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07-1223

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD NATHANIEL BELL,

Petitioner,

v.

LORETTA K. KELLY, WARDEN,
Sussex I State Prison,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For The Fourth Circuit
and Application For Stay Of Execution

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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QUESTIONS PRESENTED

1. Should certiorari be granted to decide whether deference under 28 U.S.C. § 2254(d) should be given to the state court's judgment after the federal habeas court has held an evidentiary hearing, in a case where the hearing developed no evidence which had not already been considered in fact or kind by the state court?

2. Should certiorari be granted to decide whether a federal court of appeals may categorically reject "double-edged" evidence as a basis for a claim of ineffective assistance in sentencing investigation, in a case where the court below did not categorically reject such evidence but rather determined that the state court reasonably found no prejudice based on a weighing of the totality of the evidence presented in aggravation and mitigation?

3. Should certiorari be granted on a lethal injection claim in this habeas corpus case upon which a certificate of appealability was denied, no decision was made in the court below and which was decided by the state court on independent state law grounds which avoided the constitutional issue?

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STATEMENT OF THE CASE

I. Proceedings

On January 25, 2001, a jury in the Circuit Court of Winchester, Virginia, found Edward Bell guilty of the capital murder of Winchester City Police Officer Richard Timbrook. See Va. Code § 18.2-31(6). It also found him guilty of the use of a firearm in the commission of murder, possession of a firearm while in possession of cocaine and possession of cocaine with the intent to distribute. The jury sentenced Bell to death for the capital murder, finding that Bell would continue to be a serious danger, Virginia Code § 19.2-264.4, and to prison terms for the other crimes. On June 7, 2002, the Virginia Supreme Court unanimously affirmed, Bell v. Commonwealth, 563 S.E.2d 695 (Va. 2002), and on January 13, 2003, this Court denied Bell's petition for a writ of certiorari. Bell v. Virginia, 537 U.S. 1123 (2003). On April 29, 2004, the Virginia Supreme Court denied Bell's habeas corpus petition (Pet. App. 231a) and on December 2, 2004, the Winchester Circuit Court set Bell's execution date for January 7, 2005. On April 18, 2005, this Court again denied certiorari review. Bell v. True, 544 U.S. 985 (2005).

On December 23, 2004, the United States District Court for the Western District of Virginia stayed Bell's execution. In a subsequent order, the district court granted Bell until May 17, 2005, to file his federal habeas corpus petition. Bell v. True, 366 F. Supp. 2d 403 (W.D.Va. 2005).[1] On February 7, 2006, the district court dismissed most claims and ordered an evidentiary hearing on Bell's Claim IV(A) that his trial counsel were ineffective in their investigation and presentation of mitigating evidence in the sentencing phase of his capital murder trial. Bell v.

[1] On May 12, 2005, Bell filed in the Fourth Circuit Court of Appeals a petition for a writ of mandamus and emergency motion for a stay, asking for an order directing the district court to

True, 413 F.Supp.2d 657, 696-97 (W.D.Va. 2006). At the conclusion of the hearing, District Judge James P. Jones found that Bell was not entitled to relief. (JA 2023).[2] On September 18, 2006, the district court granted a certificate of appealability (COA) on Bell's claim IV(A). (JA 2051). On October 12, 2006, the district court denied Bell's motion to expand the COA. (JA 2052).

On February 7, 2007, the Fourth Circuit also denied a motion to expand the COA. After briefing and argument on the COA issue, the Fourth Circuit issued its unpublished decision denying relief on January 4, 2008. Bell v. Kelly, No. 06-22, 2008 U.S. App. LEXIS 125 (4th Cir. 2008). On January 29, 2008, the Fourth Circuit denied Bell's petition for rehearing with no judge of the court requesting a poll on Bell's petition for rehearing *en banc*.

On February 14, 2008, pursuant to Virginia Code § 53.1-232.1, the Circuit Court of Winchester, Virginia scheduled Bell's execution for April 8, 2008. On March 17, 2008, the Fourth Circuit denied Bell's motion for a stay of execution. Bell filed a petition for a writ of certiorari in this Court on March 25, 2008.

II. The crimes

On direct appeal, the Supreme Court of Virginia found the facts regarding Bell's crimes. On the night of October 29, 1999, Officer Timbrook, working with probation officers in a community program, came across two men in a high-crime area. One began to run. Officer Timbrook followed on foot, yelling, "stop, police." Officer Timbrook never unholstered his service gun. The chase continued through back streets and ended in an alley when the man being

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vacate its order requiring Bell to file his § 2254 petition by May, 2005. The Fourth Circuit denied that petition on May 16, 2005. In re: Bell, No. 05-9 (4th Cir. May 16, 2005).

[2] In this brief, the Warden will refer to the Joint Appendix filed below in the Fourth Circuit as, "JA ___." The Warden has provided the Court with a copy of the Joint Appendix. The Warden will refer to the appendix filed with this brief as, ("Resp. App. ___.").

pursued stopped, turned around, shot the officer in his head, killing him, and then fled the

scene. A massive search of the area that night was unsuccessful. The next morning, Bell was found hiding in a coal bin in the basement of a house near to the shooting. He had broken in through a basement window. He had gunshot residue still on his hands. His gun was found outside the basement window. It was the murder weapon and contained a DNA profile from which Bell could not be excluded.

Bell was a Jamaican national, living in Winchester. He was a drug dealer who had been convicted of carrying a concealed weapon. Officer Timbrook had made that arrest. Bell felt harassed by Timbrook and boasted to acquaintances that someone should kill him. Bell was fighting deportation when he murdered Officer Timbrook and knew on that night that if he was caught with a gun and cocaine, he would be deported. Bell had a history of run-ins with the authorities as well as a history of domestic abuse with a girlfriend. Bell, 563 S.E.2d at 700-703, 718.

