No. 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

Capital Case – Execution Scheduled for April 8, 2008

PETITIONER'S REPLY BRIEF

Robert Lee
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, VA 22903
(434) 817-2970

James G. Connell, III
Jonathan P. Sheldon
Randi R. Vickers
DEVINE, CONNELL & SHELDON, PLC
10621 Jones Street
Suite 301A
Fairfax, VA 22030
(703) 691-8410

Maureen E. Mahoney
Richard P. Bress*
J. Scott Ballenger
Matthew K. Roskoski
LATHAM & WATKINS LLP
555 11th Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200

* ***Counsel of Record***

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

FEDERAL AND STATE STATUTES

ARGUMENT

I. RESPONDENT MISSTATES THE FACTS

Respondent's Statement of the Case contains many of the same errors that marred her brief below. Bell debunked these errors at Reply Brief of Petitioner-Appellant 3-13, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Aug. 30, 2007) ("Pet. Reply"). The most egregious include:

Deficient Performance. Attempting to relitigate deficient performance, Respondent narrates trial counsel's ostensible reliance on Nellie Hutchinson-Walker, a prison conditions expert, and Dr. William Stejskal. Respondent's assertions are both irrelevant and wrong. Counsel could not have relied on Nellie Hutchinson-Walker, Opp. 7, because they first learned she existed on December 14, 2000, the same day they learned of her death. JA 1344, 1729, 1904, 1961. Counsel could not have relied on a prison conditions expert as a substitute for a mitigation investigation, Opp. 7, because they lost that motion months before trial. JA 60. And counsel could not have relied on Dr. Stejskal to conduct their mitigation investigation, Opp. 5-6, 11, because Dr. Stejskal told them at the outset that he would perform only a limited clinical evaluation, and was not "their one-stop shop" for mitigation services. JA 1379-80. Meeting with counsel shortly before trial, Dr. Stejskal was "surprised" to learn that his assistant "was the *only* one in the room who had had *any* substantive conversations with members of the family regarding Mr. Bell's background." JA 1344 (emphasis added). Shocked at counsel's lack of preparation, Dr. Stejskal's assistant "leap[t] into the breach and offer[ed] to assist," but trial counsel *never* followed up. JA 1344-48; 1729-30. Dr.

Stejskal never called Bell a "faker." *Compare* Opp. 11 *with* JA 1394. The district court, after observing Dr. Stejskal's demeanor, believed him. Pet. App. 173a-74a.

Carmeta Albarus. Respondent asserts that Albarus is unaccredited, Opp. 9-10, but she is licensed and certified. JA 1463-64. Respondent cites criticism of Albarus in *State v. DiFrisco*, 804 A.2d 507, 549-50 (N.J. 2002), *see* Opp. 10, but relies on the dissent in *DiFrisco* for a point rejected by the majority.

Domestic Violence, Infidelity, and Child Support. Respondent credits trial counsel with keeping the jury from hearing allegations of domestic violence. Opp. 10-12. Yet Billie Jo Swartz testified to domestic violence, JA 200-207, which the prosecutor emphasized in closing, JA 265, and the trial judge emphasized at sentencing, State JA 3080. Dawn Jones would have testified that the few "physical altercations" she had with Bell did not characterize their relationship, JA 1493, 1505-06, Tracy Nicholson would have "characterized their fights as 'pushing and pulling,'" JA 1726, and Joanne Nicholson would have testified that she never observed domestic violence. Pet. App. 172a. Respondent credits trial counsel with keeping the jury from hearing of Bell's infidelity, Opp. 7, but Swartz's testimony addressed that subject. JA 202-03. Respondent credits trial counsel with keeping the jury from learning of Bell's failure to pay child support, Opp. 7, but evidence adduced in federal district court demonstrated that, beyond the gifts he bought them, Bell did provide for his children within his means and did not violate any child support order. JA 1507-08, 1531-33, 1552, 1946.

