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P R O C E E D I N G S

(11:05 a.m.)

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

Mr. Scanlon.

ORAL ARGUMENT OF KERRY A. SCANLON

ON BEHALF OF THE PETITIONER

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

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

No one on the sentencing jury had any idea that Mr. Wood had any mental deficiency, much less that he had an IQ between 59 and 64, which means he ranks in the lowest 1 percent of the total population.

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

MR. SCANLON: That's correct, Justice

1 Scalia.

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

6 MR. SCANLON: Well --

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

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

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

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

25 MR. SCANLON: Each of the statements --

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

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

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

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

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

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

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

8 MR. SCANLON: Yes.

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

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

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

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

25 MR. SCANLON: That went to deficient

1 performance, of course.

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

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

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

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

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

25 JUSTICE SOTOMAYOR: Could I take you back to

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

5 MR. SCANLON: Correct.

6 JUSTICE SOTOMAYOR: All right. And they  
7 made it on the basis of a number of factors, including  
8 the fact that there was testimony that the two senior  
9 attorneys said: It's not going to help us if we do or  
10 not.

11 You may disagree with whether or not a  
12 strategic decision was made or not, but if one can view  
13 the evidence in any way as the attorney having made the  
14 decision, isn't your argument that that decision was  
15 unreasonable?

16 MR. SCANLON: Of course. If --

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

23 MR. SCANLON: That's correct.

24 JUSTICE SOTOMAYOR: All right. So we're  
25 back to Justice Alito's --

1 MR. SCANLON: But -- but --

2 JUSTICE SOTOMAYOR: -- question, which is,  
3 isn't that a (d)(1) instead of a (d)(2) argument, and we  
4 -- the question presented --

5 MR. SCANLON: That is --

6 JUSTICE SOTOMAYOR: -- only addressed the  
7 strategic decision. It didn't address or present the  
8 question of the Strickland question of whether that  
9 would have been a reasonable strategic decision.

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

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

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

23 JUSTICE GINSBURG: When did that come up? I  
24 thought that the facts, as the Eleventh Circuit  
25 presented them, is that the senior lawyer first said:

1 We want Dr. Kirkland's report not simply on the question  
2 of insanity and incompetence to stand trial, but also to  
3 give us leads to mitigating evidence.

4 So mitigation is in his mind about looking  
5 into this mental question. He reads Kirkland's report  
6 and, for whatever reason, decides this isn't worth  
7 pursuing; this is not going to help us.

8 I thought that that's what the Eleventh  
9 Circuit said --

10 MR. SCANLON: That's --

11 JUSTICE GINSBURG: -- was the picture, that  
12 whether it was an incompetent, ineffective decision is a  
13 separate question, but as to what happened, why did the  
14 investigation stop, because the senior lawyer said:  
15 Yes, it's relevant to mitigation, but I look at the  
16 report and I think it's not wise for us to pursue  
17 mitigation.

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

23 JUSTICE GINSBURG: Where is that -- 56?

24 MR. SCANLON: On page 56a and page 57a of  
25 the petition appendix, which is the Eleventh Circuit

1 decision. And if you look at page 56a, for example, the  
2 Eleventh Circuit framed the issue correctly. They say:  
3 Here the issue becomes, did counsel, before deciding not  
4 to present evidence of Wood's borderline intellectual  
5 function, make reasonable investigation or a reasonable  
6 decision that made particular investigations  
7 unnecessary?

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

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

18 MR. SCANLON: With all due respect, Justice  
19 Ginsburg, if you look at the Eleventh Circuit decision  
20 at this critical point, there is no reference to Mr.  
21 Dozier, who was the senior lawyer. What the reference  
22 is to are the State court findings, which they say at  
23 57a are amply supported by the record. Those findings  
24 were that they did an investigation, that it was  
25 adequate, and, in fact, the State has now abandoned that

1 position.

