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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL A. KNOWLES, :

WARDEN, :

Petitioner :

v. : No. 07-1315

ALEXANDRE MIRZAYANCE. :

- - - - -x

Washington, D.C.

Tuesday, January 13, 2009

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(1:01 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this afternoon in Case 07-1315, Knowles v. Mirzayance. Mr. Mercer.

ORAL ARGUMENT OF STEVEN E. MERCER
ON BEHALF OF THE PETITIONER

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

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

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

JUSTICE KENNEDY: At some point during the oral

1 argument, and perhaps at the beginning because it is the
2 beginning inquiry -- when there is an evidentiary hearing,
3 how does the standard for the court of appeals differ than
4 when there has been no evidentiary hearing?

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

14 JUSTICE KENNEDY: Well, let me put it --

15 MR. MERCER: -- excuse me --

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

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

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

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

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

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

21 JUSTICE SCALIA: Well, I guess it could be --
22 it could be if -- if we have an opinion that makes it clear
23 that you -- you must grant an evidentiary hearing in -- in
24 certain cases. And if the State court did not grant an
25 evidentiary hearing, I guess you could say that that was

1 contrary to established Supreme Court law, couldn't you?

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

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

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

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

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

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

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

1 our position that there should not have been an evidentiary
2 hearing in the first place.

3 It's our position that, frankly, this was a
4 straightforward, routine Strickland case that was
5 uncomplicated, properly adjudicated by the district court
6 when they first reached it in 2001 without a hearing, and
7 that the Ninth Circuit has come at this matter with a -- a
8 chest full of monkey wrenches in the sense that they should
9 not have ordered the evidentiary hearing in the first
10 place, and then when they did, they should not have
11 disregarded the very fact-finding that they ordered be
12 done.

13 JUSTICE KENNEDY: But -- so then -- so then we
14 do look at the facts. I don't want to take up your or the
15 Court's time on this anymore, but I remain puzzled, I have
16 to tell you, about what to do with this hearing. I -- I
17 went through it at great length. It's a very careful fact-
18 finding, really.

19 MR. MERCER: Yes.

20 JUSTICE KENNEDY: But I -- I just don't know
21 how to fit that with the standard when I look at the -- the
22 reasonableness of the -- of the State court decision.

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

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

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

7 JUSTICE SOUTER: That would be the general
8 proposition.

9 MR. MERCER: Yes.

10 JUSTICE SOUTER: Okay.

11 MR. MERCER: And I think --

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

15 MR. MERCER: I think that question is unclear,
16 Mr. Chief Justice, because this Court did recently say in
17 Landrigan that the decision to hold an evidentiary hearing
18 remains with the sound discretion of the district court,
19 but in the same sentence said that that discretion was
20 circumscribed by the AEDPA.

21 JUSTICE SCALIA: Why should we hold a hearing
22 ourselves in the -- in the hypothetical situation that
23 Justice Souter mentioned? Why shouldn't we just reverse
24 the State courts for not having held an evidentiary
25 hearing? Remand it to them, let them hold it, and let --

1 let them make the factual determination on the basis of
2 that, after which we would -- we would apply the rather
3 strict 2254 standard to -- to the result of that hearing.

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

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

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

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

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

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

16 And every bit of Mirzayance's own deeds and
17 words show that he did. Before the killing itself, he
18 closed the curtains and waited till he was alone with the
19 victim before entering her room with a gun in his pocket
20 and the silent weapon drawn. He struck with the silent
21 weapon, delivering fatal blows, resorting to the gun only
22 when she screamed and struggled, and then immediately
23 collected the shell casings, turned off the lights,
24 collected the knife, went back to his apartment where he
25 showered, disposed of the bloody clothes, concocted a false

1 alibi message on the machine -- excuse me -- and then,
2 overcome with guilt at the wrongfulness of his conduct, he
3 calls his friend and says: "I messed up big-time." And
4 that's at page 120 of the State reporter's transcript.

