidavit uses.

1 CHIEF JUSTICE ROBERTS: Well, but the prior
2 paragraph says it's because of the history of his
3 biological grandfather, biological brother, and
4 biological child. That suggests to me that it's a
5 genetic claim and --

6 MR. VERRILLI: But one other thing it does
7 that's very significant, Mr. Chief Justice, is it also
8 says that these witnesses can attest to the use of
9 alcohol and drugs by the biological mother when
10 Landrigan was in utero.

11 CHIEF JUSTICE ROBERTS: Well, but he knew
12 about that. He knew about that mitigating evidence at
13 the trial because his biological mother was there.

14 MR. VERRILLI: Yes, but what he's saying
15 that he would have agreed to, it seems to me the only
16 fair reading in this affidavit, which again I don't
17 think fairly defines the full scope of what he's allowed
18 to proceed with under Arizona procedure, but with
19 respect to this affidavit he's saying, well, if you had
20 had an expert who could have come in and given testimony
21 about fetal alcohol syndrome and the organic brain
22 damage and other impairments that it causes, I would
23 have cooperated with that. And that's really
24 significant because if you look at page D-21 of the
25 appendix to the petition --

1 CHIEF JUSTICE ROBERTS: How could that be
2 helpful to him if he doesn't allow his biological mother
3 to testify about drug and alcohol abuse? What use would
4 the expert be if the factual predicate --

5 MR. VERRILLI: Because all the biological
6 mother would have had to do was to give that information
7 to the expert. That's a routine matter, for experts to
8 gather factual information and assimilate it into an
9 expert opinion and then provide it to the court. That
10 could have happened easily here.

11 And I think it's very significant because on
12 page 21 you'll see that the trial judge makes a
13 fundamental error about this exact issue. She says:
14 Well, I'll grant this, I'll take the mother's testimony
15 as a proffer. I'll consider the possibility of fetal
16 alcohol syndrome, but all fetal alcohol syndrome
17 establishes is that the kid will also have a
18 predisposition to addiction.

19 CHIEF JUSTICE ROBERTS: So your assumption is
20 that the defendant would have been happy to have his
21 biological mother talk with the expert, but was unwilling
22 to have his biological mother say the same thing in court?

23 MR. VERRILLI: Sure, and I don't think
24 there's anything unreasonable about that. Those are
25 very different experiences, but --

1 JUSTICE SCALIA: I don't understand. It
2 seems unreasonable to me. He was trying to spare his
3 mother, what, the nervousness of testifying in court?
4 Is that what he had in mind?

5 MR. VERRILLI: If I -- whatever else
6 happened, the trial judge here considered this evidence
7 of mitigation and did a weighing. And the key point I
8 want to make sure I make here is that therefore any
9 evidence that this lawyer had prepared, an expert on
10 fetal alcohol syndrome most prominently and any other
11 evidence, the trial lawyer could have proffered at the
12 time and had considered at the time and had weighed at
13 the time by this trial judge. And that's a claim of
14 prejudice, it seems to me, even if one grants, even
15 if one assumes -- and we dispute it and I'd like too
16 talk about that -- but even if one assumes that there is
17 a finding and we can't do anything about it that
18 Landrigan would not have cooperated in the presentation
19 of any mitigating evidence --

20 CHIEF JUSTICE ROBERTS: Counsel, do you
21 think it's possible to have a valid waiver of the
22 presentation of mitigating evidence or is it always
23 possible that some additional evidence would come up and
24 you say, what if I had known that, I wouldn't have
25 waived it?

1 MR. VERRILLI: I don't think there's a yes
2 or no answer to that question. It's something --

3 CHIEF JUSTICE ROBERTS: You can't give a yes
4 answer to whether it's ever possible?

5 MR. VERRILLI: Yes. Yes, it's possible.
6 It's certainly possible.

7 CHIEF JUSTICE ROBERTS: Okay.

8 MR. VERRILLI: But I think I don't -- I want
9 to make sure I don't leave any implication that the rule
10 we're asking for here is going to open the door to lots
11 of claims, because I don't think it does for two sets of
12 reasons. One is a procedural set of reasons and that's
13 the -- that, I would refer the Court to the Blackledge
14 against Allison decision -- that if -- that it's not
15 going to be enough in every case for you to plead an
16 adequate claim and then jump right to an evidentiary
17 hearing. As the Court said in Allison, the district
18 court has available to it a number of tools that it can
19 use to test the claim before granting an evidentiary
20 hearing. So there's a limitation there. Now --

21 JUSTICE GINSBURG: Could you do it
22 concretely, Mr. Verrilli, for this case. The defendant
23 is being rather obstreperous and says: I don't want any
24 mitigating evidence; I'm a really bad guy. And that's
25 how he's trying to portray himself. What -- you said,

1 and you allowed for the possibility that there could be a
2 knowing waiver of mitigation. What would have had to
3 transpire in this case to make it a knowing waiver?