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

9           JUSTICE KENNEDY: You don't have the cite  
10 for 542 F.3d, that part of the opinion?

11           MR. SCANLON: What page it is?

12           JUSTICE KENNEDY: It's in 542 F.3d 1281, but  
13 I don't have the particular page. Okay.

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

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

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

1 penalty stage as it would have at the guilt stage if it  
2 came in?

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

7 JUSTICE STEVENS: Right.

8 MR. SCANLON: That's what he was focused on.  
9 He -- he designated to Mr. Trotter, the junior lawyer,  
10 the penalty phase, and therefore the fact that they  
11 didn't make that decision is clear, because 2 months  
12 later Mr. Dozier himself is going to the trial court  
13 with Mr. Trotter and asking for psychological  
14 evaluations and other reports.

15 Mr. Trotter, before the trial, says: Your  
16 Honor, we have not investigated this; it needs further  
17 assessment. So clearly they haven't made a --

18 JUSTICE GINSBURG: Well, there's only --  
19 that -- that, what you've said so far, leaves out one  
20 thing; that is, I thought that Dozier had said: We need  
21 -- we have to get this Kirkland report, and it's of  
22 interest to us for three purposes, the two that were  
23 relevant to the guilt phase and the one, mitigation,  
24 that was relevant to the penalty phase.

25 That suggests that in his mind, in Dozier's

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

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

10 Now, what he actually did when he requested  
11 the Kirkland report was to limit it specifically to  
12 competency and insanity, and so -- but even if Mr.  
13 Dozier had that in mind, which I don't think the record  
14 supports -- let's assume that he had that in mind. When  
15 he got the Kirkland report, it's obvious the State  
16 agrees with it. This Court's precedents show that  
17 what's in the Kirkland report is an extremely strong  
18 lead. He has borderline intellectual functioning. And  
19 counsel were not able to simply not follow that lead.  
20 Reasonable counsel would have seen that as a green  
21 light, not a red light.

22 JUSTICE GINSBURG: Now -- now, this case,  
23 for me at least, is terribly confusing, because I  
24 thought, reading the cert position, that the Court  
25 granted cert to deal with a legal question that has

1 confused the lower courts; that is, what is the  
2 relationship between (d)(2) and (e)(1) of AEDPA?

3 MR. SCANLON: Right.

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

9 But that would be a much different -- that  
10 would be a fact-bound case tied to this record, as apart  
11 from the legal question: What does unreasonable -- the  
12 (d)(2) unreasonableness, how does it relate to the  
13 (e)(1) presumed correct, clear, and convincing evidence?  
14 I thought that that legal question was why we granted  
15 cert.

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

22 JUSTICE ALITO: But that's an entirely  
23 different question. I think that's the question. Did  
24 the validity of the -- the conclusion made by the State  
25 courts that there was a strategic decision not to

1 present this evidence until the -- the final judge stage  
2 of the -- of the proceeding, and not whether there was a  
3 reasonable investigation or whether they -- there was  
4 reasonable performance overall at the penalty phase.

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

8 MR. SCANLON: Right, and, if you look at  
9 Eleventh Circuit's opinion, the majority opinion in this  
10 case, what they did is, rather than look at the entire  
11 record for reasonableness to see if the Petitioner had  
12 shown that it was not reasonable, what they did was they  
13 looked at individual fact-findings.

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

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

22 MR. SCANLON: Okay.

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

1 MR. SCANLON: No.

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

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

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

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

13 I think that Congress made it clear that  
14 (d)(2) was a deferential standard. It has teeth in it,  
15 and --

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

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

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

21 MR. SCANLON: Right.

22 JUSTICE KENNEDY: Yes.

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

1 unreasonable.