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

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

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

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

22 MR. MERCER: It was a direct appeal to the
23 California Court of Appeal with a concurrently filed habeas
24 petition.

25 JUSTICE SOUTER: Ah, okay, yes.

1 MR. MERCER: Okay.

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

10 JUSTICE GINSBURG: How about getting another
11 jury? That was -- one of the reasons that counsel gave why
12 he, counsel, was withdrawing the NGI plea was the jury just
13 found -- rejected the second-degree murder charge and found
14 he had acted deliberately with premeditation. But couldn't
15 -- because the -- the first jury had so come in at the
16 guilt phase, couldn't the attorney have requested a brand
17 new jury to hear the NGI plea?

18 MR. MERCER: Mr. Wager did not believe that he
19 had grounds to do so in this case. And the district court
20 first addressed that opinion at the petition appendix H in
21 a footnote -- I believe it was footnote 21, but I don't
22 have that in front of me right now -- where the district
23 court talked about the standards for getting a new jury and
24 that under penal code -- California Penal Code 1026, you
25 had to show some cause to the trial court why this jury

1 could not fairly address the claim. Wager felt that he had
2 no basis to do that at that time.

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

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

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

14 MR. MERCER: Okay.

15 JUSTICE SCALIA: Good.

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

19 JUSTICE KENNEDY: Well, if -- if the Profitt --
20 the Fifth Circuit -- Profitt, the Fifth Circuit case,
21 applies in the Ninth, and I - Circuit -- and I would think
22 it would, just as the magistrate judge thought that it
23 would -- then that would be -- present a very close case
24 and it would probably require reversal of the State court,
25 wouldn't you think, if the Profitt rule applied? What is

1 it? The all or -- not all or nothing --

2 MR. MERCER: Nothing to lose.

3 JUSTICE KENNEDY: Nothing to lose.

4 MR. MERCER: Well, if -- we agree that nothing
5 to lose, in fact, was what happened here, as in Profitt.
6 The dissent recognized it, the District Court recognized
7 it, and I -- I think you're right that this case smacks of
8 application of something like a nothing-to-lose-type rule.
9 And perhaps it's announced in Profitt, but it surely has
10 not been clearly established by this Court in any decision,
11 and that pre-AEDPA Profitt decision from the Fifth Circuit
12 certainly did not compel the California courts or any other
13 State court to apply a "nothing to lose" rule on Strickland
14 performance.

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

19 MR. MERCER: Certainly.

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

24 MR. MERCER: Well, certainly this Court could,
25 indeed, take a more narrow view of what is clearly

1 established law. We agree that Strickland here covers the
2 vast majority of ineffectiveness cases. But certainly,
3 this Court has never squarely addressed such an issue
4 before, and certainly, this Court has never announced that
5 test to bind the States to resolve this claim.

6 I think that the fallback position is, absent a
7 clear answer from this Court, as stated in Van Patten,
8 absent a clear answer, the State courts are left with a
9 very general Strickland principle, and as this Court stated
10 in Yarborough v. Alvarado, the more general the rule, the
11 more leeway the States have in deciding cases on a case-by-
12 case basis.

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

16 Now I --

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

24 MR. MERCER: That's correct, Mr. Chief Justice.
25 And I think this comes back to our original point, that the

1 only dispositive question here that really matters is where
2 the -- when the State court --

3 JUSTICE STEVENS: Let me ask you this question.
4 Supposing we were convinced -- and I'm not suggesting we
5 should be on the record. But supposing we were convinced
6 that only the dumbest, untrained lawyer in the world could
7 have failed to advance this defense, and that therefore I
8 would have no doubt about it as an original proposition
9 that he was incompetent under Strickland -- under the
10 general Strickland standard. Would we be permitted to say
11 that in the case, or would we have to say, well, this
12 particular kind of attorney error has never been addressed
13 before, and therefore, we can't look at it?

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

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

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

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

8 MR. MERCER: This Court could say you haven't
9 adjudicated this --

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

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

14 JUSTICE STEVENS: Oh, okay.

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

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

23 CHIEF JUSTICE ROBERTS: Why is it --

24 JUSTICE KENNEDY: And if we say that and if
25 *Profitt* is inconsistent with that, do we then remand or do

1 we say on this record clearly it was reasonable?

