NO. 15-7848

IN THE SUPREME COURT OF THE UNITED STATES

CLARK ELMORE,

Petitioner,

v.

DONALD R. HOLBROOK, Superintendent,
Washington State Penitentiary,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT W. FERGUSON
Attorney General

Jay D. Geck
Deputy Solicitor General

John J. Samson*
Senior Counsel

**Counsel of Record*
PO Box 40116
Olympia, WA 98504-0116
360-586-1445
360-586-1319 fax
johns@atg.wa.gov

CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Washington Supreme Court unreasonably apply clearly established federal law when it determined that counsel's strategic decision not to further investigate mitigation evidence, and to instead present a limited defense focused on the defendant's remorse in order to avoid opening the door to harmful rebuttal evidence, was not deficient representation under *Strickland v. Washington*, 466 U.S. 668 (1984)?

2. Where the Washington Supreme Court determined in light of the record that the defendant's brief appearance in restraints on the first day of voir dire did not prejudice the defense for purposes of a due process or ineffective assistance claim, did the Ninth Circuit correctly deny habeas relief when it too concluded the error was not prejudicial in light of the record?

PARTIES

The petitioner is Clark Elmore. The respondent is Donald R. Holbrook, the Superintendent of the Washington State Penitentiary.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Elmore was sentenced to death for raping and murdering his 14-year-old stepdaughter. There is no doubt about Elmore's guilt; he confessed in detail to the crime and insisted on pleading guilty. Elmore challenges only his sentence. Elmore contends that defense counsel failed to fully investigate and present mitigation evidence, and that he improperly appeared in shackles without objection on the first day of jury selection. The Ninth Circuit correctly denied relief on the ineffective assistance claims because the state court adjudication was not unreasonable, and denied the due process claim because the error did not cause actual prejudice.

Applying *Strickland v. Washington*, 466 U.S. 668 (1984), the Washington Supreme Court reasonably determined that counsel's strategic decision concerning the investigation and presentation of mitigation evidence was not ineffective assistance. Counsel investigated potential mitigation evidence, including mental health evidence, but eventually made a strategic decision not to investigate further. Not only was Elmore adamantly opposed to the presentation of such evidence and was becoming increasingly aggravated by the delay caused by the investigation, counsel also knew from experience that further investigation of mental health evidence would open the door to evidence harmful to the defense. Counsel decided to stop investigating and to present a limited defense of remorse in order to prevent the prosecutor from discovering and presenting damning rebuttal evidence. In light of these facts, the Washington Supreme Court reasonably determined that counsel's strategic decision was not deficient representation.

The state court also reasonably determined that Elmore's brief appearance in shackles on the first day of jury selection was not prejudicial. The defense strategy was to have Elmore wear jail clothes during the entire penalty phase trial to show his remorse. When Elmore appeared in restraints on the first day of jury selection, counsel had no objection to Elmore wearing the restraints before prospective jurors. After that day, Elmore did not appear in restraints for the remainder of the three weeks of trial court proceedings. When Elmore challenged his appearance in restraints on direct appeal, the Washington Supreme Court determined any due process error was harmless. And, when Elmore contended on collateral review that counsel was ineffective for not objecting to the restraints, the Washington Supreme Court also found counsel's lack of objection was not prejudicial.

Applying the proper standards, the Ninth Circuit correctly determined that Elmore was not entitled to relief. The circuit court agreed with the state court that counsel made a competent strategic decision to forego further investigation and to intentionally limit the defense in order restrict the prosecution's rebuttal. The circuit court also determined that any due process error in the use of restraints did not cause actual prejudice. Any prejudicial effect was mitigated by the limited duration of the restraints, and paled in comparison to the effect the facts of Elmore's horrendous crime had on the jury's sentencing decision. Finally, the circuit court ruled that the state court reasonably found Elmore did not show prejudice from counsel's lack of objection to the restraints. The Ninth Circuit properly denied relief, and Elmore does not show any conflict necessitating this Court's review.

STATEMENT

A. Elmore Raped and Murdered his 14-Year-Old Stepdaughter

Elmore raped and murdered his 14-year-old stepdaughter, Kristy Ohnstad. Elmore was the common law husband of Kristy's mother, Sue Ohnstad, and the biological father of Kristy's younger sister.

On the morning of Monday, April 17, 1995, Elmore was home alone with Kristy when she began complaining about missing her school bus. App. 38. When Elmore told Kristy that she was "grounded forever" for her complaints, she made a comment about Elmore having molested her when she was 5 years old. App. 38. Kristy would threaten to turn Elmore in for the molestation whenever he tried to discipline her. App. 38. Elmore considered killing Kristy "[j]ust about every time" she threatened to turn him in for the molestation. App. 38. Elmore later told police that he wished she had turned him in because it "[c]ost her her life." App. 38.

That morning, Elmore told Kristy to "shut up." App. 38. Elmore and Kristy then got in Elmore's van, and drove towards Kristy's school. App. 38. But Elmore never dropped Kristy off at school. App. 38. Instead, Elmore continued driving for twenty minutes until he pulled the van onto a secluded dirt road. App. 38. After parking, Elmore unbuckled Kristy's seat belt, and told her it was time she learned to do as she was told or "she'd get seriously hurt." App. 38. Elmore grabbed Kristy, pulled her to the back of the van, and forcibly removed her clothes. App. 38. Ignoring her pleas, Elmore then raped Kristy. App. 38-39. Elmore later said Kristy did not fight back because "she wasn't strong enough to fight [him]." App. 39.

