

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HOLLY WOOD, :

4 Petitioner :

5 v. : No. 08-9156

6 RICHARD F. ALLEN, :

7 COMMISSIONER, ALABAMA :

8 DEPARTMENT OF :

9 CORRECTIONS, ET AL. :

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11 Washington, D.C.

12 Wednesday, November 4, 2009

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

17 APPEARANCES:

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

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

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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

1 Scalia.

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

6 MR. SCANLON: Well --

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

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

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

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

25 MR. SCANLON: Each of the statements --

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

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

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

23 Now, that is a, a (d)(1) argument,
24 2254(d)(1). But the two questions on which cert were
25 granted have to do with findings of fact. So they have

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

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

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

8 MR. SCANLON: Yes.

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

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

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

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

25 MR. SCANLON: That went to deficient

1 performance, of course.

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

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

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

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

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

25 JUSTICE SOTOMAYOR: Could I take you back to

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

5 MR. SCANLON: Correct.

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

15 MR. SCANLON: Of course.

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

22 MR. SCANLON: That's correct.

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

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

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

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

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

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

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

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

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

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

16 JUSTICE GINSBURG: Where is that? 56?

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

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

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

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

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

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

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

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

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

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

22 JUSTICE STEVENS: Right.

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

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

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

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

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

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

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

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

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

17 MR. SCANLON: Right.

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

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

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

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

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

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

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

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

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

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

11 MR. SCANLON: Okay.

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

15 MR. SCANLON: No.

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

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

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

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

1 it wouldn't be unreasonable.

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

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

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

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

9 MR. SCANLON: Right.

10 JUSTICE KENNEDY: Yes.

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

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

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

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

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

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

1 would apply there, too. I think --

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

6 MR. SCANLON: Right. Right.

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

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

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

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

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

9 MR. SCANLON: Correct.

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

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

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

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

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

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

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

14 MR. SCANLON: That --

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

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

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

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

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

6 MR. SCANLON: Right.

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

15 MR. SCANLON: There's --

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

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

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

1 relationship between these two --

2 MR. SCANLON: Right.

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

5 MR. SCANLON: And --

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

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

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

1 that (e)(1) plays.

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

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

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

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

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

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

7 MR. SCANLON: Right, but --

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

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

12 And if I may reserve the remainder of my
13 time?

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

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

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

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 General Maze.

8 ORAL ARGUMENT OF COREY L. MAZE
9 ON BEHALF OF THE RESPONDENTS

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

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

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

23 MR. MAZE: I --

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

1 was wrong.

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

4 (Laughter.)

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

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

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

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

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

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

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

21 MR. MAZE: Correct.

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

24 MR. MAZE: Yes.

25 CHIEF JUSTICE ROBERTS: -- and asks whether

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

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

14 JUSTICE BREYER: Well, what's an example?

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

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

18 MR. MAZE: Yes.

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

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

1 read the Kirkland report.

2 JUSTICE BREYER: Uh-huh.

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

6 JUSTICE BREYER: Uh-huh.

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

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

18 MR. MAZE: The reason --

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

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

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

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

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

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

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

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

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

5 MR. MAZE: Right.

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

11 MR. MAZE: Correct. And Justice --

12 JUSTICE ALITO: So there's no conflict.

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

16 JUSTICE BREYER: I see that, I see that.

17 MR. MAZE: The fourth --

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

20 MR. MAZE: Yes.

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

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

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

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

12 MR. MAZE: Correct.

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

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

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

8 MR. MAZE: I agree.

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

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

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

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

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

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

13 MR. MAZE: Correct.

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

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

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

24 MR. MAZE: -- right.

25 JUSTICE SOTOMAYOR: -- from, I think what

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

4 MR. MAZE: Correct.

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

9 MR. MAZE: Yes.

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

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

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

20 MR. MAZE: Work it out in theory.

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

24 MR. MAZE: I did.

25 JUSTICE SOTOMAYOR: -- one factual matter,

1 was a strategic decision made?

