No. 07-1315

In the Supreme Court of the United States

Michael Knowles, Warden, California Department of Corrections and Rehabilitation,

Petitioner,

v.

Alex Mirzayance,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief in Opposition

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Respondent urges the Court to deny petitioner's petition for certiorari because the questions presented do not qualify for review under Rule 10(a), Rules of the Supreme Court of the United States, given that the Circuit decision resolved the issues presented by a straightforward application of this Court's Strickland v. Washington, 466 U.S. 668 (1984) jurisprudence.

STATEMENT OF THE CASE

Respondent Alex Mirzayance filed a habeas petition in the Central District of California challenging his state conviction for the murder of his cousin, Melanie Ookhtens. He asserted his trial counsel provided ineffective assistance of counsel in persuading him to waive his only defense, not guilty by reason of insanity (NGI), on the morning the NGI trial was to commence. The defense, which the federal courts found credible and which was amply supported by lay and expert testimony, was abandoned for no benefit to respondent whatsoever.

Defense counsel had no tactical reason at all, much less a rational one for abandoning the insanity defense. Despite vigorously pressing the incompetency of counsel claim in the California appellate courts, neither the Court of Appeal nor the California Supreme Court addressed it in

summarily denying relief. Three separate Ninth Circuit panels have agreed that the insanity defense was strong, with the first panel remanding for an evidentiary hearing on why trial counsel decided to abandon respondent's only defense the morning the insanity trial was to commence. Quoting from U.S. v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996), that first panel wrote: "We have a hard time seeing what kind of strategy, save an ineffective one, could lead a lawyer to deliberately omit his client's only defense, a defense that had a strong likelihood of success, and a defense he specifically stated he had every intention of presenting." Petitioner's Appendix [hereafter "PA"] G-106.

At the evidentiary hearing, defense counsel confirmed both that he had no tactical reason for abandoning the NGI defense and that nothing beneficial accrued to respondent as a result. Respondent proved the bona fides of the NGI defense through the testimony of three experienced forensic psychiatrists and two psychologists. They testified at the evidentiary hearing that respondent, due to a long standing serious mental disease, met the California legal definition of insanity and affirmed that they were prepared to so testify at the NGI trial.

The Magistrate-Judge's Report &

Recommendation [R&R], adopted by the district court, found that these and other "witnesses could have testified credibly and therefore perhaps successfully." PA, F-100. On appeal, the Ninth Circuit panel twice agreed that trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), and affirmed the district court's grant of relief. The State's two requests for a rehearing en banc, after each panel decision, garnered no votes from any active Ninth Circuit judge. PA, A-1; D-1.

STATEMENT OF FACTS[1]

On October 13, 1995, Melanie Ookhtens was a college student at the University of Southern California. Her parents were out of the country on vacation and she and respondent, her younger cousin, planned to pick them up at the airport that night. That afternoon, Melanie's grandmother and aunt went to Melanie's residence to prepare the

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[1] The Petitioner, State of California, does not recite the facts supportive of the panel's two decisions finding trial counsel was ineffective in abandoning respondent's defense. Respondent thus supplements the factual recitation with the facts from the evidentiary hearing which explains and supports the relief granted. Cites to "MER" are to the federal evidentiary hearing found in respondent's excerpts of record filed in the Ninth Circuit. "Trial RT" refers to the state trial proceedings which were exhibits in the federal district court hearing.

house for the parents' return. Respondent had already arrived to meet Melanie. As a family relation, he had been given access to the home.

When the grandmother and her daughter opened the front door, respondent seemed "startled," "[m]aybe he was expecting Melanie, and when he saw us, he got confused." Trial RT 96. The grandmother described respondent as acting quite out of character. He was "following me wherever I was going with the strange walking." Trial RT 97. She found that respondent was acting very "manly" which was "extremely" abnormal for him (id. at 92) as respondent normally was a "quiet, shy person." Id. at 95. The grandmother testified respondent's relationship with his cousin Melanie was very close, like "sister and brother." Trial RT 94.

Respondent's trial attorney, Mr. Wager, testified at the district court evidentiary hearing that his strategies for the guilt trial were to call Dr. Paul Satz, a psychologist, as the sole expert witness at the guilt trial. Dr. Satz conducted thirty psychological and neuropsychological tests, thirteen of which focused on respondent's frontal lobe brain damage, and nine showed evidence of such impairment. Dr. Satz testified he found significant brain damage, "of a congenital form, long-standing, enduring structural defect of the nervous system, of

the brain." Trial RT 467.

Wager did not call any of the other mental state experts who were prepared to testify at the guilt phase that respondent's substantial impairments weighed against the mens rea for first degree murder.

Respondent's friend, Laurent Meira, testified at the guilt phase trial that on the Friday evening of the homicide, respondent picked him up outside his condominium in Pasadena at approximately 8:30 p.m., and "seemed pretty anxious, pretty excited . . . agitated." Trial RT 117. Respondent told him he had shot his cousin in the head and stomach. Trial RT 120-121. Meira suggested that respondent go to the police station and he agreed. Trial RT 123. Respondent stated to Meira he had been carrying his gun since Wednesday because he "felt pretty bad," "that he was followed," and that "someone was after him." Trial RT 149-150.