III. The lethal injection claim

Contrary to Bell's assertion at page 33 of his petition in this Court, the Virginia Supreme Court did *not* address a lethal injection claim in its habeas corpus review *because Bell did not present such a claim*.

He did present a lethal injection issue *on direct appeal* in the Virginia Supreme Court, but the issue was a state-law matter of whether the trial court improperly had denied him an evidentiary hearing on the claim. (Resp. App. 4-5). The Virginia Supreme Court expressly *declined* to address the constitutionality of lethal injection because "it would be an unnecessary adjudication of a constitutional issue to decide whether lethal injection violates the Eighth Amendment" in Virginia where capital murderers always may choose another method that has been upheld as constitutional. Bell, 563 S.E.2d at 715.

When Bell raised the claim in his federal habeas petition, the district court found the state court's decision not unreasonable under 28 U.S.C. § 2254 (d). Bell, 413 F.Supp.2d at 736-37. Bell filed a perfunctory request in the district court for a certificate of appealability (COA) on the claim. (Resp. App. 14). The district court denied the request. (Resp. App. 16). Bell's similar request in the Fourth Circuit for a COA also was denied. (Resp. App. 20-23).

IV. The ineffective assistance of counsel claim

A. Trial counsel's investigation and strategy

Before trial, Bell's two defense attorneys obtained the appointment of Dr. Stejskal, Ph.D., a well-respected licensed clinical psychologist with the University of Virginia's Institute of Law, Psychiatry and Public Policy. Dr. Stejskal conducted hours of interviews with Bell, a battery of standardized tests and interviews with Bell's family and with the Captain of security at the jail. Dr. Stejskal reviewed extensive records relating to the crime and Bell. However, as he explained:

> Jamaican school, military and criminal records were pursued through the offices of the Ambassador of Jamaica in Washington, D.C. …. [T]he Embassy of Jamaica indicated that their staff had no success in retrieving any Jamaican institutional records. Family members in Jamaica were also unsuccessful in obtaining any of this information.

(JA 1718). Bell's trial counsel independently attempted to obtain records pertaining to Bell from the Jamaican Embassy but were unsuccessful (JA 1827-28). Bell's federal habeas counsel also presented no background records to the district court. Indeed, Bell never has presented any records pertaining to his background to any court, state or federal.

Dr. Stejskal found "no signs or symptoms of a severe mental illness" (JA at 1719) or brain damage. A test for malingering was administered and the results showed Bell was malingering and thus called into question the results of all the tests. (JA at 1720-21). Dr.

Stejskal ruled out Virginia's statutory mitigating factors of being unable to appreciate the criminality of his conduct or conform his conduct to the law. He noted that there was early and persistent drug use but no known traumas, neglect or abuse. (JA at 1722). He found that Bell came from a large, happy, strongly Christian, Jamaican family, most of whom emigrated to this Country and became hard-working citizens. Bell was the only son and a spoiled "Mama's boy."

Bell fathered a child in Jamaica by Barbara Williams and, after emigrating to the States, returned to Jamaica to marry her. Bell maintained employment while he was in Jamaica but when he moved here he fell in with "wrong friends" and started seeing women even though his wife and child were in Jamaica. He eventually had four more children here by two different women and later was divorced from his wife in Jamaica. Bell had domestic violence incidents with his girlfriends involving the police, and at least one such incident involved Officer Timbrook. Bell provided no child support but did buy the children gifts. No one in the family except Bell ever was in trouble with the law. (JA at 1722-27). Dr. Stejskal advised counsel not to use him as a witness because aggravating factors might come in during his cross-examination and, if he were called to testify, that would trigger the Commonwealth's right to its own expert who would recharacterize Bell's history as aggravating. (JA at 1727). To this day, Bell disputes none of Dr. Stejskal's findings.

Before trial, counsel sought a change of venue. Counsel knew that the Winchester jury pool would be familiar with the rampant drug dealing associated with the Charlestown Racetrack area; indeed, "going to the racetrack" was code for dealing. (JA 1831-32, 1849). Counsel knew the evidence would show that Bell was returning from the racetrack the night he murdered Officer Timbrook. (JA 1890). Counsel also knew that, in the Winchester area, people assumed that unemployed Jamaican natives who frequented the racetrack were drug dealers. (JA 1831-

32, 1849). Counsel believed that, while a Winchester jury might fairly decide guilt or innocence, if guilt were found, Bell would be a "dead man walking." (JA 1893). The trial court denied the motion for a change of venue.

Counsel identified Bell's sister Nellie in Jamaica as a very good family witness whom they wanted to testify about Bell's life, but she unexpectedly died shortly before trial. (JA 1352, 1836). Counsel also planned to present witnesses about prison conditions in a maximum security prison to argue that Bell would not be a danger if given a life sentence because they had seen that strategy work in other capital trials. The trial court denied that evidence. (JA 1962).

Trial counsel used Joann Nicholson, Bell's girlfriend's mother, to find witnesses but she did not want to testify because she would be excluded from the trial. (JA 1935-36). They knew of Bell's ex-wife in Jamaica, her child and Bell's other girlfriends and children in the United States, but considered such evidence to be fraught with difficulties. Counsel Fischel believed Bell's lack of financial support for these children would have been seen as aggravating by a Winchester jury, especially given the fact that Bell was a drug dealer who gunned down an officer. (JA 1835). He also believed that it would insult the jury to present a case at sentencing asking for sympathy after so zealously contesting and denying guilt in the guilt phase, in a case where there were no strongly mitigating circumstances explaining his conduct in the killing; he believed such a strategy to be inconsistent. (JA 1829, 1835). Counsel Williams believed the picture of a man who left his wife, took up with other women and had multiple children by multiple women would be aggravating in a case where the slain officer never was permitted even to see his only child. (JA 1937). *The fact that Bell had various children with various women and abandoned his wife never was known by the jury*.