After raping Kristy, Elmore choked her with his hands, then wrapped a belt around her neck and cinched it tightly. App. 39. Elmore then took a nine-inch needle-like tool from his toolbox, and forced it into Kristy's left ear approximately five and a half inches, piercing her brain. App. 39. Kristy was still making noises, so Elmore covered her head with a plastic bag and repeatedly hit her skull with a sledgehammer until he was sure she was dead. App. 39. Elmore purposely covered Kristy's head with the plastic bag to prevent leaving evidence in the van when he hit her with the sledgehammer. An autopsy revealed that Kristy was alive throughout the entire attack as Elmore strangled her, drove the needle into her brain, and began bludgeoning her head. App. 40. Elmore left Kristy's nude body in the woods, covered with a plastic tarp. App. 39. Elmore then got back into his van and drove back to town, disposing of evidence as he drove. App. 39.

Sue Ohnstad reported Kristy missing that evening when she failed to return home from school. App. 37. The police began a formal investigation into Kristy's disappearance after her backpack was found in a ditch the next day. App. 37. In an attempt to divert attention, Elmore publicly criticized the police's efforts in looking for Kristy. App. 37. The police eventually found Kristy's body in the woods a few days later. App. 38. The plastic bag was over Kristy's head, and she was naked other than socks and a shirt pulled over one shoulder. App. 38. The black belt was around her neck and the metal spike protruded from her ear. App. 38. Detectives eventually traced back two flecks of paint recovered from the body to a toolbox in Elmore's van. App. 38.

Elmore fled Washington when he realized the police were close to finding Kristy's body. App. 39. Telling his wife he had to run errands, Elmore drove to the airport. App. 39. Elmore left his van at the airport parking lot, took a cab to the bus station, and then caught a bus to Oregon. App. 39. Elmore planned to obtain a fake identification card using his twin brother's identity, but he eventually abandoned the plan, and decided to return to Washington. App 39. After arriving back in Washington, Elmore surrendered to the police. App. 39. Elmore called 911, and told the dispatcher to send an officer to arrest him for killing Kristy. App. 38. When an officer responded to the call, Elmore told the officer he needed "to talk about killin' [his] daughter." App. 38. After being advised of his rights, Elmore admitted that he had killed Kristy in his van. App. 38. Elmore later provided detectives with a tape-recorded confession to the crime, providing extensive details about the rape and murder, as well as Elmore's actions after the murder. App. 38-39.

B. Elmore Insisted on Pleading Guilty to Rape and Aggravated Murder

When Elmore first appeared in court, Elmore tried to plead guilty, but the court commissioner would not accept the plea. App. 39. The next day the court appointed Jon Komorowski to represent Elmore. App. 39. Mr. Komorowski was the most experienced attorney in the public defender's office, having tried aggravated murder cases and having experience in pursuing mental defenses. Mr. Komorowski was assisted by another experienced criminal defense attorney, as well as by an investigator, a social worker, and a legal assistant. App. 102.

The defense team prepared a mitigation package to try to convince the prosecution not to seek the death penalty. App. 102. As part of the mitigation package, the defense investigator compiled a report that included information about Elmore's background, his family's history and destitute circumstances, and his father's alcoholism and abusive behavior. App. 102. The report also detailed Elmore's education and employment history, his military service, his minor criminal history, and his marital history. App. 102. Despite the defense's efforts, the prosecution decided to seek the death penalty. App. 102.

Elmore appeared for arraignment, and again tried to plead guilty. App. 39. The judge did not accept the plea at that time, and continued the hearing. App. 39. At his next appearance, Elmore entered guilty pleas to rape and aggravated murder. App. 40. After engaging in an extensive colloquy to ensure the plea was knowing, intelligent, and voluntary, the judge accepted Elmore's plea. App. 40. The case then proceeded to the penalty phase to determine Elmore's sentence.

C. Defense Counsel Investigated Potential Mitigation Evidence for the Penalty Phase Trial, but Eventually Decided not to Investigate Further and to Present a Limited Defense Based on Remorse

The defense began investigating potential mitigation evidence before Elmore pled guilty. App. 102. In addition to preparing the pretrial mitigation package, defense counsel worked with a trial consulting firm on nearly every aspect of the case, including mitigation, jury selection, themes, and theories. App. 102. The consulting firm conducted mock trials for the case. App. 102. The consulting firm found the jurors responded better to evidence about remorse and acceptance of responsibility than to evidence concerning mental health. ER 102.

The defense team also travelled to Oregon and Eastern Washington to contact people from Elmore's past and to collect records. App. 102. As a result of this investigation, the defense team learned that Elmore suffered numerous head injuries throughout his life, including an incident where Elmore's brother accidentally hit him on the head with an axe. App. 102. Elmore's mother told the defense team this was not a significant injury, and defense counsel decided the injury did not necessitate neurological testing. App. 121 n. 3. The defense team also learned that Elmore was exposed to Agent Orange in Vietnam, that as a mechanic Elmore worked with chemicals most of his life, that Elmore grew up near an airport where crop-dusting occurred, and that Elmore was knocked unconscious at least twice in his life. App. 102.

