No. 07-1315

In the Supreme Court of the United States

Michael Knowles, Warden, California Department of Corrections and Rehabilitation,
Petitioner,

v.

Alexandre Mirzayance,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent's Brief on the Merits

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STATEMENT OF THE CASE

Respondent Alex Mirzayance filed a habeas petition in the Central District of California challenging his state conviction for the murder of his cousin, Melanie Ookhtens. He asserted his trial counsel provided ineffective assistance of counsel in persuading him to waive his defense, not guilty by reason of insanity (NGI), on the morning the NGI trial was to commence. That defense, which federal courts found credible and which was amply supported by lay and expert testimony, was abandoned for no benefit to Mirzayance whatsoever. On the morning of trial, counsel deemed the defense "hopeless" and gave it up.

Mirzayance vigorously pressed the abandonment of the insanity defense claim in the California courts, but both the Court of Appeal and the California Supreme Court summarily denied relief without discussion of the issue. In three separate rulings, Ninth Circuit panels agreed the insanity defense was a strong one. The first panel, after finding the alleged facts in state and federal pleadings court were such that if proven would entitle Mirzayance to relief, remanded for an evidentiary hearing on why trial counsel abandoned the defense the morning the insanity trial was to commence. Pet. App. 105.[1]

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[1] Mirzayance will use the same abbreviations to the record as in the Warden's Brief on the Merits. "RT" cites are to the State trial transcript, "CT" to the State clerk's record, "Ex" are exhibits at the federal evidentiary hearing, and "EH" will be to the transcripts of that hearing.

At the evidentiary hearing, defense counsel confirmed he had no tactical reason for abandoning the NGI defense, and that nothing beneficial could have accrued as a result of abandoning it. Mirzayance proved the *bona fides* of the NGI defense through the testimony of three experienced forensic psychiatrists and two psychologists. They testified Mirzayance, due to a long standing serious mental illness,[2] met the California legal definition of insanity. They affirmed they were prepared to so testify at the NGI trial.

The Magistrate Judge's Report and Recommendation [R&R], adopted by the district court (Pet. App. 36.), found these and other "witnesses could have testified credibly and therefore perhaps successfully," Pet. App. 100, and granted the writ. Pet. App. 35-37. The Ninth Circuit affirmed, Pet. App. 24, and this Court remanded for further consideration in light of Carey v. Musladin, 549 U.S. 70 (2006). The Ninth Circuit reviewed Musladin and noted that at the time of Musladin's court's decision there was no decision of this Court that applied due process requirements to "private-actor courtroom conduct," as contrasted to "state-sponsored courtroom practices," therefore, no clearly established federal law to warrant federal relief from the state decision. Pet. App. 9. The Ninth Circuit then noted that, in contrast to the

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[2] There was no dispute about Mirzayance's serious mental illness. The prosecutor told the court at sentencing, "I feel he may have a psychosis...." RT 903. "He does appear to have some kind of mental illness." RT 905. *See also* defense counsel's comment: "And it's clear that he was psychotic at the time of commiting [sic] the offense." RT 908. The court added, "I do think that Alexandre Mirzayance is mentally ill." RT 915.

indeterminate state of the law as to spectator misconduct at the time of the state court decision in Musladin, the law of ineffective assistance was clearly established under Strickland and its progeny at the time of the state court decision in this case. The Ninth Circuit then affirmed the grant of relief based on a straightforward application of Strickland to the facts of this case. Pet. App. 8, 12.

STATEMENT OF FACTS

A. The State Trial on the Murder Charge.

In 1995, Mirzayance was a part-time college student living in Los Angeles. Mirzayance's parents lived in France and his paternal aunt lived in Los Angles. She was the mother of the decedent, Melanie Ookhtens, who was a college student at the University of Southern California. On October 13, 1995, her parents were out of the country on vacation. She and Mirzayance had planned to pick them up at the airport that night. Mirzayance went to the Ookhtens residence during the afternoon to meet Melanie. While Mirzayance was waiting there, Melanie's grandmother and aunt arrived at the residence to prepare the house for the parents' return.

When the grandmother and her daughter opened the front door, Mirzayance seemed "startled," "[m]aybe he was expecting Melanie, and when he saw us, he got confused." RT 96. The grandmother described Mirzayance as acting quite out of character. He was "following me wherever I was going with the strange walking." RT 97. She found that Mirzayance was acting very "manly" which was "extremely" abnormal for him (id., at 92), as Mirzayance normally was a "quiet, shy person."

Id. at 95. The grandmother testified Mirzayance's relationship with his cousin Melanie was extremely close, like "sister and brother." RT 94.

After the relatives left, Melanie arrived home. According to Mirzayance's statement to the police, Melanie was in an angry mood and complained that Mirzayance was watching television. She went to her room to change clothes. Mirzayance followed her to her room carrying a gun and knife. He entered her room and shot and stabbed Melanie to death. CT 161 -184. He then picked up some of the shells and clothing, went to his apartment, showered, and left a false message on the Ookhtens' answering machine stating that he could not come to the house.

He called his friend, Laurent Meira, confessed to him, dropped his bloody clothes in a garbage can, and then went to the police where he confessed he had killed his cousin. RT 117, 120-121, 149-156. He told Meira last for the past three days people were "after him" (RT 150), and he felt "pretty bad" and began carrying a gun. Ibid. Meira testified Mirzayance was a shy person who never spoke of his cousin Melanie other than in a fond and approving way, only expressing affection for her. RT 159,161.

Mirzayance's trial attorney, Donald Wager, called one mental health expert, Dr. Paul Satz, at the guilt trial[3] as the defense to first-degree murder.

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[3] The jury was informed during voir dire there would be two phases of trial and insanity would be considered only at the second trial. *E.g.,* RT June 13, 1997 (augmented), 258: "And if there is a finding of guilt then there would be a phase where the jury would need to determine whether he was legally sane or insane...." *See also* id. at 244, 315; RT June 16, 1997, 487; RT June 17, 1997, 553; RT June 18, 1997, 691.

Because of Mirzayance's fragile mental condition due to schizophrenia, Dr. Satz asked that Mirzayance be excused from the courtroom during his testimony.[4]

Dr. Satz testified he conducted thirty psychological and neuropsychological tests focusing on whether there was frontal lobe brain damage. Dr. Satz testified the tests revealed significant, longstanding brain damage. RT 467.

As part of his evaluation of Mirzayance's mental status, Dr. Satz reviewed extensive records from Mirzayance's upbringing that demonstrated serious mental deficiencies spanning the course of his life including "early experiences with auditory hallucinations." RT 469, 474-475.

Dr. Satz interviewed Mirzayance's friend, Laurent Meira, who stated "he had asked Alex why he smoked [marijuana] and Alex [Mirzayance] replied it makes the voices go away and I can sleep." Dr. Satz believed this was a form of "self-medication, particularly for very sick people, schizophrenics in particular." RT 495.

Mirzayance expressed to Meira shortly after the killing that he carried the gun because "he felt someone was after him." RT 497. This raised "the

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[4] "I would very much hope that he did not have to hear my testimony. It would be difficult for me and I feel that I would do more harm if he were to hear some of the dynamics and issues in this case. I think it would be very dangerous. And I would be potentially responsible." RT 439. This was granted and Mirzayance was not present during Dr. Satz's testimony. RT 440. This is relevant to refute the State's implication that Mirzayance's participation in the waiver of the NGI trial reflected an informed decision. *See* Pet. Brf. 21 (waiver "approved by Mirzayance").

question as to whether there was a delusional state, particularly of the paranoid type...." Ibid. Dr. Satz opined Mirzayance "most definitely had some form of schizophrenic disorder starting very early in life." RT 488.[5] Because of the additional component of depression, Mirzayance had a "schizoaffective" mental disorder. RT 492-493.

As to Mirzayance's post-homicide conduct, Dr. Satz stated "in this case you have a sick schizophrenic kid ... who is now trying to make some sense of a very explosive, irrational event." His "explanations are pathetic. And they are a product of a demented cognitively impaired sick person...." RT 501.

B. Jury Arguments.

At the close of the guilt evidence the prosecutor reminded the jury that their task was limited because the insanity aspect of the case was not before them: "you have been told there are two portions of this trial. This is the guilt portion. For this portion and this portion alone sanity is *conclusively presumed*. You are not dealing with that issue here." RT 768 (emphasis supplied). "No amount of evidence presented in this portion of the trial can overturn that conclusive presumption... So don't sit back there and argue whether or not he was insane or whether he was sane. That is not yet before you." RT 768-769; italics added.

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[5] "Schizophrenia is a severe disorder of affect cognition in social development marked by primary symptoms of delusions, hallucinations, most often auditory but could be visual too, marked by disorganization or reality testing...." RT 491-492.

Defense counsel Wager argued Mirzayance's conduct was without motive and was irrational, and was thus without deliberation. RT 816, 819. "Because he's sick he didn't weigh and consider the question of killing." RT 820, *see also* RT 823.

The prosecutor stated to the court outside the jury's presence that "the defense's whole argument rested on whether or not the defendant had a rational motive for this conduct." A rational motive, she argued, "is not necessary either to prove murder nor is it necessary for proof of premeditation and deliberation." RT 828-829. The court agreed, finding defense counsel had made "repeated statements about there being no rational thought on the deliberation which could lend the jury to misconstrue what is required." RT 830-831. The prosecutor expressly acknowledged that "the defendant did not act rationally," but that "does not negate premeditation and deliberation." RT 842-843. See also RT 844, "[a] finding of deliberation and premeditation is not negated by evidence a defendant's mental condition was abnormal or his perception of reality delusional."] RT 844.

The trial court repeated in its instructions that a finding of premeditation and deliberation is not dependent on the motivation for the act and that the necessary mental state is not "lacking when the considerations reflected on by the defendant were the product of mental disease or defect." RT 853.