2 MR. MAZE: Right.

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

5 MR. MAZE: Right.

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

15 MR. MAZE: Correct.

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

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

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

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

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

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

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

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

25 JUSTICE STEVENS: That's exactly right.

1 MR. MAZE: Correct.

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

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

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

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

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

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

13 The second piece of evidence --

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

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

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

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

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

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

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

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

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

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

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

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

3 MR. MAZE: Yeah.

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

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

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

12 MR. MAZE: Absolutely.

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

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

17 JUSTICE SOTOMAYOR: In front of the jury.

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

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

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

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

10 JUSTICE SOTOMAYOR: The sentencing --

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

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

14 MR. MAZE: Correct.

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

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

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

4 JUSTICE SOTOMAYOR: That's the question.

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

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

17 The Alabama courts, in a case called Boyd v.
18 State, and I will give you the cite, it's 746 So.2nd
19 364, and the pinpoint is 398, had said counsel cannot be
20 ineffective for failing to put on new witnesses and new
21 experts in front of the sentencing judge because our
22 statute doesn't give you the opportunity, doesn't allow
23 for it.

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

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

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

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

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

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

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

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

9 MR. MAZE: I agree. If --

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

13 MR. MAZE: There is.

14 JUSTICE KENNEDY: Res judicata doesn't work.

15 MR. MAZE: Right.

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

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

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

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

5 If the answer to the question is, yes, we
6 will accept extrinsic evidence, then you accept the
7 extrinsic evidence, and you have the question this Court
8 couldn't answer last year in Bell v. Kelly. How does
9 2254(d) work after that?

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

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

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

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

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

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

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

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

25 I mean, once you focus on the fact that

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

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

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

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

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

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

25 JUSTICE KENNEDY: Well, I don't think

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

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

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

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

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

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

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

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

13 CHIEF JUSTICE ROBERTS: Thank you, General.

14 MR. MAZE: Thank you.

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

21 And I see the exact language of (d)(1)
22 quoted in paragraphs 45, 52, 58, 63, 71, 76, 82, 90, 94,
23 97, and 104, (d)(1), and, unless I'm missing it, nowhere
24 do I see the language of (d)(2). I see the language of
25 (d)(2) in your cert petition questions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. SCANLON: Right.

