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IN THE SUPREME COURT OF THE UNITED STATES

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VINCENT CULLEN, ACTING WARDEN, :

Petitioner :

v. : No. 09-1088

SCOTT LYNN PINHOLSTER :

- - - - - x

Washington, D.C.

Tuesday, November 9, 2010

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:04 a.m.

APPEARANCES:

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Attorney General, Los Angeles, California; on behalf
of Petitioner.

SEAN K. KENNEDY, ESQ., Federal Public Defender, Los
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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 09-1088, Cullen v. Pinholster.

5 Mr. Bilderback.

6 ORAL ARGUMENT OF JAMES W. BILDERBACK, II,

7 ON BEHALF OF THE PETITIONER

8 MR. BILDERBACK: Mr. Chief Justice, and may
9 it please the Court:

10 There are three main points I wish to
11 emphasize to the Court this morning: First, because the
12 California Supreme Court rejected Mr. Pinholster's claim
13 of ineffective assistance of counsel on its merits,
14 Federal habeas corpus relief is unavailable under 28
15 U.S.C. section 2254(d)(1) unless Mr. Pinholster first
16 met his burden of demonstrating that the State court
17 rejection of his claim was unreasonable. He did not do
18 that in this case, and thus the lower courts erred in
19 granting him habeas corpus relief.

20 Second, because Mr. Pinholster never even
21 alleged, let alone proved, that he could not have
22 presented the factual basis upon which the Ninth Circuit
23 predicated its decision to grant relief when he was in
24 the State court, 2254(e)(2) should have been a barrier
25 to the State court Federal evidentiary hearing.

1 JUSTICE SOTOMAYOR: Could we just clarify
2 what you mean by "factual basis"? To be precise, he
3 didn't -- because he didn't present the expert opinion
4 with the diagnosis, or because the diagnosis was based
5 on a series of facts that, to me, appear to have been
6 presented fully to the State court; is that correct?

7 MR. BILDERBACK: Yes.

8 JUSTICE SOTOMAYOR: With the exception of
9 the fact that the defense attorneys only worked 6 hours,
10 the billing records. That -- I think that's the only
11 underlying facts to the opinion that appear new; am I
12 correct?

13 MR. BILDERBACK: No, Your Honor. The
14 diagnosis itself is a fact. The --

15 JUSTICE SOTOMAYOR: All right. So we are
16 only talking about the expert opinion facts being new?

17 MR. BILDERBACK: We -- there are a number of
18 facts that were new in the Federal --

19 JUSTICE SOTOMAYOR: What -- besides the
20 opinion, what were they?

21 MR. BILDERBACK: Well, as the Court
22 adverted, there was also the notion that there was
23 somehow a limited amount of time, specifically --

24 JUSTICE SOTOMAYOR: Well, he did allege that
25 in his petition before the State court?

1 MR. BILDERBACK: He did not allege 6 and a
2 half hours, Your Honor.

3 JUSTICE SOTOMAYOR: Not specifically, but he
4 said that his counsel didn't prepare.

5 MR. BILDERBACK: That's precisely correct,
6 Your Honor, but the court --

7 JUSTICE SOTOMAYOR: And he pointed to the
8 fact that counsel basically said at the trial, I didn't
9 think we were going to have a mitigation hearing, as
10 proof of that, correct?

11 MR. BILDERBACK: He did point to that, Your
12 Honor, but we would note that the 6-and-a-half-hour
13 conclusion drawn by the Ninth Circuit and drawn by the
14 district court is not fairly supported by the record.

15 But, putting that aside, the principal fact
16 that we are focusing on that we think is a new and
17 significant change in the factual posture of the case
18 from the time he was in State court to the time that he
19 was in Federal court is the diagnosis of organic brain
20 damage by the expert, which is not simply the opinion of
21 the expert, but a question of material fact that was
22 relied upon by the Ninth Circuit in its decision to
23 grant relief.

24 The failure to ever tell the California
25 Supreme Court that petitioner has organic brain damage

1 and the centrality of that factual determination on the
2 Ninth Circuit's decision making is -- was a substantial
3 difference between the facts upon which the State --
4 with which the State court was presented and the facts
5 that the Ninth Circuit granted -- rested its decision to
6 grant relief.

7 JUSTICE KAGAN: Mr. Bilderback, I know that
8 that's the principal fact that you rely upon, that
9 there's a difference, but could you give us a full
10 catalogue of the facts that are different in the Federal
11 court record from the facts that are different in the
12 State court record? Was there anything other than the
13 medical testimony and the billing sheets, or is that the
14 extent of it?

15 MR. BILDERBACK: Those are -- those are the
16 significant facts that we think are -- are relevant to
17 -- to the discussion of whether or not the State court
18 determination should be or could properly be found to
19 have been unreasonable, was -- was the difference in the
20 specificity of the -- of the nature of the claim of
21 deficient performance in terms of the time sheets and --

22 CHIEF JUSTICE ROBERTS: What about
23 Dr. Stalberg's new deposition? Doesn't that count as a
24 new fact? I'm looking at your brief on page 11. At a
25 deposition just before the evidentiary hearing,

1 Dr. Stalberg revealed that nothing in the new material
2 called into question his original diagnosis.

3 MR. BILDERBACK: Oh, certainly, Your Honor.
4 I -- I understood the questions from the Court to be
5 asking which new facts were relied upon in the decision
6 to grant relief. Certainly, there were new facts
7 adduced during the Federal proceedings that we think
8 inveighed against a grant of relief, and I think that
9 the fact that Your Honor points to is precisely one of
10 those.

11 But, in terms of the new facts -- and let's
12 be clear that 2254(d)(1) is a rule that says that relief
13 cannot be granted if the State court determination was
14 unreasonable. To the extent that relief is denied, the
15 inclusion of new facts in the analysis may not run afoul
16 of (d)(1) at all. So here, because the Ninth Circuit
17 relied so heavily upon the organic brain damage
18 diagnosis and because that diagnosis --

19 JUSTICE SOTOMAYOR: Could we just be clear?

20 MR. BILDERBACK: Yes.

21 JUSTICE SOTOMAYOR: I thought that
22 Dr. Stalberg's affidavit in the State court said that he
23 had brain damage of some sort.

24 MR. BILDERBACK: That's not accurate, Your
25 Honor.

1 JUSTICE SOTOMAYOR: I thought it said that
2 he -- the school records show evidence of mental
3 disturbances and some degree of brain damage.

4 MR. BILDERBACK: I believe that --

5 JUSTICE SOTOMAYOR: What he did say -- I
6 think there's a difference between -- because he pointed
7 to epilepsy. He pointed to a series of things that
8 showed some brain damage. I just want to clarify.

9 MR. BILDERBACK: Certainly.

10 JUSTICE SOTOMAYOR: It's not organic damage;
11 the issue is whether the organic damage created a
12 dysfunctionality that contributed to the events. That's
13 what he didn't know, and he said: It's not -- I would
14 have needed more information to figure that out.

15 MR. BILDERBACK: Well, he -- he never said
16 that if he had had the additional information, that he
17 would have diagnosed Mr. Pinholster as suffering from
18 organic brain damage. He --

19 JUSTICE SOTOMAYOR: No, no, no. Organic
20 brain damage dysfunctionality. There's a difference
21 between the two diagnoses.