2 Obviously, you want us to do the latter, I take it.

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

8 JUSTICE KENNEDY: Don't we have to go -- don't
9 we have to say that this was reasonable conduct?

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

13 JUSTICE KENNEDY: Of course.

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

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

25 I would have thought you would have said --

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

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

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

12 MR. MERCER: Yes, Your Honor.

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

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

23 JUSTICE SCALIA: That's right. That seems to
24 me not the --

25 JUSTICE STEVENS: Because you say the standard

1 is Strickland.

2 MR. MERCER: Well, what I say is that this
3 Court has held that Strickland generally applies to almost
4 all ineffective counsel cases. And certainly this Court
5 has stated it applies in specific type issues of conduct.
6 For example, counsel has a duty to conduct a reasonable
7 investigation; counsel has a duty to consult with his
8 client about filing an appeal. But -- but Justice Scalia
9 is absolutely right, this Court has never said anything
10 remotely like the rule applied by the Ninth Circuit here.

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

22 Then I looked to see and got the record out to
23 see, if he raised it, and he did raise it. So we have the
24 fact that they didn't talk about it, and then we have the
25 fact that, of course, the Supreme Court of California just

1 says one word, "denied."

2 Then when we discover round two in the Ninth
3 Circuit, we are going to discover some language which says
4 we are not relying on this rule. There is no such rule, as
5 a rule of you have to make a defense as a last resort.
6 Here's what they say. Where this -- instead of that we
7 say, forget about that, we were wrong the first time, we
8 assume. Where the State court has provided an adjudication
9 on the merits -- that is, it did say denied -- but has not
10 explained its underlying reasoning or held an evidentiary
11 hearing, we conduct an independent review of the record to
12 determine the State court's final resolution of the case,
13 whether it was reasonable or unreasonable.

14 So they say we did conduct that record
15 independent review, and our conclusion is that it was
16 unreasonable. Okay? Nothing to do with any special rule
17 here or anything. We just think it was unreasonable.

18 All right. Now, what are we supposed to do
19 with this?

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

22 JUSTICE BREYER: What is that deference going
23 to be? I take it what it would be is that the person, the
24 defendant, would have in his petition -- which we don't
25 actually have -- would have said the facts are thus and so,

1 and since they had no hearing, they would have to take
2 those facts as being thus and so.

3 MR. MERCER: Correct.

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

10 MR. MERCER: Correct.

11 JUSTICE BREYER: Is that what we should do?

12 MR. MERCER: Yes.

13 JUSTICE BREYER: Yes.

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

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

24 MR. MERCER: Correct.

25 JUSTICE BREYER: So we have to reach a huge

1 number of issues which we've never decided.

2 MR. MERCER: I actually think that that issue
3 is not really properly before this Court.

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

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

10 JUSTICE GINSBURG: We should treat the district
11 court proceeding as though it had never happened on the
12 ground that the Ninth Circuit never should have remanded it
13 to the district court.

14 MR. MERCER: Yes.

15 JUSTICE GINSBURG: And we just take it as
16 though we had a 2254 petition from the State supreme court
17 in the district court. And then the district court doesn't
18 conduct any hearing; it just applies the AEDPA standard.
19 So the -- the whole thing about clearly erroneous in the
20 district court, that -- that should be out of the -- the
21 case.

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

24 JUSTICE SOUTER: Okay. Then if -- if we get to
25 that point, I think your argument is as follows. I'm not

1 sure. I want you to tell me.

2 If the State court adjudication was -- was
3 contrary to what Justice Stevens' hypo suggested might be
4 the "total fool" rule, in other words no one but a complete
5 nincompoop would have failed to -- to press forward with
6 this defense, then we can decide the case simply under
7 Strickland, because Strickland unreasonableness is
8 certainly going to cover the total fool case.

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

13 MR. MERCER: Correct.

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

19 MR. MERCER: Absolutely.

20 JUSTICE SOUTER: Is that your road map?

21 MR. MERCER: Yes, it is.

22 And if there are no further questions, I'd like
23 to reserve the remainder of my time.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Sevilla.

