No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY BEARD, et al.,
Petitioners

v.

JESSE BOND,
Respondent

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

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Capital Case

Question Presented

On state collateral review, a capital defendant claimed that trial counsel was ineffective for not presenting more mitigation evidence, in particular from psychologists and psychiatrists. After a seven-day evidentiary hearing, the state courts concluded that trial counsel had properly begun his mitigation investigation months in advance, that the new defense experts had been "thoroughly refuted" at the post-conviction hearing, and that the evidence originally presented was constitutionally adequate. The federal court of appeals disagreed with each of these conclusions, determined that trial counsel should have presented an "upgraded" mitigation case, and held that the state courts therefore acted "unreasonably" under 28 U.S.C. § 2254(d).

On federal habeas corpus review of the state court's resolution of a claim of ineffective assistance of counsel, did the court of appeals apply the "doubly deferential judicial review" standard required by Knowles v. Mirzayance?

List of Parties

Petitioners

Jeffrey Beard

William Stickman

Joseph Mazurkiewicz

The District Attorney of the County of Philadelphia

The Attorney General of the State of Pennsylvania

Respondent

Jesse Bond

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Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, affirming the district court's grant of a conditional writ of habeas corpus, was entered August 20, 2008, is published at 539 F.3d 256, and is reproduced in the Appendix at App. 5-92.

The opinion of the United States District Court for the Eastern District of Pennsylvania, mandating either a new penalty hearing or a sentence of life imprisonment, was entered April 24, 2006, and is reproduced in the Appendix at App. 93-119.

Statement of Jurisdiction

This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provision Involved

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Title 28 of the United States Code, section 2254(d), provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application, of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Statement of the Case

Over a two-week period in 1991, Jesse Bond committed three separate robberies. On each occasion, he opened fire in cold blood – badly wounding one victim and killing two others. He received the death penalty for the last murder, and the state courts upheld it on direct and collateral appeal. But on federal habeas attack – despite the "doubly deferential" standard of review that applied there – the court of appeals overturned every significant state court ruling in the case, and vacated the death sentence on the ground that trial counsel was ineffective for not presenting "upgraded" mitigation evidence.

The relevant proceedings began shortly after the defendant's arrest, when an attorney was appointed to represent him in all three cases. The charges were tried separately, and only this case was capital. Before trial in the non-capital homicide, counsel retained a forensic psychologist (who also had a law degree and had practiced as a criminal defense attorney) to perform a mental health evaluation. App. 110, 135, 139.

After reviewing all the case materials, the defense expert conducted a clinical interview with the defendant to identify any psychological or substance abuse issues, and administered a battery of tests. The expert also interviewed the

defendant's mother. As the result of his investigation, the expert concluded that there were no grounds for mitigation evidence based on mental health. He prepared and submitted a written report to that effect. App. 135, 139-40; N.T. 4/15/97, 61-62, 126-31.

Counsel then interviewed several members of the defendant's family to begin preparing a mitigation case based on their testimony. Co-counsel was appointed to assist with the upcoming capital trial. App. 62, 122, 134, 137-38.

Meanwhile, the defendant was convicted of felony murder for the first homicide, in which he killed a woman who worked in the restaurant he had chosen to hold up. This case was tried next, in 1993, and resulted in a conviction for the premeditated, first degree murder of a store owner. App. 93-94.

At the capital sentencing phase, counsel presented seven defense witnesses, including several family members. Their testimony established that, although the defendant's father ran off when the child was six years old, the remaining family members managed to build strong, close relationships. The witnesses portrayed the defendant at the center of these relationships, babysitting for his nieces and nephews, managing his mother's health care, securing job training and employment. App. 57-58.

Until age 25, the defendant had no criminal record. According to the defense, however, his life went into something of a tailspin shortly before the three shootings: his stepfather died, his brother got cancer, he lost his job, he failed his high school equivalency exam. Thus the defense position was that, while the defendant had committed terrible acts and would spend the rest of his life in jail, his crimes were uncharacteristic, and he was ultimately capable of remorse and rehabilitation. App. 58-59, 134.

In the end, however, the jury decided that, after two murders, the balance weighed in favor of death. The sentence was upheld on appeal in 1995, and a new round of review began.

