NO. 19-6061

IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP JONES

Petitioner

-vs-

THE STATE OF OHIO

Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether, pursuant to *Strickland v. Washington,* 466 U.S. 668 (1984) and its progeny, trial counsel is ineffective in a capital case when counsel conducts their mitigation investigation after the trial begins, does not allow their experts enough time to fully investigate their client's background, and, as a result, fails to discover their client's childhood sexual abuse. U.S. Const. amend. VI, VIII, XIV.

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OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at *State v. Jones,* Slip Opinion, 2019-Ohio-2498, 125 N.E.3d 915 (Ohio 2019).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides, in relevant part that:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in relevant part that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTERSTATEMENT

Phillip Jones was convicted and sentenced to die for brutally raping and strangling Susan Yates in April 2007 and leaving her battered corpse in a cemetery, where it was found by a jogger. Jones was charged with one count of aggravated murder, one count of murder, and two counts of rape in May 2007; in late October 2007, the State amended Jones' indictment to make him eligible for the death penalty.

Jones' trial began during the first week of December 2007, and after hearing more than two weeks of evidence, the jury convicted Jones of aggravated murder with a death penalty specification, murder, and rape, plus sentence-enhancing "repeat violent offender" specifications to each count. By the time Jones' mitigation trial began in mid-January 2008, mitigation specialist Thomas Hrdy had met with Jones for five hours over four days; interviewed Jones' mother and his sister Yolanda; and met with six members of Jones' family for more than three hours.

Hrdy asked Jones and his family members whether there was anything but physical abuse in Jones' family, and whether Jones had been sexually abused. They – including Yolanda Jones – denied it. So did Jones. After every meeting, Hrdy left Jones' family members with his telephone number, in case anyone wished to speak with him privately. Nobody called him.

Jones' attorneys met with him frequently. Attorney Donald Hicks met with and explained Ohio's death penalty case procedures to Jones 50-60 times, and

Attorney Kerry O'Brien met with Jones once a week. Not once did Jones tell either lawyer that he had been sexually abused.

The attorneys met with Jones' family members on multiple occasions, including with Jones' sister and family spokesperson Yolanda Jones. Not once did any member of Jones' family, including Yolanda Jones, tell the attorneys that there had been sexual abuse or misconduct in Jones' family.

The attorneys asked. Jones denied it. His family members stayed silent.

Dr. James Siddall, a clinical and forensic psychologist with more than 35 years experience as a defense mitigation expert plus training by Ohio's Public Defender's Office, interviewed Jones for about seven hours, conducted personality and cognitive testing on Jones, reviewed Jones' mental health and prison records — and asked Jones about sexual abuse. Jones denied there was sexual abuse in his family.

Jones' documents included records from at least five other providers, including Summit Psychological Associates, and from Jones' previous 14-year incarceration in the Ohio Department of Rehabilitation and Corrections for a previous sexual assault. Once, in prison, when Jones was trying to be moved to a different cellblock, he reported to prison officials that his father had sexually abused him — but when Dr. Siddall asked him about sexual abuse concerning him or his family, Jones denied it.

During the mitigation phase of his trial, Jones presented 10 witnesses, his own unsworn statement, and documents to show that he had grown up in a family

with "a history of psychiatric, substance-abuse, and criminal-justice problems" that included extensive domestic violence and "moved across the generations and began with Jones's paternal and maternal grandparents. His paternal grandfather was an alcoholic, engaged in domestic abuse, and died of a fatal injection of poisoned heroin. Jones's maternal grandmother suffered from some form of mental instability and alcohol use. She was sent to prison for murdering her boyfriend, who had raped and killed one of her sons. Jones's father committed domestic abuse and suffered from a learning disability. His mother moved through foster care as a child and developed alcohol-related problems." *State v. Jones (Jones I),* 984 N.E.2d 948, ¶¶227, 249 (Ohio 2012).

The jury also heard in mitigation that Jones had been incarcerated several times as a juvenile, and that he had spent most of his adult life in prison. *Jones I,* ¶¶225, 229. The jury heard that Jones had an extensive history of depression, suicide attempts, substance abuse, diminished cognitive functioning, mood disorders, and antisocial personality disorder. *Jones I,* ¶¶224-256.

The jury heard that Jones attended special-education classes in the Akron Public Schools, where he did not adjust well, was moved between schools, was held back more than once, and was eventually expelled in the 10th grade due to truancy, disruptive behavior, and failing grades.

The jury heard that Jones reads at an eighth-grade level, and has a full-scale IQ of 86, which places him in the low-average range. Dr. Siddall testified that the Brief Neuropsychological Cognitive Examination ("BNCE") test showed that, except

for one subset or results, there was no evidence of neurocognitive impairment. Jones' scores on the Structured Inventory of Malingered Symptomatology ("SIMS") were "significantly elevated" and indicated "a level of distortion and exaggeration." Test results on the Minnesota Multiphasic Personality Inventory–2 and the Personality Assessment Inventory showed the same level of distortion. According to Dr. Siddall, the distortion of these scores indicates that Jones may have been attempting to draw attention to his situation or seeking to derive the secondary benefit of talking to mental-health professionals and to possibly receive medication when he took the tests.