1 ORAL ARGUMENT OF CHARLES M. SEVILLA
2 ON BEHALF OF THE RESPONDENT

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

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

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

18 MR. SEVILLA: Yes.

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

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

1 was objectively reasonable.

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

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

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

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

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

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

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

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

1 MR. SEVILLA: And holds it. But --

2 JUSTICE SCALIA: How do you get that out of the
3 statute? I don't understand it.

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

6 JUSTICE SCALIA: Right.

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

10 JUSTICE SCALIA: Right.

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

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

24 If there's no Strickland error, that seems to
25 me a -- an odd premise to say you ought to remand for a

1 hearing. Aren't you under an obligation to specify factual
2 issues that -- specifically that need to be developed,
3 before you would make out a case for saying they were in
4 error in not holding the evidentiary hearing?

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

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

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

21 MR. SEVILLA: What we specified is why his
22 rationale was unreasonable, and we --

23 JUSTICE SOUTER: Well, was that -- I mean, I'm
24 just asking you. I'm asking you -- I'm throwing you a
25 softball.

1 MR. SEVILLA: Right.

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

7 MR. SEVILLA: Yes.

8 JUSTICE SOUTER: Okay.

9 JUSTICE BREYER: But there's no hole in the
10 statute. What it says to do, quite explicitly, is it says
11 that you have to see whether the State court decision was
12 unreasonable in light of the evidence presented in the
13 State court. So it tells us what to do. It says look at
14 the evidence in the State court, and like any other
15 instance where there is no hearing -- every day of the
16 week, judges refuse to give a hearing. Now, when they do
17 that, they have to assume the facts in favor of the losing
18 party. So the question is, assuming the facts in favor of
19 your client, was the decision that he loses unreasonable?

20 MR. SEVILLA: We argued yes.

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

23 MR. SEVILLA: No.

24 JUSTICE BREYER: All right. Now -- now, that's
25 -- that's why I don't know how to proceed because it seems

1 to me to decide that question just as I said it. When I
2 said it, I don't think what I said is clear in the law of
3 this statute. There are two sides to it. We just had a
4 case where there were many briefs on this question. So --
5 so I'm -- I'm slightly uncertain what to do.

6 MR. SEVILLA: Was that Bell v. Kelly?

7 JUSTICE BREYER: That's right. That's right.
8 That's right.

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

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

15 MR. SEVILLA: That's California law.

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

18 MR. SEVILLA: That is --

19 JUSTICE BREYER: It's summary judgment law.

20 MR. SEVILLA: In order to deny relief, one has
21 to -- the court has to presume the adequacy of the showing
22 or the truth of the showing made by the --

23 JUSTICE SCALIA: No, but that can't be. What
24 -- what if I deny the hearing because there are ample facts
25 that show what -- what the situation was, and a hearing

1 would in my view be absolutely redundant? And therefore,
2 all of the facts that support the other side have to be
3 washed out simply because I've denied a hearing?

4 MR. SEVILLA: No. We're not making any claim
5 that there has to be a hearing in every Federal case when
6 there is an argument that could be deemed on -- based on
7 cumulative evidence.

8 JUSTICE SCALIA: I wasn't addressing that. I
9 was addressing the proposition that when you deny a
10 hearing, all of the facts for which you -- you demanded the
11 hearing have to be assumed in your favor. I -- it seems to
12 me --

13 JUSTICE BREYER: That's my fault. I'm -- I'm
14 referring by shorthand to a Rule 56 summary-judgment-type
15 standard. All those facts are assumed on your side in
16 which they're material, and there has to be in the evidence
17 a reasonable basis for dispute.