II. THE WRIT SHOULD ISSUE TO RESOLVE A MATURE CIRCUIT CONFLICT REGARDING THE SCOPE OF 28 U.S.C. § 2254(d)

A. Bell Properly Preserved This Issue

Respondent claims "Bell did not make [this] argument below" until rehearing. Opp. 19. But Bell's opening brief in the Fourth Circuit expressly argued that "[o]n [the prejudice] issue, the district court was unhindered by the strictures of the AEDPA," citing *Monroe v. Angelone*, 323 F.3d 286, 297-99 (4th Cir. 2003), and *Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003). *See* Brief of Petitioner-Appellant 38, *Bell v. Kelly*, No. 06-22 (4th Cir. filed July 13, 2007) ("Pet. Br."). On reply, Bell argued that "[t]he admission of this [new] evidence on federal habeas defeats the Warden's claim that the district court should have applied § 2254(d) deference on the prejudice issue," citing *Monroe*. Pet. Reply 23 n.9.

B. New Evidence Was Uncovered On Federal Habeas

Respondent claims the "federal evidentiary hearing developed nothing that had not already been presented" to the state court. Opp. 20. But Respondent took the opposite stance before the district court—asserting that the new evidence Bell identified on federal habeas "demonstrates that Bell argued a different claim in the" Supreme Court of Virginia. Respondent's Mem. of Law Accompanying. Answer to and Mot. to Dismiss Petition 42, *Bell v. True*, No. 7:04CV752 (W.D. Va. filed June 16, 2005) ("Resp.'s MTD"). Respondent's new theory fails at every level.

Each of Bell's witnesses gave testimony unheard by the state court. Dawn Jones testified to at least four facts not included in her state affidavit: (1) Bell supported her while she was unable to work during her pregnancy, JA 1491-92, 1494, (2) their daughter Kydesha loves Bell and will be "devastated" if Bell is executed, JA 1495, 1503, (3) she never heard Bell speak badly of police officers, including Officer Timbrook, JA 1512, and (4) her relationship with Bell remained good despite occasional arguments and the incident she testified about in aggravation. JA 1493, 1497.

Barbara Bell Williams testified to at least four facts not included in her state affidavit: (1) Bell supported her, emotionally and financially, while she was in college, JA 1077, (2) she was shocked by the charges against Bell because they were so inconsistent with his character, JA 1078, 1554, (3) their daughter Kamille visited Bell in prison, loves him dearly, and would be traumatized by his execution, JA 1078, 1553-54, and (4) Bell had many friends who were police officers, and he ministered to the sick and elderly through police youth clubs. JA 1549.

Carol Anderson did not submit an affidavit on state habeas. On federal habeas, she testified to Bell's excellent behavior while they were roommates—he cooked and cleaned for her, escorted her home when she worked late, and never made any sexual advances toward her. JA 1080, 1565. Anderson was shocked by the charges against Bell and believed taking a life to be contrary to his character. JA 1080.

Joanne Nicholson testified to at least two facts not included in her state affidavit: (1) in addition to

being a good father to his biological children, Bell treated Tracy's oldest daughter, Alyse, as his own, JA 1518, and (2) she was unsure if she, Tracy, and the children could handle Bell's execution because they "just love him so much." JA 1524.

Testimony considered by the district court yet ignored by the Fourth Circuit contains additional new evidence. Precious Henderson did not submit an affidavit on state habeas, but testified on federal habeas that Bell was a good worker who went out of his way to help others. JA 1541. Carmeta Albarus testified that Bell was beaten repeatedly by his father, JA 1445-46, abuse Dr. Mark Cunningham further documented. JA 1195.

The performance of Bell's witnesses under cross-examination itself constitutes significant new evidence—because the so-called "cross-purpose" aspect of Bell's mitigation evidence consists of his witnesses' vulnerability on cross-examination. Pet. App. 15a-16a. The Supreme Court of Virginia refused an evidentiary hearing, and thus could not see how Bell's witnesses held up under cross-examination. The federal court granted a hearing, and found Bell's witnesses credible. *See* Pet. App. 169a-70a, 171a-73a.

