No. 08-1242

In The
Supreme Court of the United States

JEFFREY A. BEARD, et al.
Petitioners

v.

JESSE BOND,
Respondent

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

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

RONALD EISENBERG
Deputy District Attorney
(counsel of record)
THOMAS W. DOLGENOS
Chief, Federal Litigation
ARNOLD GORDON
1st Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107
(215) 686-5700

Table of Contents

Table of Citations

Cases

Statute

Reasons for Granting the Petition

Bond, like the court of appeals, pays no real deference to either the fact findings or the legal conclusions of the state courts.

Bond argues that review should be denied because the failure to apply deference under 28 U.S.C. § 2254(d) presents no unsettled question of law. He contends that petitioners inadvertently concede the point by suggesting that the case may be suitable for summary, *per curiam* reversal. Petitioners, says Bond, therefore seek merely "error correction."

If so, then this Court has been doing a lot of error correction in recent years, on exactly this subject. Since the 2002 Term, the Court has reversed federal appeals courts, for failing to apply deference under § 2254(d), at least *twenty times*. *Nine* of those cases, almost half, have been decided by summary, *per curiam* opinions.[1] These numbers

---

[1]*Bell v. Cone*, 535 U.S. 685 (2002); *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (*per curiam*); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Price v. Vincent*, 538 U.S. 634 (2003); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (*per curiam*); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (*per curiam*); *Middleton v. McNeil*, 541 U.S. 433 (2004) (*per curiam*); *Yarborough v. Alvarado*, 541

(continued...)

do not even count the many additional cases in which the Court has summarily reversed and remanded for reconsideration under the proper deference standard.[2]

Compliance with the deferential standard of review, therefore, is clearly a fundamental imperative that does indeed warrant the Court's attention. Petitioners of course have no objection to full briefing and argument of this case. But, considering how many times the Court has already had to say the same thing, summary reversal is at least equally appropriate.

---

[1](...continued)
U.S. 652 (2004); *Holland v. Jackson*, 542 U.S. 649 (2004) (*per curiam*); *Bell v. Cone*, 543 U.S. 447 (2005) (*per curiam*); *Brown v. Payton*, 544 U.S. 133 (2005); *Kane v. Garcia Espitia*, 546 U.S. 9 (2005) (*per curiam*); *Rice v. Collins*, 546 U.S. 333 (2006); *Carey v. Musladin*, 549 U.S. 70 (2006); *Schrirro v. Landrigan*, 550 U.S. 465 (2007); *Uttecht v. Brown*, 551 U.S. 1 (2007); *Wright v. Van Patten*, 552 U.S. 120 (2008) (*per curiam*); *Waddington v. Sarausad*, 129 S. Ct. 823 (2009); *Knowles v. Mirzayance*, 129 U.S. 1411 (2009).

[2]*See, e.g., Klauser v. Gray*, 537 U.S. 1041 (2002); *Walls v. Henderson*, 537 U.S. 1230 (2003); *McGrath v. Chia*, 538 U.S. 902 (2003); *Miller v. Rodriguez*, 549 U.S. 1163 (2007); *Schmidt v. Van Patten*, 549 U.S. 1163 (2007); *Knowles v. Mirzayance*, 549 U.S. 1199 (2007); *Patrick v. Smith*, 550 U.S. 915 (2007); *Stevens v. Beard*, 551 U.S. 1111 (2007); *Hudson v. Spisak*, 128 S. Ct. 373 (2007).

Certainly this case presents the kind of deference-defying decision that the Court has taken pains to correct, most recently at the end of last Term with *Knowles v. Mirzayance*, 129 S. Ct. 1411 (2009). As in many of the cases this Court has reversed, the federal habeas court rejected both factual and legal conclusions by the state courts. First the circuit court overturned crucial findings about counsel's performance and the strength of the new mitigation evidence he allegedly should have discovered. Then, freed of these factual constraints, the court declared counsel ineffective at the penalty phase for presenting a positive portrait of the defendant instead of hunting for evidence of dysfunction, such as brain damage, to suggest that the defendant's violent behavior was inherent.