The defense retained a clinical psychologist, Dr. Kleinknecht, to determine whether Elmore had a mental illness, and was insane or had diminished capacity at the time of the crime. App. 102. Dr. Kleinknecht received extensive information on Elmore's background, met with Elmore four times, conducted a general screening to look for major mental disorders, and administered the Minnesota Multiphasic Personality Inventory (MMPI). App. 102. Dr. Kleinknecht found no signs of a major mental disorder, schizophrenia, or psychotic-like disorder. App. 103. According to Dr. Kleinknecht, if Elmore had significant brain damage, it would have manifested itself through difficulty in abstract thinking, poor memory, inability to use higher mental processes, and inability to hold objects. App. 103. Dr. Kleinknecht did not observe any serious impairment in Elmore's cognitive skills. App. 103.

Dr. Kleinknecht referred defense counsel to Dr. Roesch, a clinical psychologist who specialized in forensics, psychopathy, and future dangerousness. App. 103. Dr. Roesch also reviewed Elmore's background information and MMPI results, and interviewed Elmore for four hours. App. 103. Dr. Roesch concluded that Elmore was not a psychopath, and Dr. Roesch characterized the murder as an impulsive, reactive, and poorly considered attempt to cover up the rape. App. 103. Dr. Roesch opined that the crime demonstrated "overkill" consistent with heightened emotional arousal. App. 103.

Defense counsel was gravely concerned after receiving the report because it indicated that Elmore had experienced feelings common for offenders who commit serious violent acts; feelings reflecting strong emotional arousal rather than a mental illness. App. 103. The report indicated that, after raping Kristy, Elmore appreciated the seriousness of his act and he decided to kill Kristy before she regained consciousness. App. 103. Not only did this report show premeditation, counsel knew this type of evidence would result in a "battle of the experts" that would focus the jury's attention on what happened before, during, and after the crime. App. 103. Based on the information obtained from the mock juries, counsel decided a defense focusing on Elmore's remorse and acceptance of responsibility offered the best chance of obtaining leniency. App. 108. Although a mental defense would not be inconsistent with remorse, counsel feared that a "battle of the experts" that focused on Elmore's mental state and the brutal facts of the crime would detract from the remorse defense. App. 108.

Counsel knew that pursuing a mental defense could be detrimental because it could open the door to damaging evidence. If counsel had pursued a defense based upon Elmore's mental health, the prosecutor would have had his own experts examine Elmore. App. 103; *see also State v. Pawlyk*, 115 Wash.2d 457, 800 P.2d 338 (1990) (prosecutor may obtain an expert examination of a defendant pursuing a mental health defense). Counsel knew pursuing a mental defense posed a serious risk of disclosure of harmful evidence because when Elmore was examined by the defense expert, he admitted to a history of deviant sexual arousal, especially towards young girls. App. 103. Counsel was concerned that Elmore would make a similar admission if examined by the prosecution's experts. App. 108.

Counsel also feared that Elmore would himself become disruptive if they presented a defense based upon mental health evidence. Counsel knew Elmore objected both to the presentation of such evidence, and to the time it was taking to investigate this evidence. Elmore was very concerned about the effect the public attention would have on his family, particularly his mother, and he desperately wanted the case resolved to bring closure for Kristy's mother. App. 104 and 108. Elmore told counsel not to call any of his family members as witnesses, and not to present any evidence relating to any aspects of his life. App. 104 and 108. Elmore objected to the presentation of mitigation evidence, especially mental health evidence, and Elmore threatened to act out in the courtroom if the defense presented such mitigation evidence. App. 104 and 108.

Defense counsel also feared that the delay caused by further investigation would harm the remorse defense. Elmore was beginning to back away from his feelings of remorse. App. 108. Elmore indicated he no longer had a need to apologize after Sue Ohnstad stated in a letter that their relationship would never be the same. App. 108. Counsel was concerned that further investigation into potential mitigation evidence would provide the prosecution additional time to discover that Elmore was retracting his expressions of remorse. App. 108. Elmore was beginning to express to jail staff that he was having a change in feelings on remorse. App. 23. Elmore was also expressing frustration with the time it was taking to bring the case to trial. Counsel determined the defense "was 'running out of time'" because further delay would cause the remorse defense to fall apart. App. 23 Defense counsel therefore decided not to further investigate potential mitigation evidence, and to instead focus on Elmore's remorse and acceptance of responsibility for the crime. App. 104 and 108.

D. Counsel Agreed to Elmore Appearing in Restraints on the First Day of Jury Selection, and Purposely Limited the Defense to Prevent Harmful Rebuttal by the Prosecution

As part of the defense strategy of showing Elmore's remorse and acceptance of responsibility, defense counsel purposely had Elmore appear in jail attire throughout the entire penalty phase trial. App. 104. Elmore also appeared in restraints, without objection, during the first day of jury selection. App. 104. After that first day, Elmore did not again appear in restraints for the remainder of the jury selection and trial. App. 40 and 104. Jury selection proceeded over the next two weeks, and the trial itself lasted one additional week. App. 40.

The prosecution's case-in-chief in the penalty phase trial relied primarily on Elmore's confession. App. 104. A detective played a redacted version of Elmore's taped confession to the jury, and other officers testified about Elmore's statements. App. 40 and 104. The medical examiner's testimony corroborated Elmore's statements about the crime. App. 40 and 104.

