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U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXANDRE MIRZAYANCE, Petitioner - Appellee, v. MICHAEL A. KNOWLES, Warden, Respondent - Appellant.	No. 04-57102 D.C. No. CV-00-01388-DT MEMORANDUM*

On Remand from the United States Supreme Court
Before: HUG and WARDLAW, Circuit Judges, and SUKO,** District Judge.

The Warden appeals the district court's grant of Alexandre Mirzayance's petition for writ of habeas corpus based on ineffective assistance of counsel in his state trial court proceedings. In a memorandum disposition filed on April 10, 2006, we affirmed the decision of the district court.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Lonny R. Suko, United States District Judge for the Eastern District of Washington, sitting by designation.

I.

This appeal now returns to us upon remand by the United States Supreme Court in light of Carey v. Musladin, 127 S. Ct. 649 (2006). We have requested and reviewed supplemental briefing by the parties discussing both the possible relevance of Musladin, as well as Schriro v. Landrigan, 127 S. Ct. 1933 (2007). We conclude that, especially in light of Panetti v. Quarterman, 127 S. Ct. 2842 (2007), our decision is unaffected by Musladin or Landrigan, and we therefore again affirm the grant of habeas corpus.

II.

We are required by the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") to give significant deference to the decision of the state court. Where, as here, the state court has provided an adjudication on the merits of the habeas claim but has not explained its underlying reasoning or held an evidentiary hearing, however, we conduct 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. See Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003) ("Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable."); Greene v. Lambert, 288 F.3d 1081, 1088-89 (9th Cir. 2002) (explaining AEDPA

standard of review where state court provides no reasoned explanation for its decision on petitioner's claim). We therefore independently review the state court record and the evidentiary hearing held by the district court upon remand, and conclude that the state court's denial of habeas relief to Mirzayance was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(l).

III.

The district court and the magistrate judge misapprehended our prior remand for an evidentiary hearing on whether counsel's advice to withdraw the plea of not guilty by reason of insanity ("NGI") was a true tactical decision that constituted "reasonably effective assistance." Strickland v. Washington, 466 U.S. 668, 687 (1984). The citation to Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987), indicated only that labeling a decision "tactical" does not necessarily mean that a true tactical choice, one "between alternatives that each have the potential for both benefit and loss," was made. Id. at 1249. The evidentiary hearing was necessary, as the state had not conducted one, to resolve the conflicting evidence as to counsel's reason for abandoning Mirzayance's only defense—insanity.

IV.

Counsel's advice to Mirzayance to withdraw the insanity plea "fell below an objective standard of reasonableness," and therefore constitutes deficient performance. Strickland, 466 U.S. at 688. Counsel testified at the evidentiary hearing that he

recommended withdrawal of the NGI defense "out of a sense of hopelessness," basing his decision on two factors. Counsel explained that he did not believe a jury that had found premeditation would find insanity, and therefore the jury's first-degree murder verdict rendered success in the insanity phase almost certainly unattainable. Further, the "triggering event" that precipitated his decision was the supposed refusal of Mirzayance's parents to testify in the insanity phase.

The Warden argues that counsel's decision was "strategic," and thus not deficient performance. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable" under Strickland. Id. at 690. We conclude, however, that counsel did not make a true tactical choice. Counsel failed to consider the likelihood that the jury, after hearing the substantial evidence available to show that Mirzayance was legally insane at the time of the killing, might be persuaded that Mirzayance was in fact insane. As lay people, they might not recognize, as counsel thought they would, the seeming logical incompatibility between those two findings.[1/] Moreover, counsel's fear that the jury would

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1. As a matter of California law, insanity and premeditation are not mutually exclusive. To establish insanity under California law, the defendant must prove "that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." CAL. PENAL CODE § 25(b). Incapacity to know the nature and quality of one's act and to distinguish right from wrong is not incompatible with capacity to premeditate and deliberate, which does not necessarily require knowledge or understanding of the nature of the act premeditated or deliberated. Indeed, California law explicitly provides that premeditation and deliberation do not require a showing that "the defendant maturely and meaningfully reflected upon the gravity

not find insanity after finding premeditation was unfounded, based on an unreasonable assumption that because the jury rejected the opinion of one mental health expert testifying on premeditation in the guilt phase, the jury would reject the testimony of four defense experts testifying during the NGI phase that Mirzayance was legally insane at the time of the murder. Further, although counsel claims that Mirzayance's parents refused to testify, the district court's finding that the parents did not refuse, but merely expressed reluctance to testify, is correct. Competent counsel would have attempted to persuade them to testify, which counsel here admits he did not.