4 MR. VERRILLI: I think that's important, and
5 hopefully it will help explain why we think that this is
6 a narrow -- that the rule we're asking for here is a
7 narrow one, and it's not going to open the door to lots
8 of claims. It's clear that just like the waiver of any
9 other fundamental constitutional right to a fair trial,
10 the defendant's got to understand what mitigation means.
11 He's got to understand its significance in the
12 proceedings --

13 CHIEF JUSTICE ROBERTS: Well, he certainly
14 understood that. He said if you want to give me the
15 death penalty, bring it on, I'm ready for it. The
16 purpose of mitigating evidence is to prevent the
17 imposition of the death penalty. He says bring it on.

18 MR. VERRILLI: And he needs to be assisted
19 by competent counsel. That's a consistent theme of this
20 Court's decisions on the Johnson against Zerbst. And so
21 if you have a situation in which you have documented that
22 the client understands what mitigation is -- and frankly
23 I don't think, with all due respect, Mr. Chief Justice,
24 this is the kind of documentation that ought to suffice.
25 But even if you had that, even if you documented that

1 the defendant understood it, and even if you documented
2 that the defendant clearly waived it and you documented
3 that that was done with counsel's assistance, then it
4 seems to me it is going to be very hard for a habeas
5 petitioner to plead something that's going to get past --

6 CHIEF JUSTICE ROBERTS: Why isn't the type
7 of documentation that would be sufficient? He
8 understands what the consequence of not putting
9 mitigating evidence on is going to be.

10 MR. VERRILLI: Well, because I think there
11 isn't clarity at all that he understands what mitigating
12 evidence is, what the full scope of it is and how it
13 could --

14 THE COURT: He's present in the court while
15 they're making a proffer of this sort of mitigating
16 evidence. The judge, who's quite careful, saying "okay,
17 if he doesn't want the evidence, I want to know what it
18 is." And he called the two witnesses. And all that this
19 defendant does is undermine his lawyer's effort to
20 present the mitigation.

21 MR. VERRILLI: But again, Mr. Chief Justice,
22 at the time the trial judge didn't treat that as a
23 waiver. And so I don't think you can cut off his
24 ability to litigate an ineffective assistance claim
25 years later on the ground that, in fact, there was an

1 ineffective waiver.

2 JUSTICE ALITO: Well, are you claiming that
3 -- are you claiming that his attorney did not adequately
4 represent him at the sentencing hearing with respect to
5 the question of waiver? In other words, when -- that
6 the attorney should have insisted that the judge go
7 through some kind of more comprehensive colloquy with
8 him about waiver and inform him of certain things about
9 what he was giving up? Are you making that claim?

10 MR. VERRILLI: I think, Justice Alito, we're
11 making a couple of different claims, not that claim, but
12 a couple of different claims. One is, and it pertains
13 particularly to a mental health expert, that even if
14 Landrigan behaved exactly the way he in fact
15 behaved in the counterfactual world in which he had
16 received adequate representation, that the mental health
17 expert testimony could have been proffered to the court,
18 had it been prepared and developed, would have been
19 considered, and could have made a critically important
20 difference and for precisely the reason that
21 Justice Ginsburg's question suggested, which is that
22 he's obviously behaving badly in this situation.

23 What the trial court read out of that is,
24 well, he's an amoral person. What the mental health
25 testimony would give you is an alternative frame of

1 reference for making a reasoned moral judgment about
2 this guy, and could be critically important in
3 explaining that behavior. So even within the confines
4 of accepting that the world would have unfolded exactly
5 the way it did, it was ineffective to have dropped the
6 ball on preparing that kind of evidence.

7 Then it's also ineffective in --

8 JUSTICE SCALIA: Excuse me. I'm not
9 following you. You mean the mental health expert's
10 testimony could have gone to whether the judge should
11 have accepted the waiver?