The defense called five witnesses to testify about Elmore's remorse and acceptance of responsibility. App. 40 and 104. Three judges testified about Elmore's dejected demeanor in court, and his willingness to plead guilty. App. 40 and 104. The defense investigator presented evidence about Elmore's life, including information about Elmore's childhood with five siblings, the constant arguing between Elmore's parents, the alcohol abuse by Elmore's father, and the fact that the father punished the children using a belt. App. 40-41 and 104. The defense also presented evidence that Elmore dropped out of high school, joined the Army, and served in Vietnam. App. 41. The defense told the jury about Elmore's work history, his relationship with Sue Ohnstad, and the birth of their daughter. App. 41. Elmore chose not to testify or give an allocution.

At the end of the trial, the judge directed the jury to consider the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" App. 41. The jury unanimously concluded that there were not sufficient mitigating circumstances to merit leniency, and the jury sentenced Elmore to death. App. 41.

E. The Washington Supreme Court Determined on Direct Review that Elmore's Appearance in Restraints was Harmless Error

The Washington Supreme Court affirmed Elmore's convictions and sentence on direct appeal. App. 36-67. Among other things, the Washington Supreme Court concluded that Elmore's appearance in restraints was harmless error. App. 44-46. The court noted that the trial judge did not compel Elmore to wear the restraints. App. 44. Rather, when defense counsel agreed to Elmore wearing the restraints, the judge allowed Elmore to appear in shackles, believing it was part of the defense strategy to show remorse and acceptance of responsibility. App. 44-45. The Washington Supreme Court also noted that Elmore wore the restraints only on the first day of jury selection, and did not again appear in shackles during the following two weeks of jury selection and one week of trial. App. 45. The court noted that the prospective jurors were aware that Elmore had pleaded guilty to murder, and that the jurors could actually consider the removal of restraints after the first day as an indication that Elmore was not violent. App. 45; App. 63 n. 4. Reviewing the entire record, the Washington Supreme Court determined that the jury was not "inflamed or prejudiced" by Elmore's appearance in restraints. App. 46.

F. On Collateral Review, the Washington Supreme Court Concluded that Counsel's Lack of Objection to the Restraints was not Prejudicial, and that Counsel's Decision not to Further Investigate Mitigation Evidence was Competent Representation

On collateral review, Elmore alleged counsel was ineffective for not objecting to the use of restraints. Reviewing the evidence as a whole, the court found Elmore did not prove a reasonable probability that, but for his appearance in restraints, the outcome of trial would have been different. App. 109.

The Washington Supreme Court also rejected on collateral review the claim that counsel was ineffective for not further investigating and presenting additional mitigation evidence. App. 107-11. The court first ordered an evidentiary hearing on counsel's decision not to further investigate the mental health evidence. App. 101. At the hearing, counsel testified about his concern that a mental defense would harm Elmore because it could reveal Elmore's history of deviant sexual arousal and attraction to young girls, open the door to harmful rebuttal evidence by prosecution expert witnesses, and focus the jury's attention back to the horrendous facts of the crime rather than on Elmore's remorse. App. 103-04 and 107-08; *see also* App. 22 ("Komorowski believed at the time that a 'mitigation package on remorse and acceptance of responsibility' would prevent the prosecution from presenting damaging rebuttal evidence."). Several experts also testified at the hearing, fully displaying the "battle of experts" that would have occurred if Elmore had pursued a mental defense. App. 108 ("The expert witnesses did not agree on whether, or to what extent, Elmore's mental deficiencies affected his ability to conform to lawful behavior."); App. 12-13 (briefly summarizing the competing expert testimony).

Based upon the facts developed in the evidentiary hearing, the Washington Supreme Court determined that counsel's decisions regarding the presentation of mitigation evidence was not ineffective assistance. App. 107-08 and 109-11. The court found defense counsel's decision to stop further investigation, and to present a limited remorse defense to avoid opening the door to damaging rebuttal evidence was competent representation. App. 108 and 109-11.

G. The Ninth Circuit Rejected the Due Process Claim for a Lack of Actual Prejudice, and the Court Determined that the State Court Adjudication of the Ineffective Assistance Claims was not an Unreasonable Application of Clearly Established Federal Law

After the state court denied collateral relief, Elmore filed his federal petition raising the two claims. The district court denied the petition. App. 14-15. Elmore appealed to the Ninth Circuit, and the circuit court affirmed. App. 1-35.

The Ninth Circuit ruled that even if Elmore could show his appearance in restraints violated due process, the error did not cause actual prejudice under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). App. 15-17. The Ninth Circuit determined that Elmore could not show actual prejudice in light of the limited duration of the shackling, and the violent nature of the crime. App. 16-17.

The Ninth Circuit then considered Elmore's claims of ineffective assistance of counsel. As to the claim that counsel should have objected to the restraints, the Ninth Circuit found the Washington Supreme Court did not unreasonably apply federal law when it concluded the failure to object was not prejudicial under the *Strickland* standard. App 19. As to the claim that counsel should have further investigated and presented mitigation evidence, the Ninth Circuit concluded that defense counsel made a strategic decision not to further investigate and to instead rely on a limited remorse defense. App. 20-23. The Ninth Circuit recognized a decision to present a limited defense in order to avoid opening the door to harmful evidence was competent representation. App. 22 (citing *Bell v. Cone,* 535 U.S. 687, 700 (2002)). Under the facts of this case, the Ninth Circuit held the state court adjudication of the claim was not unreasonable. App. 23.