We disagree that counsel's decision was carefully weighed and not made rashly. Counsel himself admitted in the evidentiary hearing that he was "not sure" whether "given [his] anger at the parents, [he] became so emotional that [he] lost [his] sense of advocacy." Counsel's belief that Mirzayance's interests would not be advanced by conducting the insanity phase was groundless. Counsel had planned to present substantial evidence, including a "cadre of experts," to testify that Mirzayance was legally insane at the time of the killing. He did not know with any certainty that Mirzayance's parents would not testify and that he would lose the sympathy that could be gained from their testimony. That possibility remained open.

In addition, his decision was made not on the basis of the facts before him, but on speculation. The sole advantage counsel could identify of withdrawing the insanity plea was based on his speculation that the judge was sympathetic to Mirzayance and would sentence him to a psychiatric prison, but would

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of his or her act." CAL. PENAL CODE § 189.

sentence more harshly if the jury found him sane. This is not only speculative, but also contrary to law. Under California law, withdrawal of the insanity plea amounted to a concession that Mirzayance was indeed sane. See CAL. PENAL CODE § 1016 (noting that absent a plea of not guilty by reason of insanity, a defendant is presumed to be sane).

Thus, even accepting counsel's emotional and speculative reasoning, his decision ultimately secured only the loss of this sole potential advantage. No actual tactical advantage was to be gained from counsel's advice; indeed, counsel acted on his subjective feelings of hopelessness without even considering the potential benefit to be gained in persisting with the plea. "Reasonably effective assistance" required here that counsel assert the only defense available, especially given the significant potential for success.

A "reasonable probability" exists that, but for counsel's recommendation that Mirzayance withdraw his insanity plea, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. If counsel had pursued the insanity phase of the trial, there is a reasonable probability—one "sufficient to undermine confidence in the outcome"—that the jury would have found Mirzayance insane. Id. As a result, Mirzayance would have been confined in a mental health facility rather than a prison, and confinement could be terminated when a sentencing court determined that his "sanity has been restored." CAL. PENAL CODE § 1026(a)-(b); see also id. § 190(a) (prescribing punishment for first-degree murder).

V.

Neither Musladin nor Landrigan alters this analysis. In Musladin, the Supreme Court upheld a

state appellate court determination that Matthew Musladin received a fair trial despite the victim's family wearing buttons bearing the victim's picture in the audience during Musladin's trial. 127 S. Ct. at 653-54. Addressing Musladin's appeal on habeas, the Court found that the state court's determination was not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court. ld.; 28 U.S.C. § 2254(d)(1). In so holding, the Court distinguished its prior precedents of Estelle v. Williams, 425 U.S. 501 (1976) and Holbrook v. Flynn, 475 U.S. 560 (1986), both of which addressed state actors that allegedly violated defendants' fair-trial rights. The Court reasoned that Estelle and Holbrook did not govern Musladin's situation because those cases dealt with "state-sponsored courtroom practices," not "private-actor courtroom conduct," and no Supreme Court holding required the state to apply Estelle or Holbrook to the defendant's case. Musladin. 127 S. Ct. at 653-54. Because there was no Supreme Court precedent addressing private actors, the state court's determination could not be "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

In Landrigan, a defendant who had affirmatively instructed his counsel—in the presence of the sentencing judge—not to present mitigating evidence, later claimed ineffective assistance of counsel for failure to present mitigating evidence. 127 S. Ct. at 1937. The state supreme court determined that counsel's failure to present mitigating evidence to the trial court during the sentencing phase of this capital murder trial was not ineffective assistance, which the United States Supreme Court upheld as not contrary to or an unreasonable application of clearly established

Supreme Court precedent. Id. at 1942. The Court reasoned that none of its precedents "addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court. . . . Indeed, [the Supreme Court] ha[s] never addressed a situation like this." Id. The Court continued, "[A]t the time of the Arizona postconviction court's 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.

