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1 P R O C E E D I N G S

2 (10:56 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in 05-1575, Schriro versus Landrigan.

5 Mr. Cattani.

6 ORAL ARGUMENT OF KENT E. CATTANI

7 ON BEHALF OF THE PETITIONER

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

10 The Ninth Circuit's rejection of a reasoned
11 State court factual determination and decision is
12 improper under any deferential standard of review, and
13 it is particularly improper under the highly deferential
14 standard of review required under the AEDPA. This
15 morning I'd like to try to develop three -- three
16 points.

17 First, the State court's factual finding
18 that Landrigan instructed his attorney not to present
19 any mitigating evidence was not an unreasonable finding
20 and, in fact, is the most logical interpretation of the
21 record. Although Landrigan now argues that the record
22 does not show whether his decision not to present
23 mitigation evidence was knowing or voluntary, that is
24 not a claim that was ever developed in State court. He
25 never alleged in his State post-conviction proceedings

1 that that, his decision to do that was not knowing or
2 voluntary.

3 Secondly, an evidentiary hearing is
4 unwarranted in this case --

5 JUSTICE STEVENS: May I ask about the first
6 one? Does the Constitution require there be no
7 involuntary?

8 MR. CATTANI: It would require that it would
9 be knowing and voluntary, yes.

10 JUSTICE STEVENS: So if the record showed
11 that he didn't get, there wasn't a procedure followed to
12 voluntarily waive those Constitutional rights, wouldn't
13 the district court be able to reexamine that?

14 MR. CATTANI: Well, there's no colloquy
15 requirement for a defendant to waive presentation of
16 mitigation. And I think it would have been enough if
17 the defendant or defense counsel had simply said my --
18 if the attorney had said my client has instructed me not
19 to present any mitigating evidence, and that would be
20 adequate. If a defendant chooses to make a claim that
21 his waiver was not knowing or voluntary, the burden
22 would shift to him to do that in a post-conviction
23 proceeding, and he did not do that in this case.

24 JUSTICE SCALIA: How would he make such a
25 claim in this case where in open court he was asked by

1 the judge, right, with nobody twisting his arm, whether
2 it was the case that he did not want any mitigating
3 evidence introduced? And he said, right, yes, that's
4 correct?

5 MR. CATTANI: I agree, Your Honor. It would
6 be very difficult for him to make that argument and I
7 suspect that's why the argument was not raised in the
8 State post-conviction proceeding.

9 JUSTICE KENNEDY: Well, I don't know if you
10 got to the third point you were going to make. You were
11 outlining three different points. But it seems to me
12 that from the very start, what happens is that you and
13 your brother for the respondent are talking past each
14 other. You want to talk to us about the adequacy of the
15 State court's finding. The respondent says what we --
16 all we want is a hearing in the district court, and
17 those are two different issues.

18 We want a hearing in the district court,
19 i.e., so that we can show the findings are insubstantial
20 or incorrect. Those, it seems to me, are two different
21 issues, and I sense the briefs are talking past each
22 other on this point.

23 Did you see the same thing?

24 MR. CATTANI: Yes, I did, Your Honor, and I
25 think the reason for that is, in our view an evidentiary

1 hearing is not necessary because the factual finding by
2 the State court obviates the need for one. An
3 evidentiary hearing would be developing evidence that
4 would never have been presented. Given this factual
5 finding, the State court is in effect saying no matter
6 what counsel might or might not have developed, it would
7 not have been presented at sentencing because this
8 defendant specifically instructed his attorney not to
9 present any mitigating evidence.

10 JUSTICE KENNEDY: In your view, what is the
11 standard for when the district court may hold an
12 evidentiary hearing? I know there's an element of
13 discretion in it.

14 MR. CATTANI: A district -- the district
15 court can order an evidentiary hearing if the defendant
16 has been denied an opportunity to develop relevant facts
17 necessary to resolve a colorable claim in State court.
18 And I think here the defendant fails on two different
19 points.

20 First --

21 JUSTICE KENNEDY: That's the only time the
22 district court can hold a hearing?

23 MR. CATTANI: Well, it has to be through no
24 fault of his own and if the facts were not developed in
25 State court. Certainly it's the petitioner's

1 obligation, a defendant's obligation to present these
2 claims in State court and the only -- the reason --

3 JUSTICE KENNEDY: Yes, but it seems that if
4 he doesn't do that, then that's a bar. But if he has
5 done that, when can he ask for a further hearing?

6 MR. CATTANI: Well, but that's the point
7 here. He has not done that. He did not attempt to
8 develop facts or he was not precluded from developing
9 facts that would be relevant to a resolution of his
10 ineffective assistance claim.

11 If I could, Your Honor, there are two
12 different parts of that question. First, the facts are
13 not relevant. The facts that he's seeking to develop in
14 an evidentiary hearing is this additional, this
15 mitigation that should have been developed. If, in
16 fact, his avowal that he did not want any mitigation to
17 be presented is accurate, then these other facts are not
18 relevant.

19 JUSTICE SOUTER: No, but isn't that the
20 problem in your argument? Because your argument
21 assumes, and I think you said this quite candidly a
22 moment ago, that once there has been a finding that he
23 informed the court that he did not want mitigation
24 evidence presented, that in effect is a matter of --
25 binds him as a matter of law for all time.

1 And what he is saying here is look, if I had
2 known that there was this kind of mitigating evidence,
3 as opposed to what was proffered to the court at the end
4 of the trial in fact, I would not have made that waiver,
5 if you want to call it that. I would not have made that
6 representation to the court. And what I want is an
7 evidentiary hearing to show that, to show that in fact,
8 when I said to the court no mitigating evidence, I
9 didn't mean this.

10 And he wants a hearing for that. The only
11 way it seems to me that you can properly win on the
12 issue that he thus raises is exactly the way that I
13 think you said a moment ago. That once there is a
14 finding that he made a statement, whatever its
15 predicate, a statement that I don't want any mitigating
16 evidence presented, that is the end of the issue as a
17 matter of law.

18 My question is, do you have any authority
19 for that?

20 MR. CATTANI: Simply the AEDPA 2254(e). I
21 don't have a specific case that also would go directly
22 to that point.

23 Your Honor, I would also --

24 CHIEF JUSTICE ROBERTS: Justice Souter's
25 question highlights an ambiguity in this Ninth Circuit

1 opinion, for me anyway. Do you understand the hearing
2 that they directed to be on the waiver question, or is
3 the hearing that they directed on the alleged mitigation
4 evidence that he now wants to present?

5 MR. CATTANI: It seems to me the hearing is
6 directed at presenting all of the mitigation evidence
7 that he now wants to present.

8 JUSTICE SOUTER: Doesn't it have to go to
9 both? Because I mean, he's saying look, first I want to
10 show that there's a certain kind of mitigation evidence
11 that was not proffered, that I didn't have in mind, that
12 I wouldn't have objected to.

13 And he then wants to proceed with respect to
14 his inadequacy of counsel claim based also on the
15 existence of this kind of evidence that counsel didn't
16 look to.

17 There's a dual purpose, I thought.

18 MR. CATTANI: I would agree with that, but
19 Your Honor --

20 JUSTICE SCALIA: I wouldn't agree with it.
21 I thought that the Ninth Circuit had been very clear
22 that it did not agree with the district court's
23 determination that he had waived mitigating evidence. I
24 thought the Ninth Circuit simply disagreed with that
25 finding and remanded for a hearing on the mitigating

1 evidence.

2 MR. CATTANI: Yes.

3 JUSTICE SCALIA: Isn't that so? I mean,
4 that's what that -- one of the reasons the case was
5 here, that the Ninth Circuit simply smacked down a
6 district court factual finding that he had waived any
7 mitigating evidence. Isn't that what happened?

