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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

DANNY LEE JONES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

The state post-conviction court denied Jones' claim that his counsel was ineffective in failing to (a) obtain a "non-neutral" mental health expert, (b) timely seek additional mental health testing, and (c) present additional evidence of Jones' allegedly abusive childhood, head trauma and drug abuse. Notwithstanding an evidentiary hearing in state court (by the same judge who sentenced Jones) and notwithstanding an additional evidentiary hearing in federal court that only yielded evidence that was either cumulative or not credible, the Ninth Circuit reversed the district court and granted habeas relief based on its finding that the state court ruling was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984).

1. Did the Ninth Circuit err in this AEDPA case by interpreting *Ake v. Oklahoma*, 470 U.S. 68 (1985), to require appointment of a "non-neutral" mental health expert to assist the defense at sentencing, even though there is no clearly established law from this Court evidencing such a requirement and there is a circuit split regarding this interpretation of *Ake*?

2. Did the Ninth Circuit err by failing to defer to the state court's resolution of Jones' ineffective assistance claims, when the state court properly applied the analysis required under *Strickland*, and when "new" evidence developed in federal court was cumulative and/or not credible?

a. Does defense counsel perform deficiently within the meaning of the first prong of *Strickland* by relying on the description of childhood abuse provided by the defendant and his mother and stepfather, and not additionally interviewing the defendant's sibling regarding the same type of abuse?

b. Does a federal court err by considering only newly proffered mitigation evidence, without considering rebuttal evidence and evidence of aggravating circumstances, in determining whether the additional mitigation evidence would have changed the sentencing decision?

3. Did the Ninth Circuit err by ruling that a district court, in considering ineffective assistance of counsel claims following an evidentiary hearing, should not evaluate the credibility of expert witnesses who testified at the hearing regarding evidence a petitioner claims should have been presented at sentencing?

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OPINION BELOW

The United States Court of Appeals for the Ninth Circuit's decision is set forth in *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009). Pet. App. A. The Ninth Circuit's unpublished order dated January 25, 2010, concluding *en banc* proceedings, is attached as Pet. App. B. The relevant district court decision is set forth in *Jones v. Schriro*, 450 F.Supp.2d 1023 (D. Ariz. 2006). Pet. App. C. The state post-conviction court's ruling denying Jones' petition for post-conviction relief is attached as Pet. App. D. The Arizona Supreme Court's opinion on direct review is set forth in *State v. Jones*, 917 P.2d 200 (Ariz. 1996). Pet. App. E.

STATEMENT OF JURISDICTION

The Ninth Circuit filed its decision on October 2, 2009. *En banc* proceedings concluded on January 25, 2010. Petitioners timely filed this petition for writ of certiorari within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

In 1993, Danny Lee Jones was sentenced to death after a Mohave County, Arizona, jury convicted him of two counts of premeditated murder and one count of attempted premeditated murder. The facts underlying those crimes are set forth in the Arizona Supreme Court's opinion affirming Jones' convictions and death sentences:

In February 1992, defendant moved to Bullhead City, Arizona, and resumed a friendship with Robert Weaver. At this time, Robert, his wife Jackie, and their 7-year-old daughter, Tisha, were living in Bullhead City with Robert's grandmother, Katherine Gumina. As of March 1992, defendant was unemployed and was planning to leave Bullhead City.

On the night of March 26, 1992, defendant and Robert were talking in the garage of Ms. Gumina's residence. Robert frequently entertained his friends in the garage, and during these times, he often discussed his gun collection. The two men were sitting on inverted buckets on the left side of the garage, and Ms. Gumina's car was parked on the right side of the garage. Both defendant and Robert had been drinking throughout the day and had used crystal methamphetamine either that day or the day before.

At approximately 8:00 p.m., Russell Dechert, a friend of Robert's, drove to the Gumina residence and took defendant and Robert to a local bar and to watch a nearby fire. Dechert then drove defendant and Robert back to the Gumina residence at approximately 8:20 p.m. and left, telling defendant and Robert that he would return to the Gumina residence around 9:00 p.m.

Although there is no clear evidence of the sequence of the homicides, the scenario posited to the jury was as follows. After Dechert left, defendant closed the garage door and struck Robert in the head at least three times with a baseball bat. Robert fell to the ground where he remained unconscious and bleeding for approximately 10 to 15

minutes. Defendant then entered the living room of the Gumina residence where Ms. Gumina was watching television and Tisha Weaver was coloring in a workbook. Defendant struck Ms. Gumina in the head at least once with the baseball bat, and she fell to the floor in the living room.