22 MR. BILDERBACK: Absolutely, Your Honor, but
23 I want to be clear that Dr. Stalberg never diagnosed
24 Mr. Pinholster with organic brain damage, even at the
25 conclusion of the Federal evidentiary hearing, following

1 which he had access to all of the facts that habeas
2 counsel was -- managed to unearth during the course of
3 the Federal proceedings.

4 JUSTICE SOTOMAYOR: Your adversary points to
5 the difference in language between (d)(1) and (d)(2).

6 MR. BILDERBACK: Yes.

7 JUSTICE SOTOMAYOR: (D)(2) refers to
8 unreasonable in light of the facts, unreasonable
9 determination of facts in light of the record before the
10 court, and subdivision (1) doesn't. It speaks only an
11 unreasonable decision.

12 Could you address the difference in the
13 language and why that difference doesn't suggest that
14 the question of an unreasonable legal determination
15 should be based on the record before the Federal court,
16 which in most instances, the vast majority of instances,
17 is just a State court record?

18 MR. BILDERBACK: That's correct, Your Honor.

19 JUSTICE SOTOMAYOR: But there are exceptions
20 in (e)(2) for hearings.

21 MR. BILDERBACK: Yes.

22 JUSTICE SOTOMAYOR: So why shouldn't the
23 first subdivision be read to mean unreasonable legal
24 determination in light of the record before the court?

25 MR. BILDERBACK: Because subdivisions (d)(1)

1 and (d)(2) serve very different purposes. Subdivision
2 (d)(2) is concerned with determinations of fact, and the
3 additional language that the Court points to was an
4 attempt to limit the bases upon which a Federal court
5 could overturn a State court factual determination.

6 Prior to the passage of AEDPA, a Federal
7 court could overturn a State court determination of fact
8 not simply because the evidence was lacking, which is
9 the current state of the law, but also because it found
10 some sort of procedural defect or a number of other
11 bases that had grown up in the common law. With the
12 passage of AEDPA, Congress limited the bases upon which
13 a State court factual determination could be rejected to
14 only one.

15 JUSTICE SOTOMAYOR: Are you suggesting that
16 if a State court gets a proffer of evidence from a State
17 petitioner who says, I have a billing record that shows
18 that my attorney worked only 6 hours; and the State
19 says, we're not admitting that billing record because it
20 hasn't been authenticated, so we're not looking at that
21 fact; and the Federal habeas looks at what was proffered
22 and says, this is authentication under any rule, State
23 or Federal -- it was improperly admitted, so their legal
24 determination was wrong? Not unreasonable legal
25 determination as to the IAC, because in fact -- I used

1 the example of 6 hours. The billing record could show 5
2 minutes, so that there's no dispute that the person
3 spent essentially no time on mitigation, didn't present
4 anything. The clearest case you want. You're
5 suggesting that a habeas corpus court is no longer
6 permitted to look at that new evidence?

7 MR. BILDERBACK: Well, what I'm suggesting
8 is that the language of (d)(2) was designed to limit the
9 bases upon which a Federal court could overturn a State
10 court factual finding. Of course, our case doesn't
11 really involve (d)(2).

12 JUSTICE SOTOMAYOR: No, but I'm going back
13 to (d)(1).

14 MR. BILDERBACK: Yes, and the -- the
15 symmetrical language in (d)(1) is the language --

16 JUSTICE SOTOMAYOR: It's not symmetrical,
17 though.

18 MR. BILDERBACK: I would -- I would
19 disagree, because I believe the symmetrical language in
20 (d)(1) is the limitation on the Federal court's reliance
21 on lower Federal court authority to overturn State court
22 factual determinations.

23 Prior to the passage of AEDPA, lower Federal
24 courts were free to look to their own prior precedent,
25 the prior precedent of the circuit courts, to say that

1 the State court determination of a question of law was
2 unreasonable. In both statutes -- statute --
3 subdivision (d)(1), which has to do with questions of
4 law and mixed questions, the additional language
5 narrowed the focus to a new and more limited basis for
6 Federal review or to find the State court determination
7 unreasonable.

8 In (d)(2), there is this symmetrical
9 limiting language which overturned what had historically
10 been several bases for rejecting a State court factual
11 determination.

12 But, in both sections, the law is clear that
13 the - the examination is of the application that was
14 conducted by the State court. The section itself speaks
15 in the past tense, and the very concept of
16 reasonableness compels the conclusion that the State
17 court determination can only fairly be read in light of
18 -- in light of the facts that were squarely presented to
19 the State court. Otherwise we could be in a situation
20 where all of the facts before the State court are
21 entirely removed, an entirely new set of facts are
22 proven up in the Federal court, and we're going to say
23 that, notwithstanding that wholesale change in the
24 factual basis of the claim, that the State court
25 determination was not merely wrong, but unreasonable.

1 And it is this notion of unreasonableness,
2 and it is the primacy of the State court determination
3 of the claim that is the central feature of the AEDPA
4 reforms to Federal habeas corpus. The point was to make
5 State court determinations the primary forum for
6 adjudicating Federal constitutional claims, and Federal
7 courts were only supposed to interfere in those
8 determinations reluctantly. And if you examine the
9 language of AEDPA, you'll see that, in -- in many
10 respects, it mirrors the language of 2244, the "second
11 or successive" language in Federal court.

12 The purpose of AEDPA was to enforce upon
13 Federal courts the same respect for State court
14 determinations of claims that Federal courts showed to
15 their own prior State court determinations of claims.
16 State court determinations of Federal constitutional
17 claims are not lesser creatures deserving of less
18 respect than Federal court determinations of claims.
19 And here they put very specific language in the statute
20 that was designed to ensure that when a Federal court is
21 examining a State court determination of a claim, it
22 limits itself to only those facts that were before the
23 State court. And, indeed, this Court has specifically
24 said so in *Holland v. Jackson*, that the (d)(1)
25 determination is done in light of the record before the

1 State court. Similarly, in Michael --

2 JUSTICE SOTOMAYOR: Well, there's a
3 paragraph right after what you cite that basically says
4 unless there's a hearing. So Holland works -- doesn't
5 stop at the point that you're quoting. It goes on in
6 the very next sentence to say "unless a hearing has been
7 held."

8 MR. BILDERBACK: And if a hearing is
9 appropriately held, that's a very different question.
10 But as this Court stated in Michael Williams, if the
11 2254(d)(1) question is dispositive, no Federal
12 evidentiary hearing is required. And that would be our
13 position in this case. Because this claim survived
14 2254(d)(1) scrutiny, the Federal evidentiary hearing
15 should not have been held, just as, in the Michael
16 Williams case, this Court ratified the decision of the
17 district court not to hold an evidentiary hearing
18 because the claim failed under (d)(1).

19 JUSTICE SOTOMAYOR: So why don't we start
20 the way that you are proposing, which is to start with
21 (e)(2): Was the hearing appropriately held, first? And
22 if it was, why are we excluding the evidence that was
23 developed at that hearing? What you're proposing is the
24 reverse, to say we start at (d)(1) --

25 MR. BILDERBACK: I am.

1 JUSTICE SOTOMAYOR: -- and only if the
2 petitioner wins under (d)(1), on proving that the
3 decision on the facts before that -- the State court
4 were reasonable, that you ever get to (e)(2).

5 MR. BILDERBACK: And that's why --

6 JUSTICE SOTOMAYOR: Why is that logical?
7 Why isn't it logical to start with (e)(2), which is --
8 it says in (e)(2) these are the prerequisites to having
9 a hearing, you prove you're entitled to it. Why are we
10 excluding those facts from the decision makers'
11 consideration?