Attorney Wager testified at the evidentiary hearing that an insanity verdict was "what we were really driving for more than anything else," MER 50, but that the likelihood of success was contingent upon a second-degree murder verdict at the guilt

trial.[2] Wager limited the presentation in support of second degree to Dr. Satz, whose cross examination Wager viewed as an "absolute disaster," MER 49. Wager testified Dr. Satz performed "terribly." MER 89. But Wager made no effort to remedy this. He could have simply called one or more of the other more experienced forensic psychiatrists to testify at the guilt phase trial.

Three very experienced forensic psychiatrists Wager employed did detailed evaluations of respondent and found him legally insane, and they were prepared to testify to it: Dr. Bennett Blum, MER 580; Dr. Ronald Markman, MER 601; Dr. Kaushal Sharma, MER 608. Psychologist Dr. Paul Satz found respondent legally insane as well (MER 87) while psychologist Dr. Richard Romanoff found strong evidence that his "psychotic thought process caused a gross misperception of reality and a consequent potential lack of understanding of the knowledge of wrongfulness of the conduct at the time of the homicide." MER 633.

Wager testified he felt hopeless after the first degree verdict and elected to abandon the insanity defense when Mirzayance's parents purportedly

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[2] This belief was based on an irrefutably erroneous understanding of California law, as is discussed infra. See also PA, B-6, fn. 1.

refused to testify the morning the insanity trial was to begin. MER 57. Mirzayance's parents adamantly denied they refused to testify, MER 174, 296, and their family attorney, James Lund, testified that on the morning of trial Wager did not tell him the parents refused to testify. Rather, Wager told him that Wager believed the parents were in "too much pain" or "anguish" to testify. MER 285. (The magistrate judge found that "[w]hile it therefore may be accurate in a precise, semantic sense to say that the parents never refused to testify, the Court finds that the parents at least expressed clear reluctance to testify, which, in context, conveyed the same sense as refusal." PA, F-72 (emphasis in original).)[3]

Wager made no efforts to regroup in support of the insanity defense. He did not advise the parents to talk to others about testifying even though the mental health experts had previously interviewed the parents and were ready to counsel

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[3] Petitioner argues the Ninth Circuit made a new "factual finding" the parents had not refused to testify. Pet., p. 9. The R&R found only a reluctance and the Circuit rightly held Wager was unreasonable in simply dropping the defense shortly after talking to the parents that Friday morning, the first day of the NGI trial, given the options to go forward that day with witnesses subpoenaed and ready to testify. "Competent counsel would have attempted to persuade them to testify, which counsel here admits he did not." PA, B-7.

them about their concerns. MER 105-106, 111. He never told respondent his parents had purportedly refused to testify, or asked respondent to talk to them about reconsidering. MER 111. He did not discuss with the mental health experts strategies for addressing the parental reluctance to testify. He did not proceed with the expert witnesses subpoenaed for trial that day, thus giving the parents that Friday and the weekend to reconsider.

Wager knew he could proceed with his expert testimony at the NGI trial. MER 99. The experts testified at the hearing that they would have presented their testimony with equal vigor whether or not the parents testified because the parents' information had been incorporated into their opinions from prior interviews. E.g, Dr. Sharma, MER 610-611

Wager's decision to abandon the NGI trial was prompted by an erroneous understanding of California law. See PA, B-6, fn 1. This was his first insanity defense trial. MER 27. He incorrectly believed that the jury's finding of first-degree murder was the functional equivalent of a finding that Mirzayance was legally sane, and that the insanity defense was virtually hopeless for that reason. Laboring under this erroneous belief, the only ray of hope Wager claimed to see was the

possibility of some kind of jury nullification based on sympathy for respondent if his parents testified and wrenched the jurors' hearts: "I saw no sense in proceeding with a defense that had no possibility now of having an emotional portion to it so that the jury could then find in favor of this defendant they had already found guilty of first-degree murder and, whether they knew it or not, under the facts of this case, legally sane. Without the parents, it would be hopeless. That was my feeling at the time." MER 65.

Wager's misunderstanding of California law led to his self-inflicted sense of hopelessness. He erroneously believed the jury's guilt finding of first degree murder was tantamount to a rejection of the insanity defense: "once the jury had found that he had maturely and meaningfully deliberated and premeditated, they had unknowingly decided that he had -- he knew the consequences of his actions and the nature and quality of his actions although they didn't know it.[4] But in order to find, therefore,

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[4] The "maturely and meaningfully" mental elements of first-degree murder were deleted from the California statutory definition of first-degree murder in 1981 in order to remove irrational motivation from the intent elements of murder. See People v. Stress, 205 Cal. App. 3d 1259, 1270-1271 (1988). Thus, the guilt phase jury only had to find intent to kill "formed or arrived at or determined upon as a result of careful thought and weighing considerations for and

(continued...)

that he was insane, he [the jury] would have to in effect disregard their earlier findings." MER 125 (emphasis supplied). His understanding of the law was wrong.

The prosecutor correctly argued to the guilt jury that a finding of insanity and a finding of first degree murder were independent of each other: "Rational plays no part in this particular case because the defendant did not act rationally. That does not negate malice, it does not negate premeditation and deliberation." Trial RT 842-843.[5]

Wager's subjective hopelessness was thus attributable to his misunderstanding of California

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[4](...continued)
against the proposed course of action," which could occur "in a short period of time." Calif. Penal Code § 189. The second and third Circuit opinions noted Wager's fundamental error in understanding the law. He erroneously believed the jury had considered and rejected respondent's mental disease on the wrongfulness-NGI issue when they found guilt on first degree murder. PA, B-6 n. 1; E-27. In reality, they had been instructed by the court and told by the prosecutor those issues were not before them. See Trial RT 853.