18 MR. SEVILLA: I --

19 JUSTICE BREYER: That's my mistaken refusal --
20 I should have said rule 56.

21 MR. SEVILLA: Well, it's -- it also is
22 California law, and I believe it is habeas corpus law, that
23 when the petitioner files a petition and attaches
24 declarations, in order to deny those, assuming that the
25 truth of those declarations is presumed in order to

1 evaluate the prima facie case -- for example, in this case,
2 in Strickland -- that if that can't be resolved without a
3 hearing, a hearing should be held. And -- and the court of
4 appeal on the first go-around held exactly that. The court
5 said there are competing reasons here why the defense
6 counsel waived this defense on the morning --

7 CHIEF JUSTICE ROBERTS: Counsel, talking about
8 -- in Strickland -- right here. In Strickland, we said
9 that if a decision by counsel is made upon, quote, thorough
10 investigation, it is, quote, virtually unchallengeable.
11 Now, which of these facts in the Petitioner's brief is
12 wrong: That Wager retained eight expert doctors to
13 evaluate Mirzayance's mental health; he retained jury
14 consultants; he conducted a mock trial in which he
15 presented mental health defenses to two juries; he hired a
16 private investigator to interview friends and associates;
17 he consulted with Mirzayance's parents and their attorneys;
18 he discussed the case with a retained expert doctor after
19 decision and his co-counsel?

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

22 MR. SEVILLA: Well, there are a couple of
23 problems with -- all of that is true. I might quibble with
24 one, but what -- Mr. Wager was operating under a
25 fundamental misunderstanding of California law. All of

1 that was ready-to-go to present. He had a great not-
2 guilty-by-reason-of-insanity case supported by lay -- lay
3 testimony, childhood history, and -- and these psychiatric
4 opinions of very formidable experts.

5 But he had a fundamental error that was only
6 revealed at the evidentiary hearing in the understanding of
7 California law. He said -- and he said this six times at
8 the evidentiary hearing. He said that when a jury has
9 found the defendant has maturely and meaningfully
10 deliberated, that that means they found the equivalent of
11 wrongfulness. That is absolutely wrong. He was quoting
12 from a statute that was repealed in 1982, when California
13 had a major revision of its statutes and moved mental
14 health concepts --

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

22 MR. SEVILLA: Surely it enters into the
23 consideration, and every one of the experts considered
24 precisely that evidence, which was for the most part after-
25 the-fact evidence. And as the State's doctor -- and,

1 again, this came out at the evidentiary hearing because
2 it's certainly not discovered in -- in the State doctor's
3 report that was submitted.

4 The State doctor, Dr. Anderson, stated at the
5 trial in Federal court that, yes, he was aware of the
6 consciousness-of-guilt evidence that came about mostly
7 after the event, but that did not speak to his intent, his
8 mental state at the time of the offense. And he stated,
9 which was a great surprise in the Federal evidentiary
10 hearing, that he believed Mr. Mirzayance was, because of
11 the psychosis, feeling that he was justified --

12 CHIEF JUSTICE ROBERTS: I understand that, but
13 counsel here at the time retained eight expert doctors to
14 evaluate his mental health. He conducted the mock jury
15 trial. He interviewed the parents. He hired an
16 investigator to interview friends. What you're saying is,
17 well, here's -- if he had hired a ninth expert, he might
18 have come out differently. That sounds like a thorough
19 investigation under Strickland.

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

24 CHIEF JUSTICE ROBERTS: So isn't that -- aren't
25 you back to the "nothing to lose" argument? He conducted

1 this investigation, which under Strickland we said makes
2 the decision virtually unchallengeable, and you're saying,
3 well, he has an obligation to proffer it.

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

7 JUSTICE ALITO: You say that repeatedly, but
8 what is there to show that he misunderstood -- that he
9 misunderstood California law, as opposed to making a
10 practical calculation about how juries would look at this
11 evidence, having found -- having heard the evidence of
12 premeditation and having found premeditation, even though
13 that doesn't decide the NGI issue, as a matter of law. As
14 a practical matter, it makes it quite unlikely that they're
15 going to accept the NGI defense. Where -- and you say that
16 repeatedly.