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

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

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

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

12 MR. SCANLON: And I think it would -- I  
13 think it would apply there, too. I think --

14 JUSTICE KENNEDY: Because the problem, as  
15 Justice Ginsburg indicated, is that the courts of  
16 appeals are looking for guidance as -- as to when we can  
17 go into --

18 MR. SCANLON: Right.

19 JUSTICE KENNEDY: -- into these findings and  
20 set them aside.

21 MR. SCANLON: Right.

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

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

13 JUSTICE BREYER: Do I have it right, in your  
14 opinion, so far? I'm just interested in the  
15 relationship between (d) and (e), and as I read it, just  
16 to look at the language, it seems to me, in the (d)  
17 case, we're talking about something that was decided on  
18 a record in a State court.

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

24 MR. SCANLON: Correct.

25 JUSTICE BREYER: Now, (e) is a different

1 situation; (e) is a situation where, for some reason or  
2 other -- and there are a few -- you are having a new  
3 hearing in the Federal court.

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

13           So there you have to show what (d)(2) says.  
14 You have the burden of saying that that was an  
15 unreasonable fact-finding. That's what it says. Those  
16 different words make -- seem sensible to me because the  
17 proceeding is different, and the way we talk about the  
18 proceedings is a little bit different. But as a  
19 practical reality, I guess they come to about the same  
20 thing.

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

23           MR. SCANLON: I think that's right. If  
24 there's different evidence that's extrinsic to the State  
25 court record, that is looked at in the Federal

1 evidentiary proceeding under (e)(1).

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

4 MR. SCANLON: That --

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

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

14 MR. SCANLON: But, Justice Ginsburg, (d)(2)  
15 requires just as much deference, we believe, because of  
16 the -- the need to show that it's objectively  
17 unreasonable, so --

18 JUSTICE GINSBURG: I'm -- I'm not talking  
19 about (d)(2) now. We're talking about two provisions,  
20 trying to make sense --

21 MR. SCANLON: Right.

22 JUSTICE GINSBURG: -- how do they relate to  
23 each other. And one very well-presented position is the  
24 Ninth Circuit's in Judge Kozinski's opinion. My only  
25 question is, am I right to say that his view, which is

1 your view, would leave very little work for (e)(1) to do  
2 if (e)(1) applies only when there's new evidence coming  
3 in; it's not just the -- the record that was made in the  
4 State court, but new evidence coming in, in the Federal  
5 habeas?

6 MR. SCANLON: There's --

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

9 MR. SCANLON: There's less -- there's less  
10 work to do, of course. It's 10 percent of the cases or  
11 so, but no deference is lost because (e)(1) does not  
12 apply to the other 90 percent of the cases, because  
13 (d)(2), that standard itself is --

14 JUSTICE GINSBURG: What you're saying is  
15 (d)(2) is a vigorous standard, but, yes, your  
16 description, unlike the opposing description of the  
17 relationship between these two --

18 MR. SCANLON: Right.

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

21 MR. SCANLON: And that's not a --

22 JUSTICE SOTOMAYOR: Can I go back to --  
23 just to -- so that we're on the same page in my own  
24 mind, what constitutes the State record? Because one of  
25 the State amici posited situations in which the record

1 before the State court on the issue that it made its  
2 determination would be one subset of evidence, and that  
3 perhaps, as the State process developed on another  
4 issue, there was another record developed, and you're  
5 pointing to that evidence in your argument of  
6 unreasonableness as a reason for the lower court's  
7 decision being wrong.

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

10           MR. SCANLON: The other evidence -- if it --  
11 if it's intrinsic to the State court record, then it  
12 would be looked at under (d)(2), and the petitioner  
13 would have to show that, looking at all of that  
14 evidence, the determination of fact was objectively  
15 unreasonable only if the evidence is outside of that.  
16 And -- and I think we agree, it's about 10 percent of  
17 the cases, but that's not insignificant for the role  
18 that (e)(1) plays. But there's -- the --

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

25           If there's additional evidence, whether it's

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

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

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

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

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

24 MR. SCANLON: Right, but --

25 JUSTICE SOTOMAYOR: And you're using the

1 evidence on the other question.

