No. 08- 071315

IN THE

Supreme Court of the United States

MICHAEL A. KNOWLES, Warden, California Department of Corrections and Rehabilitation, *Petitioner*,

v.

ALEXANDRE MIRZAYANCE, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
KRISTOFER JORSTAD
Deputy Attorney General
*STEVEN E. MERCER
Deputy Attorney General
State Bar No. 196911
*Counsel of Record
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 576-1344
Fax: (213) 897-6496
Counsel for Petitioner

Blank Page

QUESTIONS PRESENTED

Concluding that defense counsel was ineffective in advising petitioner to withdraw his not-guilty-by-reason-of-insanity plea, the Ninth Circuit Court of Appeals granted habeas relief to petitioner without analyzing the state-court adjudication deferentially under "clearly established" law as required by 28 U.S.C. § 2254(d) and by supplanting the district court's factual findings and credibility determinations with its own, opposite factual findings. This Court vacated the Ninth Circuit decision and remanded the case for further consideration in light of *Carey* v. *Musladin*, 127 S. Ct. 649 (2006). On remand, the Ninth Circuit conceded that "no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense" but nonetheless concluded that its original decision was "unaffected" by *Musladin* and subsequent § 2254(d) decisions of this Court.

The questions presented are:

1. Did the Ninth Circuit again exceed its authority under § 2254(d) by granting habeas relief without considering whether the state-court adjudication of the claim was "unreasonable" under "clearly established Federal law" based on its previous conclusion that trial counsel was required to proceed with an affirmative insanity defense because it was the only defense available and despite the absence of a Supreme Court decision addressing the point?

2. May a federal appellate court substitute its own factual findings and credibility determinations for those of a district court without determining whether the district court's findings were "clearly erroneous?"

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

INDEX TO APPENDICES

IN THE

Supreme Court of the United States

No. 08-

MICHAEL A. KNOWLES, Warden, California Department of Corrections and Rehabilitation, *Petitioner,*

v.

ALEXANDRE MIRZAYANCE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Michael A. Knowles, Warden, California Department of Corrections and Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The post-remand opinion of the Ninth Circuit is unpublished. The original opinion of the Ninth Circuit and the previous opinions of the district court are unpublished. The opinion of the California Court of Appeal, and the California Supreme Court's summary denial of habeas corpus relief, are unpublished. Each is reproduced in the Appendix to this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

2. Section 2254 of Title 28 of the United States Code provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

JURISDICTION

The post-remand opinion of the court of appeals was filed on November 6, 2007. The court of appeals' denial of the Warden's petition for rehearing and suggestion for rehearing en banc was filed on January 17, 2008. Pet. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

This case comes to this Court for the second time. See *Knowles* v. *Mirzayance*, 127 S. Ct. 1247 (2007). Following the Ninth Circuit's original divided opinion granting habeas relief, this Court granted the Warden's petition for certiorari, vacated the panel decision, and remanded the case for further consideration in light of *Carey* v. *Musladin*, 127 S. Ct. 649 (2006).

This Court in *Musladin* reaffirmed and clarified the

limited role and authority of federal courts under § 2254(d), reversing the Ninth Circuit's grant of habeas relief in that case because "[n]o holding of this Court" compelled the California Court of Appeal to grant relief on the state prisoner's claim of spectator misconduct. *Id.* at 654. In *Schriro* v. *Landrigan*, 127 S. Ct. 1933 (2007), and *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008) (per curiam), this Court cast further light on the "clearly established law" principle set forth in § 2254(d) as articulated in *Musladin*, and applied the principle to ineffective-counsel claims. In each of these cases, this Court reversed the circuit court's grant of habeas relief because no decision of this Court had addressed the type of attorney conduct that the prisoner had challenged in state court.

Nonetheless, on remand, a divided Ninth Circuit panel concluded that its original decision was "unaffected" by *Musladin* and the subsequent § 2254(d) decisions of this Court. Instead, it again ordered a writ of habeas corpus to issue for Mirzayance's ineffective-counsel claim, even while acknowledging that "no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense," i.e., the basis of Mirzayance's claim that was raised and rejected in the state courts. The panel majority reinstated its original decision resolving Mirzayance's claims in his favor, based on its de novo review of the federal evidentiary hearing record, and without any analysis of whether the state courts' adjudication had been unreasonable under clearly established law.

The Ninth Circuit's reinstated decision failed to adhere to this Court's remand order and ran afoul of the strict limitations on habeas corpus relief imposed by § 2254(d), especially in light of *Musladin*, *Landrigan*,

and *Van Patten*. As *Van Patten* made clear, a federal habeas court cannot avoid *Musladin* simply by declaring, as the Ninth Circuit did here, that the general ineffectiveness doctrine of *Strickland* v. *Washington* is "clearly established" law. Rather, under § 2254(d), unless a holding of this Court "squarely addresses" the type of attorney conduct challenged, or gives a "clear answer" to the question presented, "it cannot be said that the state court unreasonably applied clearly established Federal law." *Van Patten*, at 747.