Tisha apparently witnessed the attack on Ms. Gumina, ran from the living room into the master bedroom, and hid under the bed. Defendant found Tisha and dragged her out from under the bed. During the struggle, Tisha pulled a black braided bracelet off defendant's wrist. Defendant then struck Tisha in the head at least once with the baseball bat, placed a pillow over her head, and suffocated her, or strangled her, or both.

Defendant next emptied a nearby gun cabinet containing Robert's gun collection, located the keys to Ms. Gumina's car, and loaded the guns and the bat into the car. At some point during this time, Robert regained consciousness, and, in an attempt to flee, moved between the garage door and Ms. Gumina's car, leaving a bloody hand print smeared across the length of the garage door and blood on the side of the car. Robert then climbed on top of a work bench on the

east side of the garage, leaving blood along the east wall. Defendant struck Robert at least two additional times in the head with the baseball bat, and, as Robert fell to the ground, defendant struck him in the head at least once more.

State v. Jones, 917 P.2d 200, 206 (Ariz. 1996). After the murders, Jones, who was the subject of outstanding warrants, removed Robert Weaver's gun collection from the house and left for Las Vegas, Nevada, selling the guns for cab fare and living expenses. *Id.* at 207.

At trial, Jones testified that he killed Weaver in self-defense and struck Katherine Gumina reflexively when she startled him. He further testified that, while he was fighting with Weaver in Weaver's garage, Frank Sperlazzo, an acquaintance of Jones who was attempting to collect a drug debt from Weaver, entered the house and killed Tisha as he was stealing Weaver's guns. The jurors were unpersuaded by Jones' testimony and convicted him on all counts.

At the sentencing hearing, Jones' counsel presented testimony from Jones' step-father that Jones' biological father was abusive to Jones' mother while she was pregnant; during Jones' birth, his mother's heart stopped and forceps were used to deliver Jones; Jones experienced black-outs when he was four; he suffered bruising easily due to a calcium deficiency; Jones' first step-father verbally and physically abused Jones, his mother, and his step-sister; that Jones suffered numerous head injuries when he was 13, 15,

and 19 years old; Jones was treated for concussions and was hospitalized when he was in the Marines; Jones suffered a history of drug and alcohol use which began at 13; and Jones participated in a drug-treatment program at a facility in San Francisco, where he stayed for almost 2 years. *Jones*, 450 F. Supp. at 1026–27.

Jones also presented testimony from a court-appointed expert, Dr. Jack Potts, who evaluated Jones twice prior to sentencing. Dr. Potts testified that he was unaware of a fall that Jones' step-father reported, but he testified to an additional fall and head injury that Jones himself had reported. *Id.* at 1027. Dr. Potts then provided the trial court with seven factors he considered mitigating and deserving of a sentence less than death: Jones' chaotic and abusive childhood and its effect on his mental health and development, of which Dr. Potts offered detailed testimony; Jones' significant history of substance abuse; the likelihood Jones suffered from an attenuated form of bipolar disorder; Jones' history of multiple head traumas¹; Jones' genetic loading for substance abuse, and affective disorder. Dr. Potts recommended additional testing that would "clearly assist in coming to a more definitive conclusion" regarding whether Jones suffered brain damage. The trial court denied this request, citing the lack of evidence of neurological deficits. *Id.*

¹ Other than his alleged head injury at age 19 in the Marine Corps, Jones did not present any documentation proving his alleged head injuries, either in state court or in district court.

Jones sought post-conviction relief in state court alleging that his Sixth Amendment right to counsel was denied based on trial counsel's ineffectiveness at sentencing for failing to (1) obtain a defense expert; (2) timely seek neurological or neuropsychological testing, and (3) present additional evidence of Jones' abusive childhood, head trauma and drug abuse. After conducting an evidentiary hearing on the second two claims, the trial court (the same judge who had sentenced Jones to death) denied relief. *See Jones*, 450 F. Supp. at 1029. The state court found that Dr. Potts provided necessary testimony regarding Jones' mental health issues, and that any additional witnesses testifying regarding Jones' childhood and upbringing would have been cumulative. *Id.* at 1029–30.