8 MR. CATTANI: That's correct, Your Honor.

9 JUSTICE SCALIA: So it wasn't remanding for
10 a hearing on whether he had waived mitigating evidence.
11 It made the determination that he had not waived it, and
12 then remanded for investigation into what that
13 mitigating evidence would be.

14 MR. CATTANI: I don't know that it's
15 completely clear as to what the Ninth Circuit is saying
16 can be developed and how that evidence can be used.

17 JUSTICE SCALIA: Well, it's clear at least
18 that they disagreed with the finding of the district
19 court that there had been a waiver, no?

20 MR. CATTANI: That's right, Your Honor, and
21 I think --

22 JUSTICE SOUTER: So it's clear that they
23 disagreed that the finding was necessarily dispositive.
24 Is anything clear beyond that? I mean, I guess I'm
25 hesitant to say I'm raising the same question that the

1 Chief Justice did, about the ambiguity of what the court
2 did.

3 I mean, there's no question that they found
4 that the -- the State trial court's finding with respect
5 to waiver or whatever we want to call it was not
6 necessarily dispositive. I don't think it's clear that
7 they found anything beyond that, but correct me if I'm
8 wrong.

9 MR. CATTANI: The Ninth Circuit ordered an
10 evidentiary hearing to allow him to develop whatever
11 mitigation he's proffered in Federal court.

12 JUSTICE SOUTER: Right. But that could
13 have, as we said a moment ago, that could have a dual
14 purpose. One to show the, in effect, the inadequacy or
15 the nondispositive character of the State court's
16 finding; and two, to show relief for inadequate
17 assistance of counsel.

18 And the question here is that, the immediate
19 question is what exactly did the State court find with
20 respect to -- oh, sorry -- what exactly did the Ninth
21 Circuit find with respect to the State court finding?

22 And there's no question that the Ninth
23 Circuit assumed that the State court finding was not
24 necessarily dispositive, but I don't know that it's
25 clear it went beyond that, and that's where perhaps you

1 could help me if I'm wrong.

2 MR. CATTANI: Well, the Ninth Circuit
3 clearly held that the State court's determination of the
4 facts was unreasonable. And that's the problem with its
5 decision because if the determination of facts was
6 reasonable, it obviates the need for any further
7 evidentiary hearing.

8 JUSTICE KENNEDY: Well, on the waiver point,
9 let's assume that this case had not come in -- come
10 here, and you had gone back to the district court
11 pursuant to the order of the Ninth Circuit.

12 Surely you would have taken the position, or
13 you could have taken the position if the evidence
14 developed that way, that he really knew or should have
15 known about all this mitigating evidence and he waived.
16 You certainly could continue to take that position in
17 the district court.

18 MR. CATTANI: Yes.

19 JUSTICE KENNEDY: And the district court
20 would say I now have a more full, factual record, and I
21 make the finding that there was knowing waiver, or there
22 wasn't.

23 MR. CATTANI: Yes, but the point we've tried
24 to make is that he was allowed an opportunity to develop
25 his claim about whether his -- whether he made that

1 statement and whether he intended to instruct his
2 attorney not to present any mitigating evidence. He
3 submitted an affidavit where he said, if my counsel had
4 told me there was this evidence of a genetic
5 predisposition to violence, I would have allowed that to
6 be presented.

7 The court -- there was no need for an
8 evidentiary hearing because the court simply accepted --
9 accepted as true that Landrigan would have provided that
10 testimony.

11 JUSTICE ALITO: Well, how could the district
12 court on remand find that there was a valid waiver when
13 the Ninth Circuit says on A-17, the appendix to the
14 petition, for all the foregoing reasons, Landrigan has
15 not waived the right to assert a claim for ineffective
16 assistance of counsel?

17 MR. CATTANI: I think you're correct. The
18 Ninth Circuit has specifically found that the
19 determination of facts was unreasonable and found that
20 Landrigan has established a colorable claim of
21 ineffective assistance.

22 JUSTICE SCALIA: And it has not waived. Not
23 that the district court was -- didn't have enough
24 evidence before it. It says the foregoing, Landrigan
25 has not waived the right to assert a claim for effective

1 assistance.

2 So how can you possibly say that that
3 question is still open?

4 MR. CATTANI: Well, I --

5 JUSTICE SCALIA: The district court has to
6 accept that he hasn't waived. And what it's sent back
7 for is for all of the facts that show -- that show he
8 had ineffective assistance of counsel.

9 JUSTICE STEVENS: Let me ask this question.
10 It seems to me that there are two separate parts to the
11 waiver issue. One, did he intend to say I don't want to
12 put on any mitigating evidence?

13 But then the second part of the question is,
14 was that statement made knowingly and voluntarily, just
15 as a guilty plea or something like that has to be.

16 So is it enough for you to say it's clear
17 what he intended, or is it also part of your burden to
18 say that that intent was expressed in a way that was
19 knowing and voluntary, compliant with the rule that
20 applies to waivers of constitutional rights?

21 MR. CATTANI: I think it's clearly enough
22 simply to say that, as I indicated, even if it had just
23 been an avowal by the attorney that this defendant has
24 instructed me not to present mitigating evidence, that
25 that would be enough.

1 JUSTICE STEVENS: Is that a sufficient
2 waiver without inquiring as to whether it was a knowing
3 and intelligent waiver, that he knew what he could put
4 in, and so forth and so on?

5 MR. CATTANI: Yes, it is, Your Honor. I
6 think to the extent that the defendant wants to raise
7 that, he can raise that in a State post-conviction
8 proceeding. He should make that type of argument in the
9 post-conviction proceeding.

10 And that's not what he did here. An
11 analogous situation is that -- came up in a case that
12 the defense, that Landrigan has cited, Iowa versus
13 Tovar. And this Court expressly noted that the time to
14 raise a claim -- that case involved whether it was a
15 counsel -- it was a decision to waive counsel at a plea
16 proceeding. And this Court noted that the time to raise
17 that is in a post-conviction proceeding, and that the
18 burden shifts to the defendant to raise that issue.

19 And here if you look at the, the petition
20 for post-conviction relief, if you look at the affidavit
21 that Mr. Landrigan submitted, there, there is nothing in
22 there that suggests that "I did not understand what I
23 was doing when I instructed my counsel not to present
24 mitigation. I, I did not understand the concept of
25 mitigation." There's nothing in there to suggest that.

1 So I would --

2 JUSTICE SOUTER: Isn't there something that,
3 isn't he saying implicitly Justice Souter implicitly "I
4 didn't have this kind of evidence in mind; if I had been
5 aware of this kind of evidence, I wouldn't have given
6 that instruction?"

7 So he is, it seems to me, implicitly saying
8 well, my waiver was not knowing, in the sense that I
9 understood there was this kind of evidence and intended
10 to preclude its introduction? Isn't that clear?

11 MR. CATTANI: It's clear he is saying that I
12 would have permitted one type of mitigating evidence.

13 JUSTICE SOUTER: But that's the same thing,
14 isn't that the same, a way of saying that to that extent
15 my waiver was not knowing?

16 MR. CATTANI: He, he's raised to it that
17 extent as to that particular piece of mitigation. And
18 the trial court is expressly saying I disbelieve you
19 when you say you would have allowed presentation of that
20 mitigation.

21 JUSTICE SOUTER: And he's saying if you will
22 give me a hearing, district court, I will try to
23 demonstrate to you why, why the State court's finding on
24 that point was unreasonable. The State court made that
25 finding based on its observation of me at trial and, and

1 at the sentencing phase; but it didn't give me a, a
2 further chance to develop my evidence on, on
3 post-conviction.

4 And I want a hearing to develop that
5 evidence in front of you, Federal district court, in
6 order to prove that the State court's finding in light
7 of that evidence was unreasonable.