C. The Circuits Are Deeply Divided

Respondent's assertion that "the 'conflict' identified by Bell simply does not exist," Opp. 21, is contrary to the conclusion of every court of appeals to consider this issue. The Eleventh Circuit recognized this circuit split in *LeCroy v. Secretary, Department of Florida Corrections*, 421 F.3d 1237, 1262-63 (11th Cir. 2005), *cert. denied*, 546 U.S. 1219 (2006). The Sixth Circuit acknowledges that its rule contradicts the Ninth Circuit's decision in *Killian v.*

Poole, 282 F.3d 1204 (9th Cir. 2002), *cert. denied*, 537 U.S. 1179 (2003). *See Johnson v. Luoma*, 425 F.3d 318, 324 (6th Cir. 2005), *cert. denied*, 127 S. Ct. 58 (2006). And the Fifth and Seventh Circuits acknowledge that their rule contradicts the Tenth Circuit's decision in *Miller v. Champion*, 161 F.3d 1249 (10th Cir. 1998). *See Valdez v. Cockrell*, 274 F.3d 941, 953 (5th Cir. 2001), *cert. denied*, 537 U.S. 883 (2002); *Matheney v. Anderson*, 377 F.3d 740, 747 (7th Cir. 2004), *cert. denied*, 544 U.S. 1035 (2005).

Respondent claims the Court did not reserve this question in *Holland v. Jackson*, 542 U.S. 649 (2004). Opp. 19. But *Holland* noted that "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer," and then "[a]ssum[ed], *arguendo*, that this analysis is correct." 542 U.S. at 653. Respondent is correct that *Holland* cited *Monroe*, 323 F.3d at 297-99 & n.19, as an example of a court applying *de novo* review. Opp. 20. Bell made the same argument below, Pet. Br. 38; Pet. Reply 23 n.9, but the Fourth Circuit nevertheless applied § 2254(d). Pet. App. 12a-13a. In the Fourth Circuit, therefore, *Brady* materiality now receives the benefit of *de novo* review when new evidence is admitted on federal habeas but, inexplicably, *Strickland* prejudice does not.

Contrary to Respondent's view, this circuit split is mature, well-defined, and recognized by multiple courts. There is no reason for this Court to await further percolation.

III. THE WRIT SHOULD ISSUE TO RESOLVE A CIRCUIT CONFLICT REGARDING THE RELEVANCE OF SO-CALLED "CROSS-PURPOSE" EVIDENCE

A. The Fourth Circuit Dismisses "Cross-Purpose" Evidence

Respondent does not deny that that the Fifth Circuit and the Supreme Court of Florida discount all mitigating evidence that may be labeled "double-edged" or "cross-purpose." *See* Pet. 23-24. But she argues that the Fourth Circuit takes a different path. According to Respondent, the Fourth Circuit merely considers that evidence is "cross-purpose" as part of a fact-specific weighing process. Opp. 22. The Fourth Circuit itself disagrees with that interpretation of its cases. In *Bowie v. Branker*, it explained that "mitigating evidence ... should be discounted, *under our precedent*" if "double-edged." 512 F.3d 112, 121 (4th Cir. 2008) (emphasis added).

Beyond *Bowie*'s characterization, the Fourth Circuit's holdings speak for themselves. Since this Court's landmark decision in *Williams v. Taylor*, 529 U.S. 362 (2000), *every* time the Fourth Circuit has found evidence to be "cross-purpose" or "double-edged," it has found counsel not ineffective.[1] And in