C. Jury Deliberations.

Even with the truncated defense and the limits on what the jury could consider in reaching a verdict, the jury deliberated at length before finding first-degree murder. Deliberations began on June 24th, continued all day the 25th during which the

jury asked numerous questions about the evidence and law (CT 208-211), and concluded with a verdict on June 26th. RT 867.

D. Withdrawal of the NGI Plea.

After the first-degree guilt verdict, Mr. Wager remarked to the court the NGI phase was now "not an uphill battle at this point, this is a perpendicular climb. Like mountain climbing." RT 869. [6]

On the following morning when the NGI phase was to begin, Mr. Wager announced to the court:

> ... it is my firm belief that this jury based on their finding will not find the defendant insane on the basis of the evidence that I can present .... [¶] I've had a discussion with the defendant about his rights in this regard, and he is willing to, at my suggestion, and after careful consideration,[7] I think on

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[6] Wager's pessimistic assessment reflected his misunderstanding that the first-degree verdict was the functional equivalent of a jury finding Mirzayance could appreciate the wrongfulness of his conduct. As discussed *infra,* California removed insanity and diminished capacity concepts from the definitions of murder in 1982, with the result that a jury finding of premeditation and deliberation had no necessary relationship to the issue of sanity.

[7] At the evidentiary hearing, Wager testified he spoke with Mirzayance on the morning of the withdrawal in a courthouse holding cell by telephone through a glass panel. Wager wanted to tell him that withdrawing the insanity plea was "the only course of action that we could intelligently take at this time." EH1 66. He spoke with him "no more than 10 minutes...maybe 15." Ibid. It was the first time he had broached the idea of the waiver. Id., at 112.

his part, waive and give up his right to continue his plea of not guilty by reason of insanity and to withdraw that plea at this time. RT 874.

The court asked Mirzayance what medications he was taking. He replied, "Zoloft, Cogentin, Navane and Vistaril." RT 877. (These are anti-psychotic and anti-depressant medications. EH3 22.) The NGI plea was withdrawn, and Mirzayance was sentenced to a term of 29 years to life in prison. RT 914-915.

E. The Facts Presented at the Evidentiary Hearing.

The Warden fails to set forth many of the important facts established at the evidentiary hearing. Even though Mirzayance was the prevailing party, the Warden makes the inaccurate summary characterization: "[f]ollowing a four-day evidentiary hearing, the district court resolved the overall factual issues against Mirzayance." Pet. Brf. 8. In light of the failure to acknowledge the important factual record established at the evidentiary hearing, Mirzayance recounts it in relevant detail. One critical fact given extremely short shrift by the Warden, Pet. Brf. 49, is that Wager believed the NGI defense "hopeless." This belief was primarily premised on his serious misapprehension of California law and incorrect belief that the jury's first-degree verdict was the

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Mirzayance's reaction was "accepting." Id., at 66. Wager described Mirzayance as "severely mentally ill," "eager to please," "compliant," who did what Wager asked of him. EH1 96, 97.

functional equivalent of a finding that Mirzayance understood the wrongfulness of his act. EH1 125.

1. Wager's testimony regarding his inexperience with the NGI defense and mishandling of the guilt trial.

Attorney Wager testified at the evidentiary hearing that "Mirzayance was the first case I defended with an insanity defense." EH1 27.[8] He recognized at the outset that based on initial mental state examinations, "Alex Mirzayance was severely mentally ill, probably lower than average IQ, that there seemed to be no overt motive for the killing of Melanie Ookhtens." EH1 31.

An insanity verdict was "what we were really driving for more than anything else." EH1 50. Because that was the ultimate goal, he decided to "save most of the people for, other than [Dr.] Satz, for the sanity phase." Ibid. At the same time, he believed the likelihood of success on the NGI phase was contingent upon obtaining a second-degree murder verdict at the guilt trial because of his erroneous belief that a first-degree verdict meant "the jury, in effect, has found him to be sane." Ibid.

Notwithstanding his assertion about the importance of a second degree verdict to an NGI verdict, Wager limited his presentation in support of a second degree verdict at the guilt phase to Dr. Paul Satz, an academic psychologist whose cross-examination Wager viewed as an "absolute disaster," EH1 49, commenting that Dr. Satz

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[8] *Cf.*, Pet. Brf. 18, describing Wager as "well versed in mental health and sanity issues," a characterization not supported by Wager's testimony.

performed "terribly" on cross. EH1 89. But Wager made no effort to remedy this perceived disaster when he could have simply called one or more of the far more experienced forensic psychiatrists to testify at the guilt phase that Mirzayance's psychotic state at the time of the homicide was inconsistent with premeditation and deliberation. Ibid.

2. Retained expert opinions on insanity.

Three very experienced forensic psychiatrists provided detailed evaluations of Mirzayance. At the evidentiary hearing, they testified by stipulated declarations and/or by live testimony that Mirzayance was legally insane at the time of the homicide, and that they had been prepared to so testify at the NGI trial: Dr. Bennett Blum, EH2 11; Dr. Ronald Markman, EH2 49; Dr. Kaushal Sharma, Ex. 5-2. In addition, Dr. Satz found Mirzayance legally insane as well (Ex. 3-2), as did psychologist Dr. Richard Romanoff who stated that Mirzayance's "psychotic thought process caused a gross misperception of reality and a consequent potential lack of understanding of the knowledge of wrongfulness of the conduct at the time of the homicide." Ex 4-3.

Wager did not consult with any of these experts about whether to withdraw the defense. They were shocked to learn of it and were entirely prepared to go forward with their testimony. As Dr. Bennett Blum[9] testified:

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[9] Dr. Blum worked with the well-known forensic psychiatrist, Dr. Park Dietz. Dietz approved Blum's opinions in this case. EH2 47. Blum's report is written under the letterhead of Dr. Dietz & Associates. Ex. 1-14. The R&R specifically found Dr. Blum a "credible witness"

> Being informed of the decision to withdraw the insanity plea was a surprise to me given the conclusions reached by myself and other mental health experts regarding Mr. Mirzayance's state of mind. I was not consulted about this decision. In my judgment, based on the data and information available to me, the plea of not guilty by reason of insanity in this case was reasonable and thus my surprise at the announcement of its abrupt withdrawal. Ex. 1-5.

Dr. Ronald Markman[10] testified he "was not consulted prior to the abrupt withdrawal of the NGI plea which did not make either psychiatric or legal sense. In my judgment, based on the data and information available to me, the plea of not guilty by reason of insanity was a viable one to present to the jury." Ex. 2-5. Indeed, Dr. Markman "arrive[d] at the courthouse on June 27, 1997, prepared to testify" at the NGI trial. Ex. 2-3. Wager testified that when he told Dr. Markman he had just waived the NGI trial, Markman immediately responded, "Now, that was a mistake." EH1 123.

(Pet. App. 69), although it barely mentions that his testimony (at EH3 11) and written opinion which found that to a "reasonable degree of medical certainty" Mirzayance legally insane. EH3 27; Ex. 1-32. *See* Pet. App. 60-61.

[10] Wager selected Dr. Markman because he "had one of the better reputations among the panel psychiatrists as being a down the middle, honorable man. He has a law degree besides a psychiatry degree." EH1 34.

> Dr. Kaushal Sharma testified that he too was:
> …very surprised to learn that the defense withdrew the insanity phase of the trial. I was not consulted about the wisdom of this course ahead of time and I would have questioned it. I would have asked why this was being done and what benefit there was in this course of action after a finding of first-degree murder. In my judgment, if presented to the jury, Alexandre [Mirzayance] had documentary evidence, lay witnesses, and qualified, experienced expert witnesses to support defenses to both premeditated murder and to show insanity at the time of the killing. I have seen mental state defenses put on with far less compelling supportive evidence. Ex. 5-4.[11]

Dr. Richard Romanoff was the first mental health expert to speak with Mirzayance after his arrest on October 13, 1995. He found it difficult to converse with him "due to the absence of any logical connection between the thoughts being expressed by Mr. Mirzayance." Ex. 4-1. Mirzayance complained of "ongoing auditory and visual hallucinations and intense fearfulness and paranoia." Ibid; *see also* his

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[11] Dr. Sharma was well regarded by the State. The prosecutor sought to have him appointed in the case as a court's expert. EH2 145.

raw interview notes. Ex. 23-1. Dr. Romanoff found a longstanding psychotic thought process. Ibid. Dr. Romanoff was prepared to give testimony at the NGI trial. The night before the trial was to begin, Wager told him by telephone he would testify the next day. They discussed his anticipated testimony. Ex. 4-2. However, the next morning, just as he was leaving for court, he was called by Wager's office and was told the "case had been resolved." Ex. 4-3.

There was additional lay testimony and documentary evidence supportive of the NGI defense. Dr. Sharma noted other NGI corroborative evidence including: Mirzayance's childhood history of abnormal behavior and mental health treatment,[12] the closeness of Mirzayance and Melanie's relationship (and thus a lack of a motive to kill her); and his repeated victimization in Los Angeles prior to the homicide; and his paranoid perspective at the time of the homicide. Ex. 5-5,16.

A jail psychiatrist prescribed and administered anti-psychotic and antidepressant drugs to Mirzayance while he was in pre-trial custody awaiting trial for 19 months, further confirming his major mental disorder. Ex. 2-2 (Dr. Markman).

Relatives gave testimony about Mirzayance's bizarre demeanor the afternoon of the homicide. Laurent Meira's testified about Mirzayance's belief in being followed and arming himself.

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[12] This included reports from France about Mirzayance's mental health. *See* Ex 6-35 (Dr. Magne); Ex 6-37 (Dr. Demule); Ex 6-38 (Dr. Boivin); Ex 6-39 (Dr. Lemmel); Ex 6-40 (Principal Barbaud); Ex 6-41 (teacher Pinaud); Ex 6-42 (teacher Regueme); Ex 6-43 (teacher Nuguez). These were also cited in the reports of Dr. Romanoff, Ex. 4, pp. 4-8; Dr. Blum at Ex 1, pp.16, 17, 19; and Dr. Markman: Ex 2, 13.

