IN THE SUPREME COURT OF THE UNITED STATES

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HOLLY WOOD, :

Petitioner :

v. : No. 08-9156

RICHARD F. ALLEN, :

COMMISSIONER, ALABAMA :

DEPARTMENT OF :

CORRECTIONS, ET AL. :

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Washington, D.C.

Wednesday, November 4, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

KERRY A. SCANLON, ESQ., Washington, D.C.; on behalf of the Petitioner.

COREY L. MAZE, ESQ., Solicitor General, Montgomery, Ala.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-9156, Wood v. Allen.

Mr. Scanlon.

ORAL ARGUMENT OF KERRY A. SCANLON

ON BEHALF OF THE PETITIONER

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

Holly Wood was sentenced to death after his lawyers failed to investigate or present to the jury evidence of his undisputed mental deficiencies. That evidence was readily available to any reasonably competent attorney, and it offered powerful mitigation which had a reasonable probability of changing the sentence from death to life without parole.

No one on the sentencing jury had any idea that Mr. Wood had any mental deficiency, much less that he had an IQ between 59 and 64, which means he ranks in the lowest one percent of the total population.

JUSTICE SCALIA: Of course, if they had introduced that evidence on behalf of the defendant, there would have come in the report they had gotten from -- who was it, Dr. Kirkland? Was that his name?

MR. SCANLON: That's correct, Justice

Scalia.

JUSTICE SCALIA: Which said that, although he -- he indeed was in the lower range of mental agility, this did not affect his ability to discern right from wrong.

MR. SCANLON: Well --

JUSTICE SCALIA: He was not -- the Kirkland report was not a favorable report for the defendant.

MR. SCANLON: Well, the Kirkland report was not -- first of all, was only about his mental competency and whether he had a mental disease or defect that prevented him from knowing right from wrong. It was an incompetency and insanity report.

This Court has made it clear in Atkins and other cases that mentally retarded persons often know the difference between right and wrong and are competent to stand trial. What that report did have is a very strong lead that he had a borderline intellectual functioning. That is different from whether or not he is able to go to trial or whether he --

JUSTICE SCALIA: Well, but it didn't just say borderline intellectual function. It went on to say that did not affect his ability to perceive that he was -- he was doing something wrong here.

MR. SCANLON: Each of the statements --

JUSTICE SCALIA: You know, if it had not added that I would have said, oh, yeah, let's -- let's pursue this further. But they -- it seems to me they made an intelligent decision There was nothing here that was going to help them and there might be stuff that would hurt them.

MR. SCANLON: Justice Scalia, everything in the Kirkland report that talked about his ability was his ability to go to trial, that he was competent and that he knew the difference between right and wrong. Those findings in the Kirkland report that talk about that relate only to that issue. It's an entirely different issue, which the courts have made clear, whether someone has significant mental deficiencies that will -- will -- is the kind of evidence that garners sympathy from the jury.

JUSTICE ALITO: Why is this question properly before us in this case? The argument that you seem to be making, and it's an argument to which you devote a lot of your brief, seems to be that the -- the State courts unreasonably applied Strickland to the performance of the attorneys at the penalty phase.

Now, that is a, a (d)(1) argument, 2254(d)(1). But the two questions on which cert were granted have to do with findings of fact. So they have

to do with (d)(2) and (e)(1) and not (d)(1) at all.

MR. SCANLON: Justice Alito, our primary argument is a (d)(2) argument, and that is that there was no strategic decision here, that in fact it was a failure to investigate in violation of this Court.

CHIEF JUSTICE ROBERTS: Was (d)(2) raised in your habeas petition?

MR. SCANLON: Yes.

CHIEF JUSTICE ROBERTS: Could you give me a citation for that, where in the habeas petition you made a (d)(2) claim as opposed to a (d)(1) claim?

MR. SCANLON: Well, our habeas -- I -- I can get a cite for that, but our habeas petition was all about failing to do an investigation in the State court's findings that there had been a reasonable investigation. The State court finding, Mr. Chief Justice, is at page 201a and 202a of the petition appendix.

And at that point the State courts talk about eight historical facts and they conclude that there was a reasonable investigation of the facts.

CHIEF JUSTICE ROBERTS: That factual determination that you say is unreasonable under (d)(2), that went to deficient performance?

MR. SCANLON: That went to deficient

performance, of course.

CHIEF JUSTICE ROBERTS: Did the -- did the State court make a ruling on prejudice under Strickland?

MR. SCANLON: The State court did make a ruling on prejudice. And it made it on two grounds: It found that he was not mentally retarded, which, of course, is -- is -- is clearly unreasonable, because you don't have to be mentally retarded to have it be valuable evidence to present to the jury.

Secondly, they -- they found that the crime was brutal in its nature, even though the trial court had -- had -- had declined to give the instruction that it was cruel and heinous.

CHIEF JUSTICE ROBERTS: Do you agree that we have to find that it was an unreasonable determination both with respect to performance and with respect to prejudice to get you through the (d)(2) hurdle?

MR. SCANLON: Yes, of course, and I think we can do that, and for the same reason, Mr. Chief Justice, that it was not reasonable in the first place for counsel to decide to stop their investigation. That's because the evidence is so powerful. This is the most powerful kind of mitigating evidence you can have in this type of case.

JUSTICE SOTOMAYOR: Could I take you back to

Justice Alito's question? As I read the lower court decision, it was saying counsel made a strategic choice not to pursue any further investigation with respect to mental health, correct?

MR. SCANLON: Correct.

JUSTICE SOTOMAYOR: All right. And they made it on the basis of a number of factors, including the fact that there was testimony that the two senior attorneys said: It's not going to help us if we do or not. You may disagree with whether or not a strategic decision was made or not, but if one can view the evidence in any way as the attorney having made the decision, isn't your argument that that decision was unreasonable?

MR. SCANLON: Of course.

JUSTICE SOTOMAYOR: But isn't that what Justice Alito asked you? That's not a dispute with the factual finding that it was a strategic decision. That's a dispute with the legal -- the legal -- whether that strategic decision met the legal standard of Strickland.

MR. SCANLON: That's correct.

JUSTICE SOTOMAYOR: All right. So we're back to Justice Alito's question, which is, isn't that a (d)(1) instead of a (d)(2) argument, and we -- the

question presented only addressed the strategic decision. It didn't address or present the question of the Strickland question of whether that would have been a reasonable strategic decision.

MR. SCANLON: Your Honor, that is our alternative argument. Our -- our main argument is a (d)(2) argument.