[5] The prosecutor also reminded jurors that "sanity is conclusively presumed. You are not dealing with that issue here...." Trial RT 768. "So don't sit back there and argue whether or not he was insane or whether he was sane. That is not yet before you...." Trial RT 769. Further,"[a] finding of deliberation and premeditation is not negated by evidence a defendant's mental condition was abnormal or his perception of reality delusional." Trial RT 844.

law. He clearly recognized that withdrawal of the insanity defense afforded no benefit to respondent whatsoever, but rather doomed him to a mandatory life term in state prison:

> Q. Was there anything Alex [respondent] gained by waiving the N.G.I. trial?
>
> A. [Wager] No. MER 123.

All the subpoenaed mental health experts had substantial forensic experience and were shocked by the abandonment of the insanity defense. As Dr. Bennett Blum testified: "Being informed of the decision to withdraw the insanity plea was a surprise to me given the conclusions reached by myself and other mental health experts regarding Mr. Mirzayance's state of mind. I was not consulted about this decision. In my judgment, based on the data and information available to me, the plea of not guilty by reason of insanity in this case was reasonable and thus my surprise at the announcement of its abrupt withdrawal." MER 553.

Dr. Ronald Markman, a psychiatrist and lawyer, testified he "was not consulted prior to the abrupt withdrawal of the NGI plea which did not make either psychiatric or legal sense. In my judgment, based on the data and information available to me, the plea of not guilty by reason of

insanity was a viable one to present to the jury." MER 589.[6]

Dr. Kaushal Sharma testified he was: "very surprised to learn that the defense withdrew the insanity phase of the trial. I was not consulted about the wisdom of this course ahead of time and I would have questioned it. I would have asked why this was being done and what benefit there was in this course of action after a finding of first-degree murder. In my judgment, if presented to the jury, Alexandre [Mirzayance] had documentary evidence, lay witnesses, and qualified, experienced expert witnesses to support defenses to both premeditated murder and to show insanity at the time of the killing. I have seen mental state defenses put on with far less compelling supportive evidence." MER 610 . The parents' input to him about their son's "mental state and history could have come into evidence through my testimony." Id. at 610-611. (In fact, much of the parents' knowledge about respondent's childhood had already been presented

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[6] Dr. Markman arrived at the courthouse the morning the NGI trial was to begin. When Wager told Dr. Markman he had just waived the NGI trial, Markman immediately responded, "Now, that was a mistake." MER 123. Dr. Markman was highly regarded by Wager as an unbiased doctor with a good reputation. MER 34.

to the jury during the guilt phase through Dr. Satz's testimony, e.g., Trial RT 474, 479; 481.)

Dr. Richard Romanoff testified he found in respondent "substantial evidence of cognitive disorganization and an active thought disorder. In talking to him, I found a lot of his conversation wandered from one topic to another. At times, it was difficult to follow this conversation due to the absence of any logical connection between the thoughts expressed by Mr. Mirzayance. Mr. Mirzayance reported ongoing auditory and visual hallucinations and intense fearfulness and paranoia. He mostly exhibited a blank and affectless expression. Testing provided substantial information about the nature and severity of his psychotic thought process. I concluded that it was ... most likely that this disorganization, confusion, and psychotic process is more pervasive and long standing in nature and not simply a reaction to the recent tragic events that had unfolded. I found that he suffered from a severe and debilitating mental illness." MER 632.

Dr. Sandhu, a specialist in geriatric psychiatry, opined for the prosecution that respondent was not insane, but also that he did not premeditate or deliberate the killing. MER 437. According to his resume, Dr. Sandhu has focused his

career on geriatric psychiatry. He agreed respondent's bizarre behavior at the Ookhten home the afternoon of the homicide "could be somebody who has some paranoia, yes." MER 454. He found "no motive or rationale for the crime," and knew the relationship between Mirzayance and his cousin had been fairly close. MER 450. He agreed that while in jail following his self-surrender, that doctors at the jail "had to determine that he was psychotic in order to get an antipsychotic drug," as respondent was prescribed. MER 446-447.

Dr. Seawright Anderson was the other prosecution psychiatrist. At the federal evidentiary hearing, he was supportive of respondent's insanity defense. Dr. Anderson agreed with virtually all the observations and analysis of the defense experts. MER 412-413. His diagnosis of respondent was schizoaffective bipolar disorder with a history of marijuana and hashish abuse, accompanied by "psychotic episodes most of his life." MER 412. When asked if respondent "at the time he was harming the victim he knew that harming her was wrong," Dr. Anderson testified: "I felt that he felt that he was justified in doing what he was doing because of the psychotic condition he was under. In breaking it down that way, we would say he felt that he was justified in not doing anything wrong

from his interpretation, not from the legal interpretation." MER 418-419. Not understanding wrongfulness at the time of the homicide due to psychosis is legal insanity under the California right/wrong test.