12 MR. BILDERBACK: Well, setting aside for the
13 moment a point I hope to get to, which is I believe that
14 they did fail under (e)(2); but assuming the premise of
15 the question, which is that (e)(2) has been satisfied
16 and that the Federal evidentiary hearing might be
17 appropriate, it makes no more sense to conduct a Federal
18 evidentiary hearing before you conduct a (d)(1) analysis
19 than it would to conduct a Federal evidentiary hearing
20 before you do the 2254(a) analysis of whether there's a
21 Federal question, the 2254(b) and (c) analysis of
22 whether the claim is properly exhausted, or the 2254(d)
23 analysis of whether the State court resolution of the
24 claim was reasonable.

25 The statute is laid out in a methodical,

1 calculated, and logical manner. And if the court just
2 adheres to the calculated, methodical, and logical
3 manner of the statute --

4 JUSTICE SOTOMAYOR: Counsel, I can tell you
5 the one thing you've said that makes no sense: There's
6 nothing logical about this statute, or clear about this
7 statute, as the legion of cases that the lower courts
8 have addressed in trying to interpret it and as the
9 legion of Supreme Court cases that have dealt with this
10 statute --

11 MR. BILDERBACK: Well, I would submit that
12 we could bring some much-needed clarity to some of the
13 confusion on these issues if the -- I think the plain
14 language of 2254(d)(1), which is retrospective and
15 contextual, is -- was -- is given its full force and
16 effect.

17 CHIEF JUSTICE ROBERTS: How does that
18 work --

19 JUSTICE KAGAN: Have you thought about --

20 CHIEF JUSTICE ROBERTS: How does that work,
21 counsel, if you have new evidence? My claim was
22 decided, it was reasonable under (d)(1) based on what
23 they knew, but I've come up with new evidence that I
24 think could not have been reasonably discovered before
25 the (d)(1) hearing? What happens to that? It seems to

1 me you determine whether that evidence can come in under
2 (e)(2).

3 MR. BILDERBACK: Well, the -- the question
4 -- and I think the question the Court's asked seems to
5 implicate the ACLU's hypothetical in their amicus brief.
6 But the problem with doing the (e)(2) analysis before we
7 examine the reasonableness of the State court
8 determination is those new facts that were never
9 presented to the State court are going to, as it did in
10 this case, confound the court's analysis of whether the
11 State court determination was reasonable.

12 If new facts arise which call into question
13 some factual determination by the State court, or let's
14 say new evidence arises which calls into question a
15 State court factual determination, of course that
16 implicates subdivision (d)(2) and that -- that
17 implicates subdivision (e)(1), neither of which are in
18 play in our case. But, under those circumstances, we
19 might find ourselves asking the question, depending upon
20 the nature of the new evidence, whether or not that
21 evidence is of such a caliber that it's going to
22 transform the claim. And if it so transforms the claim
23 that we're no longer going to consider it the same claim
24 that was adjudicated by the State court --

25 CHIEF JUSTICE ROBERTS: So -- so you

1 think -- and I have trouble understanding the parties'
2 position on this. When you talk about claims, you don't
3 mean totally different legal bases; you mean different
4 evidentiary support. The claim that it's ineffective
5 assistance of counsel based on organic -- the failure to
6 discover the organic brain damage you say might or might
7 not be considered a new claim, and, therefore, (d)(1)
8 would not be a bar to that.

9 MR. BILDERBACK: Oh, it's our position that
10 the introduction of the organic brain damage evidence
11 fundamentally changes the nature of this claim. So that
12 this -- the claim upon which the Ninth Circuit granted
13 relief is a claim that was never presented to the State
14 court. It is not simply a matter of -- of additional
15 evidence that tends to support. And the best
16 evidence --

17 CHIEF JUSTICE ROBERTS: So then -- and the
18 reason that doesn't undermine your position is because
19 you think it's evidence that could have been discovered
20 and presented earlier?

21 MR. BILDERBACK: Well, indeed, the very
22 nature of their claim compels the conclusion that it
23 could have been presented.

24 CHIEF JUSTICE ROBERTS: I understand that.
25 But if it were evidence that could not have been

1 discovered previously, then (d)(1) does not bar looking
2 at (e)(2)?

3 MR. BILDERBACK: Depending upon the nature
4 of the new evidence.

5 CHIEF JUSTICE ROBERTS: If it's really a new
6 claim?

7 MR. BILDERBACK: And, again, I think we have
8 a pretty well-settled body of jurisprudence that's
9 instructive on that, and that is the 2244(b)(2)(B)(ii)
10 analyses of when a claim that was previously adjudicated
11 on the merits by a Federal court can be revisited in a
12 subsequent petition that is filed in the Federal court.
13 If the nature of the claim is so fundamentally changed
14 that we're going to consider it a new claim, then it is
15 not the same claim that was presented to the State
16 court.

17 However, because it wasn't presented to the
18 State court, depending upon the availability of a State
19 remedy or any State procedural bars, those sort of
20 traditional habeas corpus limitations --

21 CHIEF JUSTICE ROBERTS: I suppose -- I
22 suppose the Federal court can send it back to the State
23 court for exhaustion.

24 MR. BILDERBACK: If -- if that's -- if
25 that's an appropriate remedy. But the -- the problem

1 with the procedure that was used in this case, and --
2 and some of this I acknowledge is idiosyncratic to this
3 case because the district court was unaware that AEDPA
4 applied until very late in the proceedings.

5 But the problem with following a procedure
6 that allows the development of evidence notwithstanding
7 the reasonableness of the State court determination is
8 you are very often, if not typically, going to find a
9 situation where, even if the State court determination
10 of the claim was wholly reasonable, the claim has
11 changed based upon these new facts developed for the
12 very first time in Federal court, and then that's going
13 to mean that it's a substantially transformed claim.

14 JUSTICE ALITO: What happens to the --

15 JUSTICE KENNEDY: I'll -- I'll think it
16 through, but it seems to me that it's not consistent
17 with what I thought the theory of your brief was for you
18 to tell the Chief Justice that this is -- the
19 hypothetical was a new claim.

20 Take -- take the ACLU hypothetical that you
21 discuss in your reply brief. Is -- is that a new claim?

22 MR. BILDERBACK: I don't think that the ACLU
23 hypothetical states a new claim. I was speaking of in
24 our case --

25 JUSTICE KENNEDY: Okay.

1 MR. BILDERBACK: -- with the addition of the
2 organic brain damage evidence. So I think that in -- in
3 the hypothetical that the ACLU --

4 JUSTICE KENNEDY: But if it's a new claim,
5 then if -- we don't look to (d) because it wasn't
6 adjudicated on the merits.

7 MR. BILDERBACK: Right.

8 JUSTICE KENNEDY: -- and so you go to (e).

9 MR. BILDERBACK: Well, if it was -- yes,
10 that's -- that's absolutely correct, Your Honor. If you
11 have a claim presented to the Federal court that was
12 never adjudicated on its merits by the State court, and
13 if we're further -- further positing that there's no
14 available State court remedy --

15 JUSTICE KENNEDY: Well then, now it seems to
16 me that you're saying that this is an (e) claim and that
17 you'll just fight the battle on whether or not it could
18 have been discovered through the exercise of due
19 diligence. You're -- and you're out of the
20 (d)(1)/(d)(2) framework that you've been arguing up to
21 this point, based on the Chief Justice's question and
22 your response.