JUSTICE SOTOMAYOR: It might be your alternative argument, but it's not the question presented.

MR. SCANLON: No, I'm saying the fact question is our primary argument. That is how we lost in the Eleventh Circuit. The Eleventh Circuit made a determination that it was not unreasonable to find that there had been an adequate investigation by these lawyers of a mental health defense. That's what the Eleventh Circuit found.

JUSTICE GINSBURG: When did that come up? I thought that the facts as the Eleventh Circuit presented them is that the senior lawyer first said: We want Dr. Kirkland's report not simply on the question of insanity and incompetence to stand trial, but also to give us leads to mitigating evidence.

So mitigation is in his mind about looking into this mental question. He reads Kirkland's report

and, for whatever reason, decides this isn't worth pursuing; this is not going to help us.

I thought that that's what the Eleventh Circuit said was the picture, that whether it was an incompetent, ineffective decision is a separate question, but as to what happened, why did the investigation stop, because the senior lawyer said: Yes, it's relevant to mitigation, but I looked at the report and I think it's not wise for us to pursue mitigation.

MR. SCANLON: Justice Ginsburg, that is what the State argues. That is not what the Eleventh Circuit found. On pages 56 and 57a of the petition appendix, the Eleventh Circuit clearly makes a finding that there had been a reasonable investigation done of this.

JUSTICE GINSBURG: Where is that? 56?

MR. SCANLON: Page 56a and page 57a of the petition appendix, which is the Eleventh Circuit decision. And if you look at page 56a, for example, the Eleventh Circuit framed the issue correctly. They say: Here the issue becomes, did counsel, before deciding not to present evidence of Wood's borderline intellectual function make reasonable investigation or a reasonable decision that made particular investigations unnecessary?

And they go on right after that on page 56 and 57 to say that they did a reasonable investigation. They cite eight historical facts about that investigation. Those facts are objectively --

JUSTICE GINSBURG: I'm sorry that I don't have that appendix with me now, but as I recall the Eleventh Circuit was not making any independent determination of its own, but it was reporting what the senior lawyer -- his view of it. They were not making a fact-finding as a tribunal.

MR. SCANLON: With all due respect, Justice Ginsburg, if you look at the Eleventh Circuit decision at this critical point, there is no reference to Mr. Dozier, who is the senior lawyer. What the reference is to are the State court findings, which they say at 57a are amply supported by the record. Those findings were that they did an investigation, that it was adequate, and in fact, the State has now abandoned that position.

The State no longer claims that these lawyers did any investigation at all. They claim that they looked at the Kirkland report and made a decision then and there to terminate any investigation, and that -- that of course would be a violation under (d)(1). But you first have to get to the fact issue, whether they did an investigation in the first place.

JUSTICE KENNEDY: You don't have the cite for 542 F.3d, that part of the opinion? It's in 542 F.3d, 1281, but I don't have the particular page. Okay.

MR. SCANLON: I'm sorry, I don't have the F.2d cite.

JUSTICE STEVENS: Could you clarify one -- could you clarify one thing for me?

I understand that you can understand the record as indicating that they made a reasonable strategic decision not to let that report come in or make these arguments at the guilt stage, but the separate question is whether, did they also decide, make the same decision with respect to the penalty phase? And if they did, were they assuming that the Kirkland report would become a part of the record at the penalty stage as it would have at the guilt stage if it came in?

MR. SCANLON: Well, I think your question is -- is right on point, because what Mr. Dozier was thinking about when he said it didn't merit further inquiry was the guilt phase.

JUSTICE STEVENS: Right.

MR. SCANLON: That's what he was focused on. He -- he designated to Mr. Trotter, the junior lawyer, the penalty phase, and therefore the fact that they

didn't make that decision is clear, because two months later Mr. Dozier himself is going to the trial court with Mr. Trotter and asking for psychological evaluations and other reports.

Mr. Trotter, before the trial, says: Your Honor, we have not investigated this; it needs further assessment. So clearly --

JUSTICE GINSBURG: That, what you said so far, leaves out one thing; that is, I thought that Dozier had said: We need, we have to get this Kirkland report, and it's of interest to us for three purposes, the two that were relevant to the guilt phase and the one, mitigation, that was relevant to the penalty phase.

That suggests that in his mind, in Dozier's mind from the start, was both phases, the guilt phase and with respect to mitigation. And then he looked in the report and, having said, we should see if there's any leads to mitigation, then he next says, we're not going forward with this.

MR. SCANLON: Well, Justice Ginsburg, the -- what Mr. Dozier said at that time was in response to a leading question: Did you have the penalty phase in mind? And he said: Of course.

Now, what he actually did when he requested the Kirkland report was to limit it specifically to

competency and insanity, and so -- but even if Mr. Dozier had that in mind, which I don't think the record supports -- let's assume that he had that in mind. When he got the Kirkland report, it's obvious the State agrees with it. This Court's precedents show that what's in the Kirkland report is an extremely strong lead. He has borderline mental functioning. And counsel were not able to simply not follow that lead. Reasonable counsel would have seen that as a green light, not a red light.

JUSTICE GINSBURG: Now this case, for me at least, is terribly confusing, because I thought, reading the cert position, that the Court granted cert to deal with a legal question that has confused the lower courts, that is, what is the relationship between (d)(2) and (e)(1) of AEDPA?

MR. SCANLON: Right.

JUSTICE GINSBURG: Now I read your brief and I hear what you're saying so far. It seems to be that you have a solid case under (d)(1); that is, that these counsel were ineffective because they did not pursue mental state mitigation.

But that would be a much different -- that would be a fact-bound case tied to this record, as apart from the legal question: What does unreasonable -- the

(d)(2) unreasonableness, how does it relate to the (e)(1) presumed correct, clear and convincing evidence? I thought that that legal question was why we granted cert.

MR. SCANLON: And that is very central to this case, and the reason it's central is because the Eleventh Circuit got it wrong when they focused on individual fact-findings, many of which were immaterial to the claim, instead of looking at the entire State court record, and so we --

JUSTICE ALITO: But that's an entirely different question. I think that's the question. Did the validity of the -- the conclusion made by the State courts that there was a strategic decision not to present this evidence until the -- the final judge stage of the -- of the proceeding, and not whether there was a reasonable investigation or whether they -- there was reasonable performance overall at the penalty phase.

It's purely this question of the validity of a finding of historical fact and how that is to be evaluated under -- under (d), under (d)(2) and (e)(1).

