Capital Case

Case No. 19-5298

In the Supreme Court of the United States

Kendrick Antonio Simpson,
Petitioner,
v.
Tommy Sharp, Interim Warden,
Oklahoma State Penitentiary,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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As an initial matter, Respondent complains that Mr. Simpson has not cited sufficiently to substantiate his facts. Brief in Opposition at 2. Respondent makes this complaint all the while admitting that Mr. Simpson has indeed provided citations despite this Court having no rule requiring the same. *Id*. Nonetheless, the main issue with Respondent's complaint is that, even though he claims he has "much more difficult[y]" in disputing Mr. Simpson's facts without further citation, Respondent does not once offer up a specific complaint as to what facts are without support. Brief in Opposition at 2-3. Instead, Respondent "in general disagrees." Brief in Opposition at 3. Yet, in citing to the Oklahoma Court of Criminal Appeals's (OCCA) own statement of facts, Respondent confirms Mr. Simpson's facts are indeed supported.

I. This Court Should Clarify that the AEDPA Does Not Require Federal Courts to Apply a Doubly Deferential Standard of Review to the Prejudice Prong of the *Strickland* Analysis.

Respondent premises his argument against Mr. Simpson's request for clarification on the doubly deferential standard of review and *Strickland*'s prejudice prong by arguing Mr. Simpson simply disagrees with the application of a properly stated rule of law. Brief in Opposition at 6. Yet, it is this supposed "rule of law" that is in question, as it is neither a stated rule of law, nor a properly applied one. Respondent's arguments are just as "conclusory" as he alleges Petitioner's arguments to be. Brief in Opposition at 13.

The crux of Respondent's argument is that *Strickland* puts forth a two part test: establishing counsel's deficient performance and establishing prejudice therefrom. Brief in Opposition at 8. Citing *Cullen v. Pinholster*, 563 U.S. 170 (2011), Respondent argues that *Williams v. Taylor*, 529 U.S. 362 (2000) and *Rompilla v. Beard*, 545 U.S. 374 (2005) are distinguishable because they did not apply the doubly deferential standard of review on the prejudice prong. Brief in Opposition at 9. Respondent conflates this Court's pronouncement in *Pinholster*.

In *Pinholste*r, this Court specifically noted that review is "doubly deferential" when the court is looking "at counsel's *performance*." 563 U.S. at 190 (emphasis added). In other words, trial counsel is given deference for his performance under *Strickland*, and then an added layer of deference is applied

to the state appellate court under the AEDPA. *Id*. In announcing that *Williams* and *Rompilla* "offer no guidance" for *Pinholster*'s issues stemming from a evidentiary hearing, the Court noted that AEDPA deference was not applied to the question of prejudice in those original cases. *Id*. at 202. Thus, it was the lack of AEDPA deference that caused them to miss the necessary doubly deferential review. *Id*. That is not the case here. AEDPA deference was applied. But, it is the added layer of deference to a prejudice determination that is at issue. And this Court has clearly spoken that this additional layer of deference applies to counsel's performance, not prejudice. *Pinholster*, 563 U.S. at 190; *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

Regardless of Respondent's *Pinholster* argument in this case, however, it is clear that there remains a divisive split in the circuits on this issue – something Respondent's does not contest. *See* Petition for Writ of Certiorari at 12-15. In fact, Respondent appears to acknowledge the same while asserting the split should be left "up to the circuits themselves." Brief in Opposition at 18. At most, Respondent asserts that any disagreement comes via dissenting or concurring judges. Brief in Opposition at 18-20. Yet, the inconsistencies are reflected as clearly in the majority opinion as well. *See, e.g., Elmore v. Ozmint*, 661 F.3d 783, 876 (4th Cir. 2011). *Cf. id*. at 849-51.

While attempting to distinguish Mr. Simpson's circuit split, Respondent clarified the inconsistencies. Thus, Respondent would have this Court wait for "further percolation among the lower courts" before acting on this divisive issue. Brief in Opposition at 21. But, that time is upon us now. The circuits are in need of this Court's settling hand. And, this is an appropriate case for such.

This is a case where one would be hard pressed to find a more traumatized defendant susceptible to the triggers of a highly stressful situation. As Petitioner has made clear, had counsel exercised reasonable judgment and care in presenting the whole – and accurate – picture of Mr. Simpson's past while guarding against the wrongful attacks of the prosecution, at least one juror may have determined that Mr. Simpson's life was worth sparing. This is true even if the case were the highly aggravated case Respondent claims it to be. To counter any claims that the erroneous, doubly deferential standard applied to the prejudice prong of counsel's conduct here tipped the scales, Respondent puts forth the standard argument that aggravation was extensive. "The state presented evidence to support a total of seven aggravating circumstances related to the death of both victims. The state's case was overwhelming." Brief in Opposition at 15.