In Strickland, the Court propounded the traditional two-pronged test applied to ineffective-assistance-of-counsel claims: (1) counsel's performance was deficient, falling below an "objective standard of reasonableness"; and (2) there is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different. 466 U.S. at 687; Williams v. Taylor, 529 U.S. 362, 390-91 (2000). The Court has stated, unequivocally, that "[i]t is past question that the rule set forth in Strickland qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" Taylor, 529 U.S. at 391. The Court has also stated that, because Strickland necessitates a "reasonableness" inquiry, the Court "ha[s] declined to articulate specific guidelines for appropriate attorney conduct." Wiggins v. Smith, 539 U.S. 510, 521 (2003).

In light of the aforementioned principles, Musladin and Landrigan do not affect our prior disposition. First, unlike in Musladin, where the Supreme Court had not mandated that state courts apply the Estelle and Holbrook tests to the private conduct at issue, the Court has stated that Strickland is clearly established

law, thus mandating that state courts apply the Strickland test to all ineffective-assistance-of-counsel claims.

Second, post-Landrigan, the Supreme Court has made clear that, because the ineffective-assistance-of-counsel analysis is one of reasonableness, the facts of each case will be unique, even in habeas cases:

> That [a] standard is stated in general terms does not mean the application was reasonable. AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." Musladin, 127 S. Ct. at 656 (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." 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 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in Strickland v. Washington).

Panetti, 127 S. Ct. at 2858 (citations altered and omitted); see also Rompilla v. Beard, 545 U.S. 374, 377 (2005) ("This case calls for specific application of the standard of reasonable competence required on the part of defense counsel by the Sixth Amendment."); Taylor, 529 U.S. at 391 ("That the Strickland test 'of necessity requires a case-by-case examination of the evidence,' obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." (citation omitted)). Thus, the fact that no

Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense does not carry the day; instead, the state may not issue an opinion that is an unreasonable application of the general rules established in Strickland, which is clearly established law that is binding on the states.

VI.

We affirm the district court's grant of habeas relief, albeit on different grounds.[2/] The petition for writ of habeas corpus is granted if, within one hundred and twenty (120) days from the date the mandate issues, the state court does not grant Mirzayance the opportunity to reinstate his NGI plea and to conduct a sanity phase of trial as to that defense.

AFFIRMED.

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2. "We may affirm the district court's decision on any ground supported by the record, even if it differs from the district court's rationale." Lambert v. Blodgett, 393 F.3d 943, 965 (9th Cir. 2004), cert. denied, 126 S. Ct. 484 (2005).

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Mirzayance v. Knowles, 04-57102

SUKO, District Judge , concurring in part and dissenting in part.

By virtue of the Supreme Court's granting certiorari, vacating the judgment and remanding the case (GVR order), this panel is required to reconsider its previous decision and, if warranted, to revise or correct it. See Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 167, 116 S.Ct. 604, 607, 133 L.Ed.2d 545 (1996) (describing the use of a GVR order as potentially appropriate where intervening development reveals a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration . . . ."); Youngblood v. West Virginia, 126 S.Ct. 2188 (2006) (dissenting opinions describing the Supreme Court's GVR procedure). The GVR order directed this court to reconsider the case in light of Carey v. Musladin, 549 U.S.----, 127 S.Ct. 649 (2006). After reconsideration, and for the reasons set forth below, I concur in the conclusion of Part III of the memorandum disposition finding the district court and the magistrate judge misapprehended our prior remand order. However, as to Parts I, II, IV, V, and VI, I respectfully dissent.

While this court must conduct an independent review of the legal question, facts as determined by the district court are to be reviewed under the "significantly deferential" clearly erroneous standard,

in which we accept the district court's findings of fact absent a "definite and firm conviction that a mistake has been committed. Silva v. Woodford, 279 F.3d 825, 835 (9th Cir. 2002) (as amended); Alcala v. Woodford, 334 F.3d 862, 868 (9th Cir. 2003). I accordingly disagree with the majority's independent review of the record without regard to the lower court's factual and credibility findings made after a four-day evidentiary hearing.

As set forth in my previous dissent, I also disagree with the majority's conclusion that the petitioner has satisfactorily demonstrated a violation of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). However, whether the judges sitting on this panel would or would not interpret Strickland the same as the state and lower federal courts is not the question presented in this appeal. As the Musladin decision reaffirmed, this courts role and authority is limited by AEDPA. 127 S.Ct. at 652-53. Specifically, habeas corpus relief may not be granted unless the state court's decision was contrary to, or an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Id. (citing 28 U.S.C. § 2254(d)(1) & (2)). This court is without authority to substitute its own judgment on the merits of the petition for that of the state court, in contravention of 28 U.S.C. § 2254(d).