Neither *Strickland* nor any other decision of this Court has held that an attorney must always advance an affirmative defense such as insanity if it is "the only defense available" and "might" succeed, as the majority panel declared in this case. Pet. App. at 8. On the contrary, "[b]ecause [this Court's] cases give no clear answer to the question presented, let alone one in [the state prisoner's] favor, 'it cannot be said that the state court unreasonably applied clearly established Federal law.'" *Van Patten*, at 747 (quoting *Musladin*, 127 S. Ct. at 654). Like the Seventh Circuit in *Van Patten*, the Ninth Circuit has misapprehended the import of a remand order to reconsider a grant of habeas relief in light of *Musladin*, and has again exceeded its limited authority under § 2254(d). Thus, as in *Van Patten*, this Court's intercession is again required.

STATEMENT OF THE CASE

1. *The Crime*

Mirzayance fatally stabbed and shot his nineteen-year-old cousin, Melanie Ookhtens, in her family's home. Immediately after the homicide, Mirzayance gathered the knife and the spent shell casings, showered, disposed of his bloody clothes, and left a false alibi message on Ookhtens's answering machine. Hours

later, at the urging of a friend, Mirzayance turned himself in to police. He explained that he killed Melanie because she had "pissed him off" and because he had smoked marijuana. However, a urine sample taken from Mirzayance four hours after the murder tested negative for marijuana.

2. *State Court Proceedings*

Mirzayance was charged with first-degree murder. He entered pleas of not guilty and not guilty by reason of insanity (NGI). Under California law, such pleas result in a bifurcated trial. In the first phase, the jury renders a verdict solely on the question of guilt. If the jury finds the defendant guilty, a second phase occurs in which the jury determines whether the defendant has proven that he was not sane at the time of the offense. Cal. Penal Code § 1026. To prevail at this second phase, the defendant must prove by a preponderance of the evidence that he was legally insane, meaning — regardless of whether he suffered from a mental disease or disability — he either failed to appreciate the nature and quality of his actions at the time he committed the crime, or failed to appreciate the wrongfulness of those actions. Cal. Penal Code § 25(b); *People* v. *Skinner*, 704 P.2d 752, 763-65 (Cal. 1985).

Mirzayance's trial counsel, Donald Wager, sought to obtain a guilt-phase verdict of only second-degree murder—a level of culpability that he conceded to the jury—and thereafter to secure an NGI verdict. The jury, however, returned a verdict of premeditated and deliberate first-degree murder. After conferring with his co-counsel, Wager advised Mirzayance to withdraw the NGI plea. Mirzayance did so and was sentenced to prison for a statutorily-mandated term of twenty-nine years to life.

In state habeas corpus proceedings, Mirzayance claimed that Wager had rendered ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984), for advising him to withdraw the NGI plea. The California Court of Appeal and the California Supreme Court summarily denied the ineffective-counsel claim on the merits but without stating its reasons. Pet. App. I & J.

3. *Federal Habeas Corpus Proceedings*

a. Mirzayance raised the same ineffective-counsel claim in a federal habeas petition. The district court denied relief, concluding that the state-court decisions were "neither contrary to or an unreasonable application of federal law. 28 U.S.C. § 2254(d)." As the district court explained:

> Given that the jury rejected Dr. Satz's [guilt-phase expert opinion] that [Mirzayance's] mental impairments deprived him of the ability to perform the more demanding tasks of deliberating and planning a murder, defense counsel reasonably predicted that this same jury would find plaintiff fully capable of discerning right from wrong and would, therefore, reject the proffered insanity defense. Defense counsel, who knew what he had to present during the insanity defense portion of the trial, made an informed decision that he did not have sufficient evidence to cause this jury to change its mind. Having concluded that there was no chance of success on the insanity defense, counsel advised his client to waive the defense and accept the sentence of the court.
>
> * * *
>
> Accordingly, on this record, counsel's strategic decision to recommend the withdrawal of the

> insanity defense, made after consultation with [Mirzayance], was not an unreasonable one, and does not constitute ineffective assistance of counsel.

Pet. App. at 153-54.

b. Mirzayance appealed. Concluding that "[t]he record presents conflicting reasons for the abandonment of the insanity defense," a Ninth Circuit panel remanded the case to the district court "with instructions to conduct an evidentiary hearing on whether counsel was deficient for recommending and concurring in the withdrawal of the insanity defense [*Strickland* prong one], and if so, whether this ineffectiveness prejudiced Mirzayance [*Strickland* prong two]." Pet. App. 106, 115-16.

c. Following a four-day evidentiary hearing, the district court resolved all factual disputes against Mirzayance. The district court found that the jury's conclusion that the murder was "willful, premeditated, and deliberate" meant the defense's strategy—to obtain a conviction of only second-degree murder—had failed. The court also found that, although Wager had planned to proceed with a sanity phase anyway, he believed that "[a]ny remaining chance of securing an NGI verdict . . . now depended (in his view) on presenting some 'emotional impact' testimony *by Petitioner's parents*, which Wager had viewed as key even if the defense *had* secured a second-degree murder verdict at the guilt phase." Pet. App. 42, 51. But the court determined that, just before the sanity phase was to begin, Mirzayance's parents—to Wager's surprise—made it clear that they would not testify, and that their attorney suggested to Wager that he proceed without them. The district court further found that, although Wager was angry, he concluded that the parents' refusal to testify was a "done deal," and "one that any beseeching on his

part could not undo." Pet. App. 71-76.