Bond defends these improper rulings by the court of appeals, but only by employing the same improper reasoning. He spends the largest portion of his response, *see* Brief in Opp. at 22-25, attempting to justify the circuit court's unequivocal, threshold conclusion – made in direct opposition to a specific finding by the state supreme court – that trial counsel did nothing to prepare a penalty phase defense until the night before.

As his argument proceeds, however, it becomes clear that what Bond really seems to mean is not

that counsel failed to prepare a defense, but that he failed to prepare the "right" *kind* of defense.

Bond acknowledges, for example, that counsel in fact retained a mitigation specialist before the first of Bond's three homicide/shooting trials, two months before the trial in this case. Brief in Opp. at 5. But counsel was nonetheless culpable, argues Bond, because he did not provide the expert with certain records that would have steered him to conclude that Bond's childhood was "dysfunctional."

Similarly, Bond recognizes that counsel interviewed family members about mitigation during that prior trial. Brief in Opp. at 2. But counsel was nevertheless incompetent, contends Bond, because he did not ask the family a particular set of leading questions, so as to elicit responses about beatings, poverty, drinking, and gambling.

With these allegations, Bond is in a much grayer area – which should have made it harder, not easier, to dismiss the state court ruling as unreasonable.

Bond attempts to remedy this problem simply by disregarding significant portions of the week-long post-conviction hearing record that was before the state courts. Counsel explained there that the expert he hired was not just a Ph.D. clinical psychologist, but a practicing attorney specializing

in criminal defense. Counsel had hired the same expert in the past, and had provided any additional records the expert required. In this case, though, after questioning Bond, interviewing his mother, and performing an array of psychological tests, the expert did not indicate the need for anything further. If he had, counsel would have supplied it. N.T. 4/15/97, 40-41, 43, 45, 60-62, 66-67, 90-93; 3rd Cir. App. 1587-88, 1590, 1592, 1607-09, 1613-14, 1637-40.[3]

In any case, the expert himself testified at the post-conviction hearing that, *even if* he had had the hospital and school records that Bond now says should have been provided to him, he would *still* have concluded that there was no mental status mitigation. Having now reviewed the records, he conceded, he could not testify that Bond had organic brain damage, or was suffering extreme emotional distress, or lacked the capacity to appreciate the criminality of his conduct or conform

---

[3]Bond now attempts to minimize the expert's evaluation as "limited" and "brief." Brief in Opp. at 5. But the issue here is not ineffective assistance of expert, and there was no evidence that counsel in any way constrained the expert's efforts.

Bond also alleges that the expert's written report did not explicitly state that he found no helpful mitigation. Brief in Opp. at 24. Of course not. As counsel testified, the expert reported his negative overall assessment orally, not in writing. N.T. 4/15/97, 63, 88; 3rd Cir. App. 1610, 1635.

it to the law. N.T. 4/15/97, 183-85; 3rd Cir. App. 1730-32.

Bond leaves out comparable information concerning the family members. Bond reports (in bold typeface) counsel's testimony that he did not sit down and ask relatives about Bond's "background." Brief in Opp. at 4, 23. Not in those exact words, no. Bond neglects to mention counsel's follow-up statement, however, that what he *did* ask was "what life with Jesse was like." N.T. 4/15/97, 83-84; 3rd Cir. 1630-31.

That was surely a doorway wide enough to draw in all manner of "dysfunction" details; yet family members instead informed counsel that, before the crime spree that culminated in this capital murder conviction, Bond never really had any behavioral problems. They never suggested that Bond abused drugs or alcohol, that he displayed any mental difficulties, or in fact that he was unusual in any respect. N.T. 4/15/97, 63-64, 84-86; 3rd Cir. App. 1610-11, 1631-33.

Indeed even at the post-conviction hearing, where they were certainly aware of the new mitigation strategy being pursued by Bond's new lawyers, the relatives' testimony failed to support the notion that a difficult childhood explained Bond's sudden two-week rampage at age 25. To the contrary, family members admitted that they were completely "shocked" when Bond was arrested.

The shootings seemed totally out of character with his past behavior. In fact, he had never before been violent in any way. N.T. 4/15/97, 118-19, 258; 3rd Cir. 1665-66, 1805.