The new defense lawyers had a new sentencing defense. Using many of the same family witnesses who testified at trial, they argued this time that the defendant was in fact the product of a violent, neglectful, poverty-stricken home. Building on a head injury the defendant had suffered, they presented a psychologist who testified that, according to his evaluation, the defendant had organic brain damage. They also presented a psychiatrist who seconded the brain damage claim, and added for good measure that the defendant had post-traumatic stress disorder and suffered from extreme emotional distress. Thus, in contrast to trial counsel, the new lawyers portrayed the defendant as inevitably impaired – a man who

commits crime because he cannot appreciate its criminality. That, they argued, was the kind of mitigation that trial counsel should have presented. App. 60-62, 66-69, 140, 146-49.

The Commonwealth presented its own expert at the post-conviction proceeding, which took place in 1997. He explained that the defense testing had been improperly administered and consistently under-scored, that the defendant's head injury was in fact not that serious, and that there was no organic brain damage. In addition, the defense expert from the original trial proceedings also took the stand. Although presented by the new defense lawyers to support their attack on trial counsel, this expert conceded that, had he been able before trial to review the records that were now being produced by post-conviction counsel, they would not have changed his original opinion that there was no mental status mitigation. App. 140-41, 149-50; N.T. 4/15/97, 183-85.

The post-conviction evidentiary hearing, presided over by the original trial judge, lasted seven days. Afterward, the judge concluded that the defense experts had been "thoroughly refuted," that the defendant was not suffering from organic brain damage, PTSD, or extreme emotional disturbance, that the family members' new testimony was no more effective than their original evidence, and that trial counsel therefore was not ineffective for not presenting the new lawyers'

version of mitigation. App. 149-50. The state supreme court agreed with these conclusions in 2002, on appeal from denial of the post-conviction petition. App. 133-41

The defense then filed a federal habeas corpus petition, at which point everything went the opposite way. In 2006, the federal district court, while denying various new trial claims, decided that the state courts were wrong about the mitigation ineffectiveness claim. The court ordered the penalty reduced to life unless the Commonwealth retried the sentencing hearing. App. 117-18. In 2008 the court of appeals affirmed the district court, greatly expanding on its analysis. App. 55-92. Cross-petitions for reconsideration were denied, and this petition was filed. App. 1-4.

Reasons for Granting the Petition

This case should be summarily reversed, or at the least remanded for reconsideration, in light of *Knowles v. Mirzayance*.

It has been thirteen years since Congress amended the federal habeas corpus statute to require deference for state court rulings that were not unreasonable. 28 U.S.C. § 2254(d). After a series of reversals by this Court, often in summary fashion, it appears that the lower federal courts

have become more careful to state the proper standard for federal habeas review of state criminal judgments.

Statement is not always substance, however. In *substance*, such deferential review has often proven difficult to secure. Indeed, again this Term it has been necessary for this Court to correct a court of appeals in its ostensible application of § 2254(d). *Knowles v. Mirzayance*, No. 07-1315, slip op. at 8 (U.S., decided March 24, 2009) (reversing court of appeals' "finding that the California court had unreasonably applied clearly established federal law").

The difficulty is especially great when the underlying claim is one of counsel ineffectiveness, which carries its own requirement of deference. *See Strickland v. Washington*, 466 U.S. 668 (1984).[1] Thus in *Mirzayance* this Court made clear that habeas review of an ineffectiveness claim must be "doubly deferential." Slip op. at 11.

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[1] "And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.... The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Mirzayance*, slip op. at 11 (internal quotation and citation omitted).

This case presents yet another indication that some federal courts may be reluctant to accept this limitation on their habeas review powers. The opinion below is full of the *language* of deference. It simply lacks any *actual* deference. "The question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable – a substantially higher standard." *Miryazanze*, slip op. at 10-11 (internal quotations omitted).

To be sure, the circuit court here dutifully pronounced the word "unreasonable" each time it overturned a state court ruling. But there was not one point where the federal court even attempted to explain how it made the leap from "incorrect" to the substantially higher threshold of "unreasonable." It is as if the entire opinion had been written in the days before AEDPA, and then updated by using a word processor to find every instance of the word "erroneous" and replace it with the word "unreasonable."

