No. 24-5347

IN THE
SUPREME COURT OF THE UNITED STATES

DEVIN ALLEN BENNETT, *Petitioner,*

v.

MISSISSIPPI, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
MISSISSIPPI SUPREME COURT

REPLY BRIEF FOR PETITIONER

CAPITAL CASE

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INTRODUCTION

The State's brief proves the salient point that Mississippi has taken a seriously wrong turn in assessing claims of penalty-phase ineffective assistance of counsel in capital cases. The lower court remanded this case to the trial court for a determination of prejudice after Bennett made a "substantial showing" of counsel ineffectiveness. *Bennett v. State*, 990 So. 2d 155, 159 (Miss. 2008). On appeal after a hearing, the Mississippi Supreme Court denied relief based on a flawed view of mitigation and *Strickland* prejudice—not on any alternative, independent ground. Pet. App. 24a ("[T]his Court is not required to decide whether [trial counsel] was in effective vel non., as *Strickland* is a two-part test."); Pet. App. 26a ("We affirm the trial court's conclusion that Bennett's proposed mitigation case presented in his PCR would not have led to a reasonable probability of a different outcome due to its double-edged nature.").

Contrary to the decision below, the appropriate Sixth Amendment prejudice inquiry is focused on the ultimate question of death-worthiness: whether a defendant's evidence provides a sufficiently mitigating explanation of his circumstances to offset his criminal *actions.* Thus, evidence of mental illness, abuse, homelessness, and drug dependence is *exclusively* mitigating in assessing prejudice and has been regarded as such in this Court's opinions applying the Sixth Amendment. *See Williams v. Taylor,* 529 U.S. 362 (2000); *Rompilla v. Beard,* 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003).

Mississippi's approach to ineffective assistance of counsel claims routinely and unjustifiably treats the most powerful forms of mitigating evidence as "aggravating" in assessing prejudice. Such an approach not only denies defendants such as Bennett relief in cases of manifest injustice where trial counsel's admitted ineffectiveness prevented the discovery and presentation of powerful evidence of reduced moral culpability. It also sends an inappropriate and inaccurate signal that mitigating evidence such as mental illness and abuse as a child is somehow a reason for *executing* a defendant rather than *withholding* the death penalty.

Intervention is required here to correct Mississippi's entrenched misunderstanding of the prejudice analysis under *Strickland v. Washington,* 466 U.S. 668 (1984), and to ensure reliable resolution of innumerable death penalty appeals. No state law grounds bar this Petition, and it is not presented to this Court for AEDPA review. The Court should grant the question presented in Bennett's Petition.

REPLY ARGUMENT

I. The Mississippi Supreme Court Denied Relief Based on a Flawed View of Mitigation and *Strickland* Prejudice; It Did Not Determine This Case on any Alternate, Independent Ground.

The State says that "even if the petition presented a bona fide question on *Strickland* prejudice" the lower court's decision "rests on an alternate, independent ground." Resp. p. 12. According to the State, the lower court really held that Bennett failed to make either showing under *Strickland*. The State is wrong. This case directly presents the Mississippi Supreme Court's disturbing trend of discounting mitigation

unearthed in post-conviction relating to the defendant's reduced moral culpability simply because the court could imagine some downside to that evidence.

1. The Mississippi Supreme Court remanded this case after holding that that Bennett had made a "substantial showing" of counsel ineffectiveness during the penalty phase of his trial. *Bennett v. State*, 990 So. 2d 155, 159 (Miss. 2008). The appellate court sent the case to the trial court for a "determine[ation]" of whether the testimony presented in affidavits attached to Bennett's post-conviction petition "would have been relevant to a jury's consideration of whether to impose a sentence of life in prison or death." *Id*.

The State, in fact, has recognized that Bennett's case was remanded to the trial court *for a determination of prejudice*. In explaining to the Mississippi Supreme Court the differences between Bennett's case and another inmate's case, the State acknowledged as follows: "the [Mississippi Supreme] Court found that Bennett made a substantial showing of deficient performance, but stated no opinion on prejudice, leaving that inquiry to the trial court."[1] The State is correct: at issue in the trial court and then on appeal was *Strickland* prejudice.