SUMMARY OF ARGUMENT

Following this Court's GVR order for reconsideration in light of Carey v. Musladin, 549 U.S. 70 (2006), the Ninth Circuit correctly considered Carey and applied the 28 U.S.C. § 2254(d) standard to the facts established at the evidentiary hearing. It properly concluded that the state court summary denial of relief was an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984), and Strickland's subsequent IAC decisions in this Court. The Circuit correctly found no valid tactical reason existed for withdrawing the likely meritorious insanity defense. After the decision, Petitioner garnered no votes for rehearing en banc from any Circuit judge.

Petitioner informs this Court that the Circuit "did not analyze whether the state court's adjudication of the claim had been contrary to or an objectively unreasonable application of clearly established federal law...." Pet., p. 13. Wrong. Despite the lack of any state court analysis of the claim, the Circuit nevertheless recognized that the

State's summary denial required a determination of whether "the state court's final resolution of the case was an unreasonable application of clearly established federal law." PA, B-4. Then, the Circuit, assessing the state court record, reviewed the record made at the federal evidentiary hearing, applied this Court's controlling precedent under AEDPA, and properly ruled that the state court's ruling was an unreasonable application of Strickland. Id. at 5.

As will be shown infra, neither Carey, Schriro v. Landrigan, 127 S.Ct. 1933 (2007), nor Wright v. Van Patten, 128 S.Ct. 743 (2008) warrant any other ruling in this case. As the Circuit memorandum recognized, citing this Court's recent pronouncement:

> AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." Carey v. Musladin, 549 U.S.__, __,127 S. Ct. 649, 656, 166 L. Ed. 2d 482 (2006) (KENNEDY, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. 63, 76, 123 S. Ct.

> 1166, 155 L. Ed. 2d 144 (2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. See, e.g., Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Panetti v. Quarterman, 127 S. Ct. 2842, 2858 (2007). Quoted at PA, B-11.

Strickland set forth the legal framework intended for assessment of counsel's performance. The inevitable variants of the factual contexts necessitates case-by-case application of the rule. "That the Strickland test 'of necessity requires a case-by-case examination of the evidence,' [Citation], obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." Williams v. Taylor, 529 U.S. 362, 391 (2000).

When a habeas petitioner raises IAC, Strickland focuses the analysis to "the proper measure of attorney performance" which remains "reasonableness under prevailing professional norms." Wiggins v. Smith, 539 U.S. 510, 521 (2003),

quoting Strickland at p. 688.

The cases primarily relied upon by petitioner are not Strickland performance cases. One involves a situation where there was an interference with counsel's ability to perform as a reasonable advocate. The defendant forbade his defense counsel from presenting a mitigation defense. It was thus held impossible to prove prejudice on habeas review based on defense counsel's alleged lack of a mitigation investigation. Schriro, supra at 127 S. Ct.1944.

In Wright v. Van Patten, supra at 128 S.Ct. 745, the issue was whether the defendant's guilty plea was undermined as a matter of law because his defense counsel participated only telephonically in the guilty plea hearing. There was no issue addressing counsel's actual performance. The lower federal court agreed the defendant could not succeed under the performance prong of Strickland. Rather, the lower court erroneously granted relief to the defendant under a presumed prejudice test, a ruling which had no precedent in this Court, and thus could not be sustained under AEDPA's prohibition.

Both Schiro and Van Patten are distinguishable from this Strickland claim which is a straightforward deficient performance issue. See Williams v. Taylor, 529 U.S. 362, 393 (2000) ("it is

undisputed that Williams had a right -- indeed, a constitutionally protected right -- to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." [Emphasis added].) The decision of the Circuit was correct under AEDPA and this Court's Strickland cases. The State court summary denial of relief was an unreasonable application of Strickland. Petitioner's petition should be denied.

ARGUMENT

1. The Circuit's Holding Correctly Applied 28 U.S.C. § 2254 to an Ineffective Assistance of Counsel Claim for Which Respondent Established Both Deficient Performance and Prejudice under Strickland v. Washington, 466 U.S. 668 (1984).

A. The Decision Complied With the GVR Order to Review the Case in Consideration of Carey v. Musladin 549 U.S. 70 (2006). Petitioner asserts the decision below "improperly disregarded this court's remand order." Pet., 16. A review of the Circuit decision belies this unfounded claim. See PA, pp. 4, 8-9. As the Circuit observes, Carey involved spectator misconduct. This Court found it had never ruled on the impact of private spectator

conduct on the fairness of a criminal trial and had never applied Holbrook v. Flynn, 475 U.S. 560 (1986), to strictly private spectator misconduct. Because no holding of this Court existed to direct the California Court of Appeal's resolution of the defendant's claim, the California decision, by definition, could not have been "contrary to or an unreasonable application of clearly established federal law."

Respondent's case is patently distinguishable because this Court has recognized, at least since 1984, that cases involving defense counsel's inadequate performance are to be reviewed under Strickland's two-pronged legal framework: was the performance unreasonable and was it prejudicial? That is the controlling authority for state courts. Strickland undoubtedly qualifies as the "clearly established Federal law, as determined by the Supreme Court of the United States," within § 2254(d)(1). Wiggins v. Smith, 539 U.S. 510, 521 (2003) ("We established the legal principles that govern claims of ineffective assistance of counsel in Strickland"); see Williams v. Taylor, 529 U.S. 362, 412-413 (2000) (O'Connor, concurring); Rompilla v. Beard, 545 U.S. 374, 380 (2005).