After the Arizona Supreme Court denied review of the trial court's post-conviction ruling, Jones initiated federal habeas proceedings in which he pursued several claims, including Claims 20(O), (P) and (T), which correspond to the three post-conviction claims detailed above. The district court granted an evidentiary hearing on these three claims even though the state court conducted an evidentiary hearing on Claims 20(P) and (T). Jones presented additional expert testimony in federal court based on neuropsychological testing suggesting that he suffered cognitive disorder or impairment, post-traumatic stress disorder (PTSD), attention deficit hyperactivity disorder (ADHD), and a mood disorder. The State presented expert testimony indicating that the test results and the record did not support diagnoses of cognitive disorder, PTSD, or a mood disorder. The district court denied relief, finding that Jones failed to

present persuasive evidence of the existence or cause of his alleged cognitive impairment:

The experts ascribed as the primary cause of [Jones'] cognitive impairment a series of head injuries. With the exception of the 1983 "mugging," there is no medical documentation to corroborate any of these injuries. In addition, the dates and details--and even the occurrence--of the injuries, as reported by [Jones] and his family, are inconsistent and hence difficult to credit.

...

In any event, even if [Jones'] self-reported head injuries did occur, they did not, as discussed above, result in cognitive impairment.

Jones, 450 F. Supp.2d at 1039.

The district court found that Jones failed to "affirmatively prove prejudice" with regard to his ineffective assistance claims. *Id.* at 1040 (citing *Strickland*, 466 U.S. at 693). Regarding Claim 20(O) (failure to obtain a partisan expert), the district court found that the state court's application of *Strickland* was reasonable because Dr. Potts was a *de facto* defense expert at sentencing, and the subsequent mental-health evidence developed in district court did not establish a more persuasive case in mitigation. *Id.* at 1034, 1043. The district court pointed to Jones' trial counsel's testimony at the evidentiary hearing that Dr.

Potts “actively assisted developing mitigation, planning strategy” and that, after speaking with Dr. Potts and reviewing his report, trial counsel came to regard Dr. Potts as a mitigation expert and a member of the defense team. *Id.* The district court further noted that Dr. Potts’ findings and testimony were “clearly favorable” to Jones and that, even with the benefit of additional evidence presented in federal court, Dr. Potts’ findings regarding possible neurological damage caused by head trauma or other factors “remains the most persuasive statement in the record that neurological damage constituted a mitigating factor.” *Id.* at 1044.

Regarding claim 20(P) (failure to timely seek neurological testing), the district court likewise found the state court’s denial was not an unreasonable application of *Strickland*. The court found that Jones did not prove prejudice because his newly-developed evidence did not show that neurological testing would have established that Jones suffered cognitive impairment. The district court noted that, notwithstanding an opportunity to develop this type of evidence in an evidentiary hearing, Jones presented no evidence that neurological tests such as a CAT scan, MRI, or EEG had been performed, let alone that their results would support a finding of impairment. *Id.* at 1044. The district court found that Jones failed to prove prejudice because the testing he presented in district court was largely inconclusive and ambiguous and did not demonstrate that Jones suffered any cognitive impairment. *Id.* at 1044–45.

Addressing claim 20(T) (alleged failure to present additional evidence), the district court held that Jones failed to provide testimony from additional mitigation witnesses at the federal evidentiary hearing, with the exception of an affidavit from his sister alleging abuse by Randy Jones. The district court found that trial counsel did not perform deficiently because he was not on notice of the additional information of sexual abuse by Jones' grandfather presented through testimony from experts—Jones and his family did not provide this information until nearly 10 years after Jones was sentenced. The court also found that Jones' new allegations of sexual and physical abuse would have been viewed with skepticism by the trial judge given their late disclosure, inconsistency with other information in the record, and Jones' obvious motive to fabricate. *Id.* at 1047 (citing *State v. Medrano*, 914 P.2d 225, 227 (Ariz. 1996)).

On appeal, the Ninth Circuit rejected the district court's resolution of Claim 20(O) on the basis that, under Ninth Circuit authority interpreting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), "evaluation by a 'neutral' court psychiatrist does not satisfy due process." *Jones*, 583 F.3d at 639 (citing *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990)).

The Ninth Circuit similarly rejected the district court's findings regarding the other two claims and ignored the contradictory evidence offered by the State during the evidentiary hearing in district court, instead accepting at face value all of Jones' newly-proffered mitigation evidence. The panel chastised the

district court for weighing the inconsistencies in the experts' opinions in determining whether Jones proved prejudice under the *Strickland* analysis. *Jones*, 583 F.3d at 641. In addition, the panel found that the district court's assessment that Dr. Potts was a "de facto" defense expert was clearly erroneous. *Id.* at 639.