3. Court appointed experts.

Wager did not claim the opinions of the two court appointed experts influenced his decision to waive the NGI plea. Dr. Sarabjit Sandhu, a specialist in geriatric psychiatry (Ex. 26-6, 7), opined for the prosecution that Mirzayance did not come close to meeting the insanity standard. EH3 60. He believed Mirzayance's conduct was "goal directed", but also that he could "react impulsively, irrationally if you could use that term, reacted in a manner not quite congruent to the stimuli." Id. at 65. His post-crime conduct showed an ability to determine right from wrong. Ibid. *See also* Ex. 26-1.

Dr. Sandhu testified there was no legal or logical preclusion of insanity from a jury finding of first-degree murder. EH3 72. Although he stated he did not find paranoia (EH3 73), he agreed Mirzayance's bizarre behavior at the Ookhten home the afternoon of the homicide "could be somebody who has some paranoia, yes." EH3 89.[13]

Dr. Sandhu found "no motive or rationale for the crime," and knew the relationship between Mirzayance and his cousin had been fairly close. EH3 85. He agreed that while in jail following his self-surrender, that doctors at the jail "had to determine that he was psychotic in order to get an antipsychotic drug," as Mirzayance was prescribed. EH3 81-82. Mirzayance's childhood was "consistent

[13] This was because in making his report he reviewed a police interview of the relatives at the Ookhtens' home on October 13, 1995, describing feeling "very weird an uneasy about [Mirzayance's] conduct." His face was so red it was "almost with hives." He followed one of the ladies around the house which made her nervous. EH3 86, 88, 89.

with someone who could become schizoaffective later in life." EH3 96. When asked, "when was the likely time he became psychotic," he replied, "It's hard to say at what point." He believed Mirzayance was disturbed and the psychosis came on after the killing. EH3 98. Prior to that point, he found it unlikely, but he "could not say." EH3 98, 99. If persons were reporting his having hallucinations prior to the killing, he would want to know more about it. EH3 75.[14]

Dr. Seawright Anderson's opinion, as initially elicited by counsel for the State, was that "at the time of the commission of the present offense that the defendant had the mental capacity to know the nature and purposes of his actions and also know that he was doing bodily harm to the victim at that time." EH3 9-10. He also testified that he asked Mirzayance "if he thought it was right or wrong to stab or shoot the victim," EH3 11, but was ambiguous as to whether the answer ("wrong") reflected Mirzayance's retrospective perception at the time of the subsequent interview or his actual perception at the time of the homicide.

Dr. Anderson believed Mirzayance "probably psychotic most of his life." EH3 47. He agreed with the diagnoses of Drs. Satz, Blum, and Romanoff. EH3 47-49. He agreed there appeared a

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[14] Had Wager done a competent fact investigation, he would have interviewed Melanie Ohktens' good friend, Lucy Davidian. The latter told a post-conviction investigator on March 12, 1998 that Mirzayance complained the week before the homicide of hallucinations. EH1 160. At the hearing, Davidian denied the statement (EH1 18) and repeatedly said she "did not remember" the interview with the investigator in her home, although it "may have" occurred. EH1 20.

psychiatric consensus of Mirzayance's psychotic illness and impairment. EH3 50-51. On inquiry about Mirzayance's ability to mentally reorganize after "he had a psychotic break at the time of the killing," Anderson said, "it means to me that he had the ability to recuperate or recover from a psychotic episode." EH3 52.

Dr. Anderson subsequently explained his understanding of the "knowledge of wrongfulness" prong of the California insanity standard "had to do with whether or not the person knew they were doing bodily harm to the person," and not "whether or not the person thought that they were justified in doing this act and therefore thinking it was right." EH3 32.

Counsel for the State attempted to clarify the ambiguity regarding the point in time at which Mirzayance recognized the wrongfulness of his conduct, and elicited Dr. Anderson's clear answer that Mirzayance did not believe his conduct wrong at the time of the homicide:

> Q. Is it also your opinion that at the time he was harming the victim he knew that harming her was wrong?
>
> A. I felt that he felt that he was justified in doing what he was doing because of the psychotic condition he was under. In breaking it down that way, we would say he felt that he was justified in not doing anything wrong from his interpretation, not from the legal interpretation. EH3 53-54.[15]

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[15] Not understanding legal or moral wrongfulness at the time of the homicide due to psychosis is legal insanity

4. Wager's testimony regarding withdrawal of the NGI plea.

Wager's decision to abandon the NGI trial was prompted by his erroneous understanding of California law. Pet. App. 6, fn 1. He believed the jury's finding of first-degree murder was the functional equivalent of a finding that Mirzayance was legally sane, and that the insanity defense was virtually hopeless for that reason. EH1 50, 99. Laboring under this erroneous belief, Wager believed the only possibility of a successful NGI verdict required jury nullification based on sympathy for Mirzayance if his parents testified and wrenched the jurors' hearts:

> "I saw no sense in proceeding with a defense that had no possibility now of having an emotional portion to it so that the jury could then find in favor of this defendant they had already found guilty of first-degree murder and, whether they knew it or not, under the facts of this case, legally sane. Without the parents, it would be hopeless. That was my feeling at the time." EH1 65.

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> once the jury had found that he had maturely and meaningfully deliberated

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under the California insanity test. People v. Skinner, 39 Cal.3d 765, 780; 704 P.2d 752 (1985)(reaffirming "inability to appreciate moral wrong as a component of the California test of legal insanity"). The R&R omits this portion of Dr. Anderson's testimony from its summary. Pet. App. 65-66.

> and premeditated,[16] they had unknowingly decided that he had — he knew the consequences of his actions and the nature and quality of his actions although they didn't know it. But in order to find, therefore, that he was insane, he [*sic*] would have to in effect disregard their earlier findings. EH1 125. (emphasis added)

Wager repeated this erroneous belief of the impact of the first-degree verdict on a successful NGI result in his testimony. Insanity, he testified, "is not supported by their finding of first-degree murder in this case under the facts of this case since they found him to premeditate and deliberate the killing." EH1 60. Because of the finding, to win the NGI trial would require an emotional appeal and "not because he's legally entitled to [it]." Ibid. "I thought in front of this jury with their finding that we didn't have a chance to win the sanity phase...without the parents." EH1 137. At EH1 145, he repeated the passage block quoted above on the significance of the first-degree verdict adding: "Once the jury finds that someone has premeditated and deliberated their action, they have found under the facts of this case that he knew what he was doing and they appreciated the wrongfulness of what he was doing..."

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[16] As discussed *infra*, this definition of first-degree murder that Wager thought the jury had employed had in fact been deleted by legislation fifteen years prior to the trial. *See* Stephen J. Morse & Edward Cohen, "Diminishing Diminished Capacity in California," 2 CAL. LAW. 24 (1982) (as a result the "relevance of mental-health testimony is lessened greatly." Id., 25.)

Wager recognized that withdrawal of the insanity defense afforded no benefit to Mirzayance whatsoever, but rather doomed him to a mandatory life term in state prison:

> Q. Was there anything Alex [Mirzayance] gained by waiving the N.G.I. trial?
>
> A. [Wager] No. ER1 123.

Wager acknowledged that what he lost by giving up Mirzayance's NGI defense was the opportunity to "proceed to a mental health facility for treatment," and possible release upon recovery long before he would likely be paroled on the life sentence. EH1 123, 124.

Wager ventured he might have spoken to Dr. Blum the day of the guilt verdict and wondered "if we can have any chance at all and whether it should just be waived." Pet. App. 52. (Dr. Blum testified Wager told him the night before the NGI trial was to begin that he was going to withdraw the NGI plea. Ibid.)

At the hearing, Wager detailed the "consciousness of guilt" facts in Mirzayance's behavior following the killing that made the NGI case more difficult. These included the message left on the phone, cleaning up, and his confessions. EH1 51-52. All of the experts were aware of these facts when they arrived at their opinions that Mirzayance was legally insane at the time of the killing. EH1 99. (At trial, he argued to the jury: "Thousands of people commit crimes and try to avoid detection when they have never coldly calculated, weighed and considered before the crime whether to do it or not." RT 826.)

Wager testified that on the morning the NGI was to commence, the parents refused to testify. EH1 57, 59. Mirzayance's parents denied they refused to testify. EH1 170, ER2 107. Their family attorney, James Lund, testified that on the morning of the NGI trial, Wager did not tell him the parents refused to testify. Rather, Wager told him that Wager believed the parents were in "too much pain" or "anguish" to testify. EH2 93. (The R&R found that "[w]hile it therefore may be accurate in a precise, semantic sense to say that the parents never *refused* to testify, the Court finds that the parents at least expressed clear *reluctance* to testify, which, in context, conveyed the same sense as refusal." Pet App. 72 (emphasis in original).)

Wager made no efforts to pursue the NGI defense that morning. After the parents declined to testify, he did not try to persuade them parents to testify.[17] He did not advise them to talk to Mirzayance's psychiatrists about their reluctance even though they had a working relationship with all of them. EH1 82. Wager said he believed the parental decision to not testify was pre-planned. EH1 140-141.

Wager never informed his client that his parents had purportedly refused to testify. He did not ask Mirzayance to talk to them about it. He did not tell him all the experts would testify he was NGI regardless whether his parents testified. EH1 111,

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[17] As the Circuit majority stated, "[c]ompetent counsel would have attempted to persuade them to testify, which counsel here admits he did not." Pet. App. 7. This was certainly an alternative given the equivocation of Mirzayance's father who told Wager that morning that he would not testify, that he would testify, and then that he would not. EH1 106.

