No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LONDELL BOND,
Petitioner,

v.

JASEN BOHINSKI, SUPERINTENDENT DALLAS SCI;
THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA;
THE ATTORNEY GENERAL OF THE STATE OF PHILADELPHIA,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the "probing and fact-specific analysis" mandated by *Strickland v. Washington* and *Sears v. Upton* require courts to weigh both the strengths and weakness of the prosecution's evidence when determining whether a criminal defendant was prejudiced by his counsel's deficient performance?

RELATED PROCEEDINGS IN LOWER FEDERAL COURTS

Eastern District of Pennsylvania, *Bond v. Walsh*, No. 2-13-cv-01553, 2020 WL 6939883 (E.D. Pa. Nov. 24, 2020)

Third Circuit Court of Appeals, *Bond v. Superintendent Dallas SCI*, No. 21-1027, 2024 WL 2762489 (3d. Cir. May 30, 2024)

RELATED PROCEEDINGS IN STATE COURTS

Superior Court of Pennsylvania, *Commonwealth v. Bond*, No. 732 EDA 2010 (Pa. Super. Ct. Jan. 18, 2012) (appeal from denial of post-conviction relief)

Superior Court of Pennsylvania, *Commonwealth v. Bond*, No. 1100 EDA 2006, 951 A.2d 1205 (Pa. Super. Ct. Feb. 26, 2008) (direct appeal)

Philadelphia Court of Common Pleas, *Commonwealth v. Bond*, CP-51-CR-1104831-2003 (Phila. C.C.P. 2003) (trial and re-trial)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Londell Bond respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit affirming the district court's denial of Mr. Bond's petition for habeas corpus under 28 U.S.C. § 2254.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the district court's judgment is unreported and is attached as Appendix 2. The order of the district court dismissing Bond's habeas petition is unreported and is attached as Appendix 3.

JURISDICTION

The Third Circuit Court of Appeals affirmed denial of Bond's habeas petition on May 30, 2024. It denied a petition for rehearing and rehearing *en banc* on August 2, 2024. Justice Alito extended the time for filing certiorari until November 30, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . assistance of counsel for his defense.

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

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

INTRODUCTION

This Court has repeatedly articulated the standard for assessing prejudice in an ineffective assistance of counsel claim. *See Strickland v. Washington,* 466 U.S. 668, 694 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000); *Thornell v. Jones*, 602 U.S. 154, 163 (2024). In *Sears v. Upton*, this Court made clear that *Strickland* prejudice analysis requires a fact-intensive weighing of the evidence: "we have consistently explained that the *Strickland* inquiry requires precisely [a] probing and fact-specific analysis." *Sears v. Upton*, 561 U.S. 945, 955 (2010).

The Third Circuit did not examine the quality of the prosecution's evidence or engage with the facts of Mr. Bond's case in any meaningful way. Instead, the Third Circuit merely listed the *types* of evidence presented against him and reached the bare conclusion that it was sufficient and that therefore, he was not prejudiced by trial counsel's errors. App. 2 at 6.

At trial, the prosecution's key identification witness made repeated references to viewing "mug shots" when describing a prior identification of Mr. Bond from a photo array. Such references are highly prejudicial because the term mug shot commonly implies that the individual shown had a prior criminal record of prior arrest and likely conviction. Trial counsel did not object to these statements, request a mistrial or curative instruction, or take any other corrective action.

The lower courts determined that Mr. Bond was not prejudiced by trial counsel's failure to protect him from the references to "mug shots" because the evidence was otherwise sufficient to convict. This approach accepted the prosecution's evidence at face value without considering the weaknesses and flaws in the evidence.

Rather than weigh the strength and weaknesses of the evidence, the court erroneously "assumed, rather than found" that no prejudice ensued, exemplifying a type of "truncated prejudice inquiry" that this Court has admonished against. *Sears*, 561 U.S. at 954-55.

STATEMENT OF THE CASE

A. Factual Background

Mr. Bond was charged in the Philadelphia Court of Common Pleas with fatally shooting Edward Carter during a gunpoint robbery. The shooting happened in November 2000, but Mr. Bond was not arrested and charged until July 2003. His first trial resulted in a deadlocked jury and a mistrial; he was re-tried in March 2005, convicted of second-degree murder, and sentenced to life without parole.