The Ninth Circuit granted the writ based on Jones' ineffective assistance claims, relying heavily on *Belmontes v. Ayers*, 529 F.3d 834 (9th Cir. 2008)—a case this Court subsequently reversed in *Wong v. Belmontes*, 130 S. Ct. 383 (2009)—as well as on the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, and on two pre-AEDPA cases—*Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2005), and *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008).

The Ninth Circuit asked the parties to brief whether the court should consider *en banc* review. The court denied, however, the State's request for rehearing *en banc*.

Although there is not a panel or *en banc* dissent in this case, Chief Judge Alex Kozinski, in authoring a dissenting opinion in *Pinholster v. Woodford*, 590 F.3d 651, 685 (9th Cir. 2009), specifically referenced the instant case, together with another Ninth Circuit case from Arizona, *Libberton v. Ryan*, 583 F.3d 1147 (Cir. 2009), and several other cases, as examples of "a series of mistakes that have unfortunately, become far too common in our circuit." Noting the Ninth Circuit's reliance on evidence never presented to the state courts and "perhaps worst of all" a failure to afford deference

to state court rulings, Chief Judge Kozinski stated that the Ninth Circuit has “perpetuate[d] a habeas regime where few death sentences are safe from federal judges who know ever so much better than those ignorant state judges and lawyers how capital trials ought to be conducted.” *Pinholster*, 490 F.3d at 685.

REASONS FOR GRANTING THE WRIT

The ruling below continues a practice in which death sentences are routinely set aside in the Ninth Circuit notwithstanding reasoned state-court decisions that properly apply controlling authority from this Court. To set aside Jones’ death sentence, the Ninth Circuit created several novel rules, none of which are “clearly established” by this Court’s precedents, as required for habeas relief under AEDPA. First, the court created a new “no neutral expert” extension of *Ake*; second, the court held that defense counsel must interview at least one sibling in preparation for the mitigation case, even if the defendant and the defendant’s mother and stepfather willingly speak with counsel about alleged childhood abuse; and third, the court held that district courts may not make credibility determinations after considering expert testimony from both sides in an evidentiary hearing regarding evidence that allegedly should have been presented in state court. None of these new rules is a proper basis for relief. Furthermore, in analyzing Jones’ ineffective assistance claims, the Ninth Circuit simply accepted at face value all of Jones’ assertions without considering contrary evidence and without considering how Jones’ newly-proffered mitigation would be weighed by the sentencer. Once again, therefore, the Ninth Circuit

has thwarted Congress' effort to limit federal courts' superintendence over state court criminal law rulings.

I

**THE NINTH CIRCUIT IMPROPERLY
READ A NEW REQUIREMENT INTO
THIS COURT'S RULING IN *AKE V.
OKLAHOMA*.**

Because Jones filed his petition for writ of habeas corpus after April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under AEDPA, a state prisoner is not entitled to federal habeas relief with respect to any federal claim that was adjudicated on the merits in state court proceedings unless the state court adjudication (1) was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by this Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d).

In Claims 20(O) and (P) of Jones' amended petition for writ of habeas corpus, he alleged that trial counsel should have obtained funding for an additional "partisan" mental-health expert, and should have requested neurological and neuropsychological testing. At sentencing, Jones presented mental-health expert testimony through Dr. Potts, the court-appointed expert. Dr. Potts reviewed Jones' family history and medical records, and evaluated Jones prior to

sentencing. Dr. Potts testified regarding Jones' head injuries, abusive and chaotic childhood, and his history of drug abuse. In addition, Dr. Potts identified seven mitigating factors for the trial court to consider. Although Dr. Potts recommended that Jones obtain "sophisticated neurological testing" such as a CAT Scan or EEG, the trial court rejected counsel's request for additional testing as untimely. On post-conviction review, the state court rejected Jones's ineffective assistance claims relating to mental health experts, finding that Dr. Potts provided the needed consultation and testimony regarding mental health issues.