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

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

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

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

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

14 Thank you.

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

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

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<p style="text-align: center;">A</p> <p>abandoned 11:18</p> <p>ability 4:4,23 5:8,9 43:25</p> <p>able 4:20 14:8 28:12</p> <p>above-entitled 1:14 55:18</p> <p>Absolutely 42:12</p> <p>abuse 47:25</p> <p>accept 20:20 47:6,6</p> <p>accused 46:2</p> <p>ache 32:5</p> <p>actual 25:14</p> <p>added 5:2</p> <p>additional 23:8 48:15</p> <p>address 9:2</p> <p>addressed 9:1</p> <p>addresses 48:8,9</p> <p>adequate 9:15 11:17</p> <p>adjudicated 26:13 45:11</p> <p>adjudication 50:23</p> <p>admitted 42:21</p> <p>adopts 55:3</p> <p>adversary 35:1</p> <p>advisory 43:24 44:9</p> <p>AEDPA 14:16 45:12 46:23 49:22 53:25</p> <p>affect 4:4,23</p> <p>affidavits 47:3</p> <p>aggravating 43:5</p> <p>agility 4:4</p> <p>agree 7:14 22:24 33:8 34:21 35:14 36:16 46:9 50:11,22</p> <p>agrees 14:5</p>	<p>AL 1:9</p> <p>Ala 1:21</p> <p>Alabama 1:7 44:5,15,17</p> <p>Alito 5:17 6:2 8:17 15:11 30:12 31:6,12 31:13 35:15 53:17</p> <p>Alito's 8:1,24 33:3</p> <p>allegation 52:9</p> <p>Allen 1:6 3:4</p> <p>allow 43:23 44:22,25</p> <p>allowed 45:6</p> <p>alternative 9:6,9</p> <p>altogether 24:6 28:11 46:23</p> <p>amici 22:9 23:18</p> <p>amicus 25:13</p> <p>amply 11:16</p> <p>answer 23:17 32:20 37:8 38:7,8 39:19 47:1,5,8,10 53:10</p> <p>answered 37:21</p> <p>anyway 42:25 43:20</p> <p>apart 14:24</p> <p>apologize 26:2</p> <p>appeals 18:4 50:6</p> <p>APPEARAN... 1:17</p> <p>appendix 6:18 10:13,18 11:6 39:11,17 40:2 40:9</p> <p>application 16:21 27:5,6 27:14,14 29:24 30:4 38:10 47:14 52:18,20 53:14</p> <p>applied 5:21</p>	<p>27:10,11</p> <p>applies 20:21 21:11 33:16,19 34:7 46:2,21 49:1,1</p> <p>apply 18:1 21:21 26:9 53:16</p> <p>applying 26:17 36:6</p> <p>approach 35:16</p> <p>argues 10:12 25:1</p> <p>arguing 42:22 47:13 49:15</p> <p>argument 1:15 2:2,7 3:4,6 5:18,19,23 6:3 6:3 8:13,25 9:6 9:6,7,9,12 22:14 25:8 45:1 51:19 52:4</p> <p>arguments 12:12</p> <p>articulate 28:4</p> <p>aside 18:5 50:4</p> <p>asked 8:17 39:18 40:3 41:15 54:1</p> <p>asking 13:3 32:6 34:20</p> <p>asks 27:25</p> <p>assault 44:1</p> <p>assaulted 42:24</p> <p>assaultive 43:2</p> <p>assaults 44:1</p> <p>assessment 13:7</p> <p>assume 14:3 43:22</p> <p>assuming 12:15</p> <p>Atkins 4:14</p> <p>attached 44:13</p> <p>attorney 3:14 8:12 41:1</p> <p>attorneys 5:22 8:9 30:22 41:1</p> <p>available 3:13</p>	<p>a.m 1:16 3:2</p> <hr/> <p style="text-align: center;">B</p> <p>back 7:25 8:24 22:6 32:3 33:15,20,23 51:19 52:16</p> <p>bar 27:10,12 38:9 50:21 51:2</p> <p>barred 26:14,22 33:22</p> <p>bars 47:12</p> <p>based 23:4,6,10 25:12 30:18 31:9,10 48:10 48:14 49:2 50:16 52:10 54:11</p> <p>basis 8:7 43:17</p> <p>beg 17:7</p> <p>beginning 45:19</p> <p>behalf 1:18,21 2:4,6,9 3:7,22 25:9 52:5</p> <p>behavior 41:14 41:14,21 42:24 43:2,8</p> <p>believe 20:25 25:13,13 38:12 45:5 46:22 51:8</p> <p>believes 37:17</p> <p>Bell 47:8</p> <p>best 45:20</p> <p>better 49:5</p> <p>bigger 26:8</p> <p>bit 20:3 28:24</p> <p>borderline 4:18 4:22 10:22 14:7</p> <p>Boyd 44:17</p> <p>BREYER 18:23 19:10 28:14,16 28:19 29:2,6 29:13,19,22 31:16,18,21</p>	<p>33:1,9 49:6</p> <p>Breyer's 34:20 35:13</p> <p>brief 5:20 14:18 25:1,21 40:7</p> <p>bring 23:5</p> <p>bringing 31:24</p> <p>brings 45:18</p> <p>broader 32:7 34:8 35:2 46:19</p> <p>brought 31:25 40:8 52:3,6</p> <p>brutal 7:11</p> <p>bunch 36:3</p> <p>bundle 50:17</p> <p>burden 19:24 46:3</p> <p>business 32:2</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1</p> <p>call 39:18 49:7</p> <p>called 44:17</p> <p>calls 53:12</p> <p>Carey 29:7,9</p> <p>Cary 40:5,10,18 41:3,6,23</p> <p>case 3:4 5:18 7:24 14:11,20 14:24 15:6,24 17:13 18:16,21 19:2 24:17 25:14 26:24 27:19 28:15,23 32:9,15,17 35:22 36:22 37:21 38:17 44:11,17 47:12 47:21 50:10,21 52:3 53:18 54:20,25,25 55:2,3,4,8,16 55:17</p> <p>cases 4:15 18:22 20:22,22 21:17 21:19,21 22:4</p>
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