No. 07-1016

IN THE

Supreme Court of the United States

ED BUSS, in his official capacity as Superintendent of the Indiana State Prison,
Petitioner,

v.

CHRISTOPHER M. STEVENS,
Respondent.

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

REPLY IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

I. Does a state court unreasonably apply federal law under 28 U.S.C. § 2254(d) when it holds that the Sixth Amendment right to counsel does not require trial counsel to retain successive mental-health experts in search of one that will give counsel's desired favorable opinion?

II. Does a state court unreasonably apply federal law under 28 U.S.C. § 2254(d) when it holds that the Sixth Amendment right to counsel permits attorneys in a death penalty case to exercise reasoned professional judgment to present expert testimony of a psychologist retained by the defense—the only one the state would pay for—that made both favorable and unfavorable findings in an attempt to make the best use of that expert that he can?

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The Seventh Circuit granted habeas relief vacating a death sentence after independently—and without analysis under the standards required by AEDPA—assessing trial counsel's decision to present the only mental health expert available to them at the penalty phase. The Seventh Circuit faulted counsel for (1) obeying the trial court's command and state law in disclosing the expert's report to the prosecution when the report was damaging to Stevens; and (2) not shopping for another expert who was willing to provide more favorable testimony (such as the experts Stevens later found to testify on state post-conviction review). In effect, the decision below merely disagreed with the state courts' judgments that trial counsel performed reasonably well under the circumstances and that Stevens failed to show prejudice from any mistakes of counsel.

Stevens argues that the Seventh Circuit properly found his trial counsel to have rendered ineffective assistance at the penalty phase because it made passing reference to the AEDPA standard. He also suggests that the Seventh Circuit need not have vigorously applied AEDPA because the Indiana Supreme Court's decision was not, in his estimation, sufficiently "in depth." Additionally, Stevens emphasizes a variety of factual assertions largely irrelevant to assessing whether, without the benefit of hindsight, trial counsel's decisions were within the wide range of professionally competent assistance. Stevens's arguments are not tenable.

I. Stevens's account of the facts are incomplete and largely unresponsive to the issues posed by this case.

Much of Stevens's additional factual assertions exaggerate the evidence, misstate the record, or are largely irrelevant to the precise issues before the Court. Stevens makes much of Dr. Lennon's opinions of, and approaches to, mental health issues, but downplays the careful efforts that trial counsel took in developing mitigating evidence—especially mental health evidence—on his behalf.

1. Stevens's brief mischaracterizes the circumstances that trial counsel faced when investigating Stevens's mitigation evidence. As such, his presentation of the facts vividly illustrates that his trial counsel can be judged ineffective only after examining the case through the "distorting lens of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

Trial counsel began developing the case in 1993 when current theories and practices on how to best develop and present a death penalty mitigation case were in their infancy. Nevertheless, trial counsel hired a "mitigation specialist" whose sole job on the defense team was to investigate potential mitigating evidence and help trial counsel develop a persuasive mitigation presentation at the penalty phase of trial if necessary. As Stevens points out, Br. Opp. at 1-2, counsel and the mitigation specialist conducted an initial investigation into potential mitigating evidence so that they would be best informed on how to proceed with hiring experts and conducting a more detailed investigation. After this initial

inquiry, the defense team deliberately looked for a mental health expert with experience concerning the issues that they had uncovered.

Dr. Lennon was highly recommended by the mitigation specialist, as well as prominent members of the central Indiana capital defense bar, in large part due to Lennon's impressive performance in another death penalty case that posed issues that were similar to Stevens's case. Pet. App. 141a-142a, 182a. Dr. Lennon's credentials and experience were impressive and counsel had a concrete basis upon which to believe that he would be an equally impressive expert for Stevens's case. Pet. App. 142a-143a, 182a-183a. On counsel's motion, the trial court approved funds to hire Dr. Lennon. The trial court made clear to counsel that it would not approve funding for hiring additional mental health experts. PCR. R. 2508, 2561.

Contrary to Stevens's assertion that Dr. Lennon did not render a mental health diagnosis, the psychological evaluation (Trial R. 5358-61) made diagnoses of pedophilia and depression. Both of these diagnoses are mental disorders listed in the DSM-IV. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 339-45, 527-28 (Am. Psychiatric Ass'n, 4th Ed. 1994). Additionally, Dr. Lennon and his assessment team (consisting of a social worker and a second psychologist) conducted extensive research into Stevens's background and the facts of this case and gave Stevens 11 different tests before issuing a report. Trial R. 5358-61; Pet. App. 183a.