12 MR. VERRILLI: No.

13 JUSTICE SCALIA: I thought that's what you
14 were saying, I'm sorry.

15 MR. VERRILLI: No, to the basic weighing of
16 mitigation which the judge undertook based on all
17 proffered evidence. Then beyond that, we're making an
18 argument that the waiver that, even if you are going to
19 consider that a waiver, you can't consider it a knowing
20 and voluntary waiver, knowing and intelligent waiver
21 supported adequately by the efforts of counsel.

22 JUSTICE ALITO: Isn't that a separate
23 question, whether it's a knowing and intelligent waiver?
24 Isn't the question here whether he was prejudiced, which
25 is a question of fact, which is a question of whether

1 had he been informed of the possibility of mitigation
2 evidence relating to a history of family violence, he
3 would have persisted in blocking the admission of any
4 mitigation evidence? Isn't that the issue? Not whether
5 it was knowing and intelligent. That would be a
6 separate legal question.

7 MR. VERRILLI: No. I don't think that's the
8 issue. With all due respect, Justice Alito, I think the
9 test under Strickland is whether there was deficient
10 performance, which we think we have a very powerful
11 record of here, and then a reasonable probability that
12 the outcome would have been different. And I think the
13 inquiry here that the State habeas judge is undertaking
14 is the reasonable probability inquiry. That seems to me
15 to be a mixed question that requires --

16 JUSTICE ALITO: Yes, it's a mixed question.
17 But if the postconviction relief act of court found, as
18 a matter of fact, that even had he known about the
19 possibility of this type of mitigation evidence, he
20 would have persisted in refusing to cooperate -- if there
21 was such a finding, and I know you dispute it -- and if
22 you were granted a hearing, is it not true you would
23 have to disprove that by clear and convincing evidence?

24 MR. VERRILLI: Well, taking our first
25 argument to the side, our first argument which I've been

1 discussing about what happened at the hearing, I think
2 with respect to that argument the answer's no, that
3 argument stands without any need to disprove the factual
4 finding, if you assume it is a factual finding, and we
5 don't concede that.

6 But if it is a factual finding, then yes, we
7 would have to disprove it by clear and convincing
8 evidence, but we think we can do that, and all we're
9 asking for is a hearing to enable us the opportunity.

10 JUSTICE BREYER: What is the standard? I
11 ask that because I'm not certain from what I'd heard
12 previously -- I think the State was saying that the only
13 issue that was raised before the State proceeding,
14 collateral, the State collateral post-sentencing
15 proceeding, was that you wanted to present evidence that
16 he had a biological gene, a faulty gene, or something
17 like that.

18 When I've looked at this, it's on page 88,
19 the motion filed says we have two claims. One claim is
20 the claim that was just mentioned, it says that --
21 about -- from the biological mother, and use of drugs and
22 alcohol.

23 JUSTICE SCALIA: Where are you quoting from?
24 I'm sorry.

25 JUSTICE BREYER: Joint appendix A. And then

1 there's a second one on page 88 that says in addition to
2 failing to investigate these alternative sources, we
3 also want to say that counsel failed to explore
4 additional grounds, and that was the sister. And the
5 sister was going to testify that the mother -- the
6 foster mother, Mrs. Landrigan, abused alcohol, and she
7 has a whole list of things in her affidavit.

8 So is that still before us? I mean, isn't
9 that something you want to argue?

10 MR. VERRILLI: Absolutely.

11 JUSTICE BREYER: All right.

12 MR. VERRILLI: Thank you, Your Honor, for
13 bringing us back to that question.

14 JUSTICE BREYER: And then the claim would be
15 this: You want a hearing in which you're going to
16 present the sister, the Landrigans, what they did, what
17 the school said, what happened to him at school, all
18 things that are there in Affidavit 5 which was in the
19 State court, and the biological gene. And you want
20 to say, am I right, I don't want to put words in your
21 mouth, and you want to say that given all this, had this
22 been looked into and presented to the defendant, the
23 defendant would not have said don't present any of that,
24 it would have been presented, and it would have made a
25 difference.

1 What -- is that what you want to do?

2 MR. VERRILLI: Yes.

3 JUSTICE BREYER: All right.

4 MR. VERRILLI: With one addition, which is
5 that fetal alcohol syndrome expert testimony is
6 very important.

7 JUSTICE BREYER: All right, with that too.

8 MR. VERRILLI: Yes.

9 JUSTICE BREYER: Now, what the Ninth Circuit
10 said is, we'll give you a hearing. We don't know if
11 you're right or wrong. What's the standard for giving
12 you the hearing? I -- a lot of things in the law aren't
13 always written down exactly, and I was under the
14 impression that trial judges often give hearings on what
15 you might call seat of the pants. I'd like to hear more
16 about it. I've been on appellate courts where rightly
17 or wrongly we've said, "I just think I'd like to know
18 more about this. I can't quite understand it. Let's
19 have a hearing. And we're going to tell the trial judge
20 to do it."