Trial counsel consulted with experts at Washington and Lee University who agreed with counsel's decisions regarding what evidence to present, and not present, at sentencing. (JA 1838-40). At sentencing, they presented Bell's sister and father. His sister informed the jury that Bell was one of 14 children and that the family was from Jamaica. (JA 249). His father testified that he started coming to this Country in 1966 to work on farms and that he was a construction worker in Jamaica. (JA 252). Both family members testified that Bell's family, including all the siblings, never had been in trouble with the law. (JA 250, 253). Counsel presented no additional evidence. In closing argument, counsel argued for life because Bell was not a danger in prison, a life sentence was severe punishment, any residual doubt should not result in a death sentence and his death would not bring back Officer Timbrook. (JA 267-74).

B. The Virginia Supreme Court's habeas decision

The Virginia Supreme Court dismissed Bell's sentencing ineffective assistance claim as follows:

> In claim (III) (a), petitioner alleges he was denied the effective assistance of counsel at trial because counsel failed to investigate, identify or present available mitigating evidence for the penalty phase of petitioner's trial. Petitioner contends that ample evidence existed regarding his background and character that might have led the jury to conclude that petitioner was deserving of a sentence less than death. Petitioner alleges counsel should have presented evidence that Bell was the tenth of twelve surviving children of Rosalyn Bell, that his mother had ten other children by three other men at the time of petitioner's birth, and that his father had several other children by two other women. Petitioner's father was allegedly absent from home for long periods of time when he traveled to the United States to do migrant work, and his mother was allegedly unavailable because she worked for and lived with another family. Additionally, petitioner alleges his relatives regularly gave him drugs and alcohol when he was a child, and he became a daily user of both marijuana and alcohol before the age of ten. Lastly, petitioner contends that evidence should have been presented that petitioner moved to the United States in 1992, held a variety of employment Positions, and was a devoted father, financially caring for all five of his children and for relatives in Jamaica.
>
> The Court holds that claim (III) (a) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The record;

> including the affidavit of counsel, demonstrates that after interviewing petitioner, his sisters and his mother, counsel believed that there was little mitigation evidence available to assist petitioner. However, the transcript of the sentencing hearing establishes that counsel introduced evidence of petitioner's background and family life and such evidence was heard by the jury through petitioner's sister and father. Petitioner's sister testified that petitioner was one of fourteen children and that, except for one speeding incident in which she was involved after petitioner's arrest, no member of the family ever had legal problems. Petitioner's father testified that he started traveling to the United States in 1966 to do agricultural work and that, except for speeding violations; he also never had any legal troubles. While counsel did not introduce evidence of petitioner's drug and alcohol use, evidence that both petitioner's parents had multiple children with different partners, or evidence that petitioner supported five children borne of three different women, counsel is not ineffective for failing to present evidence that could be "cross-purpose evidence" capable of aggravation and mitigation. See Barnes v. Thompson, 58 F.3d 971, 980-981 (4th Cir. 1995), cert. denied, 516 U.S. 972 (1995); Lovitt v. Warden, 585 S.E.2d 801, 825 (Va. 2003). Petitioner fails to proffer additional information that counsel should have discovered or presented during the penalty phase of petitioner's trial that would have assisted in mitigating his offense of capital murder. For example, there is not sufficient evidence in the record from a psychologist or a psychiatrist to show that petitioner's background and family life had an effect upon his development. See Lovitt, 585 S.E.2d at 825.
>
> Thus, petitioner has failed to demonstrate how counsel's performance was unreasonable or that there is a reasonable probability that, but for counsel's alleged failure to investigate and present the alleged available mitigation evidence, the result of the proceeding would have been different. In finding no prejudice, the Court has weighed the evidence in aggravation against the mitigation evidence presented at the penalty phase of the trial and on habeas. See Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 2542 (2003); Lovitt, 585 S.E.2d at 825-26.

(JA 317-19).

C. The federal district court's habeas corpus hearing on the claim

The district court ordered an evidentiary hearing over the Warden's objection. Bell was permitted, again over the Warden's objection, to present evidence from Carmeta Albarus, a self-proclaimed "mitigation specialist" of Jamaican heritage, who gave her post-death penalty, hearsay version of Bell's happy life in Jamaica before he moved to this Country and became a drug dealer and murderer. Ms. Albarus, a licensed clinical social worker in New York, is not

accredited by any social work association and was criticized for a lack of training and for taking credit for another's work in State v. DiFrisco, 804 A.2d 507, 549-50 (N.J. 2002).

According to this habeas witness, Bell enjoyed a wonderful life in Jamaica and was loving to his Jamaican girlfriend (later wife) before he abandoned her and his unborn child to move to the United States and take up with numerous new American girlfriends. Ms. Albarus said Bell was nicknamed "Slow" in Jamaica and admitted this was because he was considered lazy. (JA 1445-47). In fact, this information was not new because the jury heard that Bell's nickname was "Slow" when that fact was brought out by the prosecutor at sentencing. (JA 180). However, trial counsel Fischel testified at the habeas hearing that he knew Bell's nickname in this Country was "Fast Eddie," *a fact the jury never heard*. (JA 1849). Ms. Albarus admitted that Bell was not considered retarded in Jamaica. (JA 1447).