113. He did not discuss with the mental health experts strategies for addressing the parental reluctance to testify.[18] He did not proceed with the expert witnesses subpoenaed for trial that day, which would have thus given the parents that Friday and the weekend to reconsider.

Wager knew he could proceed with expert testimony at the NGI trial in that the first-degree murder verdict would not impact their testimony. EH1 99. The experts testified at the hearing that they could have presented their testimony with equal vigor whether or not the parents testified because the parents' information had been incorporated into their opinions from prior interviews. *E.g,* Dr. Blum, Ex. 1-5; Dr. Markman, Ex., 2-6; Dr. Sharma, Ex 5-4, 5. Wager acknowledged that the parents had been interviewed by each of the experts. EH1 81-82.

Yet, Wager made the withdrawal decision when so angry that he could not even assure the federal court he was functioning as appellant's advocate: "Q. Do you think that morning, given your anger at the parents, you became so emotional that you lost your sense of advocacy? ¶ A. I'm not sure. I'm not sure." EH1 124.

Summary of Argument

Mirzayance's argument is that the Circuit majority performed an entirely unremarkable application of Strickland v. Washington, 466 U.S.

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[18] Despite Drs. Romanoff, Blum, Markman, and Sharma all having "significant experience in the testifying to forensic matters" (EH1 90), Wager did not consult with them about the decision to waive.

668 (1984) to the facts as presented to the state court and as expanded at the federal evidentiary hearing. Its conclusion that Mirzayance was entitled to relief under 28 U.S.C. § 2254(d) was entirely consistent with the conclusion reached by the district court.

However, the Warden mischaracterizes what the Ninth Circuit did and misstates what the record shows in order to make this case appear to the Court as something that it is not. A careful, fair examination of the record and of the opinion below will disclose the numerous ways in which the certiorari petition and the Warden's Brief distort the issues presented, and will demonstrate that the judgment below is well-founded in fact and in law.

The Warden's challenge to the Circuit majority opinion has three primary components: (1) to impugn the Circuit majority's straightforward application of Strickland by inaccurately branding it as a "novel 'nothing to lose' rule," Pet. Brf. 15; (2) to impugn the Circuit majority's factual basis for its deficient performance conclusion by holding out an irrelevant divergence between the district court and the Circuit majority's characterization of trial counsel's internal subjective state when he abandoned the NGI defense, Pet. Brf. 19; and (3) to impugn the Circuit majority's Strickland prejudice conclusion by inaccurately asserting that one of the state-appointed psychiatrists had elicited a virtual confession of sanity from Mirzayance, Pet. Brf. 46. Each of these points of attack is contradicted by the record, and none provides any basis for reversing the Court of Appeals.

Regarding the attribution of a "nothing to lose" rule to the Circuit majority, the Warden relies solely on his own powers of characterization, and

not on the substance of the Circuit majority's analysis.

The Warden acknowledges, as he must, that the Circuit majority expressly repudiated the suggestion that it was relying on a "nothing to lose" rule, but nonetheless argues that the Circuit majority "dress[ed] the 'nothing to lose' rule in sheep's clothing" and "simply inverted the phrase" from "nothing to lose" to "nothing to gain." Pet Brf. 23. This is an effort to elevate semantics over substance because the content of the Circuit majority's analysis is textbook Strickland regardless of the label attributed by the Warden. This Court may well have had concerns at the time of its February 20, 2007 remand order whether the Ninth Circuit applied the clearly established law of Strickland in light of the district court's misapprehension that the Ninth Circuit had promulgated a "nothing to lose" rule – "[i]f petitioner had nothing to lose under Profitt – whether Profitt merely applies Strickland or extends it – the command of the Ninth Circuit is that therefore petitioner is entitled to relief." Pet. App. 99 (emphasis in original). The Ninth Circuit responded with an express disavowal of any reliance on Profitt for any purpose other than its discussion of the nature of a tactical decision under Strickland. Pet. App. 5, section III.

The Warden, however, ignores the Ninth Circuit's express disavowal of a "nothing to lose" rule, and argues to this Court as if it had adopted the district court's grounds for relief, even though the Circuit majority expressly rejected them – "We affirm the district grant of habeas relief, albeit on different grounds." Pet. App. 12. The Circuit majority clearly complied with this Court's remand

directive to reconsider its ruling in light of Musladin, and reaffirmed that its grant of relief was on "different grounds" than relied on by the district court. Pet. App. 12. The Circuit majority's ground was a straightforward, fact-based application of Strickland.

Regarding the purported factual conflict as to the rashness *vel non* of trial counsel's decision, Pet. Brf. 49, the Warden juxtaposes the statement in the Report and Recommendation below – "Wager's decision was carefully considered, not rashly made", Pet. App. 69 – with the Circuit majority's statement – "We disagree that counsel's decision was carefully considered and not rashly made" Pet. App. 7. The Warden highlights this juxtaposition as indicative that the Circuit majority failed to accord deference to the district court's fact finding, but the Warden fails to recognize that the conflicting characterizations about trial counsel's subjective internal state when he abandoned the NGI defense are essentially irrelevant to the Strickland issue whether the decision was objectively reasonable. An attorney can ponder a decision for two minutes, two days, or two months, while in varying states of internal calm or tumult, all of which is irrelevant to the objective reasonableness. The decision of the Warden has elected to stand or fall on the irrelevant ground of diverging characterizations of defense counsel's subjective "rashness," while the Circuit majority reached its conclusion on the basis of counsel's lack of objective reasonableness.

Regarding the Warden's prejudice argument, the Warden deems it "most significant" that one of the state-appointed psychiatrists, Dr. Anderson, single-handedly "discovered what Mirzayance's experts studiously avoided – evidence that by itself

would have doomed an insanity defense to failure." Pet Brf. 46. However, the Warden's dramatic characterization is incompatible with the evidentiary hearing record. The Warden refers to Dr. Anderson's testimony regarding his interview with Mirzayance, and cites to EH3, 10, 11, at which Dr. Anderson reported that Mirzayance acknowledged it was wrong to have killed his cousin. However, the Warden fails to inform the Court that the cited passage was ambiguous as to whether Mirzayance was acknowledging the wrongfulness of his conduct from his retrospective perspective at the time of the interview, or from his real-time perspective at the time of the homicide. The Warden further fails to inform the Court that this ambiguity was dispositively resolved as Mirzayance' retrospective acknowledgment of the wrongfulness of his conduct, reached after the passage of several months and with the benefit of an anti-psychotic medication regimen. Dr. Anderson clearly explained under questioning by the State's attorney that Mirzayance believed at the time of the homicide that he was "justified" and was "not doing anything wrong from his interpretation" due to his "psychotic condition." EH3 53-54. Thus, the Warden's "most significant" evidence in derogation of the Circuit majority's prejudice finding turns out to be a serious misreading of the evidentiary hearing record. In fact, the testimony of Dr. Anderson, taken as a whole, fully supports the NGI defense that the district court and Circuit majority found credible.

In sum, the Warden's attacks on the Circuit majority's conclusion are contrived, contradicted by the record , and provide no basis for reversing the Court of Appeals' judgment.

Argument

The Circuit's Holding Correctly Applied 28 U.S.C. § 2254 to an Ineffective Assistance of Counsel Claim for Which Mirzayance Established Both Deficient Performance and Prejudice under Strickland v. Washington, 466 U.S. 668 (1984).

The standard for review of IAC claims was well established by 1999, when California summarily denied review of Mirzayance's claim:

> We established the legal principles that govern claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id., at 687, 80 L.Ed.2d 674, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id., at 688, 80 L.Ed.2d 674, 104 S.Ct. 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Ibid.

Wiggins v. Smith, 539 U.S. 510, 521 (2003); *accord* Rompilla v. Beard, 545 U.S. 374 (2005); Williams v. Taylor, 529 U.S. 362 (2000).[19]

A. The Circuit Majority Decision Did Not Adopt a New "Nothing to Lose" Rule.

The Warden's primary argument is that the Circuit majority, while plainly repudiating any reliance on a "nothing to lose" rule, Pet. App. 5, 11, nonetheless implicitly used it to reach its result. This, of course, would be a rule unrecognized by this Court. Thus, the argument runs that the Circuit erred in its application of 28 U.S.C. § 2254(d). Pet. Brf. 15.[20] This is a fiction promulgated by the

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[19] Taylor, Rompilla and Wiggins are post-AEDPA cases. Even though they were not decided by this Court prior to finality of the state decision here in 1999, as post-AEDPA cases, they were decided by the law at the time of the finality of state review in those cases. In Rompilla, state review ended in 1995, Wiggins became final in 1991, and Taylor's state habeas review was final in 1997. Thus, those cases applied the controlling law prior to when Mirzayance's case became final.

[20] The Warden's claim is that the Circuit "majority erroneously applied a novel 'nothing to lose' test for ineffective counsel, one never adopted by the Court in its Strickland cases...." Pet. Brf, 15. But the Circuit majority answered the erroneous assumption of the district court and magistrate stating they "misapprehended our prior remand for an evidentiary hearing...," Pet. App. 5, 13. This was a direct response to the district court's view that "[t]he remand opinion mandate that the applicable substantive law by which this Court must judge the remanded claim is the 'nothing to lose' rule pronounced in *Proffit*." Pet. App. 99.

Warden presumably to induce the Court to view the Circuit majority decision as misguided as the Seventh Circuit's decision in Wright v. Van Patten, 128 S.Ct. 743 (2008), and the Ninth Circuit in Carey v. Musladin, supra.

What the majority decision held was that defense counsel's performance was unreasonable under Strickland. Significantly, the dissent also addressed the issue entirely within settled Strickland rulings. The Warden stands alone in contending that the Circuit majority created and applied a "novel" extension of Strickland. The Circuit majority simply held defense counsel's rationale for abandoning the defense "fell below an objective standard of reasonableness." Pet. App. 5. Clearly, nothing in that Strickland application implicitly or explicitly promulgates a novel rule.