Of more than a dozen witnesses to the incident, only one, Larry Lane, eventually identified Mr. Bond as the shooter. Though Lane admitted to being "high" after consuming four mixed drinks and two beers on the night of the shooting, he identified Mr. Bond nearly three years later, contradicting his earlier descriptions to the police which did not match Mr. Bond. A230. First, the night of the incident, Lane provided a written statement to detectives describing the shooter as a black male, 5'4" tall and twenty-six to twenty-seven years old. A234-36.[1] Bond was approximately 6'2" tall and only nineteen years old at the time. A236, A420.

[1] Citations to A—refer to the Appendix filed in the Third Circuit in *Bond v. Superintendent Dallas SCI*, No. 21-1027.

On July 1, 2003, Lane was brought to the police station to make an identification from a photo array and an in-person line up. A219. Lane stated that the person in photo number 2, Mr. Bond, looked like the shooter. A235. Next, he filled out a witness description form in which he indicated that the shooter was about 5'5" tall. A206. Lane subsequently identified Mr. Bond in the lineup notwithstanding the seven-inch height discrepancy with the description he had just given. A220, A236. At trial, he again identified Mr. Bond as the shooter, despite admitting that Mr. Bond appeared as tall as him—6'2". A213, A236.

When directly asked by the prosecutor to identify the photographic array from July 2003, Lane told the jury that he was looking at "mug shots." A219. He then told the jury that he identified Londell Bond from those mugshot photographs. He later repeated his explanation that he looked at "mug shots" on two additional occasions. A235, A237. Trial counsel remained silent and neither objected nor asked for a curative instruction.

The Commonwealth's other evidence included two additional civilian witnesses, ostensibly presented for identification purposes: William Ingram, the owner of the lounge where the shooting took place, and Beatrice Garland, a patron on the night of the shooting. Both testified that they had observed the shooter, but neither could identify Mr. Bond as the perpetrator. A208, A287.

Bar patrons had seized a sweatshirt from the shooter when they tried to stop him from fleeing the scene. A216. None of the patrons who tried to stop the shooter, other than Mr. Lane, ever identified Mr. Bond as the perpetrator. A DNA analyst

testified that a DNA mixture of at least two contributors was found on two different sections of the sweatshirt, and that Mr. Bond's DNA profile was included at one of these areas but excluded from the other. A378-80. A latent fingerprint found on the lighter found in the sweatshirt pocket was matched to Mr. Bond. A334.

Mr. Bond presented alibi evidence through his great aunt, Diana Barnes. Barnes was a retired New York City police officer who at the time of trial managed a restaurant in Freeport, New York. A416. She testified that at the time of the shooting, Mr. Bond was living in New York and working at the restaurant. A419.

B. Procedural Background

Mr. Bond appealed his conviction to the Pennsylvania Superior Court which affirmed. *Commonwealth v. Bond*, 951 A.2d 1205 (Pa. Super. Ct. 2008). The Pennsylvania Supreme Court denied review. *Commonwealth v. Bond*, 956 A.2d 431 (Pa. 2008). Mr. Bond filed a petition under Pennsylvania's Post Conviction Review Act (PCRA) arguing that his trial counsel was constitutionally ineffective for failing to object to Lane's use of "mug shots" to describe the photo array from which he identified Mr. Bond. App. 2 at 4. The PCRA court dismissed his petition without a hearing and the Pennsylvania Superior Court affirmed. App. 2 at 4.

Mr. Bond then filed a petition under 28 U.S.C. § 2254 in the District Court for the Eastern District of Pennsylvania, advancing the same argument. The District Court denied relief, finding that Bond had failed to demonstrate that the references to "mug shots" prejudiced him because no evidence was introduced to suggest that the photos were evidence of past criminal activity. *Bond v. Walsh*, No. 2-13-cv-01553, 2020 WL 6939883, at *7 (E.D. Pa. Nov. 24, 2020).