17 MR. SEVILLA: Yes.

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

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

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

4 MR. SEVILLA: He did not say "the functional
5 equivalent." He said words like --

6 JUSTICE KENNEDY: No. No, he didn't. And he
7 told the trial judge, I've got an uphill --

8 MR. SEVILLA: Yes.

9 JUSTICE KENNEDY: -- almost perpendicular. And
10 he had -- each -- each and every one of those experts in
11 their affidavits, in their reports, had said that he didn't
12 have deliberation or premeditation. They were getting
13 ready for that. And he felt that this would be devastating
14 cross-examination material because the jury had already
15 found the opposite. So they've already disbelieved the
16 expert on this point.

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

23 MR. SEVILLA: Well, that -- that's a challenge
24 that faces every criminal defense attorney in a case when
25 you have a -- a credible defense like this. There -- there

1 are going to be challenges to that by vigorous, trained
2 prosecutors.

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

7 But wasn't there on the other side
8 consideration of the sentence that he was going to get, and
9 might not a lawyer perfectly rationally think, if I give up
10 this defense, it's just going to waste everybody's time?
11 The judge is going to give me the benefit of -- of having
12 done that in the sentence, in giving a lower sentence, in
13 giving -- making the sentences on the multiple offenses
14 concurrent rather than consecutive.

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

19 JUSTICE SOUTER: Well, maybe -- maybe he did,
20 but when we come to judge prejudice, don't we have to judge
21 prejudice by considering exactly what Justice Ginsburg just
22 said? In other words, our standard, the -- the standard --
23 number one, the standard for Strickland prejudice is -- is
24 an objective -- I mean, the standard for -- for -- of
25 performance is an objective standard. And the standard for

1 prejudice has got to be an objective standard, too.

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

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

9 JUSTICE SOUTER: Well, shouldn't that be?

10 MR. SEVILLA: -- if there was a possibility
11 that there could be any difference whatsoever at
12 sentencing. But he testified, well, what was going to
13 happen to Mr. Mirzayance if he entered this plea. He was
14 going to get 25 or 29 to life, which is exactly what
15 happened. So there was no --

16 JUSTICE SOUTER: How did he know that?

17 MR. SEVILLA: How did he know that? Because
18 it's -- if you -- he had already been convicted of first-
19 degree murder with the use of a gun.

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

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

1 JUSTICE SOUTER: So you're saying the judge had
2 no discretion whatsoever?

3 MR. SEVILLA: Correct.

4 JUSTICE SOUTER: So, therefore --

5 JUSTICE SCALIA: 25 to life is 25, 26, 27, 28.

6 He has 25 years' worth of discretion, doesn't he?

7 MR. SEVILLA: No, no. It's a minimum mandatory
8 25 to life.

9 JUSTICE KENNEDY: No. But couldn't he also
10 give life? He could also give the max, which was life,
11 couldn't he, or am I wrong?

12 MR. SEVILLA: No. He -- he could give 25 --
13 the -- the --

14 JUSTICE SOUTER: You're saying the terms of the
15 sentence had to be 25 to life?

16 MR. SEVILLA: Correct.

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

19 MR. SEVILLA: Correct.

20 JUSTICE SOUTER: I see.

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

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

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

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

12 MR. SEVILLA: There is no case that this Court
13 has so pronounced. We're not arguing for that standard,
14 nor should we have to --

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

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

1 he decides for reasons of error --

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

11 MR. SEVILLA: Well, the -- this Court has said
12 that errors of misunderstanding -- well, the Court has said
13 that failure to fact-investigate can be a basis for
14 objectively unreasonable performance. The same is true
15 with failure to legally investigate what's the law
16 governing your case.

17 And he stated on six occasions that the fact
18 that the jury, quote, had already found Mirzayance guilty
19 of first-degree murder, and, whether they knew it or not,
20 under the facts of this case legally sane, well, then the
21 question is, well, how do you make that determination? And
22 by the way, he said the equivalent of that six times during
23 the hearing.

24 JUSTICE SCALIA: Yes, but I didn't -- I didn't
25 take that to mean under California law, since the jury

1 found the one, it has to find the other. He wasn't making
2 that argument. He was saying any jury that found that this
3 was done intentionally, that's done, you know, with -- with
4 planning, with -- with cover-up and what not, that jury is
5 not going to find that he was crazy. That's all he was
6 saying, and -- and that seems to me entirely reasonable.