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

4 And if I may reserve the remainder of my  
5 time.

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

14 MR. SCANLON: Well, those are both  
15 unreasonable determinations of fact. The first one,  
16 that they did an investigation, is what the Eleventh  
17 Circuit ruled. The State in this Court on the merits  
18 brief changed its position and no longer argues that  
19 they did an investigation, but they now say: We made a  
20 decision because Kirkland report was a red light; we  
21 made a decision not to go forward. That is also  
22 unreasonable.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
24 General Maze.

25 ORAL ARGUMENT OF COREY L. MAZE

1 ON BEHALF OF THE RESPONDENTS

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

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

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

15 MR. MAZE: I --

16 JUSTICE GINSBURG: I just want -- I just  
17 described the Ninth Circuit decision. I didn't say it  
18 was wrong.

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

21 (Laughter.)

22 MR. MAZE: Because not only does it ignore  
23 the plain language and the point you made that it would  
24 be 90 to 99 percent of the time it would cut it out, the  
25 problem is, is that position misses the bigger picture.

1 (E)(1) doesn't only apply when we're looking at (d)(2)  
2 claims. In fact, (d)(2) claims are a very, very small  
3 percentage of what the States deal with in habeas work.  
4 Typically what we're dealing with are (d)(1) claims or  
5 claims that weren't even adjudicated on the merits in  
6 the State court. Let's say it was procedurally barred  
7 in the State court and we're looking at the procedural  
8 default rule.

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

15 CHIEF JUSTICE ROBERTS: Well, isn't it --  
16 isn't it the case that under (d)(1) or (d)(2) that's a  
17 threshold determination, and once you get over that,  
18 (e)(1) would have work to do in determining whether  
19 there was a violation of the Constitution or laws in the  
20 first place?

21 MR. MAZE: Yes, (e)(1) is always going to  
22 have an application. We would say that it has an  
23 application at the moment the petition is filed; that  
24 is, every single subsidiary finding of fact is presumed  
25 to be true. Let's take a (d)(1) example, Terry Williams

1 v. Taylor. This Court said that you could overcome the  
2 (d)(1) bar in Terry Williams because they had applied  
3 the wrong law. They had applied Lockhart to  
4 Strickland's prejudice inquiry. So you jumped over the  
5 (d)(1) bar.

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

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

14 MR. MAZE: Correct.

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

17 MR. MAZE: Yes.

18 CHIEF JUSTICE ROBERTS: -- and asks whether  
19 it's unreasonable; (e)(1) talks about facts and has a  
20 whole different test. And I -- I guess the difficulty  
21 I've had is -- is reconciling the two. To the extent  
22 you can articulate their differences, why would you do  
23 both?

24 MR. MAZE: And that is the difficulty.  
25 Again, (d)(2) is very limited, the times we use it.

1 But, yes, it is tough because you see both a "clear and  
2 convincing" and an "objectively unreasonable" standard.  
3 But the way to fix the problem is not to cut (e)(1) out  
4 altogether for every type of claim. It's to try to find  
5 a way to be able to work (e)(1) and the (d)(2) standard  
6 together in a very --

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

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

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

11 MR. MAZE: Yes.

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

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

20 JUSTICE BREYER: Uh-huh.

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

24 JUSTICE BREYER: Uh-huh.

25 MR. MAZE: The third fact is Cary Dozier,

1 lead counsel, made the decision not to seek another  
2 evaluation; and the fourth fact is, is that Cary Dozier,  
3 lead counsel, decided not to present the Kirkland report  
4 or similar evidence to the jury. Those are your four  
5 facts that are presumed correct under (e)(1).

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

11 MR. MAZE: The reason --

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

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

15 JUSTICE BREYER: It didn't say that. What  
16 it says in (e)(1) is (e)(1) is talking about in a  
17 proceeding instituted by an application by a person in  
18 custody, the factual issue is presumed correct. But if  
19 you fail to develop -- you know, in a proceeding, it's  
20 presumed correct.