Three key elements of the court of appeals' review process expose its pretense of deference as, in reality, plain old disagreement. They involve a mix of factual and legal conclusions by the state courts, although both types of rulings should have been accorded deference under AEDPA's reasonableness standard. At the very least, the court of appeals should be required to reconsider

this case in light of this Court's latest guidance in *Mirzayance*.

1. The "unreasonable" state ruling that counsel prepared in advance.

The federal court of appeals held that trial counsel performed deficiently in preparing for the penalty phase because counsel and co-counsel supposedly began to do so only the night before. Just as in *Mirzayance*, the court of appeals attributed this supposed lapse to counsel's dejection and discouragement.[2]

And just as in *Mirzayance*, there is a major problem with the court's (psycho)analysis of counsel's conduct: it is flatly contradictory to the conclusion of the court under review. In this case, the Pennsylvania Supreme Court explicitly

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[2] *Mirzayance*, slip op. at 14: "In [the circuit court's] view, 'counsel acted on his subjective feelings of hopelessness without even considering the potential benefit to be gained in persisting with the plea.'"

Opinion below, App. 80: "We do not doubt that the prospect of representing a defendant at a capital penalty phase hearing can overwhelm even experienced lawyers. Nor does it surprise us that a first-degree murder verdict would disappoint defense attorneys who have worked hard during a trial. But that does not excuse trial counsel's failure to prepare for the penalty phase prior to the handing down of the conviction."

considered and rejected the claim that counsel failed to investigate until the last possible minute. Indeed the state court cited to record evidence directly demonstrating that counsel retained a mitigation specialist and solicited mitigation evidence from numerous family members – *two months* before the penalty hearing.[3]

Remarkably, the federal court of appeals did not even acknowledge the existence of the state

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[3] As the state court held, "the record contradicts appellant's assertion that counsel in this case did not begin to investigate mitigation evidence until after the guilty verdict. Appellant cites to places in counsel's testimony where they refer to the efforts made on the eve of the penalty phase in this case without acknowledging the overall circumstances. In fact, lead counsel had also been appointed to represent appellant in his other criminal cases, including a separate homicide, which proceeded to trial in December 1992, approximately two months before the trial in this case. During the previous trial, lead counsel had spoken with family members with respect to information about appellant that might be helpful in mitigation. N.T. 4/15/97 at 32-35, 62-64, 82-83. In addition, counsel had hired Dr. Tepper prior to the previous trial. One of the reasons for referring appellant to Dr. Tepper for evaluation was to discover any evidence that might be helpful as mitigation evidence in the penalty phase. Dr. Tepper's report was completed and forwarded to counsel in early December, two months before this trial. Thus, the record belies appellant's misstatement that his counsel did not begin preparing for the penalty phase until the night before the hearing began." App. 139-40; *see also* App. 134-35, 137-38.

ruling on this issue – not until *after* it had spent over six hundred words condemning counsel's supposedly tardy and therefore incomplete preparation. Even at that point, the circuit court barely mentioned what the state court had held – and then promptly dismissed that holding as "unreasonable." App. 82-83.

But how could the state court have been so completely wrong about whether counsel prepared before trial? The circuit court never answered that question. On the one hand, it baldly asserted that there was no record evidence of advance preparation, App. 83; yet on the other hand it discussed (albeit in an effort to minimize) some of the very evidence relied on by the state court, which showed that counsel had retained an expert and met with witnesses months before this trial. App. 62-63, 69.[4]

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[4] The circuit court also complained that counsel should have elicited different information from these potential mitigation witnesses – *i.e.*, information that would have supported the kind of penalty phase defense the court thought counsel should have presented, rather than the defense that counsel actually presented. *See* issue 3., *infra*.

But the court made clear that its finding of deficient performance was nonetheless premised on its conclusion that counsel did not start any penalty phase preparation until after the guilty verdict. "Trial counsel[] fail[ed] to prepare for the penalty phase prior to the handing down of the

(continued...)

This was a straightforward issue of historical fact. If the state court's reading of the record was so irrational that no reasonable person could have concurred, then surely the federal court should easily have explicated the error. Instead the court treated the state ruling as an afterthought, unworthy of any serious attention. The proper standard of review demands far more.