Moreover, Stevens does not discuss the expert testimony that Dr. Lennon ultimately provided

Stevens. He explained that Stevens suffered characteristics of reactive attachment disorder (although Stevens did not satisfy all of the diagnostic criteria for a diagnosis), and demonstrated antisocial and sociopathic tendencies (although there was an insufficient basis to make a diagnosis of antisocial personality disorder or sociopathic personality disorder). Trial R. 5324-26, 5350-54. He found Stevens to have the emotional age of a 12 to 13 year-old. Trial R. 5374. He also testified about Stevens's sexual abuse as a child and alcohol and drug use, but acknowledged Stevens's statement that he had stopped abusing substances when first arrested for the child molesting offense for which he was imprisoned before meeting Zachary. Dr. Lennon opined that "so much of [his] behavior could be explained by the abuse, the neglect that he's had on top of his genetic predisposition, and that ... his birth mother ... probably did do drugs or alcohol during pregnancy." Pet. App. 156a, 210a. This testimony formed the basis for the mitigating circumstances ultimately found by the trial court and relied upon by the Indiana Supreme Court. Pet. App. 276a-277a n.28.

2. Nor does Stevens discuss the unquestionably devastating evidence that Drs. Coons and Kaplan would have provided at the penalty phase had they testified instead of Dr. Lennon. Both Dr. Coons and Dr. Kaplan, experts frequently employed by capital defendants in Indiana, revealed additional, highly prejudicial facts that would have completely undermined Stevens's penalty-phase argument that Zachary was a willing participant in the molestation. The doctors testified on post-conviction review that Stevens forcibly molested Zachary against the boy's

will, a fact the jury did not hear. Pet. App. 45a-46a. To say the least, had the jury known the molestation was forcible, it is unlikely to have treated Stevens more leniently.

Furthermore, Dr. Coons admitted that dissociation (the condition that Drs. Coons and Kaplan diagnosed after Stevens's conviction) is a highly controversial diagnosis in the psychiatric field. Some prominent psychiatrists have written publications expressing skepticism as to the validity of dissociation as a mental condition. PCR R. 1895-96. Thus, Stevens essentially argues that his trial counsel erred by relying on a mainstream diagnosis from a controversial doctor rather than shopping for a controversial diagnosis from a more mainstream doctor. This is hardly a valid basis for finding ineffective assistance of counsel.

3. In an attempt to normalize the Seventh Circuit's opinion, Stevens invokes *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000). His comparisons are untenable, as each of these cases involved trial counsel who wholly failed to conduct even the most basic investigation into critical and obvious areas of potential mitigation. Not even the Seventh Circuit has contended that such circumstances are present here.

Counsel in *Rompilla* inexplicably failed to even look at his client's file from a prior conviction for rape and assault—despite knowing that the prosecution planned on using those convictions to establish aggravating circumstances—that supplied a host of mitigation evidence that could not have

been found elsewhere. *Rompilla*, 545 U.S. at 385-86, 390-91. Counsel in *Wiggins* obtained some social services reports about their client but then conducted no additional investigation into the facts found therein, missing the opportunity to discover the severe physical, sexual, and emotional abuse their client suffered as a young child. *Wiggins*, 539 U.S. at 524-25. Counsel in *Williams* failed to prepare for sentencing until a week beforehand, to uncover extensive records graphically describing Williams's nightmarish childhood, to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade, and to examine Williams's prior conduct in prison. *Williams*, 529 U.S. at 395-96. In each of these cases, the attorneys had no reasonable excuse for not having done even basic factual research into their clients' lives.

Stevens's trial counsel, however, did have reasonable justifications for every choice they made. The Seventh Circuit faulted trial counsel for not hiring additional experts who would have been willing to reach different *opinions* (not relate historical *fact*). It expected counsel to have somehow hired these experts with no funding and after the discovery deadline for expert evidence had past.

There is no basis in clearly established federal law for that expectation. Stevens has never, in the nearly 15-year pendency of this case, presented evidence that the trial court would have approved—or even that he was entitled to—funding to hire additional mental health experts. The district court correctly held that *Ake v. Oklahoma*, 470 U.S. 68 (1985), did not require the state court to fund any

additional experts beyond Dr. Lennon, as "an indigent defendant [does] not have 'a constitutional right to choose a psychiatrist of his personal liking." Pet. App. 59a (*quoting Ake*, 470 U.S. at 83). In any event, the trial court went above the requirements of *Ake*, which merely requires that a defendant be given *access* to an expert, and gave Stevens funds to hire his own expert. *Ake*, 470 U.S. at 83. It cannot follow, as Stevens argues and the Seventh Circuit assumed, that the Indiana courts were therefore required to give Stevens even more funds to let him choose yet even more experts "of his personal liking."