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit Applied the Standards Established by this Court, and Correctly Concluded that the State Court Adjudication was not an Unreasonable Application of Clearly Established Federal Law

1. 28 U.S.C. § 2254(d) Imposes a Doubly Deferential Standard for Reviewing Claims of Ineffective Assistance of Counsel

The Antiterrorism and Effective Death Penalty Act (AEDPA) created a "high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007). Under AEDPA, "a federal court may grant habeas relief on a claim 'adjudicated on the merits' in state court only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting 28 U.S.C. § 2254(d)(1)). This is a highly deferential standard of review that demands the "state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). The petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. The petitioner bears the heavy burden of showing "there was no reasonable basis for the state court to deny relief." *Id.* at 98.

When the claim at issue is the effectiveness of counsel, this standard of review becomes "doubly deferential." *Yarborough v. Gentry,* 540 U.S. 1, 5-6 (2003). The court must give deference both to the state court adjudication and to defense counsel's strategic decisions. *Id.* "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. For this reason, counsel is given wide latitude in making tactical decisions, and the federal courts must strongly presume that counsel made decisions with "the exercise of reasonable professional judgment." *Id.* at 690.

2. Applying the Doubly Deferential Standard, the Ninth Circuit Correctly Ruled that the Decision to Present a Limited Defense and to Forego Further Investigation Was Not Deficient

Applying the doubly deferential standard, the Ninth Circuit correctly concluded that counsel made a competent strategic decision in light of the facts known at the time of trial. App. 20-23. Counsel began investigating potential mitigation evidence, including mental health evidence, in preparation for the penalty phase trial. App. 8-10. The defense team hired a consulting firm to conduct mock trials, investigated Elmore's background and social history, and retained experts to perform psychological evaluations. App. 8-10. But counsel eventually decided not to investigate further. App. 8-10. Not only did the defense psychological evaluation produce harmful evidence, counsel also knew a mental defense would open the door to damaging rebuttal evidence and focus the jury back on the crime. App. 8-9, 12-13, and 20-23. Counsel, therefore, purposely chose to present a limited defense that "would prevent the prosecution from presenting damaging rebuttal evidence." App. 22.

The Ninth Circuit also recognized counsel's concern that delaying the trial to conduct further investigation would harm the defense. App. 8-9, 12-13 and 20-23. Counsel felt "time was running out" because Elmore objected to further delay, he threatened to act out if counsel presented mitigation evidence, and he began to retract from his feelings of remorse. App. 9, 12, and 22-23.

The Ninth Circuit examined the argument that counsel could have further investigated Elmore's mental health, and presented a defense using evidence of brain damage. App. 20-21. The circuit court correctly concluded that the decision not to further investigate such evidence, and to present a limited remorse defense, was competent representation. App. 21-23. "Even if we entertain the possibility that Elmore might be correct that some of the material Komorowski did not present to the jury could have assisted his case, his arguments are little more than a challenge to his defense attorney's trial strategy with the benefit of hindsight." App. 21. In light of the particular circumstances of Elmore's investigation, the court concluded, "the decision to present a limited defense to restrict the prosecution's rebuttal evidence was a legitimate strategy." App. 22 (citing *Bell v. Cone,* 535 U.S. 685, 700 (2002) (counsel's decision to present a limited defense and to waive final argument in order to prevent the prosecution's rebuttal was not deficient representation). Applying the doubly deferential standard required under 28 U.S.C. § 2254(d), the Ninth Circuit correctly determined that counsel's representation was competent, and that the state court adjudication of the claim was not unreasonable. App. 21-23.

3. The Ninth Circuit's Decision Does Not Conflict with this Court's Precedent Concerning Counsel's Duty to Investigate

Elmore argues that the Ninth Circuit eliminates the duty of counsel to thoroughly investigate all potential mitigation evidence. But Elmore misstates this Court's precedent. This Court actually held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691. The Court stressed that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* The Ninth Circuit applied this *Strickland* investigation standard and determined that counsel, for the reasons discussed above, reasonably decided to pursue a remorse defense rather than a mental health defense. App. 20-23.

Elmore argues the Ninth Circuit's decision conflicts with *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000). But both cases are factually different from Elmore's case. In *Wiggins*, counsel had no strategic reasons for not presenting evidence of Wiggins' life history or family background. *Wiggins*, 539 U.S. at 515-17. Unlike Elmore's counsel, Wiggins' "counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless[.]" *Id.* at 525. Using that fact, the Court distinguished *Wiggins* from *Strickland. Id.* (citing *Strickland,* 466 U.S. at 699 (where counsel made a reasonable decision "that character and psychological evidence would be of little help.")). It also

distinguishes *Wiggins* from the Ninth Circuit's decision in this case where Elmore's counsel has a reasonable basis for similar decisions. App. 8-9, 12, and 21-23.

Williams is similarly distinguishable. In *Williams*, the attorney did not begin preparing for the penalty phase until just a week before trial, and consequently had no strategic reason for not presenting extensive evidence. *Williams*, 529 U.S. at 395. Even the prosecution in *Williams* "barely disputed" that counsel's representation during sentencing fell short of professional standards. *Id.* In contrast, Elmore's attorneys began preparing for the penalty phase from the very beginning, and made a reasonable decision not to investigate further out of fear it would harm the defense. In light of the factual difference in preparation and reasonableness of decisions made by Elmore's counsel, there is no conflict with *Williams*.

Elmore gets no further by citing *Sears v. Upton*, 561 U.S. 945 (2010). In *Sears*, unlike here, counsel did not make a strategic decision not to investigate the evidence. Instead, the investigation by Sears' counsel lasted less than one day, and even the state court concluded that this representation was deficient. *Id.* at 951-52. The issue in *Sears* was whether the deficient representation was prejudicial to the defense. *Id.* at 952-56. The Ninth Circuit's decision does not conflict with *Sears*.