2. The "unreasonable" state ruling that the new defense experts were "thoroughly refuted."

The court of appeals further held that trial counsel was ineffective for failing to secure the testimony of experts, who supposedly would have established that the defendant suffered from the usual catalogue of psychological ailments alleged in death penalty litigation: "organic brain damage," "post-traumatic stress disorder," and "extreme emotional disturbance" caused by his "dysfunctional" childhood.

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[4](...continued)
conviction. . . . These attorneys . . . should not have waited until the eve of the penalty phase to begin their preparations. . . . Counsel's failure to think ahead caused them to fail to inquire meaningfully. . . . [C]ounsel conducted an *ad hoc* and perfunctory preparation for the penalty phase *the night before it began* [emphasis in original]. . . . [C]ounsel decided at the eleventh hour." App. 80-82.

Once again, the federal court's conclusion runs smack into the state courts, which thoroughly aired these claims in a lengthy evidentiary hearing, and found that they were "thoroughly refuted" by the record developed there. App. 140-41, 148-49.

That finding should have held back the federal court – but it did not. The court of appeals simply declared yet again that the state courts were "unreasonable" in rejecting this expert opinion. This time the federal court said it could cast aside the state courts' ruling because the defense presented two experts at the post-conviction hearing – one to claim organic brain damage, the other to claim PTSD and extreme emotional disturbance – whereas the prosecution presented only one expert, who addressed only the organic brain damage claim. App. 87. At the end of the day, in other words, the defense was ahead in the tally of the psycho-diagnoses.

But that sort of analysis would be off base even in a pre-AEDPA world. Under the doubly deferential standard of review applicable here, it was not even in the ballpark. In reality, *both* defense experts asserted organic brain damage, an allegation that the Commonwealth's neuro-psychologist did indeed thoroughly refute. App. 140-41, 148-49. The additional claims of the second defense expert, however, were hardly left on the field, unaddressed; on the contrary, they were the subject of an additional finding by the state trial

judge, who *specifically rejected them*.[5] Yet the court of appeals never even mentioned this additional finding.

In any event, the process by which the federal court circumvented the state rulings on mental health evidence would be troubling no matter how many witnesses each side had presented, or how much of their testimony went without specific reply. Fact-finding is not a bijective function: there is no requirement of one-to-one correspondence between every statement by opposing witnesses before testimony may be discounted. The trial judge was called upon to make an overall credibility judgment about the persuasiveness of the witnesses presented by the defense, which bore the burden of proof in this proceeding. That judgment arose not only from what the prosecution's witness said, but from what the defense witnesses themselves said, particularly on cross-examination.[6] The federal court was not

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[5] "With respect to Dr. Richard Dudley's testimony that petitioner suffered from post-traumatic stress syndrome when he examined him in 1996, there is no showing that petitioner suffered from this disorder at the time of the offense in 1991. Accordingly, petitioner has failed to carry the burden of showing that, at the time of the offense, he was under the influence of extreme emotional or mental disturbance." App. 150.

[6] Indeed even during the course of the proceedings,

(continued...)

free to second-guess the state court's appraisal of the expert evidence.

The circuit court's rejection of the state court ruling was even more improper given the field of expertise in question. The dispute here, after all, was not about the laws of physics. Forensic psychology, if science it is, is hardly an exact one. This Court has written extensively on the dangers of transplanting mental health treatment concepts into the constructs of criminal responsibility. *Clark*

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[6](...continued)
the trial judge expressed his skepticism over the core defense claims. *See, e.g.,* N.T. 4/15/97, 204 ("There was a psychologist who testified and told us his opinion.... I just am trying to find out if you agree with him because I don't"); N.T. 4/15/97, 217 (suggesting that defense expert employed particular testing procedure because he had a "preconceived" position that the defendant was brain-damaged); N.T. 4/21/97, 131 (noting the defendant's inconsistent accounts of his alleged drug use); N.T 4/21/97, 139 (questioning expert's suggestion that the defendant did not appreciate the criminality of his conduct; "Did he know he was shooting someone when the man said don't shoot me and he pulled the trigger?"); N.T. 4/21/97, 140-42 (challenging notion that difficulties in the defendant's childhood excused his criminal conduct; "So anyone with ... that type of background could commit these crimes and would have [the statutory mitigating circumstance of extreme] emotional disturbance? ... What makes this defendant different from all the other people who have these same type backgrounds?").

v. Arizona, 548 U.S. 735 (2006).[7] In the face of such inherent uncertainty, how could the state courts' view of the mental capacity evidence possibly be dismissed as "unreasonable?" There was no deference here.