Dawn Jones told Ms. Albarus that Bell had beat her. (JA 1453-54). Bell's sisters told Ms. Albarus that Bell was known as a "mama's boy," Bell was not abused, physically or sexually, and Bell's father provided well for the family. (JA 1471). Although Ms. Albarus knew about aggravating evidence in the case, she did not include any of it in her report to habeas counsel: Bell was fired from a job in the States for falsifying a drug screen test; Bell threatened sheriff's deputies; Bell committed domestic violence on his various girlfriends. (JA 1472-75).

Ms. Albarus said she found two law enforcement witnesses in Jamaica to say Bell really liked police officers, but admitted she never told these witnesses that Bell had threatened to kill sheriff's deputies in this Country, dealt drugs and murdered a police officer. She conceded if those facts were true, then Bell was a different person than she had been led to believe. (JA 1482-83). Ms. Albarus charged Bell's habeas counsel at least $ 20,000 for her work on the case,

an amount it was undisputed that the trial court in Bell's case never would have authorized for mitigation services when Bell was tried. (JA 1481, 1924, 1941).

No one, including Bell's trial counsel, Ms. Albarus, Dr. Stejskal or Bell's current habeas counsel, were able to find any records of Bell's schooling, medical or employment history.

Bell presented the testimony of Dr. Stejskal at the habeas hearing. Stejskal shockingly disavowed the very words he had written in his mitigation report before trial and denied the proclamations of his own employer – The Institute of Law, Psychiatry and Public Policy – as to that institution's role as a self-professed mitigation-gathering vehicle for defense attorneys representing capital murderers. (JA 1354-62). Trial counsel Jud Fischel testified he was "flabbergasted" at the way Stejskal's current testimony contradicted what Stejskal had told counsel before trial about his extensive role as a mitigation expert. (JA 1834). To repeat, Dr. Stejskal found in his pretrial testing that Bell was a faker and malingerer and found no evidence of retardation. He found no statutory mitigating factors and completed a comprehensive background and family history and determined that the evidence was "double-edged." He told trial counsel not to use him as a witness because it would reveal too much aggravating evidence.

Dawn Jones testified at the habeas hearing that Bell was "very sweet, real charming," Bell stood by her when her pregnancy by him was difficult, and Bell chipped in paying bills when she could not work due to the complications (JA 1491-94). She also repeated the incident – which she had testified to at trial - after she and Bell had broken up, in which she had to call the police because Bell "pulled" a gun on a man in her house. (JA 1496). She admitted that Bell had beat her "maybe three or four" times. (JA 1505). *At trial, the jury never heard her habeas testimony that Bell had beat her.*

The district court also allowed testimony from Joann Nicholson, Tracey Nicholson's mother. Joann testified that Bell loved his illegitimate children and helped take care of them, although she admitted he paid no child support, she provided him a home and loaned him money and she did not know how he supported five children. (JA 1524, 1531-33). She also said that she had been present during an incident, presented at trial through the victim's detailed eyewitness testimony – the victim being another one of Bell's ex-girlfriends – in which Bell brutally assaulted the girlfriend. Nicholson said that she saw the argument and that no assault occurred. She had no explanation for why she said nothing at the time of trial when the event occurred and Bell presented no testimony from the victim or any other eyewitness.

The district court also allowed Precious Henderson, a young woman of Jamaican heritage who knew Bell in this Country, to testify about Bell. Ms. Henderson testified that she got Bell a job at Southeastern Containers and that Bell was a good employee, but was fired because he failed a drug screen test. (JA 1542). She did not know that Southeastern Containers fired Bell because he *falsified* the drug screen test and then *refused* to take another test. (JA 1544, Presentence Investigation Report dated May 30, 2001, at 7-7a). *The jury never heard about Bell's poor conduct at jobs in this Country.*

Barbara Williams, Bell's ex-wife from Jamaica, also testified at the habeas hearing. She testified that Bell was a loving person and had many police officer friends in Jamaica. She was unaware that Bell had been convicted of assault in Jamaica and did not know until apparently recently that Bell had murdered a police officer in Winchester. (JA1557-58). When Ms. Williams went into premature labor in Jamaica with their child, Bell left the Country and moved to the United States, returning the following year to marry her. (JA 1550-51). Bell successfully kept secret from Ms. Williams for years the fact that he had girlfriends in the States by whom he

had fathered four children. (JA 1560). After she and Bell divorced, Bell maintained a loving relationship with their daughter. Ms. Williams' sister, Carol Anderson, testified that Bell was an upstanding, wonderful, loving young man when she knew him in Jamaica. (JA 1566).

The district court found that trial counsel failed under Wiggins v. Smith, 539 U.S. 510 (2003), to adequately investigate mitigating evidence because they did not interview Dawn Jones in this Country, Barbara and Carol Williams in Jamaica and, to a lesser extent, Precious Henderson. The court faulted counsel for not calling Joann Nicholson as a witness to say favorable things about Bell and to rebut the eyewitness testimony of the ex-girlfriend Bell assaulted. (JA 2026-28). The court found it unreasonable for counsel to have relied on Dr. Stejskal as a mitigation expert. (JA 2029). It dismissed trial counsel's explanations for why these witnesses did not fit within their sentencing strategy. (JA 2028-31). The court inexplicably found that trial counsel "put on no mitigation evidence at all." (JA 2030).

The district court, however, found that, even if all the evidence presented at the hearing had been presented to the jury, the jury still would not have returned a life sentence (the same conclusion the state habeas court had reached) and thus denied the claim of ineffective assistance of counsel. (JA 2032).