Yet, this case was not so overwhelming. Remarkably, Respondent makes the point that the state presented evidence for *seven* aggravating circumstances,

but fails to acknowledge only half this number was alleged or found by the jury. Brief in Opposition at 15. And, even then, Respondent does not deal with the fact that in Oklahoma, it takes but one juror to determine the death penalty is not appropriate. In a case where had counsel fought off wrongful prosecutorial attacks and faulty instructions while presenting an accurate picture of Mr. Simpson's traumatized life in the Ninth Ward of New Orleans, at least one juror could have seen reason to spare Mr. Simpson's life or understand the reactive nature in which he functioned. Yet, the layering of additional deference ensured that this one-juror difference would be dismissed.

This Court is called upon to settle this issue so as to provide clarity to an area wrought with confusion at the highest cost – life and death. Certiorari should be granted.

II. This Court Should Clarify that the AEDPA's Deferential Standard Does Not Apply to a "Cause and Prejudice" Determination on Whether a Petitioner Has Overcome a Procedural Default.

Petitioner has asked whether a death sentence may stand where a district court erroneously applies 28 U.S.C. § 2254(d) deference to the "cause and prejudice" standard, thus leading to a denial of a Certificate of Appealability (COA) on a critical, meritorious *Lockett v. Ohio* issue. *See* Petition for Writ of Certiorari at i, 15. Respondent premises his response on the notion that because the circuit court of appeals did not adjudicate the underlying issue on its merits

– having not issued a COA for the same – the matter is not now appropriate for this Court's review. Brief in Opposition at 24-26. Respondent's premise goes without citation or support. This issue is properly before this Court.

While Respondent makes the argument, more than once, that Petitioner does not argue he should have received a COA, Brief in Opposition at 24-26, one cannot read Mr. Simpson's petition without understanding that it is the very denial of the COA under an erroneous review standard with which Petitioner takes issue. Petition for Writ of Certiorari at i, 15-23. Indeed, were it not for the erroneous deference applied on review, reasonable jurists could and would debate the merits of Mr. Simpson's claim, as Mr. Simpson has claimed. Petition for Writ of Certiorari at 23 ("Were it not for the deference granted the OCCA's 'cause and prejudice' determination here, the merits of the clearly meritorious *Lockett* claim would have given way to relief under this Court's clearly-established law."). And, Respondent, himself, does not once dispute that exclusion of this crucial *Lockett* claim was a meritorious and cognizable constitutional claim appellate counsel should have pursued. In fact, under Respondent's own cited standard of *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether

the district court was correct in its procedural ruling." Brief in Opposition at 26. A *Lockett* claim, such as that presented here, falls well within this standard – jurists of reason could surely debate – especially when Respondent himself does not dispute the same.

Respondent next claims that the underlying issue lacks merit. Brief in Opposition at 26-29. Yet, his basis for the same is nearly as lacking as that of his previous argument. Relying solely on this Court's case of *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000), Respondent reasons that "[i]f circuit courts cannot consider the claim of ineffective assistance of appellate counsel as cause pursuant to *Edwards* unless that claim has been exhausted in state court, then it follows that it would review the claim with § 2254(d) deference like any other exhausted claim." Brief in Opposition at 28. However, *Edwards* does not stand for this proposition. *Edwards* merely makes clear that the independent, substantive claim of ineffective assistance of counsel must be exhausted before being presented to the state courts to establish cause for a procedural default. *Edwards*, 529 U.S. at 452. Mr. Simpson's independent claim of ineffective assistance of counsel was exhausted as Respondent acknowledges. So, *Edwards* no longer governs with respect to the limited question of "cause" to excuse the default of the *Lockett* claim. It is the use of counsel's ineffectiveness as "cause" for a procedural default that is questioned in reference to the deference

principles of § 2254(d). And, Respondent has failed to show how "cause and prejudice" determinations are "claims" adjudicated on the merits and entitled to deference under the AEDPA. *Cf. Fairchild v. Trammell*, 784 F.3d 702, 711 (10th Cir. 2015).

Finally, Respondent does nothing to distinguish the circuit split Mr. Simpson presented on this issue, thus seemingly acknowledging the continued friction amongst the lower courts and the need for this Court's settling hand. Certiorari should be granted.