Elmore also cites *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Skipper v. South Carolina*, 476 U.S. 1 (1986), and *Buchanan v. Angelone*, 522 U.S. 269 (1998) to argue that counsel had a duty to investigate all relevant mitigation evidence. Elmore relies on a quote from *Buchanan* to support his statement that "competent capital trial counsel must make 'a broad inquiry into

all relevant mitigating evidence to allow an individualized determination' of the appropriateness of the death penalty.'" Pet. at 15. But none of these cases establish the rule asserted by Elmore. The holdings in *Lockett, Eddings*, and *Skipper* all address the duty of the judge to admit and the jury to consider mitigation evidence. The quoted language from *Buchanan* concerns the trier of fact's ability to fully consider all the mitigation evidence presented to it, not counsel's duty to investigate such evidence. *Buchanan*, 522 U.S. at 276. None of these cases clearly establish a requirement that counsel must thoroughly investigate all potential mitigation evidence in order to provide effective representation.

In his most granular claim, Elmore essentially argues that counsel did not properly investigate because counsel only consulted psychologists and never consulted a neuropsychological expert. But this Court has never established "a per se rule that a particular type of mental health expert is required in death penalty cases." *Carter v. Mitchell*, 443 F.3d 517, 526 (6th Cir. 2006). "[T]here is not and should not be a per se rule that trial counsel is ineffective at mitigation unless a particular type of expert is retained." *Id.* at 527. In fact, the Court has recognized that counsel need not call any mental health expert, let alone a "specialist expert," in order to provide competent representation. *See Bell v. Cone*, 535 U.S. 685, 698-702 (2002); *see also Link v. Luebbers*, 469 F.3d 1197, 1202-04 (8th Cir. 2006); *Ringo v. Roper*, 472 F.3d 1001, 1003-07 (8th Cir. 2007). Since counsel made a competent decision not to further investigate and to pursue a limited remorse defense, the absence of neuropsychological expert testimony was not deficient representation.

4. The Ninth Circuit did not Allow Counsel to Merely Speculate about Harmful Rebuttal Evidence

Citing to *Rompilla v. Beard,* 545 U.S. 374 (2005), Elmore argues that by allowing counsel to stop their mental defense investigation, the Ninth Circuit's decision eliminates a duty to investigate rebuttal evidence. But *Rompilla* did not fault counsel for deciding to stop investigating mitigation evidence. *Id.* at 381-83 ("reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."). Rather, *Rompilla* found counsel ineffective because they failed to review public court files that the prosecution had declared it intended to use as proof of the aggravating factors. *Id.* at 383-90. The Court found counsel's failure to review this public evidence was ineffective. *Id.*

Elmore claims a *Rompilla* error occurred here by arguing that his attorneys merely speculated about rebuttal evidence when deciding to stop their investigation and present a limited defense to restrict rebuttal. But Elmore's counsel did not speculate about the rebuttal. Counsel knew Elmore had made prejudicial statements to his own expert about sexual deviancy, including recent abuse of young girls, and counsel knew the prosecution would learn of these statements if Elmore pursued a mental defense. App. 12, 22, 103, and 108.

Under Washington law, presenting a mental defense provides the prosecutor the right both to discover any expert reports in defense counsel's possession, and to compel a mental examination of the defendant by the prosecution's own expert. *State v. Hutchinson*, 111 Wash.2d 872, 884-85, 766 P.3d 447 (1989); *State v. Pawlyk*, 115 Wash.2d 457, 800 P.2d 338 (1990). Elmore's counsel knew the prosecutor was a

very experienced, methodical, and highly qualified opponent who would have sought this discovery, including a mental examination of Elmore. App. 108. The defense would have been forced to disclose Dr. Roesch's report, and would have been forced to subject Elmore to examination by the prosecution's experts. It was not speculation for counsel to be gravely concerned that the prosecutor would discover prejudicial information if Elmore pursued a mental defense.

Nor did counsel merely speculate that the prosecution would present rebuttal expert testimony. The state court evidentiary hearing produced the very "battle of experts" that counsel feared would occur if Elmore presented a mental defense at trial. App. 108. Counsel reasonably surmised that this "battle of experts" would have occurred, and would have focused the jury away from Elmore's remorse and back to the horrendous facts of the crime. App. 108.

Counsel also did not speculate that if Elmore presented evidence concerning a lack of future dangerousness, then the prosecution would have offered rebuttal evidence of Elmore's prison record that contained numerous examples of "major violations with disciplinary repercussions." App. 110. Among other things, Elmore was caught concealing a saw blade under his shirt, and had a history of escape and parole violations. App. 110. Finally, counsel did not speculate that, if counsel delayed the trial to further investigate, the prosecution would discover Elmore's change of heart and lack of remorse. Counsel knew further delay would allow the prosecution time to "'start interviewing jailers, transportation officers and even the jail chaplain, who were aware of Mr. Elmore's feelings.'" App. 111.

The petition thus relies on a premise unsupported by the record. Counsel did not speculate about the prosecution's rebuttal when counsel made a strategic decision to present a limited defense in order to restrict rebuttal. Counsel made reasoned decisions based upon information available at the time of trial. In light of the presumption of competence required under *Strickland*, and the deference required under 28 U.S.C. § 2254(d), counsel's decision was not deficient and the state court adjudication of the claim was not unreasonable. More to the point, the Ninth Circuit's decision does not conflict with the decisions of this Court and other circuit courts, and does not present an issue that warrants this Court's review.