D. The Fourth Circuit's decision

The Fourth Circuit ruled as follows:

> We conclude that the district court correctly found that the finding of the Supreme Court of Virginia on prejudice was reasonable, and therefore Bell is not entitled to relief on his claim of ineffective assistance of counsel. Under these circumstances, it is unnecessary for us to address the district court's conclusion that the finding of the Supreme Court of Virginia that Bell did not receive deficient performance was unreasonable. … In concluding that counsel's performance did not prejudice Bell, the Supreme Court of Virginia found that the evidence from Bell's witnesses constituted cross-purpose evidence, which is evidence capable of both aggravation and mitigation. *See Barnes v. Thompson, 58 F.3d 971, 980 (4th Cir. 1995)*(citations omitted). In making its prejudice determination, the Supreme

Court of Virginia weighed this cross-purpose mitigation evidence against the evidence in aggravation. *See Wiggins, 539 U.S. at 534*.

At the district court's evidentiary hearing, Bell presented testimony from the five witnesses he claims should have testified for him during the penalty phase of the trial. After reviewing testimony from these witnesses, the district court concluded that the Supreme Court of Virginia was reasonable in finding that the absence of their testimony did not prejudice Bell because the evidence in aggravation outweighed the mitigation evidence presented at trial and on state and federal habeas.

In reviewing the district court's decision that the Supreme Court of Virginia was reasonable in finding no prejudice, we review the evidence that the district court found would have been the most beneficial to Bell had it been presented during the penalty phase of Bell's trial. After its evidentiary hearing, the district court identified Dawn Jones, Barbara Bell Williams, Carol Baugh Anderson[4], and Joanne Nicholson as Bell's strongest witnesses.[5]

> [4] This witness is referred to as Carol Baugh Williams in the district court's oral order.
>
> [5] Bell also presented testimony from his coworker, Precious Henderson, but the district court considered her testimony less helpful because she was unaware that Bell had been terminated from his job for substance abuse.

Ex-girlfriend Dawn Jones testified that Bell helped pay her bills when she was pregnant and was a good father to their child. However, Jones also testified that Bell physically assaulted her three or four times during their five-year relationship. While Jones was pregnant in 1993, Bell returned to Jamaica and married Barbara Williams, with whom he had previously fathered a child. Furthermore, after their relationship ended, Bell displayed a firearm during an argument with a man at Jones' house.[6] Finally, although Bell sent gifts to Jones, he never paid child support.

> [6] Jones is the only one of the five witnesses to testify during the penalty phase of the trial. She testified for the prosecution regarding Bell's display of a firearm during this incident.

Ex-wife Barbara Williams testified that Bell was hard-working, loving, and a good father. However, she also testified that while she was pregnant in 1992, Bell left her and went to the United States. Bell never paid child support to Williams.

Prior to moving in with Williams, Bell lived in the same house with her sister, Carol Baugh Anderson, for approximately eighteen months.[7] Anderson testified to the district court that Bell was hard-working, helpful around the house, and non-violent. However, Anderson's testimony allowed the prosecution to question her on Bell's relationship with her sister.

[7] Carol Baugh Anderson testified to the district court that she and Bell lived in separate rooms and did not have a romantic relationship.

Joanne Nicholson is grandmother to the three children Bell fathered with his ex-girlfriend, Tracy Nicholson. Joanne testified to the district court that Bell was a good father and that she never saw him hit Tracy. However, her testimony was undermined by police reports showing that Bell assaulted Tracy. Joanne also testified that she saw the incident with Billy Jo Schwartz and stated that Bell did not have a gun and did not hit Tracy. However, Schwartz testified that Joanne was not present when Bell held a gun to Schwartz's head. Additionally, Joanne's account of the incident conflicts with both Schwartz's testimony and Tracy's affidavit.[8] Finally, her testimony allowed the prosecution to emphasize that Bell gave gifts, but did not provide child support to Tracy.

[8] Both Tracy and Schwartz state that during the incident Tracy was on top of Bell's car while it was moving. Joanne denied that Tracy was ever on top of Bell's car.

After review, we conclude that the district court correctly concluded that the finding of the Supreme Court of Virginia on prejudice was reasonable. Evidence from each of these witnesses was cross-purpose because it would have allowed the prosecution to emphasize multiple instances of Bell's infidelity; abandonment of his children, wife and girlfriend; domestic abuse; and failure to provide child support. Furthermore, focusing on Bell's domestic relationships likely would have caused the jury to compare Bell unfavorably to Officer Timbrook, whose death left behind a pregnant wife. When weighed against the aggravating factors of Bell's criminal record and propensity for violence, we find it reasonable for the Supreme Court of Virginia to conclude that the factors in aggravation outweighed the mitigation evidence. Accordingly, we affirm the district court's decision denying Bell's petition for writ of habeas corpus.

Bell, 2008 U.S. App. LEXIS 125, *16-21.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY SHOULD BE DENIED

I. This Court Has No Jurisdiction To Review Bell's Lethal Injection Claim.

Bell admits that the court below denied him a Certificate of Appealability (COA) on his lethal injection claim. (Pet. at 34). He admits that the Fourth Circuit applied the proper standard of review in denying him a COA. (Pet. at 34). He does not ask this Court for review of the COA decision; neither does he present any argument to this Court on such an issue. Indeed, Bell

presents little argument on the lethal injection claim itself: he simply states in conclusory fashion that Virginia will use the same chemicals in his execution that Kentucky uses. (Pet. at 33).

Bell asks this Court to stay his execution until the Court decides Baze v. Kentucky, to grant his petition, vacate the Fourth Circuit decision and remand his case for further proceedings not inconsistent with the as-yet-undecided Baze. (Pet. at 34-35). He says that it would be a "miscarriage of justice" were he to be executed before this Court's decision in Baze is issued. However, Bell makes no argument under – and barely mentions - the governing standard in Barefoot v. Estelle, 463 U.S. 880, 895 (1983), that, before a stay may be granted in a habeas case, there must exist "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; … a significant possibility of reversal of the lower court's decision; and … a likelihood that irreparable harm will result if that decision is not stayed." He does not acknowledge the preclusive effect of 28 U.S.C. § 2253 which preconditions jurisdiction upon a grant of a COA in a habeas case.