The Court of Appeals for the Third Circuit affirmed the District Court's decision. It summarily found that the District Court's decision was not unreasonable. Ex. A at 6. It reasoned that Mr. Bond was not prejudiced because "[s]ubstantial evidence . . . supported his conviction" since the DNA, fingerprint, and eyewitness evidence outweighed Mr. Bond's "weak" alibi defense. Ex. A at 6. A petition for rehearing *en banc* was subsequently denied.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to clarify for the lower courts that the *Strickland* test for prejudice does not permit reviewing courts to accept the prosecution's case at face value without examining both the strength and the weaknesses of that evidence. In this case, the prosecution's evidence had glaring weaknesses. Mr. Bond did not match the description or the of the perpetrator, thus rendering the sole identification testimony extremely suspect. The DNA and fingerprint evidence showed that the sweatshirt was passed around among several different people. While the evidence may have shown that Mr. Bond had contact with the sweatshirt at some point, it could not indicate when the evidence was left or who was wearing the sweatshirt at the time of the crime. These evidentiary weaknesses turn what might appear to be a strong case on the surface into a prosecution replete with questions and doubt.

The Third Circuit failed to conduct the "probing and fact-specific analysis" of prejudice that this Court required in *Sears*. *Sears*, 561 U.S. at 955; *see also Breakiron v. Horn*, 642 F.3d 126, 140 (3d Cir. 2011) (holding that merely noting the sufficiency of the evidence without examining its weight was an unreasonable application of

Strickland's prejudice prong). This Court should grant the writ to reaffirm the rigorous prejudice analysis that *Strickland* and *Sears* require and protect a critically important constitutional right.

I. THE SIXTH AMENDMENT REQUIRES COURTS TO WEIGH THE STRENGTHS AND WEAKNESSES OF THE EVIDENCE WHEN ASESSING PREJUDICE UNDER *STRICKLAND*.

The Third Circuit's application of *Strickland* is at odds with this Court's precedent of how to evaluate prejudice in an ineffective assistance of counsel claim. *Strickland* requires a showing that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. To show prejudice, Mr. Bond must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Courts must consider the totality of the evidence before the factfinder. *Id.* at 695. However, Mr. Bond does not need to show that he would have been acquitted in absence of trial counsel's error.[2] *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). If there is a reasonable probability that absent the errors, the factfinder would have had a reasonable doubt respecting Mr. Bond's guilt, then he was prejudiced. *Hinton v. Alabama*, 571 U.S. 263, 276 (2014).

Strickland requires a "probing and fact-specific analysis" of prejudice. *Sears*, 561 U.S. at 955. This analysis is qualitative. It necessarily entails reweighing *all* the

[2] *Strickland*'s prejudice standard is co-extensive with that of materiality of exculpatory information not disclosed to the defense by the prosecution. *Strickland*, 466 U.S. at 694 (citing *United States v. Agurs*, 427 U.S. 97, 104 (1976)); *see also United States v. Bagley*, 473 U.S. 667, 682 (1985).

evidence, in light of trial counsel's errors. *See Williams*, 529 U.S. at 397-98 (finding state court prejudice determination unreasonable where "it failed to evaluate the totality of available mitigation evidence . . . in reweighing it against the evidence in aggravation"). This in effect assesses prejudice by "comparing the actual trial with the hypothetical trial that would have taken place had counsel performed competently." *Ross v. Davis*, 29 F.4th 1028, 1055 (9th Cir. 2022) (internal citations omitted). This inquiry is not merely an accounting of the amount of evidence; it must examine the nature and quality of the evidence. *See Thornell*, 602 U.S. at 164 ("Determining whether a defense expert's report or testimony would have created a reasonable probability of a different result if it had been offered at trial necessarily requires an evaluation of the strength of that report or testimony.").

In *Andrus v. Texas*, this Court re-affirmed what *Sears* had established: *Strickland* prejudice is a "weighty and record-intensive analysis." *Andrus v. Texas*, 590 U.S. 806, 824 (2020). The lower court's "brief order" denying relief was vacated because it "did not analyze *Strickland* prejudice or engage with the effect the additional mitigating evidence highlighted by Andrus would have had on the jury." *Id.* at 822. Because Andrus' death sentence required a unanimous jury finding, this Court found that "prejudice here requires only a reasonable probability that at least one juror would have struck a different balance." *Id.* at 822 (internal quotations omitted). Mr. Bond's conviction required a unanimous jury to find him guilty beyond a reasonable doubt. Indeed, this "one juror" rationale applies with equal force to assessing prejudice with respect to evidence establishing guilt.