On federal collateral review, the district court granted an evidentiary hearing to allow Jones to further develop his allegations that neurological defects should have been explored. At the hearing, however, Jones did not present any neurological test results. Jones instead presented testimony from three mental health experts who only posited that Jones suffered from PTSD, mood disorder, and ADHD. The State presented testimony from three experts who disagreed that Jones suffered from PTSD and testified there was no link between any mental health condition and Jones' conduct at the time of the murders. The district court found the State's experts to be more credible than those offered by Jones. The district court further found that Jones' "new" evidence was largely inconclusive or cumulative, and did not alter the sentencing profile presented in state court. *Jones*, 450 F. Supp. at 1043.

Notwithstanding that ruling, the Ninth Circuit granted relief, based in part on its view that the state

court ruling “was contrary to clearly established Supreme court precedent” as set forth in *Ake. Jones*, 583 F.3d at 638. In reaching this conclusion, the Ninth Circuit noted that *Ake* requires “access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” *Id.* (citing *Ake*, 470 U.S. at 83). The Ninth Circuit extended the reach of *Ake*, however, by relying on its own decision in *Smith*, 914 F.2d at 1158, for the additional proposition that, “under *Ake*, evaluation by a ‘neutral’ court psychiatrist does not satisfy due process.” *Jones*, 583 F.3d at 638.

The Ninth Circuit’s decision in *Smith* does not constitute “clearly established Federal law as determined by this Court.” Accordingly, the Ninth Circuit’s reliance on that decision on federal collateral review should be rejected under 28 U.S.C. § 2254(d)(1).

Other circuits have interpreted *Ake* differently than the Ninth Circuit. For example, in *Woodward v. Epps*, the Fifth Circuit expressly rejected an argument that a court-ordered evaluation by a “neutral” expert did not satisfy *Ake*:

Availability of a neutral expert provides defendants with “the raw materials integral to the building of an effective defense.” *Ake*, 105 S. Ct. at 1093. The state is not required to permit defendants to shop around for a favorable expert He has no right to the appointment of a psychiatrist who will reach biased or only favorable conclusions.

580 F.3d 318, 331–32 (5th Cir. 2009) (quoting *Granviel v. Lynaugh*, 881 F.2d 185, 191 (5th Cir. 1989)).² See also *Smith v. Mitchell*, 348 F.3d 177, 208 (6th Cir. 2003) (holding that *Ake* does not entitle a defendant to an independent psychiatrist of his choosing, only a competent psychiatrist). But see *Starr v. Lockhart*, 23 F.3d 1280, 1290–91 (8th Cir. 1994) (finding that *Ake* “expressly disavows” the theory that due process is satisfied by the appointment of a neutral expert).

Given this conflict in how *Ake* should be interpreted, and given the absence of clearly established law from this Court regarding this issue, the Ninth Circuit violated the precepts of AEDPA by finding that the state court ruling was contrary to *Ake*. See *Carey v. Musladin*, 549 U.S. 70, 76 (2006) (reflecting the lack of guidance from this Court regarding spectator conduct claims, lower courts have diverged widely in their treatment of the issue); *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (“Because our cases give no clear answer to the question presented, let alone one in Van Patten’s favor, it cannot be said that the state court unreasonabl[y]

² In *Granviel*, after the Fifth Circuit ruled that there is no right to a non-neutral expert, this Court denied certiorari review. See *Granviel v. Texas*, 495 U.S. 963 (1990). Although the denial of certiorari review carries no precedential value, see *Teague v. Lane*, 489 U.S. 288, 296 (1989), it suggests that the underlying decision in *Granviel* was not contrary to Supreme Court authority, particularly given a dissent from the denial of certiorari by Justices Marshall and Brennan, in which they argued that providing a “disinterested” expert “does not satisfy *Ake*.” *Granviel*, 495 U.S. at 965 (Marshall, J., dissenting).

appli[ed] clearly established Federal law.”) (quotations omitted).

Furthermore, even assuming *Ake* requires something more than appointment of a neutral expert, in the instant case, defense counsel testified during the evidentiary hearing in federal court that he worked closely with Dr. Potts and viewed him to be a member of the defense team. *Jones*, 450 F. Supp. at 1043. Favorable testimony from a “neutral” expert is arguably more persuasive than similar testimony from an expert paid by a party. Thus, it is illogical to conclude that *Ake* requires testimony from a “non-neutral” expert when a “neutral” expert has become a *de facto* member of the defense team.

Regardless, there is no clearly established law from this Court holding that appointment of a neutral expert who works closely with the defense team does not suffice under *Ake*. Thus, the Ninth Circuit’s ruling violates AEDPA’s mandate that state court convictions and sentences be upheld absent clearly established authority to the contrary from this Court.

