IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - x

DORA B. SCHRIRO, DIRECTOR, :

ARIZONA DEPARTMENT OF :

CORRECTIONS, :

Petitioner :

v. : No. 05-1575

JEFFREY TIMOTHY LANDRIGAN, AKA :

BILLY PATRICK WAYNE HILL. :

- - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Tuesday, January 9, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:56 a.m.

APPEARANCES:

KENT E. CATTANI, ESQ., Phoenix, Ariz; Assistant Attorney General, on behalf of the Petitioner

DONALD B. VERRILLI, JR., Washington, D.C.; on behalf of the Respondent

C O N T E N T S

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

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

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

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

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

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

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

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

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

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

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

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

Did you see the same thing?

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

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

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

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

First --

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

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

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

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

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

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

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

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

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

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

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

Your Honor, I would also --

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

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

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

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

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

There's a dual purpose, I thought.

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

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

evidence.

MR. CATTANI: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

you could help me if I'm wrong.

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

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

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

MR. CATTANI: Yes.

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

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

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

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

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

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

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

assistance.

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

MR. CATTANI: Well, I --

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

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

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

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

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

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

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

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

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

that. So I would --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CATTANI: That's right.

CHIEF JUSTICE ROBERTS: -- his claim?

MR. CATTANI: That's right.

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

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

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

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

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

And my argument is that if only my lawyer

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

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

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

JUSTICE BREYER: In State court he didn't.

MR. CATTANI: In State court in the --

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

MR. CATTANI: Well, there is a requirement

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

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

MR. CATTANI: Ineffective assistance --

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

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

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

JUSTICE SCALIA: The criminal gene argument.

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

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

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

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

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

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

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

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

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

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

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

MR. CATTANI: Except in this case we

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That would always be possible, wouldn't it?

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

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

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

mitigation. But this case provides a good example --

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

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

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

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

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

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

MR. CATTANI: Yes.

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

MR. CATTANI: Yes.

JUSTICE SOUTER: Okay.

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

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

MR. CATTANI: Yes.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

ON BEHALF OF THE RESPONDENT

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

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

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

And the trial judge, the State habeas judge

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

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

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

We then went to --

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

that.

MR. VERRILLI: I may have the wrong page.

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

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

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

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

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

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

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

the State proceedings.

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

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

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

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

MR. VERRILLI: On both, Your Honor.

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

MR. VERRILLI: Let me move to that if I

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

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

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

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

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

JUSTICE SCALIA: Okay.

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

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

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

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

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

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

MR. VERRILLI: I respectfully --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Okay.

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

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

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

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

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

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

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

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

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

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

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

ineffective waiver.

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

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

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

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

Then it's also ineffective in --

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

MR. VERRILLI: No.

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: Joint appendix A. And then

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

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

MR. VERRILLI: Absolutely.

JUSTICE BREYER: All right.

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

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

What -- is that what you want to do?

MR. VERRILLI: Yes.

JUSTICE BREYER: All right.

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

JUSTICE BREYER: All right, with that too.

MR. VERRILLI: Yes.

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

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

MR. VERRILLI: No.

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

MR. VERRILLI: Well, but --

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

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

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

JUSTICE SCALIA: Whatever.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. VERRILLI: Yes. Yes.

JUSTICE KENNEDY: So it seems to me that

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

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

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

MR. VERRILLI: Well, but --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If I could just say --

JUSTICE KENNEDY: I have just one other

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Verrilli.

The case is submitted.

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