---

[1] In addition to the examples cited in the Petition, see also *Emmett v. Kelly*, 474 F.3d 154, 170-71 (4th Cir.) (finding no prejudice from omission of evidence "comprised of at least as much bad evidence in aggravation as good evidence in mitigation"), *cert. denied*, 128 S. Ct. 1 (2007); *Lovitt v. True*, 403 F.3d 171, 181-82 (4th Cir.) (finding no prejudice based on failure to present "mixed" mitigating evidence), *cert. denied*, 546 U.S. 1152 (2005); *Moody v. Polk*, 408 F.3d 141, 152 (4th Cir. 2005) (disregarding a mitigating letter because it was "double-edged"), *cert. denied*, 546 U.S. 1108 (2006); *Howard v.*

this case, the *only* specific reason the Fourth Circuit gave for its finding of no prejudice was the ostensibly "cross-purpose" nature of Bell's evidence. *See* Pet. App. 16a. Where the Fourth Circuit's application of "[its] precedent" has led it *without variation* to the same result in even the most extreme cases, it is fairly viewed as applying a rule of law. If it walks like a duck, and quacks like a duck, odds are it's a duck.

B. Prejudice Is Apparent From Evidence Properly Received By The District Court

Respondent protests Bell's citation of pre-hearing reports and affidavits. Opp. 24. The district court, however, held that the evidentiary hearing "expand[ed] a pre-existing record," and that "all of the matters that have been previously filed are part of the record in this case." JA 1272-73. Respondent also invites this Court to enforce Virginia's hearsay rules, Opp. 24, but this Court rightly declined a similar invitation in *Wiggins v. Smith*. *See* 539 U.S. 510, 536 (2003) (evaluating prejudice in reliance on mitigation specialist's admittedly hearsay report and refusing to "make the state-law evidentiary findings that would have been at issue in sentencing"). Moreover, the district court rejected Respondent's

---

Moore, 131 F.3d 399, 420-21 (4th Cir. 1997) (finding no prejudice for failure to investigate and present past prison records that were a "double-edged sword"), *cert. denied*, 525 U.S. 843 (1998); *Barnes v. Thompson*, 58 F.3d 971, 980-81 (4th Cir.) (finding no prejudice where counsel failed to present mitigating evidence that also may have supported future dangerousness finding), *cert. denied*, 516 U.S. 972 (1995). In Respondent's own words, counsel in the Fourth Circuit "is not ineffective for failing to pursue evidence that is a 'two-edged sword.'" Resp.'s MTD 44.

objections to Albarus's live testimony, *e.g.*, JA 1444-45, 1449, 1451, 1453-55, Virginia courts have permitted Albarus to testify as a mitigation specialist, JA 1428, and under the streamlined procedures governing federal habeas, courts are free to receive hearsay evidence under 28 U.S.C. § 2246.

IV. THIS CASE SHOULD BE HELD PENDING BAZE V. REES, THEN VACATED AND REMANDED

A. This Court Has Jurisdiction To Vacate The Order Denying Bell A Certificate Of Appealability

Respondent's claim that Bell "does not ask this Court for review of the COA decision," Opp. 15, is simply wrong. The Petition acknowledged that "[t]he Fourth Circuit denied a Certificate of Appealability," and asked this Court to "grant the petition, vacate *the decision of the Fourth Circuit*, and remand for further proceedings not inconsistent with *Baze*." Pet. 34-35 (emphasis added). The decision in question is, of course, the decision to deny a certificate of appealability—a decision the Fourth Circuit made *before* this Court granted certiorari in *Baze v. Rees*, 128 S. Ct. 34 (2007). The Petition unambiguously asks this Court to vacate and remand *the decision of the Fourth Circuit*, to provide the Fourth Circuit an opportunity to consider Bell's lethal injection claim in light of *Baze*.[2] And this

---

[2] Respondent is correct that Bell's lethal injection claim was presented on direct appeal, rather than state habeas. Opp. 4, 16-17. The Petition correctly stated the procedural history of this issue at 9-10, but misstated it at 33. Respondent's effort to attach substantive weight to this point, Opp. 16-17, however, fails. The district court did not find Bell's lethal injection claim

Court unquestionably has jurisdiction so to do. *Hohn v. United States*, 524 U.S. 236, 253 (1998).