Wager then consulted with his co-counsel, who concurred that they should withdraw the NGI plea. Pet. App. 71. The district court found that Wager "carefully weighed his options before making his decision final," that he had "made a rational choice to forgo the insanity defense," and that his decision was "carefully considered," "not rashly made," and "appeared to be reasonable to him and his co-counsel, in light of the guilt phase verdicts and the parents' statements to him on the way to court that morning." Pet. App. 68-71.

Crediting counsel's decision as competent, the district court opined that, under the deferential standard of review required by 28 U.S.C. § 2254(d), the state courts' rejection of the claim did not result from an unreasonable application of *Strickland*. The court also stated that its opinion would be the same even under de novo review of the record as expanded in federal court. Pet. App. 97-98.

Despite its factual and legal conclusions, however, the district court ultimately granted the writ because, in its view, the Ninth Circuit's remand order had amounted to a "mandate" that "destined [Mirzayance] to relief." The court noted that the remand order had contained a parenthetical citation to the pre-AEDPA case of *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987), an ineffective-counsel case in which the Fifth Circuit had observed that it could see "no advantage" in a trial counsel's decision to bypass an insanity defense. Pet. App. 97-98. The district court inferred from the Ninth Circuit's citation that the "'nothing to lose' rule pronounced in *Profitt*" was the "law of the case." Thus, the district court explained, the function of the evidentiary hearing was simply to determine, de novo, "whether, in fact, Petitioner had nothing to lose."

Because defense counsel Wager had acknowledged there was nothing that Mirzayance "*gained* by waiving the NGI trial," the district court said it was "bound" to find that counsel had "nothing to lose," and that his performance was therefore necessarily deficient under *Proffitt*. Pet. App. 98-100 (italics added). The district court did not assess whether Wager's "deficient" performance had been prejudicial under *Strickland*. Instead, it concluded that the Ninth Circuit, per the remand order, had already decided that Wager's remaining NGI defense was "viable and strong" and that there was a reasonable probability Mirzayance "would have obtained a better trial outcome had that defense been presented." Given the perceived mandate, the district court "reluctantly" granted relief. Pet. App. 35-37, 98-100.

d. The Warden appealed and argued, inter alia, that the state courts' decision was reasonable and thus conclusive under 28 U.S.C. § 2254(d)(1). The Ninth Circuit affirmed. In an unpublished 2-to-1 opinion, the panel first asserted that the district court had erred in inferring any mandate for relief from the remand order. The majority, however, did not implement the ruling denying relief that the district court stated it would have issued absent the perceived mandate. Nor did it analyze whether the state courts' adjudication of the claim had been contrary to or an objectively unreasonable application of clearly established federal law under § 2254(d)(1). Rather, the majority affirmed the granting of the writ, "albeit on different grounds."

The panel majority replaced the district court's "key" factual findings with its own opposite findings. The panel majority found (1) that Wager had acted "rashly," and (2) that the parents had not refused to testify. Pet. App. 28. Based on these new factual findings, the

majority concluded that "'reasonably effective assistance' would put on the only defense available, especially in a case such as this where there was significant potential for success." Pet. App. 29. Although the district court had not addressed prejudice, the majority independently resolved that issue in Mirzayance's favor, concluding from the evidentiary hearing record that had a sanity phase proceeded, there was a "reasonable probability" "that the jury would have found Mirzayance insane." *Id.* The majority did not address the state courts' denial of the claim on habeas corpus, or explain how under § 2254(d) the state courts' adjudication was an unreasonable application of clearly established federal law.

The dissent contended that the majority should have deferred to the district court's well-founded "explicit factual findings," and that the majority's opinion "suggests that to avoid violating *Strickland*, an attorney must always advance any potentially non-futile, colorable, affirmative defense regardless of its questionable merit or arguable chance of success. This is not the standard established by *Strickland* and in fact suggests something more akin to the 'nothing to lose' standard set forth in *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987)." Pet. App. 31-34.

The Warden filed a petition for rehearing and suggestion for rehearing en banc, arguing that the panel majority failed to review the state courts' rulings deferentially under 28 U.S.C. § 2254(d)(1) and wrongly substituted its own factual findings for those of the district court. The court of appeals declined to rehear the case en banc. Pet. App. 23.

4. *United States Supreme Court Proceedings*

The Warden petitioned this Court for certiorari,

arguing, inter alia, that the panel majority's analysis and conclusions were wrong, and that the state courts' adjudication was conclusive because it was not "contrary to" or an "unreasonable application" of "clearly established Federal law as determined by the Supreme Court." Mirzayance filed an opposition and the Warden filed a reply. This Court distributed the case for conference seven times and ordered the records of the proceedings in the Ninth Circuit and the district court.