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

1 all the work.

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

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

14 There are also a host of subsidiary findings  
15 of historical fact because the attorneys testify and  
16 documents are produced, and there are conflicts in the  
17 testimony. And so there's a question of did -- did  
18 Dozier and Ralph talk about this on a particular day?  
19 Did Trotter write a letter to so-and-so? And so forth.  
20 So you've got all these subsidiary -- all these findings  
21 of historical fact, and they are to be reviewed under  
22 (e)(1), under the plain language of (e)(1).

23 MR. MAZE: Right.

24 JUSTICE ALITO: And then after they're  
25 reviewed under the plain language of (e)(1), you turn to

1 the question under (d)(2), which is whether the decision  
2 about whether there was a strategic decision was based  
3 on -- based on an unreasonable determination of facts.

4 MR. MAZE: Correct. And, Justice --

5 JUSTICE ALITO: So there's no conflict.

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

9 JUSTICE BREYER: I see that. I see that.

10 MR. MAZE: The fourth --

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

13 MR. MAZE: Yes.

14 JUSTICE BREYER: And the problem that I see  
15 with that -- now I see why it's controverted, but the  
16 problem with it, with these standards of review, it just  
17 -- it mixes people up --

18 MR. MAZE: Right.

19 JUSTICE BREYER: -- and it sounds as if  
20 you're just bringing in a hammer after you've brought in  
21 a saw, and the hammer looks a little tougher than the  
22 saw, and -- but why get into all this business?

23 MR. MAZE: Because -- I would come back with  
24 the same, that this is almost like having -- because  
25 (d)(2) is so limited in what we do, you have a toe ache

1 but you're asking us to cut the leg completely off. I  
2 mean, there's a much broader use of (e)(1) --

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

7 MR. MAZE: Correct.

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

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

21 JUSTICE BREYER: Well, we have one here, and  
22 my real objection, I guess -- and it's interesting, I  
23 now see the conflict, with Justice Alito's clear  
24 explanation of it. And I -- I suppose the -- the thing  
25 I would ask you then is, look, my objection to it,

1 hypothetically, is it's too complicated. Lawyers have  
2 enough trouble trying to figure this out.

3 MR. MAZE: I agree.

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

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

15 But then you came back and said in the  
16 limited circumstances in which we have a (d)(2) claim --  
17 not a (d)(1) or a procedurally barred claim, but a  
18 (d)(2) claim -- if the Court came back and said we're  
19 going to treat objectively unreasonable as the  
20 equivalent of clear and convincing evidence -- that  
21 means if you can prove that something is objectively  
22 unreasonable, it also proves by clear and convincing  
23 evidence it's wrong -- then that would not be a problem.

24 But, again, what we're saying to the Court  
25 is, is if you say that, you need to also say that (e)(1)

1 is still not tethered to extrinsic evidence --  
2 evidentiary hearings, because (e)(1) applies in a much  
3 broader scope than just the (d)(2) question.

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

8 MR. MAZE: Correct.

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

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

17 JUSTICE SOTOMAYOR: Well, that's why he -  
18 that's why he starting --

19 MR. MAZE: Right.

20 JUSTICE SOTOMAYOR: -- from, I think what  
21 he's saying is, what your adversary responded to Justice  
22 Ginsburg, unreasonable really is much broader than clear  
23 and convincing --

24 MR. MAZE: Correct.

25 JUSTICE SOTOMAYOR: -- evidence on

1 correctness. You don't need it because whether the  
2 decision is right or wrong is not the issue. Even if  
3 it's wrong, it could still be reasonably wrong.