To qualify as an "unreasonable application of clearly established federal law" sufficient to merit habeas corpus relief, the state court's decision to deny habeas must be more than just incorrect or erroneous: it must be "objectively unreasonable." Schiro v. Landrigan, --- U.S. ----, ----, 127 S.Ct. 1933, 1939 (2007) (noting that AEDPA changed the standards for granting federal habeas relief; the determination that

a state court's interpretation is unreasonable is a substantially higher threshold than the determination that a decision is incorrect).

In applying the deferential standard of AEDPA, "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004); see also Musladin, 127 S.Ct. at 654. Given the broad case-by-case nature of the Strickland analysis, the state court had significant leeway in determining petitioner's habeas petition. Indeed Strickland emphasizes that "[n]o particular set of detailed rules for counsel's conduct" is appropriate, but rather that courts must consider whether counsel's assistance was reasonable considering all the circumstances from counsel's perspective at the time. 466 U.S. at 688-89. It is nevertheless possible for a standard as general as Strickland to 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). However, the state court's resolution of Mirzayance's habeas petition was not an objectively unreasonable application of Supreme Court precedent.

Under the standards established in Strickland, to prevail on an ineffective assistance of counsel claim, a habeas petitioner must show that: (1) counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. Id. at 687-88, 104 S.Ct. at 2064. In considering claims of ineffective assistance, courts are to address not "what is prudent or appropriate, but only what is constitutionally compelled." Burger v. Kemp, 483 U.S.

776, 794, 107 S.Ct. 3114 (1987).

The majority concludes there was "substantial evidence available to show that Mirzayance was legally insane at the time of the killing," presumably reaching this conclusion by judging the quantity of experts who were subpoenaed to testify on Mirzayance's mental state during the NGI-phase of the trial. A simple comparative count as to the number of experts however, ignores the quality of the totality of evidence, the law, and the facts of the case. At a minimum, the record certainly demonstrates there is substantial ground for a difference of opinion as to whether the petitioner had any chance of succeeding on his insanity defense.

To prove the petitioner was insane it would have been the petitioner's burden to prove by a preponderance of the evidence that he was "incapable of knowing or understanding the nature and quality of his act", or that he was incapable of "distinguishing right from wrong", at the time of the commission of the offense. Cal. Penal Code § 25(b); People v. Skinner, 39 Cal.3d 765, 769 (1985) (holding that section 25(b) was intended to reflect two distinct and independent bases upon which a verdict of not guilty by reason of insanity might be returned). During the guilt-phase of the trial, the jury had heard the following facts of the crime: Mirzayance initiated the crime after entering the victim's bedroom with a knife in hand and a pistol in his pocket; he had waited until he was alone with the victim in the house before he closed the curtains and commenced the fatal stabbing and shooting attack; immediately after the murder he collected the knife and some of the spent bullet shell casings; he then returned to his apartment where he showered and put the bloody clothes into a trash bag; he concocted a false alibi on a telephone answering machine; then drove to

a Burger King where he dumped the bag containing the bloody clothes into the restaurant's trash container.

The defense strategy at trial was to secure no worse than a second degree murder conviction, a level of guilt that was conceded to the jury. In this pursuit, the jury had been given the opportunity to consider some of the petitioner's mitigating evidence of Mirzayance's mental state, but had implicitly rejected that evidence in finding him guilty of first degree murder. According to the jury instruction given at trial, the jury must have found that Mirzayance had "weigh[ed] and consider[ed] the question of killing and the reasons for and against such a choice, and ha[d] in mind the consequences" when he decided to kill Melanie Oohkhtens. The verdict of the jury shed light on its view of the petitioner's state of mind at the time of the offense. While, as the majority indicates, it did not legally defeat the insanity defense, it certainly was a blow to the likelihood of its success.

Moreover, according to the evidence adduced at the evidentiary hearing conducted by U.S. Magistrate Judge Zarefsky, each of the experts who were prepared to testify during the NGI-phase that the petitioner was insane because of his mental impairment, had also, on the same basis, opined that the petitioner could not have acted with premeditation, a finding the jury had rejected. Having so stated, this testimony would have subjected every one of the petitioner's "cadre of experts" to impeachment and cross-examination. The weaknesses of the petitioner's expert evidence was also revealed when upon cross-examination at the evidentiary hearing two of petitioner's experts testified that Mirzayance's actions were consistent with "goal-directed behavior designed to avoid detection." A third expert, Dr. Romanoff, in a written declaration indicated he was not prepared to testify at the sanity-phase as to

whether Mirzayance met the legal definition of insanity. Rather, he was to opine that in his diagnostic opinion Mirzayance had only a "potential" lack of understanding of the wrongfulness of his conduct at the time of the homicide.