In compliance with Carey, the Circuit rightly found this to be a Strickland case and applied post-

AEDPA rules. Although Petitioner argues the decision is an "extension" of Strickland (Pet., pp. 19, 20, 22), that is not so. As this Court stated in Panetti, quoted supra, that the facts need not be nearly identical for the controlling legal rule to be applied. AEDPA does not forbid a federal court from finding the state's application of a principle unreasonable just because the facts are not the same as in the case in which the principle was announced.

The Circuit found counsel gave unreasonable advice in abandoning his client's only (and viable) defense to the charge, a defense that was ready to go to the jury on the morning counsel abandoned it. While Petitioner appears to claim a pivotal difference is that defense counsel abandoned an affirmative defense (Pet., p. i, 3, 4, 10, 12, 15, 18, 19, 25), it makes no difference under Strickland whether a defense to the elements of the charges or an affirmative defense is at issue. In Hill v. Lockhart, 474 U.S. 52, 58-59 (1985), this Court held that Strickland applied to challenges to guilty pleas, and held "[w]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely

would have succeeded at trial." Hill v. Lockhart, supra at 59-60; italics added.

The decision below was correct that the label on the viable defense withheld is not determinative under Strickland. The fact that this Court has not "specifically addressed a counsel's failure to advance the defendant's only affirmative defense does not carry the day." PA, B-12. It is not the label that controls; it is whether the defense abandoned was a defense to the charges. Defense counsel himself testified the NGI defense was "what we were really driving for more than anything else." MER 50.

B. Schriro v. Landrigan, 127 S.Ct. 1933 (2007) Is an Interference With Counsel's Performance Case. Petitioner also relies on Landrigan to support its position (Pet., p. 17), but fails to acknowledge that this Court categorized it as a special type of case: "Neither Wiggins nor Strickland addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." Id. at 942. There, defendant's own conduct prohibited the presentation of a potential mitigation defense:

> Even assuming the truth of all the facts Landrigan sought to prove at the evidentiary hearing, he still could not be granted federal habeas relief because the state courts' factual

> determination that Landrigan would not have allowed counsel to present any mitigating evidence at sentencing is not an unreasonable determination of the facts under § 2254(d)(2) and the mitigating evidence he seeks to introduce would not have changed the result. In such circumstances, a District Court has discretion to deny an evidentiary hearing. Id. at 1944.

In other words, Landrigan made his determination and required his counsel's adherence to it. This Court held he could not make a Strickland claim under AEDPA because there was no prior Supreme Court case addressing the novel legal issue presented: that of a capital defendant deciding he wanted no mitigation defense, making an in court waiver of his right to present such a defense, and then later prevailing on an ineffective assistance of counsel (IAC) claim based upon trial counsel's failure to conduct an appropriate mitigation investigation.

Because there was no precedent in this Court whether a client's trial choice waiving a mitigation defense could lead, post-conviction, to a Strickland claim for not pursuing it,[7] the state ruling could not

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[7] "In short, at the time of the Arizona postconviction court's (continued...)

be contrary to or an unreasonable interpretation of settled law of this Court.

This case does not involve a client's interference with defense counsel's functioning. Rather, it is the basic question of whether counsel's abandonment of his client's viable and only defense, because of a subjective feeling of "hopelessness," was reasonable. This issue was entirely amenable to resolution under Strickland's settled standard. Indeed, such a failure to advocate the only defense for a defendant and instead to abandon it for no client benefit whatsoever, strikes at the core of the Sixth Amendment's guarantee of the right to effective assistance of counsel.

C. The Decision Does Not Adopt a "Nothing to Lose" Rule. Petitioner argues the decision, in "practical effect," is an application of a "nothing to lose" rule; that is, that it would be ineffective assistance of counsel not to litigate a defense regardless of the merits or strength because the defendant has "nothing to lose." Petition, p. 18.

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[7](...continued)
decision, it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish Strickland prejudice based on his counsel's failure to investigate further possible mitigating evidence." Id. at 127 S.Ct. 1942.

Indeed, petitioner further asserts the Circuit applied a "'nothing to lose'" [standard] in place of the clearly established Strickland standard." Pet., p. 23.

The decision says no such thing. The words "nothing to lose" appear nowhere in the decision. PA, B-1-12. It applies Strickland to hold that counsel acted unreasonably when he made the abandonment decision the morning trial was to commence while angry, emotional, and lacking a sense of advocacy. He had a subjective feeling of hopelessness brought on by his failure to understand the critical legal differences between the elements of murder and California NGI.[8] PA, B-6, 7. The latter belief and parental reluctance were the foundation for his abrupt decision to tell his client to give up his only defense.

The fact that respondent had the prospect of substantial gain by going forward with the NGI trial, and without any countervailing downside, was surely a relevant consideration that would necessarily be involved in almost every Strickland

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[8] Wager testified the jury "whether they knew it or not, under the facts of this case, [found respondent] legally sane." MER 65, 125, 145. This is absolutely wrong, yet it formed a basis for his belief the NGI was now "hopeless" and led to the withdrawal decision.

calculus. See e.g., Pavel v. Hollins, 261 F.3d 210, 218 (2d Cir. 2001) ("strategic" decision not to investigate held ineffectiveness); Moore v. Johnson, 194 F.3d 586, 615 (5th Cir. 1999) (a strategic decision is one made "on the basis of sound legal reasoning, to yield some benefit or avoid some harm to the defense"); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (ineffectiveness found where counsel "did not choose, strategically or otherwise, to pursue one line of defense over another," but instead, "simply abdicated his responsibility to advocate his client's cause").