8 Isn't, isn't it correct that that's what
9 he's asking for now?

10 MR. CATTANI: He is, Your Honor, but I would
11 suggest that there is no further evidence that was
12 presented that he was attempting to present in State
13 court regarding whether his waiver was knowing or
14 voluntary.

15 JUSTICE SOUTER: How would -- how do we know
16 that?

17 MR. CATTANI: How do we know we know that?
18 Because of the, the affidavit he submitted. And he,
19 he's required to submit an affidavit to establish a
20 colorable claim. And, and he's required to allege in
21 his post-conviction petition that his waiver is not
22 knowing or voluntary. But the burden is on the
23 defendant --

24 JUSTICE SOUTER: But you, I don't think you
25 mean this, but you're not arguing that he just omitted

1 the magic words not knowing and voluntary?

2 MR. CATTANI: I don't think, I don't think
3 he just omitted them. I think he was not raising that
4 claim.

5 JUSTICE SOUTER: No, but, I thought a second
6 ago you -- you admitted that to a degree he was, because
7 he is saying implicitly if I had known about this kind
8 of mitigating evidence, I wouldn't have waived.
9 Therefore, my waiver was, as to this, not a knowing
10 waiver.

11 MR. CATTANI: He raised that as to that one
12 aspect of mitigation. But it would have been very
13 simple for him, a simple matter for him to argue I
14 didn't understand the whole concept of mitigation. I
15 didn't understand what I was doing.

16 JUSTICE SOUTER: Look, it would have been a
17 better affidavit, it would have been better pleading.
18 We can stipulate to that. But is there, I don't see
19 there is any serious question that he is arguing right
20 now that as to this kind of evidence, had I known about
21 it I wouldn't have waived and therefore, I shouldn't be
22 precluded from, from getting it in now.

23 And, and if there's no question about that,
24 then -- then I think we're just fighting about words.

25 MR. CATTANI: Well, I think the issue was

1 resolved by the State court's factual determination that
2 Landrigan was not credible even in making that assertion
3 that I would have allowed presentation of genetic
4 predisposition of violence.

5 JUSTICE SOUTER: And he says in the
6 district, he says in the district court: I want a
7 hearing to show that I was credible. So credible that
8 the State court finding should be seen as an
9 unreasonable resolution of a factual issue. I want a
10 hearing.

11 That's all he's asking for, isn't it?

12 MR. CATTANI: I would just suggest that
13 there is no further evidence other than putting
14 Landrigan on the stand to say --

15 JUSTICE SOUTER: Well, that's pretty good
16 evidence, isn't it? I mean, he may be a believable
17 witness on this point. I don't know.

18 MR. CATTANI: Well, I don't think there was
19 any need for an, for the trial court to put Landrigan on
20 the stand having already presided over Landrigan's trial
21 and sentencing.

22 CHIEF JUSTICE ROBERTS: If he wants, if he
23 wants a hearing on that, we'd have to reverse the Ninth
24 Circuit, right? Because the Ninth Circuit held that he
25 didn't waive --

1 MR. CATTANI: That's right.

2 CHIEF JUSTICE ROBERTS: -- this claim?

3 MR. CATTANI: That's right.

4 CHIEF JUSTICE ROBERTS: The part of the
5 opinion that Justice Alito quoted on page A-17.

6 MR. CATTANI: That, that's right, Your
7 Honor. And I think that's why this case should be
8 relatively straightforward.

9 Because the Ninth Circuit, the Ninth
10 Circuit's finding, that the State court unreasonably
11 found that, that Landrigan expressly instructed that his
12 attorney not present any mitigation, given that --
13 that's the problem with the Ninth Circuit's opinion.
14 Everything else builds on top of that.

15 If that's an incorrect holding, then the
16 rest of the ruling is, is incorrect.

17 JUSTICE BREYER: Even if it is incorrect, if
18 we -- we don't know precisely what he meant by the words
19 he said, why doesn't that argue even more strongly for a
20 hearing? At the hearing he wants to introduce, doesn't
21 he, his stepparents, or foster parents, a school
22 teacher, the various others? And he'll say anyone who
23 listens to those people will see that I have the most
24 horrendous upbringing anyone could have. The worst
25 you've ever heard.

1 And my argument is that if only my lawyer
2 had looked into this at that moment in the trial, he
3 would have said in the sentencing proceeding, look what
4 I can present for you. And if he had done it and told
5 me that, anyone would have said, "of course, present
6 it." And I want a chance to show that that's true of my
7 case.

8 Now, why shouldn't he have a hearing on
9 that? No hearing was given him in the State court.

10 MR. CATTANI: Well, the problem with, that
11 Your Honor, is that he didn't ask for, for a hearing to
12 present testimony from, for example, his biological
13 mother and his ex-wife, who would have presented the
14 very evidence --

15 JUSTICE BREYER: In State court he didn't.

16 MR. CATTANI: In State court in the --

17 JUSTICE BREYER: Well, I mean, is the
18 requirement such that when you ask for a hearing in a
19 State court on a general matter, "I would like to show
20 through a hearing," then he gives a whole lot of
21 affidavits of the kind of thing he's going to produce,
22 that then the State says "no," you go into Federal court
23 and say "I'm roughly going to do the same thing, I have
24 a few extra witnesses, some of the people say some extra
25 things," no, you can't do that?

1 MR. CATTANI: Well, there is a requirement
2 in State court that you plead with specificity what type
3 of claims you're raising in a post-conviction --

4 JUSTICE BREYER: Didn't he say my claim is
5 ineffective assistance?

6 MR. CATTANI: Ineffective assistance --

7 JUSTICE BREYER: Yeah. Because he didn't
8 investigate to discover the horrendous circumstances in
9 which I was raised, and had he done it, he would have
10 found roughly this kind of thing, and I would like to
11 show that he should have done that because it would have
12 changed the result?

13 MR. CATTANI: Well, his argument at
14 State court was not that he didn't investigate that; his
15 argument in the post-conviction proceeding was he could
16 have presented that through some other witnesses.
17 The -- his argument at the trial -- at the
18 post-conviction --

19 CHIEF JUSTICE ROBERTS: That's not what I
20 understood his argument that he wants to raise to be.
21 In his affidavit, it is a different argument. It is the
22 biological component of violence. "Look, my grandfather
23 was convicted, my father was convicted," and so the
24 mitigating evidence he wants to present at sentencing
25 that is I'm biologically predetermined to commit crimes.

1 JUSTICE SCALIA: The criminal gene argument.

2 CHIEF JUSTICE ROBERTS: That -- which is
3 certainly an ambiguous argument to present in mitigation
4 at a sentencing hearing.

5 MR. CATTANI: Certainly. And that is, that
6 is the main point I'm trying to make is that that was
7 the only thing he was asserting in his post-conviction
8 proceeding, was that "I would have liked have raised
9 this argument that I'm generically predisposed to
10 violence." The rest of the argument I think would have
11 been frivolous because it was so obvious that he had
12 restricted, he had limited his counsel's, restricted his
13 counsel from presenting the very type of evidence that
14 we're talking about now, this other type of evidence.

15 JUSTICE SCALIA: I thought all that evidence
16 was basically before the district court anyway. Didn't
17 the district court know about all of that when it made
18 its ruling?

19 MR. CATTANI: Yes, Your Honor and the trial
20 court knew about it when it made its ruling.

21 JUSTICE SOUTER: Well, the district court
22 had a proffer, but the district court but had not heard
23 witnesses, it had not heard evidence.