II

THE NINTH CIRCUIT’S OPINION FAILS TO FOLLOW THE CORNERSTONE AEDPA REFORM REQUIRING DEFERENCE TO STATE- COURT RULINGS.

AEDPA creates a “highly deferential standard for evaluating state court rulings.” *Lindh*, 521 U.S. at

334 n.7. The federal court's opinion of the merits of a claim raised in a federal habeas petition is not the question. *Woodford v. Visciotti*, 537 U.S. 19, 24–25 (2007); *Yarborough v. Alvarado*, 541 U.S. 542, 665 (2002). Rather, “the only question that matters” under Section 2254(d) is whether the state-court ruling was at least “reasonable” under this Court’s clearly-established law. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

In analyzing claims of ineffective assistance on federal collateral review, state court rulings are entitled to a double layer of deference under AEDPA: first, the substantial deference to which lawyers are entitled under *Strickland* in making judgments during the course of their representation; and second, the deference to which the state court is entitled in determining whether the lawyers’ performance was ineffective *and* prejudicial. *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009).

The Ninth Circuit did not apply this deferential standard in evaluating the state court’s resolution of Jones’ post-conviction claims. The state court undertook the analysis required by *Strickland* and reasonably concluded that the additional evidence Jones proffered would not have changed the sentencing decision. Thus, the state court ruling was reasonable under Section 2254(d).

A. THERE IS NO CLEARLY ESTABLISHED LAW FROM THIS COURT REQUIRING THAT EVERY FAMILY MEMBER BE INTERVIEWED AS PART OF A MITIGATION INVESTIGATION WHEN THE DEFENDANT AND HIS PARENTS COOPERATE WITH DEFENSE COUNSEL AND PROVIDE INFORMATION REGARDING HIS BACKGROUND.

In Claim 20(T), Jones alleged that his trial counsel was ineffective for failing to present additional lay witnesses and evidence to bolster his mitigation case. Specifically, Jones claimed that counsel should have presented evidence from Jones' ex-wife, family members, friends, and former drug counselors.

At sentencing, trial counsel presented testimony through Randy Jones, Jones' second step-father, regarding Jones' abusive childhood, difficult childbirth, drug and alcohol abuse and drug treatment history, including his introduction to drugs by his grandfather, school history, history of head injuries, and the apparent effect of the drugs and head injuries on his behavior. In his state post-conviction relief proceeding, Jones presented additional testimony from his mother, Peggy Jones, regarding the abuse that she and Jones suffered at the hands of Jones' father and first step-father. The state court found this evidence redundant to what was presented at sentencing and concluded that Jones failed to meet his burden of proving that trial counsel performed deficiently.

In federal court, notwithstanding an opportunity to present additional testimony, Jones failed to present any lay witnesses to provide additional mitigation evidence. His "new" allegations were presented

primarily through expert reports detailing assertions that Jones was physically abused by Randy Jones, and sexually abused by his step-grandfather. Jones also presented an affidavit from his sister, Carrie Haigney, who avowed that her step father (1) threatened to kill himself, (2) was physically and verbally abusive to Jones, and (3) abused their mother so severely that Jones' threatened to kill him if he did not stop the abuse. Jones did not raise these allegations until 10 years after sentencing even though he and his family were presumably aware of them prior to sentencing. The district court concluded that this new evidence was unpersuasive—particularly because Jones and his family members never told trial counsel about this alleged abuse—and did not significantly change the analysis of the ineffective-assistance claim resolved by the state court.

The Ninth Circuit rejected that conclusion, finding that “[t]his information was not hidden for ten years because the family was uncooperative; it was hidden because the defense lawyer never asked the question.” *Jones*, 583 F. 3d. at 645. The Ninth Circuit further held that “[t]he defense lawyer was aware that [Petitioner’s] childhood abuse was perhaps the greatest mitigating evidence available, and he therefore had no justifiable excuse not to interview [Petitioner’s] sister.” *Id.*

Again, the Ninth Circuit has created a new requirement that has never been imposed by this Court – that a defense attorney who has interviewed a defendant and his mother, who both have knowledge of alleged abuse – is nevertheless incompetent unless he

interviews other family members like a sibling. Under this approach, a defense attorney will inevitably be found to have rendered deficient performance, because there is always at least one additional relative or friend who might have been interviewed and who might have turned up additional information.