MR. SCANLON: Right, and, if you look at Eleventh Circuit's opinion, the majority opinion in this case, what they did is, rather than look at the entire record for reasonableness to see if the Petitioner had

shown that it was not reasonable, what they did was they looked at individual fact-findings.

And -- and they said that those are not rebutted by clear and convincing evidence; therefore, it's reasonable. And that's the mistake.

JUSTICE KENNEDY: But let's just talk about the -- the finding of -- by the district court that there was no strategic reason and the -- and the disagreement with that in the Federal circuit, and let's talk about it just under (d)(1) -- just under (d)(1).

MR. SCANLON: Okay.

JUSTICE KENNEDY: Would you say that the test is whether or not the -- that finding was clearly erroneous?

MR. SCANLON: No.

JUSTICE KENNEDY: Is that -- is that another way?

MR. SCANLON: No. I think the standard is much more difficult than that. I think the standard --

JUSTICE KENNEDY: Why -- why is "unreasonable application" different from "clearly erroneous"?

MR. SCANLON: I think it's -- I think something could be incorrect, but it wouldn't be unreasonable. I think something could be erroneous, but

it wouldn't be unreasonable.

I think that Congress made it clear that (d)(2) was a deferential standard. It has teeth in it.

JUSTICE KENNEDY: Well, I'm -- I'm talking about (d)(1).

MR. SCANLON: Okay. Under (d)(1) --

JUSTICE KENNEDY: I-- I beg your -- (d)(2), unreasonable determination of facts.

MR. SCANLON: Right.

JUSTICE KENNEDY: Yes.

MR. SCANLON: Right. And that is that Congress said that a Petitioner has to show, before they can go anywhere in their case, that that is objectively unreasonable.

In the prior version of this statute, it was much easier --

JUSTICE KENNEDY: So you -- you think there can be findings that are clearly erroneous, but not an unreasonable determination of facts?

MR. SCANLON: I think that this Court, certainly, in the context of (d)(1) has said, in Miller-El, that there is a difference between something being erroneous and something being unreasonable.

JUSTICE KENNEDY: I'm talking about (d)(2).

MR. SCANLON: I think it would -- I think it

would apply there, too. I think --

JUSTICE KENNEDY: Because the problem, as Justice Ginsburg indicated, is that the courts of appeals are looking for guidance as -- as to when we can go into -- into these findings and set them aside.

MR. SCANLON: Right. Right.

JUSTICE KENNEDY: And it really is very difficult for me to wear a "clearly erroneous" hat or an "unreasonable determination of fact." I -- I just can't sense any difference there.

MR. SCANLON: I -- I think the key difference is this, Justice Kennedy, and that is that when you have a "clearly erroneous" test -- or under -- under (e)(1), you're not looking at the entire factual record. You're looking at independent fact-findings. And that's where the Court got it wrong in this case. And what this Court needs to do is clarify several things. One, that (e)(1) does not mean and (d)(2) does not mean that you have to show unreasonableness by clear and convincing evidence. That's what the Court did in this case, and the Eleventh Circuit has done that in other cases.

JUSTICE BREYER: Do I have it right, in your opinion, so far? I'm just interested in the relationship between (d) and (e), and as I read it, just

to look at the language, it seems to me, in the (d) case, we're talking about something that was decided on a record in a State court.

And you -- you're the lawyer, trying to get the Federal judge to say, that's all wrong. You're going to say their facts are wrong, their fact-finding. So you say: Judge, that was unreasonable, you know, in light of the record. That's what you do under (d)(2)?

MR. SCANLON: Correct.

JUSTICE BREYER: Now, (e) is a different situation. (E) is a situation where, for some reason or other -- and there are a few -- you are having a new hearing in the Federal court.

One reason for having such a hearing could be that there was a factual predicate that couldn't have been discovered and it's very important. So you're get into that Federal court hearing. And now, when you're in the Federal court hearing it turns out that in the earlier State court hearing there was a fact-finding that has something to do with this. It may be not so important, but it's over there and you want to get the judge to ignore it.

So there you have to show what (d)(2) says. You have the burden of saying that that was an unreasonable fact-finding. That's what it says. Those

different words make -- seem sensible to me because the proceeding is different, and the way we talk about the proceedings is a little bit different. But as a practical reality, I guess they come to about the same thing.

All right. Now, forgetting my last comment, have I got the first part right as you understand it?

MR. SCANLON: I think that's right. If there's different evidence that's extrinsic to the State court record, that is looked at in the Federal evidentiary proceeding under --

JUSTICE GINSBURG: And that's -- that's what the Ninth Circuit position developed by Judge Kozinski.

MR. SCANLON: That --

JUSTICE GINSBURG: The only problem with that, it would shrink the province of (e)(1) very considerably, because overwhelmingly Federal habeas petitioners do not get evidentiary hearings in Federal court.

So, if we accept the Ninth Circuit's view of it, then (e) -- (e)(1) applies to a rather small category of cases; i.e., cases in which there is an evidentiary hearing in the Federal habeas proceeding.

MR. SCANLON: But, Justice Ginsburg, (d)(2) requires just as much deference, we believe, because of

the -- the need to show that it's objectively unreasonable, so --

JUSTICE GINSBURG: I'm -- I'm not talking about (d)(2) now. We're talking about two provisions, trying to make sense how do they relate to each other.

MR. SCANLON: Right.

JUSTICE GINSBURG: And one very well-presented position is the Ninth Circuit's in Judge Kozinski's opinion. My only question is am I right to say that his view, which is your view, would leave very little work for (e)(1) to do if (e)(1) applies only when there's new evidence coming in; it's not just the -- the record that was made in the State court, but new evidence coming in in the Federal habeas.

MR. SCANLON: There's --

JUSTICE GINSBURG: There are not -- not many cases.

MR. SCANLON: There's less -- there's less work to do, of course. It's ten percent of the cases or so, but no deference is lost because (e)(1) does not apply to the other 90 percent of the cases, because (d)(2), that standard itself --

JUSTICE GINSBURG: What you're saying is (d)(2) is a vigorous standard, but, yes, your description, unlike the opposing description of the

relationship between these two --

MR. SCANLON: Right.

JUSTICE GINSBURG: -- does leave for (e)(1) this maybe 10 percent of the cases, not more.

MR. SCANLON: And --

JUSTICE SOTOMAYOR: Can I go back to -- just to -- so that we're on the same page in my own mind, what constitutes the State record? Because one of the State amici posited situations in which the record before the State court on the issue that it made its determination would be one subset of evidence, and that, perhaps as the State process developed on another issue there was another record developed, and you're pointing to that evidence in your argument of unreasonableness as a reason for the lower court's decision being wrong.