Further, the Court was unanimous in stating that the Magistrate and district court misapprehended the original panel's[21] remand instructions and the significance of its citation to Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987). The majority explained the Profitt citation in the remand order "indicated only that labeling a decision 'tactical' does not necessarily mean that a true tactical choice, one 'between competing alternatives that each have the potential for both benefit and loss' was made." Pet App. 5.[22]

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[21] The original panel was composed of Judges Beezer, Fernandez and Paez. Pet. App. 102-116. The second and third Circuit decisions were made by Circuit Judges Wardlaw and Hug, with District Court Judge Suko dissenting.

[22] *See e.g.,* Moore v. Johnson, 194 F.3d 586, 615 (5th Cir. 1999) (a strategic decision is one made "on the basis of sound legal reasoning, to yield some benefit or avoid some

The flaw in the Warden's position is its mischaracterization that the Circuit majority decision promulgated a new rule that counsel has a duty to present *any* remotely colorable defense, no matter how implausible, if there is nothing to lose. Notwithstanding the Warden's effort to paint the Circuit decision into a contrived corner, the decision fairly read states only that counsel has a duty to present a substantial viable defense where there was an objective prospect for success and no strategic or other benefit in abandoning it.[23]

The district court did grant relief based on its misapprehension that it was obligated to apply a "nothing to lose" rule derived from Profitt, supra, Pet. App. 99, whether or not it was an extension of Strickland, and that may well have caused this

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harm to the defense"); Clozza v. Murray, 913 F.2d 1092, 1099 (4th Cir. 1990) (there is a "distinction which can and must be drawn between a statement or remark which amounts to a tactical retreat and one which has been called a complete surrender.... [A] 'complete concession of the defendant's guilt' may constitute inef2fective assistance of counsel"); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (ineffectiveness found where counsel "did not choose, strategically or otherwise, to pursue one line of defense over another," but instead, "simply abdicated his responsibility to advocate his client's cause").

[23] The Warden cites Evans v. Meyer, 742 F.2d 371, 373-374 (7th Cir. 1984), to assert defense counsel need not argue every theoretical defense. Pet. Brf. 49. Evans, however, held a defendant had an "at best" theoretical defense of intoxication, but faced 120 years if convicted by trial. Counsel's advice to plead guilty and receive a 9 and 1/2 year sentence was deemed reasonable because "no competent counsel would have advised Evans to risk a trial in which his defense would have been intoxication." Id. at 373.

Court concern as the proper application of §2254(d). At this point, however, the Circuit majority has made it abundantly clear that the state court disposition was an unreasonable application of settled Strickland doctrine, nothing more.

The Circuit majority did not hold every possible defense must be advanced, and comports with this Court's prior decisions that some potentially meritorious defenses may be sacrificed in favor of a better defense or in favor of a plea that reduce the defendant's exposure. Jones v. Barnes, 463 U.S. 745 (1983), *cited at* Pet. Brf., pp. 17, 25, 30, makes this point in the appellate context. There, a defendant requested several issues be included in his appellate counsel's presentation. Counsel exercised his own discretion and argued on behalf of his client three of the seven issues as the strongest arguments for relief. All of the issues were before the appeal court. Jones upheld counsel's *strategic choice* to argue the strongest issues without abandoning others: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752.

Jones v. Barnes stands for the non-controversial proposition that counsel's reasoned choice to argue *stronger* claims as opposed to *marginal* ones is effective assistance of counsel. It does not stand for the proposition that counsel may simply abandon all of a client's potentially meritorious defenses for no justifiable reason. See also Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997) (counsel "did not present any mitigating evidence because he did not think that it would do any good. However, [because witnesses]...were available and willing to testify on his behalf, this reasoning does

not reflect a strategic decision, but rather an abdication of advocacy.")

The Warden's reliance on Jones v. Page, 76 F.3d 831, 843-844 (7th Cir.1996) is similarly misplaced. Jones found counsel's failure to present an insanity defense to be reasonable because counsel had investigated it and found *no evidence* supporting it. He had consulted with a mental health professional who had been seeing Jones and who opined there was no basis for an insanity inquiry. Here, in contrast, counsel's investigation yielded an unusually large amount of credible NGI evidence, which counsel could not scuttle without any benefit to Mirzayance.[24]

B. The Circuit Majority Correctly Applied the 28 U.S.C. § 2254(d) Standard of Review.

The State argues that "[n]othing in the opinion addresses the dispositive Section 2254(d) question of whether the state-court decision was at least reasonable under clearly established law." Pet. Brf. 16. That is simply wrong. The Ninth Circuit majority specifically concluded upon full review that "the state court's denial of habeas relief to Mirzayance was 'contrary to, or involved an unreasonable application of, clearly established Federal law." Pet. App. 5. *Accord*, id., at 12. Thus,

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[24] The Warden's new rule considerations (abandonment of the only, non-futile defense with no downside to presenting it) are those that must be considered as part of any Strickland reasonable performance calculus. That Mirzayance had the prospect of substantial gain by going forward with his credible insanity defense, with no countervailing downside to presenting it, was very relevant to finding unreasonableness.

the answer to the first Question Presented in the petition for certiorari – "Did the Ninth Circuit again exceed its authority under section 2254(d) by granting habeas relief without considering whether the state-court adjudication of the claim was 'unreasonable' under 'clearly established Federal law'"– is "No."

Most of the argument in the Warden's brief does not even undertake to answer this Question Presented, i.e., whether the Circuit majority granted relief "without considering whether the state-court adjudication of the claim was unreasonable under clearly established law." Instead, it addresses a different question, *i.e.,* whether the Circuit majority's grant of relief, upon considering whether the state court adjudication was unreasonable under clearly established federal law, was a correct result. While this question involves nothing more than a claim that the Court of Appeals' result was incorrect — not generally a staple of this Court's discretionary docket — Mirzayance will address it as well.

1. The type of § 2254 review applicable to the state court adjudication in this case.

The specific type of § 2254(d) review to be applied by the federal courts must reflect the type of state court adjudication under scrutiny. In the prototypical case that Congress most likely had in mind when it enacted § 2254(d), the state court adjudication involved both a reasoned, written opinion and an adequate development of the factual record in support of the claims. This is the type of state court adjudication addressed in Carey v. Musladin, supra, Wright v. Van Patten, supra,

Schriro v. Landrigan, ___ U.S. ___, 127 S.Ct. 1933 (2007), and the other cases cited by the Warden.

This case is distinguishable in two crucial ways: the state court failed to provide any written opinion as to the NGI abandonment claim; and the state failed to provide any type of procedural opportunity for essential fact development. In the absence of a written state court opinion, the federal courts are obliged to undertake a different type of analysis, necessarily less deferential to the state court because there is no written opinion to defer to. Similarly, in the absence of an adequate opportunity for fact development in state court, the federal courts are obliged by [Michael] Williams v. Taylor, 529 U.S. 420 (2000) to conduct an evidentiary hearing, which in this case produced pertinent facts supporting the claim that were never before the state courts, and which provides a different reason why the usual § 2254(d) deferential approach must be modified and adapted.

This Court has given ample guidance to the federal bench regarding the proper manner of applying § 2254(d) where there is a written state court decision. *See, e.g.,* Carey v. Musladin, supra; Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (per curiam); Rice v. Collins, 546 U.S. 333, 342 (2006).[25]

Where, as here, there is a summary state court disposition but no specification of any clearly

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[25] The Warden incorrectly describes Collins as a case in which "the Ninth Circuit improperly ignored that [2254(d)] standard, and then substituted its de novo evaluation of a federal evidentiary hearing record for the state court's evaluation of the state court's record." Pet. Brf. 16. However, there was no federal evidentiary hearing in Collins, and there was a written state opinion, thus distinguishing it from this case.

established federal law and no discussion of the factual record, this Court has not yet provided specific guidance to federal courts for this situation. However, if § 2254(d) is to apply at all,[26] it follows that the federal court must in effect construct a proxy analysis in the face of the state court's silence, and then test the state court's disposition against that proxy analysis for reasonableness under § 2254(d). This analysis-by-proxy requires the federal court to make its best effort to identify any clearly established federal law on the assumption that the state court implicitly identified the same rule of decision; then review the factual record, and determine under § 2254(d) whether the state court's disposition fell within the range of reasonable outcomes.

Similarly, a modified application of § 2254(d) is required where, as here, (1) the federal court properly held an evidentiary hearing under §2254(e) as construed in [Michael] Williams v. Taylor, 529 U.S. 420, 434-435 (2000); and (2) the evidentiary hearing yielded facts supporting Mirzayance's claim for relief that were not part of the state court record. Again, this Court has not yet provided specific

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[26] The Circuits have taken different views on this question, *compare* McAdoo v. Elo, 365 F.3d 487, 498 (6th Cir. 2004) ("When a state court fails to address the merits of a properly raised ineffective assistance of counsel issue, this court conducts its review de novo"), *with* Schaetzle v. Cockrell, 343 F.3d 440, 443 (5th Cir. 2003) ("when…state habeas relief is denied without an opinion…our court: (1) assumes that the state court applied the proper 'clearly established Federal law'; and (2) then determines whether its decision was 'contrary to' or 'an objectively unreasonable application of' that law").

guidance to federal courts for this situation,[27] but if § 2254(d) is to apply at all,[28] it must be based on the federal court's application of the clearly established federal law, which it must independently determine in the absence of a written state court decision, and apply it to the body of facts as determined in the federal evidentiary hearing.