4 MR. MAZE: Yes.

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

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

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

15 MR. MAZE: Work it out in theory.

16 JUSTICE SOTOMAYOR: Work it out in theory.  
17 There are --

18 MR. MAZE: Okay.

19 JUSTICE SOTOMAYOR: You see the difficulty  
20 with this case --

21 MR. MAZE: I do.

22 JUSTICE SOTOMAYOR: -- is there's one  
23 factual matter: Was a strategic decision made?

24 MR. MAZE: Right.

25 JUSTICE SOTOMAYOR: There are a bunch of

1 subsidiary facts that -- that were made.

2 MR. MAZE: Right.

3 JUSTICE SOTOMAYOR: If you're applying  
4 (d)(2), the court would look at all the subsidiary facts  
5 and decide not whether they were correct or not, but  
6 whether they were unreasonably incorrect --

7 MR. MAZE: Right.

8 JUSTICE SOTOMAYOR: -- okay? If they  
9 weren't unreasonably incorrect -- so you don't have to  
10 get to the correctness question by clear and convincing  
11 evidence. If they're -- if they're not unreasonably  
12 incorrect, the four subsidiary facts would then support  
13 the fifth general question, correct?

14 MR. MAZE: Correct.

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

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

22 Again, we talked about the four facts that  
23 might lead to the strategic decision. Let's say that  
24 the State court record proves by clear and convincing  
25 evidence that the three counsel never spoke to each

1 other at all about the Kirkland report, and that has  
2 been proved wrong by clear and convincing evidence, but  
3 you have the other three subsidiary findings of fact.

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

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

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

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

24 JUSTICE STEVENS: That's exactly right.

25 MR. MAZE: Correct.

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

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

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

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

1 record is not objectively unreasonable.

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

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

14           The second piece of evidence --

15           JUSTICE GINSBURG: Somebody said it was put  
16 in his mouth. The question was on cross-examination.

17           MR. MAZE: Well, point 2 was not put in  
18 his mouth. Point 2 is page 140 of the joint appendix.  
19 He was specifically asked, do you -- did you call any  
20 witnesses in mitigation? And his answer was: I don't  
21 recall. I know that we talked a lot to psychologists  
22 and so forth.

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

1 talk to psychologists for mitigation purposes.

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

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

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

25           On the page before, 282, he has just said

1 that I could see issues, but because I was the young  
2 attorney, I relied on the senior attorneys to resolve  
3 them.

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

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

20 So, here we are 6 weeks before trial. They  
21 are fighting to exclude evidence that he is prone to  
22 violent behavior and specifically referring to the  
23 Kirkland report. Again, because, the very month before,  
24 Cary Dozier had told Trotter we will not have another  
25 evaluation done because I have read the Kirkland report

1 and we are not going to do it any further.

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

4 MR. MAZE: Yes.

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

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

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

13 MR. MAZE: Absolutely.

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

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

18 JUSTICE SOTOMAYOR: In front of the jury.

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

23 JUSTICE SOTOMAYOR: No, we're not arguing  
24 about the penalty phase.

25 MR. MAZE: Yes.

1 JUSTICE SOTOMAYOR: The issue is if the  
2 trial judge at sentencing did hear about the prior  
3 assaultive behavior anyway, what would have been the  
4 strategic decision not to pursue further evaluations  
5 because they -- there's no likelihood in my mind that  
6 similar assaultive behavior was ever going to be kept  
7 out of the sentencing phase. That's true, isn't it? I  
8 mean, that's one of the strongest aggravating factors  
9 that you could prove, correct?

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

14 JUSTICE SOTOMAYOR: The sentencing --

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

16 JUSTICE SOTOMAYOR: -- jury. Not the  
17 penalty phase.

18 MR. MAZE: Correct.

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

25 MR. MAZE: Let me see if I'm understanding

1 the question correctly. You're saying that let's assume  
2 that it was strategic not to allow the jury that gives  
3 the advisory verdict that can turn into a mitigating  
4 circumstance the ability to find out about the previous  
5 assault and all of his other prior assaults, but not to  
6 seek a further evaluation in time for the judge, who  
7 makes the ultimate sentence -- that's your question?