So your use of that other evidence, does that go under (d)(2) or (d)(1)?

MR. SCANLON: The other evidence -- if it -- if it's intrinsic to the State court record, then it would be looked at under (d)(2), and the Petitioner would have to show that, looking at all of that evidence, the determination of fact was objectively unreasonable only if the evidence is outside of that. And -- and I think we agree, it's about ten percent of the cases, but that's not insignificant for the role

that (e)(1) plays.

JUSTICE SOTOMAYOR: Does that seem -- does that seem reasonable, meaning the State court is making a decision based on what's before it. Can't -- it can't foretell unknown evidence and bring it into its equation. So one has to presume that its finding based on the evidence before it is correct.

If there's additional evidence, whether it's part of a record that's developed elsewhere, not part of what it based its decision on, and if you look at the language of (d)(2), it talks about the record on the fact determined. It doesn't talk about on the --

MR. SCANLON: Yes. And any new evidence would be looked at under the clear and convincing standard, whether that --

JUSTICE SOTOMAYOR: So you're changing your earlier answer to me? You're going closer to what the amici were suggesting, which is that record has to be defined narrowly, it has to be the facts before the court?

MR. SCANLON: No. I -- I understood your question to mean that the facts were part of a State court determination. It just wasn't the first one. There were two different determinations, but they were both in the State court proceeding.

JUSTICE SOTOMAYOR: I'm not sure I understand that, meaning often a trial court is presented with evidence that determines something. This was a strategic choice. It may be that later the State court has a hearing on that question, but it may be that it has a hearing on a different question altogether.

MR. SCANLON: Right, but --

JUSTICE SOTOMAYOR: And you're using the evidence on the other question.

MR. SCANLON: And if it's within the State court record, it is looked at under (d)(2).

And if I may reserve the remainder of my time?

JUSTICE STEVENS: Could I ask a question? Maybe you need a little extra time. I want to be sure I understand one thing. What is your view of what the unreasonable determination of facts was in this case, either the decision not to go forward with further investigation or that the results of the investigation would not have been -- would have been -- would have been prejudicial?

MR. SCANLON: Well, those are both unreasonable determinations of fact. The first one, that they did an investigation, is what the Eleventh Circuit ruled. The State in this Court on the merits

brief changed its position and no longer argues that they did an investigation, but they now say: We made a decision because Kirkland report was a red light, we made a decision not to go forward. That is also unreasonable.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Maze.

ORAL ARGUMENT OF COREY L. MAZE

ON BEHALF OF THE RESPONDENTS

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

Based on the Court's questioning so far, I believe that I, as did every amicus, believe the questions presented in this case are the actual questions listed in the petition. So unless this Court has an objection, I'm going to focus on the (d)(2) question and how it interplays with (e)(1). And I would like to start with Justice Ginsburg's point about why the Ninth Circuit opinion is wrong. And other than the plain language, which was what we've discussed in the brief --

JUSTICE GINSBURG: I -- I didn't --

MR. MAZE: I --

JUSTICE GINSBURG: I just want -- I just described the Ninth Circuit decision. I didn't say it

was wrong.

MR. MAZE: I apologize. You're correct. I would say it's wrong.

(Laughter.)

MR. MAZE: Because not only does it ignore the plain language and, the point you made that it would be 90 to 99 percent of the time it would cut it out, the problem is is that position misses the bigger picture. (E)(1) doesn't only apply when we're looking at (d)(2) claims. In fact, (d)(2) claims are a very, very small percentage of what the States deal with in habeas work. Typically what we're dealing with are (d)(1) claims or claims that weren't even adjudicated on the merits in the State court. Let's say it was procedurally barred in the State court and we're looking at the procedural default rule.

If you're looking at applying the rule that Judge Kozinski has forwarded in the Ninth Circuit, they would say that (e)(1) is completely eviscerated if there is no extrinsic evidence, even if we're looking at a (d)(1) claim and even if we're looking at a procedurally barred claim. So --

CHIEF JUSTICE ROBERTS: Well, isn't it -- isn't it the case that under (d)(1) or (d)(2) that's a threshold determination, and once you get over that

(e)(1) would have work to do in determining whether there was a violation of the Constitution or laws in the first place?

MR. MAZE: Yes, (e)(1) is always going to have an application. We would say that it has an application at the moment the petition is filed. That is, every single subsidiary finding of fact is presumed to be true. Let's take a (d)(1) example, Terry Williams v. Taylor. This Court said that you could overcome the (d)(1) bar in Terry Williams because they had applied the wrong law, they had applied Lockhart to Strickland's prejudice inquiry. So you jumped over the (d)(1) bar.

At that point you look at the claim de novo. But (e)(1) still has application. Its application is -- is every finding of fact that the State court made that goes towards the prejudice determination is presumed to be correct.

CHIEF JUSTICE ROBERTS: That's under -- you've given yourself an easier case because you're going -- you're getting over the threshold under (d)(1).

MR. MAZE: Correct.

CHIEF JUSTICE ROBERTS: The problem is (d)(2) refers to determination of facts --

MR. MAZE: Yes.

CHIEF JUSTICE ROBERTS: -- and asks whether

it's unreasonable. (E)(1) talks about facts and has a whole different test, and I -- I guess the difficulty I've had is -- is reconciling the two. To the extent you can articulate their differences, why would you do both?

MR. MAZE: And that is the difficulty. Again, (d)(2) is very limited, the times we use it. But yes, it is tough because you see both a "clear and convincing" and an "objectively unreasonable" standard. But the way to fix the problem is not to cut (e)(1) out altogether for every type of claim. It's to try to find a way to be able to work (e)(1) and the (d)(2) standard together.

JUSTICE BREYER: Well, what's an example?

MR. MAZE: Let's take this case --

JUSTICE BREYER: I can't think of any -- give me an example --

MR. MAZE: Yes.

JUSTICE BREYER: -- where you're trying to proceed under (d)(2), and (e)(1) is somehow relevant. Couldn't think of one.

MR. MAZE: Let's take -- let's take this case, for example. Let's switch the facts just a little bit and let's say that the State court had made four findings of fact. The first one is all three counsel

read the Kirkland report.

JUSTICE BREYER: Uh-huh.

MR. MAZE: The second fact is that all three counsel talk to each other for 4 days about the Kirkland report.