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

9 JUSTICE KENNEDY: Well, it's hard for me to
10 believe that he didn't. He's tried a hundred cases. He
11 had moot or mock -- mock trials where he was asking the
12 experts these questions with the co-counsel. And you want
13 us to -- to say that he didn't understand the law? And
14 there's no -- there's no finding to that effect. There's
15 no finding to that effect, that he did not understand the
16 law by the magistrate.

17 MR. SEVILLA: Well, the circuit in --

18 JUSTICE KENNEDY: By the magistrate, there's no
19 finding to that effect.

20 MR. SEVILLA: That's correct, because the
21 magistrate did really not make a finding on prong one. The
22 -- the magistrate misapprehended the intention of the
23 circuit's first remand by thinking that it had mandated a
24 nothing-to-lose rule. And if there was nothing to lose, it
25 was prong one ineffectiveness, so there was no need to make

1 a finding. So we're left without a finding.

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

12 And -- and this point is very important to this
13 argument. When he was arguing to the jury, he said he
14 can't premeditate and deliberate because he's mentally ill.
15 He's mentally diseased. And he was cut off by the
16 prosecutor and the court who gave an instruction -- it's at
17 853 of the trial transcript -- saying the fact that Mr.
18 Mirzayance may have deliberated for irrational reasons
19 brought on by mental disease is not a defense to this case.
20 His reasons can be irrational in deliberating.

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

1 add --

2 JUSTICE KENNEDY: But they didn't -- they
3 didn't strike the expert's testimony. The expert testified
4 at some length, the -- the psychiatrist.

5 MR. SEVILLA: He did.

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

9 MR. SEVILLA: They did consider what he said,
10 but they were precluded from channeling that into a defense
11 to premeditation and deliberation.

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

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

24 JUSTICE BREYER: I was just reading from the
25 California Court of Appeal. Because I look at that. I

1 think when I go back and see what was the evidence in front
2 of them, I'm going to find all these -- all these things,
3 not the last part by the way, not -- not the part about the
4 counsel admitting he was wrong or whatever this argument
5 we're having now. We won't find that, but we'll find
6 everything else there.

7 And so they're using that as the basis to say
8 there was no prejudice. And now, I guess that the Ninth
9 Circuit and the Federal courts would have to defer to that
10 finding on prejudice. Now, what's your response to that?

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

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

25 And -- and then, of course, we know that at --

1 at the Federal evidentiary hearing, this defense was found
2 credible, and one of the State doctors came over to the
3 defense side and -- and testified that Mirzayance did not
4 understand wrongfulness at the time of the homicide because
5 of the psychosis. And this doctor made an error, and it's
6 -- it's clear from the record at the evidentiary hearing,
7 he had an error in his understanding of the NGI test in
8 California. He thought if you met prong one, you
9 understood the nature and quality of the act, you were
10 sane, and he never went to wrongfulness.

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

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

20 MR. SEVILLA: In California in 1982, there was
21 a statutory amendment which prohibited forensic experts
22 from testifying to opinions at the guilt phase, so that --
23 on legal issues like premeditation and deliberation. So
24 they could not, Dr. Satz could not testify at the guilt
25 phase on premeditation and deliberation. At the insanity

1 phase, they absolutely can testify as to whether he was
2 sane or not.

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

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

7 Speaking to -- I think, Justice Kennedy, you
8 raised the issue about couldn't these -- in the prejudice
9 calculus, couldn't the psychiatrists have been impeached
10 with the fact that they found no premeditation and
11 deliberation? Well, California statute under Penal Code
12 section 28 prohibits their opinion on premeditation and
13 deliberation at the guilt phase where the issue is
14 premeditation and deliberation. So I can't understand how
15 a court would let in their opinions on premeditation and
16 deliberation when there's a totally separate issue of
17 insanity at the insanity phase.