The jury heard Dr. Siddall testify that he diagnosed Jones with a mood disorder resulting from a serious history of depression and mood instability associated with repeated attempts at suicide. The jury heard that Jones had a history of alcohol and cannabis use, an antisocial personality disorder, psychotic behavior, and reports of hallucinations — namely, a chronic history of mental illness that required expansive psychiatric treatment, hospitalizations, and medications when Jones was in prison and when he was free.

The jury heard that Jones' mental health problems may have begun as young as age eight, when he drank gasoline in a suicide attempt and had to have his stomach pumped. At another point, he tried to hang himself and had to be admitted to a state psychiatric hospital.

The jury heard Jones' mother testify that Jones was the youngest of eight children, all of whom had problems with law enforcement and drug abuse. The jury

heard that Jones was born with a "lazy eye," and that other children — including his siblings — mercilessly taunted and teased him about it. Jones said in his unsworn statement that he had a physically abusive childhood, in which he witnessed domestic violence on numerous occasions between his parents, and between his siblings as well.

The Ohio Supreme Court reviewed and re-weighed this evidence against the evidence in aggravation as part of its review of Jones' conviction and sentence in *Jones I,* 984 N.E.2d 948.

In his petition for postconviction relief, Jones claimed that his trial counsel was ineffective for failing to employ a mitigation specialist far enough in advance of the trial to find yet more mitigating evidence, particularly of pervasive sexual abuse in his family. The trial court initially denied his petition without a hearing; the Ninth District Court of Appeals twice remanded his case back to the trial court, the latest time to determine whether his counsel was ineffective. See *State v. Jones (Jones II),* 9th Dist. Summit No. 25695, 2011-Ohio-6063 (Ohio Ct.App. Nov. 23, 2011).

After that hearing, the trial court denied Jones' petition, and he appealed again to the Ninth District. That Court found that the trial court did not abuse its discretion, and affirmed. See *State v. Jones (Jones III),* 9th Dist. Summit No. 28063, 2019-Ohio-289 (Ohio Ct.App. Jan. 30, 2019). Jones then sought review in the Ohio Supreme Court, which declined jurisdiction. See *State v. Jones* (*Jones IV*), Slip Opinion 2019-Ohio-2498, 125 N.E.3d 915 (Ohio 2019).

REASONS FOR DENYING THE WRIT

Jones asks this Court to do something this Court has repeatedly refused to do: to create and enshrine bright-line standards for counsel's performance. Specifically, Jones asks this Court to dictate a deadline before which counsel must hire a mitigation specialist in death penalty murder cases. Jones also asks this Court to define the parameters of a "full" or "meaningful" mitigation investigation. Then, he asks this Court to apply those standards to his case in order to declare that his counsel's performance was *per se* deficient under *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny.

Next, Jones asks this Court to assume from a single paragraph in his Petition that his lawyers' actions were automatically prejudicial under *Strickland.*

In a nutshell, however, Jones asks this Court to perform essentially the same function that Ohio's Ninth District Court of Appeals performed – which is to review the trial court's decision for an abuse of discretion – but to reach a different conclusion. That is not this Court's role.

I. Ineffective Assistance of Counsel and *Strickland v. Washington*

The Sixth Amendment guarantees several rights to a criminal defendant to ensure his right to a fair trial, and among them is the right to have the assistance of counsel. See *Strickland*, 466 U.S. at 685. Because attorneys play such a necessary role in ensuring that a defendant's trial is fair, this Court has recognized that a defendant has not only a right to assistance, but to effective assistance by counsel. See *Strickland*, 466 U.S. at 686.

This Court has never tolerated mere second-guessing of a lawyer's performance by a disgruntled client, however. Instead, this Court has insisted that a defendant bear the burden to demonstrate two things: that his counsel's performance was deficient, meaning counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"[;] and then that counsel's performance prejudiced the defendant, meaning counsel's errors were so serious that they deprived the defendant of a trial whose result is reliable. *Strickland*, 466 U.S. at 687.

To demonstrate *Strickland*'s deficient performance prong, the defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The reasonableness of counsel's conduct must be judged as of the time it occurred, not in hindsight. See, e.g., *Maryland v. Kulbicki*, 136 S.Ct. 2, 4 (2015).

As for the prejudice prong, in the context of a mitigation hearing in a death-penalty case, "the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 698.

II. This Court Does Not Prescribe Performance Standards

Jones' Question posits that "trial counsel is ineffective in a capital case when counsel conducts their mitigation investigation after the trial begins, does not allow

their experts enough time to fully investigate their client's background, and, as a result, fails to discover their client's childhood sexual abuse[,]" and he cites to two versions of the American Bar Association's Guidelines for capital counsel for support.

This Court has repeatedly refused to make bright-line rules dictating when counsel will be effective, starting with *Strickland*.

> The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. *** Prevailing norms of practice as reflective in American Bar Association standards and the like, *** are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-689.