Thus on the actual record, the one on which the state courts ruled, it was hardly unreasonable to find that counsel did inquire about Bond's background. If counsel perceived Bond as a basically good kid gone briefly wrong, it was because he was advised, both by an experienced J.D./Ph.D. mitigation expert and by family members, that there were no mental health or behavioral problems in Bond's past. If, in contrast, Bond were really the innately homicidal product of lifelong organic and social dysfunction, as he now sees fit to portray himself, perhaps someone would have mentioned something about that even without specific prompting from counsel.

Bond, like the court of appeals, avoids this conclusion by reading the record in the light most favorable to himself, ignoring conflicting testimony, passing over evidence that does not favor his position, and highlighting or overstating the rest. But that, of course, is not the test under § 2254(d). On the proper standard, there is simply no defense for the circuit court's declaration that the state supreme court lacked *even a reasonable basis* for its ruling on counsel's preparation.

Even more indefensible was the circuit court's rejection of the credibility determinations made against defense experts. The state trial judge, after hearing the two experts who would supposedly prove that Bond's "social history" was the cause of various disabilities, discredited the experts' opinions. In response now, Bond has not much to say, but essentially adopts the circuit court's two-against-one theory: the state presented a brain damage expert, but he only negated the defense brain damage expert, leaving the remaining defense expert unscathed; so the state judge could not reasonably disbelieve both defense witnesses.

Such a syllogism would be silly even under a normal standard of review, let alone under AEDPA deference. Appellate courts do not get to micro-manage trial court assessments of expert opinion by counting up the number of witnesses. And the circuit court's credibility veto in this case was even more inappropriate in light of the state judge's written findings about the second expert, Dr. Dudley. The judge made clear that he rejected Dudley's diagnoses on *two* grounds: not only because they were debunked by the state's expert, App. 149, but *also* because Dudley failed to convince him that they were true *as of the time of the crime*, App. 150. *See* Cert. Pet. at 14-15. This second finding by the state judge, on top of the first, should have constrained the habeas court. Yet neither Bond nor the court of appeals ever even mention it.

Nor does Bond or the circuit court ever grapple with the import of these expert witness findings as to the *lay* witnesses. Without the discredited expert opinions, the testimony of Bond's family members – that he was poor, that his mother was bad, that he missed school, that he was hit on the head – was simply incapable of establishing a "dramatically upgraded" mitigation case.[4] Without the discredited diagnoses, there was no causation – no link between Bond's childhood experiences, which are hardly unique, and the three people he shot in cold blood. Without the debunked defense experts, there was no way to distinguish Bond from the millions of other children from bad neighborhoods who do not grow up to be double murderers. There was no way to distinguish him even from his own five siblings, who grew up in the same household.

In the end, however, worse than the circuit court's failure to give factual deference was its refusal to respect the state courts' legal conclusions. The state courts ruled that counsel's actual mitigation strategy – to show that Bond's criminal conduct was aberrational – was within the bounds of effective representation. The court of appeals held, in contrast, that counsel should

---

[4]Bond insinuates that the "upgrade" language is petitioners'. Brief in Opp. at 27. In fact the words come directly from the court of appeals opinion. App. 89.

instead have pursued a dysfunction defense, and that the state courts did not have even a reasonable basis for concluding otherwise. That holding by the habeas court was a violation of AEDPA/*Strickland*[5] deference, even aside from the court's improper redeterminations of fact.

The basis for the circuit court's dismissal of the state ruling, echoed now by Bond, is the line of this Court's cases culminating in *Rompilla v. Beard*.[6] Bond and the circuit court treat *Rompilla* as if it establishes in essence an automatic investigation rule. Buried in the Sixth Amendment is supposedly a checklist of conduct that all capital counsel must follow, most especially including efforts to develop evidence that the defendant had a dysfunctional childhood and psychological impairments that caused his criminal behavior. If, as here, relatives and experts belie the existence of such evidence, counsel has a duty to press on anyway.