Given the posture of Bell's case, he cannot make the required showing under Barefoot. Further, this Court could not vacate the Fourth Circuit's decision because that judgment simply did not encompass Bell's lethal injection claim: there was no jurisdiction to have decided it.

As shown above, Bell made a claim of trial court error in the Virginia Supreme Court *on direct appeal*, but that claim merely asked for reversal because the trial court had denied him an evidentiary hearing on the constitutionality of lethal injection. That state-law, direct appeal issue is not before this Court in Bell's collateral, federal habeas corpus case. Indeed, the time for certiorari review of that issue passed when Bell filed his certiorari petition on direct appeal and

failed even to mention anything about lethal injection. See Bell v. Virginia, No. 02-7230, 537 U.S. 1123 (2003).

Bell did not renew his claim in the Virginia Supreme Court in his state habeas petition and the Virginia Supreme Court never addressed it after its direct appeal decision. As shown above, the state court in its direct appeal decision expressly *declined* to decide whether lethal injection violated the Constitution because, under Virginia law, inmates may chose another method that has been upheld as constitutional. See Bell v. Commonwealth, 563 S.E.2d at 715.[3]

Bell presented his direct appeal claim to the federal district court only in his § 2254, habeas corpus case decided below. The only question before the federal habeas court on the issue was whether the Virginia Supreme Court's direct appeal decision *declining to adjudicate the constitutional issue* was unreasonable under 28 U.S.C. § 2254(d). The federal habeas court properly decided it had not been unreasonably adjudicated by the Virginia Supreme Court on direct appeal. Bell, 413 F.Supp. 2d at 736-37. There was no claim attacking the constitutionality of Virginia's lethal injection process before the federal habeas court which was capable of review on its merits, and none was decided.

Not surprisingly, both the federal district court and the court of appeals below declined to issue a COA on the only issue before the federal courts: whether the Virginia Supreme Court's direct appeal decision had been unreasonable under § 2254(d). That is the only issue which was

[3] Bell's apparent attempt now (Pet. at 34) to escape the Bell decision on direct appeal by proclaiming that he has not "chosen" a method, but rather, by *not choosing*, the Commonwealth has chosen lethal injection for him, is most disingenuous. The Virginia statute, Code § 53.1-234, provides for lethal injection for inmates who refuse to choose and that procedure is explained to the inmate before he chooses or refuses to choose. The federal courts in cases under 42 U.S.C. § 1983 involving challenges by Virginia inmates to Virginia's lethal injection procedures correctly have held that a decision *not to choose* is a choice for lethal injection. See Reid v. Johnson, 333 F. Supp. 2d 543, 552 (E.D. Va. 2004), stay denied, No. 04-25 (4th Cir. 9/8/04), stay denied, 542 U.S. 963 (2004). Clearly, Bell chose lethal injection when he knowingly chose *not to choose*.

even capable of presentation to this Court in Bell's federal habeas case, but only if the Fourth Circuit had decided to take jurisdiction over it by a grant of a COA. Again, Bell does not contest the decision of the Fourth Circuit to deny him a COA. There thus is no issue regarding the merits of a constitutional attack on lethal injection procedures in Virginia that is capable of review in Bell's federal habeas case.

"[U]ntil a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." Miller-El v. Cockrell, 537 U.S. 322, 336 (2002) (construing 28 U.S.C. § 2253). The Fourth Circuit's denial of a COA divested the habeas courts of jurisdiction to determine his lethal injection claim.

Even if a COA had been granted and the Fourth Circuit had ruled as the district court did, the issue still would not warrant a stay of execution under Barefoot. Again, the issue was that decided on direct appeal in 2002. See Bell v. Commonwealth, 563 S.E.2d at 715. There is no probability that this Court would grant certiorari review to decide whether the Virginia Supreme Court's direct appeal decision in 2002 was unreasonable, much less a significant possibility of reversal.

Clearly it cannot have been unreasonable under § 2254(d). Courts historically avoid deciding constitutional issues when they can. Because Virginia provides inmates with a choice, they always can chose a method that has been upheld as constitutional. They thus should not be heard to complain about a method they do not have to chose. See Stewart v. LaGrand, 526 U.S. 115, 119 (1999) (holding, in § 2254 case, that inmate waived objections to lethal gas where the State provided him with the option of choosing another method).

Bell's case is a federal court habeas case, governed by § 2254. Section 2254(d) permits a grant of federal habeas relief only where the state court's decision "resulted in a decision that was

contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Given this Court's 1999 LaGrand decision, the Virginia Supreme Court's 2002 almost identical decision cannot have been unreasonable under § 2254(d). Bell's lethal injection issue is not capable of review in this habeas corpus certiorari proceeding and thus is not deserving of a stay of execution under Barefoot.

II. Bell's § 2254(d) Argument Presents No Compelling Reason For Review.

Bell argues that the Fourth Circuit improperly applied § 2254(d) to his claim that his trial counsel were ineffective because they allegedly did not properly investigate and present mitigating evidence. He says that § 2254(d) simply does not apply after there has been an evidentiary hearing in federal court. He contends that there is a conflict among the circuits and that this Court "reserved" the issue in Holland v. Jackson, 542 U.S. 649, 653 (2004).

Certiorari review of this issue is not warranted, much less compelled, see U.S.Sup. Ct. R. 10, because Bell did not make the argument below until he filed a petition for rehearing. Bell was required by appellate rules to provide the Fourth Circuit with the standard of review he believed applied to his case. See FRAP 28. He simply failed to make the argument he makes now. Certiorari should not be granted to review an issue never briefed, argued or decided below.