24 MR. CATTANI: But, but the focus here is on
25 the reasonableness of the State court's factual finding.

1 JUSTICE SOUTER: Sure, but the
2 reasonableness of factual findings depends on what the
3 evidence is that can go in on the issue of
4 reasonableness. And there's a universe of difference
5 between a proffer of evidence which the district court
6 says "well, I'll assume that," on the one hand, and on
7 the other hand, the actual presentation of witnesses
8 perhaps including Landrigan himself, which the court
9 actually hears.

10 You know, you, sometimes you get a lot more
11 impressed by real evidence than by assumptions you make
12 for the sake of argument. And that seems to me a world
13 of difference.

14 MR. CATTANI: I don't necessarily disagree
15 except that we're -- the focus has to be on what the
16 claim was that was raised in the State post-conviction
17 proceeding; and --

18 JUSTICE SOUTER: The only thing, but the --
19 the -- I guess on that point, my only, my only reason
20 for raising this with you is on that point, it's not
21 enough to say well, the district court assumed this. Or
22 for that matter, the State trial court assumed this.

23 That is not the same thing as putting in the
24 evidence.

25 MR. CATTANI: Except in this case we

1 certainly had the trial court that presided over the
2 sentencing and had seen Landrigan in person and was
3 uniquely qualified to make a credibility assessment
4 regarding the points that Landrigan made in his
5 affidavit, that "I would have allowed presentation of
6 genetic predisposition."

7 JUSTICE STEVENS: May I ask what might be an
8 awfully elementary and stupid question? But -- it seems
9 to me that there's no question about the facts of what
10 he said. And you can interpret him saying I don't want
11 any mitigating evidence put it. But isn't it clear that
12 the waiver of the right to put in any mitigating
13 evidence at a capital sentencing hearing is a
14 constitutional right of very important dimensions?

15 And can that right be waived if the record
16 does not show whether or not he knew the full right
17 of -- that is available to every defendant in a capital
18 case? Namely, he had been advised by his counsel he
19 could put in all sorts of stuff. Is there anything to
20 show that there was that kind of waiver here, on the
21 face of the record?

22 MR. CATTANI: There, there's not a specific
23 colloquy that goes through --

24 JUSTICE STEVENS: Then it is, as a matter of
25 law, an ineffective waiver. Isn't the Ninth Circuit

1 dead right, not factually, but just as a matter of law,
2 that you cannot waive this right unless the record shows
3 that he's fully advised of the scope of the right that
4 he's waiving.

5 MR. CATTANI: Well, first, there's no
6 authority that I'm aware of that would require any type
7 of a specific colloquy. I think this record --

8 JUSTICE SCALIA: It's new to me also. I
9 never heard of it.

10 MR. CATTANI: And I think that would be --

11 JUSTICE STEVENS: But why should it be, why
12 should there be a less complete colloquy for this kind
13 of waiver than a guilty plea itself? Now I admit
14 there's no authority on the point. But isn't it
15 absolutely obvious?

16 MR. CATTANI: Well, I think the reason
17 there's no need for one is because a defendant can come
18 in and if he really believes that his waiver was not
19 knowing and voluntary, he has an opportunity to pursue
20 that type of claim in a post-conviction proceeding. And
21 he can come in and proffer whatever evidence he wants to
22 proffer if, in fact, that's his claim, that he didn't
23 understand --

24 JUSTICE SCALIA: Some kind of waivers, like
25 waiver to the right to counsel, we do indeed require a

1 colloquy, because a defendant is not likely to know what
2 consequences of foregoing counsel are. So the judge
3 discusses with him and, you know, points out what a --
4 what a significant decision that is. But it doesn't
5 take a whole lot of smarts to answer yes or no to the
6 question, you know, "do you agree that your counsel
7 should not introduce any mitigating evidence?" I mean,
8 it's clear on, on its face.

9 MR. CATTANI: I would agree, Your Honor.
10 And I think --

11 JUSTICE KENNEDY: But doesn't that assume
12 that the defendant know what mitigating evidence is? I
13 mean, this defendant, I suppose wants to show, "I
14 thought mitigating evidence was just going to be what
15 the, these two relatives were going to testify to.
16 There was really much more, if my counsel had
17 investigated." And that's not a knowing waiver.

18 MR. CATTANI: I think that type of argument
19 was belied by what, what happened at the time of
20 sentencing.

21 JUSTICE SCALIA: Well, unless the argument
22 is, and maybe this is what the other side its going to
23 argue, that -- that when you make waiver of all
24 mitigating evidence, knowing as any person knows who's
25 reached that far in the criminal process what mitigating

1 evidence is, you must know, in fact, all of the elements
2 of mitigation that could have been introduced. Which
3 will almost never be the case. So that it's always
4 possible after waiving the right to introduce mitigating
5 evidence to come into the court a year later and say,
6 "Oh, my goodness, here's the sort of mitigating evidence
7 I didn't know about at the time. My grandfather was a
8 criminal. I didn't realize that at the time. And now I
9 want" -- you know -- "therefore my waiver was
10 uninformed" and, you know, we go back to square one and
11 try the case again.

12 That would always be possible, wouldn't it?

13 MR. CATTANI: Well, I agree, Your Honor.
14 And it's because the nature of mitigation is so open
15 ended, it would be difficult to explain precisely and
16 have a waiver of every conceivable item of mitigation.

17 JUSTICE SOUTER: And so are you, are you in
18 effect then saying that the waiver does not need to be a
19 knowing waiver in the sense that it needs to be based
20 upon an appreciation of all the possible mitigation
21 evidence that in this case might come in? Are you
22 saying it need not be knowing in that sense?

23 MR. CATTANI: I think a defendant needs to
24 understand the nature -- the basic nature and concept of
25 mitigation. But this case provides a good example --

1 JUSTICE SOUTER: Well, you're not answering
2 my question. I -- we all agree that he needs to
3 understand the basic concept of mitigation. Does his
4 waiver have to be a knowing one in the sense that I just
5 described? Or doesn't it? What's your position?

6 MR. CATTANI: It does have to -- it does not
7 have to be knowing as to every conceivable aspect of
8 mitigation.

9 JUSTICE SOUTER: And it will nonetheless
10 kind him if he comes in later and says look, I accept
11 the fact that it's my burden to show at this point that
12 my waiver was not a knowing one, and that there us
13 mitigating evidence that I would have let in?

14 Are you saying that he simply as a matter of
15 law cannot say that? Or cannot be heard to say that?

16 MR. CATTANI: He is bound by that, Your
17 Honor. And if I could --

18 JUSTICE SOUTER: So -- so the answer to my
19 question is yes?

20 MR. CATTANI: Yes.

21 JUSTICE SOUTER: As a matter of law, he
22 cannot do what he is trying to do here?

23 MR. CATTANI: Yes.

24 JUSTICE SOUTER: Okay.

25 MR. CATTANI: And Your Honor, I think here

1 we have a situation where the defendant is now trying to
2 proffer evidence that is inconsistent with what counsel
3 was trying to present at the time of sentencing.

4 JUSTICE GINSBURG: But you are -- what you
5 are saying is that it was sufficient when he said, I
6 don't want my lawyer to introduce mitigating evidence,
7 and the trial court said, do you know what that means,
8 and he said yes?

9 MR. CATTANI: Yes.

10 JUSTICE GINSBURG: That doesn't have to be
11 fleshed out at all, unlike a Rule 11 colloquy. To see
12 if he really understands? Do you know what that means,
13 and he yes and that's the end of it?

14 MR. CATTANI: I think that is sufficient,
15 Your Honor. And again, here he's now raising this claim
16 of genetic predisposition. The sentencing memorandum
17 that counsel submitted attempted to pore Landrigan as
18 someone who is basically a good person who committed
19 this crime because he was under the influence of alcohol
20 and drugs. This new type of evidence -- and the
21 sentencing memorandum -- and you'll see that Landrigan
22 had been evaluated by an expert, who had said he didn't
23 have any mental deficiencies.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Verrilli.