8 JUSTICE SOTOMAYOR: That's the question.

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

15 In this case, the presentence investigation  
16 report was made. The two prior psychological  
17 evaluations were attached to it by our Rule 26.3.

18 It's -- let me be honest. It is an open question under  
19 Alabama law whether you can present new witnesses and  
20 new evidence in front of the sentencing judge.

21 The Alabama courts, in a case called *Boyd v.*  
22 *State* -- and I will give you the cite; it's 746 So. 2d  
23 364, and the pinpoint is 398 -- has said counsel cannot  
24 be ineffective for failing to put on new witnesses and  
25 new experts in front of the sentencing judge because our

1 statute doesn't give you the opportunity, doesn't allow  
2 for it.

3 All that the sentencing hearing in front of  
4 the judge is for is for the judge to allow counsel to  
5 give a final argument after the presentence  
6 investigation report has come in and counsel has ensured  
7 that it's correct.

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

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

23 JUSTICE KENNEDY: That -- that brings us to  
24 the point of the beginning. And could you give me, in  
25 summary form, your best interpretation of both (d) and

1 (e) -- (d)(1), (d)(2), (e)(1) -- in light of the  
2 deference that the Federal courts should pay to State  
3 determinations?

4 It seems to me that, if you use -- if you  
5 reserve (e)(1) for cases in which there's a hearing in  
6 the district court, then it's somewhat counterintuitive  
7 because the strongest standard applies to the accused.  
8 He has the greatest burden when the State hearing was  
9 the least effective.

10 On the other hand, if they overlap, they're  
11 -- then (d)(2) is often superfluous. So I have a choice  
12 of something --

13 MR. MAZE: Right.

14 JUSTICE KENNEDY: -- that's counterintuitive  
15 or superfluous, and I don't know which one to take.

16 MR. MAZE: I agree. If --

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

20 MR. MAZE: There is.

21 JUSTICE KENNEDY: Res judicata doesn't work.

22 MR. MAZE: Right.

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

25 MR. MAZE: If I may, let me give you the way

1 we see (e)(1) working on a broader scope. And we ran  
2 into the problem that Mr. Chief Justice had mentioned  
3 earlier, about how (e)(1) applies to (d)(2).

4 Here's how we believe (e)(1) works  
5 altogether under AEDPA: A petition is filed. At the  
6 moment that petition is filed, all subsidiary findings  
7 of fact are presumed correct under (e)(1). The next  
8 question you should answer should be will extrinsic  
9 evidence come in, either under Rule 7 through  
10 affidavits, et cetera; under Rule 8 in evidentiary  
11 hearing.

12 If the answer to the question is, yes, we  
13 will accept extrinsic evidence, then you accept the  
14 extrinsic evidence, and you have the question this Court  
15 couldn't answer last year in *Bell v. Kelly*. How does  
16 2254(d) work after that?

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

22 The problem runs in when you have a (d)(2)  
23 claim with new extrinsic evidence -- with no extrinsic  
24 evidence. Excuse me. The way I think that it should  
25 work and the way it will work all the way down the line,

1 no matter how the Court comes to it, is to say that the  
2 smaller subsidiary findings of fact are presumed correct  
3 until, in this case, the record evidence shows that  
4 they're clear and convincingly wrong.

5 An example of that would be Miller-El II.  
6 In Miller-El II, you found that the state record  
7 evidence proved that the finding that there was sexual  
8 abuse in the -- in the State court records was proved  
9 wrong by clear and convincing evidence.

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

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

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

25 Having found, let's say, two of the five

1 facts to fail that test, you then go up to (d)(2) and  
2 say, okay, in light of the fact that two of the facts --  
3 in light of the fact -- since two of the facts that the  
4 court relied on were false, was the decision vitiated by  
5 that reason, or was it nonetheless a reasonable  
6 determination?

7 I mean, once you focus on the fact that  
8 (e)(1) applies to facts and (d)(2) applies to the  
9 decision, it's whether the decision was -- was based on  
10 an unreasonable determination of the facts.