21 JUSTICE SCALIA: Mr. Verrilli, I thought you
22 already conceded that the Ninth Circuit did not ask for
23 a hearing on this question of whether he had waived,
24 effectively waived mitigating evidence.

25 MR. VERRILLI: No.

1 JUSTICE SCALIA: That isn't what the Ninth
2 Circuit said.

3 MR. VERRILLI: Well, but --

4 JUSTICE SCALIA: It found that he had not
5 waived mitigating evidence. So what --

6 JUSTICE BREYER: I'm not actually talking
7 about waiver. My question was just generally what I
8 asked. What is the standard there on whether you get a
9 hearing?

10 MR. VERRILLI: Justice Scalia, would you
11 permit me to answer that question, and I'll come back to
12 Your Honor's?

13 JUSTICE SCALIA: Whatever.

14 MR. VERRILLI: Thank you. The -- with
15 respect to the standard, there are two things that we
16 have to show and if we do, we're entitled to a hearing.
17 One is that we're not disentitled under the analysis
18 under section 2254(e)(2) as explicated in the Court's
19 Michael Williams decision, to show that the court below
20 found it, it was not raised in the cert petition. We
21 pointed out in the brief in opposition that it wasn't
22 raised, they said nothing about it. That's established
23 as the case comes to the court.

24 CHIEF JUSTICE ROBERTS: What is established?
25 That you've satisfied (e)(2)?

1 MR. VERRILLI: That (e)(2) is not a bar to
2 us proceeding to an evidentiary hearing.

3 CHIEF JUSTICE ROBERTS: Why, because you
4 satisfy it or because it doesn't apply?

5 MR. VERRILLI: Because we -- there is no
6 lack of diligence here that would trigger us meeting the
7 heightened requirements of (e)(2), and therefore it
8 doesn't apply to bar us. That's the theory.

9 Now, with -- the other thing we have to
10 show --

11 CHIEF JUSTICE ROBERTS: I'm sorry, you're
12 just going to have to bear with me.

13 MR. VERRILLI: I'm sorry, Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: So you're saying you
15 satisfy (e)(2)(A)(ii), because there's no lack of
16 diligence. Don't you also have to satisfy (e)(2)(B),
17 which is to show that no reasonable factfinder would
18 have found him guilty? In other words -- subject to --

19 MR. VERRILLI: No. No, Your Honor. That's
20 -- as we understand the Michael Williams decision
21 interpreting that provision, Your Honor, those
22 requirements only kick in in a situation where you
23 haven't shown diligence and therefore you're at fault,
24 and you can overcome your fault by meeting those
25 heightened standards. They don't apply in a situation

1 where you have been diligent and therefore you're not --
2 they don't apply to you at all.

3 With respect to the -- what else -- with
4 respect to what else we have to show, we have to
5 show that -- and this is the Townsend standard, which
6 nothing in the passage of AEDPA changed -- that we've
7 alleged facts which, if proven, entitle us to relief.
8 Those are the two things we have to show and we've done
9 both of those things.

10 JUSTICE KENNEDY: And the district court has
11 substantial discretion in determining whether or not to
12 grant that hearing on that basis.

13 MR. VERRILLI: And the Ninth Circuit -- and
14 it seems to us actually, Your Honor, under Townsend in
15 that situation the hearing's mandatory. The district
16 court would have discretion under the habeas, under
17 habeas practice, to hold a hearing as a discretionary
18 matter even in a situation where we haven't shown a
19 mandatory entitlement to it. So there is discretion
20 there.

21 JUSTICE KENNEDY: Part of that discretion
22 is, and you've been careful to say this, that there's a
23 likelihood of a different result?

24 MR. VERRILLI: Yes. Yes.

25 JUSTICE KENNEDY: So it seems to me that

1 that is a difficult part of your case based on this
2 evidence.

3 MR. VERRILLI: Well, but I think -- what I
4 think is important there is that that issue ought to be
5 decided after the evidentiary hearing when you know what
6 it's going to be. It's premature to decide that --

7 JUSTICE KENNEDY: Well, we know what the
8 fetal alcohol testimony is going to be.

9 MR. VERRILLI: Well, but --

10 JUSTICE KENNEDY: And we could make a
11 determination or the court of appeals could make a
12 determination or the district court could make a
13 determination how likely that would be to affect the
14 result.