23 MR. BILDERBACK: If we assume that the claim
24 is a new claim, if we assume --

25 JUSTICE KENNEDY: Well, I thought you said

1 you agreed that it was.

2 MR. BILDERBACK: In my case, I agree that
3 the facts presented to the Federal court were never
4 presented to the State court, and those facts
5 fundamentally transformed the claim such that the claim
6 upon which the Ninth Circuit granted relief was never
7 presented to California.

8 JUSTICE KENNEDY: Okay. So then this is an
9 (e)(2) case.

10 MR. BILDERBACK: No, Your Honor, because you
11 only can leap to (e)(2) if the State court never had the
12 opportunity to examine the facts of the claim and if the
13 petitioner can show that he could not have previously
14 presented the claim to the State court.

15 JUSTICE SOTOMAYOR: No --

16 JUSTICE KENNEDY: Then it's a procedural
17 bar? Is that --

18 CHIEF JUSTICE ROBERTS: Just a second.

19 JUSTICE KENNEDY: Then it's a procedural bar
20 case?

21 MR. BILDERBACK: Well, depending on how the
22 State court reacts to the new evidence. Yes, if the
23 State court erects a procedural bar then, yes, this
24 Court's well-settled jurisprudence on the question of
25 procedural bars is going to control whether or not we

1 can reach the merits of the claim in Federal court.

2 That's absolutely correct.

3 But here part of the problem in the instant
4 case is that the very nature of the claim that they have
5 presented precludes the conclusion that they could not
6 have presented this evidence to the State court in the
7 exercise of reasonable diligence. They have asserted
8 that any reasonable attorney in 1984 at the time of the
9 trial had to discover the organic brain damage diagnosis
10 that Dr. Vinogradov offered in Federal court, but the --

11 JUSTICE KAGAN: Well, Mr. Bilderback, going
12 back to your question of what's a claim. So the claim
13 here could be ineffective assistance at the penalty
14 stage. Or you could be saying, no, the claim is
15 ineffective -- ineffective assistance for failing to
16 present evidence of organic brain damage. That would be
17 a narrower understanding of the claim. Or still
18 narrower, it might be ineffective assistance for failing
19 to present evidence of a particular kind of brain
20 damage, frontal lobe brain damage, which is what the new
21 doctor said, as opposed to what the old doctor said,
22 which was bipolar disorder.

23 So how do we choose the level of generality,
24 if you will, when we try to figure out what the claim
25 is?

1 MR. BILDERBACK: Well, of course, a claim is
2 made up of two components, and one of them is -- is the
3 legal theory of the claim, and the other is the factual
4 landscape that we're asking that legal theory to be
5 applied to. So, for example, if someone were to present
6 to a State court or, frankly, to a Federal court, a
7 claim as general as the first statement that you made,
8 Justice Kagan, that my trial attorney gave me
9 ineffective assistance of counsel at the penalty phase,
10 that's a claim that's void for vagueness.

11 Rule 2 requires that you specifically
12 identify the factual bases of your claim to the Federal
13 court in your Federal petition. And California has a
14 similar rule that requires you to communicate the
15 factual bases of the claim. If we utterly change the
16 factual basis of the claim, then it is in essence a new
17 claim.

18 I see that I'm almost out of time. I'd like
19 to reserve the balance for rebuttal.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 MR. BILDERBACK: Thank you.

22 CHIEF JUSTICE ROBERTS: Mr. Kennedy.

23 ORAL ARGUMENT OF SEAN K. KENNEDY

24 ON BEHALF OF THE RESPONDENT

25 MR. KENNEDY: Good morning, Mr. Chief

1 Justice, and may it please the Court:

2 There has been a lot of discussion about
3 changes from State to Federal court, but if we limit
4 ourselves, even to the evidence that was only presented
5 in State court, the mitigation evidence demonstrates an
6 objectively unreasonable application of Strickland, and
7 the judgment of the Ninth Circuit should be affirmed on
8 that basis alone.

9 We presented a substantial amount of legal
10 specificity and factual specificity in support of our
11 claim. We alleged in State court that his mom had run
12 over his head, that -- at age 2 and a half, and a year
13 later his head had propelled through the windshield in a
14 car accident, and that it caused mental and organic
15 impairments that affect intent and culpability.

16 And Justice Kagan asked, what is the rule
17 for the generality of the claim? I believe it is that
18 which focuses on what is legally relevant in the habeas
19 hearing.

20 JUSTICE SCALIA: Yes, but, look, you say
21 that, even on the basis of the facts before the
22 California court, your client deserved relief. That may
23 well be, but that's not what the -- what the Ninth
24 Circuit said. The Ninth Circuit said that your client
25 deserved relief in light of the facts before the

1 California court plus other facts.

2 Now, I'm not going to go back and answer a
3 hypothetical question of whether, if the Ninth Circuit
4 said on the basis of those facts alone that were before
5 the California court, if -- if the Ninth Circuit had
6 said that, would that opinion be affirmed? That's not
7 the opinion they came up with. They added facts. So it
8 seems to me that you have to live with what they wrote.
9 And the basis of their decision included additional
10 facts.

11 MR. KENNEDY: We do have to live with the
12 basis that the Ninth Circuit wrote, and the Ninth
13 Circuit majority en banc said that there were alternate
14 bases for granting relief. It felt that the (e)(2)
15 Federal hearing was compelling, but it specifically
16 stated that if you set aside the new mental health
17 theories that were introduced in Federal court and
18 focused only on the historical upbringing and childhood,
19 and the mental health facts alleged in State court, that
20 basis and that basis alone would support a finding. And
21 the dissent mentions this as well.

22 CHIEF JUSTICE ROBERTS: A finding under --
23 under the standards that we've applied under AEDPA?

24 MR. KENNEDY: Yes, an objectively
25 unreasonable application of Strickland. And --

1 JUSTICE BREYER: That in this case presents
2 no -- no issue. I mean, the -- if their holding is that
3 in the -- in your habeas hearing in State court, the
4 evidence presented in State court at that hearing was
5 sufficient and was required -- required that State court
6 to find that you win on this issue, the State court in
7 holding to the contrary is objectively unreasonable,
8 then you win. And why are we all here?

9 MR. KENNEDY: Yes, and --
10 (Laughter.)

11 JUSTICE SCALIA: That's your very point,
12 isn't it?

13 MR. KENNEDY: In -- in our opposition for
14 cert, we said this, that we thought it should not be
15 granted because of the presentation in State court --

16 JUSTICE BREYER: I mention it not because it
17 wouldn't --

18 CHIEF JUSTICE ROBERTS: We have to determine
19 under AEDPA that it was objectively unreasonable for
20 this lawyer to get a psychiatrist, or whatever his
21 status was; to get a report, which he did, and which he
22 looked at, in which the psychiatrist or psychologist
23 said, look, there's nothing here, and he went through
24 all the stuff that was there; and, in fact, after the
25 Federal evidentiary hearing, he said, well, in light of

1 this new evidence, I'm still correct; and objectively
2 unreasonable for this lawyer to say, look, my best bet
3 is to put his mother on the stand, that that might
4 engender sympathy and portray him as not as bad a guy as
5 everybody says, as opposed to putting on all this
6 evidence that explains why he's such a bad guy. Those
7 are two -- we've said those are reasonable choices.

8 If you're relying on that basis, we have to
9 decide that it is objectively unreasonable for a lawyer
10 to proceed on that basis.