While the petition for certiorari was pending, this Court decided *Carey* v. *Musladin*. In *Musladin*, this Court reversed the Ninth Circuit's grant of habeas relief and held that the state appellate court determination — that a habeas petitioner was not inherently prejudiced when spectators wore buttons depicting murder victim — was not contrary to or unreasonable application of clearly established federal law as set forth in any Supreme Court holding. 127 S. Ct. at 654. Because of "the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here," and because "[n]o holding of this Court required" the states to apply the Court's test for government-sponsored courtroom practices to spectators' courtroom conduct, this Court held that the Ninth Circuit violated AEDPA when it failed to defer to the state court's rejection of Musladin's challenge to the spectators' courtroom conduct. *Id.* at 652.

Several weeks later, the Court granted the Warden's petition for certiorari, vacated the divided panel decision, and remanded the case for further consideration in light of *Musladin*. Pet. App. 22.

Shortly after this Court issued its order in this case, it decided *Schriro* v. *Landrigan*. In *Landrigan*, the Ninth Circuit had granted habeas relief to another state

prisoner, finding his trial counsel was ineffective under *Strickland* for failing to conduct further investigation into mitigating circumstances in a capital case, notwithstanding the defendant's instruction not to present such evidence. This Court reversed, emphasizing that "we have never addressed a situation like this." *Landrigan*, 127 S. Ct. at 1942. "Neither *Wiggins* [v. *Smith*, 539 U.S. 510 (2003)] nor *Strickland* [v. *Washington*, 466 U.S. 668 (1984)] addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." *Id.* "In short, at 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.*

5. *Post-Remand Proceedings in the Ninth Circuit*

The Ninth Circuit ordered supplemental briefing from the parties on "the possible relevance of *Musladin* as well as *Schriro* v. *Landrigan*." Pet. App. 4.

On November 6, 2007, a divided Ninth Circuit panel reinstated its original decision. The majority declared that "our decision is unaffected by *Musladin* or *Landrigan*, and we therefore again affirm the grant of habeas corpus." Pet. App. 4. Adhering to its prior decision, the majority asserted that "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. . . ." Pet. App. 12. The panel majority stated that *Strickland* was the "clearly established law," and that "[r]easonably

effective assistance" under *Strickland* "required here that counsel assert the only defense available, especially given the significant potential for success." Pet. App. 8, 12. Once again, the opinion did not analyze whether the state courts' adjudication of the claim had been contrary to or an objectively unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). The dissenting judge found that the decision did not comport with *Musladin* or AEDPA, and again protested "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." Pet. App. 13-21 (italics added).

The Warden filed a petition for rehearing and suggestion for rehearing en banc, arguing that the panel majority wrongly disregarded this Court's GVR order; again failed to analyze the state courts' adjudication under 28 U.S.C. § 2254(d)(1); and again wrongly substituted its own factual findings for those of the district court.

While the Warden's petition for rehearing was pending, this Court decided *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008) (per curiam). In *Van Patten*, as in the instant case, this Court had vacated the Seventh Circuit's grant of habeas relief and remanded for further consideration in light of *Musladin*. The court of appeals simply reissued its prior ruling granting relief under § 2254 on the claim that trial counsel's telephonic appearance at a plea hearing violated the Sixth Amendment. Following a second petition for certiorari, this Court summarily reversed. This Court reiterated the import of *Musladin*, and noted that its cases had never "squarely addresse[d]" the type of attorney conduct challenged in *Van Patten*. This Court further explained, "Our precedents do not clearly hold that

counsel's participation by speaker phone should be treated as a 'complete denial of counsel,' on par with total absence." *Id.* at 746. The Court concluded, "Because our cases give no *clear answer* to the question presented, let alone one in Van Patten's favor, 'it cannot be said that the state court unreasonably applied clearly established Federal law.' Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized." *Id.* at 747 (quoting *Musladin*, 127 S. Ct. at 654, italics added and punctuation omitted).

Because of its similarity to the instant case, the Warden notified the Ninth Circuit of the *Van Patten* decision. The court of appeals declined to rehear the case en banc. Pet. App. 1.

REASONS FOR GRANTING THE PETITION

BY REINSTATING ITS PRIOR DECISION UNCHANGED, THE NINTH CIRCUIT AGAIN EXCEEDED ITS AUTHORITY UNDER § 2254(D)(1) AND AGAIN IGNORED WELL-ESTABLISHED PRINCIPLES LIMITING ITS REVIEW OF DISTRICT COURT FACT FINDINGS

1. Certiorari should be granted again because the Ninth Circuit, declaring its prior decision to be "unaffected" by such matters, failed to account for this Court's GVR order and recent precedent reaffirming the limited role and authority of federal courts under AEPDA. The reinstated majority opinion amounts to an untenable extension of *Strickland* to encompass a novel "nothing to lose" test of attorney competence. At the least, it raises a question of exceptional importance: whether the Constitution requires that attorneys must always advance any potentially non-futile affirmative defense regardless of its questionable merit or arguable chance of success if it is the "only defense available."