Whether this Court should exercise that jurisdiction will necessarily turn on the outcome of *Baze*. The Petition does not argue that *Baze* renders the decisions of the courts below incorrect, Opp. 15-16, as this Court has not yet decided *Baze*. But this Court has previously stayed executions by lethal injection pending *Baze*, *e.g.*, *Callahan v. Allen*, 128 S. Ct. 1138 (2008), and it should do so again here.

B. The Supreme Court Of Virginia's Decision Did Not Rest On Independent And Adequate State Grounds

Virginia's rule, that a prisoner who declines to make a choice under Virginia Code § 53.1-234 has thereby chosen by default, is not an independent state ground under this Court's precedents. Where a state court's rule "depends on a federal constitutional ruling," the state rule "is not independent of federal law, and [this Court's] jurisdiction is not precluded." *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985). In *Orbe v. Johnson*, 601 S.E.2d 543, 545-46 (Va. 2004), and *Orbe v. Johnson*, 601 S.E.2d 547, 549 (Va. 2004), the Supreme Court of Virginia based its choice-by-default rule directly on this Court's decision in *Stewart v. LaGrand*, 526 U.S. 115 (1999). Listing its prior decision in *Bell* as one of many in which it faced this issue, the court held that the circumstances of Virginia inmates "are legally indistinguishable from those presented to the United States Supreme Court in *LaGrand*." 601 S.E.2d at

---

on federal habeas untimely or unexhausted. Pet. App. 162a-67a.

549; *see also* Opp. 18-19 (defending Virginia's rule as flowing from *LaGrand*). The state court's rule, therefore, "depends on a federal constitutional ruling," and, under *Ake*, does not preclude this Court's jurisdiction. 470 U.S. at 75.

Although Virginia's choice-by-default theory depends on *LaGrand*, it misreads that precedent. The defendant in *LaGrand* affirmatively "insisted" and "declar[ed]" his preference for execution by lethal gas over lethal injection. 526 U.S. at 119. This Court's only holding, thus, was that an inmate's *affirmative* selection of a method of execution waives his right to challenge the constitutionality of that method. *Id.* This Court did not have occasion to consider whether an inmate waives his right to challenge a method of execution he does not *affirmatively* select, but is instead defaulted to after refusing to choose. It is well-settled that the waiver of a constitutional right must be *voluntary* as well as knowing, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Iowa v. Tovar*, 541 U.S. 77, 87-88 (2004), and the choice Respondent posits is anything but voluntary. This Court "'indulge[s] every reasonable presumption against waiver' of fundamental constitutional rights." *Zerbst*, 304 U.S. at 464 (citations omitted). Any doubt about the voluntariness of Bell's "choice" must be resolved against waiver. *Id.*

Under those precedents, this Court's decision in *Baze* may create a reasonable possibility that the Fourth Circuit would have granted a certificate of appealability. No other jurisdiction agrees with Virginia's choice-by-default interpretation of

LaGrand.[3] Indeed, the petitioner in *Baze* faced exactly the same choice as Bell. *See* Ky. Rev. Stat. Ann. § 431.220(a)-(b); *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006), *cert. granted*, 128 S. Ct. 34 (2007); *see also Nelson v. Campbell*, 541 U.S. 637, 640 (2004) (petitioner declined to elect and defaulted to lethal injection). Bell asks nothing more than that the Fourth Circuit be given the opportunity to consider his claim in light of *Baze*.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

---

[3] Tellingly, Respondent can muster only one district court case to support her claim that "federal courts ... have held that a decision *not to choose* is a choice for lethal injection." Opp. 17 n.3.

Respectfully submitted,

Robert Lee
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, VA 22903
(434) 817-2970

James G. Connell, III
Jonathan P. Sheldon
Randi R. Vickers
DEVINE, CONNELL &
SHELDON, PLC
10621 Jones Street
Suite 301A
Fairfax, VA 22030
(703) 691-8410

Maureen E. Mahoney
Richard P. Bress*
J. Scott Ballenger
Matthew K. Roskoski
LATHAM & WATKINS
LLP
555 11th Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200

* *Counsel of Record*