1 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

2 ON BEHALF OF THE RESPONDENT

3 MR. VERRILLI: Thank you, Mr. Chief Justice,
4 and may it please the Court:

5 I'd like to begin by clearing up what
6 exactly we did and didn't argue with respect to waiver
7 and what exactly is and isn't before this Court on that
8 set of issues in our judgment. I then would like to
9 spend a couple of minutes on what I think the Ninth
10 Circuit did and what effect that would have on this
11 Court's disposition of the case. And if there's any
12 time remaining. I'd like to turn to the question of
13 whether we have asserted colorable claims that warrant
14 an evidentiary hearing here, which is all that we're
15 asking for.

16 Now, with respect to this question of
17 whether we pursued or didn't pursue waiver, I'm afraid
18 counsel for the State is just wrong about this. It's
19 important to understand how this comes up. We asserted
20 a claim for ineffective assistance of counsel, deficient
21 performance and prejudice. The State asserted as a
22 defense to that claim: No, no, he's waived.

23 And the trial judge, the State habeas judge
24 in the State court conviction ruling, agreed with that
25 and said, well, yes, he's waived. We then filed a

1 petition for rehearing in which we said, no, you can't
2 rely on that defense because it's got to be a knowing
3 and intelligent waiver under Johnson against Zerbst.
4 That's at page 92 of the joint appendix.

5 That motion for rehearing was denied without
6 any further comment. We then took a petition to review
7 to the Arizona Supreme Court. That's also in the joint
8 appendix and I believe the page cite is 101 and 102, in
9 which we specifically argued that you can't look to this
10 so-called waiver as a defense to our claim of
11 ineffective assistance because it wasn't knowingly and
12 intent.

13 Now, in the State's response to our
14 petition, which unfortunately is not in the joint
15 appendix but is in the record, the State says: No, this
16 waiver is binding and, furthermore, you're procedurally
17 defaulted because this procedure was decided on direct
18 review. But the one thing the State does not say is
19 that you raised this Johnson against Zerbst issue too
20 late, it can't be considered.

21 We then went to --

22 JUSTICE SCALIA: Excuse me. I'm looking at
23 page 92 of the joint appendix. I don't, I don't see
24 that.

25 MR. VERRILLI: I may have the wrong page.

1 JUSTICE SCALIA: Well, that's rather
2 important, don't you think?

3 MR. VERRILLI: I'm sorry. I will find it
4 for Your Honor.

5 I'm sorry for the delay here. The motion
6 for rehearing is, I'm sorry, 99, and on 102 is where we
7 raise it, and then subsequently -- then subsequently we
8 raise it --

9 JUSTICE SCALIA: Is that effective? Does
10 the court have to entertain a motion for rehearing?

11 MR. VERRILLI: Well, it doesn't have to,
12 but, Your Honor --

13 JUSTICE SCALIA: Isn't it your obligation to
14 raise it in your original motion rather than in a motion
15 for rehearing?

16 MR. VERRILLI: Well, there's no -- but the
17 point is that's not -- when we took this to the Arizona
18 Supreme Court that's not an argument that the State made
19 in opposition to our raising Johnson against Zervst.
20 Then when we got to the Federal district court we raised
21 this again, this exact argument in Federal district
22 court, and the State in Federal district court didn't
23 object that we had failed to raise this appropriately in
24 the State proceedings.

25 We took it to the Ninth Circuit. They

1 didn't raise the objection that we failed to raise it
2 appropriately in the State proceedings. The first time
3 that question has even been raised here is in the reply
4 brief on the merits in this Court.

5 And I think that's tied to the next point I
6 want to make, which is significant, which is as the case
7 comes to this Court the Ninth Circuit has ruled that we
8 have met the requirements of 2254(e)(2) and are
9 therefore entitled to an evidentiary hearing.

10 Now, what the State is essentially saying
11 is, well, no, you really aren't entitled to an
12 evidentiary hearing on this set of issues because you
13 didn't raise them adequately in the State court.

14 CHIEF JUSTICE ROBERTS: And is it just an
15 evidentiary hearing on his biological pre determination
16 to commit violent crime or an evidentiary hearing on the
17 waiver question?

18 MR. VERRILLI: On both, Your Honor.

19 CHIEF JUSTICE ROBERTS: Well, why did -- the
20 court on page A-17 ruled that there was no waiver. So
21 why would they then send it back for an evidentiary
22 hearing on waiver?

23 MR. VERRILLI: Let me move to that if I
24 could, because I do think that's significant. I think
25 the Court has elucidated the two potential readings of

1 the Ninth Circuit's decision. It seemed to us as we
2 prepared this case on the merits that the reality is
3 that the two, the issue of performance and the issue of
4 waiver, are tied together, because if it comes out after
5 a hearing that counsel did perform an effective job, a
6 diligent job of performing the investigation, and did
7 instruct the client as to what the mitigation evidence
8 was, then you view the waiver in a different light than
9 of course you would if the counsel hadn't. So we
10 acknowledge here that the proper disposition of this
11 case ought to be a remand for an evidentiary hearing.

12 JUSTICE SCALIA: But that wasn't your
13 assertion even in this motion for a hearing. It wasn't
14 that he didn't know what he was giving up. It was
15 rather the sentencing transcript, you say, "does not
16 establish that Petitioner knowingly, voluntarily, and
17 intelligently waived his right to present mitigating
18 evidence. Rather, it shows that Petitioner gave up that
19 right without thought, in the heat of anger, and in
20 frustration with his attorney during that particular
21 proceeding."

22 MR. VERRILLI: We're trying to establish
23 there, Your Honor --

24 JUSTICE SCALIA: But that was a factual
25 matter best, best disposed of by the judge who was

1 present at the time. And he didn't think it was in the
2 heat of anger. He did think that it was a valid waiver.
3 Now, you're raising a totally different issue. You're
4 saying, oh, he can't waive validly without knowing all
5 the elements of mitigation that the waiver might
6 embrace. That wasn't the argument you were making here.

7 MR. VERRILLI: Your Honor, I want to respond
8 directly to Your Honor's question, if you'll just permit
9 me one more thought about the Ninth Circuit and I'll
10 turn right back to that.

11 JUSTICE SCALIA: Okay.

12 MR. VERRILLI: So in other words, we are
13 making a more modest request for relief here which, is
14 affirmance of the judgment sending back for an
15 evidentiary hearing, but with a recognition that the
16 evidentiary hearing ought to deal with the issue of
17 waiver, which should be understood to be left open. I
18 think we're conceding something here, that waiver ought
19 to be left open and not definitively resolved. It's
20 premature to definitively resolve that against the State
21 without an inquiry.

22 Now, turning to Your Honor's point, the --
23 with respect to whether there was a waiver here or not
24 and what the State judge did or didn't do, something
25 very significant here that I think the State's argument

1 just overlooks. There's an assumption in the State's
2 argument that Landrigan's conduct at the sentencing
3 hearing itself was a waiver and considered to be a
4 waiver. But if one looks at the transcript of that
5 hearing, and this is D to the appendix to the petition
6 and beginning at page D-4 -- D-3 is where the colloquy
7 occurs where this alleged waiver happened. The very
8 next thing that occurs, the very next thing that occurs,
9 is the trial judge says: Okay, I want to hear from the
10 mitigation witnesses.

11 Then the mitigation witnesses say: Well,
12 we're not going to testify. Then the very next thing
13 that occurs is the trial judge says: Well, I want a
14 proffer of what they would have said. Then when -- then
15 when all that's said and done, the trial judge says to
16 the lawyer -- - and this is at D-15 -- you got anything
17 else, and the lawyer says, no, Your Honor, that's all
18 I've got, all I've got is what's in the sentencing memo
19 and these two witnesses. Then the judge proceeds to
20 pass sentence. That's the -- the particularly important
21 pages are D-20 and 21, and on those pages you will see
22 that what the judge does is not treat Mr. Landrigan's
23 statements as a waiver, because if she had treated those
24 statements as a waiver what she would have said is,
25 well, here's the aggravation case, Mr. Landrigan has

1 waived mitigation, he has a right to do that.