[Michael] Williams v. Taylor, supra, and 28 U.S.C. § 2254(e)(2) recognize that this puts the federal court into a significantly different position regarding the state court result. When the state court has refused to permit a state habeas petitioner to develop the facts bearing on his federal claim, the federal court must hold a hearing to ascertain the relevant facts. Once that hearing has been held and the facts determined by the federal court, the federal court's decision will necessarily be based upon information that was not known to the state court. At this point it is neither possible nor sensible to try to reconstruct the state court's rationale and assess it for reasonableness, with the result that only two approaches to §2254(d) make any sense now. The federal court can ask whether the state court's result is unreasonable in the light of the facts that the federal court has found to be true. That is the maximum possible deference that

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[27] Holland v. Jackson, 542 U.S. 649, 652-653 (2004) noted that "[w]here new evidence is admitted, some Courts of Appeals have conducted de novo review on the theory that there is no relevant state-court determination to which one could defer."

[28] Several Circuits have viewed this circumstance as relieving the federal courts of giving any deference to the state court's disposition, *see, e.g.,* Monroe v. Angelone, 323 F.3d 286, 297-299, and n.19 (4th Cir. 2003); Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004).

it can give a state court which decided the case without relevant facts.

Alternatively, the federal court can ask whether the state court's result is wrong and, if so, the federal court can grant relief on the ground that a state court decision "involve[s] an unreasonable application of" federal law (within §2254((d)(1)) when the state court has so far deviated from the proper process for applying federal constitutional law as to make an incorrect ruling on a federal constitutional claim after having willfully foreclosed necessary factual development and blinded itself to relevant facts.

Mirzayance believes that the latter approach is preferable because it most closely comports with this Court's decision regarding the necessity of adequate state court fact-development proceedings as a prerequisite to the reasonable application of federal constitutional law. Panetti v. Quarterman, __ U.S. __, 127 S.Ct. 2842 (2007) concluded that "no deference is due" to the state court's denial of Panetti's claim of incompetence to be executed because "[t]he state court's failure to provide the procedures mandated by Ford constituted an unreasonable application of clearly established law as determined by this Court." 127 S.Ct. at 2855. Panetti stated that the "basic requirements" of procedural due process regarding a Ford claim include "an opportunity to submit 'evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination,'" id. at 2856, quoting Ford v. Wainwright, 477 U.S. 399, 427 (1986). Applying that settled principle to the ineffective assistance of counsel arena, the state must provide at a minimum a mechanism for the petitioner to obtain and present the evidence that, if

credited by the trier of fact, would entitle him to relief.

In this regard, McNeal v. Culver, 365 U.S. 109 (1961) granted certiorari to determine whether the state court's refusal to afford the petitioner a hearing on his claims constituted a violation of due process. McNeal concluded that the petitioner had stated a cognizable due process claim; that the record was inadequate to determine the truth of his allegations; but that "the allegations themselves made it incumbent on the Florida court to grant petitioner a hearing to determine what the true facts are." 365 U.S. at 117.

The California courts' refusal to afford Mirzayance the opportunity to develop relevant facts that he had requested violated both California habeas corpus procedure, People v. Duvall, 9 Cal.4th 464, 474; 886 P.2d 1252 (1995), and federal due process. Under these circumstances, the federal court's responsibility under §2254(d) should consist of determining whether the state court disposition was wrong, and if so, that it was also unreasonable in light of the truncated and inadequate fact development procedures.

2. The Circuit majority correctly applied the type of review appropriate to the state court adjudication.

As between the two possible approaches to § 2254(d) where there is no written state court opinion and no adequate opportunity for fact-development, the Circuit majority undertook the more § 2254(d)-deferential review, and set forth its mode of analysis as follows:

> We are required by the Antiterrorism and Effective Death Penalty Act, Pub. L.No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") to give significant deference to the decision of the state court. Where, as here, the state court has provided an adjudication on the merits of the habeas claim, but has not explained its underlying reasoning or held an evidentiary hearing, however, we conduct an independent review of the record to determine whether the state court's final resolution of the case was an unreasonable application of clearly established federal law. Pet. App. 4.

The Warden incorrectly characterizes the Circuit majority's methodology with his assertion that "[t]he Ninth Circuit saw Panetti as somehow justifying de novo review when the facts of a state case can be distinguished from this Court's precedent," Pet. Brf. 28-29, but that is patently incorrect. Nowhere does the Circuit majority claim to engage in de novo review of the issue; and nowhere does the Circuit majority actually engage in de novo review in any form. Rather, the Circuit majority engaged in the standard AEDPA procedure of identifying the clearly established federal law of Strickland v. Washington, 466 U.S. 668 (1984); applying Strickland to the facts determined at the federal evidentiary hearing; and then determining whether the State court adjudication was within the range of reasonable outcomes.

The Circuit majority concluded that trial counsel did not make a "true tactical decision" when counsel abandoned the insanity defense, Pet. App. 6,

i.e., within the meaning of this Court's Strickland jurisprudence. The Circuit majority found deficient performance because, inter alia, trial counsel incorrectly believed that the jury would view its verdict of first-degree murder as akin to a lay version of res judicata as to sanity, Pet. App. 6, and on the consequent "unreasonable assumption" that the jury would necessarily reject the sanity phase evidence that petitioner was legally insane. Pet. App. 7.

This Court has repeatedly reaffirmed that an attorney's decision based on a misunderstanding of the applicable law is not a true tactical or strategic decision for purposes of Strickland analysis. Kimmelman v. Morrison, 377 U.S. 365, 285 (1986) rejected an attorney's justifications for failing to file a potentially meritorious suppression motion and failing to file a discovery motion:

> Viewing counsel's failure to conduct any discovery from his perspective at the time he decided to forego that stage of pretrial preparation and applying a "heavy measure of deference," ibid., to his judgment, we find counsel's decision unreasonable, that is, contrary to prevailing professional norms. The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law – or a weak attempt to shift blame for inadequate preparation. (emphasis supplied)

Similarly, [Terry] Williams v. Taylor, 529 U.S. 362, 395 (2000) rejected trial counsel's reasons for failing to obtain documentary mitigating evidence for a penalty trial because of a misunderstanding of the law:

> They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. (emphasis supplied)

Here, trial attorney Wager's abandonment of the insanity defense was based on an equally fundamental misunderstanding of California law, a misunderstanding that he repeated at the federal evidentiary hearing. EH1 50, 99, 125. See Statement of Facts, Part E-4, supra, at 24, 25. The Circuit was correct in its finding of deficient performance because as stated in Wiggins, he did not "mak[e] an informed choice among possible defenses," Wiggins v. Smith, 539 U.S. 510, 525 (2003). That is the only rational conclusion available under Strickland and its progeny, rendering the state court's disposition of Mirzayance's claim unreasonable under § 2254(d).

The stark testimony from trial counsel at the evidentiary hearing unequivocally supports the circuit majority's determination:

> Q. Was there anything Alex [Mirzayance] gained by waiving the N.G.I. trial?
>
> A. [Trial counsel] No. ER1 123.

The Warden cites United States v. Cronic, 466 U.S. 648 (1984) for the proposition that "counsel does not perform deficiently by making an informed decision to forgo a bona fide defense." Pet. Brf., 25.

However, the context of the quote is that counsel may only forgo a bona fide defense where counsel has developed an alternative strategy that is preferable to the client. Cronic states "even when there is a *bona fide* defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances." Id., at 657. In some circumstances a guilty plea may provide more benefit to the client than going to trial even with a colorable defense.

Cronic cited other cases where giving up of a potential *bona fide* defense came in exchange for a benefit: *e.g.,* Parker v. North Carolina, 397 U.S. 790, 797 (1970) (where the client risked a capital sentence, there was no IAC in advising the defendant to forgo motions and plead guilty to charges leading to a life sentence); McMann v. Richardson, 397 U.S. 759, 770-771 (1970) (three defendants pleaded guilty to lesser offenses than charged; held, not IAC to not pursue the question of the voluntariness of their confessions); *compare* Brady v. United States, 397 U.S. 742, 756 (1970) (upholding a guilty plea that was a voluntary and intelligent choice *among the alternatives available* to a defendant); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 363-365 (1978) (plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial). Other cases have upheld counsel's strategic choices when grounded in reasonable advocacy for the client.[29]

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[29] Bell v. Cone, 535 U.S. 685, 701-702 (2002) (unreasonable for the federal court to deem counsel's choice in waiving argument a non-tactical decision given the tactical upside for the client in not doing so); Yarborough v. Gentry, 540 U.S. 1 (2003) (no IAC stemming from an underwhelming

The Warden cites no case and Mirzayance has found none that holds counsel met his Strickland duty of advocacy by foregoing a bona fide defense for nothing in return. Wiggins, supra, recognizes counsel serves the client by "making an informed choice among possible defenses." Wiggins, supra, at 525. Only the Warden urges a rule that counsel is competent by foregoing his client's bona fide defense for nothing.

The remaining question is that of Strickland prejudice, which the Circuit majority determined in Mirzayance's favor, noting the prospect of "four defense experts testifying during the NGI phase that Mirzayance was legally insane at the time of the murder," Pet. App. 7, which constituted a "significant potential for success." Id., at 8. That is the only rational conclusion available under Strickland.[30]

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final argument by defense counsel; deemed reasonable because "[f]ocusing on a small number of key points may be more persuasive than a shotgun approach." Id. at 7.)

[30] The concurring and dissenting opinion asserts that "the record certainly demonstrates that there is substantial ground for a difference of opinion as to whether Mirzayance has any chance of succeeding on his insanity defense." Pet. App. 16. With respect, that is an incorrect focus, because it applies to virtually every case. At an NGI trial in this case, this Court could well presume that the jury arguments of the prosecutor and defense counsel would reflect such a difference of opinion. The proper focus is that there is no substantial ground for a difference of opinion regarding the availability of substantial evidence that Mirzayance believed his conduct justified due to his psychotic state, and that such evidence was ample to support an NGI verdict. Those objective factors are paramount in a Strickland prejudice analysis, not subjective factors such as how a jury

The Warden's argument that "there was strong evidence in the state-court record of Mirzayance's obvious consciousness of guilt", Pet. Brf. 18, refers almost entirely to post-homicide conduct and statements, which the defense experts were well aware of and which did not cause them to retract their opinions regarding insanity. The Warden fails to acknowledge that at the federal evidentiary hearing one of the prosecution's mental health experts, Dr. Anderson, testified to an opinion of Mirzayance's mental state at the time of the homicide that was consistent with legal insanity – Dr. Anderson testified that in his opinion, because of Mirzayance's psychosis, "he felt that he was justified in doing what he was doing." ER3 53-54.