The basic flaw in petitioner's position is in mischaracterizing the Circuit decision as a rule that counsel has a duty to present any remotely colorable defense, no matter how implausible, if there is nothing to lose. Notwithstanding petitioner's effort to paint the Circuit decision into that contrived corner, the decision fairly read, states only that counsel has a duty to present a substantial viable defense where there is a prospect for success and no strategic benefit in abandoning it.

As to the issue of prejudice, common sense dictates there must be consideration of the viability of the defense surrendered and whether there was anything strategic in its abandonment. Here, the district court and R&R concluded the defense NGI

witnesses "could have testified credibly and therefore perhaps successfully – even though subject to strong cross-examination...." PA, F-100. The Circuit also found prejudice in that there was a reasonable probability, one sufficient to undermine confidence in the outcome, that the jury would have found respondent insane. PA, B-8.

This was a straightforward application of Strickland's legal framework to the facts of the case. Contrary to Petitioner's claims, no new legal rule or extension of the law was pronounced.[9] See Pet., p. 19.

D. Advancing the Client's Interest is the Essence of Sixth Amendment Effective Assistance. Strickland, argues petitioner, does not require an attorney to always advance potentially meritorious affirmative defenses. Pet., p. 19. The decision below did not so hold. Of course, one or more potentially meritorious defenses may be sacrificed for some potential benefit, but not surrendered for no reason at all. This Court's decision in Jones v. Barnes, 463 U.S. 745 (1983), cited at Pet., p. 20, makes the point. There, a defendant requested several issues be argued by his appellate counsel.

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[9] A fortiori, there was no Teague v. Lane, 489 U.S. 288 (1989) retroactivity issue. See Pet., p. 19.

Counsel exercised his own discretion and argued three of the seven issues as the strongest arguments for relief. All of the issues were before the appeal court. Jones upheld a strategic choice to argue the strongest issues without abandoning others: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752.

Arguing all the claims was not required. Jones stands for the non-controversial proposition that counsel's reasoned choice to argue stronger defenses as opposed to marginal ones is effective assistance of counsel. It does not stand for the proposition that counsel may simply abandon all of a client's potentially meritorious defenses for no justifiable reason.[10]

Petitioner's reliance on Jones v. Page, 76 F.3d 831, 843-844 (7th Cir.1996) is misplaced. Jones found counsel's investigation and rejection of an insanity defense to be reasonable. Counsel found no

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[10] E.g., Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997) (counsel "did not present any mitigating evidence because he did not think that it would do any good. However, [because witnesses]...were available and willing to testify on his behalf, this reasoning does not reflect a strategic decision, but rather an abdication of advocacy.")

evidence supporting it. He had consulted with a mental health professional who had been seeing Jones and who opined there was no basis for an insanity inquiry. The IAC claim was ultimately resolved for lack of prejudice. In post-plea evaluations, Jones was found sane. He thus had no evidence to support his claim.[11]

In Evitts v. Lucey, 469 U.S. 387, 394 (1985), cited at Pet., 20, a grant of habeas relief was upheld based on trial counsel's failure to perfect the initiation of defendant's appeal. This Court held counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim."

E. Reasonable Performance Involves Efforts at Beneficial Advocacy for the Client. This Court has held that "even when there is a bona fide defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances." United States

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[11] In an apparent effort to construct a cert-worthy issue, Petitioner meritlessly claims Jones "directly conflicts" with the case at bar. Pet., 20. The cases are so grossly distinguishable, there is nothing remotely close to a conflict. Jones found no IAC in counsel's not pursuing a defense that had no evidentiary support, whereas here, counsel gave up a defense that had a phalanx of psychiatrists lined up to testify in its support supported by lay witness testimony.

v. Cronic, 466 U.S. 648, 657 (1984). This statement is premised on the assumption that advocacy is involved in making such consequential decisions; that is, a guilty plea may provide more benefit to the client than going to trial even with a colorable defense. Cronic cited other cases where giving up of a potential bona fide defense came in exchange for a benefit: e.g., Parker v. North Carolina, 397 U.S. 790 (1970) (where the client risked a capital sentence, there was no IAC in advising the defendant to forgo motions, pleaded guilty to charges leading to a life sentence); McMann v. Richardson, 397 U.S. 759, 762 (1970) (three defendants pleaded guilty to lesser offenses than charged; held, not IAC to not pursue the question of the voluntariness of their confessions); compare Brady v. United States, 397 U.S. 742 (1970) (upholding a guilty plea that was a voluntary and intelligent choice among the alternatives available to a defendant); see also Bordenkircher v. Hayes, 434 U.S. 357, 363-365 (1978) (plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial).