3. The "unreasonable" state ruling that counsel's original mitigation evidence was adequate.

The circuit court concluded that, in addition to his failure to present the expert testimony that was discredited by the state courts, counsel was also ineffective for failing to present "upgraded" non-expert testimony, App. 88 – primarily from the same family members who testified at the original sentencing hearing.

As before, this conclusion required the court of appeals to discard an exactly opposite ruling by the state courts. As before, the federal court was careful to invoke "unreasonableness" in doing so.

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[7] "[T]here are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. . . . [T]he expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the *probable relationship* between medical concepts and legal or moral constructs such as free will." 548 U.S. at 775-77 (internal quotation and citation omitted).

And as before, what was missing was any coherent case for such a pronouncement.

Both the state and federal courts recognized counsel's original mitigation strategy: to emphasize that the defendant had led a law-abiding, admirable life for 25 years, until a series of personal crises temporarily pushed him over the edge. The testimony presented by trial counsel made clear that the defendant had endured a difficult childhood. But the ultimate message was, as the state supreme court observed, that the defendant's brief period of criminal behavior was both "aberrational and of recent vintage." App. 134.[8]

On collateral attack, the defense, having failed before, tried a somewhat altered strategy.

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[8]As summarized by the circuit court, the evidence that trial counsel presented to the jury was that the defendant's father walked out when the boy was six; that the defendant was well-behaved as a child, respected his elders, and stayed out of trouble; that the defendant was beaten by gang members because he refused to join, and was forced to drop out of high school; that the defendant enrolled in the Job Corps and worked steadily; and that the defendant helped care for his siblings' children, his chronically ill mother, and his elderly neighbors. Shortly before his crimes, however, the defendant's stepfather (his only real father figure) died; his brother was diagnosed with cancer; he lost his job; and he was rejected by the military because he failed his G.E.D. exam by one point. App. 57-58.

New counsel elicited from the same witnesses a more negative picture. The goal was to portray the defendant as the victim of irreparable brain damage, grinding poverty, and familial neglect.[9]

Some might argue that the second type of strategy is "better" – as the federal court plainly presumed – although it is hardly obvious as an objective matter why that is so.[10]

In the end, however, it does not matter – *because "better" is not the test.* That is the whole point of *Strickland*, as the *Mirzayance* decision

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[9] This time witnesses testified that the defendant's mother drank and gambled, and that she was violent with her children; that at times the family lacked for food, clothing, and utilities; and that on occasion the defendant had eaten lead paint chips. School records showed that he had been absent on numerous occasions; that a first grade report card noted he "seems sleepy" and "unkempt"; that he had to repeat third grade; and that over his many years of schooling his mother had accounted for various absences on various grounds: *e.g.*, that he did not have a coat, or shoes, or heat at home. App. 60-62.

[10] The circuit court apparently believed that the setbacks suffered by the defendant just before his crime spree were too pedestrian to qualify as persuasive mitigation: they were "the type of disappointments many people face in life." App. 88. But the same is true of the alternative defense preferred by the federal court. Many people have "dysfunctional," even "awful," childhoods. Almost none of them grow up to be double murderers.

reestablishes. There is always some other thing that counsel could have done. There is always, in the capital sentencing context, some new fact about the defendant's life for which counsel could have searched, always some new spin which counsel could have considered. There is "nothing to lose," *see Mirzayance*, slip op. at 6, 9, in trying. But if that is enough to trump both *Strickland* deference and AEDPA deference, then these standards of review are simply ceremonial.

Given substance, the doubly deferential review standard imposes a high threshold indeed. A state court ruling that violates it should be fairly easy to spot, and simple to describe. Here it took the circuit court over 7,800 words to overturn the state courts – yet none of those words explained how the court of appeals could conclude that the state courts' views were *not even within the realm of reasonable*. If that is what deference looks like, how would the analysis have differed if there were none?

Further review is warranted. The case should be summarily reversed or, in the alternative, remanded for reconsideration in light of *Mirzayance*.

Conclusion

For these reasons, petitioners respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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