11 MR. KENNEDY: Yes, and it is in the facts of
12 this case, Mr. Chief Justice. First, counsel didn't
13 make a reasoned strategic decision to -- to put forward
14 a certain mitigation strategy based on the mother.
15 Counsel didn't think the case was proceeding to penalty
16 phase.

17 JUSTICE GINSBURG: What about the argument
18 that a good deal of mitigation evidence came out during
19 the trial on the guilt?

20 MR. KENNEDY: It did not come out, Justice
21 Ginsburg. A few little pieces of information were given
22 by Mrs. Brashear, Mr. Pinholster's mom. But there was
23 no relationship of how his traumatic head injuries then
24 affected him and caused him damage. And so the -- the
25 presentation was incomplete. And even the State's own

1 expert, Dr. Stalberg, after he had actually seen all the
2 documents that he would have wanted to receive if he was
3 doing a mitigation mental health phase, he said it was
4 profoundly misleading. And it was.

5 JUSTICE KENNEDY: All right. And this goes
6 back to Justice Scalia's question. The question which
7 we granted -- question 1 is whether the Federal court
8 may reject a State court adjudication of a petitioner's
9 claim as unreasonable based on a factual predicate for
10 the claim that petitioner could have presented in the
11 State court but did not. And that describes what you're
12 talking about in response to Justice Ginsburg.

13 Now, the Petitioner, unaccountably, has told
14 us a few minutes ago that this is a new claim, which I
15 think changes the whole question. But it seems to me
16 the claim is whether there's ineffective assistance of
17 counsel by reason of the mitigation evidence. And in
18 that case, we go back to Justice Scalia's opening
19 question to you: Was it the court relied on different
20 evidence, evidence that was not in the State hearing?
21 And that's the question, whether or not they can do
22 that, if this evidence could have been presented.

23 And certainly it could have been presented.

24 MR. KENNEDY: Well, Justice Kennedy, the
25 Ninth Circuit did make alternative rulings, but turning

1 to the question of the new evidence, we believe the new
2 evidence was properly considered, although the court
3 made it clear that it would affirm based only on what
4 was on State court, because that showing was so
5 substantial in and of itself.

6 But, turning to the new evidence, there is a
7 reason things like this happen. In California, the
8 claim was denied without any hearing and without any
9 explanation. And then the -- the case moves to Federal
10 court. And for the first time, it's the State that
11 starts bringing forth its mental health theory to rebut
12 the offered theory and starts to question whether or not
13 Dr. Stalberg, who is our expert, has a neurology license
14 and can opine on how epilepsy affects intent and
15 culpability.

16 CHIEF JUSTICE ROBERTS: Just to pause for a
17 moment, you said there was no hearing in the State
18 court. Well, that was because the State court, pursuant
19 to the established procedures, assumed everything you
20 wanted to show was true. It's a little bit much. I
21 mean, you were not going to be in any better position
22 after a hearing than you were before the State court.

23 MR. KENNEDY: Mr. Chief Justice, the
24 California Supreme Court didn't tell us what I -- what
25 they did. It is true that there is a procedure for

1 provisionally assuming facts are true. They didn't say
2 that they did that here.

3 And the backdrop against how this case
4 happened in State court is we presented all of the
5 allegations with affidavits in support of them, and the
6 California Supreme Court issued an OSC, which normally
7 means they think if the showing is true, it's got to be
8 granted, and there has to be a hearing and a ruling that
9 describes the reasoning.

10 Then the State filed in State court
11 documents, fairly conclusory, saying: You shouldn't
12 believe Dr. Woods. He came into this evaluation 10
13 years after the fact. You shouldn't believe him. You
14 shouldn't believe trial counsel. Trial counsel was
15 disbarred.

16 And after that, the State Supreme Court
17 withdraws the OSC and issues a postcard denial. That
18 suggests that we didn't get the procedures that are
19 referred to, at least from the State's perspective.

20 JUSTICE ALITO: But isn't it the California
21 rule that a hearing had to have been conducted unless
22 they concluded that the petitioner was not entitled to
23 relief based on the facts alleged in the petition?

24 MR. KENNEDY: I think that's the rule,
25 Justice Alito, but if that is what was done here,

1 because it is the most commonly invoked rule, it was
2 objectively unreasonable, because in light of the
3 presentation that was made in State court -- and I've
4 given the Court some of it -- that was definitely a
5 showing of an unreasonable application of Strickland,
6 because --

7 JUSTICE ALITO: Well, to get back to the
8 question the Chief Justice asked before, trial counsel
9 did consult a psychiatrist, Dr. Stalberg, and his report
10 was very unfavorable.

11 Now, it's your -- it's your argument that it
12 was ineffective for them not to continue their search
13 for a helpful expert and come upon Drs. Vinogradov and
14 Olson or someone like them during that period of time?
15 Is that -- is that the claim?

16 MR. KENNEDY: I'm sorry, Justice Alito,
17 that's not my argument. I think there are many times
18 where it would be perfectly acceptable for trial counsel
19 to hire a mental health expert, receive a report, and
20 say, based on what we have, we're not going to use this
21 route.

22 But it wasn't acceptable here, because what
23 happened here is they hired a mental health expert in
24 the middle of the guilt phase who went down on a Sunday
25 for 1 to 2 hours without any of the documents that he

1 said -- he said -- that he needed to do a proper
2 mitigation investigation. And he gave them a letter
3 that they had to have known on its face showed
4 Dr. Stalberg did not have enough information to render a
5 competent psychiatric opinion.

6 JUSTICE BREYER: That's -- again, it would
7 be helpful -- maybe you can't do this from the top of
8 your head, but when I looked at the Ninth Circuit en
9 banc decision, I found a long discussion on page 79
10 following by Chief Judge Kozinski in dissent, from which
11 I got the impression that the majority was not saying:
12 We think the State court decision here was unreasonable
13 or violated clearly established law, based on the record
14 before the State court on habeas, State habeas.

15 Now, you've just told me in the 70-page
16 opinion by Judge Smith, there's a paragraph or something
17 that says: Even were all this issue out of it, the
18 extra evidence, we still think that looking just at the
19 evidence before the State court habeas, and just at
20 their decision, we think in light of all these things
21 you now are bringing up that that was a -- was an
22 unreasonable application of clearly established Federal
23 law, or at least was based on an unreasonable
24 determination of the facts; in other words, satisfied
25 (d).

1 Where does it say that? That would save me
2 a lot of time if you know that off the top of your head.

3 JUSTICE SCALIA: Page 35. I've spent all
4 that time.

5 JUSTICE BREYER: Well, that's very good.
6 (Laughter.)

7 MR. KENNEDY: Justice Breyer, the Ninth
8 Circuit said: "Although Pinholster substituted experts
9 during the proceeding who ultimately developed different
10 mental impairment theories, these experts nonetheless
11 relied on the same background facts that Pinholster" --
12 "Pinholster presented to the State court. Accordingly,
13 if 2254(e)(2) were to limit the scope of the evidence
14 before us, it would exclude only the new mental
15 impairment theories introduced in federal court, and
16 their exclusion would not affect our result."

17 JUSTICE BREYER: Well, there you are, and I
18 should have asked Justice Scalia beforehand.
19 (Laughter.)

20 JUSTICE KAGAN: Mr. Kennedy --

21 CHIEF JUSTICE ROBERTS: So you're putting
22 your eggs in the basket that, under AEDPA, what happened
23 here was objectively unreasonable?