15 MR. VERRILLI: Well, they could, but it
16 seems to me not until you actually hear the expert
17 testimony, and then we have all of the other testimony
18 that Justice Breyer detailed that you'd want to
19 consider.

20 I do want to try to come back,
21 Justice Scalia, to your point. Yes, we acknowledge that
22 the Ninth Circuit went too far in the way Your Honor
23 described. But you don't get from that conclusion to
24 the conclusion that you ought to grant the relief that
25 the State is requesting here, which is a reversal and

1 directing dismissal of the petition, because to get to
2 that you have to show that there's no set of
3 circumstances under which we could prevail.

4 We're -- our position is an intermediate
5 one, which is that the right answer here is that the
6 judgment to send it back for an evidentiary hearing was
7 correct and should be affirmed.

8 CHIEF JUSTICE ROBERTS: What do you do
9 with -- following up on Justice Kennedy's question, the
10 dissent took the position in the Ninth Circuit that the
11 mitigating value of any proven -- I'm quoting A-24,
12 "genetic predisposition for violence would not have
13 outweighed its aggravating tendency to suggest that
14 Landrigan was undeterable and even from prison would
15 present a future danger"?

16 MR. VERRILLI: I think the answer is that
17 that is an inappropriately truncated assessment of the
18 mitigation case and a wrongly focused assessment of the
19 mitigation case, which ought to focus on the troubled
20 history and the fetal alcohol syndrome, which provides a
21 medical mental health explanation for his conduct which
22 is quite different and that -- and so that's what ought
23 to be balanced.

24 CHIEF JUSTICE ROBERTS: But that was
25 presented in the State court proceedings?

1 MR. VERRILLI: That's not correct, Your
2 Honor.

3 CHIEF JUSTICE ROBERTS: The biological
4 mother's abuse of alcohol and drugs.

5 MR. VERRILLI: The fact that she used
6 abusive -- that she abused alcohol, but not the medical
7 expert testimony explaining what effects that would
8 have. That's precisely the thing that wasn't there and
9 that was the big problem.

10 So I do think that that -- that's why we
11 need an evidentiary hearing, to develop that. This
12 weighing, by the way --

13 CHIEF JUSTICE ROBERTS: So you think the
14 State trial court had no familiarity with fetal alcohol
15 syndrome and the effect?

16 MR. VERRILLI: Well, if you look at page
17 D-21, Mr. Chief Justice, what you'll see is actually
18 proof in the transcript that she had no familiarity,
19 because she said on page D-21, "well all it does is
20 predispose you to being an addict yourself." But fetal
21 alcohol syndrome is a much, much broader set of
22 impairments that can bear directly on one's -- one's
23 moral culpability.

24 If I could just say --

25 JUSTICE KENNEDY: I have just one other

1 question on a different matter. In Judge Bias's
2 dissent, Judge Bay's dissent, he quotes a letter from
3 the Petitioner, the Petitioner does not want to proceed
4 with this appeal and wants the execution scheduled. Can
5 you comment on that?

6 MR. VERRILLI: Sure. What happened there was
7 that the Ninth Circuit, upon receiving this letter,
8 contacted counsel for Mr. Landrigan, asked him -- asked
9 them to go visit him in prison and find out what's going
10 on. They did so. They reported back to the Ninth Circuit
11 that Mr. Landrigan did in fact want to proceed with the
12 appeals. He has continued to want to proceed with the
13 appeals, signing the IFP papers, et cetera, and it turns
14 out there were neurological problems that were
15 afflicting him, that were very serious at the time, and
16 everyone thinks the explanation was that. So,
17 that's what happened.

18 If I could say in conclusion, just remind
19 the Court what it said in the first Miller-El decision,
20 that even in the world of habeas there's a difference
21 between deference and abdication. And in a situation
22 like this one, in which the State court has not afforded
23 an evidentiary hearing and has not allowed the
24 development of the evidence that bears directly on
25 Mr. Landrigan's claims, it would be a form of abdication

1 to hold that he can be conclusively barred from
2 proceeding further, even to an evidentiary hearing, on
3 the basis of the present record.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Verrilli.

7 The case is submitted.

8 (Whereupon, at 11:55 a.m., the case in the
9 above-entitled matter was submitted.)

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