In Florida v. Nixon, 543 U.S. 175, 191-192 (2004), counsel conceded his client's guilt as a tactic to avoid the death penalty without the client's explicit consent. This Court held the conduct within

the realm of reasonable performance because pursuing a strategy of challenging the prosecution's case, when the evidence of guilt was overwhelming, could destroy chances to save the client's life at sentencing. Thus, defense counsel cannot be deemed ineffective for being candid and not engaging in "a useless charade," when saving his best arguments for the sentencing phase. There was no IAC because the concessions were made for a strategic benefit.[12]

Wiggins, supra, noted that defense counsel elected not to present mitigation evidence at sentencing and chose "to pursue an alternate strategy instead." Ibid. But even that tactical choice was found unreasonable. Here, there was no alternative strategy whatsoever. Counsel just gave up the one and only perfectly good defense for no countervailing benefit as opposed to "making an informed choice among possible defenses." Id. at 525.

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[12] See also Bell v. Cone, 535 U.S. 685, 701-702 (2002) (unreasonable for the Tennessee Court of Appeals to deem counsel's choice to waive argument a non-tactical decision given there was a tactical upside for the client in not doing so); Yarborough v. Gentry, 540 U.S. 1 (2003) (no IAC stemming from an underwhelming final argument by defense counsel; deemed reasonable because "[f]ocusing on a small number of key points may be more persuasive than a shotgun approach." Id. at 7.)

In each of these cases, important rights were given up based on counsel's strategic decision that a reasonable expectation of a benefit would come in return. Here, counsel admitted there was no benefit. He just gave up the defense during an emotional, angry time while laboring under fundamental misconceptions about California law. That is not reasonable performance under any assessment. For "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975), quoted in U.S. v. Cronic, supra at 655.

2. The Circuit Correctly Applied AEDPA's Standard of Review to Find the State's Summary Denial an Unreasonable Application of Strickland.

Despite the Petitioner's argument to the contrary, the Circuit both recognized and applied the habeas review standard under AEDPA, 28 U.S.C. § 2254(d)(1). See Pet., pp. 21-26. First, where petitioner spends a page discussing state law rules on summary denials of petitions (Pet., 21-22), the Circuit states it in one line: "Where, as here, the

state court has provided an adjudication on the merits...." PA, B-4. Petitioner criticizes the Circuit for not "analyzing the state courts' adjudication pursuant to § 2254(d)." Pet., p. 22. But the Circuit explicitly acknowledges it must give "an independent review of the record to determine whether the state court's final resolution of the case was an unreasonable application of clearly established federal law." PA, B-4. In addition, it reviewed the federal evidentiary hearing to conclude the state court's denial of relief was "contrary to or an unreasonable application of clearly established Federal Law." PA, B-5.

Petitioner contends the Circuit never explained how the state court summary denial was an unreasonable application of Strickland. Pet., p. 22. This is a confounding assertion given that the decision explains that the purpose of the federal evidentiary hearing was to resolve conflicting evidence on why counsel waived the defense, a necessary step given the failure of the state courts to hold a hearing. Further, the decision explains why defense counsel's decision was ineffective, i.e., that the state decision upholding the conviction was an unreasonable application of Strickland. It then reassessed the whole case under Carey v. Musladin as per the order of this Court. PA, B 5-12.

Petitioner argues the state record "reasonably supports the conclusion that counsel's challenged decision was not prejudicial under the second prong of the Strickland standard." Pet., p. 23. Then, petitioner argues the case facts, and particularly the consciousness of guilt facts as contrary to a reasonable likelihood of a different outcome such as to undermine judicial confidence. Pet., p. 24-25.

However, the Circuit recognized that each of the respondent's experts had considered these facts (e.g., Dr. Blum, PA, F-60), and concluded respondent's mental sickness deprived him of the ability to appreciate the wrongfulness of his conduct at the time of the homicide. Indeed, Dr. Anderson, one of the State's two experts testified at the federal hearing and agreed with the defense experts. MER 412-413. He diagnosed respondent with a schizo-affective bipolar disorder with "psychotic episodes most of his life." MER 412. Because of his illness, "I felt that he felt that he was justified in doing what he was doing [during the homicide] because of the psychotic condition he was under." MER 418-419.[13] Further, he explained respondent's post-offense conduct (the conduct indicative of

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[13] The dissent completely misses this point in characterizing Dr. Anderson's opinion as unsupportive of the NGI defense. PA, B-18.

consciousness of guilt) as respondent's "ability to recuperate or recover from a psychotic episode." MER 417.

The Circuit thus was clearly aware of the facts relied upon by petitioner when it conducted its Strickland prejudice analysis.

Defense counsel knew of the purported weaknesses in the defense well before the NGI trial, a trial that he was prepared to go forward with on the very day he abandoned it. Given this, defense counsel's "weakness" rationale is a comment that "resembles more a post-hoc rationalization of counsel's conduct than an accurate description" of his thinking (Wiggins, supra at 526-527), and "a mistaken memory shaped by the passage of time." Id. at 533.[14]

Many issues in contested cases contain weaknesses. But here, the consensus of the lay testimony and expert opinions (save for the State's geriatric expert, Dr. Sandhu), supported an NGI

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[14] Also, contrary to Pet. 27-28, there was no expert who would have been called at trial to be impeached with altered notes involving another case, because Wager testified, "I don't think I was going to call [him]." MER 56.

finding, and was, at a minimum, sufficiently strong to undermine judicial confidence in the outcome.[15]

Wager's concern that the defense needed the parent's contribution about respondent's childhood was met by Dr. Satz's testimony at the guilt phase. Dr. Satz recounted the parents' history regarding respondent including that he had subnormal intelligence, an extremely low self concept, and early experiences with auditory hallucinations. At age 5 or 6, his parents sought professional help for him. His condition became more florid so that by age 14 he was taken to see two psychiatrists. Trial RT 475-476.