24 MR. KENNEDY: Well --

25 CHIEF JUSTICE ROBERTS: Or do you want to go

1 on and look at the question on which we granted cert and
2 argue that we should look at the new evidence or that
3 the State court should look at the new evidence?

4 MR. KENNEDY: Well, we think what happened
5 here was perfectly appropriate for the court to hold a
6 hearing. No hearing had been held in State court, and
7 the Federal court determined that a hearing was
8 appropriate because Pinholster had been diligent in
9 attempting to develop the facts, and that is the test
10 that this Court has set forth in Michael Williams.

11 CHIEF JUSTICE ROBERTS: Well, this -- your
12 friend pointed it out, and I have to say it's a logical
13 conundrum for me, too -- you have to show under (e)(2)
14 that the factual predicate could not have been
15 previously discovered, and your claim is that his lawyer
16 should have discovered this. They both can't be true.
17 And if the former is not true, you don't get a hearing;
18 and if the latter is not true, you don't get relief.

19 MR. KENNEDY: Well, I guess it depends on
20 how one interprets the term "factual predicate," because
21 if we focus on mental health impairments and how
22 impairments affect intent and culpability and how it
23 plays out on the specific facts of the crime, Pinholster
24 did discover those, even though he didn't have discovery
25 or an evidentiary hearing. He did allege them, and he

1 should have been given a hearing where he would have
2 then further developed those facts, just as he did in
3 Federal court, when he received the hearing that he
4 should have received in State court but did not.

5 There's nothing wrong with that. But we
6 don't need that view --

7 JUSTICE SOTOMAYOR: Could you go back to
8 Justice Kagan's earlier question of how we draw the
9 line? At what level of generality is sufficient to say
10 that a factual basis of a claim has been developed?

11 MR. KENNEDY: I think we draw the line by
12 focusing on what is legally relevant, not a DSM opinion.

13 I have to say, as a long-time public
14 defender, my experience is that the mental health
15 professionals often speak about the legally relevant
16 facts in different ways based on the DSM, but to focus
17 on what matters: What was his impairment? How did it
18 affect him?

19 He was, right before the homicides, at the
20 house of a friend in an erratic state, saying he had a
21 message from God, brandishing a knife and putting it
22 into the door. Dr. Stalberg, who did this mid-trial
23 evaluation, said that that was extraordinarily important
24 to him, because it showed that this was not a cold and
25 calculated murderer, as he thought when he didn't have

1 the information, but it showed we had a severely
2 impaired person. And he thought, because of his
3 epilepsy and mental health condition, he was
4 hypersensitive.

5 JUSTICE ALITO: Well, suppose a petitioner
6 in the State post-conviction proceeding proffers an
7 affidavit from one mental health expert alleging one
8 type of mental disorder, and then after relief is denied
9 in the State court, the petitioner files in Federal
10 court and asks for an evidentiary hearing at which the
11 petitioner is going to call a dozen highly distinguished
12 mental health experts who will testify to a very
13 different mental disorder. Now, has the petitioner
14 developed the factual predicate for that claim in the
15 State proceeding?

16 MR. KENNEDY: I think it's going to depend
17 on the facts of the case, but he's going to have a very
18 difficult time. And that's the reason why there's --

19 JUSTICE SOTOMAYOR: But why? Explain why
20 that -- the opinion is not a fact that's different.

21 MR. KENNEDY: Because the opinion is based
22 on facts. So the more differently the cases look, the
23 more they focus on different underlying facts, different
24 reasons and how they affect conduct differently, the
25 more it's going to be difficult, because under this

1 Court's doctrines, you have to -- a petitioner who wants
2 to go to Federal court with new experts, he's got to
3 show first that he's exhausted, and, you know, that's
4 going to be a problem. And, second, that if he's
5 exhausted, that he was diligent in trying to develop the
6 facts in State court --

7 JUSTICE ALITO: Well, that's very
8 complicated, just as your opponent's idea of what
9 constitutes a claim is very complicated and
10 fact-dependent. What -- would it not be better to say
11 that the petitioner in the example that I gave did
12 not -- was not diligent in developing all of the
13 additional evidence that could have been brought forward
14 at the State proceeding, assuming that it could have
15 been, but was not brought forward until the Federal
16 proceeding?

17 MR. KENNEDY: I --

18 JUSTICE ALITO: The factual predicate of the
19 claim is the new evidence that's brought forward in --
20 in the Federal proceeding, and unless there is a good
21 reason why that wasn't brought forward in the State
22 proceeding, it shouldn't be considered.

23 MR. KENNEDY: Justice Alito, I think that
24 can and should be a part of analyzing diligence, and in
25 the particular hypothetical that Your Honor has posed,

1 it seems like it's going to be tough to show diligence.
2 In this case, he does have good reasons. The State sat
3 back in State court and didn't really address the
4 allegations of mental health mitigation that weren't
5 developed. They just simply said you shouldn't believe
6 it; it happened too late.

7 JUSTICE SCALIA: Mr. Kennedy, can I bring
8 you back to page 35? The -- the court of appeals'
9 opinion, Ninth Circuit's opinion, says, "Accordingly, if
10 2254(e)(2) were to limit the scope of the evidence
11 before us, it would exclude only the new mental
12 impairment theories" -- the new mental impairment
13 theories -- "introduced in federal court, and their
14 exclusion would not affect our result."

15 The State contends that there -- there was
16 other factual material, not just those theories but also
17 the 6-and-a-half-hour time sheet evidence.

18 MR. KENNEDY: Well --

19 JUSTICE SCALIA: So at least, you know, that
20 really doesn't cover the waterfront of -- of all new
21 evidence.

22 MR. KENNEDY: Well, the State also says in
23 its reply brief that it's not just the affidavits; it's
24 the affidavits looked -- looked at against the backdrop
25 of the whole State court record.

1 JUSTICE KAGAN: But, Mr. Kennedy, do you
2 agree with the State that there are two things at issue
3 here? There's the new medical testimony, and there's
4 also the billing sheets?

5 MR. KENNEDY: Well, I -- I respectfully
6 don't, because the billing sheets in our State --
7 there's a procedure where counsel has to submit the
8 billing sheets to the court, and where the information
9 comes from is the clerk's transcript in this case from
10 the State court record.

11 JUSTICE KAGAN: Oh, but that's not -- that
12 was not presented as evidence in the State court, the
13 billing sheets?

14 MR. KENNEDY: No, we -- we said he didn't
15 prepare at all in State court. And then when the
16 billing sheets were revealed, Mr. Brainard, who is the
17 lawyer who did all of the witnesses at penalty phase,
18 has an entry, "begin preparing for penalty phase," and
19 every one -- that entry and every one after it is
20 6.5 hours.

21 JUSTICE SOTOMAYOR: Could you just clarify
22 again for me? I'm not sure I understand. Do the
23 billing records in -- when do they get disclosed to --

24 MR. KENNEDY: In our State, the -- the
25 appointed counsel submits a 987 form under penalty of

1 perjury saying these are the hours I worked; I want to
2 be paid. And it happens in real time, and it was done
3 throughout the trial, and it's part of the clerk's
4 transcript. And the reason the district court admitted
5 them in this case, they were -- they were exhibits 67
6 through 72, and it's -- they were admitted because they
7 were the records from the State court record, from the
8 clerk's transcript.

9 JUSTICE BREYER: But what about --

10 JUSTICE KAGAN: I think what's important is
11 that they are not -- I mean, tell me if I am wrong, but
12 they were not part of the State court record on which
13 the State court made the 2254(d)(1) determination; is
14 that right?