2 JUSTICE SCALIA: This is belt and
3 suspenders, that's all. The -- I don't think any judge
4 likes to decide a case just on the basis of waiver.
5 This judge is saying he waived it and even if he hadn't
6 waived it there's nothing there --

7 MR. VERRILLI: I respectfully --

8 JUSTICE SCALIA: -- because he wasn't
9 bringing in at this point the biological -- by the way,
10 biological proclivity to violence is a mitigating factor
11 rather than an aggravating factor?

12 MR. VERRILLI: Let me address your second
13 question first and then your first question.

14 I think that that in two senses does not
15 accurately represent what this mitigation case presented
16 to the State court and presented to the Federal court is
17 all about. With respect even to his affidavit, which I
18 don't think fairly under Arizona procedure can define
19 the full scope of his claim, but with respect to that
20 affidavit alone, what it says is not genetic
21 predisposition. It says the "biological component of
22 violence." That's the language that Mr. Landrigan's
23 affidavit uses.

24 CHIEF JUSTICE ROBERTS: Well, but the prior
25 paragraph says it's because of the history of his

1 biological grandfather, biological brother, and
2 biological child. That suggests to me it's a genetic
3 claim and --

4 MR. VERRILLI: But one other thing it does
5 that's very significant, Mr. Chief Justice, is it also
6 says that these witnesses can attest to the use of
7 alcohol and drugs by the biological mother when
8 Landrigan was in utero.

9 CHIEF JUSTICE ROBERTS: Well, but he knew
10 about that. He knew about that mitigating evidence at
11 the trial because his biological mother was there.

12 MR. VERRILLI: Yes, but what he's saying
13 that he would have agreed to, it seems to me the only
14 fair reading in this affidavit, which again I don't
15 think fairly defines the full scope of what he's allowed
16 to proceed with under Arizona procedure, but with
17 respect to this affidavit he's saying, well, if you had
18 had an expert who could have come in and given testimony
19 about fetal alcohol syndrome and the organic brain
20 damage and other impairments that it causes, I would
21 have cooperated with that. And that's really
22 significant because if you look at page D-21 of the
23 appendix to the petition --

24 CHIEF JUSTICE ROBERTS: How could that be
25 helpful to him if he doesn't allow his biological mother

1 to testify about drug and alcohol abuse? What use would
2 the expert be if the potential predicate --

3 MR. VERRILLI: Because all the biological
4 mother would have had to do was to give that information
5 to the expert. That's a routine matter, for experts to
6 gather factual information and assimilate it into an
7 expert opinion and then provide it to the court. That
8 could have happened easily here.

9 And I think it's very significant because on
10 page 21 you'll see that the trial judge makes a
11 fundamental error about this exact issue. She says:
12 Well, I'll grant this, I'll take the mother's testimony
13 as a proffer. I'll consider the possibility of fetal
14 alcohol syndrome, but all fetal alcohol syndrome
15 establishes is that the kid will also have a
16 predisposition to addiction.

17 CHIEF JUSTICE ROBERTS: The defendant would
18 have been happy to have his biological mother talk with
19 the expert, but was unwilling to have his biological
20 mother say the same thing in court?

21 MR. VERRILLI: Sure, and I don't think
22 there's anything unreasonable about that. Those are
23 very different experiences, but --

24 JUSTICE SCALIA: I don't understand. It
25 seems unreasonable to me. He was trying to spare his

1 mother, what, the nervousness of testifying in court?
2 That's what he had in mind?

3 MR. VERRILLI: If I -- whatever else
4 happened, the trial judge here considered this evidence
5 of mitigation and did a weighing. And the key point I
6 want to make sure I make here is that therefore any
7 evidence that this lawyer had prepared, an expert on
8 fetal alcohol syndrome most prominently and any other
9 evidence, the trial lawyer could have proffered at the
10 time and had considered at the time and had weighed at
11 the time by this trial judge. And that's a claim of
12 prejudice, it seems to me, that even if one grants, even
13 if one assumes -- and we dispute it and I'd like too
14 talk about that -- but even if one assumes that there is
15 a finding and we can't do anything about it that
16 Landrigan would not have cooperated in the presentation
17 of any --

18 CHIEF JUSTICE ROBERTS: Counsel, do you
19 think it's possible to have a valid waiver of the
20 presentation of mitigating evidence or is it always
21 possible that some additional evidence would come up and
22 you say, what if I had known that, I wouldn't have
23 waived it?

24 MR. VERRILLI: I don't think there's a yes
25 or no answer to that question. It's something --

1 CHIEF JUSTICE ROBERTS: You can't give a yes
2 answer to whether it's ever possible.

3 MR. VERRILLI: Yes. Yes, it's possible.
4 It's certainly possible.

5 CHIEF JUSTICE ROBERTS: Okay.

6 MR. VERRILLI: But I think I don't -- I want
7 to make sure I don't leave any implication that the rule
8 we're asking for here is going to open the door to lots
9 of claims, because I don't think it does for two sets of
10 reasons. One is a procedural set of reasons and that's
11 the -- that, we refer the Court to the Blackledge
12 against Allison decision -- that if -- that it's not
13 going to be enough in every case for you to plead an
14 adequate claim and then jump right to an evidentiary
15 hearing. As the court said in Allison, the district
16 court has available to it a number of tools that it can
17 use to test the claim before granting an evidentiary
18 hearing. So there's a limitation there. Now --

19 JUSTICE GINSBURG: Could you do it
20 concretely, Mr. Verrilli, for this case. The defendant
21 is being rather obstreperous and says: I don't want any
22 mitigating evidence; I'm a really bad guy. And that's
23 how he's trying to portray himself. What -- you said,
24 and you allow for the possibility that there could be a
25 knowing waiver of mitigation. What would have had to

1 transpire in this case to make it a knowing waiver?

2 MR. VERRILLI: I think that's important, and
3 hopefully it will help explain why we think that this is
4 a narrow -- that the rule we're asking for here is a
5 narrow one, and it's not going to open the door to lots
6 of claims. It's clear that just like the waiver of any
7 other fundamental constitutional right to a fair trial,
8 the defendant's got to understand what mitigation means.
9 He's got to understand its significance in the
10 proceedings --

11 CHIEF JUSTICE ROBERTS: Well, he certainly
12 understood that. He said if you want to give me the
13 death penalty, bring it on, I'm ready for it. The
14 purpose of mitigating evidence is to prevent the
15 imposition of the death penalty. He says bring it on.

16 MR. VERRILLI: And he needs to be assisted
17 by competent counsel. That's a consistent theme of this
18 Court's decisions on the Johnson inquiry. And so if you
19 have a situation in which you have documented that the
20 client understands what mitigation is -- and frankly I
21 don't think, with all due respect, Mr. Chief Justice,
22 this is the kind of documentation that ought to suffice.
23 But even if you had that, even if you documented that
24 the defendant understood it, even if you documented that
25 the defendant clearly waived it and documented that was

1 done with counsel's assistance, then it seems to me it
2 is going to be very hard for a habeas petitioner to
3 plead something that's going to get past --

4 CHIEF JUSTICE ROBERTS: Why isn't the type
5 of documentation that would be sufficient? He
6 understands what the consequence of not putting
7 mitigating evidence on is going to be.