As the highly experienced forensic psychiatrists testified at the evidentiary hearing (Dr. Markman, Dr. Blum, Dr. Sharma, and Dr. Romanoff), and as supported by the State's Dr. Anderson, the insanity defense was quite viable, supported by respondent's childhood history of mental problems, his paranoid conduct the week of

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[15] In a futile attempt at judicial nose counting, Petitioner claims 14 state and federal judges have disagreed with the Circuit's decision. Pet., p. 26. Presumably, the number includes the three Circuit panels that voted in favor of respondent's claim. It fails to include, however, that Petitioner's two en banc petitions garnered not a single vote from any of 28 Circuit judges, which, under Petitioner's mode of counting, warranted 56 more votes for respondent.

the homicide, and psychotic break from reality at the time of the homicide. The finding of prejudice under Strickland was proper.

3. The Circuit Did Not Substitute Its Own Fact Finding for that of the District Court.

Petitioner characterizes two conclusions of the district court as fact-finding, and then complains that the Circuit reached a different conclusion. The two issues were properly characterized by the Circuit. Further, they made no difference whatsoever to the finding of prejudicial IAC. Indeed, even the R&R and district court, agreed the abandoned defense was credible and might have succeeded if litigated.

First, the Circuit correctly found that the "reluctance" of the parents to testify the morning of trial was not the functional equivalent of a "refusal." Respondent's father, according to trial counsel, changed his mind, and said he would testify, but then said that he wouldn't. MER 106.[16] As the

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[16] The issue of parental testimony was not central to the issue of IAC for withdrawal of the NGI defense. The parents' statements about their son's mental problems had already come into evidence through Dr. Satz at the guilt trial and would have been repeated by the other defense experts who all interviewed the parents as part of their history taking. The issue of the "refusal" was important only because Wager

(continued...)

Circuit noted, counsel could have responded to the alleged "reluctance" and used any number of approaches to effect a reconsideration. PA, B-7.

The R&R itself stated that the "parents may not have expressly refused to testify, but they expressed a pronounced reluctance to do so, which amounted to the same thing." PA, F-71. The Circuit acknowledged the lower court's factual finding that the parents' expressed reluctance to testify, but did not accept the lower courts' opinion, or inference or conclusion that reluctance meant refusal.

The second complaint by petitioner is that the Circuit did not accept the lower court's characterization that Wager's decision on the morning of trial was well thought-out. See PA, B-7. Whatever the label, the facts accepted by the Circuit were irrefutably established at the hearing: Wager admitted that he decided to abandon the NGI defense as he drove to court the morning of trial. The parental expressed reluctance made him angry, emotional and increased his sense of "hopelessness." Wager could not assure the federal court he was

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[16](...continued)
unreasonably seized upon it that morning as his reason to abandon the defense.

functioning as an advocate[17] for respondent when he advised his client to waive his only defense.

The crux of the Circuit's conclusion was the Wager's decision was "rash" in the sense of "irrational," and this was true whether he spent one, ten or sixty minutes thinking about it that morning before abandoning the NGI trial.

CONCLUSION

Abandoning advocacy and surrendering a defendant's credible and only defense for no benefit is the epitome of ineffective counsel. As stated long ago in the American Bar Association Ethics Opinion 280 (1949), defense counsel is to proceed with objectively viable claims even if counsel has subjective doubts whether the claim will prevail:

> [T]he lawyer...is not an umpire, but an advocate. He is under no duty to refrain from making any proper argument in support of any legal point because he is not convinced of its inherent soundness.... His personal belief in the soundness of his cause or

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[17] "Q. Do you think that morning, given your anger at the parents, you became so emotional that you lost your sense of advocacy? ¶ A. I'm not sure. I'm not sure." MER 124.

> the authorities supporting it is irrelevant.[18]

The record below amply supports the Circuit's holding of prejudicial IAC. There was an unusual and strong consensus among the various mental state experts supporting an NGI finding. Moreover, the near consensus of experts was supported by the corroborating evidence of respondent's childhood psychological problems, his treatment by child psychologists, the parents' history concerning respondent's childhood psychological problems as presented through Dr. Satz, and the lay witness testimony of Laurent Meira and the Ookhtens relatives about respondent's paranoid behavior the week and day of the homicide. All this expert and lay witness evidence presented the likelihood of a different result sufficient to undermine confidence

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[18] See Commentary to §1.2, ABA Standards, The Defense Function, 122-123 (3rd Ed.1993), on counsel's duty to present the client's case: "Advocacy is not for the timid, the meek, or the retiring. Our system of justice is inherently contentious, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer be inclined toward vigorous advocacy. Nor can a lawyer be half-hearted in the application of his or her energies to a case. Once a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense, without regard to compensation or the nature of the appointment."

in the outcome. Rompilla v. Beard, 545 U.S. 374, 379 (2005).

It is respectfully requested that the Petitioner's petition for certiorari be denied.

May 15, 2008 Respectfully submitted,

/s/ Charles M. Sevilla

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