Further undermining the possibility of proving Mirzayance insane, the prosecution had intended on calling two experts to testify the petitioner was legally sane, one of which was to testify that he had directly asked Mirzayance whether at the time of the offense he felt it was right or wrong to commit the murder and that Mirzayance had responded that he felt it was wrong. The other prosecution expert was prepared to testify that Mirzayance did not "even [come] close to meeting the criteria" for insanity and that his actions were goal oriented. Finally, petitioner's parents, who were to provide the "emotional" element of the defense, had indicated a "strong disinclination" to testify during the NGI-phase.

Under the circumstances presented to Wager, a reasonable attorney in the exercise of proper professional judgment could question the viability and merit of the insanity defense and conclude it was therefore inappropriate to pursue. See e.g. U.S. v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 n.19 (1984) (". . . [T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade."); Cepulonis v. Ponte, 699 F.2d 573, 575 (1st Cir. 1983) (". . . counsel need not chase wild factual geese when it appears, in light of informed professional judgment, that a defense is implausible or insubstantial as a matter of law, or, as here, as a matter of fact and of the realities of proof, procedure, and trial tactics."). Counsel has no

constitutional duty to raise every non-frivolous issue requested by a defendant. Jones v. Barnes, 463 U.S. 745, 751-54, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

The fact that the psychiatric defense was his sole defense remaining does not alter this analysis. This conclusion is echoed by the Seventh Circuit in its decision in Jones v. Page, 76 F.3d 831, 843 (7th Cir. 1996), wherein the court held:

> We refuse to hold that [counsel's] prudent, good-faith decision to forego an insanity defense (after investigation) constitutes ineffective assistance of counsel. Implicit in such a holding would be the notion that in order to represent a criminal defendant competently, an attorney must not only pursue each and every possible psychiatric defense, but perhaps also search out and present questionable 'expert' testimony in support of such arguments. A holding of this kind would defy common sense and contradict well-established case law . . . ."

76 F.3d 831 (internal citations omitted). More importantly, in light of all of the facts described above, the undersigned finds it is at least debatable whether Strickland mandated Wager to pursue the NGI defense, and thus it was not objectively unreasonable for the state court to conclude counsel's performance was not deficient under Strickland.

It is true that another lawyer in Wager's position might reasonably have requested a further continuance, might have taken time to attempt to persuade the parents to testify, and because it was the sole remaining defense available, may have chosen to forge ahead with the defense no matter what. But Strickland admonishes courts to resist the natural temptation to play Monday-morning quarterback.

Strickland, 466 U.S. at 689, 104 S.Ct. 2052. Even if petitioner were able to overcome the strong presumption that counsel's actions were within the range of reasonable professional assistance, to succeed under Strickland the petitioner must be able to also prove prejudice. This demands he demonstrate there is a "reasonable probability that but for the alleged unprofessional error that the outcome would have been different-probability sufficient enough to undermine the confidence in the outcome." 466 U.S. at 694. Given the facts of the crime, the petitioner's burden of proof, the jury's verdict, and arguable weakness of petitioner's expert evidence compared to the totality of the prosecution's evidence (including two court-appointed psychiatrists who found the defendant to be sane), the undersigned cannot conclude that the state court would have been "objectively unreasonable" in concluding the petitioner had failed to meet this burden. To the contrary, the state court could reasonably find the petitioner had not demonstrated a "reasonable probability" that he would have been found insane at the time he committed the murder and that his resulting sentence would have been any different.

In conclusion, in addition to the great deference to counsel's performance mandated by Strickland, AEDPA adds another layer of deference-this one to a state court's decision-when we are considering whether to grant federal habeas relief from a state court's decision. Under AEDPA, this court has no authority to grant habeas corpus relief simply because it concludes, in its independent judgment, that a state supreme court's application of Strickland is erroneous or incorrect. Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1512, 146 L.Ed.2d 389 (2000). Consideration of whether the state court's application of Strickland was "objectively unreasonable" leads me to the conclusion that it was

not. I therefore respectfully dissent from Parts I, II, IV, V, and VI of the amended disposition.