8 MR. VERRILLI: Well, because I think there
9 isn't clarity at all that he understands what mitigating
10 evidence is, what the full scope of it is and how it
11 could --

12 THE COURT: He's present in the court while
13 they're making a proffer of this sort of mitigating
14 evidence. The judge is quite careful, saying okay, if
15 he doesn't want the evidence, I want to know what it is.
16 And he called the two witnesses. And all that this
17 defendant does is undermine his lawyer's effort to
18 present the mitigation.

19 MR. VERRILLI: But again, Mr. Chief Justice,
20 at the time the trial judge didn't treat that as a
21 waiver. And so I don't think you can cut off his
22 ability to litigate an ineffective assistance claim
23 years later on the ground that it was an ineffective
24 waiver.

25 JUSTICE ALITO: Well, are you claiming that

1 -- are you claiming that his attorney did not adequately
2 represent him at the sentencing hearing with respect to
3 the question of waiver? In other words, when -- that
4 the attorney should have insisted that the judge go
5 through some kind of more comprehensive colloquy with
6 him about waiver and inform him of certain things about
7 what he was giving up? Are you making that claim?

8 MR. VERRILLI: I think, Justice Alito, we're
9 making a couple of different claims, not that claim, but
10 a couple of different claims. One is, and it pertains
11 particularly to a mental health expert, that even if
12 Landrigan behaved exactly the way -- at 13 -- he in fact
13 behaved in the counterfactual world in which he had
14 received adequate representation, that the mental health
15 expert testimony could have been proffered to the Court,
16 had it been prepared and developed, would have been
17 considered, and could have made a critically important
18 difference and for precisely the reason that
19 Justice Ginsburg's question suggested, which is that
20 he's obviously behaving badly in this situation.

21 What the trial court ruled out of that is,
22 well, he's an amoral person. What the mental health
23 testimony would give you is an alternative frame of
24 reference for making a reasoned moral judgment about
25 this guy, and could be critically important in

1 explaining that behavior. So even within the confines
2 of accepting that the world would have unfolded exactly
3 the way it did, it was ineffective to have dropped the
4 ball on preparing that kind of evidence.

5 Then it's also ineffective in --

6 JUSTICE SCALIA: Excuse me. I'm not
7 following you. You mean the mental health expert's
8 testimony could have gone to whether the judge should
9 have accepted the waiver?

10 MR. VERRILLI: No.

11 JUSTICE SCALIA: I thought that's what you
12 were saying, I'm sorry.

13 MR. VERRILLI: No, to the basic weighing the
14 mitigation which the judge undertook based on all
15 proffered evidence. Then beyond that, we're making an
16 argument that the waiver that, even if you are going to
17 consider that a waiver, you can't consider it a knowing
18 and voluntary waiver, knowing intelligent waiver
19 supported adequately by the efforts of counsel.

20 JUSTICE ALITO: Isn't that a separate
21 question, whether it's a knowing and intelligent waiver?
22 Isn't the question here whether he was prejudiced, which
23 is a question of fact, which is a question of whether
24 had he been informed of the possibility of mitigation
25 evidence relating to a history of family violence, he

1 would have persisted in blocking the admission of any
2 mitigation evidence? Isn't that the issue? Not whether
3 it was knowing and intelligent. That would be a
4 separate legal question.

5 MR. VERRILLI: No. I don't think that's the
6 issue. With all due respect, Justice Alito, I think the
7 test under Strickland is whether there was sufficient
8 performance, which we think we have a very powerful
9 record of here, and then a reasonable probability that
10 the outcome would have been different. And I think the
11 inquiry here that the State habeas judge is undertaking
12 is the reasonable probability inquiry. That seems to me
13 to be a mixed question that requires --

14 JUSTICE ALITO: Yes, it's a mixed question.
15 But if the post-conviction relief court found as a
16 matter of fact that even had he known about the
17 possibility of this type of mitigation evidence, he
18 would have persisted in refusing to cooperate -- if
19 there was such a finding, and now you dispute it -- and
20 if you were granted a hearing, is it not true you would
21 have to disprove that by clear and convincing evidence?

22 MR. VERRILLI: Well, taking our first
23 argument to the side, our first argument which I've been
24 discussing about what happened at the hearing, I think
25 with respect to that argument the answer's no, that

1 argument stands without any need to disprove the factual
2 finding, if you assume it is a factual finding, and we
3 don't concede that.

4 But if it is a factual finding, then yes, we
5 would have to disprove it by clear and convincing
6 evidence, but we think we can do that, and all we're
7 asking for is a hearing to enable us the opportunity.

8 JUSTICE BREYER: What is the standard? I
9 ask that because I'm not certain from what I heard
10 previously -- I think the State was saying that the only
11 issue that was raised before the State proceeding,
12 collateral, the State collateral post-sentencing
13 proceeding, was that you wanted to present evidence that
14 he had a biological gene, it's a faulty gene, something
15 like that.

16 When I've looked at this, it's on page 88,
17 the motion filed says we have two claims. One claim is
18 the claim that was just mentioned, it says that -- about
19 it's from the biological mother, and use of drugs and
20 alcohol.

21 JUSTICE SCALIA: Where are you quoting from?
22 I'm sorry.

23 JUSTICE BREYER: Joint appendix A. And then
24 there's a second one on page 88 that says in addition to
25 failing to investigate these alternative sources, we

1 also want to say that counsel failed to explore
2 additional grounds, and that was the sister. And the
3 sister was going to testify that the mother -- the
4 foster mother, Mrs. Landrigan, abused alcohol, and she
5 has a whole list of things in her affidavit.

6 So is that still before us? I mean, isn't
7 that something you want to argue?

8 MR. VERRILLI: Absolutely.

9 JUSTICE BREYER: All right.

10 MR. VERRILLI: Thank you, Your Honor, for
11 bringing us back to that question.

12 JUSTICE BREYER: And then the claim would be
13 this: You want a hearing in which you're going to
14 present the sister, the Landrigans, what they did , what
15 the school says, what happened to him at school, all
16 things that are there in Affidavit 5 which was in the
17 State court, and that the biological gene. And you want
18 to say, am I right, I don't want to put words in your
19 mouth, and you want to say that given all this, had this
20 been looked into and presented to the defendant, the
21 defendant would not have said don't present any of that,
22 it would have been presented, and it would have made a
23 difference.

24 What -- is that what you want to do?

25 MR. VERRILLI: Yes.

1 JUSTICE BREYER: All right.

2 MR. VERRILLI: With one addition, which is
3 this one, fetal alcohol syndrome expert testimony is
4 very important.

5 JUSTICE BREYER: All right, with that too.

6 MR. VERRILLI: Yes.

7 JUSTICE BREYER: Now, what the Ninth Circuit
8 said is, we'll give you a hearing. We don't know if
9 you're right or wrong. What's the standard for giving
10 you the hearing? I -- a lot of things in the law aren't
11 always written down exactly, and I was under the
12 impression that trial judges often give hearings on what
13 you might call seat of the pants. I'd like to hear more
14 about it. I've been on appellate courts where rightly
15 or wrongly we've said, I just think I'd like to know
16 more about this. I can't quite understand it. Let's
17 have a hearing. And we're going to tell the trial judge
18 to do it.

19 JUSTICE SCALIA: Mr. Verrilli, I thought you
20 already conceded that the Ninth Circuit did not ask for
21 a hearing on this question of whether he had waived,
22 effectively waived mitigating evidence.

23 MR. VERRILLI: No.

24 JUSTICE SCALIA: That isn't what the Ninth
25 Circuit said.

1 MR. VERRILLI: Well, but --

2 JUSTICE SCALIA: It found that he had not
3 waived mitigating evidence. So what --

4 JUSTICE BREYER: I'm not actually talking
5 about waiver. My question was just generally what I
6 asked. What is the standard there on whether you get a
7 hearing?