B. The Ninth Circuit's Resolution of the Restraints Claims does not Conflict with the Precedent of this Court or other Circuit Courts

Elmore pursued two separate claims concerning his limited appearance in restraints, alleging a violation of due process and ineffective assistance of counsel. The state court denied both claims, finding that the due process error was harmless, and that Elmore did not show prejudice under *Strickland*. The Ninth Circuit denied the due process claim for a lack of actual prejudice. App. 15-17. The court denied the ineffective assistance claim because the state court adjudication was not unreasonable. *See* App. 19.

Unable to show any true defect in the Ninth Circuit's analysis, Elmore instead attempts to manufacture a conflict by arguing the court's conclusion on the two claims rests upon reasoning different from that of the Washington Supreme Court. But Elmore's argument mischaracterizes the rulings of both courts, and he fails to show a true conflict requiring resolution by this Court.

1. The Ninth Circuit Determined the Reasoning of the Washington Supreme Court on the Ineffective Assistance Claim was not Unreasonable

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must show prejudice in addition to deficient representation. *Strickland*, 466 U.S. at 693-94. Specifically, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694.

The Washington Supreme Court applied this standard and held that Elmore did not show prejudice from counsel's lack of objection to his appearance in restraints. App. 109. In support of this decision, the state court noted that Elmore was restrained only on the first day of jury selection, and not during the remaining two weeks of jury selection and the one week of trial. App. 109. The court also noted the use of restraints might aid the defense by suggesting that Elmore was remorseful and accepted responsibility. App. 109. The court also noted that while the use of restraints suggests dangerousness, the removal of the restraints after just one day offsets this implication. App. 109. Finally, the court concluded that, "[v]iewing the evidence as a whole, we do not believe that Elmore has carried his burden of demonstrating that, but for his brief appearance in shackles, the jury would have made a different decision." App. 109. The Ninth Circuit determined the state court's analysis was not unreasonable. App. 19.

Contrary to Elmore's arguments, the Ninth Circuit did not rest its decision on reasons different from those given by the state court. On the contrary, the Ninth Circuit indicated it reviewed the analysis of the state court and reached the same

conclusion as the state court. App. 19 ("The Washington Supreme Court applied this prejudice standard to the ineffective assistance of counsel claims and arrived at the same conclusion. *In re Elmore*, 172 P.3d at 352."). Reviewing the state court opinion, the Ninth Circuit expressly stated that the Washington Supreme Court's "analysis was reasonable." App. 19. The Ninth Circuit did not resolve the claim using reasons different than the Washington Supreme Court. App. 19.

Citing the phrase "violent nature of the crime" in the Ninth Circuit's opinion, Elmore argues the Ninth Circuit applied reasoning different from that of the Washington Supreme Court because the circuit court considered the facts of the crime to find no prejudice. But this reasoning did not differ from the Washington Supreme Court's analysis. In finding a lack of prejudice, the state court expressly stated that "[v]iewing the evidence as a whole, we do not believe that Elmore has carried his burden of demonstrating that, but for his brief appearance in shackles, the jury would have made a different decision." App. 109. The "evidence as a whole" in this case included the violent nature of the crime. Elmore's argument that the state court somehow did not consider the horrendous facts of his crime in deciding the claim fails to give proper deference to the state court adjudication.

Elmore attempts to create an issue that simply does not exist in this case. Although Elmore contends the circuit courts are split on the proper application of *Harrington v. Richter*, 562 U.S. 86 (2011), the "conflict" cited by Elmore is between opinions issued prior to *Harrington* versus opinions issued after *Harrington*. Elmore does not show that opinions issued after *Harrington* conflict with each other.

More importantly, even assuming there is any merit to Elmore's claim of a split in the circuits on whether 28 U.S.C. § 2254 allows the federal court to consider reasons not given by the state court, or restricts the federal court to consider only the reasoning of the state courts, this case does not present that issue. The Ninth Circuit found the Washington Supreme Court's analysis in this case was not unreasonable, and the Ninth Circuit applied the same reasoning as that of the state court. This case is not the proper vehicle to resolve the conflict asserted by Elmore.

2. The Ninth Circuit Correctly Denied Relief on the Due Process Claim Because the Error did not Cause Actual Prejudice

The Ninth Circuit determined Elmore was not entitled to relief on his due process claim because the error did not cause actual prejudice. App. 15-17. Elmore complains the Ninth Circuit's decision conflicts with the decisions of other circuits because the Ninth Circuit did not consider whether the state court decision was unreasonable, but instead applied an independent actual prejudice standard. Elmore does not show any error or true conflict with the other circuit courts.

"[T]he commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal." *Washington v. Recuenco*, 548 U.S. 212, 218 (2006). On collateral review, there must be actual prejudice to obtain relief on a constitutional trial error. *Brecht v. Abrahamson*, 507 U.S. 619, 637-39 (1993). Like a ruling on the merits of the underlying claim, the state court's determination that the claimed error was harmless is an adjudication "on the merits" entitled to deference under 28 U.S.C. § 2254(d). *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015).