11 MR. MAZE: I think that, in 2 minutes,  
12 you've said it better than I did in 20.

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

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

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

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

7           JUSTICE KENNEDY: Well, I don't think  
8 they've been handling it. I think there's a tremendous  
9 confusion, and I -- I find it very difficult to write an  
10 opinion to give them guidance as to when they can set  
11 aside hearings, to what extent they have to review the  
12 entire record.

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

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

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

6           I would simply might like to make the point,  
7 regardless of how the Court comes out on the (d)(2)  
8 question on deficient performance, it cannot overcome  
9 the 2250(d) bar for prejudice here because, again,  
10 simply knowing that someone had the low IQ and had a low  
11 grammar school kind of education level, we are in the  
12 unique position where the sentencer actually knew that.

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

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

20           CHIEF JUSTICE ROBERTS: Thank you, General.

21           MR. MAZE: Thank you.

22           CHIEF JUSTICE ROBERTS: Mr. Scanlon, you  
23 have 3 minutes remaining, but I'll give you more,  
24 since I'd like to start with a question. My -- my first  
25 question was whether your petition was under (d)(2), and

1 during the argument, I went back and looked at the  
2 petition.

3 And I see the exact language of (d)(1)  
4 quoted in paragraphs 45, 52, 58, 63, 71, 76, 82, 90, 94,  
5 97, and 104 -- (d)(1) -- and, unless I'm missing it,  
6 nowhere do I see the language of (d)(2). I see the  
7 language of (d)(2) in your cert petition questions.

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

11 REBUTTAL ARGUMENT OF KERRY A. SCANLON

12 ON BEHALF OF THE PETITIONER

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

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

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

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

5           CHIEF JUSTICE ROBERTS: Well, yes, I find it  
6 hard for you to -- to understand how you can say it was  
7 focused on when you quote (d)(1) 12 times and never  
8 quote (d)(2). It would seem to me that the focus was on  
9 (d)(1).

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

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

24           And, Justice Alito, in your example, the  
25 problem in this case was that they looked at subsidiary

1 facts; half of them were immaterial to the claim  
2 completely. And then the State court jumped from the  
3 fact that those were not rebutted by clear and  
4 convincing evidence to deciding immediately that  
5 everything was therefore reasonable.

6           And that's why the courts have had a hard  
7 time with this standard, is AEDPA is hard enough to  
8 understand as it is, but if they are asked to put in a  
9 correctness standard on top of a reasonableness  
10 standard, and then you've got the difficulty of defining  
11 what's a subsidiary finding. And, Justice Scalia, the  
12 points you made -- it's actually very difficult, because  
13 (e)(1) focuses on the determination of a factual issue;  
14 (d)(2) focuses on determination of the facts. It's  
15 not a decision in (d)(2); it's the determination of the  
16 facts.

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

20           MR. SCANLON: Right, and what the court --

21           JUSTICE SCALIA: It focuses on the decision,  
22 whether the decision --

23           MR. SCANLON: Right.

24           JUSTICE SCALIA: -- could have been reached  
25 without the use of any facts that had been found to be

1 false.

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

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

9 MR. SCANLON: Yes, there is. But in this  
10 case, I want to make it clear that whatever the standard  
11 the Court adopts in this case, the Petitioner has  
12 clearly made its case, because there was evidence. They  
13 never did any investigation when they had this strong  
14 lead. And Strickland and Wiggins, if they mean  
15 anything, means that you have to make an informed  
16 decision after an investigation.

17 And in this case, there was no  
18 investigation. They now concede that, and there was no  
19 reasonable decision made that the investigation should  
20 be limited. And the Eleventh Circuit got that right.  
21 They simply found the wrong facts.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
24 The case is submitted.

25 (Whereupon, at 12:04 p.m., the case in the

1 above-entitled matter was submitted.)

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