8 MR. VERRILLI: Justice Scalia, would you
9 permit me to answer that question, and I'll come back to
10 Your Honor's?

11 JUSTICE SCALIA: Whatever.

12 MR. VERRILLI: Thank you. The -- with
13 respect to the standard, there are two things that we
14 have to show and if we do, we're entitled to a hearing.
15 One is that we're not disentitled under the analysis
16 under Section 2254(e) (2) as explicated in the Court's
17 Michael Williams decision, to show that the court below
18 found it, it was not raised in the cert petition. We
19 pointed out in the brief in opposition that it wasn't
20 raised, it had nothing about it. That's established and
21 the case comes to the court.

22 CHIEF JUSTICE ROBERTS: What is established?
23 That you've satisfied (e) (2)?

24 MR. VERRILLI: That (e) (2) does not apply to
25 us proceeding to an evidentiary hearing.

1 CHIEF JUSTICE ROBERTS: Why, because you
2 satisfy it or because it doesn't apply?

3 MR. VERRILLI: Because the -- there is no
4 lack of diligence here that would trigger us meeting the
5 heightened requirements of (e) (2), and therefore it
6 doesn't apply to bar us. That's the theory.

7 Now, with -- the other thing we have to
8 show --

9 CHIEF JUSTICE ROBERTS: I'm sorry, you'll
10 just have to bear with me.

11 MR. VERRILLI: I'm sorry, Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: So you're saying you
13 satisfy (e) (2) (A) (ii), because there's no lack of
14 diligence. Don't you also have to satisfy (e) (2) (B),
15 which is to show that no reasonable factfinder would
16 have found him guilty, in other words words subject to
17 --

18 MR. VERRILLI: No. No, Your Honor. That's
19 -- as we understand the Michael Williams decision
20 interpreting that provision, Your Honor, those
21 requirements only kick in in a situation where you
22 haven't shown diligence and therefore you're at fault,
23 and you can overcome your fault by meeting those
24 heightened standards. They don't apply in a situation
25 where you have been diligent and therefore you're not --

1 they don't apply to you at all.

2 With respect to the -- what else -- with
3 respect to what else we'd have to show, we'd have to
4 show that -- and this is the Townsend standard, which
5 nothing has changed -- that we've alleged facts which,
6 if proven, entitle us to relief. Those are the two
7 things we have to show and we've done both of those
8 things.

9 JUSTICE KENNEDY: And the district court has
10 substantial discretion in determining whether or not to
11 grant that hearing on that basis.

12 MR. VERRILLI: And the Ninth Circuit -- and
13 it seems to us actually, Your Honor, under Townsend in
14 that situation the hearing's mandatory. The district
15 court would have discretion under habeas, under habeas
16 practice, to hold a hearing as a discretionary matter
17 even in a situation where we haven't shown a mandatory
18 entitlement to it. So there is discretion there.

19 JUSTICE KENNEDY: Part of that discretion
20 is, and you've been careful to say this, that there's a
21 likelihood of a different result?

22 MR. VERRILLI: Yes. Yes.

23 JUSTICE KENNEDY: So it seems to me that
24 that is the difficult part of your case based on this
25 evidence.

1 MR. VERRILLI: Well, but I think -- what I
2 think is important there is that that issue ought to be
3 decided after an evidentiary hearing when you know what
4 it's going to be. It's premature to decide that --

5 JUSTICE KENNEDY: Well, we know what the
6 fetal alcohol testimony is going to be.

7 MR. VERRILLI: Well, that's true.

8 JUSTICE KENNEDY: And we could make a
9 determination or the court of appeals could make a
10 determination or the district court could make a
11 determination how likely that would to be affect the
12 result.

13 MR. VERRILLI: Well, they could, but it
14 seems to me not until you actually hear the expert
15 testimony, and then we have all of the other testimony
16 that Justice Breyer detailed that you'd want to
17 consider.

18 I do want to try to come back,
19 Justice Scalia, to your point. Yes, we acknowledge that
20 the Ninth Circuit went too far in the way Your Honor
21 described. But you don't get from that conclusion to
22 the conclusion that you ought to grant the relief that
23 the State is requesting here, which is a reversal and
24 directing dismissal of the petition, because to get to
25 that you have to show that there's no set of

1 circumstances under which we could prevail.

2 We're -- our position is an intermediate
3 one, which is that the right answer here is that the
4 judgment to send it back for an evidentiary hearing was
5 correct and should be affirmed.

6 CHIEF JUSTICE ROBERTS: What do you do
7 with -- following up on Justice Kennedy's question, the
8 dissent took the position in the Ninth Circuit that the
9 mitigating value of any proven, quoting A-24, "genetic
10 predisposition to violence would not have outweighed its
11 aggravating tendency to suggest that Landrigan was
12 undeterable and even from prison would present a future
13 danger"?

14 MR. VERRILLI: I think the answer is that
15 that is an inappropriately truncated assessment of the
16 mitigation case and a wrongly focused assessment of the
17 mitigation case, which ought to Focus on the troubled
18 history and the fetal alcohol syndrome, which provide a
19 medical mental health explanation for his conduct which
20 is quite different and that -- and so that's what ought
21 to be balanced.

22 CHIEF JUSTICE ROBERTS: That was presented
23 in the State court proceedings.

24 MR. VERRILLI: That's not correct, Your
25 Honor.

1 CHIEF JUSTICE ROBERTS: The biological
2 mother's abuse of alcohol and drugs.

3 MR. VERRILLI: The fact that she used
4 abusive -- that she abused alcohol, but not the medical
5 expert testimony explaining what effects that would
6 have. That's precisely the thing that wasn't there and
7 that was the big problem.

8 So I do think that that -- that's why we
9 need an evidentiary hearing, to develop that. This
10 weighing, by the way --

11 CHIEF JUSTICE ROBERTS: So you think the
12 State trial court had no familiarity with fetal alcohol
13 syndrome?

14 MR. VERRILLI: Well, if you look at page
15 D-21, Mr. Chief Justice, what you'll see is actually
16 proof in the transcript that she had no familiarity,
17 because she said on page D-21 all it does is predispose
18 you to being an addict yourself. But fetal alcohol
19 syndrome is a much, much broader set of impairments that
20 can bear directly on one's, one's moral culpability.

21 If I could just say --

22 JUSTICE KENNEDY: I have just one other
23 question on a different matter. In Judge Bias's
24 dissent, Judge Bay's dissent, he quotes a letter from
25 the Petitioner, the Petitioner does not want to proceed

1 with this appeal and wants the execution scheduled. Can
2 you comment on that?

3 MR. VERRILLI: Sure. What there was that
4 the Ninth Circuit, upon receiving this letter, contacted
5 counsel for Mr. Landrigan, asked him -- asked them to go
6 visit him in prison and find out what's going on. They
7 did so. They reported back to the Ninth Circuit that
8 Mr. Landrigan did in fact want to proceed with the
9 appeals. He has continued to want to proceed with the
10 appeals, signing the IFP papers, et cetera, and it turns
11 out there were neurological problems that were
12 afflicting him, very serious, at the time. So that's
13 what happened.

14 If I could say in conclusion, just remind
15 the Court what it said in the first Norrell decision,
16 that even in the world of habeas there's a difference
17 between deference and abdication. And in a situation
18 like this one, in which the State court has not afforded
19 an evidentiary hearing and has not allowed the
20 development of the evidence that bears directly on
21 Mr. Landrigan's claims, it would be a form of abdication
22 to hold that he can be conclusively barred from
23 proceeding further, even to an evidentiary hearing, on
24 the basis of the present record.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Verrilli.

3 The case is submitted.

4 (Whereupon, at 11:55 a.m., the case in the
5 above-entitled matter was submitted.)

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