2. Certiorari should also be granted because the reinstated opinion again ignored the threshold and dispositive question under 28 U.S.C. § 2254(d)(1): whether the state courts' adjudication of the merits of Mirzayance's claim was "contrary to," or an "unreasonable application of," federal law as "clearly established" by the holdings in this Court's decisions. See *Musladin*, 127 S. Ct. at 652-54; *Landrigan*, 127 S. Ct. at 1942; *Early* v. *Packer*, 537 U.S. 3, 11 (2002) (per curiam); *Woodford* v. *Visciotti*, 537 U.S. 19, 26-37 (2002) (per curiam); see, *e.g.*, *Rice* v. *Collins*, 546 U.S. 333, 342 (2006); *Brown* v. *Payton*, 544 U.S. 133, 140-46 (2005); *Yarborough* v. *Alvarado*, 541 U.S. 652, 664-66 (2004); *Middleton* v. *McNeil*, 541 U.S. 433, 436 (2004);

Yarborough v. *Gentry*, 540 U.S. 1, 5 (2003) (per curiam); *Lockyer* v. *Andrade*, 538 U.S. 63, 75-76 (2003).

3. Certiorari should be granted again, finally, because the reinstated opinion directly conflicts with fundamental principles of appellate review of factual determinations as set forth by the Federal Rules of Civil Procedure and by this Court. See Fed. R. Civ. P. 52(a); *Anderson* v. *Bessemer City*, 470 U.S. 564, 573-74 (1985).

A. The Ninth Circuit Improperly Disregarded This Court's Remand Order and Exceeded Its Authority Under 28 U.S.C. § 2254(d)(1)

1. While the Warden's first petition for certiorari was pending, this Court decided *Carey* v. *Musladin*. Soon thereafter, this Court granted the Warden's petition in this case, vacated the original decision with costs, and remanded the case for further consideration in light of *Musladin*. Pet. App. C. This Court has explained that the "GVR" procedure is "a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review." *Lawrence* v. *Chater*, 516 U.S. 163, 167-68 (1996); see also *Youngblood* v. *West Virginia*, 126 S. Ct. 2188, 2190-93 (2006) (dissenting opinions describing GVR procedure).

As this Court has stated, the issue in *Musladin* "was the significance of [this Court's] precedents in a case under § 2254." *Van Patten*, 128 S. Ct. at 745. Musladin challenged the California Court of Appeal's conclusion that the fact that the victim's family wore buttons displaying the victim's image at the defendant's trial was not inherently prejudicial. *Musladin*, 127 S. Ct. at 651-52. Reversing the Ninth Circuit's eventual grant of habeas relief, this Court noted that it had never

squarely addressed the issue presented. *Id.* at 653-54. Thus, "Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonably applied clearly established Federal law.' § 2254(d)(1)." *Id.* at 654.

Following the remand order in this case, this Court decided *Landrigan*, 127 S. Ct. 1933 (2007), another AEDPA case from the Ninth Circuit that cast further light on *Musladin*'s holding. In *Landrigan*, the Ninth Circuit granted habeas relief to a state prisoner by finding that his trial counsel was ineffective under *Strickland* for failing to conduct further investigation into mitigating circumstances in a capital case, notwithstanding the defendant's instruction not to present such evidence. This Court reversed, emphasizing that under AEDPA, state courts have great leeway in deciding ineffective-counsel claims absent Supreme Court holdings that address specific types of attorney conduct. *Id.* at 1942. As the Court succinctly stated, "Indeed, we have never addressed a situation like this." *Id.* Thus, the Court held the state court's postconviction decision was not objectively unreasonable under § 2254(d). *Id.*

The Ninth Circuit's reissued majority opinion in this case did not abide by this Court's GVR decision and failed to heed the import of *Musladin* or *Landrigan*. The panel majority dedicated just a single sentence to the actual relevance of *Musladin*, in which it deemed the case to be inapplicable. Pet. App. 10-11. By brushing aside the intervening authority of *Musladin* and its progeny as having "no effect" on its decision to issue a writ of habeas corpus, the Ninth Circuit gave short shrift to this Court's remand order. See *Lawrence*, 516 U.S. at 167 (describing the use of a GVR order as

appropriate where intervening development reveals a "reasonable probability that the decision below rests upon a premise that the lower courts would reject if given the opportunity for further consideration . . . ."); see, *e.g.*, *Van Patten*, 128 S. Ct. at 745 (reversing the Seventh Circuit for failing to heed the import of a GVR order citing *Musladin*, in which the "[t]he issue was the significance of [this Court's] precedents in a case under § 2254."); *Ayers* v. *Belmontes*, 127 S. Ct. 469, 472, 475 (2006) (reversing the Ninth Circuit after it "failed to heed the full import" of the holding in the case cited in a GVR order); *Sumner* v. *Mata*, 455 U.S. 591, 596-97 (1982) (issuing a second GVR order upon finding that the Ninth Circuit "misunderstood the terms of our remand" and failed to "comply with the requirements of § 2254(d)").

In this case, application of *Musladin*, *Landrigan*, and *Van Patten* would have precluded the Ninth Circuit's new extension of the law deeming counsel ineffective for failing to advance such an affirmative defense on the ground that it "might" succeed or is the "only defense available," as the panel majority found in this case. By announcing that the absence of applicable Supreme Court holdings "does not carry the day" in constraining a federal court's review of a state adjudication, and by granting habeas relief based on its new and unique test of attorney competence, the Ninth Circuit failed to adhere to the GVR and misconstrued AEDPA.