15 MR. KENNEDY: Well, the -- they were not,
16 but the allegation was that they did nothing. So it was
17 an even stronger allegation in State court than was
18 ultimately pursued at the (e)(2) hearing.

19 JUSTICE SCALIA: To say that they were on
20 record in the State court is not to say that they were
21 part of the record, of the trial record. And these
22 things were not part of the trial record, right?

23 MR. KENNEDY: Well, the clerk's transcript
24 is part of the trial record. The transcript is -- part
25 of the record is usually the reporter's transcript, the

1 clerk's transcript, and the docket. So that --

2 JUSTICE SCALIA: All -- all that goes --
3 goes to the fact-finder?

4 MR. KENNEDY: Well --

5 JUSTICE SCALIA: All that goes to a jury in
6 criminal cases?

7 MR. KENNEDY: Oh I'm sorry, Your Honor, I
8 didn't mean to say that. It's not in the evidentiary
9 portion of the record before the jury; it is part of the
10 State court record.

11 JUSTICE KAGAN: I'm sorry, I don't know --

12 CHIEF JUSTICE ROBERTS: When you say the
13 State court -- you just told us that this was better off
14 because it's only 6 hours, and you said in State court
15 they did nothing; is that right?

16 MR. KENNEDY: Yes. Are they --

17 CHIEF JUSTICE ROBERTS: When you say they
18 did nothing, surely that was rhetorical hyperbole, and
19 you took the 6 hours to say this proves what we said,
20 they did nothing; they did next to nothing. You're not
21 saying, oh, well, it was 6 hours, so we're sorry we said
22 they did nothing.

23 MR. KENNEDY: I think what we did is we
24 confirmed the allegation that we had made in State
25 court, which is just another example of why it was

1 important based on these allegations for Pinholster to
2 get a hearing to develop the record --

3 CHIEF JUSTICE ROBERTS: Well, that's -- that
4 gets back to the point Justice Scalia was making, is
5 that this is new evidence that the Ninth Circuit
6 considered with respect to the original. In other
7 words, they were not just saying, okay, even if none of
8 this happened, we'd still rule against you, because one
9 of the new things they had was the 6-hour evidence,
10 which you've just said makes your case stronger. I
11 think it does make your case stronger, but it also makes
12 clear that we can't say let's just look -- the Ninth
13 Circuit just looked at what was there originally.

14 MR. KENNEDY: Well, I think you can, because
15 the Ninth Circuit -- I mean, if you look at the -- if
16 the Court looks at the allegations in State court, there
17 were -- the allegations regarding counsel's performance
18 was that they did not believe that they were going to a
19 penalty phase; that, because they did not look at the
20 prosecutor's open file, they did not know that their
21 theory that they would not have a penalty phase was
22 wrong; and that they had no strategic reason
23 whatsoever --

24 CHIEF JUSTICE ROBERTS: You're going back to
25 arguing that you win under the original proceeding, and

1 the question on which we granted cert --

2 MR. KENNEDY: Yes.

3 CHIEF JUSTICE ROBERTS: -- shouldn't be
4 addressed.

5 MR. KENNEDY: Yes.

6 CHIEF JUSTICE ROBERTS: Okay.

7 JUSTICE BREYER: Is -- I just want to be as
8 clear as possible. Justice Scalia read the sentence on
9 page 35. I read the heading from what Judge Kozinski
10 says, "Our review is limited to the record presented in
11 the state habeas petitions." That's what he says.

12 All right. Now, you told me that the
13 sentence he read means the majority there says if our
14 record is limited to the record -- our review is limited
15 to the record presented in the State habeas petitions,
16 you still win.

17 MR. KENNEDY: Yes.

18 JUSTICE BREYER: Okay. But that's not what
19 it said. It said exactly what Justice Scalia said it
20 said, so -- which is talking about the evidence coming
21 in under (e)(2) or something. Now, I see a nightmare in
22 front of me where I have to go through hundreds or
23 thousands of pages to try to figure out whether they did
24 or didn't mean our review is limited to the record
25 presented in the State habeas petition.

1 MR. KENNEDY: Well, the --

2 JUSTICE BREYER: And I can ask you, is that
3 conceded on both sides?

4 MR. KENNEDY: Well, what the Ninth Circuit
5 majority was saying is that if there was some bar that
6 (e)(2) had to holding a hearing where new evidence could
7 be properly presented, that it wouldn't matter, because
8 based on the record before it in State court, it proved
9 a Strickland violation under Williams, Wiggins, and
10 Rompilla; and it was objectively unreasonable.

11 JUSTICE SCALIA: Yes, but that -- that was
12 on the assumption that the only new evidence would have
13 been the evidence of -- how did they put it? "The new
14 mental impairment theories introduced in federal court."
15 That that's the only new evidence that would be -- would
16 be excluded. And the other side contradicts that.

17 MR. KENNEDY: Well, but I'm -- I'm sorry.

18 JUSTICE SOTOMAYOR: Counsel, could I just
19 ask one clarifying question? In the Second Circuit for
20 many years, you had the record on appeal which the
21 parties prepared, but you also had the record below
22 which was sent automatically to the judges to review as
23 well. The billing records that we're talking about --
24 you say they were part of the record below -- would that
25 automatically have been sent under California law to the

1 reviewing court?

2 MR. KENNEDY: Yes, because it's the same --
3 we have automatic appeals, and the habeas is done in
4 front of the Supreme Court. So the entire record, I
5 believe, is before the California Supreme Court, and
6 it's also my understanding that the State makes the same
7 argument in its reply brief, that it's not just
8 Pinholster's allegations; it's Pinholster's allegations
9 considered against the total record.

10 But even if the specific allegation of
11 6.5 hours was not there, the allegation was that counsel
12 had done nothing to prepare, that they had not spent any
13 time preparing because they wrongly believed that they
14 were not in a death penalty --

15 JUSTICE SCALIA: I wouldn't believe that. I
16 mean, you had nothing to support it. I mean, I'd say
17 that's just lawyer's puffery --

18 MR. KENNEDY: Well --

19 JUSTICE SCALIA: -- whereas you come up with
20 a record that shows 6.5 hours. I mean, that's
21 something.

22 MR. KENNEDY: Your Honor, the lawyers made
23 this revelation in court at trial in front of the
24 famously aggressive prosecutor and the trial judge, who
25 knew these lawyers and had sat through the hearing, and

1 no one had any suggestion that it was puffery or it was
2 false. In fact, the trial prosecutor started
3 to staunchly defend her conduct by saying, look, I
4 offered them to look at my file and they didn't show up.
5 Which sounds, you know, strikingly similar to Rompilla,
6 where counsel doesn't even look at the file that will
7 reveal that their whole defense is problematic and built
8 on a lie.

9 CHIEF JUSTICE ROBERTS: How long does it
10 take to read Dr. Stalberg's report that says I've looked
11 at this, I've examined this, this, and this, and there's
12 nothing here that's going to support a mental impairment
13 theory?

14 MR. KENNEDY: It's very short, but the
15 report, when they read that quick report on its face,
16 they had to know that he wasn't prepared enough to
17 render an opinion. He seemed not to know about this
18 incident about I have a message from God and all of the
19 drinking and drug use beforehand. And the report
20 doesn't even mention the head injuries, being run over
21 by his mother and going through the window. Counsel had
22 to know these things, first, because that witness
23 testimony had occurred days before Dr. Stalberg's Sunday
24 interview. And, two, at least at some point in time the
25 mother said these things happened, and they had to know

1 that that report didn't appear to know that there were
2 serious traumatic head injuries.