B. THE NINTH CIRCUIT FAILED TO CONSIDER REBUTTAL EVIDENCE AND AGGRAVATING CIRCUMSTANCES, AND INSTEAD ENGAGED IN *DE NOVO* REVIEW.

In analyzing the reasonableness of the state court's post-conviction ruling, the Ninth Circuit failed to consider all the relevant evidence the sentencer would have considered, including rebuttal evidence and "the entire body of aggravating evidence." *Wong v. Belmontes*, 130 S. Ct. 383, 386 (2009); *see also Bobby v. Van Hook*, 130 S. Ct. 13 (2009) (reversing Sixth Circuit decision and holding that cumulative evidence of difficult childhood did not warrant relief). Here, the state court found that Jones committed multiple murders in a cruel, heinous, and depraved manner, and for pecuniary gain.³ In addition, the State proved an additional aggravating factor for the murder of 7-year-old Tisha Weaver, who hid under a bed after witnessing Jones beat her grandmother. The Ninth Circuit failed to weigh any of the rebuttal evidence or the aggravating factors in analyzing whether Jones could prove prejudice. Given the aggravation findings in this case, there is no reasonable probability that

³ The overwhelming evidence of aggravating factors is detailed in *Jones*, 917 P.2d at 206–07.

additional, relatively insubstantial mitigation would have changed the sentence.

Furthermore, although the Ninth Circuit acknowledged the AEDPA deference standard, the court made no effort to apply it because, in its view, the state court did not address the prejudice prong of the *Strickland* analysis, and thus federal review of that issue is *de novo*. *Jones*, 583 F.3d at 641. However, the state court, in analyzing Jones post-conviction claims, ruled that “the report and testimony of Dr. Potts, who was appointed by the court, adequately addressed defendant’s mental health issues at sentencing.” *Jones*, 450 F. Supp. at 1029. The state court also ruled that “the additional witnesses and evidence suggested by petitioner would have been redundant.” *Id.* at 1029–30. These rulings address the prejudice prong of *Strickland* and this Court should not countenance an end run around AEDPA deference by allowing the Ninth Circuit to mischaracterize the state court ruling.

Notwithstanding opportunities in both state and federal court to develop evidence that should have been presented at sentencing, the record shows only that Jones’ trial counsel could have presented additional evidence that was either cumulative or unreliable.⁴ Accordingly, the Ninth Circuit violated

⁴The fact that the district court granted an evidentiary hearing does not change the analysis of the reasonableness of the state court’s post-conviction ruling. In fact, because Jones developed only cumulative and/or unpersuasive “new” evidence in federal court, the federal court evidentiary hearing confirms the reasonableness of the state court ruling. *See Knowles*, 129 S. Ct. (Continued)

AEDPA's mandate requiring deference to the state court's resolution of Jones' post-conviction claims, particularly given the fact that the post-conviction decision was made by the same judge who sentenced Jones and who was uniquely qualified to assess the prejudice prong of the *Strickland* analysis. *See Schriro v. Landrigan*, 550 U.S. 465, 476 (2007) (noting that post-conviction judge was "ideally situated" to evaluate ineffective assistance claim because she had also been the judge who imposed sentence).

In his dissenting opinion in *Pinholster*, Chief Judge Kozinski's description of the Ninth Circuit's flawed review of ineffective-assistance-of-counsel claims in this and other cases is particularly apt and highlights the need for corrective action by this Court:

The majority reaches the contrary conclusion [that the habeas petitioner is entitled to relief on a claim of ineffective assistance] through a series of mistakes that have, unfortunately, become far too common in our circuit. First, the majority relies on evidence never presented to the state courts and that we may therefore not consider in federal habeas proceedings governed by AEDPA. *Contra Williams v. Taylor (Michael Williams)*, 529 U.S. 420, 437-40, 120 S. Ct. 1479, 146 L.Ed.2d 435 (2000). Second, the majority applies

(Continued).

at 1420.

retrospectively a standard for counsel's performance that bears no relationship to that prevailing at the time of Pinholster's trial in 1984. *Contra Bobby v. Van Hook*, ___ U.S. ___, 130 S. Ct. 13, 18-19 (2009) (per curiam). Third, and perhaps worst of all, the majority accords no deference to the California Supreme Court's superior expertise in determining what constitutes competent representation among the members of its bar and the likely consequences (or lack thereof) of any deficient performance. *Contra Schriro v. Landrigan*, 550 U.S. 465, 473-74, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).