2. Besides erring in extending the *Strickland* rule at all, the panel decision extended it in untenable ways. The opinion is, in its practical effect, an application of the "nothing to lose" standard contemplated by the Fifth Circuit in the pre-AEDPA *Profitt* case. Indeed, this was the standard that Mirzayance explicitly advanced, that the Ninth Circuit cited in its remand

order for an evidentiary hearing, that the district court understandably applied as the perceived "law of the case," and that the dissent recognized was being applied by the panel majority.

The court of appeals' interpretation of *Strickland* would require that attorneys always advance any potentially meritorious affirmative defense. But since even the Ninth Circuit concedes that neither *Strickland* nor any other *holding* of this Court binds the *states* to apply such a test, AEDPA bars relief. *Musladin*, 127 S. Ct. at 651-52. Additionally, the application of such a rule to grant habeas relief in this AEDPA case violates the anti-retroactivity provisions of *Teague* v. *Lane*, 489 U.S. 288, 299-300 (1989).

Moreover, the Ninth Circuit's extension of the law is inconsistent with *Strickland* and unworkable. An attorney's decision may be informed and reasonable, and therefore not deficient, even where there may be "nothing to lose" (or gain) by choosing differently. Advancing an affirmative defense, let alone a state-created affirmative defense such as NGI, on the ground that it "might" succeed or is the "only defense available," is not a Sixth Amendment requirement, even as interpreted previously by the Ninth Circuit. See, e.g., *Lowry* v. *Lewis*, 21 F.3d 344, 346 (9th Cir. 1993) (noting habeas claim of deficient performance cannot succeed when based on the previously-rejected proposition that "'a defendant has "everything to gain and nothing to lose" in filing a motion to suppress'"). A "nothing to lose" exception is unworkable under *Strickland* because it imposes an impermissible bright-line rule that whenever a lawyer can obtain expert opinions finding insanity, he must *always* go forward with an insanity phase, regardless of his professional judgment as to its appropriateness or likelihood of success.

Further, the Ninth Circuit's extension of *Strickland* to encompass a "nothing to lose" rule directly conflicts with the standard employed in the Seventh Circuit, which has 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 . . . .

Jones v. *Page*, 76 F.3d 831, 843 (7th Cir. 1996).

In sum, as the district court and the dissenting judge correctly observed, neither *Strickland* nor any other holding of this Court has required attorneys to advance all nonfrivolous claims, motions, defenses, arguments, etc., all of which might theoretically succeed and thus benefit their clients. Pet. App. 14, 32-33; see, *e.g.*, *Jones* v. *Barnes*, 463 U.S. 745, 751-54 (1983) (appellate counsel has no constitutional duty to raise every nonfrivolous issue requested by a defendant); *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985) (same). 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* v. *Cronic*, 466 U.S. 648, 656, n.19 (1984); *cf. Landrigan*, 127 S. Ct. at 1942.

B. The Ninth Circuit Improperly Failed to Review the State Court Adjudication for Simple Reasonableness Under 28 U.S.C. § 2254(d)

1. In California, a petitioner seeking habeas corpus relief must make specific factual allegations that state a claim upon which relief can be granted. *In re Swain*, 209 P.2d 793, 796 (Cal. 1949); see *In re Robbins*, 959 P.2d 311, 341 n.1 (Cal. 1998) (Mosk, J., conc.). The state court reviews the factual allegations and, if a prima facie claim has been made, an order to show cause is issued. *In re Sassounian*, 887 P.2d 527, 534 (Cal. 1995); *People* v. *Romero*, 883 P.2d 388, 390-93 (Cal. 1994). Here, the California Court of Appeal and the California Supreme Court summarily resolved Mirzayance's ineffective-assistance claim on the merits, but without a statement of reasons. Pet. App. I & J. As the California Supreme Court has repeatedly explained, a summary rejection of a habeas corpus claim without a statement of reasons is based on the assumption that the facts alleged in support of the claim are true but nevertheless do not make out a prima facie case of a valid constitutional claim. *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993); *In re Lawler*, 588 P.2d 1257, 1259 (Cal. 1979).

The California Supreme Court's decision rejecting Mirzayance's claim, therefore, was an adjudication on the merits. The Ninth Circuit has recognized that this is California's procedure. See *Griffey* v. *Lindsey*, 345 F.3d 1058, 1066, *vacated as moot*, 349 F.3d 1157 (9th Cir. 2003); *Visciotti* v. *Woodford*, 288 F.3d 1097, 1104-05 (9th Cir.), *rev'd on other grounds*, 537 U.S. 19 (2002); *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc), *cert. denied*, 420 U.S. 973 (1975)

(holding that a California Supreme Court's "postcard denial without opinion is . . . a decision on the merits of the petition"); *accord Bennett* v. *Mueller*, 364 F. Supp. 2d 1160, 1173 (C.D. Cal. 2005).