Here, the lower courts were required to assess the effect of counsel's deficient performance on the trial evidence. The Third Circuit failed to conduct such a rigorous inquiry. The Third Circuit, like the Pennsylvania Superior Court, did not weigh the strengths and weaknesses of the case, but simply recited a list of the types of evidence presented against Mr. Bond. In a single paragraph of analysis it reached the bare conclusion that "[s]ubstantial evidence . . . supported his conviction" and that therefore Bond suffered no prejudice. Ex. A at 6. This Court should tell the lower courts that *Strickland* requires more.

In *Sears*, this Court found the lower court to have improperly "placed undue reliance on the assumed reasonableness of counsel's mitigation theory." *Sears*, 561 U.S. at 953. Likewise, here the Third Circuit did not consider the quality of the evidence. It assumed that each of the pieces of evidence presented against Mr. Bond was probative, credible, and inculpatory. This was not the case.

To the contrary, a "probing and fact-specific analysis" of the Commonwealth's evidence reveals that its case was not as strong as it might first appear. Where, as here, the identity of the perpetrator is the central issue in the case, evidence going to identification should be examined with scrutiny. *See United States v. Wade*, 388 U.S. 218, 229 (1967) ("the vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification"). Eyewitness Larry Lane, who was intoxicated at the time of the shooting, provided pre-trial descriptions of the offender that did not match Mr. Bond. At both the time of the crime and the line-up, Lane described the perpetrator as someone older and much shorter than Mr.

Bond. This is a significant difference, particularly as Lane is about the same height as Mr. Bond and believed that the perpetrator was a man considerably shorter than he. Moreover, the identification was made three years after the shooting and was of questionable reliability. *See Neil v. Biggers*, 409 U.S. 188, 201 (1972) (finding that the passage of seven months between the incident and the identification "would be a seriously negative factor").

The panel also accepted the DNA testimony as determining the identity of the shooter, even though the sweatshirt contained DNA from people other than Mr. Bond, who were just as likely to have worn the sweatshirt at the time of the robbery. Similarly, the fingerprint on the lighter, an item easily passed from person to person, only shows that he touched the lighter at some unknown time. But the panel simply accepted the prosecution's evidence at face value and found that it was substantial.

However, the *amount* of evidence initially presented at trial is irrelevant to determining prejudice. *See Andrus*, 590 U.S. at 823-24. Having found that some quantum of evidence was presented, the Third Circuit ended the inquiry there. *See Sears*, 561 U.S. at 955 ("We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.") (emphasis in original). It did not account for the overall effect of counsel's errors, which placed before the jury the idea that Mr. Bond was involved in prior criminal activity, undermining his presumption of innocence. It superficially "assumed, rather than

found," that that Mr. Bond was not prejudiced. *Sears*, 561 U.S. at 953. *Strickland* requires more.

This Court recently emphasized the need for a substantive weighing of evidence in assessing *Strickland* prejudice. In *Thornell v. Jones*, the Ninth Circuit erred where it "failed adequately to take into account the weighty aggravating circumstances" presented at sentencing and "did not mention those circumstances at all" in its initial opinion. *Thornell*, 602 U.S. at 164-65. So too here, the Third Circuit did not acknowledge the facts that tended to diminish the Commonwealth's case against Mr. Bond. It did not mention the weaknesses in Lane's identification or limited probative value of the DNA and fingerprint. Constrained by this, it would have been impossible for the Third Circuit to engage in the type of "comparative analysis" required to determine whether Mr. Bond was prejudiced. *Id.* at 164; *see also Dennis v. Sec'y Pa. Dep't of Corrs.*, 834 F.3d 263, 301 (3d. Cir. 2016) (emphasizing the need to consider the weaknesses in the prosecution's evidence as part of a prejudice/materiality analysis).

Against the backdrop of the prosecution's flawed evidence, counsel's deficient performance resulted in the jury hearing testimony strongly suggesting Mr. Bond's prior criminal activity. A mug shot is commonly defined as a photograph of a person taken by the police at the time of arrest.[3] In common parlance, a mug shot is an arrest

[3] Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/mugshot (last visited November 22, 2024).

photo and thus necessarily relates to criminal activity. When a jury learns that the police have possession of a person's mug shot, the jury necessarily knows that the suspect has been previously arrested and likely convicted of prior crimes.