But while the state court decision on harmlessness is entitled to deferential review under 28 U.S.C. § 2254(d), this Court has also held that because the *Brecht* actual prejudice standard subsumes the unreasonableness standard, there is no need to formally apply both standards before the federal court may deny relief. *Davis*, 135 S. Ct. at 2199. A court may deny relief if either the state court decision was not unreasonable, or the error did not cause prejudice. *Id.* Here, the Ninth Circuit resolved the due process claim because it found no actual prejudice.

The Ninth Circuit correctly determined that Elmore's limited appearance in restraints on one day of jury selection did not cause actual prejudice. App. 15-17. The jurors never saw Elmore in restraints after the first day of jury selection, and any prejudice that might have initially arisen dissipated with time and was offset by the positive sense that came with elimination of the momentary restraints. Two weeks passed during the jury selection process, and the jurors actually picked for trial then saw Elmore without restraints for the entire week of trial. This passage of time reduced any prejudicial taint from the initial viewing of restraints. Moreover, there was no concern about the presumption of innocence because Elmore had already been convicted prior to the penalty phase trial. Also, the jurors who actually sat for trial were examined during voir dire, after the initial exposure to the restraints, and those jurors indicated they could impartially decide the issues based solely on the evidence and the law. The fact that the isolated exposure to the restraints occurred before this selection process further reduces any potential prejudice that may have come from the initial viewing of the restraints.

Finally, any prejudicial effect from the one day appearance in restraints pales in comparison to the facts of the crime. Contrary to any argument Elmore makes, these facts are relevant to the prejudice inquiry. The jury is specifically instructed to consider the facts of the crime when determining the proper sentence. App. 10 (quoting jury instruction, "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"). These facts include Elmore's brutal rape of a young girl under his care, his manual strangulation of her, his driving a nine-inch spike into her brain, and his bludgeoning her head with a sledgehammer. The jury did not sentence Elmore to death because he appeared in restraints on one day at the beginning of jury selection. The jury sentenced him to death because, after raping his stepdaughter, he brutally killed her to prevent her from telling anyone about the rape. The Ninth Circuit correctly determined that Elmore's brief appearance in restraints did not cause actual prejudice.

C. Elmore Cannot Retroactively Apply *Deck v. Missouri* to Obtain Relief on the Due Process Claim

Elmore argues that the Ninth Circuit's resolution of his restraints claim conflicts with *Deck v. Missouri*, 544 U.S. 622 (2005). However, both *Teague v. Lane*, 489 U.S. 288 (1989) and 28 U.S.C. § 2254(d) bar the application of *Deck* in this case. The Washington Supreme Court adjudicated the due process claim on direct appeal in 1999, and Elmore's judgment became final in 2000 when this Court denied certiorari. *Elmore v. Washington*, 531 U.S. 837 (2000). This Court did not issue *Deck* until 2005. *Deck* cannot apply in this case.

A necessary prerequisite for relief under 28 U.S.C. § 2254(d) is that a claim must be based upon "clearly established Federal law." *Wright v. Van Patten*, 552 U.S. 120, 126 (2008). The statutory phrase "clearly established Federal law" refers to the holdings of this Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). The holding of an opinion is limited to the final result of the case as well as the portions of the opinion necessary to that result. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). An expression by the Court that goes beyond the point actually decided is not a holding. *Humphrey's Executor v. United States*, 295 U.S. 602, 626-27 (1935). That a rule may be implied by a holding is not sufficient to render the rule clearly established federal law. *Kane v. Espitia*, 546 U.S. 9, 10 (2005). Similarly, *Teague v. Lane* bars relief if the rule was not clearly established when the judgment became final. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

The law has long forbidden the routine use of visible restraints in the guilt phase of a criminal trial. *Deck v. Missouri*, 544 U.S. 622, 626-29 (2005). However, until this Court decided *Deck*, the Court had never considered whether the due process right to appear free of restraints continued to apply in court proceedings once the defendant was convicted. *Id.* at 630-33. *Deck* considered for the first time whether this due process right continued after the defendant was convicted. *Id.* For the first time, *Deck* clearly established that the right to appear free of restraints applies to a convicted defendant in the penalty phase trial. *Id.* Since this Court did not clearly establish until 2005 the rule underlying Elmore's due process claim, the rule cannot be applied in Elmore's case.

Moreover, even if *Deck* applied, Elmore cannot show a true due process violation because he was not compelled to appear in restraints. The particular evil proscribed by the Due Process Clause is compelling the defendant to appear in such restraints against his will. *See Estelle v. Williams,* 425 U.S. 501, 507-08 (1976) (due process prohibits compelling a defendant to appear in jail attire against his will). There is no due process error if the defendant is not "compelled." *Id.* at 512-13. Here, defense counsel expressly stated that Elmore had no objection to the restraints. App. 44 and 104. With no objection, Elmore was not "compelled" to wear the restraints. *Id.* Consequently, there can be no due process error.

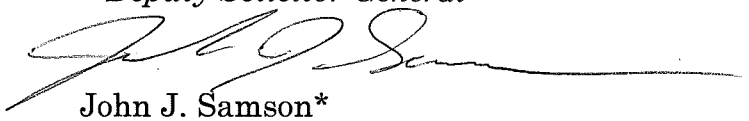
CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

RESPECTFULLY SUBMITTED,

ROBERT W. FERGUSON
Attorney General

Jay D. Geck
Deputy Solicitor General



John J. Samson*
Senior Counsel

**Counsel of Record*
PO Box 40116
Olympia, WA 98504-0116
360-586-1445
360-586-1319 fax
johns@atg.wa.gov

February 26, 2016