2. Federal habeas corpus relief therefore is precluded in this case unless the state courts' ruling—that Mirzayance's claim was meritless even if his factual allegations were assumed to be true—was "contrary to" this Court's precedents, or an objectively "unreasonable application" of them, under § 2254(d). The district court twice showed this § 2254 deference, correctly explaining in two decisions that Mirzayance's claim failed as a matter of law under AEDPA.[1/] Pet. App. 97-98, 152-56. But the Ninth Circuit, without analyzing the state courts' adjudication pursuant to § 2254(d), granted relief by reviewing Mirzayance's claim de novo on the basis of an improper extension of this Court's *Strickland* rule and the federal evidentiary hearing record. Certainly, the panel never explained how the state courts' denial of relief was "objectively unreasonable" under *Strickland*. Instead, as in *Rice* v. *Collins*, the Ninth Circuit substituted its evaluation of the federal evidentiary hearing record for the state court's evaluation of the state court's record. *Rice*, 546 U.S. at 342.

3. Application of AEDPA's deference standard would have led to a ruling that the state courts' adjudication was conclusive because it was not "contrary to" or an "unreasonable application" of "clearly established Federal law as determined by the Supreme Court." 28

---

1. The district court, however, "reluctantly" granted relief because of a mistaken belief that the Ninth Circuit's remand order was a "mandate" that "destined [Mirzayance] to relief," and gave it "no alternative other than to grant the Petition." Pet. App. 35-37, 98-100.

U.S.C. § 2254(d)(1). Under *Strickland*, to prevail on an ineffective assistance of counsel claim, a habeas petitioner must show both that, considering all the circumstances, his counsel's performance fell below an objective standard of reasonableness and that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687. On the "performance" prong of the ineffective-counsel test, however, the Ninth Circuit failed to accord counsel's tactical decision the requisite "double deference" under AEDPA and *Strickland*. *Yarborough* v. *Gentry*, 540 U.S. at 4. It did the opposite. Instead, as explained above, the panel majority improperly applied a completely different standard—one inquiring whether counsel had "nothing to lose"—in place of the "clearly established" *Strickland* standard.

In any event, federal habeas corpus relief is unavailable under § 2254(d)(1) because the record before the state courts reasonably supports the conclusion that counsel's challenged decision was not "prejudicial" under the second prong of the *Strickland* standard. *Strickland* places the burden on the petitioner to establish a "reasonable probability" of prejudice. *Strickland*, 466 U.S. at 694. In the context of Mirzayance's challenge to the withdrawal of an NGI plea, that appears to mean demonstrating a reasonable probability that the jury otherwise would have found him not guilty by reason of insanity. See, *e.g.*, *United States* v. *Cox*, 826 F.2d 1518, 1525-26 (6th Cir. 1987); *Profitt*, 831 F.2d at 1250-51; *Weekley* v. *Jones*, 76 F.3d 1459, 1462 (8th Cir. 1996); *Weeks* v. *Jones*, 26 F.3d 1030, 1038 (11th Cir. 1994).

To prevail on an insanity claim under California law, the defendant must prove by a preponderance of the evidence that he was legally insane, meaning that—regardless of whether he suffered from a mental

disease or disability—he either could not appreciate the nature and quality of his actions at the time he committed the crime or could not appreciate the wrongfulness of those actions. Cal. Penal Code § 25(b); *Skinner*, 704 P.2d at 763-65. Here, only the latter question was at issue, for no one has opined that Mirzayance failed to appreciate the nature and quality of his actions.

Even if Mirzayance's parents and experts would have testified as alleged in his state habeas petitions, it would not be "objectively unreasonable" under *Strickland* to conclude that Mirzayance had failed to establish a "reasonable probability" that the jury would have found he could not appreciate the wrongfulness of his actions. Although the defense experts were prepared to opine that he did not know killing Melanie Ookhtens was wrong because he was acting on the paranoid delusion that he needed to defend himself, their testimony met the serious obstacle of Mirzayance's obvious consciousness of guilt. In Mirzayance's own statements to the state's court-appointed psychiatrist, he admitted feeling that his shooting and stabbing Melanie was wrong at the time of the offense. Mirzayance's pre- and post-murder actions, which were obviously goal-oriented rather than irrational, also clearly showed he knew the murder was wrong. Those actions included: parking his car some distance from the Ookhtens's house on the night of the murder; waiting until he was alone with Melanie in the house before he closed the curtains and commenced his attack; collecting the knife and spent shell casings immediately after the murder; showering, disposing of his bloody clothes in a trash can, and concocting a false alibi on her telephone answering machine.

To the extent that defense experts would testify that

Mirzayance thought he needed to defend himself, there is no evidence that Mirzayance held such a belief. Indeed, there has never been a suggestion that Mirzayance would testify to that effect, and there is no evidence that he actually made such a claim to the defense expert doctors. While the experts all described Mirzayance's claims to having experienced visual and auditory hallucinations, *none* opined that he was hallucinating at the time he attacked Melanie. And Mirzayance told police just hours after the murder that he killed Melanie because she had "pissed him off," not because he had to defend himself for any reason, real or imagined. Thus, the mere *speculation* by additional defense experts — that Mirzayance acted because of a paranoid delusion that he needed to defend himself — would have scant evidentiary weight, assuming such testimony would be admissible at all.