Accordingly, "[m]ug shots in particular, are highly prejudicial, and their visual impact can leave a lasting impression on a jury." *United States v. Cunningham*, 694 F.3d 372, 387 n.24 (3d Cir. 2012) (quoting *United States v. Lopez-Medina*, 461 F.3d 724, 749 (6th Cir. 2006)). Mug shot evidence is prejudicial precisely because "it informs the jury that a defendant has a criminal record." *United States v. McCoy*, 848 F.2d 743, 746 (6th Cir. 1998). The use of the term "mug shot" is so common in popular culture that the inference that a person was involved in criminal activity "is natural, perhaps automatic." *Barnes v. United States*, 365 F.2d 509, 511 (D.C. Cir. 1966).

This type of evidence is recognized as uniquely prejudicial. *See Old Chief v. United States*, 519 U.S. 172, 180-81 (1997) (noting the risk of "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged."). In failing to weigh the evidence the Third Circuit did not give due consideration to the hypothetical impact of the repeated references to "mug shots" during Lane's testimony.

As to Mr. Bond's alibi, the Third Circuit only noted that it was "weak" without considering the possible impact of counsel's errors upon the jury's perception of this evidence. Alibi evidence becomes less powerful when the jury is made to believe that it is being proffered by a criminal, rather than an individual who is presumed innocent. Although Mr. Bond did not produce any documentary evidence

corroborating his alibi, this is easily understandable given the three-year delay between the shooting and his arrest. While the evidence against Mr. Bond was rife with deficiencies, the inference flowing from the references to "mug shots"—that he was already a criminal—would have influenced the jury to resolve any doubt in favor of conviction.

In *Breakiron*, the Third Circuit found that the petitioner was prejudiced by counsel's failure to take corrective action during voir dire when a venireperson testified that the defendant "used to do a lot of robbing." *Breakiron*, 642 F.3d at 141. The petitioner claimed counsel was ineffective for failing to move to strike the panel, seek a mistrial, or take other corrective action to protect him from this statement. *Id.* In determining prejudice, the court noted that "determining the objectively probable effect of prior-crimes evidence is hardly a novel task." *Id.* Such evidence "is patently prejudicial…so prejudicial that it cannot be cured even by a proper limiting instruction, which was neither requested nor given here." *Id.* at 147.

The question the Third Circuit should have, but did not address, is whether there was a reasonable probability that a juror might have harbored a reasonable doubt as to Mr. Bond's guilt given the deficiencies in the prosecution's evidence coupled with the alibi testimony, if they had not heard, through the term mug shot, that he had a prior criminal record. The answer to that question is yes. The Third Circuit should have considered the prejudicial impact of the references to prior criminal activity inherent in the phrase "mug shot" and weighed that prejudice in light of the weaknesses of the prosecution's evidence. *See Smith v. Sec'y, Dep't of*

Corr., 572 F.3d 1327, 1347 (11th Cir. 2009) ("One factor [of materiality] is the net inculpatory weight of the evidence on both sides that actually was presented at trial."). Instead, it simply concluded that there was no prejudice because, on the surface, the prosecution's evidence was of a certain quantity. This Court should grant certiorari to clarify that *Strickland* requires more.

The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of his trial. *Strickland*, 466 U.S. at 691-92. Determining prejudice under *Strickland* "is not as simple as comparing two piles of evidence and asking which is greater." *Stokes v. Sterling*, 10 F.4th 236, 255 (4th Cir. 2021), *vacated on other grounds* 142 S. Ct. 2751 (2022). Consideration must be given to the "force and effect" of counsel's error on the overall integrity of the verdict. *Smith*, 572 F.3d at 1347. By dismissing Mr. Bond's claim of constitutionally ineffective assistance of counsel on the basis that the evidence was sufficient to convict him, the Third Circuit dispensed with this Court's precedent in *Strickland* and *Sears*. The Third Circuit's disregard of this longstanding precedent is worthy of this Court's attention.

CONCLUSION

For the reasons set forth above, this Court should grant the writ of certiorari and reverse the Third Circuit's judgement.

Respectfully submitted,

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