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

24 So, in this case, we have an attorney who, for
25 whatever reasons based on a subjective sense of

1 hopelessness, gave up his client's only and best defense, a
2 defense that was found credible at the Federal evidentiary
3 hearing. Once -- once that defense is found credible, that
4 bespeaks of the unreasonableness of counsel giving it up.
5 It's a credible defense. It's the only defense available
6 to him, and counsel gave it up for no tactical benefit.
7 There was no upside to this. There was a clear downside to
8 it, because it consigned his client to 29 years to life as
9 opposed to the possibility of treatment in a mental
10 hospital and -- and, potentially, upon the restoration of
11 sanity, potential relief -- release if he could prove his
12 restoration.

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

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

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

19 MR. SEVILLA: I don't think so. I don't
20 believe -- I think at the sentencing hearing, the trial
21 judge did not do anything special except sentence him to
22 prison? Although both -- in terms of the bona fides of his
23 disease, both the prosecutor and the judge at the time of
24 the sentencing said he was clearly a mentally diseased
25 person. So that -- this -- this bespeaks back to the

1 credibility of the defense which was established by the
2 mental disease evidence which stemmed from childhood.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. SEVILLA: Thank you very much.

5 CHIEF JUSTICE ROBERTS: Mr. Mercer, you have 4
6 minutes remaining.

7 REBUTTAL ARGUMENT OF STEVEN E. MERCER

8 ON BEHALF OF THE PETITIONER

9 MR. MERCER: Just a couple of points I'd like
10 to make briefly to clarify a couple things.

11 First off, there was no finding that Attorney
12 Wager misunderstood California law or somehow was under the
13 impression that a finding of first-degree murder was
14 legally precluded a finding of NGI. He argued at the State
15 trial that there's no question that an insane person can
16 deliberate, and surely while the jury's verdict was
17 devastating under the facts of this case, he didn't close
18 up his books and go home. He told the trial judge, we need
19 to reassess this, I need to decide who I'm going to call, I
20 need to consult with my doctors and my co-counsel and
21 decide what we're going to do.

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

1 son. And this was, in fact, his first NGI defense, but as
2 Mirzayance's family attorney stated in his State court
3 declaration, Attorney Wager was a 10-year expert on mental
4 health and sanity issues with the Los Angeles District
5 Attorney's Office. He had tried more than a hundred
6 trials. He was the expert. He had done his homework here.
7 He knew what he had to -- to present. He did not make a
8 rash decision. He consulted with co-counsel, and concluded
9 reasonably under his professional valuation that the
10 defense could not meet its affirmative burden of proof
11 here.

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

20 JUSTICE SOUTER: What -- what discretion did
21 the judge have?

22 MR. MERCER: The -- the sentencing judge could
23 have imposed a high, middle or low term for the weapons
24 enhancement. The underlying sentence was 25 to life, and
25 my friend is correct, it's set by statute. But he had

1 discretion on sentence enhancement. And he was convinced
2 that Mirzayance was remorseful, and gave him a mid-term
3 instead of a high-term, despite the facts.

4 JUSTICE GINSBURG: Wasn't there also something
5 about the revocations? There were three revocations
6 involved, I thought, and he got 2 years on each.

7 MR. MERCER: I don't believe that's correct. I
8 think it was a straightforward 25-years-to-life sentence,
9 plus a weapons enhancement of 4 years added on.

10 JUSTICE BREYER: You keep saying 29 years. Is
11 it 29 years to life? Is that just a misprint or --

12 MR. MERCER: It's -- the aggregate sentence is
13 25 -- excuse me. The aggregate sentence is 29 years to
14 life. It's 25 years to life for the first-degree murder,
15 plus 4 years for the weapons enhancement in this term, a
16 mid-term, because Wager successfully argued that his client
17 was remorseful.

18 Second --

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

21 MR. MERCER: I believe that it was -- I believe
22 that it was 6 years as opposed to 4. It may have been 8
23 years as opposed to 4. I don't know. That's not discussed
24 in the State court record.

25 And finally, Mr. Mirzayance concedes that

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

7 CHIEF JUSTICE ROBERTS: Why don't you --

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

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

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

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