Last, such expert opinions also could not be reasonably reconciled with the jury's own determination that Mirzayance was guilty of premeditated and deliberate murder. The jury had previously rejected Dr. Satz's extensive guilt phase mental-health testimony that Mirzayance's mental impairments prevented him from the more demanding tasks of deliberating and planning a murder. Pet. App. 153-54. And, as the district court painstaking detailed following the evidentiary hearing, the additional experts were subject to significant impeachment. Pet. App. 70-71. Accordingly, even if Wager's decision to forgo an affirmative NGI defense amounted to deficient performance, the state courts were not wrong—let alone "objectively unreasonable"—in rejecting Mirzayance's *Strickland* claim.

It is not "objectively unreasonable" to conclude that Mirzayance failed to show *Strickland* prejudice. Indeed,

some *fourteen* state and federal judges have disagreed with the panel majority's view. See, *e.g.*, *Van Patten*, 128 S. Ct. at 747. The Ninth Circuit failed to abide by AEDPA's strict limits on habeas review.

C. The Ninth Circuit Improperly Substituted Its Own Factual Findings for Those of the District Court

Certiorari also should be granted to correct the Ninth Circuit's departure from the rules governing appellate review of district-court factfinding. As the dissent correctly stated in the panel's original divided opinion, "the district court found that the trial counsel had made a rational, carefully considered, and informed decision to forgo the insanity defense." Pet. App. 32. The district court also found that the parents' actions amounted to "an express refusal to testify." *Id.*

But, without even discussing whether the district court's findings were clearly erroneous, the panel majority concluded: "We disagree that counsel's decision was carefully weighed and not made rashly." Pet. App. 7. And, as for the parents' refusal to testify, the majority inexplicably stated that "the district court's finding that the parents *did not refuse*, but merely expressed reluctance to testify is correct." *Id.* (italics added). By making its own factual findings, and then granting habeas relief because of those findings, the Ninth Circuit failed to heed both AEDPA and established principles of appellate review as set forth by the Federal Rules of Civil procedure and by this Court. The dissenting judge rightly faulted the majority for granting relief based on its independent findings, made "*without regard* to the lower court's factual and credibility findings made after a four-day evidentiary hearing." Pet. App. 13-14 (italics added).

A federal appellate court must assess a district court's factual findings under the "clearly erroneous" standard of review. Fed. R. Civ. P. 52(a); *Anderson*, 470 U.S. at 573. As long as the trier of fact's account of the evidence "is *plausible* in light of the record viewed in its entirety," a circuit court of appeals may not reverse it "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74 (italics added). Moreover, "appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). As this Court recently stressed, "[a] panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Rice*, 546 U.S. at 342.

Here, the district court's factual findings, which clearly support the correctness and the reasonableness of the state-court decision, are well-supported by the record, and the panel majority did not suggest otherwise. Indeed, in support of its conclusion that counsel's decision was rational, carefully considered, informed, and not rashly made, the district court explained: (1) that Wager had hired multiple mental health experts to testify at the sanity phase that Mirzayance had committed the killing without premeditation or deliberation; (2) that Wager had recognized his expert testimony had "significant weaknesses," and he "convincingly detailed ways in which [the experts] could have been impeached[] for overlooking or minimizing facts which showcased [Mirzayance's] clearly goal-directed behavior"; (3) that the experts were subject to other impeachment, including evidence that one of the experts had altered

his notes in a highly-publicized criminal case; (4) that Wager's strategy at the sanity phase had been to appeal to the jurors' emotions, which required "the heartfelt participation of [Mirzayance's] parents as witnesses"; (5) that Mirzayance's parents refused to testify, which made Wager's sanity-phase strategy "impossible to attempt"; and (6) that, prior to making his recommendation, Wager conferred with his "experienced co-counsel, Lawrence Boyle," who concurred in Wager's proposal. Pet. App. 69-71.

As for the district court's second "key" finding—that the parents refused to testify—the district court dedicated an entire section of evidentiary analysis to the issue. Over the course of five pages, the district court detailed the extensive live testimony and record evidence upon which the court made its credibility determinations. Pet. App. 71-76.

Thus, it was improper for the panel majority to twice set aside the district court's factual findings and to conclude instead that Wager's decision was "made rashly" and was not carefully weighed. It was equally improper for the panel majority to disregard the finding that the parents conduct amounted to a "an express refusal to testify" and to instead opine that Wager "did not know with any certainty that Mirzayance's parents would not testify . . . ." In making its own contrary findings, the Ninth Circuit ignored the settled rule that "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Anderson*, 470 U.S. at 573-74; *Zenith*, 395 U.S. at 123.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: April 15, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

KRISTOFER JORSTAD
Deputy Attorney General

*STEVEN E. MERCER
Deputy Attorney General
*Counsel of Record

Counsel for Petitioner

SEM:fc
60292683.wpd
LA2008501075

Blank Page