Dr. Anderson's explanation of his understanding of Mirzayance's mental state at the time of the homicide in fact aligns him with the defense retained experts who viewed Mirzayance as insane under the California test in light of the evidence that he did not know the wrongfulness of his act at the time of the homicide. The fact Mirzayance subsequently came to his senses, went to the police, and confessed to the commission of the crime, was consistent with the point Dr. Anderson made that Mirzayance was fortunate in his "ability to recuperate or recover from a psychotic episode." ER3 53.

Under these circumstances, the only rational conclusion regarding Strickland prejudice was that the insanity defense was sufficiently viable to undermine confidence in the existing judgment.

The Warden argues against the Circuit majority's prejudice determination on the basis that

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might actually respond to the conflicting inferences arising from the evidence.

"[t]here is no direct evidence that Mirzayance entertained such a belief" that he needed to defend himself, arguing that "[h]e never submitted a declaration to that effect; there has never been a suggestion that he would have testified to that effect; and there is no evidence that he actually made such a claim to the defense experts." Pet. Brf. 40. That is both factually inaccurate and a red herring. The psychiatric experts who were conversant with the effects of schizophrenia, regardless of the psychotic defendant's capacity to verbalize his symptoms and feelings, were prepared to testify that, *e.g.,* "the psychotic thought process present in Mr. Mirzayance resulted in a gross misperception of reality and a consequent potential lack of understanding of the wrongfulness of his conduct at the time of the homicide." Dr. Richard Romanoff. Ex 4, p. 3.

However, Mirzayance did convey his subjective feelings at the time of the homicide to the examining psychiatrists, who incorporated them into their opinions. Dr. Bennett Blum's declaration stated, based on his interviews with Mirzayance, that his "psychotic and paranoid perspective made him think he needed to defend himself against a non-existent, life-threatening attack." Ex. 1, p. 2.

To the extent that the Warden is currently asserting that there was a question of fact whether the insanity defense would prevail, he misperceives § 2254(d) review. The operative question is whether any reasonable court would have to conclude that Mirzayance had a reasonable chance of prevailing, notwithstanding the questions of fact raised by the Warden. The Circuit majority correctly answered that question in the affirmative, Pet. App. 8, concluding that the record established that the

insanity defense had a "significant potential for success." Ibid.

C. The District Court's Fact-Findings Do Not Support the State Court Disposition, and the Circuit Majority Did Not Improperly Supplant Them.

1. The prejudice finding.

The Warden begins section C of its brief (pp. 45-50) by stating the Circuit "supplanted" certain findings of the district court and ignored others. Regarding prejudice, it is the Warden who has ignored the district court finding that the insanity defense was substantial and credible. Pet. App. 8, 100.

Instead, the Warden claims that "[t]he additional evidence adduced at the evidentiary hearing verified the absence of Strickland prejudice, Pet. Brf. 46, cites competing evidence and mischaracterizes it in part. It cites the testimony of Drs. Sandhu and Anderson, "both of whom found Mirzayance sane." Id. at 46. This overlooks the actual testimony of Dr. Anderson who labored under a misconception on the insanity standard in his belief that if the defendant understood he was doing bodily harm, he was sane. More importantly, his testimony regarding Mirzayance's mental state at the time of the homicide is entirely supportive of an NGI finding. EH3 53-54.

The Warden makes a dramatic argument regarding Dr. Anderson's testimony that is contrary to the record and not part of the district court's

factual findings.[31] The Warden contends that Dr. Anderson elicited an admission from Mirzayance that he knew his conduct was wrongful at the time of the homicide and further implies that the district court made a finding to this effect. Neither position is supported by the record.

Dr. Anderson asked Mirzayance in a jail interview several months after the homicide whether Mirzayance thought it was right or wrong to kill Melanie, and Mirzayance appropriately answered that it was wrong. That portion of the testimony was ambiguous as to whether Dr. Anderson was reporting Mirzayance's perspective at the time of the interview, or at the time of the homicide.

Counsel for the Warden elicited a clarification that Mirzayance's acknowledgment of wrongdoing related to the time of the interview. At the time of the homicide, Dr. Anderson testified Mirzayance "felt that he was justified in doing what he was doing because of the psychotic condition he was under.... he felt that he was justified in not doing anything wrong from his interpretation, not from the legal interpretation." EH3 53-54.

The Warden's argument to this Court is thus contrary to the record as established by the State's own counsel's questioning of Dr. Anderson at the

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[31] "Most significant, as the district court noted, only Dr. Anderson directly asked Mirzayance what he was actually thinking [no citation] at the time of the crime. By 'direct query,' he discovered what Mirzayance's experts studiously avoided: evidence that by itself would have doomed an insanity defense to failure. Dr. Anderson elicited from Mirzayance his admission that the felt his murderous actions of shooting and stabbing Melanie *'were wrong at the time of [the] offense.'"* Pet. Brf. 46; emphasis in original.

hearing. To the extent that the Warden implies the district court made a finding that Mirzayance acknowledged to Dr. Anderson a knowledge of wrongfulness at the time of the homicide, the Warden is mistaken. Nowhere in the "Findings" section did the R&R refer to or rely on Mirzayance's interview with Dr. Anderson at all, much less as a damning or dooming admission.[32] Rather, the R&R found that the NGI defense was credible.

Next, the Warden cites to the district court's "key findings" without reference to the court's ultimate finding: "As witnesses could have testified credibly and therefore perhaps successfully – even though subject to potential strong cross-examination – prejudice is established, as the Court's confidence in the verdict therefore is undermined." Pet. App. 100. The district court's findings relevant to the prejudice prong are clearly consistent with the Circuit majority's analysis and conclusion.

2. The unreasonable performance finding.

The Warden contends that the Circuit majority failed to credit the district court's factual finding that "Wager's decision was carefully considered, not rashly made." Pet. Brf. 50, citing Pet. App. 68-71. The Warden is fixated on a red herring irrelevant to the validity of the judgment. For Sixth Amendment purposes, it does not matter whether trial counsel made a particular decision while in an emotionally charged state or while calm

[32] The R&R's section devoted to the summary of facts refers to Dr. Anderson's testimony at EH3 10-12, but not in sufficient detail to include the explanation concerning Mirzayance's statement as elicited by the State. Pet. App. 65.

and deliberative. It does not matter whether counsel mentally labored over the decision for hours or days, or whether counsel made the decision in an instant of intuition. The only issue for Sixth Amendment purposes is whether the decision was objectively reasonable. The record here establishes that it was objectively unreasonable because Wager made the unreasonable and ill-informed decision that the first-degree verdict precluded all hope for a successful NGI finding, and then waived the defense knowing that decision afforded no benefit to Mirzayance.

Thus, the Warden may have identified a divergent characterization between the district court and the Circuit majority regarding Wager's subjective emotional state at the time he abandoned the NGI defense. That, however, is irrelevant to Sixth Amendment question of whether his decision was objective unreasonable.

The Warden similarly pursues an irrelevant disagreement as to the courts' respective characterizations of whether Mirzayance's parents refused to testify or merely expressed reluctance. For Sixth Amendment purposes, even if they unequivocally refused to testify, Wager's decision to abandon the NGI defense was still objectively unreasonable.

Next, the Warden points to the following testimony from the evidentiary hearing in support of the abandonment of the insanity defense.

1) Wager "hired multiple mental health experts to testify at the sanity phase that Mirzayance had committed the killing without premeditation or deliberation." That assertion makes no sense on its face because premeditation and deliberation were not at issue at the sanity phase. Wager had hired the multiple mental health

experts to testify at the insanity trial that Mirzayance was insane at the time of the homicide, and they were prepared to do so. The Warden may be referring to a very different comment by the district court, i.e., that the psychiatrists who were prepared to testify at the sanity phase had also expressed opinions relevant to the guilt phase issue of premeditation and deliberation. Pet. App. 71. This point goes nowhere. Pet. Brf. 46.

2) Wager recognized his witnesses had significant weaknesses and could be subjected to impeachment. Pet. Brf. 46. The experts all were aware of the consciousness of guilt conduct, most of which occurred after the homicide, and were confident in their opinions that Mirzayance was legally insane at the time of the killing. As Dr. Anderson explained, the fact that Mirzayance mentally reorganized after the killing demonstrated "he had the ability to recuperate or recover from a psychotic episode." EH3 52. Further, the R&R found the defense credible despite it being subject to strong impeachment.[33]

3) One expert was subject to impeachment for allegedly altering notes in another case. Pet. Brf. 47. This is a false premise. None of the experts Wager intended to call were subject to such impeachment. ER1 56. Wager testified he would have called Drs. Markman, Romanoff, Sharma and Blum. Ibid.