This is an increasingly common conception of *Rompilla* in the lower courts; but it is wrong; and it should be corrected. To be sure, the defendant in *Rompilla*, represented by the same lawyers as is

---

[5]*Strickland v. Washington*, 464 U.S. 668 (1984).

[6]*Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005).

Bond here, argued that capital defense counsel have an inherent duty to explore school, hospital, and other records, even if family members have suggested little reason to believe such investigation will be useful.

But the *Rompilla* Court *explicitly declined* to adopt the defendant's checklist approach, 545 U.S. at 383, and *specifically denied* the charge of the dissent that it was doing so, *id.* at 389; *see id.* at 399-400, 402-04 (Kennedy, J., dissenting). Indeed the Court discounted the notion that capital counsel must routinely be "[q]uestioning a few more family members and searching for old records." *Id.* at 389. The actual reason for finding ineffective assistance in *Rompilla* was not because counsel failed to cast a wider net for more mitigation evidence, but because counsel failed to focus on specific *aggravation* evidence that he already knew the prosecution would be introducing. *Id.* at 377, 383, 385, 389.

Nor can *Rompilla* support the idea that a capital defendant is necessarily prejudiced when his lawyer presents an aberration defense at the penalty phase in place of a dysfunction defense. The problem in Rompilla's case was that he did not *have* an aberration defense. Unlike Bond, he sorely lacked a pristine prior record; indeed, he had already committed a serious burglary/assault that closely paralleled the murder for which he was on trial. And his family could not credibly testify to

his good traits, because he had spent so many years in jail for various offenses that they barely felt they knew him. 545 U.S. at 382, 383, 386; *id.* at 394 (O'Connor, J., concurring.)

By contrast, Bond was a reasonably solid citizen who, despite gang harassment, limited education, and abandonment by his father, managed to work, take care of his relatives, and stay out of trouble until a confluence of misfortunes pushed him into a brief spasm of violent acts. An attempt to supplement this evidence -- by claiming that Bond was brain damaged and incapable of controlling himself – would have been both dumbfounding and dangerous: Where was his brain for the first 25 years of his life? And if he is really that impaired, what is to stop him from doing it again?

The court of appeals insisted that there was no such trade-off, App. 88, but that is facile. The whole point of an organic-brain-damage, post-traumatic-stress-disorder, alcoholic-abusive-mother defense is that the defendant is less culpable for his conduct because he cannot help it; the failure to appreciate or inhibit anti-social behavior is, through no moral failing of his own, characteristic. The whole point of an aberration defense, on the other hand, is that the defendant has led a more virtuous life in the past, and can again in the future; the criminal interlude is uncharacteristic. These two approaches cannot easily coexist.

But even if they could, the court of appeals would still have had no business overturning the state judgment. The federal court held that counsel was constitutionally obligated to develop an alternative defense, and accept its risks, not because he otherwise lacked a viable strategy, but simply because he could improve his options. A checklist investigation is required, in other words, just in case. There was nothing to lose, and an "upgraded" mitigation case to gain.

That is why the Court's recent decision in *Knowles v. Mirzayance* is of particular significance. Bond maintains that *Knowles* did not really break new ground. But that is exactly the point. There have indeed been many prior cases attempting to conform federal habeas rulings to current law. Some of these decisions have involved circumstances much like those here.[7] *Knowles* makes clear, however, in regard to both fact findings and legal conclusions, and as a matter of both AEDPA and *Strickland* deference, that the problem remains acute. The ruling below should

---

[7]*See, e.g., Woodford v. Visciotti*, 537 U.S. 19, 26 (2002) (*per curiam*) (summarily reversing federal court of appeals ruling that state habeas petitioner's counsel was ineffective for failing "to introduce mitigating evidence about [petitioner]'s background, including expert testimony that could have been presented about his growing up in a dysfunctional family in which he suffered continual psychological abuse").

no more be permitted to stand than those in the Court's other recent deference decisions.

Conclusion

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

Respectfully submitted,

RONALD EISENBERG
Deputy District Attorney
(*counsel of record*)
THOMAS W. DOLGENOS
Chief, Federal Litigation
ARNOLD GORDON
1st Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107
(215) 686-5700