2. This Court can also take the Mississippi Supreme Court at its word when it says what it is *not* deciding. Here, the court concluded that "it is not required to decide whether [trial counsel] was in effective vel non., as *Strickland* is a two-part test." Pet. App. 24a. The Court concluded this after explaining, "it is arguable that

[1] *See* State's Response Brief, *Powers v. State*, Supreme Court of Mississippi, No. 2017-DR-00696-SCT, p. 66, n 18 (the State explaining how Bennett's case differs from another case).

counsel fell below the standard of a minimally competent attorney by failing to more fully investigate this potential theory of mitigation defense." Pet. App. 22a.

In addition, the Mississippi Supreme Court more than once couched its holding in *Strickland* prejudice terms:

- "[I]t is apparent that the trial court correctly found that the alternative mitigation would have been inferior to the one presented at trial." Pet. App. 24a.[2]
- "We affirm the trial court's conclusion that Bennett's proposed mitigation case presented in his PCR would not have led to a reasonable probability of a different outcome due to its double-edged nature." Pet. App. 26a.

All in all, Bennett's new mitigation evidence presented in post-conviction had remarkable value. If not for the Mississippi Supreme Court improperly discounting mitigation evidence due to its "double-edged nature," "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith,* 539 U.S. 510, 537 (2003).

II. The Decision Below Flouts Federal Law.

The Mississippi Supreme Court's misguided focus on the purported "double-edged nature" of the new evidence fails to comport with clear takeaways from this Court's precedents. *See e.g.*, *Williams v. Taylor,* 529 U.S. 362 (2000) and *Rompilla v. Beard,* 545 U.S. 374 (2005); *see also Zant v. Stephens,* 462 U.S. 862, 885 (1983) (citations omitted) (suggesting that "due process of law would require that [a] jury's decision to impose death be set aside" if a State had "attached the 'aggravating' label

[2] In noting the Mississippi Supreme Court's prejudice holding, Bennett is not conceding the Court phrased or applied *Strickland* correctly.

to … conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness."). Discounting entire categories of mitigation and failing to reweigh the entirety of the evidence contravenes decisions from this Court.

1. Contrary to the State's contention, the lower court avoided the fact-intensive, case-specific analysis that it should have undertaken. The court skipped that analysis by instead presuming that any evidence of mental health issues or abuse invites an increased risk of a death sentence. This judicially created presumption effectively transforms all mitigating evidence into aggravating evidence, and it insulates from review even the most egregious failures by trial counsel to conduct a reasonable mitigation investigation.

Below are categories of evidence that the court turned from mitigating into aggravating by branding the evidence "doubled-edged":

- Bennett had been deprived of the care, concern, and paternal attention that children deserve. His life was filled with physical and mental abuse and neglect. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Porter v. McCollum*, 558 U.S. 30 (2009); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

- Bennett's parents' both used drugs in his presence during his formative years which resulted in lack of appropriate parenting and resulted in failure to nurture. *See Lockett v Ohio*, 438 U.S. 586 (1978).

- Bennett's schooling was interrupted by behavior associated with hyperactivity and drug use. *See Rompilla v. Beard*, 545 U.S. 374 (2005). Bennett also self-medicated and failed in his goals at rehabilitation as a result of a bi-polar disorder.

- Bennett suffered a turbulent family history and a traumatic upbringing wherein his father physically abused him while he was on drugs himself. *See Brewer v. Quarterman*, 550 U.S. 286 (2007); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v Ohio*, 438 U.S. 586 (1978); and *Rompilla v Beard*, 545 U.S. 374 (2005).

- Bennett's mother had sex with men on multiple occasions in his presence and she abused drugs. *See Andrus vs Texas*, 590 U.S. 806 (2020). Bennett suffered PTSD as a result of untoward incidents as a child including finding his mother unconscious with a syringe in her arm.

- Bennett was homeless and lived in shelters because of his untenable homelife. *See Rompilla v Beard*, 545 U.S. 374 (2005).