Furthermore, this Court did not "reserve" the issue for later decision. In Holland, this Court found the federal court in error because it had made no attempt to account for a *de novo* review of evidence held inadmissible in state court: "[t]he District Court made no finding that respondent had been diligent in pursuing Gooch's testimony (and thus that § 2254(e)(2) was inapplicable) or that the limitations set forth in § 2254(e)(2) were met. Nor did the Sixth Circuit

independently inquire into these matters; it simply ignored entirely the state court's independent ground for its decision, that Gooch's statement was not properly before it." This Court did not identify any issue regarding § 2254(d) and/or evidentiary hearings which it deemed important to resolve.

In fact, in Holland, this Court recognized the Fourth Circuit as a court which employs precisely the standard Bell proposes in this Court. 542 U.S. at 653. Bell tries to explain this away by arguing now that the Fourth Circuit has adopted a split standard – one for Brady claims and a different one for Strickland ineffective assistance claims. (Pet. at 20). However, there is no indication in the decision below or in any other Fourth Circuit decision that it has backed off from its § 2254 *de novo* rule observed by this Court in Holland. What Bell fails to recognize is that the "*de novo* review of new evidence" standard he proposes to this Court simply could not apply to his case, and therefore was not used by the Fourth Circuit, because his federal evidentiary hearing developed nothing that had not already been presented in fact or in kind to the Virginia Supreme Court.

The evidence Bell alleged in state court to support his claim was about his background, including his life in Jamaica, his Jamaican ex-wife and child and his ex-girlfriends and children in the United States and about Nicholson's supposed witnessing of the sentencing evidence of Bell's assault on an ex-girlfriend. He specifically presented affidavits to the Virginia Supreme Court from his father, ex-wife, two ex-girlfriends, Nicholson and numerous experts. Most of these witnesses were presented to the federal district court at the federal habeas hearing. Because the federal district court found that their testimony did not prove prejudice under Strickland v. Washington, 466 U.S. 668 (1984) – *the identical conclusion reached by the Virginia Supreme*

Court without a hearing – it was obvious that there had been no need for a federal court evidentiary hearing in the first place.

The Fourth Circuit utilizes the *de novo* standard proposed by Bell where *new evidence* has been unearthed for the first time in an authorized federal habeas hearing. See Holland, 542 U.S. at 653 (recognizing Monroe v. Angelone, 323 F.3d 286, 297-299 (4th Cir. 2003), as an example of a court of appeals that gives *de novo* review to evidence admitted for first time in federal court). In Bell's case, however, that simply did not occur. The *de novo* standard proposed by Bell thus could not apply in his case even if this Court were to embrace it for evidence newly-discovered in an authorized habeas hearing.

Upon closer inspection, the "conflict" identified by Bell simply does not exist. He says that the Ninth and Tenth Circuits employ the standard he wants. The Ninth and Tenth Circuit cases he cites hold that the federal habeas court may hold a hearing whenever the state court has denied one and that the new evidence is not entitled to deference under § 2254(d). (Pet. at 18). Apart from the fact that these cases appear to be in violation of the very holding of this Court in Holland that a federal court must first determine that new evidence may be received under § 2254(e) before considering it, the cases simply apply, by their own rule, to *new* evidence. Again, there was no new evidence presented in Bell's federal habeas hearing. The Virginia Supreme Court considered it and found no reasonable probability that the jury would have rejected a death sentence had it heard the evidence. It was that decision to which the Fourth Circuit properly deferred under § 2254(d). Bell's attempt to make of his case an interesting conflict to be resolved fails because it simply does not fit within the very conflict he perceives.

III. The Fourth Circuit Did Not Adopt A Categorical Rule About Double-Edged Evidence.

Bell argues that the Fourth Circuit has adopted a rule that whenever "double-edged" evidence is alleged as grounds for an ineffective assistance claim, trial counsel cannot be found ineffective for failing to investigate or present it. He then extrapolates from that perceived rule that there is a conflict among the circuits that this Court needs to resolve. However, Bell misreads the Fourth Circuit's decision and misidentifies a conflict where there is none.

The Fourth Circuit faithfully applied both the controlling standard in § 2254(d) and this Court's clear precedents about ineffective assistance claims. First, the Virginia Supreme Court resolved Bell's claim on the prejudice prong of Strickland. (JA 317-19). The Fourth Circuit therefore properly applied the deference standard of § 2254(d), as required by this Court. Bell, 2008 U.S.App. LEXIS 125 at *15 (citing Schriro v. Landrigan, 127 S. Ct. 1933, 1939 (2007)).

Second, contrary to Bell's misreading, the Virginia Supreme Court did not find a lack of prejudice because cross-purpose evidence was at issue, but rather it found the contested evidence *was* cross-purpose in character, *and then* "weighed this cross-purpose mitigation evidence against the evidence in aggravation" as required by "Wiggins, 539 U.S. at 534." Bell, 2008 U.S.App. LEXIS 125 at *17-18. It is this decision by the Virginia Supreme Court which the Fourth Circuit found to be reasonable under § 2254(d). Id. It did not find that the existence of cross-purpose evidence trumped a claim of ineffective assistance.