JUSTICE BREYER: Uh-huh.

MR. MAZE: The third fact is Carey Dozier, lead counsel, made the decision not to seek another evaluation; and the fourth fact is is that Carey Dozier, lead counsel, decided not to present the Kirkland report or similar evidence to the jury. Those are your four facts that are presumed correct under (e)(1).

JUSTICE BREYER: No. You just look at them, and you look under (d)(2), and you say this is an unreasonable determination of fact, period. There's no reason to go into (e)(1). I mean, if it is an unreasonable determination of fact, he wins.

MR. MAZE: The reason --

JUSTICE BREYER: And if it isn't, you win.

MR. MAZE: The reason that you go under (e)(1) is because Congress has said that you have to.

JUSTICE BREYER: It didn't say that. What it says in (e)(1) is (e)(1) is talking about in a proceeding instituted by an application by a person in custody, the factual issue is presumed correct. But if

you fail to develop -- - you know, in a proceeding, it's presumed correct.

You're right it doesn't say it literally. But I can't figure out an application for it unless they're talking about where there is a new hearing. Otherwise there is just no need for it, it is just repetitive and it gets people mixed up, and (d)(2) does all the work.

MR. MAZE: Again, the problem is, is because we're looking at an (e)(1)-(d)(2) situation, but that's not the only situation.

JUSTICE ALITO: Well, let me give you an example involving exactly those two provisions and facts very similar to the facts here. The State court finds that a strategic decision was made, and that raises a question under (d)(2): Was the State court's rejection of the Strickland claim the result of a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding?

There are also a host of subsidiary findings of historical fact because the attorneys testify and documents are produced, and there are conflicts in the testimony. And so there's a question of did -- did Dozier and Ralph talk about this on a particular day?

Did Trotter write a letter to so-and-so? And so forth. So you've got all these subsidiary -- all these findings of historical fact, and they are to be reviewed under (e)(1), under the plain language of (e)(1).

MR. MAZE: Right.

JUSTICE ALITO: And then after they're reviewed under the plain language of (e)(1), you turn to the question under (d)(2), which is whether the decision about whether there was a strategic decision was based on -- based on an unreasonable determination of facts.

MR. MAZE: Correct. And Justice --

JUSTICE ALITO: So there's no conflict.

MR. MAZE: No. And Justice Alito, if -- the way you said it is exactly where I was going with my hypothetical. But --

JUSTICE BREYER: I see that, I see that.

MR. MAZE: The fourth --

JUSTICE BREYER: That's a possible way to look at it.

MR. MAZE: Yes.

JUSTICE BREYER: And the problem I see with that -- now I see why it's controverted, but the problem with these standards of review, it just -- it mixes people up, and it sounds as if you're bringing in a hammer after you've brought in a saw, and the hammer

looks a little tougher than the saw, and -- but why get into all this business?

MR. MAZE: Because I would come back with the saying that this is almost like having, because (d)(2) is so limited in what we do, you have a toe ache but you're asking us to cut the leg completely off. I mean, there's a much broader use of (e)(1) --

JUSTICE GINSBURG: I don't understand that. I thought that your -- your position in this case or at least one of your positions is there was no unreasonable determination of fact. Period.

MR. MAZE: Correct.

JUSTICE GINSBURG: If you're right about that then you win, and there's no reason in the world to go on to (e)(1), that this case in your view should be totally governed by (d)(2), that is, the determinations of fact were reasonable. End of case.

MR. MAZE: That is not the position we took. That position is what the Court ended up doing in Rice v. Collins, saying that even if we don't answer the question, the State wins. And you could do the same thing here, too, that the strategic decision, finding of fact is not unreasonable. But we're trying to help the Court find a way to make (e)(1) and (d)(2) work together.

JUSTICE BREYER: Well, we have one here, and my real objection, I guess -- and it's interesting, I now see the conflict, with Justice Alito's clear explanation of it. And I -- I suppose the -- the thing I would ask you then is, look, my objection to it, hypothetically, is it's too complicated. Lawyers have enough trouble trying to figure this out.

MR. MAZE: I agree.

JUSTICE BREYER: Is there any reason we need to interpret it that way? The language doesn't have to be. Why not have just a simple, clear thing? If -- if they're unreasonable, the State loses, and if they're not unreasonable, the State wins. Da-da. That's too simple. But why not use it?

MR. MAZE: If the Court would come back and say that (e)(1) applies when the petition is filed and that if you're outside the (d)(2) claim -- (e)(1) is not tethered to the introduction of extrinsic evidence, it simply applies.

But then you came back and said in the limited circumstances in which we have a (d)(2) claim -- not a (d)(1) or a procedurally barred claim, but a (d)(2) claim -- if the Court came back and said we're going to treat objectionably unreasonable as the equivalent of clear and convincing evidence -- that

means if you can prove that something is objectively unreasonable, it also proves by clear and convincing evidence it's wrong -- then that would not be a problem.

But again, what we're saying to the Court is, is if you say that, you need to also say that (e)(1) is still not tethered to extrinsic evidence -- evidentiary hearings, because (e)(1) applies in a much broader scope that just the (d)(2) question.

JUSTICE SOTOMAYOR: Counsel, you don't really want us to say that, because unreasonable, as we've defined it in (d)(1), means it could be wrong, but still not unreasonable.

MR. MAZE: Correct.

JUSTICE SOTOMAYOR: So if we say that proof of a -- by clear and convincing evidence that a decision by the State court was incorrect, you can't equate -- you don't really want us equating that with (d)(2), do you?

MR. MAZE: No. Let me -- let me be clear. I was asking Justice Breyer's question about how he could write it. I agree that our --

JUSTICE SOTOMAYOR: That's why he -- that's why he starting --

MR. MAZE: -- right.

JUSTICE SOTOMAYOR: -- from, I think what

he's saying is, what your adversary responded to Justice Ginsburg, unreasonable really is much broader than clear and convincing --

MR. MAZE: Correct.

JUSTICE SOTOMAYOR: -- evidence on correctness. You don't need it because whether the decision is right or wrong is not the issue. Even if it's wrong, it could still be reasonably wrong.

MR. MAZE: Yes.

JUSTICE SOTOMAYOR: I mean, one could quarrel with that proposition, but that's the state of the law. So, why do you need (e)(1)? That's -- that's Justice Breyer's question, as I understand it.

MR. MAZE: I agree. And, again, my position is just what Justice Alito had said earlier, that's the step-by-step way that we would approach it. That is the way --

JUSTICE SOTOMAYOR: But work it out in theory, okay?