III. Failure to Grant Certiorari Would Put the Fundamental Principles of *Lockett v. Ohio* at Risk.

Respondent takes issue with Mr. Simpson's claim that Oklahoma has imposed a nexus requirement – requiring mitigating evidence to be connected to criminal responsibility – in contravention of the Eighth Amendment. Brief in Opposition at 31-32. Yet, in doing so, Respondent does not once argue against Mr. Simpson's assertion that a host of other states have imposed this same type of requirement. As such, the circuit split on this issue remains uncontested by Respondent. Nonetheless, Respondent focuses on the fact that there is not a required "nexus" in Oklahoma. *Id.* Respondent relies exclusively on the jury instruction language, of which Mr. Simpson did not receive the benefit. *Id.* In doing so, Respondent does not deal with the fact that Oklahoma prosecutors have and will continue to limit the jurors' understanding of what is to be

considered, thus becoming a nexus requirement by whatever name. The Tenth Circuit itself announced here that Mr. Simpson's case "evidences significant and troubling prosecutorial comments that, standing alone, might violate federal constitutional law" even *after* "this court and the OCCA had previously held that such comments are improper and risk erroneously informing the jury that it cannot consider legally relevant mitigating evidence." *Simpson v. Carpenter*, 912 F.3d 542, 581, 582 n.28 (10th Cir. 2018).

Respondent focuses solely on the instruction's language to disguise the wide impact of the prosecutorial manipulation, but that is not what the OCCA focused on in *Harris* when the instructional language was sent for revision. *Harris v. State*, 164 P.3d 1103, 1114 (Okla. Crim. App. 2007). While the *Harris* court acknowledged the instructional language was troubling, it was the prosecution's repeated emphasis of this language that called for concern. *Id.* And, it is the prosecutors' deliberate exploitation of the jury instruction that is the subject of the question before this Court. This prosecutorial trend existed then and exists now, as evidenced in this case and subsequent cases presented recently to this Court and the Tenth Circuit Court of Appeals. *See Grant v. Royal*, 886 F.3d 874, 966 (10th Cir. 2018), *cert denied*, 139 S. Ct. 924 (2019). *See also Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 893-95 (10th Cir. 2019), *petition for cert. filed*, (No. 19-5968, Sept. 17, 2019); *Johnson v. Carpenter*, 918

F.3d 895, 906-07 (10th Cir. 2019). Respondent offers no response to same.

Respondent relies on additional instructional language given at trial to mitigate any limitations the disputed language may have created in the jurors' understanding. Brief in Opposition at 32-33. Yet, the additional instructions Respondent cites do nothing to instruct the jurors that they may consider that which does not contain a culpability nexus. In fact, if the jurors were to read the moral culpability language in "context of the overall charge" as dictated in *Boyde*, the jurors would have had to incorporate the restrictive nature of this instruction into their analysis and application of all other instructions. *Boyde v. California*, 494 U.S. 370, 378 (1990).

Here, prosecutors repeatedly emphasized as "the law" that there must be a connection between the proffered mitigation evidence and the effect such evidence might have on Mr. Simpson's legal and moral culpability for the crime. *See* Tr. VIII 31. *See also* Tr. VIII 24-25, 31-33, 61. In Oklahoma, where a death verdict must be unanimous, its takes but one juror to determine the death penalty is not appropriate. Thus, no matter what aggravating evidence is presented, and even if the aggravating evidence outweighs the mitigating evidence, jurors – and certainly at least one – could have understood this to mean that without this connection, or nexus, the evidence could not be considered to mitigate the death penalty.

Respondent relies on *Brown v. Payton*, 544 U.S. 133, 143 (2005) and *Boyde v. California*, 494 U.S. 370, 380 (1990) for the proposition that the Tenth Circuit analyzed this claim as required by this Court's precedent. Brief in Opposition at 30. However, in making this argument, Respondent extracts from the analysis the whole of the trial. Respondent focuses review " in light of all of *the jury instructions*." Brief in Opposition at 34 (emphasis added). But, this is not the standard. As cited by Respondent, the standard is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Brief in Opposition at 31 (citing *Boyde*, 494 U.S. at 380). The prosecution's manipulation of "the law" is part of the analysis of whether the jury applied the instruction in a way that prevented consideration of the constitutionally relevant evidence. And, the prosecutorial manipulation here was enough to cause the Tenth Circuit to emphasize the "significant and troubling prosecutorial comments that, standing alone, might violate federal constitutional law." *Simpson v. Carpenter*, 912 F.3d 542, 581, 582 n.28 (10th Cir. 2018).

Where the merits determination ignores the fundamental principles of *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) permitting prosecutors to deliberately exploit a jury instruction by arguing a defendant's evidence must reduce moral culpability, a state court's

adjudication should not be entitled to deference under § 2254(d). Certiorari should be granted.

Respectfully submitted,

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