Concerning just the ABA Guidelines, this Court has rejected the idea that they dictate what is constitutionally effective in three cases since *Strickland*. See *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) (rejecting invitation to enshrine bright-line rules); *Bobby v. Van Hook*, 558 U.S. 4 (2009); *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (including ABA Guidelines among nondispositive authorities).

To the extent that Jones' argument is that counsel's performance is *per se* deficient if a later attorney or investigator discovers information that could have been used in a mitigation proceeding, this Court has already rejected such an argument, particularly in cases such as Jones' where the defendant and/or his friends and family have given counsel reason *not* to believe a particular mitigation

strategy might exist or be fruitful. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. *** And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691.

As this Court has noted, "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" *Harrington v. Richter*, 562 U.S. 86, 109 (2011).

The cases Jones cites do not actually support his argument. They and other cases where counsel *has* been found to be ineffective share one of three common traits that are not present in Jones' case. In each case, trial counsel either: 1) did no mitigation investigation at all; 2) limited the mitigation investigation based on incorrect notions of the law that counsel could easily have dispelled with research, see *Hinton v. Alabama*, 571 U.S. 263 (2014), and *Williams v. Taylor*, 529 U.S. 362, 373, 395-396 (2000); or 3) knew or reasonably should have known of the potential existence of information that would have changed the entire complexion of their client's mitigation case, based on information they had received already or on information that was publicly available to them, see *Wiggins v. Smith*, 539 U.S. 510, 523-525 (2003); see also *Foust v. Houk*, 655 F.3d 524, 536-537 (6th Cir.2011); *Johnson v. Bagley*, 544 F.3d 592 (6th Cir.2008).

For instance, the lawyer representing George Porter, Jr., conducted no mitigation investigation at all. Yet, counsel had just enough insight into Porter to have told the jury that Porter was not "mentally healthy" and had "other handicaps" that were not apparent during the trial — but then did not put on any evidence related to Porter's mental health. See *Porter v. McCollum*, 558 U.S. 30, 33, 40 (2009).

In another example, Ronald Rompilla's counsel knew that Pennsylvania prosecutors would rely on records from Rompilla's previous conviction — which included a range of mitigation leads such as prison files that contradicted Rompilla's vanilla depiction of his childhood, mental health experts' reports pointing to schizophrenia and other mental disorders, and test scores showing a third grade level of cognition after nine years of schooling — but counsel never looked at the file. See *Rompilla v. Beard*, 545 U.S. 374, 387-393 (2005).

Next, Jones argues that Ohio's courts ought to have applied a test from *Johnson v. Bagley*, 544 F.3d 592 (6th Cir.2008) to determine whether mitigation specialist Hrdy's investigation was adequate to have discovered the history of sexual abuse in Jones' family. Jones' argument is misplaced for three reasons.

First, it is undermined by this Court's decision in *Bobby v. Van Hook*, 558 U.S. 4, 18 (2009). Second, *Bagley* does not pronounce a rule of law that Ohio declined to follow; instead, the Sixth Circuit in *Bagley* reviewed the facts and conducted the analysis this Court set out in *Strickland*. See *Bagley, passim.*

Third, Jones' argument about Hrdy does not take into account the attorneys' testimony, Hrdy's testimony, or Siddall's testimony that when asked about sexual abuse, Jones and his family members all denied it took place. See *Rompilla*, 545 U.S. at 389 ("Questioning a few more family members and searching for old records can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there.")

III. Jones Did Not Demonstrate Prejudice

Finally, the Question Jones presents does not account for *Strickland*'s requirement that Jones demonstrate prejudice. His Petition devotes one paragraph to the topic, and treats it as if it were a given.

This Court, however, has presumed prejudice only in cases where impairments to the defendant's Sixth Amendment rights are easy to identify and prejudice is so likely that a case-by-case inquiry is not worth the cost, such as when counsel has been compromised or denied at a critical stage during trial or on appeal, or counsel completely fails to counter the prosecution's case. See *Strickland*, 466 U.S. at 692; *United States v. Cronic*, 466 U.S. 648 (1984); *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (actual conflict of interest); *Garza v. Idaho*, 139 S.Ct. 738, 743-744 (2019).

Instead, *Strickland* required Jones to demonstrated by more than mere talismanic recitation of assumptions that there is a reasonable probability that the jury would not have recommended the death penalty, had the jury heard the evidence he presented during his postconviction hearing in addition to the evidence

Jones already presented in mitigation and that the State presented in aggravation. See *Wiggins*, 539 U.S. at 534, 536.

Jones has not met that burden. Ohio's Court of Appeals described the mitigation evidence that Jones presented during his trial as substantial, see *Jones III*, 2019-Ohio-289, ¶52, and, when the Ohio Supreme Court weighed it against the aggravation evidence on direct review, that Court found that the death penalty was appropriate. The evidence Jones now argues his counsel was ineffective for not finding earlier does not change the character of that evidence, or his case. It is not different in character from the evidence he presented; it is only more, and that is not enough.

CONCLUSION

For the above-stated reasons, the State of Ohio respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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