MR. MAZE: Work it out in theory.

JUSTICE SOTOMAYOR: Work it out in theory. There are -- you see, the difficulty with this case is --

MR. MAZE: I did.

JUSTICE SOTOMAYOR: -- one factual matter,

was a strategic decision made?

MR. MAZE: Right.

JUSTICE SOTOMAYOR: There are a bunch of subsidiary facts that -- that were made.

MR. MAZE: Right.

JUSTICE SOTOMAYOR: If you're applying (d)(2), the Court would look at all the subsidiary facts and decide not whether they were correct or not, but whether they were unreasonably incorrect, okay? If they weren't unreasonably incorrect? So you don't have to get to the correctness question by clear and convincing evidence. If they're -- if they're not unreasonably incorrect, the four subsidiary facts would then support the fifth general question, correct?

MR. MAZE: Correct.

JUSTICE SOTOMAYOR: Either we agree it does or it doesn't, but -- I -- I -- I don't understand why you need (e)(1) because you never need to get to the correctness of the finding.

MR. MAZE: If I could finish the hypothetical earlier, I think I can show how (e)(1) and (d)(2) can both have effect in the same case.

Again, we talked about the four facts that might lead to the strategic decision. Let's say that the State court record proves by clear and convincing

evidence that the three counsel never spoke to each other at all about the Kirkland report, and that has been proved wrong by clear and convincing evidence, but you have the other three subsidiary findings of fact.

Then you go to (d)(2). You ask is an objectionably unreasonable determination of the facts, facts plural, which is how (d)(2) works, to say that a strategic decision was made? Well, the answer would be, no, it's not objectionably unreasonable, because we still know it's presumed correct that Mr. Dozier read the report and he made the decision. So --

JUSTICE STEVENS: Let me just interrupt because I am trying to follow this here. The four facts you have described would -- would support a conclusion that it was not unreasonable to make a strategic decision not to use the report at the guilt phase trial. But what if one believes that it would have been unreasonable not to pursue the investigation and -- and -- and to find out more facts for the penalty phase trial, and the -- the -- the State court said, no, those facts have answered the case.

Would the unreasonable use of the reasonable facts violate the statute?

MR. MAZE: That would be (d)(1). If you --

JUSTICE STEVENS: That's exactly right.

MR. MAZE: Correct.

JUSTICE STEVENS: Would that violate (d)(1) if even -- even if every one of the subsidiary facts was correctly filed and the conclusion drawn by the court was also correct, that it was a reasonable strategic decision at the guilt phase but unreasonable at the penalty phase? How did -- what is the answer there?

MR. MAZE: The answer would than under 2254 (d)(1) you could overcome the habeas bar for penalty phase because you have shown an unreasonable application of Strickland to the facts that we have shown to be correct. Again, we don't believe that's the question presented, but the (d)(2) question is whether a strategic decision was factually made. And if I may --

JUSTICE STEVENS: It also has to involve what the strategic decision was?

MR. MAZE: Yes. And -- and in this case, the factual finding, the strategic decision was twofold. The strategic decision was not to seek a further mental health evaluation after reading and conferring about the Kirkland report and not to introduce the Kirkland report or similar evidence to the penalty phase jury. That's the question of historical fact that you're making under (d)(2). And that determination of historical fact we can show by the record is not objectively unreasonable.

And if I may, I would like to move to Justice Ginsburg's questions earlier about what in the record or her point about what in the record shows that Mr. Dozier was actually thinking about the penalty phase when he made the decision. And there are four parts of the record that show he specifically had the penalty phase in mind when he made the decision.

The first is what Justice Ginsburg had pointed out, is that when he sought the penalty phase about the -- the competency report, the Kirkland report, on page 150 of the Joint Appendix he testified that one reason was the fact he wanted mitigating evidence.

The second piece of evidence --

JUSTICE GINSBURG: Somebody said it was put in his mouth, the question was on cross-examination.

MR. MAZE: Well, point two was not put in his mouth. Point two is page 140 of the Joint Appendix. He was specifically asked, do you -- did you call any witnesses in mitigation? And his answer was, I don't recall. I know that we talked a lot to psychologists and so forth.

The specific question was, do you remember talking to any witnesses for mitigation purposes. And the first thing that Mr. Dozier remembered was we did talk to psychologists for mitigation purposes.

The clearest piece of evidence is page 283 of the Joint Appendix, and that is quote where Trotter is asked about the Kilby -- I mean the Taylor Harden report from Dr. Kirkland, and the part we keep quoting is the fact he said that Cary Dozier came and told me that we didn't need a further evaluation.

But what we haven't put in the brief and brought up until now is the rest of the quote. Again, it's on page 283 of the Joint Appendix. And he starts off right after the dash saying he, meaning Cary Dozier, determined that we didn't need any further evaluators and no further recall because in the course of my preparation, "my" being Trotter, in course of my preparation for the penalty phase I would read things about different psychological evaluations and had raised that to him. And again he looked at the report and thought that that wouldn't be needed.

So at the moment Cary Dozier made the decision and told to it Trotter, it was specifically because Trotter had come to him and said, I am getting ready for the penalty phase, just as I was told. I have been reading things about having mental health evaluations.

On the page before, 282, he has just said that, I could see issues, but because I was the young

attorney, I relied on the senior attorneys to resolve them.

So he goes to Cary Dozier and says I have read all of these things about mental health evaluations for the penalty phase, should we do another one? And Cary Dozier, lead counsel of 22 years, criminal experience on both sides, says, I have read the Kirkland report, we do not need a further evaluation.

It was the very next month that counsel filed a motion to exclude all psychological evidence, and the reason was, as Mr. Trotter told the trial court in the trial court record on pages 2 -- of 72 and 73, we don't want the State to introduce evidence that he is prone to violent behavior, prone to violent behavior being the quote. And the trial court asked Mr. Trotter what evidence do you have that the State will do that? He said the report that was done at Taylor Harden, that being Dr. Kirkland's report.

So, here we are six weeks before trial they are fighting to exclude evidence that he is prone to violent behavior and specifically referring to the Kirkland report. Again, because the very month before Cary Dozier had told Trotter we will not have another evaluation done because I have read the Kirkland report and we are not going to do it any further.

JUSTICE SOTOMAYOR: Can I stop you just for a factual clarification?

MR. MAZE: Yeah.

JUSTICE SOTOMAYOR: Did the defendant's prior history with his other girlfriend come into the penalty stage of the trial?