Few state court judgments can withstand even one such error, *see, e.g.*, *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009); *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009); *Gilley v. Morrow*, 246 Fed. Appx. 519 (9th Cir. 2007) (unpublished); *Stankewitz v. Woodford*, 365 F.3d 706 (9th Cir. 2004); *see also* cases cited pp. 692, 711 *infra*, but in combination they are deadly. I had hoped that our en banc court would sweep away these mistakes and bring our caselaw into conformity with AEDPA. Instead, the majority repeats and magnifies the errors in these prior cases so that they will be very difficult, probably impossible, for us to correct. This perpetuates a habeas regime where few death sentences are

safe from federal judges who know ever so much better than those ignorant state judges and lawyers how capital trials ought to be conducted. Because I don't believe we are the ultimate font of wisdom on such matters, I must dissent.

590 F.3d at 685. *See also Robinson v. Schriro*, 595 F.3d 1068, 1117 (9th Cir. 2010) (Rawlinson, J., dissenting) (noting the Ninth Circuit's failure to properly apply the prejudice analysis required under *Van Hook* and *Belmontes*). This Court should grant certiorari review to change the Ninth Circuit's errant analysis and mandate proper deference to reasoned state-court decisions.

III

THE NINTH CIRCUIT IMPROPERLY HELD THAT DISTRICT COURTS MAY NOT MAKE CREDIBILITY DETERMINATIONS WHEN ASSESSING EXPERTS' TESTIMONY PRESENTED AT FEDERAL COURT EVIDENTIARY HEARINGS REGARDING *STRICKLAND* CLAIMS.

Not only did the Ninth Circuit fail to defer to the state court's analysis of Jones' ineffective assistance claims, it also failed to defer to factual findings made by the federal district court following an evidentiary hearing. In overturning the district court ruling, the Ninth Circuit chastised the district court for weighing

competing testimony from experts for both sides who evaluated Jones and who testified in the federal evidentiary hearing. *Jones*, 583 F.3d at 641. The Ninth Circuit held that the district court should not have independently evaluated the testimony of the experts in determining which expert was believable, and instead should only have decided “whether there existed a ‘reasonable probability’ that ‘an objective factfinder’ in a state sentencing hearing would have concluded, based on the evidence presented, that [the defendant] had a brain injury that impaired his judgment at the time of the crime.” *Id.* (quoting *Correll v. Ryan*, 539 F.3d 938, 952 (9th Cir. 2008)). The Ninth Circuit did not explain, however, how an assessment can be made regarding a reasonable probability that proffered evidence would have changed the factfinder’s decision in state court *without* evaluating the evidence’s credibility. *Cf. Ford v. Wainwright*, 477 U.S. 399, 415 (1986) (explaining the value of cross-examination in assessing “inconsistent” psychiatric evidence).

Without considering the district court’s assessment of the credibility of Jones’ experts, the Ninth Circuit simply noted that Jones presented experts who testified about his “extensive history of physical, mental, and sexual abuse, numerous head injuries resulting in unconsciousness, and a lifetime of substance abuse.” *Jones*, 583 F.3d at 643. The Ninth Circuit accepted as true the testimony from Jones’ experts, and ignored the contrary evidence presented by the State’s experts. The Ninth Circuit thus concluded that Jones had established a “persuasive” case that he suffered serious mental defects, was

abused throughout his childhood, and became a substance abuser to self-medicate for the trauma he experienced. *Id*

Under the Ninth Circuit's approach, there is no reason for an evidentiary hearing in district court. A petitioner would be entitled to simply submit affidavits and the federal courts would be required to take them at face value without attempting to assess the credibility of the proffered evidence. Such an approach is illogical and conflicts with this Court's pronouncement that "courts of appeals may not set aside a district court's factual findings unless those findings are clearly erroneous." *Knowles*, 129 S. Ct. at 1421 (citing Federal Rule of Civil Procedure 52(a)). In *Knowles*, this Court accepted certiorari review and reversed a Ninth Circuit decision that had granted federal habeas relief on an ineffective-assistance-of-counsel claim notwithstanding factual findings by a magistrate judge contrary to the conclusion reached by the Ninth Circuit. *Id*. This Court should similarly grant certiorari review in the instant case to confirm that factual findings by a district court following an evidentiary hearing are relevant and appropriate.

CONCLUSION

For the above reasons, this Court should grant certiorari review.

Respectfully submitted

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