The discounting of Bennett's mitigation follows a troubling trend in Mississippi. Before it decided Bennett's case, the Mississippi Supreme Court found "no prejudice result[ing] from an alleged failure to present FASD-related testimony because it would have been a double-edged sword as far as mitigating evidence." *Garcia v. State*, 356 So. 3d 101, 114 (Miss. 2023). As in this case, the *Garcia* court found the mitigation presented "was just as likely to persuade jurors that the death-penalty was appropriate." *Id.*; *see* Pet. App. 25a (explaining mitigation is doubled-edged because "abuse begets abuse" under the "tropes of popular psychology.").

Mississippi's conceptual and legal error treats damaged individuals as *more* deserving of execution. While that alone is constitutionally disquieting, it is even more troubling in Mississippi because future dangerousness is not a statutory aggravator. *See Balfour v. State*, 598 So. 2d 731, 748 (Miss. 1992).

2. The Mississippi Supreme Court's truncated approach to *Strickland* prejudice allows it to ignore swaths of mitigation evidence discovered in post-conviction. Given this, Bennett was not afforded any meaningful review of his ineffectiveness claim.

a. The State argues that the "double-edged" nature of the mitigating evidence matters "because it affects the weight of the mitigating evidence and thus the balance between the mitigating and aggravating circumstances." Resp. p. 18. Even if this argument on its own held merit, it is for sure not the analysis the Mississippi Supreme Court undertook. The lower court did not re-weigh any evidence; it considered the "doubled-edged" evidence in isolation and altogether bypassed the prejudice inquiry. After all, if everything is "doubled-edged," it is never prejudicial.

But that precludes accurate, individualized reweighing of the evidence. *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."). "[T]he true impact of new evidence, both aggravating and mitigating, can only be understood by asking how the jury would have considered that evidence in light of what it already knew." *Trevino v. Davis*, 584 U.S. 1019, 138 S. Ct. 1793, 1794, 201 L. Ed. 2d 1014 (2018) (Sotomayor, J., dissenting). "[A] court cannot simply conclude that new evidence in aggravation cancels out new evidence in mitigation." *Id.*

b. In what can only be described as an afterthought, the Mississippi Supreme Court notes the correct *Strickland* standard. The court then explicitly ignores it. The Mississippi Supreme Court recognized that "it is possible a jury might have taken pity on Bennett given his claimed history of childhood abuse." Pet. App. 22a. That alone satisfies *Strickland* prejudice. Bennett was not required to show that "the jury" in its entirety would have been so moved; it is sufficient that, had this evidence had been placed "on the mitigating side of the scale, there is a reasonable

probability that at least one juror would have struck a different balance." *Wiggins,* 539 U.S. at 537; *see Thornell v. Jones*, 144 S. Ct. 1302, 1310 (2024) (discussing the prejudice standard).

The Mississippi Supreme Court's holding infers that an analysis of prejudice under *Strickland* need not be followed anytime evidence can be considered "double-edged." And, as discussed, any evidence can be construed as "double-edged" in the context of mitigation. If the Mississippi Supreme Court's analysis is correct, all mitigating evidence found on post-conviction can be tossed aside by appellate courts under the "double-edged" moniker without reweighing the evidence.

III. No State Law Grounds Bar This Petition, and It Does Not Come Before This Court on AEDPA Review.

In support of its claim that the decision below is correct, the respondent cites cases where this Court reviewed appeals of denials of petitions for writ of habeas corpus. Resp. pp. 13; 17- 18. *See Thornell v. Jones,* 602 U.S. 154 (2024)*; Wong v. Belmontes*, 558 U.S. 15 (2009); *Cullen v. Pinholster*, 563 U.S. 170 (2011); *Darden v. Wainwright*, 477 U.S. 168 (1986). These cases were not procedurally before this Court in the same manner as Bennett's petition.

This case is not one where the Court must decipher whether there are any "adequate and independent state-law ground[s]." *Cruz v. Arizona*, 598 U.S. 17, 21 (2023). Nor does this case present one calling for AEDPA review. *See generally* 28 U.S.C. §2254. Directly presented for review is a state court's truncated approach to mitigation and *Strickland* prejudice that contravenes this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 1, 2024.

Respectfully submitted,

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