MR. MAZE: No, at the trial it did not. And in fact, the State --

JUSTICE SOTOMAYOR: So this was a wise strategic decision, perhaps, with respect to the penalty phase?

MR. MAZE: Absolutely.

JUSTICE SOTOMAYOR: It did come in at the trial -- at the sentencing phase, correct?

MR. MAZE: Are you talking about in front of the judge?

JUSTICE SOTOMAYOR: In front of the jury.

MR. MAZE: No, the jury never found out about it, because Trotter and Dozier fought to keep it out. And, in fact, had the Kirkland report been admitted or had counsel followed --

JUSTICE SOTOMAYOR: We're not arguing about the penalty phase. The issue is if the trial judge at sentencing did hear about the prior assaulted behavior anyway, what would have been the strategic decision not

to pursue further evaluations because they -- there's no likelihood in my mind that similar assaultive behavior was ever going to be kept out of the sentencing phase. That's true, isn't it? That's one of the strongest aggravating factors that you could prove, correct?

MR. MAZE: Right. I think your point is, is that there was no way they were could prevent the jury from hearing about the other sort of violent behavior he had except for keeping out the mental health.

JUSTICE SOTOMAYOR: The sentencing --

MR. MAZE: Jury. The penalty phase jury --

JUSTICE SOTOMAYOR: -- jury. Not the penalty phase?

MR. MAZE: Correct.

JUSTICE SOTOMAYOR: So that's really -- I think that was Justice Stevens' question, which was, what was the strategic basis of a decision not to pursue mental health information when everything you wanted to keep out of the penalty phase would be coming at the sentencing phase anyway?

MR. MAZE: Let me see if I'm understanding the question correctly. You're saying that let's assume that it was strategic not to allow the jury that gives the advisory verdict that can turn into a mitigating circumstance the ability to find out about the previous

assault and all of his other prior assaults, but not to seek a further evaluation in time for the judge, who makes the ultimate sentence, that's your question?

JUSTICE SOTOMAYOR: That's the question.

MR. MAZE: All right. Under Alabama law, you have one trial. You have the expert witnesses testify in front of the jury. The time gap between the judge hearing it and the jury making their initial penalty phase advisory verdict is simply so a presentence investigation report can be made.

In this case, the presentence investigation report was made. The two prior psychological evaluations were attached to it by our Rule 26.3. It's -- let me be honest. It is an open question under Alabama law whether you can present new witnesses and new evidence in front of the sentencing judge.

The Alabama courts, in a case called Boyd v. State, and I will give you the cite, it's 746 So.2nd 364, and the pinpoint is 398, had said counsel cannot be ineffective for failing to put on new witnesses and new experts in front of the sentencing judge because our statute doesn't give you the opportunity, doesn't allow for it.

All that the sentencing hearing in front of the judge is for is for the judge to allow counsel to

give a final argument after the presentence investigation report has come in and counsel has ensured that it's correct.

We have had a Federal district court say that, I believe that's unconstitutional, I don't think you should be allowed to prevent counsel from presenting new evidence in front of the judge, in the way you're suggesting; but, again, that's open -- it's an open question.

The point here is, though, that's not the claim that was adjudicated in front of the state court, and, again, this is AEDPA 2254(d). The only merits determination made by the State court and, thus, the only thing this court can hold the State court in error for, is whether or not there was a strategic decision to withhold it from the jury and whether that question is prejudicial because what you would have to do --

JUSTICE KENNEDY: That -- that brings us to the point of beginning. And could you give me, in summary form, your best interpretation of both (d) and (e), (d)(1), (d)(2), (e)(1), in light of the deference that the Federal courts should pay to State determinations?

It seems to me that, if you use -- if you reserve (e)(1) for cases in which there's a hearing in

the District Court, then it's somewhat counterintuitive because the strongest standard applies to the accused. He has the greatest burden, when the State hearing was the least effective.

On the other hand, if they overlap, there -- then (d)(2) is often superfluous, so I have a choice of something that is counterintuitive or superfluous, and I don't know which one to take.

MR. MAZE: I agree. If --

JUSTICE KENNEDY: And -- and -- but maybe there is -- is some more general theory that you can give me.

MR. MAZE: There is.

JUSTICE KENNEDY: Res judicata doesn't work.

MR. MAZE: Right.

JUSTICE KENNEDY: Although I think Congress might have had something like that in mind.

MR. MAZE: If I may, let me give you the way we see (e)(1) working on a broader scope. And we ran into the problem that Mr. Chief Justice had mentioned earlier, about how (e)(1) applies to (d)(2).

Here's how we believe (e)(1) works altogether under AEDPA: A petition is filed. At the moment that petition is filed, all subsidiary findings of fact are presumed correct under (e)(1). The next

question you should answer should be will extrinsic evidence come in, either under Rule 7 through affidavits, et cetera, under Rule 8 in evidentiary hearing.

If the answer to the question is, yes, we will accept extrinsic evidence, then you accept the extrinsic evidence, and you have the question this Court couldn't answer last year in Bell v. Kelly. How does 2254(d) work after that?

Now, let's say that you answer the question, no, you will not have extrinsic evidence, which is the case you have here, and you move over the 2251(d) bars. If they're only arguing (d)(1), you don't have a problem because you simply look at the application.

The problem runs in when you have a (d)(2) claim with new extrinsic evidence -- with no extrinsic evidence. Excuse me. The way I think that it should work and the way it will work all the way down the line, no matter how the Court comes to it, is to say that the smaller subsidiary findings of fact are presumed correct until, in this case, the record evidence shows that they're clear and convincingly wrong.

An example of that would be Miller-El 2. In Miller-El 2, you found that the state record evidence proved that defining that there was sexual abuse in

the -- in the State court records was proved wrong by clear and convincing evidence.

At that point, you can say, well, it's also a (d)(2) violation because it's objectively unreasonable.

JUSTICE SCALIA: Can I -- can I suggest -- it doesn't seem to me there's any -- any contradiction between the two. (E)(1) addresses a factual finding. (D)(2), on the other hand, addresses the decision of the Court, which was based on, sometimes, just one factual finding, but, sometimes, many.

So you -- you proceed, first, with (e)(1), and you -- you ask whether each factual finding on which the decision was based was shown by the defendant, either in the record, or if -- if you have an additional hearings, by new evidence, to be incorrect by clear and convincing evidence. You do that fact-by-fact.