3 CHIEF JUSTICE ROBERTS: Counsel, just to get
4 back to (e)(2), what is specifically the factual
5 predicate that could not have been previously discovered
6 in this case?

7 MR. KENNEDY: The factual predicate that
8 could not be discovered was the evolution of the mental
9 health testimonies, as it moved from affidavit to live
10 testimony, and the State gave for the first time
11 specific notice of how it was going to attack the
12 presentation in State court. And all of the arguably
13 new mental health theories were in response to the
14 changes in -- that the State itself had made in Federal
15 court.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Mr. Bilderback, you have 5 minutes
18 remaining.

19 MR. KENNEDY: Thank you.

20 REBUTTAL ARGUMENT OF JAMES W. BILDERBACK, II,
21 ON BEHALF OF THE PETITIONER

22 JUSTICE SOTOMAYOR: Could you clarify the
23 procedure question I asked earlier? Were the billing
24 records made part of the record that went up to the
25 California reviewing courts?

1 MR. BILDERBACK: Some, but not all of them
2 were. There were --

3 JUSTICE SOTOMAYOR: Are -- are you claiming
4 the 6-hour one didn't go up?

5 MR. BILDERBACK: Well, of course, part of
6 the problem is that the 6-and-a-half-hour figure is --
7 is arrived at by purportedly adding up all of the hours
8 spent in preparation --

9 JUSTICE SOTOMAYOR: I'm just asking a simple
10 question. Was the -- were the billing records that were
11 used ultimately to calculate the 6 hours --

12 MR. BILDERBACK: Yes --

13 JUSTICE SOTOMAYOR: -- were they before the
14 California reviewing courts?

15 MR. BILDERBACK: Yes. The billing records
16 that the Ninth Circuit relied upon were before the
17 California Supreme Court in the context of the clerk's
18 transcript that was presented to the California Supreme
19 Court in the appeal.

20 However, there were important -- indeed, the
21 most important records, that might have shed light on
22 the amount of time that counsel actually spent
23 preparing, were never presented to the California
24 Supreme Court. Indeed, those records were never
25 presented to the Federal court, and those were the

1 records of Mr. Dettmar.

2 Mr. Dettmar was the lawyer principally
3 tasked with preparation of the case in mitigation at the
4 penalty phase, and there were no records for Mr. Dettmar
5 for the 6-week period leading up to and through the
6 penalty phase. And it -- given --

7 JUSTICE SCALIA: Is that where the 6 and a
8 half hours came from?

9 MR. BILDERBACK: No, the --

10 JUSTICE SCALIA: His records --

11 MR. BILDERBACK: No, the 6 and a half hours
12 came from Mr. Brainard's records. Mr. Brainard was --

13 JUSTICE SCALIA: Which the California court
14 had.

15 MR. BILDERBACK: Yes. The California court
16 had Mr. Brainard's records. They did --

17 JUSTICE SCALIA: So it's not new evidence,
18 then. It wasn't new evidence before the Federal court.

19 MR. BILDERBACK: Well, the -- again, the
20 allegation that there were only 6 and a half hours spent
21 in preparation, that allegation was never made to the
22 California Supreme Court.

23 JUSTICE SOTOMAYOR: But if I'm a reviewing
24 court and I'm told the lawyer spent no time preparing --

25 MR. BILDERBACK: I beg your pardon, Your

1 Honor.

2 JUSTICE SOTOMAYOR: When I was a reviewing
3 judge on the court of appeals, someone said he didn't
4 spend any time doing X, Y, and Z, the first thing I went
5 to was the billing records. What -- do the billing
6 records dispute that or not?

7 MR. BILDERBACK: Yes. The billing
8 records --

9 JUSTICE SOTOMAYOR: So I'm assuming -- I
10 have to assume -- I don't have to assume, but it's not
11 new evidence. They had it before them.

12 MR. BILDERBACK: The billing records --
13 again, the billing records upon which the Ninth Circuit
14 arrived at its conclusion that there were only 6 and a
15 half hours was before the State court. However, the
16 allegation that there were only 6 and a half hours spent
17 in preparation was never presented to State court, and,
18 indeed, the records presented to the State court were
19 incomplete in a way that would not admit to that
20 conclusion.

21 JUSTICE SCALIA: If you're relying on
22 allegations rather than the evidence, the allegation was
23 even worse. The allegation was zip.

24 MR. BILDERBACK: Exactly.

25 JUSTICE SCALIA: No time.

1 MR. BILDERBACK: But that allegation --

2 JUSTICE SCALIA: Well, exactly, that doesn't
3 help you.

4 MR. BILDERBACK: No, it does, Your Honor,
5 because that allegation was plainly false, based upon
6 the State court record. The State doesn't blindly
7 accept any factual allegation made in the petition. It
8 -- it reviews those allegations in light of the State
9 court record.

10 And, in this case, as the Court indicates,
11 the State court record plainly showed that the
12 allegation that they did nothing to prepare for the
13 penalty phase was false, and, indeed, the State court
14 records showed that they began preparing for the penalty
15 phase well before the penalty phase began.

16 So the factual allegation that was presented
17 to the State court was not only false, based on the
18 State court record; it was affirmatively disproved
19 during the Federal evidentiary hearing. It's very
20 difficult to see how we can arrive at the conclusion
21 that the State court determination was unreasonable,
22 when in fact it was correct.

23 JUSTICE BREYER: Is this right, then?
24 First, for you to win, the first thing we have to say is
25 we're going to look at page 35, and they say, we're

1 looking at the State court record, the State courts
2 were, in effect, unreasonable. We have to say that was
3 wrong. We have to look through the evidence and say
4 that was wrong. Then you're at first base.

5 MR. BILDERBACK: Yes.

6 JUSTICE BREYER: And to get home, we now
7 have to look at the new evidence, and there it's some
8 combination of (a) there was nothing to have a hearing
9 about because there's nothing here that lets you have a
10 hearing; or (b) there was something to have a hearing
11 about because this was so new that it was a new claim,
12 and you should have gone to the State court first on
13 that one, but there's no room to do it. They don't let
14 you do it.

15 So, okay, judge in the Federal court, you
16 have the hearing, and now, when you have the hearing,
17 first see if there was the diligence. And there wasn't.
18 That gets you home. That's the whole argument.

19 MR. BILDERBACK: The only point with which I
20 would -- I would take issue with the Court's
21 characterization is -- I assume the Court was not
22 speaking hypothetically. The Court is speaking about my
23 case.

24 JUSTICE BREYER: Yes, yes.

25 MR. BILDERBACK: In my case, the State

1 court's doors are not closed. That --

2 JUSTICE BREYER: Well, then why isn't this a
3 part of the thing, if you have a new claim here, go to
4 the State first?

5 MR. BILDERBACK: Because the exhaustion
6 difficulty in this case, the exhaustion problem in this
7 case, is a consequence of the errors that the Federal
8 court made in doing the (d)(1) -- in failing to do the
9 (d)(1) determination at all and in taking evidence in
10 clear derogation of (e)(2). If you ever take evidence
11 in derogation of (e)(2), you're going to end up with an
12 unexhausted claim, and that's precisely what happened
13 here.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 The case is submitted.

16 (Whereupon, at 12:05 p.m., the case in the
17 above-entitled matter was submitted.)

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