4 & 5) Wager's NGI strategy was to call the parents to evoke emotion and their refusal to testify made that strategy impossible. Pet. Brf. 47. As we

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[33] If the standard for going forward with a defense was that the presentation had to be unimpeachable, few would go forward.

have observed, Wager's strategy in this regard suffered from his misconception that the jury verdict on first-degree established Mirzayance's ability to distinguish between right and wrongful as an established fact. Thus, his "strategy" involving an attempt at jury nullification through the parents was misguided. The guilt phase jury made no finding on his client's ability to understand wrongfulness. Indeed, as the prosecutor twice correctly informed the jury (RT 768, 769), Mirzayance was conclusively presumed sane at the guilt phase.[34]

In California, a finding of insanity "does not negative an element of the offense" (People v. Hernandez, *infra,* 22 Cal. 4th 522), and neither does a finding of murder negate a finding of insanity. "A finding of such mental state [for the crime itself] does not foreclose a finding of insanity." Id., at 520. *See* People v. Ferris, 130 Cal. App. 4th 773, 780; 30 Cal. Rptr. 3d 426 (2005) ("insanity is not an element of a criminal offense").[35]

Had Wager understood California law, he would have known: a) that sanity was conclusively presumed at the guilt phase and not a jury consideration; b) that the "maturely and meaningful

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[34] *See* People v. Hernandez, 22 Cal. 4th 512, 520; 93 Cal. Rptr. 2d 509 (2000) ("[Calif.] Penal Code section 1026, subdivision (a), provides ... 'the defendant shall first be tried [on guilt] and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed'").

[35] People v. Hernandez, supra*,* 523: Insanity "is a plea to the effect that the defendant, even if guilty, should not be punished for an offense because he was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the offense."

reflection on the gravity of the crime" elements of first-degree murder had been abolished in 1982; c) that under post-1982 California law, an insane motivation to kill would not defeat the element of deliberation. Had he known this, he would have understood that the NGI defense did not rise or fall according to the jury's verdict on the murder charge.

Because the factual questions related to the elements of murder and insanity are so distinct in California, it is entirely consistent to have a first-degree murder conviction *and* an NGI finding. In Hernandez, the defendant was convicted of murder and then found insane. *See* People v. Villarreal, 167 Cal. App. 3d 450, 455; 213 Cal. Rptr. 179 (1985) ("appellant asks us to hold that an insane person, as a matter of law, cannot commit first-degree murder," but "[w]e decline to do so"); People v. Corona, 80 Cal. App. 3d 684, 713; 145 Cal. Rptr. 894 (1978) ("[i]t is, of course, elementary that the legal defense based on insanity embraces a question different from diminished capacity," a guilt phase defense to elements of the crime.)

Whether or not the parents testified did not diminish the force of the evidence supporting the defense, and it was Wager's misunderstanding of the law that made him believe the defense was hopeless and thus triable only to seek jury nullification if the parents testified.

6) Wager consulted with his co-counsel Boyle just before withdrawing the NGI plea and he agreed with Wager to withdraw the defense. Pet. Brf. 47. That Boyle agreed with Wager's decision does not make the decision reasonable in the face of the evidence supporting the defense and Wager's misunderstanding of the impact of the guilty verdict (that it meant the jury had already assessed wrongfulness).

Nor did the Circuit make its "own" findings. Pet. Brf. 47. First, the finding that the insanity defense was credible was not made by the Circuit, but by the district court. The credibility of the defense and Wager's fatal misunderstanding of the law undermined the reasonableness of his decision to abandon the NGI trial the morning it was to commence.

Even assuming the failure of the state to conduct a fact-finding hearing warrants AEDPA's "double deference" (Pet. Brf. 47), "deference is not abdication; it cannot shield counsel's performance from meaningful scrutiny or automatically validate challenged acts and omissions." People v. Dennis, 17 Cal. 4th 468, 541; 950 P.2d 1035 (1998).

Wager's testimony on why he believed the NGI trial "hopeless" may well explain why he abandoned the NGI defense, but also confirms that he had no objectively reasonable tactical basis for doing so. Rather, he erroneously assumed that by finding deliberation, the jury had necessarily determined that Mirzayance "maturely and meaningfully reflected on the gravity of the crime," a finding he equated with Mirzayance's being able to know right from wrong. Wager did not realize that the definition of first-degree murder had been amended in 1982 to remove any requirement that the jury find the defendant had "maturely and meaningfully reflected on the gravity of the crime."[36]

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[36] Wager's flawed understanding of the law in 1997 was also evident during final argument when he erroneously argued that Mirzayance's irrational motivation stemming from mental illness defeated the deliberation element. *E.g.,* RT 820 ("But because he's sick, he didn't weigh and consider the question of killing, the reasons for and against....") This could be argued until 1982, prior to

Without question, this amendment [in 1982] was intended to undo the Wolff decision.[37] By this amendment, the legislature, in effect, said mental abnormalities are irrelevant; no matter what the quality of the thought processes, if the accused thinks about the killing in advance and considers alternatives, premeditation and deliberation are proved.

Suzanne Mounts, "Premeditation and Deliberation in California: Returning to a Distinction Without a Difference," 36 U.S.F. L. Rev. 261, 304-305 (2002).[38]

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legislation dramatically overhauling the California Penal Code to remove most mental health considerations from the elements of murder. Wager's error led to prosecution argument and a jury instruction informing the jury that irrational thoughts due to mental illness did not mean one could not deliberate.

[37] Where the California Supreme Court held "'the true test [for premeditation and deliberation] must include consideration of the somewhat limited extent to which this defendant could maturely and meaningfully reflect upon the gravity of his contemplated act.'" People v. Wolff, 61 Cal. 2d 795, 821-822, 394 P.2d 959 (1964), *quoting* People v. Thomas, 25 Cal.2d 880 [156 P.2d 7](1945).

[38] The California State Legislature by Stats 1981 ch 404 § 7,p. 1593, effective September 13, 1982, amended Penal Code §189 to eliminate from murder definitions the concept of maturely and meaningfully appreciating the gravity of one's conduct. People v. Stress, 205 Cal.App.3d 1259, 1268; 252 Cal. Rptr. 913 (1988). This was part of a major revision of the Penal Code to eliminate much of the role of psychiatric testimony on the elements of murder. *See* Penal Code §§ 25, 28 and 29, eliminating the diminished capacity defense and circumscribing expert testimony on

As noted, whether Wager's decision to abandon the NGI is more appropriately characterized as "rash" or "carefully weighed" is irrelevant. The question is: was it unreasonable regardless of whether he anguished over it or came to a snap judgment. Clearly, Wager could have taken a day or a week to make that decision, but it would have been unreasonable at any time.

The undisputed facts leading to his decision to waive the defense were: he had an insanity defense developed over a period of one year prior to trial; it was well-supported by historical evidence of Mirzayance's childhood psychological problems; it was also supported by lay evidence of his paranoid behavior and paranoid thinking the week of (as well as the day of) the homicide; there was a wealth of expert testimony by very experienced and respected mental health professionals who could credibly testify that Mirzayance was insane at the time of the homicide; and Wager failed to understand that a finding of first-degree murder was not a finding tantamount to a finding sanity.

In light of these facts, and, and as the district court found, the supporting "witnesses could have testified credibly and therefore perhaps successfully" (Pet. App. 100), there was no rational basis for abandoning advocacy to surrender the defense.

Yet, the Warden asserts Wager did not arrive at his feeling of "hopelessness" about the defense out of anger,[39] or because of his mistaken belief

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the elements of the crime *See* Morse & Cohen, supra, 29, n. 23.

[39] Wager claimed he was angry the day of the NGI withdrawal in 1997 and was still angry about it seven years

about the law, but rather as a "practical matter." Pet. Brf. 49. Again, Wager's subjective feelings of hopelessness, of whatever origin, cannot make reasonable a decision to abandon an objectively viable defense for no benefit.

Giving up a credible defense based on a misunderstanding of the controlling law is an unreasonable decision under the Sixth Amendment, see Kimmelman v. Morrison, supra; [Terry] Williams v. Taylor, supra.

The issue of the parental "refusal" was also unimportant to the ultimate issue in this case. Wager unreasonably seized upon it that morning as his reason to abandon the defense. But he had already made the decision the trial was hopeless based on his very flawed legal understanding of the jury finding of first-degree murder.

Even so, the "reluctance" of the parents to testify the morning of trial, was not the functional equivalent of a "refusal." Mirzayance's father, according to trial counsel, changed his mind, and said he would testify, but then said that he wouldn't. ER1 106. As the Circuit noted, counsel could have responded to the alleged "reluctance" and used any number of approaches to effect a reconsideration. Pet. App. 7. The Circuit thus acknowledged the lower court's factual finding that the parents' expressed pronounced reluctance to testify that morning, but simply noted that a competent attorney would have attempted to persuade them otherwise. Pet. App. 7.

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later when he testified in 2004. RT 105. He testified he had an angry conversation with Mirzayance's father in the courthouse just before the withdrawal. RT 106. He was not sure whether his "anger at the parents [made him] so emotional that [he] lost [his] sense of advocacy." EH1 124.

The crux of the Circuit's holding was that Wager's decision to give up the NGI defense was unreasonable. "Counsel's belief that Mirzayance's interests would not be advanced by conducting the insanity phase was groundless." Pet. App. 7. His decision was not a "tactical choice," but the sacrifice of a defense based on a misunderstanding of the law. Pet. App. 6, n. 1.

Even assuming that the Magistrate's "findings" that Wager's decision was not rash and that the parents refused to testify were not clearly erroneous, Wager's decision was still objectively unreasonable. While attorneys are given great leeway in charting the course of a client's defense through various alternatives, the Sixth Amendment imposes one requirement: defense counsel must make objectively reasonable choices. *See* Strickland, supra at 688.

Conclusion

The record below amply supports the Circuit's holding of prejudicial IAC. There was an unusual and strong consensus among the various mental state experts supporting an NGI finding. Moreover, the near consensus of experts was supported by the corroborating evidence of Mirzayance's childhood psychological problems, his treatment by child psychologists, the parents' history concerning Mirzayance's childhood psychological problems as presented through Dr. Satz, and the lay witness testimony of Laurent Meira and the Ookhtens relatives about Mirzayance's paranoid behavior the week and day of the homicide.

Under any standard of prejudice, the evidence presented a likelihood of a different result sufficient to undermine confidence in the outcome. The decision below should be affirmed.

Sept. 29, 2008 Respectfully submitted,

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