Without the misleading benefit of hindsight, the Seventh Circuit had no basis to find the state courts' rejection of Stevens's ineffective assistance claim to be objectively unreasonable.

II. Stevens's argument reflects a fundamental misunderstanding of federal habeas review under AEDPA.

1. Section 2254(d) has as its purpose "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 702 (2002) (*citing Williams*, 529 U.S. at 403-04). To effectuate this purpose, AEDPA permits habeas relief for claims adjudicated on the merits by state courts only if those decisions were "contrary to or involved an unreasonable application of clearly established federal law." *Williams*, 529 U.S. at 412-13.

In its discussion of Stevens's penalty phase ineffective assistance claim, the Seventh Circuit majority did not analyze whether the Indiana Supreme Court's decision was objectively unreasonable. Instead it concluded that the Indiana Supreme Court was simply wrong and perforce "unreasonable." Pet. App. 26a. *See also* Pet. App. 24a ("We conclude, on this record, that the performance of Stevens's lawyers at his capital sentencing proceedings fell below the constitutional minimum."), 25a ("In this case, we find a reasonable probability—that is, one sufficient to undermine our confidence in the outcome of the sentencing phase—that the result would have been different if the jury had heard mainstream psychological testimony..."), and 26a ("We conclude that the conduct of Stevens's lawyers at his capital sentencing proceedings fell below the constitutional minimum standard and that this was prejudicial to Stevens.").

AEDPA prohibits such de novo review. *Early v. Packer*, 537 U.S. 3, 11 (2002) (per curiam); *Yarborough v. Alvarado*, 541 U.S. 652, 665-66 (2004). Stevens contends that the conclusory invocation of the "unreasonable application" clause, coupled with a recognition of the correct standard of review at the outset of the opinion, suffices. AEDPA is meaningless, however, if courts provide nothing more than "lipservice to the *Williams* standard." *Rompilla*, 545 U.S. at 404 (Kennedy, J., dissenting).

2. Even under Stevens's incorrect understanding of AEDPA, which would require a state court to have conducted an exhaustive and lengthy examination of all aspects of a prisoner's claims before being entitled to deferential review, the Indiana Supreme

Court's decision qualifies because it is fully reasoned and thoughtful.

Stevens fails to comprehend the standard of review and the Indiana Supreme Court's role in reviewing appeals from the denial of post-conviction relief. Unlike in some states where appellate courts have the power to review collateral judgments *de novo* or even sit as the trier of fact, the Indiana Supreme Court's review is more circumscribed. At the outset of its opinion, the state supreme court explained that, on appeal from the denial of post-conviction relief, the court looks only for whether the "evidence as a whole leads unerringly and unmistakably to a decision opposite that reached" by the trial court. Pet. App. 137a. "In other words, [Stevens] must convince [the Indiana Supreme Court] that there is *no* way within the law that the court below could have reached the decision it did." Pet. App. 138a (emphasis in original). Under this standard, it was unnecessary for the Indiana Supreme Court to engage in a deep discussion of Stevens's claims to properly adjudicate them. Regardless, the Section 2254(d) standard does not fluctuate depending on the length of the state court opinion.

3. When reviewing ineffective assistance claims, the Court has always been careful to examine the facts "as a defense lawyer would have done at the time". *Rompilla*, 545 U.S. at 385. The Seventh Circuit made no such effort. By the time Dr. Lennon issued his unfavorable and unsolicited report, trial counsel had no viable—let alone reasonable—option to secure alternative expert opinion testimony. This left counsel facing a Morton's Fork: either present

the testimony of Dr. Lennon in an attempt to explain Stevens's background and crime through an expert in child mental development despite Lennon's other harmful opinions, or do nothing and abandon any effort to explain to the jury and judge the psychological significance of Stevens's mitigating evidence, and thereby ensure a claim of ineffective counsel.[1] When faced with those alternatives, counsel's choice is a quintessential strategic decision, and neither can be deemed objectively unreasonable.

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[1] None of this is to say Dr. Lennon's testimony was a failure; he effectively explained the significance of Stevens's poor childhood and other mitigating evidence as it related to Zachary's murder. Pet. App. 156a, 210a, 276a-277a n.28; Trial R. 5280-377.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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