The Fourth Circuit then reviewed the evidence which the district court said it found to be mitigating, the very evidence which the Virginia Supreme Court also had weighed against the aggravating factors in the case. Bell, 2008 U.S.App. LEXIS 125 at *18-21. The Fourth Circuit found, as the Virginia Supreme Court had found, that the evidence was indeed "cross-purpose" evidence:

> Evidence from each of these witnesses was cross-purpose because it would have allowed the prosecution to emphasize multiple instances of Bell's infidelity; abandonment of his children, wife and girlfriend; domestic abuse; and failure to provide child support. Furthermore, focusing on Bell's domestic relationships likely would have caused the jury to compare Bell unfavorably to Officer Timbrook, whose death left behind a pregnant wife.

Id. at *21. Bell's attempt in his petition in this Court to portray his evidence as good character evidence is preposterous. His witnesses who spoke well of Bell years after a death sentence had been imposed hardly were good character witnesses. As the Fourth Circuit found, they spoke of his abandoning his wife, adulterous affairs, illegitimate children for whom he provided no financial support and domestic abuse. The jury never heard about these bad character qualities. Whatever can be said about the evidence, it cannot be said it was not at least double-edged.

But more importantly, the Fourth Circuit's decision does not support in any way Bell's charge in this Court that it treats cross-purpose evidence as a claim-ender. Quite the contrary. The Fourth Circuit gave § 2254(d) deference to the Virginia Supreme Court's decision precisely because it weighed the evidence alleged to be mitigating "against the aggravating factors of Bell's criminal record and propensity for violence." Bell, 2008 U.S.App. LEXIS 125 at *21. That weighing is what this Court requires. See Wiggins v. Smith, 539 U.S. 510, 534 (2003).

Bell's real complaint is that he simply disagrees with the outcome of his fact-bound case. The cases he cites for the proposition that the Eleventh, Third and Tenth Circuits and the Georgia Supreme Court conflict with other circuits and state courts demonstrate nothing more than the fact that evidence in some cases, when weighed against the aggravating factors, proves a reasonable probability that the jury would have sentenced the defendant to life instead of to death. (See cases cited in Petition at 24-27). The Fourth Circuit utilized no categorical rule in this, or any other, case that the mere appearance of double-edged evidence negates a claim of ineffective assistance.

Bell's recitation of the evidence he says was considered by the district court in his case is quite misleading. He presents this Court with a compilation of citations to the record but fails to inform the Court that much of what he describes in his petition was not evidence which was considered by the District Judge because it was not admitted at the federal habeas evidentiary hearing; rather it comes from pre-hearing written statements from witnesses he did not produce at the hearing, or hearsay from an investigator whose testimony never would have been admissible in a Virginia capital sentencing hearing before a jury, and which was not credited by the District Judge. See Buchanan v. Commonwealth, 384 S.E.2d 757, 773 (Va. 1989) ("[E]xperts in criminal cases must testify on the basis of their own personal observations or on the basis of evidence adduced at trial.").

Contrary to Bell's assertion, the Fourth Circuit did not agree with the district court's opinion that trial counsel's conduct was unreasonable under Strickland. It simply found it unnecessary to make any ruling on Strickland's first prong. Bell, 2008 U.S.App. LEXIS 125 at *17 (citing Strickland, 466 U.S. at 697-98). The Fourth Circuit expressly declined even to "decide whether the district court correctly granted an evidentiary hearing" precisely because it agreed with the district court's conclusion that the Virginia Supreme Court reasonably had dismissed the claim for lack of prejudice. Bell, 2008 U.S.App. LEXIS 125 at *15 n.1.

The evidence actually relied upon by the District Judge is accurately described by the Fourth Circuit. The District Judge cited the four witnesses discussed above and explained that he gave less credit to a fifth witness who did not know Bell well enough to know that he had been fired for falsifying a drug screen test at their place of employment. Bell, 2008 U.S.App. LEXIS 125 at *18-19 & n.5. As described above, these witnesses – an ex-wife and her sister, an ex-girlfriend, and an ex-girlfriend's mother – provided harmful details about Bell's life which did

not come out at trial. Bell inaccurately argues that these harmful facts already were before the jury: the jury never heard about the abandonment, adultery, illegitimacy, domestic abuse and lack of child support. To say this evidence was not dangerous to the defense in a case involving a drug dealer with a criminal history (and no history of deprivation or abuse) in a small town who gunned down a police officer who had not even unholstered his firearm, leaving the officer's young widow pregnant with a first son he never would see, is simply to ignore the obvious aggravating use to which the prosecutor would have put it.

Contrary to Bell's assertion, trial counsel did present two family witnesses in mitigation, as described above. However, the problem counsel had was that there was no evidence from any other source – expert, records or witnesses – which would not have hurt as much as helped their case. Recently, the Fourth Circuit addressed a case involving a claim that trial counsel were ineffective precisely because they elected *to present* all the cross-purpose background evidence like Bell faults his counsel for *not* presenting. See Cagle v. Branker, __ F.3d __, 2008 U.S. App. LEXIS 5643 at *19 (4th Cir. March 17, 2008). See also Truesdale v. Moore, 142 F.3d 749, 754-55 (4th Cir. 1998) ("Failure to present particular mitigating evidence often leads to claims that counsel should have introduced such evidence or investigated further. On the other hand, the introduction of evidence that the jury does not credit or that the state turns to its advantage leads to ineffectiveness claims also.").

This ineffective assistance "catch 22" only highlights what this Court emphasized in Strickland:

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

466 U.S. at 689. Bell invites this Court to reopen a fact-intensive record to decide an issue of attorney performance in a case where the lower court avoided "grading counsel," see Strickland, 466 at 697 ("The object … is not to grade counsel's performance"), in favor of relying on the reasonable decision of the state court finding an abundant and accessible lack of prejudice. This Court should reject Bell's invitation because it presents no unsettled issue of law but rather only an application of existing law to particular facts.

CONCLUSION

The petition for a writ of certiorari and application for a stay of execution should be denied.

Respectfully submitted,

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