Having found, let's say, two of the five facts. To fail that test, you then go up to (d)(2) and say, okay, in light of the fact that two of the facts -- in light of the fact -- since two of the facts that the court relied on were false, was the decision vitiated by that reason, or was it nonetheless a reasonable determination?

I mean, once you focus on the fact that

(e)(1) applies to facts and (d)(2) applies to the decision, it's whether the decision was -- was based on an unreasonable determination of the facts.

MR. MAZE: I think that, in two minutes, you've said it better than I did --

JUSTICE BREYER: If that's so, why would we not soon have what I call the habeas corpus jurisprudence of what is a subsidiary and what is a major fact and what is a finding?

And what's wonderful about that is no habeas corpus proceeding will ever end because, throughout the country, people will make mistakes about what is the -- what is the subsidiary and the subsidiary to the subsidiary, and then what is the more general, and pretty soon, we'll have all -- everybody will be arguing about that, and there will only be four professors in the country who understand which is which, and they will each say different things.

MR. MAZE: I -- I would disagree. I think the district courts can handle that question. I don't -- I don't -- I mean, they've been handling it since AEDPA came out in '96.

I see that my time is almost through. I want to make --

JUSTICE KENNEDY: Well, I don't think

they've been handling it. I think there's a tremendous confusion, and I -- I find it very difficult to write an opinion to give them guidance as to when they can set aside hearings, to what extent they have to review the entire record.

To me, I think many courts of appeals and district of -- and district courts think that it's just like a clearly erroneous standard. It's very hard to -- to use these standards to give you any concrete guidance in this specific case.

MR. MAZE: I agree. It's difficult, but again, that's why we're saying just use the plain language. Look at the smaller subsidiary findings of fact, to see whether or not you can rebut the presumption, and, as Justice Scalia said, you look at the overall decision and see if it was based on a determination of facts, a larger bundle of facts, to see whether or not it was unreasonable.

Again, my time is about to run out. I want to make one final point. Mr. Scanlon has said that prejudice also has a 2254(d) bar in it in this case, and we agree with that because there was a merits adjudication on prejudice.

I would simply might like to make the point, regardless of how the Court comes out on the (d)(2)

question on deficient performance, it cannot overcome the 2250(d) bar for prejudice here because, again, simply knowing that someone had the low IQ and had a low grammar school kind of education level, we are in the unique position where the sentencer actually knew that.

So we have a very large insight into what the sentencer would have done. There's no -- it's not objectively unreasonable to believe the sentencer would have done, again, what he had done the first time had he heard similar facts.

So, if the Court has no further questions, I will cede my time to the Court.

CHIEF JUSTICE ROBERTS: Thank you, General.

MR. MAZE: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Scanlon, you have three minutes remaining, but I'll give you more, since I would like to start with a question. My first question was whether your petition was under (d)(2), and during the argument, I went back and looked at the petition.

And I see the exact language of (d)(1) quoted in paragraphs 45, 52, 58, 63, 71, 76, 82, 90, 94, 97, and 104, (d)(1), and, unless I'm missing it, nowhere do I see the language of (d)(2). I see the language of (d)(2) in your cert petition questions.

Now, I think there's a huge difference between (d)(1) and (d)(2). We've been talking about (d)(2) in a case that was only brought under (d)(1).

REBUTTAL ARGUMENT OF KERRY A. SCANLON
ON BEHALF OF THE PETITIONER

MR. SCANLON: Well, it was brought -- with all due respect, Mr. Chief Justice, under (d)(2), as well, because the central focus was the factual allegation, the factual findings made by the State court. That's what the petition was based on, and that's --

CHIEF JUSTICE ROBERTS: Is the language -- but then I -- you knew to quote the language of (d)(1). You did it -- I think it's more than a dozen times. You never quoted the language of (d)(2).

Now, going back, you can say, well, we talk about these facts or those facts, but that is also relevant to the application question under (d)(1).

MR. SCANLON: But there were -- there was language about unreasonable application -- unreasonable determination of the fact. That was always part of the petition. That's what was focused on.

CHIEF JUSTICE ROBERTS: Well, yes, I find it hard for you to -- to understand how you can say it was focused on when you quote (d)(1) twelve times and never

quote (d)(2). It would seem to me that the focus was on (d)(1).

MR. SCANLON: Well, I think the focus was on both. And these cases, they're inextricably linked together as well, because these determinations of whether something is strategic is not only a factual determination, but it's a determination that has legal principles under Strickland and Wiggins and Williams.

But another thing I would like to say, in answer to Justice Kennedy's question, is (d)(2) should never be made superfluous in this, because that is the primary provision in this statute. It calls for looking at the entire State record. It's a very strong deference standard. (E)(1) has its application, but it would be incredibly complicated for this Court to tell lower courts to apply (e)(1) on top of (e)(2).

And Justice Alito, in your example, the problem in this case was that they looked at subsidiary facts; half of them were immaterial to the claim completely. And then the State court jumped from the fact that those were not rebutted by clear and convincing evidence to deciding immediately that everything was therefore reasonable.

And that's why the courts have had a hard time with this standard, is AEDPA is hard enough to

understand as it is, but if they are asked to put in a correctness standard on top of a reasonableness standard, and then you've got the difficulty of defining what's a subsidiary finding, and Justice Scalia, the points you made, it's actually very difficult, because (e)(1) focuses on the determination of a factual issue. (D)(2) focuses on the determination of the facts. It's not a decision in (d)(2); it's the determination of the facts.

JUSTICE SCALIA: No, no, no. It resulted in a decision that was based on an unreasonable determination of facts.

MR. SCANLON: Right, and what the Court --

JUSTICE SCALIA: It focuses on the decision, whether the decision could have been reached --

MR. SCANLON: Right.

JUSTICE SCALIA: -- without the use of any facts that had been found to be false.

MR. SCANLON: Right, but in every (d)(2) case this Court has considered from the lower courts, what they focus on is whether it's an unreasonable determination, as opposed to focusing on the word "decision." And I think --

CHIEF JUSTICE ROBERTS: Do you think there's a difference between a (d)(1) case and a (d)(2) case?

MR. SCANLON: Yes, there is. But in this case, I want to make it clear that whatever the standard the Court adopts in this case, the Petitioner has clearly made its case, because there was evidence. They never did any investigation when they had this strong lead. And Strickland and Wiggins, if they mean anything, means that you have to make an informed decision after an investigation. And in this case there was no investigation.

They now concede that, and there was no reasonable decision made that the investigation should be limited. And the Eleventh Circuit got that right. They simply found the wrong facts.

Thank you.

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

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)

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