

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL A. KNOWLES, :

4 WARDEN, :

5 Petitioner :

6 v. : No. 07-1315

7 ALEXANDRE MIRZAYANCE. :

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9 Washington, D.C.

10 Tuesday, January 13, 2009

11

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

15 APPEARANCES:

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

18 CHARLES M. SEVILLA, ESQ., San Diego, Cal.; on behalf
19 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 will hear argument this afternoon in Case 07-1315, Knowles v. Mirzayance.

Mr. Mercer.

ORAL ARGUMENT OF STEVEN E. MERCER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

16 MR. MERCER: -- a --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 MR. MERCER: Yes.

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

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

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

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

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

14 JUSTICE SOUTER: That would be the general
15 proposition.

16 MR. MERCER: Yes.

17 JUSTICE SOUTER: Okay.

18 MR. MERCER: And I think --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 JUSTICE SOUTER: Ah, okay.

12 MR. MERCER: Yes, okay.

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

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

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

4 MR. MERCER: Mr. Wager did not believe that
5 he had grounds to do so in this case. And the district
6 court first addressed that opinion at the petition
7 appendix H in a footnote -- I believe it was footnote
8 21, but I don't have that in front of me right now --
9 where the district court talked about the standards for
10 getting a new jury and that under Penal Code, California
11 Penal Code 1026, you had to show some cause to the trial
12 court why this jury could not fairly address the claim.
13 Wager felt that he had no basis to do that at this time.

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

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

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

1 MR. MERCER: Okay.

2 JUSTICE SCALIA: Good.

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

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

15 MR. MERCER: "Nothing to lose."

16 JUSTICE KENNEDY: "Nothing to lose."

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

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

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

7 MR. MERCER: Certainly.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. MERCER: This Court could say you

1 haven't adjudicated this --

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

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

6 JUSTICE STEVENS: Oh, okay.

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

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

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

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

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

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

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

5 JUSTICE KENNEDY: Of course.

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

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

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

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

1 standard. So --

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

6 MR. MERCER: Yes, Your Honor.

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

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

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

19 JUSTICE STEVENS: You say the standard is
20 Strickland.

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

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

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

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

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

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

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

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

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

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

1 so.

2 MR. MERCER: Correct.

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

10 MR. MERCER: Correct, yes.

11 JUSTICE BREYER: Yes.

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

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

22 MR. MERCER: Correct.

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

25 MR. MERCER: I actually think that that

1 issue is not really properly before this Court.

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

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

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

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

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

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

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

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

10 MR. MERCER: Correct.

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

17 MR. MERCER: Absolutely.

18 JUSTICE SOUTER: Is that your road map?

19 MR. MERCER: Yes, it is.

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

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Sevilla.

24 ORAL ARGUMENT OF CHARLES M. SEVILLA

25 ON BEHALF OF THE RESPONDENT

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

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

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

17 MR. SEVILLA: Yes.

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: So we have to look
2 at this counsel's performance under Strickland, I guess,
3 and determine whether it was objectively unreasonable in
4 light 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
8 have 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
12 were it not for the fact that there was an evidentiary
13 hearing which resolved facts that should have been
14 resolved in the State court. Appellant filed a separate
15 petition in the court of appeal in California, filed the
16 same petition in the California Supreme Court, asked --
17 first argued up front that this was unreasonable
18 performance under Strickland, and then said if the court
19 disagrees, then it ought to be remanded to a referee for
20 fact development.

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

1 held?

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

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

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

7 JUSTICE SCALIA: Right.

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

11 JUSTICE SCALIA: Right.

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

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

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

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

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

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

25 MR. SEVILLA: What we specified is why his

1 rationale was unreasonable.

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

4 MR. SEVILLA: And we --

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

7 MR. SEVILLA: Right.

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

14 MR. SEVILLA: Yes.

15 JUSTICE SOUTER: Okay.

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

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

3 MR. SEVILLA: We argued yes.

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

6 MR. SEVILLA: No.

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

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

15 JUSTICE BREYER: That's a good one.

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

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

23 MR. SEVILLA: That's California law.

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

1 MR. SEVILLA: That is --

2 JUSTICE BREYER: It's summary judgment law.

3 MR. SEVILLA: In order to deny relief, one
4 has to -- the court has to presume the adequacy of the
5 showing, or the truth of the showing made by the --

6 JUSTICE SCALIA: No, but that can't be.
7 What if I deny the hearing because there are ample facts
8 that show what the situation was, and a hearing would in
9 my view be absolutely redundant? And therefore all of
10 the facts that support the other side have to be washed
11 out simply because I've denied a hearing?

12 MR. SEVILLA: No. We're not making any
13 claim that there has to be a hearing in every Federal
14 case when there is an argument that could be deemed on
15 its face cumulative evidence.

16 JUSTICE SCALIA: I wasn't addressing that.
17 I was addressing the proposition that when you deny a
18 hearing, all of the facts for which you demanded the
19 hearing have to be assumed in your favor. I -- it seems
20 to be --

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

1 MR. SEVILLA: I --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 MR. SEVILLA: Yes.

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

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

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

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

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

20 MR. SEVILLA: Yes.

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

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

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

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

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

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

1 sentences on the multiple offenses concurrent rather
2 than consecutive.

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

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

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

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

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

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

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

5 JUSTICE SOUTER: How did he know that?

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

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

11 MR. SEVILLA: Correct, but under California
12 law there is a mandatory prison sentence for the use of
13 a gun, so -- and the sentence for first-degree murder is
14 25 to life.

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

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

19 JUSTICE SCALIA: Twenty-five -- 25, 26, 27,
20 28, he has 25 years worth of discretion, doesn't he?

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

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

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

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

5 MR. SEVILLA: Correct.

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

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

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

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

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

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

1 that standard, nor should we have to --

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

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

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

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

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

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

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

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

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

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

6 MR. SEVILLA: Well, the circuit --

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

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

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

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

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

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

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

21 MR. SEVILLA: He did.

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

25 MR. SEVILLA: They did consider what he

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Speaking to -- I think, Justice Kennedy, you

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

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

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

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

3 There was no upside to this. There was a
4 clear downside to it, because it consigned his client to
5 29 years to life as opposed to the possibility of
6 treatment in a mental hospital, and potentially, upon
7 the restoration of sanity, potential relief -- release
8 if he could prove his restoration.

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

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

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

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

1 childhood.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. SEVILLA: Thank you very much.

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

6 REBUTTAL ARGUMENT OF STEVEN E. MERCER

7 ON BEHALF OF THE PETITIONER

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

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

18 He told the trial judge, we need to reassess
19 this, I need to decide who I'm going to call, I need to
20 consult with my doctors and my co-counsel and decide
21 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
24 no final decision made until the morning of trial when
25 the parents expressed a profound reluctance to assist

1 their son. And this was, in fact, his first NGI
2 defense, but as Mirzayance's family attorney stated in
3 his State court declaration, Attorney Wager was a
4 ten-year expert on mental health and sanity issues with
5 the Los Angeles District Attorney's Office. He had
6 tried more than a hundred trials. He was the expert.
7 He had done his homework here. He knew what he had to
8 present. He did not make a rash decision. He consulted
9 with co-counsel, and concluded reasonably under his
10 professional valuation that the defense could not meet
11 its affirmative burden of proof 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
15 hindsight said, well, perhaps there was nothing to lose.
16 But he argued to the sentencing judge the very fact that
17 his client knew the wrongfulness of his actions and was
18 so remorseful should entitle him to a lesser sentence on
19 the weapons enhancement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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